No. 13-8725

IN THE SUPREME COURT OF THE UNITED STATES

DEMARCUS ALI SEARS,

PETITIONER,

v.

BRUCE CHATMAN, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

SAMUEL S. OLENS
Attorney General

BETH A. BURTON
Deputy Assistant Attorney General

SABRINA D. GRAHAM
Senior Assistant Attorney General
(*Counsel for Respondent*)

Please serve:
Sabrina D. Graham
Senior Assistant Attorney General
40 Capitol Square
Atlanta, Georgia 30334-1300
(404) 656-7659
Facsimile (404) 651-6459

QUESTIONS PRESENTED

1. **SHOULD THIS COURT DENY CERTIORARI TO REVIEW THE STATE COURT'S DECISION REGARDING PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THAT IN ACCORD WITH THIS COURT'S PRECEDENT?**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

I. STATEMENT OF THE CASE

Petitioner, Demarcus Ali Sears, was convicted by a jury of kidnapping with bodily injury and armed robbery on September 22, 1993, and was sentenced to death for the kidnapping with bodily injury and life in prison for armed robbery on September 25, 1993. Petitioner's motion for new trial was denied on July 18, 1996. Petitioner filed his notice of appeal on August 19, 1996. The Georgia Supreme Court affirmed Petitioner's convictions on December 3, 1997, but remanded the case for further development of the record with regard to potential jury misconduct during the sentencing phase. Sears v. State, 268 Ga. 759 (1997).

On March 15, 1999, the Georgia Supreme Court found that the jury issues did not violate Petitioner's constitutional rights and affirmed the imposition of the death sentence.

Petitioner's petition for writ of certiorari was denied by this Court on October 12, 1999. Sears v. Georgia, 528 U.S. 934 (1999), *rehearing denied,* 528 U.S. 1040 (1999).

On January 13, 2000, Petitioner filed his state habeas corpus petition. An evidentiary hearing was held on January 19, 2006. Both parties subsequently filed post-hearing briefs focusing specifically on addressing five of Petitioner's claims that his constitutional rights were or would be violated by: application of Sabel v. State, 248 Ga. 10 (1981); ineffective assistance of counsel; imposition of the death penalty; the suppression of evidence concerning his co-defendant; and the cumulative error in his trial.

On January 7, 2008, the habeas court held:

> After considering the allegations made in Petitioner's original and amended petitions for Writ of Habeas Corpus, Respondent's original and amended answers, relevant portions of the appellate record, the evidence admitted in the hearing held on this matter on January 19, 2006, the arguments of counsel and the post-hearing

> briefs, this Court concludes Petitioner has failed to demonstrate that any of Petitioner's constitutional rights were denied.

(1/7/2008 habeas order, p. 34). In particular, utilizing the standards of Strickland v. Washington, 466 U.S. 668 (1984), the habeas court rejected Petitioner's ineffective assistance of counsel claim for failing to satisfy the prejudice requirement holding, "Because counsel put forth a reasonable theory with supporting evidence, Petitioner has failed to meet his burden of proving that there is a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced." (1/7/2008 habeas order, p. 30).

On September 28, 2009, the Georgia Supreme Court denied Petitioner's application for certificate of probable cause to appeal the denial of habeas corpus relief. Thereafter, Petitioner filed a petition for writ of certiorari in this Court. On June 29, 2010, this Court issued an opinion vacating the denial of Petitioner's application for certificate of probable cause to appeal in this Court. The Court criticized the original state habeas court's prejudice analysis with regard to the ineffective assistance of counsel claim. The Georgia Supreme Court then issued an order on October 4, 2010, vacating its order and further vacating the habeas judgment.[1] The Georgia Supreme Court "remanded to the Superior Court of Butts County for further proceedings not inconsistent with the opinion of the Supreme Court of the United States."

On January 31, 2011, Petitioner filed his brief in support of habeas corpus relief on remand specifically addressing the original ruling on prejudice, which this Court found "failed to apply the correct prejudice inquiry." Subsequently, Respondent filed his remand brief in opposition to Petitioner's writ of habeas corpus on February 28, 2011. After reviewing the briefs

[1] By vacating the January 2008 judgment of the habeas court, it became necessary for the remand habeas court to rule on all of Petitioner's habeas claims presented in his original and amended petitions.

and the record, the state habeas court, on August 15, 2011, ruled on all of the claims presented in Petitioner's original and amended petitions. Specifically, the state habeas court held:

> This Court adopts the original findings of the previous state habeas court with regard to all claims except Petitioner's claim that he received unconstitutionally ineffective assistance of counsel. With regard to Petitioner's claim of ineffective assistance of counsel, this Court finds that even if Petitioner can prove deficient performance, which this Court does not expressly address, Petitioner failed to prove that he was prejudiced in any way by trial counsel's performance. Under the well-established precedent of Strickland both deficiency and prejudice must be proven by Petitioner in order to find ineffective assistance of counsel, thus as Petitioner has failed to prove at least one of the prongs, this Court denies habeas relief as to this issue.

(8/15/11 habeas order, pp. 3-4).

Subsequently, Petitioner filed his certificate of probable cause to appeal this ruling and Respondent filed his response that the habeas court's ruling was proper. The Georgia Supreme Court granted Petitioner's application to appeal and requested that the parties' appeal briefs specifically address: whether the habeas court ignored the mandate of the United States Supreme Court; whether the habeas court unreasonably discounted evidence, including affidavit testimony; and whether the habeas court erred in finding that Petitioner was not prejudice by counsel's failure to present the evidence of mental impairment and troubled background which was presented during the habeas proceeding. Petitioner's application for a certificate of probable cause to appeal was denied by the Georgia Supreme Court on November 18, 2013.

II. STATEMENT OF FACTS

On direct appeal, this Court summarized the facts underlying Petitioner's convictions and sentences as follows:

> The evidence showed that on the afternoon of October 7, 1990, Demarcus Sears and Phillip Williams were walking through Atlanta because their car had broken down. Wanting to return home to Ohio, where they lived, they walked to a Waffle House in Smyrna and tried to borrow money from several patrons in the restaurant. They told the patrons that their car had broken down and they needed money to go to Cincinnati. Sears carried a black briefcase that contained brass knuckles, knives and a set of old handcuffs that was missing a key. He opened the briefcase in the restaurant and tried to sell some of the items to a customer. After receiving directions and a couple of dollars for bus fare, Sears and Williams walked to a nearby Kroger food store. A police officer observed them loitering near the Kroger parking lot and briefly spoke with them before he left in response to a radio call. Subsequently, they decided to steal a car so they could drive back to Cincinnati.
>
> They spotted the victim, Gloria Wilbur, when she parked her 1985 Buick and entered the Kroger. Around 8:00 p.m., Ms. Wilbur returned to her car and placed her groceries in the trunk. Sears approached her, struck her with the brass knuckles and forced her into the car. Williams then got behind the wheel and they drove north on I-75. Sears told Ms. Wilbur to keep quiet, pulled her into the back seat, and handcuffed her with her hands behind her back. When they stopped for gas and hamburgers, Sears wedged Ms. Wilbur down between the seats and covered her with book bags to prevent discovery. While they were driving through Tennessee, he raped her.
>
> They crossed the border into Kentucky around 1:00 a.m. and stopped the car. Despite her pleas to remain in the car, Sears took the victim into the bushes along I-75 and stabbed her to death. Ms. Wilbur's body was found, still handcuffed, almost a week later. Her abandoned Buick was discovered in a Cincinnati suburb. Bloodstains in the car matched the victim and pubic hair taken from the back seat matched Sears.
>
> Based on an identification by witnesses at the Waffle House and a tip from an Ohio informant, the police questioned Williams and Sears. Both men gave statements. Sears admitted that he had taken the Buick and kidnapped, raped and killed the victim. His statement matched Williams' statement, except that Sears claimed that it was Williams who had struck Ms. Wilbur with the brass knuckles and Williams claimed that it was Sears. Both men stated that only Sears had raped and stabbed her. Sears also consented to a search of his mother's house, where he lived, and was escorted by police to this residence. He took the police to his room

> and showed them the black briefcase and brass knuckles. Williams pled guilty in exchange for two life sentences and testified for the state at Sears' trial.

Sears, 268 Ga. at 759-760.

