NO. ____

In the
Supreme Court of the United States

ANDREW HOWARD BRANNAN,

Petitioner,

v.

CARL HUMPHREY,
WARDEN, GEORGIA DIAGNOSTIC &
CLASSIFICATION STATE PRISON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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April 7, 2014

CAPITAL CASE
QUESTION PRESENTED

Petitioner Andrew Brannan is a decorated Vietnam War veteran 100% disabled by PTSD and also diagnosed with Bipolar Disorder. In 1998, while off his medication, and with no prior criminal record, he killed a Georgia deputy sheriff in an incident where his strange and violent behavior was captured on videotape. The jury rejected trial counsel's insanity defense and found Brannan guilty of murder late on Friday night. After a one-day sentencing phase conducted on Saturday, during which Brannan's counsel failed to offer testimony from soldiers who served with him and his treating Department of Veterans Affairs (VA) psychiatrist and to introduce critical mitigating facts, the jury sentenced Brannan to death.

A state habeas court concluded that Brannan was denied effective assistance of counsel by the failure to introduce evidence during sentencing that would have explained his bizarre behavior and ordered a new trial on sentencing. The Georgia Supreme Court reversed, finding no prejudice as a matter of law. Despite noting that "Brannan's postconviction case for mitigation is decidedly better than that presented at his trial," the Eleventh Circuit affirmed. App-13.

The question presented is whether Brannan, as a disabled combat veteran who is undeniably mentally ill, received ineffective assistance of counsel during the hurried sentencing phase of his death penalty trial. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); *Strickland v. Washington*, 466 U.S. 668 (1984).

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of this petition. Petitioner in this Court, Petitioner-Appellant below, is Andrew Howard Brannan. Respondent in this Court, Respondent-Appellee below, is Carl Humphrey, in his official capacity as Warden of the Georgia Diagnostic & Classification State Prison.

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The Eleventh Circuit's unpublished per curiam decision is reported at 541 F. A'ppx 901 and is reproduced in the appendix at App-1. The unpublished order denying rehearing is reproduced in the appendix at App-129.

The unpublished order of the district court denying habeas relief is reproduced in the appendix at App-14.

JURISDICTION

The Eleventh Circuit entered judgment on August 8, 2013. App-130. It denied a petition for rehearing and rehearing *en banc* on November 8, 2013. App-129. This Court extended to April 7, 2014, the time within which to file a petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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Section 104 of the Antiterrorism And Effective Death Penalty Act, 28 U.S.C. § 2254(d), is reproduced at App-207.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Andrew Brannan, a Vietnam War veteran who has for years been diagnosed as 100% disabled with Post-Traumatic Stress Disorder ("PTSD") and also diagnosed with Bipolar Disorder, who had no history of violence or criminality, murdered Deputy Sheriff Kyle Dinkheller during a late night traffic stop on a deserted road. Brannan's bizarre and violent behavior was captured by the camera in the deputy sheriff's vehicle.

Following a one-week trial at which his counsel urged an insanity defense, Brannan was convicted of murder at 10:30p.m. on Friday. During a one-day sentencing phase hearing on Saturday, his counsel offered limited "families and friends" testimony, but did not provide evidence of the horrific nature of his combat experience or the testimony from his treating VA psychiatrist concerning his illness and the fact that Brannan had not been on his medications at the time of the murder. The jury returned a death sentence by noon on Sunday.

Although the death sentence was vacated after a state habeas evidentiary hearing, it was reinstated by the Georgia Supreme Court and allowed to stand by the federal district court and court of appeals.

A. Brannan Served Heroically In Combat.

Brannan volunteered for the U.S. Army in 1968. He excelled in basic training and, in Officer Candidate School, developed occupational specialties as a parachutist and trained as a Forward Observer in the artillery division of an airborne unit. RX127 at 673–756. In 1970, Brannan was stationed in Chu Lai, Vietnam as a First Lieutenant. *Id.* at 722, 748.

Within days of his arrival, Brannan's unit was engaged in intense combat. RX130 at 1642. From June 1970 to December 1970, Brannan was responsible for "controlling and adjusting artillery fire in close support of an infantry company under combat conditions in a counter-insurgency environment." RX127 at 749. During the second half of 1970 and the first few months of 1971, Brannan was in the field for all but seven days. *Id.* at 761. During that time, Brannan served with soldiers who confirmed in the state habeas proceeding that their platoon saw extensive combat and suffering, and explained Brannan's leadership role. *Id.* at 635–56; RX152 at 8300, 8306; RX124 at 205, 213.

Brannan's fellow soldiers, who never testified at his trial, testified at the habeas proceeding that Brannan "had a very demanding job" that "involve[d] a great amount of pressure and responsibility," including "getting [the platoon] to where we needed to go on the missions and then getting all of us back to base alive." RX127 645–46. "As our platoon's lieutenant, Andrew went out with us in the bush on search and destroy missions" where they "frequently received heavy sniper fire from Viet Cong hiding in the bush," who "relied on land mines, booby traps, grenades, and surprise attacks." *Id.* at 646. The men "rarely got any sleep, and when we did, they were brief naps on the ground." *Id.* at 639–40.

Brannan saw death repeatedly, including that of comrades and two immediate commanding officers, and remained plagued with guilt over these deaths decades later. RX152 at 8265; RX125 at 365. One of Brannan's immediate commanding officers died when he stepped on an explosive device. RX127 at 641–42, 813, 832, 825; RX124 at 206. Upon hearing the explosion, Brannan rushed his team to the location and immediately "assumed command of the company." RX127 at 642, 749. Subsequently, he was praised: "On two separate occasions LT Brannan unhesitatingly assumed command of the company when it had lost its company commander. LT Brannan has done an outstanding job in a combat environment." *Id.* at 749–50. He received two Army Commendation Medals and a Bronze Star, one of the nation's highest awards for meritorious service in combat. RX28 at 1330–31; RX34 at 2712–17.

At the end of 1970, Brannan was transferred from his Forward Observer position to the position of Executive Officer. RX127 at 727. In mid-1971, this tour of duty in Vietnam ended, and he returned home. *Id.* at 738, 767.

B. Brannan Suffered Severe, Debilitating Mental Illness.

Brannan's combat experience forever altered his personality and his life. Although he initially re-entered civilian life, he soon began to manifest signs of serious mental illness. His condition worsened from an initial diagnosis by the VA of PTSD and partial disability rating in 1984, to a diagnosis and rating of 100% disability as a result of service-connected PTSD in 1991, retroactive to 1990.[1] He also was diagnosed by his VA psychiatrist as suffering from Bipolar Disorder in 1994. RX128 at 900, 910; RX129 at 1253.

VA doctors documented Brannan's deteriorating condition, his increased withdrawal from society, his inexplicable behavior and "bizarre" speech, and his "continued and chronic depression." RX128 at 930, 1159; RX129 at 1373. In early 1989, his VA psychiatrist noted that Brannan was "preoccupied with total aspects of the Vietnam conflict, in which he served as a point observer, to the point of giving up employment, perhaps a marital relationship, and limiting his contacts with society as a whole except for Vietnam veterans." RX128 at 922. Brannan was then hospitalized for several weeks for treatment "centered on psychotherapy dealing with PTSD issues" and "mood disturbance." *Id.* at 927; RX129 at 1344. The staff found Brannan to be depressed and chronically suicidal. RX128 at 1164.

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1 Under VA guidelines, a declaration of 100% disability from PTSD requires "[t]otal occupation and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name." 38 C.F.R. § 4.130. According to the VA, when Brannan was first deemed 100% disabled, only 6% of veterans receiving compensation for any disability were rated as 100% disabled. RX155 at 9160.

Brannan's VA psychiatrist concluded that Brannan was "very much in need of intensive, psychotherapeutically oriented therapy and would be an excellent candidate of the Post-Traumatic Stress Disorder Long-Term Program in the Augusta VA Medical Center," RX129 at 1367, 1374–75, 1429, in part because his long-standing history of depression, and family history of depression and other mood disorders, "severely predisposed" Brannan to developing PTSD. RX125 at 258–59, 278. Only veterans with the most severe PTSD were admitted to the program, and only after a thorough screening process. *Id.* at 351. Brannan was admitted to the program in 1989.

By 1991, Brannan's deteriorating condition required another five-month hospitalization at a VA Medical Center, during which he "continued to have symptoms of PTSD, described as decreased sleep, nightmares, depression, isolation, rage, anger, decreased concentration, survival guilt and intrusive thoughts," and he was declared 100% disabled. RX128 at 949–59, 965, 967; RX130 at 1731. Later, his treating VA psychiatrist, Dr. William Boyer diagnosed Brannan as also suffering from Bipolar Disorder and "cyclical mood disorder." RX126 at 571, RX129 at 1245. Dr. Boyer prescribed a medication regimen that included an antidepressant, a mood stabilizer, and a sedative. RX124 at 151–58; RX142 at 5033–34.

Throughout his years of treatment, the chaos and violence of Brannan's combat experiences dominated his thoughts, as Dr. Boyer would have testified at trial had he been called. RX124 at 155;

RX125 at 365. Brannan frequently recounted how he was troubled by his Vietnam experiences and by survivor guilt. For example, Dr. Boyer would have testified that Brannan still felt guilt that another soldier took Brannan's place in a helicopter, which crashed, killing the man. RX 124 at 155. Approximately one month before the murder of Deputy Dinkheller, Brannan related to Dr. Boyer for the first time several stories of how he had narrowly escaped death in Vietnam. RX129 at 1243.

