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 II)

CAPITAL CASE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13752-P

JERRY SCOTT HEIDLER,
Petitioner-Appellant,

vs.

WARDEN,
Georgia Diagnostic Prison,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
STATESBORO DIVISION

APPLICATION FOR CERTIFICATE OF APPEALABILITY

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JERRY SCOTT HEIDLER

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY SCOTT HEIDLER, Petitioner-Appellant,	)	
vs.	)	Case No. 20-13752-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

CERTIFICATE OF INTERESTED PERSONS

Counsel hereby certifies that the following have an interest in the outcome of this case:

Askew, Steve, prosecutor at trial

Beauvais, Steven L., local counsel for Heidler in federal habeas proceedings

Boleyn, Susan V., counsel for the state on appeal and for Respondent in state habeas proceedings

Bryant, Jessica, victim

Burton, Beth A., counsel for Respondent in state and federal habeas proceedings

Culpepper, Emily J., counsel for Heidler in state habeas proceedings

Daniels, Bryant, victim

Daniels, Danny, victim

Daniels, Kim, victim

Duffey, Aubrey, Superior Court Judge, state habeas proceedings

Dunn, Thomas H., counsel for Heidler in state habeas proceedings

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Freidlin, Akiva, counsel for Heidler in federal habeas proceedings

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Respectfully submitted,

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COUNSEL FOR PETITIONER
JERRY SCOTT HEIDLER

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I. INTRODUCTION

Jerry Scott Heidler's longstanding and severe mental illness touches every aspect of this tragic case. He has suffered from psychosis, severe depression, and suicidal ideation and attempts, dating back to childhood. And his illness was exacerbated by the extreme abuse and neglect he endured as a child. Indeed, the state habeas court found that Heidler "has a long history of severe mental illness," with "impairments [that] are longstanding, and . . . have been present since Petitioner's 'preteen years,'" and "that it is 'highly unlikely' he will ever be free of the substantial impairments." D.31-12:16. Yet the jury received a misleadingly benign story of Heidler's mental health and upbringing, hearing nothing, for example, of his psychiatric hospitalizations, long-term symptoms of psychosis, or severe beatings.

The district court denied relief on all claims, many on questionable procedural grounds that it adopted at the last minute, despite previously finding those claims properly before it. Many of these procedural rulings are confusing, warranting this Court's intervention to untangle them. The court, though, denied a certificate of appealability ("COA") on any issue, concluding its rulings were not subject to debate. Because reasonable jurists could debate the court's procedural and merits rulings, a COA should be granted to address the claims below.

II. PROCEDURAL AND FACTUAL HISTORY

Whether the result of genetics,[1] the instability and violence of his childhood home, or a combination of the two, Heidler developed symptoms of severe mental illness at a very young age. These included repeated, serious, suicide attempts, audio and visual hallucinations, and severe depression, which continued through adolescence and led to psychiatric hospitalizations and other emergency interventions.

At twenty years old, Heidler's already tenuous mental state was rocked by his child's stillbirth. D.19-11:68, 71-72. He attended his baby's funeral on December 3, 1997. In the early morning hours of the following day, Heidler killed four members of the Daniels family in their home. D.12-1:34-38. Following the murders, Heidler left with three surviving girls and later sexually assaulted one of them. D.13-18:34-36. He then dropped the girls in Alma, where police found them walking down a road and brought them to the local DFCS office. D.13-14:74-76. Two other children were found unharmed in the home. D.13-14:64-65, 94-95. Later that night, Heidler returned to the cemetery where his infant son was buried the previous day. D.19-4:105.

[1] Heidler's mother and two brothers also suffer from severe mental illness, including major depression, bipolar disorder, schizoaffective disorder and suicidal ideation and attempts. *See, e.g.*, D.22-2:54-55; D.22-3:2-3; D.22-5:46; D.22-7:36-39; D.22-9:4, 6-7, 10; D.22-11:64, 67, 73; D.22-11:73; D.22-13:1. His mother is also intellectually disabled. D.22-3:3.

In September 1999, following a change of venue, Heidler was convicted on four counts of murder, three counts of kidnapping, and one count each of aggravated sodomy, aggravated child molestation, child molestation, and burglary, and sentenced to death. D. 14-7:74-76; 15-9:24-26. Heidler could not attend most of state habeas proceedings because he suffered a psychiatric emergency and was heavily medicated. D.19-6:3-4. Although acknowledging Heidler's longstanding, severe mental illness, the state habeas court denied relief on all grounds. *See* D. 31-12–D.31-13. The Georgia Supreme Court summarily denied Heidler's application for a certificate of probable cause ("CPC"). D.31-18.

Heidler timely filed a habeas corpus petition in the Southern District of Georgia. D.1–1-1; D.45; D.70; D.124. He moved to stay proceedings due to mental incompetency, but the court "denied [it] at this time."[2] *See* D.47–D.52. The court also denied Heidler's motions for discovery and an evidentiary hearing, and for a hearing to address whether his longstanding and severe mental illness rendered him permanently incompetent to be executed. D.59–D.60-3; D.63; D.66–D.70; D.72–74: D.76–D.78; D.97.

[2] The Supreme Court later held that a capital defendant does not have a statutory right to suspend federal habeas proceedings on the basis of mental incompetency, "[g]iven the backward-looking, record-based nature of most federal habeas proceedings . . . ." *Ryan v. Gonzales*, 568 U.S. 57, 68 (2013).

After briefing on procedural defenses, *see* D.53–D.55, the district court agreed with Respondent-Appellee that most claims were reviewable, and the court listed the limited claims it found procedurally barred, *see* D.56:47. Following merits briefing, the court denied relief on all claims. D.127; D.129; D130; D.136. Yet it addressed only a few claims on the merits, rejecting the remainder as insufficiently pled, procedurally defaulted, and/or unexhausted—including numerous aspects of claims it had previously ruled were properly before it. D.136. The court also denied a COA on any issue. D.136:68-69.

III. STANDARDS FOR ISSUING A COA

Under 28 U.S.C. § 2253(c)(1) and F.R.A.P. Rule 22(b)(1), a petitioner who has been denied habeas corpus relief and a COA in the district court must obtain a COA from the Court of Appeals in order to appeal. A COA should be granted for each issue regarding which the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

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, 327 (2003)). This determination should

be made "without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* at 773 (internal citation omitted). A "claim can be debatable even though every jurist of reason might agree, after COA has been granted and the case received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338.

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).

In a capital case, "doubts about whether a COA should issue must be resolved in favor of the petitioner." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) ("In a capital case, the nature of the penalty is a proper consideration in determining whether to issue [permission to appeal.]").

Under these standards, the following issues warrant a COA.

IV. GROUNDS FOR ISSUING A COA

A. REASONABLE JURISTS COULD DISAGREE WITH THE DISTRICT COURT'S DENIAL OF HEIDLER'S CLAIM THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATING EVIDENCE.

Reasonable jurists could debate whether the district court correctly ruled that the state courts reasonably found Heidler's attorneys effective at sentencing.

In briefing below, Heidler detailed the evidence of serious mental illness and severe abuse and neglect the jury never heard, and also explained counsel's responsibility for this failing; Heidler further highlighted the unreasonable factfinding and legal analysis the state courts relied on in denying the claim. *See* D.127:64-67, 86-96, 99-117, 129-55. Due to counsel's numerous deficiencies,[3]

[3] A COA should be granted as to all of Heidler's sentence-impacting IAC claims. *Strickland v. Washington*, 466 U.S. 668, 695 (1984), requires courts to determine whether counsel's "errors" (in the plural) created "a reasonable probability that . . . the result of the proceeding would have been different." When raising a *Strickland* challenge to counsel's failure to investigate and present penalty-phase mitigating evidence, courts must "consider the totality of the available mitigation evidence—both that adduced at trial and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation," *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam). Assessing *Strickland* prejudice at sentencing thus requires courts to consider the cumulative impact of counsel's various deficiencies. *See, e.g.*, *Maples v. Comm'r, Ala. Dep't of Corr.*, 729 Fed. Appx. 817, 822-23 (11th Cir. 2018) (citing *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1278 (11th Cir. 2016), and *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

Heidler's jury received a misleadingly benign view of his mental illness and heard virtually nothing about the trauma and neglect he suffered throughout his young life.

The district court's endorsement of the state habeas court's ruling overlooked the significant disparity between the version of Heidler's life the jury heard and its actuality, and ratified the state courts' rulings on the basis of its debatable assessment of both the record and the law. A COA accordingly should issue to address Heidler's sentence-impacting IAC claim.

1. Counsel Failed to Investigate and Present Evidence Demonstrating the Severity of Heidler's Lifelong Mental Illness.

Counsel made Heidler's mental illness the centerpiece of their defense, seeking a guilty-but-mentally-ill ("GBMI") verdict in the trial's guilt phase, *see, e.g.*, D.19-8:35-36, and relying on this evidence at sentencing. Yet, they depicted Heidler as a man with a personality disorder who wrestled with some mental health issues but was mostly unimpaired, when the reality was that Heidler had been plagued by serious, debilitating mental illness since childhood and extending through to trial. Although counsel possessed records documenting Heidler's longstanding and severe mental illness, they failed to present that information to the jury or to follow the documents' leads to witnesses who would have testified to this history. And, although counsel were on notice that Heidler was actively psychotic while awaiting

trial, they did not obtain records of his pretrial treatment and did not speak with the jail nurse or treating psychiatrist.

Counsel's inattention to the documents they had, failure to obtain others that were readily available, and disregard of numerous red flags led to their failure to present the jury with evidence of Heidler's longstanding mental illness. The jury did not hear, for example, that at age eight DFCS referred Heidler for mental health treatment, *see, e.g.*, D.20-7:54, or that by age eleven school records documented he suffered "significant anxiety," "severe depression," "[s]evere emotional disturbance," and was "extremely suicidal," D.28-15:27-28, or that those problems continued as he got older, *see, e.g.*, *id.* at 31-32 (school records at age fourteen describing him as "experiencing both anxiety and depression," dealing with a family history with "much sociopathy," and "experiencing severe emotional disturbance").

Counsel also failed to present any evidence that Heidler's mental illness, even in childhood, was so severe it necessitated lengthy hospitalizations. His first, at age eleven, occurred following several suicide attempts—one in which he stood on the highway in front of oncoming trucks, causing one to jack-knife to avoid hitting him. *See* D.15-7:49-50, 52, 54. Records from the psychiatric hospital documented that even at this early age, Heidler experienced auditory and visual hallucinations. *See id.* at 51 ("Mother states ct. experiences A/V hallucinations."); 56 (noting "A-V hallucinat[ions]"); 70 (same). Psychiatry notes described command hallucinations

instructing Heidler to hurt himself: "Seeing things and hearing? 'Like somebody talking to me.' Voices–inside my head–telling me to do something–hang myself . . . a man's voice." D.21-10:40. After almost *two months* in the hospital, Heidler's mother decided not to bring him back from a weekend visit home, and he was discharged against medical advice. *See id.* at 49. The hospital recommended Heidler at least receive outpatient treatment, but his mother did not follow up. *See* D.28-15:51.

Counsel also failed to show the jury how Heidler's mental health continued to deteriorate in the years leading up to the crime. Heidler was committed to the psychiatric hospital again at age thirteen for ten days, *see id*. at 47, following violent episodes and alcohol abuse, *see id*. at 24-25. At age fourteen, he was institutionalized at the Regional Youth Development Center, where he made repeated suicidal and homicidal threats and banged his head so often that he was placed in a helmet and restrained. D.21-14:23. He was referred to Satilla Mental Health Services and given a prognosis of "long-term, severe disability" due to a "thought disorder." D.28-15:67. At seventeen, he was again brought to Satilla by a sheriff's deputy, who had taken a knife away from him. D.21-14:14; D.28-16:3. At the time, Heidler said he wanted to kill himself and was "curled in a fetal position, sucking a pacifier . . . ." *Id*. The counselor who saw him noted his diagnosis of "major depression, recurrent,"

and recommended "stabilization at GRH-S [the psychiatric hospital]." D.28-16:4. The jury heard none of this.

Although counsel attempted to question defense expert Maish at sentencing about the content of the psychiatric hospital records, the State objected after Maish said he had never seen them; defense counsel then withdrew the records and ended questioning, leaving jurors unaware of critical information explaining the true depth of Heidler's mental illness. D.14-9:88.[4]

Counsel also neglected to interview witnesses of Heidler's early psychosis and mental illness. Despite having records of an emergency visit to Satilla Mental Health Center when Heidler was twelve, following bizarre behavior and distress at school, *see* D.29-9:59; 29-10:8, counsel never spoke to Dr. Adrienne Butler, the pediatrician who witnessed Heidler hallucinating, *see* D.28-15:53 ("In the office today he is obviously having auditory hallucinations. . . . [I] strongly suspect thought disorder in this child."), and remembered the incident vividly twenty years later, *see* D.19-6:92:93 (Butler's state habeas testimony). Butler signed an involuntary

[4] Counsel then dumped these records, along with DFCS records it received mid-trial, on the jury prior to deliberations—over 1,100 pages. *See* D.14-11:36. No witness had testified to these records nor had counsel highlighted any portion. *See* D.14-9:128. The jury could not have read, much less absorbed, those records on its own, given that it deliberated for only 50-90 minutes (the record is unclear), and a portion of that time included praying and writing a note to be read by the foreman before the verdict. *See* D.15-9:17-20, 22. A meaningful review was even less possible given that handwritten scrawl filled many of the record pages.

admission order to the psychiatric hospital, but Heidler's mother refused to bring him. *See* D.28-15:59. Susan Holcomb, a school social worker who accompanied Heidler to the Satilla Center that day, would have corroborated Butler's report. *See* D.19-10:87-90. When Holcomb found out that Heidler's mother had not taken him to the hospital, she reported the neglect to DFCS. *See id.* at 88-89.

Trial counsel also failed to speak to teachers, family members, and others who would have explained how depressed and disturbed Heidler was throughout his life, and how they repeatedly witnessed him talking and responding to people or things that were not there. *See, e.g.*, D.19-11:1-2, 48, 52, 57. Instead, the jury heard at sentencing that Heidler's "mental problems" just consisted of him "do[ing] things that he know . . . was dangerous," that his suicide attempts were for attention, D.14-11:17, and that he simply had imaginary friends, *see, e.g.*, D.14-11:7-8, 20.

Counsel not only failed to show the jury Heidler's long history of mental illness, but also that it extended through to trial. Counsel knew Heidler was severely mentally ill pretrial and that he suffered hallucinations in jail. *See, e.g.*, D.19-3:56, 58-59; D.19-13:10-27. Yet they failed to obtain psychiatric records documenting Heidler's pretrial hallucinations and his psychotic disorder diagnosis and corresponding prescription for an anti-psychotic.[5] *See* D.21-17:33; D.19-10:32-34.

[5] Although jurors were told that Heidler was prescribed Haldol while in jail, they were advised that this could have been for behavior control, not psychosis. D.13-18:115.

Counsel also failed to speak with the jail nurse, George Dykes, *see* D.19-10:16, despite knowing that Dykes had repeatedly referred Heidler for mental health treatment. *See* D.12-17:9. Dykes would have testified to the severe symptoms of mental illness that Heidler suffered pretrial, *see* D.19-6:64-87; D.19-10:13-31, and that Heidler, when untreated, was one of the most seriously mentally ill inmates he had encountered in twenty-five years as a jail nurse. D.19-6:79. Counsel later testified in state habeas that Dykes' testimony "would have been great" and they "would have used it." D.19-8:47.

Counsel's failure to obtain and present evidence of Heidler's severe mental illness deprived the jury of critical information. It also led to the trial experts' conclusions that Heidler suffered from borderline personality disorder ("BPD") but nothing more, adding to the jury's misleadingly benign understanding of his mental illness.[6] The bulk of the evidence regarding Heidler's mental illness was introduced at guilt in support of a guilty-but-mentally-ill verdict, with counsel's hope that it would lead to a non-death sentence at penalty. *See, e.g.*, D.19-8:35-36. The defense rested without calling any witnesses or presenting evidence, instead letting the court call its three appointed experts, Drs. D'Alesandro, Ifill, and Kuglar, to address the

[6] The State harped on the BPD diagnosis in summation, implying to the jury that it meant Heidler had no actual disorder and instead was just on the "borderline" of having a real issue. *See* D.14-11 at 51-52.

GBMI issues. *See* D.13-18:69-125; D.13-19:6-55. All three testified that Heidler suffered borderline personality disorder and noted only an inconsequential history of psychosis. *See* D.13-8:73-74, 76. At the penalty phase, defense expert Dr. Maish repeated that diagnosis. *See* D.14-9:53.

Those diagnoses were ill-informed. Court expert Kuglar testified in state habeas that the information he lacked—including Heidler's psychosis history—led to an inaccurate diagnosis. *See* D.23-12:38-42. With that information, he would have diagnosed Heidler with a thought and mood disorder instead of BPD. *Id.* at 42. Defense expert Maish testified similarly, concluding he would have more strongly considered a schizophrenia diagnosis. D.22-20:59. These fully informed diagnoses matched state habeas forensic psychiatrist Dr. Sarah Deland's diagnoses of probable schizoaffective disorder and probable post-traumatic stress disorder in addition to BPD. *See* D.19-4:96.

a) Reasonable Jurists Could Disagree with the District Court's Disposition.

Reasonable jurists could disagree with the district court's overall rejection of this claim, as well as its underlying determinations that the state court did not rely on unreasonable factfinding in denying the claim, and its conclusion that Heidler's citation to on-point circuit court opinions applying *Strickland* amounted to a failure to show "'clearly established Federal law' under AEDPA." *See* D.136:10-20.

Trial counsel's central strategy revolved around mental health. Through both trial phases, they aimed to show the jury that Heidler's actions were a product of serious mental illness. *See* D.19-8:35-36. Yet, they made no effort to uncover easily accessible, critical information, and also failed to present to the jury or the experts critical information they did have. This amounted to deficient performance under clearly established federal law. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 389 (2005) (finding "[n]o reasonable lawyer would forgo examination" of readily available and significant records); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (finding deficiency where counsel's failure to investigate "was the result of inattention, not reasoned strategic judgment"). The deficiency prejudiced Heidler by giving the jury a falsely benign view of his mental health and leaving counsel unable to contest the State's aggravation, which depicted Heidler as "evil" instead of mentally ill, D.14-11:47. *See Jefferson v. GDCP Warden*, 941 F.3d 452, 485 (11th Cir. 2019); *Ferrell v. Hall*, 640 F.3d 1199, 1235 (11th Cir. 2011). The state court unreasonably applied Supreme Court law in finding otherwise, and also relied on a series of unreasonable factual determinations,[7] *see* D.127:99-106; reasonable jurists could conclude the district court erred.

[7] For instance, Heidler argued that the state courts unreasonably found that counsel had undertaken an extensive investigation when billing records refuted this. *See* D.127:90, 99-101, 129-30. Reasonable jurists could disagree with the district court's rejection of this argument. *See, e.g.*, D.13-5:3; 13-14:2; 22-17:99, 103 (records showing counsel spent one day, after trial began, attempting to locate and

The district court also erred in concluding Heidler's citation to circuit court cases applying *Strickland* amounted to a failure to show an unreasonable application of clearly established Supreme Court law. *See* D.136:20. Circuit court cases can "demonstrate that the Supreme Court's pre-existing, clearly established law compelled the circuit courts (and by implication would compel a state court) to decide in a definite way the case before them." *Hawkins v. Alabama*, 318 F.3d 1302, 1309 (11th Cir. 2003).

Reasonable jurists could debate whether the district court erred in its disposition of the claim and could also conclude it deserves encouragement to proceed. *See Miller-El*, 537 U.S. at 322. For either reason, a COA should issue.

2. <u>Evidence of Neglect and Abuse Never Heard by the Jury.</u>

Counsel also failed to follow the red flags indicating that Heidler suffered severe abuse and neglect throughout his childhood. Had they done so, the jury would have heard compelling evidence of Heidler's brutal and dysfunctional childhood, instead of evidence portraying his life as unhappy but tolerable.

Heidler's mother, Latrell, was intellectually disabled, had anxiety, depression, a personality disorder, *see* D.22-2:55; 22-3:1-7, and drank heavily, *see* D.19-11:15, 20. She beat her stomach when she was pregnant with Heidler, screaming "I'll kill

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talk to witnesses); D.29-8:70 (records showing defense investigator spent 5.5 total hours on the case, also after trial began).

this bastard." D.19-11:15. She would hit and throw things at her children. *Id.* Heidler's father George was an alcoholic and the two would fight violently, *id.* at 14, 42, and George would beat the kids on the head with a belt, *id.* at 26.

Things became worse when Latrell moved in with Heidler's stepfather Lawton. Latrell drank heavily, and Lawton was always drunk and often violent. *See* D. 19-11:22-23, 27, 46, 59-60. They used drugs in front of the kids. *Id.* at 30. Lawton often beat Heidler, threatened to kill him, and once tried to choke him to death. *Id.* at 23, 28, 46, 60. Another time he beat him with the metal end of a water hose until Heidler "had big bleeding welts[.]" *Id.* at 31.

Heider was sent to school in dirty clothes and his hair was dirty and matted, *id.* at 1, 8-9, and he was repeatedly bullied, *id.* at 4. He looked malnourished and sickly. *Id.* at 8. As a kid, "Scott would use a lighter to burn his skin a lot" and "had red[] sores and boils on his body that he picked at." *Id.* at 61. The summer before the crime, his arms were completely covered in scabbed welts. *Id.* at 39. He would come to his aunt's house "with bruises, welts and cuts" and the "adults in that house did not care for him[.]" *Id.* at 28. His mother repeatedly neglected his mental health, *see, e.g.*, D.29-14:44; D.21-10:49, and his schooling, *see, e.g.*, D.19-11:9. The family moved constantly, adding to the instability, making it harder to access resources, and often keeping him out of school. *Id.* at 5, 9, 11, 42.

The jurors heard none of this. Instead of learning about the severe abuse, they were told that Heidler's father "wasn't all that good to none of the young'uns" and that his stepfather "didn't beat him . . . [but] sometimes bad words come out of his mouth" and "[h]e was mean to everybody." D.14-11:16, 19, 31. Instead of hearing about the serious neglect, the jury was told Heidler had "a chaotic background" and had a father that was gone, D.14-9:73, and a mother that "was nice enough," *id.* at 99.

The discrepancy between what the jury heard and what Heidler's life was really like was a product of trial counsel's deficiency. Counsel spent a single day, after trial had already begun, attempting to locate and talk to witnesses. *See* D.13-5:3; D.13-14:2; D.22-17:99, 103. Their investigator spent a total of 5.5 hours on the case, also after trial had started. *See* D.29-8:70. They failed to obtain a complete set of DFCS records until the middle of trial, *see* D.14-9:120-21, and then dumped the hundreds of pages, unexplained and unorganized, on the jury just before deliberations,[8] *see* D.14-11:36. The result was a penalty phase that included zero testimony regarding abuse, except to deny it ever happened, *see* D.14-11:19, and almost nothing indicating neglect.

[8] As counsel testified in state habeas proceedings, had they obtained them earlier, they "would have turned them over to the mental health professionals" and "it's highly likely they would have suggested other [helpful] witnesses[.]" D.19-8 at 48-49.

Some witnesses counsel never talked to, and others they just spoke to superficially. Heidler's sister Lisa, who testified at trial, "did not understand the purpose" of her testimony and counsel did not prepare her to answer questions about Heidler's life. D.19-11:24-25. Heidler's aunt, Marylee Taylor, was with other family members when someone on the defense team came to talk to them as a group; the meeting was short and the person said she would come back but never did. *Id.* at 48-49. Many others were never contacted by the defense, including Heidler's aunt Elaine Towns who "would have liked to have been able to tell people [Heidler's] story," *id.* at 29; his friend Junior Towns who was "willing to talk about everything," *id.* at 32; and his cousin Darryle Boyd, *id.* at 40. His teacher Joan Pickren tried to contact counsel but never heard back from them. *Id.* at 6-7.

a) Reasonable Jurists Could Disagree with the District Court's Disposition.

Reasonable jurists could conclude the district court erred in ruling that the state court relied on reasonable factfinding in determining counsel were not deficient. *See* D.136:22-25. The court did not address whether the state courts unreasonably applied clearly established federal law, and also made no prejudice determination.

Counsel's failure to review readily available and relevant records was deficient. *Rompilla*, 545 U.S. at 389. Their failure to interview family members who could speak to the abuse and neglect Heidler suffered was deficient. *Williams v.*

Allen, 542 F.3d 1326, 1340 (11th Cir. 2008). Dumping records on a jury without organizing or explaining them was deficient. *Johnson v. Bagley*, 544 F.3d 592, 602 (6th Cir. 2008).

The state courts' conclusion to the contrary was based on its unreasonable application of governing Supreme Court law—an argument the district court failed to address—and unreasonable factual findings, as set forth in detail in prior briefing. *See* D.127:141-44. Reasonable jurists could debate the district court's determination that the state courts reasonably found counsel's performance competent.

3. Reasonable Jurists Could Conclude that Heidler Was Prejudiced by Counsel's Deficient Performance.

Reasonable jurists could conclude that counsel's deficiencies, considered individually or, as Supreme Court law requires, cumulatively, prejudiced Heidler at sentencing. The district court only briefly addressed prejudice from counsel's failure to develop and present mental health evidence, and chose not to address prejudice with respect to counsel's failure to develop and present abuse and neglect evidence. D.136:15-16, 25-26, Yet the record demonstrates that counsel's deficiencies misled the jury into believing Heidler's sole mental health problem was a personality disorder and that his childhood was tolerable, if not especially happy. In reality, his mental illness was longstanding and severe, and it was exacerbated by life with an intellectually disabled and mentally ill mother who neglected him; an alcoholic father and then stepfather who violently beat him, his siblings, and his mother; and

constant instability. "[A] petitioner is prejudiced where the mitigating evidence omitted by counsel's deficient investigation paints a vastly different picture of [the petitioner's] background than that created by the actual penalty-phase testimony." *DeBruce v. Comm'r*, 758 F.3d 1263, 1276 (11th Cir. 2014); *see, e.g.*, *Williams*, 542 F.3d at 1340.

Reasonable jurists could debate whether the district court erred in denying the claim, and jurists could also conclude it deserves encouragement to proceed. *See Miller-El*, 537 U.S. at 322. A COA should issue.

B. REASONABLE JURISTS COULD DISAGREE WITH THE DISTRICT COURT'S DISPOSITION OF HEIDLER'S CLAIM THAT HE WAS TRIED WHILE INCOMPETENT.

The evidence presented to the district court raises a real and substantial doubt, despite the trial court's competency finding, as to whether Heidler was tried, convicted, and sentenced while, in fact, incompetent. Reasonable jurists could therefore debate the district court's denial of an evidentiary hearing.

A person who "lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Communication with counsel is especially significant because a defendant who is unable to communicate effectively with counsel may be unable to exercise a myriad of other critical trial rights. *See Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996). The

right to be tried only while competent occupies a special place in the panoply of constitutional criminal rights. "'[W]ithout competence, a defendant cannot meaningfully exercise his other constitutionally guaranteed rights,' and 'trying an incompetent defendant is like trying an absent defendant.'" *United States v. Cometa*, 966 F.3d 1285, 1291 (11th Cir. 2020) (quoting *United States v. Wingo*, 789 F.3d 1226, 1235 (11th Cir. 2015)).

A habeas petitioner "make[s] a substantive competency claim by alleging that he was, in fact, tried and convicted while mentally incompetent." *Medina v. Singletary*, 59 F.3d 1095, 1106 (11th Cir. 1995). When a petitioner presents "clear and convincing evidence" that creates a "real, substantial, and legitimate doubt" as to his or her trial competency at the time of trial, the district court must order an evidentiary hearing. *See Lawrence v. Sec'y Fla. Dep't of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012). In determining whether a petitioner's substantive competency claim raises a legitimate doubt as to trial competency, the habeas court must accept petitioner's alleged facts as true, *Card v. Singletary*, 981 F.2d 481, 484 (11th Cir. 1992), and the court is not limited to evidence known by the trial court, *see James v. Singletary*, 957 F.2d 1562, 1572 (11th Cir. 1992).

A substantive competency claim cannot be procedurally defaulted and may be raised for the first time in federal habeas proceedings. *See Lawrence*, 700 F.3d at

481 ("We have both pre- and post-AEDPA precedent [] holding that substantive competency claims generally cannot be defaulted.") (internal citation omitted).

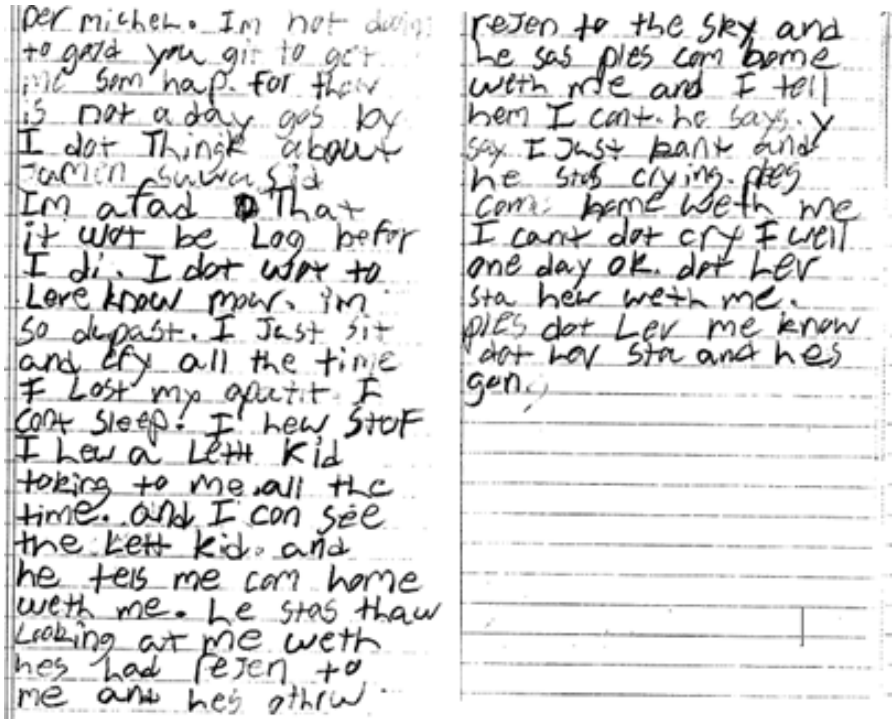
1. Heidler Presented Clear and Convincing Evidence that Creates a Real Doubt as to His Trial Competency.

As briefed to the district court, Heidler could not meaningfully communicate with trial counsel at any point of their representation, which they indicated pretrial, *see* D.12-3:53; D.13-2:14-15, and detailed in state habeas proceedings. Counsel Michael Garrett testified bluntly: "I couldn't communicate with him at all; nobody can." *See* D.19-8:62; *see also id*. at 62-63; D.22-16:48-49. Heidler "wouldn't look you in the eye" and "would never really give an appropriate response to a question." D.19-8:31.

Counsel Kathy Palmer had the same experience. Asked about what Heidler may have told her of any significance, Palmer replied "Nothing. Nothing." *Id*. at 74. Heidler, Palmer testified, was "not very responsive at all . . . totally nonresponsive" during their initial meeting, and in general was "not communicative" and would rarely look at her. D.19-3:32-33, 45. Both attorneys were unequivocal: Heidler's failure to provide them information was unintentional as he genuinely lacked the ability to communicate with them. *See* D.19-8:34-35; D.19-3:47.

Heidler's inability to meaningfully communicate with counsel was consistent with the symptoms of severe mental illness he exhibited pretrial. Heidler attempted suicide while in custody multiple times, with the last attempt just weeks before trial.

See D.20-19:52-57, 59-61; D.20-20:28-31. He repeatedly burned himself with cigarettes and cut himself with anything he could find. *See* D.19-3:54. He would pick at the scars covering his arms while trial counsel tried to talk to him. *See id*. Palmer had to instruct him to take care of himself because "he didn't have the physical, mental abilities, energies, or whatever, to even get himself up and go get a shower and get his hair cut." *Id.* at 55. He wrote desperate, barely literate letters to his attorneys, asking for help and describing what appear to be hallucinations, like this one:


Dear Michael. Im not doing
to good you got to get
me som help. For thar
is not a day goes by
I dot Think about
Comin Suicid
Im afad That
it wot be Log befor
I di. I dot wot to
Lore know mor. Im
so depast. I Just sit
and cry all the time
I Lost my apetit I
Cant Sleep. I hev STOF
I Lev a Lett Kid
toking to me all the
time. and I con see
the Lett kid. and
he tels me com home
weth me. He stas thaw
looking at me weth
hes had rejen to
me and hes othrw
rejen to the sky and
he sas ples com home
weth me and I tell
hem I cant. he says. Y
say I Just want and
he stos crying. ples
com home weth me
I cant dot cry I well
one day ok. dot Ler
sta her weth me.
ples dot Ler me know
dot her sta and hes
gon.

Translation:

Dear Michael. I'm not doing too good. You've got to get me some help. For there is not a day goes by I don't think about committing suicide. I'm afraid that it won't be long before I die. I don't want to live no

> more. I'm so depressed. I just sit and cry all the time. I lost my appetite. I can't sleep. I hear stuff. I hear a little kid talking to me. All the time. And I can see the little kid. And he's telling me come home with me. He stays there looking at with his hand reaching to me and his other reaching to the sky and he says please come home with me and I tell him I can't. He says why. I say I just can't and he starts crying. Please come home with me. I can't, don't cry. I will one day, okay? Don't leave, stay here with me. Please don't leave me. No don't leave—stay. And he's gone.

D.19-13:10; *see also* D.19-13:15-17; 22-17:105.

The jail nurse, George Dykes, observed Heidler's severe pretrial mental illness and "repeatedly" referred him to mental health, D.19-6:70, but his observations went unrevealed until state habeas proceedings. There he testified that Heidler would injure himself to keep from falling asleep because of visions of people "trying to get him" when he slept and, later, even when he was awake. *Id.* at 69, 71. Dykes also described burn marks on Heidler's body and marks where he had been "pinching himself and actually taking pieces of his tissue out of his face." *Id.* at 69-71.

Counsel also recognized that Heidler needed psychiatric help. *See, e.g.*, D.19-3:36, 56, 58-59. Dr. David Faulk, the psychiatrist who treated Heidler pretrial, agreed, finding Heidler to have "serious mental health symptoms[,]" and "difficult[y] discerning reality from dreams." *See* D.19-10:33. In September 1998, he diagnosed Heidler with psychotic disorder, not otherwise specified, and prescribed Haldol, an anti-psychotic. *See id*. at 33.

Heidler took Haldol off and on before fully stopping shortly before trial. *See* D.20-20:62-77; D.20-21:10-16. His last pretrial Haldol dose was on July 5, 1999, and he was then without anti-psychotics for the two months prior to trial and during the trial itself. *See* D.20-21 at:10-16. Heidler's psychiatrist at Georgia Diagnostic and Classification Prison, Dr. Jack Matteson, testified in state habeas that "[Heidler's] situation deteriorates tremendously" when off his medications. D.19-4:58. Matteson described observing Heidler's hygiene decline to the point of "get[ting] a lot of sores and lesions because he does not bathe" when in a psychotic state, *see* D.19-4:51, consistent with what Palmer saw pretrial, *see* D.19-3:55. Matteson also described observing Heidler as actively psychotic while off medication. *See* D.19-4:51-52.

Heidler's mental health "got progressively worse" during his pretrial incarceration, *see* D.19-6:72-73, and it further deteriorated around the time he stopped medication. Two months before trial, Heidler escaped from jail and then walked, in the middle of the highway, right back. *See* D.14-9:5, 17. Six weeks later, he sent trial counsel a rambling letter begging for the death penalty. *See* D.19-13:22. Less than a month before trial, guards found him standing on a bench with a blanket tied from his neck to the cell bars; the guards cut the blanket just as he was finishing the knot. *See* D.20-20:28-31. When Heidler was transferred to prison on September 7, 1999, following the September 3 completion of trial, the prison psychiatrist found

him in immediate need of treatment and prescribed him an anti-psychotic, a mood stabilizer, and an anti-anxiety medication. *See* D.25-7:59; 25-13:10.

The competency evaluations on which the trial court based its competency determination were completed months before trial and did not take into account Heidler's inability to communicate with counsel or the scope of his mental health history. *See* D.23-1:8 (Maish evaluation, completed eight months before trial); 23-12:30 (Ifill/D'Alesandro evaluation, four months); D.23-12:45 (Kuglar evaluation, three months). Heidler was regularly taking Haldol during the periods surrounding the evaluations with Ifill, D'Alesandro, and Kuglar.[9] *See* Docs. 20-20:62-77; 20-21:10-16.

[9] The jail medication logs are incomplete, but indicate that Heidler was taking Haldol prior to each of his three meetings with the court's designated evaluators. Heidler first met with Ifill and D'Alesandro on February 19, 1999; the medication log from February 16-22 is missing, but those in the record indicate Heidler took Haldol in the days leading up to that period and the days right after. *See* D.20-20:74-75. Heidler met again with Ifill and D'Alesandro on April 27th; the logs from April 23-May 14 are missing, but the prior logs show he took Haldol consistently from April 14-20. *See* D.20-21:1. On May 25, 1999, Heidler met with Kuglar; the logs indicate he took Haldol regularly from May 17-27. *See id*. at 3-4.

Heidler had not yet been prescribed Haldol during his first five sessions with defense expert Maish, which took place between June 6 and September 9, 1998 (approximately one year before trial). *See* D.23-1:2-7. For at least two of the Maish sessions, Heidler was taking Vistaril, an anti-anxiety medication. *See* D.20-20:62-71.

The evaluators lacked critical facts about Heidler's mental illness. *See, e.g.*, D.23-4:58 (Ifill deposition) (missing information about psychotic episodes observed by a medical doctor would have been "very material" to his evaluation); D.23-12:39 (Kuglar affidavit) (acknowledging he was missing information "vital to [the ability to] completely and accurately assess the extent of Heidler's mental illness"); D.23-12:34 (Ifill/D'Alesandro evaluation incorrectly noting Heidler's history included just one hallucinatory episode and noting it was drug-induced).

They also lacked critical information regarding Heidler's ability to communicate with counsel. Kuglar met with Heidler for just one hour, after which he noted "[his] opinion that . . . he is capable of communicating and cooperating with his attorneys," but without any indication that Kuglar spoke with trial counsel before making that finding. *See* D.23-12:45. Ifill and D'Alesandro's report also concluded Heidler was "capable of rendering counsel the necessary assistance in his own defense[,]"citing to the fact that he was able to identify the attorneys by name and had met with them. *See id*. Maish's letter-reports contained zero discussion of Heidler's ability to communicate with counsel or assist with his case, yet his final letter-report noted that "[he] saw Scott as being competent to stand trial[.]" D.23-1:9.

On May 25, 1999, the experts testified at a hearing on Heidler's "mental condition" and addressed competency very briefly. *See* D.13-3. Kuglar said, "I think

he is competent to stand trial," but also, "I think there may be questions of further elaboration required." *Id.* at 6. The remainder of his testimony discussed Heidler's general mental health. *See id.* at 5-8. D'Alesandro said only that Heidler was competent "in terms of understanding the legal process" but said nothing of his ability to consult with counsel or assist in his defense. *See id.* at 9-11. Ifill briefly referenced competency—"it's my opinion that he does meet the criteria for being found competent to stand trial"—before turning to address the GBMI issue. *See id.* at 11-13. The expert testimony spanned just twelve transcript pages, *see id*. at 2-13, and included no defense cross-examination, save for a single question to Kuglar regarding whether Heidler met the GBMI criteria, *see id.* at 8. Based on this testimony the trial court entered an order, three months later, declaring Heidler competent. *See* D.12-7:60.

The full evidentiary picture of Heidler's psychiatric history and declining mental health prior to trial presents "clear and convincing evidence" creating a "real, substantial, and legitimate doubt" as to Heidler's competency at the time of trial. *Lawrence*, 700 F.3d at 481. Reasonable jurists could thus conclude that the district court erred in failing to conduct an evidentiary hearing.

2. Reasonable Jurists Could Debate Whether the District Court Correctly Applied 28 U.S.C. § 2254(d) in Reviewing this Claim.

In denying Heidler's substantive competency claim, the district court, considering itself "constrained by AEDPA," determined it could only consider the evidence known by Heidler's trial court and that the claim therefore failed because "the trial court did not unreasonably apply any federal law nor did it make an unreasonable determination of fact in reaching its conclusion [that Heidler was competent to stand trial]." D.136:53-55.

Section 2254(d) precludes habeas relief on "any claim that was adjudicated on the merits in the State court proceedings" unless the state court's decision was based on its unreasonable application of Supreme Court law or unreasonable factfinding. The substantive competency claim before this Court was not adjudicated on the merits by the trial court; the trial court's competency determination was made without knowledge of critical evidence of incompetency, predicated on competency reports made months before trial, and did not capture Heidler's mental decline in the intervening period between his evaluations and the trial. The claim Heidler now presents of his competency at trial, which includes significant evidence of incompetency the trial court never heard, is, in essence, a new claim[10]—one that,

[10] *See, e.g.*, *Brown v. Hooks*, 176 Fed. Appx. 949, 953-54 (11th Cir. 2006) (citing *Hart v. Estelle*, 634 F.2d 987, 989 (5th Cir. 1981) (per curiam)) ("State remedies are not considered exhausted, even if the prior state proceedings asserted

because of substantive competency's unique position in securing other constitutional protections, cannot be defaulted. Reasonable jurists could accordingly debate whether the district court properly relied on § 2254(d) to circumscribe its consideration of the expansive evidence demonstrating Heidler's likely incompetence.

Moreover, jurists of reason could debate the degree to which § 2254(d) should govern substantive competency claims where substantial evidence of incompetence at the time of trial was never heard by the trial court assessing competence. *See, e.g.*, *Austin v. Davis*, 876 F.3d 757, 779 (5th Cir. 2017) (analyzing trial court's competency finding for clear and convincing error under § 2254(e) when adjudicating the habeas substantive competency claim); *Buchanan v. Lamarque*, 121 Fed. Appx. 303, 313 (10th Cir. 2005) (finding "the AEDPA deference standards in § 2254(d) do not apply" because petitioner "did not assert a substantive due process claim in the state-court proceedings" and applying § 2254(e) to trial court's competency determination); *Salter v. Sec'y*, 2018 U.S. Dist. LEXIS 127188, *42, 46-48 (M.D.Fla. Jul. 30, 2018) (despite trial court's finding that defendant was "competent to proceed," reviewing substantive competency claim *de novo*)).

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the same claim, when entirely new factual claims are made in support of the habeas petition before the court.").

At the very least, given the body of cases deciding differently, reasonable jurists could accordingly debate whether the district court properly relied on § 2254(d) to circumscribe its consideration of the evidence demonstrating Heidler's likely incompetence. And, given the centrality of the issue to the fairness of the trial and the integrity of the judicial process, it deserves encouragement to proceed further. For either reason, a COA should issue.

C. REASONABLE JURISTS COULD DEBATE THE DISTRICT COURT'S ADJUDICATION OF HEIDLER'S CLAIM THAT TRIAL COUNSEL OPERATED UNDER A CONFLICT OF INTEREST AT SENTENCING.

The State introduced aggravating evidence at sentencing concerning Heidler's escape from jail, in which he used a hacksaw blade that had been left behind by Joel Buttersworth, an inmate who had escaped shortly before. Unknown to Heidler, his attorney Kathy Palmer was concurrently defending Buttersworth against his escape charges at the same time she was defending Heidler at trial. *See* D.19-3:81. Because of this conflict of interest, Palmer failed to investigate and present evidence that would have mitigated the escape, showing that Heidler had not developed the plan but instead had copied Buttersworth. *See, e.g.*, D.31-2:14-15; D.68:17-20, and accompanying exhibits. The escape evidence was particularly damaging because it supported the State's sentencing portrayal of Heidler as uncontainable and able to destroy high-security devices, presenting a heightened risk of future escapes. *See, e.g.*, D.14-7:95-97; 14-11:47

Although state habeas counsel failed to raise this conflict claim, the district court allowed Heidler to amend his petition to include it, but then denied an evidentiary hearing to address the claim. *See* D.68–D.70; D.97. Reasonable jurists could debate the district court's rejection of this claim, particularly given its importation of *Strickland*'s prejudice standard, despite the court's recognition that *Cuyler v. Sullivan*, 446 U.S. 335 (1980), governs the analysis of conflicts arising from counsel's concurrent representation of defendants with divergent interests.[11] *See* D.97:15, 24-27. A COA should be granted.

D. A COA SHOULD ISSUE AS TO HEIDLER'S CLAIM THAT TRIAL COUNSEL WERE CONSTITUTIONALLY INEFFECTIVE IN FAILING TO CONDUCT AN ADEQUATE VOIR DIRE.

Trial counsel neglected to conduct an adequate voir dire examination of prospective jurors, failing to probe the impact of pretrial publicity on their ability to be fair, or their ability to consider all sentencing options in a case like Heidler's, thus imperiling his fundamental right to a fair trial and impartial jury. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992). This was particularly problematic given that

[11] The district court assumed that *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 469 U.S. 413 (2013), applied to excuse Heidler's default of the claim. D.97:20. Under those cases, 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 v. GDCP Warden*, 759 F.3d. 1210, 1262 (11th Cir. 2014). A COA grant on the conflict-of-interest claim would necessarily include the applicability of *Martinez* and *Trevino*.

the majority of venirepersons, including at least six of the jurors, admitted to having already read or heard something about the case, but were asked no questions about the content or depth of their exposure. *See*, *e.g.*, D.13-9:7, 10-16; D.13-8:38, 43-48, *see also* D.23-14:30-33 (front-page, illustrated article detailing Heidler's jail escape).

The formation of an impartial jury depends upon an adequate voir dire, *see Warger v. Shauers*, 135 S.Ct. 521, 528-29 (2014), and Heidler's counsel failed to protect that right. Voir dire is inadequate when it creates an avoidable risk that a partial juror sat on the jury. *See Morgan*, 504 U.S. at 739 ("Because the inadequacy of voir dire leads us to doubt that petition was sentenced to death by [an impartial] jury . . . his sentence cannot stand.") (internal citation omitted).

When jurors have been exposed to potentially prejudicial media, it is necessary to "determine[] what in particular each juror had heard or read and how it affected his attitude toward the trial, and . . . whether any juror's impartiality had been destroyed." *United States v. Davis*, 583 F.2d 190, 196-98 (5th Cir. 1978). It is also inadequate when, in the wake of prejudicial pretrial publicity, no attempt is made to discover bias related to that exposure. *See Jordan v. Lippman*, 763 F.2d 1265, 1266-67 (11th Cir. 1985). ("[A petitioner] is entitled to relief if outside influences indicate a significant possibility of prejudice in the face of a voir dire

procedure which was inadequate to permit discovery of juror bias.") (internal citation omitted).

Heidler's counsel knew that leaving jurors' biases undiscovered could harm their client, which is why they filed a pretrial memo detailing the necessity of a comprehensive voir dire. *See* D.12-5:98-109; D.23-6:1-6. And they had a right to a robust voir dire under state law. *See* O.C.G.A. § 15-12-133 (1999). But they neglected to do what they themselves knew reasonably had to be done, leaving Heidler to be tried by jurors, like Patricia Squires, *see* D.127:176-182, whose expressed biases counsel left unprobed.

