

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERRY SCOTT HEIDLER,
Petitioner,
-v-
SHAWN EMMONS, Warden,
Georgia Diagnostic and Classification Prison,
Respondent

**APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS
(VOLUME I)**

CAPITAL CASE

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[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-13752

JERRY SCOTT HEIDLER,

Petitioner-Appellant,

versus

WARDEN, GDCP

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 6:11-cv-00109-LGW

Before WILSON, LUCK, and LAGOA, Circuit Judges.

LUCK, Circuit Judge:

In the early morning of December 4, 1997, Jerry Heidler broke into the home of Danny and Kim Daniels and shot them and two of their children to death. Heidler 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.

Heidler makes three arguments on appeal. First, Heidler 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 in investigating and presenting evidence of his mental health during the guilt phase of his trial. Second, he argues that the Georgia Supreme Court unreasonably applied *Strickland* in denying his claim that his trial counsel were ineffective in investigating and presenting mitigating evidence during the penalty phase of his trial. And third, Heidler argues that the district court erred in concluding that he did not sufficiently plead, and did not exhaust, his claim that his trial counsel were ineffective because they failed to adequately present information and evidence in pretrial motions relating to Heidler waiving his constitutional rights while he was being interrogated by the police. After careful review of the briefs and the record, and with the benefit of oral argument, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. *The Murders*

Danny and Kim Daniels lived in Santa Claus, Georgia—a small town in Toombs County—with their seven children, three of

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whom were foster children. Mrs. Daniels had been in foster care herself as a child. And over the years, the Danielses opened their home to many foster children—including Heidler’s sister Joanne. While his sister was staying there, Heidler would visit the Danielses’ home. Even after his sister left their care, Heidler continued to visit their home. But Mr. Daniels asked Heidler to stop visiting after the twenty-year-old Heidler developed a relationship with the Danielses’ sixteen-year-old daughter.

Around the time that Mr. Daniels told Heidler to stop visiting the home, Heidler’s girlfriend, Marie Spivey, “got pregnant . . . with [Heidler and Ms. Spivey’s] second son.” Six months into Ms. Spivey’s pregnancy, though, the baby boy was stillborn. Days later, on December 3, 1997, Heidler went to his stillborn son’s funeral. Distraught, Heidler left the funeral and drove to the Danielses’ home. Heidler explained that his “mind just went blank” and that he “[j]ust couldn’t take nothing.” All he felt was “rage.”

When he got to the Danielses’ home, Heidler entered the house through a back window, smoked a cigarette, and took a shotgun from Mr. Daniels’s gun cabinet. He then went to the master bedroom and shot Mr. and Mrs. Daniels as they slept. Mrs. Daniels probably died instantly, but Mr. Daniels survived the initial shot. At the time, Mr. Daniels was forty-seven years old. Mrs. Daniels was thirty-three.

After shooting Mr. and Mrs. Daniels, Heidler left their room and went to the Danielses’ eight-year-old son’s bedroom. When he got there, Heidler killed the sleeping boy with a shot to the head

from close range. The Danielses' sixteen-year-old daughter woke up from the commotion and ran to her parents' bedroom, where Heidler shot her in the back of the head, killing her instantly. When Heidler noticed that Mr. Daniels was still alive, Mr. Daniels threw up his hands and arms to protect himself but Heidler shot him a second time. Then a third time. Then a fourth. Those shots were fatal.

After killing Mr. and Mrs. Daniels and two of their children, Heidler left the Danielses' two youngest children—a four-year-old boy and a ten-month-old infant—in the house with their dead family members. But Heidler took the Danielses' three young daughters with him to a secluded place where he sexually assaulted one of them, who was eight years old. Heidler threw Mr. Daniels's shotgun into a river, dropped the girls off on the side of a dirt road, and returned to his stillborn son's grave. After that, Heidler went to his mother's house to sleep and play video games.

B. Heidler's Arrest and Confession

Later that morning, police found the Danielses' three young daughters in the middle of the road in their pajamas. The girls identified Heidler as their kidnapper. Police arrested Heidler, informed him of his *Miranda*¹ rights, and interrogated him for about four hours.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

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During the interrogation, Heidler said that he remembered what had happened in the Danielses' home "as if it were in a dream." The interrogating police officers asked Heidler if they could "come with [him] and walk in this dream with [him]" and Heidler then told them "what he remembered from his dream." At the end of the interrogation, the officers videotaped Heidler's confession in which he admitted to killing Mr. and Mrs. Daniels and two of their children, and to "t[aking] the girls" and "molest[ing]" one of them.

C. *Trial Counsel's Investigation of Mitigation Evidence*

Two experienced criminal defense attorneys were appointed to represent Heidler at trial. The first, Michael Garrett, served as lead counsel. Before Heidler's case, Mr. Garrett had defended about fifty death penalty cases, including approximately forty that he tried first chair. Mr. Garrett had experience presenting a mental health defense in "many" capital cases. "Of the nearly fifty clients that Mr. Garrett ha[d] represented in death penalty cases[,] only two received the death penalty."

The second attorney was Kathy Palmer. Ms. Palmer was the contract public defender in Toombs County. Before Heidler's case, Ms. Palmer had tried "several" murder cases and first chaired three of them. She had also tried a death penalty case involving mental health issues before taking Heidler's case and was "very familiar with the process of a death penalty case" and "everything that needed to be done in order to prepare for a death penalty case."

Based on their initial meetings with Heidler, Mr. Garrett and Ms. Palmer were “totally convinced” that Heidler was mentally ill. Mr. Garrett and Ms. Palmer also determined that “the facts were overwhelming as to what happened” on the night of the murders. So Mr. Garrett and Ms. Palmer decided to pursue a “guilty but mentally ill” verdict to avoid a death sentence.² Mr. Garrett took responsibility for “deal[ing] with the mental health issues.” Ms. Palmer took responsibility for “mitigation,” which involved “investigating [Heidler’s] background and finding out anything that [she] could in regards to reasons as to why [Heidler] was mentally ill and

² At the time of Heidler’s trial, Georgia law provided:

In all cases in which the defense of insanity is interposed, the jury, or the court if tried by it, shall find whether the defendant is:

- (A) Guilty;
- (B) Not guilty;
- (C) Not guilty by reason of insanity at the time of the crime;
- (D) Guilty but mentally ill at the time of the crime, but the finding of mentally ill shall be made only in felony cases; or
- (E) Guilty but mentally retarded, but the finding of mental retardation shall be made only in felony cases.

Ga. Code Ann. § 17-7-131(b)(1) (1998). A “guilty but mentally ill” verdict didn’t preclude a death sentence. *See id.* § 17-7-131(g), (j); *Spivey v. Head*, 207 F.3d 1263, 1280 (11th Cir. 2000) (“[B]oth guilty but mentally ill and guilty but mentally retarded defendants are sentenced the same as those found guilty of the offense except that those found guilty but mentally retarded are not eligible for the death penalty.”).

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what about his past would help to convince a jury that he should not receive the death penalty.”

Trial counsel hired an investigator to assist in their investigation, interviewed witnesses, and gathered Heidler’s records

During Mr. Garrett’s and Ms. Palmer’s initial meetings with Heidler, Heidler “was totally nonresponsive.” In later meetings, Heidler continued to provide only “minimal” information to Ms. Palmer. Beyond interviewing Heidler, Ms. Palmer also hired an investigator, Frank Gillis, to help her “find witnesses down in the country.” Investigator Gillis sought out Heidler’s “aunts and uncles and cousins” and some of Heidler’s friends. Ms. Palmer also “drove up and down the dirt roads” and “went up and down the street where [Heidler] lived” going “door to door and around the community and at the convenience store” to investigate Heidler’s background. Ms. Palmer also went “to the jails,” to the “Juvenile Court,” and to the Toombs County Department of Family and Children Services (“DFACS”) to speak with caseworkers and gather Heidler’s records. And when Investigator Gillis found “anything helpful,” Ms. Palmer would “follow up [her]self” to interview the witnesses that Investigator Gillis found.

Ms. Palmer interviewed Heidler’s mother, his aunt and uncle, and his sister, Lisa Aguilar. Ms. Palmer described Heidler’s family members as people who “run from you, they don’t come and pour out information at all.” According to Ms. Palmer, Ms. Aguilar was the “most sympathetic family member,” while Heidler’s mother was “an absolute, raving lunatic.” Heidler’s

mother claimed that Heidler “was not guilty,” that “this was a conspiracy,” and that Heidler’s brother Steve (who was in prison) “committed the murders.” She was “not helpful” at all. Ms. Palmer and Investigator Gillis also interviewed Heidler’s friends, but they “weren’t sympathetic” or “helpful.”

Ms. Palmer also met with a DFACS attorney and caseworkers to “put[] together the history of how [Heidler’s] mother had mistreated him and his stepfather had abused him and how they had run from DFACS and [Heidler had] been in and out of care.” Ms. Palmer explained that it was “very hard” to piece together Heidler’s history because his mother “had jumped county to county.” Ms. Palmer “spent hours” going through Heidler’s DFACS records with the DFACS attorney and caseworkers.

Ms. Palmer used the information from Heidler’s DFACS records to find his former foster parents and people who had interacted with him while he was under DFACS’s care. But “a lot” of them “didn’t want to talk” to Ms. Palmer because “the murder[s] [were] so bad.” Heidler’s case “was exceedingly traumatic for the people of Toombs County and [DFACS] because of children in their care being involved and the fact that many of them knew [Heidler].” For example, one of the juvenile probation officers that Ms. Palmer interviewed was at first “very sympathetic” and “helpful” over the phone but then claimed not to “remember anything about anything” when Ms. Palmer tried to interview him in person. And when Ms. Palmer visited the Cedarwood Psychoeducation Program, a school for emotionally and behaviorally “disordered”

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students that Heidler attended during his middle school years, Ms. Palmer could find only one teacher, Marilyn Dryden, who would testify at Heider's trial.

Trial counsel retained two mental health experts to evaluate
Heidler

Mr. Garrett retained a psychologist, Dr. James Maish, to evaluate Heidler. Dr. Maish met with Heidler six times, interviewed him "extensively," and gave him a "battery of tests." Mr. Garrett and Ms. Palmer provided Dr. Maish with reports of Heidler's behavior in jail and "several binders" of Heidler's background records, including records "from mental health centers in Southeast Georgia," "DF[A]CS records," and "reports from juvenile settings."

Based on his evaluation of Heidler and his review of Heidler's records, Dr. Maish diagnosed Heidler with "borderline personality disorder." Dr. Maish concluded that Heidler "did not meet the standard for not guilty by reason of insanity for the state of Georgia" and that Heidler was competent to stand trial because he "ha[d] a rational as well as reasonable understanding" of his criminal proceedings. But Dr. Maish thought that Heidler "met the standard" for a "guilty but mentally ill" verdict because of his borderline personality disorder diagnosis.

Mr. Garrett also retained Dr. Albert Olson, a "neurological expert," to evaluate Heidler for "pathological issues," "brain damage," or a "head injury" and to do "neurological testing." Dr.

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Olson’s evaluation “didn’t find anything that [trial counsel] thought would be helpful” to Heidler’s case.

Trial counsel interviewed the court-appointed mental health experts

Because Heidler pleaded not guilty and his trial counsel gave notice of his intent to raise a mental illness defense, Georgia law required the state trial court to order Heidler to undergo a separate, independent psychological evaluation. *See* Ga. Code Ann. § 17-7-130.1; *Nance v. State*, 526 S.E.2d 560, 564 (Ga. 2000). In line with this requirement, the state trial court appointed three mental health experts to evaluate Heidler: Drs. Nic D’Alesandro, Gordon Ifill, and Everette Kuglar.

Mr. Garrett provided Heidler’s background records and “anything that [Ms. Palmer] got” from her background investigation to Drs. D’Alesandro, Ifill, and Kuglar and interviewed each of them before trial. Based on his interviews, Mr. Garrett understood that Drs. D’Alesandro, Ifill, and Kuglar “seemed to agree [with Dr. Maish] that [Heidler] was mentally ill.” Mr. Garrett thought that Dr. Maish’s testimony “was going to be the strongest” but was “confident” that Drs. Ifill and Kuglar would accurately present Heidler’s mental health at trial.

D. Trial Counsel’s Motion to Suppress Heidler’s Statement to Police

Before trial, trial counsel moved to suppress “all evidence obtained in the course of any illegal search and seizure” and explained in their motion that because “discovery and defense investigation [were] still ongoing and incomplete,” they “file[d] this

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preliminary motion to suppress in general form so as to preserve the right to challenge the legality of any search or seizure of evidence that the [s]tate might introduce at trial.”

The state trial court held a *Jackson-Denno*³ hearing on the admissibility of Heidler’s statement to police. During the hearing, the state called the two police officers who had interrogated Heidler after his arrest. Mr. Garrett cross examined the officers about Heidler’s statement that he “could remember things if he was in his dream” and how the police officers “g[ot] in his dream with him and . . . participated as best [they] could.”

The state trial court denied the motion to suppress Heidler’s statement to police. The state trial court “f[ound] from a preponderance of the evidence that [Heidler] was advised of each of his *Miranda* rights, that he understood them, that he voluntarily waived them, and that he thereafter gave his statement knowingly, freely[,] and voluntarily without any hope of benefit or fear of injury.”

E. The Trial

Then came the trial—which was split into a guilt phase and a sentencing phase. We’ll start with the guilt phase. During the guilt phase, the state introduced video and photographs of the

³ See *Jackson v. Denno*, 378 U.S. 368 (1964). In *Jackson*, “the Supreme Court held that, when a defendant objects to the introduction of his statement as involuntary, due process requires a trial judge to make an independent determination that the statement is voluntary before permitting it to be heard by the jury.” *Miller v. Dugger*, 838 F.2d 1530, 1535 (11th Cir. 1988).

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murder scene, evidence that Heidler's fingerprint was on the back window of the Danielses' home, evidence that Heidler's DNA was on a cigarette butt found at the Danielses' home, evidence that the Danielses' three daughters identified Heidler as their kidnapper, and evidence that Heidler sexually assaulted one of the them. The state also played Heidler's videotaped confession and called the two police officers who had interrogated him to testify about his statements during the interrogation.

After the state rested, the state trial court ruled—over the state's objection—that it would call Drs. D'Alesandro, Ifill, and Kuglar as witnesses and would permit Heidler to use the court-appointed experts to prove his mental health condition. Based on the state trial court's ruling, Mr. Garrett decided not to call Dr. Maish during the guilt phase because he “wanted to let the jury hear the mental health evidence on the front end with [Drs. D'Alesandro, Ifill, and Kuglar], and then let them hear it all over again [in the penalty phase] from someone who [Mr. Garrett] thought would . . . give the strongest testimony.” Thus, trial counsel rested their case without calling any witnesses during the guilt phase but presented mental health evidence through Drs. D'Alesandro's, Ifill's, and Kuglar's testimony. We'll walk through that testimony now.

Trial counsel's guilt phase presentation of mitigation evidence

Dr. D'Alesandro

Dr. D'Alesandro was employed by Georgia as a “coordinator of forensic services” and “forensic psychologist” at the Georgia Regional Hospital in Savannah. Dr. D'Alesandro testified that he,

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together with Dr. Ifill, performed “a fairly extensive evaluation” of Heidler that included two “clinical interview[s]” and “a review of the voluminous records that were provided . . . by both the [state] as well as [trial counsel].” The records that Dr. D’Alesandro reviewed included records from Satilla Mental Health (a mental health institution where Heidler had been treated), “mental health histories,” “school records,” “prior mental health evaluations,” and “clinical documents.” Those records also included “police reports,” “witness statements,” and “investigating officers’ reports.” Dr. D’Alesandro also “talked to the jail employees that were . . . watching [Heidler] during the time of his incarceration.”

Dr. D’Alesandro explained that the state trial court had posed two questions for him to answer when it appointed him to evaluate Heidler: “[o]ne, is the defendant competent to stand trial”; and two, “was [Heidler] affected by some form of mental illness such that it would make him incompetent or make him not responsible for his behaviors.” As to Heidler’s competency to stand trial, Dr. D’Alesandro concluded, based on his evaluation, that Heidler was not mentally disabled and was competent to stand trial because Heidler “understood the proceedings” and “was able to work with his attorney in the preparation of his defense.”

As to whether Heidler was not guilty by reason of insanity, Dr. D’Alesandro concluded, “based on the information [that he and Dr. Ifill] had and on the [Georgia] statutes,” that Heidler “was responsible for his behaviors during that time frame [of the murders].” Dr. D’Alesandro said that “there had been no indication

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that [Heidler] was psychotic” when he killed the Danielses, which would have meant “that [Heidler] was out of contact with reality or that he was unaware of what he was doing.” Instead, Dr. D’Alesandro testified that “what [Heidler] was doing was volitional and it was fairly goal directed.” For this reason, Dr. D’Alesandro concluded that Heidler “kn[ew] the difference between right and wrong, and . . . d[id] not meet the criteria for not guilty by reason of insanity.”

Dr. D’Alesandro diagnosed Heidler with alcohol and substance abuse and “a number of personality disorders which have influenced his behaviors, have affected the way he perceive[d] things, [and] the way he [thought] about things.” Dr. D’Alesandro “found severe emotional problems beginning in [Heidler’s] childhood” that Heidler “was still suffering from” at the time of his evaluation.

Dr. D’Alesandro explained that Heidler “probably would best be identified as a borderline and/or an antisocial personality disorder,” which meant that, “through his upbringing, . . . he’[d] developed behavioral patterns which [were] basically in conflict with society.” Dr. D’Alesandro testified that a person with borderline personality disorder would be “really unstable,” have “a very poor sense of themselves,” “overreact to stimuli,” and “at times become very dramatic” and “impulsive.” Dr. D’Alesandro stated that a person with antisocial personality disorder “doesn’t really care about the rights of others,” “do[es] things that are in conflict with society,” and “know[s] what they’re doing, but at the same time

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they're willing to go ahead and suffer the consequences." Dr. D'Alesandro agreed that this "severe disorder" would "influence [Heidler's] decision-making capacity."

Dr. D'Alesandro said that, "[f]rom the information [he] got, [Heidler] did experience hallucinations . . . during a time that he was doing some type of drug." Dr. D'Alesandro also testified that, in examining Heidler's mental history, "[t]here was a suggestion" that Heidler had experienced "psychotic episodes." Although he "did not find sufficient evidence to validate that [Heidler] actually was psychotic," Dr. D'Alesandro explained that "people with this type of diagnosis sometimes will get to such an extreme that they may temporarily at least function in a psychotic-like state, but it's usually very transient," meaning that it "[c]omes and goes very quickly" in a matter of "[m]inutes."

Dr. D'Alesandro testified that Heidler's mental health problems "seemed to be pretty much right from childhood, early childhood." Dr. D'Alesandro described Heidler's childhood as "chaotic" and "dysfunctional" and said that Heidler was "[d]eprived of the familial love and support that one normally would expect to get as he's being brought up." Dr. D'Alesandro explained that Heidler's mental health issues resulted from "the chaos of someone being brought up in that type of environment." And Dr. D'Alesandro agreed that Heidler "ha[d] been subjected to serious traumatic experiences in his childhood at a very early age."

Dr. D'Alesandro gave the jury a few examples of Heidler's traumatic childhood experiences. Dr. D'Alesandro testified, for

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example, that “there was some indication of voodoo and cultism brought in that was practiced in [Heidler’s] family.” He explained that, “as a child, [Heidler] evidently was placed in a number of foster homes throughout his developmental years, and as a result this in effect caused some type of lasting effect on him in terms of where he had problems or he felt abandoned by his family.” Dr. D’Alesandro told the jury that Heidler’s records showed that he had “attempted on several occasions to smother his sister,” “bec[ame] involved in fights in school,” and “was engaged in suicidal and homicidal episodes when he was eight and nine years old.”

Dr. D’Alesandro described Heidler’s suicidal episodes. He said that “[t]here were indications from the record that at times past [Heidler] would stand in the middle of the road waiting for a car to try and hit him,” and one time, “a tractor-trailer jackknifed in [an] attempt[] to avoid hitting him.” Dr. D’Alesandro testified that Heidler had a history of “recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior,” and that “the first time [he] saw him [Heidler] had cigarette burns up and down his arms,” which “certainly would signify self-mutilation.” And Dr. D’Alesandro said there were at least two instances in Heidler’s childhood where he “was brought to the mental health center after attempting suicide.”

Thus, Dr. D’Alesandro said, there was “no question about” whether Heidler “ha[d] some mental health issues,” and he thought that “there [was] sufficient clinical documentation to

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substantiate a consideration of a guilty but mentally ill [verdict] if that would be the [c]ourt and the jury's decision." Dr. D'Alesandro explained that "the qualification for the guilty but mentally ill [verdict] [was] not predicated on the personality disorder, [or] on the antisocial," but was instead "predicated on some of the behaviors that [Heidler] demonstrated in the past," including "examples of depression that in some occasions led [Heidler] to self-mutilate or to attempt suicide." This was evidence, not of a "personality dysfunction," but of a "mental disorder."

On cross examination, Mr. Garrett asked Dr. D'Alesandro whether he had "an opinion within a reasonable degree of psychological certainty whether the facts support[ed] a finding of guilty but mentally ill." Dr. D'Alesandro answered that he was "going to hedge on that," saying that "[t]he ultimate decision [he] th[ought] would be in the trier of fact, the jury or the judge, on whether the information [he] provide[d] me[t] that legal standard." But Dr. D'Alesandro conceded that the pretrial report that he had prepared and signed said that the facts of Heidler's case "could also support a finding of guilty but mentally ill."

And when Mr. Garrett asked whether Heidler was taking medication when Dr. D'Alesandro evaluated him, Dr. D'Alesandro answered that he "believed he was" but couldn't recall the name of the medication. Dr. D'Alesandro told the jury that Heidler "conceivably could have been" taking Haldol at the time, which he explained was "an antipsychotic medication" that "help[ed a patient] reorganize or organize their thinking process" and "aid[ed] in

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behavioral control.” Dr. D’Alesandro assumed that “the physician that consults with the jail probably” prescribed Haldol to Heidler.

On cross examination by the state, Dr. D’Alesandro conceded that he “wouldn’t know” if Heidler had fooled him about his mental illness since “[t]hat’s the nature of being fooled,” but that he “felt [Heidler] was fairly forthcoming” during his two clinical interviews and didn’t think Heidler tried to “fool” him. While “[t]here were some indications that [Heidler] may have been not totally cooperative,” “for the most part [Dr. D’Alesandro] w[as] able to get enough information [that he] felt comfortable in [his] assessment.” And based on his interaction with Heidler “in the last several months,” Dr. D’Alesandro thought that “the symptoms [of Heidler’s mental illness] seem[ed] to be somewhat in remission” because “[s]ome of the things that [they] looked at or [they] saw from early childhood d[idn]’t appear to be happening right now” and the seriousness of his mental illness was “not so bad that he require[d] hospitalization.”

Dr. Ifill

Dr. Ifill, a board-certified psychiatrist at Georgia Regional Hospital in Savannah, testified that he and Dr. D’Alesandro performed a psychiatric evaluation of Heidler. Dr. Ifill explained that their evaluation of Heidler consisted of “a review of an extensive number of reports from several sources,” “two separate interviews,” “the completion of a mental status examination,” and “a complete neurological evaluation” to “rule out organic brain damage.” The records that Dr. Ifill reviewed included “reports from

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school,” “reports from DF[A]CS,” reports from mental health centers, “reports from the police investigations,” and “a report from a private psychiatric evaluation.”

Dr. Ifill testified that he asked Heidler “a lot of questions about his background, his childhood, his upbringing, [and] his family relationships” and reviewed “[m]any records . . . with regard to his childhood, treatments received, referrals made, [and] evaluations that were done.” Dr. Ifill also “reviewed some historical information which described some bizarre behaviors” and “behaviors [that were] out of control and self-destructive.” The records showed that Heidler had exhibited “these kinds of behaviors since childhood.” Dr. Ifill “found that [Heidler] was suffering from severe emotional disorders beginning in childhood and continuing up until the present.” Like Dr. D’Alesandro, Dr. Ifill said that he saw self-inflicted cigarette burn marks on Heidler’s skin. Dr. Ifill also told the jury that Heidler’s “history recorded recurrent thoughts of wanting to kill himself and several attempts to do so,” including a time when he was admitted to “the hospital in Savannah.”

Dr. Ifill testified that Heidler’s childhood records “indicated that the household was chaotic, disorganized, that [Heidler] was unable to get the ordinary nurturing that a growing child would need to have for normal development in the household, [and] that there was violence or threats of violence or neglect within the household.” He said that the records also “suggested that there was a lot of drinking in the home, there was alcoholism in the

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household.” And he said that the records “indicated emotional and physical abuse.” According to Dr. Ifill, Heidler’s childhood environment was “likely . . . a significant contributing factor” to Heidler’s personality disorders.

Based on his evaluation, Dr. Ifill concluded that Heidler “was suffering from many elements of the borderline personality disorder” but was “able to distinguish between right and wrong” and was not “mentally retarded.” Dr. Ifill thought that Heidler was “responsible” for his actions and was not “insane.” Dr. Ifill testified that Heidler had “a long history of out of control behavior” and “discreet episodes of bizarre behavior.” But Dr. Ifill said that he did not have any evidence that Heidler was suffering a “psychotic episode” on the night of the murders and that he did not think that a psychotic episode had anything to do with Heidler’s actions that night. And as to Heidler’s neurological examination, Dr. Ifill said that the results “were all normal.”

On cross, Dr. Ifill testified that there was “one reference to one of the evaluations where [Heidler’s] behavior at one point might have been thought of being psychotic.” He also explained that “there are many instances where a person who is not normally psychotic may have psychotic episodes.” Mr. Garrett also asked Dr. Ifill if those suffering from a personality disorder may be “triggered into a psychotic episode.” In response, Dr. Ifill said: “[t]here is only one personality disorder with which a brief or transient psychotic episode is associated[,] . . . and that is the borderline personality disorder.”

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When asked by Mr. Garrett whether he had an opinion about “whether [Heidler] would be eligible or meet the criteria as [he] underst[ood] the[m] for guilty but mentally ill under Georgia law,” Dr. Ifill answered that Heidler “d[id] not qualify on the basis of a serious mental disease or disorder of thinking or mood,” but “[w]hether a personality disorder [would] qualify [he] l[eft] to the judgment of the trier of fact and to the [c]ourt.” When Mr. Garrett pointed out that Dr. Ifill had signed a report stating that the evidence in Heidler’s case “could support a verdict of guilty but mentally ill,” Dr. Ifill said that the evidence “could be considered . . . in making such a decision.”

Dr. Kuglar

Dr. Kuglar, a psychiatrist, testified that he examined Heidler and reviewed Heidler’s records, including reports from Georgia Regional Hospital in Savannah, written neurological reports from Central State Hospital, and “some reports by Dr. James Maish.” Dr. Kuglar testified that Heidler’s records showed he “had a terrible childhood He was sort of kicked around from pillar to post, his home environment was not very good, et[]cetera.” Dr. Kuglar said that Heidler “was constantly . . . off and on during those years threatening to kill himself, doing disruptive things.” Heidler had been “admitted after some sort of self-harm attempts on a couple of occasions to the Regional Hospital, and at times he was threatening to kill other people.”

When he interviewed Heidler, Dr. Kuglar saw “where [Heidler] had cut himself and what appeared to be cigarette burns,

some kind of burns on his body, and where he had . . . pick[ed] at small lesions on his face until he had sort of created sores.” Dr. Kuglar said that while Heidler’s behavior “was certainly a little bit weird, odd, or bizarre” when he interviewed him, Heidler “presented himself as someone who was in contact with reality at the time that [Dr. Kuglar] talked to him.” Dr. Kuglar also said that Heidler “seemed to show . . . some probable degree of depression.” It “was [Dr. Kuglar’s] understanding that [Heidler] had been on some medicine while he was incarcerated in the county detention center.”

Dr. Kuglar said that during his interview, Heidler “basically indicated that he committed the crime with which he [was] accused, that he did the actual acts” because “he was upset over the very recent death of his infant child by a lady who was not part of the crime scene . . . and that he was upset because of conflicts between one of the young ladies who was killed by him who was about age [fifteen] or [sixteen] . . . and his other girlfriend.”

Based on his evaluation, Dr. Kuglar concluded that Heidler “d[id] not meet the [s]tate of Georgia’s criteria for a defense of being not guilty by reason of insanity” because “he d[id] not have a mental illness which prevent[ed] him from appreciating the difference between right and wrong, nor d[id] he have delusions, that is, ideas that exist[ed] only in his head which played a role in the alleged crime.” Dr. Kuglar did not think that Heidler was mentally disabled.

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But Dr. Kuglar testified that Heidler met the criteria for a guilty but mentally ill verdict based on his “primary diagnosis” of borderline personality disorder. Dr. Kuglar also explained that people with borderline personality disorder have “very poor” judgment, “often make poor decisions,” and have “outbursts of anger” which they “certainly have a problem controlling.” Dr. Kuglar explained that people with borderline personality disorder “often have very brief episodes of being psychotic.” Dr. Kuglar said that Heidler talked about “the hearing of voices” and hearing “a baby crying,” but Dr. Kuglar thought that “based upon the time and other things [that he] c[ouldn’t] be absolutely certain that what [Heidler was] saying [was] true there.”

Mr. Garrett’s Closing Argument

In his guilt-phase closing argument, Mr. Garrett explained to the jury that all he was “asking for in this case[] [was] a verdict based on the evidence.” He noted that Heidler was not “trying to get away with murder.” Heidler had “told the police what happened.” “It is obvious,” Mr. Garrett said, “that there is overwhelming evidence that [Heidler] did it.” Mr. Garrett explained that he “would be insulting [the jury] if [he] said find him not guilty.” So, rather than focusing on guilt, Mr. Garrett argued that “[t]he issue in this case [he] th[ought] that [the jury] should pay the most attention to and spend the most time on [was] whether [Heidler] was mentally ill as defined by Georgia law when these acts occurred.”

To support this guilty but mentally ill defense, Mr. Garrett highlighted: (1) Dr. D’Alessandro’s testimony that there was

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evidence from which the jury could determine that Heidler was guilty but mentally ill; (2) Dr. Ifill's testimony that there was evidence that could support a guilty but mentally ill verdict; and (3) Dr. Kuglar's testimony that Heidler met the criteria for being mentally ill at the time of the offense. Mr. Garrett argued that, although Drs. D'Alesandro and Ifill had hedged their opinions on whether Heidler qualified for a guilty but mentally ill verdict as being "for the jury" to decide, they only hedged their opinions because they did "not want to do what we lawyers call invading the province of the jury."

Mr. Garrett pointed to testimony about how Heidler said "he just went berserk" and how Heidler described the scene as "like being in a dream." He reminded the jury of expert testimony that Heidler was "self-abusive, that he mutilate[d] himself, he burn[ed] himself with cigarettes, he cut[] himself on the arms, . . . [and he] pick[ed] at his face until there [were] open sores." Mr. Garrett recalled the expert testimony about Heidler's self-mutilation and the testimony that Heidler "began at the age of eight and nine to show bizarre and self-destructive behavior," including standing "out on the highway in front of trucks and [not] mov[ing]." Mr. Garrett also emphasized Dr. D'Alesandro's testimony that Heidler was being given Haldol, a "very strong antipsychotic drug." Mr. Garrett ended his closing argument by asking the jury to "consider the very strong and un rebutted evidence that [Heidler] was mentally ill as defined by Georgia law at the time" of "this horrible tragedy" in rendering its verdict.

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The jury's verdict

The jury returned a unanimous guilty verdict on four counts of malice murder, three counts of kidnapping, one count of aggravated sodomy, one count of aggravated child molestation, one count of child molestation, and one count of burglary. The jury did not find that Heidler was guilty but mentally ill.

The state's penalty phase presentation of aggravation evidence

Then, the penalty phase began. The state called five witnesses: (1) a patrol officer with the Toombs County Sheriff's Office who testified that he found a "shank" hidden in Heidler's prison uniform; (2) a booking officer at the Toombs County Detention Center who testified that Heidler said he "wasn't through collecting souls" and likened himself to a fictional character who "went around killing families while they slept"; (3) a jailer at the Toombs County Detention Center who testified that Heidler had removed the brass locks from his cell door, placed them in a sock, and threatened to kill the jailer and other prison officials; (4) a jail administrator at the Toombs County Detention Center who testified that Heidler had removed locks from his cell door and had also escaped from the jail for almost twelve hours by sawing through a bar of his cell window with a hacksaw blade; and (5) a prosecutor with the Georgia Bureau of Investigation who testified that Heidler called him from prison and identified himself by saying "nine little piggies, four dead" in reference to the Daniels family.

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Trial counsel's penalty phase presentation of mitigation evidence

Mr. Garrett and Ms. Palmer called nine witnesses, including Heidler's family members, DFACS workers, and Dr. Maish, to testify about Heidler's difficult childhood and mental health problems. They also introduced Heidler's mental health and DFACS records.

Mary Mosley

Mary Mosley, Heidler's mother, testified about Heidler's upbringing and his mental health. She testified that she divorced Heidler's father when Heidler was four years old. Mrs. Mosley said that Heidler's father was an alcoholic and "wasn't all that good" to their children. When Heidler was six years old, Mrs. Mosley married Heidler's stepfather. She said that Heidler's stepfather was also an alcoholic, but he "didn't beat [Heidler]" and only sometimes got into "fusses" and used "bad words" with Heidler.

Mrs. Mosley testified that Heidler "had mental problems" growing up. Mrs. Mosley told the jury that Heidler had attempted to commit suicide by "jump[ing] in front of a semi truck on a main highway" and by "tr[ying] to hang hi[m]self by a store to get attention from people at the store." She also testified that Heidler had "imaginary friends" since he was a small child. Mrs. Mosley added that Heidler was "really upset" after his son was stillborn.

Lisa Aguilar

Lisa Aguilar, Heidler's sister, testified about their childhood. She explained that their family "move[d] a lot," that their father

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“was a[n] alcoholic,” and that their stepfather “did drink.” She also said that their stepfather “was mean to everybody” but “only talked” and “never hit [her] or nobody.” Ms. Aguilar did not remember whether Heidler had been hospitalized because of a suicide attempt. She asked the jury not “to kill [her] brother.”

William Johnston

William Johnston was a program manager with the Georgia Department of Juvenile Justice who had worked with Heidler and his family. Mr. Johnston testified that Heidler entered the juvenile justice system at age fourteen or fifteen because of an “altercation” between Heidler and his stepfather. Mr. Johnston supervised Heidler after he was placed on probation.

Mr. Johnston testified that he went to Heidler’s home and could tell “from the odor and from discussions” that Heidler’s stepfather had been drinking. He also said that “there was some discussion” that Heidler’s family “may [have] be[en] involved in . . . devil worship.” Mr. Johnston testified that Heidler’s family “move[d] a lot” and normally lived in “small houses” that were in “poor” condition. But Mr. Johnston testified that Heidler “didn’t give any indication that he had a problem with his family.”

When Ms. Palmer asked Mr. Johnston if he remembered taking “action” to have Heidler evaluated by mental health professionals, Mr. Johnston said he did remember but that he no longer had any records on Heidler. Ms. Palmer moved for the state trial court to allow her to question Mr. Johnston as a hostile witness because “his answers [were] not those answers that he ha[d] given

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[her] in the past and [she] would ask to be able to use leading questions.” The state trial court granted Ms. Palmer’s request, but Mr. Johnston continued to testify that he didn’t remember anything else about Heidler.

Cathy McMichael

Cathy McMichael, a social services case manager with DFACS’s foster care unit, explained that she worked with Heidler’s family when his sister entered foster care in 1995. During Ms. McMichael’s “aftercare” visits to the family’s home to check on Heidler’s sister, Ms. McMichael saw Heidler but said that he did not “cause [her] any problem.” Ms. McMichael also testified that she had brought Heidler’s DFACS records to the trial pursuant to the state’s subpoena.

Willene Wright

Willene Wright, a social services worker with DFACS, testified that she first contacted Heidler’s family in 1985 when she investigated Heidler’s mother’s failure to enroll her children in school after they moved to a different county. Ms. Wright testified that DFACS started another investigation of Heidler’s family in 1986 because of “unsupervision of the children.” In 1987, Ms. Wright “investigated a complaint concerning inadequate supervision of [Heidler]” and recommended that Heidler’s mother “make an appointment with mental health” because Ms. Wright was concerned that Heidler had “some mental health problems.” And in 1988, Heidler was placed into foster care, but his foster mother

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requested that Heidler be removed from her home “because of behavior.”

Based on her interactions with Heidler’s family, Ms. Wright said that Heidler’s mother wasn’t “affectionate towards [Heidler]” and wasn’t a “nurturing mother.” Ms. Wright explained that Heidler’s mother did not “praise the children for doing good, work[] with affection, touch[] or hug[] them or show[] signs of affection towards the children.” Ms. Wright also testified that DFACS provided Heidler’s family with Christmas gifts, transportation to get to and from health care and mental health care appointments, and energy assistance to keep gas, lights, and heat on in their home because the family “needed that kind of assistance.”

Joanne Oglesby

Joanne Oglesby, a DFACS employee, testified that she met Heidler in 1990 during a “child protective services case.” She explained that DFACS “received a report alleging physical abuse, emotional abuse, [and] neglect,” and that DFACS “confirmed neglect” and worked with Heidler’s family until the family moved to a different county.

Ms. Oglesby testified that she had received a report that Heidler “had tried to tie a rope to a tree in the yard and hang himself” but Heidler denied that it happened when Ms. Oglesby went to investigate. And, although DFACS “had numerous reports that maybe [physical abuse] was occurring,” DFACS “couldn’t” confirm it. Ms. Oglesby described Heidler’s family as “very closed” because “they knew how to talk to DF[A]CS and not tell them anything.”

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And Ms. Oglesby explained that it was “really difficult to prove” emotional abuse and neglect, even though she knew that “there [were] some issues going on with some inappropriate parenting things going on.”

Sylvia Boatright

Sylvia Boatright testified that she was Heidler’s foster mother from August 1988 until March 1989, when Heidler was eleven years old. Ms. Boatright said that Heidler “was afraid of the dark and always talked about a knife cutting him, could a knife come through a ceiling and cut him.” Ms. Boatright also testified that Heidler attended a school for children with learning disabilities. And she told the jury that Heidler “always had an imaginary mouse” that he would talk to.

Marilyn Dryden

Marilyn Dryden testified that she taught Heidler during his middle school years at the Cedarwood Psychoeducational Program, which she described as a school for students “that were emotionally behavior disordered.” In describing Heidler, Ms. Dryden told the jury that Heidler “was a loner” but “was not physically aggressive to the other students.” She also said that Heidler would “pick at his skin ‘til sometimes it would bleed” and would sometimes “arrive to school . . . with marks on his body where he apparently had carved his initials and things on his skin.” According to Ms. Dryden, Heidler “would sometimes refer to some type of imaginary friend” and “act like it was in his hand and he would talk to it sometimes.”

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Dr. James Maish

Dr. Maish, the psychologist hired by Heidler's trial counsel, testified about his "extensive[]" pretrial evaluation of Heidler and his review of Heidler's background records. Dr. Maish testified that Heidler wasn't mentally disabled and didn't meet the standard for a not guilty by reason of insanity verdict because Heidler did not have "a delusional idea" or "an inability to resist the urge to . . . commit the criminal act." Dr. Maish also concluded that Heidler was competent to stand trial because Heidler "ha[d] a rational as well as reasonable understanding" of his criminal proceedings.

But Dr. Maish explained that, like Drs. D'Alesandro, Ifill, and Kuglar, he had diagnosed Heidler with borderline personality disorder and said that "apparently you have four people who came to the same conclusion" as to Heidler's diagnosis. According to Dr. Maish, having four psychologists reaching the same conclusion about an individual's diagnosis "was unheard of." Dr. Maish testified that Heidler "met eight of the nine" criteria for borderline personality disorder, including: (1) "recurrent suicidal behavior . . . or self-mutilating behavior"; (2) a "markedly and persistently unstable self-image" caused by "a chaotic type of family situation"; (3) "impulsivity in at least two areas that [were] potentially self-damaging"; (4) "affective instability due to a marked reactivity of mood"; and (5) "inappropriate, intensive anger or difficulty controlling anger."

Dr. Maish testified that Heidler met the standard for a guilty but mentally ill verdict "with plenty of room to spare." He also

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explained that Heidler met the standard for a guilty but mentally ill verdict because Heidler had borderline personality disorder. Dr. Maish described Heidler's borderline personality disorder as "severe" and said that it affected his ability to make decisions because "any kind of stress . . . [would] go[] straight to rage."

Dr. Maish testified that he did not think Heidler was "psychotic," explaining that Heidler "was never overtly psychotic at any of the six times that [he] saw him." At the same time, Dr. Maish explained that "there are times when" people with borderline personality disorder "would probably meet the criteria for being psychotic or out of touch with reality." Dr. Maish said that he had reviewed Heidler's records and that those records "talk[ed] of hallucinations" and "transient psychotic disturbances," but Dr. Maish didn't think that Heidler "was ever overtly psychotic" during the thirteen hours he spent interviewing him. Dr. Maish thought it was "debatable" whether Heidler had experienced "transient, stress-related paranoid ideation or severe dissociative symptoms" because Dr. Maish "didn't see it."

Dr. Maish said that Heidler "acknowledged to [Dr. Maish] that he committed" the murders but "didn't have an answer" for why he murdered the Danielses and their two children. Dr. Maish said that Heidler expressed remorse "about what happened" and that Dr. Maish had "seen him cry." Dr. Maish explained that Heidler's actions on the night of the murders resulted from his "severe" borderline personality disorder that "impair[ed] virtually every area of his functioning" and "a combination" of: (1) "some

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neurological difficulties”; (2) “a chaotic background in family”; (3) “the lack of a solid family background”; (4) “a father that was for the most part gone”; and (5) “emotional difficulties” and “years of being in and out of mental health centers, . . . hospitals, . . . [and] judicial settings.”