III. DENIAL OF SPECIFIC "FACTS" SET OUT IN PETITION

Petitioner states that he was administered psychometric testing by Dr. Tony Strickland, a psychologist, which showed: "scores revealed drastic inabilities in nearly every area of executive functioning tested"; one of these scores "reflects that well over 99% of Mr. Sears' same-age peers have more ability to inhibit their impulses"; and, the "pattern" from the testing shows "[h]is ability to organize his choices, assign them relative weight and select among them in a deliberate way is grossly impaired. He instead reacts to problems impulsively and becomes disorganized and confused." (Petitioner's brief, p. 8). Petitioner footnotes the tests that allegedly show these deficiencies. (Petitioner's brief, p. 8, footnote 1). The first test is the Stroop Color and Word test, a test with the words of a color in an ink color that does not correspond to the name of the color, and the test subject must name the color of the ink in which the word is printed instead of the word. The next test is the Trail Making Test which has the test subject draw lines between numbers and letters in a certain order in a timed setting. Finally, Petitioner lists the Symbol Modalities Test, which has a test subject substitute a number, either orally or written, for randomized presentations of geometric figures. When Petitioner's test results and the mental health experts' conclusions are compared to the real world evidence of Petitioner's crimes, as found by the Georgia Supreme Court, their weight is stretched thin:

> The testimony of Drs. Strickland and Dudley loses much of its impact when viewed together with the evidence presented at trial. In addition to mitigating evidence presented by the defense, the jury also had before it the following State's evidence, much of which the prosecuting attorney cited in support of his sentencing phase closing argument that "the man running this show" was Sears: all four witnesses who encountered Sears and Williams on the day of Wilbur's abduction, including three Waffle House customers and a police officer, testified

that Sears did "all the talking"; all three Waffle House customers testified that Sears alone had control of the briefcase containing knives, brass knuckles, and a set of handcuffs; Sears led police to the discovery of the brass knuckles on his bedroom closet shelf and the briefcase containing knives under his bed; Sears alone raped Wilbur with no encouragement or assistance from Williams; and Sears alone murdered Wilbur without encouragement or assistance from Williams.

The evidence also entitled the jury to believe that, prior to leaving the Waffle House and walking to Kroger, Sears had been given bus fare and directions to a shelter and that he had spoken with the shelter's staff, who had agreed that he and Williams could stay there, and that Williams, who knew how to hot-wire an automobile, had suggested that they, instead, steal an unoccupied automobile in order to travel home to Ohio. However, Sears had deliberately rejected those two options and had told Williams that they were going to wait until dark to take a vehicle. Then Sears, who was over six feet tall, patiently waited until Wilbur drove into the Kroger parking lot and selected her — a five feet four inch 59-year-old wife and mother weighing less than 125 pounds — as his victim because her automobile appeared capable of making the trip back to Ohio. He watched Wilbur enter the grocery store and, while she purchased her groceries, he prepared for her abduction and eventual rape and murder by removing from his briefcase a set of brass knuckles, a pair of handcuffs, and a knife with its accompanying holster, which he put around his belt. While waiting, he also had Williams exchange coats with him, which enabled him to avoid the possibility that any witnesses who happened to see his brutal attack of Wilbur in the parking lot would later describe her attacker as wearing a coat like the distinctive "Raiders' jacket" that several witnesses had seen him wearing earlier that day and also enabled him to later tell the police that Williams had access to his brass knuckles because they were in the pocket of his coat that Williams was wearing. He also put on gloves, which he would wear during the entire time that he was inside Wilbur's automobile, thereby preventing the police from connecting him with the vehicle through fingerprints.

After watching Wilbur come out of the store, put her groceries in the trunk, replace her cart, and put her key in her automobile's door lock, Sears assaulted her about the face and head with the brass knuckles as she entered the automobile, knocking her to the ground. Despite Wilbur's desperate attempts to escape, including screaming for help and attempting to climb onto the vehicle's hood, Sears shoved her, bleeding and injured, inside the automobile and picked up Williams, who drove while he pulled Wilbur into the back seat and bound her hands "directly" behind her back with a set of handcuffs that he knew had no key. Sears went through Wilbur's purse, taking her money to purchase gasoline for the trip and fast food for himself and Williams. For a significant portion of the trip, including before entering the gas station and driving through the fast food restaurant, he made Wilbur lie wedged face down on the floorboard between the front and rear seats, covered with overcoats and book bags, and he threatened to

kill her if she made a sound. An hour into the abduction, Sears again climbed into the back seat area with the victim, tore most of the clothing she was wearing off of her, raped her, and then threw her clothing out the window.

Once they reached a deserted stretch of highway in Kentucky, he told Williams to pull over and Wilbur to get out of the automobile. When Wilbur begged to remain inside, Sears told her that he was going to let her go and walked her sixty feet from the highway, down an embankment, and into shoulder-high grass, where he made her get down on the ground while she repeatedly pleaded for her life. Then, taking the knife that he had strapped to his belt prior to her abduction more than five hours earlier, he stabbed her at least twice in the neck, striking a vertebra. Leaving her partially nude body lying where it was not likely to be quickly discovered, he went back to Wilbur's automobile and told Williams that he would drive the rest of the way home, and he "flung" the knife and its holster out the window sometime "through the course of that night." Before abandoning Wilbur's automobile the following morning when it became disabled, he and Williams removed all items connected to them and Wilbur's purse, which they threw in a dumpster. After his arrest and before making a statement to police, he asked two different officers what was "the maximum penalty time ... for these things," and he told police in his statement that he "knew [his] time was coming," that "[he] did what [he] did," and that he was "about to pay [his] consequences."

On cross-examination, the State would surely have inquired of Drs. Strickland and Dudley as to how their theories regarding Sears, including his tendency to become disorganized under stress and his inability to plan and sequence, to reject any actions suggested by Williams, and to appreciate the consequences of his actions, fit into such a scenario. Further, under Sears' proffered new trial strategy, counsel in the sentencing phase closing argument to the jury would have tried to use Sears' frontal lobe abnormalities, particularly the testimony regarding his impulsivity, to reduce his moral culpability for his attack on Wilbur. However, the State would likely have countered by arguing that the evidence showed that this was not, as the defense's mental health experts suggested, an impulse crime in which Sears was suddenly confronted with having a kidnapping victim with which to contend. Rather, the prosecuting attorney would likely have argued, as he actually did at trial, that Sears' crimes "w[ere] planned" and then "carried out." Thus, the jury could reasonably have concluded that "[t]he evidence depicted a man capable of planning and executing criminal acts and willing to victimize anyone who would get in his way, which w[ould have been] more than sufficient" to lead a reasonable jury to find the testimony of Drs. Strickland and Dudley unpersuasive. Nance, 293 Ga. at 219 (II) (C) (3) (b) (iv).

Sears v. Humphrey, 294 Ga. 117, 156-159 (2013).

Petitioner alleges his "school and psychological records also document a significant learning disability." (Petitioner's brief, p. 9). However, the following was found by the Georgia Supreme Court,

> Evelyn Mercer, Sears' ninth grade guidance counselor, testified [at trial] that she knew personally all members of the Sears' family except for Sears' twin sisters. She also testified to the following: Sears was referred to her as a ninth grader because he was having problems completing his schoolwork; after he was tested by the psychologist and was "deemed to be a learning disability student,"n15 he was placed in learning disability tutoring classes; when he continued to have "self-destructing" problems, such as talking, making noises, or disturbing those around him, he was placed in an S.B.H. class for grade ten
>
> n15 **There is no evidence in the record that Sears' "learning disability" has ever been diagnosed.**

Sears, 294 Ga. at 135 (emphasis added). Moreover, in support of his allegation that his "psychological records also document a significant learning disability," Petitioner cites to the testimony of Dr. Strickland. (Petitioner's brief, p. 9, citing, HT 44). However, Dr. Strickland did not testify to this, instead he stated that Petitioner's school records showed he had significant problems with his "behavior" not that he had significant learning disabilities.[2] (HT 44)

Petitioner alleges that his "frontal lobe abnormality" is "tied to his history of .... traumatic insults to the front of his skull during childhood" and "chemical insults" from "ingest[ing] cocaine as an adolescent." (Petitioner's brief, p. 10). Regarding the "traumatic insults" to his skull, the Georgia Supreme Court found there was a lack of medical records in support, and even assuming he did receive injuries to his head, as he did have scars on his head, this did not prove they were of the nature to cause permanent damage:

> Regarding Sears' history of brain trauma, Sears contends that the habeas court made a clearly erroneous factual finding that there was "no concrete evidence" to support the "possible head injuries" upon which Dr. Strickland partly relied. Our

[2] This point demonstrates a chronic theme throughout Petitioner's habeas proceeding, the constant over exaggeration by Petitioner of his mitigating evidence.

> review shows that the only records of medical treatment received by Sears before his incarceration that are in the record concern his burned hand at age 15, and Dr. Strickland reported that Sears told him that this was the only occasion that he had ever been hospitalized. Thus, Dr. Strickland testified, he relied on Sears' self-reporting, family affidavits, and the fact that Sears has two scars on his head to verify his history of head injuries.
>
> According to the affidavit testimony, Sears was treated at a hospital after he was hit in the head with a golf club at age eight or nine, after he hit his head on an end table, and after he lost consciousness as the result of a head injury suffered in a skating rink accident. Certainly, scars on Sears' head coupled with testimony describing personal knowledge of specific incidents in which Sears suffered injuries to his head constitute "concrete" evidence that Sears at some point in his life suffered head injuries; however, even assuming that the habeas court's factual finding here is clearly erroneous, we do not find the error significant. In his report, Dr. Strickland relied on the skating rink and golf club incidents and an incident apparently self-reported by Sears and not supported elsewhere in the record that he was struck in the head with a hatchet. At the evidentiary hearing, he also testified that "[Sears] would frequently ingest [drugs] to the point where [he] would pass out and would strike [his] head[ ]," which also has no support in the record. The habeas court was authorized to consider the evidence upon which Dr. Strickland's opinion was based and, specifically, to consider that Sears submitted no medical records to verify the severity of these head injuries or to show whether Sears could have possibly suffered brain injuries as a result of these head injuries.

Sears, 294 Ga. at 149-150.