Reasonable jurists could debate the district court's conclusion that counsel's inadequate voir dire must have been strategic, *see* D.136:28-30, despite the evidence indicating it was not. A COA should issue.

E. A COA SHOULD ISSUE REGARDING THE COURT'S PROCEDURAL RULINGS, WHICH ERRONEOUSLY DISMISSED SEVERAL VALID CONSTITUTIONAL CLAIMS.

1. Reasonable Jurists Could Disagree with the District Court Dismissing Claims as Insufficiently Pled.

Reasonable jurists could debate the district court's *sua sponte* dismissal of claims as insufficiently pled years after the petition was filed. Heidler met the pleading requirements under 2(c) of the Rules Governing Section 2254 Cases ("Habeas Rules") and, even if not, the court erred in dismissing claims years too late and without giving Heidler the opportunity to correct any deficiencies.

a) Heidler Satisfied the Pleading Standards.

Heidler met the 2(c) pleading requirements, which require petitioners to "specify all the grounds for relief" and "state the facts supporting each ground." Heidler pled specific facts that amounted to constitutional error. For example, Heidler raised a global ineffective assistance of counsel claim, *see* D.124:17, and then identified the *particular* deficient acts and omissions by trial counsel, *see* D.124:17-27, such as:

> 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;
>
> Counsel failed to conduct an adequate pretrial investigation into the voluntariness of Petitioner's statements to law enforcement personnel, and specifically failed to investigate the effect of Petitioner's mental capacity, and his medical and psychological history on Petitioner's mental state at the time he provided the incriminating statements[.]

See D.124:19; 136:32-33.[12] Reasonable jurists could debate the district court's findings that Heidler's claims failed to meet 2(c)'s requirements.

b) The Claims Were Dismissed Years into Litigation and Without an Opportunity to Amend.

Even if the district court correctly assessed Heidler's claims, it came too late. Courts must review a petitioner's claims for 2(c) compliance "promptly" at the

[12] *See also* D.1:17 (identical claims as set forth in original petition). The others are listed in an attachment to Heidler's 59(e) motion, reflecting counsel's attempt to catalog the district court's procedural rulings. *See* D.139-1.

"preliminary" stage of federal habeas proceedings. *See* Habeas Rule 4; *see also Mayle v. Felix*, 545 U.S. 644, 656 (2005). The Habeas Rules further contemplate that the petitioner will be allowed to correct any 2(c) deficiencies:

> [T]he 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).

Notes of the Advisory Committee on the 2004 Amendments to the Habeas Rules.

Heidler's case was actively litigated for over eight years without the district court noting any pleading deficiency—even though it issued a ruling on procedural issues after briefing by the parties. D.56. That order dismissed several of Heidler's claims as procedurally barred, but noted no pleading deficiency, despite specifically mentioning Rule 2(c)'s pleading standard. *See id.* at 4.

Nonetheless, the district court, *sua sponte*,[13] dismissed certain claims as insufficiently pled in its December 12, 2019 order denying Heidler's petition. Dismissing claims for inadequate pleading at that late stage of litigation and with no opportunity to correct the alleged deficiencies was error. *See* Habeas Rule 4; *accord Benjamin v. Sec'y for the Dep't of Corr.*, 151 Fed. Appx. 869, 874 n.9 (11th Cir.

[13] Respondent-Appellee never argued that any of Heidler's claims were insufficiently pled, despite the opportunity to do so when it filed four separate Answer-Responses to Heidler's initial and amended habeas petitions, D.10; D.46; D.75; D.128; briefed procedural default issues, D.54; and addressed the merits, D.129.

2005); *Wingfield v. Sec'y, Dep't of Corr.*, 203 Fed. Appx. 276, 278 (11th Cir. 2006). The district court refused Heidler's request for leave to correct the alleged deficiencies. D.139; D.146.

Failing to give Heidler an opportunity to correct any pleading deficiencies also amounted to a due process violation. "The 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) (internal citation omitted). 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 Rodriguez v. Fla. Dep't of Corr.*, 748 F.3d 1073, 1080 (11th Cir. 2014).

2. Reasonable Jurists Could Disagree with the District Court Dismissing Claims as Unexhausted.

a) Dismissing Claims as Unexhausted Despite Their Adequate Presentation to State Courts.

Reasonable jurists could debate the district court's dismissal of claims as unexhausted for purportedly failing to include them in the CPC application to the Georgia Supreme Court. *See* D.136:21-22, 30-34, 35, 35 n.9, 36-39.[14] Heidler raised these claims in his state habeas petition.[15] After the petition was denied, he filed a

[14] *See* D.139-1.

[15] Some of these claims were adjudicated on direct appeal and were thus exhausted there. *See supra* Section IV(F)(1)(a).

CPC application, in which he expressly incorporated by reference "all of the [state habeas] claims and arguments" and stated he was not abandoning any claims. D.31-15:6 n.1. He further explained that "[t]he page limitation ha[d] prevented him from setting out all of his claims herein."[16] *Id.*

A state procedural rule bars federal review if it is "firmly established and regularly followed." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (internal citation omitted). There is no "firmly established and regularly followed" Georgia requirement to brief all claims in a CPC application. *See* O.C.G.A. § 9-14-52(b); Ga. Sup. Ct. Rule 36.[17] The Georgia Supreme Court's practice, moreover, also reflects that issues not briefed in CPC applications are not abandoned. *See, e.g.*, *Whatley v. Terry*, 668 S.E.2d 61 (Ga. 2008) (Georgia Supreme Court adjudicating a claim on appeal that was not briefed in the CPC application, and not finding it abandoned); *Whatley v. Upton*, No. 3:09-cv-00074 (N.D. Ga), Doc. 14-16 (CPC application).

[16] Incorporating claims by reference in a CPC application has long been the practice in Georgia capital state habeas proceedings because the CPC application page limits, *see* Georgia Supreme Court Rule 20, typically prevent petitioners from briefing every claim.

[17] By contrast, Georgia Supreme Court Rule 22, captioned "BRIEFS: ARGUMENT AND AUTHORITY," does consider non-argued claims abandoned. Rule 22 applies only to "briefs," which CPC applications are not; the Georgia Supreme Court Rules are careful to identify which pleading types each rule encompasses. *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 response").

The district court relied partially on *Hittson* to find claims not fully briefed in Heidler's CPC application defaulted, but that case does not support the district court's ruling. *See* D.136:21. In dictum, the *Hittson* panel noted that "claims not in [a] CPC application are unexhausted." 759 F.3d at 1232 n.23. First, the footnote's meaning is unclear: Are claims incorporated by reference and expressly not abandoned considered "in" or "not in" a CPC application? Second, if the footnote's meaning *is* that Georgia law requires briefing in a CPC application in order to exhaust, it inaccurately portrays Georgia law, as explained above.

Other district courts, both pre- and post-*Hittson*, have agreed that Georgia law does not require briefing of all claims in order to exhaust them. *See, e.g.*, *Sears v. Chatman*, 2016 U.S. Dist. LEXIS 47589, *41 (N.D. Ga. April 8, 2016) ("In Georgia, there is no state law requirement that each claim be briefed and there is no state rule that failure to brief a claim asserted in a state habeas petition constitutes a procedural default of that claim."); *Presnell v. Hall*, 2013 U.S. Dist. LEXIS 41063, *35 (N.D. Ga. Mar. 25, 2013). Because there is no "firmly established and regularly followed" rule requiring briefing in CPC applications in order to exhaust claims, federal review cannot be precluded on that basis. *See Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2020).

b) Overlooking the State's Exhaustion Waiver.

Even assuming claims not briefed in Heidler's CPC application were unexhausted, reasonable jurists could debate the district court's conclusion that Respondent-Appellee did not waive exhaustion. "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). A state makes an express waiver, *see* 28 U.S.C.S. § 2254(b), when it declines to raise the exhaustion defense or concedes a claim is exhausted in its answer to a habeas petition. *Vazquez v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 964, 966-67 (11th Cir. 2016); *Dorsey v. Chapman*, 262 F.3d 1181, 1187 (11th Cir. 2001). A district court must accept a state's exhaustion waiver absent a finding that invoking exhaustion *sua sponte* serves an important federal interest. *See Vazquez*, 827 F.3d at 966-67.

With respect to multiple claims the district court found unexhausted, Respondent-Appellee had identified them as exhausted and reviewable in his Answer-Responses and procedural default briefing. *See* D.10, 46, 54, 75, 128; D.139-1. For several of those claims, *see* D.139-1, the district court excused Respondent-Appellee's exhaustion waiver by reasoning that the claim's details were not obvious until merits briefing and Respondent-Appellee therefore could not have raised the exhaustion defense in his answer-response. *See* D.136:21-22, 30, 32-34, 36-37. 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.*, 789 Fed. Appx. 756, 758 (11th Cir. 2019). The State cannot expressly find a claim exhausted and then later assert it was too vague to determine exhaustion. *See id.*; *accord Pike v. Guarino*, 492 F.3d 61, 72-73 (1st Cir. 2007) ("[T]o the extent that the [competency] claim was vague . . . it was incumbent upon the waiving party to use caution in the exercise of the [exhaustion] waiver.").

Reasonable jurists could debate whether Respondent-Appellee expressly waived exhaustion, and whether the district court erred in overlooking that waiver and dismissing Heidler's claims as unexhausted and procedurally defaulted. *See Vazquez*, 827 F.3d at 966-67.

3. The Erroneous Procedural Rulings Dismissed Claims That Are At Least Debatably Valid.

The district court's procedural rulings dismissed numerous claims that are, at the least, debatably valid. *See Slack*, 529 U.S. at 478; D.139-1. Space does not permit the detailing of each dismissed claim, but a brief summary of two are below. The rest are listed, to the best of undersigned counsel's ability to accurately capture the district court's procedural rulings, in D.139-1.

The district court struck Heidler's claim that trial counsel had provided ineffective representation by failing to move to suppress Heidler's inculpatory statement on the grounds it was the product of an illegal arrest and that Heidler's

mental illness precluded him from making a valid *Miranda* waiver. The court ruled those IAC subclaims were both insufficiently pled and unexhausted, and there was no showing of cause and prejudice. D.136 at 33. Reasonable jurists could find that these claims were, at the least, debatably valid.

Counsel tried to suppress Heidler's statements, *see* D.13-1:14-47; D.12-3:52-55, but they failed to argue the most compelling grounds for suppression. Police arrested Heidler pursuant to a warrant issued on "bare conclusions" and not probable cause, so the arrest violated the Fourth Amendment and his resulting statement should have been suppressed. *See Illinois v. Gates*, 462 U.S. 213, 239 (1983); *United States v. Leon*, 468 U.S. 897, 915-18 (1984); D.12-1:12. Also, counsel failed to introduce evidence of Heidler's mental illness to argue his *Miranda* waiver was not "knowing[] and intelligent[]," *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), though counsel knew of Heidler's serious mental illness and "[t]here is little doubt that mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver." *Miller v. Dugger*, 838 F.2d 1530, 1539 (11th Cir. 1988).

Given counsel's goal of suppressing the statement, their failure to raise these grounds for suppression stemmed from deficiency, not strategy. *See, e.g., Tho Van Huynh v. King*, 95 F.3d 1052, 1055-58 (11th Cir. 1996). The deficiency prejudiced Heidler. The unique importance of a defendant's confession, *see, e.g., Arizona v. Fulminante*, 499 U.S. 279, 296 (1991), and the prosecutor's reliance on it throughout

Heidler's trial—including playing the videotaped statement to the jury, *see* D.13-18:33-43, and invoking its language in penalty closing, *see* D.14-11:46, 50—generates a reasonable probability that, without it, one juror's verdict would have changed. *See also* D.127:247-56.

Similarly, the district court dismissed as insufficiently pled Heidler's argument that trial counsel were ineffective in failing to object to inadmissible, prejudicial evidence the State introduced at penalty. *See* D.136:31; *see also* D.127:187-93. Such inadmissible evidence included Heidler's aggravating answers to jailor Bruce LeBlanc's un-*Mirandized* questions,[18] and inadmissible statements purporting to show Heidler's beliefs in devil-worship, such as medical forms Heidler filled out with the name "Sandman," with "666-Hell" as his address and "Satan" as his next of kin, and "Devil Child" as his religion. *See* D.23-1:98-99. This evidence "proved nothing more than [Heidler's] abstract beliefs," violated the First Amendment, and was inadmissible. *See Dawson v. Delaware*, 503 U.S. 159, 166-67 (1992); *see also Zant v. Stephens*, 462 U.S. 862, 885 (1983). Like in *Dawson*, the State used this evidence "simply because the jury would find these beliefs morally reprehensible," 503 U.S. at 167, arguing at penalty: "Jerry Scott Heidler sends notes

[18] *See, e.g., Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). LeBlanc testified that Heidler told him "he was a collector of souls" and that "he wasn't through collecting souls," and that "he was fascinated with" the Sandman, a character "whose soul belonged to the devil and . . . went around killing families while they slept." D.14-7:111-12.

. . . saying that his next of kin is Satan. Some of you are religious people, church-going folks. That isn't a mischief to me. That ain't funny." D.14-11:49. Reasonably effective counsel would have objected to the evidence's admissibility. *See, e.g.*, *Scott v. Upton*, 208 Fed. Appx. 774, 778 (11th Cir. 2006) (finding failure to object to inadmissible evidence deficient and remanding for prejudice determination); *Atkins v. Attorney Gen. of Alabama*, 932 F.2d 1430 (11th Cir. 1991) (counsel ineffective in failing to object to inadmissible fingerprint card). Heidler presented, at the least, a debatably valid constitutional claim that trial counsel's failure to object to inadmissible aggravating evidence was deficient and prejudicial.

Because the district court's procedural rulings are debatable by jurists of reason, and they precluded review of debatably valid constitutional claims, a COA should issue. *See Slack*, 529 U.S. at 484.

F. A COA SHOULD ISSUE AS TO HEIDLER'S CLAIM THAT THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT THROUGHOUT BOTH PHASES OF TRIAL.

1. Reasonable Jurists Could Disagree with the District Court's Rulings Finding the Claim Procedurally Barred.

The district court dismissed the majority of Heidler's prosecutorial misconduct claims as unexhausted, procedurally defaulted, and/or insufficiently pled. *See* D.136:35-41. In addition to some claims having been exhausted for the reasons set forth in Section IV(E)(2), many were exhausted because the Georgia Supreme Court adjudicated them on the merits on direct appeal.

a) The State Court Adjudicated the Guilt-Phase Closing and Penalty-Phase Misconduct Claim on the Merits.

The district court found the guilt-phase closing argument misconduct claim defaulted because "the Georgia Supreme Court . . . rel[ied] on state procedural rules to resolve the federal claim without reaching the merits of the claim." D.136:37-38 (internal citation omitted). The court overlooked that the state court, after finding the arguments waived for failure to object at trial, *did then* adjudicate the claim on the merits. *See Heidler v. State*, 537 S.E.2d 44, 54 (Ga. 2000) ("[W]e have made an independent examination of the prosecution's closing argument . . . . We conclude that there is no reasonable probability that the argument changed the jury's [sentence]. Nor is there any evidence of prosecutorial misconduct.") (internal citations omitted). As to penalty-phase misconduct, the Georgia Supreme Court found wholesale that "[t]he prosecutor's conduct and argument in the penalty phase were not improper." *Id.* at 65. Indeed, the state habeas court denied the misconduct claims as *res judicata*. D.31-12:10; *see Bell v. Cone*, 556 U.S. 449, 467 (2009).

For a state court's procedural ruling to preclude federal review, it cannot also reach the merits of the claim. *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001); *see also 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."). A state court's "alternative

holding on the merits constitutes an adjudication on the merits." *Riechmann v. Fla. Dep't of Corr.*, 940 F.3d 559, 580 (11th Cir. 2019).

b) The District Court Erroneously Dismissed Prosecutorial Misconduct Claims as Insufficiently Pled.

For the reasons above, Section IV(E)(1), reasonable jurists could debate the district court's dismissal of prosecutorial misconduct claims as insufficiently pled. *See* D.139-1.

c) The District Court Erroneously Dismissed Prosecutorial Misconduct Claims as Absent from the Petition.

Heidler petition alleged that, during both phases of Heidler's trial, "the State delivered a series of improper, inflammatory, and unsubstantiated arguments[.]" D.124:34. When briefing the merits, Heidler fleshed out the ways in which the prosecutor's arguments were "improper, inflammatory, [or] unsubstantiated." *Id.* The district court then dismissed the claims as absent from the petition. *See* D.136:36-42; D.139-1.

The district court did so *sua sponte*. Respondent-Appellee never asserted the claims were absent from the petition. *See* D.129:157-87. The district court erred in doing so on its own. *See, e.g., Greenlaw v. United States*, 554 U.S. 237, 243-244 (2008) ("[O]ur 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); *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (finding the purpose of proper pleading is to provide notice to the responding party of petitioner's claims).

2. Heidler Presented, at the Least, a Debatably Valid Claim.

Underlying the district court's debatable procedural rulings is, at the least, a debatably valid claim that the prolific prosecutorial misconduct through both phases of trial "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal citation omitted). This is particularly so with respect to its impact on sentence.

a) Guilt-Phase Misconduct.

The prosecutor, Rick Malone, opened the case with an improper argument. In line one of his opening, Malone invited jurors to imagine themselves as the crime victims:

> What is your worst nightmare? If you're a father, perhaps it's an intruder coming into your house and harming your family. Maybe if you're secure in your bed it's someone coming in and killing you in your sleep. If you're a child it may be that you're being awakened and taken from your home in the middle of the night and then sexually molested. If you're an infant, maybe you're left alone in the home with only the dead bodies of your mother and father to listen to your cries for help. What is your worst nightmare? The only good thing about a nightmare is that you wake up. . . . This case is about all of those things, all of those things happening to a good family in a very small town called Santa Claus in South Georgia, but they didn't wake up.

D.13-14:38. An argument that "asks the jurors to place themselves in the victim's position [or] asks the juror to imagine the victim's pain and terror" is an improper "Golden Rule" argument, *Grossman v. McDonough*, 466 F.3d 1325, 1348 (11th Cir. 2006) (internal citation omitted), and is "calculated to inflame the passions or prejudices of the jury." *See United States v. Young*, 470 U.S. 1, 9 n.7 (1985).

In guilt-phase closing, Malone further appealed to the jury's passions by invoking justice for the victims as reason to return a guilty verdict:

> [J]ustice for Danny Daniels, justice for Kim Daniels, justice for [J.D.] . . . . Kim became a foster mother and created a home for other children who needed help. . . . [S]he was killed for her kindness. [J.D.], a 16-year old child, deserves justice. [B.D.], an eight-year old boy in his bed, deserves justice. . . .

D.13-19:110. Invoking the need to obtain justice for the victims as reason for a guilty verdict is misconduct. *See, e.g.*, *United States v. Phillips*, 664 F.2d 971, 1031 (11th Cir. 1981) ("A prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to an understanding of the facts and the law."); *see also Cardona v. State*, 185 So. 3d 514, 522 (Fla. 2016) ("The argument that the case is about 'justice' for the victim or the victim's family has been uniformly condemned.").

Malone also improperly impugned the mental health evidence. For instance, while examining court expert D'Alesandro, Malone intentionally misrepresented the DSM's Cautionary Statement as warning that the DSM cannot be used to diagnose

criminal defendants, *see* D.13-18:88, and then returned to that argument in closing, *see* D.13-19:104. While examining Ifill, Malone insinuated that the experts' evaluation of Heidler was done without the State's knowledge, when the State knew Heidler was being evaluated and even sent requested records to the evaluators. *See* D.12-4:37-39; D.13-19:29; D.23-6:84. Malone's false assertions were "calculated to mislead the jury" and were improper. *See Berger v. United States*, 295 U.S. 75, 85 (1935).

During his guilt-phase closing, Malone amplified his improper attacks on the mental health evidence. He misled the jurors into believing that the expert testimony did not constitute evidence and was unreliable:

> [T]hey based it all on a bunch of documents, a bunch of papers, a bunch of things sent to them by the defense attorney. Hadn't been sent to you. Have you seen those documents? They're not evidence.
>
> [. . .]
>
> How can it be evidence if you don't have it? . . .
>
> So they have based their opinion on something not in evidence. . . . Expert witnesses can give you their opinion and you can accept it and you can reject it, but they have to base their opinion on something in evidence. . . .
>
> [. . .]
>
> How much can you care about that, when you've taken an oath to make a decision based on this case based on the evidence?

D.13-19:102-03; *see also id.* at 83, 84, 108. Intentional misrepresentations and insinuations of personal belief are misconduct. *See, e.g.*, *Boyde v. California*, 494 U.S. 370, 384 (1990); *United States v. Dennis*, 786 F.2d 1029, 1046 (11th Cir. 1986); *accord Young*, 470 U.S. at 18-19 ("[T]he prosecutor's opinion . . . may induce the jury to trust the Government's judgment rather than its own view of the evidence."). When examining Kuglar, Malone elicited inadmissible statements Heidler made during his compelled evaluation, and then relied on those statements in closing to prove motive and malice.[19] *See* D.13-19:35-36; D.13-19:88-89. These are just examples, as the prosecutor's misconduct peppered the entire guilt phase of Heidler's trial and had a direct impact at sentencing. *See generally* D.127:197-214, 228-31.

b) Penalty-Phase Misconduct.

In penalty-phase closing, Malone argued that the defense's expert was a "hired gun" who lied when he explained Heidler's BPD diagnosis; Malone argued instead that BPD is not an actual disorder, but just means approaching having an actual disorder:

> Don't lose your good sense, ladies and gentlemen of the jury, because of the mumbo-jumbo that people can bring to this courtroom.

[19] Statements made about the offense during a psychiatric examination implicate a defendant's Fifth Amendment rights and are inadmissible, *see, e.g.*, *Miller*, 838 F.2d at 1542, except for the purpose of explaining the basis for the expert opinion, *see Isley v. Duggar*, 877 F.2d 47, 49 (11th Cir. 1989).

> Borderline doesn't mean borderline, [Dr. Maish] told you. Well we all know what a borderline is. . . . You think about that yourself.

D.14-11:50. Such remarks, made without evidentiary support and reflecting Malone's own opinion on the evidence and witness credibility, were improper. *See Young*, 470 U.S. at 8; *Dennis*, 786 F.2d at 1046.

Malone also repeatedly argued to the jurors that they represented the people of the State of Georgia, the party Malone himself represented, *see* D.14-11:44, 45, 52, and suggested the State and jury were aligned by arguing "it's in your power . . . to correct *as best a government and a group of people can* correct this horrible, terrible crime." *Id*. at 52 (emphasis added). This was improper. *See e.g.*, *Leavitt v. Arave*, 371 F.3d 663, 687 (9th Cir. 2004) (improper to "portray[] the jury as part of a team opposing the defendant") (internal citation omitted); *United States v. Manning*, 23 F.3d 570, 573 n.1 (1st Cir. 1994) (telling juror they "represent the people of the United States" improper).

Malone also argued that Heidler was an "evil" and "rage-filled" force who could not be stopped by anything other than execution and that if the jurors failed to vote for death, they would make a future prison guard Heidler's next victim. *See* D.14-11:46-49. "Arguing that any future victim would be on the jury's conscience, and that jurors were the *only* people who could stop [the defendant] from killing" is improper. *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir. 1985). Then, at the end of his argument, Malone instructed that jurors had pledged to give death in this case:

"All of you said in voir dire that you could give the death penalty in this case. When you're in that jury room I want you to think about this. If not for this, then what? If not for these crimes, for what?" D.14-11:52-54. That was improper. *See Young*, 470 U.S. at 18 (improper "to try to exhort the jury to 'do its job'; that kind of pressure . . . has no place in the administration of criminal justice").

c) The Misconduct Rendered Both Trial Phases Fundamentally Unfair.

The prolific prosecutorial misconduct infected the entire trial. Without it, there is a reasonable probability that the jury would have entered a GBMI verdict and also would have spared Heidler's life. *See Davis v. Zant*, 36 F.3d 1538, 1545 (11th Cir. 1994).

In the guilt-innocence phase, Heidler's attorneys conceded guilt and tried to convince the jury to return a GBMI verdict. *See, e.g.*, D.19-8:35-36. But Malone's misleading attacks on the expert mental health testimony diminished the attainability of that verdict. *See, e.g.*, *Napue v. Illinois*, 360 U.S. 264, 270 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative[.]"). So did Malone's elicitation of Heidler's Fifth-Amendment-protected statements to Kuglar and use of those statements to argue motive, which undermined the defense's theory that the crimes lacked motive and resulted solely from Heidler's serious mental illness. *See, e.g.*, D.13-19:118. Given the rampant nature of the prosecutor's uninvited misconduct and the lack of any curative

instruction, there is a reasonable probability that the jury would have returned a GBMI verdict but for Malone's misconduct. *See Darden*, 477 U.S. at 179-83; *Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974); *Romine v. Head*, 253 F.3d 1349, 1369-70 (11th Cir. 2001).

That prejudice, moreover, carried into sentencing, particularly because, "as a practical matter, defendants found to be guilty but mentally ill of death-penalty-eligible murders normally receive a term of years or life imprisonment." *Stevens v. McBride*, 489 F.3d 883, 893 (7th Cir. 2007) (citations omitted). Moreover, trial counsel relied on the guilt-phase expert testimony to plead for life at sentencing, *see, e.g.*, D.14-7:99, 100, 101; D.14-11:55, 62, 63—but the damage to that evidence had already been done.

The State's separate penalty-phase misconduct then exacerbated the guilt-phase misconduct. Malone disparaged the defense expert and argued Heidler's placidity at trial proved lack of mental illness, D.14-11:50-51, continuing the theme that the mental illness evidence was manipulated. Malone's repeated insinuations that the State and the jury were on one team aided the jurors' rejection of Heidler's defenses and pleas for mercy. As in the guilt phase, trial counsel did not invite the misconduct, *see Young*, 470 U.S. at 11-12, or effectively mitigate it, *see id.*, and the court provided no curative instructions in response to it, *see Donnelly*, 416 U.S. at 644. The prosecutor's misconduct here undermines confidence in the outcome of the

proceedings. There is a reasonable probability that, but for the State's improprieties, jurors would have returned a GBMI verdict and would have exercised their discretion to spare Heidler's life.

A COA should issue because reasonable jurists could disagree with the district court's procedural rulings barring review of the prosecutorial misconduct claim, and, reviewed *de novo* or applying § 2254(d) to the state court's decision, reasonable jurists could agree that Heidler has presented a valid constitutional claim.

G. A COA SHOULD ISSUE AS TO HEIDLER'S CUMULATIVE-ERROR CLAIM.

The district court concluded that because "all of Heidler's constitutional claims fail . . . . there is nothing to accumulate, and, as such, Mr. Heidler cannot prevail on his cumulative-error claim." D.136:66. As detailed above, reasonable jurists could debate whether the district court erred in denying Heidler's constitutional claims; as such, reasonable jurists could also debate the district court's denial of the cumulative-error claim. A COA should issue.

H. A COA SHOULD ISSUE BECAUSE THE DISTRICT COURT FAILED TO ADJUDICATE ALL CLAIMS.

Reasonable jurists could debate whether the district court violated *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992), in failing to adjudicate the claim that the character of the voir dire and the trial court's failure to exclude biased jurors for cause violated Heidler's right to an impartial jury and fair trial. *Clisby* requires district courts to address all claims in a § 2254 petition; when it fails to, this Court

must remand the case for adjudication. *See, e.g., Senter v. United States*, 2020 U.S. App. LEXIS 35704 (11th Cir. 2020).

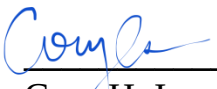
The unadjudicated claim encompasses the arguments that the trial court: disqualified jurors without adequately inquiring into their death penalty views, D.119-1:53; coerced jurors into giving certain voir dire answers, *id.* at 55-56; and improperly rehabilitated and failed to excuse biased jurors, *id.* at 56-59. Respondent-Appellee acknowledged this claim as exhausted. D.128:35. Whether or not § 2254(d) applies, there is, at the least, a debatably valid claim underlying the *Clisby* error. *See, e.g., Gray v. Mississippi*, 481 U.S. 648 (1987); *Davis v. Georgia*, 429 U.S. 122 (1976). A COA must issue.

V. CONCLUSION

Mr. Heidler respectfully requests this Court grant a COA on the issues described above.

This 21st day of December, 2020.

Respectfully submitted,



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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY SCOTT HEIDLER, Petitioner-Appellant,	)	
vs.	)	Case No. 20-13752-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing motion for leave to proceed *in forma pauperis* is in compliance with Federal Rule of Appellate Procedure 32(a)(7) and Eleventh Circuit Rule 22-2 because it includes 12,980 words, according to Microsoft Word processing software.

This the 21st day of December, 2020.

Cory H. Isaacson

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

JERRY SCOTT HEIDLER, Petitioner-Appellant,	)	
vs.	)	Case No. 20-13752-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

NOTICE OF ELECTRONIC FILING
AND CERTIFICATE OF SERVICE

This is to certify that I have filed the foregoing pleading by uploading it using this Court's ECF e-filing system, which will serve an electronic copy on counsel for Appellee directed to:

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This the 21st day of December 2020.

Cory H. Isaacson

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13752-P

JERRY SCOTT HEIDLER,
Petitioner-Appellant,

vs.

WARDEN,
Georgia Diagnostic Prison,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
STATESBORO DIVISION

MOTION FOR PANEL CLARIFICATION AND RECONSIDERATION OF THE CERTIFICATE OF APPEALABILITY ORDER

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CERTIFICATE OF INTERESTED PERSONS

Counsel hereby certifies that the following have an interest in the outcome of this case:

1. Askew, Steve, prosecutor at trial
2. Beauvais, Steven L., local counsel for Heidler in federal habeas proceedings
3. Boleyn, Susan V., counsel for the state on appeal and for Respondent in state habeas proceedings
4. Bryant, Jessica, victim
5. Burton, Beth A., counsel for Respondent in state and federal habeas proceedings
6. Culpepper, Emily J., counsel for Heidler in state habeas proceedings
7. Daniels, Bryant, victim
8. Daniels, Danny, victim
9. Daniels, Kim, victim
10. Duffey, Aubrey, Superior Court Judge, state habeas proceedings
11. Dunn, Thomas H., counsel for Heidler in state habeas proceedings
12. Edenfield, B. Avant, Federal District Court Judge, federal habeas proceedings
13. Freidlin, Akiva, counsel for Heidler in federal habeas proceedings
14. Ford, Benjamin, Warden, Respondent

15. Garrett, Michael C., counsel for Heidler at trial and on appeal

16. Goldberg, Allison B., counsel for the state on direct appeal

17. Graham, Sabrina D., counsel for Respondent in state and federal habeas proceedings

18. Hartley, Jr., Marvin, State Judge (pretrial), Superior Court of Toombs County

19. Heidler, Jerry Scott, Petitioner-Appellant

20. Hoffmann, Jr., William E., counsel for Heidler in state habeas proceedings

21. Isaacson, Cory, counsel for Heidler in federal habeas proceedings

22. Jackson, George Terry, local counsel for Heidler in federal habeas proceedings

23. Kammer, Brian S., counsel for Heidler in federal habeas proceedings

24. Malone, Richard A., prosecutor at trial and on appeal

25. McMillan, Walter C., State Trial Judge, Superior Court of Toombs County, sitting in Walton County by designation

26. Mears, Michael, counsel for Heidler on appeal

27. Palmer, Kathy S., trial counsel for Heidler

28. Pearson, Lynn Margo, counsel for Heidler in federal habeas proceedings

29. Russ, Michael C., counsel for Heidler in state habeas proceedings

30. Sharkey, Kimberly L., counsel for Heidler in state habeas proceedings

31. Stewart, Alice C., counsel for Heidler on appeal

32. Vrolijk, Allison, counsel for Respondent in state habeas proceedings

33. Westmoreland, Mary Beth, counsel for the state on appeal and for Respondent in state habeas proceedings

34. Widder, Marcia A., counsel for Heidler in federal habeas proceedings

35. Wood, Lisa Godbey, Federal District Court Judge, federal habeas proceedings

Respectfully submitted,

Cory H. Isaacson (Ga. 983797)

COUNSEL FOR PETITIONER
JERRY SCOTT HEIDLER

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MOTION FOR PANEL CLARIFICATION AND RECONSIDERATION OF THE CERTIFICATE OF APPEALABILITY ORDER

COMES NOW, Petitioner-Appellant Jerry Scott Heidler, by and through undersigned counsel and, pursuant to 28 U.S.C. § 2253, Rules 22(b) and 27(c) of the Federal Rules of Appellate Procedure, and Eleventh Circuit Rules 22-1(c), 27-1(d) and 27-2, respectfully moves this Court for panel clarification of two of the issues for which the Court granted a certificate of appealability ("COA"), and panel reconsideration of the partial denial of his application for a COA.

I. INTRODUCTION

As the state habeas court expressly found, Mr. Heidler "has a long history of severe mental illness," with "impairments [that] are longstanding and . . . have been present since [his] 'preteen years,'" and "it is 'highly unlikely' he will ever be free of the substantial impairments." D.31-12:16-17. Those impairments include a lengthy history of psychosis, suicide attempts, and extended psychiatric hospitalizations dating back to Mr. Heidler's childhood.

Although issues related to Mr. Heidler's severe mental illness were the central focus of the claims raised in federal habeas proceedings, the district court rejected them all, many on questionable procedural grounds, in its ruling denying Mr. Heidler

relief under 28 U.S.C. § 2254, and further denied a COA as to any issue, concluding that none could be the subject of reasonable debate. *See* D.136, D.146.

Mr. Heidler applied for a COA with this Court on December 21, 2020 ("COA App."), identifying eight claims that met the standard for a COA grant. On January 11, 2021, the Court, by single-judge order, granted Mr. Heidler's application as to three issues and denied a COA on all other issues. Mr. Heidler now moves for panel clarification of two issues in the COA grant. He also moves for panel reconsideration on the following denied claims: 1) whether Mr. Heidler was tried while incompetent in violation of his substantive due process rights; 2) whether, in addition to the suppression issue underlying the third COA grant, other claims dismissed by the district court's procedural rulings warrant a COA; and 3) whether Mr. Heidler's counsel operated under a conflict of interest. These claims meet the minimal threshold for a COA, as reasonable jurists could disagree with how the district court resolved the claims and the issues presented "deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2002).

II. REQUEST TO CLARIFY THE COA ISSUES GRANTED.

A. Clarification of First and Second COA Issues Granted.

The first two issues for which this Court granted a COA read 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 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.

These COA grants specifically address only counsel's ineffectiveness in "investigating" mental health and other mitigation evidence. But trial counsel's ineffectiveness in *presenting* such evidence is also part and parcel of those ineffectiveness claims. Undersigned counsel believe the granted issues reasonably may be read to include the presentation of such evidence, but request clarification from the Court on this point.

In the event the original grants do in fact only address counsel's inadequate investigation, Mr. Heidler respectfully asks the panel to reconsider the exclusion of counsel's ineffectiveness in presenting available evidence (both evidence counsel possessed but failed to present, and evidence counsel failed to obtain due to inadequate investigation) regarding Mr. Heidler's mental illness and mitigation.

As to Issue #1, trial counsel not only failed to conduct an adequate investigation of Mr. Heidler's mental health for the guilt phase of trial, but also failed to present relevant evidence in their possession. Counsel had records, for example, documenting Mr. Heidler's numerous and lengthy childhood psychiatric hospitalizations, repeated suicide attempts, and psychosis (including hallucinations),

but failed to adequately present that evidence to the jury, leaving it with a misleadingly benign picture of Mr. Heidler's mental health. *See, e.g.*, COA App. at 18-22.

The same is true for Issue #2: Trial counsel not only failed to conduct an adequate investigation of mitigating evidence of, for instance, the significant physical abuse Mr. Heidler suffered as a child, but also failed to present the evidence they did have. As explained above, counsel had significant evidence of Mr. Heidler's lifelong, severe mental illness, but never presented it to the jury. *See, e.g.*, COA App. at 18-22. Counsel also failed to present other mitigating evidence, like school records demonstrating Mr. Heidler "lack[ed] nu[r]turance and basic security needs, and [wa]s emotionally abandoned" as a child, D.29-11:38-43, and suffered serious family dysfunction. *See, e.g.*, D.28-15:27-28. To the extent counsel presented evidence of abuse and neglect, it was through a 1,100-page document dump of DFCS records at the close of evidence, provided to the jury without any organization or explanation and which, given the brevity of sentencing deliberations, the jury could never have read. *See* D.14-11:36.

Mr. Heidler respectfully asks this Court to modify the language of Issues #1 and #2 to include specifically trial counsel's ineffectiveness as it relates to their failure to present evidence.

III. REQUEST TO RECONSIDER THE COA ISSUES DENIED.

A. Reasonable Jurists Could Disagree with the District Court's Disposition of Mr. Heidler's Claim That He Was Tried While Incompetent, and a COA Should Issue.

To be competent to stand trial, a person must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and must also have "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see also Drope v. Missouri*, 420 U.S. 162, 171 (1975). A habeas petitioner "make[s] a substantive competency claim by alleging that he was, in fact, tried and convicted while mentally incompetent," in violation of his substantive due process rights. *Medina v. Singletary*, 59 F.3d 1095, 1106 (11th Cir. 1995). A district court must order an evidentiary hearing when a petitioner presents "clear and convincing evidence" that creates a "real, substantial, and legitimate doubt" as to his or her competency during trial. *See Lawrence v. Sec'y Fla. Dep't of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012).

In determining whether a petitioner's substantive competency claim raises a legitimate doubt as to trial competency, the habeas court must accept petitioner's alleged facts as true, *Card v. Singletary*, 981 F.2d 481, 484 (11th Cir. 1992), and the court is not limited to evidence known by the trial court, *see James v. Singletary*, 957 F.2d 1562, 1572 (11th Cir. 1992). A substantive competency claim cannot be procedurally defaulted and may be raised for the first time in federal habeas

proceedings. *See Lawrence*, 700 F.3d at 481 ("We have both pre- and post-AEDPA precedent [] holding that substantive competency claims generally cannot be defaulted.") (internal citation omitted).

As described below, Mr. Heidler presented evidence in state habeas proceedings of his complete inability to communicate meaningfully with counsel and of his serious mental illness—including suicide attempts, hallucinations, and self-mutilation—that worsened as he approached trial. In adjudicating Mr. Heidler's substantive competency claim, however, the district court rejected the post-conviction evidence of Mr. Heidler's trial incompetency, finding it could only consider the evidence before the trial court at the time of its competency determination. D.136:49-55. Applying 28 U.S.C. § 2254(d), the district court asked not whether the evidence now presented raises a real doubt as to Mr. Heidler's trial competency, but instead whether the trial court was unreasonable in finding Mr. Heidler competent based on the information it had at the time. As explained below, reasonable jurists could debate the district court's disposition of the claim, and a COA is warranted.

1. Mr. Heidler Presented Clear and Convincing Evidence Raising a Real Doubt as to His Trial Competency.

Mr. Heidler has an extensive history of severe mental illness, which includes multiple, lengthy psychiatric hospitalizations as a child, hallucinations beginning at a young age, repeated suicide attempts, and childhood substance abuse. *See, e.g.*,

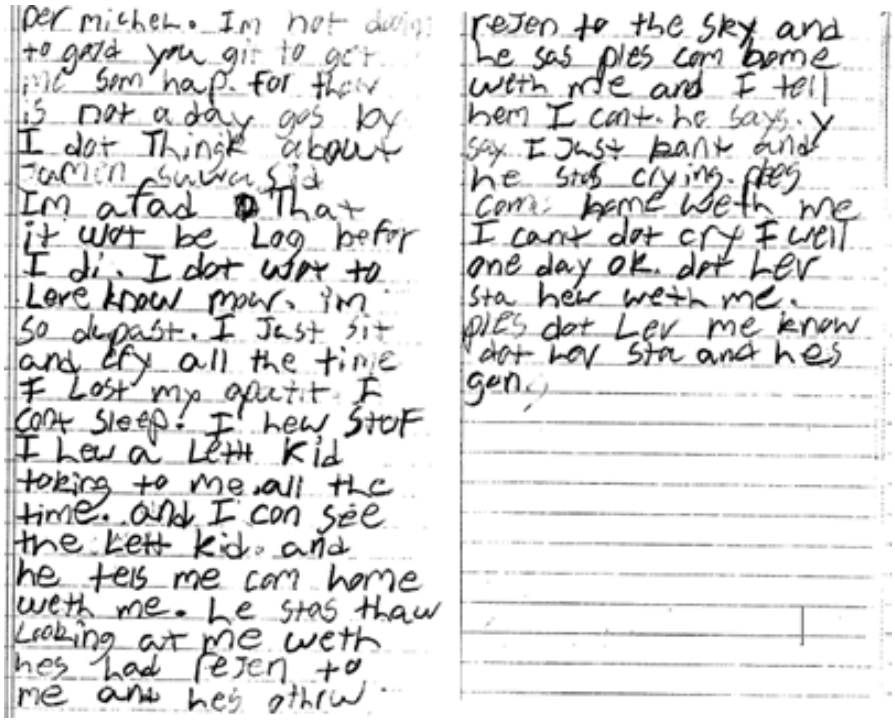
COA App. at p. 1-2; 7-13. Mr. Heidler presented the district court with evidence of the debilitating manifestations of his mental illness around the time of trial that raises a real doubt as to his competency while tried, convicted, and sentenced.

As briefed to the court below, both trial counsel testified in state habeas proceedings that Mr. Heidler could not meaningfully communicate with them at any point of their representation. Counsel Michael Garrett testified: "I couldn't communicate with him at all; nobody can." D.19-8:62; *see also id.* at 62-63 ("[Y]ou can't discuss anything with him, and that's the problem."); D.12-3:53 (trial suppression motion noting that "[Mr. Heidler] is unable to furnish his lawyers with information regarding [] searches and seizures"); D.13-2:14-15 (trial counsel during a pretrial hearing: "I think we're dealing with very serious mental illness . . . . Quite frankly, while he may understand or at least give indications that he understands in a sense a lot of what's going on, *he's not able to help*.") (emphasis added). When attorney Kathy Palmer was asked "what, if anything was [Mr. Heidler] ever able to tell you, of any significance[,]" she replied "Nothing. Nothing." *Id*. at 74; *see also* D.19-3:32-33, 45-46.

Mr. Garrett and Ms. Palmer agreed that Mr. Heidler's inability to communicate was beyond his control. When asked in state habeas whether they ever sensed Mr. Heidler purposefully did not help counsel, Mr. Garrett replied, "No. Well, I never thought that he was malingering . . . . [a]nd I don't think you could

fake it for that long," D.19-8:34-35, and Ms. Palmer replied, "No. No. Uh-uh (negative), never," D.19-3:47. Instead, his lack of communication resulted from "an inability to do so." *Id.*; *see also* D.19-3:51 ("He didn't have any rational thought processes in his mind."). Mr. Heidler's inability to communicate meaningfully with counsel was consistent with his mental illness, which counsel recognized as genuine and profound. *See, e.g.*, D.19-3:49 ("If anything, I thought I was not capable of really understanding just how truly mentally ill he was."); *id*. at 3, 22, 56.

Mr. Heidler's inability to communicate with counsel is only part of the evidence casting serious doubt on his competency when tried. While incarcerated pretrial, Mr. Heidler attempted suicide multiple times, with the last attempt just weeks before trial. *See* D.20-19:52-57, 59-61; D.20-20:28-31. He would burn and cut himself repeatedly, and would pick at the scars covering his arms while counsel tried to talk to him. *See* D.19-3:54. He was plagued by hallucinations, which he described in desperate letters to counsel, as illustrated below:


Dear Michael. Im not doing
to good you git to get
me som hap. for thar
is not a day goes by
I dot Think about
committing suicide
Im afad That
it wot be Log befor
I di. I dot wot to
Lore know mor. Im
so depast. I Just sit
and cry all the time
I Lost my apetit I
Cont sleep. I hew STOF
I Lew a Lett Kid
toking to me all the
time. and I con see
the Lett kid. and
he tels me com home
weth me. He stas thaw
Looking at me weth
hes had rejen to
me and hes othrw
rejen to the sky and
he sas ples com bome
weth me and I tell
hem I cant. he says. y
say I Just cant and
he stas crying. ples
com bome weth me
I cant dot cry I well
one day ok. dot Lev
sta hev weth me.
ples dot Lev me know
dot hev sta and hes
gen.

Translation: "Dear Michael. I'm not doing too good. You've got to get me some help. For there is not a day goes by I don't think about committing suicide. I'm afraid that it won't be long before I die. I don't want to live no more. I'm so depressed. I just sit and cry all the time. I lost my appetite. I can't sleep. I hear stuff. I hear a little kid talking to me. All the time. And I can see the little kid. And he's telling me come home with me. He stays there looking at with his hand reaching to me and his other reaching to the sky and he says please come home with me and I tell him I can't. He says why. I say I just can't and he starts crying. Please come home with me. I can't, don't cry. I will one day, okay? Don't leave, stay here with me. Please don't leave me. No don't leave—stay. And he's gone."

D.19-13:10; *see also* D.19-13:15-17 ("If [my baby] was dead, I wouldn't hear him crying for me. . . . I know he did not die, for I heard him cry for me, and I still do. I can see him sometimes. He's so beautiful."); D.22-17:105.

The jail nurse testified in state habeas that Mr. Heidler had marks "where he had been pinching himself and actually taking pieces of his tissue out of his face," D.19-6:70, and that Mr. Heidler would injure himself to keep from falling asleep because he would see people "trying to get him" when he did, *id*. at 69, 71. The nurse "repeatedly" referred Mr. Heidler for mental health services. *Id*. at 70.

Mr. Heidler was finally referred to Pineland Mental Health Center in late June 1998 and, following an assessment, referred to "physician care and assessment." D.19-10:46. In September 1998, a little less than a year before trial, his treating psychiatrist at Pineland diagnosed him with psychotic disorder, not otherwise specified (NOS), and prescribed Haldol, an anti-psychotic. *See* D.19-10:33. Mr. Heidler then took Haldol off and on before fully stopping shortly before trial. He was without anti-psychotics for the two months prior to trial and during the trial itself. *See* D.20-21:10-16. Mr. Heidler's psychiatrist at Georgia Diagnostic and Classification Prison, Dr. Jack Matteson, later testified in state habeas that "[Mr. Heidler's] situation deteriorates tremendously" when off medication, D.19-4:58, and described observing Mr. Heidler as actively psychotic in that state, *see id.* at 51-52.

Mr. Heidler's mental health worsened as he got closer to trial, D.19-6:72-73, and further deteriorated around the time he stopped medication. Two months before trial, Mr. Heidler escaped from jail and then walked, in the middle of the highway, right back. *See* D.14-9:5, 17. Six weeks prior to trial, he sent trial counsel a rambling

letter asking for death. *See* D.19-13:22 ("[H]alp me get the deft penlti it wot I wot."). Less than a month before trial, guards stopped him from hanging himself just as he was finishing the knot. *See* D.20-20:28-31. When Mr. Heidler was transferred to prison four days after trial ended, the prison psychiatrist found him in immediate need of treatment and prescribed him an anti-psychotic, a mood stabilizer, and an anti-anxiety medication. *See* D.25-7:59; 25-13:10.