Heidler’s Background Records

At the close of their penalty phase presentation, Heider’s trial counsel entered into evidence two sets of Heidler’s background records. The first set was Heidler’s DFACS records—over 1,100 pages worth—which Ms. McMichael had brought with her to trial pursuant to the state’s subpoena. The second set was “a certified and authenticated copy of the records of the Georgia Regional Hospital . . . in Savannah,” which consisted of 109 pages of documents. With that, the trial came to a close.

Heidler’s death sentences

The jury unanimously recommended the death penalty for each of the four murders, finding two aggravating circumstances: (1) that each murder “was committed while [Heidler] was involved in the commission of other capital felonies”—the other three murders; and (2) that each murder “was committed while [Heidler] was involved in the commission of the offense of burglary of the home of Danny and Kim Daniels.” The state trial court sentenced Heidler to death consistent with the jury’s recommendation.⁴ The

⁴ The state trial court also sentenced Heidler to life imprisonment for kidnapping with bodily injury, twenty years for each kidnapping, life imprisonment

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state trial court denied Heidler's motion for a new trial and his motion to vacate his death sentences.

Heidler's direct appeal

On direct appeal, the Georgia Supreme Court affirmed Heidler's murder convictions and death sentences.⁵ *Heidler v. State*, 537 S.E.2d 44 (Ga. 2000). In affirming Heidler's convictions, the Georgia Supreme Court rejected Heidler's argument that his statement to police had been involuntary. *Id.* at 49–50. The Georgia Supreme Court pointed out that “[t]he police read Heidler his rights” and that Heidler “signed” the “waiver-of-rights form.” *Id.* at 49. Heidler “was lucid, not intoxicated, and he appeared to understand his rights.” *Id.* “He was not handcuffed, and was provided with cigarettes and a soft drink.” *Id.* “He was neither coerced, threatened, nor promised anything in exchange for his statement.” *Id.* Nor did he “request a lawyer or ask that the questioning cease.” *Id.* Heidler's confession was voluntary. *Id.*

Against all that, Heidler pointed to the fact that, when the investigating officers asked him “about the sequence of events and why they occurred, [he] said several times that he was unsure because it was like ‘a dream.’” *Id.* “One of the interrogating officers

for aggravated sodomy, thirty years for aggravated child molestation, twenty years for child molestation, and twenty years for burglary, with all sentences to be served consecutively.

⁵ The Georgia Supreme Court reversed Heidler's conviction for aggravated child molestation because it “merged into the aggravated sodomy conviction as a matter of fact.” *Heidler*, 537 S.E.2d at 55.

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volunteered to ‘get in the dream with him,’ and Heidler claim[ed] that this was coercive.” *Id.* The Georgia Supreme Court disagreed, explaining that “a review of the record show[ed] that the offer was simply an attempt on the part of the officer to prod Heidler’s memory.” *Id.* The Georgia Supreme Court, “[v]iewing the totality of the circumstances,” concluded “that the trial court properly denied Heidler’s motion to suppress his statement on the ground that it was involuntary.” *Id.* at 49–50.

The United States Supreme Court denied Heidler’s petition for a writ of certiorari. *Heidler v. Georgia*, 532 U.S. 1029 (2001), *reh’g denied*, 533 U.S. 965 (2001).

F. State Habeas Proceedings

Heidler filed a habeas petition in the Superior Court of Butts County, Georgia. Heidler asserted a general ineffective assistance of counsel claim and listed instances of his “[t]rial counsel’s ineffectiveness” in forty-two bullet points. Three of the bullet points claimed that trial counsel were ineffective in their investigation and presentation at trial because they: (1) “failed to conduct an adequate pretrial investigation into the . . . defenses available to [Heidler], including but not limited to the psychological, medical, and psychiatric factors affecting [Heidler’s] mental state during, before, and after his alleged participation in the murders”; (2) “failed to conduct an adequate pretrial investigation into [Heidler’s] life and background to uncover and present to the jury evidence in mitigation of punishment, failed to present a complete picture of [Heidler’s] background, and failed to locate, interview, and present

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as witnesses numerous individuals who had compelling mitigating evidence regarding [Heidler]”; and (3) “failed to obtain those records, including educational, medical, and mental health records of [Heidler] and his family which would have assisted in formulating and supporting defenses in the guilt/innocence phase.”

In another set of three bullet points, Heidler claimed that trial counsel were ineffective in failing to suppress Heidler’s confession because they: (1) “failed to adequately raise and litigate that [Heidler’s] statement to law enforcement was the result of an illegal arrest and should be suppressed”; (2) “failed to conduct an adequate pretrial investigation into the voluntariness of [Heidler’s] statements to law enforcement personnel, and specifically failed to investigate the effect of [Heidler’s] mental capacity, and his medical and psychological history on [Heidler’s] mental state at the time he provided the incriminating statements”; and (3) “failed to adequately present information and evidence in pretrial motions and proceedings at trial relating to [Heidler’s] allegedly voluntary waiver of constitutional rights during interrogation by police.”

Heidler’s state habeas evidence

In 2006, the state habeas court held an evidentiary hearing on Heidler’s petition. At the hearing, Heidler presented live testimony, affidavits, and deposition testimony from more than thirty witnesses. Heidler’s witnesses included Ms. Palmer and Mr. Garrett, one of Heidler’s former foster parents, his teachers, his family members, medical providers who had treated Heidler as a child or as an inmate, two mental health experts retained by Heidler’s state

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habeas counsel, and Dr. Kuglar. Most of the witnesses who testified at this state habeas proceeding hadn't spoken with Heidler's counsel before trial and didn't testify on Heidler's behalf. Heidler did not present evidence on his claim that trial counsel were ineffective in investigating and litigating the suppression of his statement to police.

Ms. Palmer

Ms. Palmer, who by then had become a state superior court judge, testified that she met Heidler in jail about five days after the murders. During Ms. Palmer's meeting with Heidler, Heidler was "[d]isheveled," "not willing to make any contact with [her]," and "not helpful." Ms. Palmer spoke with the chief jailer, who described Heidler's strange behavior to her. Based on her initial observations of Heidler and the chief jailer's description of his behavior, Ms. Palmer "knew that [Heidler] was mentally ill." Ms. Palmer testified that Heidler continued to provide only "minimal information" about his background after their first meeting.

Ms. Palmer said that she and Mr. Garrett decided that their theory of the case would be "[t]hat [Heidler] was mentally ill and that we were going to concentrate on the mental illness" because "it [was] a rather difficult and bad crime, but [Heidler's] life had been so bad, and, of course, the [s]tate's examiners said he was mentally ill[, o]ur forensic psychologist said he was mentally ill," and "the court's expert witness [Dr. Kuglar] . . . said that [Heidler] was mentally ill."

Ms. Palmer testified that she would follow up on investigative leads that Investigator Gillis identified because she was “sort of a hands-on kind of defense attorney” who “like[d] to interview and talk to the witnesses [her]self” and did not “want to depend on an investigator’s little synopsis to [her] about what someone is going to say.” Ms. Palmer testified about her efforts to go “door to door” in Heidler’s community and schools to learn about his background. Ms. Palmer also testified about the many hours she spent piecing together Heidler’s DFACS records. And when questioned about her billing records for work she performed in Heidler’s case, Ms. Palmer explained that she “th[ought she] did a lot more work that [she] didn’t document.”

In preparing for trial, Ms. Palmer and Mr. Garrett “talked about all the witnesses and who to use and who not to use.” For example, they decided to call only the DFACS caseworkers, teachers, and foster parents who “could better articulate [Heidler’s] true behavior and had seen significant evidence of mental illness and could convey that to the jury in a heartfelt way.” Ms. Palmer chose to call only the DFACS caseworkers who were “the most articulate,” “had the most contact with Heidler,” and “were the most sympathetic towards his plight.” And Ms. Palmer explained that she was “trying to bring out some specific highlights” in Heidler’s DFACS records through the caseworkers’ testimony and “tried to hit the really tough parts, where [Heidler] was truly harmed” because “we would have spent days and days with the jury had we tried to go through that entire stack of records.”

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Ms. Palmer explained that she “struggled with whether or not to put [Heidler’s mother] on the witness stand” because she was “explosive” and “irrational.” Ms. Palmer explained that she decided to put Heidler’s mother on the stand for only a few questions because “[w]e could not get to her, we couldn’t ask her to ask the jury to spare her son’s life,” and there was not “one helpful bit of information we ever got out of that woman.” Ms. Palmer testified that “everybody said that” Heidler’s stepfather beat him but that Heidler’s mother and Ms. Aguilar testified that his stepfather didn’t abuse Heidler because of “[f]amily protectiveness.”

Ms. Palmer said that she and Mr. Garrett relayed “all the bizarre episodes that happened with [Heidler] at the Toombs County Jail” to Dr. Maish. According to Ms. Palmer, she and Mr. Garrett met with Drs. D’Alesandro and Ifill and “made sure that they knew all of those kinds of things [about Heidler’s behavior in prison], too.” And they “spent most of [a] day” with Dr. Kuglar preparing for trial and knew that “Dr. Kuglar was totally and 100 percent convinced that . . . Heidler was very, very, very mentally ill.” Ms. Palmer and Mr. Garrett also knew that Drs. D’Alesandro and Ifill “were on [their] page” about Heidler’s mental health problems. Ms. Palmer confirmed that she gave Drs. Maish, D’Alesandro, Ifill, and Kuglar “everything [she] had” about Heidler’s bizarre behaviors and told them about reports that Heidler had imaginary friends.

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Mr. Garrett

Like Ms. Palmer, Mr. Garrett concluded that Heidler “obviously needed a psychological evaluation” during their first meeting because “everything he did screamed out that he was having mental health problems.” Mr. Garrett said that he “couldn’t communicate with [Heidler] at all” and that Heidler “didn’t provide [him] with any kind of information in his case.”

Mr. Garrett explained that his and Ms. Palmer’s trial strategy was to approach Heidler’s trial like “one long penalty phase, with the psychiatric evidence put at the front end and then mitigation put in afterwards.” Mr. Garrett said that he and Ms. Palmer “believed that if [they] argued to the jury that [Heidler] was guilty but mentally ill, that it would be consistent with the evidence and that [they] would retain credibility with the jury and that perhaps the jury would be sympathetic and spare [Heidler’s] life.”

Mr. Garrett testified that he interviewed Drs. Maish, D’Alesandro, Ifill, and Kuglar before trial and gave them all the evidence from Ms. Palmer’s background investigation. Mr. Garrett thought that all four doctors agreed that Heidler was mentally ill and he intended to use Drs. D’Alesandro’s, Ifill’s, and Kuglar’s testimony to show “[t]hat [Heidler] was qualified for a verdict of guilty but mentally ill, that he was mentally ill at the time that the killings were committed.”

Mr. Garrett “believe[d] that [he] had developed evidence that [Heidler] was at periods psychotic” and said that Dr. Maish had explained that people with borderline personality disorder “could

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have psychotic features such as [they] had seen with [Heidler],” like “hallucinations and hearing voices.” Mr. Garrett testified that he had discussed Heidler’s “psychotic episodes” and Heidler’s “auditory or visual hallucinations” with Drs. Ifill and Kuglar but that “[e]verybody’s conclusion [was] that [Heidler] could have been” having “a psychotic episode on the night of the crime” but there was “no way of knowing it.”

Mr. Garrett explained that he and Ms. Palmer selected the witnesses that they called at trial based on who they “thought could help the most.” And, like Ms. Palmer, Mr. Garrett testified that “there probably was” a “significant amount of work [he] did on [Heidler’s] case that [he] didn’t bill for.”

Heidler’s foster parents, teachers, and family members

Heidler presented testimony from his foster parents, teachers, and family members. Ms. Boatright, Heidler’s foster mother who had testified at trial, submitted an affidavit in which she said that Heidler “spoke often about an invisible creature he called a ‘mouse’” and would often “beat the mouse with a belt” as a form of disciplining the mouse. Ms. Boatright said that she had spoken with Ms. Palmer before Heidler’s trial “for a short time on the phone,” and she’d spoken to Ms. Palmer again “only one more time” in the hotel lobby the night before her trial testimony.

Joan Pickren testified that she taught Heidler at the Cedarwood Center, that Heidler was “very unkempt,” seemed depressed, and constantly “cut himself.” Ruth Davis, the parent liaison at the Cedarwood Center when Heidler was a student,

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submitted an affidavit in which she said that Heidler “was one of the most ill, emotionally disturbed kids [she] h[ad] ever seen,” “was always pretty dirty and looked sickly,” “had a malnourished look about him,” and “had some sort of imaginary friend” that he would talk to.

George Heidler, Heidler’s father, submitted an affidavit in which he said that Heidler’s mother “beat on her stomach very hard, screaming ‘I’ll kill this bastard’” many times while she was pregnant with Heidler. And Ms. Aguilar, Heidler’s older sister who had testified at trial, submitted an affidavit in which she said that their stepfather was “usually” drinking and “was mean when he was drinking.” She also said that their stepfather would hit Heidler and “threatened to kill him; he threatened to slit his throat.” And Ms. Aguilar said that Heidler “talked to himself a lot.”

Ms. Aguilar explained that she “did not understand the purpose of [her] testimony” when she testified at Heidler’s trial and remembered that she had met with Mr. Garrett twice and had met with Ms. Palmer “for a few minutes” before she took the stand. Ms. Aguilar said that “no one had ever asked [her]” “many of the questions [she] was asked on the stand,” and she “just wasn’t ready to be asked so many personal questions about [Heidler].” According to Ms. Aguilar, “[i]f anyone had taken the time to prepare [her] about what [she] would be asked and why it mattered, [she] would have been able to tell the stories” that she included in her affidavit.

Elaine Towns, Heidler’s aunt, submitted an affidavit in which she said that “each time [she] visited [Heidler’s family], [she]

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saw [Heidler's] father beating on one of his kids with a belt." Ms. Towns also said that Heidler's stepfather "beat" Heidler and that she "saw some of the beatings when [she] was over to their house" and "saw a lot more of the marks [Heidler's stepfather] left on [Heidler]."

Junior Towns, Ms. Towns's son, submitted an affidavit in which he said that he was friends with Heidler while they were growing up. Mr. Towns said that Heidler's stepfather "laid a hand on [Heidler] whenever any one of us got on his nerves" and would beat Heidler with "his hand, a belt, a cord, a shoe, and a water hose." Mr. Towns also remembered that Heidler "held a pocket knife to his wrist and talked about cutting himself."

Medical treatment providers

Dr. Adrienne Butler, a pediatrician at Satilla Medical Center, testified that she treated Heidler when he was twelve years old. Dr. Butler's notes from her encounter with Heidler said that "[i]n the office today he [was] obviously having auditory hallucinations," that Heidler's "eyes [were] darting," and that Heidler "smiled and respond[ed] to voices which [were] calling his name." Dr. Butler's notes also stated that she had referred Heidler to Georgia Regional for in-patient evaluation. Dr. Butler testified that she had an independent recollection of her encounter with Heidler because she "almost never saw a psychotic child in that setting, and [Heidler] stuck in [her] memory." On cross examination, Dr. Butler conceded that she was "probably not" qualified to give a mental illness diagnosis.

Lisa Fesperman, a school psychologist, submitted an affidavit in which she said that she evaluated Heidler in 1988. Ms. Fesperman said that she determined “that . . . Heidler was severely emotionally disturbed,” partly because he “told [her] he sometimes saw things coming off the wall.”

George Dykes, a nurse at the Toombs County Detention Center, testified that Heidler told him, while he was in jail after the murders, that he was afraid to go to sleep because “he was seeing people who w[ere] trying to get him.” Nurse Dykes said that he thought that Heidler was burning himself with cigarettes to help him stay awake. Nurse Dykes referred Heidler to Pineland Mental Health Center for treatment because Heidler was “hallucinating and he was hearing voices” and “continuing to injure himself.”

Dr. David Faulk, a psychiatrist at Pineland Mental Health Center, submitted an affidavit in which he said that he treated Heidler five times between July 1998 and January 1999 (i.e., pending Heidler’s trial). Dr. Faulk said that following his third visit with Heidler in 1998, he diagnosed Heidler with “psychotic disorder, not otherwise specified” and stated the diagnosis in his clinical notes. Dr. Faulk prescribed Haldol to “help control [Heidler’s] psychotic symptoms,” including seeing “visions of people” and “hear[ing] a baby crying all the time.” But Dr. Faulk confirmed that Heidler’s discharge diagnosis from Pineland Mental Health Center “d[id] not incorporate” Dr. Faulk’s findings about Heidler’s psychotic symptoms and stated only that Heidler had been diagnosed with “adjustment disorder with anxiety and antisocial personality disorder.”

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Dr. Faulk also noted that he “did not receive any background information” about Heidler prior to making his diagnosis.

Dr. Jack Matteson, a licensed psychiatrist at Georgia Diagnostic and Classification Prison, testified that he had been Heidler’s treating psychiatrist in prison since March or April 2003 and saw Heidler “on a regular basis.” Dr. Matteson testified that Heidler “ha[d] a mood disturbance as well as a psychotic disturbance” and that “[t]he psychotic component comes and goes.” Dr. Matteson said that he had observed Heidler “in a psychotic state” and explained that Heidler reported “hearing voices.” On cross examination, Dr. Matteson conceded that his “work with [Heidler] ha[d] been done primarily through [Dr. Matteson’s] contact with him,” and was “based on [Heidler’s] current presentation” and not “all of [Heidler’s] previous volumes of records.” Dr. Matteson agreed that his “sole purpose” was to evaluate Heidler’s “mental health now” and that he did not know “what sort of mental illnesses [Heidler] was suffering from at the time of the [murders].”

Mental health experts

Heidler’s state habeas counsel retained two mental health experts to evaluate Heidler. The first, Dr. Sarah DeLand, was a board-certified forensic psychiatrist who evaluated Heidler in October, November, and December 2005—shortly before the state habeas court’s evidentiary hearing. Dr. DeLand’s evaluation of Heidler included a review of his medical and mental health records, school records, DFACS records, jail records, and some of the trial testimony and state habeas affidavits.

Dr. DeLand diagnosed Heidler with “schizoaffective disorder,” “probable post-traumatic stress disorder,” and “a borderline personality disorder.” She also said that Heidler “was psychotic on every day that [she] saw him,” including a time when he was “actively hallucinating while [she] was speaking to him.” Dr. DeLand testified that Drs. D’Alesandro’s, Ifill’s, Kuglar’s, and Maish’s pre-trial evaluations of Heidler happened while Heidler was taking Hal-dol, which “improve[d Heidler’s] psychotic symptoms.” Thus, Dr. DeLand agreed that it “would be important for those mental health experts to understand that [Heidler was] being medicated with anti-psychotropic drugs.”

Dr. DeLand didn’t know what Heidler’s mental state was on the day of the murders but she thought that, “in light of everything that [she’d] reviewed,” it “would be most likely” that Heidler would meet the criteria for a guilty but mentally ill verdict. On cross examination, Dr. DeLand conceded that her diagnosis of Heidler was “on the same page” as the diagnoses of Drs. D’Alesandro, Ifill, Kuglar, and Maish. The only thing Dr. DeLand could have added to the testimony of the four mental health experts who testified at trial was “more information about the longstanding nature of [Heidler’s] illness” and Heidler’s “repeated psychotic episodes.”

The second mental health expert retained by Heidler’s state habeas counsel was Dr. John Carton, a Ph.D. in clinical psychiatry and an expert in forensic psychiatry. Dr. Carton testified that he evaluated Heidler and found him “to be a very mentally ill

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individual, who struggled with a thought and mood disorder as well as a variety of other illnesses, and that there had been a longstanding history of these problems.” Dr. Carton reviewed the state habeas affidavits submitted by people who had witnessed the physical abuse and “deplorable conditions” during Heidler’s childhood and testified that Heidler’s background “help[ed] provide” a “theory for why [Heidler] was behaving the way he was when [Dr. Carton] met him.” According to Dr. Carton, the state habeas affidavits were “very important . . . in terms of corroborating what [he] was seeing in [Heidler’s] history.”

Dr. Carton testified that he was “certain” that, on the day of the murders, Heidler was suffering from a mental illness as defined under Georgia’s guilty but mentally ill verdict statute. On cross examination, Dr. Carton explained that he “underst[ood] why [Drs. D’Alesandro, Ifill, Kuglar, and Maish] gave [Heidler] a borderline personality disorder” and that he “probably would have given [Heidler] that [diagnosis], too.” But Dr. Carton said that he would have also “given [Heidler] an additional diagnosis” based on Heidler’s “other mood and thought disorder symptoms.”

Dr. Kuglar

Dr. Kuglar submitted an affidavit in which he stated that “the records [he] had at the time of [his pretrial] evaluation [of Heidler] suggested that [Heidler] experienced brief psychotic breaks during his history.” But, Dr. Kuglar said, “[he] did not have background materials that indicated a history of more longstanding or recurrent psychotic episodes nor did [he] have concrete

examples or descriptions of [Heidler's] psychotic episodes that [he] could have described to a jury." Dr. Kuglar testified that Heidler's state habeas counsel had given him additional information, including: (1) letters written by Heidler to trial counsel from jail; (2) Heidler's jail medical logs; (3) Heidler's treatment records from Pineland Mental Health Center; and (4) the state habeas affidavits submitted by Heidler's foster parents, teachers, family members, and healthcare providers.

Dr. Kuglar explained that these other records "document[ed] many more symptoms of mental illness than [he] was aware existed" when he testified at Heidler's trial. For example, Dr. Kuglar explained that Nurse Dykes's affidavit stated that Heidler "reported hearing voices and seeing dead people in his cell" and that Heidler "burned himself with cigarettes in order to stay awake and avoid having dreams of people telling him to kill himself." And Dr. Kuglar noted that Heidler's letters to trial counsel said that he "was hearing voices and wanted to kill himself" and that "[t]he incident reports from the jail also recount several suicide attempts by [Heidler]."

According to Dr. Kuglar, the other records "present[ed] a fuller history of [Heidler's] psychotic episodes." For example, Dr. Kuglar pointed to Dr. Butler's observation that Heidler was "hearing voices" and "actively hallucinating" and said that affidavits from other individuals who knew Heidler "at different points in his life also describ[ed] behavior indicative of probable psychosis, such as [Heidler] carrying on conversations when no one was around,

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cutting himself, and having an imaginary pet who he disciplined.” Dr. Kuglar also explained that Heidler’s jail records showed that Heidler was taking Haldol—an anti-psychotic medication—and that Haldol was “a likely explanation why [Heidler] was not psychotic during our meeting and why it had been ‘some time’ since [Heidler] heard voices.” Dr. Kuglar said that he “had no knowledge that [Heidler] was prescribed Haldol” when he evaluated him.

Dr. Kuglar explained that the other records also “contain[ed] evidence that [Heidler] was suffering from an extreme mental or emotional disturbance at the time of the offense” because of the death of his stillborn son. Dr. Kuglar said that he had “recently learned that [Heidler] wrote letters to his trial attorneys, repeatedly complaining that he was hearing his baby son . . . crying for him every day” and that Heidler’s Pineland Mental Health Center records “reiterate[d Heidler’s] complaints that he was hearing a baby crying and also state[d] that on the night of the offense, [Heidler] woke up on top of his son’s grave.” According to Dr. Kuglar, “at minimum, this information indicate[d] that [Heidler’s] mental health was severely impacted by the death of his child.”

In sum, in his affidavit, Dr. Kuglar said that the added information that Heidler’s state habeas counsel provided was “significant.” If trial counsel had provided Dr. Kuglar with the same information, then Dr. Kuglar “would have testified with more certainty that [Heidler] ha[d] a serious mental illness” because the “new information confirm[ed] the presence of a thought disorder

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component of his mental illness in addition to a mood disorder component.”

The state habeas court denied Heidler’s habeas petition

The state habeas court denied Heidler’s petition. Applying *Strickland*, the state habeas court denied Heidler’s ineffective assistance of counsel claim. The state habeas court determined that trial counsel’s investigation of Heidler’s background and mental health wasn’t deficient because trial counsel: (1) “conducted an exhaustive investigation of [Heidler’s] background by interviewing family members, teachers, friends, DFACS caseworkers, and [Heidler’s] juvenile probation officer”; (2) interviewed “employees of the Toombs County Detention Center”; and (3) “gathered voluminous documents from the various schools, including the psycho-educational centers [Heidler] attended, the numerous mental health centers records, DFACS records, [Heidler’s] Toombs County Detention Center records[,] and medical records.” The state habeas court also concluded that Heidler had not shown that he “was prejudiced by trial counsel’s investigation” into his background and mental health.

The state habeas court determined that trial counsel reasonably presented evidence on Heidler’s mental health during the guilt phase because trial counsel “provided all background records they obtained” to all of the mental health experts and because Drs. D’Alesandro, Ifill, and Kuglar “testified that they were aware of [Heidler’s] auditory and visual hallucinations, yet they concluded that this was a feature of his [b]orderline [p]ersonality [d]isorder, in

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that [Heidler] could have brief psychotic episodes.” The state habeas court also found that trial counsel made a “logical and effective” strategic decision not to call Dr. Maish during the guilt phase. The state habeas court determined that Heidler wasn’t prejudiced by trial counsel’s presentation of his mental health “given the abhorrent nature of the crimes committed and the extensive mental health evaluations conducted by the mental health experts at trial.”

The state habeas court determined that trial counsel’s mitigation presentation during the penalty phase wasn’t deficient because “[t]rial counsel diligently sifted through” the information they gathered during their investigation of Heidler’s background and “chose the witnesses they felt would provide the best testimony.” The state habeas court found that the witnesses trial counsel called during the penalty phase “testified to the terrible childhood [Heidler] had to endure and to his mental illnesses” and that trial counsel presented an “abundant amount of mitigating evidence.” The state habeas court found that “trial counsel’s strategy of presenting [Heidler’s] DFACS records en masse, without a lengthy and cumulative review with the jury, was reasonable.” And trial counsel’s presentation of mitigation evidence during the penalty phase didn’t prejudice Heidler, the state habeas court concluded, “given the copious amount of mitigating evidence presented at trial and the nature of [Heidler’s] crimes.”

The state habeas court did not specifically address Heidler’s claim that trial counsel were ineffective in their efforts to suppress his statements to police. The state habeas court “deem[ed] . . .

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abandoned” claims for which Heidler “failed to present evidence [to] support” at the evidentiary hearing. But the state habeas court also said that, “[u]nless otherwise specified, to the extent that [Heidler] ha[d] not briefed the other claims of ineffective assistance of counsel, [it] f[ound] that [Heidler] ha[d] failed to establish the requisite prongs of *Strickland* as to these claims.”

The Georgia Supreme Court denied Heidler a certificate of probable cause to appeal

Heidler applied to the Georgia Supreme Court for a certificate of probable cause to appeal the denial of his state habeas petition. Heidler’s application did not include argument about trial counsel’s alleged ineffectiveness in investigating and litigating the suppression of Heidler’s statement to police. Instead, in a footnote, Heidler’s application said,

Heidler does not abandon any of the claims he previously made in his amended petition and briefs or at hearings in this case, which are not herein addressed. He incorporates by this reference all of the claims and arguments raised in his Petition, Amended Petition, Second Amended Petition, briefs and all other pleadings he has filed, and in the evidentiary hearing. Heidler requested an extension of the 30-page limit for this pleading, but was only allowed 40 pages. The page limitation has prevented him from setting out all his claims herein.

The Georgia Supreme Court summarily denied Heidler’s application.

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G. Federal Habeas Proceedings

Heidler filed a section 2254 petition in the Southern District of Georgia. Heidler claimed that trial counsel were ineffective in investigating and presenting his mental health and background. In support of his claim, Heidler asserted that trial counsel: (1) “failed to conduct an adequate pretrial investigation into the [s]tate’s case and defenses available to [Heidler], including but not limited to the psychological, medical[,] and psychiatric factors affecting [Heidler’s] mental state during, before, and after his alleged participation in the murders”; (2) “failed to conduct an adequate pretrial investigation into [Heidler’s] life and background to uncover and present to the jury evidence in mitigation of punishment, failed to present a complete picture of [Heidler’s] background, and failed to locate, interview, and present as witnesses numerous individuals who had compelling mitigating evidence regarding [Heidler]”; and (3) “failed to present evidence and to raise defenses at the guilt/innocence phase of the case, including but not limited to evidence and defenses based upon [Heidler’s] mental state at the time of the alleged offenses, [and Heidler’s] actions in the days surrounding the offense.”

Heidler also claimed that trial counsel were ineffective in investigating and litigating the suppression of his statement to police. In support of his claim, Heidler asserted that trial counsel: (1) “failed to adequately raise and litigate that [Heidler’s] statement to law enforcement was the result of an illegal arrest and should be suppressed”; (2) “failed to conduct an adequate pretrial

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investigation into the voluntariness of [Heidler's] statements to law enforcement personnel, and specifically failed to investigate the effect of [Heidler's] mental capacity, and his medical and psychological history[,] on [Heidler's] mental state at the time he provided the incriminating statements"; and (3) "failed to adequately present information and evidence in pretrial motions and proceedings and at trial relating to [Heidler's] allegedly voluntary waiver of constitutional rights during interrogation by the police."

The district court denied Heidler's section 2254 petition. The district court denied Heidler's claim that trial counsel were ineffective in investigating and presenting evidence of his mental health because "the state habeas court's thorough discussion of [Heidler's] trial counsel's investigatory efforts" showed that the state habeas court reasonably concluded that trial counsel performed a reasonable investigation and presentation of evidence about Heidler's mental health. The district court denied Heidler's claim that trial counsel were ineffective in investigating and presenting mitigating evidence because the state habeas court didn't unreasonably decide that trial counsel's investigation and presentation of mitigation evidence was constitutionally adequate. The district court reasoned that "the record show[ed] that Ms. Palmer spoke with [Heidler's] family members, located witnesses, and found records within a timely manner" and "the state habeas court listed numerous pieces of mitigating evidence that [Heidler's] trial counsel presented in its decision," showing "that [Heidler's] trial counsel were not deficient in their investigation or presentation of mitigating evidence."

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The district court denied Heidler’s ineffective assistance claim relating to the suppression of his statement to police for four reasons. First, the district court concluded that the claim was “not properly before the [district court]” because “Heidler generally raise[d] the[] claim[] in his [section 2254 petition]” but did not “provide[a] factual basis for [it].” Second, even if the claim had been properly pleaded, the district court concluded that the claim was unexhausted because Heidler “failed to include [it] in his application for a [certificate of probable cause to appeal to] the Georgia Supreme Court.” Third, the state hadn’t waived its exhaustion defense. And fourth, the district court found that Heidler “ha[d] not attempted to show cause and prejudice for this failure [to exhaust] or that procedural default would result in a miscarriage of justice.”

The district court denied a certificate of appealability. Heidler appealed, and we granted a certificate of appealability as to three issues:

1. Whether the district court erred in concluding that the state habeas court did not unreasonably apply *Strickland* . . . in finding that trial counsel was not ineffective in investigating and presenting evidence of Mr. Heidler’s mental health for the guilt phase of the trial.
2. Whether the district court erred in concluding that the state habeas court did not unreasonably apply *Strickland* . . . in finding that trial counsel was not ineffective in investigating and presenting

mitigating evidence for the penalty phase of Mr. Heidler's trial.

3. Whether the district court erred in concluding that Mr. Heidler did not sufficiently plead[,] and did not exhaust, his claim that trial counsel was ineffective by failing to adequately present information and evidence in pretrial motions relating to Mr. Heidler's waiver of constitutional rights during interrogation by the police.

In other words, we granted a certificate of appealability on (1) trial counsel's investigation and presentation of *mental health* evidence during the *guilt phase*, (2) trial counsel's investigation and presentation of *mental health and background evidence* in the *penalty* phase, and (3) trial counsel's efforts to exclude Heidler's statements to police.

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). This appeal is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Id.* When a state court has adjudicated a habeas petitioner's claim on the merits, we review its decision under AEDPA's "highly deferential standards." *Davis v. Ayala*, 576 U.S. 257, 269 (2015). Under those highly deferential standards, a federal court may not grant a section 2254 petition unless the state court's adjudication was (1) "contrary to, or involved an unreasonable application of, clearly

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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).

A state court’s factual findings—both express and implied—are “presumed to be correct,” and the petitioner bears “the burden of rebutting [that] presumption of correctness by clear and convincing evidence.” *Id.* § 2254(e)(1); *see Green v. Sec’y, Dep’t of Corr.*, 28 F.4th 1089, 1145 (11th Cir. 2022) (explaining that the petitioner “has the added burden under [section] 2254(e)(1) of rebutting by ‘clear and convincing evidence’ the presumption of correctness given to state court factual findings, both express and implied”); *see also 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)).

A habeas petition “must show far more than that the state court’s decision was merely wrong or even clear error.” *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (quotation and citation omitted). The question is not whether we “believe[] the state court’s determination was incorrect but whether that determination 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.” *See Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quotation omitted). In other words, we may only grant habeas

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relief if the state court’s decision is “so obviously wrong that its error lies beyond any possibility for fairminded disagreement.” *Shinn*, 141 S. Ct. at 523 (quotation omitted). “If this standard is difficult to meet, that is because it was meant to be.” *Harrington*, 562 U.S. at 102.

Our focus under section 2254(d) is on the “last reasoned” state court decision. See *McGahee v. Ala. Dep’t of Corr.*, 560 F.3d 1252, 1261 n.12 (11th Cir. 2009) (quotation omitted). When the final state court decision on the merits doesn’t come with reasons—as here, where the Georgia Supreme Court summarily denied Heidler a certificate of probable cause to appeal—we “‘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.” *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

But, in assessing whether the state court’s decision was reasonable, a “federal habeas court reviews only the state court’s decision and is not limited to the particular justifications that the state court supplied.” *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1037–38 (11th Cir. 2022) (en banc). What that means is that we look to “the *reasons* for the state court’s decision” and then “consider any potential *justification* for those reasons.” *Id.* at 1036. So, for example, if “the specific reason for a state court’s decision to deny habeas relief was that the petitioner wasn’t prejudiced by his counsel’s deficient performance, we can, in evaluating whether that reason was reasonable, consider additional rationales that

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support the state court’s prejudice determination.” *Id.* at 1036 (cleaned up). And we defer to the state court’s determination so long as it was not “so obviously wrong that its error lies beyond any possibility for fairminded disagreement.” *Id.* (quotation omitted).

DISCUSSION

Our review is limited to the three issues specified in Heidler’s certificate of appealability. *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 conclude that the Georgia Supreme Court did not unreasonably apply *Strickland* in denying Heidler’s claim that trial counsel were ineffective in investigating and presenting evidence of his mental health during the guilt phase of trial. Second, we find that the Georgia Supreme Court did not unreasonably apply *Strickland* in denying Heidler’s claim that trial counsel were ineffective in investigating and presenting mitigating evidence in the penalty phase of trial. And third, even if Heidler sufficiently pleaded and exhausted his claim that trial counsel were ineffective in failing to suppress his inculpatory statements to police, we explain that the claim fails on the merits under de novo review.

But before we get there, we’ll start with the law that governs Heidler’s ineffective assistance of counsel claims. Under *Strickland*, “[a] petitioner asserting a claim of ineffective assistance of counsel must demonstrate both deficient performance and prejudice—that

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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 . . . , 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).

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) (en banc) (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.

In short, 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.*

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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.”); *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (referring to “[a] standard of reasonableness applied as if one stood in counsel’s shoes”). “*Strickland* does not guarantee perfect representation, only a reasonably competent attorney.” *Harrington*, 562 U.S. at 110 (quotation omitted).

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 reasonableness was *itself* reasonable. See 28 U.S.C. § 2254(d)(1). So we 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).

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, we ask “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). “A reasonable probability means a substantial, not just conceivable,

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likelihood of a different result.” *Shinn*, 141 S. Ct. at 523 (quotation omitted). “It is a ‘probability sufficient to undermine confidence in the outcome.’” *Hayes v. Sec’y, Fla. Dep’t of Corr.*, 10 F.4th 1203, 1210 (11th Cir. 2021) (quoting *Strickland*, 466 U.S. at 694).

A. Heidler’s Claim that Trial Counsel Were Ineffective in Investigating and Presenting Evidence of His Mental Health During the Guilt Phase

With that, we turn to Heidler’s claim that trial counsel were ineffective in investigating and presenting evidence of his mental health during the guilt phase of his trial. Because the Georgia Supreme Court summarily denied that claim, we look to the “last reasoned” state court decision. *See McGahee*, 560 F.3d at 1261 n.12. In our case, that’s the state habeas court’s decision. The state habeas court denied Heidler’s claim, reasoning that Heidler failed under *Strickland*’s performance and prejudice prongs. We conclude that fairminded jurists could agree with those determinations about the guilt phase: that trial counsel’s investigation was not deficient, that trial counsel’s presentation was not deficient, and that Heidler has failed to show that he suffered any prejudice.

Deficiency – Investigation

The state habeas court concluded that Heidler’s trial counsel’s investigation into his mental health for the guilt phase was not deficient. Under our “doubly” deferential standard of review, we can’t say that the state habeas court unreasonably concluded that trial counsel weren’t deficient under the circumstances. *See Jenkins*,

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963 F.3d at 1265 (quoting *Harrington*, 562 U.S. at 105). Mr. Garrett and Ms. Palmer thoroughly investigated Heidler's mental health.

For starters, both Mr. Garrett and Ms. Palmer visited Heidler in jail within days of the murders. Even based on those initial meetings with Heidler, Mr. Garrett and Ms. Palmer were "totally convinced" that Heidler was mentally ill. Ms. Palmer, for example, saw that Heidler "was making babies out of toilet paper and doing strange things in his cell." Ms. Palmer continued to visit Heidler every six weeks or so and talk with the chief jailer every Thursday "to see how [Heidler] was doing, was he taking his medication." Mr. Garrett also met with Heidler at least a dozen times before the trial. Trial counsel concluded that Heidler "obviously needed a psychological evaluation."

Trial counsel's mental health investigation also included interviewing Heidler's family members, including his mother, aunt, uncle, and his sister, Lisa Aguilar. Ms. Palmer recounted that Heidler's "family members" all said "[t]hat he had always been mentally ill." At the same time, Heidler's family members "weren't real helpful" with giving "specific examples of mental health problems." Ms. Palmer also spoke with some of Heidler's teachers and foster parents. One of those teachers, Ms. Dryden, worked with Heidler at the Cedarwood School for "mentally ill students." Ms. Dryden was able to talk about "how sick [Heidler] was during the time." And one of Heidler's foster parents, Ms. Boatright, explained that Heidler "hallucinated that he had this pet friend that was [a] white mouse." To gather more information,

Ms. Palmer also went “to the jails,” to the “Juvenile Court,” and to the DFACS to speak with caseworkers and gather Heidler’s records. And she hired Investigator Gillis, who sought out Heidler’s “aunts and uncles and cousins” and some of Heidler’s friends.

Heidler’s trial counsel also collected extensive records from DFACS, medical service providers, mental health centers, and schools (including psycho-educational centers). For example, trial counsel received records from:

(1) Harrell Psychoeducational Program; (2) First District Cooperative Educational Service Agency; (3) Appling County Special Education Program; (4) Okefenokee RESA Child Development Center; (5) Bacon County Elementary; (6) Jeff Davis Middle School; (7) Georgia Regional of Savannah; (8) Cedarwood Psychoeducational Program; (9) Daisy Youth Clinic (Sattilla Community Mental Health); (10) Bacon County Juvenile Court; (11) DFACS [in] Appling, Bacon and Jeff Davis Counties; (12) Pineland Mental Health; and (13) Toombs County Detention Center.

These records revealed, for example, that Heidler was “extremely suicidal,” that he “kill[ed] animals,” that he “attempt[ed] to harm himself” by “standing in front of logging trucks” and tying “a rope around his neck,” and that Heidler had “tremendous [amounts] of pent up anger . . . that exhibit[ed] itself in inappropriate and sometimes psychotic manners.” The records also included Heidler’s medication log from while he was detained pending trial, which showed that he was prescribed Haldol, “an antipsychotic

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medication.” Trial counsel also collected letters that Heidler had sent to them leading up to trial, including a letter in which Heidler said that he “hear[d] a dead baby crying.”

In assessing Heidler’s mental health, trial counsel also hired two experts. Specifically, Mr. Garrett retained Drs. Maish and Olson to evaluate Heidler. Mr. Garrett testified that he and Ms. Palmer gave Dr. Maish reports of Heidler’s behavior in jail and “all documents” comprising Heidler’s background records. Dr. Maish met with Heidler six times, interviewed him “extensively,” and gave him a “battery of tests.” Mr. Garrett also retained Dr. Albert Olson to evaluate Heidler for “pathological issues,” “brain damage,” or a “head injury” and to do “neurological testing.” Beyond hiring experts, Mr. Garrett also interviewed the court-appointed experts, Drs. D’Alesandro, Ifill, and Kuglar, and gave them Heidler’s background records too.

In short, the record shows that trial counsel’s investigation of Heidler’s mental health was comprehensive and thorough. We’ve previously held that similar—and even less extensive—investigations were constitutionally adequate. *See, e.g., Gissendaner v. Seaboldt*, 735 F.3d 1311, 1331 (11th Cir. 2013) (“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 [an expert].”); *Raheem v. GDCP Warden*, 995 F.3d 895, 919 (11th Cir. 2021) (finding that trial counsel “conducted an extensive [and adequate] investigation into [the petitioner’s]

mental health before trial” where trial counsel “consulted with *four* different mental health experts,” “spoke with [one of the experts] often,” and “me[t] with [the petitioner’s] family”). The state habeas court’s conclusion that trial counsel performed an adequate investigation of Heidler’s mental health was not unreasonable.