The Georgia Supreme Court also conducted a thorough review of the evidence in support of Petitioner's allegations that his cocaine ingestion could have contributed to his brain damage, and found it lacking:

> (iv) Evidence of Marijuana and Cocaine Abuse
>
> Unquestionably, trial counsel were aware of Sears' drug use, because they argued, as Sears testified at the hearing on the admissibility of his pretrial statement, that Sears' statement was given while he was under the influence of drugs. However, Sears denied being under the influence of drugs or alcohol at the time of the crimes in his statement to police, and there is no evidence to the contrary. Moreover, a police officer testified at trial that Sears told her after his arrest that he did not use drugs. However, Sears alleges that affidavit testimony that he submitted shows that he regularly abused marijuana and cocaine around the time of the crimes. In that respect, a review of the testimony of Kenneth Burns, Sr., and his son, William,n23 shows the following: at age "16 or 17," Sears began smoking marijuana with Burns, Sr., William, William's brother, and Demetrius at

Burns' house; neither Burns, Sr., nor William testified as to how much marijuana Sears smoked; and, while both of them testified that Sears "had access" to cocaine through Demetrius, neither of them testified that Sears used cocaine.

n23 Both Kenneth Burns, Sr., and William Burns had felony convictions at the time of Sears' trial, and their testimony would have been subject to impeachment. See Witcher, 260 Ga. at 248.

Sears friend, Rodney Tillman, testified that he and Sears smoked "weed" together every morning at Sears' house. He also testified that, because Demetrius smoked "primos"n24 and thus had them around the Sears' home, he "imagine[d]" that Sears also smoked them. Demetrius, in fact, testified that Sears wanted to participate in dealing drugs with him but that he considered Sears "too slow and too odd to run with [him]" and "brushed him off" and that Sears got in trouble for bringing "fake" drugs to school after Demetrius was expelled from high school for selling drugs there. However, the only testimony that Demetrius provided regarding Sears' drug use was that he "used to … smoke up … every day" with "Rodney," and the only "Rodney," i.e., Rodney Tillman, who testified in the habeas proceedings testified only that he smoked "weed" with Sears. Accordingly, the evidence presented in the habeas proceedings shows only that Sears smoked marijuana regularly beginning as early as 16 years of age and does not show that he ever used cocaine.

n24 One of Sears' habeas mental health experts testified that "primos" are marijuana cigarettes laced with cocaine.

***

We also find noteworthy Dr. Strickland's reliance on Sears' "significant" drug abuse history, particularly his abuse of cocaine, as a cause of his frontal lobe deficits. With respect to the significance of Sears' abuse of cocaine to his diagnosis, Dr. Strickland testified that "every time you ingest a primo, there is another insult to the brain," that "[t]he brain does not make the distinction between … blunt force trauma … [and] a substance-induced insult to the brain," and that the result is that "[t]he neurochemistry is still compromised, particularly if you're ingesting a compound … such as cocaine, which causes blood vessels to constrict." However, Dr. Strickland acknowledged that he relied upon Sears' self-reporting for the information that he had a "significant history of marijuana and cocaine use that began at [ages] 12 to 13 and increased in its intensity through ages 14 to 18 up to incarceration" and that he did not review any documents or interview anyone who corroborated Sears' account. At trial, the State would certainly have challenged Dr. Strickland's diagnosis, given the fact that there was no testimony that Sears ever used cocaine or that his marijuana use began before the age of 16.

Sears, 294 Ga. at 146-147, 150.

Petitioner states, "Dr. Dudley interviewed Sears concerning the crime, and found an absence of deliberative decision-making on Mr. Sears' part at the time of the crime." This completely misrepresents the record as found by the Georgia Supreme Court:

> We also find it significant that Dr. Dudley attributed Sears' actions at the time of the crimes to his cognitive deficits and personality disorder but, as the habeas court found, "[w]hen confronted with the particulars of [Sears'] crime[s], ... Dr. Dudley admitted that [Sears] would not discuss the crime with him." Sears contends that the habeas court's finding is clearly erroneous. We disagree. Although Dr. Dudley responded affirmatively when asked whether Sears provided him with "the factual scenario of how the crime played out," his testimony explaining his answer shows that he was referring to the fact that he and Sears "talked about the whole trip down here [from Ohio to Georgia] and what was the planning of the trip down here and what happened with the trip, where the plans fell through," in other words, how Sears' and Williams' "poor planning" led to their being stranded in Georgia. Dr. Dudley also testified that Sears told him that Williams attacked the victim in the parking lot and forced her into the automobile with them, which was consistent with his confession.
>
> However, when asked about the return trip to Ohio made in the victim's automobile, Dr. Dudley testified to the following: he and Sears did not talk "that much" about that trip or the facts of the crime; he "more or less" tried to talk with Sears about those matters by asking him what they did on the return trip to Ohio; Sears "talked about traveling to Ohio" but "was unclear about the rape" and "unclear" about the murder other than "that [the victim] ended up in the woods"; he asked Sears about what happened when he let the victim out of the automobile, and Sears "didn't want to talk about it"; and, while he asked Sears about what he said in his confession, he only "discussed the circumstances of it." Thus, the habeas court's finding that Dr. Dudley admitted that Sears would not discuss the facts of the crime with him is not clearly erroneous, and we conclude that this testimony would discredit Dr. Dudley's opinion that Sears' deficits were responsible for his behavior at that time.

Sears, 294 Ga. at 151-152 .

Petitioner alleges he and "his brother were often left in the care of an adolescent male cousin who sexually abused them." (Petitioner's brief, p. 12). However, the Georgia Supreme Court found the following regarding Petitioner's alleged sexual abuse:

> (ii) Evidence of Sexual Abuse

Demetrius Sears stated in his affidavit that, as children, their "older teenage[d]" cousin took the younger cousins one at a time into a closet while playing "hide and seek" in order to touch them inappropriately, that there were "plenty of times when [this cousin] had [Sears] in the closet," that he did not know whether Sears was able "to wiggle away or run off," that he also saw this same cousin put Sears in his lap as a child and rub against him in an inappropriate manner, and that he never told anyone about this abuse until he was a teenager.n20 Sears did not testify in his habeas proceedings, and the only evidence that he himself has ever claimed to have been sexually abused is the hearsay affidavit testimony of Rodney Tillman, Sears' friend, that Sears told him that someone "molested" him and Demetrius when they were young. The remaining affidavits that contain similar testimony are all hearsay based upon Demetrius' statements.n21

n20 Ms. Sears testified that Demetrius did not tell her about these incidents until after Sears' trial.

n21 We also note that another of Sears' cousins testified that the Sears cousins were staying overnight together when she was approximately 14 years old and Sears was "10 or 11" years old, that this same older teenaged cousin entered her bedroom after she was in bed, that she pretended to be asleep, that he attempted to put his hands between her legs and that she locked her legs together, that he left her room, and that she heard him walking down the hall toward where Sears, his brother, and his cousin were sleeping. However, we conclude that a jury would not have found this weak circumstantial evidence significantly persuasive.

We conclude that this evidence would have carried little weight with the jury for several reasons. Regarding Demetrius' testimony, we conclude that the jury would not have found it very persuasive, considering its equivocal nature, Demetrius' obvious interest in his brother's case, and, as previously noted, the fact that he was subject to impeachment based on his prior felony convictions. As to Tillman's hearsay affidavit testimony, he testified that he had only known Sears for a relatively short period of time when he and Sears began to get "high" together on "weed" every morning and that it was during one of their conversations while they were "hanging out" that Sears told him only that "someone" had "molested" him and Demetrius when they were young without providing any further details. Thus, Sears failed to show that this testimony is anything other than unreliable hearsay. See Gissendaner v. State, 272 Ga. 704, 714-715 (12) (532 SE2d 677) (2000) (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). Most significantly, Sears did not report that he had ever been sexually abused to either of the habeas mental health experts who examined him, and, as Dr. Strickland noted in his report and affirmed through his affidavit, Sears denied any sexual abuse to the mental health professionals treating him at the Georgia Diagnostic and Classification Center.

Sears, 294 Ga. at 143-144.

Petitioner also alleges that the "effects of Mr. Sears' cognitive impairment and unhealthy home environment were apparent at least as early as the third grade" and that background records from this time show that "nine-year-old Mr. Sears lacked self-confidence and struggled to follow directions, with one examiner noting that Mr. Sears had an 'overbearing' father with 'unrealistic expectations' for his learning-disabled son." (Petitioner's brief, p. 13). This is not an entirely accurate representation of this information, as found by the Georgia Supreme Court:

> Finally, Drs. Dudley and Strickland relied on evidence submitted in the habeas proceedings that Sears had suffered from "significant" mental deficits from an early age. However, there is little evidence in the record to support such a conclusion. As previously discussed, the testimony from family members regarding Sears' "unusual" childhood behavior is not persuasive. As to Sears' school records, a third grade "learning disability evaluation or academic underachievement" assessment reported that Sears was "neurological[ly] normal" and had an "overbearing father with unrealistic expectations for his child." A third grade psychological assessment reported that Sears scored in the average range on the Wechsler Intelligence Scale for Children - Revised but that in the classroom he was functioning on a second grade level in reading and math, and the report "noted that certain behaviors seem[ed] to be interfering with [Sears'] learning process, including poor direction-following, and lack of self-confidence."n26 In an eighth grade evaluation, the teacher who referred Sears for the evaluation due to his difficulty in reading and English, stated that Sears "did not try," "daydreamed, drew pictures, and did not get his work completed." The evaluating psychologist concluded that Sears "was not at that point of his development where he would willingly take responsibility for organizing his schoolwork," "was [not] disciplined enough to be a self-starter and finisher," and "need[ed] a firm, consistent program that insist[ed] that he work first and engage in privileges later."n27 Sears contends that the habeas court erred in concluding that "the jury might reasonably find this information to be aggravating in nature and contradictory to the reports recounted by the witnesses at trial." We agree, because this description of Sears is largely cumulative of what the jury did hear regarding Sears' academic and behavioral struggles at school. Nevertheless, the school records do not provide persuasive support for the testimony of Sears' mental health experts that Sears' struggles at school were the result of significant mental deficits.
>
> n26 This exhibit submitted by Sears is missing the last page, on which the evaluator's conclusions and signature should have appeared.

