APPENDIX

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APPENDIX A

[FILED: DECEMBER 20, 2023]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12898

DARRYL SCOTT STINSKI,

Petitioner—Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 4:18-cv-00066-RSB

Before ROSENBAUM, GRANT, and ABUDU, Circuit Judges.

PER CURIAM:

Petitioner Darryl Stinski was sentenced to death in Georgia state court for the murders of Susan and Kimberly Pittman. He appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. The district court granted Stinski a certificate of appealability ("COA") on one issue.

After a thorough review of the record and with the benefit of oral argument, we affirm the district court's denial of Stinski's habeas petition.

I. BACKGROUND

A. Facts of Conviction

The Supreme Court of Georgia set forth the facts of the case as follows:

> The evidence at trial showed that Darryl Stinski and Dorian O'Kelley engaged in a crime spree that spanned April 10–12, 2002. On the night of April 10, two police officers observed two men dressed in black clothing in a convenience store. Later, the officers responded to two separate calls regarding the sounding of a burglar alarm at a nearby home and the officers returned to the store after responding to each call. Then, at approximately 5:00 a.m. on April 11, the officers noticed while leaving the store that "the sky was lit up." The officers discovered the victims' house fully engulfed in flames. As one of the officers moved the patrol vehicle to block traffic in preparation for the arrival of emergency vehicles, his headlights illuminated a wooded area where he observed the same two men that he and his partner had observed earlier in the convenience store. O'Kelley, as the neighbor living across the street from the burned house, gave an interview to a local television station. The officer saw the interview on television and identified O'Kelley as being one of the men he had seen in the convenience store and near the fire. The officer later identified both Stinski and O'Kelley in court.
>
> Stinski and O'Kelley left items they had stolen with friends who lived nearby. The friends handed those items over to the police. Testimony showed that, before their arrest, O'Kelley had

bragged about raping a girl and keeping one of her teeth as a me-mento and Stinski had laughed when he saw O'Kelley being interviewed on the news in front of the victims' house.

Stinski gave two videotaped interviews with investigators after his arrest, the second of which was suppressed on his motion. In the interview the jury heard, Stinski confessed to participating in the crime spree described below, which began with burglarizing a home and leaving when a motion detector in this first home set off an alarm. After their botched bur-glary of the first home, Stinski and O'Kelley turned off the electricity to the home of Susan Pittman and her 13–year–old daughter, Kimberly Pittman, and entered as both victims slept. O'Kelley took a walking cane and began beating Susan Pittman, while Stinski held a large flashlight. Stinski beat Susan Pittman with the flashlight and then left the room to subdue Kimberly Pittman, who had awakened to her mother's screams. O'Kelley then beat Susan Pittman with a lamp and kicked her. At some point, Susan Pittman was also stabbed three to four times in the chest and abdomen. Stinski took Kimberly Pittman upstairs so she would not continue to hear her mother's screams. Susan Pittman eventually died from her attack. Stinski and O'Kelley then brought Kimberly Pittman back downstairs, drank beverages, and discussed "tak[ing] care of" her. Stinski took Kimberly Pittman back upstairs and bound and gagged her. As Stinski rummaged through the house downstairs, O'Kelley raped Kimberly Pittman. Stinski and O'Kelley then agreed that Stinski would begin

> beating Kimberly Pittman with a baseball bat when O'Kelley said a particular word. On cue, Stinski hit Kimberly Pittman in the head with the bat as she knelt on the floor, bloody from the rape and with her hands bound. O'Kelley then slit Kimberly Pittman's throat with a knife but she remained alive. Stinski went downstairs and came back upstairs when O'Kelley called him. Stinski then hit Kimberly Pittman in her knee with the bat as O'Kelley tried to suffocate her. O'Kelley then took another knife and stabbed her in the torso and legs. O'Kelley kicked her and threw objects at her head, but her groans indicated that she was still alive. Stinski and O'Kelley then set fires throughout the house and went to O'Kelley's house across the street to watch the fire. Kimberly Pittman died of smoke inhalation before the fire fully consumed the house. Later, in the early morning hours of April 12, Stinski and O'Kelley broke into numerous vehicles in the neighborhood.

Stinski v. State, 286 Ga. 839, 840–41 (2010).

B. Procedural History

1. *Pre-Trial Preparation*

In June 2002, Stinski was indicted by a grand jury on two counts of malice murder and related charges, and the prosecutors sought the death penalty.[1] *Id.* at n.1. Three attorneys were ap-pointed to represent Stinski. *Stinski v. Warden*, No. 2011-V-942, at 6 (Super. Ct. Butts Cnty. Ga. Jan. 15, 2017). Trial counsel's mitigation strategy involved

[1] O'Kelley was tried separately and convicted on two counts of malice murder and related charges. *O'Kelley v. State*, 284 Ga. 758, 758 n.* (2008). He also received a death sentence for the murders. *Id.*

showing that Stinski "[got] caught up" in the crime due to his immaturity, troubled background, and O'Kelley's influence. State Habeas Hr'g Tr. vol. 1, 171:6–17, ECF No. 13-15.

Counsel retained two experts for the mitigation phase of trial: Dale Davis, a social worker and mitigation specialist, and Dr. Jane Weilenman, a clinical psychologist. *Id.* at 147:16–148:24, 159:22–161:5.

To prepare for her testimony, Davis met with Stinski "many times," interviewed forty people, and prepared an "extensive" so-cial history on Stinski, billing over 400 hours to the case. *Stinski*, No. 2011-V-942, at 31–35; State Habeas Hr'g Tr. vol. 262, 73150–51, ECF No. 24-8 ("Persons Interviewed" Mem.); State Habeas Hr'g Tr. vol. 319, 90071–84, ECF No. 26-17 (Davis's billing records).

Dr. Weilenman conducted a psychological evaluation of Stinski to determine his mental-health status and social history. State Habeas Hr'g Tr. vol. 321, 90813, ECF No. 26-19 (Weilenman Psychological Evaluation). To prepare her report and testimony, Dr. Weilenman met with Stinski at least four times, corresponded with him in writing, reviewed background documents, and con-ducted interviews of mitigation witnesses. *Id.*; State Habeas Hr'g Tr. vol. 254, 70690–97, ECF No. 23-21 (written correspondence); Hr'g Tr. vol 1, 197:22–198:1, ECF No. 13-15. Dr. Weilenman did not conduct any psychological testing, and counsel testified that she never recommended testing by additional experts, either. *Stinski*, No. 2011-V-942, at 38; Hr'g Tr. vol 1, 100:23–101:5, ECF No. 13-15; State Habeas Hr'g Tr. vol. 2, 299:1–13, ECF No. 13-16.

According to Stinski, though, several times before trial (in-cluding in a December 2004 email, a January 2005 defense-team meeting, and another meeting sometime in

2007 just before trial), Davis raised the issue of retaining additional experts besides herself and Dr. Weilenman. State Habeas Hr'g Tr. vol. 146, 38346–47, ECF No. 19-9 (emails between Davis and counsel); State Habeas Hr'g Tr. vol. 5, 835:7–36:22, ECF No. 13-19; Hr'g Tr. vol. 1, 158:12–59:21, ECF No. 13-15.

2. *Trial*

Trial began in May 2007. On June 8, 2007, at the conclusion of the guilt-innocence phase of trial, the jury found Stinski guilty on all counts, including two lesser-included counts of felony murder. Verdict Form, 34–37, ECF No. 7-11.

During the sentencing phase, trial counsel presented extensive mitigation evidence, calling twenty-six witnesses to testify, including Davis and Dr. Weilenman. *Stinski*, No. 2011-V-942, at 42–68. Many witnesses testified about Stinski's childhood and back-ground, including his frequent moves, his parents' divorce, his experiences of abuse and neglect, and his family's history of alcohol-ism and mental-health issues. *Id.* Several of his former classmates and a teacher testified to Stinski's nature as a "follower" and his at-tempts to fit in with others. *Id.* at 49–50, 56. And several also testified about O'Kelley and his potential influence on Stinski. *Id.* at 43.

Besides these witnesses, trial counsel called the two retained experts, Davis and Dr. Weilenman, to testify during the sentencing phase. Through Davis, the mitigation specialist, "several volumes of records" and a social history on Stinski were introduced into the record. *Id.* at 45; Trial Tr. vol. 11, 2350–455, ECF No. 10-9.

Dr. Weilenman's testimony built upon the records and his-tory introduced by Davis and the other mitigation witnesses, ex-plaining how Stinski's entire background,

not just the immediately preceding events, led to the crime. *Stinski*, No. 2011-V-942, at 61; Trial Tr. vol. 13, 2766–845, ECF No. 10-11. Dr. Weilenman testified extensively about the general themes of instability, neglect, abandonment, and abuse in Stinski's childhood. *Stinski*, No. 2011-V-942, at 61; Trial Tr. vol. 13, 2771–827, ECF No. 10-11. Throughout her testimony, Dr. Weilenman also noted Stinski's various mental-health diagnoses, including attention-deficit/hyperactivity disorder, "adjustment disorder with depressed features," a potential learning disability, and post-traumatic stress disorder. Trial Tr. vol. 13, 2817:3–20, ECF No. 10-11. In explaining Stinski's diagnoses and general immaturity, Dr. Weilenman discussed the development of the frontal lobes and Stinski's executive functioning, suggesting that his impulse control and follower tendencies may have improved with time, post-crimes. *Id.* at 2817:20–18:17, 2819:12–20:12, 2822:2–85:22.

At the end of the sentencing phase, on June 12, 2007, the jury found that nine aggravating factors warranted the death sentence for Stinski for the murders of the Pittmans:

> [1] The offense of murder [of Susan Pittman] was committed while the defendant was engaged in the commission of a burglary. . . .
>
> [2] The offense of murder [of Susan Pittman] was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind of the defend-ant[,] or
>
> [3] The offense of murder [of Susan Pittman] was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim before death. . . .

> [4] The offense of murder [of Kimberly Pittman] was committed while the defendant was engaged in the commission of another capital felony (the murder of Susan Pittman)[.]
>
> [5] The offense of murder [of Kimberly Pittman] was committed while the defendant was engaged in the commission of a burglary.
>
> [6] The offense of murder [of Kimberly Pittman] was committed while the defendant was engaged in the commission of arson in the first degree.
>
> [7] The offense of murder [of Kimberly Pittman] was outrageously or wantonly vile, horrible, or inhuman in that it involved torture to the victim before death[,] or
>
> [8] The offense of murder [of Kimberly Pittman] was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind of the defend-ant[,] or
>
> [9] The offense of murder [of Kimberly Pittman] was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim before death.

Verdict Sentencing Form, 210–13, ECF No. 8-11. The trial court denied Stinski's motion for a new trial, *Stinski*, No. 2011-V-942, at 2, and the Georgia Supreme Court affirmed Stinski's convictions and death sentence, *Stinski*, 286 Ga. at 840, *cert. denied*, *Stinski v. Georgia*, 562 U.S. 1011 (2010).

3. *State Court Habeas Proceedings*

Stinski filed a petition for a writ of habeas corpus in the Superior Court of Butts County on September 26, 2011, State Pet. Writ Habeas, ECF No. 11-19, and amended his petition on March 21, 2013, State First Am.

Pet. Writ Habeas, ECF No. 12-24. Stinski argued, among other claims, that his trial counsel rendered ineffective assistance during the sentencing phase of trial. *Id.* at 9–24.

The state habeas court held an evidentiary hearing at which twenty witnesses were called, *Stinski v. Ford*, No. 4:18-CV-66, 2021 WL 5921386, at *6 (S.D. Ga. Dec. 15, 2021); *Stinski*, No. 2011-V-942, at 2, including three additional experts: Dr. Joette James, a clinical neuropsychologist, State Habeas Hr'g Tr. vol. 6, 1150–263, ECF No. 13-20; Dr. Peter Ash, a forensic psychiatrist, State Habeas Hr'g Tr. vol. 3, 417–579, ECF No. 13-17; and Dr. James Garbarino, a developmental psychologist, State Habeas Hr'g Tr. vol. 7, 1322–445, ECF No. 13-21. As a part of his ineffective-assistance-of-counsel claim, Stinski argued that his trial counsel unreasonably neglected to pro-cure and present expert mental-health mitigation evidence from the three doctors. *Stinski*, No. 2011-V-942, at 81.

The additional proposed expert testimony focused on deficiencies or abnormalities in Stinski's brain functioning, caused by the psychological maltreatment he experienced in childhood, that could have made him particularly vulnerable to outside influence in a high-stress situation. The testimony thus implicated Stinski's culpability on the night of the crime. Hr'g Tr. vol. 6, 1220:10–21:8, ECF No. 13-20; Hr'g Tr. vol. 3, 477:2–20, ECF No. 13-17; Hr'g Tr. vol. 7, 1411:6–16, ECF No. 13-21. Two experts, Dr. James and Dr. Ash, conducted cognitive-function testing. Hr'g Tr. vol. 6, 1159–61, ECF No. 13-20; Hr'g Tr. vol. 3, 463–67, 473, ECF No. 13-17. All three experts reviewed Dr. Weilenman's social history as a part of their analysis. Hr'g Tr. vol. 6, 1258:17–20, ECF No. 13-20; Hr'g Tr. vol. 3, 437:7–12, ECF No. 13-17; Hr'g Tr. vol. 7, 1411:19–20, ECF No. 13-21.

The Georgia State Superior Court denied Stinski's habeas petition. *Stinski*, No. 2011-V-942, at 1. In relevant part, the state habeas court addressed both prongs of the *Strickland* test regarding Stinski's ineffective-assistance-of-counsel-at-the-sentencing-stage claim. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defining the two-part test for ineffective assistance of counsel as requiring the defendant to show that (1) counsel's performance was deficient and (2) that deficient performance prejudiced the defense).

As to deficient performance, the court found that trial counsel was "reasonable in retaining Dr. Weilenman and relying upon her findings, which did not include any recommendation of further testing" or additional experts. *Stinski*, No. 2011-V-942, at 38. "Where, as here, trial counsel presented substantial mitigation, but did not employ the additional means of mitigation as urged by Petitioner," counsel was not ineffective for not pursing that line of investigation, the court concluded. *Id.*

As to the prejudice prong, the state habeas court found that Stinski's trial attorneys "effectively presented much of the same factual evidence urged by Petitioner" and his chosen experts related to his life circumstances, immaturity, susceptibility to O'Kelley's in-fluence, and developmental issues. *Id.* at 5, 80–83 ("The fact that Petitioner's new expert witnesses may provide additional details regarding similar conclusions does not equate to a showing of prejudice."). Because the subject matter raised by Stinski's habeas wit-nesses was "largely cumulative" of the testimony actually and effectively presented at trial, the court found, Stinski had not adequately demonstrated prejudice. *Id.* at 5, 42, 80. And "[c]onsidering the overwhelming evidence in aggravation," the court concluded that "new evidence of Petitioner's subtle neurological impairments" would not,

"in reasonable probability," have altered the outcome of the sentencing phase." *Id.* at 80. Accordingly, the court denied Stinski's ineffective-assistance-of-counsel claims. *Id.* at 5.

On February 5, 2018, the Georgia Supreme Court denied Stinski's application for a certificate of probable cause to appeal the denial of his habeas petition. *Stinski v. Warden*, No. S17E1093 (Sup. Ct. Ga. Feb. 5, 2018).

4. *Federal Court Habeas Proceedings*

Stinski timely filed a petition for a writ of habeas corpus un-der 28 U.S.C. § 2254 in the United States District Court for the Southern District of Georgia. As relevant for this appeal, Stinski argued his trial counsel "unreasonably neglected to present available expert mental health mitigation evidence, including testimonies from experts such as Dr. James, Dr. Ash, and Dr. Garbarino." *Stinski*, 2021 WL 5921386, at *7.

The district court denied Stinski's claims. *Id.* at *1. It concluded that Stinski failed to show that the state-court decision denying his ineffective-assistance-of-counsel claim was based on an un-reasonable determination of the facts under § 2254(d)(2). The district court also found that the state habeas court reasonably deter-mined that Stinski had failed to satisfy both *Strickland* prongs, *id.* at *10–16. As to the ineffectiveness prong, the district court concluded that "the state court reasonably determined that trial counsel's decision not to retain additional experts was supported by 'rea-sonable professional judgments.'" *Id.* at *13 (quoting *Strickland*, 466 U.S. at 690–91). The district court found that the record "at best" revealed contradictory evidence about whether Dr. Weilenman discussed the need to retain additional experts, and Dr. Weilenman never recommended additional testing. So the district court thought the record

lacked enough evidence to overcome the presumption of correctness afforded to a factual determination made by the state court. *Id.* (stating that overcoming such a presumption requires "clear and convincing evidence").

As to the prejudice prong, the district court reiterated the state court's findings that Stinski's new proposed evidence was largely cumulative or duplicative of that presented at trial because it covered the same social history and themes of abuse, instability, abandonment, trauma, and neglect provided by Dr. Weilenman in the sentencing phase. *Id.* The district court also echoed the state court's finding that the evidence against Stinski was "highly aggravating," and that "it is hard to imagine that any amount of mitigating evidence could have outweighed it." *Id.* at *15–16.

On January 14, 2022, Stinski moved under Rule 59(e), FED. R. CIV. P., to alter or amend the judgment. Among other issues, Stinski argued that he was entitled to a certificate of appealability regarding his ineffective-assistance-of-counsel claim because, at the time the district-court opinion was issued, a circuit split existed on the correct application of Sections 2254(d)(2) and 2254(e)(1) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and the Eleventh Circuit had no binding precedent on the issue.

The district court granted a COA on just one issue: "whether the Court properly applied Sections 2254(d)(2) and 2254(e)(1) of the AEDPA in the Habeas Order when evaluating Petitioner's ineffective assistance of counsel claim." Order, 35, ECF No. 75. In other words, the district court explained, it granted Stinski a COA on the issue of whether it was proper for the district court "to apply Section 2254(d)(2)'s deference to the state habeas court's *decision* but apply Section 2254(e)(1)'s deference to the

state habeas court's *individual findings of fact*." *Id.* at 31 (emphasis in original). Invoking the certificate of appeal that the district court granted, Stinski filed notice of this appeal on August 30, 2022.

II. STANDARDS OF REVIEW

This Court reviews "de novo a district court's denial of habeas relief on an ineffective-assistance-of-counsel claim, which presents a mixed question of law and fact." *Pye v. Warden*, 50 F.4th 1025, 1034 (11th Cir. 2022) (en banc). But AEDPA governs our re-view of federal habeas petitions. AEDPA prescribes a highly deferential framework for evaluating issues previously decided in state court. *Id.* Under AEDPA, a federal court may not grant habeas relief on claims that were "adjudicated on the merits in [s]tate court" unless the state court's decision (1) "was contrary to, or in-volved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d).

Regarding § 2254(d)(2), we must defer to a state court's de-termination of the facts unless the state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." *Id.* § 2254(d)(2). Section 2254(d)(2) requires us to give state courts "substantial deference." *Brumfield v. Cain*, 576 U.S. 305, 314 (2015). "We may not characterize . . . state-court factual determinations as unreasonable 'merely because [we] would have reached a different conclusion in the first instance.'" *Id.* at 313–14 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). "If '[r]easonable minds reviewing the record might disagree

about' the state court factfinding in question, 'on habeas review that does not suffice to supersede' the state court's factual determination." *Daniel v. Comm'r*, 822 F.3d 1248, 1259 (11th Cir. 2016) (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)). Regarding § 2254(e)(1), we presume that the state court's factual de-terminations are correct, absent clear and convincing evidence to the contrary. *Pye*, 50 F.4th at 1035.

On each claimed basis for relief, we review "the last state-court adjudication on the merits." *See Greene v. Fisher*, 565 U.S. 34, 40 (2011). In this case, where the Georgia Supreme Court's final decision "doesn't come with reasons," we must "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale and presume that the unexplained decision adopted the same reasoning." *Pye*, 50 F.4th at 1034 (internal quotation marks omitted) (quoting *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)).

In sum, AEDPA sets "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted).

III. DISCUSSION

As we've noted, the district court certified the following question on appeal: "whether the Court properly applied Sections 2254(d)(2) and 2254(e)(1) of the AEDPA [in the Habeas Order] when evaluating Petitioner's ineffective assistance of counsel claim." Order, 12, 31, 35, ECF No. 75. That is, "whether it was proper for the [c]ourt to apply Section 2254(d)(2)'s deference to the state habeas court's *decision* but apply Section 2254(e)(1)'s deference to the state habeas court's

individual findings of fact." *Id.* at 31 (emphasis in original). Our review is limited to this issue. *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998) ("[I]n an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the COA.").

After careful review of the record and with the benefit of oral argument, we conclude that the district court properly applied §§ 2254(d)(2) and 2254(e)(1) when evaluating the state habeas court's decision and factual determinations. Under § 2254(d)(2), a federal court may not grant habeas relief on claims that were "ad-judicated on the merits in [s]tate court" unless the state court's decision was, among other potential exceptions, "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." Section 2254(e)(1) further mandates that a state court's findings of fact "shall be presumed to be correct," unless rebutted "by clear and convincing evidence." While the Supreme Court has not yet defined the precise relationship between these two provisions, *Burt v. Titlow*, 571 U.S. 12, 18 (2013), since the district court granted its COA, our binding precedent has definitively answered the question certified for appeal in this case.

In *Pye v. Warden*, we held, in an en banc opinion, that (1) a petitioner must meet § 2254(e)(1)'s "clear and convincing evidence" burden to overcome the presumption of correctness ap-plied to state-court factual determinations, and (2) even if a petitioner successfully meets that burden, he has not necessarily met his burden under § 2254(d)(2). 50 F.4th at 1035. That is, "that decision might still be reasonable even if some of the state court's individual factual findings were erroneous—so long as the decision, taken as a whole, doesn't constitute an unreasonable determination of the facts and isn't based on

any such determination." *Id.* (quotation marks omitted). *Pye* makes clear that Sections 2254(e)(1) and 2254(d)(2) are independent hurdles to relief. *Id.* (citing *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (noting that subsections (e)(1) and (d)(2) are "independent requirements")).

Pye also analyzed the reasonableness of the state court's de-terminations there "with respect to each alleged deficiency, and with respect to the deficiencies cumulatively." *Id.* at 1042. For each alleged deficiency, the court first resolved challenges to the state habeas court's factual determinations, finding that even where the state court's assessment "might have been debatable," its factual findings were not "clearly and convincingly erroneous." *Id.* at 1043 (cleaned up). Then the court determined that each individual deficiency was reasonably found nonprejudicial by the state habeas court. *Id.* at 1043–1055 (finding the weight that the state court gave to each factor in its prejudice analysis was not unreasonable in light of the factual record); *id.* at 1049 ("None of [the state habeas court's] choices individually resulted in a decision that . . . was based on an unreasonable determination of the facts.").

Finally, the court looked at the deficiencies cumulatively and the reasonableness of the state habeas court's ultimate conclusion: "Even if the state court's prejudice determination as to each ground of allegedly deficient performance was reasonable, we must still decide whether its conclusion as to the cumulative prejudice constituted an unreasonable application of *Strickland*." *Id.* at 1055. Ultimately, the *Pye* court concluded that, "[g]iven the reason-ableness of the state court's weighing of the evidence and the lack of contrary precedent, AEDPA requires us to defer to that court's cumulative-prejudice conclusion because it wasn't . . .

based on an unreasonable determination of the facts." *Id.* at 1056 (citing § 2254(d)).

Although the district court decided Stinski's habeas claim before we issued *Pye*, the district court was spot on in its analysis. Indeed, the district court articulated the same standard and followed the same application as we did in *Pye*.

In particular, the district court stated that § 2254(e)(1)'s bur-den applied to state-court findings of fact, *Stinski*, 2021 WL 5921386, at *8 ("The Court 'presume[s] findings of fact made by state courts are correct, unless a petitioner rebuts that presumption by clear and convincing evidence.'"), and that § 2254(d)(2) set the standard for reviewing state-court decisions, *id.* ("Regarding Section 2254(d)(2), the Court must 'evaluat[e] whether a state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.'" (quotation marks omitted)). The district court then applied § 2254(e)(1)'s presumption of correctness to state-court factual findings, asking whether Stinski had carried his burden to rebut that presumption. *See id.* at *13 (finding that Stinski did not over-come the "presumption of correctness" afforded to the state court's determination that Dr. Weilenman did not recommend further testing and additional experts). Then, under § 2254(d)(2), the district court asked whether the state court's overall determination was reasonable, given the evidence presented. *See id.* (holding that the state court "reasonably determined that trial counsel's decision not to retain additional experts was supported by 'reasonable professional judgments[,]'" and that "the state habeas court reasonably determined that Petitioner failed to establish prejudice for [any alleged] deficiency"). The district court followed this analysis for both the deficient-

performance and prejudice prongs of *Strickland*. *See id.* at *9–15. Therefore, the district court properly articulated the rules and applied them in Stinski's case.

Stinski's arguments to the contrary are unavailing. Stinski first asserts that, in violation of *Miller-El*, 537 U.S. at 341, the district court impermissibly combined the two standards under § 2254, claiming that the district court required that the petitioner prove by clear and convincing evidence that the state-court *decision*, as opposed to *an individual finding of fact*, was objectively unreasonable. *Miller-El* stands for the proposition that "AEDPA does not re-quire petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence." 537 U.S. at 341.

But the district court did no such thing. It did not apply a clear-and-convincing-evidence burden to § 2254(d)(2)'s unreasonable-decision review. As the district court stated in its order granting the COA and demonstrated in the underlying order itself, the district court applied § 2254(e)(1) to state-court factual findings and § 2254(d)(2) to state-court decisions—as *Miller-El* requires. *Stinski*, 2021 WL 5921386, at *8.

And to the extent that Stinski argues that the district court treated §§ 2254(e)(1) and 2254(d)(2) as compounding barriers to re-lief—such that an erroneous factual finding under § 2254(e)(1) was *necessary* to find an unreasonable determination of fact under § 2254(d)(2)—the district court did not do this, either. It merely asked, where the petitioner attempted to rebut a state-court factual finding, whether he had done so with clear and convincing evidence. *See Stinski*, 2021 WL 5921386, at *13. Then, it looked at the evidence presented before the state court and asked if its ultimate determination was reasonable. *See id.* So the district court relied on the state court's

undisturbed factual findings to hold that the state court's ultimate conclusion was not based on an unreasonable determination of fact. That is not the same thing as using § 2254(e)(1) as a prerequisite to applying § 2254(d)(2).

Nor does Stinski offer specific examples of where he believes the district court improperly "merged" the standards or treated § 2254(e)(1) as a prerequisite in its application of the rule. Instead, Stinski advocates for an entirely new rule.

Stinski argues that § 2254(e)(1)'s burden applies to only *new* evidence presented to the district court, not evidence that was also presented to the state court. In so arguing, he implies that we should adopt the Ninth Circuit's (former) approach to § 2254: first, resolve "intrinsic" challenges to the state court's decision under § 2254(d)(2)'s "unreasonable determination" standard; then, if the state court's fact-finding process survives, or if no intrinsic challenge is raised, look to any new or "extrinsic" evidence presented for the first time in federal court and see if it survives § 2254(e)(1)'s clear-and-convincing-evidence standard. *Taylor v. Maddox*, 366 F.3d 992, 999–1000 (9th Cir. 2004), *overruled by Pinholster*, 563 U.S. at 185; *Hayes v. Sec'y*, 10 F.4th 1203, 1223 (11th Cir. 2021) (Newsom, J., concurring) (stating that the Ninth Circuit alone has held that "§ 2254(e)(1)'s presumption applies only when a habeas petitioner presents new evidence in federal court"). Stinski contends that be-cause he presented no "new" evidence to the district court, § 2254(e)(1)'s clear-and-convincing-evidence burden should not have been applied to his challenge.

But we rejected the Ninth Circuit's approach in *Pye*, where we articulated and applied a contrary standard. 50 F.4th at 1052–53 (applying § 2254(e)(1)'s "clear and

convincing" evidence standard where the petitioner presented no new evidence to rebut a state habeas court finding). We also noted previous cases in our Circuit that declined to follow the Ninth Circuit's approach in *Taylor*. *Id.* at 1040 n.9 (citing *Landers v. Warden*, 776 F.3d 1288, 1298 (11th Cir. 2015)); *see also Prevatte v. French*, 547 F.3d 1300, 1304 n.1 (11th Cir. 2008) (noting that "the plain language of § 2254 does not provide the basis" for petitioner's argument that § 2254(d)(2) is applicable and § 2254(e)(1) is inapplicable where no new evidence is presented to the federal court).

Besides that, even the Ninth Circuit no longer follows the approach Stinski argues for. The Supreme Court's decision in *Cullen v. Pinholster* "eliminated the relevance of 'extrinsic' challenges when we are reviewing state-court decisions under AEDPA, . . . because it held that petitioners may introduce new evidence in federal court only for claims that we review de novo. . . . Thus *Taylor*'s suggestion that an 'extrinsic' challenge may occur 'once the state court's fact-findings survive any intrinsic challenge' under § 2254(d)(2) is no longer applicable." *Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014) (citing *Pinholster*, 563 U.S. at 185).

The upshot of this is that Stinski's proposed application of § 2254(e)(1) does not comport with the law of this Circuit and is no longer even enthusiastically endorsed by the Ninth. *See also id.* at 1001 ("[O]ur panel decisions appear to be in a state of confusion as to whether § 2254(d)(2) or (e)(1), or both, applies to AEDPA review of state-court factual findings. . . . We believe any tension between *Taylor* and our cases or between *Taylor* and limited statements by the Supreme Court will have to be

resolved by our court en banc, or by the Supreme Court.").[2]

Finally, to the extent that Stinski's remaining arguments can be construed as a challenge under § 2254(d)(2), asserting that the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented, these arguments are also unavailing.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. *Strickland*, 466 U.S. at 686. As we've noted, to succeed on an ineffective-assistance-of-counsel claim, a movant must show that (1) his attorney's performance was deficient, and (2) the deficient performance prejudiced his defense. *Id.* at 687. A court need not address both prongs if a defendant has made an insufficient showing of one. *Id.* at 697. But when both *Strickland* and AEDPA apply, "the question is not whether counsel's actions were reasonable" or there was prejudice; "[t]he question is whether there is *any* reasonable argument that counsel satisfied *Strickland*'s deferential standard" or that the errors were not prejudicial. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (emphasis added).