In response, Heidler makes six main arguments—all unpersuasive. First, Heidler argues that trial counsel “[f]ailed to investigate and develop evidence of Heidler’s continuing severe mental illness while awaiting trial.” But trial counsel *did* investigate Heidler’s mental health as he awaited trial. For example, Mr. Garrett and Ms. Palmer visited Heidler every few weeks. At these visits, trial counsel learned that Heidler “was making babies out of toilet paper and doing strange things in his cell.” When they visited, trial counsel saw that Heidler “colored every cement block in [his] cell” with crayons, tore up his “sink” and “toilet,” and engaged in “self-mutilation within the jail.” Ms. Palmer also spoke with the chief jailer every week to check in on Heidler and whether he was taking his medication.

Heidler’s trial counsel also requested—and received—at least some records from Pineland Mental Health, including Heidler’s medication log from while he was detained, which showed that he was prescribed Haldol, an antipsychotic medication. The state habeas court also credited Mr. Garrett’s testimony that he spoke with Nurse Dykes, the nurse at the Toombs County Detention Center, who referred Heidler to Pineland Mental Health Center for treatment. Mr. Garrett read his notes from the time as

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stating that Nurse Dykes “said that [Heidler] needed to go to mental health.” Given all this, we can’t say that the state habeas court unreasonably concluded that trial counsel adequately investigated Heidler’s mental health while he was detained pending trial.

Pushing back, Heidler faults trial counsel for “never reach[ing] out to [Nurse] Dykes or to Dr. Faulk, the treating psychiatrist.” He also criticizes trial counsel for failing to collect certain records from Pineland Mental Health Center, which (among other things) documented Dr. Faulk’s findings, including a notation that Heidler appeared “psychotic.” But the state habeas court found that trial counsel did reach out to Nurse Dykes. Even if Heidler could undermine that finding by clear and convincing evidence—and even if trial counsel failed to interview Nurse Dykes and Dr. Faulk and failed to obtain certain Pineland Mental Health records—that wouldn’t render the state habeas court’s decision unreasonable. *See Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001) (“[I]t is possible that, while the state court erred with respect to one factual finding under [section] 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under [section] 2254(d)(2).”).

Here’s why. We’ll start with the interviews. “A claim of failure to interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person’s account is otherwise fairly known to defense counsel.” *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)). Here,

Nurse Dykes referred Heidler to Pineland Mental Health Center because Heidler was “hallucinating and he was hearing voices” and “continuing to injure himself.” And Dr. Faulk diagnosed Heidler with “[p]sychotic [d]isorder” and prescribed him Haldol to “help control [Heidler’s] psychotic symptoms,” including seeing “visions of people” and “hear[ing] a baby crying all the time.” But trial counsel already knew about the hallucinations, self-mutilation, and signs of psychosis. The state habeas court didn’t unreasonably conclude that this information was fairly known to trial counsel and was thus cumulative. *See Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (“[T]here comes a point at which evidence . . . can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.”).

The same goes for the Pineland Mental Health records. A petitioner can’t prove ineffective assistance simply by pointing to undiscovered records that were “cumulative to what was uncovered during counsel’s investigation.” *Raheem*, 995 F.3d at 922; *see also Darling v. Sec’y, Dep’t of Corr.*, 619 F.3d 1279, 1284 (11th Cir. 2010) (“No reasonable jurist could debate the holding that the fact that [a petitioner] now has gathered additional evidence about his [mental health] that differs in some minor respects from the evidence actually presented at trial does not render his attorneys’ performance deficient[.]”). And the state habeas court did not err in finding that the Pineland Mental Health records were cumulative to what trial counsel already discovered. Those records generally reflected that Heidler experienced “suicidal/homicidal ideations,” had “attempted suicide” in the past, displayed “antisocial

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personality traits,” was diagnosed with “antisocial personality disorder,” “[r]eport[ed] hearing voices and seeing things” (including “a baby cry”), showed signs of “psychosis,” and was prescribed “Haldol.” But counsel were already aware of these things. And they already had *five* mental health experts evaluating Heidler. Trial counsel were not required to “scour the globe on the off chance” they’d find more evidence of what they already knew. *Rompilla*, 545 U.S. at 383. At the very least, the state habeas court was not unreasonable in concluding as much.

Second, Heidler similarly points to other witnesses that (in his view) trial counsel should have interviewed—like Dr. Butler (a pediatrician who treated Heidler when he was twelve and saw him experiencing “auditory hallucinations”), Ms. Fesperman (a school psychologist whom Heidler had told he “sometimes saw things coming off the wall”), and Ms. Pickren (a teacher who saw Heidler’s “severe depression”). Heidler says that trial counsel’s failure to interview these people rendered their investigation constitutionally inadequate.

Heidler’s argument doesn’t work. For one thing—this bears repeating—trial counsel were aware of Heidler’s mental health problems and made them a focal point of trial. And so the state habeas court did not unreasonably conclude that these accounts were “fairly known” to trial counsel. *See Eggleston*, 798 F.2d at 376 (quotation omitted). For another, while Heidler faults trial counsel for not interviewing some witnesses who (he says) would have offered helpful testimony, trial counsel’s “duty to investigate does

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not necessarily require counsel to investigate every evidentiary lead.” *Raheem*, 995 F.3d at 909 (quotation omitted). We must 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 v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999) (cleaned up). Here, trial counsel interviewed Heidler’s family, friends, teachers, and foster parents. They went door to door around the community, and they spoke to people at the jails, the juvenile court, and DFACS. They hired two mental health experts and worked closely with three others. They collected binders (and binders) of Heidler’s records. We can’t say that the state habeas court unreasonably found this sufficient.

Third, Heidler asserts that trial counsel performed unreasonably because they “failed to ensure the experts had additional important information, such as Heidler’s own letters documenting ongoing psychosis.” In those letters, Heidler said he could hear his stillborn baby crying. But Ms. Palmer testified at the state habeas court hearing that the “letters that [Heidler] had written to [trial counsel] . . . were . . . turned over to Dr. Maish and the other mental health expert[s].” And the state habeas court credited this testimony. Even if Heidler could show by clear and convincing evidence that this finding was erroneous (and we doubt he could), the evidence shows that the experts were equipped with the knowledge that Heidler suffered from hallucinations. By the time they testified at trial, for example, Dr. Kuglar knew about Heidler’s “auditory delusion[s],” including a “baby crying”; Dr. D’Alessandro was aware that Heidler was taking medication that “conceivably

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could have been” Haldol, an antipsychotic; and Dr. Maish had seen “talk in the records” of “hallucinations” and “psychotic disturbances.” The state habeas court did not unreasonably conclude that trial counsel adequately prepared the experts.

Fourth, Heidler argues that the state habeas court’s factual findings about the scope of trial counsel’s pretrial investigation are clearly erroneous. Specifically, Heidler argues that the state habeas court: (1) “ignored the fact that many of [trial counsel’s] conversations [with witnesses] happened in the middle of trial and that most of their witness contacts failed to cover critical mitigation topics”; (2) “credited” trial counsel with hiring Investigator Gillis even though Investigator Gillis “did practically no work on this case”; and (3) “took at face value” Ms. Palmer’s testimony about her investigation even though Ms. Palmer’s billing records didn’t corroborate her testimony.

But Heidler hasn’t shown by clear and convincing evidence that the state habeas court’s factual findings about the scope of trial counsel’s investigation were incorrect. *See* 28 U.S.C. § 2254(e)(1). To the contrary, the state habeas court’s factual findings are supported by Ms. Palmer’s testimony at the state habeas evidentiary hearing about the pretrial interviews she conducted, her preference not to rely on Investigator Gillis to interview witnesses, and that she “did a lot more work” than what was documented in her billing records. We have “no license” to question the state habeas court’s determination that Ms. Palmer’s testimony was credible. *See Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (“28 U.S.C.

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[section] 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.”).

Fifth, Heidler asserts that the state habeas court unreasonably “blamed [him] for [trial] counsel’s own deficiencies during the investigation” because Heidler’s inability to communicate was “a symptom of his illness, not an ‘unwillingness to cooperate’” and because “even if Heidler had intentionally withheld information, counsel would still be obligated to conduct a reasonable investigation.” Heidler is correct that his lack of assistance did not relieve trial counsel of their duty to perform a reasonable investigation. *See Porter v. McCollum*, 558 U.S. 30, 40 (2009) (“Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation.”).

But the state habeas court didn’t conclude that Heidler’s inability or unwillingness to assist his counsel’s investigation obviated counsel’s duty to reasonably investigate his mental health. Instead, the state habeas court considered Heidler’s lack of cooperation as context for *assessing* the reasonableness of trial counsel’s investigation. This was not unreasonable. *See Johnston v. Singletary*, 162 F.3d 630, 642 (11th Cir. 1998) (“In practical terms, counsel’s ability to present certain types of evidence may be informed, if not sharply curtailed, by a client’s refusal to cooperate”); *Thomas v. Wainwright*, 767 F.2d 738, 743 (11th Cir. 1985) (“A criminal defendant’s unreasonable refusal to communicate or cooperate with his

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attorney is one of the ‘circumstances’ that must be considered in determining whether an attorney’s assistance was reasonably effective.”); *Gardner v. Ozmint*, 511 F.3d 420, 427 (4th Cir. 2007) (“[W]hen determining whether counsel has delivered a constitutionally deficient performance, a state court also may consider a defendant’s own degree of cooperation[.]”); *Lorraine v. Coyle*, 291 F.3d 416, 435 (6th Cir. 2002) (“Trial counsel cannot be faulted for their client’s lack of cooperation.”); *cf. Strickland*, 466 U.S. at 688 (“[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.”).

And sixth, Heidler likens his case to *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011), where we found that “trial counsel’s mental health investigation was unjustifiably and unreasonably circumscribed.” *Id.* at 1227. In *Ferrell*, trial counsel limited the mental health expert “to answering *only* two questions: [1] whether [the petitioner] was mentally retarded and [2] whether he suffered from any problems that may have affected his waiver of rights for the statements he gave to the police.” *Id.* “Notably,” the mental health expert “had *not* been asked to look for evidence of brain damage, was provided *no* material from counsel other than school records, and was *not* asked to perform a clinical interview, or do anything else for possible use in mitigation.” *Id.* “Nor, despite [the petitioner’s] obvious mental disabilities, did defense counsel ever ask any of [the petitioner’s] family . . . about any topics related to [his] mental health.” *Id.* at 1228.

Our case is different. Unlike trial counsel in *Ferrell*, for example, Heidler’s trial counsel (1) *did not* limit testimony to only mental retardation or competence to waive rights; (2) *did* obtain a second expert to look for evidence of “brain damage”; (3) *did* provide “several binders” of records to the experts, including DFACS records, school records, mental health records, and juvenile records; (4) *did* have their mental health expert interview their client “extensively” across six visits; (5) *did* ask family members about Heidler’s mental health; and (6) made his mental health the main focus of their investigation. In other words, Heidler’s trial counsel did all of the things that trial counsel didn’t do in *Ferrell*. This isn’t a case where a criminal defendant had obvious mental health issues and trial counsel simply did nothing. And so *Ferrell* doesn’t help Heidler’s claim.

Deficiency – Presentation

The state habeas court concluded that trial counsel’s presentation of mental health evidence in the guilt phase was reasonable. Fairminded jurists could agree with that assessment. In assessing the reasonableness of counsel’s presentation, we’ve explained that “[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). Indeed, where, as here, “strategic choices”—like deciding what theories or witnesses to present—are “made after [a] thorough investigation,” those decisions “are virtually unchallengeable.” *Id.* (quoting *Strickland*, 466

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U.S. at 690). Viewed in this light, the state habeas court's decision was not unreasonable.

As we've explained, trial counsel realized early on that Heidler was "mentally ill." Ms. Palmer testified that, as soon as she "walked in[to] [Heidler's cell] and saw [the] toilet paper babies, [she] knew that he was mentally ill." Mr. Garrett likewise testified that he knew that "mental health" would be an issue in the case "[a]lmost right away." At the same time, trial counsel recognized that it would be ineffective to argue that Heidler was innocent because "the facts were overwhelming as to what happened." So trial counsel landed on a strategy for the guilt stage of arguing that Heidler was guilty but mentally ill. In explaining this strategy, Mr. Garrett testified:

[T]he facts were overwhelming as to what happened[,] and it was not a mental health defense so much as it was how to go through the guilt/innocence phase seamlessly connected to the penalty phase that was inevitable and . . . be consistent. And so it was really one long penalty phase, with the psychiatric evidence put at the front end and then mitigation put in afterwards. We believed that if we argued to the jury that he was guilty but mentally ill, that it would be consistent with the evidence and that we would retain credibility with the jury and that perhaps the jury would be sympathetic and spare his life.

Heidler doesn't contend that this strategy was unreasonable. Nor could he. *See Thomas*, 767 F.2d at 747 (finding that trial counsel was

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not ineffective where he “advance[d] arguments at sentencing consistent with those he advanced at the guilt phase”); *Watkins v. Murray*, No. 92-4010, 1993 WL 243692, *9 (July 7, 1993) (4th Cir. 1993) (“[I]t was an eminently reasonable trial strategy to offer a theory at sentencing consistent with the theory offered at the guilt phase of the trial.”); see also Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 357–58 (1993) (noting the importance of “develop[ing] a consistent theory to be used at the guilt and penalty phases” and using as an example trial counsel “present[ing] an insanity defense at trial” and then “present[ing] additional testimony relating to the defendant’s mental impairment as mitigating evidence at the penalty trial”).

The state habeas court did not unreasonably conclude that trial counsel weren’t deficient in implementing this strategy at trial. Starting with opening statements, Ms. Palmer told the jury that she “expected that mental health issues [were] going to be a very important part of this case.” After the state rested, trial counsel then sought to present Drs. D’Alesandro, Ifill, and Kuglar during the guilt phase to prove that Heidler was mentally ill. Over the state’s objection, the state trial court ruled in Heidler’s favor, deciding that it would call Drs. D’Alesandro, Ifill, and Kuglar as witnesses and would permit Heidler to use the court-appointed experts to prove his mental health condition in support of a guilty but mentally ill verdict.

In light of the state trial court’s ruling, Heidler’s trial counsel decided not to call Dr. Maish during the guilt phase. In explaining

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this decision, Mr. Garrett noted that he and Ms. Palmer “thought [Dr. Maish’s] testimony was going to be the strongest.” And so they “wanted to let the jury hear the mental health evidence on the front end with the other three, and then let them hear it all over again from someone who [trial counsel] thought would . . . give the strongest testimony.” We can’t say that the state court unreasonably found this to be an effective strategy. Indeed, “[w]hich 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.” *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc).

Heidler’s trial counsel then questioned the three expert witnesses, highlighting Heidler’s severe mental health issues. First, Dr. D’Alesandro told the jury that he “found severe emotional problems beginning in [Heidler’s] childhood” that Heidler “was still suffering from” at the time of his evaluation. Dr. D’Alesandro said that Heidler would probably be best identified as having borderline personality disorder. Dr. D’Alesandro agreed that this “severe disorder” would “influence [Heidler’s] decision-making capacity.” The borderline personality disorder could also make Heidler “really unstable,” have “a very poor sense of themselves,” “overreact to stimuli,” and “at times become very dramatic” and “impulsive.”

Dr. D’Alesandro testified that, “[f]rom the information [he] got, [Heidler] did experience hallucinations . . . during a time that he was doing some type of drug.” Dr. D’Alesandro also testified

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that, in examining Heidler's mental history, "[t]here was a suggestion" in the records that Heidler had experienced "psychotic episodes." Although he couldn't validate the psychosis, Dr. D'Alesandro explained that "people with this type of diagnosis sometimes will get to such an extreme that they may temporarily at least function in a psychotic-like state." Dr. D'Alesandro further mentioned that Heidler "conceivably could have been" taking Haldol, "an antipsychotic medication."

Dr. D'Alesandro also explained that Heidler had a history of "depression" and "recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior." He told the jury, for example, that the records indicated that Heidler "would stand in the middle of the road waiting for a car to try and hit him," and one time, "a tractor-trailer jackknifed in [an] attempt[] to avoid hitting him." He also explained that "the first time [he] saw him [Heidler] had cigarette burns up and down his arms," which "certainly would signify self-mutilation." And he shared his view that "there [was] sufficient clinical documentation to substantiate a consideration of a guilty but mentally ill [verdict] if that would be the [c]ourt and the jury's decision."

Second, Heidler's trial counsel reinforced this testimony through Dr. Ifill. Dr. Ifill testified that he "found that [Heidler] was suffering from severe emotional disorders beginning in childhood and continuing up until the present." Like Dr. D'Alesandro, Dr. Ifill said that he saw "self-inflicted" cigarette burn marks on Heidler's skin. Dr. Ifill also told the jury that Heidler's "history

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recorded recurrent thoughts of wanting to kill himself and several attempts to do so,” including a time when he was admitted to “the hospital in Savannah.” Dr. Ifill explained that he’d “found that [Heidler] was suffering from many elements of . . . borderline personality disorder.”

Dr. Ifill told the jury that there “were evaluations where [Heidler’s] behavior at one point might have been thought of being psychotic.” He explained that “there are many instances where a person who is not normally psychotic may have psychotic episodes.” Mr. Garrett also asked Dr. Ifill if those suffering from a personality disorder may be “triggered into a psychotic episode.” And, in response, Dr. Ifill said: “[t]here is only one personality disorder with which a brief or transient psychotic episode is associated with, . . . and that is the borderline personality disorder.” Dr. Ifill conceded that Heidler’s case “could support a verdict of guilty but mentally ill.”

Third, Dr. Kuglar testified (like the first two experts) that the “primary diagnosis [he] arrived at” was “borderline personality disorder.” Dr. Kuglar saw “where [Heidler] had cut himself and what appeared to be cigarette burns, some kind of burns on his body, and where he had . . . pick[ed] at small lesions on his face until he had sort of created sores.” Dr. Kuglar said that Heidler “seemed to show . . . some probable degree of depression” and that Heidler had previously been “admitted after some sort of self-harm attempts.” Dr. Kuglar explained that people with borderline personality disorder “often have very brief episodes of being psychotic.”

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And he told the jury that Heidler talked about “auditory delusion[s]” like “hearing . . . voices” and the sound of “a baby crying.” Dr. Kuglar concluded by testifying that, “[i]n [his] opinion,” Heidler “would qualify for [a] guilty but mentally ill” verdict.”

To end the guilt phase, Mr. Garrett gave a closing statement. Mr. Garrett explained that he was not asking the jury “to find [Heidler] not guilty” because there was “overwhelming evidence that he did it.” Instead, what he was asking for was a verdict recognizing that Heidler “was mentally ill as defined by Georgia law when these acts occurred.” In this way, all he was “asking for in this case[] [was] a verdict based on the evidence.”

Mr. Garrett reminded the jury that each of the three court-appointed experts opined that there was evidence to support a guilty but mentally ill verdict. Mr. Garrett also pointed to testimony about how Heidler described the scene as “like being in a dream.” He reminded the jury of expert testimony that Heidler was “self-abusive, that he mutilate[d] himself, he burn[ed] himself with cigarettes, he cut[] himself on the arms, . . . [and] pick[ed] at his face until there [were] open sores.” Mr. Garrett recalled the expert testimony that Heidler “began at the age of eight and nine to show bizarre and self-destructive behavior,” including standing “out on the highway in front of trucks and [not] mov[ing].” Mr. Garrett emphasized the testimony that Heidler was being given Haldol, a “very strong antipsychotic drug.” And he ended his closing argument by asking the jury to “consider the very strong and

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unrebutted evidence that [Heidler] was mentally ill as defined by Georgia law at the time” of “this horrible tragedy.”

In sum, Heidler’s trial counsel brought out, through the experts, (1) Heidler’s depression, (2) that Heidler experienced hallucinations, (3) that he had attempted suicide on multiple occasions, (4) that he engaged in self-mutilation, and (5) that he had been prescribed a powerful antipsychotic medication. Trial counsel showed that Heidler had suffered from a severe disorder from the time he was a child through the time of trial. They also offered powerful examples: that Heidler had experienced auditory delusions like a baby crying, that Heidler self-mutilated with cigarette burns, and that Heidler had tried to kill himself as a child by walking in front of cars. We can’t say that the state habeas court’s conclusion that this presentation was reasonable was “so obviously wrong that its error lies beyond any possibility for fairminded disagreement.” See *Shinn*, 141 S. Ct. at 523 (quotation omitted).

Looking to avoid this conclusion, Heidler offers three main arguments. None of them are convincing. First, Heidler argues that trial counsel were ineffective because they didn’t present evidence of his “lifelong struggles with serious mental illness marked by auditory and visual hallucinations . . . and severe depression.” But trial counsel *did* present evidence of all of those things. As to the hallucinations, both Dr. D’Alesandro and Dr. Kuglar testified about Heidler’s “delusion[s]” and “psychotic episodes,” including the fact that Heidler was “hearing . . . voices” and the sound of “a baby crying.” As to depression, Drs. D’Alesandro and Kuglar

specifically discussed Heidler’s “depression.” And all of the experts told the jury about Heidler’s long history of “recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior.” It’s simply not true, then, that trial counsel failed to present evidence of Heidler’s hallucinations and depression.

Second, Heidler contends that trial counsel’s guilt phase mental health presentation was deficient because they “effectively abdicated the development of [a guilty but mentally ill] defense to the trial court” by “relying solely on the court-appointed experts.” But it was not unreasonable for the state habeas court to find that trial counsel made a “logical and effective” strategic decision not to have Dr. Maish testify during the guilt phase. Mr. Garrett testified he made this decision based on his belief that Dr. Maish’s testimony was the “strongest” and his “confidence” that Drs. Ifill and Kuglar would accurately present Heidler’s mental health in the guilt phase. We can’t say that the state habeas court unreasonably concluded that this was a reasonable strategic decision. *See Waters*, 46 F.3d at 1512 (“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.”); *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 649 (11th Cir. 2016) (“We . . . afford substantial deference to trial counsel’s strategic decision to present [the petitioner’s] mother as the only penalty phase witness.”); *Fortenberry v. Haley*, 297 F.3d 1213, 1229–30 (11th Cir. 2002) (“Strategic considerations may even reasonably lead defense counsel to conclude that presenting no mitigating evidence is to the defendant’s benefit.”).

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Third, Heidler asserts that trial counsel should have presented “credible witnesses who would have given compelling testimony of Heidler’s psychosis and major depression,” including Dr. Butler, Ms. Pickren, and Ms. Fesperman. Dr. Butler was the pediatrician who saw Heidler “hallucinating” when he was twelve, Ms. Pickren was a teacher who could speak to Heidler’s “depression,” and Ms. Fesperman was a school psychologist who said Heidler had reported “sometimes [seeing] things coming off the wall.”

The problem, as the state habeas court pointed out, is that all of this testimony would have been cumulative of the evidence already presented to the jury. “A petitioner cannot establish ineffective assistance by identifying additional evidence that could have been presented when that evidence is merely cumulative.” *Van Poyck v. Fla. Dep’t of Corr.*, 290 F.3d 1318, 1324 n.7 (11th Cir. 2002). In general, “evidence presented in postconviction proceedings is cumulative . . . to or duplicative of that presented at trial when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury.” *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1260–61 (11th Cir. 2012) (cleaned up) (op. of Ed Carnes, J.). That’s exactly what this added testimony would do here. Heidler’s trial counsel brought out Heidler’s hallucinations and depressions at trial. He can’t show ineffective assistance of counsel by simply pointing to more or better examples.

Prejudice

The state habeas court’s conclusion that Heidler’s trial counsel did not perform deficiently at the guilt stage is sufficient to dispose of Heidler’s first claim. *Windom*, 578 F.3d at 1248 (“[T]he failure to demonstrate either deficient performance or prejudice is dispositive[.]”). But the state habeas court *also* found that Heidler failed to show that he was prejudiced by trial counsel’s investigation and presentation of mental health evidence during the guilt phase. We can’t say that this no-prejudice determination was contrary to, or an unreasonable application of, clearly established federal law.

“[A] petitioner cannot satisfy the prejudice prong of the *Strickland* test with evidence that is merely cumulative of evidence already presented at trial.” *Rose v. McNeil*, 634 F.3d 1224, 1243 (11th Cir. 2011); *see also, e.g., Cullen v. Pinholster*, 563 U.S. 170, 200 (2011) (finding “no reasonable probability that the additional evidence [from the] state habeas proceedings would have changed the jury’s verdict” because “[t]he ‘new’ evidence largely duplicated the mitigation evidence at trial.”); *Knight v. Fla. Dep’t of Corr.*, 958 F.3d 1035, 1049–50 (11th Cir. 2020) (concluding that the petitioner failed to establish prejudice because his “‘new’ mitigation evidence merely strengthen[ed]—corroborate[ed], confirm[ed]—the mitigating circumstances that [counsel] presented at sentencing”).

Here, as we’ve explained, the state habeas court did not unreasonably conclude that Heidler’s preferred evidence was merely cumulative—that the evidence simply strengthened, corroborated,

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or confirmed the theories already presented at trial. For example, Heidler argues that he was prejudiced because trial counsel failed to “present[] credible witnesses—including Dr. Butler, Dr. Faulk, Nurse Dykes, and Ms. Pickren—with first-hand knowledge of Heidler’s psychosis and severe depression.” But Drs. D’Alesandro, Ifill, and Kuglar testified not only that Heidler could be found guilty but mentally ill but also about Heidler’s depression and psychotic episodes. The state habeas court did not unreasonably conclude that there was no prejudice because this evidence was simply duplicative.

Along similar lines, Heidler argues that trial counsel failed to collect and present (some) Pineland Mental Health records from while he was detained pending trial. As we’ve explained, the Pineland Mental Health records generally reflected that Heidler experienced “suicidal/homicidal ideations,” had “attempted suicide” in the past, displayed “antisocial personality traits,” was diagnosed with “antisocial personality disorder,” “[r]eport[ed] hearing voices and seeing things” (including “a baby cry”), showed signs of “psychosis,” and was prescribed “Haldol.” But all of this closely matched the evidence that trial counsel discovered and then presented to the jury during the guilt phase at trial. The state habeas court did not unreasonably find no prejudice based on these Pineland Mental Health records.

More than that, the state habeas court also concluded that there was no prejudice resulting from trial counsel’s failure to discover Heidler’s Pineland Mental Health records from while he was

detained because those records “would not have benefited [Heidler] at trial.” This conclusion was not an unreasonable one. A “reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice.” *Wong v. Belmontes*, 558 U.S. 15, 26 (2009). And here, there was plenty of bad evidence that would’ve sharply cut against Heidler’s case. The records, for instance, reflect that Heidler’s diagnosis at discharge was “antisocial personality disorder.” They state that Heidler initially “[r]eport[ed] hearing voices and seeing things past three or four months” but then said that these “[v]oices were not present prior to murders.” And the records reflect that Heidler, at one point, “denie[d] any auditory or visual hallucinations.” The records, in other words, may very well have cut against trial counsel’s theme that Heidler was likely having a psychotic episode on the night of the murders. On these facts, it was not unreasonable to find that Heidler suffered no prejudice from the absence of these records.

We’ve concluded that state courts have reasonably found no prejudice in similar circumstances. In *Cook v. Warden, Georgia Diagnostic Prison*, 677 F.3d 1133 (11th Cir. 2012), for example, trial counsel failed to discover “one set of mental health records” from while the defendant was “incarcerated awaiting trial.” *Id.* at 1137. Trial counsel “did not know of the [mental health] records and did not present [them] to [the] [p]etitioner’s [mental health expert].” *Id.* We concluded that the state court reasonably found no prejudice, though, because the mental health expert “knew much of what was contained in the . . . records.” *Id.* at 1138. And the records were “unhelpful to [the] [p]etitioner’s case in other ways”

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because they conflicted with other evidence. *Id.* The same is true here. The experts were aware of Heidler’s mental health issues during trial and the evidence in the Pineland Mental Health records would have cut against Heidler’s defense at trial.

B. Heidler’s Claim that Trial Counsel Were Ineffective in Investigating and Presenting Mitigating Evidence for the Penalty Phase of Trial

The state habeas court found that “trial counsel’s presentation of mitigating evidence [in the penalty phase] was neither deficient nor was [Heidler] prejudiced by counsel’s performance.” And the Georgia Supreme Court summarily adopted this conclusion. The state habeas court didn’t unreasonably apply *Strickland* in denying Heidler’s claim that trial counsel were ineffective in investigating and presenting mitigating evidence—including evidence of Heidler’s mental health and background—in the penalty phase.

Deficiency – Investigation

The state habeas court found that trial counsel’s investigation was “exhaustive,” and its determination that trial counsel reasonably investigated Heidler’s mental health and background was not contrary to, or an unreasonable application of, clearly established federal law. Mr. Garrett and Ms. Palmer performed an extensive investigation into Heidler’s background. To start, both Mr. Garrett and Ms. Palmer met with Heidler. Ms. Palmer continued to visit Heidler every six weeks or so and Mr. Garrett also met with Heidler at least a dozen times before the trial.

At these meetings, trial counsel explored Heidler’s background and mental health. For example, Ms. Palmer learned that

Heidler “had two brothers in jail,” that his mother “practiced all kinds of magic,” that Heidler was “upset” about “the baby that died,” and some other “background information.” She also observed Heidler’s “toilet paper babies” and concluded he was “mentally ill.” Mr. Garrett also tried to talk to Heidler about his background and testified that Heidler may have told him a little bit “about his family.” Ms. Palmer also leveraged her connections as the contract public defender in Toombs County to speak with guards at the jail, including the chief jailer, who “described to [Ms. Palmer] that [Heidler] was not mentally well.

Heidler’s trial counsel interviewed family, friends, teachers, DFACS caseworkers, and a juvenile probation officer. For example, Ms. Palmer spoke with Heidler’s mother, aunt, uncle, his brother Steve, and his sister Ms. Aguilar. Ms. Aguilar, along with Heidler’s aunt and uncle, “provide[d] some background information,” including that Heidler was “in and out of foster care.” Heidler’s family members all said that “he had always been mentally ill” and that he’d been admitted to Georgia Regional Hospital twice for “mental health issues.” “Everybody” said that Heidler’s “stepfather had beaten” him. Heidler’s brother said that “the family was dysfunctional” and that Heidler “always had problems.” Trial counsel also reached out to some of Heidler’s foster parents, including Ms. Boatright, who told them that Heidler “had needed more help that he had not gotten” and that he “needed to be rid of his [mother] to have any help whatsoever.” Ms. Boatright also told trial counsel that “he hallucinated that he had this pet friend that was [a] white mouse.”

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Trial counsel also spoke with at least six DFACS employees. Ms. Palmer's notes from the time show that these DFACS employees (for example) "confirmed neglect" and explained that Heidler's mother would "threaten[]" caseworkers and use "voodoo." The DFACS employees explained that Heidler's mother "had not been a good mother at all" and that Heidler had a "pathetic life." Trial counsel's notes from interviewing Mr. Johnston, a juvenile probation officer, stated that Heidler's family "moved frequently" to "avoid unpaid bills," that Heidler had "[a]dmited killing animals," that Heidler's mother was "unstable," and that Heidler's parents were "heavy drinkers." Trial counsel also hired an investigator, Frank Gillis, to help her "find witnesses down in the country." And Ms. Palmer literally went "door to door and around the community" to investigate Heidler's background.

Beyond interviewing Heidler and those who knew him, trial counsel also collected extensive records from DFACS, medical service providers, mental health centers, and the schools Heidler attended. For example, trial counsel received records from:

(1) Harrell Psychoeducational Program; (2) First District Cooperative Educational Service Agency; (3) Appling County Special Education Program; (4) Okefenokee RESA Child Development Center; (5) Bacon County Elementary; (6) Jeff Davis Middle School; (7) Georgia Regional of Savannah; (8) Cedarwood Psychoeducational Program; (9) Daisy Youth Clinic (Satilla Community Mental Health); (10) Bacon County Juvenile Court; (11) DFACS [in] Appling, Bacon and

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Jeff Davis Counties; (12) Pineland Mental Health; and
(13) Toombs County Detention Center.

These records, the state habeas court explained, “cover[ed] the majority of [Heidler’s] childhood and teen years.” The records showed that Heidler’s “mother had mistreated him and his stepfather had abused him.” They indicated that Heidler had “been in and out of care” and that he had “emotional problems from early on.” They revealed, for example, that Heidler was “extremely suicidal,” that he “kill[ed] animals,” that Heidler’s “parents [were] divorced,” that his stepfather was “an alcoholic” and “abusive,” that Heidler did “not attend school regularly,” that Heidler’s mother was “involved in witchcraft,” that his “house was” often “unkempt,” that he “led a life of instability and turmoil,” and that he had “tremendous [amounts] of pent up anger . . . that exhibit[ed] itself in inappropriate and sometimes psychotic manners.” The records included Heidler’s medication log from while he was detained pending trial, which showed that he was prescribed Haldol. Trial counsel also collected letters that Heidler had sent to them leading up to trial, including a letter in which Heidler said that he “hear[d] a dead baby crying.”

As we’ve explained, trial counsel also hired two mental health experts as part of their investigation. Specifically, Mr. Garrett retained Drs. Maish and Olson. Dr. Maish met with Heidler six times, interviewed him “extensively,” and gave him a “battery of tests.” And Dr. Olson evaluated Heidler for “pathological issues,” “brain damage,” or a “head injury” and did “neurological

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testing.” Mr. Garrett also interviewed the court-appointed experts, Drs. D’Alesandro, Ifill, and Kuglar, and gave them the bulk of the background and mental health records they’d obtained from their investigation.

It’s also worth placing this investigation in context. See *Strickland*, 466 U.S. at 688 (“[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.”). Trial counsel gathered all of this evidence despite limited cooperation. Heidler himself gave trial counsel “minimal” information. Mr. Garrett testified that he “couldn’t communicate with [Heidler] at all; nobody c[ould].” This obviously posed a challenge. See *Chandler*, 218 F.3d at 1318 (explaining that “the reasonableness of counsel’s [investigation] . . . depends critically upon information supplied by the petitioner” (cleaned up)). Trial counsel didn’t do much better with Heidler’s family. Heidler’s mother never gave “one helpful bit of information.” His family members would “run from you” rather than “come and pour out information.” And as to everyone else, Ms. Palmer testified that “the murder was so bad a lot of people didn’t want to talk to us.”

Heidler’s trial counsel, to sum things up, interviewed broad swaths of people in his life and obtained extensive background and mental health records. Through this investigation, trial counsel learned about Heidler’s background (for example) that his mother exhibited strange behaviors, that his stepfather was an abusive alcoholic, that Heidler didn’t attend school regularly, that his parents struggled to pay the bills, that his home was unkempt, and that he

bounced from place to place. They also learned about his mental health: that he exhibited psychosis, experienced depression, attempted suicide, killed animals, and otherwise had a long history of mental health issues. And they learned all this even in the face of limited cooperation. We can't say that the state habeas court's conclusion that this investigation was reasonable was "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Shinn*, 141 S. Ct. at 523 (quotation omitted).

Indeed, we've routinely found no error when reviewing similar investigations. *See, e.g., Ledford*, 818 F.3d at 647–48 (attorneys interviewed the petitioner, his family, friends, and mental health experts and hired a private investigator to investigate petitioner's background); *Puiatti v. Sec'y, Fla. Dep't of Corr.*, 732 F.3d 1255, 1280–81 (11th Cir. 2013) (attorneys met with the petitioner, interviewed family members, hired a private investigator, and retained mental health experts); *Tharpe v. Warden*, 834 F.3d 1323, 1339 (11th Cir. 2016) (attorneys met with the petitioner and interviewed prosecutors, law-enforcement officials, former employers, friends, and family and retained an expert).

But, in Heidler's view, his trial counsel didn't do enough. First, Heidler argues that trial counsel "did not contact readily available witnesses who would have testified to the trauma of Heidler's childhood." This argument doesn't work. For starters, as we've explained, "[a] claim of failure to interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person's account is otherwise fairly known to

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defense counsel.” *Eggleston*, 798 F.2d at 376. The state habeas court’s conclusion that trial counsel conducted a thorough investigation—and that Heidler failed to identify any non-cumulative evidence to be gained—was not unreasonable. For another, “[h]ow a lawyer spends his inherently limited time and resources is also entitled to great deference by the court.” *Chandler*, 218 F.3d at 1318 n.22. Trial counsel conducted a comprehensive investigation. The state habeas court didn’t unreasonably reject Heidler’s attempt to undermine that fact by pointing to *more* people they could’ve interviewed. “[T]he Constitution,” we’ve explained, “requires a good deal less than maximum performance.” See *Atkins v. Singletary*, 965 F.2d 952, 959–60 (11th Cir. 1992) (noting that, “[a]t some point, a trial lawyer has done enough” and that “[a] lawyer can almost always do something more in every case”).

Second, Heidler asserts that trial counsel “performed deficiently in largely neglecting to cover critical mitigation topics” with “the witnesses trial counsel did contact.” Heidler points to one example—trial counsel’s interview of his father—noting that his father did not remember “discussing anything about Heidler’s background or childhood.” This hardly shows that trial counsel were ineffective. Heidler “didn’t have contact with his dad” growing up and so there would have been little reason to ask his father about Heidler’s background. See *Rompilla*, 545 U.S. at 383 (“[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.”). And, in any event, pointing to a single witness doesn’t say anything about all of the

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discussions trial counsel had with all the other people they interviewed.

Deficiency – Presentation

The state habeas court found that trial counsel’s presentation was constitutionally adequate because they presented “substantial mitigating evidence on [Heidler’s] behalf,” including his DFACS records and witnesses who “testified to the terrible childhood [Heidler] had to endure and to his mental illnesses.” That was not an unreasonable determination. Before we get to the evidence presented at trial, there’s one point worth noting. “When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.” *Chandler*, 218 F.3d at 1316. In this case, trial counsel had significant experience trying capital cases. Indeed, Mr. Garrett had defended about fifty death penalty cases, including approximately forty that he tried first chair. Only two of his clients (one of whom was Heidler) had “received the death penalty.” That’s not to say that trial counsel couldn’t have erred. But it means we should be cautious before questioning trial counsel’s strategy of who to call and when.

With that said, the state habeas court did not unreasonably conclude that trial counsel effectively presented mitigating evidence at the sentencing phase. To begin, trial counsel’s mitigation case effectively started during the guilt phase—when trial counsel started presenting evidence of Heidler’s background and mental health through Drs. D’Alesandro, Ifill, and Kuglar. We may

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consider this evidence—from the guilt phase—in assessing whether trial counsel effectively presented mitigating evidence for the purpose of sentencing. *See Ledford*, 818 F.3d at 648 (“It is misleading to assert that trial counsel only called one mitigation witness on [petitioner]’s behalf because several witnesses offered mitigation testimony throughout both stages of the trial.”); *see also Bell v. Cone*, 535 U.S. 685, 699–700 (2002) (“Respondent’s suggestion that the jury could not fully consider the mental health proof as potentially mitigating because it was adduced during the guilt phase finds no support in the record.”).

Drs. D’Alesandro, Ifill, and Kuglar testified about Heidler’s significant mental health issues and difficult background. Here are just a few examples. Dr. D’Alesandro told the jury that “[t]here was a suggestion” in the records that Heidler had experienced “psychotic episodes” and he explained that people (like Heidler) who have borderline personality disorder “sometimes will get to such an extreme that they may temporarily at least function in a psychotic-like state.” He also testified that Heidler had a history of “depression” and “recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior,” and had attempted suicide. Dr. D’Alesandro also told the jury about Heidler’s “chaotic” and “dysfunctional” childhood. He explained, for example, that Heidler was “shuffled from household to household, person to person.” Heidler “was moved about from various foster homes after the state took custody of him from his mother.” There was also “some indication of voodoo and cultism . . . that was practiced in [his] family.” Dr. D’Alesandro also explained that Heidler was “[d]eprived

of the familial love and support that one normally would expect to get as he's being brought up."

Dr. Ifill likewise told the jury about Heidler's "severe emotional disorders beginning in childhood and continuing up until the present." He talked about Heidler's "self-inflicted" cigarette burns and "several attempts" to kill himself. He also spoke about "evaluations where [Heidler's] behavior at one point might have been thought of being psychotic." And he told the jury that "a brief or transient psychotic episode is associated with . . . borderline personality disorder." Dr. Ifill also testified about Heidler's difficult upbringing. He told the jury that Heidler had been "suffering from alcoholism since around the age of [eleven]." He explained that Heidler's "household was chaotic, disorganized" and that Heidler "was unable to get the ordinary nurturing that a growing child would need to have for normal development." Dr. Ifill testified that "there was violence or threats of violence or neglect within the household." He explained that Heidler's mother "believed in witchcraft." And he shared that "there was a lot of drinking in the home" and that the records "indicated neglect" as well as "emotional and physical abuse."

Then came Dr. Kuglar, who also told the jury that Heidler "seemed to show . . . some probable degree of depression," that he saw "where [Heidler] had cut himself and what appeared to be cigarette burns, some kind of burns on his body, and where he had . . . pick[ed] at small lesions on his face until he had sort of created sores," and that Heidler had talked about "auditory delusion[s]"

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like “hearing . . . voices” and the sound of “a baby crying.” Dr. Kuglar explained that Heidler had a “terrible childhood.” He noted that Heidler had been “kicked around from pillar to post” and that his “home environment was not very good.”

And the testimony about Heidler’s mental health and background flowed into the sentencing phase—in which trial counsel called nine witnesses. Heidler’s mother, for instance, told the jury that Heidler “had a mental problem” growing up and that he “went to a special school.” She also explained that Heidler had tried to commit suicide when he was younger by “jump[ing] in front of a semi truck” and “hang[ing] himself.” She also testified that she divorced Heidler’s biological father when Heidler was four, that Heidler’s father “was a[n] alcoholic,” and that his father “wasn’t all that good to none of the young’uns.” Heidler’s mother also shared that Heidler’s stepfather was an “alcoholic.” Heidler’s sister, Ms. Aguilar, similarly testified that their father was an “alcoholic” and that their stepfather “was mean to everybody.”