The trial court found Mr. Heidler competent, without the benefit of almost all of the information above[1] and relying on outdated competency determinations. *See* D.23-1:8 (evaluation of defense expert Dr. Maish, completed eight months before trial); D.23-12:30 (evaluation of court-appointed experts Drs. Ifill/D'Alesandro, completed four months before trial); D.23-12:45 (evaluation of court-appointed expert Dr. Kuglar, completed three months before trial). Mr. Heidler was regularly taking Haldol during the periods surrounding the Ifill/D'Alesandro and Kuglar evaluations. *See* D.20-20:62-77; 20-21:10-16.

Moreover, the evaluators made their determinations without knowledge of critical facts, *see, e.g.*, D.23-4:58 (Ifill deposition) (missing information about psychotic episodes would have been "very material" to his evaluation); D.23-12:39

[1] For instance, the trial court did not know the extent of Mr. Heidler's inability to meaningfully communicate with counsel; did not have jail records documenting his psychotic disorder diagnosis, his off-and-on antipsychotic regimen, or his multiple suicide attempts; and was not privy to information regarding Mr. Heidler's pretrial hallucinations or self-mutilation.

(Kuglar affidavit) (acknowledging he was missing information "vital to [the ability to] completely and accurately assess the extent of Mr. Heidler's mental illness"), and without any indication they knew of Mr. Heidler's difficulty communicating with counsel.[2]

On May 25, 1999, more than three months before trial, the experts testified at a hearing on Mr. Heidler's "mental condition" and briefly addressed competency. *See* D.13-3:6 (Kuglar: "I think he is competent to stand trial," but also, "I think there may be questions of further elaboration required."); *id.* at 9-11 (D'Alesandro: finding Mr. Heidler competent "in terms of understanding the legal process" but saying nothing of his ability to consult with counsel or assist in his defense); *id.* at 11-13 (Ifill: saying only "it's my opinion that he does meet the criteria for being found competent" before moving to other topics). Trial counsel did not cross-examine the experts, save for a single question regarding the GBMI criteria. *See id.*

[2] In state habeas proceedings, Dr. Sarah Deland diagnosed Mr. Heidler with probable schizoaffective disorder and probable post-traumatic stress disorder, in addition to borderline personality disorder. *See* D.19-4:96. Both Dr. Kuglar and Dr. Maish testified in state habeas that their mental health assessment of Mr. Heidler would likely have changed had they been privy to all the relevant information. *See* D.23-12:38-42; D.22-20:59. Dr. Deland also reflected on competency issues in state habeas: "It was the issue about his ability to assist counsel which caused me the most concern because of his difficulty concentrating, difficulty focusing, the incredible difficulty I had just getting day-to-day information and history from him." D.194-4:102-03.

at 8. The trial court entered an order, three months later, declaring Mr. Heidler competent, relying on the testimony presented at the hearing. *See* D.12-7:60.

The full evidentiary picture, as developed in state habeas, presents "clear and convincing evidence" creating a "real, substantial, and legitimate doubt" as to Mr. Heidler's competency at the time of trial. *Lawrence*, 700 F.3d at 481; *see also Wright v. Moore*, 278 F.3d 1245, 1259 (11th Cir. 2002) ("[T]he best evidence of [petitioner's] mental state at the time of trial is the evidence of his behavior around that time, especially the evidence of how he related to and communicated with others then."). But the district court did not consider the full evidentiary picture, instead erroneously deciding it could only consider the incomplete and outdated evidence the trial court considered when it made its competency determination. *See* D.136:54. That determination is debatable by reasonable jurists.

2. Reasonable Jurists Could Debate Whether the District Court Correctly Adjudicated This Claim.

The state habeas record is replete with evidence raising a legitimate doubt as to Mr. Heidler's incompetence at the time of trial, yet the district court refused to consider most of it, concluding that it was limited to considering the evidence that was before the trial court at the time it found Mr. Heidler competent to stand trial.[3]

[3] Trial counsel made Mr. Heidler's mental health the key issue at trial. *See, e.g.*, D.19-3:35-36 (trial counsel explaining that the trial "was really one long penalty phase, with the psychiatric evidence put at the front end and then mitigation put in afterward. We believed that if we argued to the jury that he was guilty but mentally

D.136:53-55. The district court first found the claim was not defaulted, *see* D.136:49, and then, finding itself "constrained by AEDPA," determined the relevant inquiry to be, under § 2254(d), whether the trial court unreasonably found that Mr. Heidler was competent to proceed to trial given the information it had at the time, *see id.* at 53-54. Reasonable jurists could disagree with the district court's disposition.

"The requirement that a defendant be mentally competent to stand trial 'has deep roots in our common-law heritage,'" and "essentially assures that the defendant is mentally, as well as physically, present in the courtroom." *Moore v. Campbell*, 344 F.3d 1313, 1322 (11th Cir. 2003) (quoting *Medina v. California*, 505 U.S. 437, 446 (1992)). "[T]he prohibition [against trying a mentally incompetent defendant] is fundamental to an adversary system of justice." *Drope*, 420 U.S. at 172. In keeping with its foundational importance, this Court has recognized, both before and since the passage of the AEDPA, "that substantive competency claims generally cannot be procedurally defaulted." *Lawrence*, 700 F.3d at 481 (citing cases). Substantive competency occupies a unique position in the panoply of constitutional criminal rights, and reasonable jurists could debate whether the district court properly disregarded substantial evidence demonstrating Mr. Heidler's incompetence at the

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ill, that it would be consistent with the evidence and that we would retain credibility with the jury . . . .").

time of his capital trial, irrespective of the trial court's finding, based on incomplete, stale evidence, that he was competent.

Reasonable jurists could also disagree with the district court's conclusion that 28 U.S.C. § 2254(d) applied at all. Section 2254(d) requires deference only to claims "adjudicated on the merits in the State court proceedings," but reasonable jurists could conclude that the competency claim the trial court addressed was *not* the same substantive competency claim Mr. Heidler raised in the district court, given the significant evidence of incompetence and Mr. Heidler's mental decline in the months leading up to trial that the trial court did not consider. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 186 n.10, 187 n.11 (2011) (acknowledging that new evidence presented in federal habeas proceedings may fundamentally alter claim addressed by state court); *see also Brown v. Hooks*, 176 Fed. Appx. 949, 953 (11th Cir. 2006) ("State remedies are not considered exhausted, even if the prior state proceedings asserted the same claim, when entirely new factual claims are made in support of the habeas petition before the court.") (citing *Hart v. Estelle*, 634 F.2d 987, 989 (5th Cir. Unit A. Jan. 1981) (per curiam)).

Other courts, moreover, have determined federal habeas consideration of a trial court's competency finding is governed by 28 U.S.C. § 2254(e) and not § 2254(d), as the district court held. *See, e.g.*, *Austin v. Davis*, 876 F.3d 757, 777-81 (5th Cir. 2017) (evaluating substantive competency claim under § 2254(e) despite

trial court finding of competence); *Buchanan v. Lamarque*, 121 Fed. Appx. 303, 313 (10th Cir. 2005) (finding "the AEDPA deference standards in § 2254(d) do not apply" because petitioner "did not assert a substantive due process claim in the state-court proceedings" and applying § 2254(e) to trial court's competency determination); *see also Salter v. Sec'y*, 2018 U.S. Dist. LEXIS 127188, *42, 46-48 (M.D. Fla. Jul. 30, 2018) (despite trial court's finding that defendant was "competent to proceed," reviewing substantive competency claim *de novo*); *see also Sanchez-Velasco v. Sec'y of the Dep't of Corr.*, 287 F.3d 1015, 1030 (11th Cir. 2002) (finding that "a state court finding of competency" is "factual in nature").[4] Indeed, in merits briefing below, Respondent-Appellee took the position that the "[substantive competency] claim is before the Court on de novo review." D.129:206.

Furthermore, both before and since the AEDPA was enacted, federal habeas courts have expressly recognized that consideration of substantive competency claims should not be limited to the evidence presented to the trial court. To the contrary, "post-conviction evidence can often be relevant to establishing substantive incompetency." *Grant v. Royal*, 886 F.3d 874, 893 (10th Cir. 2018). *See, e.g.*, *Powell v. Shinn*, No. 19-15375, 2021 U.S. App. LEXIS 1493, at *5 (9th Cir. Jan. 20, 2021) ("Because [trial court's competency determination] was not unreasonable at the time

[4] The interaction between § 2254(d)(2) and § 2254(e)(1) remains an open question. *See, e.g.*, *Brumfield v. Cain*, 576 U.S. 305, 322 (2015); *Landers v. Warden*, 776 F.3d 1288, 1294 n.4 (11th Cir. 2015).

of trial . . . any decision to grant Powell's petition on his substantive competency claim must necessarily rely on evidence not available to the trial court."); *see also Watts v. Singletary*, 87 F.3d 1282, 1290 (11th Cir. 1996) (finding the "difference between the merits of the procedural and substantive claims is with respect to the relevant factual bases: in determining whether Watts was actually incompetent, *we are not limited to the information available to the state trial court before and during trial*, as we are in evaluating the procedural claim") (emphasis added); *Medina*, 59 F.3d at 1111-12 (considering post-conviction evidence in adjudicating substantive competency claim, and not limiting inquiry to the evidence before the trial court when it determined competency); *Card*, 981 F.2d at 484-5 (same).

Given the variety of federal court responses to trial court competency findings, it is clear that there is significant confusion about how the AEDPA should be applied to the foundational due process right to be tried only if mentally competent and, accordingly, that reasonable jurists could disagree with the district court's treatment of the issue. Moreover, given the centrality of competency to the fairness of the trial and the integrity of the judicial process, the claim deserves encouragement to proceed further. *See, e.g.*, *Guzman v. Williams*, No. 98-2172, 1999 U.S. App. LEXIS 14676, *17-19 (10th Cir. 1999) (granting COA on substantive competency claim where state court lacked relevant evidence). A COA should issue.

B. This Court Should Expand Issue #3 to Include Additional Claims Denied on Similar Procedural Grounds.

The district court denied relief on numerous claims on the grounds that they were insufficiently pled, procedurally defaulted, and/or unexhausted. *See* D.139-1 (list of claims). The third COA issue granted, however, limits consideration of the district court's procedural rulings to only one substantive claim:

> 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.

Mr. Heidler respectfully asks the panel to expand this COA to cover the additional claims the district court denied on procedural grounds. This Court's recognition that a COA is merited to review the district court's procedural rulings as to the suppression claim applies to other substantive claims the district court dismissed on similar procedural grounds. As previously set forth, *see* D.139:1-15; COA App. at p. 34-65, the district court dismissed numerous colorable claims as insufficiently pled and/or unexhausted despite: accepting the adequacy of the pleadings for over eight years and then dismissing on the basis of insufficient pleading without notice or an opportunity to cure any purported deficiency, *see* COA App. at 45-48; the exhaustion of some claims in state habeas proceedings, *see id.* at 48-50; and the State's waiver of exhaustion with respect to many of the claims, *see id.* at 51-52. Mr. Heidler moves the Court to include other valid constitutional claims

dismissed on those grounds, as it did for the third granted issue. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); D.139-1 (list of dismissed claims).

The dismissed claims include numerous aspects of trial counsel's alleged ineffectiveness, the prejudicial impact of which should properly be cumulated with aspects of trial counsel's deficient performance already before this Court.[5] For instance, although Mr. Heidler alleged in state and federal court that counsel were ineffective in failing to object to inadmissible evidence presented in aggravation, and although Respondent agreed these allegations were exhausted and properly before the district court, the district court dismissed them as inadequately pled.[6] *See* D.18-25:15, 17, 19, 20; D.124:19, 22, 24, 25; D.127:187-93; D.128:19, 21, 23; D.136:30-31.

Likewise, the district court dismissed Mr. Heidler's claim that the prosecutor engaged in misconduct during both phases of trial, *see* D.136:34-42, even though

[5] *Strickland v. Washington*, 466 U.S. 668, 695 (1984), requires courts to determine whether counsel's "errors" (in the plural) created "a reasonable probability that . . . the result of the proceeding would have been different."

[6] Counsel, for instance, failed to object to inadmissible, prejudicial evidence, such as un-*Mirandized* statements made to the county jailer and jail medical forms purporting to show Mr. Heidler's belief in devil worship. *See* COA App. at 54-55. They did not object to Dep. White's testimony that Mr. Heidler had been caught at the jail with "weapons" some "50 or 75 times," D.14-9:7-10, even though the prosecutor had noticed only a single occasion when Mr. Heidler was found with a weapon, D.127:190-92, and Dep. White's testimony relied on hearsay and inaccurately portrayed Mr. Heidler's infractions, *see* D.31-3:53, 80-82.

much of that claim had in fact been adjudicated on the merits on direct appeal, *see* COA App. at 55-57, and Respondent agreed it was properly before the district court, *see* D.128:25. The misconduct was prolific, beginning in line one of the guilt-phase opening statement and running through the sentencing-phase closing argument. There is, at the least, a debatably valid claim that it "so infected the trial with unfairness as to make the resulting [verdicts] a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal citation omitted).

For instance, the prosecutor, Rick Malone, opened the trial with a prohibited "Golden Rule" argument,[7] inviting the jurors to imagine themselves as the crime victims:

> What is your worst nightmare? If you're a father, perhaps it's an intruder coming into your house and harming your family. . . . If you're a child it may be that you're being awakened and taken from your home in the middle of the night and then sexually molested. If you're an infant, maybe you're left alone in the home with only the dead bodies of your mother and father to listen to your cries for help. What is your worst nightmare? The only good thing about a nightmare is that you wake up. . . . This case is about all of those things, all of those things happening to a good family in a very small town called Santa Claus in South Georgia, but they didn't wake up.

[7] *See, e.g., Braithwaite v. State*, 572 S.E.2d 612, 615 (Ga. 2002) (observing that the court had repeatedly held improper "[a] 'golden rule' argument . . . ask[ing] the jurors to place themselves in a victim's position"); *Grossman v. McDonough*, 466 F.3d 1325, 1348 (11th Cir. 2006).

D.13-14:38. Then, throughout the guilt phase, Mr. Malone made false assertions in an effort to impugn the evidence concerning Mr. Heidler's mental health, misrepresenting to the jury that the Diagnostic and Statistical Manual cannot be used to diagnose a criminal defendant, *see* D.13-18:88; D.13-19:104, and insinuating that the mental health evaluations of Mr. Heidler were done without the State's knowledge and were therefore not credible—when in reality the State knew about the evaluations and even sent records to the evaluators. *See* 12-4:37-39; D.13-19:29; D.23-6:84. In guilt-phase closing, Mr. Malone argued to the jury that the expert testimony was not actual evidence and could not be considered because the experts had relied on information gleaned from witnesses and documents to inform their expert opinions—although Georgia law expressly allows this.[8] *See* D.13-19: 83, 84, 102, 108. These false assertions were "calculated to mislead the jury" and were improper. *See Berger v. United States*, 295 U.S. 75, 85 (1935); *accord United States v. Young*, 470 U.S. 1, 18-19 (1985) ("[T]he prosecutor's opinion . . . may induce the jury to trust the Government's judgment rather than its own view of the evidence.").

The misconduct continued in the penalty phase, where Mr. Malone argued, among other things, that the defense expert was a "hired gun" who lied when he explained Mr. Heidler's borderline personality disorder diagnosis, repeatedly argued

[8] *See, e.g.*, *Roebuck v. State*, 586 S.E.2d 651, 655 (Ga. 2003) (quoting *King v. Browning*, 268 S.E.2d 653, 655 (Ga. 1980)).

to the jurors that they represented the State of Georgia, the party Mr. Malone himself represented, and further suggested the State and jury's entanglement by arguing "it's in your power . . . to correct *as best a government and a group of people can correct* this horrible, terrible crime."[9] *See* D.14-11:44, 45, 50, 52 (emphasis added). He urged that the jury's failure to vote for death would make a future prison guard Mr. Heidler's next victim. *See* D.14-11:46-47 ("They've got 60 years to make a mistake that can cost them their life at the hands of this man. Do we really want to do that? Is that a good and just sound decision?"). "Arguing that any future victim would be on the jury's conscience, and that jurors were the only people who could stop [the defendant] from killing" is improper. *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir. 1985).

Jurists of reason could find it debatable whether claims such as these challenging trial counsel's ineffectiveness or the prosecutor's misconduct stated valid claims of the denial of constitutional rights. Given the single-judge order's recognition that the district court's procedural rulings were debatable with respect to the suppression issue, it logically follows that the COA should be expanded to

[9] *See, e.g.*, *Leavitt v. Arave*, 371 F.3d 663, 687 (9th Cir. 2004) (improper to "portray[] the jury as part of a team opposing the defendant") (internal citation omitted); *United States v. Manning*, 23 F.3d 570, 573 n.1 (1st Cir. 1994) (telling juror they "represent the people of the United States" improper).

cover the other valid constitutional claims the district court dismissed on the same or similar grounds.

The district court never reached the merits of numerous colorable claims on the basis of a tangle of confusing and questionable procedural rulings, many adopted without prior notice of any deficiencies and without providing any opportunity to address the court's concerns or to cure any problems. Assuming this Court were to find error in the district court's procedural rulings as to the suppression issue currently before it, the likely remedy would be a remand to address the merits of the claim. Mr. Heidler respectfully submits that the third COA grant should be expanded to encompass the range of debatably valid constitutional claims, *see Slack*, 529 U.S. at 478, which the district court dismissed on the same or similar procedural grounds. In the event this Court were to find the district court erred in its procedural rulings, the task of adjudicating the merits of these various claims would fall to the district court on remand. That is particularly appropriate given the cumulative assessment of prejudice that *Strickland* requires and the possibility that the cumulative effect of errors in this case warrants the grant of relief.[10]

[10] To that end, Mr. Heidler raised a cumulative error claim in his COA Application to this Court, which he includes in this motion for reconsideration.

C. Reasonable Jurists Could Debate the District Court's Adjudication of Mr. Heidler's Claim That Trial Counsel Operated Under a Conflict of Interest at Sentencing.

A central focus of the State's sentencing phase case was aggravating evidence that Mr. Heidler escaped from jail less than two months before trial using a piece of a hacksaw blade. *See* D.14-9:5-7 (testimony of jailor Jerry White). In his opening statement, the prosecutor told jurors that "perhaps 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. . . . [T]his man remains the same horrible killer that he was on December 4, 1997. Not only can he escape, he will." D.14-7:97. In closing, the prosecutor castigated the defense for "ma[king] light" of Mr. Heidler's behavior in jail by dismissing it as "mischief":

> 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.

D.14-11:47.

Despite notice that the escape would be introduced in aggravation at sentencing, *see* D.12-5:28, the defense did little to prepare for it. Attorney Garrett cross-examined Dep. White and elicited that another inmate, Joel Buttersworth, had previously escaped in similar fashion using a hacksaw blade and that Mr. Heidler may have used a leftover piece of it, but that Mr. Buttersworth and Mr. Heidler did not know each other at the jail. *Id.* at 15-17. In reality, as Mr. Buttersworth later

admitted during state habeas proceedings, he had in fact spoken with Mr. Heidler while they were jailed in adjacent pods and, regardless, many other inmates knew how Mr. Buttersworth escaped and even watched him doing so. *See* D.68-7:3. This information never came out at trial.

Unknown to Mr. Heidler at the time of his trial, his attorney Kathy Palmer was also defending Mr. Buttersworth against his escape charges at the same time she was defending Mr. Heidler. *See* D.19-3:81. With her conflicted loyalties, Ms. Palmer failed to investigate and present evidence that would have mitigated the escape by showing that Mr. Heidler had not developed the plan but instead had copied what Mr. Buttersworth had done based on information circulating in the jail.[11] *See, e.g.*, D.31-2:14-15; D.68:17-20, and accompanying exhibits. The escape evidence was particularly damaging because it supported the State's sentencing portrayal of Mr. Heidler as uncontainable and able to destroy high-tech security devices, making Mr. Heidler a heightened escape risk in the future. *See, e.g.*, D.14-7:95-97; 14-11:47.

[11] In state habeas proceedings, Ms. Palmer explained that the defense strategy was largely to ignore the escape: "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." D.19-4:35. But, the prosecution had noticed its intent to present the escape as aggravation at sentencing—*i.e.*, the jury *would* know about the escape—and trial counsel thus had a duty to defend against that evidence.

Although state habeas counsel alleged that trial counsel were ineffective under *Strickland* in failing to conduct an adequate investigation of the escape, *see* D.18-25:15, they did not raise the conflict of interest in state habeas proceedings. Mr. Heidler argued in district court that, under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 469 U.S. 413 (2013), the procedural default was excused because state habeas counsel were ineffective in failing to raise the claim. D.97:20.[12] The district court allowed Mr. Heidler to amend his petition to include the conflict claim, but then denied an evidentiary hearing to prove it. *See* D.68–D.70; D.97. Reasonable jurists could debate the district court's rejection of this claim.

The district court denied an evidentiary hearing on the ground that Mr. Heidler had not presented a substantial claim of trial counsel's ineffectiveness *vis a vis* the escape. Although expressing doubt that Mr. Heidler and Mr. Buttersworth had

[12] Under those cases, 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. The district court assumed without deciding that *Martinez* and *Trevino* applied. D.97:20.

Whether *Martinez* and *Trevino* apply to cases arising out of Georgia state courts remains an open question in this Circuit. *See Hittson v. GDCP Warden*, 759 F.3d. 1210, 1262 (11th Cir. 2014). Reasonable jurists could debate this issue and a COA grant to address the conflict-of-interest claim would necessarily include the applicability of *Martinez* and *Trevino*.

conflicting interests,[13] the district court assumed that was the case, but found that Mr. Heidler had not shown that any purported conflict adversely affected his representation. D.97:24-27. The court instead accepted as reasonable trial counsel's explanation at the state habeas hearing "that trial counsel's strategy for the escape evidence was to minimize it," *id.* at 25, and rejected Mr. Heidler's argument that unconflicted counsel would have presented evidence to affirmatively show that Mr. Heidler had simply copied the steps Mr. Buttersworth took to escape, using the tools Mr. Buttersworth left behind, and that Mr. Heidler would not have been capable of planning an escape on his own. According to the district court, such an alternative strategy would have resulted in "even greater attention [being] paid to the escape," an "unreasonable" approach "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." D.97:26.

Although the district court acknowledged that *Cuyler v. Sullivan*, 446 U.S. 335 (1980), governs the analysis of conflicts arising from counsel's concurrent representation of defendants with divergent interests, it arguably misapplied *Sullivan* and caselaw applying it. Under *Sullivan*, a defendant may prove the denial of his

[13] The district court's expression of doubt that Mr. Heidler and Mr. Buttersworth had divergent interests, D.97:24, is dubious. While Ms. Palmer was ethically prohibited from throwing her other client Mr. Buttersworth under the bus, reasonable, unconflicted counsel would have presented evidence showing that he was the escape mastermind and that Mr. Heidler had simply copied him.

Sixth Amendment right to counsel by showing "that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348. "Adverse effect" requires proof that counsel failed to pursue an available "plausible alternative defense strategy or tactic" that was "reasonable under the facts" and "possessed sufficient substance to be a viable alternative." *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (citations omitted). A petitioner also "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." *United States v. Novaton*, 271 F.3d 968, 1010 (11th Cir. 2001); *see also Boykin v. Webb*, 541 F.3d 638, 644 (6th Cir. 2008) ("Causation can be proved circumstantially, through evidence that the lawyer did something detrimental or failed to do something advantageous to one client that protected another client's interests.").

Reasonable jurists could disagree with the district court's conclusion that it would not have been a reasonable alternative strategy to disprove affirmatively Mr. Heidler's ability to mastermind an escape because such evidence would have conflicted with the defense strategy of "minimizing" the escape.[14] "Counsel's

[14] "Plausible does not mean winning, as the Supreme Court has rejected the application of harmless error in the context of an actual conflict." *United States v. Grayson*, 950 F.3d 386, 399 (7th Cir. 2020) (citation omitted).

obligation to rebut aggravating evidence extend[s] beyond arguing it ought to be kept out"[15]—an argument Mr. Heidler's defense counsel never even made.

Counsel knew the evidence was coming in and, given its importance to the State's aggravation case, reasonable jurists could debate the district court's determination that conflicted counsel reasonably chose what was essentially a head-in-the-sand approach to defending against it. Moreover, reasonable jurists could debate the district court's conclusion that it would have been unreasonable to present evidence showing "that [the] circumstances of the [escape] were less damning than the prosecutor's characterization of [it] would suggest." *Rompilla*, 545 U.S. at 386 n.5.[16] Because reasonable jurists could debate the district court's rejection of this claim, a COA should be granted.

IV. CONCLUSION

Mr. Heidler respectfully requests this Court clarify and expand the COA as discussed above.

This 27th day of January, 2021.

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[15] *Rompilla v. Beard*, 545 U.S. 374, 386 n.5 (2005).

[16] Reasonable jurists could also debate the district court's alternate conclusion that Mr. Heidler could not satisfy *Strickland*'s prejudice prong because reasonable counsel could opt to "minimize" evidence that was certain to be admitted and highlighted by the prosecutor instead of investigating and presenting evidence demonstrating why that evidence was "less damning" than the prosecutor's version of it. *See* D.97:27-29.

Respectfully submitted,

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COUNSEL FOR PETITIONER,
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY SCOTT HEIDLER, Petitioner-Appellant,	)	
vs.	)	Case No. 20-13752-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

CERTIFICATE OF NON-COMPLIANCE

This is to certify that the foregoing Motion for Reconsideration is 7,070 words, which is over the 5,200-word limit specified by Federal Rule of Appellate Procedure 27(d)(2)(A). Together with this motion, undersigned counsel has filed a Motion for Permission to File a Motion for Reconsideration That Exceeds the Word Limit.

This the 27th day of January, 2021.

Cory H. Isaacson

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FOR THE ELEVENTH CIRCUIT

JERRY SCOTT HEIDLER, Petitioner-Appellant,	)	
vs.	)	Case No. 20-13752-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

NOTICE OF ELECTRONIC FILING
AND CERTIFICATE OF SERVICE

This is to certify that I have filed the foregoing pleading by uploading it using this Court's ECF e-filing system, which will serve an electronic copy on counsel for Appellee directed to:

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This the 27th day of January, 2021.

Cory H. Isaacson

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13752-P

JERRY SCOTT HEIDLER,
Petitioner-Appellant,

vs.

WARDEN,
Georgia Diagnostic Prison,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
STATESBORO DIVISION

RENEWED MOTION TO EXPAND THE CERTIFICATE OF APPEALABILITY

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WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

CERTIFICATE OF INTERESTED PERSONS

Counsel hereby certifies that the following have an interest in the outcome of this case:

Askew, Steve, prosecutor at trial

Beauvais, Steven L., local counsel for Heidler in federal habeas proceedings

Boleyn, Susan V., counsel for the state on appeal and for Respondent in state habeas proceedings

Bryant, Jessica, victim

Burton, Beth A., counsel for Respondent in state and federal habeas proceedings

Culpepper, Emily J., counsel for Heidler in state habeas proceedings

Daniels, Bryant, victim

Daniels, Danny, victim

Daniels, Kim, victim

Duffey, Aubrey, Superior Court Judge, state habeas proceedings

Dunn, Thomas H., counsel for Heidler in state habeas proceedings

Edenfield, B. Avant, Federal District Court Judge, federal habeas proceedings

Freidlin, Akiva, counsel for Heidler in federal habeas proceedings

Ford, Benjamin, Warden, Respondent

Garrett, Michael C., counsel for Heidler at trial and on appeal

Goldberg, Allison B., counsel for the state on direct appeal

Graham, Sabrina D., counsel for Respondent in state and federal habeas proceedings

Hartley, Jr., Marvin, State Judge (pretrial), Superior Court of Toombs County

Heidler, Jerry Scott, Petitioner-Appellant

Hoffmann, Jr., William E., counsel for Heidler in state habeas proceedings

Isaacson, Cory, counsel for Heidler in federal habeas proceedings

Jackson, George Terry, local counsel for Heidler in federal habeas proceedings

Kammer, Brian S., counsel for Heidler in federal habeas proceedings

Malone, Richard A., prosecutor at trial and on appeal

McMillan, Walter C., State Trial Judge, Superior Court of Toombs County, sitting in Walton County by designation

Mears, Michael, counsel for Heidler on appeal

Palmer, Kathy S., trial counsel for Heidler

Pearson, Lynn Margo, counsel for Heidler in federal habeas proceedings

Russ, Michael C., counsel for Heidler in state habeas proceedings

Sharkey, Kimberly L., counsel for Heidler in state habeas proceedings

Stewart, Alice C., counsel for Heidler on appeal

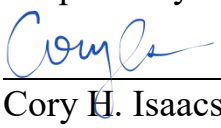
Vrolijk, Allison, counsel for Respondent in state habeas proceedings

Westmoreland, Mary Beth, counsel for the state on appeal and for Respondent in state habeas proceedings

Widder, Marcia A., counsel for Heidler in federal habeas proceedings

Wood, Lisa Godbey, Federal District Court Judge, federal habeas proceedings

Respectfully submitted,



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COUNSEL FOR PETITIONER
JERRY SCOTT HEIDLER

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I. INTRODUCTION

Petitioner-Appellant Jerry Scott Heidler, by and through undersigned counsel, respectfully submits this Renewed Motion to Expand the Certificate of Appealability ("COA") in light of questions the Court raised during the January 10, 2022 oral argument.

By way of background, Mr. Heidler sought a COA to address the district court's broad dismissal of numerous constitutional claims on the grounds they were unexhausted and/or insufficiently pled. This Court, however, limited its COA grant to those procedural rulings only as they related to a subclaim of Mr. Heidler's ineffective-assistance-of-counsel claim which alleged that counsel inadequately litigated Mr. Heidler's waiver of constitutional rights during custodial interrogation ("IAC-suppression claim"):

> 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.

See January 11, 2021 Order Granting COA (Issue 3). Undersigned counsel previously moved to expand Issue 3 to encompass other claims the district court dismissed on the same or similar procedural grounds, *see* January 27, 2021 Motion for Panel Clarification and Reconsideration of the COA Order, and that request was denied, *see* February 26, 2021 Order Denying COA Reconsideration.

During oral argument, the Court questioned the district court's procedural rulings and whether it could bypass those rulings by affirming the denial of the claim on its underlying merits. *See, e.g.*, Oral Argument, *Heidler v. Warden*, No. 20-13752-P at 52:41 (11th Cir. Jan. 10, 2022), available at https://www.ca11.uscourts.gov/oral-argument-recordings. Given the Court's questions about the procedural rulings, and because the district court relied on the same or similar grounds to dismiss numerous claims beyond the IAC-suppression claim identified in Issue 3, Mr. Heidler moves this Court to expand the COA to encompass the other claims dismissed by the district court as unexhausted and/or insufficiently pled. Mr. Heidler further asks that the Court determine whether the district court erred in its procedural rulings and, if it did, remand the case for further proceedings.

II. THE COURT'S AUTHORITY TO EXPAND THE COA.

This Court has the authority to expand a COA even after oral argument in a case. *See, e.g.*, *Clark v. Crosby*, 335 F.3d 1303, 1307 (11th Cir. 2003) ("Following oral argument, however, we granted his request for a COA on the ineffective assistance of appellate counsel claim and asked both parties to file supplemental briefs on this issue."); *Dell v. United States*, 710 F.3d 1267, 1272 (11th Cir. 2013) (granting Dell's request to expand the COA after oral argument). The standard for expanding a COA following argument is the same as the standard for granting a

COA initially. *See, e.g.*, *Dell*, 710 F.3d at 1273 ("We expand a COA when 'reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'") (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

When a district court denies a habeas petition on procedural grounds, a COA should issue when "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [] jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. This determination should be made "without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* at 773 (internal citation omitted). A "claim can be debatable even though every jurist of reason might agree, after COA has been granted and the case received full consideration, that petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

In a capital case, "doubts about whether a COA should issue must be resolved in favor of the petitioner." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) ("In a capital case, the nature of the penalty is a proper consideration in determining whether to issue [permission to appeal.]").

III. THE COA SHOULD BE EXPANDED TO INCLUDE THE OTHER CLAIMS DENIED BY THE DISTRICT COURT ON SAME OR SIMILAR PROCEDURAL GROUNDS.

The district court dismissed numerous claims raising constitutional deprivations Mr. Heidler suffered at trial on the same or substantially similar grounds as the IAC-suppression claim—namely, as unexhausted and/or insufficiently pled. *See* D.139-1. In granting a COA on Issue 3, this Court has already determined that the correctness of those procedural rulings is debatable. *See Slack*, 529 U.S. at 484. The Court has also determined that "whether the petition states a valid claim of the denial of a constitutional right" is debatable as to the suppression claim. *See id.* But the other claims dismissed by the district court on same or similar procedural grounds also at least debatably state a valid claim of the denial of a constitutional right. Those claims therefore warrant inclusion in Issue 3 of the COA.

For example, the district court dismissed the majority of Heidler's prosecutorial misconduct claims as unexhausted and/or insufficiently pled, *see* D.136:35-41, even though some of those claims had actually been adjudicated on the merits on direct appeal by the Georgia Supreme Court, *see Heidler v. State*, 273 Ga. 54, 61, 65 (2000), and were denied as res judicata by the state habeas court, *see* D.31-12:10.

Mr. Heidler raised valid constitutional claims regarding the prosecutor's persistent and egregious guilt and penalty-phase misconduct. *See generally*

D.127:194-234. The misconduct included, for example, a guilt-phase "Golden Rule" argument that invited the jurors to imagine themselves as the crime victims. *See* D.13-14:38 ("What is your worst nightmare? If you're a father, perhaps it's an intruder coming into your house and harming your family. . . . If you're an infant, maybe you're left alone in the home with only the dead bodies of your mother and father to listen to your cries for help.. . . . This case is about all of those things, all of those things happening to a good family . . . . ."). *see, e.g.*, *Grossman v. McDonough*, 466 F.3d 1325, 1348 (11th Cir. 2006) (an improper "Golden Rule" argument is one that "asks the jurors to place themselves in the victim's position [or] asks the juror to imagine the victim's pain and terror"). The guilt-phase misconduct also included, among other things, *see generally* D.127:197-214, the prosecutor instructing the jurors that the expert testimony could not be considered evidence and could not form the basis for their verdict. *See, e.g.*, D.13-19:102-03; *United States v. Sosa*, 777 F.3d 1279, 1298 (11th Cir. 2015) ("[A] prosecutor is forbidden to make improper suggestions, insinuations and assertions calculated to mislead the jury[.]") (cleaned up).

The penalty-phase misconduct included, among other things, *see* D.127:215-31, the prosecutor falsely arguing that borderline personality disorder is not an actual disorder but instead on the "borderline" of being a disorder, D.14-11:50; *see Sosa*, 777 F.3d at 1298, and arguing that a future prison guard would be Mr. Heidler's next

victim if the jurors voted for life, *see Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir. 1985) (finding "[a]rgu[ment] that any future victim would be on the jury's conscience, and that jurors were the *only* people who could stop [the defendant] from killing" improper).

The prosecutorial misconduct infected the entire trial, *see Darden v. Wainwright*, 477 U.S. 168, 181 (1986), and was unmitigated by defense counsel, *see United States v. Young*, 470 U.S. 1, 11-12 (1985), or by curative instructions, *Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974). Without the misconduct, there is a reasonable probability the jury would have entered a GBMI verdict and/or also would have spared Mr. Heidler's life. *See* D.127:222-31; *Davis v. Zant*, 36 F.3d 1538, 1545 (11th Cir. 1994).

The district court likewise dismissed multiple IAC subclaims on procedural grounds, *see* D.136:30-34, despite Respondent's oft-stated position that these claims were properly before the district court.[1] *See* D.10:16-23; D.46:15-22; D.75:15-21;

[1] Because the district court dismissed these IAC subclaims on procedural grounds, they were not included in the court's assessment of prejudice, even though *Strickland* makes clear that the prejudice assessment is cumulative. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (a defendant is prejudiced where "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). *See, e.g.*, *Burgess v. Terry*, 478 F.3d App'x. 597, 601 (11th Cir. 2012) (noting that *Strickland* prejudice may be found "by the alleged deficiencies in counsel's performance, considered cumulatively") (citing *Strickland*, 466 U.S. at 694-97); *see also Magill v. Dugger*, 824 F.2d 879, 889 (11th Cir. 1987) (death sentence undermined by combined prejudice of counsel's deficient

D.128:18-25. These included trial counsel's ineffectiveness in failing to: challenge a biased juror, *see* D.127:176-87; object to inadmissible and aggravating evidence, including unnoticed aggravating factors at sentencing, *see id.* at 187-93; or object to the prosecutor's misconduct, *id.* at 193, 235-36.[2]

"[J]urists of reason would find it debatable" whether the above claims, and the other claims similarly dismissed by the district court, *see* D.139-1, "state[] a valid claim of the denial of a constitutional right[.]" *Slack*, 529 U.S. at 484 (2000). The COA on Issue 3 should therefore be expanded to include the other claims the district court dismissed as unexhausted and/or insufficiently pled.

IV. CONCLUSION

In light of the Court's inquiries at oral argument regarding the district court's procedural rulings, and because those rulings encompassed numerous other constitutional claims not included in the COA—claims that are, at the least, debatably valid—Mr. Heidler respectfully asks this Court to expand the COA to include the other claims dismissed by the district court as unexhausted and/or insufficiently pled.

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performance in guilt and sentencing phases, in combination with trial court's erroneous instructions).

[2] The district court dismissed the claim related to trial counsel's ineffectiveness in failing to object to the prosecutor's improper statements solely as insufficiently pled. *See* D.136:32.

Undersigned counsel believe that the errors in the district court's procedural rulings have been adequately addressed in the briefing already before the Court, but will gladly provide supplemental briefing on individual claims or other matters upon the Court's request.

This 21st day of January, 2022.

Respectfully submitted,

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COUNSEL FOR PETITIONER,
JERRY SCOTT HEIDLER

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY SCOTT HEIDLER, Petitioner-Appellant,	)	
vs.	)	Case No. 20-13752-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing motion for leave to proceed *in forma pauperis* is in compliance with Federal Rule of Appellate Procedure 32(a)(7) and Eleventh Circuit Rule 22-2 because it includes 1,692 words, according to Microsoft Word processing software.

This 21st day of January, 2022.

Cory H. Isaacson

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

JERRY SCOTT HEIDLER, Petitioner-Appellant,	)	
vs.	)	Case No. 20-13752-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

NOTICE OF ELECTRONIC FILING
AND CERTIFICATE OF SERVICE

This is to certify that I have filed the foregoing pleading by uploading it using this Court's ECF e-filing system, which will serve an electronic copy on counsel for Appellee directed to:

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This 21st day of January, 2022.

Cory H. Isaacson

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13752-P

JERRY SCOTT HEIDLER,
Petitioner-Appellant,

vs.

WARDEN,
Georgia Diagnostic Prison,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
STATESBORO DIVISION

PETITION FOR REHEARING AND REHEARING *EN BANC*

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vs.	)	Case No. 20-13752-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

CERTIFICATE OF INTERESTED PERSONS

Counsel hereby certifies that the following have an interest in the outcome of this case:

1. Allyn, Danielle, counsel for Heidler in federal habeas proceedings

2. Arceneaux, Anna, counsel for Heidler in federal habeas proceedings

3. Askew, Steve, prosecutor at trial

4. Beauvais, Steven L., local counsel for Heidler in federal habeas proceedings

5. Boleyn, Susan V., counsel for the state on appeal and for Respondent in state habeas proceedings

6. Bryant, Jessica, victim

7. Burton, Beth A., counsel for Respondent in state and federal habeas proceedings

8. Culpepper, Emily J., counsel for Heidler in state habeas proceedings

9. Daniels, Bryant, victim

10. Daniels, Danny, victim

11. Daniels, Kim, victim

12. Duffey, Aubrey, Superior Court Judge, state habeas proceedings

13. Dunn, Thomas H., counsel for Heidler in state habeas proceedings

14. Edenfield, B. Avant, Federal District Court Judge, federal habeas proceedings

15. Freidlin, Akiva, counsel for Heidler in federal habeas proceedings

16. Ford, Benjamin, Warden, Respondent

17. Garrett, Michael C., counsel for Heidler at trial and on appeal

18. Goldberg, Allison B., counsel for the state on direct appeal

19. Graham, Sabrina D., counsel for Respondent in state and federal habeas proceedings

20. Hartley, Jr., Marvin, State Judge (pretrial), Superior Court of Toombs County

21. Heidler, Jerry Scott, Petitioner-Appellant

22. Hoffmann, Jr., William E., counsel for Heidler in state habeas proceedings

23. Isaacson, Cory, counsel for Heidler in federal habeas proceedings

24. Jackson, George Terry, local counsel for Heidler in federal habeas proceedings

25. Kammer, Brian S., counsel for Heidler in federal habeas proceedings

26. Malone, Richard A., prosecutor at trial and on appeal

27. McMillan, Walter C., State Trial Judge, Superior Court of Toombs County, sitting in Walton County by designation

28. Mears, Michael, counsel for Heidler on appeal

29. Palmer, Kathy S., trial counsel for Heidler

30. Pearson, Lynn Margo, counsel for Heidler in federal habeas proceedings

31. Russ, Michael C., counsel for Heidler in state habeas proceedings

32. Sharkey, Kimberly L., counsel for Heidler in state habeas proceedings

33. Stewart, Alice C., counsel for Heidler on appeal

34. Vrolijk, Allison, counsel for Respondent in state habeas proceedings

35. Westmoreland, Mary Beth, counsel for the state on appeal and for Respondent in state habeas proceedings

36. Widder, Marcia A., counsel for Heidler in federal habeas proceedings

37. Wood, Lisa Godbey, Federal District Court Judge, federal habeas proceedings

Respectfully submitted,

COUNSEL FOR PETITIONER
JERRY SCOTT HEIDLER

CERTIFICATION OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following Supreme Court decisions and this Court's precedents, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

Buck v. Davis, 580 U.S. 100 (2017)

Chatom v. White, 858 F.2d 1479 (11th Cir. 1988)

Hardwick v. Fla. Dep't of Corr., 803 F.3d 541 (11th Cir. 2015)

Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988)

Miller-El v. Cockrell, 537 U.S. 322 (2003)

Porter v. McCollum, 558 U.S. 30 (2009)

Rompilla v. Beard, 545 U.S. 374 (2005)

Slack v. McDaniel, 529 U.S. 473 (2000)

Strickland v. Washington, 466 U.S. 668 (1984)

United States v. Cronic, 466 U.S. 648 (1984)

Wiggins v. Smith, 539 U.S. 510 (2003)

Williams v. Taylor, 529 U.S. 362 (2000)

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Can trial counsel be found to have performed deficiently notwithstanding the fact that they conducted at least some investigation tailored to the case?

2. Did the panel and the state court misuse the concept of "cumulative" evidence in finding that new evidence presented in state habeas establishing that Heidler had suffered since childhood from debilitating psychiatric disorders of thought (psychosis, including auditory and visual hallucinations) and mood (severe depression) was "cumulative" of trial testimony that he merely had a personality disorder with antisocial traits?

3. Whether the panel misapplied 28 U.S.C. § 2253 in denying a certificate of appealability ("COA") to review the district court's resolution of numerous claims where reasonable jurists could disagree with the district court's challenged rulings, an issue warranting the full court's review given dramatic differences in the granting of COA in this circuit and the critical role the Court plays in ensuring that the constitutional rights of state prisoners are adequately protected.

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STATEMENT OF THE ISSUES MERITING REHEARING OR *EN BANC* CONSIDERATION

I. Whether trial counsel were ineffective at guilt and/or sentencing in investigating and presenting mental health and mitigation evidence at Heidler's capital trial.

II. Whether the panel erred in denying a COA on one or more claims because reasonable jurists could disagree with the district court's challenged rulings.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Scott Heidler has suffered since childhood from severe and crippling mental illness – characterized by profound psychotic symptoms including auditory and visual hallucinations, major depression, and repeated suicide attempts, as contemporaneous records well document – an illness for which he never received adequate support or treatment.[1] The state court, after considering the extensive evidence Heidler presented in habeas proceedings regarding his longstanding psychiatric disorders, found that "for the majority of Petitioner's life, Petitioner has

[1] These include records from a six-week-long psychiatric hospitalization at Georgia Regional Hospital – Savannah ("GRH-S") when Heidler was 11 (which ended when, against medical advice, his mother refused to return him after a weekend furlough) and a pediatrician's notes documenting his active psychosis when he was 12, which prompted a referral to GRH-S for evaluation (though, again, his mother denied him further treatment and instead brought him home).

been significantly impaired by his mental illness and . . . it is 'highly unlikely' he will ever be free of the substantial impairments." D.31-12:17.

The jury that sentenced Heidler to death, however, never heard an accurate description of Heidler's severe mental illness, receiving instead an inaccurate and aggravating version of his psychiatric history. Although counsel recognized early on that Heidler's mental illness would be the centerpiece of his defense, *see, e.g.*, D.19-3:36; D.22-16:48, they bungled it by failing to conduct an adequate investigation of Heidler's medical and social history, and ignoring symptoms of his ongoing illness while he awaited trial (including suicide attempts and hallucinations), symptoms that ultimately led the jail psychiatrist to diagnose Heidler with psychosis and to prescribe an antipsychotic. Counsel further failed to ensure that testifying mental health experts were adequately apprised of this critical information.

Due to counsel's deficient performance, Heidler's jurors were told he merely had a borderline and/or antisocial personality disorder, and that his misconduct was due to flaws in his personality and moral character, rather than mental illness. *See, e.g.*, D.13-18:73-74 (court-appointed psychologist D'Alesandro testifying that Heidler had "a number of personality disorders which have influenced his behaviors" and explaining that a personality disorder "is a long term behavioral

pattern that's learned or started at an early age" and that Heidler "probably would best be identified as a borderline and/or an antisocial personality disorder").

Heidler was prejudiced at guilt and sentencing by counsel's deficient failure to investigate and present evidence showing the true scope and debilitating impact of his serious mental illness. He was further prejudiced at sentencing by counsel's deficient failure to investigate and present evidence of the severe abuse and neglect he endured throughout childhood – circumstances counsel were aware of, but failed to present.

The state habeas court's conclusion that counsel performed adequately was flawed by numerous unreasonably wrong applications of law and findings of fact.[2] The panel, in turn, ratified the state court's unreasonable decision based on its own errors. The panel's assessment of counsel's performance was marred by two overriding mistakes: It failed to recognize that counsel can be deficient due to even a single significant error, and it disregarded the profound difference between the mental health presentation at trial (Heidler behaves badly and has a personality disorder with antisocial traits) and the accurate one that should have been presented

[2] These have been addressed at length in prior briefing, which Heidler incorporates by reference herein. *See, e.g.*, Appellant's Brief, 70-78, 97-106.

(Heidler has suffered since childhood from serious psychiatric disorders of thought and mood which impair his connection to reality, his judgment, and his conduct to such a degree that he meets the requirements for a guilty-but-mentally-ill ("GBMI") verdict under O.C.G.A. § 17-7-131(a)(3), and have substantial mitigating weight at sentencing). The panel, moreover, abdicated its responsibility to review the state court ruling, instead uncritically adopting the very errors the federal habeas statute required it to review and ignoring clear and convincing evidence disproving factual findings on which the state court's decision was based. Rehearing should be granted to address these and other errors addressed below.