It is undisputed that, at the time of the murder, Brannan had not taken his medications regularly for at least five days. RX124 at 140; RX172 at 13644; RX142 at 5007. Because Dr. Boyer did not testify, the effect of not being on the medications was never explained to the jury.

C. The Murder of Deputy Dinkheller.

On January 12, 1998, Deputy Sheriff Kyle Dinkheller observed Brannan driving 98 miles per hour on the highway. Dinkheller followed Brannan, ultimately stopping him on a deserted road at approximately 5:30p.m. Brannan initially "exited his truck and addressed Dinkheller with relative cordiality," but quickly became angry, shouting profanities, "dancing around in the street" and "yelling, 'Here I am, here I am . . . [s]hoot me.'" App-186. Brannan physically attacked Dinkheller, and the confrontation "escalated wildly into a gun fight" after Brannan retrieved a rifle from his vehicle. App-160 n.1. Dinkheller was shot nine times. App-186.

These facts are undisputed because the incident was captured on video, and are summarized in the

Georgia Supreme Court's opinion. App-185–87. The Georgia Supreme Court, the federal district court, and the Eleventh Circuit all placed great weight on the horrific nature of the shooting in explaining their determination that the failure to offer meaningful mitigation evidence at the sentencing phase did not prejudice Brannan. But it is precisely because the murder was so brutal and Brannan's behavior so violent and "bizarre," App-182, that all of the mitigation evidence concerning Brannan's combat-related mental illness and his lack of medication needed to be fully investigated and presented during the sentencing phase to the jury that was deciding whether this seriously ill veteran should be put to death.

II. PROCEDURAL HISTORY

1. Brannan was convicted in the Superior Court of Laurens County, Georgia of one count of malice murder and sentenced to death.

Brannan's trial took approximately two weeks from *voir dire* to death sentence, with the trial itself lasting one week. When the jury rendered a guilty verdict at 10:30p.m. on Friday, the court pressed immediately into the sentencing phase over the weekend. Opening statements in the sentencing phase began at 10:30a.m. Saturday. The jury heard evidence concerning aggravation between the midday and afternoon breaks, and heard mitigation evidence and closing arguments between the afternoon break and 7:05p.m. The jury deliberated from 9p.m. Saturday until after midnight, before returning at 10a.m. Sunday. After being re-charged twice at their request, RX29 at 1467–78, 1483–1504, the jury delivered a death sentence at 12:07p.m.

The jury found that the three aggravating factors argued by the State applied: that the murder was (i) committed against a police officer; (ii) committed for the purpose of avoiding arrest; and (iii) outrageously or wantonly vile, horrible, or inhuman, in that it involved torture or aggravated battery to the victim before death, or depravity of mind of the defendant. *Id.* at 1441–44, 1511.

The jury heard only a cursory mitigation presentation: six "five or ten minute" layperson witnesses, RX28 at 1173—neighbors who only saw Brannan "in passing" or knew Brannan "[j]ust as a neighbor" who "did a lot of work in the yard," *id.* at 1291–95, and a boarding school roommate of Brannan's younger brother. *Id.* at 1307–13. Brannan's niece testified that Brannan let her borrow his car and "put together computer programs" for her and her sisters, but that Brannan was "very distant" and lived in the woods in a strange structure he had built without electricity or running water. *Id.* at 1296–1302.

The final mitigation witness was Brannan's mother, who identified several photographs, testified that Brannan graduated from college in 1968, then joined the Army, became an officer, and served in Vietnam. She "real quick" identified mementos from Andrew's service, including two Army Commendation Medals and the Bronze Star for his service in Vietnam, and offered an apology and her prayers to the victim's family. RX28 at 1315–33; RX34 at 2712–18.

Trial counsel did not investigate and offer detailed first-hand evidence of the events that precipitated Brannan's mental illness, including testimony from the soldiers who served with Brannan, which would have placed his PTSD in context for the jury. Instead of offering testimony from Brannan's fellow combatants, trial counsel offered only expert testimony in the guilt phase that lacked credible foundation and that allowed the prosecution repeatedly to cross-examine the experts about their limited knowledge and to question whether Brannan's war service was being exaggerated to receive disability. RX27 at 1015.

Trial counsel also did not investigate and offer evidence from Dr. Boyer, Brannan's VA psychiatrist, of the full extent of the development, history, and treatment of Brannan's mental illness. It is undisputed that Dr. Boyer, who had been treating Brannan for years before the incident and who had prescribed Brannan's medications, could have offered unique and compelling mitigation testimony that was not heard at all during the sentencing phase, including why he had prescribed specific medication and how Brannan's failure to take the medication likely contributed to Brannan's erratic and uncontrolled behavior at the time of the murder.

The Georgia Supreme Court affirmed the conviction and sentence on direct appeal, App-3. This Court denied Brannan's Petition for Writ of Certiorari. *Brannan v. Georgia*, 537 U.S. 1021 (2002).

2. Brannan filed a Petition For Writ Of Habeas Corpus in the Superior Court of Butts County,

Georgia. Following an extensive evidentiary hearing, the state habeas court concluded that, under *Strickland v. Washington*, 466 U.S. 688 (1984), Brannan had been denied effective assistance of counsel in numerous respects and that he had been prejudiced as a result. The court granted the writ, vacating Brannan's death sentence for purposes of retrial. App-4.

The state habeas court found that trial counsel's failures deprived the jury of compelling evidence of "the causal connection between the conduct reflected by the video and [Brannan's] nonmedicated state, and his bi-polar and PTSD as compared to [his] 'relatively stable' medicated state" at trial. App-182–83. The court also found that "Dr. Boyer's testimony did during the habeas hearing, and could have at trial, connected [Brannan's diagnosis for Bipolar Disorder and PTSD and his unmedicated state] to the behavior exhibited by [Brannan] on the video and [Brannan's] moods and personality, such as the symptomatic laughing[.]" App-168–69.

The Georgia Supreme Court reversed, reinstating Brannan's conviction and death sentence.[2] *Id.* The court concluded "that the absence of counsel's deficiencies would not in reasonable probability have changed the outcome in Brannan's case." App-187. Specifically, the court concluded that counsel were not deficient and Brannan was not

[2] The Georgia Supreme Court stated that it was unclear whether the habeas court also vacated Brannan's conviction. App-185; App-33 n.15.

prejudiced "to a significant degree" by the failure to call Dr. Boyer "in light of counsel's reasonable strategic concerns" that Dr. Boyer might not support an insanity defense, App-193, 194, and because Dr. Boyer's evaluation and treatment was discussed by other experts, App-193–95. The court also concluded that counsel did not perform deficiently and Brannan's defense was not prejudiced "regarding evidence of Brannan's personal tragedies and his medical history as those things pertain" to PTSD because counsel presented evidence and argument that Brannan had a long history of treatment for PTSD related to "his war experiences." App-195. And in a single paragraph addressing the sentencing phase, the court concluded that counsel did not perform deficiently and Brannan was not prejudiced because counsel "presented lay testimony that supported the expert testimony presented in the guilt/innocence phase along with other testimony about Brannan's good character" and reminded the jury that guilt/innocence testimony carried over to the sentencing phase. App-197.

3. Brannan filed a Petition For Writ Of Habeas Corpus in the U.S. District Court for the Southern District of Georgia. The district court denied the petition. App-126.

With respect to the investigation and presentation of mitigation evidence during the penalty phase, the district court concluded that this case differs from this Court's precedents because Brannan "has not argued that his trial counsel failed to uncover some relevant 'bombshell' about his background," App-44, and that Brannan was not prejudiced because "none of the additional mitigation evidence proffered here would have altered the jury's finding that the murder was especially heinous or atrocious." App-47.

5. The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's denial of habeas relief, App-13, and denied Brannan's petition for reconsideration. App-129.

The Eleventh Circuit concluded that Brannan did not demonstrate prejudice under *de novo* review. App-11–12. The court's cursory analysis stated that "*To be sure, Brannan's postconviction case for mitigation is decidedly better than that presented at his trial.* However, the differences between his postconviction and trial mitigation are not meaningful enough to establish a reasonable probability of a different outcome . . . ." App-13 (emphasis added). The court's cursory analysis on a cold record reached exactly the opposite conclusion reached by the state habeas court that heard the evidence.

REASONS FOR GRANTING THE PETITION

This case presents issues of critical importance that this Court should address. Before the ultimate penalty of death is imposed on a decorated veteran who was irrevocably damaged by his combat experience, the Constitution requires that the jury charged with making this difficult decision hear all of the critical mitigation evidence necessary to make an informed decision. *Porter v. McCollum*, 558 U.S. 30, 43–44 (2009) (per curiam). Here, the circumstances of the trial evidence a "rush to judgment" that reduced the sentencing phase to no more than a footnote to the proceedings. Brannan's rights to a full hearing essentially were ignored.