Mr. Johnston, the juvenile probation officer, testified that Heidler entered the juvenile justice system at age fourteen or fifteen because of an “altercation” between Heidler and his stepfather. He testified that he could smell “the odor” of alcohol at Heidler’s house, that there were rumors that Heidler’s family “may [have] be[en] involved in . . . devil worship,” and that Heidler’s family “move[d] a lot” and normally lived in “small houses” that were in “poor” condition. Ms. Wright, a social services worker with DFACS, testified that she first contacted Heidler’s family

when she investigated Heidler's mother's failure to enroll her children in school after they moved to a different county. She testified that she later investigated a lack of "[s]upervision." She explained that Heidler's mother wasn't "nurturing" and that DFACS provided "assistance" because the family couldn't keep up with bills. And she thought that Heidler suffered from "mental health problems" at age "ten."

Similar testimony about Heidler's mental health problems and terrible upbringing went on and on. Ms. Oglesby, for example, a DFACS employee, testified that DFACS "received a report alleging physical abuse, emotional abuse, [and] neglect," and that DFACS "confirmed neglect" and worked with Heidler's family until the family moved to a different county. Ms. Oglesby testified that she had received a report that Heidler "had tried to tie a rope to a tree in the yard and hang himself." And she noted that DFACS "had numerous reports that maybe [physical abuse] was occurring." Ms. Boatright, Heidler's foster mother, said that Heidler "was afraid of the dark and always talked about a knife cutting him, could a knife come through a ceiling and cut him." And she told the jury that Heidler "always had an imaginary mouse" that he would talk to. Ms. Dryden, one of Heidler's teachers, said Heidler went to a school for students "that were emotionally behavior disordered." She said that Heidler would "pick at his skin 'til sometimes it would bleed" and would sometimes "arrive to school . . . with marks on his body where he apparently had carved his initials and things on his skin." Heidler "would sometimes refer to some

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type of imaginary friend” and “act like it was in his hand and he would talk to it sometimes.”

Dr. Maish also took the stand. Dr. Maish said that he agreed with Drs. D’Alesandro, Ifill, and Kuglar that Heidler had borderline personality disorder and explained that such a consensus among mental health experts was “unheard of.” Dr. Maish also testified that Heidler’s “severe” borderline personality disorder “impair[ed] virtually every area of his functioning” and that Heidler had “some neurological difficulties.” He also observed that Heidler’s records “talk[ed] of hallucinations” and “transient psychotic disturbances.” As to Heidler’s childhood, Dr. Maish testified that Heidler had a “chaotic background in family,” a “lack of a solid family background,” a “father that was for the most part gone,” “emotional difficulties,” and “years of being in and out of mental health centers, . . . hospitals, . . . [and] judicial settings.” At the close of their penalty phase presentation, Heider’s trial counsel entered into evidence two sets of Heidler’s background records: his DFACS records and his Georgia Regional Hospital records.

Heidler’s trial counsel got all of this evidence before the jury even though they faced resistance from many witnesses. For example, some of Heidler’s “foster parents . . . didn’t want to have anything to do with [Heidler], nothing.” Ms. Dryden, Heidler’s teacher, was “very helpful” during trial counsel’s investigation but then “went kicking and screaming” when it came time to testify. Ms. Dryden “was mad at [trial counsel] for subpoenaing her.” But trial counsel got her to testify and “her good heart came through.”

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Heidler's sister didn't want to testify either. Ms. Palmer literally "begged her to come to trial and ask the jury to spare his life." And she did. Mr. Johnston, the juvenile probation officer, was forthcoming about Heidler's mental health and difficult childhood when he was interviewed pre-trial, but then Ms. Palmer had to treat him as a hostile witness on the stand when he suddenly suggested he didn't know anything. It's hard to blame trial counsel when they faced opposition at every turn.

In any event, although trial counsel faced substantial obstacles in presenting a compelling case for sentencing, they still were able to put on a strong case. As to Heidler's mental health, they presented to the jury, by way of example, that Heidler suffered from depression, that he engaged in self-mutilation by burning and cutting himself, that he experienced hallucinations of a baby crying and of imaginary figures, that he attempted suicide by walking in front of a truck and hanging himself, that his records suggested he had experienced psychosis, and that he was prescribed a strong antipsychotic pending trial. As to Heidler's background, trial counsel told the jury about Heidler's parents' divorce, about the drinking in his household, that his stepfather was cruel, that there were suspicions of abuse, that his life was unstable and he consistently changed homes, that his mother didn't give him the love he needed for normal development, that his family practiced witchcraft, that he was neglected, that he was addicted to alcohol by age eleven, that his family struggled to pay their bills, and that he lived in small houses that were in poor condition. The state habeas court did not

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unreasonably conclude that trial counsel performed effectively in presenting this mitigating evidence.

Against all this, Heidler raises five main arguments. First, Heidler contends that trial counsel “failed to reasonably . . . present . . . evidence” that he “suffered from depression and/or psychoses,” instead painting Heidler’s issues as being “limited to personality disorders marked by antisocial conduct.” But that’s just not true. Drs. D’Alessandro and Kuglar, for example, specifically discussed Heidler’s “depression.” And several witnesses, including Dr. D’Alessandro, Dr. Ifill, Dr. Kuglar, Dr. Maish, Heidler’s mother, Ms. Oglesby, and Ms. Boatright explained that Heidler had a history of self-mutilation and suicide attempts, including that Heidler burned himself with cigarettes, cut himself, stepped in front of a truck, and hung himself. So trial counsel *did* present evidence of depression.

Trial counsel also presented evidence that Heidler suffered from psychosis. For example, Dr. D’Alessandro told the jury that “[t]here was a suggestion” in the records that Heidler had experienced “psychotic episodes.” Dr. Ifill spoke about “evaluations where [Heidler’s] behavior at one point might have been thought of being psychotic.” Dr. Kuglar discussed Heidler talking about “auditory delusion[s]” like “hearing . . . voices” and the sound of “a baby crying.” Ms. Boatright said that Heidler “always talked about a knife cutting him, could a knife come through a ceiling and cut him.” She also testified that Heidler “always had an imaginary mouse” that he would talk to. Ms. Dryden similarly said that

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Heidler “would sometimes refer to some type of imaginary friend” and “act like it was in his hand and he would talk to it sometimes.” So trial counsel did present evidence of Heidler’s depression and psychosis. We can’t say that the state habeas court unreasonably rejected any argument to the contrary.

Second, Heidler argues that he “suffered severe abuse and neglect as a child, living with adults who physically hurt him and who failed to secure even his most basic needs,” but that trial counsel “made almost no mention of the trauma.” But, as we’ve seen, trial counsel brought out testimony about Heidler’s abuse and neglect through several witnesses. As to abuse, Dr. Ifill testified that “there was violence or threats of violence or neglect within the household.” Ms. Oglesby discussed reports “alleging physical abuse.” As to neglect, several witnesses testified that Heidler was “[d]eprived of . . . familial love and support.” And several witnesses, including Dr. Ifill, Ms. Oglesby, and Ms. Wright, discussed a history of “neglect.” In essence, Heidler appears to argue that trial counsel failed to present more or better evidence of Heidler’s abuse or neglect. But the state habeas court did not unreasonably conclude that that’s not enough. A petitioner cannot show a deficient presentation simply by pointing to “more or better examples” that support “the themes presented to the jury.” *Holsey*, 694 F.3d at 1260–61 (op. of Ed Carnes, J.).

Third, Heidler repeatedly asserts that witnesses were “not prepared” to testify. He says, for example, that trial counsel failed to prepare Dr. Maish to testify. But the state habeas court found

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that trial counsel met with Dr. Maish on at least a dozen occasions, that they told Dr. Maish about Heidler's self-mutilation pending trial, and that they reported to Dr. Maish the information they learned from witnesses. Heidler has failed to undermine these findings by clear and convincing evidence. See *Kimbrough v. Sec'y, DOC*, 565 F.3d 796, 804 (11th Cir. 2009). Heidler also points to Ms. Oglesby, arguing that "her trial testimony reflects a similar lack of reasonable preparation." But the record doesn't reflect a lack of preparation. Ms. Oglesby recalled that she "became involved with [Heidler] in a child protective service manner in May 1990"; that there was a report "alleging physical abuse, emotional abuse, [and] neglect," and that DFACS "confirmed neglect"; that she had "[m]onthly" conversations with Heidler's family; that she "visited [Heidler's] home" and that "[t]hey lived in two different residence[s] during" that time period; and that Heidler's family told her they "had a long history with DF[A]CS" and "had a lot of negative feelings about DF[A]CS." These are simply by way of example, and they render implausible the claim that Ms. Oglesby came in unprepared to testify. We can't say the state habeas court unreasonably concluded that trial counsel did an adequate job preparing witnesses.

Fourth, Heidler argues that trial counsel's presentation of his DFACS records was unreasonable because they "dump[ed them] into the record[] without any explanation . . . at the conclusion of the penalty phase." But trial counsel testified that this was a strategic decision. As Ms. Palmer explained, she spent "hours" with DFACS employees going through Heidler's records and

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“ferret[ing] out boxes of records” that weren’t helpful to the case. She explained that they were still left with “a stack this high” of records “that had relevant information” and that she “redact[ed]” all of those records. Rather than go through all of these records one by one at trial, trial counsel decided to call certain DFACS caseworkers “who were the most articulate, who had had the most contact with him, and, of course, my perspective, who were the most sympathetic towards his plight.” Ms. Palmer explained that she relied on *these* witnesses to present relevant information from those records to the jury in a digestible form that wouldn’t bore the jurors to sleep:

Q Now, when you had the caseworkers on the stand were you trying to bring out some specific highlights within—?—

A We did. That’s exactly what we did.

Q Okay.

A I mean, you couldn’t possibly, we would have spent days and days with the jury had we tried to go through that entire stack of records. And we tried to hit the really tough parts, where [Heidler] was truly harmed . . . by people in his life who were harming him and not helping him with his mental health issues. Other things they did that did nothing but exacerbate the mental illness that he had suffered all his life. And I don’t think there’s a person in the world that says [Heidler] has not had mental illness since he was very young.

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Q And all of that was presented to the jury?

A Yes.

Q They had all of that information; is that right?

A That's correct. That's correct.

In line with this testimony, the state habeas court found that trial counsel made a strategic decision to “present[Heidler’s] DFACS records en mass, without a lengthy and cumulative review with the jury.” “The question of whether an attorney’s actions were actually the product of a tactical or strategic decision is an issue of fact,” *Provenzano v. Singletary*, 148 F.3d 1327, 1330 (11th Cir. 1998), and Heidler has not undermined the state habeas court’s finding by clear and convincing evidence. Because trial counsel’s decision as to how to present the information in the records was a strategic decision, that decision is “virtually unassailable.” *Williams*, 185 F.3d at 1242.

And fifth, Heidler argues that the state habeas court “discount[ed] to irrelevance” the state habeas affidavits. The Supreme Court, it’s true, has held, with respect to evidence adduced from deposition testimony during habeas proceedings, that it was “unreasonable to discount to irrelevance the evidence of [the petitioner’s] abusive childhood, especially when that kind of history may have particular salience for a jury evaluating [the petitioner’s] behavior.” *Porter*, 558 U.S. at 43. But a state court’s decision is not contrary to nor an unreasonable application of law where it simply “review[s] the [p]etitioner’s affidavit evidence with caution” but

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does not “discount[] the contents of the affidavits to irrelevance.” *Pye*, 50 F.4th at 1045 (cleaned up).

And, here, there’s no indication that the state habeas court discounted the affidavits “to irrelevance.” The state habeas court considered the affidavits, but it credited Ms. Palmer’s testimony that Heidler’s family and friends weren’t helpful during her pretrial investigation and reasoned that trial counsel “cannot be responsible for [Heidler’s] family’s reticence in revealing shameful family secrets.” “[T]he state [habeas] court’s decision to view the affidavit evidence with caution was neither contrary to nor an unreasonable application of clearly established federal law.” *Id.* (marks omitted).

Also, there were inconsistencies between the trial testimony and the habeas affidavits. For example, Ms. Aguilar went from testifying at the penalty phase that her and Heidler’s stepfather “only talked” to writing in her state habeas affidavit that their stepfather “threatened to kill [Heidler]” and “threatened to slit [Heidler’s] throat.” “[I]t wasn’t unreasonable for the state court to discount the affidavits, to some degree, based on the inconsistencies it found in several of them[.]” *Id.* at 1046.

In any event, Dr. Kuglar said in his state habeas affidavit that Heidler’s state habeas evidence would not have changed his diagnosis; the evidence would have merely allowed Dr. Kuglar to “testif[y] with more certainty that [Heidler] ha[d] a serious mental illness.” Thus, it wasn’t unreasonable for the state habeas court to give little weight to the affidavits in its analysis of trial counsel’s

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presentation of mitigation evidence. *See Van Poyck*, 290 F.3d at 1324 n.7.

In short, trial counsel investigated Heidler’s background and mental health, interviewed his family members, friends, social workers, teachers, and mental health experts, had a strategy for the penalty phase, and called mitigation witnesses. The Georgia Supreme Court did not unreasonably apply clearly established federal law in determining that trial counsel’s performance was not ineffective.

Prejudice

The state habeas court concluded that, even if trial counsel’s investigation and presentation of mitigation evidence was deficient, there wasn’t a reasonable probability that the result of the penalty phase would have been different “given the copious amount of mitigating evidence presented at trial and the nature of [Heidler’s] crimes.” That conclusion was far from unreasonable. The mitigating evidence not presented as a result of counsel’s deficient performance must be weighed “against the evidence in aggravation.” *Porter*, 558 U.S. at 41. We’ve repeatedly held that even extensive mitigating evidence wouldn’t have been reasonably likely to change the outcome of sentencing given a particularly heinous crime and significant aggravating factors. *See, e.g., Windom*, 578 F.3d at 1251 (noting that, given “the strength of the state’s case” “and the nature of the crimes themselves,” the state court didn’t “unreasonably apply *Strickland* when it found that the available mitigating evidence, taken as a whole, did not outweigh the

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aggravating nature of Windom’s crimes” (citing *Payne v. Allen*, 539 F.3d 1297, 1318 (11th Cir. 2008)); *Suggs v. McNeil*, 609 F.3d 1218, 1232 (11th Cir. 2010) (explaining that significant aggravating facts are “difficult to overcome” and holding that a state supreme court’s prejudice decision wasn’t unreasonable).

The jury learned about how Heidler shot the Danielses as they slept, shot their 8-year-old son and sixteen-year-old daughter from close range, shot Mr. Daniels a several more times as Mr. Daniels tried to protect himself, kidnapped the Danielses’ three young daughters, raped one of them, and dropped them off on a remote dirt road before he returned home to play video games. The jury also heard that rather than showing remorse, Heidler told people that he “wasn’t through collecting souls” and referred to the Daniels family as “nine little piggies, four dead.” And the jury learned that Heidler hid weapons in his prison uniform, escaped from prison, and threatened to kill prison officials. It wasn’t unreasonable for the state habeas court to weigh these aggravating factors heavily in its evaluation of whether the presentation of additional mitigation evidence about Heidler’s background would have changed the outcome of the penalty phase.

The state habeas court also found that “none of [Heidler’s state habeas] experts or prior mental health experts ha[d] testified that [Heidler] was in fact in the throes of a psychotic episode when he committed the crime,” and it concluded that “without this causal link between the alleged mental illness and the crimes, there exist[ed] no evidence that the outcome of [Heidler’s trial] would

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have been different.” Heidler argues that this conclusion is unreasonable because it “required a causal link” between the evidence of Heidler’s mental health and the crime. Heidler is correct that there is no requirement that mitigation evidence have a “causal connection” to the defendant’s crimes. See *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (“[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime.”). But Dr. D’Alessandro testified that “what [Heidler] was doing was volitional and it was fairly goal oriented” and that Heidler’s “symptoms seem[ed] to be somewhat in remission” because the symptoms “from early childhood d[idn]’t appear to be happening right now.” It therefore wasn’t unreasonable for the state habeas court to find and weigh in its prejudice analysis the fact that evidence of Heidler’s mental health was less likely to influence jurors because it wasn’t strongly connected to his crimes. See *Shinn*, 141 S. Ct. at 525 (concluding that “reasonable jurists could debate the extent to which [petitioner’s bipolar disorder and untreated addictions] significantly impaired his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the law at the time of the murder” because the defendant’s actions before, during, and after the murder “display[ed] a measure of control and intentionality”).

Finally, Heidler argues that the Georgia Supreme Court unreasonably applied *Strickland* because it failed to assess prejudice cumulatively. Heidler is wrong. The state habeas court “consider[ed trial] counsel’s representation as a whole” and concluded that even if trial counsel’s “alleged errors constituted deficient

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performance,” there was not “a reasonable probability[] that but for this performance[] the result of either phase of [Heidler’s] trial . . . would have been different. And even if the state habeas court had only assessed prejudice on an “item-by-item” basis, that would “not [be] inconsistent with a cumulative analysis,” and the state habeas court is “presume[ed]” to have “assessed prejudice cumulatively.” *See Allen v. Sec’y, Fla. Dep’t of Corr.*, 611 F.3d 740, 749–50 (11th Cir. 2010). Heidler fails to rebut that presumption.

C. Heidler’s Claim That Trial Counsel Were Ineffective for Failing to Adequately Present Information and Evidence in Pretrial Motions Relating to Heidler’s Waiver of Constitutional Rights During Interrogation by the Police

The district court denied Heidler’s claim that trial counsel were ineffective for failing to adequately litigate Heidler’s waiver of constitutional rights during his interrogation by the police because, the district court concluded, the claim was unexhausted and insufficiently pled. We “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). We’ll take this “‘Ockham’s razor’ approach” and “skip over the difficult procedural default questions and cut to the heart of the matter” because, even under de novo review, Heidler’s claim fails because he cannot establish prejudice. *See id.* at 1307 & n.4.

Heidler argues that he was prejudiced by the state’s presentation of his videotaped confession and the two police officers’ testimony about Heidler’s statements during the interrogation

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because of “the unique importance of a defendant’s confession” and “the prosecutor’s reliance on it” during both the guilt phase and penalty phase of trial. Indeed, we’ve found that an attorney’s “failure to move to suppress the [defendant’s] confessions was *extremely* prejudicial” where the confessions “provided the primary evidence offered” and where, “[w]ithout the confessions, conviction for first degree murder was probably impossible.” *See Smith v. Wainwright*, 777 F.2d 609, 616–17 (11th Cir. 1985). But we’ve also found that a defendant “was not prejudiced by the failure of counsel to suppress the police confessions” where “the state had abundant evidence (including other confessions) at its disposal with which to obtain a conviction.” *Zamora v. Dugger*, 834 F.2d 956, 959 (11th Cir. 1987).

As the Georgia Supreme Court found in affirming Heidler’s convictions, there was overwhelming evidence of Heidler’s guilt, including: the Danielses’ three daughters each identifying Heidler as their kidnapper, Heidler’s fingerprint on the back window of the Danielses’ home, and his DNA on a cigarette butt found on the floor in the Danielses’ home. *See Heidler*, 537 S.E.2d at 52. And Heidler’s statements to police during his interrogation weren’t the only confessions at the state’s disposal. Heidler confessed to the murders to both Dr. Kuglar and Dr. Maish during his mental health evaluations, and Drs. Kuglar and Maish told the jury what Heidler had told them about the murders. Because the state had abundant evidence with which to obtain a conviction—including Heidler’s confessions to Dr. Kuglar and Dr. Maish—Heidler can’t establish

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that the jury wouldn't have sentenced him to death even if the jury hadn't heard his statements to police. *See Zamora*, 834 F.2d at 959.

CONCLUSION

The Georgia Supreme Court didn't unreasonably apply *Strickland* in denying Heidler's claims that trial counsel were ineffective in investigating and presenting his mental health during the guilt phase and in investigating and presenting mitigating evidence during the penalty phase. And even assuming that Heidler's claim that trial counsel were ineffective in litigating the suppression of his statement to police isn't procedurally defaulted, the claim fails under de novo review because Heidler wasn't prejudiced. We therefore **AFFIRM** the district court's denial of Heidler's section 2254 petition.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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

David J. Smith
Clerk of Court

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August 02, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-13752-P
Case Style: Jerry Scott Heidler v. Warden GDCP
District Court Docket No: 6:11-cv-00109-LGW

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

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

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

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

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OPIN-1 Ntc of Issuance of Opinion

**In the United States District Court
for the Southern District of Georgia
Statesboro Division**

JERRY SCOTT HEIDLER,

Petitioner,

v.

No. 6:11-CV-109

GDCP WARDEN,

Respondent.

ORDER

Petitioner Jerry Scott Heidler's Third Amended Petition for Writ of Habeas Corpus is before the Court. Dkt. No. 124. It has been fully briefed and is ripe for review. For the reasons below, Mr. Heidler's petition is DENIED.

BACKGROUND

I. Mr. Heidler's Crimes¹

The Georgia Supreme Court summarized Mr. Heidler's crimes as follows:

Danny and Kim Daniels lived in the town of Santa Claus in Toombs County[, Georgia] with their seven children, three of whom were foster children. Heidler's sister was in the Daniels' care as a foster child for 45 days in 1995, and it was then that he began to frequent the house and occasionally to stay there overnight. Months before the murders, Mr. Daniels noticed that Heidler, 20 years old at the time, was beginning to develop a relationship

¹ The factual findings of both the state habeas court and Supreme Court of Georgia are presumed to be correct unless they are rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Rolling v. Crosby, 438 F.3d 1296, 1301 (11th Cir. 2006) (per curiam).

with his 16 year old daughter, Jessica. He had a conversation with Heidler, after which Heidler stopped visiting the Daniels' home.

At approximately 5:00 a.m. on December 4, 1997, the police in Bacon County[, Georgia] found three young girls on the street in their nightclothes. The girls said they had been kidnapped from the Daniels' house in Toombs County by a man they knew as Scott Taylor, who drove them to Bacon County in a white van. The police subsequently learned from DFCS [Division of Family and Child Services] that "Scott Taylor" was actually Heidler. The ten-year-old victim told the police that Heidler sexually assaulted her in the van while in Toombs County. This was corroborated by evidence of physical trauma to the child and by DNA testing. The eight-year-old victim told the police that she witnessed the sexual assault. From a photographic lineup, each of the three girls separately identified Heidler as the kidnapper.

Toombs County police officers went to the Daniels' house, where they found the bodies of the four victims. Bryant Daniels, eight years old, was found lying on his bed face-down, where he died from massive head trauma caused by a close-range shotgun blast. Both Mr. and Mrs. Daniels were found lying in their bed, each having been killed by multiple shotgun blasts. The body of Jessica Daniels also was found lying in the master bedroom, near a doorway that led into the hallway. She had been killed by a close-range shotgun blast to the back of her head. A Remington 1100 semi-automatic shotgun was missing from Mr. Daniels' gun cabinet, the door to which was open. Seven spent shotgun casings were found throughout the house. A firearms expert testified that the Remington 1100 shotgun holds six shotgun shells, so the shooter must have reloaded at least once. A neighbor heard, at 1:45 a.m., noises that could have been shots and the police determined that the assailant entered the house by using a ladder to climb through a bathroom window. A fingerprint lifted from this window matched Heidler's fingerprint. DNA taken from saliva on a cigarette butt found on the floor in the house matched Heidler's DNA.

After dropping the girls off in Bacon County, Heidler went to his mother's house where he slept and played video games with his brother. Heidler asked his brother

if he had ever killed anyone, and his brother said no. Heidler then said that killing "gives you a rush, makes you want to go out and kill more people." After his arrest, Heidler confessed to the crimes. He told the police that he threw the shotgun into a river and the kidnapped girls confirmed this assertion.

Heidler v. State, 273 Ga. 54, 58-59 (2000).

II. Mr. Heidler's Jury Trial

After a jury trial in the Superior Court of Walton County, Georgia (the "trial court"), Mr. Heidler was convicted of four counts of malice murder, three counts of kidnapping, one count of kidnapping with bodily injury, one count of aggravated sodomy, one count of aggravated child molestation, one count of child molestation, and one count of burglary. Dkt. Nos. 12-7 at 108-16; 12-8 at 1-2. During the trial's sentencing phase, the jury found that aggravating circumstances existed and recommended the death penalty for each of the four malice murder counts. Dkt. No. 12-8 at 13-16. In September 1999, the trial court sentenced Mr. Heidler to death for each of those four counts. Id. at 18-25. The trial court also sentenced Mr. Heidler to two consecutive life terms for aggravated sodomy and kidnapping with bodily injury, thirty years (consecutive) for aggravated child molestation, and twenty years (consecutive) for each of the remaining counts. Id. at 26.

III. Mr. Heidler's Direct Appeal

Mr. Heidler first filed a motion for new trial, which he later amended. Id. at 41-42, 55-56. Following a hearing, that motion was

denied. Id. at 44-48; Dkt. No. 12-9 at 1-14. Then, Mr. Heidler appealed his case to the Supreme Court of Georgia. There, the Supreme Court of Georgia affirmed Mr. Heidler's death sentences, reversed Mr. Heidler's sentence for aggravated child molestation (finding that it merged into the aggravated sodomy count), and affirmed the remainder of Mr. Heidler's sentences. Heidler v. State, 273 Ga. 54 (2000); Dkt. No. 15-18. Thereafter, the United States Supreme Court denied Mr. Heidler's petition for writ of certiorari. Heidler v. Georgia, 532 U.S. 1029 (2001), reh'g den'd, 533 U.S. 965 (2001); Dkt. Nos. 15-23; 16-2.

IV. Mr. Heidler's State and Federal Habeas Proceedings

In November 2001, Mr. Heidler filed a state habeas corpus petition in the Superior Court of Butts County, Georgia (the "state habeas court"). Dkt. No. 16-3. In April 2004, Mr. Heidler amended that petition. Dkt. No. 18-4. In January and May 2006, the state habeas court conducted evidentiary hearings. Dkt. No. 31-12 at 9. In August 2009, the state habeas court denied Mr. Heidler's amended petition. Dkt. Nos. 31-12; 31-13. The Supreme Court of Georgia summarily denied Mr. Heidler's application for a Certificate of Probable Cause to Appeal ("CPC") from the state habeas court's decision. Dkt. No. 31-18.

In October 2011, Mr. Heidler commenced this action by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Dkt. No. 1. Mr. Heidler amended his petition in April 2012, dkt. no. 45, April 2014, dkt. no. 70, and—for the third and final time—in April 2019, dkt. no. 124.

LEGAL STANDARD

Mr. Heidler's federal habeas corpus petition was filed after April 24, 1996; therefore, his case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See e.g. 28 U.S.C. § 2254; see also Payne v. Allen, 539 F.3d 1297, 1312 (11th Cir. 2008). AEDPA "greatly circumscribe[s]" this Court's review and makes it "highly deferential to the state courts." Crawford v. Head, 311 F.3d 1288, 1295 (11th Cir. 2002). First, under AEDPA's deferential standard, state court factual determinations are "presumed to be correct" unless the petitioner rebuts them "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); see also id. § 2254(d)(2) (requiring federal courts to accept state court adjudications unless they "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").

Second, state court legal determinations will be accepted unless they "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." 28 U.S.C. § 2254(d)(1). "[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 [it constituted] an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" among jurists. Harrington v. Richter, 562 U.S. 86, 103 (2011). In other words, "if some fairminded jurists could agree with the state court's decision, although others might disagree, federal habeas relief must be denied." Loggins v. Thomas, 654 F.3d 1204, 1220 (11th Cir. 2011); see also Hill v. Humphrey, 662 F.3d 1335, 1347 (11th Cir. 2011) (en banc); Bobby v. Dixon, 565 U.S. 23, 32-33 (2011) (per curiam).

Finally, when filing a 28 U.S.C. § 2254 habeas petition, "generalized allegations are insufficient." Hittson v. GDCP Warden, 759 F.3d 1210, 1265 (11th Cir. 2014). Instead, "petitioners must meet heightened pleading requirements." McFarland v. Scott, 512 U.S. 849, 856 (1994). Specifically, petitioners are required to (1) "specify all the grounds for relief available to the petitioner" and (2) "state the facts supporting each ground." 28 U.S.C. § 2254, Rule 2(c).²

² In other words, habeas petitions must contain "'fact pleading' as opposed to 'notice pleading.'" Hittson, 759 F.3d at 1265. Fact pleading is required, in part, because "[u]nlike a plaintiff pleading a case under Rule 8(a), the habeas petitioner ordinarily possesses, or has access to, the evidence necessary to establish the facts supporting his collateral claim; he necessarily became aware of them during the course of the criminal prosecution or sometime afterwards." Id. at 1265 n.63 (citation omitted).

DISCUSSION

As an initial matter, when the state's highest court issues an unexplained, summary decision on appeal of a reasoned lower court decision, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." Wilson v. Sellers, 138 S. Ct. 1188, 1191 (2018).

Here, Mr. Heidler applied to the Georgia Supreme Court for a CDC after the state habeas court denied his Amended Petition for Writ of Habeas Corpus. Dkt. No. 31-15. The Georgia Supreme Court then summarily denied Mr. Heidler's CPC application. Dkt. No. 31-18. Therefore, this Court presumes that the Georgia Supreme Court's summary denial adopted the state habeas court's reasoning, Raulerson v. Warden, 928 F.3d 987, 996 (11th Cir. 2019). As such, this Court will "look through" the Georgia Supreme Court summary denial and focus on the reasonableness of the state habeas court's decision even though it was not the last state court decision on the merits. 28 U.S.C. § 2254(d).

I. Mr. Heidler's Strickland Claims

Mr. Heidler argues that he is entitled to *de novo* review of the claims set forth in Part IV.B of his Brief in Support, dkt. no. 127 at 75-117, because the state habeas court's decision relied upon unreasonable factual and legal determinations. Id. at 11.

However, this Court finds the contrary to be true: the state habeas court's decision relied upon reasonable factual and legal determinations. Therefore, Mr. Heidler is not entitled to *de novo* review. Instead, this Court applies the following standard:

To allege a successful ineffective assistance of counsel claim (a Strickland claim), a defendant must establish (1) that his trial counsel's "performance was deficient, and [(2)] that the deficiency prejudiced [his] defense." Wilson v. Warden, Georgia Diagnostic Prison, 898 F.3d 1314, 1322 (11th Cir. 2018) (second alteration in original) (quoting Wiggins v. Smith, 539 U.S. 510, 521 (2003)). To satisfy the first prong—deficient performance—"a defendant must show that his counsel's conduct fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place." Johnson v. Upton, 615 F.3d 1318, 1330 (11th Cir. 2010) (quoting Bobby v. Van Hook, 558 U.S. 4, 7 (2009)) (internal citations omitted).

However, judicial review of a defense attorney's performance is "highly deferential—and doubly deferential when it is conducted through the lens of federal habeas." Yarborough v. Gentry, 540 U.S. 1, 6 (2003). First, as a general principle, "[j]udicial scrutiny of counsel's performance must be highly deferential." Evans v. Sec'y, Dep't of Corr., 703 F.3d 1316, 1333 (11th Cir. 2013). Then, "[w]hen we layer the deferential lens of

§ 2254(d) atop that first level of deference, the . . . result is [a] doubly deferential review of counsel's performance." Id. (internal quotations omitted); Strickland v. Washington, 466 U.S. 668, 689 (1984).

Comparatively, determining the second prong of the test—whether an attorney's deficient performance resulted in prejudice to the defendant—is, "in the end, a legal [question]." Evans, 703 F.3d at 1334. Answering this legal question requires no underlying deference (apart from AEDPA deference). Id. A defendant has been prejudiced when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. As the Supreme Court noted in Harrington v. Richter, 562 U.S. 86 (2011):

This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Id. at 111-12 (internal quotation marks and citations omitted).

For the reasons provided below, this Court denies all of Mr. Heidler's Strickland claims.

A. Mr. Heidler's Strickland Claims Relating to Evidence regarding His Mental Health

First, Mr. Heidler finds fault with Part III.D.2.d.2. of the state habeas court's decision. There, the state habeas court discussed Mr. Heidler's trial counsel's investigation of his background and found the following:

Palmer [one of Mr. Heidler's trial counsel] testified that they hired an investigator, Mr. Gillis, whom they used to track down Petitioner's friends in Alma and Baxley and a few family members. Unfortunately, Petitioner's friends were "criminals, thugs" and "dopers" that were currently in jail and were not helpful to Petitioner's case. . . . Palmer went on to testify that in her efforts to locate mitigating witnesses, "I drove up and down the dirt roads and went to the jails and went to the DFACS and went to the Juvenile Court and went up and down the street where he lived . . . I'm the one who went door to door and around the community and at the convenience store. I did all that."

Dkt. No. 31-12 at 38. Mr. Heidler also argues that according to Ms. Palmer's own billing records, she only spent one day driving "up and down dirt roads looking for witnesses," and that her one day spent searching for witnesses was only four days prior to the start of the evidentiary portion of the guilt-innocence phase of trial. Id. at 100. Second, Mr. Heidler argues that Mr. Gillis only worked on the case for one day for a total of 5.5 hours, and so the state habeas court erroneously credited defense counsel with hiring him. Dkt. No. 127 at 99.

Importantly, Mr. Heidler has not shown that either of these factual findings by the state habeas court are incorrect or

unreasonable through clear or convincing evidence. See 28 U.S.C. § 2254(e)(1). After a review of record, it appears that the state habeas court simply summarized and quoted Ms. Palmer's testimony. Moreover, it is unclear how the state habeas court was incorrect when it credited the defense counsel with hiring Mr. Gillis when they did, in fact, hire him. For example, Mr. Heidler does not argue that the state habeas court credited such hiring to an unreasonable degree, merely that it credited defense counsel at all.

Further, Ms. Palmer's testimony at the state habeas evidentiary hearing belies Mr. Heidler's reliance on Palmer's billing records as conclusive proof of the extent of her investigatory efforts. There, she testified that she thought "she did a lot more work" than the billing records document. Dkt. No. 19-4 at 40-41. Even though Palmer also testified that she "tried" to document witness interviews in her billing records, that does not show that the state habeas court erroneously relied on Palmer's testimony regarding the extent of her efforts. Finally, even if Palmer did only search for witnesses on that one day, the state habeas court did not make an unreasonable determination of fact by quoting her testimony that she searched for witnesses. Accordingly, this first contention fails.

Second, Mr. Heidler contends that the state habeas court erroneously believed Mr. Heidler's defense counsel, Michael

Garrett, when he testified that "his notes indicate he spoke with Mr. George Dykes . . . regarding Petitioner's need for mental health treatment." Dkt. No. 31-12 at 43. Mr. Heidler argues that "[t]he record does not establish that Mr. Garrett had any contact with Mr. Dykes and [that] Mr. Garrett's testimony referring to Mr. Dykes as a female corroborates his recollection that he did not speak with Mr. Dykes." Dkt. No. 127 at 101.

Mr. Heidler fails to prove these claims by clear and convincing evidence. For example, Mr. Heidler did not show that Mr. Garrett did not testify that his notes indicated that he spoke with Mr. Dykes, nor did he show that Mr. Garrett did not, in fact, speak with Mr. Dykes. Finally, Mr. Heidler did not show that the state habeas court unreasonably credited Mr. Garrett's testimony regarding his interpretation of his own notes. Accordingly, this argument also fails.

Third, Mr. Heidler argues that the record does not support the state habeas court's determination that Palmer "requested and received records from the Detention Center as late as June 1999, three months before the trial." Id. at 101-102 (quoting dkt. no. 31-12 at 4. Mr. Heidler asserts that the state habeas court relied on a letter dated June 15, 1999, from Palmer to Garret that states, "Enclosed please find a copy of the record I have obtained from the jail in Toombs County." Dkt. No. 30-8 at 44 (emphasis added). Notably, the letter's subject line reads: "Re: State vs. Jerry

Scott Heidler, Toombs County Detention Center Records." Id. This letter shows that the state habeas court's finding that Palmer received at least one record from the Toombs County Detention Center (i.e., the jail) in June 1999 is supported by the record. The fact that the letter uses the singular "record" instead of the plural "records" does not show that the state habeas court's finding that "records" were received in June 1999 was unreasonable (nor does it show that the ultimate decision was based on this determination of fact).³ Accordingly, this argument, like the others before it, fails.

Fourth, Mr. Heidler argues that the state habeas court's finding that "'the trial attorney files clearly prove that trial counsel did obtain [the Toombs County Detention Center] documents' was critical to the court's conclusion that counsel did not perform deficiently in failing to provide these records to the mental health experts . . . [but such finding] has no meaningful record support." Dkt. No. 127 at 102 (quoting Dkt. No. 31-12 at 56) (alteration by Mr. Heidler). This argument lacks merit. The state habeas court cites to numerous locations in the record to support its finding that "the trial attorney files clearly prove that trial

³ Considering the topic of the letter was "Toombs County Detention Center Records," the use of the singular "record" could have been a typographical error. Even if Mr. Heidler clearly and convincingly showed that only a single record was received in June 1999, this does not make the use of the plural by the state court unreasonable because records were received prior to June (thus the June record combined with the earlier records constitutes "records").

counsel did obtain these documents and, once again, trial counsel testified that all records regarding Petitioner were turned over to the mental health experts." Dkt. No. 31-12 at 56. In short, Mr. Heidler's conclusory argument is insufficient to meet his burden to successfully allege this claim. Accordingly, it fails.

Fifth, Mr. Heidler contends that the state habeas court was "unreasonable" in blaming any deficiencies in trial counsel's investigation into Mr. Heidler's past "on Mr. Heidler." Dkt. No. 127 at 102. In support of this contention, Mr. Heidler highlights the state habeas court's finding that Mr. Garrett "testified that when he met with [Mr. Heidler] he 'couldn't communicate with him at all' and gathered very little information from [Mr. Heidler] due to [Mr. Heidler's] unwillingness to cooperate." Dkt. No. 31-12 at 36. Mr. Heidler argues that the state habeas court's use of the word "unwillingness" shows that the state habeas court found (a) that Mr. Garrett blamed Mr. Heidler for being unwilling to cooperate and (b) that Mr. Garrett believed "Heidler was being obstructive on purpose." Dkt. No. 127 at 103.

The state habeas court pointing out that Mr. Heidler was unwilling to cooperate does not mean that it "blam[ed] any deficiencies on the investigation on Mr. Heidler." Id. at 102. Here, the context in which the state habeas court uses the word "unwillingness" illustrates that the court used the term to characterize Mr. Garrett's testimony: that he was unable to gather

information from Mr. Heidler because of Mr. Heidler's unwillingness to cooperate. Thus, a fair reading of the state habeas court's decision shows that it did not identify or blame any deficiencies in trial counsel's performance on Mr. Heidler's lack of cooperation and forthrightness. Rather, the record reflects that the state habeas court thoroughly detailed Mr. Heidler's trial counsel's efforts to investigate mitigating evidence despite Mr. Heidler's lack of assistance (whether willful or not). Such a determination is reasonable, and Mr. Heidler fails to show otherwise by clear and convincing evidence. Accordingly, this claim fails.

Sixth, Mr. Heidler argues that the state habeas court made several unreasonable errors in its "rejection of Dr. Faulk's testimony and its dismissal of the Pineland records." Id. at 105. Mr. Heidler alleges that in so doing, the state habeas court "wholly discounted important pieces of evidence" presented before it. Id. at 104. However, the state habeas court determined that the records Mr. Heidler now claims are "important pieces of evidence" were, in fact, cumulative evidence that trial counsel did not need to present to the jury. Dkt. No. 31-12 at 59 ("Trial counsel [was] not ineffective for not presenting cumulative evidence."). Such a conclusion is reasonable, and Mr. Heidler has not presented clear and convincing evidence to the contrary. See Reaves v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1137, 1157 (11th

Cir. 2017) (holding that "counsel's failure to present cumulative evidence is not ineffective assistance."). Accordingly, this claim fails.

Finally, Mr. Heidler argues that the state habeas court erroneously found that Mr. Heidler hearing a baby crying was the only indication in the record of Mr. Heidler hallucinating, when in fact the record also states that Mr. Heidler "[a]lleges that he's been having flashback of the 'death,'" dkt. no. 127 at 105 (quoting dkt. no. 21-17 at 34). The state habeas court's finding that an alleged flashback is not a report of a hallucination is not unreasonable. Additionally, even if it were unreasonable for the state habeas court to find that Mr. Heidler's self-reported flashback was not a report of a hallucination, the court's bottom line ruling on Mr. Heidler's ineffective assistance of counsel claims was not based on this determination of fact. 28 U.S.C. § 2254(d)(2). Since Mr. Heidler has not shown that this factual finding was unreasonable or that the state habeas court based its decision on this factual finding, this claim fails.

This Court now turns to the remainder of claims set forth in part IV.B of Mr. Heidler's brief. Here, Mr. Heidler argues that because of his "trial counsel's deficient performance, the expert opinions in both the guilt and sentencing phases of trial were profoundly misleading and inaccurate." Dkt. No. 127 at 76. Mr.

Heidler argues that his trial counsel were deficient in three respects:

- (1) they "failed to obtain relevant documents that would have shown that Mr. Heidler in fact suffered from a psychosis-inducing thought disorder and not merely a personality disorder," id.;
- (2) they failed to contact witnesses that witnessed Mr. Heidler's psychotic behavior, id. at 92-94; and
- (3) they "failed to take an active role in highlighting and curating the extensive records reflecting Mr. Heidler's many years of debilitating mental illness to focus the experts' attention on the more relevant portions of the records they provided to the experts," id. at 76.