STATEMENT OF FACTS

During a three-day trial in September 1998, Heidler was convicted and sentenced to death for the murder of four members of the Daniels family in their home, and other crimes. D.14-7:74-76; D.15-9:24-26. The Georgia Supreme Court affirmed. *Heidler v. State*, 537 S.E.2d 44 (Ga. 2000).

At trial, counsel sought to prove that Heidler was guilty but mentally ill pursuant to O.C.G.A. § 17-7-131. Although the statute requires proof that the defendant has "a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands

of life," but expressly excludes "a mental state manifested only by repeated unlawful or antisocial conduct," O.C.G.A. § 17-7-131(a)(3), counsel failed to investigate and present evidence that Heidler, since childhood, had suffered from psychosis and severe depression (*i.e.*, disorders of *both* thought and mood), which were largely untreated and continued to afflict him while awaiting trial (and which continue to this day). Instead, jurors heard only that Heidler had borderline and/or antisocial personality disorder.

The documents counsel collected contained significant red flags they ignored, such as medical records documenting pediatrician Adrienne Butler's observation of Heidler, then 12, actively hallucinating in front of her when he was brought, "in crisis," by school officials to the community health center. *See* D.29-10:8. Although Butler wrote that she "strongly suspect[ed a] thought disorder in this child" and referred Heidler to GRH-S for in-patient evaluation, Heidler's mother instead took him home. D.19-6:94-95; D.19-10:65, 88; D.28-15:59. Counsel made no effort to speak with Butler (or other witnesses to this event) and failed to direct the testifying experts to medical records reflecting her observations of his active psychosis as a child. *See, e.g.*, D.19-6:95; D.23-12:38-39. Similarly, counsel knew that Heidler, while in jail awaiting trial, reported auditory and visual hallucinations; that jail nurse

George Dykes had referred him to mental health numerous times; and that the jail administered him Haldol, an antipsychotic. *See* D.12-17:9-10; D.13-18:115; D.19-13:6, 10, 15-17. Yet, counsel made no effort to speak with Dykes,[3] nor did they request records from Pineland Mental Health Center ("Pineland") for Heidler's treatment while awaiting trial. *See, e.g.*, D.22-16:6-7. Notes by the treating psychiatrist there reflect Heidler's complaint of "seeing things," a diagnostic impression of psychotic disorder, and a prescription for Haldol. D.21-17:33.

Jurors heard none of this critical evidence. Instead, the mental health experts testified that Heidler had a borderline and/or antisocial personality disorder – an incorrect and aggravating diagnosis, which the prosecutor used to his advantage, persuasively challenging the borderline diagnosis and bolstering the antisocial diagnosis through his cross-examination of the experts and closing arguments. *See, e.g.*, D.13-18:79; D.13-19:101-03; D.14-11:50.

In state habeas, Heidler presented extensive evidence demonstrating that jurors were misled by the mental health expert testimony and explaining the severity

[3] The state court found that counsel had interviewed Dykes, but the record shows by clear and convincing evidence, ignored by both the state court and the panel, that counsel never did. *See infra* at I(C).

of his longstanding and continuing mental illness.[4] Heidler also presented extensive evidence documenting the neglect and frequent, severe abuse inflicted by his mentally ill and substance-abusing caregivers on him and each other. *See, e.g.*, D.19-6:48, D.19-11:31 D.19-11:13, 23-24, 26; D.19-6:43, 46; D.19-11:8-9; D.19-11:15, 22, 27. This evidence, *inter alia*, countered the misleading picture of Heidler's background at trial, where his mother and sister had indicated Heidler was *not* the subject of physical abuse.

On the basis of this compelling evidence, the state habeas court found that Heidler had suffered debilitating mental illness since childhood, but nonetheless denied relief. D.31-12–D.31-13. The Georgia Supreme Court summarily denied Heidler's appeal, D.31-18.

[4] Witnesses included pediatrician Butler, who vividly recalled seeing Heidler hallucinating, D.19-6:88-99; D.19-10:63-64; nurse Dykes who testified to Heidler's hallucinations while incarcerated pretrial, D.19-6:64-87; D.19-10:13-31; and Pineland psychiatrist David Faulk, D.19-10:32-58. Teachers and family members described symptoms of psychosis Heidler experienced during childhood, his longstanding depression, and recurring suicidality. *See, e.g.*, D.19-6:46, D. 19-11:2, 10. Psychiatrist Sarah Deland and psychologist John Carton detailed Heidler's history of depression and psychosis, described his family history of mental illness, and explained how his mental illness, exacerbated by his traumatic upbringing and triggered by the death of his newborn son, led to the tragic events of his crime when he was 20. D.19-4:88–19-5:40; D.19-6:99–19-7:99.

The district court, in turn, denied Heidler's federal habeas corpus petition and denied a COA on any claim. D.136; D.146. This Court granted COA to address counsel's effectiveness in the investigation and presentation of mental health and mitigation evidence, and the district court's dismissal on procedural grounds of ineffective-assistance claims regarding a motion to suppress, *see* Orders, Jan. 11, 2021; Feb. 26, 2021, and ultimately affirmed. *See* Opinion, August 2, 2023 (Exhibit A hereto).

ARGUMENT AND CITATION OF AUTHORITY

I. The Panel Erroneously Rejected Heidler's Claims that Counsel Were Ineffective in Investigating and Presenting Evidence of his Severe Mental Illness and Mitigation.

The panel's rejection of Heidler's ineffective-assistance-of-counsel claims was riddled with significant errors of fact and law, on the basis of which rehearing is warranted. Some are addressed below.

A. The panel imposed an unduly high standard for finding deficient performance.

The panel ratified the state court's determination that counsel performed adequately because they did more work than other lawyers found effective under *Strickland*: "[T]he 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." Op. 58-1:65 (citing cases). But counsel may be ineffective due to even a single error, despite otherwise competent representation. As this Court has explained, "*Strickland*'s 'in light of all circumstances' review does not preclude a finding of ineffective assistance where the alleged deficient actions or omission centers upon a single incident, if that error is sufficiently egregious and prejudicial." *Chatom*, 858 F.2d at 1485 (citation omitted). *See, e.g.*, *Cronic*, 466 U.S. at 657 n. 20 (explaining that ineffective assistance "is not limited to counsel's performance as a whole – specific errors and omissions may be the focus of a claim of ineffective assistance as well"); *Kimmelman v. Morrison*, 477 U.S. 365, 383, 386 (1986) (noting that "a serious error may support a claim of ineffective assistance of counsel" and finding counsel's failure to file a suppression motion deficient, despite a "creditable enough" performance at trial); *Parker v. Allen*, 565 F.3d 1258, 1278-79 (11th Cir. 2009) (*Strickland* test "can be met when the deficient actions center on a single sufficiently egregious and prejudicial incident").

Here, counsel ignored numerous red flags indicating that Heidler had suffered and continued to suffer serious mental illness characterized by psychosis, depression, and suicide attempts – information that was critical to the assessments

conducted by the court-appointed and defense mental health experts, resulting in jurors receiving a misleading, far less mitigating explanation for Heidler's offense. Lead counsel Michael Garrett, in charge of the mental health presentation, D.19-3:43-44, testified in state habeas proceedings that he had no reason to keep this evidence from jurors and would have presented it had he known about it. D.19-8:47-48. The panel was wrong to conclude that the state court reasonably found counsel's performance adequate simply because they went through the motions of investigating the case, but failed to follow-up on critical leads to ensure that jurors received an accurate picture of Heidler's serious mental illness.

B. The panel disregarded the mitigating significance of the new evidence.

The panel also erroneously endorsed the state habeas court's conclusion that the evidence introduced in habeas proceedings demonstrating Heidler's longstanding psychosis and severe depression was "cumulative" of the trial testimony that Heidler had borderline and/or antisocial personality disorder. *See, e.g.*, Ex. A 68; D.31-12:59 (state court order). But the new evidence was far from cumulative. This Court has clearly held that evidence of personality disorders is hardly mitigating, if at all, and that antisocial personality disorder is, by definition, aggravating. *See, e.g.*, *DeYoung v. Schofield*, 609 F.3d 1260, 1265, 1288 (11th Cir.

2010) (noting that "pretrial experts' diagnoses of narcissistic personality disorder and borderline personality disorder" "have been found not to be mitigating") (citation omitted); *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1246 (11th Cir. 2010) ("[A] diagnosis of antisocial personality disorder was … not 'good' mitigation.") (citations omitted); *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1368 (11th Cir. 2009) (noting that "a diagnosis of antisocial personality disorder … is not mitigating but damaging").

By contrast, evidence that Heidler, since childhood, has suffered from both a thought disorder characterized by auditory and visual hallucinations, and severe depression is precisely the type of evidence the Supreme Court "ha[s] declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535. *See, e.g.*, *Rompilla*, 545 U.S. at 391 (finding trial counsel's deficient failure to investigate evidence "pointing [*inter alia*] to schizophrenia and other disorders" prejudicial); *Hardwick*, 803 F.3d at 558-59 (finding counsel ineffective where they failed to present "powerful mitigating evidence," including documented "depression, mood swings, and multiple suicide attempts," as well as a schizophrenia diagnosis); *Middleton*, 849 F.2d at 495 (evidence such as a childhood diagnosis of schizophrenic reaction "has the potential to totally change the evidentiary picture by altering the

causal relationship that can exist between mental illness and homicidal behavior [and] 'not only can act in mitigation, [but] could significantly weaken the aggravating factors.'") (citation omitted).

C. The panel rubber-stamped the state court's unreasonable, clearly erroneous fact-finding.

The panel ignored clear and convincing evidence disproving numerous important factual findings by the state court. For instance, the panel disregarded evidence showing that counsel's investigation was not nearly as thorough as the state court found. The panel, for instance, found that second chair Kathy Palmer "hired Investigator Gillis, who sought out Heidler's 'aunts and uncles and cousins' and some of Heidler's friends." Ex. A:64. *See also* D.31-12:34 (state habeas order). But the record is clear: Gillis was hired late in the day and did practically nothing. Lead counsel Garrett testified that "Gillis, a local investigator, was hired to do several discreet tasks just prior to trial." D.22-16:3. This was, corroborated by Palmer's introductory memo to Gillis days after voir dire began, D.22-18:1, and Gillis's bill for services, D.29-8:70, which documented 5.5 hours of work, total, conducted entirely on the same day as Palmer's memo. Heidler pointed out these facts in briefing to this Court, but the panel ignored them, instead rubber-stamping the state court's unreasonably wrong finding.

The panel and state court likewise took at face value Palmer's state habeas testimony about "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.'" D.31-12:38. *See* Ex. A. 7. But Palmer's billing records also indicate that most of this investigation happened on a single day, the day before Gillis conducted his own limited work. *See* D.22-17:99.[5] Conducting witness interviews on literally the eve of trial hardly demonstrates that counsel undertook a thorough investigation. Rather, it is proof of deficient performance. *See, e.g.*, *Williams*, 529 U.S. at 395 (habeas relief where trial counsel "did not begin to prepare for [the sentencing] phase of the proceeding until a week before the trial").[6]

[5] This was the only day that Palmer billed for travel unrelated to either attending court or meeting with co-counsel. *See* D.22-17:103. In state habeas, she testified that she aimed for accuracy in her billing records regarding witness meetings. D.19-4:41.

[6] The panel contends that "[w]e have 'no license' to question the state habeas court's determination that Ms. Palmer's testimony was credible." Ex. A. 71-72 (citing *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). But that is wrong. "A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El*, 537 U.S. at 340.

Similarly, the state habeas court found that Garrett had spoken with the jail nurse because Dykes's name was written on a note Garrett had scribbled, D.31-12:43, and the panel ratified that finding, Ex. A. 66-67. But this note, D.22-18:12, reflects Garrett's meeting with Heidler at the courthouse, when, during the lunch break in the middle of an *ex parte* hearing, Heidler told Garrett that "a Mr. George" had seen him and twice recommended mental health treatment, but this had not happened. *See* D.12-17:9-10. Dykes himself testified in state habeas that counsel never contacted him. D.19-6:79-80. And Garrett testified he had no recollection of talking to Dykes, a fact corroborated by Garrett's mistaken reference to Dykes as a woman. *See* D.19-8:47-48, 108.

Even under the AEDPA, federal habeas review is not intended to rubber-stamp state court rulings. Rather, the Supreme Court "ha[s] been unmistakably clear that . . . 'deference does not imply abandonment or abdication of judicial review....'" *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct.

Indeed, in *Marshall*, the Court found the circuit court erred in discrediting witness testimony because there was no additional corroborating evidence. By contrast, Heidler has presented clear and convincing evidence demonstrating that Palmer's testimony about her work was inaccurate and exaggerated. The state habeas court was unreasonable in blindly crediting her testimony in the face of such evidence, and so was the panel.

2141, 2168 (2023) (quoting *Miller-El*, 537 U.S. at 340). The panel's uncritical acceptance of fact-findings on which the state court decision was based, despite clear and convincing evidence revealing their error, was an abdication of the Court's vital role in protecting Heidler's constitutional right to counsel.[7]

On the basis of these and numerous other errors by the panel, rehearing should be granted.

II. The Panel's Denial of a COA to Address Claims that Satisfied 28 U.S.C. § 2253's Minimal Requirements Warrants Rehearing.

A COA should be granted for each issue regarding which the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. §

[7] The panel also rejected Heidler's argument that the state court unreasonably blamed Heidler for counsel's investigative deficiencies. *See, e.g.*, D.31-12:36 (noting that counsel "gathered very little information from Petitioner *due to Petitioner's unwillingness to cooperate*") (emphasis added). Instead, the panel recharacterized the state court's determination as "consider[ing] Heidler's lack of cooperation as context for *assessing* the reasonableness of trial counsel's investigation." But, as a factual matter, Garrett never blamed Heidler for being "unwilling[] to cooperate," recognizing that Heidler's inability to communicate was a symptom of his illness and not "unwillingness to cooperate." *See* D.19-8:34-36, 62. Moreover, even had Heidler intentionally withheld information, counsel would still have been obligated to conduct a reasonable investigation. As the Supreme Court has explained, a petitioner's lack of cooperation "does not obviate the need for defense counsel to conduct some sort of mitigation investigation." *Porter*, 558 U.S. at 40. The panel's reliance on a line of cases predating *Porter*, *see* Ex. A. 72-73, does not demonstrate that the state court's unreasonably wrong criticism of Heidler justified counsel's failure to investigate.

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 … whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. "At 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*, 580 U.S. at 116 (quoting *Miller-El*, 537 U.S. at 327 (2003)).

Although the required showing is not demanding, *see, e.g.*, *Bradley v. United States*, 7 F. Supp. 3d 1272, 1273 (S.D. Ga. 2014), the panel denied a COA on numerous claims that satisfied it, thereby depriving Heidler of his only opportunity for appellate review of important constitutional claims. *See, e.g.*, COA Application; Orders, Jan. 11, 2021; Feb. 26, 2021. Some of these claims are briefly addressed below.

1. <u>Heidler Was Incompetent at Trial.</u>

The trial court found Heidler competent to stand trial on the basis of expert reports completed months before trial[8] and written without an adequate understanding of Heidler's long-term, severe mental illness or his treatment for active psychosis while awaiting trial. *See* D.13-3; D.12-7:59-60. The full picture of Heidler's mental illness, as well as his inability to communicate with his attorneys, did not come to light until state habeas proceedings. That evidence raises a real and substantial doubt as to whether Heidler was incompetent when he was tried, convicted, and sentenced to death. The district court, however, refused to consider the clear and convincing evidence of incompetence introduced in state habeas proceedings and instead reviewed only the factual basis underpinning the trial court's competency finding. D.136:54. Reasonable jurists could debate the district court's refusal to consider that evidence and its denial of an evidentiary hearing to determine Heidler's competence at trial.[9]

[8] Heidler's final meeting with the defense psychologist occurred almost eight months before trial. *See* D.23-1:8. The court's experts saw him more than three-to-four months before trial. D.23-12:30; D.23-12:45.

[9] Heidler did not challenge his competency at trial in state habeas proceedings, but a substantive competency claim cannot be procedurally defaulted and may be raised for the first time in federal habeas proceedings. *See Lawrence v. Sec'y Fla. Dep't of Corr.*,700 F.3d 464, 481 (11th Cir. 2012).

"It is fundamentally unfair to try an incompetent defendant." *United States v. Wingo*, 789 F.3d 1226, 1235 (11th Cir. 2015). "[T]rying an incompetent defendant is like trying an absent defendant: 'the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.'" *Id.* (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975)). Central to a defendant's competence is the ability to communicate effectively with counsel. *See Cooper v. Oklahoma*, 517 U.S. 348, 364, 368 (1996).

The evidence presented to the district court (all previously introduced in state proceedings) created a "real, substantial, and legitimate doubt" as to Heidler's trial competency, and the district court accordingly should have ordered an evidentiary hearing. *Lawrence*, 700 F.3d at 481. The evidence showed that Heidler could not communicate meaningfully with his attorneys at any point of their representation, *see, e.g.*, D.19-8:31, 34-35, 62-63; D.22-16:48-49 (Garrett); D.19-3:32-33, 45, 47, 73-74 (Palmer), and, as discussed in the Statement of Facts, *supra*, the expert mental health evidence the trial court considered was incomplete and inaccurate.

Heidler's inability to communicate effectively with counsel was consistent with the symptoms of severe mental illness he exhibited pretrial. Heidler attempted suicide while in custody multiple times, with the last attempt just weeks before trial.

See D.20-19:52-57, 59-61; D.20-20:28-32. Jail nurse Dykes observed Heidler's severe pretrial mental illness and "repeatedly" referred him to mental health, D.19-6:70. Heidler, Dykes testified in state habeas, would injure himself to keep from falling asleep because of visions of people "trying to get him" when he slept and, later, even when he was awake, and would "pinch[] himself and actually tak[e] pieces of his tissue out of his face." D:19-6:69-71. Dr. Faulk, the psychiatrist treating Heidler pretrial, found Heidler to have "serious mental health symptoms[,]" and "difficult[y] discerning reality from dreams." D.19-10:33. He diagnosed Heidler with a psychotic disorder and prescribed Haldol. *See id*. at 33. None of this evidence was considered or presented at Heidler's competency trial, though it was readily available.

"The best evidence of [Heidler's] mental state at the time of trial is the evidence of his behavior around that time, especially the evidence of how he related to and communicated with others then." *Wright v. Moore*, 278 F.3d 1245, 1259 (11th Cir. 2002). Although this evidence, and more, raises a real and substantial doubt as to whether Heidler was competent at trial, it was not before the trial court when it found Heidler competent. Reasonable jurists could find that the district court was wrong to exclude this evidence when determining whether Heidler was entitled to

an evidentiary hearing to determine his competence. *See, e.g.*, *Watts v. Singletary*, 87 F.3d 1282, 1290 (11th Cir. 1996) ("[I]n determining whether Watts was actually incompetent, we are not limited to the information available to the state trial court before and during trial, as we are in evaluating the procedural [competency] claim."); *Williams v. Woodford*, 384 F. 3d 567, 608 (9th Cir. 2002) (same) (citing *Watts*). A COA accordingly should have issued to review this claim.

2. Counsel Had an Actual Conflict of Interest at Sentencing.

The State introduced aggravating evidence at sentencing that Heidler escaped from jail using a hacksaw blade that had been left behind by another inmate who had escaped shortly before. Unknown to Heidler, his attorney Kathy Palmer was concurrently defending that very inmate, Joel Buttersworth, against his escape charges while she was defending Heidler at trial. *See* D.19-3:81. That conflict was not revealed until Palmer testified in state habeas. *See* D.19-3:81. Due to the conflict, Palmer failed to investigate and present evidence that would have mitigated the escape, showing that Heidler had not developed the plan but instead had merely copied Buttersworth. *See, e.g.*, D.31-2:14-15; D.68:17-20, and accompanying exhibits. The escape evidence was particularly damaging because it supported the State's sentencing portrayal of Heidler as able to destroy high-security devices and

uncontainable, presenting a heightened risk of future dangerousness. *See, e.g.*, D.14-7:95-97; 14-11:47.

State habeas counsel failed to raise this conflict claim. The district court allowed Heidler to amend his petition to include it, but then denied an evidentiary hearing to prove it. *See* D.68–D.70; D.97. Reasonable jurists could debate the district court's rejection of this claim, particularly given its misuse of *Strickland*'s prejudice standard, despite the court's recognition that *Cuyler v. Sullivan*, 446 U.S. 335 (1980), governs the analysis of conflicts arising from counsel's concurrent representation of defendants with divergent interests. *See* D.97:15, 24-27. A COA should accordingly be granted.

3. The District Court Erroneously Dismissed Several Valid Constitutional Claims.

Reasonable jurists could debate the district court's *sua sponte* dismissal of claims as insufficiently pled, unexhausted, or otherwise procedurally defaulted years after the petition was filed and despite Respondent's waiver of affirmative defenses. The panel, in fact, granted COA to review a small portion of the claims the district court dismissed, those addressing counsel's ineffectiveness in litigating the motion to suppress. *See* Order Jan. 11, 2021. That COA grant demonstrates that "jurists of reason would find it debatable whether the district court was correct in its [other]

procedural ruling[s]." *Slack*, 529 U.S. at 484. The panel, however, ultimately did not reach the procedural issues, ruling instead that Heidler could not win on the merits of the underlying claim. *See* Ex. A. 110-12.

Numerous other claims for which COA was denied are indistinguishable on the procedural questions the panel initially agreed to hear. Moreover, "jurists of reason would find it debatable whether [those claims] state[] a valid claim of the denial of a constitutional right . . . ." *Id.* For instance, the district court dismissed numerous claims of prosecutorial misconduct in argument as unexhausted, procedurally defaulted, and/or insufficiently pled, D.136:35-41, even though some of those claims had actually been adjudicated on the merits on direct appeal by the Georgia Supreme Court, *see Heidler*, 537 S.E.2d 44, 53-54 (Ga. 2000), were denied as res judicata by the state habeas court, *see* D.31-12:10, and thus were "*ripe* for federal adjudication." *Cone v. Bell*, 556 U.S. 449, 466-67 (2009) (emphasis original). Likewise, the district court dismissed as insufficiently pled Heidler's claim that counsel were ineffective for not objecting to inadmissible, prejudicial evidence the State introduced at penalty. *See* D.136:31, D.127:187-93. Reasonably effective counsel would have objected to the evidence. *See, e.g.*, *Scott v. Upton*, 208 Fed.

Appx. 774, 778 (11th Cir. 2006); *Atkins v. Attorney Gen. of Alabama*, 932 F.2d 1430 (11th Cir. 1991).

Because the district court's procedural rulings were debatable by jurists of reason and precluded review of debatably valid constitutional claims, a COA should have issued. *See Slack*, 529 U.S. at 484.[10] Heidler respectfully asks the Court to grant rehearing to expand the scope of his appeal.

CONCLUSION

For the foregoing reasons, Heidler respectfully asks the Court to grant rehearing and/or rehearing *en banc*.

This 30th day of August, 2023.

Respectfully submitted,

Marcia A. Widder (Ga. 643407)
Anna Arceneaux (Ga. 401554)
Danielle Allyn (Al. 7265X48X)

[10] Heidler notes that this Court recently heard argument in another Georgia capital case, *Williams v. Warden*, No. 22-10249-P (11th Cir.), addressing the district court's dismissal of claims as insufficiently pled without affording the petitioner an opportunity to object or to amend his petition, an issue also presented in this case. Heidler respectfully submits that the Court should hold this case pending its adjudication of *Williams*.

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COUNSEL FOR PETITIONER-
APPELLANT JERRY SCOTT HEIDLER

CERTIFICATE OF NONCOMPLIANCE AND SERVICE

This is to certify that the foregoing brief is in compliance with Federal Rule of Appellate Procedure 32(a)(2)(A) and (c)(2) because it has been prepared in Times New Roman 14 point, a proportionally-spaced typeface, using the Microsoft Word word-processing software. This brief does not comply with the type-volume limitation set forth in Federal Rules of Appellate Procedure 35(b)(2)(A) and 40(b)(1) because it contains 4,867 words, exclusive of items listed in 11th Cir. R. 35-1. A motion to exceed the word count limitation is filed herewith.

Additionally, on the date set forth below, counsel uploaded this brief to the Court's web site, which promptly served opposing counsel:

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This 30th day of August, 2023.

Marcia A. Widder

_____
Marcia A. Widder

Rhonda Waits Smith, Clerk
Beth S. Smith, Chief Deputy Clerk
Patricia L. Smith, Deputy Clerk
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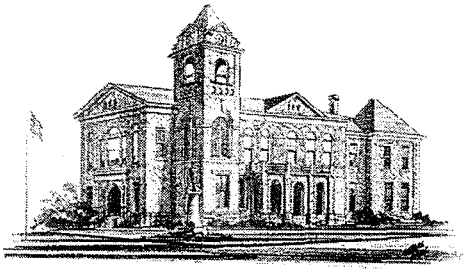

Thomas H. Wilson, Chief Judge
William A. Fears, Judge
E. Byron Smith, Senior Judge
Towaliga Judicial Circuit

Sharon J. Whitwell, Juvenile Judge
Richard Milam, District Attorney

BUTTS COUNTY CLERK OF SUPERIOR COURT

September 8, 2009

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RE: JERRY SCOTT HEIDLER, #951142
VS: HILTON HALL, WARDEN
NO: 2001-V-844

To all parties listed;

Enclosed is a copy of the FINAL ORDER filed in the above stated case.

Sincerely;
Frances R Barnes
Frances R. Barnes

COPY

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

JERRY SCOTT HEIDLER,	*	
	*	**CIVIL ACTION NO.**
Petitioner,	*	**2001-V-844**
	*	
v.	*	**HABEAS CORPUS**
	*	
HILTON HALL, WARDEN,	*	
Georgia Diagnostic and	*	
Classification Prison,	*	
	*	
Respondent.	*	

PROPOSED FINAL ORDER

COMES NOW before the Court Petitioner's Amended Petition for Writ of Habeas Corpus as to his conviction and sentence in the Superior Court of Toombs County. Having considered Petitioner's original and Amended Petition for Writ of Habeas Corpus (hereinafter "Amended Petition"), the Respondent's Answer and Amended Answer, relevant portions of the appellate record, evidence admitted at the hearing on this matter on January 23-24, 2006 and May 30, 2006, the arguments of counsel and the post-hearing briefs, this Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49 and denies the petition for writ of habeas corpus as to the conviction and sentence.

FILED
BUTTS SUPERIOR COURT
2009 SEP -8 A 9:43
BY Shawn R. Barnes, Sp.
RHONDA SMITH, CLERK

TABLE OF CONTENTS

I. PROCEDURAL HISTORY

A. Trial Proceedings In Toombs County Superior Court

Petitioner, Jerry Scott Heidler, was convicted by a jury of four counts of malice murder, one count of kidnapping with bodily injury, one count of aggravated sodomy, one count of aggravated child molestation, one count of child molestation, one count of burglary and two counts of kidnapping. On September 3, 1999, Petitioner was sentenced to death for each of the four counts of malice murder. Petitioner was also sentenced to life for kidnapping with bodily injury, life for aggravated sodomy, thirty years for aggravated child molestation, twenty years for child molestation, twenty years for burglary, and twenty years for kidnapping, all to be served consecutively.

The Georgia Supreme Court summarized the facts as follows:

> Danny and Kim Daniels lived in the town of Santa Claus in Toombs County 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 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 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 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, 537 S.E.2d 44, 52 (2000).

B. Motion For New Trial

Petitioner's motion for new trial, as amended, was denied on December 29, 1999.

C. Appeal to the Georgia Supreme Court

The Georgia Supreme Court affirmed Petitioner's murder convictions and death sentences on October 2, 2000. Heidler v. State, 273 Ga. 54, 537 S.E.2d 44 (2000). The Court reversed Petitioner's aggravated child molestation conviction because it merged as a matter of law into the aggravated sodomy conviction. Id. at 63-64.

D. Appeal to The United States Supreme Court

Petitioner's petition for writ of certiorari was denied by the United States Supreme Court on May 14, 2001. Heidler v. Georgia, 532 U.S. 1029 (2001). Petitioner's motion for reconsideration was denied on June 29, 2001. Heidler v. Georgia, 533 U.S. 965 (2001).

E. Instant Habeas Proceedings in the Butts County Superior Court

On November 20, 2001, Petitioner filed the above-styled habeas corpus petition. Evidentiary hearings were held on January 23-24, 2006 and May 30, 2006.

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

Petitioner's Amended Petition enumerates sixteen claims for relief. As is stated in further detail below, this Court finds: (1) some claims asserted by Petitioner are procedurally barred due to the fact that they were litigated on direct appeal; (2) some claims are procedurally defaulted, as Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; (3) some claims are non-cognizable; and, (4) some claims are neither procedurally barred nor procedurally defaulted and are therefore properly before this Court for habeas review.

To the extent Petitioner failed to brief his claims for relief and failed to present evidence in support of these claims, the Court deems those claims abandoned. Any claims made by Petitioner that are not specifically addressed by this Court are DENIED.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CLAIMS THAT ARE BARRED

Many of Petitioner's grounds for relief in the instant action were rejected by the Georgia Supreme Court on direct appeal. Issues raised and litigated on direct appeal will not be reviewed in a habeas corpus proceeding Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974); Gunter v. Hickman, 256 Ga. 315, 348 S.E.2d 644 (1986); Hance v. Kemp, 258 Ga. 649(6) 373 S.E.2d 184 (1988); Roulain v. Martin, 266 Ga. 353, 466 S.E.2d 837 (1996).

This Court finds that the following claims raised in the instant petition were litigated adversely to Petitioner on direct appeal in Heidler v. State, 273 Ga. 54, 537 S.E.2d 44 (2000), and may not be raised in this habeas corpus proceeding:[1]

a) **That portion of Claim V**, wherein Petitioner alleges that the prosecution suppressed records from the Department of Family and Children Services, (see Heidler v. State, 273 Ga. at 55(2));

b) **That portion of Claim V**, wherein Petitioner alleges that the prosecution failed to comply with the trial court's discovery orders in a complete and timely fashion, (see Heidler v. State, 273 Ga. at 55(2));

c) **That portion of Claim V**, wherein Petitioner alleges that the State made improper and prejudicial remarks in its opening statements and its closing arguments to the jury during both phases of the trial, including, but not limited to, instructing the jury not to consider mental illness during its sentencing deliberations, suggesting that the jury consider what the victims were feeling and thinking, commenting on Petitioner's exercise of his constitutional rights, and referring to Petitioner as "evil," (see Heidler v. State, 273 Ga. at 61, 65(10) and (19));

d) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in allowing the introduction of illegally obtained statements and unspecified evidence, (see Heidler v. State, 273 Ga. at 54-55, 59-60, 64-65(1)(6)(7) and (18));

e) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in refusing to strike prospective jurors who were unqualified for reasons such as, but not limited to, bias against the defense, (see Heidler v. State, 273 Ga. at 55-58(3));

f) **That portion of Claim VI**, wherein Petitioner alleges that the trial court gave unconstitutional, inaccurate and inappropriate jury instructions during both phases of the trial, (see Heidler v. State, 273 Ga. at 62-63, 65(12)(14) and (20));

---

[1] To the extent that there are allegations contained in supporting paragraphs of these claims (other than the sentencing hearing jury instructions in Claim X) which set forth new arguments in support of these issues and allege violations under different constitutional provisions, these allegations are procedurally defaulted absent a showing of cause and actual prejudice, or of a miscarriage of justice. Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985). The Court considers Claim X on the merits in Section III.D.1 of the instant order.

g) **That portion of Claim VI**, wherein Petitioner alleges that the trial court failed to instruct the jury on lesser included offenses, (see Heidler v. State, 273 Ga. at 62-63(13));

h) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in failing to find Petitioner's statement to be the product of an illegal arrest, (see Heidler v. State, 273 Ga. at 54-55(1));

i) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in finding that two videotapes introduced into evidence had sufficient indicia of reliability, (see Heidler v. State, 273 Ga. at 60(7));

j) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in failing to strike for cause several venirepersons whose attitudes towards the death penalty would have prevented or substantially impaired their performance as jurors in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), and Wainwright v. Witt, 469 U.S. 412 (1985), (see Heidler v. State, 273 Ga. at 55-58(3));

k) **That portion of Claim VI**, wherein Petitioner alleges that the trial court failed to possess and employ an accurate and proper understanding of what constitutes mitigation and what constitutes aggravation, (see Heidler v. State, 273 Ga. at 64(17));

l) **That portion of Claim VI**, wherein Petitioner alleges that the trial court failed to curtail the improper and highly prejudicial arguments by the State, including, but not limited to, arguments on burden-shifting, arguments that violate the Golden Rule, and arguments that focus on victim-impact, (see Heidler v. State, 273 Ga. at 61, 65(10) and (19));

m) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in admitting testimony and evidence of other crimes and bad acts, (see Heidler v. State, 273 Ga. at 64-65(18));

n) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in admitting various unspecified items of prejudicial, unreliable, unfounded, unsubstantiated and/or irrelevant evidence tendered by the State at either phase of trial, (see Heidler v. State, 273 Ga. at 59-60, 64-65(6)(7) and (18));

o) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in failing to require the State to disclose certain items of unspecified evidence in a timely manner so as to afford the defense an opportunity to conduct an adequate investigation, (see Heidler v. State, 273 Ga. at 55 (2));

p) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in failing to require the State to disclose certain unspecified items of evidence of an exculpatory or impeaching nature to the defense, (see Heidler v. State, 273 Ga. at 55(2));

q) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in restricting Petitioner's presentation of mitigating evidence, (see Heidler v. State, 273 Ga. at 64 (17));

r) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in allowing the State to suggest and argue that the scope of mitigation is restrictive and what constitutes mitigation is limited, (see Heidler v. State, 273 Ga. at 65(19));

s) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in admitting photographs and a videotape into evidence despite the inflammatory, cumulative, repetitive, prejudicial effect of such evidence, (see Heidler v. State, 273 Ga. at 59-60(6));

t) **That portion of Claim VI**, wherein Petitioner alleges that the trial court erred in compelling prejudicial and incriminating testimony from mental health professionals during the guilt/innocence trial for reasons other than impeachment or rebuttal, (see Heidler v. State, 273 Ga. at 60-61(9));

u) **That portion of Claim IX**, wherein Petitioner alleges that the trial court incorrectly charged the jury on the burden of proof beyond a reasonable doubt which permitted the jury to convict Petitioner upon less than "utmost certainty" of guilt, (see Heidler v. State, 273 Ga. at 62(12));

v) **That portion of Claim IX**, wherein Petitioner alleges that the trial court gave an unconstitutionally vague definition of guilty but mentally ill, (see Heidler v. State, 273 Ga. at 62(12));

w) **That portion of Claim IX**, wherein Petitioner alleges that the trial court erred in requiring Petitioner to bear the burden on proving his mental illness beyond a reasonable doubt, (see Heidler v. State, 273 Ga. at 62 (12));

x) **That portion of Claim IX**, wherein Petitioner alleges that the trial court erred in instructing the jury to not be swayed by sentiment, sympathy, prejudice or other factors, (see Heidler v. State, 273 Ga. at 62 (12));

y) **That portion of Claim IX**, wherein Petitioner alleges that the trial court erred in defining aggravated sodomy in a manner that was not adjusted to the law and the facts, (see Heidler v. State, 273 Ga. at 62 (12));

z) **That portion of Claim IX**, wherein Petitioner alleges that the trial court erred in incorrectly instructing the jury on who would take custody of Petitioner if convicted under a guilty but mentally retarded verdict. See Heidler v. State, 273 Ga. at 63(14). As to Petitioner's claim that the trial court incorrectly instructed the jury on who would take custody of Petitioner if convicted under a guilty but mentally ill verdict, this claim is procedurally defaulted;

aa) **That portion of Claim IX**, wherein Petitioner alleges that the trial court erred in incorrectly instructing the jury that if a verdict of guilty but mentally retarded is returned, the case would not proceed to the aggravation/mitigation trial. See Heidler v. State, 273 Ga. at 63(14). As to Petitioner's claim that the trial court erred in incorrectly instructing the jury that if a verdict of guilty but mentally ill is returned, the case would not proceed to the aggravation/mitigation trial, this claim is procedurally defaulted;

bb) **That portion of Claim X**, wherein Petitioner alleges that the trial court improperly instructed the jury regarding the definition of mitigating evidence, (see Heidler v. State, 273 Ga. at 65(20));

cc) **That portion of Claim XI**, wherein Petitioner alleges that the death penalty in Georgia is imposed arbitrarily and capriciously and amounts to cruel and unusual punishment, (see Heidler v. State, 273 Ga. at 66-67(27));

dd) **That portion of Claim XII**, wherein Petitioner alleges that his death sentence is disproportionate, (see Heidler v. State, 273 Ga. at 66-67(27)); and,

ee) **Claim XIII**, wherein Petitioner alleges that the Unified Appeal Procedure is unconstitutional, (see Heidler v. State, 273 Ga. at 66(24)).

Summary of Findings – Claims That Are Barred

This Court is bound by the decisions of the Georgia Supreme Court as to the portions of **Claims V, VI, IX, X, XI, XII, XIII set forth above,** and habeas corpus relief is denied as to each of these claims.

B. CLAIMS THAT ARE PROCEDURALLY DEFAULTED

Claims Petitioner failed to raise on direct appeal are procedurally defaulted absent a showing of cause and actual prejudice, except where their review is necessary to avoid a

miscarriage of justice and substantial denial of constitutional rights. Black v. Hardin, 255 Ga. 239 (1985); Valenzuela v. Newsome, 253 Ga. 793 (1985); O.C.G.A. § 9-14-48(d); Hance v. Kemp, 258 Ga. 649(4), (1988); White v. Kelso, 261 Ga. 32, (1991). Petitioner's failure to enumerate alleged errors at trial or on appeal operates as a waiver and bars consideration of those errors in habeas corpus proceedings. See Earp v. Angel, 257 Ga. 333, 357 S.E.2d 596 (1987). See also Zant v. Gaddis, 247 Ga. 717, 279 S.E.2d 219 (1981) (holding that ineffective assistance of counsel can constitute cause under O.C.G.A. § 9-14-48(d)); Turpin v. Todd, 268 Ga. 820, 493 S.E.2d 900 (1997)(a procedural bar to habeas corpus review may be overcome if Petitioner shows adequate cause for failing to raise an issue at trial or on direct appeal and actual prejudice resulting from the alleged error or errors. When a habeas petitioner meets both prongs of the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), he has established cause and prejudice sufficient to overcome the procedural bar of O.C.G.A. § 9-14-48(d)).

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

a) **Claim I,** wherein Petitioner alleges that he is severely mentally ill, and therefore his death sentence is unconstitutional as an excessive and disproportionate penalty;

b) **Claim II,** wherein Petitioner alleges that he is severely mentally ill and is thus ineligible for the death penalty under the Georgia evolved standards of decency that prohibit the execution of those who are guilty but mentally ill;

c) **Claim IV,** wherein Petitioner alleges that he was denied access to competent mental health assistance in violation of Ake v. Oklahoma, 470 U.S. 68 (1985), and his constitutional rights;

d) **That portion of Claim V**, wherein Petitioner asserts his constitutional rights to due process and a fair trial were violated by prosecutorial misconduct, specifically that the State presented false testimony in violation of his due process rights as defined in Giglio v. United States, 405 U.S. 150 (1972).

e) **That portion of Claim VI**, wherein Petitioner alleges the trial court conduct gave an improper guilty but mentally ill charge to the jury at the guilt/innocence phase of Petitioner's trial.

f) **That portion of Claim VI**, wherein Petitioner alleges the trial court conducted his trial in a manner that violated his constitutional rights;

g) **Claim VII**, wherein Petitioner alleges that misconduct by the jurors violated his constitutional rights;

f) **Claim VIII**, wherein Petitioner alleges that he was denied due process of law when the same jury that convicted him was responsible for determining the appropriate sentence;

g) **That portion of Claim IX**, wherein Petitioner alleges that the trial court erred in its instructions to the jury in the guilt/innocence phase and violated his constitutional rights; and

h) **Claim XII**, wherein Petitioner alleges that the proportionality review conducted by the Georgia Supreme Court is constitutionally infirm in general and as applied.

Constitutional Prohibition Against Executing the Severely Mentally Ill (Claims I and II)

Petitioner alleges that, because of his longstanding mental illness, his execution will violate the prohibitions against cruel and unusual punishment of the Eighth and Fourteenth Amendments to the U.S. Constitutions and analogous provisions of the Georgia Constitution. See Ga. Const. of 1983, Art. I, Sec. I, Par. XVII. Although these claims are procedurally defaulted, the Court analyzes the claims on the merits to avoid a miscarriage of justice.

This Court affirmatively finds that Petitioner has a long history of severe mental illness. These impairments are longstanding, and according the psychiatrist employed by Respondent, Jack E. Matteson, M.D., have been present since Petitioner's "preteen years." (HT 1:191).

Under O.C.G.A. § 17-7-131, a person is mentally ill if he or she has "a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." O.C.G.A. § 17-7-131(a)(2). At his trial, four mental health experts evaluated Petitioner and assessed his eligibility for a guilty but mentally ill verdict; in habeas proceedings, three mental health experts evaluated Petitioner and made such an assessment. All seven experts concluded that, at the time of the offense, Petitioner suffered from severe mental illness such that it "significantly impair[ed his] judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." O.C.G.A. § 17-7-131(a)(2).

During the instant proceedings, Petitioner was present for the first day of the evidentiary hearing, but his mental illness prevented him from attending the second day of the hearing. Dr. Matteson testified to the Court that, during the overnight recess, Petitioner decompensated psychiatrically. He explained that Petitioner had to be removed from his cell and placed in the Crisis Stabilization Unit (hereinafter CSU) within the prison after "feeling unsafe" and endorsing delusions that he would be hurt in his cell. (HT 2:291). Once in CSU, Petitioner grew increasingly agitated and upset. He began grabbing cell bars, growling at the nurse, and making odd noises. The prison staff identified the situation as an emergency and contacted Dr. Matteson at home. Dr. Matteson authorized the staff to forcibly medicate Petitioner. Due to the heavy dose of medication required to sedate Petitioner, he did not awake to loud banging on his door

the next morning and thus could not attend the second day of the evidentiary hearing. (HT 2:291-92).

The Court finds that, for the majority of Petitioner's life, Petitioner has been significantly impaired by his mental illness and that it is "highly unlikely" he will ever be free of the substantial impairments. (HT 1:193). Nevertheless, the Court denies Petitioner's claim that his execution will violate state or federal prohibitions against cruel and unusual punishment.

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This federal amendment is applicable to the states through the Fourteenth Amendment. Furman v. Georgia, 408 U.S. 238, 239 (1972). As the U.S. Supreme Court stated in Roper v. Simmons, 543 U.S. 551, 560 (2005), the "Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions." "The right flows from the basic precept of justice that punishment for the crime should be graduated and proportioned to [the] offense.'" Id. (citation omitted); see also Enmund v. Florida, 458 U.S. 782, 788 (1982).

Because the death penalty is the most severe of punishments, the Eighth Amendment applies to it with "special force." Roper, 543 U.S. at 568. The death penalty must be limited to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them the most deserving of execution.'" Id. (citing Atkins v. Virginia, 536 U.S. 304, 319 (2002)). Certain offenders, regardless of the nature of the crimes they committed, simply cannot act with a level of culpability that could warrant imposition of the death penalty. For example, the Eighth Amendment prohibits the execution of individuals who suffered from mental retardation at the time of the capital offense. Atkins, 536 U.S. at 306. Individuals who

are juveniles, defined as younger than eighteen years of age, at the time of an offense are similarly categorically ineligible for the death penalty. Roper, 543 U.S. at 578-79.

Petitioner urges this Court to find that the Eighth Amendment – and the evolving standards of decency, which help define its scope – in addition to protecting juveniles and mentally retarded individuals, also protects from execution individuals like Petitioner, who suffer from severe, longstanding mental illness that was present at the time of the crime. Petitioner similarly urges the Court to find that to impose the death penalty upon Petitioner will violate the state prohibition against cruel and unusual punishment under the Georgia Constitution.

The Georgia Supreme Court has recently addressed this very issue:

> [U]nlike the case of juvenile offenders and mentally retarded persons, there is no consensus discernable in the nation or in Georgia sufficient to show that evolving standards of decency require a constitutional ban under either the Constitution of the United States or under the Georgia Constitution, on executing all persons with mental illnesses . .

Hall v. Brannan, 284 Ga. 716, 726 670 S. E.2d 87, 96-97 (2008), (footnote omitted).

Accordingly, these claims are denied.

Prosecutorial Misconduct (Claim V)

Petitioner asserts his constitutional rights to due process and a fair trial were violated by prosecutorial misconduct, specifically that the State presented false testimony in violation of his due process rights as defined in Giglio v. United States, 405 U.S. 150 (1972). As Petitioner failed to raise this claim, that was previously available to him in the trial court below, at his motion for new trial or on direct appeal, this claim is procedurally defaulted, and may not be litigated in this habeas corpus proceeding as Petitioner failed to establish cause and prejudice or a miscarriage of justice to excuse his default of this claim.

Petitioner alleges that Jerry White, the chief jail administrator, testified falsely during the sentencing phase of Petitioner's trial. Specifically, Petitioner complains that Mr. White's statement that Petitioner was caught with a weapon on 50 to 75 different occasions and Mr. White's statement that he and a locksmith were unable to discern how Petitioner was able to dismantle the door and mirrors in Petitioner's cell constituted false testimony. Petitioner failed to raise this claim on direct appeal therefore, in order for this Court to examine this claim on its merit, Petitioner must first overcome this procedural bar.

i. Petitioner Must Establish Cause To Overcome His Default Of This Claim.

In order to overcome the procedural default of this claim Petitioner must show that the State suppressed evidence from Petitioner's trial counsel that would have supported his allegations of prosecutorial misconduct or Petitioner must prove trial counsel were ineffective in their representation of Petitioner regarding this issue.

a. No State Suppression

In order to support Petitioner's allegation that Mr. White falsely testified that Petitioner was caught 50 to 75 times with a weapon, Petitioner relies upon records from the Toombs County Detention Center, which show Petitioner was caught with a weapon eight times. These documents from the Toombs County Detention Center were requested and received by trial counsel prior to trial. (RX 23, 48:13,234). Furthermore, the records Petitioner is currently relying on to allegedly prove Mr. White testified falsely are also in the trial attorney files that Petitioner provided Respondent during this state habeas action. (RX 23, 48:13,234-358). Therefore, there can be no State suppression because trial counsel were in possession of these documents that allegedly contradict Mr. White's testimony.

Additionally, there was no evidence presented by the Petitioner that the prosecution, specifically District Attorney Richard Malone, had any reason to believe that Jerry White was testifying falsely about the number of weapons Petitioner was caught with at the Detention Center. As stated above, the only evidence Petitioner has proffered to this Court to prove that Petitioner was not in possession of 50 to 75 weapons is a sparse file from the Toombs County Detention Center. Although Petitioner deposed Mr. White in the instant proceeding, Petitioner's current counsel never asked Mr. White if the files from the Toombs County Detention Center were complete or if every incident that happened in the Detention Center was documented. (RX 73).

Petitioner has the burden to establish his claims. "A charge of prosecutorial misconduct is a serious charge and is not to be lightly made, having raised it, Appellant has the duty to prove it by the record and by legal authority." Roberts v. State, 267 Ga. 669, 671, 482 S.E.2d 245 (1997). In the instant case, Petitioner has neither shown that the State suppressed evidence that contradicted the testimony of Jerry White nor has Petitioner proven there was a deliberate deception perpetrated on the court at Petitioner's trial regarding the testimony of Jerry White. Thus, Petitioner has failed to overcome the procedural default of this claim.

