IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

DARRYL SCOTT STINSKI,	*	
	*	
	*	**CIVIL ACTION NO.**
Petitioner,	*	**2011-V-942**
	*	
v.	*	**HABEAS CORPUS**
	*	
BRUCE CHATMAN, WARDEN,	*	
	*	
Georgia Diagnostic and	*	
Classification Prison,	*	
	*	
Respondent.	*	

FINAL ORDER

Petitioner seeks habeas corpus relief as to his conviction and sentence in the Superior Court of Chatham County. Having considered Petitioner's original and Amended Petition for Writ of Habeas Corpus (hereinafter "amended petition"), the Respondent's Answer and Amended Answer, relevant portions of the appellate record, evidence admitted at the hearing in this matter on August 12-15, 2013, the arguments of counsel and the post-hearing briefs, this court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49. As explained hereinafter, this court DENIES the petition for writ of habeas corpus.

I. PROCEDURAL HISTORY

On June 8, 2007, a jury found Petitioner, Darryl Scott Stinski, guilty of two counts of malice murder, two counts of felony murder, two counts of burglary, one count of cruelty to children, two counts of first degree arson, five counts of entering an automobile, and one count

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Morgan Vueline
Deputy Clerk, Butts Superior Court

Res. Ex. No. 501
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of possession of a controlled substance with intent to distribute. (R 1477-1479).[1] At the conclusion of the sentencing phase on June 12, 2007, the jury found the existence of the nine statutory aggravating circumstances. (R 1694-1697). The jury recommended a sentence of death for each of Petitioner's two murder convictions, and the trial court sentenced Petitioner to death. (R 1695, 1697-1699). The trial court also sentenced Petitioner to twenty years for each count of burglary, twenty years for cruelty to children, twenty years for each count of first degree arson, five years for each count of entering an automobile, and fifteen years for possession of a controlled substance with intent to distribute, all to be served consecutively.[2] (R 1698-1699).

Petitioner's motion for new trial, filed on July 13, 2007, was denied on April 20, 2009. (R 3848-3893). The Georgia Supreme Court affirmed Petitioner's convictions and sentence of death on March 1, 2010. Stinski v. State, 286 Ga. 839 (2010), cert. denied, Stinski v. Georgia, 562 U.S. 1011, 131 S. Ct. 522 (2010).

On September 26, 2011, Petitioner filed the above-styled habeas corpus petition and an amended petition on March 21, 2013. This court held an evidentiary hearing on August 12-15, 2013. The parties were given a subsequent briefing period and this order follows review of all pleadings. The amended petition raised seven grounds. However, Petitioner presented evidence and briefing as to four issues: (1) ineffective assistance of counsel in the investigation, preparation, and presentation of the guilt-innocence phase of the trial; (2) ineffective assistance

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[1] The following abbreviations are used in citations throughout this order:

Record on interim appeal – (RIR [page])
Pretrial Hearing – ([date] T [page])
Record on Direct Appeal – (R [page])
Supplemental Record – (Supp. R [page])
Trial Transcript – (T [page])
Habeas Corpus Transcript – (HT [volume]:[page])
Petitioner's Post-Hearing Brief – (PHB [page])

[2] The felony murder conviction was vacated by operation of law. Malcolm v. State, 263 Ga. 369, 371-372 (4) (1993).

of counsel in investigation, preparation, and presentation of the sentencing phase of the trial; (3) cruel and unusual punishment based upon the adolescent nature of the Petitioner, and; (4) cruel and unusual punishment based upon the execution methods employed by the State of Georgia.

II. FACTS OF THE CASE

The Georgia Supreme Court summarized the facts of Petitioner's crime 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 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, 286 Ga. 839, 840-841 (2010).

III. SUMMARY OF RULINGS

Petitioner's amended petition enumerates seven (7) claims for relief. As stated in further detail below, this court finds: (1) the claims of ineffective assistance of counsel are properly before this court for habeas review as said claims are neither procedurally barred nor procedurally defaulted; (2) some claims asserted by Petitioner are procedurally barred due to the fact that they were litigated on direct appeal; (3) some of Petitioner's claims are procedurally defaulted as Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; and, (4) some claims asserted in this action are non-cognizable.

The crux of Petitioner's claim for habeas relief is the contention that Petitioner's trial attorneys were ineffective in preparing and presenting a defense during the penalty phase of trial.[3] Petitioner presented compelling scientific evidence which could have been presented at

[3] Petitioner also raises a cognizable claim of ineffective assistance of counsel during the guilt/innocence phase which is addressed in Part V of this order.

trial to demonstrate that Petitioner's impulsive behavior and susceptibility to the influence of his codefendant was related to the lack of development of Petitioner's near adolescent brain. The record also confirms that the attorney conducting the sentencing phase of trial was not overly experienced as lead trial counsel in such a setting. 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, and at times Mr. Sparger's presentation and argument appeared disjointed.[4] 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 evidence presented by trial counsel in mitigation more than adequately addressed the subject matter raised by Petitioner's witnesses in this action. Moreover, while trial counsels' representation during the sentencing phase was not stylistically perfect, it was certainly effective. 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. Accordingly, as explained in detail below, Petitioner's claims of ineffective assistance of counsel are denied.

To the extent Petitioner failed to brief any claims for relief, the court deems those claims abandoned. Any claims made by Petitioner that are not specifically addressed by this court are DENIED.

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[4] The court notes it is difficult to reach meaningful conclusions about the presentation of trial counsel based upon a reading of the transcript. The court's review of the wording of the closing argument and witness presentation during the penalty phase leads to its conclusion that at times counsel appeared to present argument and/or witnesses in a disjointed fashion. It is entirely possible that the presentation was more effective "live" than in print.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL—STANDARD OF REVIEW AND QUALIFICATIONS OF COUNSEL

In **Claim I** of his amended petition, and in footnotes to multiple other claims, Petitioner alleges he received ineffective assistance of counsel at the guilt-innocence and penalty phases of his trial, as well as at his motion for new trial and on direct appeal.[5] Petitioner was represented at trial primarily by Michael Schiavone and Steven Sparger. Mr. Schaivone and Mr. Sparger were assisted at trial by attorney Willie Yancey, Jr.. Mr. Schiavone and Mr. Sparger represented Petitioner at his motion for new trial and direct appeal as well. Accordingly, Petitioner's allegations of ineffective assistance of trial counsel, which were neither raised nor litigated adversely to Petitioner on direct appeal, nor procedurally defaulted, are properly before this court for review on their merits.[6]

A. STANDARD OF REVIEW

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

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

466 U.S. 668, 687 (1984). See also Wiggins v. Smith, 539 U.S. 510 (2003) (reaffirming Strickland as governing ineffective assistance of counsel claims). The Strickland

[5] The merits of these contentions are addressed in Parts V and VI of this order.

[6] Unless otherwise specified, to the extent that Petitioner has not briefed particular claims of ineffective assistance of counsel, this court finds that Petitioner has failed to establish the requisite prongs of Strickland as to these claims.

standard, which requires that a petitioner satisfy both the performance and prejudice prongs to demonstrate ineffectiveness, was adopted by the Georgia Supreme Court in Smith v. Francis, 253 Ga. 782, 783 (1985). See also Jones v. State, 279 Ga. 854 (2005); Washington v. State, 279 Ga. 722 (2005); Hayes v. State, 263 Ga. 15 (1993). Therefore, the Strickland standard governs this court's review of Petitioner's ineffective assistance of counsel claims.

As to the first prong, Petitioner must show that counsel's representation "fell below an objective standard of reasonableness," which is defined in terms of "prevailing professional norms." Wiggins v. Smith, 539 U.S. 510, 521 (2003) (citing Strickland, 466 U.S. at 688). In Strickland, the Court established a deferential standard of review for judging ineffective assistance of counsel claims by directing that "[j]udicial scrutiny of counsel's performance must be highly deferential...[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. See also Sears v. Humphrey, 294 Ga. 117, 119 (2013) ("[t]he inquiry with regard to Strickland's first prong is highly deferential toward counsel's challenged conduct").

As the Strickland Court acknowledged, "there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. 668, 689 (1984). "We do not measure counsel against what we imagine some hypothetical 'best' lawyer would do[.]" LeCroy v. United States, 739 F.3d 1297, 1313 (11th Cir. 2014). Although any one of counsel's decisions "could later be pinned beneath the appellate microscope,

dissected, and made to look foolish by collateral counsel, who – unlike trial attorneys – have years and sometimes decades to craft dazzling new theories of defense ... '[a reviewing court's] task is not to grade counsel's performance.'" Bates v. Sec'y, Fla. Dep't of Corr., 768 F.3d 1278, 1299 (11th Cir. 2014) (quoting Strickland, 466 U.S. at 697).

Strickland's second prong requires that Petitioner establish that the outcome of the proceedings would have been different, but for counsel's errors. Smith v. Francis, 253 Ga. at 783. The Georgia Supreme Court has relied on the Strickland test for establishing actual prejudice which requires Petitioner to demonstrate that there is a "reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Smith v. Francis, 253 Ga. at 783. See also Head v. Carr, 273 Ga. 613, 616 (2001).

As explained in Parts V and VI of this order, this court has applied the guiding principles set forth in Strickland and its progeny, as adopted by the Georgia Supreme Court, and finds that Petitioner failed to establish that trial counsel's performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. This court further finds that Petitioner has failed to establish that, but for alleged errors or omissions by counsel, there is a reasonable probability that the result of the proceeding would have been different.[7] Id. at 694.

B. QUALIFICATIONS OF TRIAL COUNSEL

Petitioner was represented at trial by three experienced criminal defense attorneys, Michael Schiavone, Steve Sparger, and Willie Yancey, Jr. (8/21/02 T 2; HT 305:86161). Mr.

[7] The court has also considered the combined effects of trial counsel's alleged errors in evaluating Petitioner's claims of ineffective assistance of counsel. Schofield v. Holsey, 281 Ga. 809, 811 (2007).

Schiavone, who was lead counsel, became a member of the State Bar of Georgia in 1980 and entered private practice. (8/21/02 T 3; HT 1:25-26, 56; 237:65706; 238:65814, 65821, 65897). At the time of Petitioner's case, Mr. Schiavone had tried numerous felony cases and had tried or been co-counsel on at least ten death penalty cases. (8/21/02 T 3-4; HT 1:26-27; 238:65815-65816). Mr. Schiavone testified that he was lead counsel on most of the death penalty cases, and the majority of those went to trial. (HT 238:65816). In addition to his trial experience, Mr. Schiavone handled some appeals early in his legal career. (HT 238:65817). Mr. Schiavone also attended death penalty seminars. (HT 238:65822-65823).

Mr. Sparger, who was counsel in charge of mitigation, became a member of the State Bar of Georgia in June, 1992. (RIR 164; HT 1:119; 237:65692). At the time of Petitioner's case, Mr. Sparger had experience in handling criminal cases at both trial and appellate levels. (RIR 164). Mr. Sparger acted as "co-counsel on several non-death penalty murder trials to verdict, as well as co-counsel on a number of felony jury trials and lead counsel on a few felony jury trials."[8] Id. Mr. Sparger had also served as additional counsel in "two death penalty trials to verdict." (RIR 164; HT 1:128). In these prior death penalty cases, Mr. Sparger assisted with pretrial preparations for the guilt and sentencing phases, drafted motions and briefs, conducted research, and spoke with experts. (HT 2:213; 237:65697-65698; 238:65828-65829). It was common for Mr. Sparger to be appointed as additional counsel in the death penalty cases handled by Mr. Schiavone and Mr. Jackson, and he had been additional counsel "on at least eight other death penalty cases (two of which [were] currently active)." (RIR 164). Mr. Sparger did not have previous experience as lead counsel in either phase of a death penalty case. (HT 1: 128-139; 340).

[8] Mr. Sparger estimated that he had served as lead counsel on five or six non-death penalty felony cases, and specified that he had acted as second chair in several cases for Mr. Schiavone and Mr. Jackson. (HT 1:121-123; 237:65693-65694).

Mr. Sparger also had extensive appellate experience. Prior to Petitioner's case, Mr. Sparger had handled numerous appeals and habeas corpus actions in non-death penalty cases. (HT 1:121-122; 2:219-220; 237:65694-65696). Mr. Sparger handled approximately forty to fifty appeals prior to his representation of Petitioner. (HT 2:219-220). Mr. Sparger had also attended death penalty seminars prior to his representation of Petitioner. (RIR 164-165; HT 2:217-218; 237:65698-65699). These seminars covered topics such as motions practice, direct and cross examinations, mitigation, and the use of mitigation investigators. (HT 2:217-218; 237:65699).

Mr. Schiavone and Mr. Sparger were assisted by Willie Yancey, Jr., who became a member of the State Bar of Georgia in 1980. (HT 2:347-348). At the time of Petitioner's case, Mr. Yancey had tried between fifty and one hundred felony cases and around ten to fifteen murder cases. (HT 2:351-352; 238:65892). Mr. Yancey served as lead counsel in the murder cases. (HT 238:65892). Mr. Yancey also had appellate experience. (HT 238:65893). Following his appointment to Petitioner's case, Mr. Yancey attended a death penalty seminar and became death penalty qualified. (HT 2:355-356, 407-408; 238:65904; 301:84767-84769). The death penalty seminar covered topics including voir dire, cross-examination, mitigation, and the guilt-innocence and sentencing phases of trial. (HT 2:407-408; 238:65904).

Counsel enjoyed a good working relationship, and communicated with each other through meetings, written correspondence, and over the telephone. (HT 1:60-61; 2:227-228, 373-374; 237:65709; 238:65826-65827, 65901; 304:85754-85861; 305:85864-85944). Mr. Schiavone made the final strategic decisions in the case; however, Mr. Sparger made some decisions regarding mitigation. (HT 1:62-63, 104; 2:227; 237:65708-65709; 238:65828).

In addition to trial counsel's experience, trial counsel also consulted with other criminal defense attorneys who were experienced in representing capital defendants. Trial counsel spoke

with G. Terry Jackson, Mr. Schiavone's law partner, "one of the leading death penalty advocates in the State." (HT 1:27, 57; 2:354; 238:65814-65815, 65823-65824). Counsel also consulted with attorneys from the Georgia Capital Defender's Office and the Southern Center for Human Rights. (HT 2:230-231; 263:73275, 73280-73281, 73284, 73288; 304:85722-85739). Mr. Sparger testified that he consulted with these organizations because "they did capital defense all the time, completely." (HT 2:231). Additionally, counsel consulted with attorneys Frank Hogue, Laura Hogue, and Michael Garrett. (HT 263:73299; 304:85820, 85822, 85829). Trial counsel also received materials from various death penalty organizations. (HT 2:231-233; HT 300:84539-84661; 301:84664-84756; 303:85297-85387).

In reviewing claims of ineffective assistance of counsel, the United States Supreme Court has held that "[a]mong the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense." Strickland, 466 U.S. at 681. The presumption that trial counsel rendered adequate assistance is therefore, "even greater" when trial counsel are experienced criminal defense attorneys. Williams v. Head, 185 F.3d 1223, 1228-1229 (11th Cir. 1999) (citing Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998)). This court finds Petitioner was represented by experienced counsel and has given their investigation and presentation the appropriate deference.[9]

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW--INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT-INNOCENCE PHASE

Petitioner contends he received ineffective assistance of counsel during the guilt-innocence phase of his trial. The court finds that Petitioner's trial attorneys, in spite of the fact

[9] Petitioner's allegations concerning Mr. Sparger's ineffectiveness based upon lack of lead counsel experience are addressed in Part VI, Section C, Subsection 7 of this order.

that Petitioner faced overwhelming evidence, effectively represented Petitioner in the guilt-innocence phase of his trial. Petitioner's attorneys were particularly effective in effectuating their strategy to "front load" mitigation evidence from the beginning of his trial.

A. GUILT-INNOCENCE PHASE INVESTIGATION AND PREPARATION

In **Claim I (A)(1)** *of his amended petition, Petitioner claims trial counsel were ineffective* in the guilt-innocence phase of his trial because they failed to conduct an adequate investigation and failed to anticipate penalty phase issues. Specifically, Petitioner alleges counsel failed to coordinate their guilt-innocence phase strategy with their sentencing phase strategy. Strickland instructs that an attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. As explained in detail below, the court finds that counsel's approach to the investigation and preparation for the guilt-innocence phase of Petitioner's trial was reasonable and not deficient. The court further finds that Petitioner has failed to establish prejudice under Strickland.

1) Reasonable Strategy

Counsel testified that the facts of the case and the substantial evidence of Petitioner's guilt made Petitioner's case difficult to win. (HT 1:65; 237:65722-65724; 238:65837, 65908-65909). The strongest evidence against Petitioner was his statements to police, which included the "graphic description of what he and Dorian O'Kelley did that night, along with the autopsy photographs" and counsel felt that these put Petitioner "on the fast track to death row." (HT 301:84821). Accordingly, trial counsel's guilt-innocence phase strategy included front-loading mitigation evidence to "[a]cclimate the jury to it ahead of time" and to inform the jury of "what was coming and to have the two phases complement each other." (HT 2:255-259; 237:65747-65748). In addition, counsel described their guilt-innocence phase theory as attempting to create

reasonable doubt and establish that Petitioner's co-defendant was more culpable. (HT 1:65; 2:236, 403-404; 237:65722, 65725-65726; 238:65837-65839).

2) Reasonable Investigation

As part of their investigation, counsel regularly met with Petitioner and spoke with him about the "reality of his situation." (HT 1:36-37, 131, 145-146; 2:229, 362; 237:65719-65720; 238:65832-65834, 65844-65845, 65899, 65906; 262:73258; 263:73267, 73269, 73275, 73276, 73280, 73282-73283, 73288-73290, 73298-73302, 73308; 303:85542, 85547, 85549, 85552). Counsel explained to Petitioner that there was tremendous evidence against him, and the case was about whether he was going to death row, not about him being found guilty or not guilty. (HT 1:145-146; 237:65722; 238:65844-65845). Counsel reviewed and discussed the state's evidence with Petitioner. (HT 2:248-249; 237:65721-65724; 238:65844-65845, 65899, 65913). They discussed the state's witnesses, as well as the people Petitioner had been with before the crime. (HT 237:65721; 238:65907). Petitioner provided counsel with information regarding the individuals who lived at the mobile home where he was living at the time of the crime. (HT 2:235).