Mr. Heidler claims that as a result of these deficiencies, his mental health expert at trial, Dr. Maish, and the three mental health experts retained by the trial court—Dr. D'Alesandro, Dr. Ifill, and Dr. Kuglar—did not diagnose Mr. Heidler with a thought disorder but misdiagnosed him as having one or more personality disorders.⁴

Regarding the investigation of records, Mr. Heidler primarily argues that his trial counsel were deficient by failing to obtain records from Pineland Community Mental Health Center regarding Mr. Heidler's treatment there while he awaited trial. He also argues that his trial counsel did not obtain a complete set of medical

⁴ Mr. Heidler appears to make these claims with the operating assumption that this Court can review them *de novo*; however, as stated before, this Court's review of Mr. Heidler's Strickland claims are constrained by the standards established by AEDPA. Notably here, Mr. Heidler's arguments do not identify how the state habeas court's decision (or reasoning) was unreasonable.

records from Toombs County Detention Center. Mr. Heidler further argues that they did not speak with Nurse George Dykes from the Toombs County Detention Center—who treated Mr. Heidler and recommended on several occasions that Mr. Heidler be given mental health treatment—or Dr. David Faulk—who evaluated Mr. Heidler at Pineland and prescribed him with Haldol, an anti-psychotic medication.

Regarding his claim that trial counsel failed to contact witnesses, Mr. Heidler argues that his trial counsel failed to locate and interview “numerous” individuals that witnessed Mr. Heidler experience auditory and visual hallucinations and could have testified to the same. Mr. Heidler identifies two such individuals, both of whom interacted with Mr. Heidler on a single occasion when he was twelve.

Finally, regarding the curation of the voluminous records, Mr. Heidler argues that “[n]umerous documents reflected the severity of Mr. Heidler’s mental illness, long before he was arrested and charged with the murders.” Dkt. No. 127 at 94. Mr. Heidler highlights several records and the information they allegedly contain before arguing that “it does not appear that [his trial counsel] were aware of the information contained” therein. Id. at 95. Mr. Heidler concludes his arguments on this point by claiming his trial counsel were deficient because they

failed to provide the mental health experts with "a roadmap of what to review." Id. at 96.

The record tells a different story. The state habeas court concluded that "trial counsel's investigation was not deficient as they conducted an exhaustive investigation of Petitioner's background by interviewing family members, teachers, friends, DFACS caseworkers, and Petitioner's juvenile probation officer." Dkt. No. 31-12 at 65-66. The court reasoned that the record made "clear that trial counsel gathered voluminous documents from the various schools, including the psycho-educational centers Petitioner attended, the numerous mental health centers records, DFACS records, Petitioner's Toombs County Detention Center records and medical records." Id. at 66. In its Order, the state habeas court thoroughly described the record evidence above to support its decision and findings. See id. at 35-66.

Moreover, the state habeas court's thorough discussion of Mr. Heidler's trial counsel's investigatory efforts show that the state habeas court's decision was not unreasonable, and Mr. Heidler fails to show otherwise by clear and convincing evidence. Merely identifying documents and witnesses that could have supported Mr. Heidler's case is insufficient to show that his trial counsel's investigation was deficient or that the state habeas court's decision regarding the same was unreasonable. See Reaves, 872 F.3d at 1157 ("[T]he fact 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.").

Of note, Mr. Heidler supports his argument that trial counsel did not sufficiently curate the records they provided to the mental health experts by relying on cases that are not "clearly established Federal law" under AEDPA, i.e. they are not United States Supreme Court holdings. See Carey v. Musladin, 549 U.S. 70, 74 (2006) (reaffirming that the "clearly established Federal law in § 2254(d)(1) refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision") (internal quotations and citations omitted); see also Williams v. Taylor, 529 U.S. 362, 412 (2000). For this additional reason, Mr. Heidler has not shown that the state habeas court's adjudication of this claim violated 28 U.S.C. § 2254(d)(1), 28 U.S.C. § 2254(d)(2), or both. Accordingly, this last claim, like the others before it, fails.

For the above reasons, Mr. Heidler's Strickland claims relating to evidence regarding his mental health are denied.

B. Strickland Claims regarding Trial Counsel's Mental Health Defenses at Trial

In his Brief in Support, dkt. no. 127, Mr. Heidler claims that his trial counsel were deficient because they failed to narrow down their mental health defenses at trial "to focus the issue of Mr. Heidler's mental health on the sole question that was at issue during the guilt phase of the trial—whether Mr. Heidler was guilty but mentally ill." Id. at 119. This claim fails for two reasons. First, Mr. Heidler did not raise it in his Third Amended Petition, dkt. no. 124. Second, it is procedurally defaulted. Regarding the first reason, Rule 2(c) of the Rules Governing Section 2254 Cases requires the operative petition, here the Third Amended Petition, to: "(1) specify all grounds for relief available to the petitioner; [and] (2) state the facts supporting each ground." 28 U.S.C. § 2254, Rule 2(c). Mr. Heidler has done neither with respect to this claim.

Regarding the second reason—procedural default—Mr. Heidler never raised this specific claim before the state habeas court or in his application to the Georgia Supreme Court for a CPC. As a result, this claim was not "adjudicated on the merits in the State court proceedings" within the meaning of 28 U.S.C. § 2254(d). Thus, it is procedurally defaulted. See, e.g., Hittson, 759 F.3d at 1232 n.23 (finding that "[b]ecause Georgia prisoners are required to apply for a CPC before they have exhausted their state remedies"

several of the petitioner's claims not included in the petitioner's CPC application were procedurally defaulted).

Moreover, the State has not expressly waived this defense. Heidler's argument, that the State "expressly and affirmatively stated that the claims [Mr. Heidler] now asserts are unexhausted were in fact reviewable," dkt. no. 130 at 7, is conclusory and unsupported by the record. As the record shows, Heidler first raised this claim in his Brief in Support, dkt. no. 127, which precluded the State from arguing that the claim was unexhausted until now. Additionally, Mr. Heidler has neither shown nor attempted to show cause for the default or any resulting prejudice (or that a miscarriage of justice would occur). For the above reasons, Mr. Heidler's Strickland claims regarding his trial counsel's mental health defenses at trial fail and are denied.

C. Trial Counsel's Investigation and Presentation of Mitigating Evidence

Mr. Heidler's next Strickland claim argues that the state habeas court unreasonably found that his trial counsel were not deficient in their investigation or presentation of mitigating evidence. Mr. Heidler claims that "the state habeas court had an overly inflated view" of trial counsel's work. Dkt. No. 127 at 141. This Court has already rejected that argument. The state habeas court determined that trial counsel did indeed hire an investigator, Frank Gillis, who found witnesses and conducted

interviews. Additionally, according to her testimony, Ms. Palmer's billing records did not reflect the true extent of her investigatory attempts to discover mitigating evidence. Neither of these factual findings by the state habeas court were unreasonable nor has Mr. Heidler shown by clear and convincing evidence that such testimony and evidence, or any reliance upon it, was erroneous.

Next, Mr. Heidler claims that "the state habeas court's reading of the evidence that the defense did present at trial has little correspondence to the actual testimony jurors heard." Id. Mr. Heidler specifically finds fault with the state habeas court's factual determination that Mr. Heidler's trial counsel presented evidence at sentencing that Mr. Heidler suffered from abuse, neglect, and mental illness. Mr. Heidler contends that, in fact, "very little was shown about Mr. Heidler's challenging childhood." Id. Heidler also argues that the state habeas court unreasonably found that Heidler's trial counsel presented witness testimony about his "troubled childhood of neglect and abuse," dkt. no. 127 at 141 (quoting Dkt. no. 31-12 at 50), when, according to Heidler, his trial counsel merely presented testimony of allegations of abuse since the members of Heidler's family who testified denied that any abuse occurred.

These arguments are not enough to satisfy Mr. Heidler's burden, at this stage, under AEDPA. He fails to show that this

factual finding by the state habeas court was unreasonable. Moreover, even if he did show that these factual findings were unreasonable, Mr. Heidler does not show that the state habeas court based its decision on these findings. First, testimony stating that there were allegations of abuse is circumstantial evidence of abuse. Thus, the trial court's finding that witnesses testified about abuse is not unreasonable. Second, the state habeas court listed numerous pieces of mitigating evidence that Mr. Heidler's trial counsel presented in its decision that Mr. Heidler's trial counsel were not deficient in their investigation or presentation of mitigating evidence. Thus, even if the state habeas court did slightly mischaracterize the evidence of allegations of abuse as evidence of abuse, the record does not show that the state habeas court's ultimate decision was based on this finding of fact (as it must under 28 U.S.C. § 2254(d)(2)). Accordingly, these arguments fall short and fail.

Third, Mr. Heidler argues that the state habeas court's finding that his "[t]rial counsel cannot be held responsible for [his] family's reticence in revealing shameful family secrets," dkt. no. 31-12 at 62, was unreasonably wrong because "trial counsel are responsible for the failure to conduct an adequate investigation," dkt. no. 127 at 142. In other words, Mr. Heidler argues that his trial counsel performed deficiently because they

did not timely investigate mitigating evidence and they did not adequately interview Mr. Heidler's family members. See id. at 143.

Mr. Heidler does not meet his burden with this argument. While the record does contain evidence showing that Ms. Palmer only interviewed mitigation witnesses four days prior to the start of the guilt-innocence phase of trial, the record also shows that Mr. Heidler's "counsel [began] work on obtaining mental health-related documents early in the representation." Dkt. No. 127 at 143 n. 57. Obtaining those documents "early in the representation," necessarily involved speaking with Mr. Heidler's family early in the investigation. Ms. Palmer testified that she talked with Mr. Heidler's family members, who told her that "Mr. Heidler has been in and out of foster care," which then prompted her to speak with DFACS, from whom she obtained records. Dkt. No. 19-3 at 63. Thus, the record shows that Ms. Palmer spoke with Mr. Heidler's family members, located witnesses, and found records within a timely manner.

Moreover, Mr. Heidler has not shown that the state habeas court's decision on this matter was unreasonable. Instead, Mr. Heidler's arguments are colored by the "distorting effects of hindsight." Strickland, 466 U.S. at 689. Such arguments are not enough to meet his burden under AEDPA. As this argument fails.

Mr. Heidler's remaining arguments on this claim focus on the second prong of a Strickland claim: prejudice. Since this Court

finds that Heidler falls well short of his burden of proof under AEDPA with respect to first prong of a Strickland claim (deficiency), we do not need to reach an analysis involving the second prong.

For the above reasons, Mr. Heidler's overall claim that the state habeas court unreasonably found that his trial counsel were effective in their investigation of mitigating evidence fails. It is denied.

D. Mr. Heidler's Escape from Toombs County Detention Center

This Court has already rejected this claim when it denied Mr. Heidler's motion for an evidentiary hearing. See Dkt. No. 97. There, this Court determined that Mr. Heidler's ineffective assistance of counsel claim "stemming from a conflict of interest" lacked merit. Id. at 29. This Court also found that "there is no need to consider post-conviction counsel's ineffectiveness . . . because post-conviction counsel could not be deemed ineffective for failing to raise a claim that the Court has determined lacks any merit." Id. at 29-30. Although Mr. Heidler requests that this Court revise that order, dkt. no. 130 at 31, this Court has no reason to do so. Mr. Heidler's claim is still without merit. Accordingly, this claim is denied.

E. Trial Counsel's *Voir Dire*

Mr. Heidler's next Strickland claim argues that his trial counsel were deficient by "conduct[ing] an anemic *voir dire* . . . that ignored critical and specific issues." Dkt. No. 127 at 165. Mr. Heidler identifies the following ways that his trial counsel were allegedly deficient, they:

- (1) "asked virtually no case-specific questions of venirepersons beyond a general inquiry into their willingness to listen to the testimony of a psychiatrist or psychologist," id. at 166;
- (2) failed "to determine which venirepersons held harmful (and potentially disqualifying) views, and which held helpful views, on issues germane to the trial," id. at 167;
- (3) "failed to test the jurors' ability to consider all sentencing options in a case with facts similar to those alleged in Mr. Heidler's," id. at 169; and
- (4) "neglected to object to the prosecutor buttonholing jurors into stating their ability to consider all three sentences," id. at 170.

This Court will review the merits of this claim.⁵ Further, the Court is not constrained by AEDPA because the state habeas court did not (and could not) rule on this claim. Nevertheless, this claim fails because Mr. Heidler has not met his burden of showing deficient performance under Strickland's highly deferential standard of review. See 466 U.S. at 689 (recognizing that

⁵ Although Mr. Heidler did not raise this claim in the state habeas court or in his application for CPC to the Georgia Supreme Court, the State has expressly waived its procedural bar defense when it recognized in its Answer to Mr. Heidler's Third Amended Petition that this claim is "properly before this Court for review" and is "reviewable under § 2254(d)." Dkt. No. 128 at 18, 20-21.

"[j]udicial scrutiny of counsel's performance must be highly deferential" and that courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

Here, Mr. Heidler's trial counsel wrote a very detailed and well researched "Memorandum of Law in Support of Adequate Voir Dire." Dkt. Nos. 12-5 at 98-109; 12-6 at 1-6. That memorandum touched on topics including:

- (1) that a juror who will automatically impose the death sentence must be excused for cause;
- (2) that jurors must be willing to consider mitigating evidence;
- (3) that Mr. Heidler's trial counsel must be allowed "to conduct a meaningful voir dire," dkt. no. 12-5 at 101, by asking both "open-ended" and "case-specific questions," id. at 102, 109;
- (4) that the trial court should act to mitigate the fact that "the process of death qualification itself has a prejudicial effect" on jurors, id. at 103; and
- (5) that the trial court should "refrain from making any comments to the prospective jurors that would in any way tend to lessen the responsibility that each juror would be required to shoulder" at the penalty phase (if reached), id. at 108.

Given, then, the strong presumption in favor of effective performance and the fact that Mr. Heidler's trial counsel were acutely aware of the importance and strategic nature of voir dire, Mr. Heidler has not met his burden of showing deficient performance. Instead, Mr. Heidler's arguments are grounded in "the

distorting effects of hindsight," which this Court must make "every effort . . . to eliminate." Strickland, 466 U.S. at 689. The mere fact that his trial counsel did not probe the jury further on these topics does not mean that trial counsel's decisions were "not part of a reasonable trial strategy." Dkt. No. 127 at 174; See Brown v. Jones, 255 F.3d 1273, 1279 (11th Cir. 2001) (finding that although trial counsel at a capital trial engaged in limited *voir dire*, the trial counsel "may well have thought it better to avoid any focus on the death penalty . . . because it seems reasonable for trial counsel to want to focus the jury on the idea of the death penalty as little as possible"); Hughes v. United States, 258 F.3d 453, 457 (6th Cir. 2001) ("Counsel is . . . accorded particular deference when conducting *voir dire*. An attorney's actions during *voir dire* are considered to be matters of trial strategy"; Neill v. Gibson, 278 F.3d 1044, 1055 (10th Cir. 2001) ("Lawyers experienced in the trial of capital cases have widely varying views about addressing [during *voir dire*] the delicate balance between the disqualification of jurors whose personal beliefs prevent them from ever imposing the penalty of death . . . and those who would automatically recommend that sentence if they found the defendant guilty.")). The deference given to an attorney under a Strickland analysis and the presumption that any action (or inaction) by trial counsel during *voir dire* was a strategic decision coupled with Heidler's trial counsel's acute awareness of the importance of

voir dire, render Heidler's claim—based solely on his trial counsel's lack of questioning—unsuccessful. It is denied.

F. Failure to Challenge a Biased Juror

First, this claim is procedurally defaulted because it was not raised in Mr. Heidler's CPC application to the Georgia Supreme Court. See, e.g., Hittson, 759 F.3d at 1232 n.23. Moreover, the State has not expressly waived this defense.⁶ Since Mr. Heidler did not raise this claim until he filed his Brief in Support, dkt. no. 127, the State had no opportunity to argue that it was unexhausted until now. Second, Mr. Heidler has not shown cause and prejudice to excuse these procedural defaults, nor has he shown that a miscarriage of justice would result. For these reasons, Mr. Heidler's claim that his trial counsel were ineffective for failing to challenge an allegedly biased juror is procedurally defaulted and, in the alternative, not sufficiently plead under Rule 2(c). Accordingly, it fails and is denied.

G. Failure to Object to Inadmissible Evidence

Although there are issues of whether these claims are unexhausted and procedurally barred and if so, whether the State expressly waived the defense of exhaustion, the Court need not reach these issues because these claims are not properly before

⁶ Comparatively, the State expressly recognized Mr. Heidler's voir dire claim was properly before the Court. Here, the State did not do so.

the Court because Mr. Heidler does not meet the pleading requirements of Rule 2(c).

Here, like the petitioner in Hittson, 759 F.3d at 1210, Mr. Heidler's claims are not sufficiently plead. In Hittson, the Eleventh Circuit found the following claim to not satisfy Rule 2(c)'s requirements: "[S]tate habeas counsel failed to pursue obvious avenues of investigation, resulting in a failure to raise meritorious and potentially meritorious claims. Ineffective Assistance claims which Mr. Hittson believes are 'substantial' and which have 'some merit' were available to be litigated in state habeas proceedings but post-conviction counsel unreasonabl[y] failed to raise them." 759 F.3d at 1265-66. This claim was found to contain "generalized allegations" that lacked any factual allegations in support. Id. at 1265.

Here, Mr. Heidler's Third Amended Petition sets the following claims: "Counsel failed to object to the admission of several items of evidence and testimony offered by the State during the guilt/innocence and sentencing phases of trial and permitted the jury to receive and consider evidence that was improper, inadmissible, prejudicial, irrelevant, and/or false." Dkt. No. 124 at 22. Such a pleading is quintessentially conclusory.⁷ They contain no factual allegations and list generalized reasons that

⁷ The following claim also fails for the same reason: "Counsel failed to adequately object to and litigate the improper admission of certain evidence, including but not limited to videotapes and photographs." Dkt. No. 124 at 24.

evidence may be improperly admitted. Accordingly, these claims, like those in Hittson, fail to state a claim and are unsuccessful. They are denied.

H. Failure to Object to Prosecutorial Misconduct

These Strickland claims are also improperly plead. Mr. Heidler's Third Amended Petition alleges that his trial counsel: (1) "failed to adequately object to and litigate improper testimony, including but not limited to testimony that was hearsay, irrelevant, cumulative, outside the personal knowledge of the witness, and testimony that was highly prejudicial," dkt. no. 124 at 25; and (2) "failed to object to improper and prejudicial statements made by the State during opening and closing arguments of both the guilt/innocence and sentencing phases of the trial," id. These broad, generalized claims—which are devoid of supporting facts—are insufficient to satisfy the fact pleading requirements of Rule 2(c). Mr. Heidler cannot amend his Third Amended Petition with arguments and factual allegations contained in his Brief. Therefore, these claims are not properly before the Court and are denied.

I. Failure to Make Reasonable Efforts to Suppress Mr. Heidler's Statements to Law Enforcement

This claim fails for four reasons. First, Mr. Heidler generally raises these claims in his Third Amended Petition;

however, he provides no factual basis for them.⁸ Mr. Heidler did not set forth the specifics of this claim until his Brief in Support, dkt. no. 127. Petitioners cannot use their Brief in Support to bypass pleading requirements. Thus, these claims are not properly before the Court. Second, even if they were, Mr. Heidler did not exhaust these claims because he failed to include them in his application for a CPC to the Georgia Supreme Court. Third, the State has not expressly waived exhaustion with respect to these claims. The State's general statement in its Answer to the Third Amended Petition repeating Mr. Heidler's general statement of these claims is not an express waiver within the meaning of 28 U.S.C. § 2254(b)(3)—especially considering that in its Answer the State "specifically reserve[d] the right to assert procedural default as to any additional claims in response to any additional petition or any brief filed on behalf of Petitioner." Dkt. No. 128 at 18. Moreover, the State raised this defense at the earliest opportunity, which was its Response Brief to the Third Amended Petition, dkt. no. 129. Fourth and finally, Petitioner has not attempted to show cause and prejudice for this failure or that

⁸ The Third Amended Petition claims that Mr. Heidler's trial counsel "failed to adequately raise and litigate that Petitioner's statement to law enforcement was the result of an illegal arrest and should be suppressed," dkt. no. 124 at 19, and "failed to adequately present information and evidence in pretrial motions and proceedings and at trial relating to Petitioner's allegedly voluntary waive of constitutional rights during interrogation by the police," id. at 19-20. No facts supporting these claims are provided in the Third Amended Petition.

procedural default would result in a miscarriage of justice. For these reasons, this claim fails, and it is denied.

J. Failure to Adequately Present Evidence and Advocate on Mr. Heidler's Behalf at the Competency Hearing

This claim fails on procedural grounds. Before Mr. Heidler stood trial, the trial court ordered that he be evaluated by multiple, independent mental health professionals to determine whether he was competent to stand trial. After the evaluations were complete, the trial court held a hearing on the issue of Mr. Heidler's competency. Dkt. No. 13-3. The trial judge then determined that Mr. Heidler was competent to stand trial. Dkt. No. 12-7 at 59-60. Now, Mr. Heidler argues that his trial counsel were unconstitutionally deficient because they failed to present certain evidence to the trial court and they did not adequately advocate that he was incompetent before the trial court. However, Mr. Heidler raises this claim for the first time in his Brief in Support, dkt. no. 127. As stated before, procedural default occurs when a petitioner raises a claim for the first time in their brief in support. Doing so also does not meet the requirements of Rule 2(c). For these procedural reasons, this claim fails. It is denied.

II. Prosecutorial Misconduct During the Guilt-Innocence Phase

Mr. Heidler sets forth numerous claims that the prosecutor acted improperly, violating several constitutional rights. Each of these claims fail for the reason(s) provided below:

A. Mr. Heidler's Mental Health Evidence

First, Mr. Heidler alleges several instances of prosecutorial misconduct related to the presentation of mental health evidence at trial. These claims relate to the prosecutor's comments and questions at trial. Specifically, Mr. Heidler argues that the prosecutor intentionally misled the jury by cautioning against using the Diagnostic and Statistical Manual (DSM) to diagnose criminal defendants. This claim, however, was not presented to the state courts on Mr. Heidler's direct appeal nor did he raise it during his state habeas proceedings (including his application for CPC).⁹ Therefore, this claim is unexhausted and procedurally defaulted. See, e.g., Hittson, 759 F.3d at 1232 n.23. Second, the state did not expressly waive this defense (because Mr. Heidler raised this claim for the first time in his Brief in Support).¹⁰ Therefore, the Court cannot consider it. Finally, Petitioner has not shown, nor has he attempted to show, cause and prejudice for

⁹ The Court notes that although Mr. Heidler did raise certain prosecutorial misconduct claims on direct appeal and in the state habeas proceedings, this specific claim was not one of them because the factual basis for this claim was not presented to any of the state courts. See Kelley v. Sec'y for Dep't of Corr., 377 F.3d 1317, 1344 (11th Cir. 2004) (finding that "the prohibition against raising nonexhausted claims in federal court extends not only to broad legal theories of relief, but also to the specific assertions of fact that might support relief").

¹⁰ The Court notes that this claim also does not satisfy the federal habeas pleading requirements because Mr. Heidler does not set forth the factual allegations supporting the broader prosecutorial misconduct claim in which this claim ostensibly falls. Although the Third Amended Petition broadly states that "the prosecution . . . mislead the jury as to the significance and meaning of Petitioner's mental health history," dkt. no. 124 at 35 ¶ 52, such allegation is too generalized and, once again, contains no factual bases—making the claim insufficiently plead.

this failure or that procedural default would result in a miscarriage of justice.

Mr. Heidler's next set of claims regarding his mental health evidence are either precluded from federal habeas review or procedurally defaulted. These claims allege that on cross-examination the prosecutor "further undermined the experts' credibility by falsely alleging that they had not asked the State to supply records for their evaluation and that the State did not even know Mr. Heidler was being evaluated," dkt. no. 127 at 200, and, during closing arguments the prosecutor "falsely argued . . . that the medical records utilized were untrustworthy; that the expert testimony was not evidence; and that the jury was prohibited from considering it," id. at 201.

Regarding Mr. Heidler's claim relating to the cross-examination of the mental health experts are procedurally defaulted. Mr. Heidler claims that the prosecutor unconstitutionally "undermined the [mental health] experts' credibility by falsely alleging that they had not asked the State to supply records for their evaluation and that the State did not even know Mr. Heidler was being evaluated." Dkt. No. 127 at 200. Like many of Mr. Heidler's claims, these claims were not set forth in his application for CPC to the Georgia Supreme Court and for this reason are unexhausted and procedurally barred. Further, the State has not waived this defense because Mr. Heidler did not raise

these specific claims until he argued them in his Brief in support of his Third Amended Petition, dkt. no. 127. In addition, Petitioner has not shown, nor attempted to show, cause and prejudice for this failure or that procedural default would result in a miscarriage of justice.

The claims stemming from the prosecutor's closing arguments at the guilt-innocence phase are precluded from the Court's review. On direct appeal of his conviction, Mr. Heidler alleges that the prosecutor engaged in misconduct when he:

- (a) "argued that [the mental health experts] did not base their opinions on evidence in the record of the case," dkt. no. 15-11 at 52;
- (b) "decried the experts' reliance on records that had been sent to them by defense counsel," id.;
- (c) said these records had not been subject to cross-examination like other evidence in the case, id.; and
- (d) "comment[ed] upon the defendant's failure [to] produce evidence" relating to the records the mental health experts relied upon," id.

The Supreme Court of Georgia rejected these arguments on the ground that Mr. Heidler did not object to them at trial, "and thus [Mr. Heidler] waived any right to seek a reversal based thereon." See Heidler, 273 Ga. at 61. This holding qualifies as an independent and adequate state ground and thus precludes federal habeas review. Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001) (citation omitted). First, the Georgia Supreme Court "clearly and expressly

state[d] that it [was] relying on state procedural rules to resolve the federal claim without reaching the merits of the claim." Id. Second, the decision was on state law grounds and it did not interpret federal law. Id. Finally, the state procedural rule was "adequate" in that it is not "manifestly unfair" in its treatment of Mr. Heidler. Id. Additionally, Petitioner has not shown, nor has he attempted to show, cause and prejudice for this failure (or that procedural default would result in a miscarriage of justice).

Finally, both of these claims are insufficiently plead. The factual basis for these claims were not alleged in Mr. Heidler's Third Amended Petition. Therefore, these claims are unsuccessful.

B. The Prosecutor's Appeal to Passions and Emotions and Sharing of Personal Belief

Mr. Heidler's claim that the prosecutor improperly employed the "Golden Rule" argument during his closing argument is procedurally defaulted. This claim was not raised in Mr. Heidler's application for CPC to the Supreme Court of Georgia. Further, in its Answer to Mr. Heidler's Third Amended Petition the State expressly argued that this "claim is procedurally defaulted," dkt. no. 128 at 15. Mr. Heidler's only argument on this point is that the State waived this defense; however, the State must do so explicitly, and it has not. See 28 U.S.C. § 2254(b)(3). Finally, Petitioner has not shown cause and prejudice for this failure, nor

has he shown that procedural default would result in a miscarriage of justice. Thus, this claim is procedurally defaulted and fails.

Next, Mr. Heidler claims that the prosecutor acted improperly "by invoking repeated cries for justice for the victims during his guilt-phase closing argument" and by ending "his [closing] argument with a forceful pronouncement of Mr. Heidler's guilt." Dkt. No. 127 at 205-06. These remarks did not deprive Mr. Heidler of a fair trial nor were they improper. Nevertheless, this Court need not reach this issue because the claims are not sufficiently plead. Therefore, they are procedurally defaulted. Specifically, these claims were not plead in Mr. Heidler's CPC application (or at any other stage of the direct appeal or state habeas proceedings). Finally, Petitioner has not shown, nor attempted to show, cause and prejudice for this failure or that procedural default would result in a miscarriage of justice. For these reasons, these arguments fail, and this claim is denied.

C. The Prosecutor Misled the Jury on the Burden of Proof

Mr. Heidler argues that the prosecutor misled the jury on the correct burden of proof by telling the jury to "return to us with the truth" and to "tell us the truth." Dkt. No. 127 at 207 (quoting Dkt. No. 13-14 at 53). Mr. Heidler did not set forth this claim in his Third Amended Petition. Accordingly, it is not properly before the Court. It is denied. See 28 U.S.C. § 2254, Rule 2(c).

D. The Prosecutor Derided Defense Counsel and Improperly Elicited Incriminating Statements

Mr. Heidler claims that the prosecutor discredited the defense at trial by "disparag[ing] defense counsel's handling of the expert testimony and underlying records," while "bolster[ing] his own handling of such things." Dkt. No. 127 at 209. He also claims and that the prosecutor improperly used statements made by Mr. Heidler during his mental health examination.¹¹ These claims are wholly absent from Mr. Heidler's Third Amended Petition. Thus, they are not properly before the Court. As such, this argument, like the ones before it, fails.

For the reasons above, Mr. Heidler's claims regarding prosecutorial misconduct during the guilt-innocence phase of trial are denied.

III. Prosecutorial Misconduct During the Penalty Phase Closing Argument

For the reasons below, each of Mr. Heidler's claims regarding the prosecutor's closing arguments at the penalty phase of the trial are denied.

¹¹ This claim does not fit within Mr. Heidler generalized claim in his Third Amended Petition that the prosecutor elicited "false and/or misleading testimony from State witnesses," dkt. no. 124 at 39 ¶ 60. The mental health experts were not state witnesses. Nevertheless, even if this claim could fit within this allegation it would not be sufficiently plead under Rule 2(c).

A. Expressing Personal Opinion on the Evidence

This claim is wholly absent from Mr. Heidler's Third Amended Petition. Mr. Heidler, of course, cannot amend his Third Amended Petition by adding new claims in his brief. Accordingly, this claim is not properly plead and fails.

B. Improperly Instructing the Jury

Mr. Heidler's next claim is that the prosecutor's closing argument improperly "limited the scope of what the jury could consider" at the sentencing phase, dkt. no. 127 at 217, by stating:

[T]his is the time for rational thinking, sound judgment rather than emotion or overwhelming sympathy. This is to decide not again the verdict, not again the issue of mental illness or mental retardation, but what should be done as a penalty for these crimes, what should be done as a punishment to this man.

Dkt. No. 14-11 at 44. The last reasoned decision on this issue was the Georgia Supreme Court's decision on direct appeal. There, the Georgia Supreme Court concluded that "[t]he prosecutor's conduct and argument in the penalty phase were not improper." Heidler, 273 Ga. at 65. Mr. Heidler has not shown how this decision was unreasonable. Thus, Mr. Heidler has not met his burden under AEDPA. Instead, he merely cites two cases that he represents stand for the obvious proposition that "prosecutorial misstatements of the law" are "objectionable" and "subject to court correction." Dkt. No. 127 at 217-18 (citing Boyde v. California, 494 U.S. 370, 384

(1990); California v. Brown, 479 U.S. 538, 541 (1987)).¹² This is not sufficient to show that the Georgia Supreme Court's decision was unreasonable, which Mr. Heidler must do at this stage. Accordingly, this claim fails.

C. Misrepresenting the Jury's Role; Appealing to the Jury's Passions and Prejudices; and Arguing that the Jury's Responsibility was to Impose Death

These claims—Part V.C.3-5 of Petitioner's Brief in Support, dkt. no. 127 at 218-22—are not presented in his Third Amended Petition. Accordingly, they do not meet the pleading standards required by Rule 2(c). Specifically, Rule 2(c) requires, in relevant part, that "[t]he petition . . . (1) specify all grounds for relief available to the petitioner; [and] (2) state the facts supporting each ground." 28 U.S.C. § 2254, Rule 2(c). Since Mr. Heidler did not allege these claims in his operative pleading, his Third Amended Petition, they must fail.

For the above reasons, Mr. Heidler's claims regarding prosecutorial misconduct during the closing argument of the penalty phase of trial are denied.

IV. Trial Court Erred by Admitting Videotaped Hearsay that Lacked Indicia of Reliability

Mr. Heidler claims that the trial court "erroneously allowed the State to introduce damaging hearsay, which violated Mr.

¹² Of note, Brown reiterates the principle that capital defendants must generally be allowed to introduce any relevant mitigating evidence, 479 U.S. at 541, and the prosecutor's statement did not misstate this principle.

Heidler's rights to due process and fundamental fairness." Dkt. No. 127 at 264. Specifically, Heidler objects to the trial court allowing the prosecution to play two videotapes for the jury, each of which contained an interview of minor: A.D. and B.D., respectfully. The trial court allowed the tapes to be played to the jury under Georgia's child-hearsay statute.¹³ The statute, allowed the introduction of certain out-of-court statements in cases involving the sexual abuse of children. The statute read:

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another or performed with or on another in the presence of the child is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.

O.C.G.A. 24-3-16 (1995).

Mr. Heidler argues that the trial court's finding that the interviews of the two girls provided "sufficient indicia of reliability" was incorrect "because the record reflects serious problems with the girls' statements." Dkt. Not. 127 at 267. Further, he argues that "[t]hese problems so thoroughly undermine the statements' reliability that admission of the tapes violate[d] Mr. Heidler's rights to due process and his right to confront the witnesses against him." Id. Finally, Mr. Heidler claims that he is

¹³ During Mr. Heidler's trial, Georgia's child-hearsay statute was codified at O.C.G.A. § 24-3-16, but it has since been amended and re-codified at O.C.G.A. § 24-8-820.

entitled to *de novo* review on this claim because the trial court's findings were based on unreasonable determinations of fact. See 28 U.S.C. § 2254(d)(2).

Assuming *arguendo* that these claims are not procedurally barred (as the State argues), they fail on their merits. Regarding the first videotape at issue, the interview of A.D., a ten-year-old who Mr. Heidler sexually assaulted, the trial court found:

Well it appears to me that the atmosphere and circumstances under which the statement was made satisfies [Georgia's child-hearsay statute], the spontaneity of the child's statement to the persons present, the persons present did not seem to press the child for answers. I did not glean that they put words in the child's mouth. They did make suggestions, but obviously that's necessary. The child's age, she appears to me to be very intelligent for her age, she was responsive to the questions, and the child's general demeanor was certainly good. She was not emotional. I think she was very aware of what she was doing. She was reluctant to speak when the man was there, but she apparently was able to speak to the DFCS worker. There were no threats or promises of any benefits to her. She was complimented on what she did, but that was generally after she said some things. She was complimented about her behavior when she was in jeopardy, and she apparently used good judgment then, and I see nothing wrong with the DFCS worker complimenting her on what she had done previously. She looked like to me she held her presence very well under the very trying and terrible circumstances. And there was - well, no presence of any drugs or alcohol. The child appeared to me to be creditable, and her credibility was good. And there was no coaching that I found from by [sic] parents or other third parties, or certainly there's no evidence of that. And she was examined very early after the event, and I think that goes to her credibility. Of course the jury is going to have to pass on that anyhow. I see nothing that would detract from the indicia of reliability. It seems certainly reliable to me and should go to the jury.

Dkt. No. 13-16 at 132-33.

From this laundry list of factual findings and indicia of reliability, Mr. Heidler focuses on the spontaneity finding and argues that it was an unreasonable determination. Mr. Heidler begins by noting that the tape starts with A.D. talking as if she was in the middle of a conversation. Then, Mr. Heidler points out that at approximately the five minute and seven minute mark, the GBI Agent brought up three details that had not yet been mentioned on the tape. Finally, Mr. Heidler argues that circumstantial evidence suggests that the GBI Agent spoke with A.D. prior to the DFCS investigator being present.

Despite these arguments, this Court finds that the trial judge's determination—that sufficient indicia of reliability existed to admit the videotaped interview of A.D.—was not unreasonable, nor was it based on any unreasonable determinations of fact. This is true even though it appears that the videotape did not start at the very beginning of the interview. Admittedly, Mr. Heidler's circumstantial evidence that topics were covered with A.D. prior to the recording commencing undermines the trial court's finding of spontaneity; nevertheless, the spontaneity finding was not erroneous or unreasonable. For example, Mr. Heidler has not shown that the topics that appear to be discussed during the recording were also discussed with A.D. before the recording commenced. The GBI agent could have discovered this information by

other means, such as from the third child Mr. Heidler kidnapped who was also interviewed by the authorities. Furthermore, Mr. Heidler did not challenge other findings that were crucial to the trial court's holding of admissibility, including that A.D. was intelligent, responsive, credible, aware of what she was doing, and had a good general demeanor. For these reasons, Mr. Heidler has not met his burden of proof regarding this claim, and it fails.

Next, Mr. Heidler argues that the leading questions used by authorities during their interview of B.D. renders the trial court's finding of admissibility so unreasonable that no fairminded jurist could agree with it. Out of the approximately thirty pages of transcript, Mr. Heidler points to a page in transcript that contains some leading questions. More specifically, Mr. Heidler argues, in part, that "the adults used leading questions to elicit several details from B.D., including the allegations that Mr. Heidler went to the back of the van and 'had sex' with A.D." Dkt. No. 127 at 272. The portion of the interview that Mr. Heidler points to in support of this position simply does not show that leading questions elicited that response. The interviewers simply asked if something happened. They never suggested that the "something" was "sex with [A.D.]." See Dkt. No. 13-17 at 14-15.¹⁴

¹⁴ Here is a more complete version of the exchange:

Mr. Heidler further argues that the interviewers acted impermissibly by telling B.D.:

We've already talked with [A.D.], and we've already talked with [your other sister, A.A.]. So we're trying to get, trying to understand what everybody saw and what happened to everybody, you know, during the night. And, uh, if you saw something that happened to [A.D.], let us know because we need to know what you saw. What happened to [A.D.] back there?

Dkt. No. 13-17 at 15-16. Specifically, Mr. Heidler claims that "[t]he adults [used] a strongly suggestive interviewing technique, implying that B.D. should confirm details that A.D. and A.A. had already revealed." Dkt. No. 127 at 272. The Court strongly disagrees with this characterization of the interviewers' statements to B.D., an eight-year-old who witnessed her sister

GBI Agent: Did he ever get in the back of the van? Did he hurt you? Okay. Did he hurt [A.D.]?

B.D.: Uh-uh.

GBI Agent: He didn't? Did - did you see him in the van, in the back of the van with [A.D.]?

B.D.: Uh-huh

GBI Agent: You did? What did he do in the back of the van?

DFCS Investigator: [B.D.], did something happen in the back of the van with [A.D.]? What happened?

B.D.: He did it with [A.D.].

DFCS Investigator: He did what with [A.D.]? It's okay to tell us.

GBI Agent: Yeah, you can tell us. [A.D.] - [A.D.] didn't do anything wrong.

DFCS Investigator: No.

GBI Agent: Not at all, and it's okay for you to tell us. Okay?

DFCS Investigator: We've already talked with [A.D.], and we've already talked with [A.A.]. So we're trying to get, trying to understand what everybody saw and what happened to everybody, you know, during the night. And, uh, if you saw something that happened to [A.D.], let us know because we need to know what you saw. What happened to [A.D.] back there?

B.D.: (Unintelligible) had sex with [A.D.].

DFCS Investigator: He had sex with [A.D.]? Did you see it happen?

B.D.: Yes, ma'am.

Dkt. No. 13-17 at 14-15.

being sexually assaulted mere hours before being interviewed. The interviewers did not say, "A.D. said [x]," or "A.A. said [y]." The interviewers simply said that they had talked with both sisters—the implication being that it was permissible for B.D. to talk to them, too. Such statements by a trained DFCS Investigator and a trained GBI officer are not improper.

Moreover, a review of the exchange between B.D. and the authorities reveals that very few leading questions were used, and when they were used, it was to turn B.D.'s attention towards a new topic. At no time were leading questions used to prompt B.D. to testify in a specific way. Therefore, the facts in this case are distinct from the the only case Mr. Heidler cites in support of this claim, Idaho v. Wright, 497 U.S. 805 (1990). There, the United States Supreme Court affirmed the Supreme Court of Idaho's finding that a child's hearsay statements should not have been admitted because the interview lacked certain procedural safeguards: the interview was not taped, the interviewer asked "blatantly leading questions," and the interviewer had a "preconceived idea of what the child should be disclosing." Id. at 812-13 (quoting State v. Wright, 116 Idaho 382, 385 (1989)).¹⁵ Accordingly, Mr. Heidler has not met his burden on this claim. Finally, Mr. Heidler cannot show

¹⁵ The Court also notes that the Supreme Court of Georgia found that A.D. and B.D. "were also available to testify if Mr. Heidler desired to cross-examine them." Heidler, 273 Ga. at 60. Mr. Heidler has not sufficiently rebutted this factual finding, even though he has conclusorily argued to the contrary.

prejudice by the admission of B.D.'s interview tape, which merely corroborated what A.D. had testified to in A.D.'s taped interview. For the above reasons, Mr. Heidler's claim that the trial court erred by admitting videotaped hearsay that lacked indicia of reliability fails. Therefore, this claim is denied.

V. Mr. Heidler was Incompetent to Stand Trial

Mr. Heidler argues that the state violated his right to due process because he was not competent to stand trial. He requests an evidentiary hearing on this issue. The trial court found—after a competency hearing and multiple evaluations by independent mental health experts—that Mr. Heidler was competent to stand trial, and Mr. Heidler did not challenge that determination on appeal or during his state habeas proceedings; however, this claim is not procedurally defaulted. See Lawrence v. Sec'y Fla. Dep't of Corr., 700 F.3d 464, 481 (11th Cir. 2012) ("We have both pre- and post-AEDPA precedent . . . holding that substantive competency claims generally cannot be procedurally defaulted"); but see Thomas v. Wainwright, 788 F.2d 684, 688 (11th Cir. 1986) (finding that "once the issue of competency to stand trial is raised and the state court takes the proper steps to resolve the issue, the defendant is [not] free to drop the issue or later pick it up as it suits his purposes").