Further, this case involves a critical federal interest that justifies this Court's careful review at this pivotal time in our nation's history. It is undisputed that Brannan's Vietnam combat service was a significant cause of his mental illness. More than 1.5 million Americans participated in combat operations in Iraq and Afghanistan between 2001 and 2009. With these veterans' return, a new wave of legal issues triggered by combat-related PTSD has begun. *See, e.g.*, Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 Fordham L. Rev. 2955, 2955, 2959 & n.20 (2009). Veterans are not above the law or immune from punishment for crimes. But as this Court has noted, "[o]ur nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines." *Porter*, 558 U.S. at 43–44.

This Court's review is warranted for the following reasons.

The Eleventh Circuit's application of *Strickland* is contrary to this Court's precedents, particularly this Court's decision in *Porter*. The Eleventh Circuit's cursory analysis ignored this Court's clear direction that courts must not "unreasonably discount[]" the mitigation evidence adduced in post-conviction habeas proceedings, especially the "intense stress and mental and emotional toll" that combat experience takes on veterans. *Porter*, 558 U.S. at 42, 44.

Brannan's attorneys failed to investigate and present critical mitigating evidence to explain and corroborate the full picture of Brannan's combat service in Vietnam and its relationship to Brannan's mental illness, and that Brannan was not properly medicated at the time of the murder. Counsel also failed to present testimony from Brannan's treating VA psychiatrist, Dr. Boyer, even during the sentencing phase, despite telling the jury that it likely would hear his testimony.

At the sentencing phase, these failures cannot be explained as the product of a reasonable strategic decision by trial counsel. This case involved the murder of a police officer in which the State alleged that aggravating circumstances justified the death penalty. The State argued that Brannan deceitfully exaggerated his combat experiences and mental illness to get disability benefits and to avoid responsibility for the offense, suggesting that he was a malingerer and that "everybody has some PTSD." Effective assistance of counsel required trial counsel to fully investigate Brannan's military service and history of mental health treatment—beyond merely the information in the cold paper records—and to present the jury with detailed, corroborated mitigating evidence.

The Eleventh Circuit acknowledged that "[t]o be sure, Brannan's postconviction case for mitigation is decidedly better than that presented at his trial." App-13. But for counsel's deficiencies, there is a reasonable probability that at least one juror would have delivered a different sentence, particularly where the jury requested to be re-charged on sentencing twice. RX29 at 1467–78, 1483–1504.

In addition, the Eleventh Circuit's conclusion that Brannan was not prejudiced by the failure to present testimony from Dr. Boyer, *after* telling the jury that Dr. Boyer would testify, conflicts with decisions of the First, Sixth, and Seventh Circuits.

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH *PORTER* AND MISAPPLIES *STRICKLAND.*

This Court consistently has held that reasonable counsel must conduct thorough investigations into penalty phase matters and present evidence of the individual characteristics of the defendant that mitigate his moral culpability. *See, e.g.*, *Porter*, 558 U.S. at 41–42; *Williams v. Taylor*, 529 U.S. 362, 395–97 (2000); *Wiggins v. Smith*, 539 U.S. 510, 524–27 (2003); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005). Brannan's counsel here fell well below the standard for reasonable investigation and presentation of mitigation evidence.

The lower courts failed to recognize or "unreasonably discounted" the important mitigation evidence adduced in the habeas proceeding, all of which was available with reasonable investigation. *Porter*, 558 U.S. at 42. This violates this Court's holding that courts must conduct a "probing and fact-specific analysis" considering "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—and "reweig[h] it against the evidence in aggravation." *Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010) (per curiam) (internal quotation mark omitted); *Porter*, 558 U.S. at 41.

A. Brannan's Combat Service And Its Contribution To His Mental Illness

1. In *Porter*, this Court held that "it was objectively unreasonable to conclude there was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented," including, among other things, "(1) Porter's heroic military service in two of the most critical—and horrific—battles of the Korean War, [and] (2) his struggles to regain normality upon his return from war[.]" 558 U.S. at 30–32, 41. In reaching this conclusion, this Court held that the state courts unreasonably discounted Porter's military service. *Id.* at 43–44.

Here, the Eleventh Circuit committed the same error that this Court corrected in *Porter*—it "unreasonably discounted the mitigation evidence adduced" in the habeas proceeding, particularly the value of detailed evidence about the nature and intensity of Brannan's service in Vietnam, and "fail[ed] to engage with what [Brannan] actually went through" in Vietnam and in his struggles with PTSD and Bipolar Disorder thereafter. *Id.* (noting that the "relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took").

In *Porter*, this Court removed any doubt that a jury, evaluating whether a military veteran should live or die, should hear all of the evidence about the combat events and circumstances that contributed to the veteran's mental illness and that impacted his conduct on the night of the murder. *Id.* at 41–43. That testimony, together with the testimony of experts regarding the impact of Brannan's not being medicated, including his treating psychiatrist, Dr. Boyer, form a complete picture of the severity of Brannan's struggles that the jury should have heard and considered.

Instead, here the mitigation case consisted of six "five or ten minute" layperson witnesses: Brannan's mother, four of her neighbors, and one of Brannan's nieces. RX28 at 1173. Except for his mother and niece, the witnesses barely knew Brannan, and their testimony did little to help the jury understand his life experiences. None of the testimony, including that of Brannan's mother and niece, can fairly be said to "support[] the expert testimony" offered in the guilt phase concerning Brannan's severe mental illness. App-197. Moreover, because the jury never heard from any person with firsthand knowledge of Brannan's military service, none of the testimony helped the jury understand his combat experience, its impact on his mental health, or his heroic service—all critical mitigating evidence that "might well have influenced the jury's appraisal of his moral culpability." *Williams*, 529 U.S. at 398.

Indeed, counsel admitted during closing argument that the mitigation presentation did not illustrate who Brannan was, stating: "[I]t's hard to tell about someone's life in two and a half hours. And all we can do is all that we can do. You've been [through] a lot already. *And we just try to get to, get to it as quick as we can.*" RX29 at 1409 (emphasis added).

The "cornerstone of [Brannan]'s defense" was his combat-induced PTSD. App-58. But counsel did not investigate his service in Vietnam beyond merely obtaining his Army file and reviewing the accounts of his combat service that he self-reported to mental health professionals. Relying on Brannan's self-reporting did not satisfy his counsel's independent duty to conduct a reasonable investigation. *Rompilla*, 545 U.S. at 387 (stating that "[t]he duty to investigate exists regardless of the accused's . . . statements"); *Wiggins*, 539 U.S. at 524–27, 536–37; *Wood v. Allen*, 558 U.S. 290, 308 n.4 (2010) (Stevens & Kennedy, JJ., dissenting). Particularly here, where the State repeatedly criticized the experts offered on insanity as not having any first-hand knowledge and attacked Brannan as a malingerer who essentially was faking his illness, offering the testimony of soldiers who served with him and the psychiatrist who actually treated him was essential to an effective mitigation case.

With a reasonable investigation, the testimony by Brannan's fellow soldiers could have corroborated Brannan's self-reporting and verified that he was exposed to extensive combat, for long durations, in a dangerous zone, where he witnessed the deaths of many close to him. RX127 at 635–56, 812–91; RX124 at 203. Counsel was on notice that Brannan had discussed specific, haunting events from Vietnam with Dr. Boyer and others who had treated him, but counsel failed to interview or use those witnesses. RX152 at 8265, 8275, 8280.

Because of counsel's deficiencies, the jury heard only vague testimony in the guilt phase about Brannan's time in Vietnam from two retained experts. Neither expert could offer detailed information to the jury because neither had spoken to Brannan about his wartime service. RX25 at 575, 581 (Dr. Storms admitting on the stand that he had little information about Brannan's service); RX26 at 666; RX27 at 1018, 1048 (State's closing argument twice noting that Dr. Weiss never spoke with Brannan).

These failures prejudiced Brannan by allowing the State to question the extent of Brannan's combat experience, *see, e.g.*, RX26 at 727–34; RX27 at 1015, and to belittle the severity of his PTSD: "[Dr. Weiss] talked about PTSD, I contend everybody's got a little bit of PTSD. We've all been through some kind of trauma or another." RX27 at 1048. Leaving such callous dismissal of Brannan's combat experience unrebutted at sentencing is directly contrary to *Porter* and underscores why a thorough presentation of the facts and the testimony of the soldiers who served with Brannan and the doctor who treated him was critical at the mitigation phase.

Similarly, the district court's statement that "extolling [Brannan's] wartime experiences from nearly 30 years prior to the murder may have served to better humanize" him, but "would have done little to mitigate the uncontested aggravating factors found by the jury," App-49 n.20, directly conflicts with this Court's holding in *Porter*, where counsel failed to investigate and present mitigating evidence about military service that occurred thirty-six years before the murder. Where the incident is particularly troubling, the need for a full presentation of mitigating evidence is magnified, not minimized, as the courts below found.

2. Further, there is a unique federal interest in protecting disabled veterans from the prejudice that Brannan suffered. In *Porter*, this Court recognized that military service introduces a uniquely national factor to a state death penalty case involving a veteran suffering from combat-induced mental illness. In words directly applicable here, this Court explained why mitigation evidence concerning combat experience must be heard:

> Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter's extensive combat experience is *not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took* on Porter. . . . *To conclude otherwise reflects a failure to engage with what Porter actually went through* in Korea.