During their investigation, trial counsel also received extensive discovery from the state, which counsel reviewed.[10] (HT 1:71-72; 2:248-249; 265-273:74007-76308; 303:85543, 85545-85548, 85550-85551). Trial counsel's files contain Petitioner's audiotaped and videotaped confessions, crime scene photographs, and documents regarding Susan Pittman's first offender conviction for involuntary manslaughter. (HT 265:74002, 74005; 295-297:82980-83551). Additionally, as part of their investigation, counsel spoke with the lead detective, Robert

[10] During pretrial hearings, the prosecution repeatedly stated that their entire file was open for review by the defense. (8/21/02 T 29-30; 4/4/03 T 20, 39-44, 48, 50, 54, 101, 105).

Vonloewenfeldt, in an effort to obtain as much information as possible about the case. (HT 1:32; 238:65825, 65840; 263:73280).

Trial counsel also received funds from the trial court to retain the services of private investigator Thomas Gillis to assist with their guilt-innocence phase investigation. (HT 263:73467-73468; 301:84794-84795). Investigator Gillis, who was on the recommended list of the Multi-County Public Defender's Office, was certified through the Georgia Peace Officer Standards and Training Council and had experience as a police officer.[11] (HT 2:244-245; 263:73460; 265:73930-73931). In addition, Investigator Gillis had attended numerous death penalty seminars presented by the Multi-County Public Defender's Office and had experience performing investigations in Georgia death penalty cases. (HT 2:244-245; 263:73460; 265:73930-73931; 327:92479). Investigator Gillis also enlisted the assistance of another private investigator, David Watkins.[12] (HT 263:73451, 73466; 301:84793, 84798-84799). Investigator Watkins had been "involved in death penalty cases for a number of years" and had "received training through the Multi-County Public Defender's Office." (HT 301:84793; 327:92480).

Trial counsel communicated with Investigators Gillis and Watkins through in-person meetings, written correspondence, and over the telephone. (HT 237:65728-65729, 65736-65737; 263:73269; 301:84821-84822, 84826, 84829, 84832-84834, 84843, 84845-84848, 84850; 303:85546, 85549, 85552-85553; 327:92480). Counsel asked the investigators to focus on locating evidence that showed Mr. O'Kelley was the leader and Petitioner was simply a follower.

[11] Investigator Gillis received other law enforcement certifications in South Carolina, North Carolina, and the United States Federal Law Enforcement Training Academy. (HT 263:73460; 327:92479).

[12] Investigator Watkins died in December 2003. (HT 237:65729; 301:84833, 84835; 319:90279). Following his death, trial counsel obtained the files of Investigator Watkins. (HT 301:84845).

(HT 301:84821). Trial counsel also requested that the investigators look into whether there were any challenges that could be made to the state's investigation. (HT 237:65728).

Counsel provided a copy of the discovery to Investigators Gillis and Watkins for their review. (HT 1:131: 237:65727; 301:84821, 84826; 327:92480). The investigators reviewed the discovery and prepared a witness database and timeline. (HT 237:65727; 301:84821, 84826). Additionally, Investigators Gillis and Watkins reviewed the crime scene, located and interviewed witnesses, and conducted background checks. (HT 237:65737; 260:72505-72509; 301:84826, 84829, 84851-84852; 305:85987).

Investigators Gillis and Watkins also met with Petitioner numerous times. (HT 301:84826, 84829, 84850; 327:92481). Investigator Gillis stated that Petitioner was aware of the "gravity of the situation" and knew he faced the possibility of receiving the death penalty. Id. The investigators opined that Petitioner was deceptive during their first interview regarding his role in the crimes. (HT 301:84850). Petitioner told the investigators that he assumed some responsibility for the crimes because he was threatened by Mr. O'Kelley. Id. However, trial counsel testified that they were unable to question Mr. O'Kelley regarding these threats as he was under indictment and represented by counsel. (HT 2:240).

In an effort to confirm the identities of the victims, counsel also received funds for a DNA expert, Linda Adkison, and requested that she review the DNA evidence at the GBI crime lab. (HT 237:65730; 264:73643-73659; 302:85134). Counsel provided copies of the relevant discovery to Dr. Adkison, which included crime lab reports. (HT 302:85134-85143). After reviewing the DNA evidence and case log at the GBI crime lab, Dr. Adkison concurred with the findings made by the state's expert. (HT 2:247; 302:85146-85147).

3) Pre-Trial Motions

Trial counsel testified that Mr. Sparger conducted research, and prepared and filed pretrial motions. (HT 1:29-30, 131, 134-135; 237:65706). To prepare pretrial motions, counsel utilized a databank from the Multi-County Public Defender's Office. (HT 1:131). Counsel filed a motion requesting a copy of Dorian O'Kelley's trial transcript, and requesting permission to inspect and copy the exhibits introduced during Mr. O'Kelley's trial. (RIR 3262-3269). The trial court granted counsel's motion. (RIR 3336). Trial counsel also reviewed the file of the Clerk of Court and obtained extensive documents from Mr. O'Kelley's case, including: pleadings, orders, the trial judge report, sentencing documents, certificates of discovery disclosures, pretrial hearing and trial transcripts, jail records, and Mr. O'Kelley's police statements. (HT 2:234; 258-259:72055-72093; 263:73280; 277-295:77522-82978). Counsel reviewed the voir dire and trial transcripts from Mr. O'Kelley's case, and spoke with the attorneys who represented Mr. O'Kelley.[13] (HT 1:90-91, 93; 2:230, 369; 237:65710-65712; 262:73258; 263:73267, 73269, 73275, 73280, 73288, 73298, 73301; 303:85547, 85559).

Additionally, counsel filed a motion to suppress Petitioner's April 12, 2002 and April 14, 2002 statements. (RIR 51-52, 862-872, 1228-1252). Following three hearings, the trial court denied the motion to suppress Petitioner's statements. (RIR 1253-1257; 6/23/03 T 53-97; 8/22/03 T 2-22; 9/4/03 T 3-21). Counsel subsequently filed a motion for reconsideration. (RIR 1306-1316). On reconsideration, the trial court granted Petitioner's motion to suppress his April 14, 2002 statement. (RIR 2636). Counsel then filed a second motion for reconsideration of the order denying the motion to suppress Petitioner's April 12, 2002 statement, which the trial court denied. (RIR 3033-3050, 3431-3469, 3552-3570, 3575-3582). Trial counsel then appealed this

[13] Trial counsel indicated that they spoke with counsel for Mr. O'Kelley about their review of the physical evidence. (HT 237:65714-65715; 263:73275, 73280, 73298).

decision to the Georgia Supreme Court on interim appeal, but the Georgia Supreme Court affirmed the trial court's ruling. Stinski v. State, 281 Ga. 783, 784-785 (2007).

Trial counsel also filed a motion seeking to suppress a red tote bag and its contents which were seized from a residence located across the street from the Pittman residence. (RIR 880-905, 1159-1175, 1178-1189). Following a hearing, the trial court denied this motion. (RIR 1190-1193). Counsel also appealed this ruling. The Georgia Supreme Court affirmed this ruling on interim appeal. Stinski, 281 Ga. at 783-784.

Trial counsel filed a motion seeking to preclude the admission of color photographs of the victims. (RIR 677-685; HT 237:65734; 238:65854-65855). In support of the motion, counsel obtained funds for a forensic pathologist, Dr. Sandra Conradi. (HT 264:73599-73600). Dr. Conradi was the former Deputy Chief Medical Examiner and Chief Medical Examiner for Charleston County, South Carolina. (12/19/03 T 5). During a pretrial hearing, counsel presented Dr. Conradi in support of their motion to show that the photographs of the victims had "no purpose other than to inflame the jury and prejudice the defendant." (12/19/03 T 4-29; HT 301:84909). The trial court denied this motion, (RIR 1298), and the Georgia Supreme Court affirmed the trial court's ruling on interim appeal. Stinski, 281 Ga. at 785-786.

Counsel subsequently filed another motion to exclude the autopsy photographs of the victims. (R 106-109). In denying this motion, the trial court noted that its prior ruling allowing the photographs had been upheld by the Georgia Supreme Court on interim review.[14] (R 387).

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[14] In **Claim I(A)(3)** of his amended petition, Petitioner alleges that trial counsel were ineffective in failing to successfully suppress autopsy photos which showed the victims' charred remains. Petitioner filed a motion to exclude a number of photographs of the victims' burned bodies, which was addressed by the Georgia Supreme Court on interim review. The Georgia Supreme Court held that the trial court did not abuse its discretion in weighing the photographs' probativeness against any undue prejudice. Stinski v. State, 281 Ga. 783, 785-786 (2007). This court finds that trial counsel were not deficient in addressing these photos.

Before trial, counsel also filed a motion seeking to exclude evidence relating to the dogs found at the crime scene. (R 110-112). The trial court denied the motion holding that the evidence was "relevant to the trial of this matter."[15] (R 311).

Additionally, counsel filed a motion for change of venue, requesting that the case be transferred to a county with "reasonable similar demographic characteristics."[16] (RIR 724-737, 3393-3419). The trial court granted this motion and ordered that the jury would be selected from Bibb County, but it withheld ruling on where the trial would be held. (RIR 3423). Counsel subsequently filed a motion requesting that the trial be held in Bibb County. (RIR 3470-3482). The trial court denied this request and ordered the trial be held in Chatham County. (RIR 3583-3584). On direct appeal, the Georgia Supreme Court affirmed the ruling of the trial court. Stinski, 286 Ga. at 845.

Trial counsel also filed motions challenging the legality of the Chatham County Board of Jury Commissioners, the composition of the grand and traverse jury pools, and the constitutionality of the grand jury. (RIR 738-749, 761-770). In addition, counsel filed a motion seeking to quash the indictment alleging that there was an ineligible member on the grand jury,

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[15] In **Claim I(A)(3)** of his amended petition, Petitioner alleges that trial counsel were ineffective in failing to suppress evidence concerning the death of the two dogs that were in the victims' home, including photographs of charred remains. Petitioner raised this issue on direct appeal and the Georgia Supreme Court agreed that the trial court abused its discretion by refusing to exclude this evidence on the ground that its probative value in proving the charges in the indictment was outweighed by undue prejudice. However, the Court held that "in light of the overwhelming evidence of Stinski's guilt, including his own confession, [ ] it is highly probable this error did not contribute to the verdict in the guilt-innocence phase and, therefore, that it is not reversible error." Stinski, 286 Ga. at 848. Thus, Petitioner has failed to show resulting prejudice and this claim fails.

[16] Counsel obtained information on various counties from the U.S. Census Bureau. (HT 302:85151-85220).

specifically that there was a probation officer with arrest powers on the grand jury.[17] (RIR 1119-1127).

Counsel received funds for two experts for the purpose of examining the constitutionality of the grand and traverse jury pools. Counsel hired Jeffrey Martin, a jury consultant expert, and Stephanie Bohon, Ph.D, a sociology expert. (HT 237:65731; 264:73661-73672, 73673-73674, 73677-73678). Mr. Martin, who had served as a statistical expert in numerous death penalty cases, was retained to review information related to the grand and traverse jury pools to determine whether they were constitutionally composed. (HT 237:65731-65732; 264:73661-73672; 265:73936-73937). Dr. Bohon was retained to review the compiled data and testify regarding cognizable groups. (HT 265:73937; 301:84918-84920, 84927-84929).

During a motions hearing on December 19, 2003, counsel presented the testimony of ten witnesses in support of their challenge to the composition of the grand and traverse jury pools. (12/19/03 T 49-153). This included Dr. Bohon, who testified that Hispanics and Latinos were cognizable groups that were underrepresented in the jury pools. (12/19/03 T 111-137). Mr. Martin also testified about the underrepresentation of Hispanics and Latinos and forced balancing. (12/19/03 T 137-153).

Following this hearing, the trial court entered an order denying Petitioner's challenge to the legality of the Chatham County Board of Commissioners. (RIR 3420-3422). The trial court also denied counsel's motion to quash the indictment and their challenge to the composition of the grand and traverse jury pools. (RIR 3424-3429). On interim appeal, the Georgia Supreme Court affirmed the trial court's rulings. Stinski, 281 Ga. at 788.

[17] During a pretrial hearing, trial counsel presented the testimony of the probation officer who served on the grand jury. (12/19/03 T 30-49).

B. REASONABLE GUILT-INNOCENCE PHASE PRESENTATION

In **Claim I(A)** of his amended petition, Petitioner alleges trial counsel were ineffective in their guilt-innocence phase presentation because counsel: failed to distinguish between the conduct of Petitioner and the conduct of Mr. O'Kelley; failed to highlight the insufficient evidence of Petitioner's intent; and, failed to exclude prejudicial evidence regarding Mr. O'Kelley. This court finds Petitioner has not shown that his counsel performed deficiently in their guilt-innocence phase presentation, or that Petitioner was prejudiced by their performance. Strickland instructs that "[t]here are countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U. S. at 689.

1) Distinction Between Petitioner's Guilt and Mr. O'Kelley's Guilt

As discussed above, trial counsel's strategy for the guilt-innocence phase involved the presentation of evidence showing Petitioner was less culpable than Mr. O'Kelley and the "front loading" of mitigation evidence that would carry over to the sentencing phase. In their opening statements, trial counsel argued to the jury that Petitioner was not seeking to avoid responsibility for his role in the crime; however, counsel requested that the jury place the appropriate responsibility based upon the conduct of Petitioner and Mr. O'Kelley. (T 1563-1564, 1566, 1572-1573). Counsel also argued that the state had to prove that Petitioner had the intent to commit the murders. (T 1564). In support of this argument, counsel asserted that Petitioner was a homeless eighteen-year-old child who did not know Mr. O'Kelley very well prior to the crime. (T 1565-1566). On the night of the crime, Petitioner believed that they were going to break into some cars and possibly burglarize a house, which showed that he lacked intent to commit a murder. (T 1565, 1573). Mr. O'Kelley, however, intended to commit murder that night and the

majority of the state's evidence was against co-defendant O'Kelley. (T 1566). Counsel informed the jury that Mr. O'Kelley: made "wild statements" about one week prior to the crime, knew the victims, watched the fire, appeared giddy on television, had the victims' blood on his clothing, and was older than Petitioner. (T 1569-1572). Counsel argued that Petitioner was scared and got caught up in something he did not know was going to happen. (T 1567-1568, 1572).

Additionally, trial counsel cross-examined several of the state's witnesses to elicit testimony consistent with the defense's theory that Petitioner was less culpable than Mr. O'Kelley. On cross-examination of three of the state's witnesses, including Petitioner's girlfriend, counsel elicited testimony that prior to the crime, Mr. O'Kelley bragged about his ability to escape prosecution for murder and that he would claim that he was legally insane. (T 1646, 1654-1655, 1687, 1714-1715). During cross-examination, two of these witnesses testified that Mr. O'Kelley made bizarre statements prior to the crime because he wanted people to believe that he was crazy. (T 1645, 1682-1683). Additionally, Mr. Schiavone elicited testimony that Mr. O'Kelley made statements before the murders that he planned to physically assault a person and commit arson; and, after the crime Mr. O'Kelley told others that he was going to have a "legal insanity party." (T 1654-1655, 1714-1715, 1721). One state witness testified during cross-examination that Mr. O'Kelley stated that he and Petitioner had gone to the victims' house for the purpose of burglary; admitted that he slit the throats of both victims and that he raped Kimberly Pittman; showed Kimberly's tooth to two witnesses, and; stated that Kimberly's rape was "special" and that Petitioner did not participate in the rape. (T 1646-1651, 1654, 1686). One witness also testified that crime was a source of pleasure for Mr. O'Kelley, who never showed remorse. (T 1654).

In addition, trial counsel elicited testimony that Mr. O'Kelley was a violent person who had previously physically assaulted a man and put him in the hospital. (T 1646, 1682-1683, 1719). Witnesses also testified that Mr. O'Kelley was sexually attracted to young girls and that he started dating Amy Norman when she was fifteen years old. (T 1652-1654, 1716). Mr. O'Kelley and Ms. Norman had an intermittent relationship for five years, and Mr. O'Kelley was extremely jealous of Ms. Norman. (T 1652-1654, 1716, 1719-1720). Counsel also elicited testimony from two witnesses during cross-examination that Mr. O'Kelley was upset that Susan Pittman's son had dated Ms. Norman. (T 1652-1653, 1722-1723). Ms. Norman testified on cross-examination that she had been raped by Mr. O'Kelley two times, and that Mr. O'Kelley had expressed a desire to rape her friend's younger sister. (T 1717-1719). Trial counsel also elicited testimony from the state's witnesses that they were scared of Mr. O'Kelley. (T 1683-1684, 1714-1715).

In addition to testimony regarding Mr. O'Kelley and the crime, trial counsel elicited mitigation evidence during the cross-examination of Ms. Norman. Ms. Norman testified that she had known Petitioner for one week and that he had previously dated her friend Betsy. (T 1716). Petitioner and Betsy had one child together. Id. Counsel also brought out testimony from John Owen that there was a significant difference in a person between the ages of eighteen and twenty-three in regard to maturity and decision making. (T 1650).

Finally, during their guilt-innocence phase closing argument, trial counsel urged the jury to distinguish between the culpability of Petitioner and Mr. O'Kelley. Consistent with their guilt-innocence phase theory, counsel argued that Petitioner was an immature eighteen year old child who lacked the intent to commit murder. (T 2133-2135). Petitioner was caught in the middle of a crime that he did not know was going to happen. (T 2131-2132, 2138). Counsel

asserted that the strongest case of criminal intent was that of Mr. O'Kelley, who had previously talked about committing a murder and had planned to commit murder that night. (T 2134-2135, 2138, 2143). Counsel argued that Petitioner tried to protect Kimberly and did not want to hit either victim. (T 2139). Petitioner was guilty of burglary, not murder. (T 2132, 2138).

Counsel further argued that there was a difference between an eighteen year old and a twenty year old. (T 2137). According to counsel, an eighteen year old does not make good, rational decisions as their minds are not fully developed. (T 2135, 2142). Counsel asserted that Petitioner was a child who got caught in a situation that was overwhelming and out of his control. (T 2136). Petitioner wanted to run away from Mr. O'Kelley but was scared. (T 2141). In concluding, counsel urged the jury to hold Petitioner responsible for his own intent and conduct that night, not what someone else did. (T 2145).