For background information on the trial court's determination of competency, this Court looks back to September 10, 1998 when the trial court was provided with a letter—dated September 9,

1998—from Dr. James Maish (a mental health expert hired by the defense to evaluate Mr. Heidler) to Mr. Michael Garrett (one of Mr. Heidler's defense counsel). Dkt. No. 12-4 at 5. The trial court characterized the report contained within the letter as "inconclusive" with respect to Mr. Heidler's mental health status. Id. In an order dated September 29, 1998, the trial court directed counsel to give "guidance to the court pertaining to: (1) timetable for completion of the mental evaluation of the defendant; [and] (2) issues of defendant's competency to be presented at a non-jury hearing before the court" Id. at 7. Thereafter, on January 15, 1999, the trial court, finding that "the mental competency of [Mr. Heidler] has been called into question," ordered that the Forensic Psychiatry Program at Georgia Regional Hospital conduct an evaluation of Mr. Heidler to determine (1) his competency to stand trial and (2) the degree of criminal responsibility or mental competence at the time of the act. Id. at 37-38. As Georgia Regional Hospital psychiatrists—Dr. Gordon Ifill and Dr. Nic D'Alesandro—neared the completion of their evaluation, the trial court also ordered that Dr. Everett Kulgar—a retired psychiatrist, former superintendent of Georgia Regional Hospital and another hospital, and former state forensic medical director—to review the assessments of Dr. Ifill, Dr. D'Alesandro, and Dr. Maish, and, if necessary, to personally evaluate Mr. Heidler. Id. at 48-49.

On May 25, 1999, the trial judge held a hearing to determine whether Mr. Heidler was competent to stand trial. Dkt. No. 13-3. To start the hearing, the trial judge noted that he had been, or would be, provided with the following: Dr. Maish's September 9 preliminary report, Drs. Ifill and D'Alesandro's final reports (collectively, the "Georgia Regional Hospital Reports"); and Dr. Kulgar's evaluation. Id. at 3-4. Dr.

At the hearing, Dr. Kulgar testified first. Dr. Kulgar concluded that although "there may be questions of further elaboration required," and there was "some degree of mental illness present" in Mr. Hiedler, he was "competent to stand trial." Id. Dr. Kulgar based this opinion on his review of the Georgia Regional Hospital Reports, another report that was done at Milledgeville Central State Hospital, three reports by Dr. Maish, and "some really extensive childhood records . . . including the various mental health problems and juvenile court problems that [Mr. Heidler] had." Id. at 5. Dr. Kulgar also testified that he met with Mr. Heidler for the first time the morning of the hearing for about an hour. Id. at 5-6.

Dr. D'Alesandro testified next. He testified that he was "exclusively in agreement with Dr. Kulgar" in that he and Dr. Ifill found "Mr. Heidler to be competent," because Mr. Heidler "understand[s] the legal process and understand[s] the functions of the officers of the court." Id. at 9. Dr. D'Alesandro

further testified that he and Dr. Ifill also had Mr. Heidler evaluated at Milledgeville Central State Hospital, "which involved a full neurological workup," that looked for "physical damage that might contribute to psychological dysfunctioning." Id. at 10.

Then Dr. Ifill testified. It was his "opinion that [Mr. Heidler] does meet the criteria for being found competent to stand trial." Id. Dr. Ifill further testified that he "met with Mr. Heidler on a couple of occasions, once up at the county jail here and then we had him come down to our hospital, and we interviewed him there." Id. at 11. Each of these interviews lasted approximately two hours. Id. Dr. Ifill also testified that the Milledgeville Central State Hospital evaluation discovered no evidence that Mr. Heidler suffered from gross neuropsychological dysfunction. Id. at 12-13.

On August 30, 1999, the trial judge determined that Mr. Heidler was competent to stand trial. Dkt. No. 12-7 at 59-60. The judge noted that "[s]ince the beginning of jury selection of this criminal action I have neither observed facts which raise doubt as to the sanity of the accused, nor have such facts been brought to my attention." Id. at 60. The judge also noted that if Mr. Heidler appeared to be incompetent during the trial, appropriate steps would be taken. Id.

As an initial matter, the state trial court's determination that Mr. Heidler was competent to stand trial was an adjudication

of this claim on the merits within the meaning of AEDPA.¹⁶ Accordingly, AEDPA applies. Mr. Heidler, then, must show that the trial court's decision on this claim was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The cases upon which Mr. Heidler relies to support this claim are either pre-AEDPA or do not involve a state court decision on the merits. Moreover, those cases review their respective claims *de novo*, and as such, are not applicable to this claim.¹⁷ Here, the Court is constrained by AEDPA, which dictates the standard of

¹⁶ The trial court's decision was also the last and only adjudication of this claim on the merits. Thus, it is that decision to which the Court looks under AEDPA. See Wilson v. Sellers, 138 S. Ct. at 1191 (finding that federal courts should examine the last state-court decision that provides "a relevant rationale").

¹⁷ For example, in Lawrence v. Sec'y, Fla. Dep't of Corr. the issue of competency was never raised (even at the trial court level) until the petitioner's federal habeas petition. 700 F.3d 464, 467-68 (11th Cir. 2012). In Pardo v. Sec'y, Fla. Dep't of Corr., the issue was a procedural competency claim, and the petitioner's trial counsel stipulated to the petitioner's competence (such that the trial court never made an adjudication on the claim). 587 F.3d 1093, 1100 (11th Cir. 2009). See also Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1259 (11th Cir. 2002) ("We review [petitioner's substantive competency claim] without any § 2254(d)(1) deference, because there is no state court decision on the merits of this claim," in part because the trial court never inquired into competency); Johnston v. Singletary, 162 F.3d 630, 632 n.1 (11th Cir. 1998) (applying pre-AEDPA standards to the petitioner's substantive competency claim because the habeas petition was filed before the effective date of AEDPA).

review for both reviewing this claim on its merits and whether an evidentiary hearing is warranted.

In Dusky v. United States, the United States Supreme Court established the standard for when a defendant is mentally competent to stand trial: the test is "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." 362 U.S. 402, 402 (1960). Thus, this Court must determine whether the trial court unreasonably applied the test above, unreasonably applied some other clearly established law, or based its decision on an unreasonable determination of fact. As explained below, the trial court's decision reflects none of these errors. Accordingly, this claim fails.

Here, Mr. Heidler has not set forth any evidence showing that the trial court's decision satisfies the standards of § 2254(d)(1) and (2). For example, Heidler looks to evidence developed during the state habeas evidentiary hearing and the state habeas case; however, this evidence was not before the trial court when it made its decision on this claim. Accordingly, this Court cannot consider it. See Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (holding that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits").

Second, because Mr. Heidler misapplies a *de novo* standard of review to this case, he has not set forth any evidence showing that the trial court's decision satisfies the standards of § 2254(d)(1) or (2). Comparatively, as the trial court record shows, its decision was eminently reasonable. Every mental health expert who evaluated Mr. Heidler concluded that he was competent to stand trial because he "understand[s] the legal process and understand[s] the functions of the officers of the court." Dkt. No. 13-3 at 9. Moreover, the trial court's order made the factual finding (which Mr. Heidler has not challenged) that "[s]ince the beginning of jury selection of this criminal action I have neither observed facts which raise doubt as to the sanity of the accused, nor have such facts been brought to my attention." Dkt. No. 12-7 at 60. Since the trial court did not unreasonably apply any federal law nor did it make an unreasonable determination of fact in reaching its conclusion, Mr. Heidler's claim fails, and he is not entitled to an evidentiary hearing. Both are denied.

VI. Mr. Heidler is Competent to be Constitutionally Executed

Mr. Heidler claims he is incompetent to be executed in conformity with due process and the Eighth Amendment because of his severe mental illness and persistent delusional state. Dkt. No. 124 at 14-15 ¶¶ 24-30. Assuming *arguendo* that this claim is not procedurally defaulted (as the Court already found, see dkt. no. 56), binding precedent forecloses this claim. See Carroll v.

Secretary, DOC, 574 F.3d 1354, 1369 (11th Cir. 2009) (holding that Atkins v. Virginia, 536 U.S. 304 (2002), "protects only those individuals who are mentally retarded" (emphasis omitted). Accordingly, this claim fails.

VII. Ineffective Assistance of State Habeas Counsel

Although Mr. Heidler sets forth this claim in his Third Amended Petition, he does not argue it in his Brief in Support. In the Third Amended Petition, Mr. Heidler claims:

Post-conviction counsel rendered ineffective assistance of counsel in litigating trial and appellate counsel's ineffectiveness in a variety of ways, including but not limited to failing to thoroughly investigate Petitioner's claims; failing to obtain and utilize available, relevant evidence; failing to adequately litigate Petitioner's claims; failing to present relevant and favorable testimony by live witnesses; failing to preserve the testimony of witnesses; and failing to ensure that Petitioner was competent during critical stages of his state habeas proceedings.

Dkt. No. 124 at 33 ¶ 47. Assuming *arguendo* that these allegations satisfy the pleading standard, such conclusory statements are insufficient to satisfy his burden at this stage. Thus, these claims must fail.

Mr. Heidler also argues that his state habeas counsel was ineffective in failing "to allege that some aspects of trial counsel's ineffective representation at the sentencing hearing were attributable to second chair counsel's actual conflict of interest." Id. at 33-34 ¶ 48. The Court has already determined that this claim is meritless, see Dkt. No. 97 at 29-30, and sees

no reason to find differently now. Accordingly, this claim fails. It is denied.

VIII. Guilt/Innocence Phase Jury Instructions

Mr. Heidler takes issue with a number of the jury instructions from the guilt/innocence phase of his trial. Each issue he raises is addressed below; however, each is ultimately unsuccessful. Specifically, he claims:

- A. The trial court understated the Government's burden of proving his guilt beyond a reasonable doubt.

The trial court's jury instructions closely mirror Georgia's current pattern jury instructions. Compare Dkt. No. 14-7 at 11-13 with GAJICRIM 1.20.10 (current to August 2019). Further, similar charges have been upheld, and the Court sees no reason to find this one inadequate. Johnson v. Kemp, 759 F.2d 1503, 1508 (11th Cir. 1985) (upholding use of "wavering, unsettled or unsatisfied"); United States v. Campbell, 61 F.3d 976, 980-81 (1st Cir. 1995) (upholding use of "doubt based upon reason and common sense."); Watkins v. Ponte, 987 F.2d 27, 32 (1st Cir. 1993) (upholding distinction of government's burden from "mathematical certainty"). This claim fails.

- B. The trial court vaguely defined guilty but mentally ill.

Again, the trial court's definition hues closely to the one in Georgia's current pattern jury instructions. Compare Dkt. No. 14-7 at 30 with GAJICRIM 3.80.40 (current to August 2019). Mr.

Heidler has not given the Court reason to think a different charge was "constitutionally required," nor has the Court found any "dispositive case supporting [his] position." State v. Laible, 594 N.W.2d 328, 333-34 (S.D. 1999) (considering instruction did not distinguish mental illness from mental depravity). This claim fails.

C. The trial court burdened Mr. Heidler with proving his mental illness beyond a reasonable doubt.

The trial court indeed did so, but it did so in accordance with Georgia's current pattern jury instructions. Dkt. No. 14-7 at 30; GAJICRIM 3.80.40 (current to August 2019). AEDPA bars granting Mr. Heidler relief on this ground because "no decision of the United States Supreme Court clearly establishes that [this] is unconstitutional." See Hill, 662 F.3d at 1360. This claim fails.

D. The trial court improperly instructed the jury on intellectual disability.

The Georgia Supreme Court found "no evidence" supporting this charge, Heidler, 273 Ga. 54, 63 (Ga. 2000); however, this Court presumes that the jury correctly determined the facts and thus did not let the baseless charge mislead it in any way. See Sochor v. Florida, 504 U.S. 527, 538 (1992); see also Griffin v. United States, 502 U.S. 46, 59-60 (1991). Accordingly, this claim also fails.

E. The trial court wrongly instructed the jury on the consequences of different verdicts, and on who would have custody of Mr. Heidler if they found him "guilty but mentally ill" or "guilty but mentally retarded."

The trial court charged the jury that a verdict of "not guilty by reason of insanity" would result in Mr. Heidler being "committed to a state mental health facility until such time, if ever, the court is satisfied that he should be released pursuant to law." Dkt. No. 14-7 at 29. This charge was statutorily mandated. O.C.G.A. § 17-7-131(b)(3)(A); Moore v. State, 217 Ga. App. 207, 209 (1995) (en banc) (holding giving summary version to be reversible error). "[N]o decision of the United States Supreme Court clearly establishes that [this charge] is unconstitutional," so AEDPA bars granting Mr. Heidler relief on this ground. Hill, 662 F.3d at 1360; see also id. at 1343-47.

Next, the trial court charged that a verdict of "guilty but mentally ill" would result in Mr. Heidler being "given over to the Department of Corrections or to the Department of Human Resources as the mental condition of the defendant may warrant." Dkt. No. 14-7 at 30. At the time of Mr. Heidler's trial, this language tracked the charge required by O.C.G.A. § 17-7-131(b)(3)(C). See Moore, 217 Ga. App. at 208-9 (holding that the "shall" used within the statute mandates that state courts use the statutory language). Thus, the charge was accurate. In addition, AEDPA bars granted Mr. Heidler relief on this ground, because "no decision of the United

States Supreme Court clearly establishes that [this then-mandatory charge] is unconstitutional." Hill, 662 F.3d at 1360.

The trial court continued, charging that a verdict of "guilty but mentally ill" "has the same force and effect as any other guilty verdict, with the additional provision that the Department of Corrections or other incarcerating authority provide mental health treatment." Dkt. No. 14-7 at 30-31. This is factually correct, so there is no basis for finding it unconstitutional. Accordingly, it is not a ground for relief. See Hill, 662 F.3d at 1360; United States v. Bankston, 121 F.3d 1411, 1415-16 (11th Cir. 1997); Logan v. State, 256 Ga. 664, 664 (Ga. 1987).

The trial court's initial charge on "guilty but mentally retarded" was not materially different from the one it gave on "guilty but mentally ill." Dkt. No. 14-7 at 31-32. At the time, it, too, was statutorily mandated. See Morrison v. State, 276 Ga. 829, 877, 877 n. 11 (2003). The Court finds no Supreme Court precedent establishing that this charge is unconstitutional, so AEDPA bars relief here, too. Hill, 662 F.3d at 1360.

Lastly, the trial court recharged the jury that a verdict of "guilty but mentally retarded" "would preclude any further deliberations by the jury regarding punishment and the Court would then automatically sentence the defendant to life in prison with eligibility for parole." Dkt. No. 14-7 at 60. Giving this recharge was an error, as the Georgia Supreme Court found. Heidler, 273 Ga.

at 63. However, the Georgia Supreme Court also correctly recognized the error's harmlessness beyond a reasonable doubt, because "[a] finding of guilty but mentally retarded would not have been authorized" given the evidence. Id. ("[A]ll three court-appointed mental health experts testified that Mr. Heidler was not mentally retarded and that he had an IQ in the low-average range. There was no evidence presented to the contrary. In fact, Mr. Heidler's counsel conceded this point on closing argument . . ."). Thus, this is not a ground for relief. See Bester v. Warden, 836 F.3d 1331, 1338 (11th Cir. 2016) (observing that a court need not grant relief for an error that is harmless beyond a reasonable doubt). Accordingly, this claim fails.

F. The trial court wrongly instructed the jury as to merger of charges.

The Court cannot identify any such charge in the record. This claim is without merit and fails accordingly.

G. The trial court did not instruct the jury on lesser included offenses.

This is not a ground for relief because Mr. Heidler did not request any such charge or object to its omission. Heidler, 273 Ga. at 62-63; See United States v. Ford, 649 F. App'x 756, 759 (11th Cir. 2016) (per curiam) (citing United States v. Chandler, 996 F.2d 1073, 1099 (11th Cir. 1993) (holding that where a defendant fails to request an instruction on a lesser included offense, and fails to object to the omission of such an instruction

at trial, it is not error for a district court to fail to give such an instruction *sua sponte*). This claim fails.

- H. The trial court told the jury the case would not proceed to aggravation/mitigation if the jury gave a verdict of guilty but mentally ill or guilty but mentally retarded.

In fact, the trial court only charged this in reference to a verdict of "guilty but mentally retarded." Dkt. No. 14-7 at 60. As discussed above, this error was harmless beyond a reasonable doubt, so it is not a ground for relief. This claim fails.

- I. The trial court failed to adjust its definitions of child molestation and aggravated sodomy to the law and facts.

The trial court's definition of aggravated sodomy, in the context of all the jury instructions, was about as adjusted as two charges that were upheld by the Georgia Court of Appeals as adequate. Compare Dkt. No. 14-7 at 24 with Rice v. State, 243 Ga. App. 143, 145-146 (2000); Miles v. State, 201 Ga. App. 568, 570 (1991). Likewise, the trial court's definition of child molestation, taken in context, was about as adjusted as one upheld by the Georgia Court of Appeals as adequate. Compare Dkt. No. 14-7 at 24-25 with Clemens v. State, 318 Ga. App. 16, 20 (2012). Thus, this court finds both charges in the present case adequately adjusted. This claim, like the many before it, fails.

J. The trial court used vaguely defined statutory terms.

This claim is insufficient to meet Mr. Heidler's burden. He does not identify the jury instruction(s) or statutory term(s) that he is challenging. It fails.

K. The trial court made it possible for jurors to disagree as to what underlying crime supported a possible felony-murder verdict.

This issue was mooted by Mr. Heidler's malice-murder conviction. Darville v. State, 289 Ga. 698, 700 ("We conclude this issue is moot because [Defendant's] felony murder conviction was vacated by operation of law based on his conviction for the charge of malice murder."). This claim fails.

L. The trial court gave a burglary charge despite insufficient evidence that Mr. Heidler lacked authority to enter the Daniels' dwelling.

There was sufficient evidence. Mr. Heidler "entered the [Daniels'] home by using a ladder to climb through a bathroom window in the early morning hours, when the occupants were in nightclothes and in bed, and . . . stole a shotgun and committed murders once inside." Heidler, 273 Ga. at 61. This claim fails.

M. The trial court failed to adjust its insanity charge to the law and facts.

Mr. Heidler argues that the trial court should have charged the jury on "delusional compulsion" because testimony supported a delusion. Dkt. No. 124 at 51-52 ¶ 75. Mr. Heidler, however, points to no case law or authority for why the trial court should have

made this charge or why it was an error for the trial court not to do so. Moreover, Mr. Heidler does not explain how the Georgia Supreme Court's determination on this issue, Heidler, 273 Ga. at 62, was unreasonable. This claim fails.

N. The trial court failed to charge on delusional compulsion.

The Georgia Supreme Court found, "Heidler never requested such a charge, the evidence did not support it, and the defense never suggested that he was acting under a delusional compulsion when he committed the crimes." Heidler, 273 Ga. at 62; see also Ford, 649 F. App'x at 759 (citing Chandler, 996 F.2d at 1099). Accordingly, this claim, like the ones that precede it, fails.

IX. Trial Court's Restriction of Voir Dire

Mr. Heidler claims in his Third Amended Petition (but does not argue in his Brief in Support) that the trial court erroneously restricted the defense's questions of prospective jurors during voir dire. This claim, however, was never raised on direct appeal or in the state habeas proceedings. As the State argues in its Answer to the Third Amended Petition, dkt. no. 128, this claim is unexhausted. Further, this claim is procedurally defaulted because any attempt to exhaust in the Georgia courts would be futile. See O.C.G.A. § 9-14-51 (requiring a state habeas petitioner to raise "[a]ll grounds for relief . . . in his original or amended petition," or else such ground for relief is waived—with

exceptions that do not apply here). Finally, Petitioner has not attempted to show cause and prejudice for this failure or that procedural default would result in a miscarriage of justice. Accordingly, this claim fails.

X. Photographic and Video Evidence

Mr. Heidler claims that the trial court's admission of "inflammatory, prejudicial, and cumulative photographs of the victim[s]" that had "limited relevancy and materiality" and whose "prejudicial impact outweighed any probative value" violated his constitutional rights. Dkt. No. 124 at 65 ¶ 108. This claim fails. Here, the trial court "admitted into evidence five photographs of the victims taken at the crime scene." Id. In one, the bedsheet that had been covering Mrs. Daniels' body had been removed. Heidler, 273 Ga. at 59. Jurors were also shown a crime-scene videotape. Id.

This did not violate the U.S. Constitution. "The introduction of graphic photographic evidence rarely" does. Jacobs v. Singletary, 952 F.2d 1282, 1296 (11th Cir. 1992). Mr. Heidler has given this Court no reason to think this case is an exception to that general rule, and this Court does not find the photographs in this case exceptionally gruesome within the universe of murder crime scene photographs. See Dkt. No. 14-3 at 4-8, 12-13.

The combined use of the photographs along with the videotape does not violate the Constitution, either. The videotape gave

jurors "a three dimensional view" of the "physical relationship" of the bodies to each other and their surroundings, while the photographs provided "a close up." Rhodes v. Sec'y, Dep't of Corrs., No. 8:09-CV-1350, 2010 WL 3819358, at *67 (M.D. Fla. Sept. 30, 2010); Crone v. McDonough, No. 5:05cv47, 2006 WL 3483487, at *9 (N.D. Fla. Dec. 1, 2006). This sort of evidentiary presentation is constitutionally permissible. Accordingly, this claim fails.

XI. Cumulative Constitutional Violation

Mr. Heidler claims that "the sheer number and types of errors involved in his proceedings—when considered as a whole"—add up to a constitutional violation. Dkt. No. 124 at 68 ¶ 116. However, there is nothing to add up because—for the reasons above—all of Mr. Heidler's constitutional claims fail. Accordingly, there is nothing to accumulate, and, as such, Mr. Heidler cannot prevail on his cumulative-error claim. Insignares v. Sec'y, Fla. Dep't of Corr., 755 F.3d 1273, 1284 (11th Cir.2014). It is denied.

XII. Constitutionality of Georgia's Lethal-Injection Scheme

Mr. Heidler claims Georgia's lethal-injection scheme violates due process and the Eighth Amendment because state law forbids him from discovering the source and quality of the drugs that will be used to execute him, and the compounded pentobarbital that will be used poses an unconstitutional risk of pain, suffering, and harm. Dkt. No. 124 at 78-86 ¶¶ 141-56. Binding precedent forecloses both claims. See generally Wellons v. Comm'r, Ga. Dep't of Corrs., 754

F.3d 1260 (11th Cir. 2014) (per curiam); accord Jones v. Comm'r, Ga. Dep't of Corrs., 811 F.3d 1288, 1293-94, 1296 (11th Cir. 2016).

XIII. Sufficiency of the Evidence

Mr. Heidler claims there is insufficient evidence supporting his guilty verdict, given that he proved he was "guilty but mentally ill" beyond a reasonable doubt. Dkt. No. 124 at 86-92 ¶¶ 157-71. Even assuming he did, "a verdict of guilty but mentally ill does not preclude a death sentence" under Georgia law, so "the relevant issue [here] is the role that mental health evidence . . . played during the mitigation phase." Cook v. Upton, No. 5:09-CV-25, 2010 WL 1050404, at *20 (M.D. Ga. Mar. 18, 2010), aff'd sub nom. Cook v. Warden, Ga. Diagnostic Prison, 677 F.3d 1133 (11th Cir. 2012) (per curiam); Lewis v. State, 279 Ga. 756, 764 (2005). This Court adequately discussed that issue above, when it found that the state habeas court reasonably found that Mr. Heidler's trial counsel's investigation and presentation of mitigating evidence was adequate. See supra I.C. This claim is denied.

XIV. Incompetence During State Habeas Proceedings

Mr. Heidler claims he was incompetent during the state habeas proceedings, dkt. no. 124 at 93-96 ¶¶ 172-78, but "[h]e cites no authority for the proposition that the Constitution requires a death row inmate to be mentally competent to assist counsel in pursuing state habeas relief or to participate in state habeas proceedings." Delk v. Johnson, 273 F.3d 1098, 2001 WL 1066775, at

*4 (5th Cir. Aug. 13, 2001) (per curiam) (unpublished opinion) (emphasis omitted). He thus seeks adoption of a new procedural rule—which cannot be applied retroactively on collateral review.” Id. (citing e.g. Caspari v. Bohlen, 510 U.S. 383, 389 (1994)). Therefore, this claim fails.

XV. Incompetence During These Proceedings

Mr. Heidler’s final claim is that he is incompetent now and so these proceedings violate his constitutional rights. Dkt. No. 124 at 96-98 ¶¶ 179-84. But the U.S. Supreme Court has held that there is no constitutional or statutory right to competence in federal habeas proceedings. See Ryan v. Gonzales, 568 U.S. 57, 64, 66 (2013). This claim, like all the claims the precede it, fails.

XVI. Certificate of Appealability

Federal Rule of Appellate Procedure 22(b)(1) provides in relevant part: “In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court . . . the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a [COA] under 28 U.S.C. § 2253(c).” Under 28 U.S.C. § 2253(c)(2), a COA should be issued “only if the applicant has made a substantial showing of the denial of a constitutional right.” The United States Supreme Court has recently reemphasized that “[t]he COA inquiry . . . is not coextensive with a merits analysis.” Buck v. Davis, 137 S. Ct. 759, 773 (2017). Rather, at this stage, “the only question is

whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. (internal quotation marks and citation omitted).

Here, Mr. Heidler has not made a substantial showing of the denial of a constitutional right. The Court **DENIES** a Certificate of Appealability finding that no jurist of reason could disagree with the Court's conclusions on the issues presented in these claims.

CONCLUSION

For the reasons above, Mr. Heidler's Third Amendment to Petition for a Writ of Habeas Corpus by a Person in State Custody, dkt. no. 124, is **DENIED**.

SO ORDERED, this 12th day of December, 2019.



HON. LISA GODBEY WOOD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

**In the United States District Court
for the Southern District of Georgia
Statesboro Division**

JERRY SCOTT HEIDLER,

Petitioner,

v.

No. 6:11-CV-109

GDCP WARDEN,

Respondent.

ORDER

This matter is before the Court on Petitioner Jerry Scott Heidler's Motion to Alter or Amend the Court's Habeas Order. Dkt. No. 139. It is fully briefed and ripe for review. Dkt. Nos. 140, 145. For the reasons outlined below, Mr. Heidler's motion is **DENIED**.

STANDARD OF REVIEW

Rule 59(e) allows a party to move the court to alter or amend its judgment no later than 28 days after the entry of judgment. Fed. R. Civ. P. 59(e). The decision to alter or amend a judgment is left to the "sound discretion of the district judge." Lawson v. Singletary, 85 F.3d 502, 507 (11th Cir. 1996) (citations omitted). "Relief under Rule 59(e) is only appropriate where the moving party shows: (1) there has been a change in law; (2) new evidence is available; or (3) reconsideration is necessary to correct a clear

error or to prevent manifest injustice.” Williams v. United States, 2018 U.S. Dist. Lexis 117214 at *1 (S.D. Ga. July 13, 2018). Rule 59(e) is not a means to “relitigate old matters, or to raise arguments or to present evidence that could have been raised prior to the entry of judgment.” Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008). Instead, the movant must “demonstrate why the court should reconsider its decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.” United States v. Battle, 272 F. Supp. 2d 1354, 1357 (N.D. Ga. 2003) (internal quotations and citations omitted).

DISCUSSION

Mr. Heidler identifies five broad categories in which the Court allegedly erred, including (1) finding certain claims insufficiently pled, (2) finding certain claims procedurally defaulted, (3) finding several sub-claims absent from the petition, (4) not adjudicating certain claims, and (5) deciding not to grant a Certificate of Appealability (“COA”) on any of Mr. Heidler’s claims. See Dkt. No. 139.¹ Each alleged error is addressed below.

I. The Court did not err in denying certain claims because they were insufficiently pled.

Mr. Heidler alleges that the Court erred in finding nine Strickland claims insufficiently pled along with four claims of

¹ Mr. Heidler specifically names each claim that he believes the Court erred in adjudicating in an appendix to his motion. Dkt. No. 139-1.

prosecutorial misconduct. See Dkt. No. 139-1 at 1-3. In doing so, Mr. Heidler argues that he, in fact, satisfied the heightened fact pleading standards of Rule 2(c) and even if he did not, the Court should have given him an opportunity to amend his petition prior to issuing the Habeas Order.

As stated in the Habeas Order, several of Mr. Heidler's claims did not satisfy the heightened pleading requirements set forth under Rule 2(c) because they were conclusory in nature or otherwise lacking in substantive facts. See, e.g., Dkt. No. 136 at 31. As the Eleventh Circuit explained in Hittson v. GDCP Warden, "generalized allegations" are not enough. 759 F.3d 1210, 1264-65 (11th Cir. 2014). As other judges in the Southern District of Georgia have explained:

[Fact pleading] states each legal claim and lays out a detailed factual basis for it. It uses [specific record evidence] to show the court why the petitioner is entitled to relief. It also uses [the record to] evidence that the petitioner is pleading facts, not merely opinion.

Arrington v. Warden, GDCP, 1:17-cv-022, 2017 WL 4079405, at *4 (S.D. Ga. Sept. 14, 2017). In other words, a fact-pled petition, over a notice-pled petition, "paints a clear picture that allows the court to make a preliminary judgment about whether a real possibility of constitutional error" exists. Id. (internal quotation marks omitted); See also Advisory Committee Note to Rule 4 of the Rules Governing Section 2254 Cases for the U.S. District

Courts (hereinafter "Advisory Note Rule 4") ("[N]otice pleading is not sufficient [in habeas proceedings], for the petition is expected to state facts that point to a real possibility of constitutional error."); see also Mayle v. Felix, 545 U.S. 644, 655 (2005) (quoting Advisory Note Rule 4).

As explained in the Habeas Order, the claims now at issue in this motion were all conclusory, opinion-driven, and unsubstantiated on their face. Such insufficiently pled claims—presented frequently in a bullet point list of single sentence accusations—do not rise to the fact pleading requirements of Rule 2(c). Therefore, there is no reason for the Court to amend its Habeas Order on this ground.

Next, Mr. Heidler argues that even if the Court was correct in finding that he did not satisfy the relevant pleading standards, the Court should have given Mr. Heidler another opportunity to amend his petition so he could address his insufficiently pled claims. In support, Mr. Heidler points to Notes of the Advisory Committee on the 2004 Amendments to the Habeas Rules, which provide:

Now, under revised Rule 3(b) the clerk is required to file a petition, even though it may otherwise fail to comply with the provisions in revised Rule 2(c). The committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2(c).

See also Wingfield v. Sec'y, Dep't of Corr., 203 F. App'x 276, 278 (11th Cir. 2006) ("Rule 2(e) authorizes the court to return a petition to the petitioner if it fails to substantially comply with the requirements of Rule 2. Rule 2 does not, however, expressly authorize the *sua sponte* dismissal of a petition for the petitioner's failure substantially to comply with the rule." (internal quotation marks omitted)).

These citations to authority are misplaced. Both the Rules Notes and the Wingfield opinion address a situation in which the Court, on its own motion, dismisses a petitioner's habeas petition without affording him the opportunity to amend his petition and without addressing the petition's merit, as briefed by the parties. Here, Mr. Heidler was afforded three opportunities to amend his petition. He was also afforded the opportunity to amend his merits brief. Only after multiple rounds of amendment opportunities and briefing did the Court adjudicate his claims.

Moreover, the Court's decision to deny some of Mr. Heidler's claims for being insufficiently pled did not violate any right he had to fair notice or his right to be "heard at a meaningful time and in a meaningful manner," as Mr. Heidler also contends. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotation marks and citations omitted). Mr. Heidler's case was before this Court for seven years; however, during those seven years, the Court afforded Mr. Heidler two lengthy stays and the opportunity to amend

his petition three times (which he did). At every opportunity to amend his petition, Mr. Heidler—like all federal habeas petitioners—was on ample notice that his petition must be fact pled. See Borden v. Allen, 646 F.3d 785, 810 (11th Cir. 2011) (“If . . . Rule 2(c)(1) and (2) of the § 2254 Rules should cause a petitioner (or his counsel) to doubt what the words ‘specify all grounds’ and ‘state the facts supporting each ground’ mean, the **CAUTION** contained in paragraph (9) of the ‘Instructions’ should remove such doubt.” (emphasis original)).² Mr. Heidler simply failed to fact-plead many of his claims, after being given multiple opportunities, over several years, to do so.

II. The Court did not err in denying certain claims because they were procedurally defaulted.

Next, Mr. Heidler argues that the Court erred in finding certain claims procedurally defaulted. Specifically, Mr. Heidler contends: (1) that certain claims were, in fact, adequately presented to the state courts for consideration; (2) the state waived its exhaustion defenses; and (3) the state court actually adjudicated some of these claims on their merit. As explained

² Paragraph (9) of the Model Form available to all petitioners, represented by counsel or otherwise states:

Caution: You must include in this petition all grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds on a later date.

Petition for Relief from a Conviction or Sentence by a Person in State Custody, Habeas Corpus Rules, Form App., 28 U.S.C. § 2254 (emphasis in original).

below, Mr. Heidler has not met his burden of persuasion under Federal Rule of Civil Procedure 59(e).

A. Mr. Heidler did not adequately present to the State Courts any of the claims this Court determined were procedurally not exhausted.

First, Mr. Heidler contends that the Court erred in finding various claims not exhausted because Mr. Heidler did not include them in his certificate of probable cause ("CPC") application. Mr. Heidler contends that such a factual finding was in error because "Mr. Heidler raised each of these claims in his state habeas petition," and then "incorporated by reference all of the claims and arguments raised in the state habeas pleadings" through a footnote in his CPC application. Dkt. No. 139 at 8 (internal quotation marks omitted) (quoting Dkt. No. 31-15 at 6 n.1). Mr. Heidler contends that such notice to the Georgia Supreme Court satisfies the requirement that a federal habeas petitioner must present claims in a CPC application before he can exhaust his state remedies as to those claims. See O.C.G.A. § 9-14-52(b). However, such bare-bones bootstrapping of various claims does not provide the state court with an "opportunity to apply controlling legal principles to the facts bearing upon (his) constitutional claim." Kelley v. Sec'y for Dep't of Corr., 377 F.3d 1317, 1343-44 (11th Cir.2004).

Moreover, Mr. Heidler has not carried his burden under Rule 59(e) of showing any "law of a strongly convincing nature" to

induce the Court to reconsider this finding. Battle, 272 F. Supp. 2d 1354, 1357 (N.D. Ga. 2003). Specifically, Mr. Heidler argues that his case is analogous to Whatley v. Terry, 284 Ga. 555 (2008), wherein the petitioner specifically argued four claims in his CPC application but also incorporated by reference all the claims he raised in the state habeas proceeding. There, the Georgia Supreme Court granted Mr. Whatley's CPC application. Id. at 644. In review of the habeas court's order, the Georgia Supreme Court made no distinction between the four claims specifically raised in the CPC application and those incorporated by reference, and it addressed at least one claim Mr. Whatley raised only by reference in his CPC application. Id. at 664. Therefore, Mr. Heidler suggests the Whatley decision implies the Georgia Supreme Court has a full opportunity to consider claims only incorporated by reference in CPC applications, no matter the procedural history of the case.

The Court disagrees, particularly in this case, because here, the Georgia Supreme Court summarily denied Mr. Heidler's CPC application. Thus, Mr. Heidler's case is more analogous to the petitioner's case in O'Kelley v. Warden, GDCP, 4:15-cv-104, 2019 WL 1452514, at *8 (S.D. Ga. Apr. 2, 2019), reconsideration denied sub nom. O'Kelley v. Warden, GDCP, 4:15-cv-104, 2020 WL 2772769 (S.D. Ga. May 28, 2020). There, prior to filing his federal habeas action, the Georgia Supreme Court summarily denied Mr. O'Kelley's CPC application. See id. at *7-8. Then, upon federal habeas review,

the District Court held that although the Georgia Supreme Court has full access to the habeas record, thoroughly reviewed the evidence in the case, and reviewed the arguments made in petitioners CPC application before it summarily denies a petitioner's CPC application, such a process does not necessarily mean the Georgia Supreme Court conducts a review of "every theoretical argument that could have been raised in a CPC application," including those raised through incorporating reference. Id. at *7-8. Ultimately, the District Court held:

Petitioner is mandated to properly raise his claims so that the underlying state court can fully consider the merits of each claim on review. Kelley, 377 F.3d at 1344. A reviewing court is unable to fully assess claims that have simply been incorporated by reference [Therefore,] Petitioner's footnote is an improper attempt to preserve claims without allowing the underlying state court a full and fair opportunity to review the merits of his claims. Accordingly, this Court finds that Petitioner's attempt to incorporate his claims by reference is insufficient [to consider such claims exhausted].

Id. at 8.

Here, Mr. Heidler's CPC application was summarily denied. Despite its review of the evidence and arguments presented in the CPC application, it is unlikely that the Georgia Supreme Court would peruse the entire habeas record in search of claims that a petitioner did not feel were worthy of explicitly including in his CPC application. Thus, Mr. Heidler's attempt to incorporate his claims by reference is insufficient to consider such claims

exhausted for federal habeas review purposes. Mr. Heidler's reliance on the Georgia Supreme Court's procedurally distinct Whatley opinion is unpersuasive and not of a "strongly convincing nature to induce the court to reverse" its prior decision on this very same issue. See Battle, 272 F. Supp. 2d at 1357. Accordingly, the Court will not alter or amend the Habeas Order on this basis.

B. The State did not waive its procedural defenses.

Second, Mr. Heidler argues that the Court erred in finding certain claims unexhausted and procedurally defaulted because the State included "an exhaustion waiver" in its answer. Dkt. No. 139 at 10-11. Petitioner has made this argument repeatedly in the past. See, e.g., Dkt. No. 130 at 6-8. Rule 59(e) is not a means to "relitigate old matters" that were first presented "prior to the entry of judgment." Exxon Shipping Co., 554 U.S. at 485 n.5. Accordingly, this is not a ground upon which this Court can justify altering or amending the Habeas Order.

C. Certain claims raised by Mr. Heidler remain unexhausted because the State Courts did not adjudicate them on the merits.

Third, Mr. Heidler argues that the Court "dismissed the majority of his prosecutorial misconduct claims as unexhausted" despite the Georgia Supreme Court examining "the prosecutor's guilt-innocence closing argument and the entirety of the penalty phase for misconduct." Dkt. No. 139 at 13. Mr. Heidler contends that this general review constitutes exhaustion by the state courts

and therefore these claims are properly before this Court. Id. Mr. Heidler presented this same argument in his Reply Brief. Dkt. No. 130 at 39. The Court addressed these arguments fully in the Habeas Order. See Dkt. No. 134 at 35-39. Accordingly, this is not a ground upon which this Court can justify altering or amending the Habeas Order.

III. The Court did not err in rejecting several “subclaims” first presented in Mr. Heidler’s brief because the Court correctly concluded that such claims were absent from his petition.

The Court did not err in denying several of Mr. Heidler’s “subclaims” regarding ineffective assistance of counsel and prosecutorial misconduct. Despite Mr. Heidler’s contention that these “subclaims” were in his petition, the Court appropriately viewed them as separate and new claims not raised until Mr. Heidler filed his (amended) brief on the merits. Mr. Heidler now contends that these “subclaims” merely “elaborated on and explained” the claims already presented in his petition. Dkt. No. 139 at 14. However, in making this argument, Mr. Heidler presents no new evidence and points to no convincing legal authority that shows the Court’s view of Mr. Heidler’s “subclaims” as new claims was a manifest error of law or fact. See Marion, 562 F.3d at 1335. Accordingly, the Court will not alter or amend the Habeas Order on this ground.

IV. The Court did not erroneously fail to adjudicate certain claims.

Next, Mr. Heidler's motion alleges that the Court "inadvertently failed to address certain claims" including "the claim that trial counsel erred in failing to strike certain jurors for cause" and a claim that Mr. Heidler's counsel "failed to challenge the admission of videotaped interviews of children victims." Dkt. No. 139 at 15. After revisiting Mr. Heidler's petition, the Court could not locate either of those claims as now urged by Petitioner.

First, Mr. Heidler made no claim "trial counsel erred in failing to strike certain jurors for cause" in his Third Amended Petition for Habeas Corpus. As such, this argument necessarily fails. Nonetheless, Mr. Heidler does make a claim very similar to the one above, so the Court will briefly address that claim. A single clause within the eighteenth bullet point of the thirty-fourth paragraph of his Third Amended Petition alleges Mr. Hiedler's trial counsel was ineffective because they "failed to challenge the trial court's refusal to excuse certain jurors for cause." Dkt. No. 124 at ¶ 34.³ Then, in his merit briefing and reply, Mr. Heidler attempts to transform this claim into a claim that his counsel were ineffective for not challenging an allegedly

³ Of note, Mr. Heidler Third Amended Petition alleges that the state trial *court*—not his trial *counsel*—failed to strike certain prospective jurors for cause. *Id.* at ¶ 57 (Claim Five), ¶ 96 (Claim Seven), ¶ 107 (Claim Eight).

biased juror, Ms. Squires. Dkt. No. 127 at 165-76; Dkt. No. 130 at 33-34, 34 n. 6 (“Respondent does not at all contest the merits of Mr. Heidler’s claim that trial counsel allowed a biased juror, Patricia Squires, to sit on his jury. Instead, Respondent argues only that the claim is unexhausted and procedurally defaulted . . . Respondent’s argument comes too late . . . Respondent has known since October 7, 2011, that a component of Petitioner’s ineffective assistance of counsel claim in these proceedings is trial counsel’s ‘fail[ure] to challenge the trial court’s refusal to excuse certain jurors for cause[.]’” (citing Doc. 1 at 19 (Petition); see also Dkt. No. 127 at 15)). The Court squarely addressed—and denied—this claim, in the Habeas Order. See Dkt. No. 136 at 30.