> n27 As the habeas court noted, this exhibit submitted by Sears is missing a page, which appears to include a key portion of the assessment, including part of the conclusion.

Sears, 294 Ga. at 152-153.

In conclusion of his recitation of his background, Petitioner states, "Jurors heard no evidence of this difficult history nor of Mr. Sears' severe cognitive and psychiatric impairments described above." (Petitioner's brief, p. 14). This is false. As found by the Georgia Supreme Court, the habeas "description of Sears is largely cumulative of what the jury did hear regarding Sears' academic and behavioral struggles at school." Sears, 294 Ga. at 153. For example, "Through Ms. Sears' testimony, the jury also heard about the following: ... the fact that he began having "a lot of behavioral problems" in the ninth grade; his receipt of "special tutoring" in areas in which he struggled and his subsequent placement in a Severe Behavior Handicap class; his withdrawal from and re-enrollment in high school." Id. at 132. As also stated above, "Evelyn Mercer, Sears' ninth grade guidance counselor, testified that ... Sears was referred to her as a ninth grader because he was having problems completing his schoolwork; after he was tested by the psychologist and was "deemed to be a learning disability student," he was placed in learning disability tutoring classes; when he continued to have "self-destructing" problems, such as talking, making noises, or disturbing those around him, he was placed in an S.B.H. class for grade ten." Id. at 135.

IV. REASONS FOR NOT GRANTING THE WRIT

A. CERTIORARI REVIEW SHOULD BE DENIED AS THE STATE COURTS' DECISION WAS IN ACCORD WITH THIS COURT'S MANDATE AND THIS COURT'S PRECEDENT.

Petitioner propounds two competing arguments to this Court in support of his allegation that the state courts, more specifically the Georgia Supreme Court, failed to follow the mandate

of this Court. Petitioner alleges that, pursuant to this Court's mandate, the state court on remand was bound by the factual findings of the 2008 habeas order regarding Petitioner's Sixth Amendment claim and by this Court's holdings and findings of fact in its order remanding the case. In his Statement of the Case, Petitioner argues that this Court only authorized the *judgment* of the 2008 habeas court, i.e. the denial of relief, to be vacated, not the order. (Petitioner's brief, p. 19-20, fn. 5). Subsequently, Petitioner argues in his Reasons for Granting the Writ that this Court's mandate was solely limited to having the state court conduct another prejudice analysis, bound of course by this court's alleged factual findings and the 2008 habeas courts' factual findings. Thus, Petitioner is arguing that only the denial of relief was authorized by this Court to be vacated, but that the state court was to perform an additional prejudice analysis that would substitute for the 2008 habeas court's prejudice finding without vacating that original prejudice determination.

As will be shown below, neither the 2011 habeas court nor the Georgia Supreme Court violated this Court's mandate. This Court returned the case due to an erroneous prejudice analysis by the 2008 habeas court. This Court vacated the Georgia Supreme Court's denial of an Application for Certificate of Probable Cause to Appeal and the Georgia Supreme Court in turn vacated the 2008 habeas order. There is no holding by this Court that its mandate precluded the Georgia Supreme Court from vacating the entire 2008 habeas order. Nor is there any *holding* by this Court in the mandate which precludes the state courts from reviewing the entire record, making their own factual and credibility determinations regarding the evidence and applying that to both prongs of the Strickland analysis. Consequently, as the state courts did not violate this Court's mandate, and as a proper Strickland analysis was conducted, this case fails to present a question worthy of this Court's certiorari jurisdiction.

1. The Georgia Supreme Court Properly Vacated The 2008 Habeas Order.

As stated *supra*, Petitioner alleges this Court only authorized the *denial of relief* by the 2008 habeas order to be vacated not the *order*. Petitioner's interpretation of this Court's mandate appears to be based upon this argument, inexplicably relegated to a footnote, "The *Sears v. Upton* opinion and mandate provides for vacating the *judgment* rendered on the habeas corpus claim, not the 2008 Order or its findings. The only *order* the *Sears v. Upton* mandate vacated was the order denying Petitioner's Application for a Certificate of Probable Cause to Appeal the 2008 order." (Petitioner's brief, p. 29-20, fn. 6) (emphasis in original). Specifically, this Court held, "For the reasons that follow, it is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry we have established for evaluating Sears' Sixth Amendment claim. We therefore grant the petition for writ of certiorari, vacate the judgment, and remand for further proceedings not inconsistent with this opinion." Sears v. Upton, 130 S. Ct. 3259, 3261. This mandate clearly does not state only the *judgment, or denial of relief* as Petitioner seems to have defined it, of the 2008 habeas order is vacated. Moreover, this argument was not presented to the Georgia Supreme Court and is therefore not properly before this Court for review. Petitioner does not cite to any precedent in support of this novel argument. Indeed, how could there be any precedent as it is wholly illogical. If Petitioner's argument were correct and only the denial of relief was vacated, then that would mean the habeas court's prejudice analysis was also not vacated whose error was the reason for the remand.

Putting all of that aside, the Georgia Supreme Court is the court that vacated the habeas court's 2008 order. Upon remand to the Georgia Supreme Court, it properly determined that this Court had vacated its order denying Petitioner's Application for a Certificate of Probable Cause to Appeal, vacated the judgment of the 2008 habeas court and remanded the case for decision.

When Petitioner argued on appeal that the 2008 habeas order was not vacated, the Court explained the order was vacated:

> The Supreme Court then vacated this Court's order denying Sears' application for a certificate of probable cause to appeal and remanded the case for further proceedings not inconsistent with its opinion. Id. Pursuant to the Supreme Court's mandate, this Court vacated the habeas court's judgment and remanded the case to the habeas court for further proceedings not inconsistent with the Supreme Court's mandate.
>
> ***
>
> Finally, Sears contends that the habeas court erred in the 2011 Order by making factual findings and legal conclusions that "cannot be reconciled with prior findings" in the 2008 Order. However, the 2008 Order was vacated, which means that it was nullified or canceled. See Black's Law Dictionary (9th ed. 2009) (defining "vacate" as "[t]o nullify or cancel; make void; invalidate"). Thus, the habeas court was not constrained by the 2008 Order.

Sears, 294 Ga. at 117-118, 122. Petitioner attempts to discredit this finding by stating that this finding was not supported with a reference to an order or precedent. (Petitioner's brief, p. 19). However, the Georgia Supreme Court entered an order on October 4, 2010 stating this Court had vacated the Georgia Supreme Court's judgment in the case and thus: "It is further ordered that the judgment of the Superior Court of Butts County, entered on January 9, 2008, is vacated and that the case is remanded to the Superior Court of Butts County for further proceedings not inconsistent with the opinion of the Supreme Court of the United States." (See Petitioner's Appendix E). The fact that the Georgia Supreme Court did not cite to this order is of no moment. Moreover, Petitioner *has failed* to point to any precedent showing the court's interpretation of this Court's mandate or its own order to be in error.

Consequently, as the Georgia Supreme Court found the 2008 habeas order was vacated, and Petitioner has failed to show this was in violation of this Court's mandate or precedent; Petitioner has failed to present a question worthy of this Court's certiorari jurisdiction.

2. The Georgia Supreme Court's Performance Decision Does Not Violate This Court's Mandate.

Petitioner alleges this Court found trial counsel were deficient and the Georgia Supreme Court's decision in opposite is in violation of this Court's mandate. Without actually stating that this Court found trial counsel was deficient, Petitioner alleges this Court "embrac[ed]" the holding of the 2008 habeas court finding trial counsel's performance to be deficient making it "law of the case." (Petitioner's brief, p. 24). The Georgia Supreme Court rejected this argument, finding this Court had not disposed of either prong of Petitioner's Strickland claim and did not thoroughly review the evidence regarding trial counsel's performance. See Sears, 294 Ga. at 120-121. Petitioner has failed to show that the Georgia Supreme Court's decision was not in compliance with this Court's mandate.