2) Petitioner's Intent

Petitioner also argues that trial counsel were ineffective because they failed to establish that Petitioner had no intent to kill and that his actions constituted felony murder, not malice murder.[18] The record reflects that trial counsel informed the jury that the state was required to prove beyond a reasonable doubt that Petitioner had the specific intent to kill to support the charge of malice murder. (T 1564-1566, 1573, 2131-2135, 2138-2139, 2143-2144). Petitioner argues that trial counsel failed to highlight the insufficient evidence of Petitioner's intent. However, the Georgia Supreme Court has emphasized that "criminal intent may be inferred from

[18] To the extent Petitioner argues that he lacked the intent to kill the victims, this claim is procedurally barred as the Georgia Supreme Court ruled on this issue on direct appeal. The Georgia Supreme Court, after reviewing the evidence, including Petitioner's April 12, 2002 confession, determined that the evidence supported Petitioner's convictions for malice murder. See Stinski, 286 Ga. at 841 ("We conclude upon our review of the record that the evidence was sufficient to authorize a rational trier of fact to conclude beyond a reasonable doubt that Stinski was guilty of the crimes of which he was convicted.").

one's conduct prior, during, and after the commission of the crime charged." Jones v. State, 250 Ga. 11, 13 (1982).

Although trial counsel stressed, as did Petitioner in his April 12, 2002 confession, that Petitioner did not intend to kill the victims, the evidence demonstrates Petitioner's intent to commit murder. Regarding the crime itself, Petitioner admitted: he went to the scene of the crime with a knife in his possession, (T 2045, 2057); he repeatedly struck Susan Pittman with a foot long flashlight, knowing his strikes connected with the victim as he heard a thud, (T 2031, 2057-2059); he procured a baseball bat and struck Kimberly Pittman in the head with it, believing he had knocked her unconscious, (T 2045); and, he later struck Kimberly Pittman in the knee with the bat after Mr. O'Kelley slashed the victim's throat and attempted to suffocate her. (T 2047). Petitioner also admitted that he helped start fires throughout the Pittman home which ultimately caused the death of Kimberly Pittman, motivated in part because of the fact that Kimberly Pittman had not yet died from the beatings or knife wounds. (T 2016-2017, 2048-2049).

Accordingly, it was for the jury to assess the credibility of Petitioner's statements and counsel's claims that Petitioner did not intend to kill. The jury rejected both. Counsel were not deficient in not further arguing lack of intent.

Petitioner further argues that trial counsel were ineffective for failing to highlight for the jury that there was no forensic evidence suggesting that Petitioner ever developed the specific intent to kill. (PHB 85-86). The record reflects that counsel made a strategic decision not to highlight the forensic evidence during the guilt-innocence phase, and did not cross-examine the state's blood and dental experts at all. (T 1900, 1907). However, trial counsel reminded the jury

that the bloody clothing found by police belonged to Mr. O'Kelley in both their opening and closing arguments. (T 1572, 2138).

3) Evidence Regarding The Victim's Tooth

Petitioner argues that trial counsel were ineffective in failing to seek exclusion of evidence that Mr. O'Kelley was carrying a tooth from one of the victims when he was arrested. The court finds the tooth was relevant evidence which supported trial counsel's strategy of showing that Mr. O'Kelley was more depraved and was the only one with specific intent to commit malice murder. The tooth was relevant and properly admissible under Georgia law:

> While "mere presence" at a crime scene does not make a bystander criminally liable absent "special circumstances or relations [that] create a duty to interfere, . . . presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred." Thornton v. State, 119 Ga. 437, 439 (46 SE 640) (1904).

Brown v. State, 288 Ga. 902, 904 (2011). The fact that during the concealment phase of the crime Mr. O'Kelley was found in possession of the victim's tooth was relevant, even if it was prejudicial to his accomplice. See Sallie v. State, 276 Ga. 506, 513 (2003) ("Acts and circumstances forming a part or continuation of the main transaction are admissible as res gestae.").

Although Petitioner offers no suggestions as to how counsel could have kept the jury from hearing the evidence that Mr. O'Kelley was found with the tooth of the victim, counsel reasonably could have concluded that such evidence suggested that the responsibility for much of the depravity of the crimes belonged to Mr. O'Kelley, and not Petitioner. Thus, as this evidence was relevant and properly admissible, counsel's failure to object to this evidence does not constitute deficient performance. Failure to make a meritless objection cannot be evidence

of ineffective assistance. Fults v. State, 274 Ga. 82, 87 (2001); see also Strickland, 466 U.S. at 687.

Accordingly, the court finds trial counsel did not render ineffective assistance by failing to object to the admissible evidence concerning his and Mr. O'Kelley's actions during the guilt-innocence phase, and not highlighting Petitioner's alleged lack of nexus of forensic evidence with his claimed lack of intent.

4) No Guilt-Innocence Phase Prejudice

This court finds that, in addition to failing to carry his burden to establish deficiency of performance as to any of his ineffective assistance of counsel claims, Petitioner has also failed to establish that there is a reasonable probability that, but for the alleged errors of trial counsel, the jury would have returned a different verdict. Accordingly, Petitioner's claims alleging ineffective assistance of counsel at the guilt-innocence phase of his trial fail.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW--INEFFECTIVE ASSISTANCE OF COUNSEL DURING SENTENCING PHASE

In **Claim I(B)** of his amended petition, Petitioner contends he received ineffective assistance of counsel during the sentencing phase of his trial. As explained below, the court finds that trial counsel effectively represented Petitioner in the sentencing phase of his trial. The court further finds that Petitioner has failed to demonstrate prejudice under Strickland.

A. REASONABLE PERFORMANCE DURING VOIR DIRE

Petitioner alleges in **Claim I(B)(1)** of his amended petition that trial counsel were ineffective during voir dire because they failed to question potential jurors regarding their views about the death penalty in cases involving child victims, considering that one of the victims was under the legal age of maturity. Petitioner argues that had counsel questioned potential jurors regarding their feelings about the death penalty in cases regarding child victims, his death

sentence would have been avoided. The court finds that Petitioner has failed to prove that trial counsel were ineffective during voir dire and this claim fails.

Trial counsel's conduct of voir dire is a matter of trial tactics. Head v. Carr, 273 Ga. 613, 623 (2001) (citing Hammond v. State, 264 Ga. 879, 885 (1995)). Here, as in Hammond, Petitioner's potential jurors were provided a jury questionnaire prior to voir dire. See Hammond, 264 Ga. at 885. Petitioner's potential jurors were specifically informed:

> This case arises from the deaths of Susan Pittman and Kimberly Pittman on April 11, 2002. At the time of this incident, Susan Pittman was 41 years old and was the mother of **13 year old Kimberly Pittman**. It is alleged that Darryl Stinski, along with Dorian Frank O'Kelley, entered the Pittman's home ... and attacked and killed the women. ... In addition to the counts of malice murder for the deaths of Susan and Kimberly Pittman, it is alleged that Darryl Stinski committed the offenses of burglary, arson, and **cruelty to a child in the first degree.**

(HT 205:55902) (emphasis added). Accordingly, the court finds the potential jurors were informed from the outset of their involvement in the case that Petitioner was charged with murdering a thirteen year old girl.

Further, the trial court initially agreed with the prosecutor that counsel were improperly asking the potential jurors too many specific facts about the case by asking about the murder of children. (T 448-449). Counsel strenuously objected, and later revisited the defense's request to question potential jurors about the number of victims as well as their age:

> And I also would ask where a child is the victim in a case in which the person is accused of the murder of a child, I would also ask that question. I'm not going to frame it in the facts of this case. That is exactly what I'm dealing with in this case.
>
> And I do think that that's a relevant question that has to be asked, because some people will impose the death penalty in every case in those instances, and they are not qualified if they will, so I do intend, and I would ask that of each and every juror from this point forward and I'd like a continuing objection that I'm not allowed to ask those questions of each juror.

(T 451). Ultimately, the trial court allowed trial counsel to ask over the state's objection:

> There are some cases in which one of the victims in the case might end up being a child. Your feelings about the death penalty, would that have an impact on that, on whether you might impose the death penalty always in those situations?

(T 466-467). Accordingly, the court finds counsel did, in fact, ask potential jurors whether they could be fair in such a case.

Furthermore, the court finds that other potential jurors provided responses so favorable to the defense that Petitioner's counsel could reasonably have believed any further questions would lead to a challenge for cause by the state. See, e.g., T 1033 (potential juror Martin Kanode indicated that cases involving narcotics, accomplices, or gang members who are simply following orders to kill might not warrant the death penalty). Additionally, counsel's demand to ask "each and every juror" specifically about whether the age of the victim would cause that juror to automatically vote for a particular sentence to the exclusion of others was itself effective in persuading the trial court to disqualify a previously qualified juror. (T 589).

Thus, counsel's persistence ultimately persuaded the trial court to grant the defense's motion to disqualify a potential juror, Ms. Sanders, and to permit counsel to question potential jurors specifically about the age of the victims when counsel so chose, over the objection of the state. Accordingly, this court finds Petitioner cannot demonstrate that counsel performed deficiently during voir dire.

The court further finds that Petitioner has not shown prejudice. As 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, the court finds Petitioner has failed to establish prejudice. Accordingly, Petitioner's claim that trial counsel were ineffective during voir dire is denied.

B. SENTENCING PHASE INVESTIGATION AND PREPARATION

In **Claim I (B)(2)** of his amended petition, Petitioner alleges that his trial counsel were ineffective in the investigation and preparation of the sentencing phase of his trial.[19] The court finds counsel's investigation and preparation for sentencing was thorough. As detailed below, trial counsel conducted an exhaustive investigation of Petitioner's background by interviewing Petitioner, his family members, and friends; hiring a mental health expert to evaluate Petitioner; and, gathering substantial documentation of Petitioner's history.

1) Sentencing Phase Strategy

After reviewing the discovery and information from the investigators, trial counsel testified that "it became rather obvious this was not going to be a guilt-innocence-type trial, in the classic sense" and that they "very quickly ... went away from having someone to try to redo the police case." (HT 1:138; 2:240-241). Counsel discussed the case with the investigators and made a reasonable decision to focus their efforts on the mitigation investigation. (HT 1:140). As previously discussed, counsel also decided to "front load" mitigation evidence in the guilt-innocence phase by emphasizing the dominance of Mr. O'Kelley in the perpetration of the crime. In support of their theory that Petitioner was less culpable than O'Kelley, counsel wanted to show that Petitioner was under the influence of Mr. O'Kelley and lacked an understanding of what was going on at the time of the crime due to his age and immaturity. (HT 1:171; 2:405-406; 237:65751-65752; 238:65920). Additionally, trial counsel attempted to persuade the jury to spare Petitioner's life by presenting evidence of his troubled background. (HT 1:201-203; 2:405-406; 237:65751-65752; 238:65775-65779).

[19] As all of Petitioner's sentencing phase ineffectiveness claims are intertwined and as Petitioner collectively addresses the issue of prejudice in his brief, the court will address prejudice following consideration of trial counsel's performance on each ineffectiveness claim.

2) **Mitigation Investigator**

On June 24, 2003, counsel filed a motion seeking funds for mitigation specialist, Dale Davis, to perform an investigation of Petitioner's social history. (HT 263:73470-73483; 265:73932). Counsel informed the trial court that Ms. Davis would assist in locating experts and background material for experts; assist counsel in developing a theory of mitigation; identify and locate potential mitigation witnesses; and work with family members who might help in this regard. (HT 265:73932). Ms. Davis had extensive experience in preparing mitigation for death penalty cases. (HT 263:73482, 73552; 265:73931). She had "worked on more than thirty (30) death penalty cases at both the trial level and post-conviction level in State courts as well as federal and military courts" and had received extensive training in areas relevant to her role as a mitigation specialist. (HT 263:73482, 73552).

Mr. Sparger, who was responsible for the sentencing phase, was the primary contact person for Ms. Davis. Mr. Schiavone also met with Ms. Davis on several occasions. (HT 1:38-40, 150; 2:260; 5:811, 813, 866; 237:65753; 238:65835-65836, 65858-65859). Counsel had a good working relationship with Ms. Davis, and communicated with her through e-mails, letters, telephone calls, and in-person meetings. (HT 1:150; 2:221, 269; 237:65753; 303:85548, 85552-85553; 319:90262-90336). Mr. Sparger testified that Ms. Davis understood her responsibilities, and he relied upon her training and expertise in conducting the mitigation investigation. (HT 1:156; 2:269; 237:65752-65753). Similarly, Mr. Schiavone testified that he "always relied on mitigation specialists" in death penalty cases and expected them "to be the competent expert on preparing a mitigating case." (HT 238:65834, 65836).

Counsel provided Ms. Davis with copies of the discovery relevant to her investigation, because they believed that it was important for her to have an understanding of what the case

was about. (HT 5:872-874; 255-256:71006-71377; 258:72019-72040; 259:72202-72216; 260:72461-72500, 72517-72552, 72399-72411). During the investigation, Ms. Davis provided Mr. Sparger with the information that she received, and Mr. Sparger kept Mr. Schiavone and Petitioner apprised of the information that he received from Ms. Davis. (HT 1:155; 2:221, 229, 234-235, 268; 5:866; 237:65754-65755). Additionally, Mr. Sparger informed Ms. Davis of the information he received from Petitioner and from his own review of the discovery. (HT 1:155; 2:234-236; 237:65754-65755). Counsel reviewed the information provided by Ms. Davis and provided her with feedback. (HT 1:82, 87, 91, 155-156, 172; 2:221, 223; 263:73267, 73269, 73276; 303:85552; 319:90267). According to her billing records, Ms. Davis spent approximately 432 hours on Petitioner's case, and her billings totaled about twenty-one thousand dollars.[20] (HT 319:90071-90083). As detailed below, Ms. Davis' investigation included meetings with counsel and Petitioner, obtaining records, and locating and interviewing potential mitigation witnesses. Id.

3) Obtaining Records and Documents

As part of the mitigation investigation, counsel obtained numerous records and relevant documents. During the mitigation investigation, the defense team made numerous records requests regarding Petitioner and his family. (HT 255:71390, 71442-71443; 257:71525, 71528, 71548, 71649, 71694, 71748; 258:71793; 260:72436-72460, 72671; 262:72983-72987; 73036-73043, 73045-73061, 73065-73067, 73073-73077; 319:90339-90352). From these requests, counsel obtained the following records regarding Petitioner: prenatal and birth records; Naval hospital records; Toms River hospital records; United Behavioral Health Services records;

[20] Ms. Davis testified that her billing records did not reflect all of the work performed on Petitioner's case. (HT 5:932).

Children's Health medical records; Belin Health medical records; school records; juvenile records; Shawano County Wisconsin family court records; Shawano County Wisconsin Department of Social Services records; Chatham County Detention Center records; divorce records of Pam and Michael Stinski; marriage license of Pam and Frank Sutton; Barnwell County Sheriff's Office police report regarding Frank Sutton; National Guard records on Petitioner; and, South Carolina Department of Mental Health records on Donald Stinski. (HT 256-258:71381-72018; 261:72674-72784; 316-318:89347-89832). All records requested by Ms. Davis were provided to trial counsel. (HT 2:222; HT 5:874-888; 256-258:71381-72018; 313-314:88284-88573; HT 5:899-900; 313-314:88284-88573). In addition to the records, counsel received a copy of everything that was in Ms. Davis' possession. (HT 5:899-900).

Ms. Davis also obtained numerous photographs of Petitioner and his family. (HT 5:895; 260:72384-72388; 262:73174-73218; 318:89835-90059). Additionally, Ms. Davis took photographs of residences where Petitioner lived throughout his life. (HT 5:895-896). Ms. Davis also obtained: a copy of the rule book from Petitioner's stepmother; newspaper articles regarding the Sonic shooting;[21] and, records concerning Petitioner's father's civil and criminal court cases.[22] (HT 5:890; 260-261:72366-72376, 72595-72670; 262:73103-73113; 315-316:89153-89308). Ms. Davis also conducted research on youth brain development and obtained briefs that were filed in Roper v. Simmons, 543 U.S. 551 (2005), which she provided to counsel. (HT 2:295-296; 5:945; 261:72785-72817; 314-315:88575-89112; 319:90311).

[21] As will be discussed below, after Petitioner left Wisconsin and moved back to South Carolina, approximately five months later, there was a double murder at a Sonic restaurant. (T 2604). On the night of the murders, Petitioner stayed with a grieving friend whose boyfriend was one of the victims. Id. When Petitioner returned home the next day, his stepfather kicked him out of the house. Id. Thereafter, Petitioner stayed with a friend. Id.

[22] Petitioner's father was fired from his job at Sears and charged with embezzlement.

4) Interviews With Petitioner and Potential Mitigation Witnesses

Ms. Davis met with Petitioner many times and obtained extensive information regarding his background.[23] (HT 259:72149-72160, 72310-72319, 72321-72342; 260:72396-72398, 72412-72418; 315:89114-89151; 319:90072-90078). Counsel prepared Petitioner for his meeting with Ms. Davis. Mr. Sparger testified, "...I told him, 'Look, she's going to want to know everybody – thing about you. Your parents' name, your grandparents' name, where you lived, where you went to school, those sorts of things.'" (HT 2:235-236).

Additionally, Ms. Davis interviewed a total of forty potential mitigation witnesses. (HT 262:73150-73151). These witnesses included family members, friends, teachers, and mental health professionals who lived in Georgia, South Carolina, Florida, and Wisconsin. (HT 5:860-862; 262:73150-73151). Ms. Davis prepared a memorandum for each interview that she conducted, which she provided to trial counsel. (HT 2:223; 5:825-826, 866-867; 259:72096-72138, 72161-72201, 72217-72220, 72225-72240, 72246-72272, 72274-72280, 72294-72297, 72299, 72359-72361, 72378-72381, 72434; 262:73124, 73126, 73130, 73134, 73156, 73158; 319:90207-90248). These memoranda demonstrate the extensive information regarding Petitioner's background that Ms. Davis received. Id.