Petitioner also alleges that Mr. White falsely testified that he was unable to understand how Petitioner dismantled the door and the mirrors. Petitioner attaches a portion of Mr. White's testimony regarding the locks on his cell door to his testimony concerning Petitioner's removal of mirrors in his cell. Mr. White testified at trial that no one could figure out how Petitioner removed the locks from the doors. (TT, Vol. V, 940). He also testified that Petitioner had to remove safety screws, which require a special tool, to dismantle the mirrors in his cell; however, he never testified that he did not know how Petitioner removed the screws. Id. at 940-941.

Additionally, trial counsel knew how Petitioner removed these screws: Petitioner melted the end of his toothbrush into the screws. (Pet. PH Brief, 264; PX 20, 100:5317). Petitioner has presented no evidence in the possession of the State that contradicts Mr. White's testimony regarding the cell door locks or the removal of the mirrors.

Because Petitioner failed to establish that Mr. White made false statements to the jury, Petitioner has not proven that the State deliberately deceived the jury. Thus, as Petitioner has not established that Mr. White testified falsely regarding the means Petitioner used to remove the security screws from the mirrors on the wall, and as trial counsel knew how Petitioner dismantled the mirrors in his cell, Petitioner has failed to show State suppression as the cause to overcome the procedural bar to this portion of Petitioner's **Claim V**.

b. No Ineffective Assistance Of Counsel

To establish ineffective assistance of counsel as cause to overcome his procedural default of this claim, Petitioner has to establish counsel's representation with regard to the testimony given by Mr. White was deficient.

Although the Toombs County Detention Center kept a log of when Petitioner was caught with several weapons, there is no evidence before this Court establishing that the Detention Center recorded every time Petitioner was caught with a weapon. Judge Palmer testified that she spoke with Mr. White on an almost weekly basis regarding Petitioner and neither trial counsel testified that they had any reason to doubt Mr. White's veracity at trial. (HT 1:98-99). Additionally, trial counsel testified at Petitioner's evidentiary hearing before this Court that Mr. White and Petitioner got along well.

Thus, Petitioner has failed to establish deficient performance of counsel as cause to overcome his default of this portion of **Claim V.**

ii. Petitioner Failed To Establish Prejudice To Overcome His Procedural Default Of This Claim

Further, the Court also finds that Petitioner failed to establish the prejudice to overcome his default. Petitioner complains that without the testimony of Mr. White, "the jury would have received little to no evidence to support future dangerousness." (Pet. PH Brief, p. 269). However, the Court notes that the documents detailing Petitioner's behavior while incarcerated in the Toombs County Detention Center and the testimony given by, not just by Mr. White, but by four separate jailers, discussing Petitioner's behavior and statements while incarcerated at the Toombs County Jail also support a conclusion of future dangerousness.

Bruce LeBlanc, a booking officer at the Toombs County Detention Center, testified at trial that one night he sat and talked to Petitioner about his religious beliefs. (TT, VIII, 918). Mr. LeBlanc explained that Petitioner told him "he (Petitioner) was a collector of souls" and that he "wasn't through collecting souls." (TT, VIII, 919). Petitioner then showed Mr. LeBlanc his knuckles with the word Sandman tattooed on them and explained that "the Sandman was a character in a series of movies ... the Sandman was a man whose soul belonged to the devil and ... he went around killing families while they slept." (TT, VIII, 919-920).

Petitioner also made a glass shank "about 10 inches long...coaxed one of the guards into the cell block" pulled the glass shank on the guard and backed him into a corner and threatened to cut the guard's head off. (PX 23, 4:930-931). Mr. LeBlanc also saw Petitioner make a shank out of a toothbrush with a lighter. Id. When questioned about the frequency of Petitioner possessing a weapon, Mr. LeBlanc testified that the guards had to "shake down his cell ... on a regular basis and they would have "to account for every pencil, every piece of paper." (TT at 939).

The 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. (RX 68, 49:13,535-36). 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. Id. 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. Id.

Further, with regard to Giglio claims, a reversal is required "only if the [undisclosed] evidence is material in the sense that its suppression undermines confidence in the outcome of trial.'" Owen, 265 Ga. at 70, (citing United States v. Bagley, 473 U.S. 667, 676-78, 782 (1985)). Even had Mr. White testified that Petitioner had fewer weapons, the outcome of the sentencing phase of Petitioner's trial would not have been different given the overall weight of further aggravating evidence presented at trial.

Therefore, given the fact that Petitioner was caught with a number of weapons, was involved in fights with other inmates, threatened several of the guards, and escaped from the Detention Center, in addition to the nature of the charged offenses, Petitioner has failed to prove that there is a reasonable likelihood that if Petitioner could have established that any portion of Mr. White's testimony was false, the outcome of the trial would have been different. Accordingly, Petitioner has failed to establish either cause or prejudice for his failure to raise this claim. Thus, Claim V is procedurally defaulted.

Guilty But Mentally Ill Charge by the Trial Court (portion of Claim VI))

Petitioner alleges in Claim VI that the trial court gave an improper guilty but mentally ill charge to the jury following the guilt/innocence phase of Petitioner's trial. As Petitioner failed to raise this claim, which was previously available to him below at his motion for new trial and on direct appeal, this claim is procedurally defaulted and may not be litigated in this habeas corpus proceeding as Petitioner has failed to establish cause and prejudice or a miscarriage of justice to excuse the default of this claim.

The trial court charged the jury at the conclusion of the penalty phase, in compliance with the then current version O.C.G.A. § 17-7-131(b): "Should you find the defendant guilty but mentally ill on any count charged in the indictment, the defendant will be given over to the Department of Corrections or to the Department of Human Resources as the mental condition of the defendant may warrant." (TT, VIII, 844). This portion of O.C.G.A. § 17-7-131(b) was changed effective July 1, 2006 (after Petitioner's state habeas evidentiary hearing but before Petitioner's post-hearing brief was due) to read:

> I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be placed in the custody of the Department of Corrections which will have responsibility for the evaluation and treatment of the mental health needs of the defendant, which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Human Resources.

Petitioner argues that this change in the statute, since Petitioner's death penalty trial, creates an alleged violation of his due process Constitutional rights and entitles him to a new trial. However, Petitioner admits in his own brief that the trial court's charge was in compliance with O.C.G.A. § 17-7-131 (b) at the time of Petitioner's death penalty trial. Furthermore, Petitioner fails to cite any controlling law that holds that the version of O.C.G.A. § 17-7-131(b),

charged at Petitioner's death penalty trial, was *unconstitutional*. Therefore, there exists no cause or reason to excuse the procedural default of this claim.

Additionally, Petitioner has failed to show that there is a reasonable likelihood that the outcome of his trial would have been different if the most recent version of O.C.G.A. §17-7-131(b) had been used to charge the jury instead of the original version. Petitioner claims that the jury was improperly led to believe that if he was found "guilty but mentally ill" he would be in the permanent custody of the Department of Human Resources; however, the charge plainly stated that he would only be in the custody of the Department of Human Resources, instead of the Department of Corrections, if his mental condition warranted such an arrangement. O.C.G.A. § 17-7-131(b). This Court finds that it is unlikely, given the magnitude of Petitioner's crimes, that such a small change would have changed the outcome of either phase of Petitioner's trial. The changes to the statute have no retroactive effect and have created no violation of Petitioner's Constitutional rights, therefore, Petitioner has failed to show cause or prejudice to overcome the procedural default of this claim.

Petitioner also complains that trial counsel were ineffective because they did not object to this jury instruction. As Petitioner could not have raised this claim on direct appeal this portion of Petitioner's **Claim VI** is properly before this Court. As the guilty but mentally ill instruction was a proper jury charge at the time of Petitioner's trial, Petitioner is unable to show that trial counsel were deficient in their performance as there existed no error in their judgment at the time. Petitioner can also not show prejudice because, given the heinous nature of his crimes, the substitution of a new instruction that simply clarifies who may or may not have custody of his person based upon his mental stability would be unlikely to change the outcome of the trial. As

Petitioner has failed to show deficiency and prejudice, this portion of Petitioner's **Claim VI** is DENIED.

Summary of Findings – Defaulted Claims

Claims I, II, IV, VII, VIII, IX, and XII and **the portion of Claims V and VI set forth above provide Petitioner with no basis for relief.**

C. NON-COGNIZABLE GROUNDS

Some of Petitioner's enumerated claims for relief alleged in his amended petition set forth issues which fail to allege a cognizable claim for relief under O.C.G.A. § 9-14-41(a) et. seq. The following claims fail to allege grounds which would establish a constitutional violation in the proceedings which resulted in Petitioner's conviction and sentence and are therefore barred from review by this Court as non-cognizable under O.C.G.A. § 9-14-42(a).

a) **That portion of Claim XI,** wherein Petitioner alleges that execution by lethal injection is cruel and unusual punishment; Alternatively, even if this claim was cognizable, this Court would find it is without merit. See Baze v. Rees, 128 S.Ct. 1520 (2008) and the recent holding in Alderman v. Donald, Civil Action No. 1:07-CV-1474 (N.D. Ga. May 2, 2008) (finding Georgia's method of execution constitutional);

b) **Claim XIV**, wherein Petitioner alleges cumulative error; there is no cumulative error rule in Georgia. Head v. Taylor, 273 Ga. 69, 70, 538 S.E.2d 416 (2000);

c) **Claim XV**, wherein Petitioner alleges that he is currently incompetent to be executed due to his mental impairments; this claim is not ripe for review as Petitioner's execution is not currently scheduled. See Ford v. Wainwright, 477 U.S. 399 (1986); Stewart v. Martinez-Villareal, 523 U.S. 637, 643 (1998); and,

d) **Claim XVI**, wherein Petitioner alleges he is incompetent to proceed in his current state habeas action.

Summary of Findings – Non-cognizable Claims

Claims XI, XIV, XV AND XVI are not proper claims for this Court's review and are DENIED.

D. CLAIMS PROPER FOR STATE HABEAS REVIEW

1. Sentencing Phase Instructions (Claim X)

Petitioner alleges in a portion of **Claim X** that the trial court's instructions concerning aggravating circumstances led the jurors to believe they could sentence Petitioner to death without finding any statutory aggravating circumstances, and that the trial court's instructions regarding unanimity of the sentence was an incorrect statement of law. Errors in the sentencing phase charge to the jury are "never barred by procedural default," these claims are properly before this Court for review on the merits. Head v. Ferrell, 274 Ga. 399, 403, 554 S.E. 2d 155 (2001). A review of the sentencing phase jury instructions, in their entirety, establishes that Petitioner has failed to show that the trial court erred in its sentencing phase instructions to the jury, and that these claims are without merit. Thus, this claim is DENIED

2. Ineffective Assistance Of Trial Counsel

Petitioner alleges in **Claim III** and in various footnotes to other claims, that he received ineffective assistance of counsel at the guilt/innocence and sentencing phases of his trial as well as on direct appeal. Petitioner was represented at trial and on appeal by, Michael C. Garrett and the Honorable Kathy S. Palmer. Accordingly, Petitioner's allegations of ineffective assistance of trial counsel, which were neither raised nor litigated adversely to Petitioner on direct appeal nor procedurally defaulted, are properly before this Court for review on their merits. Additionally, Petitioner's allegations of ineffective assistance of appellate counsel are properly before this Court for review on their merits.

Unless otherwise specified, to the extent that Petitioner has not briefed the other claims of ineffective assistance of counsel, this Court finds that Petitioner has failed to establish the requisite prongs of Strickland as to these claims.

a. Summary Of Petitioner's Claims

Petitioner presented testimony on the following ineffective assistance of counsel claims in his amended petition:

1. Trial counsel failed to conduct an adequate pretrial investigation including, but not limited to, the psychological, medical and psychiatric factors affecting Petitioner's mental state before, during and after the murders for which he was convicted;

2. Trial counsel failed to make requests for continuances and to make use of time available to adequately investigate and prepare for trial;

3. Trial counsel failed to make requests for investigative support;

4. Trial counsel failed to adequately use investigative tools and services to which counsel had access;

5. Trial counsel failed to conduct an adequate pretrial investigation into Petitioner's life and background to uncover and present to the jury evidence in mitigation of punishment, failed to present a complete picture of Petitioner's background, and failed to locate, interview, and present as witnesses numerous individuals who had alleged mitigating evidence regarding Petitioner;

6. Trial 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;

7. Trial counsel failed to obtain records, including educational, medical, and mental health records of Petitioner and his family which would have assisted in Petitioner's defense;

8. Trial counsel failed to prepare and adequately examine the mental health witnesses called by the trial court during the guilt/innocence phase of trial and those called by Petitioner during the aggravation/mitigation trial;

9. Trial counsel failed to take advantage of background records they obtained;

10. Trial counsel failed to investigate and obtain evidence of Petitioner's alleged thought and mood disorders;

11. Trial counsel failed to interview alleged critical witnesses;

12. Trial counsel failed to provide information to the mental health experts so that they could render accurate diagnoses of Petitioner;

13. Trial counsel failed to prepare and adequately examine mitigation witnesses;

14. Trial counsel failed to present evidence of Petitioner's mental state at the time of the crimes;

15. Trial counsel failed to adequately prepare Petitioner's witnesses and failed to elicit alleged relevant, mitigating evidence that the witnesses possessed;

16. Trial counsel failed to read and explain certain records, including Petitioner Department of Family and Children's Services records, when entered into evidence;

17. Trial counsel failed to investigate and present evidence to rebut the aggravating evidence presented by the prosecution at trial;

18. Trial counsel failed to adequately challenge the instructions given on guilty but mentally ill and guilty but mentally retarded;

19. Trial counsel failed to show that the crimes he committed were a result of his mental illness and his alleged inability to cope with the recent death of his son;

20. Trial counsel failed to object when the State allegedly misled the jury regarding what evidence and testimony they could consider in determining whether he qualified for a verdict of guilty but mentally ill; and,

21. Trial counsel failed to present further alleged mitigating evidence.

b. Standard Of Review

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

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

Strickland v. Washington, 466 U.S. at 687.

To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id at 693.

Additionally, "when reviewing whether an attorney is ineffective, courts 'should always presume strongly that counsel's performance was reasonable and adequate.' Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir. 1992). Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. In Jefferson v. Zant, the Georgia Supreme Court stated:

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

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

The United States Supreme Court has held, consistent with its prior holding in Strickland v. Washington, that the ABA's suggested guidelines for attorney performance in capital cases are only to be used as guides in determining whether an attorney's performance in a particular case was objectively reasonable, but that the ultimate determination regarding the reasonableness of an attorney's performance "must be directly assessed for reasonableness" considering "*all the circumstances*" of counsel's representation. Wiggins v. Smith, 539 U.S. 510, 533 (2003). citing Strickland, 466 U.S. at 691). (Emphasis added). "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Strickland, 466 U.S. at 688-689.

c. Qualifications Of The Defense Team

Petitioner was appointed two experienced criminal defense attorneys to represent him during his death penalty trial, Michael Garrett and the Honorable Kathy Palmer. Judge Palmer was appointed as Petitioner's attorney and requested Mr. Garrett also serve as Petitioner's counsel and he was subsequently appointed. (HT 3:549).

Michael Garrett obtained his undergraduate degree in psychology from Chapel Hill and completed one year of work in a PhD program in psychology at Indiana University. (HT 3:547, 569). Deciding not to pursue his PhD in psychology, Mr. Garret attended the University of Georgia Law School and graduated in 1973 and began his career working "for a civil litigation firm in Augusta." (HT 3:547). After working for the civil litigation firm, Mr. Garrett opened his

own practice and, since approximately 1977, he has been a criminal defense attorney. (HT 3:547).

Mr. Garrett has defended at trial in excess of forty capital cases, all of which he sat first chair, and represented roughly ten to fifteen individuals whose cases did not reach the trial stage. (HT 3:547-548, 570). Nearly all of these cases, except six or seven death penalty cases, were tried prior to Petitioner's death penalty case. (HT 3:569). Mr. Garrett has been to many continuing legal education classes on capital litigation, including the training sessions that were held by the Multicounty Public Defender Office and attended several national programs on the topic of death penalty litigation. (HT 3:571). Moreover, he currently collaborates with the Capital Defender's Office on training sessions offered twice a year and has more than once testified as an expert on capital defense with his testimony specifically addressing whether or not an attorney's representation "amounted to ineffective assistance" of counsel. (HT 3:571, 639-640). Of the nearly fifty clients that Mr. Garrett has represented in death penalty cases only two received the death penalty. (HT 3:548). To his knowledge, Mr. Garrett's assistance as an attorney has never been found to be ineffective. (HT 3:640).

The Honorable Kathy Palmer, a Superior Court judge for the Middle Judicial Circuit, obtained her undergraduate degree in child and family development in 1976 and her law degree in 1979, both from the University of Georgia. (HT 1:27). Judge Palmer's first job was working with the Prosecuting Attorneys' Council (PAC) of Georgia for three years. (HT 1:28). Following her employment with PAC, Judge Palmer worked as an assistant solicitor in Dekalb County for about a year and then took three years off to be a "full time mom and housewife" and taught occasionally for the Institute of Continuing Judicial Education. Id. In 1987, Judge Palmer went into general practice with Robert S. Reeves, in Swainsboro, Georgia and although she

focused on family law she also tried many criminal cases with Mr. Reeves. (HT 1:29, 85). Judge Palmer and Mr. Reeves tried murders cases, child molestation cases, aggravated battery cases, etc. Id. Judge Palmer served as first chair in three of the approximately ten murder trials she tried with Mr. Reeves. (HT 1:30, 86). Judge Palmer also gained experience in the capital litigation field when she and Mr. Reeves tried the death penalty case of Angela E. Crosby together in February of 1997 and successfully argued for a life sentence. Crosby v. State, 269 Ga. 434; 498 S.E.2d 62 (1998).

In 1995, at the request of the Chief Judge of the Middle Judicial Circuit, Judge Walter C. McMillan, Judge Palmer became the contract public defender in Toombs County. Id. This position led to her appointment in Petitioner's death penalty case. Judge Palmer held this position until she was elected to the Superior Court bench in 2000. (HT 1:30).

Petitioner's trial counsel reviewed lengthy written materials concerning the death penalty and consulted with various attorneys and organizations that have considerable experience in the capital litigation field. (See HT 1:90-91; 3:575-576; RX 5, 47:12,780). The main tome used by Petitioner's counsel as a guidebook was created by Petitioner's current state habeas counsel, the Georgia Resource Center (GRC), and the GRC's counterparts. (HT 1:89-90). Additionally, Mr. Garrett confirmed that he consulted with the Georgia Resource Center as well. (HT 3:576-577). Trial counsel also obtained reference materials and sought advice on the mental health issues in Petitioner's case from the Southern Center for Human Rights (SCHR) and Michael Mears, of the Multi-County Public Defender's Office (MCPD), a death penalty qualified attorney whom Mr. Garrett had tried cases with in the past. (HT 1:92-93; HT 3:572-575; RX 2, 47:12,741, 12,743; RX 6; RX 95, 53:14,455; RX 97, 52:14,491).

Supplementary to seeking advice from Georgia's most experienced authorities of death penalty defense, Mr. Garrett affirmed that he tried to "keep current on the law and trends in general" regarding capital litigation. (HT 3:574). Furthermore, Mr. Garrett testified that he had taken Continuing Legal Education classes focused on preparing for a mental health defense. (HT 3:583).

In addition to consulting with known death penalty experts, Petitioner's counsel also hired an investigator, Frank Gillis, to help with certain aspects of the case. Mr. Gillis helped find witnesses including aunts, uncles, cousins, and Petitioner's friends. (HT 1:95, 98; HT 3:577; RX 4, 47:12,779).

d. Trial Counsel's Performance

Trial Strategy

After trial counsel's initial interview with Petitioner, they developed their trial strategy and delegations of responsibility for preparing for Petitioner's death penalty trial. Mr. Garrett described their strategy at trial as follows:

> [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 not be -- and be consistent. And so it was really one long penalty phase, with the psychiatric evidence put at the front end and the 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.

(HT 3:554-55).

As set forth in the facts found by the Georgia Supreme Court, there was indeed overwhelming physical and testimonial evidence of Petitioner's guilt. Heidler, 273 Ga. at 59.

Mr. Garrett testified that he was lead counsel and was responsible for everything in Petitioner's case. (HT 3:579-580). However, there was a delineation of responsibilities. Mr.

Garrett concentrated on Petitioner's mental illness and Judge Palmer stated that she was responsible for "investigating his background and finding out anything that we could in regards to reasons as to why he was mentally ill and what about his past would help to convince a jury that he should not receive the death penalty." (HT 1:42, 153). Because Judge Palmer worked in the Toombs County area and Mr. Garrett practiced in Augusta, two hours away, she was responsible for staying in touch with the prosecutors and local law enforcement. (HT 1:43).

The working relationship between Mr. Garrett and Judge Palmer was described positively by Mr. Garrett. (HT 3:580). Mr. Garrett agreed that he and Judge Palmer had a good working relationship, discussed the majority of what they did and, as evidenced by their billing records, conversed often about Petitioner's case. (HT 3:580, RX 2, 47:12,719-754; RX 3, 47:12,755-778).

Investigation of Petitioner's Background

Petitioner's allegation that the trial counsel did not adequately investigate his background is the basis for the majority of Petitioner's claims of ineffective assistance of counsel. However, the record before this Court does not support Petitioner's allegation. Trial counsel's investigation of Petitioner's background included interviewing family members, teachers, friends, Department of Family and Children's Services (DFACS) caseworkers, and Petitioner's juvenile probation officer. Additionally, they gathered documents from the various schools, including the psycho-educational centers Petitioner attended, numerous mental health centers, DFACS, and medical service providers. Judge Palmer testified that they obtained "boxes" of records detailing Petitioner's background and Mr. Garrett stated that they diligently worked to obtain all of Petitioner's background records. (HT 1:110; 3:596).

1) Trial Counsel's Interviews of Petitioner

Only four days after the Daniels family homicides, Judge Palmer had her first meeting with Petitioner at the Toombs County Detention Center. (HT 1:30; RX 1, 47:12,756). Following this initial interview, Petitioner took Judge Palmer to his cell and showed her his toilet paper babies. (HT 1: 35-36). Judge Palmer concluded that Petitioner was "mentally ill" after seeing the toilet paper babies in his cell. (HT 1:35-37).

Mr. Garrett had his first meeting with Petitioner approximately six days after Judge Palmer met with Petitioner and described his first meeting with Petitioner as follows, "He would never really give an appropriate response to a question. It was like he was responding to someone else ... He said very little." (HT 3:550). Mr. Garrett also concluded that Petitioner was mentally ill and needed "a psychological evaluation." Id.

Judge Palmer testified that during her representation of Petitioner, she visited him approximately once every six weeks and spoke with Mr. White, the chief jail administrator, every Thursday. (HT 1:98-99, 154; RX 1, 47:12756-58, 12,760-61, 12,766, 12,768). The Detention Center jailers always reported Petitioner's "bizarre episodes" and general behavior to his counsel. (HT 1:102). Although Mr. Garrett testified that he did not meet with Petitioner as often as Judge Palmer, since he lived two hours away, his billing records show that he met with Petitioner at least a dozen times prior to Petitioner's trial. (RX 2, 47:12,728-31, 12,733-34, 12,737, 12,741, 12,743). Mr. Garrett testified that when he met with Petitioner he "couldn't communicate with him at all" and gathered very little information from Petitioner due to Petitioner's unwillingness to cooperate. (HT 3:581).

Despite Petitioner's demeanor he did impart "some background information" to trial counsel. (HT 1:47). On 12/8/97, during Judge Palmer's first visit with Petitioner he told her the

following: 1) he lived with his mother, Mary Mosley, and also provided her phone number and address; 2) he had a fiancé named Marie Spivey and provided her name and address; 3) he had received social security but it was "cut off"; 4) he went to school in Baxley, Waycross and attended Cedarwood (a school for special needs children); 5) he has a child named Joshua Richard Herrington; 6) he provided his siblings names, Lisa Marie Aguilar, Butch Heidler, Steve Heidler, and provided their ages, occupations and current locations; 7) he also stated that he had worked at "Taylor & Taylor" cabinet shop and had worked at pre-school when he was in Cedarwood; 8) he explained that he had stayed at the Daniels' home and that his sister, JoAnne Mosley, had been in their care; 9) he stated that he watched TV, played video games, cooked rarely, had no outside interests and went to church with the Daniels; 10) he also provided the name of his foster mother, Sylvia Boatright, whom he had lived with when he was 13-years old and that he was in foster care for unruliness and curfew violations; 11) he revealed that he had been to Juvenile Court for criminal trespass, breaking and entering and for having a knife while at RYDC; and, 12) he also stated he "kept seeing gun go off over and over." (RX 24, 49:13,360-363; PX 98, 53:14,549).

Additionally, Petitioner provided information to Mr. Garrett regarding Marie Spivey, the mother of his stillborn child, and his family members, specifically, how to reach them. (RX 26, 49:13,378). Petitioner also told Judge Palmer his father's name, George Owen, that his father currently lived with Petitioner's sister Lisa in Baxley but had previously lived in Port Smith, Rhode Island and that he did not see his father growing up because his parents divorced when he was five or six. Id. at 13,364.

2) Pretrial Investigator

Judge Palmer 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. (HT 1:98-99; RX 4, 47:12,779). Unfortunately, Petitioner's friends were "criminals, thugs" and "dopers" that were currently in jail and were not helpful to Petitioner's case. (HT 1:98,105). Judge 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." (HT 1:98).

3) Witness Interviews Conducted by Trial Counsel

Trial counsel's testimony at the state habeas evidentiary hearing and trial counsel's records show that trial counsel conducted numerous interviews of family members, friends, DFACS caseworkers, teachers, juvenile court workers and mental health experts. Furthermore, unlike Petitioner's current counsel, who began this case with Petitioner's entire background history already provided, Petitioner's trial counsel had a client who only provided minimal information. Additionally, efforts by trial counsel to find mitigating witnesses were severely hindered due to the heinous nature of Petitioner's crimes and the overall unwillingness of people to be involved. Judge Palmer testified to the following regarding this impediment to their investigation:

> ... the murder was so bad a lot of people didn't want to talk to us. It was just a bad situation. The Daniels family, Mr. Daniels worked for the post office. They took in foster children themselves. This case was exceedingly traumatic for the people of Toombs County and the Department of Family and Children's Services because of children in their care being involved and the fact that many of them knew him [Petitioner]. He had been in their care. A lot of people did not want to talk to us, lots and lots.

(HT 1:66).

a) Family

Trial counsel testified that they interviewed Petitioner's mother, father, sisters, Lisa and JoAnne, his brother Steve, his sister-in-law Christina Heidler and his aunt and uncle. (HT 1:62, 76-77, 104-105, 135; HT 3:591). Petitioner's trial counsel prepared a "Family Profile" listing and describing Petitioner's immediate family members. (RX 7, 47:12,782). Additionally, notes from the trial attorney files and trial counsel's billing statements reveal at least the following family members were interviewed: 1) Mary Mosely, Petitioner's mother; 2) George Heidler, Petitioner's brother; 3)Lisa Aguilar, Petitioner's sister, 4) Christina Heidler, Petitioner's sister-in-law; 5) Mamie Moseley, Petitioner's grandmother; and, 5) George Heidler, Petitioner's father. (RX 2, 47:12,728, 12,730, 12,741, 12,742, 12,743; RX 3, 47:12,756, 12,769, 12,770, 12,771; RX 28, 49:13,388-390, 392; RX 29, 49:13,398; RX 30, 49:13,402-403; RX 31, 2/18/99 49:13,404).

Trial counsel learned from interviewing Petitioner's aunt, uncle, mother and sister that Petitioner had been in and out of foster care. (HT 1:62, 104-105). Once trial counsel learned of Petitioner's placement in the foster care system, trial counsel began gathering his DFACS records in order to reconstruct his childhood. (HT 1:62).

b) DFACS Workers

Trial counsel testified they spent hours with Sherry McDonald, the DFACS attorney, going through Petitioner's records. Judge Palmer testified that the DFACS records and the caseworkers were helpful putting together the history of Petitioner's troubled background. (HT 1:66). Trial counsel obtained DFACS records from Appling, Bacon and Jeff Davis counties and composed a timeline and summary from the DFACS records covering the time period of 1988-

1997. (HT 1:115; HT 3:599; RX 11, 47:12,805-808). Trial counsel also assembled a chart listing the various people Petitioner lived with during his childhood. (RX 46, 49:13,461-464).

Trial counsel also used the DFACS records to find caseworkers, foster parents and educational professionals who had dealt with Petitioner and his family. (HT 1:97, 116-117). Judge Palmer recalled interviewing (her trial attorney files support this testimony) the following DFACS employees: 1) Joanne Oglesby, DFACS caseworker; 2) Willene Wright, DFACS caseworker, 3)Sherry Moore, Director of Bacon County DFACS; 4) Sharon Courson, DFACS caseworker; 5) Terry Amabellus, a DFACS supervisor; and, 6) Kathy McMichael, DFACS caseworker. (HT 1:144-148; RX 35, 49:13,419-421; RX 36, 49:13,423-425; RX 38, 49:13,427).

c) Foster Parents, Teachers, And Juvenile Probation Officer

In addition, Judge Palmer testified, and notes from her files support her testimony, that she interviewed various foster parents that Petitioner stayed with as a child; however, only one foster parent, Sylvia Boatright, was willing to help. (HT 1:116-117). Judge Palmer explained that when she interviewed other foster parents "they didn't want to have anything to do with Scott Heidler ... they just were not helpful. They were rude and "Leave me alone," and "We've had all we can take of this" was all they would say. (HT 1:116). Judge Palmer testified that she interviewed Ms. Boatright by phone and in person, and Sylvia Boatright was the only foster parent that "was very sympathetic" to Petitioner and felt that "he needed more help" than what was provided to him. (HT 1:116-117; RX 27, 49:13,380; RX 34, 49:13,411-414).

Petitioner's mother moved from "county to county" making it difficult for trial counsel to find all of the mental health institutions and schools Petitioner had attended. Id. at 120. However, trial counsel learned from the DFACS records about the various special education schools and institutions Petitioner attended and were admitted to as a child. (HT 1:112). Trial

counsel constructed an "Educational Timeline" that lists the various schools Petitioner attended. (RX 8, 47:12,783-792). Judge Palmer talked specifically about interviewing Marilyn Dryden, Petitioner's teacher for three years from Cedarwood. (HT 1:95-97). Judge Palmer testified that she interviewed many of Petitioner's teachers and specifically recalled interviewing teachers from Bacon County, Cedarwood Psycho-educational Program, and the Harrell Psychoeducational Program. (HT 1:120, 123; RX 44, 49:13,445). Mr. Garrett also spoke with individuals at the Satilla Community Health Center. (HT 1:121-122). Trial counsel decided to focus on the teachers that had the most contact with Petitioner. (HT 1:97).

Trial counsel also tracked down one of Petitioner's juvenile probation officers, Bill Johnston. (HT 1:136). During interviews Judge Palmer had with Mr. Johnston, he was very "sympathetic" towards Petitioner. Id. Judge Palmer's typed notes of her interview with Mr. Johnston reveal he was very forthcoming about Petitioner's deplorable childhood. (RX 32, 49:13,405). Unfortunately, once again, given the nature of the crimes committed by Petitioner, Mr. Johnston was also unreceptive to testifying on Petitioner's behalf once on the stand and Judge Palmer had to ask that he be declared a hostile witness. (HT 1:136-137; TT, Vol. IX, 981).

d) Marie Spivey And Sherry Collins

Petitioner submitted an affidavit from Marie Spivey that states she "never was asked any questions by Scott's lawyers." (PX 23, 4:822). Yet, Judge Palmer testified that she personally interviewed Marie Spivey, the mother of Petitioner's stillborn child, two or three times, the first time she interviewed her was six days after the crime. (HT 1:129, 148-150). Additionally, Judge Palmer testified that she also spoke with Sherry Collins shortly after the murders (HT 1:149). Judge Palmer testified that they were both "very upset." (HT 1:149). Judge Palmer took notes

of this interview detailing the stillbirth of the child, including Petitioner's involvement at the hospital and the funeral. (HT 1:129, 148-149; RX 39, 49:13,429-430). Judge Palmer testified that Marie told her, "Leave me alone ... I'm real sorry for him but, you know, I don't know anything." (HT 1:129-130). Finally, Judge Palmer re-interviewed both Marie and Sherry one year later to see if they had changed their minds, but their feelings were the same. (HT 1:149). Ms. Collins also provided the GBI with threatening letters Petitioner had written her daughter, Marie. (RX 67, 49:13,533-534).

4) Investigation Of Petitioner's Behavior In The Toombs County Detention Center

Petitioner's behavior during the two years he spent in the Toombs County Detention Center was often described as "bizarre" and annoying by the staff of the Detention Center. Prior to her initial meeting with Petitioner, Judge Palmer met with Jerry White, chief jailer at the Toombs County Detention Center. (HT 1:33, 100). Judge Palmer had been the contract public defender for the county for the past two years and during that time she had become "very familiar" with the jailers. (HT 1:34). Furthermore, Judge Palmer spoke with many of the jail administration about Petitioner. (HT 1:155). Mr. White, the chief jail administrator, relayed to Judge Palmer some of Petitioner's behavior since being incarcerated and, from this information Judge Palmer believed, prior to meeting with Petitioner, that he was not mentally well. (HT 1:34-35). Mr. White told Judge Palmer that Petitioner would beat on his door, shout from his cell and made several babies "out of toilet paper." (HT 1:35).

In fact, Judge Palmer discussed Petitioner with Jerry White every Thursday "to see how he was doing, was he taking his medication ... I mean, we just talked about him all the time." (HT 1:154). Judge Palmer testified that Petitioner "was always in seclusion" and was not allowed to socialize with the other inmates. (HT 1:49). Petitioner was constantly vandalizing

his cell and irritating the jailers by coloring the blocks in his cell with color crayons, tearing up the locks, tearing up the sink, tearing up the toilet, tearing up the light receptacle and anything else in his cell that was destructible. (HT 1:48-50). Petitioner also practiced self-mutilation by burning himself with cigarettes, cutting himself with anything he could find, and picking at the scabs on his arms. (HT 1:53-54; PX 93, 52:14,451).

Petitioner was also on suicide watch often at the Detention Center and the jailers had to remove everything from his cell. (HT 1:60). Judge Palmer also recalled the jailers telling her that Petitioner would talk to himself. Additionally, Judge Palmer recalled seeing shanks made by Petitioner from toothbrushes. (HT 1:99-100).

Petitioner's records from the Detention Center, taken from the trial attorneys' files contain reports of some of Petitioner's behavior while incarcerated such as destroying property in his cell, threatening other inmates and making weapons. (RX 23, 48:13,234, 13,236, 13,240, 13,242, 13,244, 13,246, 13,248, 13,250, 13,252-55). Mr. Richard Malone, the prosecuting attorney in Petitioner's case, also supplied information to trial counsel, prior to trial, regarding Petitioner's behavior while at the Toombs County Jail. (RX 91, 52:14,442-445).

In addition to talking with Mr. White, Judge Palmer also spoke with other employees of the Toombs County Detention Center, Paula and Felicia Nail, and Robin Banks. (HT 1:154; RX 40, 49:13,435, 13,437). Mr. Garrett also testified that his notes indicate he spoke with Mr. George Dykes, a nurse from the Pineland Mental Health Institution that treated inmates from the Toombs County Detention Center, regarding Petitioner's need for mental health treatment. (HT 3:626-627; RX 98, 53:14,596).

Petitioner's trial counsel also requested and received records from the Toombs County Detention Center including Petitioner's medication log kept by the Detention Center. (RX 23,

48:13,234; RX 92, 52:14,446-450). The medication log listed Haldol, an anti-psychotic, Vistaril, Crafate, and Zantac. Judge Palmer requested and received records from the Detention Center as late as June 1999, three months before the trial. (RX 93, 52:14,451).

5) Background Records Obtained By Trial Counsel

Petitioner's counsel had the tremendous task of reconstructing Petitioner's background with very little assistance from Petitioner's family. However, trial counsel requested and received Petitioner's DFACS records, school records, mental health center records and Petitioner's records from the Toombs County Detention Center records prior to his trial. Judge Palmer agreed that an extensive investigation was conducted into every location Petitioner had been since he was a small child. (HT 1:108-109). Trial counsel received records from: 1) Harrell Psychoeducational Program; 2) First District Cooperative Educational Service Agency; 3) Appling County Special Education Program (Altamaha Elementary); 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) Juvenile Court Order from Bacon County; 11) DFACS records from Appling, Bacon and Jeff Davis Counties; 12) Pineland Mental Health; and, 13) Petitioner's records from the Toombs County Detention Center. (RX 10, 47:12,796-804; RX 11, 47:12,805-809; RX 12, 47:12,801-813; RX 13, 47:12,814-876; RX 14, 47:12,876-928; RX 15, 47:12,929-966; RX 18, 48:13,126-179; RX 19, 48:13,180-195; RX 16, 47:12,966-13,047; RX 17, 48:13,049-125; RX 21, 48:13,224; RX 23, 13,234-13,358; RX 93, 52:14,451; PX 39, 16:3,682-3,960;).

Further, Mr. Garrett testified that there were records he received, specifically, "previous psychiatric records, medical records, school records, DFACS records", that were no

longer in his trial attorney files as he had turned these documents over to the mental health experts. (HT 3:653). These records cover the majority of Petitioner's childhood and teen years. Moreover, these records were given to all of the mental health experts that evaluated Petitioner prior to trial. (HT 1:125-126).

6) Mental Health Experts

As previously stated, trial counsel testified that they determined early on in Petitioner's case that mental illness was going to be the crux of their case. To assist with this issue trial counsel hired Dr. James Maish, a forensic psychologist, whom trial counsel had worked with on many cases. Mr. Garrett testified that he had retained Dr. Maish approximately 20 times in the past "25 or 30 years" and "he had confidence" in Dr. Maish's judgment. (HT 3:583-584). Judge Palmer also testified that she had worked previously with Dr. Maish on Angela Crosby's death penalty case she tried the same year that the crimes were committed in the instant case. (HT 1:69).

In order to assist Dr. Maish with his evaluation, trial counsel testified that they did "their level best" to diligently obtain all the records they could find regarding Petitioner's background. (HT 3:596). Judge Palmer testified that they conducted an extensive investigation into Petitioner's background and turned all of this information over to the mental health experts. (HT 1:108-109). Trial counsel also testified that they gave Dr. Maish Petitioner's voluminous records, including, but not limited to, letters from Petitioner to trial counsel, DFACS records, all of Petitioner's school records, including the special schools Petitioner attended (Cedarwood, Harrell), the records from the community mental health centers Petitioner sought help from (Satilla), and Petitioner's medication log from the Toombs County Detention Center showing Petitioner was on the anti-psychotic Haldol. (HT 1:109-110,126,153; HT 3:599-601; RX 92,

52:14,446-450; RX 63, 4/20/98 49:13,516). Mr. Garrett testified that he would find it to be "surprising" if there were any records that existed pertaining to Petitioner that trial counsel were unable to find for Dr. Maish. Id. at 597. Additionally, trial counsel testified that they provided the mental health experts with all accounts of Petitioner's "bizarre" behavior while incarcerated at the Toombs County Jail. (HT 1:100-102; HT 3:601). Trial counsel also reported to Dr. Maish the information they gathered from witnesses such as the information from Ms. Boatright, one of Petitioner's foster parents, about Petitioner's imaginary pet mouse. (HT 1:111). They also told Dr. Maish about Petitioner's self-mutilation. (HT 1:155). Trial counsel's billing statements prove that trial counsel met with Dr. Maish on at least a dozen separate occasions as part of the investigation of Petitioner's case. (RX 2, 47:12,733, 12,734, 12,741, 12,742, 12,743, 12,746; RX 3, 47:12,758, 12,766).

Additionally, trial counsel testified that they traveled to Savannah to meet and interview the court appointed experts, Drs. Ifill and D'Alesandro and trial counsel's billing records also prove they had telephone conversations with both doctors. (HT 1:100,127-128; HT 3:610; RX 2, 47:12,746; RX 3, 47:12,767, 12,770; RX 61, 49:13,511; RX 65, 49:13,529-531).

Judge Palmer testified that Dr. D'Alesandro had been the mental health expert in "a lot of cases" on which she worked. (HT 1:128). Judge Palmer explained that the meeting was not hostile as Drs. Ifill and D'Alesandro agreed with their expert, Dr. Maish, that Petitioner was mentally ill and they both were "very sympathetic." Id.

Mr. Garrett also recalled meeting with the court appointed expert, Dr. Everett Kuglar several times and Judge Palmer specifically recalled spending "the better part of a day reviewing things" with Dr. Kuglar. (HT 1:101, 128; HT 3:586). Judge Palmer stated that they relayed Petitioner's strange behavior while confined in Toombs County to the court appointed experts

and she specifically recalled telling them about Petitioner's toilet paper babies and Petitioner's self-mutilation. (HT 1:100-102, 155; RX 98, 53:14,581). Mr. Garrett also testified that they discussed Petitioner's alleged psychotic episodes and auditory and visual hallucinations with the court appointed mental health experts. (HT 3:587). Mr. Garrett also researched the diagnoses given to Petitioner by the mental health experts. His trial attorney files prove that he read and took notes on personality disorders. (HT 3:610; RX 98, 53:14,549-615).

Trial counsel also hired a neurological expert, Dr. Albert A. Olsen, to conduct neurological testing that Dr. Maish was not qualified to perform. (HT 1:157-158; HT 3:588; RX 57, 49:13,499; RX 2, 47:12,734, 12,735; RX 3, 47:12,760; RX 64, 49:13,517-519). Judge Palmer testified that Dr. Olsen found no evidence of a neurological impairment. (HT 1:158; HT 3:588).

7) Petitioner's Trial

a) Guilt/Innocence Phase

The testimony of Drs. D'Alesandro, Ifill and Kuglar were presented during the guilt/innocence phase of trial to support Petitioner's guilty but mentally ill plea. All three experts agreed that Petitioner was severely mentally ill and Drs. D'Alesandro and Kuglar specifically testified that Petitioner qualified for a guilty but mentally ill finding by the jury.

(1) Testimony of Dr. D'Alesandro

Dr. D'Alesandro testified at Petitioner's trial that he reviewed the following materials during his evaluation of Petitioner: "mental health histories, school records, evaluations, that had been previously completed ... police reports, and finally through the clinical documents that we obtained both through your office, I believe Mr. Malone provided us with some, and records we

had at Georgia Regional." (TT, Vol. V, 595). Dr. D'Alesandro testified that Petitioner's mental health problems began in "early childhood." Id. at 596.

Dr. D'Alesandro informed the jury that Petitioner qualified for a Guilty but Mentally Ill verdict.[2] Id. at 574. Dr. D'Alesandro testified, "it would be my opinion that there is sufficient clinical documentation to substantiate a consideration of a guilty but mentally ill if that would be the Court or the jury's verdict." Id. Dr. D'Alesandro diagnosed Petitioner with a borderline personality disorder and an antisocial personality disorder. Id. at 576. Dr. D'Alesandro testified to the following:

> With the borderline personality disorder, we're looking at somebody who's really unstable. They've got a very poor sense of themselves. They overreact to stimuli. They at times become very dramatic, they become impulsive. Acting without thinking if you will...Primarily because the person's own feelings of self worth, his own feelings about himself are negative or such that he would continually be reaching out or harboring anger that would manifest itself in different behaviors.

Id. at 576-577.

Dr. D'Alesandro testified he found "severe emotional problems beginning in his [Petitioner's] childhood" and that his mental impairments "would influence his decision-making capacity." Id. at 618.

(2) Testimony of Dr. Gordon Ifill

Dr. Gordon Ifill, at the time of trial, was the clinical director and the Chief Medical Officer at the Georgia Regional Hospital in Savannah. He testified that he conducted his

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[2] Petitioner alleges that Dr. D'Alesandro misled the trial court regarding his degrees. However, Dr. D'Alesandro testified: I have a Bachelor's Degree in Psychology from Syracuse University, I have a Master's Degree in Correctional Rehabilitation from the University of Georgia. I have also had a Ph.D. from the University of Georgia with a specialization in Correctional Mental Health Counseling and Evaluations. (TT, Vol. V, 570-571). Also, at the time of Petitioner's trial, Dr. D'Alesandro had testified as an expert in psychological matters approximately three or four hundred times. Id. at 594.

evaluation of Petitioner in conjunction with Dr. D'Alesandro and reviewed "an extensive number of reports from several sources, including reports from school, reports from DFCS, Department of Family and Children Services, reports of other evaluations including evaluations ... at Georgia Regional Hospital ... police investigations, and ... a report from a private psychiatric evaluation." (TT, VI, 629-630). Dr. Ifill also testified that "many records were provided with regard to his childhood, treatments received, referrals made, evaluations that were done." Id. at 632.

Dr. Ifill testified that Petitioner "was suffering from severe emotional disorders beginning and continuing up until the present." Id. at 634. Dr. Ifill testified that Petitioner's personality disorder was "severe." Id. Dr. Ifill testified that he did not feel that Petitioner faked anything during his evaluation. Id. at 647.

(3) Testimony of Dr. Everett C. Kuglar

Dr. Kuglar was hired by the trial court to perform an independent evaluation of Petitioner. Dr. Kuglar was the superintendent of Georgia Regional Hospital in Augusta for twenty-five years and was a state forensic medical director for a couple of years but had retired at the time of Petitioner's trial. (TT, VI, 653). Dr. Kuglar also testified that he reviewed Petitioner's background records, DFACS records, "a significant number of records from mental health services during the time that he was a teenager," and "some juvenile court records" and conducted an interview with him as well. Id. at 654, 658-659. Dr. Kuglar testified that Petitioner would, "in his opinion," meet the criteria for guilty but mentally ill. Id. at 670.

b) Sentencing Phase

(1) Testimony of Dr. James I. Maish

Dr. James Maish was hired by trial counsel to evaluate Petitioner. Dr. Maish was a licensed psychologist for 27 years prior to Petitioner's trial and approximately seventy percent of

Dr. Maish's practice was forensic psychology. (TT, IX, 1088). Dr. Maish had testified in court approximately six or seven hundred times before he testified in Petitioner's trial. Id. at 1092. Dr. Maish testified that he "saw Scott Heidler on six different occasions" in his office in Augusta, he interviewed Petitioner "extensively" and gave Petitioner a battery of tests. Id. at 1093. Dr. Maish also testified that he reviewed several binders of information regarding Petitioner, specifically, "records from mental health centers in Southeast Georgia ... records from DFCS ... and reports from juvenile settings." Id. It was Dr. Maish's opinion that there were "very few facilities in Southeast Georgia Scott Heidler hadn't been to." Id. at 1094. When asked if Petitioner met the standard of guilty but mentally ill, Dr. Maish informed the jury, "I thought he met the standard and I thought he met the standard with plenty of room to spare." Id. at 1100. Dr. Maish completed his evaluation prior to Drs. Ifill, D'Alesandro and Kuglar, however, he reviewed their reports and concluded that they all came to the same conclusions which was "unheard of" in his area of practice. Id. at 1101.