In this case, trial counsel presented substantial mitigation evidence, and the new habeas evidence was "largely cumulative" of that presented at trial. *Stinski*, No. 2011-V-942, at 37–39, 80–83. Trial counsel presented testimony from twenty-six witnesses during the sentencing phase at trial, including two experts. *Id.* at 80.

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[2] To the extent that Stinski asks for clarity on the order in which a reviewing court must approach challenges to state-court decisions versus individual findings of fact, we decline to reach this issue, as it is not necessary to adopt a rigid approach to our system of review in order to resolve the issue on appeal.

These witnesses gave an "extensive and detailed" account of Stinski's background, including the abuse and neglect he was subjected to as a child, giving the jury an explanation for Stinski's participation in the crime. *Id.*

As for the new expert testimony Stinski proffered in the state habeas proceeding, it merely "provide[d] additional details regarding similar conclusions" as the experts presented at trial. *Id.* at 82; *Holsey v. Warden*, 694 F.3d 1230, 1260–61 (11th Cir. 2012) (stating that postconviction proceeding evidence is largely cumulative of that presented at trial "when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury"). The new experts covered the same themes as Dr. Weilenman's testimony: the instability, neglect, abandonment, and abuse Stinski experienced as a child; his "follower" tendencies and susceptibility to peer pressure; and his emotional immaturity, characterized by his impulsivity and inability to consider consequences. *Compare* Trial Tr. vol. 13, 2811–25, ECF No. 10-11, *with* Hr'g Tr. vol. 6, 1191–93, 1214, ECF No. 13-20, Hr'g Tr. vol. 3, 477–78, 491–95, 543–45, 554–55, ECF No. 13-17, *and* Hr'g Tr. vol. 7, 1339–44, 1360–81, 1396–97, ECF No. 13-21.

And the new experts offered similar bottom-line conclusions as those Dr. Weilenman testified to: that Stinski's background made him more impulsive and more easily influenced, such that a jury could infer that his background affected his behavior on the night of the crime. *Compare* Trial Tr. vol. 13, 2823–24, ECF No.10-11, with Hr'g Tr. vol. 6, 1220–21, ECF No. 13-20, Hr'g Tr. vol. 3, 491–93, ECF No. 13-17, *and* Hr'g Tr. vol. 7, 1411:6–16, ECF No. 13-21. That the additional experts further explained scientific terms and concepts that Dr. Weilenman had already introduced—such as executive

functioning, or frontal lobe anatomy—"does not alter the cumulative nature of the rest of the additional evidence." *Holsey*, 694 F.3d at 1264.

Ultimately, when we weigh this mitigation evidence against the nine aggravating factors that the jury found, we can't say that no reasonable jurist would have reached the same decision denying Stinski relief that the state habeas court did.

IV. CONCLUSION

For the foregoing reasons, the district court correctly articulated and applied the standards from §§ 2254(d)(2) and (e)(1), as clarified in this Court's decision in *Pye*. We therefore affirm the district court's denial of Stinski's habeas petition.

AFFIRMED.

APPENDIX B

[FILED: JULY 28, 2022]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

DARRYL SCOTT STINSKI, Petitioner, v. WARDEN BENJAMIN FORD, Respondent.	CIVIL ACTION NO. 4:18-CV-66

ORDER

In 2007, following a trial in the Superior Court of Chatham County, a jury convicted Petitioner Darryl Stinski of two counts of malice murder, two counts of felony murder, and other related crimes for the murders of Susan Pittman and her thirteen-year-old daughter, Kimberly Pittman. (Doc. 7-11, pp. 34–37.) Petitioner was sentenced to death on June 13, 2007. (Doc. 8-1, pp. 210–215.) After the completion of his direct appeal and state habeas corpus proceedings, Petitioner filed a Petition for Writ of Habeas Corpus in this Court, pursuant to 28 U.S.C. § 2254, challenging his conviction and death sentence. (Doc. 1.) On December 15, 2021, the Court denied Petitioner's Petition for Writ of Habeas Corpus and denied him a Certificate of Appealability. (Doc. 72.) Petitioner has now filed a Motion to Alter or Amend Judgment, pursuant to Federal Rule of Civil Procedure

59(e), asking the Court to reconsider its decision. (Doc. 74.) For the reasons set forth below, the Court **GRANTS in part** and **DENIES in part** Petitioner's Motion to Alter or Amend Judgment. (*Id.*) Specifically, the Court **GRANTS** Petitioner a Certificate of Appealability on the issue of whether the Court properly applied Sections 2254(d)(2) and 2254(e)(1) of the AEDPA in the Habeas Order when evaluating Petitioner's ineffective assistance of counsel claim. The remainder of the Court's prior Order, (doc. 72), remains unchanged and in full force and effect.

BACKGROUND[1]

In 2007, Petitioner faced trial for the murders of Susan Pittman and her 13-year-old daughter, Kimberly Pittman, and other related crimes he and Dorian O'Kelley committed. (*See* doc. 72, p. 3.) Attorneys Michael Schiavone, Steven Sparger, and Willie Yancy were appointed to represent Petitioner, with Schiavone serving as lead counsel and Sparger in charge of mitigation. (Doc. 27-20, pp. 8–9; *see* doc. 72, p. 3.) On June 8, 2007, a Georgia jury found Petitioner guilty on all counts. (Doc. 7-11, pp. 34–37; see doc. 72, pp. 1–3); *see also Stinski v. State*, 691 S.E.2d 854, 862 n.1 (Ga. 2010).) Shortly after the guilt phase of Petitioner's trial concluded, the sentencing phase of trial began. (Doc. 10-8, pp. 145, 167–68; *see* doc. 72, p. 3.) Petitioner's trial counsel called twenty-six witnesses to testify during the sentencing phase of trial, including mitigation specialist Dale Davis and Dr. Jane Weilenman, a psychologist. (Doc. 27-20, pp. 43–47, 61–68; *see* doc. 72, p. 3.)

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[1] The Court set out the facts and procedural background of this case in detail in its December 15, 2021, Order denying Petitioner's Petition for Writ of Habeas Corpus (the "Habeas Order") and need not fully recount them here. (*See* doc. 72, pp. 1–15.)

Davis's role in Petitioner's case was to "take [Petitioner] and find out every single thing [she could] find out about [him] from [his] birth, even pre-birth, up until [the crime]." (Doc. 10-9, p. 78.) Davis also testified during the sentencing phase of trial. (*See* doc. 72, pp. 5–7.) In short, Davis testified extensively about Petitioner's abusive childhood; his family history; and his medical records and conditions, including ADHD, depression, post-traumatic stress disorder, and a psychotic disorder for which Petitioner received medication. (*See id.*) For her part in Petitioner's case, Dr. Weilenman conducted a psychological evaluation of Petitioner and helped create a social history for Petitioner. (*See id.* at pp. 7–8.) Dr. Weilenman testified about, among other things, Petitioner's background (including issues of neglect, abandonment, and abuse), his mental health, his development, and his juvenile conduct. (*See id.* pp. 7–10.)

The jury ultimately recommended the death sentence for Petitioner based on the murders of Susan and Kimberly Pittman, finding that the existence of nine aggravating circumstances across the two murders warranted such a sentence.[2] (Doc. 8-1, pp. 210–13.) In

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[2] The nine aggravating circumstances were: (1) Petitioner was "engaged in the commission of a burglary" while murdering Susan Pittman; (2) the murder of Susan Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved the depravity of mind of" Petitioner; (3) the murder of Susan Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim before death"; (4) Petitioner was committing "another capital felony" while murdering Kimberly Pittman; (5) Petitioner "was engaged in the commission of a burglary" while murdering Kimberly Pittman; (6) Petitioner "was engaged in the commission of arson in the first degree" while murdering Kimberly Pittman; (7) the murder of Kimberly Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it

addition to the death sentence, Petitioner was sentenced to a total of 140 years of confinement for his other crimes. (*Id.* at pp. 214–15.) Petitioner subsequently filed a motion for a new trial, which was denied. (Doc. 27-20, p. 2.) The Georgia Supreme Court then affirmed Petitioner's convictions and death sentence. *See Stinski v. State*, 691 S.E.2d at 874-75.

On September 12, 2011, Petitioner filed a petition for writ of habeas corpus in the Superior Court of Butts County, (doc. 11-19), and later amended the petition, (doc. 12-24). In the petition, Petitioner argued, among other things, that his trial counsel rendered ineffective assistance of counsel during the sentencing phase of trial and that he is ineligible for the death penalty under *Roper v. Simmons*, 543 U.S. 551 (2005), because he was the functional equivalent of an adolescent at the time of his crimes. (Doc. 12-24, pp. 9–24, 29–30; *see* doc. 72, pp. 11–12.) The state habeas court held an evidentiary hearing in which twenty witnesses testified, including family members, friends, acquaintances, and medical professionals. (*See* doc. 27-20, p. 2.) Among medical professionals, Petitioner called a clinical neuropsychologist, Dr. Joette James; a forensic psychiatrist, Dr. Peter Ash; and a developmental psychologist, Dr. James Garbarino. (Doc. 13-20, pp. 84–196; doc. 13-17, pp. 5–169; doc. 13-21, pp. 56–179; *see* doc. 72, pp. 12–13.) After conducting the evidentiary hearing, the Superior Court denied the petition on January 15, 2017. (Doc. 27-20.) Petitioner then filed an Application for

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involved tortur[ing] . . . the victim before death"; (8) the murder of Kimberly Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved the depravity of mind of" Petitioner; and (9) the murder of Kimberly Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim before death." (Doc. 8-1, pp. 210–13.)

Certificate of Probable Cause to Appeal in the Georgia Supreme Court, (doc. 27-22), which the Georgia Supreme Court denied, (doc. 27-24).

On March 26, 2018, Petitioner filed his Petition for Writ of Habeas Corpus in this Court pursuant to 28 U.S.C. § 2254 (the "Petition"). (Doc. 1.) Petitioner subsequently filed the Brief on the Merits in support of his Petition. (Doc. 65.) In his Brief in support of the Petition, Petitioner asserted two general claims: (1) his trial counsel rendered ineffective assistance of counsel at the sentencing phase of his trial in violation of his Sixth and Fourteenth Amendment rights, (*id.* at pp. 87–133), and (2) his execution would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments and the United States Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), because he was the equivalent of a juvenile when he committed his crimes, (*id.* at pp. 133–150). The Court denied the Petition and denied him a Certificate of Appealability ("COA"). (Doc. 72.)

Petitioner then filed the at-issue Motion to Alter or Amend Judgment, pursuant to Federal Rule of Civil Procedure 59(e), asking the Court to reconsider its decision. (Doc. 74.) Specifically, Petitioner argues that the Court committed "manifest errors of fact and law" when it denied his claim for ineffective assistance of counsel at the penalty phase of his trial and requests that the Court amend its prior ruling to grant him a COA on that claim and his Eighth Amendment claim. (*Id.* at pp. 2, 10–13.)

STANDARD OF REVIEW

The granting of a motion to reconsider or a motion to alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e), is "an extraordinary remedy, to be employed sparingly." *Smith ex rel. Smith v. Augusta-*

Richmond County, No. 1:10-cv-126, 2012 WL 1355575, at *1 (S.D. Ga. Apr. 18, 2012) (citation omitted). The decision to grant a motion for reconsideration is committed to the sound discretion of the district court. *See Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health and Rehab. Servs.*, 225 F.3d 1208, 1216 (11th Cir. 2000). "A movant must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Smith*, 2012 WL 1355575, at *1 (internal quotations omitted). Rule 59(e) does not specifically provide any basis for relief, but district courts in the Eleventh Circuit have recognized three grounds that justify reconsidering a judgment: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice. *See, e.g.*, *Ctr. for Biological Diversity v. Hamilton*, 385 F. Supp. 2d 1330, 1337 (N.D. Ga. 2005); *Richards v. United States*, 67 F. Supp. 2d 1321, 1322 (M.D. Ala. 1999); *Aird v. United States*, 339 F. Supp. 2d 1305, 1312 (S.D. Ala. 2004) (quoting *Pac. Life Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998)). A clear error must be a "clear and obvious error which the interests of justice demand that [the Court] correct." *Am. Home Assurance Co. v. Glenn Estess & Assocs, Inc.*, 763 F.2d 1237, 1239 (11th Cir. 1985). A Rule 59(e) motion cannot be used "to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)).

DISCUSSION

I. Ineffective Assistance of Counsel at Sentencing Phase of Trial

Petitioner argues that the Court's denial of his claim for ineffective assistance of counsel at the penalty phase of his trial is based on "manifest errors of fact and law." (Doc. 74, p. 2.) Specifically, Petitioner argues that (1) the Court "overlooked the critical distinction between [his] social history and the missing explanation for his criminal conduct"; (2) the Court's "conclusion that [his] trial counsel acted reasonably is manifestly incorrect"; and (3) the Court's "prejudice determination is based on manifest errors of fact and law." (*Id.* at pp. 2–10.)

A. Whether the Court "overlooked the critical distinction between [Petitioner's] social history and the missing explanation for his criminal conduct"

Petitioner first argues in his Motion to Amend or Alter Judgment that the Court "overlooked the critical distinction between [his] social history and the missing explanation for his criminal conduct." (*Id.* at p. 2.) In his Petition, Petitioner argued that his trial counsel rendered ineffective assistance of counsel at the sentencing phase of his trial, in part, because his trial counsel failed to retain additional experts like Dr. James, Dr. Ash, and Dr. Garbarino and present their testimonies during sentencing. (*See* doc. 65, pp. 87–101.) The state habeas court rejected this argument, finding that "Petitioner's scientific evidence . . . was cumulative of the testimony actually presented at [his] trial" and that "the extensive evidence presented by trial counsel in mitigation more than adequately addressed the subject matter raised by Petitioner's witnesses . . . ." (Doc. 72, pp. 21–22 (quoting doc. 27-20, p. 5).) In the Habeas Order, the Court concluded that the state habeas court reasonably determined that Petitioner's trial counsel was not deficient for failing to provide testimony from such experts. (*Id.* at p. 22.) In reaching this conclusion, the

Court found that Petitioner's trial counsel "conducted an extensive mitigation investigation" and relied on Davis as a "mitigation specialist" and Dr. Weilenman as a "retained clinical psychologist." (*Id.* at pp. 22–24.) The Court further found that trial counsel's "extensive mitigation investigation" distinguished Petitioner's case from other cases in which the United States Supreme Court and Eleventh Circuit Court of Appeals had determined that trial counsel had conducted inadequate mitigation investigations. (*Id.* at pp. 24–25 (citing *Williams v. Taylor*, 529 U.S. 362, 369–70 (2000); P*orter v. McCollum*, 558 U.S. 30, 40 (2009); *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 553 (11th Cir. 2015)).)

Petitioner now argues that the Habeas Order "misse[d] the crux of [his] trial counsel's ineffectiveness at the sentencing stage." (Doc. 74, p. 3.) Specifically, Petitioner argues that "[t]he Court relie[d] on the wrong principle to deny [his] claim of ineffective assistance of counsel" when the Court "compare[d] [his] case to those in which trial counsel did virtually nothing to prepare for the penalty phase of a capital trial." (*Id*. at p. 4.) Petitioner asserts that the Court's "denial of [his] claim for ineffective assistance of counsel at the sentencing phase ignores trial counsel's failure to connect the dots between the experts' testimony and [Petitioner's] actions." (*Id*. at p. 2.)

To the extent Petitioner argues that the Court relied on the "wrong principle" in the Habeas Order, that argument is unpersuasive. In the Petition, Petitioner argued that his trial counsel performed an inadequate mitigation investigation, in part, because his trial counsel failed to retain additional experts like Dr. James, Dr. Ash, and Dr. Garbarino and present their testimonies at the sentencing phase of trial. (*See* doc. 65, pp. 87–101.) However, as noted in the Habeas Order, while "[c]ounsel

representing a capital defendant must conduct an adequate background investigation, . . . it need not be exhaustive." *Raulerson v. Warden*, 928 F.3d 987, 997 (11th Cir. 2019); (see doc. 72, p. 22.) "The scope of counsel's investigation, like all other actions undertaken by counsel, need only be objectively reasonable under the circumstances to satisfy constitutional demands." *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1322 (11th Cir. 2013). In addition, "the Supreme Court of the United States has held that trial counsel's investigation is not deficient 'when counsel gather[s] a substantial amount of information and then ma[kes] a reasonable decision not to pursue additional sources.'" (Doc. 72, p. 22 (quoting *Porter*, 558 U.S. at 40).) In the Habeas Order, the Court concluded that Petitioner's trial counsel conducted an "extensive mitigation investigation and hired two experts for the sentencing phase in this case: Davis, as the mitigation expert, and Dr. Weilenman, as a clinical psychologist." (Doc. 72, p. 23.) The Habeas Order further details the "extensive work" performed by Davis and Dr. Weilenman for Petitioner's case, which distinguished Petitioner's case "from other cases in which trial counsel was deemed to have inadequately investigated a petitioner's background for mitigation purposes." (*See id.* at pp. 5–11, 23–25.)

While Petitioner now relies on the Supreme Court's decision in *Sears v. Upton*, 561 U.S. 945, 954–55 (2010), for the proposition that "counsel's effort to present *some* mitigation evidence should [not] foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant," the mitigation investigation conducted by Petitioner's trial counsel was far more extensive than the "facially inadequate mitigation investigation" in *Sears*. 561 U.S. at 952. Indeed, in *Sears*, the trial counsel presented evidence describing

the petitioner's childhood "as stable, loving, and essentially without incident." *Id.* at 947. Specifically, the petitioner's trial counsel called "[s]even witnesses [who] offered testimony along the following lines: [the petitioner] came from a middle-class background; his actions shocked and dismayed his relatives; and a death sentence . . . would devastate the family." *Id.* In the state postconviction evidentiary hearing, however, the mitigation evidence "demonstrate[d] that [the petitioner] was far from 'privileged in every way.'" *Id.* at 948. Instead, the mitigation evidence in *Sears* showed, among other things, that the petitioner's parents were in a physically abusive relationship and divorced when he was young, that petitioner was sexually abused as a minor, that his father was verbally abusive, and that the petitioner suffered from "substantial behavior problems from a very young age" and severe learning disabilities. *Id.* This evidence was not heard by a jury or known to the petitioner's trial counsel because trial counsel failed to conduct an adequate mitigation investigation. *Id.* at 951. In Petitioner's case, however, as detailed in the Habeas Order, trial counsel performed an "extensive mitigation investigation" with Davis as a "mitigation specialist" and Dr. Weilenman as a "retained clinical psychologist." (*See* doc. 72, pp. 5–10, 22–24 (describing Dr. Weilenman and Davis's extensive work on Petitioner's case.) Thus, the decision in *Sears* is distinguishable from Petitioner's case.

Finally, to the extent Petitioner argues that his trial counsel was ineffective for failing to "connect the dots between the experts' testimony and [his] actions," (doc. 74, p. 2), that argument is also unpersuasive. As the Court pointed out in the Habeas Order, trial counsel asked Dr. Weilenman, "What happens when you have someone like [Petitioner] . . . meet[] [Dorian O'Kelley,] who's been described as manipulative and . . . compared to Charles

Manson?" (Doc. 72, p. 10 (quoting doc. 10-11, pp. 60–61).) Dr. Weilenman responded that Petitioner "did what he [did] at that time, listening to [O'Kelley], as a follower . . . and not questioning it. He needed to fit in with that group." (*Id.* (quoting doc. 10-10, p. 61).) Furthermore, as discussed in the Habeas Order, Dr. Weilenman testified about Petitioner's mental health, development, and juvenile conduct, including Petitioner's lack of "executive functioning." (*See id.* at pp. 9–10 (citing doc. 10-11, pp. 54–55, 59–60).) While the Court recognizes that the additional expert testimony Petitioner believes his trial counsel should have presented during sentencing was more "scientific-based" and "possibly more convincing" than Dr. Weilenman's testimony, (doc. 72, p. 30), "the mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1242 (11th Cir. 2010). The Court's conclusion is further supported by the fact that the state habeas court determined that Petitioner's trial counsel, during closing argument, (1) compared O'Kelley to Charles Manson; (2) argued that O'Kelley was very manipulative and held control over Petitioner due to Petitioner's lack of development; and (3) argued that Petitioner was the product of his upbringing, could not think for himself, lacked logic skills, and was a "young boy." (*See* doc. 27-20, pp. 68–69.) Thus, the Court finds this argument unpersuasive as well.

B. Whether the Court's ruling that Petitioner's trial counsel acted reasonably is manifestly incorrect

Petitioner next argues that the Court's conclusion that Petitioner's trial counsel acted reasonably is based on a clear error of facts. (*See* doc. 74, pp. 4–7.) In his Brief,

Petitioner argued that his trial counsel's mitigation investigation was inadequate because his counsel overlooked "[s]everal red flags" that should have placed them on notice that additional experts were needed. (See doc. 65, pp. 94–96; *see also* doc. 72, p. 25.) Among these supposed "red flags" was Davis's advice to trial counsel that additional experts could explain how Petitioner's mental state impacted his actions and inactions at the time of his crimes. (Doc. 65, pp. 94–95; *see* doc. 72, p. 25.) The Court was unpersuaded by this argument, finding that the argument "overlooks the fact that the state habeas court found that Dr. Weilenman, the expert responsible for performing the psychological evaluation of Petitioner, did not recommend further testing by additional experts." (Doc. 72, p. 25 (citing doc. 27-20, p. 38).) The Court further found that, at best, contradictory evidence existed as to whether Dr. Weilenman and Sparger "discussed the need to retain *additional experts* to perform testing on Petitioner that Dr. Weilenman could not perform herself" and that "contradictory testimony is not enough to overcome the 'presumption of correctness' afforded to a 'factual determination made by a state court' under the AEDPA, which requires 'clear and convincing evidence.'" (*Id.* at pp. 25–26 (quoting *Consalvo v. Sec'y for Dep't of Corr.*, 664 F.3d 842, 845 (11th Cir. 2011).) The Court noted that Sparger testified,

> If I had been told that testing was needed and it wasn't testing that [Dr. Weilenman] was going to perform, I would have said, "Well, who do we need?" and then it would have been getting the motion, getting the funds to go to the next person. And that never happened because I was never told . . . by Dr. Weilenman, by Ms. Davis, or anyone that there was testing [that needed to be done].

(*Id.* at p. 25 (quoting doc. 13-16, p. 89).) The Court also noted, however, that Dr. Weilenman's notes showed a purported list of experts and scientific literature, Davis recommended the need for a neuropsychological exam, and trial counsel believed that Petitioner "seemed young for his age." (*Id.* at p. 26.)

Petitioner now argues that the Court's conclusion that contradictory evidence exists as to whether Sparger discussed the need for additional expert assistance with other members of the defense team "rests on manifest errors of fact." (Doc. 74, pp. 4–5.) Specifically, Petitioner points to an email Davis sent to Sparger about the possibility of additional testing, Davis's testimony of a purported meeting in which Davis mentioned retaining additional experts, and a single page from Dr. Weilenman's notes with a list of experts in the field of adolescent crimes and examples of their scholarship. (See *id.* at pp. 5–6.) From this evidence, Petitioner argues that his defense team "set out a plan to engage at least one additional expert." (*Id.* at p. 6.) The Court, again, disagrees.

As an initial matter, Petitioner already made this argument before the Court. (*See* doc. 65, pp. 94–96.) In his Brief, Petitioner argued that Sparger was "on notice that neuropsychological testing and the retention of other appropriate experts was necessary." (*Id.* at p. 94.) In support of this argument, Petitioner cited to much of the same evidence Petitioner cites in his Motion to Amend, including the January 2005 meeting in which Davis supposedly recommended the need to consult an additional expert. (*Id.* at p. 95.) In the Habeas Order, the Court rejected this argument, stating that "[w]hile Petitioner highlights Davis's testimony asserting that she raised the need for a neuropsychological exam[] [and] a single page from Dr. Weilenman's notes that shows a list

of purported experts, that evidence . . . reveals contradictory evidence regarding whether Dr. Weilenman and Sparger discussed the need to retain *additional experts*." (Doc. 74, p. 26.) While Petitioner appears to wish to reargue this issue, "motions for reconsideration may not be used to present the court with arguments already heard and dismissed or to repackage familiar arguments to test whether the court will change its mind." *Bryan v. Murphy*, 246 F. Supp. 2d 1256, 1259 (N.D. Ga. 2003).

Moreover, Petitioner overstates what the evidence represents. For example, Petitioner asserts that "Sparger recalled a meeting with [Davis and Dr. Weilenman] in which they discussed additional expert testing after . . . Sparger learned he would be conducting the mitigation phase [of the trial]." (Doc. 74, p. 5 (citing doc. 13-15, pp. 158–59).) However, Sparger further testified that this meeting occurred a mere six weeks to two months before the start of Petitioner's trial and that any reference to an additional expert was made "almost in passing." (Doc. 13-15, pp. 157–59.) Furthermore, Sparger testified that the meeting was the "the first mention" of any need to retain *additional* experts and that he was "surprised to hear that there was *other* testing . . . that people thought was necessary." (*Id.* at 159 (emphasis added).) Thus, this meeting hardly represents "a plan" to retain an additional expert. Furthermore, the fact that Davis sent Sparger an email discussing her opinion that they needed a "specialist in [developmental issues] to explain [Petitioner's] impulsiveness [and] lack of judgment" is not relevant to whether *Dr. Weilenman* recommended retaining an additional expert to perform tests she could not perform herself. (*See* doc. 19-9, p. 184.)

Finally, Petitioner overlooks Sparger's own testimony which indicates that Sparger was not aware of

a need for additional experts. While Davis testified that she had recommended to Petitioner's trial counsel and Dr. Weilenman during a January 2005 meeting that they retain an additional expert, (doc. 13-19, pp. 37–39), Sparger's testimony clearly contradicts Davis's testimony. Sparger testified that "the first mention" of an additional expert occurred approximately six weeks before the start of Petitioner's trial, which began on May 24, 2007. (Doc. 13-15, p. 159.) Furthermore, as noted in the Habeas Order, Sparger testified:

> If I had been told that testing was needed and it wasn't testing that [Dr. Weilenman] was going to perform, I would have said, "Well, who do we need?" and then it would have been getting the motion, getting the funds to go to the next person. *And that never happened because I was never told . . . by Dr. Weilenman . . . that there was testing* [*that needed to be done*].

(Doc. 72, p. 25 (quoting doc. 13-16, p. 89) (emphasis added).) Sparger's reliance on Dr. Weilenman's opinion regarding further testing is further exemplified by his testimony that he thought Dr. Weilenman "would do . . . what psychologists do: you meet them, you talk to them, and you get an idea, and you determine the appropriate tests." (Doc. 13-16, p. 88.) Thus, as the Court found in the Habeas Order, contradictory evidence exists as to whether Dr. Weilenman and Sparger "discussed the need to retain *additional experts* to perform testing on Petitioner that Dr. Weilenman could not perform herself." (Doc. 72, pp. 25–26.) Furthermore, as the Habeas Order states, "contradictory testimony is not enough to overcome the 'presumption of correctneess' afforded to 'a factual determination made by a state court' under the AEDPA, which requires 'clear and convincing evidence.'" (Doc. 72, p. 26 (quoting *Consalvo*, 664 F.3d at 845).) While

Petitioner asserts that "Sparger's . . . inability to recall the plan years later does not contradict the defense team's documented strategy to seek additional expert assistance," Sparger's testimony does not conclusively show that he had an "inability to recall" such a plan. Rather, Sparger expressly testified that he "was never told . . . by Dr. Weilenman . . . that there was testing [that needed to be done]." (Doc. 13-16, p. 89.) Therefore, as the Court determined in the Habeas Order, Petitioner failed to show the "clear and convincing" evidence necessary to "overcome the 'presumption of correctness' afforded to a 'factual determination made by a state court' under the AEDPA." *Consalvo*, 664 F.3d at 845; (see doc. 72, p. 26.)

C. Whether the Court's prejudice determination is based on manifest errors of law and fact

Petitioner next argues that that the Court's "prejudice determination is based on manifest errors of fact and law." (Doc. 74, pp. 7–10.) Petitioner argues that the Court (1) improperly treated this "highly aggravated case[] as incapable of producing any sentence other than death," which is "contrary to established federal law" and (2) discounted "compelling mitigating evidence presented by Drs. James, Ash, and Garbarino" in its prejudice determination contained in the Habeas Order. (*Id.*) The Court disagrees.