558 U.S. at 43–44 (emphasis added).

In 1988, a comprehensive study of psychological problems in Vietnam veterans found that the lifetime prevalence of PTSD was 30.9% among male theater veterans. Richard A. Kulka, *et al.*, Contractual Report Of Findings From The National Vietnam Veterans' Readjustment, Study Vol. 1, at 2, 6–7 (1988) ("NVVRS"). Further,

> [t]he prevalence of PTSD and other postwar psychological problems is significantly, and often dramatically, higher among those with high levels of exposure to combat and other war zone stressors in Vietnam, either by comparison with their Vietnam era veteran and civilian peers or with other veterans who served in the Vietnam theater and were exposed to low or moderate levels of war zone stress. This suggests a prominent role for exposure to war stress in the development of subsequent psychological problems, and confirms that those who were most heavily involved in the war are those for whom readjustment was, and continues to be, most difficult.

Id. at 3; *see also id.* at 10–11 (discussing co-morbidity of other post-war psychiatric or psychological disorders: "By far the most important risk factor for virtually all of these disorders . . . was direct and intensive participation in the war and the resulting high exposure to combat and other dimensions of war zone stress.").[3]

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[3] The NVVRS found the prevalence rate estimate for either Major Depressive Episode or Manic Episode among male Vietnam theater veterans to be only 5.9% total. NVVRS at 9.

Our nation's tradition of "according leniency to veterans in recognition of their service," *Porter*, 558 U.S. at 43, should be even more applicable to combat veterans suffering from service-connected PTSD, an Axis I mental disorder. The effects of PTSD "reduce the personal culpability of combat veterans for their capital crimes because '[a]t the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect.'" Giardino, 77 Fordham L. Rev. at 2960 & nn.25–28, 2975 (noting that the ABA considers all Axis I disorders to be severe mental disorders that alter behavior and judgment to the degree that persons who suffer from such disorders should be exempt from the death penalty).

The Eleventh Circuit's failure to accord proper weight to detailed mitigation evidence concerning Brannan's combat experience means that this Court should grant review to reaffirm the principle that combat experience is an important factor that should be viewed in conjunction with other evidence of mental illness. There is a reasonable probability that, had the jury been presented with full details and corroboration of Brannan's combat service in Vietnam, the extent of his mental illness, and the fact that he was not medicated at the time of the

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Brannan's treatment records show reoccurrence of both manic and depressive episodes, over extended periods, as a result of his Bipolar Disorder. RX126 at 564–65, 571; RX129 at 1245.

murder, at least one juror would have voted to spare his life. *Porter*, 558 U.S.at 44.

Nor are these deep and abiding wounds limited to Vietnam War veterans. It is important that this Court review this case now because the prevalence of PTSD among veterans will grow as a result of extended wars in Iraq and Afghanistan. *See, e.g.*, *id.* at 35 n.4 (quoting Congressional testimony of Secretary of Veterans Affairs that approximately 23% of Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1016–17 (9th Cir. 2012) (*en banc*) (noting that "[t]here are approximately 25 million veterans in the United States and, as of May 2007, between 5 and 8 million of those veterans were enrolled with the VA"); *see also Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 853 (9th Cir. 2011) (vacated *en banc*) ("From 2002 to 2003 there was a 232 percent increase in PTSD diagnoses among veterans born after 1972. A 2008 study by the RAND Institute shows that 18.5 percent of U.S. service members who have returned from Iraq and Afghanistan currently have PTSD, and that 300,000 service members now deployed to Iraq and Afghanistan 'currently suffer PTSD or major depression.'"); *id.* at 876 (noting that, as of 2011, "over 84,000 veterans are on waiting lists for mental health care"); Giardino, 77 Fordham L. Rev. at 2957 & n.13 (noting a "very high level of combat experiences" reported by Iraq and Afghanistan veterans); *id.* at 2958 & n.15 (20 percent of veterans deployed to Iraq or Afghanistan suffer from PTSD).

These facts are not an excuse for violent criminal conduct, but they nonetheless flow from our nation's wars, and they are facts that should be understood by a state court jury that is asked to determine whether a combat veteran suffering from PTSD should live or die. *See id.* at 2960–75 (noting that "combat veterans would not have service-related PTSD . . . but for government action in the form of training them to kill and sending them to war"). Indeed, some commentators have argued that this Court's precedents create a framework for excluding combat veterans with service-connected PTSD or traumatic brain injuries from execution under the Eighth Amendment. *See id.* at 2988–95 (applying the reasoning of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). At a minimum, such veterans must receive a full and fair sentencing-phase presentation.

B. Lack Of Medication

1. While counsel sought to prove that Brannan's actions were a product of mental illness, RX144 at 5831, they failed to present mitigation evidence that Brannan was not on his prescribed medication at the time of the murder and that his actions and judgment were directly related to his unmedicated condition. The state habeas court concluded that the failure to present available testimony concerning "the *causal connection* between the conduct reflected by the video and [Brannan's] nonmedicated state, and his bi-polar and PTSD as compared to [his] 'relatively stable' medicated state while he was evaluated at Central State Hospital, after the incident"

constituted ineffective assistance of counsel. RX190 at 14–15.

During opening statements, counsel told the jury that for years Brannan had taken "psychotropic medications, medications that affect your behavior and your mind and your thought processes." Counsel explained, "He's taking Effexor. He's taken Prozac. He's taken Lithium, and he's taking Depakote. These are all psychotropic medications primarily anti-depressants and mood stabilizers, and, again, he's on them *through today*." RX24 at 28 (emphasis added). Counsel's statement plainly suggested to the jury that Brannan *was* medicated at the time of the offense; yet the undisputed evidence showed that Brannan was not. Indeed, during the colloquy with the court required at the close of the guilt phase under Georgia's Unified Appeal procedure, Brannan himself told the court that "we should have brought out that I wasn't on my medication. We never seemed to have gotten that in." RX27 at 915. When the court began the charge conference, Brannan again stated: "I'm still concerned that I wasn't on my medication that day. . . . I just thought the jury ought to know that." *Id.* at 923.

The *only* reference counsel made to Brannan not being medicated at the time of the offense was during closing argument in the guilt phase. Counsel criticized both (1) the court-appointed psychiatrist, Dr. Carter, for not testifying about "the potentially negative effects from Brannan having been off his medication for a period of five days" and (2) the State for not "bring[ing] it out." RX27 at 998. This reference to the lack of medication shows that there was no strategic reason for counsel's failure to provide readily available evidence of these facts and their impact on Brannan's behavior. But the defense never offered proof of this critical fact. There could not be *any* strategic rationale for not introducing in the sentencing phase the evidence of the "potentially negative effects from Brannan having been off his medication" that Brannan's counsel criticized the State for not introducing.

2. Evidence that Brannan was not properly medicated was readily available, including testimony from his treating psychiatrist, Dr. Boyer. RX124 at 113; RX144 at 5675, 5736; RX126 at 580–81. Indeed, Dr. Boyer testified during a *Jackson-Denno* pre-trial hearing concerning Brannan's unmedicated state at the time of crime. RX190 at 5. Dr. Boyer could have testified that being off of his prescribed mood stabilizer would make Brannan's mood cycles more rapid and more severe, would trigger a development of severe depression, and would "greatly increase[] the risk of relapse or recurrence of [his] symptoms" of Bipolar Disorder and PTSD. RX124 at 158–59; RX8 at 66.

Further, had they conducted a reasonable investigation, counsel could have called during the sentencing phase, the *court-appointed expert*, Dr. Carter, who would have provided powerful testimony that the offense was quite possibly caused by Brannan's not being properly medicated. As Dr. Carter explained to the state habeas court:

> If Brannan had not been taking proper medication regularly and consistently in the weeks before his offense, that would have a

> direct and strong affect on his mental processes and actions that day; *had he been properly medicated, it is very possibl[e] that the crime would not have occurred.*

RX144 at 5675 (emphasis added). Dr. Carter also testified that Brannan "was more prone toward irritability and the anger" when he was unmedicated, and his irritability on the day of the offense "was likely" a result of his being off the mood stabilizer. *Id.* at 5696–97. There could not be any strategic rationale for not eliciting such testimony in the sentencing phase; the jury never heard this evidence simply because counsel "ignored pertinent avenues of investigation of which [they] should have been aware." *Porter*, 558 U.S. at 40; *see also Wiggins*, 539 U.S. at 525.

3. The sentencing jury also never learned that Brannan's mental illness could be effectively managed with medication and that he had not exhibited symptoms when medicated while incarcerated at Central State Hospital during trial. But for counsel's failure to present this evidence, Dr. Carter could have told the jury what he wrote in his report: "So long as Brannan is on medication intended to treat and control his mental disorders," Dr. Carter did "not think that Brannan presents a future danger to society." RX144 at 5675. Counsel's failure indisputably prejudiced Brannan because the State argued during the penalty phase that Brannan posed a future danger, RX28 at 1186, RX29 at 1385. The state habeas court explained the prejudice: "Unaware of the extent of [Brannan's] non-medicated state . . . the jury was left with no basis to determine

that [his] acts . . . were not the product of conscious rational deliberation." App-183 & n.84. Because there is a reasonable probability that, after hearing such evidence, at least one juror at the sentencing phase would have voted to spare Brannan's life, the Eleventh Circuit's decision directly conflicts with this Court's decision in *Porter*.