Specifically, the Georgia Supreme Court held the following regarding this Court's mandate and the determination of the performance prong of Petitioner's ineffectiveness claim:

> However, we do not read the language of Sears v. Upton as establishing that the Supreme Court "disposed of" either prong of Sears' ineffective assistance claim. See In re Sanford Fork & Tool Co., 160 U. S. at 256 (stating that "[t]he opinion delivered by th[e Supreme C]ourt, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate"). Rather, we read the remanding opinion as showing that the Supreme Court only assumed for the purposes of its discussion the correctness of the 2008 Order's conclusion that trial counsel conducted a "'constitutionally inadequate'" investigation. Sears v. Upton, 130 S. Ct. at 3261 (stating that the evidence that Sears presented in his habeas proceeding "was not brought to light" at the time of his trial "because — in the words of the state [habeas] court — [Sears'] counsel conducted a penalty phase investigation that was 'on its face ... constitutionally inadequate' " (quoting Sears' App. to Pet. for Cert. 27B (emphasis supplied)); id. at 3264 (II) (stating that "[i]n [the habeas court's] view, the cursory nature of counsel's investigation into mitigation evidence ... was 'on its face ... constitutionally inadequate'" (quoting Sears' App. to Pet. for Cert. 27B (emphasis supplied)).
>
> Our reading of the Supreme Court's opinion is sound. First, the Supreme Court did not explicitly engage with any evidence in the record regarding trial counsel's performance. Compare, e.g., Wiggins v. Smith, 539 U. S. 510, 523-534 (II) (B) (1-3) (123 SCt 2527, 156 LE2d 471) (2003); Williams v. Taylor, 529 U. S. 362,

> 395-396 (IV) (120 SCt 1495, 146 LE2d 389) (2000); Strickland, 466 U. S. at 699 (V). Second, the Supreme Court never stated that it agreed with the habeas court that the assistance rendered by Sears' trial counsel was constitutionally deficient. Compare Kimmelman v. Morrison, 477 U. S. 365, 387 (III) (A) (106 SCt 2574, 91 LE2d 305) (1986) (stating that the Court "agree[d] with the District Court and the Court of Appeals that the assistance rendered [to the defendant] by his trial counsel was constitutionally deficient"). Therefore, we conclude that neither prong of Sears' ineffective assistance of counsel claim was finally disposed of by the Supreme Court.

Sears, 294 Ga. at 120-121. Although this Court did make statements such as "Unsurprisingly, the state postconviction trial court concluded that Sears had demonstrated his counsel's penalty phase investigation was constitutionally deficient" at no point in the Court's order did it set out the facts of trial counsel's actual mitigation investigation or state that it had thoroughly reviewed this evidence. Sears v. Upton, 130 S. Ct. at 3264. In contrast, the Georgia Supreme Court did perform a thorough review, which is not in contradiction of any findings of this Court.

Petitioner alleges that because this Court had the habeas record, which consists of twenty-two volumes, that this Court must have thoroughly reviewed this evidence. However, with all due respect to this Court, it does recite evidence either not supported by the record or not in the record. For example, this Court reports that Petitioner was sexually abused "at the hands of an adolescent male cousin." Sears, 130 S. Ct. at 3262. The record does not support this statement. As correctly found by the Georgia Supreme Court, the record shows that: "Sears did not report that he had ever been sexually abused to either of the habeas mental health experts who examined him"; only one affidavit from a friend containing the hearsay statement of Petitioner alleging he was sexually abused as a child; and the affidavit from Petitioner's brother, a convicted felon, that there was a cousin that sexually abused him personally in a closet and he saw Petitioner also go in the closet with this cousin. Therefore, there was no direct evidence of this alleged abuse, not even from Petitioner, and the speculative evidence was from a source of

questionable reliability. Certainly, this Court's decision does not stand for the proposition that this type of evidence is all that is required to prove sexual abuse. Additionally, the Georgia Supreme Court pointed out that this Court stated that Petitioner's habeas experts "attributed" Petitioner's brain damage to "alcohol abuse in his teens." Sears, 294 Ga. at 122, fn 6. This was clearly in error as the experts did not make this finding and there was no evidence in the record that Petitioner abused alcohol. Id.

Moreover, this Court did not recite any evidence regarding trial counsel's investigation. However, the Georgia Supreme Court thoroughly reviewed the factual findings of the state habeas court regarding trial counsel's performance, and applied those facts to its own legal analysis of performance. The court details trial counsel's actions with regard to investigating background information from those who knew Petitioner:

> At the time of his arrest, Sears was 18 years old, was residing with his parents, and, according to his mother, had recently re-enrolled in high school after having withdrawn from school while in the eleventh grade. Trial counsel testified that they "knew from personal experience that teenage boys are not particularly insightful or reliable," and, therefore, they also sought assistance from Sears' parents concerning his background. They learned that Sears was the second oldest of four children born to Frank and Virginia Sears, both college-educated professionals, and that the family resided in a suburban middle-class neighborhood near Cincinnati.
>
> At Sears' arraignment, Gary obtained funds from the trial court to enable Treadaway and him to travel to Kentucky and Ohio to investigate the case. Trial counsel testified that there was a "need for speedy development of mitigation case evidence so that [counsel] could make an informed decision whether to pursue funds for a [mental health expert]."
>
> ***
>
> Trial counsel also interviewed approximately a dozen potential mitigation witnesses, speaking with each person privately. A review of the transcripts of counsel's audiotaped interviews shows that counsel explored pertinent areas of mitigation, such as Sears' relationship with his mother, his father, and his siblings. The witnesses stated that Sears had "always gotten along fine" with every family member, that he was "a good brother," that he got along "[g]reat" with his twin

> sisters "as far as babysitting [them], taking care of them, [and] being patient with them," and that he also had a good relationship with his older brother, although there was "a little sibling rivalry." Witnesses also stated that Sears' parents were "decent" and "caring people" who had apparently "invested ... a lot in the well being of their children" and that Sears appeared to get along fine with his father, had a "healthy," "excellent[,] and open relationship" with his mother, and "never complained" about either parent.

Sears, 294 Ga. at 124, 125.

The assertions that counsel did not probe the necessary mitigation areas are completely refuted by the record which unequivocally shows that Petitioner's attorneys interviewed these persons for the *purpose* of finding mitigation witnesses and asked the witnesses detailed questions to bring out potentially mitigating evidence.[3] Petitioner also attempts to make much of the fact that these interviews only spanned the length of one day. By doing so, Petitioner is criticizing trial counsel for not knowing that the information these individuals were providing was not entirely accurate.[4] Moreover, Petitioner is attempting to shift the burden from himself to trial counsel. As this Court stated in Strickland:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain

---

[3] As pointed out by Petitioner, trial counsel was unable to interview Petitioner's father in person on that trip as he was in Las Vegas on business. What Petitioner neglects to inform this Court is that Mr. Treadaway testified, however, that counsel spoke with Frank Sears prior to trial and that Frank Sears would not return counsel's phone calls. (Res. Ex. 124, HT 4901, 4906). In addition, Mr. Gary testified that Frank Sears thought Petitioner could kill again and was less than interested in the case. (Res. Ex. 125, HT 5212, 5218).

[4] Additionally, most of Petitioner's arguments are from the 2008 habeas order. However, that order was vacated and does not set the standard for determining whether trial counsel performed effectively, Strickland does.

> investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland v. Washington, 466 U.S. at 691. Upon initially meeting with his client, trial counsel informed Petitioner that they needed "background, family history, social history, things of that nature." (Res. Ex. 124, HT. 4925). Petitioner would have been well aware of the alleged dysfunction in his family. Yet he failed to prove in habeas that he ever informed trial counsel of this alleged dysfunction, despite their interviews with him. Petitioner's arguments are attempting to take this case far afield of this Court's decision in Strickland.

Trial counsel also investigated Petitioner's mental health. As found by the Georgia Supreme Court:

> Trial counsel also asked whether the potential witnesses knew if Sears suffered from any drug, psychiatric, or behavioral problems. Sears contends that the habeas court ignored evidence that some of these persons expressed concerns about Sears' mental health by concluding that it was "difficult to reconcile" the expert mental health testimony that Sears presented in the habeas proceeding that he was "among the most impaired individuals in the population in terms of his ability to suppress competing impulses and conform behavior only to relevant stimuli" with the fact that no one close to [him], including those trained in mental health professions, ... relayed this information to trial counsel. In this regard, Sears points to two potential witnesses whom trial counsel interviewed, Josie Russell and Sears' ninth grade counselor.n9
>
> n9 Both of these persons testified in the sentencing phase of Sears' trial.
>
> Russell, who identified herself as Sears' neighbor and a psychiatric nurse, told counsel that she had tried to talk Sears into seeing a psychiatrist. When trial counsel asked Russell about the reasons for her concern, she listed the following: Sears told her that he was unable to sleep and that he was "seeing" a psychologist n10 because he was bored with school; all he talked about was the music and recording business; "he wouldn't be with the rest of the kids" but, instead, stood across the street from them "totally engrossed" in himself "with that blank stare on his face"; and she sometimes had difficulty getting his attention to say hello when she passed him. Russell also stated that Sears did not carry drugs on him, that she did not think that his behavior was the result of drug use or that he used

drugs, that she had never seen any violent tendencies in him, that she was "[v]ery much" surprised to hear what he was accused of, and that he was independent, a leader, and "a nice young man."

n10 While Sears' school records show that he was evaluated on at least one occasion by a school psychologist, there are no indications in Sears' school records or in any other exhibits that were submitted in his habeas proceedings that Sears was ever under the care of a psychologist prior to his commission of the crimes.