Trial counsel also presented testimony from family members, teachers, caseworkers, a foster parent and a juvenile probation officer who testified about Petitioner's troubled childhood of neglect and abuse, his bizarre behavior, and his mental illness. Judge Palmer testified that she and Mr. Garrett decided to use the teachers, caseworkers and foster parents that could "better articulate his [Petitioner] true behavior and had seen significant evidence of mental illness and could convey that to the jury in a heartfelt way." (HT 1:126-127).

(2) DFACS Caseworkers

In deciding which caseworkers to call at trial, trial counsel's strategy was to choose "the ones who were the most articulate, who had had the most contact with him, and, of course. . . who were the most sympathetic to his plight." (HT 1:112). Judge Palmer testified that she "had

lots of experience with [caseworkers] over the years" and had noticed that some caseworkers "get hardened on the job," so trial counsel "tried to pick those that could convey some real humanness about his condition." Id.

Judge Palmer recalled that Joanne Oglesby had been helpful and had no "sympathy whatsoever for Mary Moseley", Petitioner's mother. (HT 1:144-145). Willene Wright was also helpful by providing information about Petitioner's "pathetic life". Id. at 45. Judge Palmer telephoned Sherry Moore, but unfortunately Ms. Moore did not have any firsthand knowledge of Petitioner. However, she did help find Ms. Sharon Courson. Id. at 46. They did not call Ms. Courson, as the witness was out-of-state, pregnant and her testimony would have only repeated Ms. Wright's testimony. Id. Terry Amabellus was a supervisor and had never been a caseworker on Petitioner's case, and therefore had no "real recollection" of Petitioner. Id. at 47. Based on these interviews, trial counsel determined that Ms. Wright was the best caseworker to present evidence of Petitioner's early childhood years. Id. Cathy McMichael, a caseworker from Toombs County, was also interviewed by trial counsel. Trial counsel expressed admiration for Ms. McMichael and thought she was also a good witness for Petitioner. Id. at 47-48.

In addition, Judge McMillan, the trial court judge, "limited" "a good bit" the testimony trial counsel was allowed to elicit from the DFACS workers. Id. at 113. Judge Palmer testified that Judge McMillan thought trial counsel was trying to "hoodwink him on the mental health issues" so, "he had the book out and he was going right by the book, to be sure everything went like it ought to do." Id.

(3) Foster Parents

In addition, Judge Palmer testified that she interviewed various foster parents that Petitioner stayed with as a child; however, only one foster parent, Sylvia Boatright, was willing

to testify for Petitioner. (HT 1:116-117). As stated above, Judge Palmer explained that when she interviewed other foster parents "they didn't want to have anything to do with Scott Heidler ... they just were not helpful." (HT 1:116). Trial counsel correctly deduced from this behavior that these individuals would not have been helpful had they been called to testify.

(4) Teachers

Trial counsel decided to focus on the teachers from Cedarwood. (HT 1:123). Petitioner was much younger when he attended Bacon County schools but spent his middle school and early teen years at Cedarwood. Id. Trial counsel felt that jury would be more interested in these years in order to understand what was "wrong with him as he gets to be the young adult." Id.

Judge Palmer explained to this Court the hurdles that the school board attorneys put in their path to gather information regarding Petitioner's education. The school board attorneys did not want trial counsel to speak with anyone and trial counsel would have to "serve everybody with 500 subpoenas" before trial counsel could even talk to the teachers. Id. at 96.

Despite these obstacles, trial counsel found Marilyn Dryden from Cedarwood and discovered that she was "the one most familiar with Scott's history and worked with him most at Cedarwood." (HT 1:96; RX 33, 49:13,406-410). Judge Palmer testified that Ms. Dryden "was very, very helpful in describing his condition and his treatment and his progress." Id. Ms. Dryden helped trial counsel sort through the records from Cedarwood and as she had established contact with Petitioner's family "[s]he knew a lot more about him [Petitioner] than anybody" else trial counsel was able to interview. Id. at 97. Ms. Dryden was not pleased about having to testify; however, "her good heart came through and she testified as to just how pathetic, how sick Scott was during the time, what little [Cedarwood] was able to do for him and how the family, everything they did to pull him up, the family situation pulled him down." Id. at 96.

(5) Juvenile Probation Officer

As explained above, Judge Palmer testified, and her notes support her testimony, during her interviews with Mr. Johnston he was very forthcoming about Petitioner's deplorable childhood. (RX 32, 49:13,405). Although he was sympathetic to Petitioner when interviewed by Judge Palmer, Mr. Johnston was hostile toward Petitioner when called by the defense to the witness stand. Judge Palmer found his testimony to be "so very different" from the interviews that she asked the trial court to declare Mr. Johnston a hostile witness. (HT 1:136-137; TT, IX, 981).

(6) Petitioner's Family

Judge Palmer testified that Petitioner's sister, Lisa, was the most sympathetic family member, but that it took a lot of work to convince Lisa to take the stand. (HT 1:63, 76). Judge Palmer personally served Lisa with her subpoena for court. (Id. at 63).). Petitioner's mother and Petitioner's extended family were very "dysfunctional". Petitioner's "lunatic" mother only provided denials of the abuse and neglect Petitioner had suffered as a child and blamed DFACS for Petitioner's troubles. (HT 1:76-77).

(7) DFACS Records

All of Petitioner's DFACS records were submitted during the sentencing phase. Trial counsel testified that their strategy with presenting evidence with the caseworkers was to bring out specific highlights of Petitioner's background with the DFACS records that were submitted during the sentencing phase. Id. at 114. Judge Palmer elaborated that they "tried to hit the really tough parts, where Scott was truly harmed in his, by people in his life who were harming him and not helping him with his mental health issues." Id.

c) Evidence Presented To This Court Regarding Mental Health That Petitioner Contends Trial Counsel Failed To Discover.

In the case at bar, Petitioner presented the affidavits of several family and friends detailing Petitioner's mental illness and difficult childhood. Additionally, Petitioner presented the testimony and reports of Dr. Sarah Deland, a psychiatrist, Dr. Alfred Messer, a psychiatrist, Dr. John Carton, a psychologist and several other mental health providers whom had seen Petitioner prior to the commission of the crimes for which he received the death penalty.

Petitioner now alleges trial counsel failed to properly inform the four mental health experts used to evaluate Petitioner prior to trial of the seriousness of Petitioner's mental health issues. Petitioner further claims that this alleged failure resulted in an incorrect diagnosis rendered by Drs. Ifill, D'Alesandro, Maish and Kuglar. As previously stated, trial counsel testified that they turned over every document they received to the mental health experts and any information they gathered during their discovery period.

Petitioner was diagnosed at trial by Drs. D'Alesandro, Ifill, Kuglar and Maish with severe personality disorders. Petitioner contends that these mental health experts failed to also diagnose him with mood and thought disorders which would have further supported his guilty but mentally ill plea. Petitioner alleges trial counsel were ineffective for failing to provide the mental health experts at trial with enough information regarding Petitioner's background and mental health symptoms. This allegation is contrary to the holding of our Georgia Supreme Court, which has stated that the "onus" should not be on trial counsel to know what additional information a mental health expert would need to make a certain diagnosis as "a reasonable lawyer is not expected to have a background in psychiatry or psychology." Head v. Carr, 273 Ga. 613, 631, 544 S.E.2d 409, 423 (2001).

(1) Background Records

This Court finds that trial counsel were not deficient and Petitioner was not prejudiced as the records obtained by trial counsel were voluminous and provided a well-documented history of Petitioner's background. Petitioner concedes that trial counsel obtained school records, mental health facility records and DFACS records, however, Petitioner specifically alleges the following information was not given to Drs. Ifill, D'Alesandro, Kuglar and Maish: 1) Petitioner's Toombs County Detention Center Medication Log; 2) Petitioner's Georgia Diagnostic and Classification Prison Records;[3] 3) letters from Petitioner to trial counsel; 4) Pineland Mental Health Records; 5) note by Petitioner; 6) evaluation by Alan Dryden; 7) Georgia Regional Hospital Records; 8) evaluation of Arthur W. Hartzell; 9) Social Security Administration Records; 10) Toombs County Detention Center Records (specifically, Pineland Mental Health records while incarcerated in the Toombs County Detention Center); 11) criminal and other records regarding his immediate family; and, 12) information from various witnesses now contained in affidavits proffered to this Court. (PX 104, 20:5473-5479).

The Georgia Supreme Court stated in Schofield v. Holsey, 281 Ga. 809, 813, 642 S.E.2d 56, 61 (2007), " A defendant is not constitutionally entitled to any certain level of effective assistance from experts that are reasonably selected by trial counsel and that are funded within constitutional requirements." Citing Turpin v. Bennett, 270 Ga. 584, 587-588 (1), 513 S.E.2d 478 (1999). Moreover, the courts have declined to set "rigid rules" that require trial counsel to perform certain actions, for example, acquiring every record pertaining to their client. Williams v. Head, 185 F.3d 1223, 1237-1238 (11th Cir. 1999); See Fugate v. Head, 261 F.3d 1206, 1230-1231 (11th Cir. 2001) (trial counsel did not gather any records, i.e. school, employment, medical, etc. regarding Petitioner and were not found to be ineffective). Furthermore, "just because

[3] Petitioner's current records from the Georgia Diagnostic and Classification Prison would not have been available to trial counsel as these records did not exist at the time of trial.

counsel might have done more does not mean counsel was incompetent." Putman v. Head, 268 F.3d 1223, 1247 (11th Cir. 2001).

However, the record before this Court shows that trial counsel did obtain the majority of the records of which Petitioner complains. Trial counsel did obtain Petitioner's medication log from the Toombs County jail and provided the mental health experts with this information. In fact, Drs. Ifill and D'Alesandro referenced in their written evaluations the anti-psychotic, Haldol, Petitioner was taking while in the Toombs County jail and testified at trial that Petitioner was taking Haldol. (RX 23, 48:13,234; RX 92, 52:14,446-450; TT, V, 614).

Trial counsel testified that they provided their mental health expert with letters Petitioner had written to trial counsel prior to trial and trial counsel's files support this statement. (HT 1:153; RX 63, 4/20/98 49:13,516).

The evaluations of Drs. Dryden and Hartzell were found in trial counsel's files and trial counsel testified that they turned all of their records of Petitioner's mental health background over to the mental health experts. (HT 1:109-110,126,153; HT 3:599-601; RX 15, 47:12,953-955; RX 18, 48:13,152-156).

Additionally, Petitioner alleges that trial counsel failed to obtain and provide the mental health experts with his records from the Toombs County Detention Center. However, the trial attorney files clearly prove that trial counsel did obtain these documents and, once again, trial counsel testified that all records regarding Petitioner were turned over to the mental health experts. (HT 1:109-110,126,153; HT 3:599-601; RX 23, 48:13,234; RX 93, 52:14,451).

Petitioner alleges trial counsel did not obtain his Social Security records. Judge Palmer testified that she was aware Petitioner was on Social Security. Petitioner signed forms to enable trial counsel to obtain the records (RX. 99 at 53:14774; RX. 24 at 49:13365).Judge Palmer

testified that she was "pretty sure" but could not definitely say that the records were subpoenaed and Mr. Garrett testified that several records were no longer in his trial attorney files because he had given them to the mental health experts at trial. (HT 1:107; 3:653).

In, Williams v. Head, 185 F.3d at 1227, the trial attorney, accused of ineffective assistance of counsel, turned his file over to another attorney and the file was subsequently lost. The Court upheld the district court's holding recognizing the importance of the presumption that counsel rendered effective assistance and "correctly refused to 'turn that presumption on its head by giving Williams the benefit of the doubt where it is unclear what [trial counsel] did or did not do because [counsel] turned his file over to someone on Williams' legal team". Applying the same law to this case, this Court cannot find trial counsel did not obtain these records simply because they were not found in the trial attorneys' current file.

Petitioner implies that he received Social Security disability benefits as a child due to "a persistent mood disturbance", however, his primary diagnosis, and the reason he received disability benefits, was "Attention Deficit Disorder with Hyperactivity." (RX 30 A, 6:1052, 1054). Furthermore, although Petitioner received disability benefits as a child, Petitioner was re-evaluated in 1996 and the Social Security Court terminated his benefits in December of 1997, ten days after the murder of the Daniels family, for reasons unrelated to his crimes. (PX 30 A-D, 1018-1996).

Even if the Court were to find that trial counsel failed to obtain Petitioner's Social Security records and failed to provide the records to Petitioner's mental health experts prior to trial, and that such failure constituted deficient performance, the Court cannot find that but for this failure, there is a reasonable probability that either phase of Petitioner's trial would have been different.

Petitioner claims that trial counsel were ineffective for allegedly failing to obtain his Pineland Mental Health records while he was incarcerated. Trial counsel did request records from Pineland Mental Health and clearly received records from Petitioner's childhood. Regardless of whether trial counsel did or did not obtain these files, the Court finds that the diagnosis given by Pineland Mental Health would not have benefited Petitioner at trial. Therefore, Petitioner suffered no harm if trial counsel did not obtain the records.

While Petitioner was incarcerated at the Toombs County Detention Center he was referred to Pineland Mental Health on June 26, 1998 and seen by Jason Hill. Petitioner's initial "Mental Status Assessment" stated his diagnosis was "Adjustment Disorder and Anxiety" and "Antisocial Personality Traits." (PX 41, Pineland Mental Health records, 17:4195-96). Petitioner reports "hearing voices and seeing things past three or four months;" however, he reports that these were "**not present prior to murders.**" Id. at 4198. The evaluator went over Petitioner's background and it appears had some records. Id. at 4197-98. The evaluator's "diagnostic impression" was "Antisocial disorder." Id.

Petitioner was seen on several more occasions at Pineland and he complained of "hearing [a] baby cry" but denied having auditory or visual hallucinations, but had a "flashback" of the murders. Id. at 4200-4201. Petitioner was discharged from Pineland Mental Health on April 13, 1999, and was diagnosed with Adjustment Disorder, anxiety and Antisocial Personality Disorder. Id. at 4203.

Petitioner has now submitted an affidavit from David Faulk, M.D., stating that he saw Petitioner at Pineland Mental Health and the final diagnosis given to Petitioner does not comport with his observations. Although Dr. Faulk disagrees with the final diagnosis of Petitioner, a

Pineland evaluator's contemporaneous notes state that the evaluator's impression is that Petitioner is "Antisocial." (PX 41 at 4200). There is a small notation after Petitioner complains that he was hearing a baby cry that his impression was that Petitioner is "psychotic." Id. However, on a later date when Petitioner was seen because Petitioner has refused to take his medication, it is noted that Petitioner "denies any auditory or visual hallucinations." Id. at 4201. No other reports of any kind of hallucination are contained within the records from Pineland Mental Health.

Further, this Court finds trial counsel were not deficient if they did not obtain these notes as the Pineland pretrial detention diagnoses reinforce the diagnoses of the mental health experts from trial and would have been cumulative evidence. Trial counsel is not ineffective for not presenting cumulative evidence. See Campbell v. State, 281 Ga. App. 503, 504, 636 S.E.2d 687 (2006); DeYoung v. State, 268 Ga. 780, 786 (5), 493 S.E.2d 157 (1997).

Petitioner also alleges that trial counsel were ineffective for not obtaining background records detailing the criminal and emotional problems of his family. Thirty-four of the forty exhibits (two of Petitioner's exhibits are missing from the record) are criminal records of Petitioner's family. The other six records document some mental illness within the family, however, most of the diagnoses rendered are conduct disorders (socialized aggressive), "intermittent explosive disorder", "impulsive control disorder", substance abuse problems, and personality disorders, all of which are similar to the diagnoses given to Petitioner at trial. (*These diagnoses will be discussed in detail later in this Order.*) (PX 46, 18:4348; PX 61, 18:4486; PX 79, 19:4849; PX 82, 19:5001; PX 86, 19:5024). The criminal records document the following behavior in Petitioner's family: 1) battery; 2) terroristic threats; 3) theft by conversion; 4) driving under the influence; 5) burglary; 6) manufacture of marijuana with the intent to distribute; and 7)

theft. (PX 48, 18:4374; PX 49, 18:4378; PX 50, 18:4386; PX 58, 18:4454; PX 60, 18:4493; PX 67, 19:4625; PX 71, 19:4783; PX 72, 19:4793; PX 80, 19:4990; PX 82, 19:4996; PX 86, 19:5024). This Court finds Respondent's assertion that this information could be more harmful than helpful to Petitioner's case a reasonable conclusion.

Furthermore, just as trial counsel is under no obligation to interview every person who has ever known Petitioner, trial counsel is also under no obligation to gather every possible record pertaining to his family members. See Williams v. Head, 185 F.3d at 1237. Additionally, "an attorney is not obligated to present mitigation evidence if, after reasonable investigation, he or she determines that such evidence may do more harm than good." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). "Strickland does not require counsel to investigate every conceivable line of mitigation evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigation evidence at sentencing in every case. Both conclusions would interfere with the 'constitutionally protected independence of counsel' at the heart of Strickland." Wiggins, 539 U.S. at 533. See also Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc) (noting that no absolute duty exists to present all possible mitigating evidence available). Therefore, this Court finds trial counsel were not ineffective for failing to present this evidence at trial as there exists no reasonable likelihood that such evidence would have changed the outcome of Petitioner's trial.

Although Petitioner's current state habeas counsel has found additional background records regarding Petitioner and his family, this Court finds trial counsel employed reasonable efforts to gather background records pertaining to Petitioner. As stated by the United States Supreme Court and the Court of Appeals for the Eleventh Circuit, trial counsel's representation is to be judged only by what is "constitutionally compelled" "not what is possible or 'what is

prudent or appropriate.'" Fugate v. Head, 261 F.3d 1206, 1240 (11th Cir. 2001), quoting Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (quoting Burger v. Kemp, 483 U.S. 776, 794, (1987).

As stated by trial counsel, they diligently attempted to recover every record they could find regarding Petitioner, despite the dearth of information provided by Petitioner and his family. The fact that Petitioner's new "team" of lawyers has been able to uncover new records working from the extensive records trial counsel provided Petitioner's current counsel does not prove trial counsel were ineffective. See Williams v. Head, 185 F. 3d 1223, 1236 (11th Cir. 1999). It would be improper for this Court to employ "hindsight analysis" and hold trial counsel to a standard of performance that is not "constitutionally compelled" for failure to locate every conceivable record in Petitioner's past. Furthermore, this Court finds that there is no reasonable likelihood that the information contained in these missing documents would have changed the outcome of Petitioner's trial given the nature of the crimes committed by Petitioner and the evidence presented by trial counsel. Thus, this portion of Petitioner's ineffective assistance of counsel claim is DENIED.

(2) Family Affiants

Petitioner submitted several affidavits from family members all stating that they could have offered further proof of Petitioner's mental illness and difficult childhood. Trial counsel testified at length regarding the family members they interviewed. Judge Palmer testified that Petitioner's family and friends, except his sister Lisa and his aunt and uncle, were not very helpful. (HT 1:65, 121). According to Judge Palmer, one of Petitioner's brothers was in jail at the time of the crime and another brother, Steve, was later incarcerated while counsel was preparing for trial, to serve a ten year sentence. (HT 1:105). However, Petitioner's trial counsel

did interview Steve who provided the same information as the rest of Petitioner's family. (HT 1:105).

Petitioner's sister, Lisa, was the most sympathetic family member according to Judge Palmer. (HT 1:63). However, Lisa "was struggling financially and she was just overwhelmed" and moved often because, in Judge Palmer's opinion, "she was trying to run away from Scott's situation." Id. Judge Palmer further testified that Petitioner's mother and Petitioner's extended family were very "dysfunctional" and Petitioner's mother only provided denials of the abuse and neglect Petitioner had suffered as a child and blamed DFACS for Petitioner's troubles. (HT 1:76-77).

Trial counsel cannot be held responsible for Petitioner's family's reticence in revealing shameful family secrets. Furthermore, trial counsel did present evidence through DFACS caseworkers and a foster mother that he was emotionally and physically neglected and abused as a child.

With regard to the newly obtained affidavits from Petitioner's family members, the Eleventh Circuit Court of Appeals has held that "It is common practice for petitioner's attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called," but "the existence of such affidavits, artfully drafted though they may be, usually proves little of significance." Waters, 46 F.3d at 1513-1514. "Such affidavits "usually prove[] at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specified parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." Id. at 1514. Trial counsel was not deficient and Petitioner was not prejudiced.

(3) Friend Affiants

Petitioner contends trial counsel were ineffective for failing to discover certain alleged friends and gather information from them. Specifically, Petitioner alleges trial counsel should have located and interviewed Melinda Placher and Darene Garcia. First, trial counsel were not deficient as trial counsel has no duty to find every friend Petitioner has acquired over his lifetime. "Strickland does not require counsel to investigate every conceivable line of mitigation". Wiggins v. Smith, 539 U.S. at 533. Second, the records from the trial attorney files suggest trial counsel had no way of knowing Melinda or Darene would have been willing to talk with them.

In the trial attorney files there is a summary of Petitioner's DFACS records and it notes that there was a fight at Melinda Placher's home and Petitioner moved out on December 2, 1997, two days before the murders. (RX 11, 47:12,808). Moreover, trial counsel made the following notation of this incident in their trial attorney notes, "Ms. Melinda Placher[,] JSH evidently lived with her up until 12/2/97 – - see DFACS report #1 in vol. 3." (RX 9, 47:12,794). Further, the testimony each of these witnesses provides is merely cumulative of the background records obtained by trial counsel.

As the Eleventh Circuit Court of Appeals has held, there is no requirement that counsel interview all family members and/or friends of their client in preparation for trial; only that counsel conduct a reasonable investigation into their client's background. See Williams v. Head, 185 F.3d 1223, 1237 (11th Cir. 1999)(not ineffective for declining to attempt to interview the defendant's father and sister where the defendant "had grown up apart from his father" and where nothing counsel had learned from speaking with the defendant's mother "suggested that the sister might be more helpful than the mother"). See also Holladay v. Haley, 209 F.3d 1243, 1252 (11th Cir. 2000) ("Counsel are not required to interview all family members"), and Stanley

v. Zant, 697 F.2d 955 (11th Cir. 1983)(no ineffective assistance where counsel spoke only to defendant and defendant's mother).

"As the United States Supreme Court has explained, 'a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" Sturgis v. State, 282 Ga. 88, 90, 646 S.E.2d 233 (2007). Viewing trial counsel's conduct pursuant to this standard, this Court finds trial counsel's investigation was not deficient for failing to interview these witnesses and Petitioner was not prejudiced by the failure of trial counsel to present the testimony of these witnesses at trial and DENIES this portion of Petitioner's ineffectiveness claim.

(4) Affiants from the Educational Profession and DFACS

Petitioner complains that trial counsel were ineffective for failing to interview certain individuals from the education profession and DFACS. As set forth above, trial counsel testified that they interviewed numerous DFACS workers, caseworks, teachers, and foster parents. Trial counsel chose to present the witnesses that had the most contact with Petitioner and were willing to testify. The fact that Petitioner's current counsel disagree with this strategy and have found further witnesses does not render trial counsel ineffective. "'In retrospect, one may always identify shortcomings, but perfection is not the standard for effective assistance...A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance. The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Williams v. Head, 185 F. 3d 1223, 1236 (11th Cir. 1999)

(quoting Cape v. Francis, 741 F2d 1287, 1302 (11th Cir. 1984); Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992)).

Trial counsel were not deficient as they had no duty to find each and every teacher or DFACS caseworker that knew Petitioner. In fact, there are no requirements that counsel must always do certain acts to be found effective, (i.e., interviewing some of Petitioner's neighbors for mitigation evidence). As the Eleventh Circuit has found, such a requirement would contravene the Supreme Court's directive that no set of detailed rules for counsel's conduct should be used to evaluate ineffectiveness claims. Chandler v. United States, 218 F.3d 1305, 1318, notes 22, 23 (11th Cir. 2000) (citing Strickland).

Furthermore, Petitioner was not prejudiced by trial counsel's performance as there is no reasonable likelihood that the outcome of Petitioner's trial would have been different had this newly submitted evidence been presented to the jury. The jury was presented with testimony and documentation regarding Petitioner's mental health and difficult family life. The majority of this information would be cumulative of that presented at trial and given the atrocity of his crimes it is not reasonable to find that this new evidence had a reasonable probability of changing the outcome of Petitioner's trial. Thus this portion of Petitioner's ineffective assistance of counsel claim is DENIED.

d) Trial Counsel's Investigation Was Reasonable

"Given the finite resources of time and money that face a defense attorney, it simply is not realistic to expect counsel to investigate substantially all plausible lines of defense." Williams v. Head, 185 F. 3d 1223, 1236 (1999). As shown above, 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. The record is also 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.

The Court of Appeals for the Eleventh Circuit stated the following regarding effective assistance of trial counsel:

> Moreover, the Supreme Court has told us in no uncertain terms that "there are countless ways to provide effective assistance in any given case," and that "intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." Strickland, 466 U.S. at 689-90, 104 S. Ct. at 2065-66. That is why there are no "rigid requirements" or per se rules in this area, and why the inquiry is focused on reasonableness given the circumstances counsel faced at the time. The one approach we are not supposed to take is the approach exemplified by the dissenting opinion, which relies upon all of the evidence which hindsight arguably shows could have been accumulated if counsel had conducted a perfect investigation.

Williams v. Head, 185 F.3d 1223, 1237-1238 (11th Cir. 1999).

This Court finds that Petitioner has failed to show that trial counsel were deficient in their investigation of Petitioner's background or that Petitioner was prejudiced by trial counsel's investigation, therefore, this portion of Petitioner's ineffective assistance of counsel claim is DENIED.

e) Petitioner's Mental Health Diagnoses

In addition to Petitioner's claim that trial counsel did not provide enough information to the mental health experts, Petitioner also claims that the mental health experts at trial incorrectly explained his criminal behavior, based on the records they were given and failed to recognize the effect of his alleged mood and thought disorders on his actions the night of the crime. This Court finds that Petitioner has had a veritable team of mental health professionals working with

him since he was a young child. A thorough review of the records relied upon by Petitioner's mental health experts at trial shows that their diagnoses of Petitioner's mental health, at the time of the crimes, are consistent with the documents relied upon and are reasonable under the circumstances in addressing Petitioner's mental health.

(1) Records Relied Upon By Petitioner's Mental Health Experts At Trial

(a) Pineland Mental Health Center Admission 12/18/85

Petitioner was first seen by mental health professionals when he was taken to Pineland Mental Health Center at eight years of age. Under the "General Behavior" category of the intake summary the following categories where checked: 1) poor attention span; 2) impulsivity (poor self-control); 3) low frustration threshold; 4) does not listen when spoken to; 5) excessive number of accidents; 6) does not learn from experience; 7) more active than siblings/others; 8) sulks/pouts; 9) sudden outbursts of physical abuse directed at others; 10) temper outburst; 11) interrupts frequently; 12) heedless to danger-notation that Petitioner chases his sister with a knife; 13) poor memory; 14) excessive crying; and, 15) sometimes has night traumas. (RX 19, 48:13,185). When Petitioner was asked what his hobbies or interests were he laughed and said "Beating people up. Cussing people out" and when asked what his areas of greatest accomplishment were he responded "Fighting." Id. The records show that Petitioner attended several counseling sessions over the next month and was diagnosed with an "Adjustment Disorder" and "Disturbance of Conduct." Id. at 13,186-188, 13,193-94.

(b) First District Cooperative Evaluation, 1/14/86

Petitioner's next psychological evaluation, on January 14, 1986, was conducted by the First District Cooperative Educational Service Agency when he was referred at the age of nine because he did "not get along well with his peers and seldom follows class rules." (RX 8, 47:12,78-85; RX 12, 47:12,810-813). The evaluation stated that Petitioner had attention deficit difficulties, severe academic deficits, and recommended Petitioner for the "Behavior Disordered (BD) Program in his school." Id. at 12,813.

(c) Evaluation By Dr. Marc Eaton, Psychologist, 9/88

In September of 1988, Marc Eaton, Ph.D., P.C., conducted Petitioner's second psychological evaluation. (RX 22, 48:13,224-13,233). Petitioner was referred for a psychological assessment after being placed in foster care for involvement in "acts related to breaking and entering and burglary." Id. at 13,320. Dr. Eaton interviewed Sharon Courson, a caseworker from DFACS, and she informed him that Petitioner's family had been in trouble with the law, an older half brother was "in jail for child molestation and incestuous activities" and that individuals had seen Petitioner "as manipulative at times, acting 'sweetly' and at other times acting in threatening, aggressive ways." Id.

Petitioner reported to Dr. Eaton that his step-father told him he was not "wanted" and ordered Petitioner to leave his step-father's home. Id. at 13,230-31. Petitioner denied "symptoms of chronic depression, unhappiness, and suicidal ideation, intent, or planning." Id. He admitted to enjoying "setting things on fire" and acknowledged fights with peers. Id.

Dr. Eaton found that Petitioner gave no "indications of psychotic symptoms" and the testing revealed "significant learning disabilities." Id. at 13,232. Furthermore he found:

> [H]e has not learned to express emotion adaptively, and appears to harbor emotions within himself which may be discharged in self-defeating, unmodultated ways, including aggressive, threatening behavioral displays. His history also suggest that he has learned to vary his behavior according to circumstance in

> order to obtain whatever might be desired at a given time, thus learning to develop and refine manipulative, self-seeking tendencies.

Id. at 13,232. Dr. Eaton diagnosed Petitioner with Attention-Deficit Disorder and Identity Disorder. Id. at 13,233.

(d) Evaluation At Satilla Community Mental Health Center, 10/5/88

Petitioner was sent by his class teacher to Satilla for his medication for attention-deficit disorder. (PX 40, 17:4005). Petitioner was noted to be in foster care and had admitted to "breaking into buildings" and "killing dogs, birds and cats." (PX 40, at 4005-4006). Petitioner also complained of nightmares and "visual hallucinations." Id. at 4005. Petitioner was diagnosed with "Conduct Disorder, Socialized, Non-Agg[ressive], ADHD." Id.

(e) Evaluation By Lisa B. Fesperman, Ed.S., Associate School Psychologist, 10/11/88

Petitioner was referred for his next psychological evaluation, conducted by Lisa B. Fesperman, Ed. S., an Associate School Psychologist on 10/11/88, due to "continuing school problems." (RX 18, 48:13,159-165). During that evaluation it was found that Petitioner displayed an "inability to interact appropriately with peer and adults, steals, fails to complete class-work, and has been involved in court system." Id. at 13,160. Characteristics checked on the referral form to Ms. Fesperman included the following:

> Showing signs of excessive worry and anxiety
>
> Severely hyperactive, extremely distractible, Extremely short attention span
>
> Negative tendency to do the opposite of what is expected
>
> Frequently inattentive, daydreams
>
> Frequently appearing depressed, rarely smiling
>
> Cruelty to younger or small children and/or animals

Defiant, negative or hostile to adults

Hostility to authority

Finds great difficulty in relating to others

Extremely destructive of property

Often fights or quarrels with classmates

Unable to control behavior

Id.

The evaluation report discloses Petitioner's placement in foster care and specifically mentions Ms. Sylvia Boatright. Ms. Boatright reported that she had difficulty with Petitioner, stating that he would run off when he got angry, had foul language, was scared of the dark, lied, would often speak of killing things and had a "fascination" with "evil." Id.

Ms. Fesperman also noted that Petitioner chose "friends that he could easily dominate." Id. Petitioner also talked about "his involvement with voodoo and the occult" and "stated he thought he could hurt people with witchcraft and voodoo and that he has tried it and it worked." Id. He also stated he had a fear of ghosts and at "night sometimes he 'can see things going off the wall.'" Id. At the time of the evaluation Petitioner was on probation for burglary, breaking and entering, and criminal trespass." Id. at 13,614.

(f) Evaluation By Alan Dryden, Associate School Psychologist, Cedarwood, 5/1/89

Petitioner was evaluated on 5/1/89 by Alan Dryden, an Associate School Psychologist at Cedarwood. (RX 18, 48:13,152-156). Petitioner was referred to Mr. Dryden "due to previous involvement with psycho-educational program in Waycross, Georgia." Id. at 13, 153. Mr. Dryden's evaluation of Petitioner consisted of a review of records, including a social narrative,

and the administration of a battery of psychological tests. Mr. Dryden summarized his findings as follows:

> Jerry is functioning in the low average to average range of intellectual ability according to previous testing. Academic functioning is significantly below intellectual potential and perceptual difficulties appear to exist. Severe emotional disturbance appears to be present and is manifest in excessive fearfulness, anger and depression. He expressed a desire to kill himself and this examiner feels Jerry to be extremely suicidal. Poor social skills, impulsiveness, over reactiveness, and poor self concept may also be attributed to attention deficit problems. Because of this, problems are often perceived at a heightened level. Severity of psycho-social stressors is severe to extreme and his global assessment of functioning is 35.

Id. at 13,154.

(g) Petitioner's First Visit To Georgia Regional Hospital In Savannah, 5/2/89

Petitioner was first admitted to Georgia Regional Hospital of Savannah by Pineland Mental Health at the age of eleven on 5/2/89. (PX 39, 16:3758; RX 19, 48:13,191). He was referred to Georgia Regional because he was expressing suicidal ideations, he stood in the way of a logging truck on the highway, causing it to jackknife, and he was found trying to hang himself by his mother. Id. Petitioner became very angry with his mother and attempted to choke her and then choked his two year old sister. Id. In the Social Work Assessment, it was reported that Petitioner "tried to kill his two year old sister by choking her and smothering her with a pillow." (PX 39, 16:3767). Petitioner also drove the "family car into the house" and he had become intoxicated over the past weekend. Id. The "Psychological Assessment" reported these same findings and additionally reported that Petitioner admitted to "some auditory or visual hallucinations." (PX 39 at 3770).

Petitioner stayed with Georgia Regional for over a month and Progress Notes were taken each day he was there. The following is just some of the behavior Petitioner exhibited while at Georgia Regional: 1) Petitioner threatens to kill the staff; 2) does not interact well with peers; 3) Petitioner "wants to always be the center of attention"; 4) Petitioner pretends to be a shotgun; 5) Petitioner curses at peers and is rude to the staff; 6) Petitioner's behavior is noted as "prankish"; and, 7) Petitioner conducted himself in an "obnoxious" manner, for example, he made "foul remarks about kicking people in the crouch." Id. at 3789-3816. When Petitioner was discharged from Georgia Regional, he was diagnosed with Depressive Disorder, Not Otherwise Specified, Conduct Disorder, Socialized Aggressive, and Dysthymic Disorder. Id. at 3745.

(h) Evaluation By Satilla Community Mental Health During August 31, 1989

Petitioner was referred to Satilla Community Health from Harrell Psychoeducational Center for "crisis evaluation for suicidal/homicidal thoughts and statements" he made at school. (PX 40, 17:3997). The "Progress Notes" report that Petitioner began talking to the interviewer about "killing his mother, stepfather and siblings with a .22 caliber pistol that was kept in a trunk of a family car." Id. Petitioner also stated that "he attempted to drown various pets in a pond near his home" and all throughout the interview Petitioner would use profanity and spit on the floor. Id. Petitioner admitted to smoking marijuana and crack cocaine. Id. Petitioner had "an underlying fascination with death, violence, and things that are evil." Id. Petitioner reported that "he occasionally hears voices during the day and often 'sees things.'" Id. The evaluator (unable to make out the name of the evaluator as the signature is cut off at the bottom of the page) concluded that Petitioner's "[g]eneral behavioral tone was manipulative and demanding" and "reliability may be questionable in some areas." Id.

A report from Satilla was completed and signed by Bryant Wiggins, a social worker, Dr. Adrienne Butler M.D., Stephen L. Shriner, HSTP, and Leela Sharma, M.D. (RX 14, 47:12,886). Petitioner was first evaluated by Bryant Wiggins, a social worker, and Dr. Adrienne Butler, a medical doctor, on August 31, 1989. Id. Petitioner "spoke of killing both himself and his family, he spoke of attempting to kill pets and other animals, he used profanity quite profusely, he admitted to both auditory and visual hallucinations, admitted to involvement in voodoo and cult-type worship and was extremely anxious and hyperactive." Id. Mr. Wiggins and Dr. Butler recommended Petitioner be sent back to Georgia Regional, but Petitioner's mother chose not to admit him. Id.

Petitioner was seen the following week by Stephen L. Shriner, HSTP, and Leela Sharma, M.D. after acting out again in school. Id. Neither Mr. Shriner nor Dr. Sharma observed the same behavior seen by Mr. Wiggins and Dr. Butler and the behavior was denied by Petitioner and his mother. Id. Petitioner explained that he had behaved disruptively in order to return to Bacon County Schools and get "out of the Harrell Center." Id.

Dr. Sharma, Dr. Butler, Mr. Shriner and Mr. Wiggins all agreed that Petitioner came from a "dysfunctional family" and came to the following conclusions:

1. Jerry is an emotional unstable young man with poor impulse control and a tremendous amount of pent up anger, that exhibits itself in inappropriate and sometimes psychotic manners; self destructive, suicidal, homicidal and abusive.

2. Jerry has the potential for harming himself and others, with little actual forethought or remorse.

Id. at 12,887. Petitioner was then diagnosed with Conduct Disorder, Socialized Aggressive and Dysthymic disorder. Id.

Dr. Butler is not a psychiatrist or psychologist; however, she testified before this Court that when she treated Petitioner at the age of twelve, she felt he was having a psychotic episode in her presence.

(i) Second Admission To Georgia Regional Hospital Of Savannah On 5/6/91

At the age of 13, Petitioner was referred for a second time by Pineland Mental Health to Georgia Regional on May 6, 1991. (PX 39, 16:3847). Petitioner was again referred for his "violent and aggressive behavior," as "he tried many times to kill his sister by smothering her," threatened his family and his school with violence, attacked several boys at school with a stick and busted their noses and mouths, and "knocked a hole in the wall and kicked the TV set." Id. at 3861-64, 3872, 3886. Petitioner denied having hallucinations. Id. The "Psychological Assessment" of Petitioner stated there was "no indication of a psychotic process" and Petitioner displayed "no apparent remorse for his behavior." Id. at 3897. Petitioner was discharged eleven days later on May 17, 1991, to his mother. Id. at 3872. Petitioner was diagnosed with alcohol abuse and continuous conduct disorder, solitary type. Id.

(j) Evaluation By Arthur W. Hartzell, Ph.D., Cedarwood, 5/20/91

Shortly following Petitioner's stay for the second time at Georgia Regional, he was evaluated by Dr. Hartzell at Cedarwood Psychoeducational Program. (RX 15, 47:12,953-955). It appears from the report this psychological evaluation was conducted to assess recommendations for the school on how to effectively cope with Petitioner. Dr. Harzell diagnosed Petitioner with Depressive Disorder, Not Otherwise Specified, "attention-deficit problems by history," "[a]cting out tendency resulting in conduct problems" and "[a]nxious tendencies." Id. at 12,954.

(k) Evaluation By Faires Jones, Associate School Psychologist, Cedarwood, 12/2/91

Petitioner was referred to Mr. Jones by Cedarwood "in order to meet Special Educational Requirements for periodic re-evaluations." (RX 15, 47:12,959). Mr. Jones reported the following information as part of Petitioner's background: 1) Petitioner's step-father is in and out of the home and his natural father rarely visits or calls; 2) Petitioner has inappropriate behavior at home and school; 3) Petitioner has "mutilated animals;" 4) "posed a physical threat to his sister;" 5) Petitioner has destroyed property; 6) Petitioner was admitted to Georgia Regional as a result of this behavior but "was asked to leave by the staff" because he "tried to start a gang, pulled staples out of the bulletin board and pulled towels out of the bathroom;" 7) Petitioner "has often been involved with juvenile authorities regarding breaking and entry, criminal trespass and burglary;" 8) Petitioner's family has a long history with DFACS; 9) one of Petitioner's brothers tried to commit suicide with a drug overdose; and 10) Petitioner's mother "has been involved in witchcraft, voodoo, and the occult." Id. at 12,961.

Mr. Jones administered a battery of psychological tests and reviewed a "Teachers Report Form" from Petitioner's teacher, Mr. Bo Sims. Mr. Sims reported that Petitioner had problems in the following areas, "[s]ocial withdrawal, anxiety, unpopularity, obsessive/compulsive behaviors, immaturity, self destructive behaviors, inattentiveness and aggressive acting out." Id. at 12,964. Mr. Sims also reported that Petitioner "possesses an explosive personality that may result in angry outbursts." Id.

Mr. Jones concluded that Petitioner continued to "manifest significant depression and anxiety" and he could "be aggressive" and have "difficulty establishing appropriate peer relationships." Id. at 12,965. Mr. Jones also noted that Petitioner was "culturally deprived" and

lacked "basic security needs" and recommended Petitioner stay in the Cedarwood Psychoeducational Program." Id.

(l) Satilla Mental Health Community, Crisis Intervention In March And April Of 1992

While Petitioner was in RYDC, he was once again seen for crisis intervention on 3/4/92, 4/3/92 and 4/7/92 at Satilla Community Health. (RX 40, 17:4025-4029). Petitioner was referred for making more "suicidal, homicidal threats," "threats to staff and peers," "terroristic threats," and "losing control." Id. The "Progress Notes" state that Petitioner denies suicidal and/or homicidal ideas and is simply "depressed about being placed in RYDC." Id. at 3983. Petitioner is suspected of "polysubstance abuse" and Petitioner admits to selling crack and cocaine. Id. The evaluator notes that Petitioner is manipulative and depressed and diagnoses him with "Adjustment disorder, disturbance of conduct and emotions, Conduct disorder." Id. at 3984.

On April 3, 1992, Petitioner was seen again for problems at RYDC, specifically he threatened a staff member and peers. Id. at 3981. Petitioner refused to go to his room and had to be "physically carried" to his room. Id. Petitioner talked about suicidal thoughts and admitted "to trying to cut his wrist-superficially, again because he wanted to go home." Id. Petitioner stated that he "really does not want to kill himself" but just wants to go home. Id. The evaluator diagnosed him with "Adjustment disorder and Depressed mood." Id.

On April 7, 1997, Petitioner was brought to Satilla and Petitioner admitted to hitting another inmate. Id. at 3982. Petitioner also admitted to making a doll, talking to the doll, and talking for the doll. Id. However, Petitioner denied any audio or visual hallucinations. Id. Petitioner was still diagnosed with Adjustment disorder and Depressed mood. Id.

(m) Social Narrative By Ruth Ann Davis 6/1/92

Ruth Ann Davis, the Parent Liaison at Cedarwood, prepared a social narrative of Petitioner after the completion of Petitioner's first year of high school. Ms. Davis reported that Petitioner's behavior did not improve, he made no academic progress, he was "obnoxious, verbally abusive, depressed," and he made threats and assaulted peers. (RX 15, 47:12,952). Petitioner also spent time in the Regional Youth Detention Center (RYDC) after he brought a knife to the Reidsville Prison. Id. After returning from RYDC, again Petitioner "started being obnoxious and verbally assaulting to his teachers and peers." Id. Ms. Davis reported that Petitioner's home life had improved and his "[t]hreats and constant abuse of Joanne (Petitioner's sister) seem to have lessened." Id. Ms. Davis concluded that Petitioner "has had many problems" throughout the year, that he appeared to be unhappy and depressed with his life, and that she would continue to work with Petitioner's family. Id.

(n) Evaluation At DAISY On 11/2/93

Petitioner came in for evaluation at DAISY for more inappropriate behavior. Petitioner admitted that "he has difficulty maintaining control of his temper, is very impulsive, and does things without thinking." (RX 40, 17:3976). The evaluator noted that Petitioner yelled "obscenities" and made "gestures" toward passer-bys and struck his female neighbor. Id. Petitioner stole his mother's car on more than one occasion and caused damage to the vehicle. Id. Petitioner also reported that his step-father drinks, physically abuses him and calls him foul names. Id. Petitioner admitted to stealing his uncle's gun in order to shoot his step-father, but reconsidered and returned the gun. Id. Petitioner reported a "history of substance abuse", "curiosity in Satanism and attendance of Satanic Church a few weeks ago." Id. Petitioner's mother reported Petitioner was "involved in the occult due to satanic symbols in his bedroom." Id. Although Petitioner denied killing animals, a former DFACS caseworker who subsequently

went to work for DAISY, saw "dead gerbils" that Petitioner admitted to killing. Id. Petitioner also reported that his first two admissions to the Georgia Regional Hospital were "due to his alcohol abuse" and admitted to drinking at an early age. Id.

Petitioner's mother reported that Petitioner got a fake gun, went to a neighborhood store, called 911, and "reported he had a gun and was going to shoot himself." Id. at 3978. Petitioner was almost shot by the police and "thought this was funny." Id. Evaluator noted that Petitioner's behavior was "bizarre." Id.

The evaluator noted that Petitioner had low self-esteem, poor hygiene, feelings of worthlessness, and became enraged and hit things. Id. at 3979. Evaluator discussed goals with Petitioner about his life, including controlling his temper, appropriate manners, and personal hygiene. Id. No diagnosis was given.

(o) Third Admission To Georgia Regional Hospital, 3/25/95

Petitioner was referred for a third time to Georgia Regional by Satilla Mental Health after he became drunk, got into a fight with his family, was made to leave his home and then stated that he wanted to kill himself. (RX 39, 16:3691, 3695-98). The "Admission Summary" states Petitioner had band-aid on his fingers from "hitting on the wall in the hospital to get attention." Id. Petitioner denied hallucinating or having suicidal or homicidal thoughts. Id. Petitioner explained that he had drunk too much beer. Id. This statement was supported by "Physician's Admission Assessment," which stated Petitioner's "Reason for Admission" was "Alcohol intoxication" and noted in the "Problems" section that Petitioner had become intoxicated and became "involved with a fight with his family." Id. at 3693-64. The treating physician diagnosed him with "Alcohol Intoxication" and "Conduct disorder." Id. at 3694. Petitioner was

advised to detox, referred to Mental Health in Waycross, and sent home with his sister the same day he was admitted. Id.

(2) Pretrial Reports of Petitioner's Mental Health Experts at Trial

(a) Report of Dr. Ifill and Dr. D'Alesandro

A seven page written report, by Drs. Ifill and D'Alesandro, was submitted to the trial court, trial counsel and Mr. Malone, the District Attorney, prior to trial. Dr. Ifill and Dr. D'Alesandro reported to the trial court that there was "ample evidence which may be used by the Court in its disposition phase of the trial. This evidence could also support a finding of Guilty But Mentally Ill." (RX 60, 49:13,505). Drs. Ifill and D'Alesandro reviewed records from the Satilla Mental Health Center, the Okeefenokee Child Development center, Pineland Mental Health and Georgia Regional Hospital, records from his schools and the DFACS records. Id. at 13,506. They reported that Petitioner had been "subjected to severe physical and emotional abuse", had a "significant discipline problem," and his behavior at times was "bizarre," that he spoke of "killing himself and his family," was abusive to animals and "spoke of attempting to kill pets and other animals," and in his past he "admitted to both auditory and visual hallucinations." Id. It was also noted in their report that "themes of intense anger, resentment and depression permeates all the assessments that have been done over the years. He has openly talked about killing himself and about killing the members of his family." Id. The doctors also noted that Petitioner "had been prescribed Haldol and Vistaril" since his incarceration in the Toombs County Detention Center. Id. at 13,507. The doctors observed that Petitioner had cigarette burns on his forearms and, although he did not speak much, "it was significant for him to mention the fact that he had been very upset on the day in question because he had just lost his son who died shortly after the birth." Id. Petitioner denied being drunk on the night of the

crime. Id. Also, "Mr. Heidler admitted experiencing visual hallucinations only on the few occasions when he drank mushroom tea some years ago." Id. at 13,508. Petitioner thought it was "funny" when he stood in the road and made cars run off the road and "smiled when he spoke of his having tortured cats and beaten them to death. He did not appear depressed." Id. Petitioner also "admitted to having in the past been very suicidal and wanting to die and having made attempts to kill himself." Id.