Finally, even if the Court were to construe Mr. Heidler’s claim that “trial counsel erred in failing to strike certain jurors for cause” as a re-articulation of the claim made in his Third Amended Petition, and then disregarded Petitioners own arguments about that claim in his merit briefing, this claim would still fail because it is not sufficiently plead under Rule 2(c). As such, this claim was due to be denied. And it was denied, along with all the others, in the Habeas Order. See Dkt. No. 136 at 69 (denying the entirety of Mr. Heidler’s Third Amended Writ of Habeas Corpus). For these several reasons, Mr. Heidler has shown no reason to disturb the Court’s conclusion on this claim.

Second, Mr. Heidler's petition does not claim "Mr. Heidler's counsel . . . fail[ed] to challenge the admission of videotaped interviews of the child victims." Dkt. No. 139 at 15. Instead, it claims something a little different: his counsel "failed to adequately object to and litigate the improper admission of certain evidence, including but not limited to videotapes and photographs." Dkt. No. 124 ¶ 34 (fortieth bullet point).⁴ Even if the Court construed these two distinct claims as one-in-the-same, Mr. Heidler's argument on reconsideration still comes up short because the Court did address such a claim in the Habeas Order. See Dkt. No. 136 at 31 n.7 ("The following claim also fails for the same reason: '[c]ounsel failed to adequately object to and litigate the improper admission of certain evidence, including but not limited to videotapes and photographs.'" (quoting Dkt. No. 124 at 24). Accordingly, the Court will not alter or amend its Habeas Order on this ground.

V. The Court's decision to deny Mr. Heidler a COA was appropriate.

Finally, Mr. Heidler requests that this Court reconsider its denial of a COA on any of his claims including: (1) whether counsel was ineffective because they failed to properly investigate and present mitigating evidence of Mr. Heidler's mental health, (2)

⁴ In his petition, Mr. Heidler's more specific allegations regarding the admission of the videotaped interviews with Mr. Heidler's child victims were directed to the trial court, not trial counsel. See Dkt. No. 124 (Claim 5, Claim 9).

whether the state habeas court correctly rejected the claim that counsel were ineffective in failing to investigate and present evidence of the neglect and physical abuse Mr. Heidler allegedly suffered as a child, (3) whether counsel were ineffective in failing to conduct an adequate voir dire, (4) Mr. Heidler's substantive incompetency claim, (5) whether Mr. Heidler's trial counsel had a conflict of interest, and (6) this Court's dismissal of numerous claims on procedural grounds. Dkt. No. 139 at 16-26. The presentation of these requests, however, is little more than an effort to relitigate matters that the Court previously decided in its Habeas Order. Dkt. No. 136.

A COA does not issue as a matter of course. Miller-El v. Cockrell, 537 U.S. 322 337 (2003). A petitioner must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented were adequate to deserve encouragement to proceed further." Id. at 327. As for merits claims, a petitioner must show that "reasonable jurist would find the district court's assessment . . . debatable or wrong." Lamarca v. Sec'y, Dep't of Corr., 568 F.3d 929, 934 (11th Cir. 2009). Where claims were denied on procedural grounds, a petitioner must show that: (1) "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" and (2) "jurists of reason would find it debatable whether [he has stated]

a valid claim of the denial of the constitutional right." Id.
(quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

After an extensive and exhaustive review of the entire record, it is clear Jerry Scott Heidler has not shown that the Court's decision is debatable among reasonable jurists, nor has he shown that any of his claims validly state a denial of a constitutional right. Therefore, no COA should issue.

CONCLUSION

For the above stated reasons, Mr. Heidler's Motion to Alter or Amend the Habeas Order, dkt. no. 139, is **DENIED**.

SO ORDERED, this 1st day of September, 2020.



HON. LISA GODBEY WOOD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13752-P

JERRY SCOTT HEIDLER,

Petitioner - Appellant,

versus

WARDEN, GDCP

Respondent - Appellee.

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

ORDER:

Appellant's motion for certificate of appealability is GRANTED IN PART as to the following issues:

1. Whether the district court erred in concluding that the state habeas court did not unreasonably apply Strickland v. Washington, 466 U.S. 688 (1984) in finding that trial counsel was not ineffective in investigating evidence of Mr. Heidler's mental health for the guilt phase of the trial.
2. Whether the district court erred in concluding that the state habeas court did not unreasonably apply Strickland v. Washington, 466 U.S. 688 (1984) in finding

that trial counsel was not ineffective in investigating mitigating evidence for the penalty phase of Mr. Heidler's trial.

3. Whether the district court erred in concluding that Mr. Heidler did not sufficiently plead; and did not exhaust, his claim that trial counsel was ineffective by failing to adequately present information and evidence in pretrial motions relating to Mr. Heidler's waiver of constitutional rights during interrogation by the police.

The motion for certificate of appealability is DENIED IN PART as to all other issues.

/s/Robert J. Luck
UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

January 11, 2021

Cory Isaacson
Georgia Resource Center
104 MARIETTA ST NW STE 260
ATLANTA, GA 30303

Appeal Number: 20-13752-P
Case Style: Jerry Scott Heidler v. Warden GDCP
District Court Docket No: 6:11-cv-00109-LGW

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov.

The enclosed order has been ENTERED.

Appellant's brief is due 40 days from the date of the enclosed order.

Sincerely,

DAVID J. SMITH, Clerk of Court

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

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13752-P

JERRY SCOTT HEIDLER,

Petitioner - Appellant,

versus

WARDEN, GDCP

Respondent - Appellee.

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

Before: MARTIN, LUCK, and LAGOA, Circuit Judges.

BY THE COURT:

Appellant's motion for leave to file a motion for clarification and reconsideration of the January 11, 2021 order on the motion for a certificate of appealability up to 7,070 words is GRANTED.

Appellant's motion for clarification of the January 11, 2021 order on the motion for a certificate of appealability is GRANTED. The first two issues in the certificate of appealability are clarified as follows:

1. Whether the district court erred in concluding that the state habeas court did not unreasonably apply Strickland v. Washington, 466 U.S. 688 (1984) in finding that trial counsel was not ineffective in investigating and presenting evidence of Mr. Heidler's mental health for the guilt phase of the trial.

2. Whether the district court erred in concluding that the state habeas court did not unreasonably apply Strickland v. Washington, 466 U.S. 688 (1984) in finding that trial counsel was not ineffective in investigating and presenting mitigating evidence for the penalty phase of Mr. Heidler's trial.

Appellant's motion for reconsideration of the January 11, 2021 order on the motion for a certificate of appealability is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13752-P

JERRY SCOTT HEIDLER,

Petitioner - Appellant,

versus

WARDEN, GDCP

Respondent - Appellee.

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

Before: WILSON, LUCK, and LAGOA, Circuit Judges.

BY THE COURT:

Appellant's renewed motion to expand the certificate of appealability is DENIED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

February 14, 2022

Cory Isaacson
Georgia Resource Center
104 MARIETTA ST NW STE 260
ATLANTA, GA 30303

Appeal Number: 20-13752-P
Case Style: Jerry Scott Heidler v. Warden GDCP
District Court Docket No: 6:11-cv-00109-LGW

Electronic Filing

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

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

MOT-2 Notice of Court Action

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-13752

JERRY SCOTT HEIDLER,

Petitioner-Appellant,

versus

WARDEN, GDCP

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 6:11-cv-00109-LGW

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

2

Order of the Court

20-13752

Before WILSON, LUCK, and LAGOA, 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.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 10, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-13752-P
Case Style: Jerry Scott Heidler v. Warden GDCP
District Court Docket No: 6:11-cv-00109-LGW

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

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

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

**In the United States District Court
for the Southern District of Georgia
Statesboro Division**

JERRY SCOTT HEIDLER,

Petitioner,

v.

CV 611-109

BRUCE CHATMAN, Warden, Georgia
Diagnostic and Classification
Center,

Respondent.

ORDER

Presently before the Court is Petitioner's Motion for Evidentiary Hearing. Dkt. No. 68. Petitioner seeks an evidentiary hearing on his petition for writ of habeas corpus, in order to prove the following: (1) that state post-conviction counsel provided ineffective representation in failing to raise a claim that Petitioner was denied his Sixth Amendment right to effective representation at the sentencing phase of his capital trial due to trial counsel's alleged conflict of interest; and (2) that trial counsel in fact labored under an actual conflict of interest, arising from their simultaneous representation of another criminal defendant, that adversely affected their

representation of Petitioner. Id. at pp. 1-2. Upon due consideration, Petitioner's Motion (dkt. no. 68) is **DENIED**.

PROCEDURAL BACKGROUND

After a jury trial in the Superior Court of Walton County, Georgia, Petitioner was convicted of four counts of malice murder, three counts of kidnapping (one of which was with bodily injury), one count of aggravated sodomy, one count of aggravated child molestation, one count of child molestation, and one count of burglary. Dkt. No. 12-7, pp. 108-16; Dkt. No. 12-8, pp. 1-2. Following the sentencing phase of trial, the jury found that aggravating circumstances existed and recommended a sentence of death for each of the four counts of malice murder. Dkt. No. 12-8, pp. 13-16. Accordingly, in September 1999, the trial court sentenced Petitioner to death for each of the four malice murder counts. Id. at pp. 18-25. The trial court also sentenced Petitioner to consecutive terms of life imprisonment for the kidnapping with bodily injury and aggravated sodomy counts; thirty years (consecutive) for the aggravated child molestation count; and twenty years (consecutive) for each of the remaining counts. Id. at pp. 26.

Petitioner filed a motion for a new trial and later amended that motion. Id. at pp. 41-42, 55-56. Following a hearing, Petitioner's amended motion for a new trial was denied. See id. at pp. 44-48; Dkt. No. 12-9, pp. 1-14. The Supreme Court of

Georgia affirmed Petitioner's death sentences but reversed the sentence for aggravated child molestation, finding that it merged into the aggravated sodomy count. Heidler v. State, 537 S.E.2d 44, 55-57 (Ga. 2000); Dkt. No. 15-18. The court affirmed all of Petitioner's other sentences. Heidler, 537 S.E.2d at 55-57. Thereafter, the United States Supreme Court denied Petitioner's petition for writ of certiorari. Dkt. No. 15-23; Dkt. No. 16-2.

Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia ("state habeas court"), in November 2001. Dkt. No. 16-3. In April 2004, Petitioner amended that petition. Dkt. No. 18-4. In January and May of 2006, the state habeas court conducted evidentiary hearings. See Dkt. No. 31-12, p. 9. In August 2009, the state habeas court denied Petitioner relief from his convictions and sentences. Id.; Dkt. No. 31-13. The Supreme Court of Georgia denied Petitioner's petition for a certificate of probable cause to appeal the denial of habeas corpus. Dkt. No. 31-18.

In October 2011, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court. Dkt. No. 1. Petitioner amended his petition in April 2012, dkt. no. 45, and again in April 2014, dkt. no. 70. Presently before the Court is Petitioner's Motion for Evidentiary Hearing and

Memorandum of Law in Support. Dkt. No. 68. The Motion is fully briefed. See Dkt. Nos. 68, 73, 78, 90, 92, 94.

FACTUAL BACKGROUND

On July 6, 1999, at around 5:00 AM, Petitioner escaped from the Toombs County Detention Center in Lyons, Georgia. See Dkt. No. 68, p. 12; Dkt. No. 14-9, pp. 5-7. Later that day, Petitioner was found about six miles away, walking down the middle of Highway 15 toward Vidalia, Georgia. Dkt. No. 68, p. 12 (citing Dkt. No. 14-9, pp. 7, 17-19).

On August 11, 1999, prior to the start of Petitioner's trial, the prosecution notified the defense of its intent to introduce evidence of the escape as a non-statutory aggravating circumstance in the penalty phase of the trial. Id. (citing Dkt. No. 12-5, pp. 27-28 ("The State of Georgia, prior to trial, notifies the Defendant of it's [sic] intent to introduce evidence of the following incidents which comprise non-statutory aggravating circumstances On July 6, 1999[,] the defendant escaped from the Toombs [C]ounty Jail and was recaptured ten hours later.")).

Petitioner's trial occurred "from August 23 to September 3, 1999." Heidler, 537 S.E.2d at 49 n.1. The penalty phase took place on September 2 and 3, 1999. Dkt. No. 68, p. 13. According to Petitioner, "[t]he clear focus of the prosecution's penalty phase presentation was Mr. Heidler's alleged future

dangerousness, and Mr. Heidler's successful excursion from the jail was the highlight of that evidence." Id. In his opening statement, the prosecutor asserted, "One of the things we're going to be introducing into evidence other than the horrible circumstances of this case, which we've already done and we're not going to repeat that, of course, is that he is still and remains an extremely dangerous man." Id. (citing Dkt. No. 14-7, p. 94). Later in the opening, the prosecutor stated,

[P]erhaps the most compelling piece of evidence we're going to present to you at this part of the case is that Jerry Heidler will escape because he did. We're going to show you that this man is looking for a way to get out of incarceration and he remains the same horrible killer he was on December 4, 1997. Not only can he escape, he will.

Id. (citing Dkt. No. 14-7, p. 97).

According to Petitioner, Jerry White, the jail administrator, provided the primary evidence regarding Petitioner's future dangerousness at the penalty phase of the trial—testifying about Petitioner's escape from jail, his seemingly uncanny ability to remove locks without the aid of sophisticated tools, and his possession of multiple shanks. Id. at pp. 13-14 (citing Dkt. No. 14-9, pp. 4-31). When asked about how Petitioner escaped, White answered that Petitioner "had got a hold of somehow a piece of hacksaw blade and had sawed out one bar of the window, and once he got outside then he got cut through the fence and left." Id. at p. 14 (citing Dkt. No. 14-

9, p. 5). White also testified on direct examination about additional security incidents at the jail involving Petitioner, including an incident where he removed a jail door lock that opened with a key—which caused even a locksmith to express puzzlement at how this was done without some kind of tools—and incidents where Petitioner removed security screws, only removable with a special type of a tool, from the cages over fire alarms and from mirrors. See id. (citing Dkt. No. 14-9, pp. 7-9).

On White's cross-examination, Petitioner's lead trial counsel, Michael Garrett, elicited testimony that another inmate named "Buttersworth" had escaped a short time before Petitioner and that Petitioner may have used a portion of the hacksaw blade that Buttersworth used in his escape. Id. at pp. 14-15. White testified that, to his knowledge, Petitioner and Buttersworth were never in a cell together and the two did not know each other in jail. See id. (citing Dkt. No. 14-9, pp. 14-17). The questioning proceeded as follows:

Q. You said he sawed through the bars.

A. Yes, sir.

Q. And he squeezed through a little hole.

A. Right, sir.

Q. In the security screen.

A. Right, sir.

Q. I guess he made that hole with a hacksaw blade.

A. A piece of hacksaw blade. Yes, sir.

Q. Because it's a half or a piece of a hacksaw blade.

A. Right, sir.

Q. He got that from another inmate didn't he?

A. We'd had the same incident a few months back, but the best we can tell it was a piece left over from there.

Q. Okay. When you say the same incident, ya'll [sic] had another escape.

A. Yes, sir. Same way.

Q. Same way. He did the same thing Scottie Heidler did.

A. Yes, sir.

Q. He sawed through the bars?

A. Yes, sir.

Q. And then sawed through the security screen and ran away.

A. Through the fence, yes, sir.

* * *

Q. Okay, and this is the second escape ya'll [sic] have had in six months?

A. In that type, yes, sir.

Q. Okay. Did you catch that other fellow?

A. Yes, sir.

Q. Who-what was his name?

A. Buttersworth.

Q. Was he ever in a cell with Scottie Heidler?

A. No, sir.

Q. Do they know each other?

A. No, sir, not that I'm-not to my knowledge. They did not know each other in jail.

Dkt. No. 14-9, pp. 14-17.

Petitioner contends that the prosecutor's aim in his penalty phase closing argument was to show that Petitioner had the ability to escape in the past and would do so again if the jury did not sentence him to death. Dkt. No. 68, pp. 15-16. The prosecution did reference Petitioner's escape in the penalty phase closing argument:

Mr. Garrett made light of this a little bit with Mr. White. He called it, what other mischief did he get in? James Snell, who has to watch Jerry Scott Heidler, did not call it mischief. Maybe it is mischievous to someone who stands in the courtroom with him for five or six days, but it's not mischief to a man who watches him for 60 years. There's nothing funny about the fact that a man has constantly taken apart the prison or jail he's constituted in. There's nothing funny about the fact that this man has escaped and has taken four lives. That's not mischief; that is evil. That's not anger or rage; that is evil.

Dkt. No. 14-11, p. 47.

In the state habeas proceedings, Petitioner's post-conviction counsel argued that trial counsel were ineffective based on their handling of Petitioner's escape. Petitioner's state habeas petition alleged that trial counsel "failed to conduct an adequate investigation into the circumstances surrounding Petitioner's escape from Toombs County Detention Center, which would have uncovered readily available and compelling evidence which would have mitigated the escape." Dkt. No. 68, p. 18 (citing Dkt. No. 18-25, p. 15).

Before the state habeas evidentiary hearing, post-conviction counsel made efforts to develop the basis for this claim by, for example, interviewing Buttersworth, as an inmate who escaped prior to Petitioner, and obtaining records relating to the escape charges against Buttersworth. Id. at p. 19. Eleanor Hopkins, an investigator and mitigation specialist working with Petitioner's post-conviction counsel, interviewed Buttersworth in Claxton, Georgia, to determine whether he could offer mitigating evidence concerning the circumstances of Petitioner's escape or the general conditions of the jail at the time of Petitioner's incarceration. Dkt. No. 68-7, p. 2. Buttersworth informed Hopkins that he remembered Petitioner and said that, while they were never housed in the same block, they were, at times, housed in adjacent blocks, or "pods." Id. at p. 3. According to Buttersworth, "[t]he pods circled a central

control area[,] and inmates could communicate between adjacent pods by talking to each other through screens at the end of each pod." Id. Buttersworth recalled having spoken to Petitioner in this way. Id.

In speaking about his own escape, Buttersworth informed Hopkins that many other inmates knew what he was doing and watched him doing it. Id. He further stated that "anyone could have told [Petitioner] how he escaped." Id. While on escape watch from a previous failed escape attempt, Buttersworth used a hacksaw blade to cut bars from a window. Id. He used a mixture of cigarette ash and toothpaste to cover the damage to the bar to conceal the fact that it had been cut. Id. He sawed the plexiglass behind the bars, using a lighter to heat the blade, before unraveling the fence surrounding the jail and making his escape. Id.

Hopkins briefly asked Buttersworth about his representation by Kathy Palmer, who was also one of Petitioner's trial attorneys, as her name was mentioned in Buttersworth's court records. Id. Hopkins was not told by Petitioner's post-conviction counsel that Palmer's representation of both Buttersworth and Petitioner had any special legal significance, so her focus remained on developing mitigating evidence that had not been presented to the jury. Id. at pp. 3-4. Near the end of discovery, post-conviction counsel asked Hopkins to see if

Buttersworth would sign an affidavit attesting to the information that he had given Hopkins. Id. at p. 4. However, Hopkins learned from Buttersworth's girlfriend that he was working in Louisiana on reconstruction efforts following Hurricane Katrina, and despite Hopkins leaving a message for Buttersworth to contact her, Hopkins did not hear from Buttersworth or persist in efforts to locate him before the state habeas hearings commenced. Id.

Following the state habeas hearing post-conviction counsel argued in their post-hearing brief that Petitioner was "able to escape for two primary reasons: (1) another inmate had already escaped in the same manner, and (2) the construction of the jail was substandard." Dkt. No. 31-2, p. 14. Post-conviction counsel asserted that Petitioner "followed Mr. Buttersworth's lead and escaped in the same manner—even down to using part of the hacksaw blade Mr. Buttersworth had left behind." Id.

The state habeas court made note of Petitioner's escape in its order denying Petitioner relief. The court observed that

[t]he most important evidence presented to show Petitioner's future dangerousness to the rest of society was Petitioner's escape from jail. Petitioner planned and successfully executed a fairly complex plan of escape. First, Petitioner acquired a piece of hacksaw and then began cutting through a bar in his cell. It took Petitioner several days to cut through the bar and, in order to cover up his criminal behavior, Petitioner made a paste out of toothpaste and ash and put it over the cut in the bar. Petitioner then timed his exit to coincide with the

guards' rotation and slipped out through the bars in his cell, cut through the perimeter fence and fled on foot.

Dkt. No. 31-12, p. 23 (citations omitted). The state habeas court also made reference to post-conviction counsel's claim that "[t]rial counsel failed to conduct an adequate investigation surrounding Petitioner's escape from the Toombs County Detention Center in order to mitigate this event at trial[.]" Id. at p. 22. But according to Petitioner, "the state habeas court did not specifically address it when rejecting the ineffective assistance of counsel claim, perhaps because relatively little attention had been paid to this claim by [post-conviction] counsel." Dkt. No. 68, p. 19.

Now, Petitioner has supplied the Court with information showing that Joel Anthony Buttersworth escaped from the Toombs County Detention Center on November 10, 1998. Dkt. No. 68-1. Buttersworth was indicted in Toombs County on the escape charge during the August 1999 grand jury term. Dkt. No. 68, p. 17 (citing Dkt. No. 68-2). Prior to Buttersworth's escape, Kathy Palmer, the contract public defender for the county, had been appointed to represent him on the charges for which he was being held, and after his escape, she was appointed to represent him on the escape charge as well as an accompanying theft charge. Id. (citing Dkt. Nos. 68-3 to -4). Palmer, who was also one of Petitioner's appointed trial attorneys, successfully negotiated

a plea deal for Buttersworth on his escape and theft charges following Petitioner's trial, and Buttersworth, represented by Palmer, pled guilty to those charges in November of 1999. Id. at pp. 17-18 (citing Dkt. Nos. 68-4 to -6).

Petitioner alleges that his trial attorney, Palmer, had a debilitating conflict of interest arising out of her simultaneous representation of Buttersworth and Petitioner. Id. at p. 17. Petitioner further maintains that post-conviction counsel had information that Palmer was representing Buttersworth on the escape charge, while trying to defend Petitioner against a death sentence that the prosecutor sought to obtain by invoking the nonstatutory aggravating circumstance of Petitioner's escape. Id. at p. 21. Petitioner alleges that this information was available in the court records that post-conviction counsel obtained, and Palmer herself acknowledged the simultaneous representation in her state habeas testimony. Id. She was asked,

Q. And are you familiar with how Scott escaped?

A. Somehow he had gotten a little blade. I think the guy who had escaped before, *who was also my client, by the way* -

Q. He probably was.¹

¹ Petitioner takes issue with this response: "Rather than moving to amend the petition to allege a conflict of interest at that juncture,

A. He, that guy had left some blades that were hidden, I think, maybe two of them that were not found when he escaped, and Scott had those blades and then he used the blades to saw. Apparently, when the new jail was built the subcontractor had used materials that were substandard and were not called for by the contract

Id. (citing Dkt. No. 19-3, p. 81).

According to Petitioner, Palmer's conflict of interest was obvious. Id. at p. 22. He contends that she could not have placed her client, Buttersworth, on the witness stand in Petitioner's defense, or presented any evidence from other witnesses that implicated Buttersworth in his own escape, without violating her obligations as counsel to Buttersworth, although, in Petitioner's view, "the failure to do so violated her obligations as counsel to Mr. Heidler." Id. Additionally, Palmer could not have used the information she received in confidence from Buttersworth without Buttersworth's express consent, but she would have been derelict in seeking that consent from Buttersworth, given that his case was pending pretrial at the time of Petitioner's trial. Id. Thus,

[post-conviction] counsel simply noted that it was to be expected that Ms. Palmer, the contract public defender for the county, would have represented Mr. Buttersworth as well as [Petitioner]." Dkt. No. 68, p. 21.

according to Petitioner, Palmer's simultaneous representation placed her in a situation of inherently divided loyalty. Id. (citation omitted).

Unlike a typical ineffective assistance of counsel claim, where a petitioner must prove both that his attorney's performance was deficient and that the deficiency prejudiced the defense, Strickland v. Washington, 466 U.S. 668, 687 (1984), an ineffective assistance claim stemming from a demonstrable conflict of interest does not require a showing of prejudice, see dkt. no. 68, pp. 23-24 (citing Cuyler v. Sullivan, 446 U.S. 335, 348-50 (1980) ("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.")). In Petitioner's view, any reasonably competent post-conviction attorney would have recognized the alleged conflict and that it would greatly benefit his client to raise the conflict claim. Dkt. No. 68, p. 23. Petitioner argues that post-conviction counsel's failure to raise the conflict claim can have had no legitimate strategic basis, as counsel were already attempting to prove that trial counsel were ineffective in their failure to present evidence to mitigate the escape under the more demanding standard set forth in Strickland. Id. at p. 24. Thus, according to Petitioner, post-conviction counsel were

ineffective in failing to raise the conflict of interest claim.

Id.; Dkt. No. 70, ¶¶ 40-48.

LEGAL STANDARD

A federal evidentiary hearing is required if three conditions are met:

(1) the petition alleges facts that, if proved, entitle the petitioner to relief . . . ; (2) the fact-based claims survive summary dismissal because their factual allegations are not palpably incredible or patently frivolous or false . . . ; and (3) for reasons beyond the control of the petitioner and her lawyer . . . , the factual claims were not previously the subject of a full and fair hearing in the state courts or, if a full and fair state court hearing was held, it did not result in state court factfindings that resolve all of the controlling factual issues in the case.

Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure 1013-16 (6th ed. 2011) (alterations and internal quotation marks omitted); see also Schriro v. Landrigan, 550 U.S. 465, 474 (2007) ("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.").²

² The third condition is based on the six enumerated circumstances in Townsend v. Sain, 372 U.S. 293 (1963), in which a court must hold an evidentiary hearing:

If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not

DISCUSSION

Under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), "[a] critical prerequisite for any state petitioner seeking federal habeas relief is the requirement that he first properly raise the federal constitutional claim in the state courts[]," which is known as the "exhaustion requirement." Ward v. Hall, 592 F.3d 1144, 1156 (11th Cir. 2010) (citing 28 U.S.C. § 2254(b)). When a petitioner fails to exhaust certain claims in state court, he is said to be in procedural default with regard to those claims. "Pursuant to the doctrine of procedural default, a state prisoner seeking federal habeas corpus relief, who fails to raise his federal constitution claim in state court, or who attempts to raise it in a manner not permitted by state procedural rules is barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default." Alderman v. Zant, 22 F.3d 1541, 1549 (11th Cir. 1994) (citations omitted).

Until recently, federal habeas petitioners could not point to the ineffectiveness of state habeas counsel in order to show

adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Williams v. Allen, 542 F.3d 1326, 1347 (11th Cir. 2008) (quoting Townsend, 372 U.S. at 313).

"cause" for the procedural default of claims that were not raised in state court. See Coleman v. Thompson, 501 U.S. 722, 757 (1991) ("Because [the petitioner] had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of [his] claims in state court cannot constitute cause to excuse the default in federal habeas.").

A few years ago, however, the United States Supreme Court, in Martinez v. Ryan, 132 S. Ct. 1309, 1318-19 (2012), "created a limited, equitable exception to Coleman where, (1) 'a [s]tate requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding,' as opposed to on direct appeal; (2) 'appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland'; and (3) 'the underlying ineffective-assistance-of-trial-counsel claim is a substantial one.'" Hittson v. GDCP Warden, 759 F.3d 1210, 1260-61 (11th Cir. 2014) (quoting Martinez, 132 S. Ct. at 1318-19). Soon thereafter, the Supreme Court decided Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013), in which it "expanded Martinez's exception to states that effectively prohibit defendants from raising ineffective-assistance claims on direct appeal." Id. at 1261 (citing Trevino, 133 S. Ct. at 1921). In Trevino, the Supreme Court found that the Martinez holding applies in states, like Texas, where the "procedural framework, by reason of its

design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." 133 S. Ct. at 1921. Therefore, in states where Martinez and Trevino apply, because the procedural systems operate such that most petitioners do not have a meaningful opportunity to present ineffective assistance of trial counsel claims on direct appeal, the ineffectiveness of state habeas counsel can constitute "cause" for procedurally defaulted claims that were not presented in state court, if the other requirements of Martinez are also met.

The parties vigorously dispute whether or not Martinez and Trevino should be considered in this case, given the structure and operation of the procedural system in Georgia. The Court stayed this case pending a potential decision regarding this issue from the Eleventh Circuit in Hittson, but the Eleventh Circuit then declined to address the issue in that case. 759 F.3d at 1262. The court stated,

Hittson has focused on Georgia's requirements for raising ineffective-assistance claims on direct appeal. He asserts that, under Georgia law, "there is no 'meaningful opportunity' to litigate ineffectiveness on direct appeal." Hittson Supp. Br. at 10 (quoting Trevino, 133 S. Ct. at 1921). While that may be true, we leave that question for another day because Hittson has failed to establish either of the other two elements of the Martinez exception—that "appointed counsel in the initial-review collateral proceeding, where the claim should have been raised,

was ineffective under the standards of Strickland"; or that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one." Martinez, 132 S. Ct. at 1318.

Id. The Hittson court went on to address each of those two elements in turn before finding that they were not satisfied. Id. at 1262-72.

For the purposes of this Order, the Court will assume, arguendo, as Petitioner proposes, that Martinez and Trevino do apply in Georgia, and consider the other two Martinez requirements in assessing whether Petitioner can establish cause to excuse the procedural default of his conflict of interest claim: (1) whether the underlying ineffective assistance of trial counsel claim is a substantial one, and (2) whether appointed counsel in the initial review collateral proceeding was ineffective under the standards of Strickland. See id. at 1262.

The Supreme Court explained in Martinez that a "substantial" underlying ineffective assistance of trial counsel claim is one that "has some merit." 132 S. Ct. at 1318-19 (citing Miller-El v. Cockrell, 537 U.S. 322 (2003)). The Eleventh Circuit in Hittson took the Supreme Court's reference to Miller-El to mean that lower courts should apply the standard for issuing a certificate of appealability, "which requires 'a substantial showing of the denial of a constitutional right.'"

759 F.3d at 1269 (quoting 28 U.S.C. § 2253(c)(2)). A petitioner must show that "jurists of reasons would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Id. at 1270 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). The petitioner does not need to show that some jurists would grant the petition, because a claim can be debatable even though every jurist of reason might agree, after fully considering the case, that the petitioner would not prevail. Id. (citing Miller-El, 537 U.S. at 338). The Eleventh Circuit, in setting up its consideration of the substantiality of the underlying ineffective assistance of counsel claim in Hittson, also drew an analogy to the preliminary review conducted by district judges in § 2254 proceedings. See id. The rules for those proceedings allow district judges to dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief," and the Advisory Committee Notes to this rule instruct that "the petition is expected to state facts that point to a real possibility of constitutional error." Id. (internal quotation marks omitted) (quoting Rule 4 of the Rules Governing Section 2254 Cases and Advisory Committee Notes).

Typically, when a defendant claims ineffective assistance of counsel, he must show that his counsel's performance was constitutionally deficient and that the deficient performance

prejudiced the defense. Strickland, 466 U.S. at 687. However, there is a limited presumption of prejudice when counsel is burdened by an actual conflict of interest. Id. at 692 (citing Cuyler, 446 U.S. at 345-50).

To establish an ineffective assistance of trial counsel claim arising out of a conflict of interest, where there was no objection made at trial, a petitioner "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Ferrell v. Hall, 640 F.3d 1199, 1244 (11th Cir. 2011) (quoting Cuyler, 446 U.S. at 348). Courts within the Eleventh Circuit employ a two-pronged test derived from Cuyler for assessing conflict of interest claims. See United States v. Novaton, 271 F.3d 968, 1010 (11th Cir. 2001) (citing Freund v. Butterworth, 165 F.3d 839, 859-60 (11th Cir. 1999)). First, a court must assess whether an "actual conflict" of interest exists, which requires a factual showing of inconsistent interests. Id. at 1010-11. A speculative or hypothetical conflict of interest is not enough to constitute a Sixth Amendment violation. Id. at 1011 (citing Burden v. Zant, 24 F.3d 1298, 1305 (11th Cir. 1994)). If the petitioner does demonstrate that there was an actual conflict, the court must then consider whether that conflict adversely affected his representation. Id.

To prove adverse effect, a [petitioner] must satisfy three elements. First, he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the [petitioner] need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used, rather he only need prove that the alternative possessed sufficient substance to be a viable alternative. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

Id. (citing Freund, 165 F.3d at 860) (citations and quotations omitted). If there is no adverse effect, there is no presumption of prejudice. Id. Under Georgia law, which Respondent suggests Petitioner would have had to address if post-conviction counsel had raised the conflict claim in the state habeas proceedings, dkt. no. 92, pp. 14-15, a defendant making an ineffectiveness claim based on conflict of interest must similarly demonstrate that a conflict of interest existed and that it significantly affected counsel's performance. State v. Abernathy, 715 S.E.2d 48, 51 (Ga. 2011) (citing Edwards v. Lewis, 658 S.E.2d 116, 120 (Ga. 2008)). An example of a significant effect on representation would be "where counsel is shown to have refrained from raising a potentially meritorious issue due to the conflict." Id.

The parties dispute both whether there was an actual conflict of interest (or whether Petitioner has made a factual showing that he and Buttersworth had inconsistent interests) and whether any alleged conflict adversely affected the representation. The Court does not see any affirmative facts, as opposed to speculative and hypothetical suggestions, that demonstrate that Petitioner and Buttersworth had inconsistent interests, but it will assume, for the sake of argument, that an actual conflict did exist based on Palmer's simultaneous representation of the two men.

Even doing so, Petitioner fails to show that Palmer's simultaneous representation had an adverse effect on his counsel's performance. First, he must point to a plausible alternative defense strategy or tactic that might have been pursued. Petitioner contends that, if not for Palmer's conflict, Buttersworth or other inmates could have been called to testify to suggest that Petitioner merely learned how to escape from Buttersworth's instructions, in order to mitigate the prosecution's suggestion that Petitioner was an escape mastermind. While that strategy might be considered plausible, it is certainly not reasonable under the facts of this case, which is the next requirement in the adverse effect test. As Respondent points out, no matter who represented Buttersworth, he could not have been forced to waive his Fifth Amendment right

not to testify against himself and confess to his crime of escape prior to his guilty plea. Moreover, if, as Petitioner suggests should have happened, other inmates had testified about Buttersworth's escape and the instructions left behind, they also would have been asked on cross-examination about Petitioner's escape, his behavior in jail, and why they did not follow Buttersworth's escape directions while Petitioner did. Such a situation would have been potentially disastrous for Petitioner.

Palmer, the allegedly conflicted trial counsel, testified in the state habeas hearing that trial counsel's strategy for the escape evidence was to minimize it. Dkt. No. 19-4, p. 35. She said:

A. Well, we didn't necessarily want the jury to know he escaped from jail because, you know, really bad guys escape from jail and we thought that could be held against him. I'm sure it was. Maybe Jerry, Jerry White actually testified about that, as I recall. But we didn't want to dwell on it or go into it too much because, you know, bad guys escape and we didn't want the jury to think of Scott as a bad guy.

Q. That was your strategy for that particular bit of evidence?

A. As best I can recall.

Id. Petitioner suggests that this attempt to minimize the escape at sentencing was not successful, dkt. no. 94, pp. 15-16,³ but it appears that even greater attention would have been paid to the escape if trial counsel had called more witnesses to testify regarding Buttersworth's escape, as in Petitioner's alternative proposed strategy. The alternative strategy also is not reasonable, because it puts focus on the escape—a very bad fact for Petitioner—rather than away from it, like trial counsel's chosen strategy aimed to do.

Additionally, the fact that Petitioner followed someone's instructions on how to escape from jail and did, in fact, escape from jail does not obviously mitigate against his future dangerousness, which is ultimately what the jury was considering, and there is a great chance a jury would find that it actually weighs in favor of future dangerousness that someone would utilize such instructions if they were available. Thus, it would not have been reasonable for trial counsel to pursue a strategy of actively presenting evidence with the potential to hurt more than help their client, when a more neutral strategy—that of minimization—existed. Finally, though there is no evidence that the alternative strategy was even considered, and

³ Contrary to this suggestion, however, certain details of the escape that came out in the state habeas proceedings did not come out at trial. For example, though the state habeas court described Petitioner's use of cigarette ash and toothpaste to cover the cut in the bar, White did not testify regarding this detail at trial. Compare Dkt. No. 31-12, p. 23, with Dkt. No. 14-9, pp. 4-31.

Petitioner has thus not shown a link between the simultaneous representation and trial counsel's decision to forego the proposed alternative strategy of defense. Moreover, logic would dictate that if trial counsel did consider the alternative strategy, they would have rejected it because it was not reasonable and not because of the simultaneous representation. Rather, the evidence shows that counsel's strategy was to minimize evidence of the escape at trial because of the perception that "bad guys escape from jail," and there is nothing to indicate that this reasonable strategic choice, as opposed to any alternative one, had to do with Palmer's simultaneous representation of Buttersworth and Petitioner. For the same reasons, the Court finds that Palmer's simultaneous representation of Buttersworth and Petitioner did not significantly affect trial counsel's performance under Georgia law.

Thus, because there was no adverse effect from Palmer's simultaneous representation, prejudice is not presumed. See Novaton, 271 F.3d at 1011. The standard for prejudice under Strickland is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Essentially, the Court must

determine whether the jury would have decided not to sentence Petitioner to death if trial counsel had been unimpeded by any alleged conflict and, presumably, had engaged in Petitioner's proposed strategy of putting Buttersworth or other inmates on the stand to testify about the fact that Petitioner did not orchestrate the plan to escape from the jail but merely followed someone else's escape plan.

Having just found that Petitioner's proposed strategy was not reasonable, because the plan drew attention to bad facts for the Petitioner and had the potential to harm Petitioner's case, the Court has no trouble finding that there is not a reasonable probability that the outcome would have been different if trial counsel had not been subject to the alleged conflict and had engaged in the proposed alternative strategy. Moreover, at trial, for each of the four murder charges, the jury found two statutory aggravating factors to exist, beyond a reasonable doubt: the first being that the murder was committed during the commission of other capital felonies (the murders of the other three victims), and the second being that the murder was committed during the commission of a burglary. Dkt. No. 12-8, pp. 13-16.⁴ The statutory aggravating factors, the nature of

⁴ In terms of which aggravators could support the death penalty, the Georgia Supreme Court arbitrarily determined, in accordance with the principle of "mutually supporting aggravating circumstances," that the murder of a "Mr. Daniels" would serve as the statutory aggravating circumstance as to Petitioner's murder of the other three victims, and

the crimes committed by Petitioner, and Petitioner's other behavior in prison completely apart from the escape also contribute to the Court's finding that the outcome of the sentencing phase would have been the same even if trial counsel had no conflicts and engaged in the strategy for which Petitioner now advocates.⁵

Jurists of reason would not find it debatable whether the petition states a valid claim of the denial of a constitutional right: it does not. See Hittson, 759 F.3d at 1269-70. Petitioner's underlying ineffective assistance of trial counsel claim, stemming from a conflict of interest, lacks any merit, and it is thus not "substantial" for the purposes of Martinez. 132 S. Ct. at 1318-19.

In order to benefit from Martinez, Petitioner would have to show both that post-conviction counsel was ineffective and that the underlying ineffective assistance of trial counsel claim was a substantial one. Hittson, 759 F.3d at 1260-61. Given the Court's finding that the underlying ineffective assistance of trial counsel claim was not substantial, there is no need to consider post-conviction counsel's ineffectiveness at this

set aside the other three murders as a statutory aggravating circumstance in Petitioner's murder of Mr. Daniels. Heidler, 537 S.E.2d at 57.

⁵ As to the nature of Petitioner's crimes, Petitioner was convicted of murdering four members of a family, including two children and two parents, all of whom were killed by shotgun blasts in their home. Heidler, 537 S.E.2d at 52.

junction. That makes sense, in this case, because post-conviction counsel could not be deemed ineffective for failing to raise a claim that the Court has determined lacks any merit. Regardless of any allegedly deficient performance by post-conviction counsel for failing to raise the allegedly obvious conflict claim, with its more defense-friendly standard (as compared to that of Strickland), there would be no prejudice caused by the alleged deficiency, because Petitioner would not be entitled to habeas relief on his underlying conflict of interest claim. Even if post-conviction counsel had raised the claim, there is not a reasonable probability that the outcome of the state habeas proceeding would have been different, because the conflict claim lacked any merit, as addressed by the Court above.

Post-conviction counsel were not ineffective, and the underlying ineffective assistance of trial counsel claim is not a substantial one. Thus, Petitioner has not shown cause, under Martinez, to excuse the procedural default of the claim that trial counsel were ineffective because of an alleged conflict of interest, and this Court may not consider the merits of that claim. See id. ("A federal court may consider the merits of a procedurally defaulted claim only if the petitioner can show both 'cause' for the default and 'prejudice' from a violation of

his constitutional right." (citing Wainwright v. Sykes, 433 U.S. 72, 84-85 (1977))).

An evidentiary hearing is not required in this case because the petition's factual allegations related to this claim do not entitle Petitioner to federal habeas relief. First, the claim Petitioner now seeks a hearing on is procedurally barred, and this Court cannot consider it on the merits. Second, in arriving at that conclusion, the Court did review the merits of the underlying constitutional claim at issue and deemed it to be without any merit. As a result, Petitioner's Motion for Evidentiary Hearing (dkt. no. 68) is **DENIED**.

SO ORDERED, this 28TH day of September, 2015.



LISA GODBEY WOOD, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

JERRY SCOTT HEIDLER,	)	
Petitioner,	)	
	)	
vs.	)	Case No. 6:11-CV-109 (LGW)
	)	
GDCP WARDEN,	)	CAPITAL CASE
Respondent.	)	

**MOTION TO ALTER OR AMEND THE COURT’S ORDER UNDER RULE
59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

Pursuant to Fed. R. Civ. P. 59(e), Petitioner Jerry Scott Heidler respectfully requests that this Court alter and amend the judgment entered on January 13, 2020, for the reasons set forth below.