As to Sears' former counselor, after the counselor told trial counsel that Sears had entered the Severe Behavior Handicap ("S.B.H.") program in high school, trial counsel asked her why Sears' behavior was "like it was." She replied that she "was not quite sure" and that counsel needed to see his test results. However, she continued by explaining that Sears' behavioral problems consisted of his "not seem[ing] able to stay on task all the time," "not concentrat[ing]" if he were in the back of the classroom, and making distracting noises. She added that Sears did not have a problem with authority or any violent tendencies and that he was "courteous" and "a nice person to talk to."

***

We also note that counsel interviewed a variety of people, including neighbors, long-time family friends, Sears' former high school counselor, a woman for whom he had babysat, and a young woman who had attended school with him. Those interviewed stated that they knew Sears personally, that he was frequently in their homes, that they regularly interacted with him, and that they had watched him grow up and had observed his relationship with his parents, his siblings, and people in the community. Several potential witnesses stated that they had often spoken with Sears by telephone since his incarceration. Counsel's notes regarding their interview with Sears' mother indicate that they asked her to obtain Sears' school records, and Gary's file contained the names and addresses of the schools Sears attended and notes summarizing Sears' school history, including that he transferred to a different high school after "encounter[ing] behavior problems," that he had "numerous suspensions" at both schools, that he left school and moved out of his parents' home in October of 1990, and that he returned home a couple of weeks later. Gary's file also contained notes regarding an interview with a close friend of Sears, Sears' juvenile record, Sears' head injuries, Sears' having "had sex" as a nine-year-old, and the backgrounds of Sears' parents and siblings. After Williams entered his plea, the investigator retained by trial counsel interviewed him in an effort to obtain mitigating evidence.

Sears, 294 Ga. at 125-126,127-128. Thus, despite talking with individuals who had known Petitioner his entire life, teachers who had experience with mental health issues, and Petitioner himself, there was not substantial evidence of mental health problems provided to trial counsel.

For entirely strategic reasons, which Petitioner has failed to show were not strategic, trial counsel **and** Petitioner chose to forego a mental health analysis. The Georgia Supreme Court held the following regarding this decision:

> According to counsel, they weighed the pros and cons of pursuing the motion for funds for a psychiatrist, considering Sears' choice, their concerns that Sears might make a statement during an evaluation that could be used against him at trial, their personal observations of Sears and "the house he grew up in," the middle-class environment in which he was raised, and the fact that his parents, "who were normal people," said that there was nothing wrong with him. Counsel then concluded that, all things considered, they could not have Sears examined pretrial "without facing an untenable risk of doing more harm than good." Consequently, trial counsel withdrew the motion for a pretrial psychiatric evaluation but left pending the motion for a presentencing psychiatric examination in the event of a conviction, which counsel testified was designed to mitigate the dilemma posed by Sabel in light of the fact that the State's use against Sears of any statements made by him about the crimes were not likely to be as damaging in the sentencing phase as they would be in the guilt/innocence phase. However, the trial court later denied this motion.
>
> ***
>
> We also agree with the habeas court that, "GA(3)(3) without any indication that [Sears] was suffering from any significant, noticeable disorder," trial counsel made a reasonable strategic decision not to have him evaluated by a mental health expert under the circumstances facing counsel at the time. See Holladay v. Haley, 209 F3d 1243, 1250 (III) (A) (3) (11th Cir. 2000) (explaining that counsel are not required to seek an independent evaluation when the defendant does not display strong evidence of mental problems and that the choice not to do so is a tactical decision that is evaluated for reasonableness in all the circumstances, applying deference to counsel's judgment, under Strickland).

Sears, 294 Ga. at 122-130-131. The Georgia Supreme Court properly applied Strickland. In strong support of this finding is the fact that despite testing and being placed in certain special

education classes, there was no record of major mental health disorder in Petitioner's records that suggested a mitigating diagnosis.

Consequently, Petitioner's disagreement with the state habeas court's fact-findings and the Georgia Supreme Court's application of those facts under Strickland v. Washington to the performance prong of his ineffectiveness claim, does not present an issue warranting this Court's grant of certiorari.

3. The Georgia Supreme Court's Prejudice Analysis Does Not Violate This Court's Mandate.

For several reasons, Petitioner alleges the Georgia Supreme Court's extensive prejudice analysis is in violation of this Court's mandate.[5] The two main reasons identified by Petitioner are his disagreement with the Georgia Supreme Court's decision regarding the weight to be given to Petitioner's evidence and the court's final reweighing of the mitigating and aggravating evidence. Petitioner argues that, due to dicta within the Court's mandate, the Georgia Supreme Court was not authorized to evaluate the weight to be given to Petitioner's evidence in the

---

[5] Petitioner alleges that the prejudice prong of Petitioner's ineffectiveness claims is inextricably intertwined with trial counsel's alleged deficient performance and cannot be analyzed on its own. That is clearly in direct contradiction to this Court's holding in Strickland:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland v. Washington, 466 U.S. 668, 697 (1984).

manner it did. Petitioner also alleges the Georgia Supreme Court failed to perform "a reweighing of the mitigating evidence adduced at trial **together with** the evidence presented at Mr. Sears' trial." (Petitioner's brief, p. 37) (emphasis in original). Despite Petitioner's strongly worded protestations, it is clear that the Georgia Supreme Court performed its prejudice analysis in accord with this Court's decision in Strickland. Additionally, the court's decision was not in violation of this Court's mandate. Accordingly, Petitioner has failed to present a question worthy of this Court's certiorari jurisdiction.

a. The Georgia Supreme Court's Assessment Of The Proper Weight of Petitioner's Mental Health Evidence Was Not In Violation Of This Court's Mandate .

Although this Court at times in Sears v. Upton appears to be making certain credibility or weight determinations regarding the mitigating value of Petitioner's evidence in evaluating whether the 2008 habeas court performed the proper prejudice analysis, these statements are in regard to that court's prejudice determination. That order was vacated. Moreover, if interpreted in the manner done by Petitioner, this would create precedent clearly at odds with Strickland and mandate automatic credibility findings that could be unsupportable.

Petitioner's first argument with the Georgia Supreme Court's decision is its findings regarding his mental health evidence. Petitioner's argument is teetered upon this premise: by this Court citing to a portion of a record with a mental health expert's finding, the lower court was bound to those findings and those findings had to be given weight so tremendous as to completely shadow the aggravating nature of Petitioner's horrendous crimes. This premise therefore wrests from the fact finder the ability to *find facts* and from the Georgia Supreme Court to perform its own reweighing. Certainly, this was not the intent of this Court in Sears v. Upton.

As admitted by Petitioner, the Georgia Supreme Court found four reasons why this evidence would not have created a reasonable probability of a different outcome at trial:

> While the testimony that Sears suffers from some brain impairment and mental health problems is uncontroverted and certainly has potential mitigating value, we conclude that he was not prejudiced by the omission of this evidence at trial for the following reasons: (1) the weakness of much of the evidence upon which Sears' mental health experts relied to support their testimony and diagnoses; (2) the aggravating potential of this evidence; (3) the testimony's inconsistency with the evidence at trial; and (4) the strength of the aggravating circumstances in Sears' case. We expound upon each of these reasons below.

Sears, 294 Ga. at 149. Petitioner states that "each of these bases was previously rejected by this Court." (Petitioner's brief, p. 31). However as this Court did not perform a thorough review of Petitioner's evidence and did not perform an actual prejudice analysis, Petitioner's argument is without merit.

Petitioner alleges that this Court found because the experts spent time with Petitioner and performed a few tests, consequently their final diagnoses were essentially unassailable even if the underlying causes for these diagnoses were not proven with reliability by the evidence.[6] This seems a dangerous precedent to set, especially in the realm of death penalty litigation, which this case perfectly illustrates. As stated in the Denial of Facts, the experts relied upon results from essentially three tests, none of which Petitioner has shown have built in mechanisms to guard against manipulation or malingering. Moreover, the experts used by Petitioner are defense experts by trade. (HT, Vol. 1, pp. 47, 116). With regard to Dr. Richard Dudley, Petitioner's habeas psychiatrist, his mental health testimony has been rejected *many* times despite the fact that he interviewed the petitioner and relied upon testing and background material. See e.g., Reaves v. Sec'y, Fla. Dep't of Corr., 717 F.3d 886, 904-905 (11th Cir. Fla. 2013) (Dudley

[6] Specifically, Petitioner alleges that the background which led to Petitioner's brain damage "is not a necessary factual underpinning to the experts' conclusions." (Petitioner's brief, p. 32).

testified "that that the combined effect of PTSD and acute intoxication prevented Reaves from being able to form the intent to kill the deputy" yet the court found Reaves "undisputed actions and statements before and after the murder prove that he possessed the presence of mind to make a conscious and purposeful decision to kill the deputy"); United States v. Merriweather, 921 F. Supp. 2d 1265, 1272-1273, 1281-282, 1291 (N.D. Ala. 2013) (the court rejected Dudley's opinion that Merriweather was incompetent due in part to Dudley's reliance on background evidence from unreliable sources and crediting only background reports that proved his opinion while ignoring others in contravention); Smith v. Baker, 2012 U.S. Dist. LEXIS 137065, 35-37 (D. Nev. Sept. 25, 2012) (Dudley found "Smith exhibited paranoid and grandiose thinking that compromised his decision-making capabilities and judgment" and the court found Petitioner had not shown a reasonable probability of a different outcome as this evidence could cut both ways, mitigating and aggravating); Swan v. State, 28 A.3d 362, 380, 394, 395 (Del. 2011)("Dudley diagnosed Swan with post-traumatic stress disorder, chronic depression, and cognitive disorder NOS, and explained that those disorders impaired Swan's judgment and decision-making" but the court found "[t]he evidence of brain injury and mental health deficits was, at best, contradictory and the postconviction judge appropriately viewed it with 'extreme skepticism'" and concluded that the "weight of the aggravating circumstances overwhelms the mitigating circumstances which have been presented in this case"). Obviously, a mental health expert's opinion does not rise to the level of canonical deference as argued by Petitioner.