Regarding his first argument, Petitioner contests the Court's statement that "[t]he evidence that Petitioner's actions were outrageously and wantonly vile, horrible, inhuman, and depraved, was so strong that it is hard to image that any amount of mitigating evidence could have outweighed it." (Doc. 74, pp. 7–9.) According to Petitioner, that statement "is contrary to established federal law that treating highly aggravated cases as incapable of producing any sentence other than death would

unreasonably discount the mitigation evidence presented at postconviction proceedings." (*Id.* at pp. 7–8 (citing *Porter*, 558 U.S. at 42–43).) Petitioner contends that he is "entitled to an individualized sentencing determination based on what *he* did and *his* character, which requires a presentation of neuropsychological assessments not presented at the sentencing hearing." (*Id.* at p. 8.) Petitioner further asserts, "To rule out consideration of such assessments in its prejudice determination, on the grounds that [his] case is highly aggravated, would be a manifest error of law and fact." (*Id.*)

However, Petitioner misinterprets the Habeas Order. In the Habeas Order, the Court concluded that Petitioner's trial counsel's failure to present additional expert witnesses at the sentencing phase did not prejudice him, in part, because "the new mitigating evidence provided by Drs. James, Ash, and Garbarino 'would barely have altered the sentencing profile presented' at Petitioner's trial." (Doc. 72, p. 31 (quoting *Strickland v. Washington*, 466 U.S. U.S. 668, 700 (1984)).) In reaching this conclusion, the Court thoroughly analyzed the mitigation evidence that was and was not presented at Petitioner's sentencing phase, (*id.* at pp. 27–30), and carefully weighed that evidence against the aggravating circumstances present in Petitioner's case, (*id.* at pp. 31–34). Specifically, the Court examined the testimonies of Dr. Ash, Dr. Garbarino, and Dr. James from the state habeas proceeding and compared those testimonies to the testimony of Dr. Weilenman during the sentencing phase. (*See id.*) The Court also detailed the aggravating factors the jury determined existed in Petitioner's case. (*Id.* at pp. 31–33 ("Among these [aggravating] factors were: (1) the murder of Susan Pittman 'was outrageously or wantonly vile, horrible, or inhuman in that it involved the depravity of mind of'

Petitioner; (2) the murder of Susan Pittman 'was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim before death;' (3) Petitioner 'was engaged in the commission of arson in the first degree' when murdering Kimberly Pittman; (4) the murder of Kimberly Pittman 'was outrageously or wantonly vile, horrible, or inhuman in that it involved tortur[ing] . . . the victim before death;' (5) the murder of Kimberly Pittman 'was outrageously or wantonly vile, horrible, or inhuman in that it involved the depravity of mind of' Petitioner; and (6) the murder of Kimberly Pittman 'was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim before death.'").) Such an analysis is required by Eleventh Circuit precedent. As the Court stated in the Habeas Order,

> 'In a case challenging a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."' *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011) (quoting *Strickland*, 466 U.S. at 695). In determining whether there is a reasonable probability that the 'additional mitigating evidence would have changed the weighing process so that death is not warranted,' *the Court considers the totality of the evidence by weighing the mitigating evidence that was presented, and that which was not presented*, '*against the aggravating circumstances that were found*.' *Hardwick v. Crosby*, 320 F.3d 1127, 1166 (11th Cir. 2003)

(*Id.* at pp. 31–32 (emphasis added).) Based on this analysis, the Court found that "the new mitigating evidence . . . 'would barely have altered the sentencing

profile presented at' Petitioner's trial," (id. at p. 31 (quoting *Strickland*, 466 U.S. at 700)), and that "the evidence against Petitioner was highly aggravating," (*id.* at p. 32). Thus, contrary to Petitioner's assertion, the Court did properly consider "the totality of the evidence" by examining the mitigation evidence that was and was not presented at Petitioner's trial and weighing it against the aggravating circumstances present in the case. (*Id.* at pp. 27–34.)

Petitioner also argues that the Court improperly discounted "compelling mitigating evidence presented by Drs. James, Ash, and Garbarino" in its prejudice determination. (Doc. 74, pp. 9–10.) According to Petitioner, "[u]nder clearly established federal law, a finding of prejudice is not foreclosed merely because some evidence submitted at [his] postconviction proceeding concerned the same subject matter as evidence submitted at his trial. Yet[,] that is what the Court has done here." (*Id.* at p. 9.) Petitioner also appears to contest the Court's finding that the testimonies of Dr. James, Dr. Ash, and Dr. Garbarino are "cumulative and duplicative" of the evidence presented at Petitioner's trial. (*See id.* at p. 9.) However, Petitioner again misinterprets the Court's analysis in the Habeas Order.

The Supreme Court and Eleventh Circuit have both consistently held that no prejudice occurs when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decisionmaker. *Strickland*, 466 U.S. U.S. at 700; *see, e.g.*, *Johnson v. Upton*, 615 F.3d 1318, 1344 (11th Cir. 2010) ("[T]his is a case in which the new evidence would barely have altered the sentencing profile presented to Johnson's jury. It was thus not unreasonable for the state habeas court to conclude that Johnson had failed to show a reasonable probability that he would receive a different sentence.")

(internal citations and quotations omitted). Indeed, numerous federal courts have found no prejudice where the new mitigating evidence is cumulative of the evidence presented at the original trial. *See Dallas v. Warden*, 964 F.3d 1285, 1308 (11th Cir. 2020) ("When reweighing the aggravating circumstances against the totality of the mitigating evidence—again, what was introduced at his original trial and what Dallas presented in his postconviction proceedings—*we consider the cumulative nature of the evidence*.") (emphasis added); *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 649–50 (11th Cir. 2016) ("[N]o prejudice can result from the exclusion of cumulative evidence."). "Mitigating evidence in postconviction proceedings is cumulative when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury." *Dallas*, 964 F.3d at 1308.

In the Habeas Order, the Court determined that the evidence presented by Drs. James, Ash, and Garbarino was cumulative of the evidence already presented at trial. (*See* doc. 72, pp. 27–31.) Petitioner argues that this ruling is in error because the evidence presented at trial did not relate to Petitioner's "specific neurological deficits." (Doc. 74, p. 10.) However, the jury already learned from Dr. Weilenman that Petitioner suffered from "an abusive and unstable childhood, functioned at an age below his chronological age of eighteen when he committed his crimes, lacked executive functioning compared to similarly aged peers, and was uniquely susceptible to peer pressure." (Doc. 72, p. 31; *see also id*. at pp. 28–29.) While it is true (as the Court acknowledged in the Habeas Order), that Drs. Garbarino, Ash, and James provided more "scientific" details about Petitioner's conditions during the sentencing phase, (*id*. at pp. 29–30), the effects

of those conditions were similar to what Dr. Weilenman and other witnesses told the jury at trial. For example, Dr. Ash testified about the "prefrontal cortex" in the brain and how Petitioner's executive functioning was less than "one would expect from the normal person of his age at that time." (Doc. 72, p. 29 (quoting doc. 13-17, p. 30).) However, the jury already heard from Dr. Weilenman that Petitioner's "executive functioning" was deficient relative to normal eighteen or nineteen-year-olds. (Doc. 72, p. 28 (citing doc. 10-11, pp. 54–55, 59).) Similarly, Dr. Garbarino testified that the severe psychological maltreatment Petitioner suffered during his childhood "undermined" his development and that he was "an untreated, traumatized child . . . inhabit[ing] the body of an 18-year-old boy." (*Id.* at pp. 29–30 (citing (doc. 13-21, pp. 114, 145).) However, the jury also heard this when Dr. Weilenman testified that Petitioner's instability and abandonment issues delayed his development and that he was abnormally susceptible to peer pressure for someone his age. (*See* doc. 72, p. 29.) Indeed, the cumulative nature of the scientific evidence during the sentencing phase is analogous to the cumulative evidence present in Dallas. *See Dallas*, 964 F.3d at 1310 ("Dr. Benedict's testimony would not have added much beyond the testimony the jury heard from Dr. Renfro. While it is true that Dr. Benedict diagnosed Dallas with learning disorders and ADHD, the effects of these conditions were similar to what Dr. Renfro, Dallas himself, and other witnesses told the jury at trial. Benedict said that people with Dallas's learning and attention disorders are more likely to develop substance abuse disorders during early adolescence. But the jury already learned, and in detail, from Dr. Renfro, from Dallas, and from his siblings that the defendant suffered from substance abuse and at a very early age. Benedict also said these disorders often cause an

individual to drop out of school. But again, the jury heard from Dallas that he had difficulty in school and in fact dropped out in the sixth grade. Most importantly, Benedict asserted that individuals with Dallas's combination of learning, attention, and other mental health issues are often 'unassertive' and 'passive-dependent.' But still again the jury heard ample testimony at trial that Dallas was passive and unassertive, and that he was under the domination and control of Yaw. Quite simply, Benedict's testimony would not have changed the characteristics and difficulties the jury heard and considered before it recommended that Dallas be sentenced to die, particularly since the jury already knew that Dallas's substance abuse and difficulties in school began at so young an age. While it is true the learning disorders and ADHD diagnosis would have offered another possible explanation for some of his difficulties, the jury heard a great deal about the potential causes of those difficulties that were beyond Dallas's control, including the incredibly neglectful and abusive parenting he endured."). Thus, the Court cannot find that its prejudice determination was tainted by a clear error of law or fact. *See, e.g.*, *Sears*, 561 U.S. at 954 ("[W]e have explained that there is no prejudice when the new mitigating evidence would barely have altered the sentencing profile presented to the decisionmaker.") (internal quotations omitted); *Brown v. United States*, 720 F.3d 1316, 1327 (11th Cir. 2013) ("[A]s in *Strickland* itself, '[t]he evidence that [the petitioner] says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented.'") (quoting *Strickland*, 466 U.S. at 669–700).

Petitioner relies on the Supreme Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), to argue that "a finding of prejudice is not foreclosed merely because some

evidence submitted at [Petitioner's] postconviction proceeding concerned the same subject matter as evidence submitted at his trial." (Doc. 74, p. 9.) However, like the Eleventh Circuit in *Dallas v. Warden*, 964 F.3d at 1312, the Court found *Wiggins* (and other similar cases) distinguishable. (See doc. 72, pp. 30–31.) In *Dallas*, the Eleventh Circuit stated,

> In each of the key Supreme Court cases finding prejudice as a result of counsel's failure to offer mitigating evidence, the disparity between what was presented at trial and what was offered collaterally was vast. In other words, the balance between the aggravating and mitigating evidence at trial and in postconviction proceedings shifted enormously, so much as to have profoundly altered each of the defendants' sentencing profiles.

Dallas, 964 F.3d at 1312 (citing *Wiggins*, 539 U.S. at 535; *Williams v. Taylor*, 529 U.S. at 369–70; *Porter*, 558 U.S. at 32–36; *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (per curiam)). The Eleventh Circuit then distinguished the facts in *Dallas* from those present in cases like *Wiggins*, stating:

> Unlike in *Wiggins*, in *Williams*, in *Porter*, and in *Andrus*, the new mitigating evidence contained in the 2007 affidavits "would barely have altered the sentencing profile presented" at Dallas's trial. That profile amply painted a broad picture of Donald Dallas's life: an abusive childhood, violence, poverty, lack of guidance and role models, and substance abuse from an early age into adulthood. Recognizing that the vast majority of the allegedly new mitigating evidence presented in the 2007 affidavits did no more than amplify the themes presented at trial, we think it wholly unlikely that the additional evidence would

> have changed the jury's result. Our confidence that the jury would have recommended death has not been undermined. In the face of the horrific nature of Dallas's crimes and the brutality of [the victim's] death, and because the jury already knew much about Dallas's life, there is no reasonable probability that, had the jury known the limited additional details presented in postconviction, they would have spared his life.

Id. at 1312–13 (citing *Strickland*, 466 U.S. at 700). Here, the Court reached a similar conclusion in the Habeas Order. (See doc. 72, pp. 30–34.) Unlike the new mitigating evidence in *Wiggins*, the new mitigating evidence in this case "would have barely altered the sentencing profile presented" at Petitioner's trial. (See id. at p. 31 (quoting *Strickland*, 466 U.S. at 700).) Indeed, the profile presented at Petitioner's trial "amply painted a broad picture of [Petitioner's] life:" an abusive and unstable childhood, lack of executive functioning, susceptibility to peer pressure, and lack of development compared to other eighteen-year-olds. *Dallas*, 964 F.3d at 1312. Thus, "[i]n the face of the horrific nature of [Petitioner's] crimes and the brutality of the victim[s'] death[s], and because the jury already knew much about [Petitioner's] life, there is no reasonable probability that, had the jury" seen the new mitigating evidence, they would have spared Petitioner's life. *Id.* at 1312–13.

Based on the foregoing, the Court finds that Petitioner failed to show the need to correct clear error in the Habeas Order's denial of his ineffective assistance of counsel claim or prevent any manifest injustice.

II. Certificate of Appealability

Petitioner next argues that the Court should amend its prior ruling and grant him a COA on his ineffective

assistance of counsel claim and his Eighth Amendment claim because its decision not to do so was based on "manifest errors of law." (Doc. 74, pp. 10–13.) Under 28 U.S.C. § 2253(c)(1), an appeal cannot be taken from a final order in a habeas proceeding unless a certificate of appealability is issued. 28 U.S.C. § 2253(c)(1). A district judge should issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claim on the merits, the showing required to satisfy [Section] 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To make this showing, the petitioner must show "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). "The COA inquiry . . . is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). In the Habeas Order, the Court denied Petitioner a COA, finding that "Petitioner . . . failed to make a substantial showing of a denial of a constitutional right with respect to his ineffective assistance of counsel claims or his Eighth Amendment claim." (Doc. 72, p. 79.)

A. Ineffective Assistance of Counsel Claim

Petitioner appears to raise two arguments in support of his Motion to Amend the Court's ruling denying him a COA on his ineffective assistance of counsel claim. (See doc. 74, pp. 11–13.) First, Petitioner argues that he "is entitled to a [COA] where the district court decision on a constitutional issue raised by [him] conflicts with decisions of other courts." (*Id.* at p. 11.) According to

Petitioner, the Ninth and Tenth Circuit Courts of Appeals have "granted habeas relief under" circumstances similar to his case and that "[c]onsidering these decisions, it is . . . at least debatable whether [his] ineffective assistance of counsel claim is meritorious." (*Id.* at pp 11–12 (citing *Hooks v. Workman*, 689 F.3d 1148, 1204 (10th Cir. 2012); *Lopez v. Att'y Gen.*, 845 F. App'x 549, 552–53 (9th Cir. 2021)). The Court finds this argument unpersuasive.

The Ninth and Tenth Circuit cases Petitioner cites are distinguishable from his case. In *Hooks*, the Tenth Circuit concluded that the petitioner's mitigation case "failed to meet the standards [it] ha[s] set out for counsel in capital-sentencing proceedings." 689 F.3d at 1203. In reaching this conclusion, the Tenth Circuit stated that "[e]vidence of family and social history was sorely lacking; the mental-health evidence presented was inadequate and quite unsympathetic; and [the petitioner] not only failed to rebut the prosecution's case in aggravation but actually bolstered it by his own statements." *Id.* Specifically, the petitioner's mitigation case included only three witnesses: his sister, his mother, and a psychologist who administered "psychological examinations" of petitioner. *Id.* at 1202–03. The sister was only asked four questions while testifying, and her "testimony fill[ed] little more than a page of the trial transcript." *Id.* at 1202. The mother's testimony was "only slightly less brief." *Id.* The Tenth Circuit concluded that their testimonies were "perfunctory, to put it mildly," and failed to "educate the jury . . . on [the petitioner's] life circumstances and his tragic, chaotic upbringing," which included a "premature birth, an openly abusive father, frequent moves, educational handicaps, and personal family tragedies." *Id.* at 1203. Moreover, while the psychologist testified that the petitioner suffered "from a chronic form of psychosis," the psychologist's testimony also "worked in the

[prosecution's] favor" as he testified that he "knew almost nothing about [the petitioner's] case" and that the petitioner was "very, very violent" and "crazy." *Id.* at 1203–04. Indeed, the psychologist in *Hooks* admitted on cross-examination that he "had not read the police reports pertaining [to the petitioner's crimes], had not listened to [the petitioner's] tape-recorded confession, and had not seen any of the photographs in the case that depicted [the victim] after her death." *Id.*

In contrast, here, Petitioner's trial counsel presented an extensive amount of mitigation evidence. Specifically, Petitioner's trial counsel called twenty-six witnesses to testify during the sentencing phase. (Doc. 72, p. 3 (citing (doc. 27-20, pp. 43–47, 61–68).) These witnesses, including Davis and Dr. Weilenman, provided an extensive amount of testimony regarding Petitioner's life circumstances, his tragic upbringing, the neglect and abuse he suffered as a child, and his poor development. (*Id.* at pp. 5–10.) In addition, Dr. Weilenman testified about Petitioner's mental health, development, and juvenile conduct, including Petitioner's post-traumatic stress disorder, ADHD, and an "adjustment disorder with depressed features." (*Id.* at p. 9.) Dr. Weilenman further testified about Petitioner's lack of "executive functioning" and development, emphasizing that Petitioner "was still more into peer pressure than you would have expected" at his age. (*Id.*) Furthermore, unlike the psychologist in *Hooks*, Dr. Weilenman was well acquainted with Petitioner and his case. (*See id.* at pp. 5–10, 22–25.) Indeed, Dr. Weilenman met with Petitioner five times, interviewed him for approximately ten to fifteen hours total, reviewed the documents, records, and interview notes procured by Davis, and re-interviewed other witnesses. (*Id.* at pp. 7, 23.) While Petitioner, relying on the Tenth Circuit's decision in *Hooks*, appears to argue that Dr. Weilenman's

testimony "left [the jury] with almost no explanation of how [the petitioner's] mental problems played into the murder of [the victim]," 689 F.3d at 1204; (doc. 74, p. 12), Dr. Weilenman did testify about how Petitioner's past impacted his behavior regarding his crimes. (*See* Discussion Section I.A., *supra*.) Specifically, Dr. Weilenman testified that Petitioner "was in a situation and, based on his personality as well, [was] the follower, [and] he . . . [,]at that time, [was] listening to [O'Kelley], as a follower, . . . and not questioning it. He needed to fit in with that group." (Doc. 10-11, p. 61.) Furthermore, to the extent that Petitioner argues that his *trial counsel* did not attempt to "connect the dots" between Petitioner's mental health and the crimes, the Court finds that argument unpersuasive because Petitioner's trial counsel argued in the sentencing phase's closing argument that Petitioner was the product of his upbringing, could not think for himself, lacked logic skills, and was a "young boy." (*See* doc. 27-20, pp. 68–69.) Furthermore, Petitioner's trial counsel compared O'Kelley to Charles Manson, arguing that O'Kelley was very manipulative and held control over Petitioner due to Petitioner's lack of development. (*Id.* at p. 69.) Finally, Petitioner does not contend, like the petitioner in *Hooks*, that any portion of Dr. Weilenman's testimony assisted the prosecution. (*See* doc. 74, pp. 11–12.) Therefore, the Court finds *Hooks* and the Ninth Circuit's unpublished opinion[3] in *Lopez* distinguishable from this case. *Cf. Lopez*, 845 F.App'x at 552–53 (finding trial counsel's performance deficient where counsel "pursued a mitigation strategy of . . . attributing [the petitioner's] conduct to his childhood neglect and abuse," but "the only penalty-phase evidence

[3] The Court notes that the Ninth Circuit's Local Rule 36-3(a) provides that "[u]npublished dispositions and orders of this Court *are not precedent*." Ninth Circuit Rule 36-3(a) (emphasis added).

counsel introduced was lay witness testimony about [the petitioner's] family from [the petitioner's] uncle"). Thus, the Court declines to amend the Habeas Order on this basis.

Petitioner's second argument, however, is more convincing than his first. Petitioner contests the Court's application of 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1) in the Habeas Order. (Doc. 74, p. 12; *see* doc. 71, pp. 11–12.) According to Petitioner, the Court should amend its judgment to grant him a COA on his ineffective assistance of counsel claim because reasonable jurists could disagree as to the "correct application" of Sections 2254(d)(2) and 2254(e)(1). (*See* doc. 74, pp. 12–13.) Specifically, Petitioner points to a split among circuit courts as the reason he is entitled to a COA on this issue. (*See id.*)

While the Supreme Court has "not defined the precise relationship between [Section] 2254(d)(2) and [Section] 2254(e)(1)," *Burt v. Titlow*, 571 U.S. 12, 18 (2013), the Supreme Court has clarified that

> [a] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system. Where 28 U.S.C. § 2254 applies, our habeas jurisprudence embodies this deference. *Factual determinations* by state courts are presumed correct absent clear and convincing evidence to the contrary, [Section] 2254(e)(1), and *a decision* adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, [Section] 2254(d)(2).

Miller-El, 537 U.S. at 340 (emphasis added). Since the Court's decision in *Miller-El*, however, "precisely how subsections (d)(2) and (e)(1) relate to one another has

remained an open question." *Hayes v. Sec'y, Fla. Dep't of Corr.*, 10 F.4th 1203, 1223 (11th Cir. 2021) (Newsom, J., concurring) (citing *Rice v. Collins*, 546 U.S. 333, 339 (2006)).

In the Habeas Order, the Court applied Sections §§ 2254(d)(2) and 2254(e)(1) as follows:

> Regarding Section 2254(d)(2), the Court must evaluat[e] whether a state court's *decision* was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. When doing so, the Court may not characterize . . . state-court factual determinations as unreasonable merely because [the Court] would have reached a different conclusion in the first instance. Section 2254(d)(2) . . . requires that federal courts afford state court factual determinations substantial deference. If [r]easonable minds reviewing the record might disagree about the state court factfinding in question, on habeas review that does not suffice to supersede the state court's factual determination. The Court presume[s] *findings of fact* made by state courts are correct, unless a petitioner rebuts that presumption by clear and convincing evidence.

(Doc. 72, p. 17 (emphasis added) (internal quotations omitted) (quoting *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1259 (11th Cir. 2016); *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015)).) In other words, the Court—in the Habeas Order—examined whether the state habeas court's *decision* was based on an unreasonable determination of facts under Section 2254(d)(2), (*see, e.g.*, doc. 72, pp. 26–27, 34, 47, 53, 57, 60), and presumed that *individual findings of fact* made by the state habeas court were correct absent clear and convincing evidence to the contrary, (*see, e.g.*, *id.* at pp. 25–26, 44). Thus, in the

Habeas Order, the Court applied both Section 2254(d)(2) and Section 2254(e)(1).

Most courts appear to apply the same or similar analysis when evaluating habeas petitions under 28 U.S.C. § 2254. *See Hayes*, 10 F.4th at 1223 ("Most courts that have addressed the subject seem to have held that [Section] 2254(e)(1) requires a federal court to presume that a state court's factual determinations are correct even in the context of a [Section] 2254(d)(2) challenge—and, thus, that the two subsections present separate barriers to relief.") (Newsom, J., concurring); *see also, e.g.*, *Lenz v. Washington*, 444 F.3d 295, 300 (4th Cir. 2006) (finding that a district court did not err when it applied Section 2254(e)(1) within the context of determining whether relief was appropriate under Section 2254(d)(2)); *Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (7th Cir. 2008) ("A petitioner's challenge to a state court decision based on a factual determination under [Section] 2254(d)(2) will not succeed unless the state court committed an 'unreasonable error,' and [Section] 2254(e)(1) provides the mechanism for proving unreasonableness."); *Collier v. Norris*, 485 F.3d 415, 423 (8th Cir. 2007) ("Because Norris concedes that both of these factual statements were erroneous, we will assume that Collier has overcome the presumption of their correctness by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Notwithstanding this assumption, it does not necessarily follow that the state court adjudication was based on an unreasonable determination of facts because [Section 2254(d)(2)] instructs federal courts to evaluate the reasonableness of the state court decision 'in light of the evidence presented in the State court proceeding.' 28 U.S.C. § 2254(d)(2).").

As Petitioner points out, however, the Ninth and Third Circuit Courts of Appeal appear to take a different approach. (See doc. 74, pp. 12–13.) The Ninth Circuit has

held that Section 2254(d)(2) applies when a petitioner challenges the state court's findings based entirely on the state court record and that Section 2254(e)(1)'s presumption of correctness applies *only when the habeas petitioner presents new evidence for the first time in federal court*. *See Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984 (7th Cir. 2014). Somewhat similar to the Ninth Circuit, the Third Circuit has held that Section 2254(e)(1) "comes into play" when a habeas petitioner "attack[s] specific factual determinations that were made by the state court[] and that are subsidiary to the ultimate decision." *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004). According to the Third Circuit, a habeas petitioner "may develop clear and convincing evidence by way of a hearing in federal court as long as he satisfies the necessary prerequisites." *Id.*

Though the Eleventh Circuit has "note[d] that the plain language of [Section] 2254 does not provide the basis" for the distinction drawn by the Ninth Circuit (and seemingly the Third Circuit), *Prevatte v. French*, 547 F.3d 1300, 1304 n.1 (11th Cir. 2008), the "interaction between [Sections 2254] (d)(2) and (e)(1) . . . is an open question," *Landers v. Warden, Att'y Gen. of Ala.*, 776 F.3d 1288, 1293 n.4 (11th Cir. 2015); *see Green v. Sec'y, Dep't of Corr.*, 28 F.4th 1089, 1128 (11th Cir. 2022) ("The precise relationship between the 'unreasonable application' standard of [Section] 2254(d)(2) and the 'clear and convincing standard of [Section] 2254(e)(1) when reviewing a state court's factual determinations under AEDPA is unclear."); *Cave v. Sec'y for Dep't of Corr.*, 638 F.3d 739, 747 (11th Cir. 2011) ("We have not yet had an occasion to completely define the respective purviews of [Sections 2254] (d)(2) and (e)(1) . . . ."); *see also Prevatte*, 547 F.3d at 1304 n.1. However, the Eleventh Circuit has

"given weight to [Section] 2254(e)(1)'s presumption without definitely determining how it relates to [Section] 2254(d)(2)." *Hayes*, 10 F.4th at 1223 (Newsom, J., concurring) (citing *Newland v. Hall*, 527 F.3d 1162, 1183–84 (11th Cir. 2008); *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1310 (11th Cir. 2012)).

The Court finds that the split among circuit courts—combined with the lack of a binding decision[4] from the Eleventh Circuit—on the relationship between Section 2254(d)(2) and 2254(e)(1) is sufficient reason to amend its judgment and grant Petitioner a COA on this issue.[5] *See*

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[4] The Eleventh Circuit has denied COAs where circuit splits exist on the relevant issues. *See, e.g.*, *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1171 (11th Cir. 2017); *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015); *Aviles v. United States*, No. 21-13303, 2022 WL 1439333, at *4 (11th Cir. Feb. 9, 2022). However, in those cases, the Eleventh Circuit relied on the principle that "[n]o COA should issue where the claim is foreclosed by *binding circuit precedent* 'because reasonable jurists will follow controlling law.'" *Hamilton*, 793 F.3d at 1266 ("[W]e are bound by our Circuit precedent, not by Third Circuit precedent."); *see Lambrix*, 851 F.3d at 1271 ("Lambrix points to an alleged circuit split, but we need not evaluate that circuit split because Lambrix's . . .argument is foreclosed by our binding precedent . . ., and his attempted appeal does not present a debatable question because reasonable jurists would follow controlling law."); *Aviles*, 2022 WL 1439333, at *4 ("[A]lthough Aviles argues that, due to a circuit split on the issue, reasonable jurists could debate whether controlling precedent precludes issuance of a COA, our binding precedent holds that a COA shall not issue if the claim is foreclosed by binding precedent."). Here, however, as discussed above, there is no binding precedent; the relationship between Section 2254(d)(2) and Section 2254(e)(1) remains an open question in this circuit.

[5] The Court notes that, in a concurring opinion in *Hayes*, Judge Newsom discussed the "relationship between subsections (d)(2) and (e)(1)" of Section 2254 and supported an analysis like the analysis the Court conducted in the Habeas Order. *See* 10 F.4th at 1221–25

(Newsom, J., concurring). In that concurring opinion, Judge Newsom stated:

> [C]areful attention to [Section] 2254's text shows that the two provisions play separate roles in federal habeas review. . . . [S]ubsection (e)(1) articulates a universal requirement: In every habeas proceeding initiated by an individual in state custody, any "determination of a factual issue" by the state court "shall be presumed correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." . . . Section 2254(d) is different—it explains how federal courts should review state-court "decision[s]" and generally prohibits a federal court from granting habeas relief unless a state court's "decision" itself was "unreasonable," either legally or factually. . . . [Section] 2254(d)(2) bars relief absent a showing that the state court's "decision" was "based on" an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." . . . [B]ecause a "decision" might comprise many "determination[s]"—some factual, some legal—[Section] 2254(d) prevents federal courts from granting relief because of errors that don't affect the ultimate reasonableness of the state court's decision. Clearly, subsections (d)(2) and (e)(1) share some of the same space, and there is some logical relationship between them. . . . If the petitioner can't discharge his burden under [Section] 2254(e)(1) by proving clear and convincing evidence that *any* of the state court's individual factual "determinations" was erroneous, then it follows that he also can't demonstrate that the state court's "decision" was "based on" an "unreasonable determination of facts" within the meaning of [Section] 2254(d)(2). The converse, though, is not necessarily true. Even if a petitioner can prove—even clearly and convincingly—that a state court's factual determination (or determinations) was (or were) erroneous, he may yet be unable to make the required showing under [Section] 2254(d)(2)—namely, that the state court's factual error (or errors) resulted in a 'decision' that was "based on" an "unreasonable determination of the facts." That's because a factual error, given its bigness or smallness, might or might not rise to the level that it renders the state court's ultimate "determination of the facts" unreasonable, or because, despite the error, the state court's "decision" might or might not have been "based on" it. That is, a state court's "decision" can be reasonable even if some of its

Lambright v. Stewart, 220 F.3d 1022, 1027–28 (9th Cir. 2000) ("[T]he fact that another circuit opposes our view satisfies the standard for obtaining a COA."); *Rodella v. United States*, 467 F. Supp. 3d 1116, 1126 (D.N.M. 2020) ("[B]ecause there is a Courts of Appeals split on a petitioner's burden of proof when arguing that the sentencing court relied upon an unconstitutional provision during sentencing, the Court will grant a certificate of appealability."); *Garza v. United States*, No. B-08-496, 2009 WL 10674261, at *2 (S.D. Tex. June 17, 2009) ("In his application for a COA Petitioner correctly identifies an existing circuit split as to whether a later habeas petition which raises issues that could have been raised in an initial habeas petition is barred as a second or successive petition under the AEDPA. Because the right to effective assistance of counsel is a protected constitutional right, and because this Court holds that reasonable jurists could differ with its procedural conclusion, Petitioner's request should be granted.") (internal citations omitted). Indeed, the split among circuit courts shows "that the issue [Petitioner] presents is debatable among jurists of reason" and, thus, entitles Petitioner to a COA. *Wilson v. Sec'y Pa. Dep't of Corr.*, 782 F.3d 110, 115 (3d Cir. 2015) (internal quotations omitted). Furthermore, pursuant to Federal Rule of Civil Procedure 59(e), the Court finds that "the interests of justice demand" that the Court correct its error in the Habeas Order and grant Petitioner

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> individual factual findings were erroneous—so long as the decision, taken as a whole, doesn't constitute an 'unreasonable determination of the facts' and isn't "based on" any such determination.

Hayes, 10 F.4th at 1224–25 (11th Cir. 2021) (Newsom, J., concurring). However, the Court's own research has not found any case law indicating that the Eleventh Circuit has adopted Judge Newsom's analysis as binding law in this circuit.

a COA on this issue. *Am. Home Assurance*, 763 F.2d at 1239.