However, the record reflects that Ms. Davis experienced difficulty in obtaining information from Petitioner's biological parents. Ms. Davis informed counsel that Petitioner's mother was in "total denial about any role she played in his emotional problems" and that she "tells things the way she wishes they were." (HT 259:72096-72098; 319:90213). In addition, Ms. Davis was unsure what Petitioner's mother could or would say regarding Petitioner's stepfather Frank's attitude toward the children as Petitioner's mother tended to "minimize, even

[23] Investigators Gillis and Watkins also obtained mitigation evidence from Petitioner. Specifically, Petitioner told the investigators that his stepfather beat him with a board that had holes drilled in it. (HT 301:84850). Petitioner also reported that he was molested by his stepfather. Id.

misrepresent, things." (HT 259:72147; 319:90260). Petitioner's mother was also uncooperative in providing information about Petitioner's stepfather as she was "afraid of consequences." (HT 260:72576; 321:90939). Counsel informed the trial court that they were having difficulties with Petitioner's mother "as she would deny matters which she had already admitted and she was continuously changing information she had previously provided." (HT 264:73576-73577).

Ms. Davis also reported that Petitioner's father's cooperation was "very limited." (HT 319:90304). Specifically, Ms. Davis informed counsel that Petitioner's father refused to "supply any information about his family including mental history (we know he had a brother who committed suicide) or even the names of his parents." Id.

Ms. Davis also attempted to locate and interview the individuals who were at the mobile home where Petitioner was hanging around the time of the crime.[24] (HT 5:862; 259:72155-72156; 260:72560; 262:73139, 73157, 73167-73170; 319:90269). Ms. Davis's contact with these individuals was limited; however, she was able to speak with Trent Owen, Amy Norman, and the mother of Mr. O'Kelley. (HT 5:862-863; 262:73139, 73157, 73167-73170; 319:90269).

Ms. Davis created numerous documents detailing the information that she received from interviews with Petitioner and potential mitigation witnesses, which included: client background information; a genogram; a narrative chronology of Petitioner's life history; and, memoranda detailing Petitioner's family situation, possible mitigation witnesses, and expected mitigation testimony. (HT 259:72139-72160, 72301-72309; 260:72421-72432, 72559-72568; 261:72951, 72825-72838; 262:73023-73027, 73031-73034, 73144-73148, 73159-73168; 319:90187-90206,

[24] Investigators Gillis and Watkins also conducted an investigation of the individuals who lived at the mobile home near the crime scene. (HT 327:92480-92481). Investigator Gillis testified that the individuals from the mobile home with whom he spoke were very cooperative. Id.

90249-90253, 90257-90260). The documents prepared by Ms. Davis were provided to counsel. (HT 5:899-900).

5) Alton VanBrackle

Prior to the trial, the state provided counsel with a copy of a statement by Petitioner's fellow inmate Alton VanBrackle, in which he stated Petitioner had remorse. (HT 1:143; 304:85667-85681, 85791). On October 31, 2003, Ms. Davis spent several hours interviewing Mr. VanBrackle. (HT 304:85684-85685). As a result of this interview, trial counsel opined that Mr. VanBrackle would be an important witness during the sentencing phase as he provided evidence of Petitioner's remorse. (HT 2:259; 304:85809). However, counsel had some concerns as Mr. VanBrackle's roommate was a relative of the victims and "there were some things in his statement ... that we wished hadn't been in it." (HT 1:190; 237:65751; 264:73576; 304:85809).

Mr. Sparger also spoke with Mr. VanBrackle close to the time of trial. (HT 263:73289). At that time, Mr. VanBrackle was living with the victim's son, David Pittman, and had "backed way off" of what he told Ms. Davis. (HT 304:85682). According to an e-mail, Mr. VanBrackle only wanted to discuss Petitioner's "confession of the crimes, not his demeanor, remorse, etc." and did not want to get involved in the trial as a witness for the defense. (HT 304:85682). Mr. Sparger testified that Mr. VanBrackle subsequently "came back around," but they were "nervous about him." (HT 2:261; 264:73576).

6) Dr. Jane Weilenman-Mental Health Expert

Trial counsel also hired Dr. Jane Weilenman, an experienced forensic psychologist, who had previously worked on two Georgia death penalty cases and performed work for the Department of Juvenile Justice. (HT 237:65718; 264:73602-73620; 265:73934; 321:90794). Additionally, Dr. Weilenman had attended several death penalty seminars and was on the

recommended list of the Multi-County Public Defender's Office. (HT 265:73934). Trial counsel testified that they sought the services of Dr. Weilenman because she worked for the state a great deal, which gave her added credibility and made her a compelling witness. (HT 238:65860).

Dr. Weilenman was asked by trial counsel to conduct a psychological evaluation of Petitioner to determine his current mental health status and social history. (HT 321:90813). Counsel provided Dr. Weilenman with documents prepared or collected by Ms. Davis, including: medical, school, counseling, and jail records; a genogram; memorandum regarding possible mitigation witnesses; client background information sheet; narrative chronology of life history; the rule book; memorandum describing the family situation in which Petitioner lived; memorandum regarding expected mitigation testimony; and, memoranda detailing the information received during witness interviews. (HT 254:70820-70861, 70902-70909; 70914-70921; 255:70870-70885, 70889-70921, 70923-70929; 319:90314; 321:90805, 90813). Trial counsel also provided her with both of Petitioner's police statements and the statement of Mr. VanBrackle. (HT 255:70930-70951; 321:90807-90808).

Dr. Weilenman met with Petitioner five times for a total of seven hours. (HT 321:90817-90818). Dr. Weilenman also submitted written questions to Petitioner seeking additional information, and Petitioner provided a written response to her questions. (HT 254:70690, 70692-70697). Dr. Weilenman interviewed numerous mitigation witnesses and had multiple consultations with trial counsel and Ms. Davis. (HT 1:197; 254:70716-70725; 263:73275, 73282, 73300, 73302, 73309; 264:73638; 321:90813, 90818).

Dr. Weilenman opined that, at the time of the crime, Petitioner exhibited a "pattern of poor insight, immaturity of judgment and decision-making skills" due to his age and

developmental stage. (HT 321:90814). Petitioner "valued peer approval, demonstrated limited ability to restrain impulses and did not consider an alternative course of actions" and was "functioning below the operational standard levels for adolescents." (HT 321:90814-90815). In regard to the crime, Petitioner wanted "to fit in to the whole group as well as he needed a place to live" and "sacrificed his right to make choices for himself and became numb to what he was involved in." (HT 321:90815). Petitioner reported that he felt "stuck, acting as a robot and was helpless in changing the course of events that evening." Id.

Petitioner alleges in **Claim I(B)(3)** of his amended petition that, in addition to Dr. Weilenman, trial counsel unreasonably failed to retain the proper mental health experts to explain the connection between Petitioner's alleged mental health problems and life history with Petitioner's conduct on the night of the crimes. In support of this claim, Petitioner cites to the testimony of trial counsel during habeas proceedings that their performance was lacking as they were never able to give the jury an explanation for Petitioner's behavior on the night of the crime.

An attorney's testimony about his own performance is not determinative of whether his actions were reasonable. Humphrey v. Nance, 283 Ga. 189, 211 (2013). Moreover, just because trial counsel lamented the fact that they were unable to provide a convincing reason for Petitioner's crimes does not mean that further investigation would have produced such a reason. Instead, the record shows that as Petitioner's state habeas evidence was largely cumulative of that presented at trial, additional investigation would not have provided a compelling explanation for Petitioner's crimes.

As shown above, Dr. Weilenman had significant experience in criminal matters, and specifically in death penalty cases. (HT 237:65718; 264:73602-73620; 265:73934; 321:90794).

Her qualifications included, "a BA and master's in social psychology, a master's in clinical psychology, [and] a Ph.D. in clinical psychology." (HT 265:73934). Trial counsel also reasonably concluded that Dr. Weilenman was a credible witness having worked for the state. (HT 238:65860). Dr. Weilenman reported to counsel a detailed summary of the neglect, abuse, rejection and abandonment from Petitioner's childhood and discussed the "overly controlling and punitive living environment" Petitioner was subjected to while living with his father and stepmother. (HT 321:90813-90814). Dr. Weilenman also found Petitioner suffered from "ADHD, Depression, unresolved grief issues/anger, and an undiagnosed Learning Disability." (HT 321:90814).

The court finds trial counsel were reasonable in retaining Dr. Weilenman and relying upon her findings, which did not include any recommendation of further testing. (HT 1:100-101; 2:299). Where, as here, trial counsel presented substantial mitigation, but did not employ the additional means of mitigation as urged by Petitioner, the Eleventh Circuit Court of Appeals has held that counsel was not ineffective for not pursuing this line of investigation:

> We have explained that "even 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[]" further. Housel v. Head, 238 F.3d 1289, 1295 (11th Cir. 2001). We have also explained that "counsel [is not] required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy." Chandler v. United States, 218 F.3d 1305, 1319 (11th Cir. 2000).

Rhode v. Hall, 582 F.3d 1273, 1281 (11th Cir. 2009). See also Strickland, 466 U.S. at 673, 699 (finding it "well within the range of professionally reasonable judgments" for defense counsel not to request a psychiatric evaluation after speaking with the defendant); Callahan v. Campbell,

427 F.3d 897, 934 (11th Cir. 2005) ("counsel is not required to seek an independent evaluation when the defendant does not display strong evidence of mental problems").

Petitioner has failed to show that counsel's conduct fell below that of reasonable, competent counsel in the retention and reliance upon Dr. Weilenman. Furthermore, the court finds that Petitioner has failed to establish prejudice as Petitioner's state habeas evidence is substantially cumulative of Dr. Weilenman's testimony at trial.

7) Reasonable Sentencing Phase Preparation

In **Claim I(B)(2)** of his amended petition, Petitioner alleges that trial counsel were ineffective in their preparation for the sentencing phase of Petitioner's trial. The court finds counsel's preparation for the sentencing phase was not deficient. The record reflects that trial counsel spent a significant amount of time reviewing and organizing the mitigation evidence several months prior to the trial. (HT 263:73267, 73269, 73276). Mr. Sparger testified that he created witness folders, reviewed the information that had been provided by Ms. Davis, and prepared outlines based upon that information. (HT 1:172-174; 319-321:90354-90747). Mr. Sparger also reviewed the sentencing phase testimony from co-defendant O'Kelley's trial, which was presented by a "very good lawyer." (HT 2:271; 263:73288).

Additionally, trial counsel consulted with Ms. Davis and Dr. Weilenman numerous times in preparing for the sentencing phase. (HT 1:99-100, 158; 237:65755-65756; 254:70685; 263:73275, 73281-73282, 73288, 73299, 73300-73302, 73308-73309). Mr. Sparger testified that Ms. Davis was involved in the sentencing phase strategy sessions, which included discussions of their theory, witnesses, and the presentation of witnesses consistent with their theory. (HT 2:279-280; 237:65755-65756; 319:90078, 90316). In addition, Dr. Weilenman provided an outline to trial counsel regarding her testimony and an outline regarding questions to ask Amber

Stinski, Petitioner's sister-in-law, and Terry Stinski, Petitioner's stepmother. (HT 2:307-308; 254:70698-70703; 320:90620-90625; 321:90777-90789).

The record before this court also shows that trial counsel adequately prepared the twenty-six witnesses who testified during the sentencing phase. Mr. Sparger testified that he spoke with all of the individuals that Ms. Davis had contacted as he wanted to explain "what [he] would be asking them about." (HT 238:65766-65768). Additionally, the billing records show that trial counsel contacted mitigation witnesses numerous times by telephone starting in March of 2007 and continuing to the start of the trial in June of 2007.[25] (HT 263:73280-73284, 73288-73290, 73298-73302, 73308). Mr. Sparger testified that during these conversations he sought to clarify the information that had been previously provided to Ms. Davis. (HT 2:278). In addition to phone calls, counsel's billing records show that they had conferences with the Correll family,[26] Liz Dostal,[27] and Sean Proctor,[28] in May of 2007. (HT 263:73298-73299).

Trial counsel also prepared the experts who testified at trial. Counsel and Ms. Davis had numerous communications regarding Petitioner's case. (HT 263:73288, 73299, 73301-73302, 73308-73309; 319:90081, 90084). Counsel informed Ms. Davis that she would be testifying for the purpose of introducing the records collected during the investigation and prepared her for that

[25] Ms. Davis interviewed Petitioner's mother and grandmother at their hotel prior to trial. (HT 5:938-943; 260:72579-72580).

[26] While Petitioner was in high school in South Carolina, he got kicked out of the house by his stepfather and went to live with the Correll family. (T 2612, 2616-2617, 2627).

[27] Elizabeth Dostal met Petitioner at Windsor Forest High School in October of 2001, and they became friends. (T 2681, 2683).

[28] Sean Proctor also met Petitioner at Windsor Forest High School in March 2001, and they became friends. (HT 319: 90225).

testimony.[29] (HT 5:845-851, 919-921; 260:72590; HT 319:90323; 19:90324; HT 319:90084). Counsel also prepared Dr. Weilenman for her trial testimony. (HT 263:7330; HT 263:73302, 73309; 321:90818).

As shown above, counsel quickly recognized following their appointment that substantial evidence of Petitioner's guilt made it necessary to front load mitigation in the guilt-innocence phase of trial to inform the jury of "what was coming and have the two phases of trial complement each other." (HT 2:255-259; 237:65747-65748). Counsel's mitigation theory was to show that Petitioner lacked an understanding of what was happening at the time of the crime due to his age and immaturity, and that he was impacted and influenced by his troubled background. (HT 1:171, 201-203; 2:405-406; 237:65751-65752; 238:65755-65779, 65920).

Though the record shows Mr. Sparger likely made the strategic decisions regarding mitigating evidence, it is clear that he and Mr. Schiavone were in constant communication on the case through written correspondence, telephone conversations, and in-person meetings. (HT 1:60-61; 2:227-228, 373-374; 237:65709; 238:65826-65827, 65901; 304-305:85754-85944). Moreover, Mr. Sparger was an experienced criminal defense attorney. (RIR 164-165; HT 1:121-122; 237:65694-65699; see also 2:217-220).

Additionally, as previously discussed, trial counsel had the assistance of an experienced mitigation investigator. Both Mr. Schiavone and Mr. Sparger had a good working relationship with Ms. Davis and actively communicated with her through email, written correspondence, telephone calls, and in-person meetings. (HT 1:150; 2:221, 269; 237:65753; 303:85548, 85552-85553; 319:90262-90336). The record also shows that trial counsel reviewed all of the

[29] Ms. Davis had previously provided similar testimony in other death penalty cases in her role as a mitigation specialist. (HT 5:808, 864).

information provided by Ms. Davis and provided her with feedback on information she discovered. (HT 1:82, 87, 91, 155-156, 172; 2:221, 223; 263:73267, 73269, 73276; 303:85552; 319:90267).

The court finds trial counsel's decision to pursue their chosen mitigation theory was reasonable and made after thorough investigation. As set forth above, trial counsel hired an experienced mitigation investigator to look into Petitioner's background and a forensic psychologist to evaluate Petitioner. Counsel prepared the expert witnesses for their testimony at Petitioner's trial. Additionally, counsel prepared and presented 26 witnesses to testify regarding the impact of Petitioner's troubled background; and, to show that he lacked an understanding of what was happening at the time of the crime due to his age and immaturity. Thus, as Petitioner has failed to demonstrate trial counsel's mitigation investigation fell below that of reasonable, competent counsel, his claim is denied. The court further finds that Petitioner has failed to demonstrate prejudice resulting from counsel's preparation of mitigation evidence.

C. REASONABLE SENTENCING PHASE PRESENTATION

In **Claim I(B)** of his amended petition, Petitioner alleges trial counsel were ineffective in their sentencing phase presentation at Petitioner's trial. The court finds counsel's sentencing phase presentation was reasonable as it cohesively continued a mitigation theme that dovetailed with their guilt-innocence phase presentation.

1) *Opening Statements*

During their opening statements to the jury, trial counsel acknowledged that the crime was "senseless and tragic" and assured the jury that Petitioner would be "severely punished." (T 2285). Counsel then set forth an outline of the witnesses and the evidence from Petitioner's

history, both social and mental health, which would be introduced during the sentencing phase. (2285-2299).

2) Extensive Witness Presentation

In support of their theory that Mr. O'Kelley was "pure evil," the leader, and more culpable, counsel presented the testimony of two witnesses who taught Mr. O'Kelley. (T 2300-2308). These witnesses testified that Mr. O'Kelley: attended a school for students with severe emotional and behavioral disorders; was similar to Charles Manson; was manipulative; and, targeted and controlled students with self-esteem issues. (T 2300-2303, 2306-2308). One teacher recounted that Mr. O'Kelley had encouraged students to injure other students. (T 2301-2303).

Counsel then presented Petitioner's maternal grandmother, Sharlene Riley. Ms. Riley informed the jury that Petitioner's great-grandfather and grandfather were both alcoholics and abusive. (T 2311-2312, 2315). Through Ms. Riley, trial counsel presented evidence that Petitioner's biological father was frequently gone from the home because he was in the Navy; and, when he was home, he drank heavily, was abusive, and was neglectful. (T 2316). Ms. Riley described two separate incidents in which Petitioner's father was drinking and failed to adequately supervise him, one resulting in Petitioner being hit by a car and having to go to the hospital. (T 2316- 2318).

Ms. Riley testified about Petitioner's father's extramarital affair and Petitioner's mother moving to South Carolina and filing for divorce, as a result of Petitioner's father's abusive and drunken behavior.[30] (T 2319- 2321). Ms. Riley further testified that, in August 1991, Petitioner's mother married Frank Sutton, a police officer in South Carolina. (T 2324-2326).

[30] Trial counsel then introduced into evidence a childhood photograph of Petitioner with his grandparents and siblings. (T 2321-2322).

She testified that Frank was arrogant, a very heavy drinker, and controlling. (T 2326). Petitioner's mother's husbands were all heavy drinkers, "control freaks," and abusive. (T 2326, 2345).