Drs. Ifill and D'Alesandro stated that there was "abundant evidence" that Petitioner had "accumulated a significant mental health history" prior the murders of the Daniels family. Id. at 13,509. They concluded the following regarding Petitioner's mental capacity on the night of the crime:

> It is clear that he has severe emotional problems beginning earlier in childhood and which have been continuous. There is reliable evidence that, in addition to these severe emotional problems, alcoholism was added sometime around the age of eleven or twelve. There is some evidence that in the past his behaviors have been so destructive, bizarre and out-of-control that he sometimes has been thought of as being psychotic. If he was, these have been for brief periods of time. He might have been under some emotional stress as a result of the loss of his infant son on the day prior to the tragic events of December 4th, however, his behaviors around that time as witnessed by others did not suggest someone who was out-of-control or who was severely emotionally upset. Most significantly, there is no indication that there was a process of delusional thinking during that time or subsequent. There has been no suggestion of a command hallucination ordering him to perform any act or behavior in connection with these criminal charges, nor has there been any suggestion or evidence to suggest that a delusional compulsion was operating before, during or immediately after the events of December 4, 1997 of which he stands charged.

Id. The conclusions of Petitioner's mental health disorders by Drs. Ifill and D'Alesandro are supported by the vast mental health records they relied upon during their evaluation of Petitioner.

(b) Report of Dr. Everett C. Kuglar

Dr. Kuglar was appointed by the trial court to evaluate Petitioner after Drs. Ifill, D'Alesandro and Maish had completed their evaluations. Dr. Kuglar reported his findings in a written report to the trial court and provided a copy of this report to trial counsel. (RX 62, 49:13,512). Dr. Kuglar stated that he interviewed Petitioner, reviewed the reports of Drs. Ifill, D'Alesandro and Maish, and reviewed the "extensive records on this young man's preadolescent years and adolescent years." Id. Dr. Kuglar noted that the report from Drs. Ifill and D'Alesandro stated Petitioner had an "extensive history of emotional, depravation, depression, suicidal thinking, abnormal behavior and hospitilizations because of the threat of suicide." Id. at 13,513. Dr. Kuglar also noted that Dr. Maish's report "focuse[d] on the probability of abuse while this man was an adolescent" and that there was a "history of suicidal ideation and possibly suicidal attempts." Id. Further, Dr. Kuglar stated that Petitioner reported to him that "it has been some time since he has heard voices and the last voice that he heard was of a baby crying." Id. at 13,514. Dr. Kuglar could "find no evidence that this man is overtly psychotic at the present time." Id.

Petitioner reported to Dr. Kuglar that on the day he committed the crimes he was upset "due to the death of his infant child." Id. Dr. Kuglar stated that he could "find no evidence that this individual has suffered from delusions. I especially find no evidence that there was a delusional compulsion in relation to the alleged crime on December 4, 1997." Id. at 13,514-515.

Dr. Kuglar reported to the trial court that Petitioner had "an extensive history since about the age of 10 of being in both an abusive and emotionally unhealthy environment." Id. at 13,515. The report also stated that Petitioner had "been prone to

brief psychotic breaks in the past and has had periods of time when not only his impulse control, but his thinking and judgment were extremely impaired." Id. Dr. Kuglar concluded the following, "[c]onsidering this man's long history of emotional depravation, depression, suicidal behaviors, and self-mutilation, it is my opinion that if found guilty he would qualify for a verdict of "Guilty but Mentally Ill." Id. Furthermore, Dr. Kuglar diagnosed Petitioner with a Borderline Personality Disorder. Id. at 13,514

(c) Reports of Dr. James A. Maish

Dr. Maish was retained by trial counsel on June 1, 1998, to evaluate Petitioner. (RX 52, 49:13,487). According to the reports of evaluation sent to trial counsel by Dr. Maish he met with Petitioner a total of seven times over the course of six months. (RX 55, 49:13,493-495; RX 56, 49:13,496-498; RX 58, 49:13,500-501).

In Dr. Maish's first report to trial counsel he had seen Petitioner on three occasions and stated that he interviewed Petitioner "rather extensively" and had given Petitioner "a variety of psychological tests." (RX 55, 49:13,493). Dr. Maish also thanked counsel for the numerous medical records that they had provided. Id. The focal point of this report was Dr. Maish's recommendation for neurological evaluation based on the findings of the psychological tests he had administered to Petitioner. Dr. Maish did not provide any conclusions regarding Petitioner's mental health in this report.

In Dr. Maish's second written report to trial counsel, he stated he had interviewed Petitioner twice more since his last report and had reviewed the "rather extensive medical records and academic records" trial counsel provided. (RX 56, 49:13,496). The information Dr. Maish had acquired suggested to him that Petitioner had "strong feelings of inadequacy, worthlessness, and helplessness." Id. He also reported that Petitioner had been "exposed to a

great deal of mental abuse and in his mind physical abuse." Id. at 13,497. Dr. Maish stated that Petitioner had "never been able to establish his own identity" due to his negative environment and this had resulted in "intense anger to the point of rage." Id. Also, Dr. Maish stated that Petitioner had suicidal thoughts and activities but he had also "engaged in aggressive behaviors toward other people and property" suggesting "antisocial characteristics." Id.

Regarding Petitioner's auditory and visual hallucinations, Dr. Maish had the following to say on the subject:

> He has complained of both auditory and visual hallucinations over the years and he complained of 'hearing voices' now. From a diagnostic frame of reference I thought Scott could be best described in the old diagnostic categories of being 'Borderline Schizophrenic.' However, the new diagnostic classifications do not have that disorder. Thus, Scott can be said to have a Borderline Personality Disorder (301.83), but it should also be noted Scott at times experiences true psychotic episodes in which he is at the mercy of his feelings and impulses. As he has demonstrated very few coping techniques for dealing with stress of both an internal and external nature, it does not take a great deal of stress to cause a decompensation or regression of his functioning. Apparently Scott has engaged in a wide variety of behaviors to avoid having to cope with problems and emotional pain and treatment to this point has not been successful. He has a history of alcohol and drug abuse which also can be seen as ways of attempting to escape pain.

Id. at 13,497 (Emphasis added). Dr. Maish also felt there was "considerable doubt as to whether he can control his impulsive urges or not," and emphasized to trial counsel Petitioner's suicidal behavior was an escape from his pain. Id.

Dr. Maish's third written report, dated January 7, 1999, stated he had met with Petitioner "on two more occasions," bringing the total to seven meetings with Petitioner. (RX 58, 49:13,500). Dr. Maish told trial counsel that Petitioner's behavior in the Toombs County jail had been "unpredictable at best and inappropriate much of the time." Id. Dr. Maish felt that the reason for this behavior was Petitioner's "inability to realistically deal with stress, anger, and anxiety created by his situation." Id. Dr. Maish went on to state that Petitioner had "been on

many medications to control emotional symptoms and none of these medications have been totally effective" and went on to say that "no medication regimen ha[d] been able to stop the auditory hallucinations." Id. Dr. Maish concluded in his report that Petitioner did meet the criteria of Guilty but Mentally Ill. Id. at 13,501.

f) Trial Counsel's Presentation of Evidence of Petitioner's Mental Health

Petitioner contends that trial counsel's performance was deficient because they did not present evidence that, in addition to the mental health disorders to which the mental health experts at trial testified, he also suffered from mood and thought disorders and, testimony, like that presented by his current state habeas counsel, would have caused the outcome of his trial to have been different. Petitioner's support for the claim is the documented evidence that Petitioner has auditory and visual hallucinations that are psychotic episodes. However, as shown above, trial counsel and the mental health experts at trial were all well aware of Petitioner's auditory and visual hallucinations. (RX 11, 47:12,805-809; PX 40, 17:4005; PX 39, 4:3770; RX 14, 47:12,886; PX 39, 16:3861-64, 3872, 3886; RX 60, 49:13,505; RX 56, 49:13,496-498). Drs. Ifill, D'Alesandro, Kuglar, and Maish all stated that Petitioner's psychotic episodes were a part of his Borderline Personality Disorder.

(1) Testimony of Dr. D'Alesandro

Dr. D'Alesandro testified that Petitioner could meet the legal definition of guilty but mentally ill. (TT, Vol. V, 610). However, when asked whether Petitioner had a history of psychotic episodes, Dr. D'Alesandro testified to the following, "There was a suggestion. I did not find sufficient evidence to validate that he actually was psychotic, but 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." Id. at 607.

Mr. Garrett brought out on cross-examination that Petitioner was currently taking "Haldol" an antipsychotic medication. Id. at 614. Furthermore, Dr. D'Alesandro stated that Borderline Personality Disorder is a "fairly complex disorder of dysfunctioning that touches into a number of areas. I don't know many folks that have had much success in long term treatment of that type of disorder." Id. at 615.

Additionally, during cross-examination, Dr. D'Alesandro went through the five criteria of Borderline Personality Disorder suffered by Petitioner,

> [N]umber one, the frantic efforts to avoid real or imagined abandonment. And here what we're looking at, as a child he 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.

Id. at 598-599. Dr. D'Alesandro went on to explain that abandonment causes "distinct behavioral patterns to develop" and these patterns could be uncontrollable anger, self-destructive behavior, and Dr. D'Alesandro stated there was a "lot of these anger feelings that were germinating through his earlier years." Id at 599. Dr. D'Alesandro went on to testify that a "pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation.... This goes toward the literally the chaos of someone being brought up in that type of environment." Id. at 600. Dr. D'Alesandro explained chaos as someone like Petitioner being "shuffled from household to household," "from various foster homes after the state took custody of him from his mother. Id. at 600-602.

Dr. D'Alesandro also testified that there had been "voodoo and cultism" that was practiced in Petitioner's family and his family was "dysfunctional." Id. at 604.

The fourth criteria of "impulsivity in at least two areas that are potentially self-damaging" was met and the example of Petitioner standing in the "middle of the road waiting for a car to try and hit him" was given by Dr. D'Alesandro. Id. at 605.

Petitioner also met criterion five, "recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior," and examples of self-mutilation were given, such as Petitioner burning his arms with cigarettes and several suicide attempts after which "he was brought to the mental health center." Id. at 606.

Petitioner also met criterion seven, "chronic feelings of emptiness," and criterion eight, "inappropriate, intense anger or difficulty controlling anger as demonstrated by his numerous fights." Id. at 607.

Dr. D'Alesandro testified he found "severe emotional problems beginning in his [Petitioner's] childhood" and that his mental impairments "would influence his decision-making capacity." Id. at 618.

(2) Testimony of Dr. Gordon Ifill

As previously stated, Dr. Ifill testified that Petitioner "was suffering from severe emotional disorders beginning and continuing up until the present." (TT, Vol. VI, 634). He also stated that he "reviewed some historical information which described some bizarre behaviors." Id. Dr. Ifill testified that he had observed "self-inflicted" cigarette burns on Petitioner and "the history recorded recurrent thoughts of wanting to kill himself and several attempts to do so." Id. at 635.

When questioned about Petitioner's childhood, Dr. Ifill had the following to say:

> The records I reviewed indicated that the household was chaotic, disorganized, that Mr. Heidler was unable to get the ordinary nurturing that a growing child would need to have for normal development in the household, that there was violence or threats of violence or neglect within the household.

Id. at 636. Dr. Ifill testified that Petitioner had been placed in numerous foster homes and agreed that Petitioner was treated in "various mental health facilities in southeast Georgia" throughout Petitioner's life, and Petitioner was emotionally deprived as a child. Id. at 636-637.

Dr. Ifill explained that when a child is deprived the "normal maturation" of the personality cannot take place and "is usually the beginning of development of personality disorders." Id. Dr. Ifill stated that he found Petitioner "to be suffering from aspects of more than one personality disorder" and that his deprived childhood was likely to have "been a significant contributing factor." Id. at 638. Mr. Garrett asked Dr. Ifill what factors in Petitioner's childhood contributed to his personality disorders and Dr. Ifill had the following to say:

> Well the records suggest that there was a lot of drinking in the home, there was alcoholism in the household. With alcoholism in the household, that in itself, the consumption of alcohol by the adults who are responsible for the rearing of a child in itself prevents that person in the frequently intoxicated state from ministering to the needs of a growing child, frequently neglect occurs as a result of that. The records indicate neglect, the records indicated emotional and physical abuse.

Id. at 639-640. Dr. Ifill also reported that voodoo and black magic was a culture in Petitioner's home. Id.

When questioned about Petitioner's "out of control" and "bizarre behavior," Dr. Ifill reported that Petitioner did "have a long history of out of control behavior" and there were "episodes of bizarre behavior" and he did see a reference in one of the evaluations from Petitioner's past that characterized Petitioner's behavior as "psychotic." Id. at 643-644. Dr. Ifill also testified that "there are many instances where a person who is not normally psychotic may have psychotic episodes." Id.

Dr. Ifill explained the following criteria suffered by Petitioner that contributed to his borderline personality disorder:

> Impulsivity. I didn't see that, that's there from the record. That wasn't evident to me by examination, but the history is there in the record. Instability in his emotional relationships with people. An emptiness inside which relates to his poor sense of self. An internalized version of himself as being a bad person. This then leads to self-destructive behavior, suicide attempts, self injury, self mutilation, and that's been there.

Id. at 645. Dr. Ifill testified that he did not feel that Petitioner faked anything during his evaluation. Id. at 647.

(3) Testimony of Dr. Everett C. Kuglar

Dr. Kuglar testified that Petitioner presented himself as someone with a "probable degree of depression" and "[h]is behavior at times was certainly a little bit weird, odd, or bizarre." (TT, Vol. VI, 663). Dr. Kuglar also saw cut marks and cigarette burn marks on Petitioner's body and when he questioned Petitioner about these marks, Petitioner responded that the cutting and burning made him feel better. Id. at 663. Dr. Kuglar testified to the following about Petitioner's background:

> The man had a terrible childhood, there is no doubt about it. He was sort of kicked around from pillar to post, his home environment was not very good, etcetera. He was constantly I think off and on during those years threatening to kill himself, doing disruptive things. He was 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 . . . The consensus of those records were certainly that he had some emotional disturbance as a youth. . . I think he would be unusual to get a really normal personality considering all the things that occurred in his childhood.

Id. at 666.

Mr. Garrett asked Dr. Kuglar if during his interview of Petitioner whether he saw any evidence of "episodes of psychosis" and Dr. Kuglar testified that Petitioner did report hearing voices but he could not be "absolutely certain" that Petitioner was being truthful. Id. Dr. Kuglar did testify that Petitioner complained of hearing a baby crying. Id. at 667. Dr. Kuglar explained the symptoms of Petitioner's Borderline Personality Disorder as the following:

> A: Well the first thing is it's hard to guess from one minute to the next how they're going to behave. Then when you get past that, there are some other characteristics. They enter into these very intense relationships which don't last because they imagine that they are sort of being rejected. They have outbursts of anger, and they have possibly outbursts of depression which is a part of the illness. They have pretty poor self-esteem, self-concept, image about themselves. As you noted, in case I haven't said it, they can have very brief episodes of psychotic behavior. They tend to over the lifetime mutilate their bodies by any number of means, certainly with males. Deep scratching, light cutting of the arms, forearms, cigarette burning of the skin, etcetera, is a common thing that men do.

Id. Dr. Kuglar also explained that people with borderline personality disorder "don't seem to have much insight, which means an understanding basically of what's going on with them, and certainly based upon their behavior their judgment would be considered very poor." Id. at 669.

Dr. Kuglar also testified that Petitioner told him that "he was upset over the very recent death of his infant child by a lady who was not part of the crime scene, so to speak, and that he was upset because of conflicts between one of the young ladies who was killed by him who was about age 15 or 16 or somewhere like that, and his other girlfriend." Id. at 657.

(4) Testimony Of Dr. James I. Maish

Dr. Maish discussed Petitioner's history of hallucinations but he testified that he never saw Petitioner act "overtly psychotic." (TT, Vol. IX, 1109). Trial counsel sent Petitioner's jail medication logs to Dr. Maish, therefore, he was aware Petitioner was taking the antipsychotic, Haldol. (RX 92, 52:14,446). However, Dr. Maish did testify that he found Petitioner's mental illness to be "severe" and "the nature of his disorder interferes with virtually every aspect of his life." Id. at 1110. Dr. Maish went on to explain that Petitioner did "not have the coping techniques that most people in the room have to deal with any kind of stress, so the anxiety builds. If it comes under things that he thinks somebody has done something to him or rejected him, then there's no stopping mechanism. It goes straight to rage." Id. at 1111.

Dr. Maish went into great length testifying about each of the nine criteria of borderline personality disorder and how Petitioner showed evidence of each of these criteria.

> A: I think frantic efforts to avoid real or imagined abandonment. There's a note to that, does not include suicidal or self-mutilating behavior. That's going to come up again. I think he spent his life trying to gather people around. The problem with this disorder, and it's going to come up again, is that any kind of slight is taken as absolute rejection. That's what makes it difficult.
>
> Two, a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation. In other words, a therapist fights this all the time with a borderline case. You are loved by your client on one session but if something comes up you're the biggest scum in the pond the next day. It goes up and down just like that. And his relationships, again, humans not being perfect, there is no way to give anybody one hundred percent of what they want, especially in an emotional sense. The problem with this particular disorder is if you don't then there's the devil to pay. You become -- like I said, you become scum.
>
> Three, an identity disturbance markedly and persistently unstable self-image or sense of self. At this moment in time, and I'm meaning today, I don't think he really understands who or what he is. There is a reason. You have to typically have a stable environment that provides a basic security. If you don't have that at a very early age, then you're not going to have that basic security, would not establish your own identity. A lot of disorders come into play on that.
>
> Impulsivity in at least two areas that are potentially self-damaging, and it gives several examples here of that. I believe you've already heard most of the examples of that...
>
> Then number five, recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior. One of the significant features when I first met Scottie Heidler was his arms were marked with burns and scars from cuts....
>
> Now suicidal behavior. I don't know if that's been described here or not. He has made more than one suicide attempt. The suicide attempts here are not necessarily the kind you think about. Borderline personality disorder is people, about ten percent will actually commit a fatal act, they will kill themselves. Maybe not because they intended to, but the impulsivity is such they do something really stupid and you can't save them...
>
> Affective instability due to a marked reactivity of mood. And it talks about intense dysphoria, which is like depression, that's the mood part of the depression. Irritability or anxiety usually lasting a few hours and rarely more than

> a few days. There are times when these people would meet the criteria for being psychotic or out of touch with reality....
>
> Chronic feelings of emptiness, that is classic. You're asking what's on the inside. Nothing, it's like they're a shell. That's the reason you need stimulation. That's the reason these people are having – they're trying to fill that void. The problem is it's impotent, it can't be filled.
>
> Inappropriate, intensive anger or difficulty controlling anger. We've seen that. Frequent displays of temper, constant anger, recurrent physical fights. The record is full of those kinds of things. Most of the time that would be related to the idea somebody has rejected him or abandoned him.

Id. at 1106-1109.

Mr. Garrett also asked Dr. Maish to explain the mitigating factors in Petitioner's life and he offered the following:

> A: I think you have a combination of some neurological difficulties. I think you have a chaotic background in family. He had open heart surgery when he was five. I believe he saw doctors on a regular basis through the first five years. I think that was a factor. I think the lack of a family, of a solid family background is another factor. A father that was for the most part gone, who was described in one of the records as a devil. I think he's had trouble, it's documented in the records that he's had emotional difficulties since at least age eight. You have a record going back to age eight. So we've had ten years of being in and out of mental health centers, in and out of hospitals, in and out of judicial settings, YDC, and none of these things seemed to work to make him any better. So I don't think he operates from the same deck the rest of us do.

Id. at 1120. Dr. Maish also explained that he may seem callous, but he saw him as "being confused, disoriented, unable to cope with his life." Id. at 1121. Dr. Maish also stated that he had seen Petitioner express remorse and he had seen Petitioner cry. Id. at 1122.

As seen above, all four of Petitioner's mental health experts at trial testified that they were aware of Petitioner's auditory and visual hallucinations, yet they concluded that this was a feature of his Borderline Personality Disorder, in that he could have brief psychotic episodes. Mr. Garrett testified that he even argued with Dr. Maish about Petitioner's hallucinations

manifesting into psychotic episodes and auditory and visual hallucinations but Dr. Maish explained that this was a feature of Borderline Personality Disorder (HT 3:563-564).

As the Eleventh Circuit Court of Appeals has held, counsel are "not required to 'shop'" for a mental health expert "who will testify in a particular way." Card v. Dugger, 911 F.2d 1494, 1513 (11th Cir. 1990) (citing Elledge v. Dugger, 823 F.2d 1439, 1447, (11th Cir. 1987)). See Daugherty v. Dugger, 839 F.2d 1426, 1432 (11th Cir. 1988)("The mere fact that an expert who would give favorable testimony for Daugherty was discovered five years after this sentencing proceeding is not sufficient to prove that a reasonable investigation at the time of sentencing would have produced the same expert or another expert willing to give the same testimony.")

As trial counsel has no duty to shop for a mental health expert that will give different testimony and the mental health experts were aware of Petitioner's hallucinations, Petitioner has failed to prove trial counsel were deficient for not eliciting this testimony at trial. Furthermore, given the abhorrent nature of the crimes committed and the extensive mental health evaluations conducted by the mental health experts at trial Petitioner has also failed to prove he was prejudiced by trial counsel's performance as there exists no reasonable likelihood that the outcome of his trial would have been different.

Thus, whether trial counsel's performance was reasonable is a distinct and separate issue from the diagnosis of the mental health experts at trial, as they were given many of the same records as Petitioner's current mental health experts but they reached a different conclusion. Trial counsel were not deficient as they hired an expert and provided all background records they obtained to not only their expert but the experts of the State and the trial court. "It is simply not reasonable to put the onus on trial counsel to know what additional information" was needed by the mental health experts at trial to arrive at the same conclusions as Petitioner's current mental

health experts and "a reasonable lawyer is not expected to have a background in psychiatry or neurology." Head v. Carr, 273 Ga. 613, 631, 544 S.E.2d 409 (2001).

Moreover, Petitioner's behavior throughout his life clearly fits within the criteria of Borderline Personality Disorder as shown in the numerous records before this Court and shown above in the various evaluations by mental health professionals. Additionally, until Petitioner was incarcerated at the Diagnostic and Classification Prison, no mental health professional has ever diagnosed Petitioner with Schizo-Affective Disorder. In fact, Petitioner's own expert, Dr. Carton, stated that he had seen a "marked increase" in Petitioner's psychotic episodes since his incarceration. (HT 2:483-485). Furthermore, none of Petitioner's current experts or prior mental health experts have testified that Petitioner was in fact in the throes of a psychotic episode when he committed the crime. Thus, without this causal link between the alleged mental illness and the crimes, there exists no evidence that the outcome of Petitioner's would have been different.

The Eleventh Circuit Court of Appeals held in Crawford v. Head, 311 F.3d 1288, 1321 (11th Cir. 2002), that even though Crawford had presented evidence of Post-Traumatic Stress Disorder (PTSD) (Crawford was diagnosed with PTSD due to service in the military during the Vietnam War), described the effects of that condition, and showed that he suffered from this condition at the time of his crime, Crawford still had not proven a causal connection between this disorder or any other "mental impairment" and had thereby not "provided any substantial mitigation" "in light of the aggravating factors" in his case.

Similarly in Petitioner's case before this Court, Petitioner has failed to show how further evidence of mental illness would have explained why Petitioner committed the crimes for which he was convicted. There exists no evidence before this Court showing that Petitioner was in the throes of any type of psychotic episode on the night of the murders and sexual assault.

Petitioner's crimes appear to have begun while Petitioner was upset over the death of his child, however, no link has been established between the crimes and Petitioner's auditory and visual hallucinations. Furthermore, there is no evidence before this Court of any eyewitness account of Petitioner harming anyone while having these hallucinations or "episodes".

Consequently, as all four experts at trial testified that Petitioner could be found Guilty but Mentally Ill, the additional diagnoses offered by Petitioner's current mental health experts would have added only cumulative testimony that Petitioner suffered from more disorders than presented at the guilt phase of trial. Ineffective assistance of counsel is neither proven by "the fact that other testimony might have been elicited" nor by the failure to present cumulative evidence. Fugate v. Head, 261 F.3d at 1218 (2001); See DeYoung v. State, 268 Ga. 780, 786 (5), 493 S.E.2d 157 (1997). Accordingly the failure to present such evidence at the guilt/innocence phase does not constitute deficient performance.

With respect to the sentencing phase, even if the Court concluded that the failure to present this additional mental health testimony regarding thought and mood disorders constituted deficient performance, the Court does not find a reasonable probability that the outcome of Petitioner's sentencing phase would have been any different. Thus, these portions of Petitioner's ineffective assistance of counsel claim is DENIED.

(a) Trial Counsel Were Not Deficient For Presenting Dr. Maish's Testimony During The Sentencing Phase

Petitioner complains that trial counsel should have presented testimony from Dr. Maish in the guilt/innocence phase of Petitioner's trial. However, trial counsel testified about their strategy for presenting Dr. Maish during the sentencing phase. (HT 3:586). Mr. Garrett testified to the following regarding their trial strategy of Dr. Maish's testimony:

> I believe that we thought his testimony was going to be the strongest and we wanted to let the jury hear the mental health evidence on the front end with the other three, (Drs. Ifill, D'Alesandro and Kuglar were the last three witnesses during the guilt/innocence phase) and then let them hear it all over again from someone who we thought would be, the strongest testimony.

Id. Furthermore, Dr. Maish's testimony, if given in the guilt/innocence phase, would have simply been cumulative evidence of the testimony given by the other mental health experts as they all offered the same diagnosis and the same opinion regarding Petitioner's eligibility for meeting a guilty but mentally ill plea. However, by having Dr. Maish testify in the beginning of the sentencing phase, trial counsel bolstering the court appointed mental health experts' testimony and did not err in failing to present cumulative evidence.

"The fact that [Petitioner] and his present counsel now disagree with the difficult decisions regarding trial tactics and strategy made by trial counsel does not require a finding that [Petitioner] received representation amounting to ineffective assistance of counsel." Stewart v. State, 263 Ga. 843, 847, 440 S.E.2d 452 (1994), overruled on other grounds, (citing Van Alstine v. State, 263 Ga. 1, 4-5, 426 S.E.2d 360 (1993)); see also Griffin v. Wainwright, 760 F.2d 1505, 1513 (11th Cir. 1985); Rogers v. Zant, 13 F.3d 384 (11th Cir. 1994).

As trial counsel clearly had a logical and effective strategy for presenting Dr. Maish's testimony during the sentencing phase, trial counsel was neither deficient nor was Petitioner prejudiced by this strategy. Thus, this portion of Petitioner's ineffectiveness claim is DENIED.

g) Trial Counsel's Presentation of Further Mitigating Evidence

Petitioner complains that trial counsel did not present enough mitigating evidence during the sentencing phase of Petitioner's trial. As explained in great detail above, trial counsel gathered records of Petitioner's background, including records from school, mental health institutions, DFACS, and the Toombs County Detention Center. Trial counsel interviewed

family, friends, teachers, caseworkers, foster parents, a juvenile probation officer and anyone else that would talk to trial counsel about Petitioner. Trial counsel hired a well trusted mental health expert and provided him and the court appointed mental health experts with volumes of background records regarding Petitioner. Trial counsel diligently sifted through all of this information and, as also explained above, chose the witnesses they felt would provide the best testimony. "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987), cert. denied, 487 US 1241, 108 S.Ct. 2915 (1988), quoted in Atkins v. Singletary, 965 F.2d at 960. Waters v. Thomas, 46 F.3d at 1514. This Court will not find trial counsel's performance deficient for not being able to present evidence from every possible acquaintance, friend, and family member of Petitioner. See Jefferson v. Zant, 263 Ga. 316, 319(3)(b), 431 S.E.2d 110 (1993)(failure to present cumulative mitigating testimony during the sentencing phase is not evidence of inadequate preparation).

Trial witnesses testified to the terrible childhood Petitioner had to endure and to his mental illnesses. As held by the Eleventh Circuit Court of Appeals, counsel is not ineffective for failing to elicit more testimony from witnesses because perfection is not required. Waters v. Thomas, 46 F.3d at 1514.. As the Eleventh Circuit Court of Appeals properly noted, trial lawyers "do not enjoy the benefits of endless time, energy or financial resources." Rogers v. Zant, 13 F.3d 384, 387 (11th Cir. 1994). "A lawyer can almost always do something more in every case . . . at some point, [however], a trial lawyer has done enough." Atkins v. Singletary, 965 F.2d 952, 959-960 (11th Cir. 1992).

A careful review of the testimony and evidence presented in the sentencing phase of Petitioner's trial by this Court, other than the testimony of Dr. Maish detailed above shows that trial counsel's presentation of mitigating evidence was neither deficient nor was Petitioner prejudiced by counsel's performance.

(1) Testimony Of Cathy McMichael

Cathy McMichael, a caseworker from the Toombs County Department of Family and Children Services, testified on Petitioner's behalf during the sentencing phase of Petitioner's trial. (TT, Vol. IX, 995). Ms.McMichael brought to court Petitioner's DFACS records from Ware County, Appling County, Jeff Davis County, and Toombs County. Id. at 995-996. These documents were tendered into evidence by trial counsel. Id. at 997. Ms. McMichael testified that Petitioner's sister, Joanne, was placed in foster care in July of 1995. Ms. McMichael did see Petitioner in the home in March or April of 1996 but she did not see Petitioner in the home during the summer of 1995. Id. at 1001. The crux of Ms. McMichael's testimony was to explain to the jury the documents contained within the tendered records, specifically, to explain to the jury the process of removing a child from a home and placing them in foster care. Id. at 1002. She explained that a child would be removed from the home because of "[n]eglect, physical abuse, sexual abuse" and after being placed in foster care DFACS would create a case plan to establish goals for reuniting the family or terminating parental rights. Id. at 1003.

(2) Testimony Of Willene Wright

Ms. Willene Wright, a case worker from Bacon County Department of Family and Children's Services, first came in contact with Petitioner's family in 1985 because Petitioner's mother had not enrolled Petitioner, who was eight years old at the time, or his sister Lisa in school. (TT, Vol. IX, 1013, 1016). Ms. Wright also recommended that Mary Mosely "make an

appointment with mental health" for Petitioner in 1987. Id. at 1019. Ms. Wright testified that she helped provide the following services to Petitioner, "Medicaid, transportation, Christmas gifts, other donations or energy assistance program." Id. at 1020-1021. Also, Mary would not follow-up with Petitioner's medical needs for his heart problem and Ms. Wright helped arrange transportation for Petitioner. Id. at 1021-1023.

Ms. Wright testified that Petitioner was placed in foster care in a relative's home in April of 1988 and Petitioner's mother harassed the foster parents so much that Petitioner had to be taken out of the home and "taken to the juvenile officer" and then placed in another foster home. Id. at 1023-1024. Petitioner was placed in two foster homes through the Bacon County DFACS. Id. at 1026. When questioned about Mary Moseley's attitude, Ms. Wright described her as an "instigator" with DFCS, who threatened the caseworkers, a practitioner of the occult and would manipulate her children into denying any neglect or abuse in the home. Id. at 1027-1028, 1035.

Ms. Wright testified Petitioner was removed from his mother's home in August of 1988, and placed in another foster home and Mary's visitation rights were terminated by the court in 1988. Id. at 1029-1030. Petitioner stayed in the second foster home until March of 1989. Id. at 1031. When asked if Mary was a "nurturing mother," Ms. Wright stated that Mary was not a nurturing mother. Id. at 1037.

(3) Testimony Of Joanne Oglesby

Ms. Joanne Oglesby, a caseworker with the Jeff Davis County Department of Family and Children Services, also testified on Petitioner's behalf during the sentencing phase of trial. (TT, Vol. IX, 1039). Ms. Oglesby testified, that she initially became involved with Petitioner's family to provide resources to the family through the Interagency group. Id. at 1041. However, in May of 1990, she began providing "child protective services" after a report of "physical abuse,

emotional abuse, neglect" was filed. Id. at 1041. Ms. Oglesby testified that they confirmed neglect within Petitioner's home. Id. at 1041. Bacon County DFACS worked on Petitioner's case until January of 1991, when the family moved to Appling County and the case was transferred to the Appling County DFACS office. Id. at 1042.

Petitioner's family lived in two separate homes during the six month period Ms. Oglesby worked with them. Ms. Oglesby had the following to say about Mary Moseley's behavior:

> Q: In talking with Mary Heidler Mosely what did you observe about her behavior?
>
> A: Well in talking with the family, what I found out was they had a long history with DFCS with our agency and prior in Bacon County. They had a lot of negative feelings about DFCS and really didn't like DFCS at all, and they perceived them as being intrusive in their home. She was by me viewed as kind of the dominant person in that family. They were a very closed family in that –
>
> Q: What was that word? They were very what?
>
> A: Closed.
>
> Q: Closed?
>
> A: Yes. You couldn't get much conversation out of the children, just one word answers maybe, and she was -- they knew how to talk to DFCS and not tell them anything but to answer their questions, I guess you could say.
>
> . . .
>
> Q: Did you actually have some difficulties with Mary Mosley yourself?
>
> A: Just some hostile attitudes and some things she would say, just cursing, she would get angry sometimes if we questioned her about a report or incident we heard, curse us. She didn't make any threats to me personally, but I had occasion to go with another person from the school system, this was a truant officer who went – this was before we had the report, before May. I would go with her to the home and as another support person because she had supposedly made threats to her that she was going to put a spell on her or something. . .

Id. at 1043, 1045.

Ms. Oglesby also explained to the jury that a "homemaker" was sent to Petitioner's home every day for "about a month and a half" to help take care of Joanne, make sure "she had adequate meals" and take her to daycare every day because Joanne needed "peer association." Id. at 1044. Ms. Oglesby also talked about Petitioner attending Cedarwood Psychoeducational in Baxley. She explained that this was a "special program" for children diagnosed with a learning disabilities and emotional problems. Id. at 1045-1046.

Ms. Oglesby explained that they had "numerous reports" of physical abuse but they could never confirm these allegations. Id. Furthermore, DFACS would have to send a counselor to Petitioner's school to help him because Petitioner's mother refused to keep Petitioner's appointments with the counselor. Id. at 1048. Ms. Oglesby also had a conversation with Petitioner about voodoo and he explained the difference between "white magic" and "black magic." Id. at 1049. Ms. Oglesby testified that she did not consider Mary to be a "nurturing mother." Id. at 1050.

(4) Testimony of Sylvia Boatright

Trial counsel had several conversations with Ms. Boatright, one interview was held at Ms. Boatright's home and although Ms. Boatright cared for Petitioner, she reported some rather disturbing information about Petitioner to trial counsel.

Ms. Boatright told trial counsel about Petitioner's cruelty to animals. Petitioner once left her home with a dog and the dog never returned and on another occasion he tried to drown some kittens in a pond. (HT 1:143; RX 34, 49:13,413). Ms. Boatright also told her that she warned her grandkids to stay away from the well with Petitioner because she was afraid he would try to drown them. (HT 1:143, RX 34, 49:13,414). Judge Palmer also learned during this interview that Ms. Boatright found two guns hidden between some quilts in Petitioner's room while

Petitioner was outside playing with her grandson Daniel. (HT 1:142; RX 34, 49:13,418). When Petitioner came in, he went straight to the quilts and Ms. Boatright saw him looking for the guns. Ms. Boatright asked Petitioner about the guns and he stated Daniel had hidden the guns between the quilts. Id.

However, when Ms. Boatright testified on Petitioner's behalf during the sentencing phase of Petitioner's trial, trial counsel was able to elicit only mitigating evidence from her on the stand. Ms. Boatright testified that Petitioner was placed in her care when he was eleven in August of 1988 and left her home in March of 1989. (TT, Vol. IX, 1053). Ms. Boatright filed a complaint with DFACS that Petitioner's mother was harassing her family. Id. at 1055. When Petitioner came to stay with Ms. Boatright he was very afraid of the dark and would talk about a knife coming "through a ceiling and cut him." Id. Ms. Boatright told the jury that Petitioner was unable to read or write and he was eventually transferred, while he was living with her, to the Harrell Psychoeducational Program, which she explained was a school for kids with learning disabilities. Id. at 1057. Ms. Boatright testified that Petitioner had an imaginary mouse[4] and he would say "come on little mouse" and he slept with the mouse. Id. at 1059. Ms. Boatright testified that she came to "love" Petitioner while he lived with her. Id. at 1060.

(5) Testimony of Marilyn Dryden

Ms. Dryden taught Petitioner at Cedarwood during his sixth, seventh, and eighth grades. (TT, IX, 1065). Ms. Dryden testified that Petitioner would "completely separate himself from the group" and she never saw him be physically or verbally aggressive to other students. Id. Ms. Dryden testified that she witnessed Petitioner self-mutilating himself by picking at his skin until

[4] Although Ms. Boatright informed trial counsel prior to trial that Petitioner beat ant punished the imaginary mouse, this testimony was not elicited from her at trial. (HT 1:106).

it bled and she saw initials carved into his skin. Id. at 1066. Furthermore, she testified that Petitioner had an imaginary friend that he would sometimes keep in his hand and he would talk to it. Id. at 1067. After Petitioner left Cedarwood and went to high school, Ms. Dryden arranged for him "to come back to our school for half day to work with a pre-school class where he would go and sit with the teacher in the room working with some of the younger kids, letting the kids listen to him as he read a story." Id. Ms. Dryden testified that he was never aggressive with the children. Id.

(6) Testimony of William A. Johnston

Trial counsel subpoenaed Bill Johnston, one of Petitioner's juvenile probation officers to testify on his behalf during the sentencing portion of Petitioner's trial. (TT, IX, 973). Mr. Johnston testified that in addition to knowing Petitioner, he also met Petitioner's sister Joanne, his mother, Mary and his step-father, Lawton Mosely. Mr. Johnston stated that Petitioner's family moved a lot during his time supervising Petitioner. Id. Mr. Johnston stated that he did not have any problems when he supervised Petitioner and Petitioner did not threaten him in any way. Id. at 975-976. However, Mr. Johnston did testify that he had heard discussions of the family being involved in "devil worship" and he did visit Petitioner's home once and found Petitioner's step-father had been drinking in the afternoon. Id. at 977. He also testified that the homes they lived in were in "poor" condition. Id. at 978. Mr. Johnston took action to have Petitioner evaluated by a mental health professional. Id. at 980. He also stated that Petitioner's sister Joanne was currently under the care of the Juvenile Court Services for delinquency and was currently in the custody of RYDC. Id. at 983-984.

(7) Testimony of Mary Moseley

Ms. Moseley, Petitioner's mother, testified that Petitioner's father was an alcoholic and did not treat Petitioner or the other children well. (TT, IX, 1074). She also testified that Petitioner had open heart surgery when he was four and that he had mental problems that required him to attend a "special school." Id. at 1074-1075. Ms. Mosley also testified that her husband Lawton Moseley, Petitioner's step-father, was an alcoholic when Petitioner was a child and would sometimes say "bad words" to Petitioner. Id. at 1076-1077. Ms. Mosley testified that Petitioner tried to commit suicide once when he "jumped in front of a semi truck on a main highway" and once when he attempted to hang himself in a store. Id. Ms. Moseley testified that Petitioner had an imaginary friend named "Boo-Boo" and was afraid to "sleep in the dark." Id. at 1078. She also told the jury that Petitioner suffered from attention-deficit disorder and he took medication to help manage this illness. Id. 1079.

Ms. Moseley stated that she has six children and she testified that her three oldest sons, Buddy, George, and Steve were incarcerated and her youngest daughter, Joanne, was being held at the Youth Detention Center. Id. at 1079-1081. Ms. Moseley testified that when Petitioner's son died, he attended his funeral the day of the crimes and Petitioner "was really upset." Id. at 1081-1083.

(8) Testimony of Lisa Aguilar

Lisa Aguilar, Petitioner's sister, testified that her family moved a lot as she was growing up. (TT, IX, 1139). Lisa recalled living with her biological dad, George Heidler, when she was very young and she remembers that he was an alcoholic. Id. at 1139. She also testified that Lawton Moseley, was mean to Petitioner and to everyone else, however, she testified that he never hit her or anybody else. Id. at 1139-1140. Lisa stated she was told that Petitioner tried to

commit suicide, but she was not present when he committed the act. Id. at 1141. She also testified that her brother George was admitted to a center for alcohol abuse. Id. Lisa refused to testify that her family practiced black magic or white magic. Id. at 1142.

She did admit that their father George Heidler would "always" make promises to her and Petitioner but would never follow through. Id. at 1143. Lisa asked the jury to spare her brother's life. Id. at 1144.

(9) Trial Counsel's Presentation of Petitioner's DFACS Records

All of Petitioner's DFACS records were submitted during the sentencing phase. As stated above, trial counsel testified that their strategy was to present testimony from the caseworkers to bring out specific highlights of Petitioner's background with the DFACS records. (HT 1:114). Judge Palmer explained they could not go through all of the DFACS records with the witnesses because it would have taken "days" to accomplish this due to the voluminous nature of the files. Id.

Trial counsel received DFACS records from Appling County, Bacon County and Jeff Davis County during their investigation of Petitioner's background covering years 1988-1997. (RX 11, 47:12,805-809). The summary of the DFACS records, which were presented at trial, prepared by trial counsel contains the following information: 1) Petitioner is suicidal, homicidal and hears voices; 2) Petitioner does not like his step-father; 3) Petitioner's mother involved in the occult; 4) Caseworker suggests to Petitioner's mother that he needs to be admitted to Savannah In House Mental Health because he is suicidal, homicidal, abusive and destructive; 5) report from Satilla that Petitioner had auditory and visual hallucinations; 6) Petitioner's mother refuses to work with DFACS and threatens the caseworkers; 7) Petitioner evaluated by Dr. Marc Eaton who finds that Petitioner has "manipulative behavior"; 8) Court finds that Petitioner is deprived;

9) report of abuse in Jeff Davis County; 10) Petitioner's mother denies abuse and denies Lawton Moseley lives in the home, but Petitioner and his sister Joanne state the opposite; 11) reports that family watches horror movies; 12) report that Petitioner "cut girls initials in arm"; 13) Petitioner reported to Cedarwood that his mom and Lawton beat him; 14) Petitioner ran away from home; 15) Petitioner does not want to return home; 15) Petitioner has "bizarre, bizarre behaviors"; 16) Mary filed juvenile charges against Petitioner; 17) Petitioner got drunk and threatened to commit suicide; 18) Petitioner upset that his mother and biological father dating again; 19) Petitioner breaks into Ms. J. Renn Lester's home and steals items, including guns, and tears house up; 20) Petitioner's mother in jail; and, 21) in 12/02/97 Petitioner has to move out of Melinda Placher's house due to fighting.

Based upon this summary and a review of the DFACS records submitted at trial in conjunction with the testimony from friends, family, teachers, a foster parent and DFACS caseworkers, this Court finds that trial counsel presented substantial mitigating evidence on Petitioner's behalf. Petitioner disagrees with trial counsel's strategy of presenting his DFACS records to the jury; however, absent a showing that this strategy was not reasonable, Petitioner's claim must fail.

The Court in Strickland explicitly stated, "there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland 466 U.S. 668, 689 (1984). The Eleventh Circuit echoed this aspect of the Strickland standard when it stated, "there is not one 'correct' way for counsel to provide effective assistance." Alderman v. Terry, 468 F.3d 775, 792 (11th Cir. 2006). In Jefferson v. Zant, the Georgia Supreme Court stated, "The test for reasonable attorney performance has nothing to do with what the best lawyers would have done. Nor is the test even

what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." Jefferson v. Zant, 263 Ga. 316 (1993).

Thus, as trial counsel's strategy of presenting Petitioner's DFACS records en mass, without a lengthy and cumulative review with the jury, was reasonable and this Court DENIES this portion of Petitioner's ineffectiveness claim.

Furthermore, testimony from the many mitigation witnesses established that trial counsel were not deficient in showing the troubled background in which Petitioner grew up. The widespread use of the tactic of attacking trial counsel by showing what "might have been" proves that nothing is clearer than hindsight -- except perhaps the rule that we will not judge trial counsel's performance through hindsight. See, e.g., Strickland v. Washington, 466 US 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort must be made to eliminate the distorting effects of hindsight."); Atkins v. Singletary, 965 F. 2d 952, 958 (11th Cir. 1992) ("Most important, we must avoid second-guessing counsel's performance. As is often said, 'Nothing is so easy as to be wise after the event.'" (Citation omitted.)); White v. Singletary, 972 F.2d 1218, 1220 (11th Cir. 1992) ("Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight."); Thompson v. Wainwright, 784 F.2d 1103, 1106 (11th Cir. 1986) ("Hindsight, however, is not the appropriate perspective for a court to examine counsel's effectiveness."). "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987), cert. denied, 487 US 1241, 108 S. Ct 2915,

101 LEd2d 946 (1988), quoted in Atkins v. Singletary, 965 F.2d at 960. Waters v. Thomas, 46 F.3d at 1514.

Trial counsel testified that due to the gruesome nature of his crimes they had an uphill battle defending Petitioner. The prosecution put in a video of the crime scene and Judge Palmer had the following to say about the impact the video had on the jury:

> [W]ithin ten minutes of the trial starting we're showing this 53 minute or 50-minute crime scene video that shows everything in living color. I mean, it was a very bad crime scene. And so it was all downhill from there. And the fourth person killed, of course, was the little boy, the eight year old little boy whose brain hit the ceiling and then bounced off the floor. The jury was already, you know, they were already in bad shape and when they saw that it was, you know, everybody's wiping, all of us are wiping tears. Everybody's wiping tears. It was just very emotional.

(HT 1:138; See RX 106, Crime Scene Video and RX 101, Crime Scene Photographs, 53:14,846-14,847). Furthermore, the video taped testimony of Amber Daniels explaining Petitioner sexually abusing her was powerful aggravating evidence. (RX 105, Interview of Amber Daniels on CD; RX 80, Typed Interview of Amber Daniels).

Petitioner asserts that trial counsel should have presented more evidence of Petitioner's difficult childhood and mental illness. However, even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. The Eleventh Circuit has held, "[w]e are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial . . . worked adequately. *See* White v. Singletary, 972 F.2d 1218, 1221, 11th Cir. 1992." Rogers v. Zant, 13 F.3d at 386.

Furthermore, the majority of Petitioner's evidence alleging his difficult childhood is hearsay and unsupported by documentation or independent source. Current law does not require

the wholesale admission of all evidence contended to be mitigating without respect to its reliability and the rules of evidence. Gissendaner v. State, 272 Ga. 704, 714 (2000).

The record reveals that trial counsel investigated Petitioner's case in accordance with their trial strategy. Therefore, given the abundant amount of mitigating evidence presented at Petitioner's trial, this Court finds that Petitioner has failed to meet his burden proving trial counsel were deficient in their presentation of mitigating evidence.