C. Testimony From Dr. Boyer

The Georgia Supreme Court ruled that counsel's failure to present testimony from Dr. Boyer was a "strategic decision" because counsel were "uncomfortable" with how Dr. Boyer might testify "on the issues directly relating to insanity." App-89–90. Specifically as to counsel's failure to carry through the promise in the opening statement to call Dr. Boyer, the Georgia Supreme Court stated:

> Pretermitting whether counsel performed deficiently by announcing the likelihood that he would call Dr. Boyer as a witness while his decision to do so was, in his own words, "evolving," we conclude as a matter of law that trial counsel's actions did not prejudice Brannan's defense to a significant degree[.]

App-193–94.

1. Even assuming that there could be a "strategic decision" not to call Dr. Boyer during the guilt phase, there is no rationale for not fully investigating Dr. Boyer's opinions and offering his testimony during the sentencing phase, after the jury had rejected the insanity defense. *Wiggins*, 539 U.S. at 524–27, 536–37; *Wood*, 558 U.S. at 308 n.4 (Stevens & Kennedy, JJ., dissenting) (stating that a "decision to

investigate avenues of mitigating evidence fully" is "a necessary prerequisite for counsel to make reasoned choices with respect to what evidence should go before the jury during the penalty phase of a capital trial").

Effective assistance of counsel at the penalty phase required that counsel fully investigate Dr. Boyer's views and present the valuable testimony that Dr. Boyer was prepared to provide regarding the origin, extent, and history of Brannan's illness, the nature of his treatment, and the importance of the medications Boyer prescribed. There is a reasonable probability that, had counsel done so, at least one juror would have voted to spare Brannan's life. *Porter*, 558 U.S. at 43.

2. This Court held in *Strickland* that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. 690–91. Here, counsel had not fully investigated what testimony Dr. Boyer could offer:

> During the habeas hearing, in answer to questions as to why Dr. Boyer was not called to testify during trial, [lead counsel] averred that he was never comfortable as to what he might testify to *on the issues directly relating to insanity*. . . . However, [counsel] acknowledged that Dr. Boyer did not evaluate the petitioner "*on the issue of whether Andrew was insane at the time of the commission of the offense*."

App-168 (emphasis added; footnote omitted). Despite this failure to investigate, counsel told the jury in his opening statement that it likely would "hear from Dr. Boyer during the course of these proceedings," RX24 at 28, but never presented Dr. Boyer's testimony in either the guilt or sentencing phase.

In these circumstances, concluding that the decision not to call Dr. Boyer was a "strategic decision" conflicts with this Court's decision in *Wiggins*, 539 U.S. at 524–27, 536–37. There, this Court held that counsel's failure to introduce mitigating evidence of defendant's history was not a strategic decision where counsel's sentencing-phase opening statement told the jury that it would hear that the defendant had a "difficult life." *Id.* at 524–27 ("the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization"). Similarly here, the failure to call Dr. Boyer cannot be deemed a strategic choice where, at the outset of trial, counsel told the jury that it would hear from him.

2. Further, the Eleventh Circuit did not address the prejudice arising from counsel's failure to present Dr. Boyer's testimony after telling the jury that it would hear from him. App-12. Its decision thus conflicts with the decisions of other courts of appeals, reflecting a circuit split on an important issue not yet addressed by this Court.

In *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), counsel promised in his opening statement to call two expert witnesses, but counsel rested the next day without calling the promised experts. *Id.* at 17.

The First Circuit rejected the argument that the failure was a "strategic choice," *id.* at 19, stating that "it was inexcusable to have given the matter so little thought at the outset as to have made the opening promise." *Id.* at 18. In concluding that counsel's broken promise was prejudicial as a matter of law, the court reasoned that "[t]he first thing that the ultimately disappointed jurors would believe, in the absence of some other explanation, would be that the doctors were unwilling, *viz.*, unable, to live up to their billing. This they would not forget." *Id.* at 17; *see also Ouber v. Guarino*, 293 F.3d 19, 22–24, 34 (1st Cir. 2002) (finding prejudicial counsel's broken opening statement promise that the defendant would testify, reasoning that "counsel's belated decision not to present the petitioner's testimony sabotaged the bulk of his efforts prior to that time (and, in the process, undermined his own standing with the jury, thereby further diminishing the petitioner's chances of success)").

In *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010), the Sixth Circuit held that counsel's opening statement promise to present a witness, then abandonment of that strategy, without having fully investigated the witness and her story before opening statements was ineffective assistance of counsel. *Id.* at 728–29. The court explained that the deficiency "was in [counsel's] being ill equipped to assess [the witness's] credibility or persuasiveness as a witness, or to evaluate and weigh the risks and benefits of putting [her] on the stand" at the time when he promised the testimony to the jury. *Id.*; *see also Plummer v. Jackson*, 491 F. A'ppx 671, 679 (6th Cir. 2012) (finding that counsel's "unfulfilled promises" during *voir dire* that the jury would hear testimony from the defendant "likely had a prejudicial effect on the jury's view of [the defendant], his case, and his lawyer").

In *United States ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003), defense counsel promised the jury both that it would hear testimony from the defendant and that evidence would show the defendant was not a gang member. *Id.* at 257. The Seventh Circuit stated that "when the failure to present the promised testimony cannot be chalked up to unforeseeable events, the attorney's broken promise may be unreasonable, for little is more damaging than to fail to produce important evidence that had been promised in an opening." *Id.* (internal quotation marks omitted) The court found that the "broken promises themselves supplied the jury with reason to believe that there was no evidence contradicting the State's case, and thus to doubt the validity of" the defense. *Id.* at 260; *see also Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) (finding ineffective assistance where "counsel's opening primed the jury to hear a different version of the incident" and "[w]hen counsel failed to produce the witnesses to support this version, the jury likely concluded that counsel could not live up the claims made in the opening").

The conclusion that the failure to carry through the promise to present Dr. Boyer "was not prejudicial because Dr. Boyer's evaluation and treatment of [Brannan] was discussed by other expert witnesses," App-88, conflicts with the holdings of the First, Sixth, and Seventh circuits. The Third Circuit, too, has explained the prejudice that occurs as a result of such a failure:

> The rationale for holding such a failure to produce promised evidence ineffective is that when counsel primes the jury to hear a different version of the events from what he ultimately presents, one may infer that reasonable jurors would think the witnesses to which counsel referred in his opening statement were unwilling or unable to deliver the testimony he promised.

McAleese v. Mazurkiewicz, 1 F.3d 159, 166–67 (3d Cir. 1993). Indeed, as the state habeas court found, rather than lessening the prejudice to Brannan, "[c]ounsel's mention of Dr. Boyer during opening statements was *compounded* during trial" because the jury "was reminded of Dr. Boyer" when the other expert witnesses "mentioned Dr. Boyer as well as [Brannan's] bi-polar or manic states, which counsel appeared to disregard[.]" App-182 (emphasis added). Dr. Boyer also could not be written off as a "hired gun," as the State urged the jury to do with the defense's retained experts. RX27 at 1019, 1040, 1045, 1048, 1051.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 12-13039

D.C. Docket No. 3:09-cv-00041-DHB

ANDREW H. BRANNAN,

Petitioner-Appellant,

versus

GDCP WARDEN,

Respondent-Appellee.

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

(August 8, 2013)

Before: HULL, WILSON, and MARTIN, Circuit Judges.

PER CURIAM:

Petitioner Andrew Brannan, a Georgia prisoner on death row, appeals from the district court's denial of his first petition for writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254. The district court denied the petition in a written order which also denied Brannan a certificate of appealiability. This Court granted Brannan a limited certificate of appealability on two claims:

> (1) the prosecutor exercised peremptory strikes in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986).
>
> (2) he was denied effective assistance of counsel during all phases of his trial in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

After careful review of the state court record and federal proceedings, we affirm the district court's judgment denying habeas relief.

I. BACKGROUND

On January 12, 1998, Brannan shot and killed Laurens County Deputy Sheriff Kyle Dinkheller during a routine traffic stop. *Brannan v. State*, 561 S.E.2d 414, 418–19 (Ga. 2002) (*Brannan I*). This case is unusual in that almost all of this tragic event was captured on videotape from the dashboard of Deputy Dinkheller's patrol car. *Id.* at 419. A detailed description of the traffic stop and murder are set forth in the Georgia Supreme Court's opinion on direct appeal. *Id.* at 418–20.

During jury selection, the state used seven of its ten peremptory strikes to remove prospective African-American jurors from the panel. *Id.* at 422. Three African-Americans served on the jury, although there were eleven African-Americans on the jury panel before jury selection. *Id.* Brannan made a *Batson* challenge immediately after the state made its peremptory strikes. Before the trial court had an opportunity to rule on whether Brannan had made a *prima facie* showing of discriminatory intent, the state offered race-neutral reasons for each of its seven strikes, rendering a preliminary showing of a *prima facie* case unnecessary. *Id.* at 422 (citing *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866 (1991)). After hearing the state's proffered reasons and Brannan's response to each of the seven jurors individually, the trial court ruled separately on each juror. In each instance, the trial court denied Brannan's *Batson* challenge.