At the request of Petitioner's mother, Ms. Riley took care of Petitioner and his siblings from May to August of 1994. (T 2327-2328). During that time, Petitioner's mother only called the children two times. (T 2328). In August of 1994, Petitioner's family moved to New Mexico. (T 2323, 2328). For approximately three months after moving to New Mexico, Petitioner, his mother, and his siblings lived with Ms. Riley. (T 2328, 2330-2331). Petitioner's family then moved into a house with eight to ten other residents. (T 2331). Petitioner's mother eventually obtained subsidized housing. (T 2332).

While living in New Mexico, Petitioner's mother began seeing a man named Barney who was a nice man and loved the children. (T 2329-2330, 2334, 2345). Barney offered to pay for Petitioner's mother's divorce from Frank and to adopt the children. (T 2334-2335). Petitioner's mother, however, returned to Frank.[31] Id.

In August 1995, Petitioner was sent to live with his father in Wisconsin, and his mother returned to South Carolina. (T 2336). Ms. Riley testified that she did not have any contact with Petitioner while he was living in Wisconsin, but noted that there were numerous changes to Petitioner's address and phone number. (T 2336-2339). Ms. Riley did not see Petitioner again until August 2001. (T 2339). Eventually, Petitioner returned to South Carolina but was kicked out of the residence by his stepfather. (T 2340). Thereafter, Petitioner moved to Savannah with his brother Donald, who also forced Petitioner out of the house. (T 2340-2341). Ms. Riley testified that, thereafter, Petitioner lived with whoever would take him in. (T 2341).

[31] Counsel introduced into evidence a photograph of Petitioner with Barney and a photograph of Petitioner in the first grade. (T 2329-2330, 2334-2335).

Counsel then presented their mitigation specialist, Dale Davis, for the purpose of introducing several volumes of records relating to Petitioner. Initially, Ms. Davis explained how she prepared a social history on Petitioner. (T 2359-2362). Ms. Davis testified that she interviewed "forty or more" people, including traveling to Wisconsin and interviewing Petitioner's father and stepmother. (T 2364-2365, 2407-2408). Ms. Davis obtained a copy of a rule book[32] that was utilized while Petitioner lived in Wisconsin, which was then introduced into evidence. (T 2364-2365).

Through Ms. Davis, counsel introduced many of the records she had gathered into evidence which included: 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. (T 2365-2371, 2377-2378, 2382-2384, 2387-2392, 2394-2395).

In addition to introducing records, counsel elicited testimony from Ms. Davis regarding significant information contained in the records including, inter alia: prenatal and delivery records showing Petitioner's mother smoked during the pregnancy; hospital records showing Petitioner was hit by a vehicle, (T 2367, 2369); records showing Petitioner was prescribed Ritalin for ADHD, (T 2371, 2377-2378, 2382-2384); Chatham County Detention Center records showing Petitioner was diagnosed with PTSD and a psychotic disorder for which he received medication, (T 2388-2390, 2452-2454); and, Detention Center records showing Petitioner reported having nightmares and hearing voices. (T 2389, 2453).

[32] The rule book was an eighty-six page book of "house rules" written by Petitioner's father and stepmother which was based on the Uniform Code of Military Justice. (T 2467-2470).

Ms. Davis further testified that the records showed Petitioner was taking an antidepressant while living with his father in Wisconsin, and he had minimal contact with his mother who lived in South Carolina.[33] (T 2379, 2387). She also told the jury that Petitioner shared his medication with other students in an attempt to make friends. (T 2371, 2382-2383).

In an attempt to show Petitioner's father's home was overly strict, Ms. Davis informed the jury that Petitioner shoplifted $2.06 worth of candy and was ordered to pay restitution and serve three days secure detention. (T 2379, 2385-2386). Ms. Davis explained that Petitioner received three days of secure detention, as opposed to continued probation, because his parents reported that he was not properly completing his chores. (T 2380-2381).

Ms. Davis testified that the school teachers in Wisconsin reported that Petitioner was constantly compared to his stepsister and that Petitioner's stepsister "couldn't do anything wrong and he couldn't do anything right." (T 2454). In addition, Ms. Davis testified that the test scores in the school records were indicative of a learning disability. (T 2376-2377).

In an attempt to show the dysfunctional nature of Petitioner's home life, Ms. Davis testified that the divorce records of Petitioner's parents showed that his mother filed for divorce due to a "pattern and practice of alcohol and/or substance abuse." (T 2390-2391). Further, Petitioner's stepfather was listed as a suspect in a police report for criminal domestic violence and simple assault. (T 2392). According to the police report, Frank Sutton pushed Petitioner's brother, Donald, in the back. (T 2393). The police report noted that Petitioner's mother refused to press charges on Mr. Sutton, who was under the influence of alcohol, for the attack on her son. (T 2393-2394). Ms. Davis further testified that the mental health records of Petitioner's brother

[33] Ms. Davis also testified that the records showed that the school personnel did not have any complaints about Petitioner's behavior, and his grades and attendance were appropriate. (T 2381, 2387).

showed "some of the situation in the home" and documented "some history of alcohol abuse and mental illness" in the family. (T 2395).

In addition to the records, trial counsel introduced newspaper articles regarding the double murder at a Sonic restaurant in 2000 which occurred while Petitioner lived with his mother and stepfather in South Carolina. (T 2401-2402). Ms. Davis testified that the two victims were friends of people with whom Petitioner went to school. (T 2401). Counsel also introduced a letter from a guidance counselor at Barnwell High School who described Petitioner as being "hyper in temperament and always in some sort of crisis at home." (T 2403-2404). In addition, the counselor noted that Petitioner and his stepfather did not get along and Petitioner "felt like he wanted him out of the house." (T 2404).

Ms. Davis testified that the records showed that Petitioner had been diagnosed with ADHD, depression, PTSD, and psychotic disorder, not otherwise specified. (T 2452-2453). Although Petitioner did not report any physical or sexual abuse, there was evidence of mental abuse. (T 2453-2454). In addition, counsel introduced the genogram that had been prepared by Ms. Davis, which showed extensive alcoholism, drug abuse, and mental illness in Petitioner's family. (T 2404-2405). Ms. Davis testified that depression "ran through his family," and there were a number of suicide and suicide attempts in both his maternal and paternal families. (T 2406).

Additionally, Ms. Davis testified concerning the records obtained from the Chatham County Jail. The jail records did not contain any evidence of violence, other than defensive behavior, by Petitioner. (T 2397-2401, 2455).

Counsel then presented Petitioner's father, Michael Stinski. Mr. Stinski, who had not seen his son since 2000, testified that he met Petitioner's mother in 1974 while he was in the

Navy. (T 2459-2460). Prior to joining the Navy, Mr. Stinski stole a police cruiser and had to make the choice of going to jail or the Navy. (T 2460). During his time in the Navy, Mr. Stinski explained to the jury that he had six month deployments and would be gone from home for nine out of twelve months.[34] (T 2462-2463).

While Mr. Stinski was stationed in Virginia, Petitioner's mother moved them to South Carolina. (T 2463). During this time, Mr. Stinski tried to visit the children, but Petitioner's mother did not want him around. (T 2464-2465). Petitioner's parents eventually divorced when he was about three or four years old. (T 2463). In 1993, Mr. Stinski retired from the Navy and moved to Wisconsin. (T 2465).

When Petitioner was around eleven or twelve years old, he moved to Wisconsin and lived with his father and stepmother who moved about once a year. (T 2466, 2476-2477). During the five years that he lived with his father, Petitioner was active in church and had a number of friends at church. (T 2475). In addition, Petitioner worked at Hardees and had a paper route. (T 2478). Counsel also elicited testimony that Petitioner went to the rescue of a child who was ganged-up on in the school restroom. Id.

Regarding discipline, Mr. Stinski testified that they utilized a rule book, which was based on the Uniform Code of Military Justice. (T 2467-2470). By using the rule book, Petitioner did not have to make any decisions as everything was in the book. (T 2475-2476). Initially, Petitioner behaved well, but the punishments increased as he started to slack off. (T 2473-2474). Mr. Stinski testified that Petitioner was a good child as long as he lived in a structured environment. (T 2474). Mr. Stinski testified that Petitioner did not perform well in school. (T

[34] Counsel also introduced several family photographs. (T 2461-2462).

2472). Mr. Stinski believed that Petitioner did not work up to his potential and had a "lackadaisical attitude" about school. Id.

After Petitioner moved back with his mother, Mr. Stinski did not have much contact with Petitioner. (T 2479). Mr. Stinski acknowledged that he had "been known to tip a few" drinks, and that Petitioner was struck by a car and climbed out of a second story window while he was drinking. (T 2471). In addition, Mr. Stinski testified that he was incarcerated for several months for employee theft during the time period that Petitioner was living with him. (T 2480).

The next witness trial counsel presented was John Anderson, the pastor at Hope Community Church in Shawano, Wisconsin. (T 2485). Mr. Anderson testified that Petitioner was a member of the church for about five years. (T 2486). Petitioner and his family attended church regularly, and Petitioner was involved in the youth group and Vacation Bible School. (T 2487). In describing Petitioner, Mr. Anderson testified that he was "respectful." Id. Additionally, Mr. Anderson testified that Petitioner's family was "blended," and there were some "difficulties and dysfunction." (T 2489-2490). Trial counsel introduced into evidence several photographs of Petitioner at church functions. (T 2488-2489).

Trial counsel also presented the testimony of Paul Van Eyck, Logan Miller, and Jonathan Hassenzahl, Wisconsin schoolmates of Petitioner. Mr. Van Eyck testified Petitioner was somewhat hyperactive, a follower, and tried to fit in with the others. (T 2495, 2498). Logan Miller testified that Petitioner's father was a "little bit on the abusive side." (T 2501). Mr. Miller stated that Petitioner was a "good kid," non-violent, and a follower. (T 2502). Jonathan Hassenzahl described Petitioner as a "small kid" who was "quiet and nervous" and had a "good sense of humor." (T 2506-2507). Additionally, Mr. Hassenzahl told the jury that Petitioner was non-violent, a follower, and "just always was wanting to help people out and do whatever they

want." (T 2508). Trial counsel also introduced testimony that Mr. Hassenzahl traveled to Savannah and visited Petitioner at the jail after Petitioner's arrest. (T 2511-2512). According to Mr. Hassenzahl, Petitioner stated he had only gone into the house to commit burglary, but things escalated and "the guy killed that other woman." (T 2515).

Trial counsel then presented the testimony of Patricia Bray, who lived with her sister, Terry Stinski, and Petitioner's father. Ms. Bray testified that Petitioner lived with them in Wisconsin from the age of twelve to seventeen years old. (T 2518). Petitioner's mother never visited Petitioner while he lived in Wisconsin, and they only spoke on the telephone a few times a year. (T 2522).

During the first three or four years, Petitioner behaved like a "typical young boy." (T 2524). During that last year, however, Petitioner was frequently grounded for not completing his chores and getting into trouble outside of the home. (T 2531). Although Petitioner was frequently in trouble, Ms. Bray testified that Petitioner never acted in a violent manner. (T 2524-2525).

The next witness counsel presented was Petitioner's stepmother, Terry Stinski. Ms. Stinksi testified that she met Petitioner's father around 1987 or 1988. (T 2540-2541). Petitioner's father divorced his mother in 1990, and he then married Terry Stinski in 1991. (T 2541). After retiring from the Navy, Petitioner's father moved to Wisconsin and did not visit Petitioner. (T 2543). In June of 1995, Petitioner moved to Wisconsin to live with his father as he was having problems with his mother. (T 2545). Petitioner was upset over the fact that his mother had shipped him off to Wisconsin, and he inquired of Ms. Stinski as to the amount of trouble he would have to get in before they would stop loving him and ship him somewhere else.

(T 2547). During the time that Petitioner lived in Wisconsin, the family moved about once a year.[35] (T 2586-2587).

During the five years that he lived with his father, Petitioner did not see his mother and he rarely spoke to her by telephone. (T 2548). Petitioner's mother would only call if his father was late sending the child support for Petitioner's brother. Id. The lack of communication between Petitioner and his mother caused a strain on Petitioner's relationship with Donald. (T 2549). Petitioner was jealous and believed that his mother "chose everybody over him." Id. In addition to the lack of communication, Ms. Stinski testified that there was a period of time where they did not know the whereabouts of Petitioner's mother and it took them several months to locate her. Id. The divorce of Petitioner's parents had a significant effect on Petitioner in that he was hurt and confused. (T 2551). Ms. Stinski testified that Petitioner was unable to let go of that hurt. Id.

As she believed that Petitioner exhibited signs of Attention Deficit Disorder, Ms. Stinski took Petitioner to counseling where he was diagnosed with ADHD and depression. (T 2550-2551). Petitioner was placed on a low dose of Ritalin for his ADHD, which improved his performance at school. (T 2552). Petitioner was also placed on medication for depression. (T 2552-2553). In addition to the ADHD and depression, Ms. Stinski testified that Petitioner had "[v]ery immature social skills." (T 2557). Regarding his interaction with peers, Ms. Stinski explained Petitioner was a follower, who was unsuccessful in his attempts to fit in with his peers. (T 2558).

Ms. Stinski testified that she took Petitioner to a counselor as he was upset about his parents' divorce, had a low self-esteem, and did not trust anyone. (T 2555). The counselor

[35] Trial counsel introduced into evidence photographs of the houses that Petitioner lived in while staying in Wisconsin and photographs of the schools Petitioner attended. (T 2560-2564). Trial counsel also introduced childhood photographs of Petitioner. (T 2541-2543).

found that Petitioner was socially immature, had a difficult time trying to fit in, and expressed negative feelings by acting out. (T 2556). During the time Petitioner lived in Wisconsin, he was under a significant amount of stress. (T 2559). Ms. Stinski testified that Petitioner never acted in a violent manner, and she taught Petitioner to express anger by striking weeds with a stick. (T 2559-2560). In raising Petitioner, Ms. Stinski testified that she loved him and tried to make sure that he became a "person that he could be proud of." (T 2588). Petitioner stated several times to Ms. Stinski that "he didn't understand why [she] still loved him, because he wasn't nice to [her]." Id.

While living in Wisconsin, Petitioner got into trouble for providing Ritalin to individuals who were not his friends and were simply using him. (T 2559). Petitioner was also charged with shoplifting candy that was valued around two dollars. (T 2565). As a result, Petitioner was placed on probation, ordered to pay restitution, and required to work community service. (T 2565-2567). Petitioner also had to spend the weekend in secure detention. (T 2567-2568). Ms. Stinski testified that Petitioner enjoyed secure detention, and he only complained about the inability to receive seconds on food and the fact that the hallway lights were left on all night. (T 2568).

Ms. Stinski testified that Petitioner worked a paper route while living in Wisconsin. (T 2566). Petitioner's father, however, received the money Petitioner earned from working the paper route. (T 2584). He also worked at Hardee's and was a good employee. (T 2582-2583). Ms. Stinski stated that Petitioner was required to provide his father with a portion of his paycheck from Hardee's. (T 2584).

Petitioner returned to South Carolina in 2000. (T 2580-2581). Ms. Stinski believed that Petitioner was going to live with his mother and stepfather; however, she later learned that those

living arrangements never materialized. (T 2581). Instead of living with his mother, Petitioner went to Georgia to live with his brother, Donald. (T 2582). At some point, Donald contacted Ms. Stinski and asked if Petitioner could return to Wisconsin to live with them. Id. Petitioner's father, however, would not allow Petitioner to return to their home in Wisconsin. Id.

Counsel then presented Petitioner's mother, Pamela Sutton. Ms. Sutton testified that Petitioner was about four years old when she divorced his biological father. (T 2600). Approximately two years after the divorce, Ms. Sutton married Frank Sutton. Id. In 1994, Ms. Sutton, Petitioner, and Donald moved to New Mexico as Frank had given her an ultimatum to give up the children or live somewhere else. (T 2601). At that time, Ms. Sutton decided to keep her children.[36] Id.

Around the summer of 1994, after Petitioner went to live with his father in Wisconsin, Ms. Sutton moved back to South Carolina. (T 2601-2602). Petitioner lived with his father for five years. Id. Ms. Sutton corroborated the fact that, during that time period, she never saw Petitioner and only spoke with him on occasion. Id.

In May of 2000, Petitioner moved back to South Carolina. (T 2603-2604). Approximately five months later, there was a double murder at a Sonic restaurant. (T 2604). On the night of the murders, Petitioner stayed with a grieving friend whose boyfriend was one of the victims. Id. When Petitioner returned home the next day, his stepfather kicked him out of the house. Id. Thereafter, Petitioner stayed with a friend. Id.

After Petitioner was kicked out of the house, Ms. Sutton stayed in contact with Petitioner and provided him with money and transportation. (T 2604). At some point, Ms. Sutton made arrangements for Petitioner to live with his brother Donald in Savannah so that he could

[36] Trial counsel also introduced several childhood photographs of Petitioner. (T 2596-2598).

complete his high school education. (T 2605). At that time, Petitioner's brother was married and expecting his first child. Id. Ms. Sutton testified that Petitioner only lived with his brother for six months. (T 2606). Petitioner then moved in with a friend and eventually got his own apartment. Id. During this time period, Petitioner was in school but had poor attendance. Id. Petitioner was also employed, but Ms. Sutton did not know his employer. Id. Ms. Sutton testified that Petitioner stayed in the apartment for three months and then moved in with a girl named Betsy. (T 2607). To her knowledge, Petitioner was living with Betsy at the time of the crime. (T 2608).

Counsel also presented testimony from Michael, Mark, and Kevin Correll. (T 2612-2616, 2616-2623, 2625-2635). Michael and Kevin Correll met Petitioner at the funeral for one of the Sonic restaurant murder victims. (T 2612-2613, 2626). At the funeral, Petitioner hugged everyone and tried to cheer them up. (T 2626). Petitioner, who did not know the victims, felt bad for what had happened at the restaurant. (T 2627). Afterwards, Petitioner went to live with the Correll family because he was having difficulties and was almost homeless. (T 2612, 2617-2618, 2627-2628).

Michael and Mark Correll testified that they got along well with Petitioner, who was like a brother to them. (T 2613-2614, 2630-2631). In addition, trial counsel elicited testimony that Petitioner did not cause any problems while living with the Correll family and never acted in a violent manner. (T 2614-2615, 2618, 2620-2622, 2627). Mark Correll testified that Petitioner called him "dad" or "Mr. Mark," and there were discussions about him obtaining legal custody of Petitioner. (T 2618).