In sum, the Court finds that Petitioner "made a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2) because reasonable jurists could disagree as to whether the Court properly applied Sections 2254(d)(2) and 2254(e)(1) of the AEDPA when evaluating Petitioner's ineffective assistance of counsel claim. The Court also finds that Petitioner satisfied the standard under Federal Rule of Civil Procedure 59(e) by showing that the Court erred in denying him a COA on this issue in the Habeas Order and that the "interests of justice demand that [the Court] correct" that error. *Am. Home Assurance*, 763 F.2d at 1239; see Fed. R. Civ. P. 59(e). Therefore, the Court finds it appropriate to amend the Habeas Order and grant Petitioner a COA on the issue of whether the Court properly applied Sections 2254(d)(2) and 2254(e)(1) of the AEDPA when evaluating the state habeas court's decision and factual determinations. That is, the Court grants Petitioner a COA on the issue of whether it was proper for the Court to apply Section 2254(d)(2)'s deference to the state habeas court's *decision* but apply Section 2254(e)(1)'s deference to the state habeas court's *individual findings of fact*.

B. Eighth Amendment Claim

Petitioner also argues that he is entitled to a COA on his Eighth Amendment claim because "the answer to the question of the application of [the] AEDPA to claims that the Eighth and Fourteenth Amendments bar the execution of defendants who are the functional equivalent of juveniles is at least debatable." (Doc. 74, p. 13.) In his Brief, Petitioner argued that the Court should review his Eighth Amendment claim *de novo* (and not under the AEDPA's standard of review) because his death sentence

violates "a substantive rule of constitutional law that would be retroactive on collateral review under the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989)." (Doc. 65, pp. 133–36; *see* doc. 72, p. 64.) The Court rejected this argument. (Doc. 72, pp. 67–74.) While the Court found that Petitioner's "proposed extension" of Roper falls within one of *Teague*'s exceptions, the Court also found that it must "also determine whether the AEDPA's standard of review under 28 U.S.C. § 2254(d)(1) applies to new rules of constitutional law that fall under one of the exceptions to Teague." (*Id.* at p. 70.) The Court noted that "neither the Supreme Court nor the Eleventh Circuit ha[s] directly answered the question" of "whether a [Section] 2254 petitioner can rely on a rule that is considered 'new' under *Teague* (even if it falls within a *Teague* exception) because the rule will not also be 'clearly established' for purposes of [Section] 2254(d)(1)." (*Id.* at p. 71.) However, the Court ultimately decided that 28 U.S.C. § 2254(d)(1) applied and reviewed Petitioner's Eighth Amendment claim under the AEDPA's standard of review. (*Id.* at p. 74.)

Petitioner now appears to argue that because "neither the Supreme Court nor the Eleventh Circuit have directly answered" the question of "whether a [Section 2254] petitioner can rely on a rule that is considered 'new' under *Teague* . . . [but] not . . . 'clearly established' for purposes of [Section] 2254(d)(1)," (doc. 72, p. 71), the question "is at least debatable," (doc. 74, p. 13). However, Petitioner has failed to cite to any case law directly supporting his assertion that *Teague*'s substantive rule exception prohibits a federal habeas court from applying the AEDPA's standard of review when reviewing a state court's adjudication. (*See* doc. 74, p. 13; *see also* doc. 65, pp. 133–36.) Instead, as the Court noted in the Habeas Order, the Supreme Court has

"stated on multiple occasions that 'the AEDPA and *Teague* inquiries are distinct.'" (Doc. 72, p. 72 (citing *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam); *Greene v. Fisher*, 565 U.S. 34, 39 (2011)). Indeed, in *Greene*, the Supreme Court stated:

> The retroactivity rules that govern federal habeas review on the merits—which include *Teague*—are quite separate from . . . [the] AEDPA; neither abrogates or qualifies the other. If [Section] 2254(d)(1) was, indeed, pegged to *Teague*, it would authorize relief when a state-court merits adjudication 'resulted in a decision that *became* contrary to, or an unreasonable application of, clearly established Federal law, *before the conviction became final*.' The statute says no such thing, and we see no reason why *Teague* should alter [the] AEDPA's plain meaning.

565 U.S. at 39; see also *Edwards v. Vannoy*, 141 S. Ct. 1547, 1565 (2021) (Thomas, J., concurring) ("[T]he Court's reliance on Teague today and in the past should not be construed to signal that . . . *Teague* could justify relief where [the] AEDPA forecloses it. [The] AEDPA . . . . does not contemplate retroactive rules upsetting a state court's adjudication of an issue that reasonably applied the law at the time."). Other federal courts have reached similar conclusions. *See Ochoa v. Davis*, 16 F.4th 1314, 1338 n.4 (9th Cir. 2021) ("The *Teague* and AEDPA inquiries are distinct."); *Demirdjian v. Gipson*, 832 F.3d 1060, 1076 n.12 (9th Cir. 2016) ("Even if applying a rule retroactively would comport with *Teague*, we still must ask whether doing so would contravene [S]ection 2254(d)(1)[] by granting relief based on federal law not clearly established *as of the time the state court render*[*ed*] its decision.") (internal quotations and citations omitted) (emphasis in original); *Greene v. Palkovich*, 606 F.3d 85,

101 (3d Cir. 2010) ("[I]t seems a leap to assume that new rules that are deemed retroactive under *Teague* would be automatically deemed 'clearly established Federal law' for purposes of [Section] 2254(d)(1)."); *Pizzuto v. Blades*, No. 1:05-cv-00516-BLW, 2016 WL 6963030, at *6 (D. Idaho Nov. 28, 2016) ("[T]o be eligible for relief under [the] AEDPA, a petitioner must show *both* that the rule he seeks to invoke is retroactive—either because it is not a new rule, it is a substantive rule, or that it is a watershed rule of criminal procedure—*and* that the state court's decision violated Supreme Court precedent that was clearly established at the time of that decision . . . ."). Furthermore, Section 2254(d)(1)'s plain text speaks in the past tense and only allows a writ to be granted where a decision "*was* contrary to, or *involved* an unreasonable application of, *clearly established* Federal law, as *determined* by the Supreme Court of the United States." 28 U.S.C. § 2254(d) (emphasis added). As the Court stated in the Habeas Order, "[i]f Congress intended for federal courts to grant habeas petitions where a state decision *is* contrary to or *involves* an unreasonable application of *now* established law, it could have said so." (Doc. 72, p. 73.) However, Congress did not include such language or otherwise create an exception to Section 2254(d)'s standard of review for claims based on a rule that would fall within one of Teague's exceptions. See 28 U.S.C. § 2254(d); see also Edwards, 141 S. Ct. at 1565 (Thomas, J., concurring) ("Section 2254(d)—the absolute bar on claims that state courts reasonably denied—has no exception for retroactive rights. Congress' decision to create retroactivity exceptions to the [AEDPA's] statute of limitations and to the [AEDPA's] bar on second-or-successive petitions but not for [Section] 2254(d) is strong evidence that Teague could never have led to relief here."). Based on the foregoing, the Court finds that

Petitioner failed to show the need to correct clear error in the Habeas Order's denial of a COA for Petitioner's Eighth Amendment claim or prevent any manifest injustice.

CONCLUSION

Based on the foregoing, the Court **GRANTS in part** and **DENIES in part** Petitioner's Motion to Amend or Alter Judgment. (Doc. 74.) Specifically, the Court **GRANTS** Petitioner a Certificate of Appealability on the issue of whether the Court properly applied Sections 2254(d)(2) and 2254(e)(1) of the AEDPA in the Habeas Order when evaluating Petitioner's ineffective assistance of counsel claim. The remainder of the Habeas Order remains in effect. (Doc. 72.)

SO ORDERED, this 28th day of July, 2022.

/s/
R. STAN BAKER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C

[FILED: DECEMBER 15, 2021]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

DARRYL SCOTT STINSKI, Petitioner, v. WARDEN BENJAMIN FORD, Respondent.	CIVIL ACTION NO. 4:18-CV-66

ORDER

In 2007, following a trial in the Superior Court of Chatham County, a jury convicted Petitioner Darryl Stinski of two counts of malice murder, two counts of felony murder, and other related crimes for the murders of Susan Pittman and her thirteen-year-old daughter, Kimberly Pittman. (Doc. 7-11, pp. 34–37.) Petitioner was eighteen years and nine months old when he committed these crimes on April 10, 2002. (Doc. 27-20, p. 88.) Petitioner was sentenced to death on June 13, 2007. (Doc. 8-1, pp. 210–15.) After the completion of his direct appeal and state habeas corpus proceedings, Petitioner filed his Petition for Writ of Habeas Corpus in this Court, pursuant to 28 U.S.C. § 2254, challenging his conviction and death sentence. (Doc. 1.) After careful consideration of the parties' briefings, (docs. 65, 69, 71), the Court

DENIES Petitioner's Petition for Writ of Habeas Corpus. (Doc. 1.)[1]

BACKGROUND

I. Factual Background

The Supreme Court of Georgia set forth the facts of this case as follows:

> Darryl Stinski and Dorian O'Kelley engaged in a crime spree that spanned April 10–12, 2002. On the night of April 10, two police officers observed two men dressed in black clothing in a convenience store. Later, the officers responded to two separate calls regarding the sounding of a burglar alarm at a nearby home and the officers returned to the store after responding to each call. Then, at approximately 5:00 a.m. on April 11, the officers noticed while leaving the store that "the sky was lit up." The officers discovered the victims' house fully engulfed in flames. As one of the officers moved the patrol vehicle to block traffic in preparation for the arrival of emergency vehicles, his headlights illuminated a wooded area where he observed the same two men that he and his partner had observed earlier in the convenience store. O'Kelley, as the neighbor living across the street from the burned house, gave an interview to a local television station. The officer saw the interview on television and identified O'Kelley as being one of the men he had seen in the convenience

[1] The Court **GRANTS** Respondent's Motion for Page Extension, (doc. 68), and **GRANTS** Petitioner's Motion to Extend Time and to Exceed Page Limitation, (doc. 70). The Court deems the parties' briefs to be filed timely and in compliance with the Court's page limit.

store and near the fire. The officer later identified both Stinski and O'Kelley in court.

Stinski and O'Kelley left items they had stolen with friends who lived nearby. The friends handed those items over to the police. Testimony showed that, before their arrest, O'Kelley had bragged about raping a girl and keeping one of her teeth as a memento and Stinski had laughed when he saw O'Kelley being interviewed on the news in front of the victims' house.

Stinski gave two videotaped interviews with investigators after his arrest, the second of which was suppressed on his motion. In the interview the jury heard, Stinski confessed to participating in the crime spree described below, which began with burglarizing a home and leaving when a motion detector in this first home set off an alarm. After their botched burglary of the first home, Stinski and O'Kelley turned off the electricity to the home of Susan Pittman and her 13–year–old daughter, Kimberly Pittman, and entered as both victims slept. O'Kelley took a walking cane and began beating Susan Pittman, while Stinski held a large flashlight. Stinski beat Susan Pittman with the flashlight and then left the room to subdue Kimberly Pittman, who had awakened to her mother's screams. O'Kelley then beat Susan Pittman with a lamp and kicked her. At some point, Susan Pittman was also stabbed three to four times in the chest and abdomen. Stinski took Kimberly Pittman upstairs so she would not continue to hear her mother's screams. Susan Pittman eventually died from her attack. Stinski and O'Kelley then brought Kimberly Pittman back downstairs, drank beverages, and discussed "tak[ing] care of"

> her. Stinski took Kimberly Pittman back upstairs and bound and gagged her. As Stinski rummaged through the house downstairs, O'Kelley raped Kimberly Pittman. Stinski and O'Kelley then agreed that Stinski would begin beating Kimberly Pittman with a baseball bat when O'Kelley said a particular word. On cue, Stinski hit Kimberly Pittman in the head with the bat as she knelt on the floor, bloody from the rape and with her hands bound. O'Kelley then slit Kimberly Pittman's throat with a knife but she remained alive. Stinski went downstairs and came back upstairs when O'Kelley called him. Stinski then hit Kimberly Pittman in her knee with the bat as O'Kelley tried to suffocate her. O'Kelley then took another knife and stabbed her in the torso and legs. O'Kelley kicked her and threw objects at her head, but her groans indicated that she was still alive. Stinski and O'Kelley then set fires throughout the house and went to O'Kelley's house across the street to watch the fire. Kimberly Pittman died of smoke inhalation before the fire fully consumed the house. Later, in the early morning hours of April 12, Stinski and O'Kelley broke into numerous vehicles in the neighborhood.

Stinski v. State, 691 S.E.2d 854, 862–63 (Ga. 2010).

II. Procedural History

A. Trial and Appeal

On June 5, 2002, a Chatham County grand jury indicted Petitioner on two counts of malice murder, two counts of burglary, two counts of arson in the first degree, five counts of entering an automobile, one count of cruelty to children in the first degree, and one count of possession of a controlled substance with intent to distribute. (Doc. 6-1, pp. 50–54); *see also Stinski v. State*, 691 S.E.2d at 862

n.1. Shortly thereafter, the prosecution filed a notice of intent to seek the death penalty. *Stinski v. State*, 691 S.E.2d at 862 n.1. Attorneys Michael Schiavone, Steven Sparger, and Willie Yancy were appointed to represent Petitioner with Schiavone serving as lead counsel and Sparger in charge of mitigation. (Doc. 27-20, pp. 8–9.)

Petitioner's trial began with jury selection on May 24, 2007. *Stinski v. State*, 691 S.E.2d at 862 n.1. On June 8, 2007, after the conclusion of the guilt phase of trial, a jury found Petitioner guilty on all counts and on two lesser-included counts of felony murder. (Doc. 7-11, pp. 34–37.) Shortly after the guilt phase of trial concluded, the sentencing phase of trial began. (Doc. 10-8, pp. 145, 167–68.) Petitioner's trial counsel called twenty-six witnesses to testify during the sentencing phase of trial, including Petitioner's maternal grandmother, mitigation specialist Dale Davis, and Dr. Jane Weilenman, a psychologist.[2] (Doc. 27-20, pp. 43–47, 61–68.)

Petitioner's maternal grandmother, Sharlene Riley, generally testified about Petitioner's childhood and family history. (*Id.* at pp. 43–44; doc. 10-9, pp. 28–64.) Concerning Petitioner's childhood, Riley testified about Petitioner's frequent moves as a child. (*See* doc. 27-20, pp. 43–44.) Riley testified that, at a young age, Petitioner lived with his biological parents, his older stepbrother Tony Raby, and his other older brother Donald Stinski. (Doc. 10-9, pp. 37–38.) Riley stated that the family moved frequently

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[2] Petitioner's trial counsel also called, among others, Petitioner's biological mother and father, stepmother, step-aunt, and stepsister, as well as Petitioner's former pastor, a social worker who had monitored Petitioner following a shoplifting conviction, a psychiatric nurse who treated Petitioner from the ages of twelve to fourteen, two of Petitioner's grade-school teachers, and several of Petitioner's former schoolmates and friends. (Doc. 27-20, pp. 43–68.)

before moving to South Carolina when Petitioner was three. (*Id.*; doc. 27-20, pp. 43–44.) While in South Carolina, Petitioner's parents filed for divorce. (Doc. 27-20, p. 43.) Riley further testified that Petitioner's mother remarried Frank Sutton, a police officer in South Carolina, in August 1991. (*Id.*; doc. 10-9, p. 42.) At the request of Petitioner's mother, Riley cared for Petitioner and his siblings for a few months in 1994 before Petitioner, his mother, and his siblings moved to New Mexico following Petitioner's mother and stepfather splitting up. (Doc. 27-20, p. 44; doc. 10-9, pp. 41, 45–46.) Petitioner's mother then moved the family back to South Carolina after reconciling with the stepfather. (Doc. 27-20, p. 44; doc. 10-9, pp. 52–53.) In August 1995, Petitioner's mother sent Petitioner to live with his biological father, stepmother, and stepsister in Wisconsin, where Petitioner remained until he was seventeen. (Doc. 27-20, p. 44; doc. 10-9, pp. 54–57, 236.) After living in Wisconsin, Petitioner moved back to South Carolina and stayed with his mother and stepfather. (Doc. 27-20, p. 44; doc. 10-9, p. 58.) However, Petitioner's stepfather kicked him out of the house, and Petitioner moved to Savannah to live with his older brother Donald, who also subsequently kicked Petitioner out of his home. (Doc. 27-20, p. 44; doc. 10-9, p. 58.) Petitioner then lived with whoever would take him in. (Doc. 27-20, p. 44; doc. 10-9, pp. 58–59.)

Regarding Petitioner's family history, Riley testified that Petitioner's family struggled with alcoholism and abuse dating back to his great-grandfather. (*See* doc. 10-9, pp. 30–38, 44, 62–63.) Riley testified that Petitioner's father "drank heavily" and was "very abusive" and neglectful. (*Id.* at p. 34.) Riley specifically recalled multiple instances of Petitioner's father's neglect, including an instance in which a car struck Petitioner in

the street when Petitioner's father was supposed to be watching Petitioner but was instead away from the home drinking alcohol with a friend. (*Id.* at pp. 34–36.) Moreover, Riley stated that Petitioner's mother divorced his father because "[s]he got tired of hi[m] being drunk and passing out on the floor with a gun or knife in his hand." (*Id.* at p. 38.) Concerning Petitioner's stepfather, Riley testified that he was a "heavy drinker[]" and "control freak." (*Id.* at pp. 44, 63.)

Dale Davis also testified during the sentencing phase of trial "for the purpose of introducing several volumes of records relating to Petitioner." (Doc. 27-20, p. 45.) Petitioner's trial counsel retained Davis as a mitigation specialist for Petitioner's trial. (*Id.*) According to Davis, her role in the case was to "take [Petitioner] and find out every single thing [she could] find out about [him] from [his] birth, even pre-birth, up until [the crime]." (Doc. 10-9, p. 78.) To fulfill this role, Davis interviewed "forty or more" people, prepared an extensive social history on Petitioner, and worked approximately 432 hours on Petitioner's case. (*Id.* at pp. 78–80, 83–89, 95–96, 101–02, 105–10, 112–13, 125; doc. 27-20, pp. 31, 45–47.) At the time of Petitioner's trial, Davis had worked on "approximately thirty death penalty cases [and] [h]undreds of other . . . cases" as a mitigation expert. (Doc. 10-9, pp. 76–77.) Through Davis, Petitioner's trial counsel introduced many records and documents relating to Petitioner's family, history, and childhood, including birth records, prenatal and delivery records, hospital records, school records, social services and family court records, counseling records, medical and mental health records from Chatham County Detention Center, divorce records from Petitioner's parents, mental health records regarding Petitioner's brother, marriage records for

Petitioner's mother and stepfather, and a police report regarding Petitioner's stepfather. (Doc. 10-9, pp. 78–80, 83–89, 95–96, 101–02, 105–10, 112–13; see also doc. 27-20, p. 45.)

Trial counsel also elicited testimony from Davis regarding information contained in the records she gathered as part of her investigation. (*See* doc. 27-20, p. 45.) Regarding Petitioner's childhood, Davis testified extensively about the abuse, neglect, and alcoholism in Petitioner's family. (*Id.* at p. 46.) Davis testified that the divorce records indicated that Petitioner's mother filed for divorce from his biological father because of a "pattern and practice of alcohol and/or substance abuse." (Doc. 10-9, p. 109.) Davis further testified that Petitioner's father suffered from a "real serious drinking problem." (Id.) Concerning Petitioner's stepfather, Davis testified about the information contained in a police report about an incident involving the stepfather. (*Id.* at pp. 111–12.) According to Davis, the police report concerned a domestic violence and simple assault incident in which Petitioner's stepfather shoved Petitioner's older brother Donald while under the influence of alcohol. (Id.) The police report also noted that Petitioner's mother declined to press charges. (*Id.* at p. 111.)

Furthermore, Davis testified about Petitioner's life in Wisconsin after he moved there to live with his father, stepmother, and stepsister. Petitioner's father and stepmother were strict parents who harshly punished him for not meeting their expectations. (*Id.* at pp. 98–100.) Davis also testified about Petitioner's father and stepmother's favoritism towards his stepsister. (Id. at p. 172; see also doc. 27-20, p. 46.) School records showed that Petitioner took an anti-depressant medication and Ritalin to treat ADHD but that he shared the Ritalin with other

students to make friends. (Doc. 10-9, pp. 89, 100–01.) During his time in Wisconsin, Petitioner had minimal contact with his mother, who still lived in South Carolina. (*Id.* at p. 105.)

Regarding Petitioner's mental health, Davis testified that Petitioner suffered from ADHD, depression, post-traumatic stress disorder, and a psychotic disorder, for which Petitioner received medication. (*Id.* at pp. 106–08, 170.) Davis also testified as to the mental health records of Petitioner's brother. (*Id.* at p. 113.) Davis stated that these records showed a "history of alcohol abuse and mental illness in [Petitioner's] family." (Id.) Indeed, Davis testified that "depression ran through [Petitioner's family]" and that "[t]here were a number of suicides and suicide attempts" within Petitioner's family. (*Id.* at p. 124; see also doc. 27-20, p. 47.)

Dr. Weilenman was the final witness Petitioner's trial counsel called at the sentencing phase of trial.[3] (Doc. 27-20, p. 61.) Trial counsel retained Dr. Weilenman to conduct a psychological evaluation of Petitioner. (Doc. 26-19, p. 150.) To this end, Dr. Weilenman "was part of the team that got some of the . . . mitigation information from . . . Davis," and "through that, was able to do interviews, back-up interviews, [and] talk to the family members in preparation for . . . trial." (Doc. 10-11, p. 6.) As part of her role in Petitioner's case, Dr. Weilenman met with Petitioner five times, interviewed him for approximately

[3] Dr. Jane Weilenman is a clinical psychologist with a master's degree in school psychology from City College in New York and a Doctor of Philosophy degree from the California School of Professional Psychology. (Doc. 10-11, p. 3.) At the time Dr. Weilenman testified at the sentencing phase of trial, Weilenman served as the clinical director of Coastal State Prison's mental health unit and maintained a private practice as a clinical psychologist. (*Id.* at pp. 4–5.)

ten to fifteen hours, and reviewed the documents Davis gathered as part of the mitigation investigation. (Id. at pp. 6–7; *see also* doc. 27-20, p. 61.) In creating a social history for Petitioner, Dr. Weilenman "focus[ed] on [Petitioner's] entire life," including "filling in all the blanks of the family history" and "focus[ing] on each family member . . . to find out . . . their impact . . . on [Petitioner's] life."[4]

As the state habeas court found, Dr. Weilenman testified about, among other things, Petitioner's background, including issues of neglect, abandonment, and abuse. (Doc. 27-20, p. 61.) Specific to Petitioner's family, Dr. Weilenman testified that they suffered from "global drug and alcohol abuse" as well as "mental health issues." (Doc. 10-11, p. 8.) Dr. Weilenman specifically noted that Petitioner's extended family suffered multiple suicides, that there was significant "alcohol abuse" during Petitioner's early childhood, and that there was an "intense conflict in [Petitioner's] home" between his parents. (*Id.* at pp. 8, 11.) Dr. Weilenman further testified that Petitioner's stepfather was a "heavy drinker," abused alcohol, and physically abused Petitioner. (*Id.* at pp. 13, 17.) For example, Petitioner's stepfather frequently paddled Petitioner with a homemade paddle into which he had drilled holes so there was less resistance. (*Id.* at p. 19.) Dr. Weilenman further testified about Petitioner's frequent moves. For example, Dr. Weilenman highlighted that Petitioner's stepfather and older brother both kicked him out of their homes and that Petitioner lived in twelve different places in the three months leading up to his crimes. (*Id.* at pp. 40, 46.)

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[4] Notably, Dr. Weilenman did not perform a "psychological test" on Petitioner. (Doc. 10-11, p. 67.)

Based on her evaluation of Petitioner, Dr. Weilenman reached several conclusions. Dr. Weilenman stated that Petitioner suffered from a "history of instability" due to moving twenty- five times in eighteen years. (*Id.* at p. 48.) The other "main theme" Dr. Weilenman emphasized in her testimony was Petitioner's "history of abandonment by his biological family." (*Id.*) Indeed, Dr. Weilenman stated that the two patterns in Petitioner's life were "instability" and "abandonment." (*Id.* at p. 50.) Due to these patterns, Dr. Weilenman testified that Petitioner "wants to be accepted." (*Id.* at p. 52.) According to Dr. Weilenman, people like Petitioner will "sometime[s] exhibit . . . inappropriate conduct" and "don't really think." (*Id.*) Furthermore, based, in part, on her own interactions with Petitioner, Dr. Weilenman concluded that Petitioner "was a follower . . . [that] did what he felt to please others." (*Id.* at pp. 52–53.)

Dr. Weilenman also testified about Petitioner's mental health, development, and juvenile conduct. Specifically, Petitioner suffered from post-traumatic stress disorder, ADHD, and an "adjustment disorder with depressed features." (*Id.* at p. 54.) According to Dr. Weilenman, "one of the major issues" with ADHD is that it effects one's "executive functioning" (i.e., "how you think, how you process information, impulse control, [and] all of those things"). (*Id.* at p. 55.) Dr. Weilenman further testified that the development of one's frontal lobe also impact's one's executive functioning. (*Id.*) According to Dr. Weilenman, the brain's frontal lobe, which she described as the "thinking center," does not fully develop until the age of twenty-five. (*Id.*) Thus, as one gets older, the frontal lobe develops, and therefore, a person "may have better control over their behaviors [during their] mid-twenties than they did when they were fourteen."

(*Id.*) Whenasked to compare Petitioner's executive functioning to that of a typical eighteen or nineteen-year-old, Dr. Weilenman stated that a typical eighteen to nineteen-year-old "is developing . . . some sense of internalizing external values." (*Id.* at p. 59.) Dr. Weilenman testified that a typical late adolescent "[is] forming some sense of identity, who they are, . . . know[s] what their belief systems are . . . [and] what they stand for, [and possesses] some sense of right and wrong." (*Id.*) However, according to Dr. Weilenman, Petitioner's instability and abandonment issues delayed his development of "that internal sense." (*Id.* at pp. 59–60.) Dr. Weilenman testified that Petitioner "was still more into peer pressure than you would have expected at that age" and, considering Petitioner's unstable life in the weeks leading up to his crimes, "needed to fit in." (*Id.* at pp. 60–61.) Indeed, Dr. Weilenman described Petitioner as someone who interacted like a "twelve-year- old," was "highly vulnerable," and did not "[know] who he was." (*Id.* at p. 56–58.) Furthermore, Dr. Weilenman stated that Petitioner exhibited "learned helplessness," whereby he would "do whatever it took to please [others] . . . to get [them] to like him." (*Id.* at p. 57.)

Notably, trial counsel asked Dr. Weilenman, "What happens when you have someone like that, that meets someone who's been described as manipulative and even compared to Charles Manson? What would happen in that sort of situation?" (*Id.* at pp. 60–61.) Dr. Weilenman responded:

> You have to understand the state of the person at that time. As I said before, he was trying to find a place to sleep, food to eat. At the time he entered the jail, he was roughly 140 pounds . . . I asked him why, and it

> was mainly because he was eating one meal a day and he was hopping from house to house . . . .
>
> And he'd stay at a house for three days, a house for five days, a house for a week, but as far as knowing where you were going to be at the time, he had no clue. . . . [I]t had to be how much his friends would tolerate him staying there, how much maybe the adults in the home would tolerate him staying here.
>
> So the basic need that all of us have, food, shelter, he was lacking that, so . . ., in order to survive, he was in a situation and, based on his personality as well, the follower, that he did what he at that time [sic], listening to this guy, as a follower . . . and not questioning it. He needed to fit in with that group.

(*Id.* at pp. 60–61.)

After the sentencing phase, the jury recommended the death sentence for the murders of Susan and Kimberly Pittman, finding that the existence of nine aggravating circumstances across the two murders warranted such a sentence:

(1) Petitioner was "engaged in the commission of a burglary" when murdering Susan Pittman;
(2) the murder of Susan Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved the depravity of mind of" Petitioner;
(3) the murder of Susan Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim before death;"
(4) Petitioner was committing "another capital felony" while murdering Kimberly Pittman;

(5) Petitioner "was engaged in the commission of a burglary" when murdering Kimberly Pittman;
(6) Petitioner "was engaged in the commission of arson in the first degree" when murdering Kimberly Pittman;
(7) the murder of Kimberly Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved tortur[ing] . . . the victim before death;"
(8) the murder of Kimberly Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved the depravity of mind of" Petitioner; and
(9) the murder of Kimberly Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim before death."

(Doc. 8-1, pp. 210–13.) In addition to the death sentence, Petitioner was sentenced to a total of 140 years of confinement for his other crimes. (*Id.* at pp. 214–15.) Petitioner subsequently fileda motion for a new trial, which was denied. (Doc. 27-20, p. 2.) The Georgia Supreme Court then affirmed Petitioner's convictions and death sentence. *See Stinski v. State*, 691 S.E.2d at 874-75.

B. State Habeas Petition

On September 12, 2011, Petitioner filed a petition for writ of habeas corpus in the Superior Court of Butts County, (doc. 11-19), and later amended the petition, (doc. 12-24). In the petition, Petitioner argued, among other things, that his trial counsel rendered ineffective assistance of counsel during the sentencing phase of trial and that he is ineligible for the death penalty under *Roper v. Simmons*, 543 U.S. 551 (2005), because he was the

functional equivalent of an adolescent at the time of his crimes. (Doc. 12-24, pp. 9–24, 29–30.) The state habeas court held an evidentiary hearing in which twenty witnesses testified, including family members, friends, acquaintances, and medical professionals. (*See* doc. 27-20, p. 2.) Among friends, family, and acquaintances, Petitioner called his stepbrother, his former high school principal, and one of his high school friends as witnesses at the evidentiary hearing. (Doc. 13-18, pp. 15–69; doc. 13-20, pp. 5–40; doc. 13-21, pp. 23–54.) Petitioner's stepbrother, Tony Raby, testified about growing up with Petitioner and Petitioner's biological parents. (Doc. 13-18, pp. 15–69.) Raby generally testified about Petitioner's biological father's alcoholism and their abusive households. (*Id.* at pp. 22–23, 29–38.) Petitioner's former high school principal, Linda Herman, generally testified that Petitioner left high school several times but "begged" her to let him return to school in the weeks leading up to the crime. (Doc. 31-20, pp. 14, 19–24.) Petitioner's high school friend, Sean Proctor, testified about Petitioner's struggle to find a place to sleep at night in the weeks leading up to the crimes. (Doc. 13-21, pp. 31, 33–35, 37–38.) Petitioner's trial counsel did not call Raby, Herman, or Proctor as witnesses at the sentencing phase of trial. (*See* doc. 27-20, pp. 75–77.)