I. The Court Erred in Denying Certain Claims on the Basis of Insufficient Pleading, and Mr. Heidler Respectfully Moves for the Court to Alter Its Order Accordingly.

In its final order, the Court denied many of Mr. Heidler’s claims, in whole or in part, for being insufficiently pled. *See* Doc. 136 at 21-22, 30, 30-32, 31 n.7, 32-34, 35, 35 n.10, 36-39, 56.¹ The dismissed claims include, but are not limited to, counsel’s failure to challenge a biased juror, counsel’s failure to litigate the

¹ These claims are specifically named in the appendix to this motion.

suppression of Mr. Heidler’s statement to law enforcement, and the prosecutor’s improper arguments regarding mental health evidence. As set forth below, dismissal of these claims as insufficiently pled was erroneous, and Mr. Heidler requests that the Court alter its order accordingly.

A. Mr. Heidler Satisfied the Relevant Pleading Standards.

Petitioners in § 2254 cases must “specify all the grounds for relief available to the petitioner” and “state the facts supporting each ground.” Rule 2(c), Rules Governing Section 2254 Cases. “In other words, Rule 2(c) ‘mandate[s] ‘fact pleading’ as opposed to ‘notice pleading[.]’” *Hittson v. GDCP Warden*, 759 F.3d 1210, 1265 (11th Cir. 2014) (citing *Borden v. Allen*, 646 F.3d 785, 810 (11th Cir. 2011)). Mr. Heidler respectfully submits that this Court erred in finding that he failed to meet those standards.

The Court used *Hittson* as a guide in finding Mr. Heidler’s claims to be insufficiently pled. *See* Doc. 136 at 6. But the Eleventh Circuit in *Hittson* found that “generalized allegations” of counsel’s ineffectiveness do not meet the requirements of Rule 2(c). *See Hittson*, 759. F.3d at 1264-65. In Mr. Heidler’s petition, on the other hand, the claims found by the Court to be insufficiently pled do not make “generalized allegations”; they instead identify specific facts in support of the alleged grounds for relief. *See, e.g.*, Doc. 124 at 19 (“Counsel failed to adequately

raise and litigate that Petitioner’s statement to law enforcement was the result of an illegal arrest and should be suppressed.”).

Mr. Heidler’s federal habeas petition raised general constitutional claims and then, under the umbrella of those claims, identified specific acts or omissions that amounted to unconstitutional error. Mr. Heidler raised, for example, a global ineffective assistance of counsel claim in his federal petition, *see* Doc. 1 at 7; Doc. 124 at 17, and he then identified the numerous specific acts and omissions of trial counsel that were deficient, *see* Doc. 1 at 7-13; Doc. 124 at 17-27. This manner of pleading is sufficient, and it conformed to the standards of practice in this district—which, until recently, *see Arrington v. Warden*, No. 1:17-CV-022 (S.D. Ga. Sept. 14, 2017),² had been unchallenged. Mr. Heidler therefore requests the Court alter its order accordingly.

² In *Arrington*, the district court dismissed *without* prejudice several claims as insufficiently pled and gave Mr. Arrington the opportunity to plead them sufficiently. *See Arrington*, Doc. 67 at 21. It did so, moreover, just over seven months after the petition was filed and before any briefing had occurred. *See Arrington*, Docs. 1, 67.

B. Even if the Court Disagrees That Mr. Heidler Has Met the Pleading Requirements, the Court Erred in Making Its Ruling After the Time Period Established by the Federal Habeas Rules and Without an Opportunity to Amend the Petition.

The federal Rules Governing Section 2254 Cases (“Habeas Rules”) instruct courts to undertake a review of a petitioner’s claims for compliance with Rule 2(c) “promptly” at the “preliminary” stage of the federal habeas proceedings. *See* Habeas Rule 4. As explained by the United States Supreme Court in *Mayle v. Felix*, 545 U.S. 644, 656 (2005):

A prime purpose of Rule 2(c)’s demand that habeas petitioners plead with particularity is to assist the district court in determining whether the State should be ordered to “show cause why the writ should not be granted.” § 2243. Under Habeas Corpus Rule 4, if “it plainly appears from the petition . . . that the petitioner is not entitled to relief in the district court,” the court must summarily dismiss the petition without ordering a responsive pleading.

Under the Habeas Rules, accordingly, the Court was supposed to assess the adequacy of the pleadings at the beginning of the case, not the end. Yet, this case was actively litigated for years without notice from the Court of any deficiency in the petition or its amendments. Even when the Court specifically addressed Rule 2(c)’s pleading standard in its August 23, 2013, order on procedural issues, Doc. 56 at 4, and dismissed several claims as unexhausted or procedurally defaulted, the Court did not find that any of the claims were insufficiently pled.

The Court, *sua sponte*,³ first reached the conclusion that certain claims were insufficiently pled in its December 12, 2019, order, more than seven years after Mr. Heidler first filed his petition. Making such a finding at that stage of the proceedings was error, and Mr. Heidler accordingly moves the Court to alter its order and reverse its insufficient pleading rulings.

Furthermore, the Habeas Rules and the general demands of due process demonstrate that the Court should have provided Mr. Heidler with the opportunity to amend any claims it considered insufficiently pled.

The Habeas Rules contemplate that, if a court finds a petition fails to meet the requirements of Rule 2(c), the petitioner will be given the opportunity to submit an amended petition:

Now, under revised Rule 3(b), the clerk is required to file a petition, even though it may otherwise fail to comply with the provisions in revised Rule 2(c). The Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2(c).

³ Respondent at no point argued that any of Mr. Heidler's claims were insufficiently pled. Respondent filed four separate Answer-Responses to Mr. Heidler's initial habeas petition and subsequent amended petitions, and in none of those Answer-Responses did Respondent challenge the sufficiency of the pleadings. In addition, Respondent's brief on procedural default issues does not allege that Mr. Heidler failed to sufficiently plead his claims under Rule 2. *See* Doc. 54. Even when the parties briefed the merits of Mr. Heidler's remaining claims, Respondent did not allege that any claims were insufficiently pled. *See* Doc. 129.

Notes of the Advisory Committee on the 2004 Amendments to the Habeas Rules; accord *Wingfield v. Sec’y, Dep’t of Corr.*, 203 Fed. Appx. 276, 278 (11th Cir. 2006) (“Rule 2(e) authorizes the court to return a petition to the petitioner if it fails to ‘substantially comply with the requirements of Rule 2’ [but it does not] expressly authorize the *sua sponte* dismissal of a petition for the petitioner’s failure substantially to comply with the rule.”); *Benjamin v. Sec’y for the Dep’t of Corr.*, 151 Fed. Appx. 869, 874 n.9 (11th Cir. 2005) (“[R]ecognizing the harsh results that can result from dismissals of § 2254 petition based on non-compliance with Rule 2(c), . . . district courts now are directed to accept a defective petition, with the condition that the petitioner submit a corrected petition.”).

Additionally, “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Thus, “[b]efore acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions.” *Day v. McDonough*, 547 U.S. 198, 210 (2006); accord *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1248 (11th Cir. 2015) (“Prior to dismissing an action on its own motion, a court must provide the plaintiff with notice of its intent to dismiss and opportunity to respond.”); *Rodriguez v. Fla. Dep’t of Corr.*, 748 F.3d 1073, 1080 (11th Cir. 2014) (“[A] [habeas] petitioner *must* have a meaningful opportunity to

challenge the propriety of rulings on procedural grounds.”) (emphasis in original). By dismissing Mr. Heidler’s claims without providing him any notice of insufficient pleading or an opportunity to amend the petition, the Court erroneously denied Mr. Heidler his due process right to notice and an opportunity to cure any error.

Because it was error to dismiss claims for pleading deficiencies without giving Mr. Heidler the chance to correct them, Mr. Heidler moves for the Court to alter its denial of claims on insufficient pleading grounds. Alternatively, he requests that the Court reopen the case and grant him leave to amend his petition to fix any deficiencies.

II. The Court Erred in Finding Certain Claims Procedurally Defaulted.

A. The Court Erred in Dismissing Certain Claims as Unexhausted Despite Their Adequate Presentation to the State Courts.

The Court denied multiple claims, in whole or in part, as unexhausted for failure to include them in the certificate of probable cause (CPC) application to the

Georgia Supreme Court.⁴ *See* Doc. 136 at 21-22, 30-34, 35, 35 n.9, 36-39.⁵ These include, but are not limited to, trial counsel's failure to challenge a biased juror, counsel's failure to litigate the suppression of Mr. Heidler's statement to law enforcement, the prosecutor's improper and misleading argument regarding mental health, and the prosecutor's improper Golden Rule argument. Respectfully, denial on that basis was error.

Mr. Heidler raised each of these claims in his state habeas petition. In seeking a certificate of probable cause, Mr. Heidler briefed certain issues in the limited space afforded to him (40 pages) and expressly stated that he was incorporating by reference "all of the claims and arguments" raised in state habeas pleadings and was not abandoning any claims. Doc. 31-15 at 6 n.1. He further explained that "[t]he page limitation ha[d] prevented him from setting out all of his claims herein."⁶

⁴ The Court dismissed some claims as unexhausted for failure to raise them in the state habeas court in addition to the CPC application. *See* Doc. 136 at 21, 35, 39. These claims, in fact, were included in Mr. Heidler's state habeas petition. *See* Doc. 18-25 at 18-19 (allegations regarding counsel's failure to ensure accurate and appropriate jury instructions); 25-26, 29 (allegations regarding the prosecutor's use of materially inaccurate arguments and improper remarks in closing argument); 29 (allegations regarding prosecutor's improper remarks in closing argument).

⁵ These claims are specifically named in the appendix to this motion.

⁶ There is not a verbatim match between the way all the claims were presented in the state habeas petition, federal habeas petition, and the merits brief, but a verbatim match is not required. *See Darity v. Sec'y, Dep't of Corr.*, 306 Fed. Appx. 532, 533 (11th Cir. 2009) ("Exhaustion requirements are not so rigid as to require a verbatim restatement of the claims brought in state court, but a petitioner must

The requirement to present claims in a CPC application in order to exhaust state remedies does not include a requirement to fully brief those claims. O.C.G.A. section 9-14-52(b), which requires an unsuccessful habeas petitioner to “file a written application for a certificate of probable cause to appeal,” does not set forth any briefing requirements; nor do the Georgia Supreme Court Rules dictate that all claims presented in a CPC application must be briefed. Ga. Sup. Ct. Rule 36.⁷

Because there exists no requirement that a claim be briefed in order for it to have been fairly presented in a CPC application, this Court was wrong to strike Mr. Heidler’s claims on the grounds that Footnote 1 of the CPC application was not

present his claims to the state court ‘such that a reasonable reader would understand each claim’s particular legal basis and specific factual foundation.’”) (internal citation omitted).

⁷ By contrast, Ga. Sup. Ct. Rule 22, which applies to “briefs” specifically, provides that “[a]ny enumerated error not supported by argument or citation of authority in the brief shall be deemed abandoned.” Read in light of the remainder of the Georgia Supreme Court Rules, it is clear that Rule 22 applies only to “briefs” and that a “brief” is distinct to other types of pleadings, including CPC applications, that may be filed in the Georgia Supreme Court. *See, e.g.*, Rule 17 (addressing formatting for “documents,” as in “petitions, applications and motions”); Rule 18 (addressing formatting for “briefs and responses”); Rule 20 (setting page limits for “[b]riefs, petitions for certiorari, applications for appeal, motions and responses”). *See, e.g., Hammock v. State*, 592 S.E.2d 415, 418 (Ga. 2004) (applying “well-known and related principles of statutory construction: *expression unius est exclusion alterius* (expression of one thing implies exclusion of another) and *expressum facit cessare tacitum* (if some things are expressly mentioned, the inference is stronger that those not mentioned were intended to be excluded)”).

adequate to fully exhaust his claims.⁸ Accordingly, Mr. Heidler requests the Court alter its order to reflect the inclusion of these claims in his CPC application.

B. The Court Erred in Finding Certain Claims Unexhausted and Procedurally Defaulted Despite the State’s Exhaustion Waiver.

Even assuming firmly established Georgia law required Mr. Heidler to fully brief each issue in his CPC application, Respondent expressly waived an exhaustion defense and this Court abused its discretion in dismissing claims on this basis. *See* Doc. 136 at 21-22, 30, 32-34, 35, 35 n.9, 36-39.⁹ “Acting through their attorneys general, states can waive procedural bar defenses in federal habeas proceedings.” *Hill v. Washington*, 441 F.3d 1374, 1376 (11th Cir. 2006). “[T]he state either may waive exhaustion expressly, or impliedly by failing to raise the issue or arguing that exhaustion would be futile.” *King v. Chase*, 384 Fed. Appx. 972, 974 (11th Cir. 2010); *see also Dorsey v. Chapman*, 262 F.3d 1181, 1186-87 (11th Cir. 2001) (finding state expressly waived exhaustion by declining to raise it in its answer to the petition).

⁸ Incorporating claims by reference in a CPC application has long been the pattern and practice in Georgia state habeas proceedings. Because of the 30-page limit provided for CPC applications, *see* Georgia Supreme Court Rule 20, it is practically impossible for capital petitioners to brief the entirety of their state habeas claims.

⁹ These claims are specifically named in the appendix to this motion.

In this case, Respondent affirmatively waived the exhaustion defense with respect to many of the claims this Court dismissed as unexhausted. Respondent asserted that these claims were exhausted and reviewable in his Answer-Responses to Mr. Heidler’s original and amended habeas petitions, *see* Docs. 10, 46, 75, 128, and echoed that waiver in his default briefing, *see* Doc. 54. The Court was required to accept Respondent’s waiver absent an explicit finding that invoking exhaustion *sua sponte* served an important federal interest. *See Vazquez v. Sec’y, Fla. Dep’t of Corr.*, 827 F.3d 964, 966-67 (11th Cir. 2016); *Esslinger v. Davis*, 44 F.3d 1515, 1524 (11th Cir. 1995).

On several of these claims, the Court excused Respondent’s exhaustion waiver on the grounds that the specifics of the claim were not obvious until Mr. Heidler’s merits brief and Respondent therefore could not have raised the exhaustion defense at the time of his answer to the petition. *See* Doc. 136 at 21-22, 30, 32-34, 36-37.¹⁰ But any argument that a “claim was so bare and conclusory that it could not determine exhaustion and truly waive it” needed to be made “in response to the § 2254 petition.” *Telamy v. Sec’y, Fla. Dep’t of Corr.*, 2019 U.S. App. LEXIS 29652, *4-5 (11th Cir.). Having waived exhaustion in its answer, Respondent cannot later assert that the claim was too broad to determine exhaustion. *See id.* at *4-5;

¹⁰ These claims are specifically named in the appendix to this motion.

accord Pike v. Guarino, 492 F.3d 61, 72-73 (1st Cir. 2007) (rejecting respondent’s belated nonexhaustion argument and noting that “to the extent that the [competency] claim was vague or not specifically identified *in haec verba* as a competence claim, it was incumbent upon the waiving party to use caution in the exercise of the waiver”).

Because Respondent affirmatively waived exhaustion and this Court “did not point to any ‘important federal interest’ . . . that required a rejection of the state’s waiver,” this Court erred in striking Mr. Heidler’s claims on exhaustion grounds. *Vazquez*, 827 F.3d at 967. Mr. Heidler moves for the Court to alter its order accordingly.

C. The Court Erred in Finding Certain Claims Unexhausted Despite the State Court’s Merits Adjudication of Those Claims.

The Court dismissed the majority of Mr. Heidler’s prosecutorial misconduct claims as unexhausted and procedurally defaulted. In addition to those claims having been exhausted because they were presented in his CPC application, *see supra* Section II(A), and Respondent having waived any exhaustion defenses as to these claims, *see supra* Section II(B), the Georgia Supreme Court adjudicated those claims on the merits on direct appeal.¹¹ Federal habeas review is therefore appropriate.

¹¹ Indeed, the state habeas court denied the misconduct claims on res judicata grounds. Doc. 31-12 at 10.

Though Mr. Heidler did not challenge every instance of the prosecutor's misconduct on direct appeal, the Georgia Supreme Court noted its statutory duty to "ma[k]e an independent examination of the prosecutor's [guilt-phase] closing argument" for misconduct and any resulting impact on sentencing. *Heidler v. State*, 273 Ga. 54, 61 (2000). The court concluded that "there is no reasonable probability that the argument changed the jury's exercise of discretion," nor "any evidence of prosecutorial misconduct." *Id.* The court also found, generally, that "[t]he prosecutor's conduct and argument in the penalty phase were not improper." *Id.* at 65. Because the Georgia Supreme Court examined the prosecutor's guilt-innocence closing argument and the entirety of the penalty phase for misconduct, the prosecutorial misconduct claims based on those arguments were exhausted and properly before the Court. *See, e.g., Horsley v. Alabama*, 45 F.3d 1486, 1489-90 (11th Cir. 1995) ("[A] state court's decision to raise and answer a constitutional question *sua sponte* will . . . permit subsequent federal habeas review.") (internal citation omitted). Mr. Heidler respectfully requests that this Court alter its order accordingly.

III. The Court Erred in Finding Several Subclaims Absent from the Petition.

The Court ruled that several of the claims briefed by Mr. Heidler were absent from his petition. *See* Doc. 136 at 21-22, 36-42.¹² This includes some pertaining to prosecutorial misconduct. However, Mr. Heidler set forth several misconduct claims in his petition, including a comprehensive claim that, during both phases of Mr. Heidler's trial, "the State delivered a series of improper, inflammatory, and unsubstantiated arguments[.]" Doc. 124 at 34. When briefing the merits of those claims, Mr. Heidler necessarily fleshed out the ways in which the prosecutor's arguments were "improper, inflammatory, [or] unsubstantiated." *See* Doc. 124 at 34. Mr. Heidler's merits brief, in other words, elaborated on and explained the instances of misconduct alleged in his petition; it did not assert new claims altogether. The Court's determination otherwise is erroneous.¹³

Furthermore, Respondent at no time claimed that the prosecutorial claims were not presented in the petition; the Court did so *sua sponte*. But the purpose of

¹² These claims are specifically named in the appendix to this motion.

¹³ For the same reason, this Court also erred in dismissing Mr. Heidler's claim that trial counsel were ineffective in failing to narrow their mental health defense and acquiescing in an overly broad jury charge on the mental health defense (Section IV(C)) on the ground that this claim was never presented and was procedurally defaulted. Doc. 136 at 21. To the contrary, this claim simply amalgamated allegations raised in both state and federal court challenging trial counsel's failure to seek proper instructions and to object to the prosecutor's presentation of inadmissible evidence. *See, e.g.*, Doc. 18-25 at 17, 18-19; Doc. 124 at 22-24.

proper pleading is to provide notice to the responding party as to the petitioner's claims. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 47 (1957) (highlighting that a petition must "give the defendant fair notice of what the plaintiff's claim is"). In this case, Respondent responded to these claims on the merits and at no time asserted they were not adequately included in the petition. It was error for the Court to do so on its own. *See, e.g., Greenlaw v. United States*, 554 U.S. 237, 243-244 (2008) ("[A]s a general rule, our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.") (internal citations omitted). Mr. Heidler therefore moves for this Court to alter its order accordingly.

IV. The Court Erroneously Failed to Adjudicate Certain Claims.

A federal district court is required to resolve all claims presented in a habeas corpus petition. *See Clisby v. Jones*, 960 F.2d 925, 938 (11th Cir. 1992). This Court, however, inadvertently failed to address certain claims, including the claim that trial counsel erred in failing to strike certain jurors for cause, and the claim that Mr. Heidler's counsel were ineffective for failing to challenge the admission of videotaped interviews of the child victims.

V. Mr. Heidler Moves This Court to Reconsider Its Decision Not to Grant a Certificate of Appealability on Any of Mr. Heidler's Claims.

This Court did not grant a certificate of appealability (“COA”) on any of Mr. Heidler’s claims, concluding that he failed to make “a substantial showing of the denial of a constitutional right.” Doc. 136 at 69. Mr. Heidler respectfully submits that the Court should reconsider its denial of a COA on the claims set forth below.

A. Standard for Granting a Certificate of Appealability.

A COA should issue where the petitioner makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a district court denies a habeas petition on procedural grounds, a COA should issue if “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

As the Supreme Court recently reiterated, the COA inquiry “is not coextensive with a merits analysis” and, “[a]t the COA stage, the only question is whether the applicant has shown that ‘jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.’” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336

(2003)). An appeal should be allowed when a claim is not “*squarely* foreclosed by statute, rule or authoritative court decision.” *Barefoot v. Estelle*, 464 U.S. 880, 893 n.4 (1983) (emphasis added). This threshold question should be decided without “full consideration of the factual or legal bases adduced in support of the claims.” *Buck* at 773 (quoting *Miller-El* at 336). Rather, 28 U.S.C. § 2253

do[es] not require petitioner to prove, before issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though *every* jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will *not* prevail.

Miller-El at 338 (emphasis added); *see also, e.g., Lott v. Attorney General*, 594 F.3d 1296, 1301 (11th Cir. 2010). “In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a [COA]” *Barber v. Comm’r, Ala. Dep’t of Corr.*, No. 19-12133-P, 2020 U.S. App. LEXIS 1554, at *2 (11th Cir. Jan. 16, 2020) (alteration in original) (quoting *Barefoot*, 463 U.S. at 893); *accord Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000) (“[I]n capital cases, doubts about whether a COA should issue must be resolved in favor of the petitioner.”) (citations omitted).

B. This Court Should Reconsider Its Denial of a COA on Whether Counsel Provided Ineffective Representation in Regards to Investigating and Presenting Mitigating Evidence of Mr. Heidler’s Mental Health.

This Court denied Mr. Heidler’s claim that counsel were ineffective for failing both to investigate and procure evidence of his serious mental illness, and to ensure that evidence would reach the jury through the testimony of the mental health experts who testified at trial. Doc. 136 at 20. Mr. Heidler respectfully submits that reasonable jurists could disagree with this Court’s determination that the state habeas court reasonably adjudicated this claim.

Because of trial counsel’s deficient performance, the jury at Mr. Heidler’s trial received a deeply misleading picture of his mental health. Counsel failed to investigate and present evidence that Mr. Heidler had a long history of psychosis dating back to his childhood, and was actively psychotic pending trial. Counsel were on notice of Mr. Heidler’s significantly impaired state, as they received letters from him describing his hallucinations and personally observed his bizarre behavior. Doc. 127 at 38, 87-88. But counsel failed to obtain a complete set of Mr. Heidler’s medical records from the jail, and never spoke with the jail’s mental health nurse, George Dykes. *Id.* at 89. Nor did they obtain the records of Mr. Heidler’s psychiatric treatment for a psychotic disorder during his incarceration. *Id.* at 90. Counsel also failed to contact witnesses who could have testified that Mr. Heidler had been psychotic as a young child. *Id.* at 92-94. Counsel furthermore provided the mental

health experts with voluminous records, but failed to direct them to significant portions demonstrating Mr. Heidler's longstanding psychosis, despite their concerns that the experts' diagnoses did not reflect the severity of Mr. Heidler's mental illness. *Id.* at 74, 94-96.

Rather than hearing about his psychosis-inducing thought disorder, jurors were led to believe, incorrectly, that Mr. Heidler's only problem was borderline personality disorder and/or antisocial personality disorder. The jurors heard that, in committing four homicides, "[b]asically . . . what he was doing was volitional and fairly goal directed." *Id.* Aggravating testimony like this allowed the prosecutor, in his penalty-phase closing arguments, to portray Mr. Heidler as a cold, rational actor, rather than a person suffering from a profound mental illness: "[W]hen are we going to expect him to take responsibility for his own actions? There's not one doctor, including the doctor brought here by the defense, that tells you he's not responsible for those actions. . . . Whatever his condition is, it's evil." Doc. 14-11 at 47.

Evidence of Mr. Heidler's severe mental illness "ha[d] the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior." *Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988). Such evidence also had the power to "substantially weaken[] the aggravating factors relied on by the jury at sentencing." *Jefferson v. GDCP Warden*, 941 F.3d 452, 485 (11th Cir. 2019); *see also Ferrell v. Hall*, 640

F3d 1199, 1235 (11th Cir. 2011) (granting sentencing relief in double homicide case due to counsel's failure to investigate and present evidence of defendant's severe mental illness and noting that "psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors") (quoting *Hardwick v. Crosby*, 320 F.3d 1127, 1164 (11th Cir. 2003)).

No one now disputes that Mr. Heidler is severely mentally ill and has been for most of his life. Even the state habeas court expressly observed that "for the majority of [his] life, [Mr. Heidler] has been significantly impaired by his mental illness and that it is 'highly unlikely' he will ever be free from the substantial impairments." Doc. 31-12 at 17. Reasonable jurists could thus conclude that it was unreasonable for the state habeas to find counsel effective despite their failure to bring Mr. Heidler's impairments to light. A COA accordingly should issue.

C. This Court Should Reconsider Its Denial of a COA on Whether the State Habeas Court Correctly Rejected the Claim that Counsel Were Ineffective in Failing to Investigate and Present Evidence of the Neglect and Physical Abuse Mr. Heidler Suffered as a Child.

Although Mr. Heidler's jury heard zero evidence of the neglect and physical abuse he suffered throughout his childhood, and, instead, were affirmatively misled to believe that Mr. Heidler was never abused, this Court denied his claim that his counsel were ineffective in failing to investigate and present such evidence at trial. Respectfully, Mr. Heidler contends that a COA should issue on this claim.

The jury never heard about Mr. Heidler's extensive family history of psychological disturbance, intellectual disability, and neglect, and how it impacted Mr. Heidler. Doc. 127 at 136-140. The jury never heard how Mr. Heidler was frequently and viciously beaten by his alcoholic step-father. *See id.* (describing the extensive evidence of abuse admitted at state habeas proceedings). In fact, Mr. Heidler's mother and sister claimed at trial that he was never beaten by his step-father. The contrast in the evidentiary pictures between trial and state habeas was staggering, and reasonable jurists could find that it likely would have made a difference to at least one juror. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (noting "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse") (internal citation omitted).

The state habeas court, however, unreasonably discounted all of the new evidence, citing Eleventh Circuit dicta regarding affidavit evidence. Doc. 31-12 at 62. But this does not provide a basis to disregard the evidence Mr. Heidler presented in state habeas. Under Georgia law, live and affidavit testimony are statutorily equivalent in habeas proceedings, *see* O.C.G.A. § 9-14-48(a), (c). Meanwhile, the

United States Supreme Court, as well as the Eleventh Circuit, have granted habeas relief based on affidavit evidence.¹⁴

Reasonable jurists could thus disagree with this Court's assessment that the state habeas court reasonably rejected this claim, especially when the evidence of Mr. Heidler's harsh childhood is considered with the totality of mitigating evidence. A COA accordingly should issue. *See, e.g., Davis v. Comm'r, Ala. Dep't of Corr.*, 2019 U.S. App. LEXIS 17039, *6 (11th Cir. 2019).

D. This Court Should Reconsider Its Decision to Deny a COA on Whether Counsel Were Ineffective in Failing to Conduct an Adequate Voir Dire.

As Mr. Heidler presented in his brief, trial counsel failed to protect Mr. Heidler's right to an impartial jury, thus depriving him of the effective assistance of counsel required by the Constitution. Despite counsel's submission of a memorandum of law on the subject of capital voir dire, it is apparent that trial counsel did not in fact follow the guidance of their own submission. The Court did not find that Mr. Heidler's counsel actually conducted an adequate voir dire, but instead that any deficiency must have been strategic because their memo

¹⁴ *See, e.g., Sears v. Upton*, 561 U.S. 945, 948 (2010) (discussing how affidavit evidence presented in habeas proceedings changed the evidentiary picture); *Ferrell*, 640 F.3d at 1213 (finding that counsel provided ineffective representation at sentencing based, in part, on the "voluminous number of affidavits [presented in state habeas proceedings] that described in great detail Ferrell's many mental health issues, [and] his impoverished and abused childhood").

demonstrated they knew the importance of an adequate voir dire. Doc 136 at 28. By the Court’s reasoning, in any given case, counsel’s theoretical awareness of their legal duties would *ipso facto* excuse their failure to actually meet those obligations.

The Court agreed that “trial counsel did not probe the jury” on the critical matters addressed in the voir dire memo,¹⁵ and it was error for the Court to impute strategy to that failure simply because counsel neglected to do something they knew was critically important. Because reasonable jurists could disagree with this Court’s rejection of the claim, a COA should issue. *See, e.g., Sterling v. Dretke*, 100 Fed. Appx. 239, 243 (5th Cir. 2004) (granting COA to address whether trial counsel was ineffective in failing to inquire into juror’s known racial bias); *Virgil v. Dretke*, 446 F.3d 598, 601 (5th Cir. 2006) (noting COA grant to address whether counsel was ineffective in failing to challenge biased jurors for cause).

E. This Court Should Reconsider Its Decision to Deny a COA on Mr. Heidler’s Substantive Incompetency Claim.

Critical evidence not considered by either the state courts or this Court indicate that Mr. Heidler, in the period leading up to the trial, could not meaningfully communicate with counsel, suffered from hallucinations, was being treated for psychosis, and had attempted to kill himself. *See* Doc. 127 at 282-98. Information

¹⁵ Counsel’s failure to do so was consequential in many ways, including in their insufficient voir dire of Juror Patricia Squires—a juror they failed to adequately examine and subsequently failed to challenge for cause. *See* Doc. 127 at 176-87.)

“concerning petitioner’s suicide attempt,” the Supreme Court recognized in *Drope v. Missouri*, “when considered together with the information available prior to trial and the testimony of petitioner’s wife at trial [regarding petitioner’s behavior], . . . created a sufficient doubt of his competence to stand trial to require further inquiry on the question.” 420 U.S. 162, 180 (1975). The same is true here. Reasonable jurists, accordingly, could disagree with this Court’s rejection of this claim. *See, e.g., Austin v. Davis*, 647 Fed. Appx. 477, 488 (5th Cir. 2016) (granting COA to address competency claim where district court did not consider petitioner’s evidence); *Zimmerman v. Cockrell*, 2002 U.S. App. LEXIS 28187 (5th Cir. 2002) (granting COA to address competency claim, noting that “[a]lthough the MMPI results, ‘suicidal’ letters, and head injury may not ultimately demonstrate a reasonable probability that [petitioner] was incompetent . . . we believe [he] has demonstrated that this question is ‘adequate to deserve encouragement further’”) (quoting *Barefoot*, 463 U.S. at 893 n.4).

F. The Court Should Reconsider Its Denial of a COA on Whether Mr. Heidler’s Trial Counsel Operated Under a Conflict of Interest.

Aggravating evidence was introduced at sentencing concerning Mr. Heidler’s escape from jail, in which he used a hacksaw blade that had been left behind by another inmate who had escaped shortly before, Joel Buttersworth. Unknown to Mr. Heidler and presumably the trial court, Mr. Heidler’s attorney Kathy Palmer was

concurrently defending Mr. Buttersworth against charges arising from his escape at the same time she was defending Mr. Heidler at trial. *See* Doc. 19-3 at 81. As a direct consequence of this conflict of interest, Ms. Palmer failed to investigate and present evidence that would have mitigated the impact of the escape, showing that Mr. Heidler had not developed the plan on his own but instead had followed in Mr. Buttersworth's footsteps. *See, e.g.,* Doc. 31-2 at 14-15; Doc. 68 at 17-20 and accompanying exhibits.

Although state habeas counsel failed to raise this conflict of interest claim, Mr. Heidler was granted permission to amend his federal habeas petition to raise it and unsuccessfully sought an evidentiary hearing to address whether state habeas counsel had been ineffective in failing to allege the conflict.¹⁶ *See* Docs. 68, 70, 97. Reasonable jurists could debate this Court's determination that no conflict of interest existed despite counsel's concurrent representation of conflicting interests. A COA should accordingly be granted.

¹⁶ Under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 469 U.S. 413 (2013), a federal habeas petitioner may establish cause and prejudice for the failure to raise a claim of ineffective representation at trial where state habeas counsel were themselves ineffective in failing to raise a substantial claim of trial counsel's ineffective representation. Whether *Martinez* and *Trevino* apply to cases arising out of Georgia state courts remains an open question in this Circuit. *See Hittson*, 759 F.3d. at 1262. A COA grant on the conflict of interest claim would necessarily include the applicability of *Martinez* and *Trevino*.

G. A COA Should Issue to Address This Court's Dismissal of Numerous Claims on Procedural Grounds.

As detailed above in Sections I, II, and III, there are compelling reasons to find that this Court erred in dismissing many of Mr. Heidler's claims on procedural grounds. Should the Court not alter and amend its judgment with respect to these claims, a COA should issue on the following:

- (1) Whether the Court erred in dismissing claims as insufficiently pled at this stage of the proceedings and without giving Mr. Heidler the opportunity to correct any deficiencies.
- (2) Whether the Court erred in dismissing claims as unexhausted.
- (3) Whether the Court erred in dismissing claims as absent from the petition when they are set forth in allegations of the state and federal petitions.

Respectfully submitted,

s/ Akiva Freidlin

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

JERRY SCOTT HEIDLER,	)	
Petitioner,	)	
	)	
vs.	)	Case No. 6:11-CV-109 (LGW)
	)	
GDCP WARDEN,	)	CAPITAL CASE
Respondent.	)	

NOTICE OF ELECTRONIC FILING

This is to certify that on February 10, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/EMF system which will send notification of such filing to the following:

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**APPENDIX TO PETITIONER’S 59(e) MOTION TO ALTER OR AMEND
THE JUDGMENT**

This appendix lists claims addressed in Mr. Heidler’s motion to alter or amend the court’s judgment denying his petition for habeas corpus. See Doc. 136. Page numbers correspond to the pages in the court’s order where each claim is discussed. Quotation marks replicate those in the Court’s opinion.

Claims the Court Denied, in Whole or in Part, for Being Insufficiently Pled Under Rule 2(c).

A. Ineffective Assistance of Counsel Claims

- Counsel failed to object to the trial court's improper jury instructions on the mental health defenses, which created issues about intellectual disability and insanity that were not presented in this case, which allowed for the admission of prejudicial evidence that had no bearing on the only mental health defense properly before the jury. Doc. 136 at 21-22.

- Counsel failed to challenge a biased juror. *Id.* at 30.
- Counsel failed to object to the admission of several items of evidence and testimony offered by the State during the guilt/innocence and sentencing phases of trial and permitted the jury to receive and consider evidence that was improper, inadmissible, prejudicial, irrelevant, and/or false. *Id.* at 30-32.
- Counsel failed to adequately object to and litigate the improper admission of certain evidence, including but not limited to videotapes and photographs. *Id.* at 31, n.7.
- Counsel failed to adequately object to and litigate improper testimony, including but not limited to testimony that was hearsay, irrelevant, cumulative, outside the personal knowledge of the witness, and testimony that was highly prejudicial. *Id.* at 32.
- Counsel failed to object to improper and prejudicial statements made by the State during opening and closing arguments of both the guilt/innocence and sentencing phases of the trial. *Id.* at 32.
- Counsel failed to adequately raise and litigate that Petitioner's statement to law enforcement was the result of an illegal arrest and should be suppressed. *Id.* at 32-34.
- Counsel failed to present evidence that because of Mr. Heidler's mental illness he had not given a knowing and intelligent Miranda waiver. *Id.*
- Post-conviction counsel rendered ineffective assistance of counsel in litigating trial and appellate counsel's ineffectiveness in a variety of ways, including but not limited to failing to thoroughly investigate Petitioner's claims; failing to obtain and utilize available, relevant evidence; failing to adequately litigate Petitioner's claims; failing to present relevant and favorable testimony by live witnesses; failing to preserve the testimony of witnesses; and failing to ensure that Petitioner was competent during critical stages of his state habeas proceedings. *Id.* at 56.

B. Prosecutorial Misconduct Claims

- The prosecution misled the jury by cautioning against use of the DSM. *Id.* at 35, 35 n.10.
- The prosecutor “undermined the experts’ credibility by falsely alleging that they had not asked the State to supply records for their evaluation and that the State did not even know Mr. Heidler was being evaluated” *Id.* at 36-38.
- During closing arguments, the prosecutor “falsely argued that the medical records utilized were untrustworthy; that the expert testimony was not evidence; and that the jury was prohibited from considering it.” *Id.* at 36-38.
- The prosecutor invoked repeated calls for justice and ended his closing with a forceful pronouncement of guilt. *Id.* at 39.

Claims the Court Found Unexhausted and Procedurally Defaulted Despite Their Fair Presentation to the State Courts.

A. Ineffective Assistance of Counsel Claims

- Counsel failed to object to the trial court's improper jury instructions on the mental health defenses, which created issues about intellectual disability and insanity that were not presented in this case, which allowed for the admission of prejudicial evidence that had no bearing on the only mental health defense properly before the jury. Doc. 136 at 21-22.
- Counsel failed to challenge biased a juror. *Id.* at 30.
- Counsel failed to object to the admission of several items of evidence and testimony offered by the State during the guilt/innocence and sentencing phases of trial and permitted the jury to receive and consider evidence that was improper, inadmissible, prejudicial, irrelevant, and/or false. *Id.* at 30-32.

- Counsel failed to adequately raise and litigate that Petitioner’s statement to law enforcement was the result of an illegal arrest and should be suppressed. *Id.* at 32-34.
- Counsel failed to present evidence that because of Mr. Heidler’s mental illness he had not given a knowing and intelligent Miranda waiver. *Id.*

B. Prosecutorial Misconduct Claims

- The prosecution misled the jury by cautioning against use of the DSM. *Id.* at 35, 35 n.9.
- The prosecutor “undermined the experts’ credibility by falsely alleging that they had not asked the State to supply records for their evaluation and that the State did not even know Mr. Heidler was being evaluated” *Id.* at 36-38.
- During closing arguments, the prosecutor “falsely argued that the medical records utilized were untrustworthy; that the expert testimony was not evidence; and that the jury was prohibited from considering it.” *Id.* at 36-38.
- The prosecutor made an improper “Golden Rule” argument. *Id.* at 38-39.
- The prosecutor invoked repeated calls for justice and ended his closing with a forceful pronouncement of guilt. *Id.* at 39.

Claims the Court Found Unexhausted and Procedurally Defaulted Despite the State’s Exhaustion Waiver.

A. Ineffective Assistance of Counsel Claims

- Counsel failed to object to the trial court's improper jury instructions on the mental health defenses, which created issues about intellectual disability and insanity that were not presented in this case, which allowed for the admission of prejudicial evidence that had no bearing on the only mental health defense properly before the jury. Doc. 136 at 21-22.

- Counsel failed to challenge a biased juror. *Id.* at 30.
- Counsel failed to adequately raise and litigate that Petitioner's statement to law enforcement was the result of an illegal arrest and should be suppressed. *Id.* at 32-34.
- Counsel failed to present evidence that because of Mr. Heidler's mental illness he had not given a knowing and intelligent Miranda waiver. *Id.*

B. Prosecutorial Misconduct Claims

- The prosecution misled the jury by cautioning against use of the DSM. *Id.* at 35, 35 n.9.
- The prosecutor "undermined the experts' credibility by falsely alleging that they had not asked the State to supply records for their evaluation and that the State did not even know Mr. Heidler was being evaluated" *Id.* at 36-38.
- The prosecutor made an improper "Golden Rule" argument. *Id.* at 38-39.
- The prosecutor invoked repeated calls for justice and ended his closing with a forceful pronouncement of guilt. *Id.* at 39.

Claims Where the Court Found Respondent Could Not Waive Exhaustion Because They Had Not Been Raised Before Petitioner's Merits Brief

A. Ineffective Assistance of Counsel Claims

- Counsel failed to object to the trial court's improper jury instructions on the mental health defenses, which created issues about intellectual disability and insanity that were not presented in this case, which allowed for the admission of prejudicial evidence that had no bearing on the only mental health defense properly before the jury. Doc. 136 at 21-22.
- Counsel failed to challenge a biased juror. *Id.* at 30.

- Counsel failed to adequately raise and litigate that Petitioner's statement to law enforcement was the result of an illegal arrest and should be suppressed. *Id.* at 32-34.
- Counsel failed to present evidence that because of Mr. Heidler's mental illness he had not given a knowing and intelligent Miranda waiver. *Id.*

B. Prosecutorial Misconduct Claims

- The prosecutor made improper arguments related to mental health evidence. *Id.* at 36-37.

Claims the Court Held Were Absent from the Petition.

A. Ineffective Assistance of Counsel Claims

- Counsel failed to object to the trial court's improper jury instructions on the mental health defenses, which created issues about intellectual disability and insanity that were not presented in this case, which allowed for the admission of prejudicial evidence that had no bearing on the only mental health defense properly before the jury. Doc. 136 at 21-22.

B. Prosecutorial Misconduct Claims

- The prosecutor "undermined the experts' credibility by falsely alleging that they had not asked the State to supply records for their evaluation and that the State did not even know Mr. Heidler was being evaluated" *Id.* at 36-38.
- The prosecutor misled the jury as to the burden of proof. *Id.* at 39.
- The prosecutor discredited the defense at trial by "disparag[ing] defense counsel's handling of the expert testimony and underlying records," while "bolster[ing] his own handling of such things." *Id.* at 40.

- The prosecutor committed misconduct when he elicited and utilized incriminating statements Mr. Heidler made during a compelled psychiatric evaluation in order to argue motive. *Id.*
- The prosecutor expressed personal opinions on the evidence. *Id.* at 41.
- The prosecutor misrepresented the jury's role; appealed to the jury's passions and prejudices; and argued that the jury's responsibility was to impose death. *Id.* at 42.