While living with the Correll family, Petitioner's mother never contacted him via telephone. (T 2619). Petitioner, however, did contact his mother several times, and Kevin

would take Petitioner to his mother's job on occasion for visits. (T 2619, 2631). Mark and Kevin both provided testimony regarding Petitioner being very upset following a visit with his mother. (T 2619-2620, 2631-2632). Petitioner never confided in the Correll family as to what happened during that visit. (T 2620, 2632). Afterwards, Petitioner violated their house rule of no alcohol and was asked to leave. (T 2632). Petitioner left the Correll residence and moved in with his brother. (T 2633).

Counsel also presented the surviving victim of the Sonic shooting, Shaun Edwards. Mr. Edwards testified that he met Petitioner at the wake for one of the victims. (T 2624). At the wake, Petitioner walked around and hugged people. Id. Thereafter, Mr. Edwards and Petitioner became friends. Id. During their friendship, Mr. Edwards recalled that Petitioner made the statement that he was going to prove that his mother and stepfather were wrong in that he was going to be successful. (T 2625).

Amy Schwitzer, who was a social worker with the Shawano County Department of Social Services, testified by deposition that Petitioner was a quiet and polite individual. (T 2637-2638). Ms. Schwitzer was responsible for monitoring Petitioner following his conviction for shoplifting candy in Wisonsin. During her supervision of Petitioner, Ms. Schwitzer received information from the school system. (T 2642). Petitioner was not a behavioral problem at school. Id. Ms. Schwitzer was shocked upon learning about the crime as it was out of character for Petitioner. (T 2643). She explained that Petitioner was a quiet person, not abusive, and not openly defiant. Id.

Ronald Schmidt, a Wisconsin teacher who taught Petitioner in the eighth grade, testified that Petitioner was a "nice kid, easy to talk to, joke around with, cooperative." (T 2646). In addition, Mr. Schmidt stated that Petitioner "tried to do a good job." Id. In meeting with

Petitioner's father and stepmother, Mr. Schmidt observed that they were more positive when talking about Petitioner's stepsister. (T 2647-2648).

Trial counsel then presented Judy Bergh, Petitioner's sixth grade teacher in Wisconsin. (T 2653). Ms. Bergh stated that Petitioner was: an average student who did not present any behavior problems; a follower; very quiet; and, got along with the other students. (T 2654-2655). Ms. Bergh testified that she was shocked upon learning about the crime as it was out of character for Petitioner who was "so quiet and reserved" and never acted in a violent manner. (T 2657).

Amber Stinski, who was married to Petitioner's brother Donald, testified that Petitioner came to live with them in Savannah around March of 2001.[37] (T 2671, 2673). Prior to living with them, Amber stated that Petitioner had been kicked out of his mother's house and was living with friends. (T 2673). Petitioner ended up at their residence as he needed to leave his friend's house. (T 2673-2674).

Initially, Petitioner abided by the rules of their house, worked two jobs, and attended school. (T 2674). As the turmoil increased between Amber and Donald, Petitioner no longer wanted to be at the residence. (T 2674). Amber explained that she and Donald frequently argued, and Donald's alcohol consumption was significant. (T 2675). At the request of Donald, Amber left the residence in June 2001. (T 2675-2676). Amber testified that Petitioner did not use alcohol while she was in the residence. (T 2675). However, after she left, there was alcohol in the apartment along with individuals "coming in and out" of the apartment. (T 2677-2678).

Approximately four months after Amber left the residence, Petitioner was forced to find another home as his brother returned to the Army barracks. (T 2676-2677). Amber testified that Petitioner's brother was not concerned about where Petitioner was going to live. (T 2677). At

[37] Trial counsel also introduced a photograph from their wedding. (T 2672).

some point, Petitioner's brother was diagnosed with bipolar disorder and received medication. (T 2678).

Counsel presented the testimony of Elizabeth Dostal, who met Petitioner at Windsor Forest High School in Savannah in Savannah in October of 2001, and they became friends. (T 2681, 2683). In describing Petitioner, Ms. Dostal stated that he was "really sweet at heart," a "real gentleman," fun, and outgoing. (T 2682, 2684). Upon learning about the crime, Ms. Dostal was surprised. (T 2684). Ms. Dostal visited Petitioner at the jail and noted that he looked like a different person in that he was "not full of life anymore" and looked "like his soul had been sucked out of him." (T 2684-2685).

Trial counsel also presented Ruth Dostal, the mother of Elizabeth Dostal, who testified that Petitioner was a "very nice young man" who had "very good manners" and "seemed friendly." (T 2687-2688). Ms. Dostal stated that Petitioner frequently called her "mom" or "mama." (T 2689). When she first met Petitioner, he was living with his brother and sister-in-law, no parents. (T 2689, 2691). Thereafter, Ms. Dostal learned that Petitioner was no longer living with his brother and needed a place to stay. (T 2689). Ms. Dostal offered her couch to Petitioner, but he declined. (T 2689, 2691).

Elizabeth "Betsy" Mathis testified that she met Petitioner in November of 2001. (T 2693). Initially, Ms. Mathis and Petitioner were friends, but they subsequently started dating. Id. When she met Petitioner, he was living with his brother. Id. Petitioner moved in with Ms. Mathis in November of 2001, and Ms. Mathis learned that she was pregnant with Petitioner's child in January or February of 2002. (T 2694). On one occasion there was a physical fight involving other people at Ms. Mathis' mobile home. (T 2695). Petitioner told Ms. Mathis to go into the bathroom and call the police as he did not want her to get involved in the fight. Id.

Following this incident, Ms. Mathis moved to Florida where she remained for about one month. Id.

Around March 2002, Ms. Mathis returned to Savannah and contacted Petitioner to inform him that she was back in the area. (T 2695-2696). During the time period when Ms. Mathis was gone, Petitioner lived with two different individuals. (T 2696-2697). Upon returning, Ms. Mathis allowed Petitioner to stay at her residence. (T 2697). Around April 1, 2002, Petitioner made the decision to stay with Amy Norman. (T 2697, 2699). Ms. Mathis testified that Petitioner met Dorian O'Kelley, Ginger Norman, Larry Gray, and Trent Owen around that time period. (T 2698-2699).

Counsel then introduced into evidence photographs of Petitioner's daughter who was born about five months after the crime. (T 2700-2702). At the time of the trial, Petitioner's daughter was five years old. (T 2702). Ms. Mathis testified that she had taken her daughter to the jail several times to see Petitioner. Id. [38]

Barbara Mathis, who was the mother of Betsy Mathis, testified that she first met Petitioner in October of 2001. (T 2707-2708). When she met Petitioner, he was living at Betsy's mobile home. (T 2708). In describing Petitioner, Ms. Mathis testified that he was young, naïve, and kind. (T 2709). Ms. Mathis explained that Petitioner lacked "world experience" and was immature. Id.

Ms. Mathis also described the incident in which she got into an altercation with another individual at Betsy's home. (T 2710). Ms. Mathis testified that Petitioner appeared scared during the altercation and did not know what to do. Id.

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[38] Counsel also elicited testimony that Petitioner's daughter suffered from cerebral palsy, which resulted in delays in her development. (T 2713). At the time of the trial, Petitioner's daughter was five years old and was just starting to talk. Id.

Counsel then presented Gail Rudolph, who was the psychiatric nurse that treated Petitioner in Wisconsin from August of 1995 to February of 1997.[39] (T 2729-2730, 2732). Petitioner's stepmother asked Ms. Rudolph to evaluate Petitioner for ADHD as he was having difficulties in school. (T 2730). In addition to the ADHD, Petitioner's stepmother was concerned about Petitioner's relationship with his mother because he was angry about being sent to Wisconsin to live with his father.[40] (T 2731-2732).

Following her evaluation, Ms. Rudolph testified that her diagnosis of Petitioner was to rule out ADHD and an adjustment disorder with depressed mood. (T 2734). As a result of the evaluation, Petitioner was placed on Ritalin for ADHD, which improved his school performance. (T 2732). Despite the medication, Petitioner still had a difficult time in school. Id. For example, it took Petitioner four hours a night to complete homework. (T 2732-2733). Ms. Rudolph requested that the school test Petitioner for a learning disability, but that testing was never completed. (T 2732, 2743-2744). Ms. Rudolph testified that Petitioner's writing was not at grade level, and he had "some comprehensive problems." (T 2744).

At the time of Ms. Rudolph's evaluation, Petitioner also had a significant anger problem. (T 2735). Ms. Rudolph explained that Petitioner was very angry at his mother, which was usually taken out on his stepmother. Id. In addition to addressing Petitioner's anger, Ms. Rudolph testified that a person with ADHD does not think about the consequences of their actions. (T 2737). As such, Ms. Rudolph used games with Petitioner to assist him in thinking about the consequences of his actions. Id.

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[39] Ms. Rudolph treated Petitioner from age twelve to fourteen. (T 2746). After Ms. Rudolph moved, Petitioner saw another therapist only one or two times. Id. According to the case file, Petitioner stopped the counseling sessions due to financial concerns. Id. Ms. Rudolph confirmed that Petitioner's family was "pretty strapped" financially. Id.

[40] While living in Wisconsin, Petitioner requested that he be allowed to return home for the summer. (T 2746). Petitioner's father told Petitioner that he would not be allowed to return to Wisconsin if he left. Id.

Ms. Rudolph also worked with Petitioner on improving his relationship with his father and stepmother. (T 2738). Petitioner's father "totally devoided himself of the parenting responsibility and gave it completely over to the stepmother." Id. Petitioner's relationship with his stepmother "went up and down," and they had moments when they got along. Id. Ms. Rudolph worked with Petitioner on being able to tell his stepmother when he was upset or needed space. Id. Petitioner's stepmother was the type of person who "really didn't give people space," and it was "Terry's way or no way." Id.

She further testified that Petitioner's father's house was a "very rigid household," and Petitioner was not given a lot of space. (T 2738-2739). Regarding the rule book, Ms. Rudolph testified that it was "obsessive" and "there's no way to win with this." (T 2740). The rule book only contained consequences, and there were no rewards. (T 2740-2741).

In describing Petitioner's family, Ms. Rudolph explained that his stepmother "ruled the roost," and his father was "sort of absentee." (T 2742). Petitioner's father never attended counseling sessions unless Ms. Rudolph requested his presence. Id. Over the course of two years, Ms. Rudolph only met Petitioner's father two or three times. (T 2742-2743). In addition, Ms. Rudolph testified that Petitioner and his stepsister were in the same grade, but they were very different in that Connie was brilliant and Petitioner struggled in school. (T 2742). Petitioner was also "very socially awkward." Id. In Wisconsin, Petitioner lived in a very isolated area on a farm, which resulted in limited social interaction with others. (T 2743).

Ms. Rudolph testified that Petitioner was a "likeable kid" who tried "very hard to please and to fit in with his dad and his stepmom." (T 2733). Ms. Rudolph observed that Petitioner had a tendency to suppress his feelings. Id. Petitioner was also a follower and was always trying to fit in with the other children and at home. (T 2747). Initially, Petitioner had a difficult time in

school. Id. Ms. Rudolph explained that Petitioner was "awkward," "socially clumsy," and "doing really badly in school." Id. Petitioner was finally able to make a couple of friends by the first half of the year. Id. At home, Petitioner fit in "[a]s well as anyone could fit in." Id. Ms. Rudolph explained that everyone in the home "just existed." Id.

The final witness presented by trial counsel was Dr. Weilenman. Dr. Weilenman explained how Petitioner's background, set forth by all of the previous witnesses, had led to the crime. Dr. Weilenman testified that she met with Petitioner approximately five times from 2004 up until Petitioner's trial, for a total of ten to fifteen hours. (T 2770). Dr. Weilenman informed the jury that there was evidence in Petitioner's extended family of "global drug and alcohol abuse and mental health issues." (T 2771). There were several suicides in Petitioner's extended family, and he had an aunt who was involuntarily hospitalized in Florida. Id.

Trial counsel then elicited extensive testimony regarding Petitioner's background, which included neglect, abandonment, and abuse. Dr. Weilenman testified that Petitioner's father abused alcohol during Petitioner's early childhood. (T 2771). She also discussed the two incidents where Petitioner was placed in harm's way by his father's neglect and drinking, one event leading to Petitioner being struck by a vehicle. Id.

Dr. Weilenman testified to the intense conflict in the home between Petitioner's parents, both parents' extramarital affairs, and the "persistent pattern of alcohol abuse, as well as a persistent pattern of mistreatment" of Petitioner's mother. (T 2774-2775). Further, Dr. Weilenman testified that, following his parents' divorce, the neglect continued as Petitioner rarely saw his father. (T 2772).

Dr. Weilenman also informed the jury that, following his parents' divorce, Petitioner's mother remarried. (T 2779-2780). She testified that Petitioner's stepfather was an alcoholic and

was physically abusive towards Petitioner, his mother, and his siblings. (T 2776, 2780). Petitioner reported that he was frequently paddled by his stepfather who used a homemade paddle with holes drilled in it. (T 2782). Petitioner's mother failed to intervene. Id.

There was also evidence of maternal neglect in Petitioner's childhood. (T 2776). Dr. Weilenman explained that, throughout his life, Petitioner struggled with feelings that his mother chose other men over him. Id. Petitioner's stepfather, who did not want the children, gave his mother an ultimatum demanding that she choose the children or him. Id. At that time, Petitioner's mother chose the children and moved them to New Mexico. (T 2777).

Dr. Weilenman also discussed the impact of Petitioner's move to New Mexico and his mother dating Barney. (T 2777, 2794). Dr. Weilenman testified that Barney was a "male figure that was putting Darryl first and really taking care of him." (T 2777). Barney spent time with Petitioner and his brother outside the relationship that he had with Petitioner's mother. (T 2777, 2794). When that relationship ended, Petitioner believed that his "life was doomed" because he knew that his mother would move back to South Carolina to be with Frank. (T 2794).

Dr. Weilenman also testified about Petitioner moving to Wisconsin to live with his father for five years and the impact it had on Petitioner. (T 2775, 2777, 2794). She testified that during that time period, Petitioner's mother, who had moved back to South Carolina with Frank, never visited him. Id. Initially, Petitioner's mother did contact him by telephone; however, that eventually stopped. Id. Dr. Weilenman testified that this was an example of how Petitioner felt abandoned by his mother. (T 2777-2778).

Dr. Weilenman also testified about Petitioner's counseling in Wisconsin, where he was diagnosed with ADHD. (T 2794). The counselor noted that Petitioner should be tested for a learning disability as he struggled in school. (T 2796-2797). Additionally, as explained by Dr.

Weilenman, the counselor's notes evidenced Petitioner's feelings of rejection by his mother and his belief that his mother chose Frank over him. (T 2794-2795).

Dr. Weilenman explained that the neglect and dysfunction continued in Wisconsin. She testified that Petitioner's stepmother was the primary caregiver during the time that he lived in Wisconsin as his father was "pretty much absent." (T 2795). Regarding Petitioner's relationship with his stepmother, Dr. Weilenman stated that Petitioner believed "that if he ever showed Terry love, that it would be even a further rejection from his mom." (T 2798).

Dr. Weilenman testified that Petitioner's stepmother was "extremely controlling, rigid" and Petitioner was "pretty much grounded during the five years" that he lived in Wisconsin. (T 2796). Dr. Weilenman discussed the eighty-six page rule book and opined that the rule book was not the best method of parenting as it did not include any rewards and resulted in a very negative approach. (T 2775, 2783, 2796, 2798).

In addition to the rigid household, Dr. Weilenman testified about Petitioner's jealousy of his stepsister. (T 2801). Petitioner believed that his stepsister received special treatment from his father, which created tension. Id. Dr. Weilenman explained to the jury that Petitioner's stepsister was very intelligent and successful in school. (T 2799). Petitioner, however, struggled in school and likely had a learning disability. (T 2799-2800). Dr. Weilenman informed the jury that Petitioner's father lacked steady employment, and was fired from his job and charged with embezzlement. (T 2775, 2803). In 2000, Petitioner left Wisconsin and did not see his father again until the trial. (T 2776).

Dr. Weilenman testified that, after leaving Wisconsin, Petitioner moved back to South Carolina. (T 2778, 2802). She then reviewed the prior testimony of the witnesses showing that

Petitioner was basically homeless and living on the good graces of family and friends for short periods of time, until they forced him back on the streets. (T 2804).

Dr. Weilenman explained that Petitioner's time with the Correll family, a family he had recently met, was likely the "happiest time of his life." (T 2778, 2803). The Correll family provided a stable home and a consistent male role model for Petitioner. Id. While living with the Correll family, Petitioner's mother never visited him despite the fact that he was only three miles away. (T 2809).

Dr. Weilenman reiterated prior testimony that Petitioner's sister-in-law was subsequently provided custody of Petitioner, and he moved to Savannah in March of 2001. (T 2778, 2804). At that time, Petitioner's brother and sister-in-law were expecting their first child. (T 2804-2805). The home situation was chaotic as Petitioner's brother was an alcoholic and had a "very volatile temper." (T 2804). As a result, there was a significant amount of fighting in the home. (T 2805). Dr. Weilenman testified that Petitioner would leave whenever his brother and sister-in-law argued because it reminded him of his biological parents and his mother and stepfather. Id. The fighting would cause Petitioner to become very emotional, and he would go outside to calm down. Id.

During the three month period after Petitioner moved out of his brother's residence to the time of the crime, Petitioner lived in twelve different places. (T 2809). Dr. Weilenman testified that Petitioner lacked a driver's license, transportation, and money; and, he just tried to find a place to sleep. (T 2810). Petitioner, who lacked any parental support, ended up staying with friends. Id. Dr. Weilenman testified that, at the time of the crime, Petitioner lacked the basic needs of food and shelter. (T 2823-2824). Petitioner was eating only one meal a day at that time and was going from house to house. (T 2824). Regarding the crime, Dr. Weilenman testified

that Petitioner "was in a situation and, based on his personality as well, the follower, that he did what he at that time, listening to this guy, as a follower, rather than -- and not questioning it. He needed to fit in with that group." Id.