Furthermore, given the copious amount of mitigating evidence presented at trial and the nature of Petitioner's crimes, there exists no reasonable probability that the outcome of Petitioner's trial would have been different with the admission of this additional evidence. Thus, Petitioner's claim that trial counsel were ineffective in their investigation and presentation of mitigating evidence is DENIED.

h) Testimony Elicited From the Staff of The Toombs County Detention Center

Petitioner alleges trial counsel failed to elicit testimony of his strange behavior while in the Detention Center from the staff of the Toombs County Detention Center. However, the trial record is clear: trial counsel did bring out evidence of Petitioner's bizarre behavior on cross-examination of the employees of the Toombs County jail. Testimony from the staff at the Toombs County Detention Center on cross-examination during the penalty phase of Petitioner's trial gave additional accounts of Petitioner's bizarre behavior while imprisoned prior to trial.

Bruce LeBlanc, a booking officer at the Toombs County Detention Center, testified at trial that one night he sat and talked to Petitioner about his religious beliefs. (TT, VIII, 918). Mr. LeBlanc explained that Petitioner told him "[Petitioner] was a collector of souls" and that he "wasn't through collecting souls." (TT, VIII, 919). Petitioner then showed Mr. LeBlanc his knuckles with the word Sandman tattooed on them and explained that "the Sandman was a

character in a series of movies . . . the Sandman was a man whose soul belonged to the devil and . . . he went around killing families while they slept." (TT, VIII, 919-920). Petitioner's contends this is a product of his mental illness, however, the mental health records from Petitioner's childhood clearly show Petitioner's ongoing fascination with the occult.

Mr. LeBlanc also testified that Petitioner would burn himself with cigarettes and had to be watched while he smoked. (TT, VIII, 921-922). On cross-examination, Mr. LeBlanc agreed that Petitioner would say "strange and bizarre things". Id. at 920. Mr. LeBlanc also testified on cross that Petitioner took Haldol, an anti-psychotic. Id. at 922.

Jerry White, the chief jail administrator, also testified during the penalty phase of Petitioner's trial. Mr. White testified that Petitioner made a doll out of tissue paper that he called his "baby", decorated his cell with a ketchup and water mixture, and also colored all the blocks in his cell with crayons. Id. at 961-962. Additionally, Mr. White testified that on Petitioner's medical request forms he wrote that "demons were taking over his body" next to the "nature of illness" category. Id. at 959.

Petitioner's allegations that trial counsel's performance was deficient in this area is without merit as the standard for deficiency is not the failure to present every shred of evidence possible. As held by the Eleventh Circuit Court of Appeals, counsel is not ineffective for failing to elicit more testimony from witnesses because perfection is not required. Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc). "'In retrospect, one may always identify shortcomings, but perfection is not the standard for effective assistance. . . A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance. . . The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to

prove ineffectiveness of counsel." Williams v. Head, 185 F. 3d 1223, 1236 (11th Cir. 1999) (quoting Cape v. Francis, 741 F.2d 1287, 1302 (11th Cir. 1984); Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992)). Based upon this standard, trial counsel's presentation of Petitioner's behavior while in jail awaiting trial was not deficient nor was Petitioner prejudiced by their performance, therefore, this portion of Petitioner's ineffectiveness claim is DENIED

i) Trial Counsel's Efforts To Mitigate Petitioner's Lack Of Remorse

Petitioner alleges trial counsel were ineffective for not presenting more evidence to mitigate the State's presentation of evidence showing Petitioner's lack of remorse for the crimes he committed. This Court finds that given the dearth of available mitigating evidence available to trial counsel regarding Petitioner's lack of remorse and the devastating evidence to the contrary, trial counsel were neither deficient in their performance nor was Petitioner prejudiced.

Trial counsel was able to elicit from Dr. Maish that he had seen Petitioner express remorse and he had seen him cry. Id. at 1122. However, overwhelming testimony given at trial contradicted this testimony. For example, Special Agent Dean McManus, of the GBI, testified at Petitioner's trial about a phone call he received from Petitioner. Agent McManus testified that his secretary accepted a collect call from a correctional institution and after speaking with the person became very upset and gave him the phone. (TT, IX, 965). The person did not identify himself, but after speaking with the individual he suspected it was Petitioner. He asked who the person was and Petitioner replied "Nine little piggies, four dead." Agent McManus then testified that he was certain at that moment it was Petitioner because he knew Petitioner "was referring to the nine Daniels family members and the four that were dead." Id. at 966. Additionally, a minute or two later a jailer picked up the phone and told Agent McManus that Petitioner was the person who had been on the other end of the phone. Id.

These statements corroborate Petitioner's statements made to his brother, Steve Heidler, the morning after the crimes. Steve told Special Agent Todd Lowery, of the GBI, that Petitioner asked him "Have you ever killed anyone?" (REX 82, 52:14,355). Petitioner went on to explain to his brother "It gives you a rush, it makes you want to go kill more people." Id.

Petitioner cannot now complain that trial counsel failed to present evidence of his lack of remorse when he made statements indicating a lack of remorse. Thus, trial counsel's performance was reasonable and Petitioner was not prejudiced by trial counsel's performance, therefore, this portion of Petitioner's ineffectiveness claim is DENIED.

j) Trial Counsel's Presentation of Testimony Regarding the Death Of Petitioner's Son

Petitioner alleges that trial counsel were ineffective for failing to present evidence of the link between the death and burial of Petitioner's son, Matthew, and the offense. Trial counsel's strategy at trial was based largely on their belief that the death of Petitioner's baby son was directly connected to Petitioner's criminal actions. (HT.1:36-40; 3:551-54). Counsel explained to this Court that, from dealing with mentally ill defendants, counsel knew that "stressors and other events [can] trigger action in mentally disordered people." (HT 3:559, 569-70). In this case, counsel felt "certain" the trauma of Matthew's death triggered Petitioner's severe mental illness around the time of the crime. (HT 3:615).

Although, Matthew's mother Marie Spivey refused to testify for Petitioner, there was evidence regarding Petitioner's reaction to the death of his son presented to the jury. During the testimony of GBI Agent Todd Lowery at the guilt/innocence phase, the jury heard a recording of a conversation the agent had with Petitioner's brother who said that Petitioner had attended "the baby's funeral that day." (TT. at 500). However, Agent Lowery testified that he did not know whose baby the funeral was for. (TT. at 505).

Matthew's death was mentioned again in the videotape of Petitioner's confession to the GBI was shown to the jury.

LS: Okay, where did you leave the van?

JSH: On a side street.

LS: Okay.

JSH: I left and went there and went out to the grave yard.

LS: To the grave yard? For why?

JSH: To see my boy.

LS: That's your . . .

JSH: (Unclear)

LS: . . . little three-hour-old son that had died that day? Or had been buried that day?

JSH: Yes, sir.

(PX. 119 at 23:6348, 6351).[5] After the video of this confession was played for the jury, Agent Sweat testified that Petitioner told him that, on the day of the crime, he had buried his son who had died shortly after he was born. (TT. at 548).

In response to questioning by the State, Dr. Kuglar, M.D., testified that Petitioner admitted committing the crimes charged against him and that Petitioner suggested the crimes were related to the death of his son: "He indicated that he was upset over the very recent death of his infant child by a lady who was not part of the crime scene . . .. He indicated he was very upset at the time." (TT. at 657-58).

The Petitioner's mother also testified that Petitioner attended Matthew's funeral and was upset on the day of the homicides. Id. at 1081-1083. In trial counsel's penalty phase closing

[5] LS refers to GBI Agent Lee Sweat, while JSH refers to Jerry Scott Heidler.

argument, counsel recognized the importance of tying Matthew's death to Petitioner's mental state and criminal actions

> I think you ought to consider stressors in his life. And I don't know what about his life there was that wasn't stressful. The death of his son just hours before ought to be given some consideration. . . . Ladies and gentlemen, can a man whose son dies lose it? Can a man who nature has not equipped to handle himself the way you people are equipped, or the way I am or the people in this audience are equipped, can he lose it after something like that? Does he have to be the master criminal, the evil criminal genius that deserves the death penalty? No. I think a weak person not equipped to handle even the everyday stresses of life, faced with intense sorrow over his son, can't you take that into consideration and give him mercy?

(TT. at 1169-70).

As there was testimony and evidence presented that Petitioner was upset over the death of this child, trial counsel were neither deficient in their presentation of this evidence nor was Petitioner prejudiced, thus, this portion of Petitioner's claim of ineffectiveness is DENIED.

3. Ineffective Assistance of Appellate Counsel

Petitioner alleges that his appellate attorneys were ineffective for failing to litigate a meritorious claim – that the jury verdict was not supported by sufficient evidence – and his rights under the Sixth and Fourteenth Amendments to the U.S. Constitution and analogous Georgia provisions were violated.

Criminal defendants have a right to counsel when pursing a first appeal as of right. Douglas v. California, 372 U.S. 353 (1963). As at any other critical stage of the proceedings, the right to counsel on direct appeal includes the right to effective representation by such counsel. See, e.g., Evitts v. Lucey, 469 U.S. 387, 395 (1985); McAuliffe v. Rutledge, 231 Ga. 745, (1974). To prove that he was denied the right to effective appellate counsel, Petitioner

must demonstrate that his attorneys rendered deficient performance and that he was prejudiced by their deficiencies. Smith v. Robbins,528 U.S. 259, 285 (2000).

Petitioner argues that the jury that convicted him heard uncontroverted, unrebutted expert testimony from three mental health professionals that, at the time of the offense, he was mentally ill under Georgia law. The record is clear that no witness – expert or lay – testified to the contrary and that the jury was not presented with any evidence that suggested Petitioner was not mentally ill. The basis of Petitioner's claim is that the jury arbitrarily rejected the experts' testimony and refused to return a verdict of guilty but mentally ill, that the straight guilty verdict was based on insufficient evidence, and that his appellate attorneys had a duty to bring this claim to the attention of the Georgia Supreme Court. Petitioner asserts that this was a viable and meritorious issue that could have been properly raised, and counsel were ineffective for failing to litigate it.

Petitioner specifically raises this claim as an alternative to his claim that trial counsel were ineffective during the preparation for and presentation of evidence regarding his mental illness. Petitioner argues that, in the event he was not prejudiced by his attorneys' failure to present certain evidence of his mental illness – for example his history of psychotic episodes and his severe psychiatric symptoms while in jail pretrial – then the jury was bound to find he was mentally ill at the time of the offense.

Petitioner's appellate counsel raised several issues on direct appeal concerning Petitioner's mental health claims including a claim that the burden of proof necessary for the jury to finds a defendant guilty but mentally ill was unconstitutional. Because Petitioner cannot prove that appellate counsel were objectively unreasonable in failing to raise the claim that the

jury verdict was not supported by sufficient evidence, given the other claims they raised on appeal, Petitioner cannot establish deficient performance.

Petitioner also failed to prove the prejudice prong of his ineffective assistance of appellate counsel claim because he fails to show that, but for the failure to allege that the jury was required to find Petitioner guilty but mentally ill, Petitioner would have prevailed on his direct appeal. Though Petitioner claims that the jury arbitrarily rejected the experts' testimony and refused to return a verdict of guilty but mentally ill, (Pet. Br., p. 238), a jury is *not* bound to accept the opinions of mental health expert witnesses, even if there is no contradictory evidence presented. See Wilson v. State, 257 Ga. 444, 449 (1987); Salter v. State, 257 Ga. 88, 89 (1987). For a jury to find a defendant guilty but mentally ill, the defendant must prove his mental illness beyond a reasonable doubt. O.C.G.A. § 17-7-131; Pittman v. State, 269 Ga. 419 (1998).

Even if the prosecution did not present evidence to the contrary at Petitioner's trial, Petitioner cannot establish that the jury absolutely must believe the experts' testimony beyond a reasonable doubt. Because the jury is not obligated to accept the testimonial evidence of mental illness beyond a reasonable doubt, if Petitioner had raised this issue on direct appeal, he would not have prevailed on this claim. Because Petitioner fails to prove that his appeal was prejudiced by not including this claim, this portion of Petitioner's ineffective assistance of appellate counsel is DENIED.

4. Conclusion-Petitioner's Ineffective Assistance of Counsel Claims

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). The totality of representation must be examined in determining the effectiveness or

ineffectiveness of counsel. Hicks v. State, 169 Ga. App. 542 (1984); Dansby v. State, 165 Ga. App. 41, 43 (1983). The seriousness of the charge is also a factor that must be considered when looking at an ineffective assistance of counsel claim. House v. Balkcom, 725 F.2d 608, 615 (11th Cir. 1984). When the Petitioner's life hangs in the balance, the reviewing court must "pay the utmost attention to rights guaranteed under the Constitutions of the United States and the State of Georgia." Ross v. Kemp, 260 Ga. 312 (1990)(citing House v. Balkcom, 725 F.2d 608, 615 (11th Cir. 1984).

The uncontroverted evidence before this Court is that Petitioner is mentally ill now, and was mentally ill at the time of his crimes. However, considering counsel's representation as a whole, the Court does not conclude that counsel's performance was deficient. Even if the Court were to find that trial counsel's alleged errors constituted deficient performance, the Court does not find a reasonable probability, that but for this performance, the result of either phase of Petitioner's trial or appeal would have been different. Accordingly, Petitioner's claims of ineffective assistance of counsel as to the guilt and sentencing phases of trial and as to his appeal are DENIED.

IV. DISPOSITION

Based upon the findings of fact and conclusions of law, this Court hereby orders that the writ of habeas corpus is DENIED as to the conviction and to the sentence. The Clerk for the Superior Court of Butts County, Georgia, is directed to serve a copy of this Order on the Petitioner, Counsel of Record for the parties, and the Council of Superior Court Judges of Georgia.

IT IS SO ORDERED this 21 day of August, 2009.

HONORABLE AUBREY DUFFEY
Superior Court of Butts County
Sitting by Designation

SUPREME COURT OF GEORGIA
Case No. S10E0385

Atlanta, April 18, 2011

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

JERRY SCOTT HEIDLER v. HILTON HALL, WARDEN

From the Superior Court of Butts County.

Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur, except Hunstein, C.J., who is disqualified.

Trial Court Case No. 2001V844

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

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

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

Pamela M. Fishburne, Deputy Clerk

In the Supreme Court of Georgia

Decided: OCT 0 2 2000

S00P0808. HEIDLER v. THE STATE

CARLEY, Justice.

A jury convicted Jerry Scott Heidler of the following offenses: four counts of malice murder; kidnapping with bodily injury; two counts of kidnapping; aggravated sodomy; aggravated child molestation; child molestation; and, burglary. For the murders, the jury recommended four death sentences, finding as the statutory aggravating circumstances that each homicide was perpetrated during Heidler's commission of the other three and that all four deaths occurred during his commission of a burglary. OCGA § 17-10-30 (b) (2). The trial court denied Heidler's motion for new trial, and he appeals.[1]

[1] The crimes were committed on December 4, 1997. The Toombs County grand jury indicted Heidler on March 10, 1998. The State filed its notice of intent to seek the death penalty on April 2, 1998. The trial was held in Walton County from August 23 to September 3, 1999. The jury convicted Heidler on all counts on September 2, 1999, and recommended the four death sentences the following day. In addition to the death penalties, the trial court sentenced Heidler to life

Pre-Trial Issues

1. Heidler claims that his confession resulted from an illegal arrest, but he waived the right to assert that issue on appeal by failing to raise it in the trial court. Rushing v. State, 271 Ga. 102, 104 (2) (515 SE2d 607) (1999); Hardeman v. State, 252 Ga. 286, 288 (2) (313 SE2d 95) (1984). The only objection made below related to the voluntariness of Heidler's statement, and that is the only question which this Court will now consider.

The trial court was authorized to find the following: Heidler was arrested at approximately 2 p.m. on the day the crimes were committed, and his interrogation began about ninety minutes later. The police read Heidler his rights and reviewed the waiver-of-rights form with him before he signed it. The interview lasted about two hours and culminated in a videotaped confession. Heidler was lucid, not intoxicated, and he appeared to understand his rights. He was twenty years old and had a tenth grade education. He was not handcuffed, and was provided with cigarettes and a soft drink. He was neither coerced, threatened, nor promised anything in exchange for his

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imprisonment for kidnapping with bodily injury, twenty years for each kidnapping, life imprisonment for aggravated sodomy, thirty years for aggravated child molestation, twenty years for child molestation, and twenty years for burglary, all sentences to be served consecutively. Heidler filed a motion for new trial on September 20, 1999, which was amended on November 30, 1999, and was denied by the trial court on December 29, 1999. The case was docketed in this Court on February 3, 2000, and was orally argued on May 8, 2000.

statement. He did not request a lawyer or ask that the questioning cease. When asked about the sequence of events and why they occurred, Heidler said several times that he was unsure because it was like "a dream." One of the interrogating officers volunteered to "get in the dream with him," and Heidler claims that this was coercive. However, a review of the record shows that the offer was simply an attempt on the part of the officer to prod Heidler's memory. Viewing the totality of the circumstances, we conclude that the trial court properly denied Heidler's motion to suppress his statement on the ground that it was involuntary. See Lee v. State, 270 Ga. 798, 800 (2) (514 SE2d 1) (1999); OCGA § 24-3-50.

2. Heidler claims a violation of Brady v. Maryland, 373 U.S. 83 (83 SC 1194, 10 LE2d 215) (1963) based upon the purported failure of the State to turn over his Department of Family & Children Services (DFCS) records that were in its possession. However, the trial transcript shows that the prosecution made the DFCS records that it possessed available to the defense before trial, and that Heidler, in turn, furnished many of the records to mental health experts to assist in their pre-trial evaluations of him and that he also introduced a significant number of those records into evidence at trial. See Pace v. State, 271 Ga. 829, 836 (17) (524 SE2d 490) (1999); Dennard v. State, 263 Ga. 453, 454 (4) (435 SE2d 26) (1993) (no Brady violation when the alleged exculpatory evidence is available to the accused at trial);

Davis v. State, 261 Ga. 382, 385 (8) (b) (405 SE2d 648) (1991) (no Brady violation when the alleged exculpatory evidence is presented to the jury at trial).

In addition, Heidler could, and did, obtain the records directly from DFCS by means of his own separate subpoena. See Mize v. State, 269 Ga. 646, 648 (2) (501 SE2d 219) (1998) (in order to prevail on Brady claim, defendant must show he could not obtain the exculpatory evidence on his own with any reasonable diligence). We find no violation by the State of Heidler's discovery rights.

Jury Selection

3. The death penalty qualification of prospective jurors during the guilt-innocence phase of a capital case is not unconstitutional. DeYoung v. State, 268 Ga. 780, 790 (11) (493 SE2d 157) (1997). Heidler further contends that the trial court erroneously found to be qualified several prospective jurors who expressed a bias in favor of the death penalty, and compounded that error by striking for cause several others who were not prejudiced against the imposition of that sentence.

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

Greene v. State, 268 Ga. 47, 48 (485 SE2d 741) (1997), quoting Wainwright v. Witt, 469 U.S. 412, 424 (II) (105 SC 844, 83 LE2d 841) (1985). We must base our review

of the trial court's rulings in this regard upon a consideration of the voir dire as a whole. Crowe v. State, 265 Ga. 582, 588 (9) (a) (458 SE2d 799) (1995). There is no requirement that a prospective juror's qualification or disqualification appear with unmistakable clarity, since the trial court often has to resolve equivocations or conflicts in the responses on voir dire. Ledford v. State, 264 Ga. 60, 64 (6) (439 SE2d 917) (1994); Jefferson v. State, 256 Ga. 821, 823 (2) (353 SE2d 468) (1987). For this reason, this Court must pay deference to the trial court's determination of a prospective juror's qualification, and affirm the ruling below absent some manifest abuse of discretion. Ledford, supra.

a. *Prospective Juror Howard.* According to Heidler, Mr. Howard was not qualified because he would not consider voting for life with the possibility of parole. The voir dire transcript shows, however, that Mr. Howard initially stated that he would consider all three sentencing options and any mitigating evidence. He was adamant that the death penalty is not appropriate for all murderers. Later, he did say that he could not vote for life with the possibility of parole for someone convicted of murder "without hearing all the evidence" and that he had negative feelings about parole "in some cases." However, he then agreed that he could vote for life with parole "if it was prove[n] to me that it was .... worthy." Although he later seemed to equivocate somewhat, Mr. Howard complained that defense counsel had "confused

me quite a bit" regarding the life with parole questions. The trial court itself then questioned Mr. Howard, and he replied that he never meant to say that he would not consider any sentencing option. Mr. Howard agreed that he would consider all of them, but that he would "have to hear the evidence first." Despite Mr. Howard's apparent confusion and seeming equivocation, his answers as a whole support the trial court's finding that he could consider all three sentencing options in accordance with his instructions and his oath. See Bishop v. State, 268 Ga. 286, 289 (6) (486 SE2d 887) (1997). Thus, we conclude that the trial court did not abuse its discretion by qualifying Mr. Howard to serve on the jury.

b. *Prospective Juror Still.* Ms. Still stated that she was able to consider all three possible sentences and that her mind was not made up about any sentence before hearing the evidence. Later, she expressed some leaning toward the death penalty for one convicted of murder. However, in response to a question about whether she could ever vote for life with the possibility of parole, she stated "I wouldn't say I would never [vote for such a sentence because] I don't ... know exactly what I would do in that situation [be]cause I've never been in that situation." She repeated that she would not automatically exclude life with parole, but that "the possibility would be strong" that she would vote for the death penalty. In response to a question by the trial court, however, she said she was not positive how she would

vote because she did not know about the case. A prospective juror is not disqualified merely for expressing a leaning for or against the death penalty. "Instead, the relevant inquiry on appeal is whether the trial court's qualification of the juror is supported by the record as a whole. [Cit.]" Mize, supra at 652 (6) (d). Viewing the record as a whole and giving deference to the trial court's decision, we conclude that the trial court did not err by finding that Ms. Still's views about the death penalty did not impair her ability to serve on the jury. See Mize, supra; Bishop, supra.

c. *Prospective jurors Hawkins, Garrett and Silva.* Pretermitting Ms. Hawkins', Mr. Garrett's and Ms. Silva's voir dire responses, they were not among the first 42 qualified prospective jurors and could have been selected only as alternate jurors. Any error as to the qualification of the 43rd or subsequent prospective juror is harmless, unless use of an alternate juror becomes necessary. Devier v. State, 253 Ga. 604, 607 (3) (b) (323 SE2d 150) (1984). Since no alternate jurors were needed during the trial, the trial court's ruling that these three prospective jurors were qualified, if error, was not harmful. Compare Pope v. State, 256 Ga. 195, 202 (7) (e) (345 SE2d 831) (1986), overruled on other grounds, Nash v. State, 271 Ga. 281 (519 SE2d 893) (1999).

d. *Prospective Juror Malcom.* Initially, Ms. Malcom expressed her belief that she could consider all three sentencing options and mitigation evidence. Later, she

did state that "God didn't spare people to take other people's lives" and that a person who takes a person's life ought to have his life taken. However, she subsequently stated that she would not automatically vote to impose death for a convicted murderer, though she "probably would" vote for death. She expressed a belief in the death penalty, but agreed that, "if the court so provided other provisions, I would be willing to take a look at it." Upon questioning by the trial court, she said that she could fairly consider and vote to impose any one of the three possible sentences. Ms. Malcom's responses show that she was not irrevocably opposed to consideration of any lawful sentence. Thus, we conclude that the trial court did not abuse its discretion by qualifying her to serve on the jury. Mize, supra; Bishop, supra.

e. *Prospective jurors Head, Campbell, Lambert, and Dockery.* Heidler did not challenge these four jurors for cause, and the trial court did not err by failing to excuse them sua sponte. See Mize, supra at 652 (6) (c); Spencer v. State, 260 Ga. 640, 641 (1) (a, b) (398 SE2d 179) (1990).

f. *Prospective jurors Moon, Jordan and Swords.* Because these prospective jurors unequivocally stated that they would automatically vote against the death penalty regardless of the evidence, the trial court did not err by excusing them for cause. See Greene, supra.

4. The venue of Heidler's trial was changed from Toombs County to Walton County. Because the crimes received state-wide media attention, some prospective jurors in Walton County had heard about them. However, based upon a consideration of the entire voir dire transcript, we find that every prospective juror who had formed a fixed opinion about Heidler's guilt due to pretrial media exposure was excused by the trial court, and that all remaining prospective jurors were properly qualified to serve because they acknowledged the obligation to decide the case based solely on the evidence presented at trial. See Irvin v. Dowd, 366 U.S. 717, 723 (81 SC 1639, 6 LE2d 751) (1961); Cromartie v. State, 270 Ga. 780, 784 (9) (a) (514 SE2d 205) (1999).

The Guilt-Innocence Phase of Trial

5. The evidence presented at trial authorized the jury to find the following: Danny and Kim Daniels lived in the town of Santa Claus in Toombs County with their seven children, three of whom were foster children. Heidler's sister was in the Daniels' care as a foster child for forty-five 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, twenty years old at the time, was beginning to develop a relationship with his sixteen-year-old daughter, Jessica. He

had a conversation with Heidler, after which Heidler stopped visiting the Daniels' home.

At approximately 5 a.m. on December 4, 1997, the police in Bacon County 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 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.

The evidence was sufficient to enable a rational trier of fact to find proof of Heidler's guilt of four counts of malice murder, kidnapping with bodily injury, two counts of kidnapping, aggravated sodomy, aggravated child molestation, child molestation, and burglary beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

6. The trial court admitted into evidence five photographs of the victims taken at the crime scene, and Heidler contends these pictures were unduly inflammatory and cumulative of a videotape that also was shown to the jury. Pre-autopsy photographs of a murder victim are generally admissible if they show the nature and extent of the wounds and the relation of the body to other crime scene evidence, such as blood and shell casings. See Jackson v. State, 270 Ga. 494, 498 (8) (512 SE2d 241) (1999); Crozier v. State, 263 Ga. 866, 867 (2) (440 SE2d 635) (1994). Still photographs are relevant and admissible for this purpose, even though they may be duplicative of a crime scene videotape. See Jackson, supra; Foster v. State, 258 Ga. 736, 740 (7) (374 SE2d 188) (1988). Heidler claims that the crime scene was altered in one photograph, but the police only removed the bed sheet that covered Mrs. Daniels' body. See Foster, supra. We conclude that the photographs were relevant and admissible.

7. The trial court admitted into evidence videotapes of police interviews with two of the kidnapped girls, the ten-year-old sexual assault victim and the eight-year-old who witnessed that attack. Because the girls did not testify at trial, Heidler claims that the Confrontation Clause was violated. However, he waived the right to raise this on appeal by failing to object to the admission of the videotapes on that ground. Earnest v. State, 262 Ga. 494, 495 (1) (422 SE2d 188) (1992).

The trial court found sufficient indicia of reliability so as to render the evidence admissible in accordance with OCGA § 24-3-16, which permits the introduction of videotaped interviews of child sex abuse victims. See Vick v. State, 194 Ga. App. 616 (1) (391 SE2d 455) (1990). Each girl was interviewed separately by a law enforcement officer and a DFCS caseworker trained to conduct this type of interview. The videotaped interviews took place only a few hours after the sexual assault and the evidence supports the trial court's finding that the interviewers did not coach the girls, and that the children's responses were consistent, spontaneous and credible. See Allen v. State, 263 Ga. 60, 61 (2) (428 SE2d 73) (1993); Newberry v. State, 184 Ga. App. 356 (2) (361 SE2d 499) (1987). The girls were also available to testify if Heidler desired to cross-examine them. Allen, supra. We find no error in the trial court's admission of the videotapes pursuant to the Child Hearsay Statute.

8. Heidler did not object to testimony concerning the van which he stole before the murders and then used during the abduction of the girls. Earnest, supra. Even if he had objected, the evidence clearly was admissible as part of the res gestae of the crimes for which he was being tried. See Nance v. State, 272 Ga. 217, 221 (4) (526 SE2d 560) (2000).

9. Heidler made a pre-trial announcement of his intent to raise mental illness and insanity as his defenses. Accordingly, the trial court ordered that he undergo a

separate independent evaluation by three psychologists or psychiatrists. See Nance, supra at 218 (2). Although the defense rested in the guilt-innocence phase without presenting any evidence, the trial court allowed the three experts to testify with regard to Heidler's mental health. On appeal, Heidler urges that the trial court erred in permitting this testimony, because a State or court-ordered mental health expert may only appear as a rebuttal witness. Nance, supra. The record shows, however, that Heidler's defense counsel actually urged the trial court to allow the expert witnesses to testify and, in fact, the State objected to this procedure on most of the same grounds that Heidler now urges on appeal. A party cannot request a ruling from the trial court and then, on appeal, take the contrary position and complain that the ruling was error. Pye v. State, 269 Ga. 779, 787 (14) (505 SE2d 4) (1998) ("A party cannot during the trial ignore what he thinks to be an injustice, take his chances on a favorable verdict, and complain later."); Barnes v. State, 269 Ga. 345, 356 (19) (496 SE2d 674) (1998) (invited error is not grounds for reversal). Thus, we find no reversible error in allowing the experts to testify in this case, even though they were not called as rebuttal witnesses.

10. At one point during the State's closing argument, the prosecutor asked the jury to hold Heidler to the same standard "you hold me." Heidler objected, claiming that this suggested that he was required to prove his innocence. According to the

attorney for the State, however, he was only referring to the presumption of sanity and to the absence of any evidence that Heidler was insane. See Parker v. State, 256 Ga. 363, 365 (1) (349 SE2d 379) (1986) (Georgia law presumes sanity and insanity is an affirmative defense); Brown v. State, 250 Ga. 66, 70 (2) (c) (295 SE2d 727) (1982); OCGA § 16-2-3. The trial court ruled that this explanation was adequate, and we conclude, based upon the context of the remark and the explanation, that there was no error.

Heidler did not object to any other portion of the State's closing argument, and thus he waived any right to seek a reversal based thereon. Gissendaner v. State, __ Ga. __ (10) (b) (Case Number S00P0289, decided July 5, 2000). In accordance with our duty under OCGA § 17-10-35 (c) (1), however, we have made an independent examination of the prosecution's closing argument to determine whether, if improper, it had any effect on Heidler's resulting death sentences. We conclude that there is no reasonable probability that the argument "'changed the jury's exercise of discretion in choosing between life imprisonment or death.'" Gulley v. State, 271 Ga. 337, 347 (14) (519 SE2d 655) (1999). Nor is there any evidence of prosecutorial misconduct. Gulley, supra at 346 (10); Roberts v. State, 267 Ga. 669, 671 (3) (482 SE2d 245) (1997).

11. Heidler's assertion that his entry into the Daniels' residence was authorized is based on speculation only. The actual evidence shows that he entered the 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 that he stole a shotgun and committed murders once inside. See Raulerson v. State, 268 Ga. 623, 624 (1) (491 SE2d 791) (1997). Thus, the trial court properly charged the jury on the crime of burglary. Heidler also complains that the trial court erred by instructing the jury on felony murder, but any issue in that regard is moot since the jury convicted him of malice murder. Lee, supra at 801 (4).

12. The trial court charged the jury that the possible verdicts included a finding that Heidler was not guilty by reason of insanity, that he was guilty but mentally ill, or that he was guilty but mentally retarded. The trial court did not err in failing also to instruct on delusional compulsion, OCGA § 16-3-3, because 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. See Wellons v. State, 266 Ga. 77, 87 (16) (463 SE2d 868) (1995).

The trial court properly charged on the burden of proof necessary to support a finding of guilty but mentally ill. Spivey v. State, 253 Ga. 187, 188 (2) (319 SE2d 420) (1984). Contrary to Heidler's further contentions, the controlling statutory

provision regarding such a verdict, OCGA § 17-7-131, is not unconstitutional. Salter v. State, 257 Ga. 88, 70 (3) (356 SE2d 196) (1987).

The instruction on reasonable doubt was a correct statement of the law. Rucker v. State, 270 Ga. 431, 433 (3) (510 SE2d 816) (1999). The trial court also properly charged that the jurors "not be swayed in your deliberations by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." See Dill v. State, 254 Ga. 17 (1) (325 SE2d 765) (1985); Duggan v. State, 225 Ga. App. 291, 295 (3) (483 SE2d 373) (1997). Compare Legare v. State, 250 Ga. 875, 878 (2) (302 SE2d 351) (1983) (error to charge jury in penalty phase not to consider sympathy when determining sentence).

With regard to aggravated sodomy, the trial court instructed that "a female under 16 years of age is legally incapable of giving consent . . . A person commits aggravated sodomy when that person commits sodomy with force and against the will of the other person." Contrary to Heidler's assertion on appeal, this charge did not instruct the jury to presume force when a person under the legal age of consent is sodomized. By its terms, the instruction relates only to the presumption of an underage victim's lack of consent, and it constitutes a correct statement of the law in that regard. See Brewer v. State, 271 Ga. 605, 606 (523 SE2d 18) (1999); State v. Collins, 270 Ga. 42-43 (508 SE2d 390) (1998).

13. Heidler never requested a charge on theft by taking and manslaughter as lesser-included offenses of burglary and murder respectively, and the trial court did not err by failing to charge on those crimes sua sponte. See Hawkins v. State, 267 Ga. 124, 125 (3) (475 SE2d 625) (1996); Fugate v. State, 263 Ga. 260, 262 (2) (431 SE2d 104) (1993); Graham v. State, 250 Ga. 473, 476 (5) (298 SE2d 499) (1983).

14. After the charge, the State objected that the trial court might have misled the jury regarding the disposition of Heidler if he was found guilty but mentally retarded. The trial court agreed, and recharged that such a verdict would preclude further deliberations regarding Heidler's punishment and that he would be sentenced to life with the possibility of parole. Giving this recharge was error, since, in the guilt-innocence phase, the trial court should not inform the jury that the defendant will not receive a death sentence if he is found guilty but mentally retarded. State v. Patillo, 262 Ga. 259, 260-261 (417 SE2d 139) (1992).

However, insofar as the harmful effect of the recharge is concerned, a review of the record shows that all three court-appointed mental health experts testified that 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, Heidler's counsel conceded this point on closing argument by telling the jury:

In any event, there's no evidence of mental retardation in this case

> at all. That's the point I wanted to make. And so you would not have anything to consider regarding mental retardation. So . . . we're not going to suggest to you that it is in order to get our client off or anything like that. The evidence is that he has subnormal intelligence, and the evidence from all three mental health professionals subnormal intelligence, but not mentally retarded. All three said not mentally retarded. So I hope that it – maybe that'll make your deliberations a little easier.

Therefore, the erroneous recharge could not have harmed Heidler, as it did not prejudice the jury against the return of a lawful verdict. A finding that he was guilty but mentally retarded would not have been authorized in any event. Since the error was harmless beyond a reasonable doubt, a reversal is not mandated as to the convictions entered on the authorized finding that Heidler committed the offenses and that his guilt was undiminished by his mental condition.

15. Count 8 of the indictment charged that Heidler committed aggravated sodomy by performing "anal sodomy" upon the kidnap victim, "age 10," with force and against her will. Count 9 of the indictment charged that he committed aggravated child molestation by performing the immoral and indecent act of "anal sodomy" against a child under the age of sixteen. Although the evidence presented at trial showed that there was only one act of anal sodomy, the jury found Heidler guilty of both counts, and the trial court imposed sentences as to each offense. However, the single act was necessary to prove the aggravated sodomy count of the indictment, so

that there was no remaining evidence upon which to base Heidler's conviction for an additional count of aggravated child molestation. See Wyatt v. State, 222 Ga. App. 604, 606 (2) (475 SE2d 651) (1996), Horne v. State, 192 Ga. App. 528, 533 (6) (385 SE2d 704) (1989); OCGA § 16-1-7 (a) (1). Under the facts of this case, the aggravated sodomy conviction includes the aggravated child molestation charge plus the additional element of force. See Brewer, supra at 606-607. Accordingly, the aggravated child molestation conviction merged into the aggravated sodomy conviction as a matter of fact, and we therefore reverse Heidler's conviction and sentence for the crime charged in count 9 of the indictment. Wyatt, supra; OCGA § 16-1-7 (a).

16. There is no evidence that the jury, which was sequestered during the trial, was affected by news coverage.

The Sentencing Phase of Trial

17. Heidler complains generally that the trial court improperly conducted the penalty phase of his trial. However, his reliance upon the admission of testimony from the three expert witnesses in the guilt-innocence phase is clearly without merit, since he specifically requested that the trial court allow that testimony. See Barnes, supra at 356 (19). Although he also complains about the failure of DFCS witnesses to produce certain records, they were not the State's witnesses, but rather his own.

Insofar as the testimony of Dr. Maish, Heidler's mental health expert, is concerned, the trial court properly sustained or overruled the State's various objections to his testimony.

At the conclusion of Dr. Maish's testimony, he responded in the negative when the trial court inquired whether Heidler was mentally retarded. On appeal, Heidler claims that the trial court erred in asking this question, but, at trial, defense counsel said, "I forgot to ask that" and he then proceeded to question Dr. Maish about Heidler's intellectual testing. Since there was no objection, the argument that the trial court erred in posing the question is waived for appeal purposes. Earnest, supra at 495 (1).

We also conclude that, contrary to the assertions on appeal, the trial court did not improperly restrict Heidler's presentation of mitigation evidence. See Barnes, supra at 357-360 (27).

18. Heidler claims that the State improperly introduced evidence that he committed prior crimes as a juvenile. However, defense counsel called an employee of the Department of Juvenile Justice as its mitigation witness and, on direct examination, elicited testimony that Heidler had an altercation with his step-father when he was fourteen or fifteen years old. On cross-examination, the prosecutor asked what Heidler had done, and the witness responded that there had been an

assault with a knife. This was perfectly acceptable cross-examination. OCGA § 24-9-64. Moreover, Heidler did not object, so the issue is waived on appeal. Earnest, supra at 495 (1). Additional complaint about the State's cross-examination of a DFCS caseworker regarding Heidler's commission of a previous burglary is without merit for the same reasons. Earnest, supra.

19. The prosecutor's conduct and argument in the penalty phase were not improper. Gulley, supra at 346 (10); Pye, supra at 788 (19); McClain v. State, 267 Ga. 378, 385 (4) (a) (477 SE2d 814) (1996).

20. Because the jury was entitled to consider the evidence presented in both phases of the trial when determining the sentence, the trial court properly refused to charge that the jurors should not consider Heidler's commission of the murders as aggravating evidence. See Romine v. State, 256 Ga. 521, 528 (3) (350 SE2d 446) (1986); Ross v. State, 254 Ga. 22, 31 (5) (d) (326 SE2d 194) (1985) (jury may consider evidence presented in both phases of the trial when determining sentence).

The trial court properly instructed the jury to consider mitigating circumstances, and that it could impose a life sentence for any reason or no reason at all. See Jenkins v. State, 269 Ga. 282, 295 (24) (498 SE2d 502) (1998); Romine, supra at 529-530 (3). The trial court also correctly charged on the nature and function of mitigating circumstances. Fugate, supra at 263 (5) (a). Since the trial court is not

required to identify specific mitigating circumstances in the charge, it did not err by refusing to instruct the jury to consider residual doubt as such a circumstance. Jenkins, supra at 296 (25). Also, the trial court was not required to instruct the jury on the consequences of a deadlock or to give the jury that option as a possible verdict. Jenkins, supra at 296 (26). The trial court did not err in failing to give several of Heidler's requested charges, the substance of which was otherwise covered by the trial court's instructions.

21. A juror had plane tickets for a trip scheduled to begin on the evening of the last day of deliberations, but there is no evidence that she felt pressured into arriving at a verdict. The trial court assured her that she would be reimbursed for the tickets if the deliberations continued past her departure time. Moreover, Heidler did not object to the trial court's handling of this matter, so this issue is waived on appeal. Earnest, supra at 495 (1).

22. It was not improper to submit to the jury every statutory aggravating circumstance supported by the evidence. Jenkins, supra at 294 (23) (b); OCGA § 17-10-30 (b). However, as an aggravating circumstance supporting the death penalty for each of the murders, the jury relied upon Heidler's commission of the other three. In accordance with the principle of "mutually supporting aggravating circumstances," one of the murders can serve as the aggravating factor in Heidler's commission of

the other three, but none of those three murders can, in turn, serve as the aggravating circumstance for his commission of the fourth. Burden v. State, 250 Ga. 313, 315 (6) (297 SE2d 242) (1987). See also Jenkins, supra at 294 (23) (a); Wilson v. State, 250 Ga. 630, 638 (9) (300 SE2d 640) (1983). Accordingly, we arbitrarily determine that the murder of Mr. Daniels is a statutory aggravating circumstance as to Heidler's commission of the murders of each of the other three victims, and set aside those three murders as a statutory aggravating circumstance in Heidler's murder of Mr. Daniels. See Waters v. State, 248 Ga. 355, 368 (12) (283 SE2d 238) (1981). We are not required to reverse any of the death sentences, however, because all four are based upon Heidler's commission of a burglary as an additional, independent valid statutory aggravating circumstance. Jenkins, supra.

23. Georgia's statutory death penalty scheme is constitutional. Gregg v. Georgia, 428 U.S. 153 (96 SC 2909, 49 LE2d 859) (1976); Thomason v. State, 268 Ga. 298, 312 (11) (486 SE2d 861) (1997); McMichen v. State, 265 Ga. 598, 611 (25) (458 SE2d 833) (1995).

24. The Unified Appeal Procedure is not unconstitutional. Jackson, supra at 498 (10); Wellons, supra at 91 (33).

25. Heidler filed a "Motion to Bar Execution by Electrocution," and claims on appeal that the trial court's failure to hold an evidentiary hearing on this motion

constitutes error. The record shows, however, that Heidler was permitted to and did proffer over 400 pages of documents, including hearing transcripts and autopsy reports, regarding the procedures and effect of execution by electrocution. He fails to specify what additional evidence he would have presented had the trial court ordered an evidentiary hearing, and we therefore conclude that the trial court did not err by holding no evidentiary hearing on this motion. See Pace, supra at 833 (6). We also conclude that the trial court correctly ruled that execution by electrocution is not unconstitutional. Gissendaner, supra at __ (15); Morrow v. State, __ Ga. __ (17) (Case Number S00P0112, decided June 12, 2000); Pruitt v. State, 270 Ga. 745, 749 (6) (514 SE2d 639) (1999); Perkins v. State, 269 Ga. 791, 797 (8) (505 SE2d 16) (1998); Wellons, supra at 91 (32).

26. The evidence was sufficient to authorize the jury to find beyond a reasonable doubt the commission of the statutory aggravating circumstances which supported the death sentences for the murders. Jackson v. Virginia, supra; OCGA § 17-10-35 (c) (2).

27. The death sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor. OCGA § 17-10-35 (c) (1). The death sentences are neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. OCGA § 17-10-35 (c) (3). In

addition to the evidence of the four murders and the other crimes for which Heidler was convicted, the State presented extensive aggravating evidence in the penalty phase, including an escape attempt before trial which resulted in his re-apprehension miles from the jail, numerous weapons which he made while he was incarcerated, repeated threats to kill guards, derogatory comments about the victims, and remorseless comments about the murders, such as a boast that he was a "collector of souls" who was not through with his collection. The similar cases listed in the Appendix support the imposition of the death penalty in this case, in that all involve the deliberate, unprovoked murder of two or more people or a murder committed during a burglary.

Judgment affirmed in part and reversed in part. All the Justices concur, except Fletcher, P. J., who concurs in the judgment and in all Divisions except Division 25, and Benham, C. J., and Sears, J., who concur in part and dissent in part.

APPENDIX

Morrow v. State,.__Ga.__ (Case Number S00P0112, decided June 12, 2000); Pace v. State, 271 Ga. 829 (524 SE2d 490) (1999); Gulley v. State, 271 Ga. 337 (519 SE2d 655) (1999); Palmer v. State, 271 Ga. 234 (517 SE2d 502) (1999); Cook v. State, 270 Ga. 820 (514 SE2d 657) (1999); Jenkins v. State, 269 Ga. 282 (498 SE2d 502); DeYoung v. State, 268 Ga. 780 (493 SE2d 157) (1997); Raulerson v. State, 268 Ga. 623 (491 SE2d 791) (1997); McMichen v. State, 265 Ga. 598 (458 SE2d 833) (1995); Stripling v. State, 261 Ga. 1 (401 SE2d 500) (1991); Ford v. State, 257 Ga. 461 (360 SE2d 258) (1987); Childs v. State, 257 Ga. 243 (357 SE2d 48) (1987); Romine v. State, 256 Ga. 521 (350 SE2d 446) (1986); Cargill v. State, 255 Ga. 616 (340 SE2d 891) (1986); Rivers v. State, 250 Ga. 303 (298 SE2d 1) (1982); Waters v. State, 248 Ga. 355 (283 SE2d 238) (1981).

S99P0808. HEIDLER v. THE STATE.

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

I concur in the majority's affirmance of appellant's adjudication of guilt. However, due only to the concerns I expressed in my partial dissent to Wilson v. The State,[1] I dissent to Division 25 of the majority opinion, and to the affirmance of the death penalty only to the extent that it requires death by electrocution. I am authorized to state that Chief Justice Benham joins me in this partial concurrence and partial dissent.

[1] 271 Ga. 811 (1999).

AO 450 (GAS Rev 10/03) Judgment in a Civil Case

United States District Court

Southern District of Georgia

JERRY SCOTT HEIDLER,

JUDGMENT IN A CIVIL CASE

V.

CASE NUMBER: 6:11-cv-109

GDCP WARDEN,

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☑ **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that in accordance with the Order dated December 12, 2019, Petitioner's Third Amended Petition for Writ of Habeas Corpus by a Person in State Custody is DENIED.

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.

This case stands closed.

Approved by: _____

UNITED STATES DISTRICT COURT ★ SOUTHERN DISTRICT OF GEORGIA ★

January 13, 2020
Date

Scott L. Poff
Clerk

Clarrette Robinson
(By) Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-10249-P

JOSEPH WILLIAMS,

Petitioner-Appellant,

versus

WARDEN, GDCP

Respondent-Appellee.

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

ORDER:

Joseph Williams is a Georgia death row prisoner who seeks a certificate of appealability ("COA") to appeal from the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. His motion for a COA is GRANTED in part as to the following issues only:

(1) Whether the district court violated Williams's due process rights by dismissing Claims 1(a)-1(c), 1(h)-1(m), 1(o), 1(r), 1(t), 1(x), 1(y), 1(aa)-1(dd), 1(ff), 1(gg), 1(ii), 1(jj), 1(ll), 1(oo), 1(qq)-1(ss), 1(uu)-1(aaa), 1(ccc)-1(ggg), and 1(iii) without giving him notice of its intent to dismiss these claims or an opportunity to respond; and

(2) Whether the district court violated Williams's due process rights by denying him leave to amend Claims 1(i), 1(j), 1(k), 1(l), 1(r), 1(t), 1(x), 1(aa), 1(bb), 1(ll), 1(qq), 1(xx), and 1(iii) after the court dismissed these claims as insufficiently pled under Rule 2(c) of the Rules Governing Section 2254 Proceedings.

Williams's motion for a COA is DENIED in part as to all other claims.

/s/ Charles R. Wilson
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
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June 15, 2022

Marcia A. Widder
Georgia Resource Center
104 MARIETTA ST NW STE 260
ATLANTA, GA 30303

Appeal Number: 22-10249-P
Case Style: Joseph Williams v. Warden GDCP
District Court Docket No: 4:12-cv-00106-WTM

Electronic Filing
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.

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