Among medical professionals, Petitioner called a clinical neuropsychologist, a forensic psychiatrist, and a developmental psychologist. (Doc. 13-20, pp. 84–197; doc. 13-17, pp. 5–169; doc. 13-21, pp. 56–179.) The clinical neuropsychologist, Dr. Joette James, evaluated Petitioner's neurocognitive strengths and weaknesses by conducting a neuropsychological examination of Petitioner during a six-hour meeting. (Doc. 13-20, p. 93.) As part of this evaluation, Dr. James conducted ten

different tests and evaluated Petitioner's records.[5] (*Id.* at pp. 99, 133.) Dr. James testified that the results of her evaluation indicated that Petitioner suffered from weaknesses in particular areas of executive functioning, including working memory, short-term memory, auditory attention, planning, and organization. (*Id.* at p. 123.) Dr. James then explained how those deficits in executive functioning contributed to Petitioner's actions the night of the crime spree. (*Id.* at pp. 154–56.)

The forensic psychiatrist, Dr. Peter Ash, conducted a psychiatric interview with Petitioner that lasted two and a half hours. (Doc. 13-17, p. 23.) Dr. Ash also relied on Petitioner's history, reading documents such as the trial transcript, school records, prison records, mental health records, Dr. Weilenman's notes, affidavits of other witnesses, and reports by Dr. James and Dr. James Garbarino, who also testified at the evidentiary hearing. (*Id.* at pp. 25–26, 30–41.) Dr.

Ash's goal in evaluating Petitioner was to "get a sense of who [Petitioner] was [and] how he thought" and to perform a "general mental status exam to get a sense of how [Petitioner] was functioning, particularly cognitively and emotionally." (*Id.* at p. 23.) Based on his evaluation of Petitioner, "a couple things" from Petitioner's history "jumped out" to Dr. Ash, including Petitioner's lack of a violent past, his history of "psychological maltreatment," his constant moves throughout his childhood, and the "ongoing pattern of rejection." (*Id.* at p. 30.)

[5] The tests Dr. James conducted on Petitioner include: the Wechsler Adult Intelligence Scale; the Wide Range Achievement Test; the Grooved Pegboard; the Wechsler Memory Scale, the Rey-Osterrieth Complex Figure, the Boston Naming Test, the Deli Kaplan Executive Functioning System, the Wisconsin Card Sorting Test, the Test of Memory Maligning, and a word choice/effort test. (Doc. 13-20, p. 99.)

Furthermore, Dr. Ash determined that Petitioner suffered from various deficiencies in his executive functioning. (*Id.* at p. 62.) Ultimately, the heart of Dr. Ash's testimony at the evidentiary hearing was that Petitioner was functioning at an "adolescent level" the night of the crime. (Doc. 13-17, pp. 51, 79–82, 86.)

The developmental psychologist, Dr. James Garbarino, read through "all the records available and the affidavits and all the reports" and conducted a psychological and developmental interview of Petitioner that lasted two and a half hours. (Doc. 13-21, pp. 69–70.) According to Dr. Garbarino, the purpose of his interview and testimony was to "help a judge and jury understand [Petitioner's] life." (*Id.* at pp. 70–71.) Dr. Garbarino relied heavily on Petitioner's social history. (*Id.* at pp. 72–78, 82–84.) Dr. Garbarino generally testified that Petitioner suffered from "severe psychological maltreatment." (*Id.* at pp. 97–113.) Dr. Garbarino further testified that the psychological maltreatment "undermined" Petitioner's development as a child and adolescent. (*Id.* at p. 114.) Dr. Garbarino also testified that his "ultimate conclusion" from his analysis was that Petitioner was, "at the time of the crime, . . . an untreated, traumatized child who inhabited the body of an 18-year-old boy." (*Id.* at p. 145.) Dr. Garbarino further stated that this conclusion "makes [Petitioner's] behavior before, and during, much more comprehensible" and "gives a basis for saying that as a victim of pervasive, chronic psychological treatment," Petitioner's ability "to resist the influence of Dorian O'Kelley was significantly impaired." (*Id.*)

After conducting the evidentiary hearing, the Superior Court denied the petition on January 15, 2017. (Doc. 27-20.) Petitioner then filed an Application for Certificate of Probable Cause to Appeal ("CPC

Application") in the Georgia Supreme Court, (doc. 27-22), which the Georgia Supreme Court denied, (doc. 27-24).

C. Federal Habeas Petition

On March 26, 2018, Petitioner filed his Petition for Writ of Habeas Corpus in this Court pursuant to 28 U.S.C. § 2254. (Doc. 1.) The parties then filed their briefs regarding the issues of procedural default, cause and prejudice, and the fundamental miscarriage of justice. (Docs. 57, 58, 59.) The Court determined that Petitioner could not brief his ineffective assistance of counsel claim regarding his trial counsel's performance during the guilt phase of his trial but that he could brief the entirety of his claim that he received ineffective assistance of counsel during the sentencing phase of his trial and his Eighth Amendment claim. (Doc. 60.) Petitioner then filed the Brief on the Merits in support of his Petition for Writ of Habeas Corpus. (Doc. 65.) Respondent filed a Response, (doc. 69), and Petitioner filed a Reply, (doc. 71).

In his Brief, Petitioner asserts two general claims. (Doc. 65.) First, he asserts that his trial counsel rendered ineffective assistance of counsel at the sentencing phase of his trial in violation of his Sixth and Fourteenth Amendment rights. (*Id.* at pp. 87–133.) Specifically, Petitioner asserts that his trial counsel (1) unreasonably neglected to present available expert mental health mitigation evidence, including testimonies from experts such as Dr. James, Dr. Ash, and Dr. Garbarino; (2) unreasonably neglected to obtain testimony from Tony Raby, Linda Herman, and Sean Proctor; (3) unreasonably presented Dale Davis as a witness and produced her memoranda and notes of the case to the prosecution; (4) unreasonably failed to rebut the prosecution's evidence that Petitioner lacked remorse for his crimes; and (5)

unreasonably failed to question jurors during voir dire about their opinions on the death penalty in cases involving juvenile victims. (*Id.*) Petitioner further asserts that his trial counsel's ineffectiveness prejudiced his defense. (*Id.* at pp. 121–33.) Next, Petitioner claims that his execution would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments and the United States Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), because he was the equivalent of a juvenile when he committed his crimes. (Doc. 65, pp. 133–150.)

STANDARD OF REVIEW

Generally, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) "bars federal courts from granting habeas relief to a state habeas petitioner on a claim that was adjudicated on the merits in state court." *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1258 (11th Cir. 2016) (citing 28 U.S.C. § 2554(d)). However, 28 U.S.C. § 2254(d) provides two exceptions to that general rule. Under Section 2254(d), a federal court may grant habeas relief to a state habeas petitioner on a claim that was adjudicated on the merits if the state court's adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

The "clearly established" prong under Section 2554(d)(1) "refers to holdings, as opposed to the dicta," of the United States Supreme Court's decisions at the "time

of the relevant state court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). "'Contrary to' means the state court applied 'a rule different from the governing law set forth in [Supreme Court] cases, or [] it decide[d] a case differently than [the Supreme Court] ha[s] done on a set of materially indistinguishable facts.'" *Daniel*, at 1258–59 (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)). The "unreasonable application" inquiry asks "whether the state court's application of clearly established federal law was objectively unreasonable," *Williams v. Taylor*, 529 U.S. at 407, which means more than "just incorrect or erroneous," *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). However, the AEDPA does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (internal citations and quotations omitted). Furthermore, review under Section 2254(d)(1) is "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Regarding Section 2254(d)(2), the Court must "evaluat[e] whether a state court's decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Daniel*, 822 F.3d at 1259 (quoting 28 U.S.C. § 2254(d)(2)). When doing so, the Court "may not characterize . . . state-court factual determinations as unreasonable merely because [the Court] would have reached a different conclusion in the first instance." *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015) (quotations omitted). "Section 2254(d)(2) . . . requires that federal courts afford state

court factual determinations 'substantial deference.'" *Daniel*, 822 F.3d at 1259 (quoting *Brumfield*, 576 U.S. at 314). "If '[r]easonable minds reviewing the record might disagree about' the state court factfinding in question, 'on habeas review that does not suffice to supersede' the state court's factual determination." *Id.* (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)). The Court "presume[s] findings of fact made by state courts are correct, unless a petitioner rebuts that presumption by clear and convincing evidence." *Id.* (citing 28 U.S.C. § 2254(e)(1)). "When considering a determination of a mixed question of law and fact, such as a claim of ineffective assistance of counsel, the statutory presumption of correctness applies to only the underlying factual determinations." *Tanzi v. Sec'y, Fla. Dep't of Corr.*, 772 F.3d 644, 651 (11th Cir. 2014).

This is a "difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen*, 563 U.S. at 181 (internal quotations and citations omitted). Indeed, the AEDPA "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *White v. Wheeler*, 577 U.S. 73, 77 (2015) (per curiam). However, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "Deference does not by definition preclude relief." *Id.* "[I]f a convicted state criminal defendant can show a federal habeas court that his conviction rests upon a violation of the Federal Constitution, he may well obtain a writ of habeas corpus that requires a new trial, a new sentence, or release." Trevino v. Thaler, 569 U.S. 413, 421 (2013).

DISCUSSION

Petitioner brings two general claims. (Docs 1, 65.) First, he asserts that his trial counsel rendered ineffective assistance of counsel at the sentencing phase of his trial in violation of his Sixth and Fourteenth Amendment rights. (Doc. 65, pp. 87–133.) Next, Petitioner claims that his execution would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. (*Id.* at pp. 133–150.) The Courts addresses each claim in turn.

I. Ineffective Assistance of Counsel at the Sentencing Phase of Trial

The United States Supreme Court explained the standard for analyzing ineffective assistance of counsel claims in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel under *Strickland*, a petitioner must demonstrate (1) his counsel's performance was deficient, i.e., the performance fell below an objective standard of reasonableness, and (2) he suffered prejudice as a result of that deficient performance. *Id.* at 687–88. "Unless a defendant makes both showings [of the two-part test], it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687. Indeed, "[i]f a petitioner cannot satisfy one prong, we need not review the other prong." *Duhart v. United States*, 556 F. App'x 897, 898 (11th Cir. 2014) (citing *Strickland*, 466 U.S. at 697).

The deficient performance requirement concerns "whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (internal quotations omitted). "There is a strong presumption that

counsel's conduct fell within the range of reasonable professional assistance." *Davis v. United States*, 404 F. App'x 336, 337 (11th Cir. 2010) (per curiam) (citing *Strickland*, 466 U.S. at 689); *see also Jenkins v. Comm'r, Ala. Dep't of Corr.*, 963 F.3d 1248, 1264 (11th Cir. 2020) ("[R]eview of counsel's actions is 'highly deferential' and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'") (quoting *Strickland*, 466 U.S. at 689). "It is petitioner's burden to establish that counsel performed outside the wide range of reasonable professional assistance by making errors so serious that [counsel] failed to function as the kind of counsel guaranteed by the Sixth Amendment." *LeCroy v. United States*, 739 F.3d 1297, 1312 (11th Cir. 2014) (alteration in original) (internal quotations omitted). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. Furthermore, retrospective judicial scrutiny of counsel's performance "must be highly deferential" and must "eliminate the distorting effects of hindsight." *Id.* at 689. "In evaluating performance, 'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *LeCroy*, 739 F.3d at 1312 (quoting *Strickland*, 466 U.S. at 690).

To show prejudice, a petitioner must "establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (internal quotations omitted); *see id.* at pp. 1312-13 ("The prejudice prong requires a petitioner to demonstrate that seriously deficient

performance of his attorney prejudiced the defense."). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Furthermore, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

Strickland created a "high bar" for petitioners to satisfy. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). This is especially true where, as here, the petitioner must satisfy both *Strickland* and Section 2254(d)'s "highly deferential" standards of review. *Harrington*, 562 U.S. at 105. Indeed, "[t]he standards created by *Strickland* and [Section] 2554(d) are both highly deferential and when the two apply in tandem, review is doubly so." *Id.* Furthermore, where both *Strickland* and Section 2254(d) apply, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* As the Eleventh Circuit Court of Appeals clarified,

> It is important to keep in mind that in addition to the deference to counsel's performance mandated by *Strickland*, the AEDPA adds another layer of deference—this one to a State court's decision—when we are considering whether to grant federal habeas relief from a State court's decision. Thus, [a petitioner] not only has to satisfy the elements of the *Strickland* standard, but he must also show that the State court applied *Strickland* to the facts of his case in an objectively unreasonable manner.

Williams v. Allen, 598 F.3d 778, 789 (11th Cir. 2010) (internal quotations, alterations, and citations omitted).

Petitioner asserts that his trial counsel's performance during the sentencing phase of his trial was deficient because counsel (1) unreasonably neglected to present available expert mental health mitigation evidence, including testimonies from experts such as Dr. James, Dr. Ash, and Dr. Garbarino; (2) unreasonably neglected to obtain testimony from Tony Raby, Linda Herman, and Sean Proctor; (3) unreasonably presented Dale Davis as a witness and produced her memoranda and notes of the case to the prosecution; (4) unreasonably failed to rebut the prosecution's evidence that Petitioner lacked remorse for his crimes; and (5) unreasonably failed to question jurors during voir dire about their opinions on the death penalty in cases involving juvenile victims. (Doc. 65, pp. 87–121.) The Court addresses each of Petitioner's arguments in turn.

A. Failure to Present Additional Expert Testimony

1. Ineffectiveness

Petitioner first argues that his trial counsel's performance was ineffective because they failed to present testimony from experts like Dr. James, Dr. Ash, and Dr. Garbarino. (*Id.* at pp. 96–97.) Specifically, Petitioner asserts that trial counsel should have: (1) provided testimony based on neuropsychological testing that explained that Petitioner's executive functioning deficiencies were more pronounced than a typical eighteen-year old's and compromised his ability "to extricate himself from and adapt to the situation as it developed in the Pittman home;" (2) provided testimony from a clinical psychiatrist explaining that Petitioner was functioning as an adolescent and was, therefore, less culpable for his crimes than an adult because of his "impulsivity, susceptibility to peer pressure and his

otherwise nonviolent nature;" and (3) provided testimony from a developmental psychologist explaining "how the severe psychological maltreatment [Petitioner] suffered impaired his development and his ability to resist Dorian O'Kelley." (*Id.* at p. 97.)

The state habeas court rejected Petitioner's claim, stating:

> It is true trial counsel did not present the type of scientific evidence offered by Petitioner in this proceeding to "connect the dots" between Petitioner's conduct and his adolescence Nonetheless, Petitioner's trial attorneys effectively presented much of the same factual evidence urged by Petitioner pertaining to Petitioner's life circumstances, immaturity, susceptibility to influence, and developmental deficiency. While Petitioner's scientific evidence was persuasive, much of the subject matter raised by Petitioner's habeas witnesses was cumulative of the testimony actually presented at Petitioner's trial. The court finds that the extensive evidenced presented by trial counsel in mitigation more than adequately addressed the subject matter raised by Petitioner's witnesses in this action. Petitioner has not demonstrated prejudice by proving that the outcome would have been different had counsel approached the case as now urged by Petitioner, especially considering the aggravating circumstances presented in this case.

(Doc. 27-20, p. 5; *see also id.* at pp. 35–39.)

Petitioner asserts that the state habeas court's ruling is unreasonable because (1) "it overlooks the testimony confirmed by contemporaneous writings that, at least by December 2004, it was clear to [Petitioner's] defense team

. . . that the mitigation case required expertise that Dr. Weilenman did not possess," and (2) "the implicit underlying assumption—that the testimony provided by Dr. Weilenman at trial served the same or a similar purpose to the testimony provided by Drs. James, Ash and Garbarino at the state court hearing—is irreconcilable with the state court's finding that 'trial counsel did not present the type of scientific evidence offered by Petitioner in this proceeding to "connect the dots" between Petitioner's conduct and his adolescence.'" (Doc. 65, pp. 98–99 (quoting doc. 27-20, p. 5).)

The Court concludes that the state habeas court reasonably determined that trial counsel was not deficient for failing to provide testimony from experts such as Dr. James, Dr. Ash, and Dr. Garbarino during the sentencing phase of trial. "Counsel representing a capital defendant must conduct an adequate background investigation, but it need not be exhaustive." *Raulerson v. Warden*, 928 F.3d 987, 997 (11th Cir. 2019). Indeed, "[t]he scope of counsel's investigation, like all other actions undertaken by counsel, need only be objectively reasonable under the circumstances to satisfy constitutional demands." *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1322 (11th Cir. 2013). Moreover, the Supreme Court of the United States has held that trial counsel's investigation is not deficient "when counsel gather[s] a substantial amount of information and then ma[kes] a reasonable decision not to pursue additional sources." *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (summarizing the holding in *Bobby v. Van Hook*, 558 U.S. 4, 9–12 (2009)).

"To determine whether trial counsel should have done something more in their investigation," the Court must first "look at what the lawyer[] did in fact." *Raulerson*, 928 F.3d at 997 (internal quotations omitted).

Here, trial counsel appears to have conducted an extensive mitigation investigation and hired two experts for the sentencing phase in this case: Davis, as the mitigation expert, and Dr. Weilenman, as a clinical psychologist. (*See* doc. 27-20, pp. 30, 35.) In her role as the mitigation expert, Davis worked approximately 432 hours to "find out every single thing" she could about Petitioner, from "pre-birth[] up until [the crime]." (Doc. 10-9, p. 78.) Davis interviewed more than forty people, including Petitioner's family, friends, pastor, psychiatrist, teachers, and acquaintances, traveled to Wisconsin, and consulted with trial counsel numerous times. (*Id.* at pp. 78–80, 83–89, 95–96, 101–02, 105–10, 112–13, 125; doc. 27-20, pp. 45–47.) Davis also investigated and procured many records and documents pertaining to Petitioner's childhood, education, and health, including birth records, prenatal and delivery records, hospital records, school records, social services and family court records, counseling records, medical and mental health records from Chatham County Detention Center, divorce records from Petitioner's parents, mental health records regarding Petitioner's brother, marriage records for Petitioner's mother and stepfather, and a police report regarding Petitioner's stepfather. (Doc. 10-9, pp. 78– 80, 83–89, 95–96, 101–02, 105–10, 112–13; *see also* doc. 27-20, p. 45.)

Dr. Weilenman, in her role as clinical psychologist, performed a psychological evaluation on Petitioner. (Doc. 26-19, p. 150.) To perform this evaluation, Dr. Weilenman met with Petitioner five times for approximately ten to fifteen hours total. (Doc. 10-11, pp. 6–7; *see also* doc. 27-20, p. 61.) Dr. Weilenman also reviewed the documents, records, and interview notes procured by Davis during her investigation and re-interviewed other witnesses. (*See* doc. 10-11, pp. 6–7; doc. 27-20, p. 61; doc. 26-19, p. 150.) To

form Petitioner's social history, Dr. Weilenman "focus[ed] on [Petitioner's] entire life," including "filling in all the blanks of [his] family history" and "focus[ing] on each family member . . . to find out . . . their impact . . . on his life." (Doc. 10- 11, pp. 7–8.) Like Davis, Dr. Weilenman had experience with death penalty cases, having worked on two Georgia death penalty cases, performed work for the Department of Juvenile Justice, and attended annual death penalty seminars. (Doc. 27-20, p. 35; *see also* doc. 24-12, p. 72.) Dr. Weilenman crafted a report that highlighted much of the neglect, abuse, and trauma Petitioner suffered during his childhood and adolescent years. (Doc. 26-19, pp. 150–52.) Dr. Weilenman specifically described Petitioner's lack of "moral reasoning and risk assessment" and noted that "[a]t the time of the crimes, due to his age and developmental stage, [Petitioner] demonstrated a pattern of poor insight, and decision-making skills." (*Id.* at pp. 151–52.) Dr. Weilenman also noted Petitioner's "limited ability to restrain impulses" and failure to "consider an alternative course of action." (*Id.* at p. 151.) Dr. Weilenman's psychological evaluation also reveals that she consulted with trial counsel and Davis on at least five occasions. (*Id.* at p. 150.)

Given the extensive work by Davis as a mitigation specialist and Dr. Weilenman as the retained clinical psychologist, this case is distinguishable from other cases in which trial counsel was deemed to have inadequately investigated a petitioner's background for mitigation purposes. *See, e.g.*, *Williams v. Taylor*, 529 U.S. at 369–70, 395 (finding an unreasonable mitigation investigation where trial counsel "did not begin to prepare for [the sentencing] phase . . . until a week before the trial," called witnesses who testified only generally that petitioner was

a "nice boy," and failed to seek prison records or the "extensive records" that described petitioner's "nightmarish childhood"); *Porter*, 558 U.S. at 40 (finding an unreasonable mitigation investigation where trial counsel had "one short meeting" with petitioner regarding the sentencing phase and failed to obtain "any of [petitioner's] school, medical, or military service records or interview any members of [petitioner's] family"); *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 553 (11th Cir. 2015) (finding an unreasonable mitigation investigation where counsel (1) "failed to obtain any of [petitioner's] readily available life-history records, such as his school, medical, psychiatric, foster care, juvenile justice, or social-services records," and (2) "failed to ask any of [petitioner's] family members about [petitioner's] dysfunctional upbringing or extended history of substance abuse").

Petitioner attempts to discredit trial counsel's mitigation investigation by asserting that "[s]everal red flags" should have alerted trial counsel that it was necessary to retain additional experts. (Doc. 65, pp. 94–96.) Specifically, Petitioner argues (1) that a "clinical mental status exam" would have revealed neuropsychological problems and (2) that Petitioner's history of psychological trauma, his youth, and Davis's advice should have placed trial counsel on notice of the need for additional experts to explain how these factors impacted Petitioner's actions and inactions at the time of his crimes. (*Id.* at pp. 94–95.) However, Petitioner's argument overlooks the fact that the state habeas court found that Dr. Weilenman, the expert responsible for performing the psychological evaluation of Petitioner, did not recommend further testing by additional experts. (Doc. 27-20, p. 38.) Indeed, Sparger testified that:

> If I had been told that testing was needed and it wasn't testing that [Dr. Weilenman] was going to perform, I would have said, "Well, who do we need?" and then it would have been getting the motion, getting the funds to go to the next person. And that never happened because I was never told . . . by Dr. Weilenman, by Ms. Davis, or anyone that there was testing [that needed to be done].

(Doc. 13-16, p. 89.) Furthermore, Schiavone testified that he could not recall whether Mr. Weilenman informed him that Petitioner "needed to have testing done." (Doc. 13-15, pp. 100– 01.) Given trial counsel's extensive mitigation investigation and the fact that Dr. Weilenman did not recommend additional testing (by either herself or another expert), the Court finds that the state court reasonably concluded that Petitioner's trial counsel acted reasonably in not retaining additional experts such as Dr. James, Dr. Ash, and Dr. Garbarino. *See Housel v. Head*, 238 F.3d 1289, 1296 (11th Cir. 2001) (finding counsel reasonably forwent additional mental health investigation where a retained expert did not "offer[] any encouragement to proceed further"); *see also Ward v. Hall*, 592 F.3d 1144, 1168 (11th Cir. 2010) ("[E]ven when trial counsel's investigation is less complete than collateral counsel's, trial counsel has not performed deficiently when a reasonable lawyer could have decided, in the circumstances, not to investigate.").

While Petitioner highlights Davis's testimony asserting that she raised the need for a neuropsychological exam, a single page from Dr. Weilenman's notes that shows a list of purported experts and scientific literature, and trial counsel's impression that Petitioner "seemed young for his age," that evidence, at best, reveals contradictory evidence regarding whether

Dr. Weilenman and Sparger discussed the need to retain *additional experts* to perform testing on Petitioner that Dr. Weilenman could not perform herself. (Doc. 65, p. 95; doc. 71, pp. 25–26.) Such contradictory testimony is not enough to overcome the "presumption of correctness" afforded to a "factual determination made by a state court" under the AEDPA, which requires "clear and convincing evidence." *Consalvo v. Sec'y for Dep't of Corr.*, 664 F.3d 842, 845 (11th Cir. 2011); *see also Williams v. Allen*, 598 F.3d at 794 ("[W]here the record is incomplete or unclear about counsel's actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment."). The fact that Petitioner "later secured a more favorable opinion of an expert than the opinion of [Dr. Weilenman] does not mean that trial counsel's failure to obtain that expert testimony constituted deficient performance." *McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008). Based on the foregoing, the Court concludes that the state court reasonably determined that trial counsel's decision not to retain additional experts was supported by "reasonable professional judgments." *Strickland*, 466 U.S. at 690–91.

2. Prejudice

Furthermore, even if Petitioner showed that trial counsel's performance was deficient for not retaining experts such as Drs. James, Ash, and Garbarino, the state habeas court reasonably determined that Petitioner failed to establish prejudice for that deficiency. Indeed, as the state habeas court determined, "[w]hile Petitioner's scientific evidence was persuasive, much of the subject matter raised by Petitioner's habeas witnesses was cumulative of the testimony actually presented at Petitioner's trial." (Doc. 27-20, p. 5.) "A petitioner cannot establish that the outcome of the proceeding would have

been different when '[t]he "new" evidence largely duplicated the mitigation evidence at trial.'" *Raulerson*, 928 F.3d at 999 (quoting *Cullen*, 563 U.S. at 200). "Generally, 'evidence presented in postconviction proceedings is "cumulative" or "largely cumulative" to or "duplicative" of that presented at trial when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury.'" *Ledford v Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 649 (11th Cir. 2016) (quoting *Tanzi*, 772 F.3d at 660).

Here, Dr. James, Dr. Ash, and Dr. Garbarino told "a more detailed version of the same story told at trial" and provided "more or better examples" of the "themes presented to the jury." *See id.* During the sentencing phase, Dr. Weilenman testified extensively about Petitioner's social history, a history that included the abuse, trauma, and neglect Petitioner suffered throughout his life. (Doc. 10-11, pp. 3–84.) Specifically, Dr. Weilenman testified that Petitioner had a "history of instability" and "abandonment," which caused Petitioner to become "a follower . . . [and] d[o] what he felt to please others." (*Id.* at pp. 48–52.) Indeed, based on her own conversations with Petitioner, Dr. Weilenman concluded that Petitioner was always trying to "please" her. (*Id.* at p. 53.) Furthermore, Dr. Weilenman testified that people like Petitioner will exhibit "inappropriate conduct or . . . inappropriate behavior at times" and "don't really think." (*Id.* at p. 52.)

Concerning Dr. Ash and Dr. Garbarino, their testimonies in the state habeas proceeding did not differ greatly from Dr. Weilenman's testimony in the sentencing phase of trial. First, their methods of evaluations were similar. Dr. Weilenman interviewed Petitioner for ten to

fifteen hours over five meetings, reviewed Davis's mitigation evidence, and conducted interviews with other witnesses. Both Dr. Ash and Dr. Garbarino formed their opinions by conducting two-and-a-half- hour interviews with Petitioner and reviewing relevant documents in Petitioner's social history. (Doc. 13-17, pp. 24–26, 30–41; doc. 13-21, pp. 69–70.) Second, Dr. Ash and Dr. Garbarino simply provided more detailed, scientific-based explanations of the same conclusions that Dr. Weilenman reached and testified about during the trial. Indeed, Dr. Weilenman testified about Petitioner's mental development, noting that Petitioner suffered from post-traumatic stress disorder, ADHD, and an adjustment disorder with depressed features. (Doc. 10-11, p. 54.) Dr. Weilenman described how ADHD effects one's "executive functioning" (i.e., "how you think, how you process information, impulse control, [and] all of those things"), which is linked to the development of one's frontal lobe in the brain. (*Id.* at p. 55.) According to Dr. Weilenman, the brain's frontal lobe, which she described as the "thinking center," does not fully develop until the age of twenty-five. (*Id.*) Thus, as one gets older, the frontal lobe develops, and therefore, a person "may have better control over their behaviors as a mid-twenties than they did when they were fourteen." (*Id.*) When asked to compare Petitioner's executive functioning to that of a typical eighteen or nineteen- year-old, Dr. Weilenman stated that a typical eighteen or nineteen-year-old "is developing . . . some sense of internalizing external values." (*Id.* at p. 59.) Dr. Weilenman testified that a typical late adolescent "[is] forming some sense of identity . . . know[s] what their belief systems are . . . [and] what they stand for, [and possesses] some sense of right and wrong." (*Id.*) However, according to Dr. Weilenman, Petitioner's instability and abandonment issues delayed

his development of "that internal sense." (*Id.* at pp. 59–60.) Dr. Weilenman testified that Petitioner "was still more into peer pressure than you would have expected at that age" and, considering Petitioner's unstable life in the weeks leading up to his crimes, "needed to fit in." (*Id.* at pp. 60–61.) At bottom, Weilenman described Petitioner as someone who did not know who he was and interacted like a "twelve-year-old." (*Id.* at pp. 56, 58.)

Through his evaluation, Dr. Ash noticed the "psychological maltreatment" in Petitioner's life, including Petitioner's constant moves throughout his childhood and the "ongoing pattern of rejection." (Doc. 13-17, p. 30.) Furthermore, Dr. Ash testified about Petitioner's deficits in executive functioning, concluding that Petitioner was functioning at an "adolescent level" the night of his crimes. (*Id.* at pp. 51, 79–82, 86.) While Dr. Ash provided more details and scientific knowledge about the "prefrontal cortex" in the brain and how Petitioner's executive functioning was less than "one would expect from the normal person of his age at that time," (*id.* at pp. 79–82), his testimony simply provided a more detailed conclusion of what Dr. Weilenman testified about during the trial: that the trauma Petitioner suffered during his childhood delayed the development of his executive functioning and caused him to function at an adolescent level despite his age of eighteen years old.