As to her conclusions, Dr. Weilenman testified that Petitioner's social history revealed a "history of instability." (T 2811). Petitioner moved twenty-five times within an eighteen year period, which was "significant instability." (T 2795, 2811). Petitioner moved every year while living in Wisconsin, and the houses were "pretty dilapidated, in the middle of the country, isolated, rural areas." (T 2796). Dr. Weilenman explained to the jury that these frequent moves resulted in a "lack of stability for him, making new friends, socially awkward, not feeling like he was fitting in." (T 2795).

There was also evidence of a "history of abandonment by his biological family." (T 2811). Petitioner's father rarely exercised his visitation rights following the divorce, and Petitioner's relationship with his father ended the moment he left Wisconsin. (T 2811-2812). Dr. Weilenman testified that Petitioner's mother abandoned Petitioner upon sending him to live in Wisconsin and Savannah, and in relinquishing her parental rights to Petitioner's sister-in-law. (T 2812). There was also evidence of abandonment by Petitioner's brother Donald. (T 2813).

Petitioner's background showed that numerous non-biological individuals assumed responsibility for Petitioner. Dr. Weilenman testified that Barney was a positive role model in Petitioner's life. (T 2812). Petitioner was devastated when the relationship ended as he trusted and opened up to Barney. Id. There was evidence that Petitioner's stepmother tried hard in raising Petitioner, but she was "extremely rigid and controlling." Id. Petitioner's stepmother struggled and did not get the needed support from Petitioner's father. Id. Finally, Mark Correll was a good role model for Petitioner, but Petitioner only lived with him for about six months. (T

2813). Dr. Weilenman testified that for about two out of eighteen years, Petitioner had a "strong male role model in his life, someone that he feels like he could trust." Id.

Additionally, Dr. Weilenman informed the jury that the manner in which Petitioner's parents lived their life was inconsistent with their beliefs on how a person should behave. (T 2814). For example, the rule book contained a rule about lying and stealing. Id. Petitioner's father, however, embezzled money from Sears for years, and he had extramarital affairs. Id. There was also evidence of "mix-matched marriages," which was confusing. Id. Dr. Weilenman testified that Petitioner's father was in a relationship with another woman despite the fact that he was still married to Terry. Id. Also, Petitioner's mother and stepfather divorced in 1995, but they were still living together. Id.

Dr. Weilenman described Petitioner as a "soft-hearted" individual who wanted to be accepted. (T 2815). Petitioner was socially immature and tried hard to fit in with others. Id. For example, in an effort to gain friends, Petitioner handed out his Ritalin to other students as he believed that he could buy their friendship. (T 2801). Dr. Weilenman also testified that Petitioner had "low self-esteem, low self-image, compared himself to Connie," and was a follower who wanted to please others. (T 2815). Petitioner also lacked an understanding of who he was due to being raised in a rigid home where he did not have to think for himself and anything he did was punishable. (T 2819). As a result, Petitioner developed a sense of learned helplessness. (T 2819-2820). Petitioner was also considered to be a follower and would do whatever people told him to do. (T 2799, 2802). Petitioner's friends described him as a chameleon in that "he was whatever you wanted him to be," and he "would do whatever it took to please you, to get you to like him." (T 2820).

Dr. Weilenman testified that individuals like Petitioner sometimes exhibit inappropriate conduct or behavior in that "[t]hey don't really think. It's just what can I do to please that person." (T 2815). Dr. Weilenman provided the jury with examples of how Petitioner always wanted to please people. (T 2816). She also noted that Petitioner would laugh at inappropriate times, which was attributed to reports that Petitioner liked to make people laugh and would try to "help people be okay with whatever situation they were in." (T 2816-2817). Further, Dr. Weilenman testified that Petitioner did not discuss his family life with others and tried to "put a positive spin on what his life was at that time." (T 2780). Petitioner, who felt rejected by both parents, feared that he would be forgotten by his mother. (T 2778, 2815). Petitioner felt invisible and believed that his mother "doesn't see me, she doesn't love me, I'm abandoned by her" and did not feel any support from her. Id.

Petitioner's social history revealed several mental health diagnoses. In 1995, Gail Rudolph diagnosed Petitioner with "ADHD, as well as adjustment disorder with depressed features, she also had, in essence a rule out for learning disabilities." (T 2817). Dr. Weilenman explained that Petitioner's ADHD was a lifelong condition that might improve with age. (T 2817-2818). She also explained to the jury that the frontal lobes of the brain are your "thinking center" and "executive functioning, how you think, how you process information, impulse control." Id. As to Petitioner's diagnosis of adjustment disorder with depressed mood, Dr. Weilenman stated that he was placed on medication for depression for two years. Id. In addition, the jail records showed that Petitioner was diagnosed with PTSD. (T 2817). Dr. Weilenman explained to the jury that PTSD is an anxiety disorder that happens when someone experiences a traumatic event and even after the event is over, that person relives the traumatic event. (T 2826-2827).

Trial counsel also elicited testimony regarding Petitioner's youth and immaturity. When she first met Petitioner in 2004, Dr. Weilenman felt like she was "interacting with a twelve year old" in that he was socially immature. (T 2821, 2824). Dr. Weilenman explained that it was "the way he acted, his mannerisms, his social skills. He just seems so much younger. And again, I think that goes back to during that very strict period of his life when he wasn't figuring out who he was, it was almost stunted." (T 2821). By the late teenage years, one would expect a child to have developed "some sense of internalizing external values...a transformation from a parent telling you what to do to an internal sense of what you should be doing." (T 2822). In addition, the child should be "forming some sense of identity, who they are, absolutely know who they are, know what their belief systems are, know what they stand for, some sense of right and wrong." Id. Due to his instability and abandonment issues, Petitioner "really lacked that internal sense." (T 2822-2823).

3) Closing Argument

In his sentencing phase closing argument, Mr. Sparger stated that they presented "snapshots" of Petitioner's life to assist the jury in understanding why Petitioner should not die as he was "not one of the worst of the worst." (T 2908, 2910-2911). Counsel asserted that this evidence was not presented with the intent of excusing or justifying Petitioner's actions during the crime. (T 2910). The evidence presented during the sentencing phase showed that Petitioner was the product of his upbringing. (T 2925). Counsel argued that Petitioner never received help from his biological parents, and he was subjected to rigid rules from his stepmother. (T 2926-2927). This rigid life resulted in Petitioner entering adolescence without having the opportunity to think for himself. (T 2927). Counsel argued that Petitioner was immature and never had the

"chance to think, to learn, to develop logic skills," and he was ill-equipped to live on his own. (T 2928).

Regarding Mr. O'Kelley, trial counsel stated that he was very manipulative and "likened to Charles Manson." (T 2929). In addition, counsel noted that Petitioner had only known his co-defendant for eleven days. Id. In comparison, Petitioner had a good heart and was not a heartless killer like Mr. O'Kelley. (T 2903, 2930). Counsel further stressed that Petitioner was a "young boy, eighteen." (T 2903).

In asking the jury to spare Petitioner's life, trial counsel assured them that Petitioner would spend the rest of his life in prison. (T 2918). Counsel told the jury that prison was "hell on earth." (T 2923). Petitioner would be housed in a small cell with just a mattress, toilet and sink. (T 2923-2924). Additionally, counsel stated that prison was a loud place where the lights were never turned off. (T 2923-2925). Counsel acknowledged that the crime was horrendous and devastating to the victims' family, and they assured the jury that Petitioner would be punished for his role in the crime. (T 2903-2904). Counsel asked the jury for fairness and mercy when making the determination as to sentence. (T 2909, 2930-2931). Regarding his punishment, trial counsel repeatedly urged the jury to sentence him to life without parole. (T 2902-2903, 2925, 2931, 2936).

4) Presentation of Dale Davis During Sentencing Phase

In **Claim I(B)(2)** of his amended petition, Petitioner alleges Ms. Davis was not qualified to testify about the impact of the information in the records she had obtained on Petitioner. Petitioner further claims counsel's performance was unreasonable in producing Ms. Davis's interview memoranda to the state. The court finds trial counsel's strategic decision to present Ms. Davis as a witness in mitigation was reasonable.

As demonstrated above, at the time she was retained, Ms. Davis was an experienced mitigation specialist having worked on more than thirty death penalty cases in state and federal courts. (HT 263:73482, 73552). 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. (T 2359-2362).

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. (T 2365-2371, 2377-2378, 2384, 2388-2392, 2394-2395, 2382-2383). 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 reasonable competent counsel, his claim is denied.

Petitioner also faults trial counsel in producing materials from the files of Ms. Davis in the course of discovery. Specifically, in his post-hearing brief, Petitioner faults Mr. Sparger for producing Ms. Davis's interview memoranda to the state, which Petitioner claims "prejudiced the penalty phase presentation going forward by giving the prosecution a window into the defense strategy." (PHB 78). However, the court finds that 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. As the court found:

> "[N]otes and summaries" made by a mitigation specialist who is working at the direction of trial counsel in a death penalty case should be regarded as "notes or summaries made by counsel" within the meaning of the criminal discovery procedure. Accordingly, 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.

Stinski, 286 Ga. at 845. The court concludes trial counsel's performance cannot be found below that of reasonable competent counsel where a rule of law such as the above is rendered subsequent to trial counsel's 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. 466 US. 668, 689 (1984).

The court further finds Petitioner has failed to establish prejudice under Strickland for this claim. The evidence presented by the state in aggravation was so highly aggravating that there is no reasonable probability that had counsel not turned over Ms. Davis's interview

memoranda to the state, the outcome of his sentencing would have been different. Accordingly, Petitioner's claim is denied.

5) Counsel Reasonably Chose not to Present Alton VanBrackle

In **Claim I(B)(4)** of his amended petition, Petitioner alleges that trial counsel were ineffective in failing to present Alton VanBrackle during the sentencing phase to rebut the state's argument that Petitioner lacked remorse. The court finds the record establishes that trial counsel made a reasonable, strategic decision not to present Mr. VanBrackle.

Counsel announced their intention to call Mr. VanBrackle as a witness during the sentencing phase. (T 2714). In response, the state argued that if the defense called Mr. VanBrackle, it should be allowed to rebut Mr. VanBrackle's testimony with Petitioner's second statement to police which had been suppressed. (T 2664-2665, T 2669). The trial court held:

> Any evidence regarding the defendant's lack of remorse is certainly admissible, and we wouldn't even think about disallowing that testimony to get in. He's got a right to bring that in, if he wants to.
>
> But then again, you know, if there's any evidence showing the opposite, that should be something for the jury to consider. You know, it just works both ways. You can't have it – you can't have it both ways. Neither side can have it both ways, put it that way.

(T 2724-2725).

This ruling was upheld by the Georgia Supreme Court on direct appeal:

> Above, we held that the trial court did not err in the guilt/innocence phase by refusing to admit a hearsay account of a statement Stinski allegedly made to a jail mate in which Stinski described the crime in a manner that was partially self-serving. In the sentencing phase, Stinski again sought to introduce the hearsay account, arguing that the rules of evidence were relaxed in the sentencing phase. See Gissendaner, 272 Ga. at 714-715 (12) (holding that the rules of evidence are *not suspended in the sentencing phase but that they may, under proper* circumstances, yield to the need to present reliable mitigating evidence). The trial court agreed to allow Stinski to introduce hearsay testimony about his alleged out-of-court statement without requiring him to take the witness stand. However, the trial court also ruled that, if Stinski chose to present the hearsay testimony, the

> State would be allowed to impeach Stinski's alleged out-of-court statement with Stinski's second videotaped confession, which previously had been suppressed on Sixth Amendment grounds and which was more inculpatory than the first videotaped confession that was already in evidence. Stinski argues that the trial court's ruling improperly compelled his choice not to present hearsay testimony about his alleged out-of-court statement.
>
> A hearsay declarant's out-of-court statement that is presented to a jury may be impeached at trial in the same manner that in-court testimony may be impeached. Smith v. State, 270 Ga. 240, 244-245 (5) (510 SE2d 1) (1998), overruled on other grounds by O'Kelley, 284 Ga. at 768 (3). As the trial court properly determined, a voluntary statement by a defendant that was obtained through a violation of the Sixth Amendment right to counsel during certain pretrial interrogations may nevertheless be used to impeach the defendant's trial testimony. Kansas v. Ventris, ___ U.S. ___, (173 L. Ed. 2d 801, 129 S. Ct. 1841) (2009). Accordingly, the trial court properly cautioned Stinski 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, which Stinski did not claim to have been involuntary. Because that ruling was proper, the trial court did not err by refusing to restrict the State's own evidence and argument about Stinski's lack of remorse as compensation for that ruling. Likewise, the trial court's proper ruling was not rendered improper simply because it later led to Stinski's strategic decision not to use hearsay accounts of the alleged statements to the jail mate to attempt to show that Stinski had made honest reports during his psychological care.

Stinski, 286 Ga. at 855-857 (footnote omitted).

Given the trial court's ruling, this court finds counsel made a strategic decision not to present the testimony of Mr. VanBrackle. (HT 2:268). Mr. Sparger testified that counsel's trial strategy involved keeping Petitioner's second statement out of evidence as it was more incriminating than the first statement. (HT 2:265). Mr. Sparger explained that the second statement contained more detailed information regarding the crime. Id. In addition, Mr. Sparger testified, "[a]nd something to me about just hearing a recording without the video seemed to make it even worse. And maybe it was because the hollow room -- the room it was taken in, and *maybe something about the sound of it. I mean, it was creepier.*" Id. Counsel wanted to present Mr. VanBrackle for purposes of putting in evidence of Petitioner's remorse. (HT 2:268).

However, Mr. Sparger explained, "...it all came back to if he steps, you know, takes one step the wrong way, that's opening the door to Darryl's second statement and -- which was not going to help Darryl in mitigation, in our opinion." Id.

Counsel initially considered calling Mr. VanBrackle as a witness during the sentencing phase of trial but reconsidered as counsel was nervous about what he might say. (HT 2:261; 264:73576). Specifically, as mentioned previously, counsel found Mr. VanBrackle had backed off what he had initially told Ms. Davis and only wanted to discuss details of Petitioner's confession, not Petitioner's remorse. (HT 204:85682). As a result of Mr. VanBrackle's inconsistency and the trial court's decision to allow Petitioner's second videotaped statement should Mr. VanBrackle's testimony open the door, counsel made a strategic decision not to present his testimony. (T 2848). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" Strickland, 466 U.S. at 690. As Petitioner has failed to show trial counsel's decision not to call Mr. VanBrackle fell below that of reasonable competent counsel, this claim fails.

The court further finds Petitioner has failed to establish prejudice resulting from counsel's decision to not call Mr. VanBrackle to testify about Petitioner's remorse. Mr. VanBrackle was a risky witness to put on the stand since he was living with Susan Pittman's son and was not always viewed as a positive witness by counsel. For these reasons, there is a significant possibility that Mr. VanBrackle would have "opened the door" to impeachment with Petitioner's second, more damaging, suppressed statement to the police. Petitioner's second statement coming into evidence would have undercut any remorse argument Petitioner would have garnered. Moreover, as the evidence in aggravation was highly persuasive, Petitioner cannot establish that there is a reasonable probability that the outcome of his sentencing would

have been different had evidence of Petitioner's remorse been presented through Mr. VanBrackle. Therefore, this claim is denied.

6) Failure to Present Tony Raby, Linda Herman, and Sean Proctor

In **Claim I(B)(2)**, Petitioner faults counsel for not presenting the testimony of Tony Raby, Linda Herman, and Sean Proctor.[41] Id. Contrary to Petitioner's claims, the court finds the record shows trial counsel made concerted efforts to contact and interview all three witnesses, but were either unable to locate them, the witnesses refused to cooperate and testify on Petitioner's behalf, or trial counsel made a strategic decision not to call them to testify after thorough investigation. Thus, Petitioner has failed to demonstrate deficient performance or resulting prejudice.

Petitioner alleges that trial counsel were ineffective in failing to present Petitioner's half-brother, Tony Raby, as a witness during the sentencing phase of trial. Petitioner claims that Mr. Raby's testimony would have illustrated what it was like to grow up with Petitioner's parents and stepfather. (PHB 75). The record shows that trial counsel and Ms. Davis attempted to contact Mr. Raby by telephone and left messages for him. (HT 5:900-901; 260:72562; 263:73283). However, despite their concerted efforts, the defense team was never able to locate Mr. Raby. (HT 1:154; 2:310; 5:900-901; 238:65773-65774; 254:70748; 305:85866).

Petitioner criticizes trial counsel for not making contact with Mr. Raby through Petitioner's mother. (PHB 75). However, the record demonstrates Mr. Raby was never contacted by Petitioner's mother or grandmother about Petitioner's case and according to Mr. Raby, they were "afraid [he] would tell the truth and air the family's dirty laundry." (HT 4:631-

[41] Petitioner also mentions that counsel did not call Donald Stinski and Frank Sutton, Petitioner's brother and stepfather, to testify. To the extent Petitioner is claiming that trial counsel were ineffective in failing to have Donald Stinski and Frank Sutton testify, Petitioner has failed to establish that counsel were unreasonable or that he was prejudiced.

634). Mr. Raby did not learn about Petitioner's trial until it was over. Id. Therefore, Petitioner has failed to demonstrate that attempting to contact Mr. Raby through Petitioner's mother would have been successful. Furthermore, as Mr. Raby's testimony would have been largely cumulative of testimony counsel presented through numerous witnesses at Petitioner's trial, Petitioner is unable to show resulting prejudice under Strickland. (See HT 4:596-649).

Petitioner also alleges trial counsel were ineffective in failing to present testimony from Linda Herman, Petitioner's principal at Windsor Forest High School. However, 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. (HT 254:70793-70805; 260:72399-72411). 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." (HT 254:70800). 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." Id. This statement was corroborated by Petitioner, who reported to Ms. Davis that he tried to re-enroll in school and was told by Ms. Herman that they "don't want your kind in here." (HT 259:72332). Thus, Petitioner has failed to establish deficiency or prejudice as to this witness.

Petitioner also faults trial counsel in not presenting the testimony of Sean Proctor, a friend of Petitioner's from Savannah. The record shows Ms. Davis initially interviewed Mr. Proctor on October 30, 2003. (HT 319:90225-90226). 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." (HT 319:90225). 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. (HT 263:73282, 73289, 73299). Mr. Schiavone made the strategic decision that Mr. Proctor would not be called as a witness. (HT 1:206-207; 2:320). Mr. Schiavone told Mr. Sparger, "We don't want him. We need to get him out of here." (HT 2:320). 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 Darryl, but we do not want you to try to describe him as the perfect All-American teenager, if he was actually something quite different." (HT 321:90951). Thus, Petitioner has failed to establish deficiency or prejudice as to this witness.