Moreover, the Georgia Supreme Court did not outright reject the mental health experts' diagnoses due to the "weaknesses" in the evidence relied upon by the expert to support their diagnoses. Instead, the Court properly asked whether this evidence would have survived

scrutiny under attack by the State and consideration by the jury.[7] Clearly, if the etiology of a diagnosis is premised upon evidence that lacks reliability, this is a proper avenue of consideration by a jury:

> While Dr. Strickland testified that he relied in part on his neuropsychological testing results and his observations of Sears to diagnose Sears with frontal lobe deficits, he also testified that he did not base his opinion on those two factors alone but also on the fact that the test results were consistent with Sears' "reported history of brain trauma" and "the psychiatric symptomatology and the substance-induced changes in brain function that have been demonstrated" to accompany cocaine abuse. Thus, the strength or weakness of the evidence regarding Sears' history of brain trauma and cocaine abuse is relevant in determining the weight that the jury would likely have given this evidence. See Whatley, 284 Ga. at 565 (V) (A) (considering the testimony of a habeas petitioner's expert "in light of the weaker affidavit testimony upon which that testimony, in part, relied").

Sears, 294 Ga. at 149. This lack of reliability does not make the evidence inadmissible but it does lessen the weight it could be afforded by a jury.

Petitioner next alleges this Court rejected the finding that the mental health experts' findings were potentially aggravating. (Petitioner's brief, p. 33). Actually, this Court said Petitioner's evidence of "grandiose self-conception and evidence of his magical thinking": "**might**" help explain his "his horrendous acts." Sears, 130 S. Ct. at 3264 (emphasis added). In addition, the Georgia Supreme Court specifically addressed this Court's statements:

---

[7] As stated by the Georgia Supreme Court:

> Pretermitting whether the habeas court erroneously relied on this factual finding in its prejudice analysis as Sears contends, we have not considered it in conducting our own independent prejudice analysis because a reviewing court applying Strickland's prejudice standard must consider the jury's perspective, as the question is whether there is a reasonable probability of a different outcome from the sentencer.

Sears, 294 Ga. at 127, fn 11.

> Although both Drs. Dudley and Strickland testified that Sears was not delusional and did not suffer from visual or auditory hallucinations, Dr. Strickland described Sears as exhibiting "a narcissistic … grandiosity" through "fantastical" boasting about "parts of his life." He testified that one of the focal points for Sears' grandiosity was his "sexual prowess" and that the "most striking" of his grandiose accounts were related to his "sexual history" and included "innumerable sexual experiences." Sears contends that Dr. Strickland's testimony would have helped jurors understand his behavior because Dr. Strickland explained that his grandiosity is a defense mechanism that he employs to shield himself from feelings of "worthlessness" caused by his parents' abuse of him. However, given the weakness of the evidence regarding Sear' parents' abuse and Williams' graphic testimony at trial regarding Sears' rape of the injured, terrorized, and handcuffed victim, including that she prayed, cried, and pleaded desperately with Sears to stop his sexual attack on her, we agree with the habeas court's conclusion that the jury would have viewed Dr. Strickland's description unfavorably.

Sears, 294 Ga. at 155. The Georgia Supreme Court also enumerated several other areas of aggravation within this evidence such as his drug use and correctly concluded overall this evidence was more aggravating than mitigating.

In addition, Petitioner's argument that if there is an expert who can provide any explanation for his actions, the jury will automatically have to find this mitigating is also unavailing. Certainly, mental health experts who routinely testify for the defense have the ability to take what is truly aggravating evidence such as impulse control issues, and word them in such a way as to sound compelling on paper. However, when those diagnoses are thoroughly considered and placed in the proper context of a *trial* in front of a jury that has seen evidence of a horrific crime, which was clearly planned, statements such as "marginal capacity for reflection and decision-making, particularly when faced with distracting stimuli" lose their intended effect. (Petitioner's brief, p. 8). Consequently, the Georgia Supreme Court was not in error for determining that the aggravating evidence, which was a part of Petitioner's mental health evidence, would have lessened the weight given to this evidence.

Next, Petitioner attempts to discredit the Georgia Supreme Court's finding that the mental health evidence was inconsistent with the evidence presented at trial. Specifically, Petitioner alleges that it was not the evidence of Petitioner's crime but instead the "*prosecution's arguments* at trial that Sears was the 'man in charge'" that this mental health evidence would have countered. (Petitioner's brief, p. 34) (emphasis in original). Petitioner's argument misses the point. The Georgia Supreme Court was not finding this evidence could not be used for the purpose of explaining Petitioner's actions, but that Petitioner's actions could not be reconciled with the mental health experts' testimony. For example:

> The testimony of Drs. Strickland and Dudley loses much of its impact when viewed together with the evidence presented at trial. In addition to mitigating evidence presented by the defense, the jury also had before it the following State's evidence, much of which the prosecuting attorney cited in support of his sentencing phase closing argument that "the man running this show" was Sears: all four witnesses who encountered Sears and Williams on the day of Wilbur's abduction, including three Waffle House customers and a police officer, testified that Sears did "all the talking"; all three Waffle House customers testified that Sears alone had control of the briefcase containing knives, brass knuckles, and a set of handcuffs; Sears led police to the discovery of the brass knuckles on his bedroom closet shelf and the briefcase containing knives under his bed; Sears alone raped Wilbur with no encouragement or assistance from Williams; and Sears alone murdered Wilbur without encouragement or assistance from Williams.

Sears, 294 Ga. at 156-157. The Georgia Supreme Court's analysis was not in contravention of this Court's precedent.

For its final reason in finding Petitioner's mental health evidence would not have created a reasonable probability of a different outcome, the Georgia Supreme Court weighed it against the aggravated nature of Petitioner's crimes. Petitioner also disagrees with this analysis and points this Court to its decisions in Porter v. McCollum, 558 U.S. 30 (2009), Rompilla v. Beard, 545 U.S. 374 (2005), Wiggins v. Smith, 539 U.S. 510 (2003), Williams v. Taylor, 529 U.S. 362 (2000), which he alleges hold that his mitigating evidence would still be "prejudicial even in the

face of considerable aggravation." (Petitioner's brief, p. 35). Obviously, the facts of those cases are much different than Petitioner's as highlighted by the Georgia Surpeme Court in analyzing the evidence of Petitioner's alleged difficult childhood:

> Compare Rompilla v. Beard, 545 U. S. 374, 391-92 (II) (C) (125 SCt 2456, 162 LE2d 360) (2005) (stating that omitted mitigating evidence included evidence that the petitioner's parents were alcoholics; that his father frequently beat his mother, bragged about his infidelity, beat the petitioner, and locked him in an excrement-filled dog pen; and that the petitioner slept in an unheated attic and went to school in rags); Wiggins, 539 U. S. at 534-535 (III) (noting omitted mitigating evidence, inter alia, of "severe privation and abuse in the first six years of ... life" and "physical torment, sexual molestation, and repeated rape during ... subsequent years in foster care"); Williams, 529 U. S. at 395 (IV) (finding that omitted mitigating evidence of defendant's "nightmarish childhood" included his parents' imprisonment for criminal neglect of him and his siblings, his severe and frequent beatings by his father, and his commitment to an abusive foster home).

Sears, 294 Ga. at 143. None of Petitioner's evidence is comparable to the evidence in these cases. The court's decision was in accord with this Court's precedent.

After considering all of Petitioner's mental health evidence, the Georgia Supreme Court concluded:

> The evidence presented against Sears at the guilt/innocence phase was overwhelming, and it left no reasonable doubt that Sears was the moving force behind the crimes and that he alone raped and murdered Wilbur. The State also presented the non-statutory aggravating evidence previously discussed regarding Sears' bad behavior in the three years that he had been incarcerated awaiting trial, and an officer testified that, after his arrest, Sears told her that he killed the victim because she was "part of society" that he felt kept him from making his goal of being a rap singer and that he expressed no remorse for his acts. Thus, considering all of the expert mental health and lay witness testimony that Sears presented in his habeas proceeding along with the mitigating evidence actually presented at trial, we still conclude that the new mitigating evidence presented in the habeas proceedings would not in reasonable probability have resulted in a different sentencing verdict for Sears' brutal crime. See Sochor v. Secretary, Dept. of Corrections, 685 F3d 1016, 1030 (III) (A) (11th Cir. 2012) (noting the difficulty of showing prejudice as the result of failing to present mitigating evidence in a death penalty case involving a murder "accompanied by torture, rape or kidnapping").