Dr. Garbarino also testified about the severe psychological maltreatment Petitioner suffered during his childhood and adolescent years. (Doc. 13-21, pp. 72–78, 82–84.) According to Dr. Garbarino, the psychological maltreatment Petitioner suffered "undermined" Petitioner's development as a child and adolescent. (*Id.* at p. 114.) Therefore, at the time of the crime, Petitioner was "an untreated, traumatized child . . . inhabit[ing] the body

of an 18-year-old boy." (*Id.* at p. 145.) Thus, Petitioner's ability to "resist the influence of Dorian O'Kelley was significantly impaired." (*Id.*) While Dr. Garbarino seemed to provide a better explanation of how the trauma Petitioner faced adversely impacted his neuropsychological development and grounded his testimony in scientific research more so than Dr. Weilenman, that testimony simply arrived at the same conclusion as Dr. Weilenman. Indeed, like with Dr. Ash's testimony, the more scientifically founded testimony of Dr. Garbarino simply provided a better explanation and more detail regarding Petitioner's development: that Petitioner functioned as an adolescent and was more susceptible to outside influences and peer pressure.

Concerning Dr. James, she evaluated Petitioner's neurocognitive strengths and weaknesses using a neuropsychological examination she conducted on Petitioner during a six-hour meeting. (Doc. 13-20, p. 93.) As part of this evaluation, Dr. James conducted a variety of different tests on Petitioner. (*Id.* at pp. 99, 133.) Dr. James testified that based on the results of her evaluation, Petitioner suffered from weaknesses in particular areas of executive functioning, including working memory, short-term memory, auditory attention, planning, and organization. (*Id.* at p. 123.) Dr. James then explained how those deficits in executive functioning contributed to his actions the night of the crime. (*Id.* at pp. 154–55.) Like with Dr. Ash and Dr. Garbarino, while this testimony was more rooted in science and *possibly* more convincing than Dr. Weilenman's testimony, the testimony still just provides a more detailed explanation of what Dr. Weilenman already testified to during the trial. Indeed, Dr. Weilenman testified that Petitioner suffered from a lack of development in executive functioning that was

caused by the trauma and abuse Petitioner suffered during his childhood and adolescent years.

As the Eleventh Circuit stated in *Dallas v. Warden*,

> In each of the key Supreme Court cases finding prejudice as a result of counsel's failure to offer mitigating evidence, the disparity between what was presented at trial and what was offered collaterally was vast. In other words, the balance between the aggravating and mitigating evidence at trial and in postconviction proceedings shifted enormously, so much so as to have profoundly altered each of the defendants' sentencing profiles.

964 F.3d 1285, 1312 (11th Cir. 2020) (citing *Wiggins v. Smith*, 539 U.S. 510, 535 (2003); *Williams v. Taylor*, 529 U.S. at 369–70; *Porter*, 558 U.S. at 32–36; *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (per curiam)).

In this case, the new mitigating evidence provided by Drs. James, Ash, and Garbarino "would barely have altered the sentencing profile presented" at Petitioner's trial. *Strickland*, 466 U.S. at 700. Indeed, the mitigating evidence Petitioner's trial counsel introduced sufficiently showed that Petitioner suffered from an abusive and unstable childhood, functioned at an age below his chronological age of eighteen when he committed his crimes, lacked executive functioning compared to similarly aged peers, and was uniquely susceptible to peer pressure. As described above, the testimonies of Drs. James, Ash, and Garbarino simply amplified these themes, albeit in a more detailed approach. Thus, the Court cannot say that "the disparity between what was presented at trial and what was offered collaterally" was so great as to create a reasonable probability that the jury's result would have changed. *See Dallas*, 964 F.3d at

1312 ("Recognizing that the vast majority of the allegedly new mitigating evidence presented . . . did no more than amplify the themes presented at trial, we think it wholly unlikely that the additional evidence would have changed the jury's result.").

Furthermore, considering the substantial aggravating evidence that the State presented during the sentencing phase, this is a case in which the new evidence presented at the state habeas hearing "would barely have altered the sentencing profile presented" to the jury. *Strickland*, 466 U.S. at 700. "In a case challenging a death sentence, 'the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011) (quoting *Strickland*, 466 U.S. at 695). In determining whether there is a reasonable probability that the "additional mitigating evidence would have changed the weighing process so that death is not warranted," the Court considers the totality of the evidence by weighing the mitigating evidence that was presented, and that which was not presented, "against the aggravating circumstances that were found." *Hardwick v. Crosby*, 320 F.3d 1127, 1166 (11th Cir. 2003). Here, the evidence against Petitioner was highly aggravating. (*See* doc. 23-4, pp. 259–61; doc. 23-5, pp. 146–47; doc. 27-20, pp. 83–84.) As the Court quoted above in the factual background of this Order, the Georgia Supreme Court summarized numerous abhorrent and depraved actions that Petitioner participated in with his cohort, including: a crime spree that included the burglary of another home and entry into the victims' home after cutting the power to the home; beating the mother of a thirteen-year old girl

with a walking cane, flashlight, and lamp and fatally stabbing the mother in the chest and abdomen all while the daughter could hear her mother's screams; binding, gagging, and raping the thirteen-year-old girl; additional torture of the thirteen-year-old-girl including beating her with a baseball bat, slitting her throat, attempting to suffocate her, stabbing her, and throwing objects at her all while she was still bloody from the rape; and ultimately setting fire to the home and leaving the child to suffocate amidst the flames and smoke while Petitioner watched from across the street. *Stinski v. State*, 691 S.E.2d at 862–63. Furthermore, the jury recommended the death sentence based on nine aggravating factors. (Doc. 8-1, pp. 210–13.) Among these factors were: (1) the murder of Susan Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved the depravity of mind of" Petitioner; (2) the murder of Susan Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim before death;" (3) Petitioner "was engaged in the commission of arson in the first degree" when murdering Kimberly Pittman; (4) the murder of Kimberly Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved tortur[ing] . . . the victim before death;" (5) the murder of Kimberly Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved the depravity of mind of" Petitioner; and (6) the murder of Kimberly Pittman "was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim before death." (*Id.*)

Weighing the mitigating evidence that was presented, and that which was not presented, against the aggravating circumstances found by the jury, the Court concludes that Petitioner has failed to show prejudice. *See*

Callahan v. Campbell, 427 F.3d 897, 938 (11th Cir. 2005) ("[T]he state court found three aggravating factors: the crime was committed while Callahan was under sentence of imprisonment; the defendant had been previously convicted of a crime of violence; and the murder was committed during a kidnapping. We have previously noted that [m]any death penalty cases involve murders that are carefully planned, or accompanied by torture, rape, or kidnapping. In these types of cases, this court has found that the aggravating circumstances of the crime outweigh any prejudice caused when a lawyer failed to present mitigating evidence.") (internal quotations and citation omitted) (alteration in original); *Brown v. Jones*, 255 F.3d 1273, 1280 (11th Cir. 2001) (citing "the heinous nature of the crime" as support for the conclusion that "[petitioner] has failed to show that [his trial counsel's] decision . . . resulted in prejudice sufficient to satisfy the second prong of *Strickland*"); *Gilreath v. Head*, 234 F.3d 547, 552 (11th Cir. 2000) ("We are unconvinced that a reasonable probability exists that the testimony of the other character witnesses would have changed the balance of aggravating and mitigating circumstances [because] [t]he State's evidence of aggravating circumstances was strong."). The evidence that Petitioner's actions were outrageously and wantonly vile, horrible, inhuman, and depraved, was so strong that it is hard to imagine that any amount of mitigating evidence could have outweighed it.

Based on the foregoing, the Court finds that the state habeas court reasonably determined that Petitioner failed to show that his trial counsel acted deficiently for failing to retain experts such as Drs. James, Ash, and Garbarino. Further, even if Petitioner did make the requisite showing that his trial counsel acted deficiently, he failed

to show that deficiency prejudiced his defense. Accordingly, Petitioner failed to show that the state habeas court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

B. Failure to Present Testimony from Additional Witnesses

Petitioner next argues that his trial counsel's performance was objectively unreasonable because counsel failed to obtain testimony from Tony Raby, Linda Herman, and Sean Proctor. (Doc. 65, pp. 101–08.)

1. Tony Raby

According to Petitioner, testimony from Tony Raby, Petitioner's half-brother, "would have been critical to present the jury with a first-hand account about what it was like to grow up with [Petitioner's] biological parents and his stepfather, the abuse that [Petitioner's] father and stepfather directed toward [Petitioner] and his brothers and his mother's indifference to it and abandonment of her sons." (*Id.* at p. 102.) Petitioner's trial counsel tried to locate Raby but was unable to do so. Nonetheless, Petitioner argues that his trial counsel was ineffective "for failing to make greater efforts to locate" Raby, including reaching out to Raby through his mother. (*Id.*)

The state habeas court rejected Petitioner's claim, finding that the record showed that trial counsel "made concerted efforts to contact" Raby by telephone, even leaving messages for him. (Doc. 27-20, p. 75.) The state

habeas court further found that Petitioner failed to demonstrate that attempting to contact Raby through his mother would have been successful because "the record demonstrates [that] . . . Raby was never contacted by Petitioner's mother or grandmother about Petitioner's case and according to . . . Raby, they were 'afraid [he] would tell the truth and air the family's dirty laundry.'" (*Id.*) Finally, the state habeas court found that Petitioner failed to show any prejudice occurred because Raby's testimony would have been cumulative of testimony Petitioner's counsel presented through other witnesses at the trial. (*Id.* at p. 76.)

Petitioner argues that the state habeas court's decision was unreasonable because "there is no record evidence that the defense team even asked Mr. Raby's mother to contact him on their behalf or otherwise to put the defense team in contact with him." (Doc. 65, p. 103.) Petitioner further argues that "even had the defense team made that request unsuccessfully in addition to their one attempt to reach Mr. Raby by phone, their efforts would have been constitutionally insufficient." (*Id.*) Relying on the Georgia Supreme Court's decision in *Perkins v. Hall*, 708 S.E.2d 335 (Ga. 2011), Petitioner contends that trial counsel was ineffective because "their attempts to contact [Raby] 'were limited to . . . making some telephone calls that were never returned.'" (Doc. 71, p. 41 (quoting *Perkins*, 708 S.E.2d at 340–41).)

As the state habeas court found, trial counsel retained Davis as a mitigation expert. Davis interviewed many witnesses and reached out to several more. Relevant to Raby, Davis attempted to contact him by telephone on more than one occasion and left messages for him. (Doc. 24-3, p. 200; doc. 24-10, p. 21.) However, neither she nor Sparger heard from or could locate Raby. (Doc. 13-15, p.

154; doc. 13-16, p. 100; doc. 13-19, p. 102–03; doc. 23-5, p. 11–12.) Furthermore, Raby testified during the state habeas proceedings that he "was never contacted by anybody" about Petitioner's trial, including his mother or grandmother. (Doc. 13-18, pp. 18, 51.) Raby believed that his mother and grandmother did not contact him because he would "tell the truth and air the family's dirty laundry." (*Id.* at p. 51.) These facts sufficiently support the state habeas court's finding that Petitioner's trial counsel was not unreasonable in failing to locate and contact Raby. *See DeYoung v. Schofield*, 609 F.3d 1260, 1290 (11th Cir. 2010) ("As to not calling the [petitioner's brother] to testify in the penalty phase, the state habeas court found that [the petitioner's trial counsel] made reasonable efforts to contact [him] to secure his testimony, but [he] did not return their calls, indicating he 'had no intention of assisting the defense in Petitioner's case.' The evidence in the state habeas proceeding amply supported this finding."). Furthermore, Petitioner's trial counsel's calling numerous other family members to testify distinguishes the present case from *Perkins*, where, unlike here, "nothing in the trial or habeas records . . . suggest[ed] that trial counsel attempted to contact any of the numerous other family members and friends who testified in the habeas court." *Perkins*, 708 S.E.2d at 341. Based on the foregoing, the Court finds that Petitioner failed to show that the state habeas court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Moreover, even if the trial counsel reasonably should have expended more effort to contact Raby, Petitioner

failed to show that he was prejudiced as a result. Where "'new' evidence largely duplicate[s] the mitigation evidence at trial," there is "no reasonable probability that the additional evidence [the petitioner] presented in his state habeas proceedings would have changed the jury's verdict." *Cullen*, 563 U.S. at 200. To determine whether the state habeas court unreasonably concluded that evidence would have been cumulative, the Court "compare[s] the trial evidence with the evidence presented during the state postconviction proceedings." *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1260 (11th Cir. 2012). As directed by the Eleventh Circuit, the Court must

> keep in mind that the United States Supreme Court, [the Eleventh Circuit], and other circuit courts of appeals generally hold that evidence presented in postconviction proceedings is "cumulative" or "largely cumulative" to or "duplicative" of that presented at trial when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury.

Id. at 1260–61 (citing *Cullen*, 563 U.S. at 200); *see also Wong v. Belmontes*, 558 U.S. 15, 22 (2009) ("[S]ome of the evidence was merely cumulative of the humanizing evidence Schick actually presented; adding it to what was already there would have made little difference."); *Boyd v. Allen*, 592 F.3d 1274, 1298 (11th Cir. 2010) ("[M]uch (although not all) of the 'new' testimony introduced at the post-conviction hearing would simply have amplified the themes already raised at trial and incorporated into the sentencing judge's decision to override the jury.") (collecting cases).

Petitioner asserts that his defense was prejudiced by his trial counsel's failure to contact Raby because Raby's testimony "would have provided first-hand testimony from a victim of, and witness to, the abuse that [Petitioner's] family inflicted on him and his brothers rather than second- hand . . . or self-serving accounts offered by the abusers." (Doc. 65, p. 123.) During the state habeas proceeding, Raby did testify about his family's unstable and abusive background. (Doc. 13-18, pp. 15–68.) Raby testified that Petitioner's biological father was "pretty distant" and abusive. (*Id.* at pp. 22–23.) Raby also noted how the biological father's neglect led to a car hitting Petitioner when Petitioner was three-years old. (*Id.* at p. 22.) Raby further testified about Petitioner's stepfather and the stepfather's relationship with Petitioner and his brothers. (*Id.* at pp. 29–38.) When describing the stepfather's "role as a father" for Petitioner and his brothers, Raby stated the role was "nonexistent" and that "it was more of a fear and control thing." (*Id.* at p. 34.) Raby testified that the stepfather "liked to control [him and his brothers] by fear" and would hit them with a belt or paddle if they did "something wrong." (*Id.* at pp. 35–36.) Raby also testified about his mother's relationship with her kids, stating that "she really tried" and "had our best interests at heart" but that "sometimes some of the decisions she made probably weren't the best at the time." (*Id.* at p. 36.)

As the state habeas court concluded, "Raby's testimony would have been largely cumulative of testimony counsel presented through numerous witnesses at Petitioner's trial." (Doc. 27-20, p. 76.) Indeed, several of Petitioner's family members and friends testified during the sentencing phase of the trial. For example, Sharlene Riley, Petitioner's material

grandmother, testified about Petitioner's family history of alcoholism and abuse. (Doc. 10-9, pp. 30–34.) Specifically, Riley testified that Petitioner's biological father "drank heavily" and was "very abusive." (*Id.* at p. 34.) Riley also recounted multiple stories illustrating Petitioner's father's neglect as a parent, including the incident in which a car struck Petitioner. (*Id.* at pp. 34–36.) Moreover, Riley testified that Petitioner's mother divorced his father because "[s]he got tired of hi[m] being drunk and passing out on the floor with a gun or knife in his hand." (*Id.* at p. 38.) Riley further testified about Petitioner's stepfather, calling him a "heavy drinker[]" and "control freak[]," and about Petitioner's frequent moves and instability during his childhood. (*Id.* at pp. 37–38, 44, 63.)

Trial counsel also presented testimony from Davis, the mitigation specialist, and introduced numerous records concerning Petitioner's childhood and unstable and dysfunctional home life. Davis testified that Petitioner's parent's divorce records showed that his mother filed for divorce due to a "pattern and practice of alcohol and/or substance abuse." (Doc. 10–9, p. 109; *see also* doc. 27-20, p. 46.) Indeed, Davis testified that Petitioner's father had "a real serious drinking problem." (Doc. 10-9, p. 109.) Davis also testified that Petitioner's stepfather was listed as a suspect in a police report for criminal domestic violence and simple assault for pushing Petitioner's brother. (*Id.* at p. 110–11; *see also* doc. 27-20, p. 46.) The police report also states that Petitioner's mother refused to press charges against the stepfather even though he was under the influence of alcohol during the domestic violence altercation. (Doc. 10-9, pp. 111–12; *see also* doc. 27-20, p. 46.) Furthermore, Davis discussed Petitioner's brother's mental health records, which

showed a "history of alcohol abuse and mental illness in [Petitioner's] family." (Doc. 10-9, p. 113; *see also* doc. 27-20, p. 47.) Davis also testified that "depression ran through [Petitioner's family]" and that "[t]here were a number of suicides and suicide attempts." (Doc. 10-9, p. 124; *see also* doc. 27-20, p. 47.)

While Petitioner emphasizes that Raby was a "first-hand witness to the familial abuse that [Petitioner] suffered," (doc. 71, p. 40), Raby's testimony—at most—simply "tells a more detailed version of the same story told at trial" and "provides more or better examples or amplifies the themes presented to the jury." *Holsey*, 694 F.3d at 1260–61. Such "duplicative" testimony is insufficient to establish prejudice under *Strickland*. *See id.* Thus, Petitioner failed to establish that his defense suffered prejudice from his trial counsel's failure to contact Raby more vigorously. *See, e.g.*, *Cullen*, 563 U.S. at 200–01 ("The 'new' evidence largely duplicated the mitigation evidence at trial. School and medical records basically substantiate the testimony of Pinholster's mother and brother. Declarations from Pinholster's siblings support his mother's testimony that his stepfather was abusive and explain that Pinholster was beaten with fists, belts, and even wooden boards."). Moreover, as discussed in Discussion Section I.A.2, *supra*, the extent of the aggravating factors present in this case further negates a finding of prejudice.

2. Linda Herman

Petitioner also argues that his trial counsel was ineffective for failing to present testimony from Linda Herman, Petitioner's high school principal at Windsor Forest High School in Savannah. (Doc. 65, pp. 103–07.) According to Petitioner, Herman would have been a

"critical witness to [Petitioner's] downward spiral and increasingly desperate condition shortly before his crimes." (*Id.* at p. 103.) Petitioner asserts that "Herman's testimony would have been important evidence to show that in the week before the crimes [Petitioner] was a desperate kid looking for help from available adults in his life—not a depraved murderer deserving of the death penalty." (*Id.* at p. 104.) However, Petitioner's trial counsel did not contact Herman. Petitioner argues that the failure to contact Herman constitutes ineffective assistance of counsel. (*Id.* at 104.)

The state habeas court rejected Petitioner's claim, finding "that counsel understood . . . Herman would not have testified on Petitioner's behalf during the sentencing phase" and that "harmful information could have been elicited from . . . Herman during cross-examination." (Doc. 27-20, p. 76.) According to the state habeas court,

> The record reflects that counsel understood Ms. Herman would not have testified on Petitioner's behalf during the sentencing phase. Trial counsel's files contained an investigative report prepared by the District Attorney's Investigator Ricky Becker which indicates that Ms. Herman informed Investigator Becker that she was unwilling to testify on Petitioner's behalf. Moreover, the record shows that harmful information could have been elicited from Ms. Herman during cross-examination by the state. Specifically, Ms. Herman told the District Attorney's investigator that Petitioner was "always showing his tattoos and gave the appearance that he just did not wish to be in school." In addition. Dr. Weilenman's file contained handwritten notes on the District Attorney's investigative report that Petitioner had "[t]ongue – earrings – blue – punk"

> and "we don't want your kind at this school." This statement was corroborated by Petitioner, who reported to Ms. Davis that he tried to reenroll in school and was told by Ms. Herman that they "don't want your kind in here."

(*Id.* at p. 76.) Based on the above findings, the state habeas court determined that Petitioner failed to establish deficiency or prejudice from his trial counsel's failure to present testimony from Herman. (*Id.*)

Petitioner argues that the state habeas court's decision was unreasonable because the state court's finding that Herman was not willing to testify on Petitioner's behalf is contradicted by Herman's sworn testimony that she would have testified at trial had she been asked. (Doc. 65, p. 104.) Petitioner further argues that the state court's finding that "harmful information could have been elicited from . . . Herman during cross-examination" was unreasonable because the State "failed to elicit such harmful testimony on cross-examination at the state-court hearing" and because other witnesses testified about Petitioner's appearance. (*Id.* at pp. 105–07.)

The Court concludes that Petitioner failed to show that the state habeas court's decision regarding trial counsel's failure to call Herman was unreasonable as the record amply supports the state habeas court's findings. In his report, the district attorney's investigator typed,

> On 6/1/07, I spoke with Linda Herman . . . .
>
> Linda Herman retired as principal of Windsor Highschool in July 2006. Herman said that she remembered [Petitioner] as an emotionally disturbed but non-violent student who often skipped school.

> [Petitioner] was *always showing his tattoos and gave the appearance that he just did not wish to be in school.*
>
> Herman said that [Petitioner] quit twice and was re-enrolled once and asked her to re-enroll again a day or so prior to the murders. Ms. Herman said that it was too late in the school year and she did not re-enroll [Petitioner].
>
> Herman said she has not spoken to the defense, that she has not been subpoenaed and *would not testify* on [Petitioner's] behalf.

(Doc. 23-21, p. 238 (emphasis added).) Furthermore, the copy of the investigator's report in Dr. Weilenman's file contained handwritten notes stating "tongue–earrings–blue–punk" and "we don't want your kind at this school." (*Id.*) The Court must evaluate trial counsel's performance without the benefit of hindsight and from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. The record shows that, at the time of trial, trial counsel had good reason to think that Herman either would not testify on Petitioner's behalf or would provide harmful testimony on cross examination. The fact that Herman later stated that she would have testified and that the State failed to elicit harmful testimony on cross-examination during the state habeas hearing does not preclude the state habeas court's finding that at the time of trial, trial counsel had reason to believe otherwise. *See, e.g.*, *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) ("Courts . . . should always avoid second guessing with the benefit of hindsight.") (citing *Strickland*, 466 U.S. at 689).

Furthermore, even if Petitioner showed that his trial counsel was deficient for failing to contact Herman and call her as a witness during sentencing, the Court finds

that the state habeas court reasonably concluded that Petitioner failed to show prejudice. Like Raby's testimony, Herman's testimony regarding Petitioner's "downward spiral" in the time leading up to his crimes "tells a more detailed version of the same story told at trial" and "provides more or better examples or amplifies the themes presented to the jury." *Holsey*, 694 F.3d at 1260–61. For example, Dr. Weilenman testified that Petitioner was "trying to find a place to sleep [and] food to eat" at the time of his crimes and was seeking out friends and adults who would "tolerate him" living with them. (Doc. 10-11, pp. 60–61.) Thus, the Court finds Herman's testimony would have been cumulative of other evidence that was presented during the sentencing phase. *See, e.g.*, *Cullen*, 563 U.S. at 200–01 ("The 'new' evidence largely duplicated the mitigation evidence at trial. School and medical records basically substantiate the testimony of Pinholster's mother and brother. Declarations from Pinholster's siblings support his mother's testimony that his stepfather was abusive and explain that Pinholster was beaten with fists, belts, and even wooden boards.").

Moreover, the possibility of the prosecution eliciting harmful testimony from Herman on cross-examination regarding Petitioner's appearance and frequent absence from school further negates a finding of prejudice. *See Cullen*, 563 U.S. at 201 (finding that the failure to present new mitigating evidence was not prejudicial because the evidence "would have opened the door to rebuttal by a state expert"); *see also DeYoung*, 609 F.3d at 1291 (discounting the possibility of prejudice because the new mitigating circumstances evidence "would have opened the door to harmful testimony which may well have eliminated any mitigating weight in the overall equation"); *Ledford*, 818 F.3d at 649 ("Prejudice is . . . not

established when the evidence offered in mitigation is not clearly mitigating or would open the door to powerful rebuttal evidence."). Finally, as discussed in Discussion Section I.A.2, *supra*, the extent of the aggravating factors present in this case further negates a finding of prejudice.

3. Sean Proctor

Petitioner also argues that his trial counsel was ineffective for failing to present testimony from Sean Proctor, a friend of Petitioner from Savannah. (Doc. 65, pp. 107–08.) According to Petitioner, Proctor "would have been another critical witness to [Petitioner's] downward spiral after he was kicked out of his brother's house in Savannah." (*Id.* at p. 107.) Trial counsel spoke with Proctor and prepared him to testify at Petitioner's trial. However, during a break in the trial, trial counsel decided not to call Proctor as a witness. Petitioner argues the "there was no strategic reason for failing to call . . . Proctor." (*Id.*)

The state habeas court rejected this claim, finding that

> [t]he record shows Ms. Davis initially interviewed Mr. Proctor on October 30, 2003. As previously stated, Ms. Davis described Mr. Proctor as a "stereotypical punk" and that "[h]e swaggers and postures while he talks and, while he tried to be helpful to me, he is a smart-mouth kid who uses drugs." Additionally, in March and April of 2007, the record shows trial counsel attempted to contact Mr. Proctor by telephone and on May 11, 2007 had a conference with Mr. Proctor, which lasted approximately thirty-six minutes. Mr. Schiavone made the strategic decision that Mr. Proctor would not be called as a witness. Mr. Schiavone told Mr. Sparger, "We don't want him. We

> need to get him out of here." Following the trial, Mr. Sparger sent Mr. Proctor a thank you letter and explained "[s]ince what you had told me was not consistent with what you had told our investigator, Dale Davis, I was very concerned about calling you, because I was not sure what you would say. I know you care very much for [Petitioner], but we do not want you to try to describe him as the perfect All-American teenager, if he was actually something quite different."

(Doc. 27-20, pp. 76–77.) Based on these findings, the state habeas court found that Petitioner failed to established deficiency or prejudice as to trial counsel's failure to call Proctor as a witness. (*Id.* at p. 77.)

Petitioner argues that the state court's findings are unreasonable because Davis's observations about Proctor occurred in October 2003, over three years before Petitioner's trial. (Doc. 65, p. 107.) According to Petitioner, the state habeas court ignored evidence that Proctor "did not present the same way he did when he spoke to Ms. Davis years earlier," as he was sober, working full time, and dating his current wife by the time of trial. (*Id.* at p. 108.) Petitioner also argues that the state habeas court ignored Sparger's testimony that the reason provided in the letter for not calling Proctor was pretextual. (*Id.*) Thus, according to Petitioner, "there was no strategic reason for failing to call Mr. Proctor." (*Id.* at p. 107.)

The Court concludes that the record sufficiently supports the state habeas court's finding that trial counsel made a strategic decision to not call Proctor as a witness, a decision that is "presumptively correct." *Fotopoulos v. Sec'y, Dep't of Corr.*, 516 F.3d 1229, 1233 (11th Cir. 2008)

("The question of whether an attorney's actions were actually the product of a tactical or strategic decision is an issue of fact, and a state court's decision concerning that issue is presumptively correct."). "Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995). Indeed, the record confirms that after Davis interviewed Proctor, she described him as a "stereotypical 'punk'" and a "smart-mouth kid who uses drugs." (Doc. 26-17, p. 163.) On May 11, 2007, (less than one month before trial) trial counsel held a telephonic conference with Proctor that lasted approximately thirty-six minutes. (Doc. 24-10, p. 37.) After Proctor showed up at trial ready to testify, lead counsel Schiavone, who Petitioner agrees "was the most experienced member of the defense team," (doc. 65, p. 56), decided not to call Proctor as a witness for the sentencing phase. (Doc. 13-15, pp. 206–07.) According to Sparger, Schiavone told him that "[w]e don't want [Proctor]. We need to get him out of here." (Doc. 13-16, p. 110.) Sparger then "sugarcoated some reason" and told Proctor he could leave.[6] (Doc. 13-15, p. 207.) After the trial, Sparger sent Proctor a letter stating, "Since what you had told me was not consistent with what you had told our investigator Dale Davis, I was very concerned about calling you, because I was not sure what you would say. I know you care very much for [Petitioner], but we did not want to try to describe him as a perfect all-American teenager if he was actually

[6] Sparger testified that although he "was doing the mitigation," Schiavone was "still lead counsel" so Sparger "follow[ed] his direction." (Doc. 13-15, p. 207.)

something quite different." (Doc. 13-16, p. 114.) These findings amply support the state habeas court's decision.

Petitioner is correct that Sparger testified that the letter does not "describe the strategy for not calling" Proctor because Sparger did not make that decision. (*Id.* at p. 114.) Furthermore, Sparger stated that he could not "recall Schiavone telling [him] the reason [for not calling Proctor]. Although, it may have been appearance, maybe a tattoo, or a piercing or something that seemed inappropriate." (*Id.* at p. 115.) This evidence shows, at most, that the record is ambiguous as to the *actual* reason Schiavone decided to not call Proctor as a witness at the sentencing phase. However, "[a]n ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [in favor of competence]. Therefore, where the record is incomplete or unclear about [counsel's] actions, the Court must presume that [counsel] did what he should have done, and that he exercised reasonable professional judgment." *Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (internal quotations omitted).

Moreover, while Petitioner argues that the state habeas court ignored evidence that Proctor was "sober," "working full-time", and "dating his current wife," the record indicates that trial counsel held a conference call with Proctor a few weeks before the trial and did not decide to dismiss Proctor as a witness until *after* Proctor showed up at trial. Thus, trial counsel would have had an opportunity to see Proctor's appearance before deciding to not call him as a witness. Furthermore, while it may be true that Proctor was sober, working full time, and dating his now wife, the Court must "avoid second guessing with the benefit of hindsight." *White v. Singletary*, 972 F.2d at 1220; *see also 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."). "As is often said, 'Nothing is so easy as to be wise after the event.'" *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992). In the years leading up to trial, Davis's observations showed that Proctor was "a smart-mouth kid who uses drugs," was "headed for more trouble because of his drug use," "introduced [Petitioner] to drugs," and lasted only three days in a five-month program "for kids with problems." (Doc. 26-17, pp. 163–64.) Then, after Proctor showed up to testify, trial counsel decided not to call him as a witness. (Doc. 13-15, pp. 206–07.) Thus, the Court cannot say that trial counsel's decision not to call Proctor was "so patently unreasonable that no competent attorney would have chosen it." *Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007). Based on the foregoing, the Court concludes that Petitioner failed to show that his trial counsel acted deficiently when Schiavone decided to not call Proctor as a witness.