As repeatedly held by the Georgia Supreme Court, "[i]t is well established that the decision as to which defense witnesses to call is a matter of trial strategy and tactics." Humphrey v. Nance, 293 Ga. 189, 220 (2013) (quoting Hubbard v. State, 285 Ga. 791, 794 (2009)). The court concludes Petitioner has failed to demonstrate that trial counsel's performance in the investigation of potential mitigation witnesses was below that of reasonable competent counsel, and accordingly, his claim is denied.

7) Inexperience of Attorney Sparger as Lead Counsel

Petitioner urges the court to consider attorney Sparger's lack of previous experience as lead counsel in a death penalty case. Mr. Sparger served as lead attorney during mitigation. In support of his claim that Mr. Sparger was ineffective, Petitioner notes that: (1) Mr. Sparger was

inexperienced as lead counsel, (PHB 37-38); (2) Mr. Sparger provided self-critical testimony as to his nervousness and indicated some reservation as to whether the decision to have him lead mitigation "hurt" Petitioner, (PHB 37-38); (3) at least one other witnesses was critical of Mr. Sparger's performance, (PHB 53); (4) the more experienced attorney, Mr. Schiavone, was not in court throughout the sentencing phase, (PHB 53); and, (5) Mr. Sparger's closing was "rambling and incoherent." (PHB 58). The court concludes that Mr. Sparger's presentation of mitigation evidence was substantively sound and any stylistic deficiency was not substantial or prejudicial.

At the time of Petitioner's trial Mr. Sparger had practiced law, almost exclusively in the area of criminal defense, for over fourteen years. (HT 1:119). Additionally, Mr. Sparger had assisted with two death penalty trials to verdict, one of which he was present during the entire trial. (RIR 164; HT 1:128).[42] The record is also quite clear that, while attorney Schiavonne was "in and out" of the courtroom, Mr. Schiavonne was "working out there with witnesses" throughout the mitigation phase when he was not present in the courtroom. (T 2456). In fact, the record notes Mr. Schiavonne's continual presence in the courtroom during mitigation presentation, particularly when objections and/or legal discussions were underway. (T 2286, 2309, 2456, 2714-2727, 2773, 2784, 2787, 2792, 2845-47).

"Every experienced criminal defense attorney once tried his first criminal case." United States v. Cronic, 466 U.S. 648, 665 (1984). There is no presumption of ineffectiveness based upon trial counsel's inexperience. Stano v. Dugger, 921 F.2d 1125, 1153 (11th Cir. 1991) (citing United States v. Cronic, 466 U.S. 648, 665 (1984)); see also Dulcio v. State, 292 Ga. 645, 651 (2013); Simmons v. State, 291 Ga. 705 (2012); Leggett v. State, 241 Ga. 237 (1978). Inexperience "does not constitute ineffectiveness per se: a defendant must still make the two-part

[42] A thorough outline of Mr. Sparger's experience with criminal law is contained in Part IV, Section B of this order.

showing of deficient performance and prejudice." Burden v. Zant, 903 F2d. 1352, 1361 (11th Cir. 1990), *reversed on other grounds by* Burden v. Zant, 498 U.S. 433 (1991). The court finds that Mr. Sparger was sufficiently experienced as a criminal lawyer and in death penalty cases to serve on Petitioner's case. See Cook v. State, 255 Ga. 565 (1986) (finding no ineffective assistance of counsel where attorney had over 10 years of experience including service as assistant solicitor and magistrate court judge, but no death penalty experience); Hall v. Lee, 286 Ga. 79 (2009) (finding no ineffective assistance of counsel where lead counsel and co-counsel had no death penalty experience prior to appointment on petitioner's case).

Mr. Sparger's critique of his performance is of little consequence. Petitioner must demonstrate particular acts or omissions of trial counsel which were below the objective standard of reasonableness under Strickland. It has been noted by the Georgia Supreme Court that "an attorney's testimony on such an issue is not determinative." Humphrey v. State, 193 Ga. 189, 211 (2013).

The Supreme Court has repeatedly held that there is no "checklist for judicial evaluation of attorney performance." Strickland at 688. Furthermore, in Strickland, the Supreme Court instructed:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

Taken as a whole, counsel's performance, even if not flawless, still does not fall "outside the wide range of professionally competent assistance." Strickland at 690. Thus, the court finds Petitioner has failed to demonstrate deficiency of counsel's sentencing phase performance.

D. LACK OF SENTENCING PHASE PREJUDICE

Petitioner alleges he has established prejudice for his sentencing phase ineffectiveness claims and argues trial counsel "failed to 'connect the dots' and explain the connection between [Petitioner's] life history, his developmental deficits and his participation in the crime." (PHB 83). However, the record reflects that trial counsel presented substantial mitigation evidence, including expert testimony regarding several mental health diagnoses and some testimony as to frontal lobe development. Although the additional testimony presented by Petitioner has mitigation value, much of it is substantially cumulative of Dr. Weilenman's testimony at trial. Considering the overwhelming evidence in aggravation, the court concludes that the new evidence of Petitioner's subtle neurological impairments, even when considered together with the other mitigating evidence presented at trial, would not in reasonable probability have changed the outcome of the sentencing phase.

1) Trial Counsel Presented Substantial Mitigation Testimony

Trial counsel's presentation during the sentencing phase provided the jury with an exhaustive overview of Petitioner's life history through the testimony of twenty-six witnesses. Counsel's presentation of Petitioner's life history was lengthy, detailed, and at times compelling. As evidenced above, contrary to the claims of Petitioner, the record is clear that trial counsel presented an extensive and detailed account of Petitioner's background at trial including the abuse and neglect he was subjected to; and provided an explanation to the jury for Petitioner's participation in the crime. Petitioner suffered no prejudice by this presentation.

2) Petitioner's Habeas Testimony is Largely Cumulative

In alleging he has established Strickland prejudice, Petitioner claims "had the jury heard all the evidence, including the evidence presented at the evidentiary hearing that Mr. Sparger did

not present," there is a reasonable probability the outcome of the sentencing phase of trial would have been different. (PHB 83). However, the court finds that the information Petitioner faults trial counsel for not presenting is largely cumulative of that presented at trial and thus would not have created a reasonable probability of a different outcome.

In state habeas proceedings, Petitioner presented the testimony of Dr. Joette James, Dr. Peter Ash, and Dr. James Garbino, to "explain how [Petitioner's] abusive and neglectful background and deficits in his brain development hindered his ability to react and adapt to circumstances at the Pittman home." (PHB 22). Similar to the conclusion of Dr. Weilenman presented at trial and detailed above regarding Petitioner's limitations in executive functioning and impulse control, Dr. James's conclusions focused upon Petitioner's alleged weaknesses in executive functioning which "limit the ability to change or revise a plan of action." (PHB 23).

Petitioner also claims Dr. Ash could have presented testimony that prior to the crimes, Petitioner had no history of violence toward others and seemed to be a non-violent person; and that at the time of the crime, he was functioning at an adolescent level. (PHB 25-26). As previously shown, consistent with these conclusions, Dr. Weilenman testified at trial regarding Petitioner's social immaturity; and numerous witnesses, including a social worker, testified as to Petitioner's non-violent nature and cooperative manner.

Petitioner argues Dr. Garbarino could have testified that the abuse and neglect Petitioner suffered during his childhood cumulatively "undermined [Petitioner's] development as a child, and then, as an adolescent impaired his ability to be a successful adolescent and move into adulthood successfully." (PHB 33). Consistent with Dr. Garbarino's findings, the record reflects that trial counsel's sentencing phase strategy was to demonstrate the abuse and neglect Petitioner was subjected to and its impact. Additionally, Dr. Weilenman's conclusions are

largely consistent with Dr. Garbarino's findings regarding Petitioner's development. The court finds it was well within the ability of jurors to discern that such pervasive abuse and neglect as presented at trial would have an effect upon Petitioner, particularly taken in conjunction with Dr. Weilenman's testimony.

"[T]he 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. Dept of Corr., 593 F.3d 1217, 1242 (11th Cir. 2010) The fact that Petitioner's new expert witnesses may provide additional details regarding similar conclusions does not equate to a showing of prejudice. Where the proposed expert testimony or evidence is largely cumulative as here, the Georgia Supreme Court has consistently held that trial counsel is not ineffective. See Schofield v. Holsey, 281 Ga. 809, 814 (2007); see also Barrett v. State, 292 Ga. 160, 188 (2012). Furthermore, the Eleventh Circuit Court of Appeals has stated:

> Our decision in Herring v. Secretary, Department of Corrections, 397 F.3d 1338 (11th Cir. 2005), is instructive. In Herring, the petitioner argued, among other things, that his trial counsel was deficient and he was prejudiced because his counsel did not "introduce two psychological reports that diagnosed him as suffering from retardation and other organic neurological disorders." Id. at 1351. We held that the petitioner had not shown prejudice because, among other things, the reports were "cumulative" of the petitioner's mother's trial testimony that he had a low IQ and a learning disability. Id. Similar to the jury in Herring, the jury at the sentencing phase in this case heard that Holsey has limited intelligence, functions in the borderline mental retardation range, and performed poorly in school. Some expert testimony diagnosing Holsey with mild mental retardation (contradicted by other expert testimony that he is not mentally retarded) or explaining the term "borderline mental retardation" does not alter the cumulative nature of the rest of the additional evidence about Holsey's limited intelligence.

Holsey v. Warden, 694 F.3d 1230, 1264 (11th Cir. 2012).

Similarly, much of the evidence presented by Petitioner during his habeas evidentiary hearing is cumulative. The additional scientific testimony may have provided a more thorough

explanation of Petitioner's immaturity and tendency to follow others; however, the court finds that such evidence would not have been compelling enough to have made a difference in outcome.

3) Extensive Nature of Statutory Aggravators

Given the horrific nature of the case, the facts in aggravation are extensive. As the Georgia Supreme Court found:

> 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.

Stinski, 286 Ga. at 840-841. As previously shown, multiple statutory aggravators were found by the jury and were amply supported by the evidence including: 1) that the murder of Susan Pittman was committed while Petitioner was engaged in the commission of a burglary; 2) that

the murder of Susan Pittman was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind of Petitioner; 3) that 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) that the murder of Kimberly Pittman was committed while Petitioner was engaged in the commission of another capital felony (murder of Susan Pittman); 5) that the murder of Kimberly Pittman was committed while Petitioner was engaged in the commission of a burglary; 6) that the murder of Kimberly Pittman was committed while Petitioner was engaged in the commission of arson in the first degree; 7) that the murder of Kimberly Pittman was outrageously or wantonly vile, horrible or inhuman in that it involved torture to the victim before death; 8) that the murder of Kimberly Pittman was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind of Petitioner; and 9) that 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. (R 1694-1697).

With particular regard to death penalty sentences, in determining prejudice, "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." Strickland at 695. "In conducting this review, this Court must consider the totality of the available mitigating evidence in reweighing it against the evidence in aggravation, while being mindful that a verdict or conclusion with overwhelming record support is less likely to have been affected by errors than one that is only weakly supported by the record." Sears v. Humphrey, 294 Ga. 117, 131 (2013). Given trial counsel's extensive mitigation presentation, the cumulative nature of the evidence proffered in state habeas proceedings by Petitioner, and the extensive evidence in aggravation, the court finds Petitioner has failed establish the prejudice necessary to

prevail on his claims that trial counsel were ineffective in the sentencing phase of trial. Therefore, Petitioner's claims are denied.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW- CLAIMS THAT ARE *RES JUDICATA*

The court finds that the following claims are not reviewable based on the doctrine of *res judicata*, as the claims were raised and litigated adversely to Petitioner in his direct appeal to the Georgia Supreme Court. Issues raised and litigated on direct appeal will not be reviewed in a habeas corpus proceeding. Elrod v. Ault, 231 Ga. 750 (1974); Gunter v Hickman, 256 Ga. 315 (1986); Hance v. Kemp, 258 Ga. 649(6) (1988); Roulain v. Martin, 266 Ga. 353 (1996). Specifically, the court finds that the following claims raised in the instant petition were litigated adversely to Petitioner on direct appeal in Stinski v. State, 286 Ga. 839 (2010):

> That **portion of Claim II**, wherein Petitioner alleges that the prosecution made improper and prejudicial remarks during its argument at the guilt-innocence phase of Petitioner's trial. Stinski, 286 Ga. at 851 (45);[43]
>
> That **portion of Claim II**, wherein Petitioner alleges that the prosecution made improper and prejudicial remarks during its argument at the penalty phase of Petitioner's trial. Stinski, 286 Ga. at 843 (10), 857-858 (64) (65);[44] and,
>
> That **portion of Claim III**, wherein Petitioner alleges that the trial court improperly struck jurors for cause based on their attitudes about the death penalty. Stinski, 286 Ga. at 846 (26), 847 (33) (34);[45]

[43] To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

[44] To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

[45] To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW- CLAIMS THAT ARE PROCEDURALLY DEFAULTED

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

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

> That **portion of Claim II**, wherein Petitioner alleges the state failed to provide him with unspecified exculpatory and impeachment evidence;
>
> That **portion of Claim III**, wherein Petitioner alleges the trial court improperly failed to strike jurors for cause where their attitudes about the death penalty would have prevented or substantially impaired the performance of their duties as jurors;

Claim IV, wherein Petitioner alleges the prosecution used its preemptory jury strikes in a discriminatory manner; and,

Claim V, wherein Petitioner alleges that the jurors engaged in misconduct, including:

a) improperly considered matters extraneous to the trial;

b) gave false or misleading responses on voir dire;

c) harbored improper biases that infected their deliberations;

d) were improperly exposed to prejudicial opinions of third parties;

e) had improper communications with third parties, jury bailiffs, and court clerks; and,

f) improperly prejudged the guilt-innocence and penalty phases of Petitioner's trial.

IX. FINDINGS OF FACT AND CONCLUSIONS OF LAW- CLAIMS THAT ARE NON-COGNIZABLE

This court finds the following claims raised by Petitioner fail to allege grounds which would constitute a constitutional violation in the proceedings that resulted in Petitioner's convictions and sentences, and are therefore barred from review by this court as non-cognizable under O.C.G.A. § 9-14-42(a).

1) Petitioner's Claim that His Execution Would Be Cruel and Unusual Punishment As he is the Equivalent of an Adolescent is Non-Cognizable

In **Claim VI** of his amended petition, Petitioner claims the his execution would be cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution as his cognitive and emotional impairments allegedly rendered him the functional equivalent of a juvenile at the time of the crimes. The court finds that this allegation fails to allege a constitutional violation in the proceedings which resulted in Petitioner's conviction and sentence. Accordingly, this claim is barred from review by this court as non-cognizable under O.C.G.A. § 9-14-42(a).

Even if the court were to look at the merits of Petitioner's claim, it would still fail as Petitioner himself conceded that he was eighteen years and nine months old at the time of the crimes. In Rogers v. State, the Georgia Supreme Court held:

> Rogers's death sentence does 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. *Roper v. Simmons*, 543 U. S. 551, 574 (III) (B) (125 S. Ct. 1183, 161 LE2d 1) (2005). That Court recognized that "a line must be drawn" and "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." Id. at 574.

282 Ga. 659, 660(2) (2007). Petitioner provides no legal support for extending the protections of Roper 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.

2) Petitioner's Claim that Georgia's Method of Execution Amounts to Cruel and Unusual Punishment is Non-Cognizable

In **Claim VII** of his amended petition, Petitioner claims that his execution by lethal injection would be cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 1, ¶ 17 of the Georgia Constitution. The Georgia Supreme Court has addressed whether this claim was properly brought in a habeas action and held:

> A habeas petition may only allege constitutional defects in a conviction or sentence itself, not defects in the manner in which a sentence is carried out by various state officers. See OCGA § 9-14-42 (a) ("Any person imprisoned by virtue of a sentence imposed by a state court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of this state may institute a proceeding under this article [governing habeas petitions]."). Accordingly, we hold that challenges to the choice of drug or drugs to be used to carry out death sentences, which choice again is the responsibility of the Department of

> Corrections, along with related claims concerning the manner in which such drugs are procured and how information about the procurement process is managed, should be raised against the state officers responsible for such matters in the superior court where venue is appropriate for suit against them, rather than in a habeas court. See Hill v. McDonough, 547 U. S. 573, 580 (II) (126 SCt 2096, 165 LE2d 44) (2006) (holding that federal lethal injection claims should be brought in a civil rights action rather than as a habeas claim).

Owens v. Hill, 295 Ga. 302, 306 (2014). Accordingly, the court finds that this claim is not proper in habeas corpus.

Furthermore, even if the court were to look to the merits of this claim, any ruling would be barred as it is *res judicata*. On direct appeal the Georgia Supreme Court held:

> We have previously held that evidence offered in other death penalty cases which was admitted by stipulation in Stinski's case fails to prove that Georgia's method of lethal injection is unconstitutional. O'Kelley v. State, 284 Ga. 758, 769-770(4) (2008)] (citing Baze v. Rees, 553 U.S. 35 (170 L. Ed. 2d 420, 128 S. Ct. 1520) (2008)).

Stinski, 286 Ga. at 844. Thus, even if this issue was cognizable in habeas corpus, it would be *res judicata* and barred from this court's review.

X. CONCLUSION

After considering Petitioner's allegations in the habeas corpus petition, the evidence presented at the habeas corpus hearing, and the argument presented to this court in the parties' briefs, this court concludes that Petitioner has failed to carry his burden of proof in demonstrating any denial of his constitutional rights.

WHEREFORE, it is hereby ORDERED that the petition for a writ of habeas corpus is DENIED and that Petitioner be remanded to the custody of Respondent for the execution of his lawful sentence. The Clerk is directed to mail a copy of this Order to counsel for the parties.

SO ORDERED, this 15 day of January, 2017.

HONORABLE W. JAMES SIZEMORE, JR.
Sitting by Designation in Butts County Superior Court