Brannan was found guilty of malice murder for the shooting death of Deputy Dinkheller. *Id.* at 418. The same jury unanimously recommended a death sentence after finding three aggravating circumstances: (1) "the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim before death;" (2) "the offense of murder was committed against a peace officer while engaged in the performance of his official duties;" and, (3) "the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant." *Id.* at 418; *see also* Ga. Code. Ann. § 17-10-30(b)(7), (8), (10).

Brannan's conviction and death sentence were affirmed by the Georgia Supreme Court in a written opinion which expressly considered and rejected Brannan's *Batson* claim. *Id.* at 422, 429. The United States Supreme Court denied Brannan's petition for writ of certiorari. *Brannan v. Georgia*, 537 U.S. 1021, 123 S. Ct. 541 (2002), *reh'g denied*, 537 U.S. 1150, 123 S. Ct. 957 (2003).

In May 2003, Brannan filed a state habeas petition in the Superior Court of Butts County. After holding an evidentiary hearing in August 2006, the state habeas court issued a written order finding that Brannan had been denied effective assistance of counsel in numerous respects and vacating his death sentence for purposes of retrial.

On November 3, 2008, the Georgia Supreme Court reversed the state habeas court's judgment and reinstated Brannan's conviction and death sentence in a written opinion. *Hall v. Brannan*, 670 S.E.2d 87, 91 (Ga. 2008) (*Brannan II*).[1] The state supreme court expressly considered and rejected Brannan's ineffective assistance of counsel claims on the merits, concluding that counsel did not perform deficiently and that Brannan did not suffer prejudice as a result of trial counsel's alleged deficiencies. *Id.* at 91–96. The court denied reconsideration on December 15, 2008. *Id.* at 87.

Brannan then filed a § 2254 petition for writ of habeas corpus in the district court for the Southern District of Georgia. After briefing, the district court denied the petition in a comprehensive 120 page order. With respect to Brannan's ineffective assistance of counsel claims, the district court considered and rejected eight separate allegations. Ultimately, the district court determined that the Georgia Supreme Court's adjudication of Brannan's ineffective assistance of counsel claim was neither

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[1] The Georgia Supreme Court observed that the state habeas court's "order clearly vacate[d] Brannan's death sentence; however, it was unclear whether it also vacate[d] Brannan's conviction." *Brannan II*, 670 S.E.2d at 91.

contrary to, nor an unreasonable application of, *Stickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), nor an unreasonable determination of the facts. The district court also rejected Brannan's argument that the state court's adjudication of his *Batson* claim was: (1) an unreasonable application of *Batson* under § 2254(d)(1); or (2) an unreasonable determination of the facts under § 2254(d)(2). The district court individually considered each of the seven black jurors stricken by the state.

II. STANDARD OF REVIEW

"We review *de novo* a district court's grant or denial of a habeas corpus petition." *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010). To warrant habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), Brannan must establish not only that his constitutional claim is meritorious, but also that the state court's adjudication of that claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *see also McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1266 (11th Cir. 2009) ("Where we have determined that a state court decision is an unreasonable application of federal law under 28 U.S.C. § 2254, we are unconstrained by § 2254's

deference and must undertake a *de novo* review of the record.”).

In addition, a state court’s finding of fact is entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1). AEDPA’s “statutory presumption of correctness applies only to findings of fact made by the state court, not to mixed determinations of law and fact.” *Parker v. Head*, 244 F.3d 831, 836 (11th Cir. 2001). We must presume the state court’s factual findings to be correct unless the petitioner rebuts that presumption by clear and convincing evidence. *Id.* at 835–36; *see also* 28 U.S.C. § 2254(e)(1).

As relevant to Brannan’s case, a determination of purposeful discrimination at *Batson*’s third step is a pure question of fact entitled to a presumption of correctness. *See Hernandez*, 500 U.S. at 364–65 (plurality opinion). In contrast, determinations of deficient performance and prejudice under *Strickland* are mixed questions of law and fact, *not* entitled to a presumption of correctness. *See Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000). We consider each of Brannan’s constitutional claims in turn.

III. *BATSON*

In *Batson*, the Supreme Court outlined a three-step test for evaluating whether a prosecutor’s use of peremptory challenges is a constitutional violation: (1) the defendant must establish a *prima facie* case to support an inference of purposeful discrimination; (2) if a *prima facie* case is established, the prosecutor must provide race neutral reasons for the strike; and (3) the trial court then has “the duty to determine if the defendant has established purposeful discrimination." 476 U.S. at 96–98, 106 S. Ct. at 1723–24. Only the third step is at issue here.

Under AEDPA, a state court's finding of no purposeful discrimination at *Batson*'s third-step is entitled to deference unless it is: (1) contrary to, or an unreasonable application of, *Batson* and its progeny, *see* 28 U.S.C. § 2254(d)(1); or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). As relevant to Brannan's case, we have held a state court unreasonably applies *Batson*'s third-step under § 2254(d)(1) when it does "not consider 'all relevant circumstances' in its analysis of the trial court's ruling." *McGahee*, 560 F.3d at 1261; *see also id.* at 1264. If the state court does not unreasonably apply federal law at *Batson*'s third-step—that is, the state court "confront[s] the decisive question and evaluate[s] the credibility of the prosecution's explanation, in light of all evidence with a bearing on it," *Parker v. Allen*, 565 F.3d 1258, 1270 (11th Cir. 2009) (quotation marks and citation omitted)—the petitioner may obtain relief only by showing that the state court's conclusion was an unreasonable determination of the facts under § 2254(d)(2). *See id.* at 1271.

Brannan argues the state violated *Batson* by using at least one peremptory strike in a racially discriminatory manner. Brannan concedes the state courts' application of *Batson*'s first two steps was not unreasonable. However, he contends that many of the reasons offered by the state are contradicted by the transcript and that the state courts failed to assess the plausibility of the state's proffered reasons in light of the totality of the evidence, as required by *Batson*.

After carefully reviewing the state court record, we cannot say the Georgia Supreme Court failed to consider all relevant circumstances in adjudicating Brannan's *Batson* claim, such that its adjudication was contrary to, or an unreasonable application of clearly established federal law within the meaning of § 2254(d)(1). Nor can we conclude, as § 2254(d)(2) requires, that the state court's adjudication of his *Batson* claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Just the opposite is true.

Here, after the Georgia Supreme Court explicitly identified *Batson* as the governing standard and accurately summarized the composition of the jury, the court rejected Brannan's *Batson* claim, stating:

> The trial court ruled that Brannan did not meet his burden of showing that the State acted with discriminatory intent. This ruling will be affirmed unless clearly erroneous.
>
> Five of the prospective jurors expressed reservations about imposing the death penalty, in addition to other valid race-neutral reasons, such as being previously charged with a criminal offense, claiming hardship due to bankruptcy or physical disability, or having a relative currently facing criminal prosecution. The sixth prospective juror learned in nursing school

> about post-traumatic stress disorder, which was to figure prominently in Brannan's defense, and the district attorney's office had previously prosecuted her for fraud. These were valid race-neutral reasons for the State to strike her. *See Jackson v. State*, 463 S.E.2d 699 (1995) ("'Unless a discriminatory intent is inherent in the . . . (proponent's) explanation, the reason offered will be deemed race neutral.'"). The seventh prospective juror served four years in the Marine Corps in the 1960's, including a tour in Vietnam as a truck driver. He said that he had known Marines with posttraumatic stress disorder ("PTSD") who would "freak out" or "snap," and that he knew they had PTSD because "the corpsman said they had [it]." The State explained that a white Vietnam veteran they did not strike was not similarly situated. That prospective juror had served 21 years in the Marine Corps as a sergeant, including a combat tour in Vietnam in the infantry, and, when asked about PTSD, said, "I ain't never had the problem with that." The trial court did not err by finding that this reason was race-neutral. Since Brannan failed to carry his burden of proving purposeful discrimination by the State during jury selection, this enumeration of error is without merit.

Brannan I, 561 S.E.2d at 422 (alterations in original) (some citations omitted).

As the Supreme Court has said, a state court's finding of no discriminatory intent is a fact-finding entitled to deference and "we presume the [Georgia] court's factual findings to be sound unless [Brannan] rebuts the 'presumption of correctness by clear and convincing evidence.'" *Miller-El*, 545 U.S. at 240, 125 S. Ct. at 2325. Brannan has not met that burden. We cannot, therefore, substitute our evaluation of the record for that of the state trial court or the state supreme court. Based on the state courts' reasonable application of clearly established federal law, acceptance of the prosecutor's stated reasons for its strikes, and consideration of all the relevant circumstances bearing on the question of discriminatory intent, the district court did not err in concluding that the state court reasonably applied *Batson* and that Brannan failed to prove purposeful discrimination. *See Parker*, 565 F.3d at 1272.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

The merits of Brannan's ineffective assistance of counsel claim are "squarely governed" by the Supreme Court's holding in *Strickland*, 466 U.S. 668, 104 S. Ct. 2052. *See Williams v. Taylor*, 529 U.S. 362, 390, 120 S. Ct. 1495, 1511 (2000). Under *Strickland*, Brannan must show that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." 466 U.S. at 687, 104 S. Ct. at 2064. To show prejudice, Brannan must show there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. 2068.