Based on the foregoing, the Court concludes that the state habeas court reasonably determined that Petitioner failed to show that his trial counsel's performance was deficient for failing to call Raby, Herman, or Proctor as witnesses during the sentencing phase. Moreover, even if Petitioner had showed trial counsel acted deficiently, the state habeas court reasonably concluded that Petitioner failed to show prejudice. This is especially true considering the cumulative nature of the testimony and, as discussed in Discussion Section I.A.2, *supra*, the highly aggravating factors present in this case. Accordingly, Petitioner failed to show that the state habeas court's decision regarding trial counsel's failure to call Proctor as a witness "resulted in a decision that was contrary to, or

involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

C. Presenting Davis's Testimony and Producing Memoranda

Petitioner next argues that his trial counsel was ineffective for calling Davis as a witness at the sentencing phase and producing Davis's memoranda and notes to the prosecution. (Doc. 65, pp. 108–113.) Specifically, Petitioner contends that trial counsel's decision to call Davis "was not strategic" and only occurred because "[counsel] forgot to act on [Davis's] recommendation to retain a social worker to introduce records." (*Id.* at pp. 108–09.) Petitioner also argues that because Davis was not qualified to testify about "the impact of the information in the record she obtained on "[Petitioner]," the prosecution on cross-examination was "able to highlight unhelpful matters in the records" that Davis could not "put . . . in their proper context." (*Id.* at p. 109.) Finally, Petitioner asserts that trial counsel "exacerbated the situation" by "unreasonably" and "voluntarily" producing Davis's interview memoranda and notes she created and accrued during her investigation to the prosecution. (*Id.*) According to Petitioner, producing Davis's memoranda and notes prejudiced the defense because it gave the prosecution "a window into the defense strategy and material that the prosecution used to impeach other witnesses." (*Id.*)

1. Trial Counsel's Decision to Call Davis as a Witness

The state habeas court rejected Petitioner's claim that calling Davis as a witness was unreasonable. (Doc. 27-20, p. 69.) According to the state habeas court,

> Ms. Davis was an experienced mitigation specialist having worked on more than thirty death penalty cases in state and federal courts. Ms. Davis was utilized by counsel at Petitioner's trial to introduce records relating to Petitioner, rather than explain the potential impact of Petitioner's social history. Early in her testimony, Ms. Davis explained her role as a mitigation specialist and provided details of how she had prepared her social history of Petitioner.
>
> Through Ms. Davis's testimony, Petitioner's attorneys were able to introduce volumes of mitigation documentation including: birth records; prenatal and delivery records; hospital records; school records; Shawano County (Wisconsin) Department of Social Services and Family Court records; counseling records; Chatham County Detention Center medical and mental health records; divorce records of Petitioner's parents; South Carolina Department of Mental Health records on Petitioner's brother Donald; marriage records for Petitioner's mother and Frank Sutton, and; a police report on Frank Sutton. Given Ms. Davis's extensive experience as a mitigation specialist and the scope of her testimony, counsel's decision to have her testify in mitigation to introduce Petitioner's social history was reasonable.
>
> Moreover, as previously shown, trial counsel chose Dr. Weilenman as the final witness in the sentencing

> phase to testify to the potential impact of Petitioner's social history. Petitioner has failed to show trial counsel's decision to utilize Ms. Davis in conjunction with Dr. Weilenman fell below the standard of reasonableness. As held by the Eleventh Circuit Court of Appeals, the test of reasonableness "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." *Bates v. Florida*, 768 F.3d 1278, 1295 (11th Cir. 2014) [(]citing *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) [)]. As Petitioner has failed to show trial counsel's conduct fell below that of a reasonable competent counsel, his claim is denied.

(*Id.* at pp. 70–71.) Petitioner argues that the state habeas court's decision was unreasonable because "it ignores the uncontradicted record evidence that Ms. Davis testified only because Mr. Sparger failed to follow through on her advice that he retain a social worker so that she would not have to testify." (Doc. 65, p. 112.)

After reviewing the evidence presented at trial and at the state habeas hearing, the Court finds that the state habeas court's decision was not unreasonable. Indeed, Petitioner failed to meet the requisite showing of an ineffective assistance of counsel claim under *Strickland*. As the state habeas court properly determined, the reasonableness test under *Strickland* asks, "whether some reasonable lawyers at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Bates v. Florida*, 768 F.3d 1278, 1295 (11th Cir. 2014). The reasonableness test "has nothing to do with what the best lawyers would have done. Nor is the test even what most

good lawyers would have done." *Id.* Here, Davis was an experienced mitigation expert, had worked on more than thirty death penalty cases in state and federal courts, and gathered the extensive mitigation evidence. (Doc. 27-20, p. 70.) Furthermore, through Davis, trial counsel introduced extensive mitigation evidence. (*Id.*) Finally, Petitioner used Davis in conjunction with Dr. Weilenman to testify about the potential impact of Petitioner's social history. (*Id.*) The record sufficiently supports the state habeas court's finding that trial counsel acted reasonably in allowing Davis to testify during sentencing.

To the extent Petitioner asserts that trial counsel needed to hire a social worker or a "record custodian" to render effective assistance of counsel or that Davis was unqualified to give testimony at trial, (*see* doc. 71, pp. 44–45), the Court emphasizes that "there is no general requirement that counsel retain a social worker or any other expert for the penalty phase, even if doing so is a sensible and widely accepted practice." *Waldrop v. Thomas*, No. 3:08-CV-515-WKW, 2014 WL 1328138, at *62 (M.D. Ala. Mar. 31, 2014). Indeed, Petitioner has not highlighted any evidence indicating that "prevailing professional norms" in Georgia dictate hiring and calling a social worker or record custodian to testify rather than a mitigation expert such as Davis. *See Morrow v. Warden*, 886 F.3d 1138, 1150 (11th Cir. 2018) ("Morrow also fails to establish that contemporary 'prevailing professional norms' in Georgia dictated hiring a social worker for capital cases.").

2. Producing Memoranda to Prosecution

Petitioner further contends that trial counsel "exacerbated the situation when he unreasonably [and] voluntarily produced Ms. Davis's privileged and

confidential interview memoranda and notes to the State." (Doc. 65, p. 109.) According to Petitioner, this production "prejudiced the entire defense sentencing phase presentation going forward by giving the prosecution a window into the defense strategy and material that the prosecution used to impeach other witnesses." (*Id.* at pp. 109–10.) During the period leading up to Petitioner's trial, Georgia enacted O.C.G.A. § 17-16-1, *et seq.*, which provides that a criminal defendant "must disclose[] five days before trial the identity of witnesses the defendant[] intends to call at sentencing and must disclose at or before the guilt/innocence verdict any *non-privileged statements of those witnesses* that are in the defendant's possession." *Stinski v. State*, 642 S.E.2d 1, 7 (Ga. 2007) (emphasis added) (citing O.C.G.A. § 17-16-4(b)(3)(C)). Notably, O.C.G.A. § 17-6-1 provides that a "'[s]tatement of a witness' . . . does not include notes or summaries made by counsel." O.C.G.A. § 17-16-1. Trial counsel objected to the criminal discovery procedure outlined in O.C.G.A. § 17- 6-1, *et seq.*, on interim appeal, arguing that the statutory scheme was unconstitutional. *See Stinski v. State*, 642 S.E.2d at 7–8. The Georgia Supreme Court rejected trial counsel's arguments on interim appeal, *id.*, and trial counsel, attempting to comply with the statutory requirements, produced Davis's notes and memoranda over to the prosecution in accordance with the criminal discovery procedure statute. (Doc. 27-20, p. 71.) Trial counsel later argued on direct appeal that the "criminal discovery procedure interferes with trial counsel's ability to use mitigation specialists to assist trial counsel in preparing for the sentencing phase of death penalty trials" because "statements of witnesses discovered by mitigation specialists and reported on in writing to trial counsel would be discoverable by the State under O.C.G.A. § 17-16-4(b)(3)(C), while statements of

witnesses discovered by trial counsel directly would not be." *Stinski v. State*, 691 S.E.2d at 865. The Georgia Supreme Court again disagreed with trial counsel's arguments but clarified the reach of the statute, stating:

> We have held that work "done by [an investigator] under the attorney's instruction and supervision was as much a part of the attorney's work as if he had done it himself." Similarly, we hold that "notes and summaries" made by a mitigation specialist who is working at the discretion of trial counsel in a death penalty case should be regarded as "notes and summaries made by counsel" within the meaning of the criminal discovery procedure.

Id. at 865. Thus, the Georgia Supreme Court determined that "there is no merit to Stinski's argument that a death penalty defendant's ability to employ a mitigation specialist to assist in investigation is unduly hampered by the criminal discovery procedure." *Id.* at 865–66.

The state habeas court concluded that "trial counsel's performance cannot be found below that of reasonable competent counsel where a rule of law such as the [one announced on direct appeal] is rendered subsequent to [their] representation. As established in *Strickland*, trial counsel's performance must be evaluated without the benefit of hindsight and from counsel's perspective at the time." (Doc. 27-20, p. 71 (citing *Strickland*, 466 U.S. at 689).) The Court agrees. As the state habeas court found, trial counsel only produced Davis's notes and memoranda to comply with the Georgia Supreme Court's decision that the criminal discovery statute applied to Petitioner's case. (Doc. 27-20, p. 71); *see Stinski v. State*, 642 S.E.2d at 6–7. Indeed, the Georgia Supreme Court did not rule until nearly three years after Petitioner's trial that a mitigation

specialist's notes and summaries fall within the "notes and summaries made by counsel" exception to the statute. *See Stinski v. State*, 691 S.E.2d at 865. As the state habeas court concluded, "until the Georgia Supreme Court issued its direct appeal decision in the instant case, trial counsel was not on notice that the materials produced by Ms. Davis in her role as a mitigation specialist were not discoverable." (Doc. 27-20, p. 71.); *see Diaz v. United States*, 799 F. App'x 685, 688 (11th Cir. 2020) ("If a legal principal is unsettled, counsel is not deficient 'for an error in judgment.' Thus, if an attorney could have reasonably reached the incorrect conclusion concerning an unsettled question of law, 'that attorney's performance will not be deemed deficient for not raising that issue to the court.'") (quoting *Black v. United States*, 373 F.3d 1140, 1144 (11th Cir. 2004)).

While Petitioner generally argues that trial counsel did not need a clear decision by the Georgia Supreme Court to reasonably know that the requirements under the criminal discovery statute did not encompass Davis's notes and memoranda, the Court must review trial counsel's decisions without the benefit of hindsight. *See Strickland*, 466 U.S. at 689. "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." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994). Considering the Georgia Supreme Court's decision on interim appeal that rejected trial counsel's arguments that the criminal discovery procedure was unconstitutional and the Georgia Supreme Court's need on direct appeal to clarify whether the criminal discovery statute encompassed a mitigation specialist's notes and memoranda, the Court finds that

Petitioner failed to carry his "heavy burden" to show that "no reasonable lawyer" would have done the same. *Id.* Indeed, this case is distinguishable from other cases, such as *Lawhorn v. Allen*, where trial counsel failed "to conduct adequate legal research in support of [their] decision[s]," 519 F.3d 1272, 1298 (11th Cir. 2008), as Petitioner's trial counsel seemingly anticipated the potential adverse effect the criminal discovery procedure could have had on Petitioner's case and sought relief through interim appeal. Thus, the Court finds that the state habeas court reasonably determined that Petitioner failed to show his trial counsel's conduct was deficient. *See Strickland*, 466 U.S. at 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.")

3. Prejudice

Furthermore, even if Petitioner satisfied his burden under *Strickland* to show deficiency in his trial counsel's conduct regarding Davis, the Court finds that Petitioner failed to show he was prejudiced by trial counsel's decision to call Davis as a witness at the sentencing phase or by his trial counsel's production of Davis's memoranda and notes. Regarding Davis's testimony, Petitioner asserts that "on cross-examination[,] the State was able to highlight unhelpful matters in the records and Ms. Davis was unable to put those matters in perspective." (Doc. 65, p. 109.) However, Petitioner's briefings fail to cite to or point to either the "unhelpful matters" the prosecution asked Davis about during cross-examination or how the discussion of those matters resulted in a "substantial likelihood of a different result" in the sentencing phase of the trial. *Harrington v. Richter*, 562 U.S. 86, 112 (2011);

(*see also* docs. 65, 71.). Furthermore, Petitioner failed to adequately show what exactly a different social worker or a record custodian would have testified to or how his or her testimony would have been substantially likely to lead to a different result during sentencing. (*See* docs. 65, 71); *see also Durr v. Mitchell*, 487 F.3d 423, 437 (6th Cir. 2007) ("The affidavit does not even discuss the potential effect such an expert would have had on the jury's decision to return a death sentence or not. Durr fails to show how the absence of this expert resulted in prejudice under *Strickland*.").

Moreover, regarding trial counsel's decision to produce Davis's notes and memoranda, Petitioner failed to show that there is a "reasonable probability that the outcome of his sentencing would have been different" had trial counsel not produced those documents. *Strickland*, 466 U.S. at 694. Petitioner asserts his defense was prejudiced because "[s]ome of the witnesses were confronted with unhelpful details from those memoranda on cross-examination." (Doc. 65, pp. 74, 109.) As an example, Petitioner points to the testimony of Matt Correll.[7] (*Id.*) According to Petitioner, because trial counsel produced Davis's notes, the prosecution was able to elicit testimony from Correll on cross examination that Petitioner had been "verbally abusive" to one of his sons. (Doc. 65, pp. 74–75; *see also* doc. 10-10, p. 86.) However, after stating that he "believe[d]" Petitioner had been "verbally abusive," Correll clarified that Petitioner was never physically violent "with anybody in [his] house" and would have let Petitioner come back to stay with him and

[7] Petitioner stayed with Correll and his two sons for a few months in 2000. (Doc. 10-10, pp. 81–84.) Correll's son asked him if Petitioner could stay with them because Petitioner "was about to be homeless." (*Id.* at p. 81.)

his family had Petitioner asked, seemingly minimizing any prejudicial effect of his testimony that Petitioner had been verbally abusive. (Doc. 10-10, p. 86.) Finally, as discussed in Discussion Section I.A.2, *supra*, the highly aggravating factors present in this case further negate a finding of prejudice. Accordingly, Petitioner failed to show that his trial counsel's conduct regarding Davis and the production of her memoranda and notes "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

D. Rebuttal Evidence regarding Petitioner's Remorse

Petitioner next argues that his trial counsel unreasonably failed to rebut the prosecution's evidence that Petitioner was unremorseful about committing his crimes. (Doc. 65, pp. 114–18.) According to Petitioner, his supposed lack of remorse for his crimes was a "major theme" of the trial, which the prosecution emphasized by referring to it during their opening statement and closing argument and by playing portions of Petitioner's videotaped statement to police in which Petitioner looked "flat" when discussing his crimes. (*Id.* at p. 114 (quoting doc. 10-8, p. 177; doc. 10-11, pp. 111–12, 121).) Petitioner asserts that his trial counsel should have rebutted the prosecution's arguments by (1) introducing testimony from an expert like Dr. Garbarino about children's response to trauma and (2) calling Alton VanBrackle as a witness. (*Id.* at pp. 114–15.)

Alton VanBrackle was a prisoner who was housed in the same jail unit as Petitioner. (Doc. 19-20, p. 107.) While

they were together in jail, Petitioner confessed to VanBrackle that he committed the crimes and expressed remorse for those crimes. (Doc. 13-15, p. 143; doc. 25-23, pp. 105–19, 229; *see also* doc. 27-20, p. 35.) Davis interviewed VanBrackle for several hours and notified trial counsel that VanBrackle described instances in which Petitioner was "crying and praying" at night, upset, and depressed. (Doc. 19-20, pp. 107–08.) Davis also informed trial counsel that VanBrackle told her that Petitioner could not "get the 'stuff'" out of his head. (*Id.* at p. 107.) Based on Davis's interview, trial counsel determined that VanBrackle could be an important sentencing phase witness because he provided evidence of Petitioner's remorse. (Doc. 13-16, p. 49; doc. 25-23, p. 247; *see also* doc. 27-20, p. 35.) However, trial counsel also expressed concerns about VanBrackle's testimony, namely that VanBrackle's roommate was a relative of the victims and that "there was [sic] some things in his statement . . . that [trial counsel] wished [were not] in it." (Doc. 13-15, p. 190; doc. 23-4, p. 288–89; doc. 24-11, p. 14; doc. 25-23, p. 247; *see also* doc. 27-20, p. 35.) These concerns were further exacerbated when, around the time of trial, trial counsel learned that VanBrackle was living with the victim's son and had "backed way off" what he previously told Davis during their interview. (Doc. 13-16, p. 51; doc. 25-23, p. 120; *see also* doc. 27-20, p. 35.) Specifically, VanBrackle was only willing to testify about Petitioner's confession to him about the crimes and not his remorse. (Doc. 25-23, p. 120; *see also* doc. 27-20, p. 35.) VanBrackle eventually "came back around," but trial counsel was still nervous about calling him as a witness. (Doc. 13-16, p. 51; *see also* doc. 27-20, p. 35.)

Furthermore, the state trial court's decision regarding VanBrackle's testimony complicated matters

further. After trial counsel announced their intent to call VanBrackle as a witness during the sentencing phase, the prosecution argued that if VanBrackle testified regarding Petitioner's confession to him, then the prosecution would impeach that testimony with a statement made by Petitioner to police that trial counsel believed was more incriminating than his confession to VanBrackle and contained more details about the crime.[8] (Doc. 10-10, pp. 128–29, 178–79; doc. 13-16, p. 55; *see also* doc. 27-20, pp. 72–73.) Indeed, keeping the more incriminating statement out of evidence was part of trial counsel's trial strategy, for trial counsel was concerned that if VanBrackle took "one step the wrong way, [it would] open[] the door to [Petitioner's] second statement . . . which was not going to help [Petitioner] in mitigation." (Doc. 13-16, pp. 55, 58; *see also* doc. 27-20, pp. 73–74.) The state trial court ruled that if VanBrackle were to testify regarding the facts of the crime as told by Petitioner, it would open the door for the prosecution to impeach him using Petitioner's more incriminating statement to police. (Doc. 10-10, p. 188.) The Georgia Supreme Court affirmed this decision, stating that "the trial court properly cautioned [Petitioner] that his alleged out-of-court statement, if he chose to present hearsay testimony recounting it at trial, could be impeached by the State by use of his previously-suppressed videotaped statement." *Stinski v. State*, 691 S.E.2d at 872–74; (*see also* doc. 27-20, pp. 72–73.)

The state habeas court ruled that trial counsel was not deficient for failing to call VanBrackle as a witness and that even if trial counsel was deficient for that decision, Petitioner failed to show that it was prejudicial. (Doc. 27-

[8] This statement to the police had previously been suppressed. (Doc. 10–10, pp. 130–31; *see also* doc. 27- 20, p. 72.)

20, pp. 73–74.) The state habeas court determined that trial counsel made a "strategic decision" not to present the testimony of VanBrackle given their concerns about the scope of his testimony and his relationship with the victim's family. (*Id.* at p. 73.) The state habeas court further ruled that Petitioner failed to show prejudice because VanBrackle was a "risky witness" and putting him on the stand could have "opened the door" to Petitioner's damaging statement to police, effectively undercutting "any remorse argument Petitioner would have garnered." (*Id.* at p. 74.)

Petitioner argues that the state habeas court's decision was based on "an unreasonable determination of facts in the state court record." (Doc. 65, p. 117.) First, according to Petitioner, the state court ignored the trial court's ruling that Petitioner's more incriminating statement to police would remain inadmissible if Petitioner limited his testimony to Petitioner's remorse, which Petitioner believes is "something largely in control of trial counsel." (*Id.* at pp. 117–18.) Next, Petitioner asserts that the state habeas court ignored Sparger's testimony that VanBrackle "came back around" and was willing to testify by the time of trial. (*Id.* at p. 118.)

The Court finds that the state habeas court reasonably determined that Petitioner's trial counsel was not deficient for failing to present testimony from VanBrackle or an expert like Dr. Garbarino. Regarding Dr. Garbarino, the Court explained above that trial counsel reasonably failed to procure testimony from someone like her who is an expert in child trauma. *See* Discussion Section I.A.1, *supra*. Concerning VanBrackle, the state habeas court properly found that trial counsel made a strategic decision to not call VanBrackle as a witness. Indeed, "[w]hich witnesses, if any, to call, and

when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Waters*, 46 F.3d at 1512; *see also, e.g.*, *Rhode v. Hall*, 582 F.3d 1273, 1284 (11th Cir. 2009). While Petitioner argues that trial counsel was "largely in control" of whether VanBrackle would testify about the facts of the crime (and, thus, could avoid opening the door to Petitioner's incriminating statement), trial counsel expressed legitimate concerns over their ability to do so, stating that "one step the wrong way" would "open[] the door to [Petitioner's] second statement . . . which [would] not . . . help [Petitioner] in mitigation." (Doc. 13-16, p. 58.) Furthermore, even though VanBrackle "came back around," trial counsel was still "nervous about him" because of how he had communicated with trial counsel and because he was living with the victim's son. (*Id.* at p. 51.) Based on the potentially harmful evidence, trial counsel, as the state habeas court found, made a reasonable strategic decision to not call VanBrackle as a witness. (Doc. 27-20, p. 73.)

Even if Petitioner showed that his trial counsel was deficient for not calling VanBrackle as a witness, the state habeas court reasonably determined that Petitioner failed to show prejudice. As the state habeas court found, Petitioner could not "establish that there is a reasonable probability that the outcome of his sentencing would have been different" had trial counsel called VanBrackle as a witness because VanBrackle could have "undercut any remorse argument Petitioner would have garnered," and "the evidence in aggravation was highly persuasive." (*Id.* at pp. 74–75); *see Cullen*, 563 U.S. at 201 (finding that the failure to present new mitigating evidence was not prejudicial because the evidence "would have opened the door to rebuttal by a state expert"); *see also DeYoung*, 609

F.3d at 1291 (discounting the possibility of prejudice because the new mitigating circumstances evidence "would have opened the door to harmful testimony which may well have eliminated any mitigating weight in the overall equation"); *Ledford*, 818 F.3d at 649 ("Prejudice is . . . not established when the evidence offered in mitigation is not clearly mitigating or would open the door to powerful rebuttal evidence."); *see also* Discussion Section I.A.2, *supra* (finding that the highly aggravating factors present in Petitioner's case further negate the finding of prejudice).

E. Voir Dire Questions regarding Views about the Death Penalty

Petitioner next argues that trial counsel rendered ineffective assistance of counsel by failing to ask potential jurors during voir dire whether "they could fairly consider a life sentence in a case involving a child victim." (Doc. 65, p. 119.) Voir dire in this case lasted six days. (*See* doc. 9-19; *see also* doc. 10-5.) During voir dire, the prosecution objected to trial counsel asking questions that were too specific to Petitioner's case, and the state trial court agreed. (Doc. 10-1, pp. 24–28.) Trial counsel then requested that they be allowed to ask potential jurors about their opinions on the death penalty "where a child is the victim in a case in which the person is accused of the murder of a child." (*Id.* at p. 29.) The state trial court initially reserved ruling on the request but then permitted trial counsel to ask the next potential juror such a question, over the prosecution's objection. (*Id.* at pp. 34–35, 44–45.) Petitioner, referencing several members of the jury who were not asked specifically about the death penalty in cases with juvenile victims, argues that his trial counsel's failure to ask that question of each juror violated his "constitutional right to an impartial jury" because the

right "include[s] the right to a jury that could consider all sentencing options even in cases involving child victims." (Doc. 71, p. 52; *see also* doc. 65, p. 119.)

The state habeas court rejected Petitioner's claim, ruling that Petitioner failed to show that his trial counsel was deficient for failing to ask the question of each potential juror and that Petitioner failed to show prejudice. (Doc. 27-20, pp. 26–28.) Regarding trial counsel's performance, the state habeas court found that the jurors knew that Petitioner was charged with murdering a juvenile, that trial counsel did ask potential jurors the question, that certain potential jurors gave responses to other questions that were so favorable to the defense that trial counsel could have reasonably believed further questions would lead to challenges for cause by the prosecution, and that trial counsel's performance persuaded the state trial court to disqualify a potential juror. (*Id.* at pp. 27–28.) Regarding prejudice, the state habeas court determined that Petitioner did not demonstrate "that the jurors who ultimately sat on his jury could not fairly consider a life sentence in a case involving a child victim or were otherwise unqualified." (*Id.* at p. 28.)

The Court finds that the state court reasonably concluded that Petitioner failed to show trial counsel acted deficiently during voir dire. Effective assistance of counsel is required during voir dire. *See Brown*, 255 F.3d at 1279. However, trial counsel's "questions and tactics during voir dire are a matter of trial strategy." *Galin v. Sec'y, Dep't of Corr.*, No. 8:08-cv-254-T-23TBM, 2013 WL 1233125, at *6 (M.D. Fla. Mar. 27, 2013) (citing *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001)); *see also Head v. Carr*, 544 S.E.2d 409, 418 (Ga. 2001) ("By [its] nature, trial counsel's conduct of voir dire . . . [is a]

matter[] of trial tactics."); *United States v. Battle*, 264 F. Supp. 2d 1088, 1178 (N.D. Ga. 2003) ("[D]eference is to be given to counsel's actions during voir dire, as voir dire is recognized to involve considerations of strategy."). Here, trial counsel engaged in a six-day long voir dire, requiring each potential juror to fill out a questionnaire and asking each individual potential juror about their opinions regarding the death penalty. (*See* doc. 9-19 through doc. 10-5.) Trial counsel also "strenuously objected" to the prosecution's motion to disallow certain questions and won the state trial court's approval to ask potential jurors specifically about the death penalty in cases involving juvenile victims. (*See* doc. 27-20, pp. 27–28.) Indeed, trial counsel ultimately asked some jurors specifically about the death penalty in cases with juvenile victims. (*See* doc. 10-1, pp. 44–45.) While trial counsel did not ask each potential juror such a question, that failure does not necessarily render their performance deficient as a plethora of reasons exists for why trial counsel could have refrained from asking each potential juror such a question. For example, as the state habeas court found, some witnesses' responses to other questions could have been so favorable to the defense that trial counsel did not need to ask any further questions for fear of the prosecution challenging such a potential juror. (*See* doc. 27-20, p. 28); *see Stanford v. Parker*, 266 F.3d 442, 454 (6th Cir. 2001) ("[I]f the jury pool was satisfactory, defense counsel may have calculated that asking additional life-qualifying questions might aid the prosecution in deciding how to use its peremptory challenges."). Considering the deference afforded to trial counsel on matters of trial strategy, the Court cannot conclude that Petitioner's trial counsel did not fall "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *see also Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) ("A

decision regarding trial tactics cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be so ill chosen that it permeates the entire trial with obvious unfairness.") (internal quotations omitted).

Even if Petitioner showed that his trial counsel acted deficiently during voir dire, the state habeas court reasonably concluded that Petitioner failed to show prejudice for that deficiency. As the state habeas court found, "Petitioner has not demonstrated that the jurors who ultimately sat on his jury could not fairly consider a life sentence in a case involving a child victim or were otherwise unqualified." (Doc. 27-20, p. 28.) Trial counsel asked each person who ultimately sat on the jury the following question: "If the defendant is found guilty of the offense of murder, would you automatically vote for the death penalty, regardless of the evidence in the case?" (Doc. 9-20, p. 165–66; doc. 10-1, pp. 114, 186–87, 217; doc. 10-2, pp. 13, 210–11; doc. 10-3, pp. 59, 129; doc 10-4, p. 51.) Every juror affirmed that he or she would not automatically impose the death penalty if Petitioner was found guilty of murder and would instead consider all the evidence before making such a decision. (*Id.*) Moreover, trial counsel asked questions which bore on potential jurors' willingness to consider various sentencing options, including life imprisonment, in a murder case. (Doc. 9-20, p. 164; doc. 10-1, pp. 116–17, 185–87, 219–20; doc. 10-2, pp. 13–14, 214–15; doc. 10-3, pp. 60–61, 130–131; doc 10-4, p. 52–54.) Again, every juror affirmed their willingness to consider voting to impose a life sentence if that penalty were warranted under the circumstances. (*Id.*) Crucially, at the time these questions were asked, the potential jurors already knew that one of the victims was a child. (*See* doc. 27-20, p. 27.) Therefore, the Court concludes that

Petitioner failed to establish that he was prejudiced by trial counsel's failure to expressly ask each potential juror whether he or she would consider a sentence of life imprisonment in a murder case where the victim was a child. *See Brown*, 255 F.3d at 1280 (finding that petitioner failed to show prejudice for trial counsel's failure to make a "reverse-*Witherspoon*" inquiry where petitioner "failed to adduce any evidence that any juror was biased in favor of the death penalty."); *see also Stanford*, 266 F.3d at 455 (finding against prejudice where "there is no evidence that any potential jurors were inclined to always sentence a capital defendant to death[,] . . . nothing in the record indicates that counsel's failure to ask life-qualifying questions led to the impanelment of a partial jury[,] . . . [and] considering the totality of the evidence, there is no reasonable probability that, even if defense counsel erred, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.").