Sears, 294 Ga. at 159-160. Contrary to Petitioner's argument, the court did not "refuse to weigh the mitigating impact" of Petitioner's brain damage, the court merely did not weigh it as Petitioner wished, in his favor. (Petitioner's brief, p. 36). The Georgia Supreme Court's decision regarding Petitioner's mental health evidence was in accord with this Court's precedent and does not present a question worthy of this Court's certiorari review.

b. The Georgia Supreme Court's Assessment Of Petitioner's Family Background Evidence Was Not In Violation Of This Court's Mandate.

Petitioner continues with his theme that the Georgia Supreme Court unreasonably "discounted" his evidence, this time with regard to his family background evidence, in contravention of this Court's mandate. (Petitioner's brief, p. 36). Specifically, Petitioner alleges that the court's decision is "internally inconsistent or facially illogical" and in support of this alleges the court was in error to compare the evidence of his background presented at trial to that presented during the habeas proceeding. Id. Petitioner goes on to explain that trial presentation was based upon an incomplete investigation and "misled" the jurors. Id. Even assuming the investigation was incomplete, it was not trial counsel who "misled" the jurors. It was his own friends and family. Moreover, Petitioner misrepresents the court's findings. The court clearly examined all of Petitioner's evidence and as part of that analysis the court did compare it to the evidence at trial, which is not inconsistent with this Court's mandate and obviously part of a proper prejudice analysis as it requires reweighing all of the evidence.

The portion of the court's order that Petitioner complains of is the following:

> Furthermore, in considering whether the jury was likely to consider the new evidence mitigating, this Court must consider the totality of the evidence before the jury. See Strickland, 466 U. S. at 695 (III) (B). The evidence presented at trial showed Sears' father to be a disabled veteran who had overcome some difficult obstacles, worked hard, and provided well materially for his family and who had demonstrated an interest in Sears by attending school conferences, taking him

> fishing and hunting, teaching him how to play sports, and coaching his ball team. Moreover, Mr. Sears testified in the habeas proceeding that he had "tried to influence [his] children to adopt a strong work ethic," that he had "attempted to show [his children] by example how to provide for a family," that he had used the disciplinary methods that he had learned in the military in that he had rewarded Sears for good behavior and withheld privileges for bad behavior, and that he had sometimes used a belt for punishment but that the mere threat of physical punishment had often been sufficient. Mr. Sears lamented that, "[i]n retrospect, [his] discipline approach [had] failed," and he admitted that he was "still perplexed as to what discipline would [have] work[ed] with [Sears]." Mr. Sears also testified that he had had a conversation with Sears about his goals and purpose in life approximately a year prior to his arrest and that Sears had told him that he just wanted to use people and that he had no interest in working, and Mr. Sears testified that there was nothing that he could do to motivate Sears to work either at home or at an outside job, which "frustrated and baffled [him]." The jury could have reasonably concluded from this testimony that Mr. Sears cared about Sears and that his approach to discipline, while stern, was not so unreasonable that it significantly mitigated Sears' moral culpability for his horrendous acts.
>
> Moreover, some of the testimony showed that, while Sears' parents may have had different child-rearing philosophies and may have lacked some parenting skills, both parents were involved with their children and attempted to provide the best for them, as it showed that Sears' parents took an active part in his education, involved him in extracurricular activities, participated in extended family activities, and ensured that he attended school regularly at least until he turned 18. Affiants also stated that, despite being in a wheelchair, Sears' father was independent, tried to teach his sons to be independent, spent time with them fishing and playing basketball, and worked with Sears to help him excel in sports and outdoor activities. Ms. Sears testified that Mr. Sears made his sons lift heavy weights when they were little "[not] because he was mean, but in order to make them better prepared for life." Although Demetrius testified that he could not recall his father's ever hugging him or Sears, telling either of them that he loved them, or complimenting them, he also stated that his father thought that the way to demonstrate his love for them "was to toughen [them] up." The prosecuting attorney could have used this testimony in conjunction with the testimony that Mr. Sears was a good provider and spent time with Sears to argue that Sears' father did love and care for him but simply did not express it in a demonstrative way.

Sears, 294 Ga. at 141-142. Petitioner alleges the court found that "evidence of Mr. Sears' parents' acrimonious marriage and poor parenting would have been unpersuasive in light of the trial evidence that his parents were loving, involved and well-respected." (Petitioner's brief, p.

36). This is not what the court held. Plainly, the court found that Petitioner's *state habeas evidence* showed parents that loved and cared for him, not the *trial evidence.*

Petitioner also alleges the Georgia Supreme Court "trivializes" his evidence of alleged sexual abuse. (Petitioner's brief, p. 37). As shown in the Denial of Facts, see pp. 11-12, the court did not "trivialize" the evidence but merely examined the lack of evidence to support this claim. Additionally, this Court stated "he suffered sexual abuse at the hands of an adolescent male cousin" and cites to Petitioner's brother's affidavit,[8] the Court clearly was not, as done by the Georgia Supreme Court, determining the reliability of this evidence. Sears, 130 S. Ct. at 3262. Evidence, even in the sentencing phase of a death penalty trial, must have some indicia of reliability and the rules of hearsay are not completely discarded. Moreover, where sexual allegations are supported only by hearsay, speculation and no admission by Petitioner, the court did not go outside this Court's mandate and find this evidence would not have carried a great deal of weight with a jury.

Accordingly, The Georgia Supreme Court's decision regarding Petitioner's background evidence was in accord with this Court's precedent and does not present a question worthy of this Court's certiorari review.

c. The Georgia Supreme Court Did Not Fail To Reweigh The Habeas Evidence With The Evidence Presented At Trial.

Petitioner concludes his attack on the Georgia Supreme Court's decision with the allegation that the "most crucial error" committed by the Georgia Supreme Court was to fail to reweigh the "mitigating evidence adduced at trial together with that evidence presented at Mr. Sears' trial." (Petitioner's brief, p. 37). Specifically, Petitioner alleges that although the Georgia

[8] As found by the Georgia Supreme Court and supported by the record, Petitioner's brother's account is based upon speculation. Sears, 294 Ga. at 143.

Supreme Court mentions the mitigating evidence presented at trial "at no point does the court add those factors back in to the prejudice calculus to determine the probable impact on reasonable jurors." (Petitioner's brief, p. 38). Pretermitting that "probable impact" is not the same as a "reasonable probability of a different outcome," the Georgia Supreme Court clearly reweighed the totality of the evidence:

> Therefore, even assuming that trial counsel were deficient in all the ways alleged by Sears, after independently **reweighing all of the aggravating and mitigating evidence**, we conclude that, absent the alleged errors, there is no reasonable probability that at least one juror would have voted for a sentence other than death, and our confidence in the outcome of this case has not been undermined. See Strickland, 466 U. S. at 694-695 (III) (B).

Sears, 294 Ga. at 143 (emphasis added). Simply because the court did not mention every item of mitigating evidence in its analysis of each category of Petitioner's mitigating evidence does not mean it failed to place this evidence into the reweighing. More importantly, as the court clearly states it reweighed all of the aggravating and mitigating evidence, unless clear proof to the contrary, no reviewing court could call this a falsehood.

In summary, what Petitioner is alleging is that the state habeas court had its ability to make credibility determinations stripped by this Court in Sears v. Upton; and in a variation of that theme, the Georgia Supreme Court was precluded from determining the proper weight to be given to Petitioner's evidence. Petitioner wants the benefit of the "could change one juror's mind" standard but wishes to take common sense out of the equation as these jurors would have heard unrefuted evidence of a brutal kidnapping, rape and murder that showed clear planning on the part of Petitioner. Thus, Petitioner wants the benefit of every nugget of mitigating evidence **together with** a total disregard for all of the aggravating evidence. The Georgia Supreme Court properly refused to conduct such an analysis.

A review of the Georgia Supreme Court's decision in Petitioner's case clearly demonstrates that the court properly utilized this Court's well-established standard promulgated in Strickland v. Washington, 466 U.S. 668 (1984), in rejecting Petitioner's trial counsel ineffectiveness claim. Petitioner's mere disagreement with the result of the state court's proper application of Strickland does not present a question warranting this Court's exercise of its certiorari jurisdiction.

CONCLUSION

WHEREFORE, for all the above and forgoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for writ of certiorari seeking review of the judgment of the Georgia Supreme Court.

Respectfully submitted,

SAMUEL S. OLENS 551540
Attorney General

BETH A. BURTON 027500
Senior Assistant Attorney General

SABRINA D. GRAHAM 305755
Senior Assistant Attorney General

Please serve:

Sabrina D. Graham
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-7659
Facsimile: (404) 651-6459

COMPLIANCE WITH PAGE LIMITATIONS

This brief complies with Rule 33.2 of this Court.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed the within and foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record and also, by depositing a copy thereof, postage prepaid, in the United States mail, properly addressed, upon:

Robert P. Edwards
Troutman Sanders LLP
Bank of America Plaza, Suite 5200
600 Peachtree St NE
Atlanta, GA 30308

This 31st day of March, 2014.

SABRINA D. GRAHAM
Senior Assistant Attorney General