Brannan argues he was denied the right to effective assistance of counsel at all phases of his capital trial. He broadly avers the Georgia Supreme Court's reversal of the state habeas court's grant of relief was contrary to and unreasonable application of clearly established federal law and based on an unreasonable determination of the facts. Specifically, Brannan says trial counsel were ineffective in three distinct ways: (1) failing to present evidence that the offense was directly related to Brannan not being medicated; (2) failing to present testimony from Dr. Boyer (Brannan's treating psychiatrist); and (3) failing to investigate and present a detailed and corroborated mitigation case concerning Brannan's experience in Vietnam and post-traumatic stress disorder.

Since a habeas petitioner must show both deficiency and prejudice, we may dispose of a *Strickland* claim based on a determination that a defendant has failed to show either prong without considering the other. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. This case can be resolved by consideration of only the prejudice prong.

Assuming, without deciding, that Brannan could show his trial counsels' performance was deficient and that he could pierce AEDPA's deference,[2] we

[2] It is not necessary to devote resources to deciding the question of whether AEDPA deference applies in this case because, even if AEDPA deference does not apply, Brannan "cannot show prejudice under *de novo* review, the more favorable standard of review." *Berghuis v. Thompkins*, 560 U.S. 370, ___, 130 S. Ct. 2250, 2265 (2010) ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo*

conclude that he has not demonstrated *Strickland* prejudice even under *de novo* review. We have carefully reviewed the Georgia Supreme Court's two written opinions which together detail the facts and circumstances underlying Brannan's offense, trial, penalty phase, and state postconviction proceedings. *See Brannan I*, 561 S.E.2d 414; *Brannan II*, 670 S.E.2d 87.

We have also independently reviewed the entire state court record, given due consideration to the parties' briefs, and had the benefit of oral argument. We conclude, for the combination of reasons expressed by Georgia Supreme Court, *see Brannan II*, 670 S.E.2d at 93–96, and the district court, that there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the [guilt phase] proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. 2068. With respect to Brannan's death sentence, we have carefully considered "'the totality of the available mitigation evidence—both that adduced at trial, and

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review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review, *see* § 2254(a)."); *see also Wellons v. Warden*, 695 F.3d 1202, 1213 (11th Cir. 2012) (conducting *de novo* review without deciding whether AEDPA deference applies); *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1109–10 (11th Cir. 2012) (same). We emphasize that we are not deciding whether AEDPA deference applies to the state court's adjudication of Brannan's *Strickland* claim. We are well aware that the Supreme Court has repudiated the notion that AEDPA's "unreasonableness question" is the same as an appellate court's "confidence in the result it would reach under *de novo* review." *Harrington v. Richter*, ___ U.S. ___, ____, 131 S. Ct. 770, 786 (2011).

the evidence adduced in the habeas proceeding'—and 'reweig[hed] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41, 130 S. Ct. 447, 45–54 (2009) (quoting *Williams*, 529 U.S. at 397–98, 120 S. Ct. at 1515). Based upon the evidence from the state court record and in light of *Strickland*, we conclude there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the [sentencing] proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. 2068.

The evidence presented during the postconviction hearing "would barely have altered the sentencing profile presented to the sentencing judge." *Id.* at 700, 104 S. Ct. at 2071. To be sure, Brannan's postconviction case for mitigation is decidedly better than that presented at his trial. However, the differences between his postconviction and trial mitigation are not meaningful enough to establish a reasonable probability of a different outcome, as in *Porter* and other cases in which the Supreme Court has found deficient performance and prejudice, such as *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456 (2005), *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), and *Williams*, 529 U.S. 362, 120 S. Ct. 1495.

For all of these reasons, we affirm the district court's denial of habeas relief.

AFFIRMED.

Appendix B

March 9, 2012

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

ANDREW HOWARD BRANNAN, Petitioner, v. CARL HUMPHREY, Warden,[1] Georgia Diagnostic and Classification Center, Respondent.	* * * * * * * * * *	CV 309-041 Death Penalty Case

ORDER

This case is before the Court on a petition fora writ of habeas corpus filed by Petitioner Andrew Howard Brannan, a Georgia death row inmate, pursuant to 28 U.S.C. § 2254. On December 9, 2010, this Court determined which claims in the instant habeas petition are entitled to a merit-based review and directed Petitioner to file a "merits brief." (Doc. No. 26.) Petitioner has timely filed his merits brief,

[1] The Court takes judicial notice that Carl Humphrey is the Warden of the Georgia Diagnostic and Classification Prison. The Clerk is **DIRECTED** to substitute Mr. Humphrey as the proper party respondent in the case.

wherein he sets forth three principal grounds for relief:

(I) Ineffective assistance of counsel in the following respects:

(a) failure to investigate, prepare and present mitigation evidence during the penalty phase of the trial,

(b) failure to investigate and present details and corroboration of Petitioner's combat service in Vietnam,

(c) failure to present evidence that Petitioner was not properly medicated at the time of the crime,

(d) failure to investigate and present detailed and corroborated evidence of the development, history, and treatment of Petitioner's mental illness,

(e) failure to thoroughly prepare for and examine the court-appointed psychiatrist, Dr. James Gary Carter,

(f) failure to present evidence that Petitioner's inappropriate, odd laughter at the time of the crime was a manifestation of his mental illness,

(g) failure to present the testimony of Dr. William Boyer, Petitioner's treating psychiatrist,

(h) basing the defense on insanity as opposed to another defense when the evidence could not legally or factually establish insanity;

(II) Prosecutorial misconduct in commission of a *Batson*[2] violation; and

(III) The execution of Petitioner, who is severely mentally ill, would violate the Eighth and Fourteenth Amendments of the United States Constitution and analogous provisions of the Georgia Constitution.

These matters have been fully briefed. Upon consideration of the briefs, the record of the case, and the relevant law, the Court finds that Petitioner is not entitled to the relief he seeks, and therefore his petition is **DENIED**.

I. BACKGROUND

In Petitioner's habeas counsel's estimation, "Andrew Brannan is a profoundly mentally ill man . . . [suffering from] a longstanding and well-documented history of two chronic and severe illnesses, Bipolar Disorder and Post-Traumatic Stress Disorder."[3] (Pet.'s Br. in Supp. of Habeas Petition at 1.) Because of his mental illness, Petitioner asks to be spared from the execution of his death sentence through invocation of the Eighth Amendment. Petitioner's mental illness is also at the core of his ineffective assistance of counsel claims in that he contends that trial counsel failed to effectively convey to the jury the severity of his illnesses. According to Petitioner, the jury was unable to properly assess his moral culpability without a more detailed and forceful account of his

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986)

[3] Respondent has in no way disputed this statement in this federal habeas proceeding.

mental illnesses. Consequently, Petitioner contends that the jury's viewing of the videotape, which captured Petitioner's horrific crime, went unmitigated by an effective portrayal of Petitioner as a "profoundly mentally ill man."

A. The Crime

On January 12, 1998, Petitioner shot and killed Laurens County Deputy Sheriff Kyle Dinkheller during a routine traffic stop. Almost the entire incident was captured on videotape from the dashboard camera of the deputy's patrol car, including chilling audio of Deputy Dinkheller's last gasping breaths of life. No consideration of this case is complete without viewing and hearing the *entire* videotape.[4] A detailed account of the traffic stop and resulting murder are set forth in the opinion of the Georgia Supreme Court, *Brannan v. State*, 561 S.E.2d 414, 418–19 (Ga. 2002). I would further observe that Petitioner's statement to authorities with the Georgia Bureau of Investigation on *January 13, 1998*, (is preserved on a cassette tape recording, which was subsequently transcribed for the trial of the case. This statement, made the day after the shooting and presumably before Petitioner knew of the existence of the videotape, is also revealing. As the prosecution would point out at trial, at the time Petitioner is interviewed by the agents, he "thinks

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[4] For the sake of convenience, this Court had the VHS format videotape converted to a DVD. The Clerk will docket a notice of the filing of this DVD and one copy in the record of the case as Court's Exhibit 1. The original VHS videotape remains in the record of the case as received from the State Attorney General's Office.

there's two witnesses, himself and Kyle Dinkheller, and he knows Kyle Dinkheller is dead. . . . when we go through this, I want you to be aware . . . that when [Petitioner's] first talking, he didn't know there's a video tape. So look for the lies." (Resp. Ex. 24, at 14, 19–20.)

B. Pre-Trial Proceedings

Petitioner was arrested the morning after he murdered Deputy Dinkheller. (Resp. Ex. 24, Trial Tr. at 140.) Authorities found Petitioner hiding in the woods 100 yards from the house that he had erected on property he owned in Laurens County.[5] (*Id.* at 162, 200.) Because Petitioner had been shot in the stomach, he was immediately admitted to Fairview Park Hospital in Laurens County. (*Id.* at 201, 204.)

Petitioner retained Mr. Richard T. Taylor and Mr. Larry L. Duttweiler to represent him.[6] (Resp. Ex. 1, at 83–85.) In fact, Mr. Taylor first met with Petitioner in the hospital after his arrest.[7] (Resp. Ex. 124, State Habeas Trial Tr. at 38.) Mr. Taylor

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[5] This house was described at different times during the trial as a fortress, a castle-like structure, and a camp house. (Resp. Ex. 24, Trial Tr. at 29, 202.) It was located two to three miles from the shooting. It was a four-story structure with no plumbing or running water; its power was supplied by a generator. The house had a wedding cake structure; the top story was described as a lookout tower. *Id.* at 29, 162–66.)