In summary, the Court finds that the state habeas court reasonably determined that Petitioner failed to show that trial counsel acted deficiently by (1) not presenting mental health mitigation evidence, including testimonies from experts such as Dr. James, Dr. Ash, and Dr. Garbarino; (2) not obtaining testimony from Tony Raby, Linda Herman, and Sean Proctor; (3) presenting Davis as a witness and producing her memoranda and notes to the prosecution; (4) not calling VanBrackle as witness to rebut the prosecution's evidence regarding Petitioner's lack of remorse; and (5) not questioning every juror of his or her's opinion on the death penalty in cases involving juvenile victims. Moreover, even if Petitioner carried his burden to show his trial counsel functioned deficiently, the Court finds that the state habeas court

reasonably determined that Petitioner failed to show that these deficiencies prejudiced his defense. After examining the effect of these supposed deficiencies individually as well as *cumulatively,* the Court finds that the effect of trial counsel's supposed deficiencies during the sentencing phase of trial were not so great as to create a reasonable probability that Petitioner's sentence would have changed.[9] This is especially true considering the cumulative nature of the additional mitigating evidence presented during the state habeas hearing and the extent of the aggravating factors present in this case, as discussed in Discussion Section I.A.2, *supra*. Accordingly, Petitioner failed to show that the state habeas court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

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[9] Petitioner argues that the state habeas court's decision on prejudice was contrary to clearly established federal law because the state habeas court failed to address the "cumulative effect of his trial counsel's errors." (Doc. 65, pp. 125–26.) Specifically, Petitioner contends that the "state court considered whether Mr. Stinski was prejudiced by each independent instance of deficient performance rather than considering the effect of all of counsels' errors on the total mix of mitigating and aggravating evidence as *Strickland* requires." (*Id.* at p. 125.) Petitioner is incorrect because the state habeas court considered the cumulative effect of trial counsel's supposed errors at the end of its order. (*See* doc. 27-20, pp. 80–85.) Moreover, while it is true that the state habeas court also evaluated the prejudicial effect of each alleged instance of deficient performance, the Eleventh Circuit explained in *Allen v. Secretary, Florida Department of Corrections* that "[t]he existence of item-by-item analysis . . . is not inconsistent with a cumulative analysis," as the "only way to evaluate the cumulative effect is to first examine each piece standing alone." 611 F.3d 740, 749 (11th Cir. 2010); (*see generally* doc. 27-20.) That is the case here. Thus, because the state habeas court analyzed both the prejudicial effect of each claimed error as well as their cumulative effect, the Court finds that its decision on prejudice was not contrary to clearly established law.

established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

II. Eighth Amendment Cruel and Unusual Punishment

Under the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." U.S. Const. amend. VIII (emphasis added). Furthermore, in *Roper v. Simmons*, the Supreme Court held that the imposition of the death penalty on those who were younger than eighteen years old when they committed their crimes constitutes "cruel and unusual" punishment in violation of the Eighth Amendment. 543 U.S. 551, 568 (2005). Petitioner, while acknowledging that he was eighteen years old at the time he committed his crimes, argues that the Eighth Amendment, as interpreted by the Supreme Court in *Roper*, bars his execution. (Doc. 65, pp. 133–50.)

A. Applicable Standard of Review

The parties dispute the applicable standard of review for Petitioner's Eighth Amendment claim. Petitioner argues that the AEDPA's standard of review does not apply to his Eighth Amendment claim and that the Court should instead review the claim *de novo* for two reasons: (1) the state court did not "adjudicate[] . . . the merits" of the Eighth Amendment claim as required by 28 U.S.C. § 2254(d), and (2) his death penalty sentence violates "a substantive rule of constitutional law that would be retroactive on collateral review under the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989)." (Doc. 65, pp. 133–36.)

1. Adjudication on the Merits

The AEDPA's deferential standard of review under 28 U.S.C. 2554(d) only applies where a petitioner's claim "was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2554(d). In the state habeas proceedings, the state court determined that the Eighth Amendment claim was "non-cognizable" under O.C.G.A. § 9-14-42(a), and, alternatively, that the claim failed on the merits. (Doc. 27-20, pp. 87–88.) While Petitioner concedes that a "state court's alternative holding typically counts as an adjudication on the merits for purposes of Section 2254(d)," he contends that this rule does not apply "where the state court's primary holding is that it lacks jurisdiction over the dispute." (Doc. 65, p. 134.) Petitioner argues that because the state court's "primary holding" was that the Eighth Amendment claim was "non-cognizable," the state court lacked jurisdiction to rule on the merits of that claim. (*Id.* (citing *Cognizable*, Black's Law Dictionary (11th ed. 2019) ("Capable of being judicially tried or examined before a designated tribunal; within the court's jurisdiction.").) Thus, according to Petitioner, the state court failed to adjudicate the merits of the claim for purposes of Section 2554(d). (*Id.*)

The only authority Petitioner cites in support of this argument is the Sixth Circuit Court of Appeal's decision in *Gumm v. Mitchell*, 775 F.3d 345, 362 (6th Cir. 2014). In *Gumm*, the Sixth Circuit addressed the question of whether the AEDPA's standard of review applied to a state appellate court's alternative merits ruling on the petitioner's *Brady* claim after the state appellate court determined that it lacked subject matter jurisdiction to "entertain" that claim under Ohio Revised Code §

2953.23(A).[10] *See id.* at pp. 358, 362; *see also State v. Gumm*, 864 N.E.2d 133, 141 (Oh. Ct. App. 2006). Interpreting Ohio law, the Sixth Circuit found that Ohio state courts had (1) "clearly indicated that [Section] 2953.23 denies courts subject matter jurisdiction over claims that cannot meet the statute's stringent requirements" and (2) "interpreted [Ohio law] to conclude that where a court lacks jurisdiction, any judgment on the merits is rendered void ab initio." *Gumm*, 775 F.3d at 362. Thus, the Sixth Circuit ruled that the Ohio state court did not "adjudicate [the] claim on the merits" for purposes of Section 2254(d) because the state court did not "address the issue in an opinion in which the court had jurisdiction over the matter." *Id.*

As an initial matter, the Court emphasizes that the Sixth Circuit's decision in *Gumm* relied on its interpretation of *Ohio* law and is not binding on this Court. *See, e.g.*, *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) ("Under the established federal legal system the decisions of one circuit are not

[10] Ohio Revised Code § 2953.23(A) imposes a time limit on filing a post-conviction relief petition. It provides, "whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the [Ohio] Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies." Ohio Revised Code § 2953.23(A). In *State v. Gumm*, the Ohio appeals court held that Section 2953.23(A) deprived it of subject matter jurisdiction because "the time for filing [petitioner's] petition expired," and the record did not demonstrate the existence of any exceptional circumstances carved out by the statute. 864 N.E.2d at 141; *see* Ohio Revised Code § 2953.23(A)(1)-(2).

binding on other circuits.").[11] Moreover, Petitioner failed to cite to—and the Court's own search failed to reveal—any binding legal precedent establishing either that a state habeas court lacks jurisdiction over a petition that does not comply with O.C.G.A § 9-14-42(a) or that the AEDPA's standard of review is inapplicable to a state habeas court's alternative merits ruling.

Finally, as Petitioner concedes, it is well-established that "a state court's alternative holding is an adjudication on the merits" for purposes of Section 2254(d). *Raulerson*, 928 F.3d at 1001; (*see* doc. 65, p. 134.) Indeed, "alternative holdings are not dicta, but instead are binding as solitary holdings." *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008); *see also Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476, 484 n.3 (11th Cir. 2014) (collecting

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[11] The Court notes that the persuasiveness of *Gumm v. Mitchell* is diminished by the differences between the reasoning underlying the Ohio appellate court's decision regarding the petitioner's *Brady* claim in *State v. Gumm* and the state habeas court's ruling on Petitioner's Eighth Amendment claim in this case. In *State v. Gumm*, the Ohio Court of Appeals declined to adjudicate the petitioner's *Brady* claim because his post- conviction petition was "tardy," i.e., it was not filed within the time frame established by Ohio Revised Code Section 2953.23(A). 864 N.E.2d at 141. However, the state habeas court in this case found that O.C.G.A. § 9-14-42(a) barred Petitioner's Eighth Amendment claim not because it was untimely but because Petitioner's amended habeas petition "fail[ed] to allege a constitutional violation in the proceeding which resulted in Petitioner's conviction and sentence." (Doc. 27-20, p. 87). Then, in its Order regarding issues of procedural default, the Court subsequently determined that Petitioner did state a cognizable claim under the Eighth Amendment. (Doc. 60, p. 17.) Thus, the Court finds the Sixth Circuit's decision in *Gumm v. Mitchell* unpersuasive. *See generally Riechmann v. Fla. Dep't of Corr.*, 940 F.3d 559, 580 (11th Cir. 2019) (applying AEDPA's deferential standard of review to the Florida Supreme Court's alternative ruling on petitioner's *Brady* claim which "was barred due to [petitioner's] failure to raise it on direct appeal.").

cases). Thus, the state habeas court's alternative ruling that Petitioner's Eighth Amendment claim fails on the merits constitutes an "adjudication on the merits" for purposes of Section 2254(d), and the AEDPA's standard of review, therefore, applies. *See Riechmann*, 940 F.3d at 580 ("This 'alternative holding on the merits' constitutes 'an "adjudication on the merits" within the meaning of § 2254(d),' and we may not grant federal habeas relief unless the state unreasonably applied *Brady*.") (quoting 28 U.S.C. §2254(d)). Considering the lack of binding legal authority for Petitioner's argument and the Eleventh Circuit's clear and established precedent that "a state court's alternative holding is an adjudication on the merits" for purposes of Section 2254(d), the Court finds Petitioner's first argument unpersuasive. *Raulerson*, 928 F.3d at 1001.

2. *Teague* and 28 U.S.C. § 2254(d)(1).

Concerning Petitioner's second argument, the Court finds that argument unavailing as well. Petitioner asserts that the AEDPA standard of review does not apply because his death penalty sentence violates "a substantive rule of constitutional law that would be retroactive on collateral review under the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989)," in which the Supreme Court held that new constitutional rules of criminal procedure generally do not retroactively apply to convictions that were final when the new rule was announced. (Doc. 65, pp. 134); *see Teague v. Lane*, 489 U.S. at 306–16. Specifically, Petitioner contends that the Court should extend the Supreme Court's ruling in *Roper v. Simmons*, 543 U.S. 551 (2005), to protect "all emerging adults" (i.e., eighteen-to-twenty-year-old offenders) from capital punishment rather than just juveniles. (Doc. 65, p. 136.) Petitioner argues that, because such an extension of

the *Roper* decision would constitute a new "substantive rule of constitutional law" under *Teague*, it retroactively applies to bar Petitioner's death sentence and renders the AEDPA's standard of review inapplicable. (*Id.* at pp. 133–136.) The Court addresses this argument in two steps. First, the Court must determine whether Petitioner's proposed extension of *Roper* falls within one of *Teague*'s two exceptions, and second, the Court must determine whether a rule that falls under one of *Teague*'s exceptions evades the AEDPA's standard of review.

In *Teague*, 489 U.S. at 306–16, the Supreme Court held that "a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced," unless (1) the new rule is a "substantive rule[] of constitutional law" or (2) the new rule is a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016) (internal citations and quotation marks omitted). Thus, the *Teague* analysis requires the Court to perform "three steps." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *see also Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1334 (11th Cir. 2019). First, the Court must "determine the date when the petitioner's conviction became final," which happens when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Knight*, 936 F.3d at 1334 (citing *Clay v. United States*, 537 U.S. 522, 527 (2003)). Second, "if the rule that the petitioner wants to apply had not been announced" prior to the final conviction, the Court must "'assay the legal landscape' as it existed at the time and determine whether existing precedent compelled the rule—that is, whether

the case announced a new rule or applied an old one." *Id.* (quoting *Beard v. Banks*, 542 U.S. 406, 413 (2004)); *see also id.* ("If —and only if—the holding was dictated by precedent existing at the time the defendant's conviction became final, then the rule is not new[.] . . . And that is not a light test—a rule is not dictated by prior precedent unless it would have been apparent to all reasonable jurists.") (internal quotations and citations omitted). Third, assuming the rule petitioner wants to apply constitutes a "new rule," the Court must determine whether the new rule fits within "either of the two exceptions to nonretroactivity." *Id.* at 1336.

Turning to the first step of the *Teague* analysis, the Supreme Court denied Petitioner's writ of certiorari on November 1, 2010. (Doc. 11-15.) Thus, Petitioner's conviction became final then, and the rule Petitioner wants to apply in this case—that *Roper*'s prohibition of the death penalty applies to "all emerging adults"—had not been announced. Regarding the second step, "[a] case announces a new rule of constitutional law when it breaks new ground or imposes a new obligation on the States or the Federal government." *In re Henry*, 757 F.3d 1151, 1158 (11th Cir. 2014) (citing *Teague v. Lane*, 489 U.S. at 301). In other words, "a case announces a new rule if the result was not dictated by precedent existing when the defendant's conviction became final." *Id.* (citing *Teague v. Lane*, 489 U.S. at 301). Furthermore, a rule may be new if the petitioner seeks to apply a prior decision's "old rule" to a novel setting, such that relief would create a new rule by the extension of the precedent. *Stringer v. Black*, 503 U.S. 222, 228 (1992); *see also In re Hammond*, 931 F.3d 1032, 1038 (11th Cir. 2019) ("The Supreme Court has noted that, even where a court applies an already existing rule, its decision may create a new rule by applying the

existing rule in a new setting, thereby extending the rule 'in a manner that was not dictated by [prior] precedent.'") (quoting *Stringer*, 503 U.S. at 228); *United States v. Reece*, 938 F.3d 630, 634 (5th Cir. 2019) ("A new rule may be created, however, by extending an existing rule to a new legal setting not mandated by precedent.") (citing *Stringer*, 503 U.S. at 222); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 903 (3d Cir. 1999) (Stapleton, J., concurring) ("[T]he Supreme Court has explained that the principles of *Teague* also apply if a petitioner, although relying on an 'old' rule, seeks a result in his case that would create a new rule 'because the prior decision is applied in a novel setting, thereby extending the precedent.'") (quoting *Stringer*, 503 U.S. at 222). Here, Petitioner asserts that the Court should extend the Supreme Court's ruling in *Roper* to encompass all "emerging adults." (Doc. 65, p. 136.) Such an extension would create a "new rule" for purposes of the *Teague* analysis in that it has not been previously dictated by federal law and would extend *Roper*'s ruling to a novel set of facts—namely, to an adult offender who possessed the attributes of a juvenile offender when he or she committed the crime.

Regarding the third step, Petitioner asserts that his proposed rule falls under *Teague*'s "substantive rule of constitutional law" exception. (Doc. 65, pp. 135–36.) A rule is "substantive" if it forbids "criminal punishment of certain primary conduct" or prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 577 U.S. at 198. *Teague*'s first exception requires both federal habeas courts and "state collateral review courts to give retroactive effect" to new substantive rules of constitutional law. *Id.* at 198–200. Here, Petitioner's proposed rule that all "emerging

adults" (i.e., those aged eighteen to twenty- years old) is substantive because, like the rule announced in *Roper*, it alters the class of persons eligible for the death penalty. *See Montgomery*, 577 U.S. at 206 (noting that *Roper* announced a substantive rule); *Dingle v. Stevenson*, 840 F.3d 171, 174 (4th Cir. 2016) ("We readily grant that *Roper* announced a substantive rule . . . ."). Based on the above analysis, the Court finds that Petitioner's proposed rule applies retroactively under *Teague* as it would be a new rule of substantive constitutional law.

While the Court agrees with Petitioner that his proposed extension of *Roper* falls within *Teague*'s first exception, the Court's analysis does not end there. As noted above, the Court must also determine whether the AEDPA's standard of review under 28 U.S.C. § 2254(d)(1) applies to new rules of constitutional law that fall under one of the exceptions to *Teague*. As discussed above, *Teague* requires federal and state habeas courts to give retroactive effect to new substantive rules of constitutional law. However, Section 2254(d)(1) makes clear that

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was *contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States*.

28 U.S.C. § 2254(d)(1) (emphasis added). Thus, "it is not clear whether a [Section] 2254 petitioner can rely on a rule that is considered 'new' under *Teague* (even if it falls

within a *Teague* exception) because the rule will not also be 'clearly established' for purposes of [Section] 2254(d)(1)." *Martin v. Symmes*, No. 10-cv-4753 (SRN/TNL), 2013 WL 5653447, at *14 n.12, (D. Minn. Oct. 15, 2013), *vacated and remanded on other grounds by* 820 F.3d 1012 (8th Cir. 2016). Indeed, neither the Supreme Court nor the Eleventh Circuit have directly answered this question. *See Greene v. Fisher*, 565 U.S. 34, 39 n.2 (2011) ("Whether [Section] 2254(d)(1) would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague* . . . is a question we need not address to resolve this case."); *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1313 n.6 (11th Cir. 2015) ("[N]either this Court nor the Supreme Court has squarely answered '[w]hether [Section] 2254(d)(1) would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague*.").

Petitioner asserts that the Supreme Court's decision in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), establishes that "[w]here a petitioner claims relief based on a rule that would fall within one of *Teague*'s exceptions, a federal habeas petitioner should be able to obtain relief even if the state court decision did not yet violate 'clearly established' federal law under AEDPA." (Doc. 65, p. 135.) According to Petitioner, the reasoning in *Montgomery* "suggests that substantive rules apply retroactively to habeas petitions subject to [Section] 2254(d)." (*Id.*) In *Montgomery*, the Supreme Court held that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." 577 U.S. at

200. However, the Court in *Montgomery* did not clarify how its decision coincides with the requirements of 28 U.S.C. § 2254(d)(1). Indeed, the majority opinion in *Montgomery* did not mention Section 2254(d)(1) or the AEDPA at all.

Furthermore, while the Supreme Court has not addressed the exact issue the Court faces here, the Supreme Court has stated on multiple occasions that "the AEDPA and *Teague* inquiries are distinct." *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam); *Greene*, 565 U.S. at 39. As the Supreme Court stated in *Greene*,

> The retroactivity rules that govern federal habeas review on the merits—which include *Teague*—are quite separate from . . . [the] AEDPA; neither abrogates or qualifies the other. If [Section] 2254(d)(1) was, indeed, pegged to *Teague*, it would authorize relief when a state-court merits adjudication 'resulted in a decision that *became* contrary to, or an unreasonable application of, clearly established Federal law, *before the conviction became final*.' The statute says no such thing, and we see no reason why *Teague* should alter AEDPA's plain meaning.

565 U.S. at 39; *see also Edwards v. Vannoy*, 141 S. Ct. 1547, 1565 (2021) (Thomas, J., concurring) ("[T]he Court's reliance on *Teague* today and in the past should not be construed to signal that . . . *Teague* could justify relief where AEDPA forecloses it. AEDPA . . . . does not contemplate retroactive rules upsetting a state court's adjudication of an issue that reasonably applied the law at the time."). Moreover, Section 2254(d)(1)'s plain text speaks in the past tense and only allows a writ to be granted where a decision "*was* contrary to, or *involved* an

unreasonable application of, *clearly established* Federal law, as *determined* by the Supreme Court of the United States. 28 U.S.C. § 2254(d). If Congress intended for federal courts to grant habeas petitions where a state decision *is* contrary to or *involves* an unreasonable application of *now* established law, it could have said so. However, Congress included no such language and did not otherwise create a carve out within Section 2254(d) for claims based on a rule that would fall within one of *Teague*'s exceptions. *See* 28 U.S.C. § 2254(d); *see also Edwards*, 141 S. Ct. at 1565 (Thomas, J., concurring) ("Section 2254(d)—the absolute bar on claims that state courts reasonably denied— has no exception for retroactive rights. Congress' decision to create retroactivity exceptions to the [AEDPA's] statute of limitations and to the [AEDPA's] bar on second-or-successive petitions but not for [Section] 2254(d) is strong evidence that *Teague* could never have led to relief here."). Finally, Petitioner failed to cite to any case law directly holding that *Teague*'s substantive rule exception prohibits a federal habeas court from applying the AEDPA's standard of review when reviewing a state court's adjudication. (*See* doc. 65, pp. 133–36.)

Based on the above, the Court finds it unlikely that the Supreme Court in *Montgomery* intended to abrogate the plain text of the AEDPA when a new substantive rule of constitutional law retroactively applies to a 28 U.S.C. § 2254 petitioner's claim under *Teague*. *See Demirdjian v. Gipson*, 832 F.3d 1060, 1076 n.12 (9th Cir. 2016) ("Even if applying a rule retroactively would comport with *Teague*, we still must ask whether doing so would contravene [S]ection 2254(d)(1) by granting relief based on federal law not clearly established *as of the time the state court render[ed] its decision*.") (internal quotations and

citations omitted) (emphasis in original); *Greene v. Palakovich*, 606 F.3d 85, 101 (3d Cir. 2010) ("[I]t seems a leap to assume that new rules that are deemed retroactive under *Teague* would be automatically deemed 'clearly established Federal law' for purposes of [Section] 2254(d)(1)."); *Pizzuto v. Blades*, No. 1:-5-cv-00516-BLW, 2016 WL 6963030, at *6 (D. Idaho Nov. 28, 2016) ("[T]o be eligible for relief under AEDPA, a petitioner must show *both* that the rule he seeks to invoke is retroactive—either because it is not a new rule, it is a substantive rule, or that it is a watershed rule of criminal procedure—*and* that the state court's decision violated Supreme Court precedent that was clearly-established at the time of that decision "). Therefore, the Court reviews Petitioner's Eighth Amendment claim under the AEDPA's standard of review.

B. Analysis

Regarding the merits of the Eighth Amendment claim, Petitioner argues that the state court unreasonably applied clearly established federal law in rejecting his Eighth Amendment claim. (Doc. 65, pp. 148–50.) Specifically, Petitioner argues that his death sentence is unconstitutional because (1) the Eighth Amendment, as interpreted by the Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005), bars the execution of all defendants who were eighteen or younger when they committed their crimes, (doc. 65, pp. 136–45), and (2) the Supreme Court's decision in *Roper* shields Petitioner from the death penalty because he was the "functional equivalent of a juvenile at the time" he committed his crimes, (*id.* at pp. 145–48).

The state habeas court rejected Petitioner's Eighth Amendment claim. The state habeas court, relying on the

Georgia Supreme Court's decision in *Rogers v. State*, 653 S.E.2d 31 (Ga. 2007), *overruled on other grounds by State v. Lane*, 838 S.E.2d 808 (Ga. 2020), first found that Petitioner's Eighth Amendment claim failed because "Petitioner himself conceded that he was eighteen and nine months old at the time of the crimes."[12] (Doc. 27-20, p. 88.) The state habeas court continued:

> Petitioner provides no legal support for extending the protections of *Rogers v. Simmons*, 543 U.S. 551 (2005), to legal adults. Petitioner was at the age of majority when he committed his crimes. As a result, Petitioner's death sentence does not violate his constitutional rights. Thus, even if this claim was cognizable in habeas, it would be denied.

(Doc. 27-20, p. 88.)

As discussed above, the Court examines the state habeas court's rejection of Petitioner's Eighth Amendment claim under the AEDPA's standard of review set out in 28 U.S.C. § 2554(d)(1). *See* Discussion Section II.A, *supra*. Under Section 2254(d)(1), the Court cannot grant a writ of habeas corpus unless the state habeas court's merits adjudication of a claim resulted in a decision that was either (1) "contrary to . . . clearly established Federal law," or (2) "involved an unreasonable application of[] clearly established Federal law." 28 U.S.C. § 2554(d)(1). For purposes of Section

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[12] In *Rogers v. State*, the Georgia Supreme Court held that a defendant's death sentence did not violate his "equal protection and due process rights merely because, at age 19 when he committed the crimes, he may have possessed the same attributes of a juvenile offender that prompted the United States Supreme Court to prohibit the imposition of the death penalty on offenders under age 18." 653 S.E.2d at 35 (citing *Roper*, 543 U.S. at 574).

2254(d)(1), only the Supreme Court can establish "clearly established Federal law." *Id.*; *see also Dombrowski v. Mingo*, 543 F.3d 1270, 1274 (11th Cir. 2008) ("[T]he 'clearly established law' requirement of [Section] 2254(d)(1) does not include the law of lower federal courts."). Furthermore, the "clearly established law" requirement "refers to the holdings, as opposed to the dicta, of [the] . . . [Supreme] Court's decisions as of the time of the relevant state- court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

1. Contrary to Clearly Establish Federal Law

Here, Petitioner failed to show that the state habeas court's decision was "contrary to" clearly established federal law.

> It is well established in [the Eleventh Circuit] that a state court decision can be "contrary to" clearly established federal law "if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case."

Dombrowski, 543 F.3d at 1274–75 (quoting *Putman v Head*, 268 F.3d 1223, 1241 (11th Cir. 2001). The United States Supreme Court has not extended *Roper*'s protections to offenders who, while legally an adult, possessed a "mental or emotional age" below eighteen when they committed their crimes. *Barwick v. Crews*, No. 5:12cv00159-RH, 2014 WL 1057088, at *14 (N.D. Fla. Mar. 19, 2014), *affirmed by Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1259 (11th Cir. 2015). Indeed, Petitioner does not argue as much. (*See* doc. 65, pp. 148–

50.) Therefore, the state habeas court's rejection of Petitioner's Eighth Amendment claim was not contrary to "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Dombrowski*, 543 F.3d at 1274 ("[W]hen no Supreme Court precedent is on point, we have held that a state court's conclusion cannot be contrary to clearly established Federal law as determined by the U.S. Supreme Court."); *see also Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d at 1258 (holding that a state supreme court's denial of a petitioner's claim that *Roper* protected defendants with a mental or emotional age lower than eighteen but a chronological age greater than seventeen at the time of the crime was not "contrary to" clearly established federal law).

2. Unreasonable Application of Clearly Established Federal Law

Petitioner instead argues that the state habeas court unreasonably applied clearly established federal law when it rejected his Eighth Amendment claim. (Doc. 65, pp. 148–50.) According to Petitioner, the state habeas court "blindly relied on *Rogers* notwithstanding significant changes in the law and science" and "fail[ed] to recognize that *Roper*'s *logic* bars [Petitioner's] execution." (Doc. 65, pp. 148–49 (emphasis added).) A state court unreasonably applies clearly established federal law where it "correctly identifies the governing legal rule but applies [the rule] unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. at 408. However, Section 2254(d)(1) "does not require state courts to *extend* [Supreme Court] precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 426 (2014); *see also Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d at 1259

("[S]tate courts are not obligated to extend legal principles set forth by the Supreme Court because the AEDPA requires only that state courts fully, faithfully and reasonably follow legal rules already clearly established by the Supreme Court.") (internal quotations omitted). In *White v. Woodall*, the Supreme Court explained:

> If a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state- court decision. AEDPA's carefully constructed framework would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.
>
> This is not to say that [Section] 2254(d)(1) requires an identical factual pattern before a legal rule must be applied. To the contrary, state courts must reasonably apply the rules squarely established by this Court's holdings to the facts of each case. The difference between applying a rule and extending a rule is not always clear, but certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt. The critical point is that relief is available under [Section] 2254(d)(1)'s unreasonable- application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question.

572 U.S. at 426–27 (internal quotations and citations omitted).

In *Roper*, "the United States Supreme Court drew a bright line—age 18." *Barwick v. Crews*, 2014 WL

1057088, at *14. Indeed, the Supreme Court squarely held that "the death penalty cannot be imposed upon juvenile offenders." *Roper*, 543 U.S. at 575. While the Supreme Court acknowledged that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns [eighteen]," the Supreme Court also stated that "a line must be drawn" and drew that line at eighteen. *Id.* at 574. Because Petitioner was eighteen years and nine months old when he committed his crimes, *Roper* does not apply. Furthermore, Petitioner has not cited to any legal authority extending the protections of *Roper* to those who committed crimes between the ages of eighteen and twenty or to those who committed crimes at the chronological age of eighteen but a mental or emotional age younger than eighteen. Indeed, in 2015, the Eleventh Circuit rejected a similar argument in *Barwick v. Secretary, Florida Department of Corrections*, and held that a state supreme court did not unreasonably apply clearly established federal law when rejecting the petitioner's argument that *Roper*'s protection should be extended to those who are chronologically older than seventeen but mentally or emotionally younger than eighteen. 794 F.3d at 1258–59.[13] Based on the above, the

[13] The Court also notes that the state habeas court's reliance on the Georgia Supreme Court's decision in *Rogers* was not "blind." Petitioner overlooks the fact that in *Rogers*, the Georgia Supreme Court straightforwardly applied *Roper* to reject an argument similar to the one Petitioner makes in this case: that *Roper* protects young adult offenders who had similar attributes to juvenile offenders when they committed their crimes. *See Rogers*, 653 S.E.2d at 660; (*see also* doc. 27-20, p. 88.) Like Petitioner, the petitioner in *Rogers* committed his crime when he was younger than twenty-years old and possessed juvenile characteristics. *Rogers*, 653 S.E.2d at 660. Furthermore, Petitioner fails to cite any authority which prohibits a state habeas court from relying upon a state supreme court's application and

Court concludes that the state habeas court did not unreasonably apply clearly established federal law when it rejected Petitioner's Eighth Amendment claim.

III. Certificate of Appealability

Federal Rule of Appellate Procedure 22(b)(1) states in part: "In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court . . . , the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a Certificate of Appealability under 28 U.S.C. § 2253(c)." Pursuant to 28 U.S.C. § 2253(c)(2), a district judge should issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." Moreover, pursuant to Rule 11(a) of the Rules Governing Section 2254 Proceedings, the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." The United States Supreme Court has stated that "[t]he COA inquiry . . . is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Rather, "[a]t the COA stage, the only question is whether the applicant had shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

Here, Petitioner has failed to make a substantial showing of a denial of a constitutional right with respect

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interpretation of clearly established United States Supreme Court precedent. Thus, the Court cannot say that the state habeas court "unreasonably applied clearly established law" when it rejected Petitioner's Eighth Amendment claim based on the Georgia Supreme Court's application of *Roper* to circumstances like Petitioner's.

to his ineffective assistance of counsel claims or his Eighth Amendment claim. The Court finds that no jurists could disagree with the Court's resolution of the issues presented in any of the claims Petitioner properly raised. Accordingly, the Court **DENIES** Petitioner a COA for any of his claims.

CONCLUSION

Based on the foregoing, the Court **DENIES** Petitioner's Petition for Writ of Habeas Corpus. (Doc. 1.) Further, the Court **DENIES** Petitioner a Certificate of Appealability and **DIRECTS** the Clerk of Court to close this case.

SO ORDERED, this 15th day of December, 2021.

/s/
R. STAN BAKER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

APPENDIX D

[FILED: MAY 7, 2024]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12898

DARRYL SCOTT STINSKI,

Petitioner—Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 4:18-cv-00066-RSB

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

Before ROSENBAUM, GRANT, and ABUDU, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing be-fore the panel and is DENIED. FRAP 35, IOP 2.

APPENDIX E

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.