[6] Unless it is necessary to identify one of Petitioner's attorneys, any reference to "trial counsel" or "defense counsel" includes both of Petitioner's lawyers.

[7] Mr. Duttweiler became involved in the case at Mr. Taylor's request within days or weeks of Petitioner's arrest. (Resp. Ex. 145, Duttweiler Dep. at 10–11.)

testified that he immediately had "strong suspicions" that Petitioner had mental health issues. (*Id.* at 40–41.) Thus, Mr. Taylor planned and prepared for a mental illness defense from early on in the case. (*Id.* at 55, 104–05.) Moreover, Mr. Taylor focused on saving Petitioner's life. (Resp. Ex. 144, Taylor Dep. at 55.) He communicated with members of the District Attorney's Office several times in an effort to have the prosecution "abandon the pursuit of the death penalty against this sick man." (Resp. Ex. 124, State Habeas Trial Tr. at 65–68; Resp. Ex. 147, Exs. 106, 110.) Mr. Duttweiler also sent letters to county commissioners detailing the expense of a death penalty trial in an effort to have the death penalty notice withdrawn. (Resp. Ex. 147, Ex. 114.) While these efforts were not entirely successful, trial counsel did succeed in having venue changed to Glynn County, Georgia. (Resp. Ex. 1, at 312–16.)

From the outset, trial counsel knew that Petitioner's mental health would play a part in the trial of the case. Trial counsel investigated the mental health issues by obtaining historical information from Petitioner and his family and friends, and by examining Petitioner's medical records in consultation with numerous experts. (Resp. Ex. 124, State Habeas Trial Tr. at 55–62, 104–05.) Counsel also knew that they had the onerous burden of mitigating the effects of the "devastating" video. (Resp. Ex. 145, Duttweiler Dep. at 19–20.)

Petitioner filed a notice of his intent to raise an insanity defense under O.C.G.A. § 17-7-130.1. (Resp. Ex. 1, at 249–50.) In accordance with Georgia law, the trial court ordered a pre-trial mental evaluation of Petitioner to take place at Central State Hospital in Milledgeville, Georgia. (*Id.* at 473–74.) Dr. James Gary Carter conducted the court evaluation and entered a written report on July 20, 1999. (Resp. Ex. 2, at 632–62.)

Meanwhile, in April of 1998, defense counsel retained the services of Dr. Robert J. Storms to conduct an independent psychological examination of Petitioner. The defense served a copy of Dr. Storms's report upon the state in November of 1998. (Resp. Ex. 1, at 376–86.)

Finally, it is apparent from the record that all parties had access to and/or copies of Petitioner's medical records from the Department of Veterans Affairs ("VA") hospitals in Augusta and in Decatur, Georgia, as well as Petitioner's military records, prior to trial.

C. Trial Proceedings

Voir dire of the jury venire was conducted over six days, from January 18, 2000 through January 24, 2000. Following jury selection, defense counsel challenged the prosecution's strikes as violative of *Batson v. Kentucky*, 476 U.S. 79 (1986). *See* Resp. Ex. 23, Voir Dire Tr. at 2032.) Of the 56 jurors qualified for service as jurors and alternates, eleven were African-American. The prosecution had used seven of its ten peremptory challenges to strike African-Americans. Three African-Americans remained and served on the jury.

Immediately following the *Batson* challenge, the prosecution offered individual race-neutral reasons for each of its peremptory strikes, to which defense counsel was given an opportunity to respond. The trial court denied Petitioner's *Batson* motion with respect to each challenged juror after counsel stated their respective positions on the juror's strike.

The jury heard opening statements in the trial of the case on the morning of January 25, 2000. The prosecution and the defense agreed in opening statements that the evidence would show Petitioner committed the offense of murder; the motivation behind this killing, or the intent element, was the disputed matter for jury consideration because of Petitioner's insanity defense.

In the opening statement, Petitiorier's attorney, Mr. Taylor, contended that the act of killing Deputy Dinkheller was not a crime because of Petitioner's mental state. (Resp. Ex. 24, Trial Tr. at 23.) He described Petitioner as a sick man who had experienced jungle combat in Vietnam. He explained that Petitioner's experience with death, having killed men and seen men killed, had a profound effect on Petitioner in that he had been diagnosed and treated for Post Traumatic Stress Disorder ("PTSD"). (*Id*. at 25–27.) Mr. Taylor described the symptoms of PTSD suffered by Petitioner to include "uncontrolled bizarre laughter," nightmares, an exaggerated startle response, and a scattered thought process. (*Id*. at 26.) He then described Petitioner's medical history with the VA. Petitioner had been diagnosed with PTSD and bipolar manic depression. (*Id*. at 27.) He was hospitalized at times and treated for PTSD throughout the ten years prior to the murder. (*Id*. at 27–28.) He was prescribed psychotropic drugs. (*Id*. at 28.) The VA declared Petitioner 100% disabled because of his PTSD. (*Id.* at 30.) In describing Petitioner's course of treatment and medications, Mr. Taylor stated: "I believe you'll hear from Dr. Boyer during the course of these proceedings." (*Id.* at 28.) Dr. William Boyer was the last VA psychiatrist to treat Petitioner five weeks prior to the shooting. (*Id.*)

Mr. Taylor then explained to the jury that he would show that during the shooting incident, Petitioner was in a disassociative state, a result of the PTSD. (*Id.* at 32.) Mr. Taylor stated that he would present the evaluation of Dr. Storms, who would explain that Petitioner was in a psychotic state during the incident. (*Id.* at 40–41.) Finally, he stated that he would present a PTSD expert. (*Id.* at 41.) He concluded that the jury should find by the evidence that Petitioner was not guilty by reason of insanity. (*Id.* at 42–43.)

In the state's case the prosecution called various law enforcement officials from the Laurens County Sheriff's Office and from the Georgia Bureau of Investigation ("GBI") They testified about the evidence gathered at the scene of the shooting and at Petitioner's camp house. They also introduced several crime scene photographs. One of the key components of evidence to the state's case was a recorded interview of Petitioner taken by the GBI at the hospital the morning he was arrested, which was one day after the shooting, because it contained certain discrepancies between Petitioner's account of events and the videotape.[8] This interview was introduced

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[8] For instance, Petitioner told the GBI agents that Deputy Dinkheller had fired upon him before he retrieved his rifle from his truck and that he did not continue to shoot Deputy

through GEI case agent Alan Watson. (*Id.* at 275–315.) Finally, the videotape of the crime was played for the jury before the close of the state's case. (Resp. Ex. 25, Trial Tr. at 528–33.)

The defense called three witnesses. The first defense witness was Dr. Donald W. Harris, the Chief of Psychology Services at Central State Hospital. (*Id.* at 537.) Petitioner had been sent to Central State Hospital for the court-ordered evaluation. Dr. Harris had performed a personality assessment of Petitioner as part of this evaluation.[9] (*Id.* at 542.) Dr. Harris determined that Petitioner's score on the assessment test indicated the possibility that Petitioner could be paranoid or psychotic, i.e., out of touch with reality. (*Id.* at 551–52.) Dr. Harris testified that this possibility would have indicated to Dr. Carter that this aspect of Petitioner's personality was something Dr. Carter should evaluate further during the course of his evaluation. (*Id.* at 562–64.)

The second defense witness was Dr. Robert J. Storms, the psychologist who had been retained by the defense to perform an independent evaluation of Petitioner. Dr. Storms testified about the military

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Dinkheller once he had fallen to the ground. The videotape shows these statements to be false. Additionally, it cannot go unnoticed that Petitioner, at the earliest of stages in this case, had a PTSD defense in mind. In his first exchange with the GBI agent, in response to the question "Where do you live?", Petitioner continued his answer ". . . I've had PTSD all my adult life." (Resp. Ex. 141, Ex. 53, Tr. at 4, ln.3.)

[9] Specifically, Dr. Harris administered the MMPI (Minnesota Multiphasic Personality Inventory) standardized personality test. (Resp. Ex. 25, Trial Tr. at 543.)

history that he had obtained from Petitioner and his records. He explained that Petitioner had conducted scouting missions in Vietnam for six months at a time and that he was responsible for setting booby traps and ambushes for the Viet Cong. (*Id.* at 575.) He then explained that Petitioner had a nervous breakdown after his return from Vietnam. (*Id.*) Petitioner's marriage ended because of his PTSD. (*Id.* at 576.) Petitioner was not comfortable being around other people or being in a routine and he used his camp house as a. retreat. Petitioner's "head had never really gotten out of the service." (*Id.* 576–77.) Dr. Storms further explained that Petitioner had a well-documented history of combat-related PTSD including recurrent intense anxiety, intrusive dreams about Vietnam, flashbacks, chronic guilt over various incidents in Vietnam, and general paranoia. (*Id.* at 578.) Petitioner was hospitalized twice with PTSD issues (*id.* at 579) , and he had a long history of psychiatric treatment (*id.* at 589–90).

With respect to the shooting incident, Dr. Storms opined that Petitioner had been in a dissociative state because of the PTSD. Essentially, Petitioner had a flashback to Vietnam. Dr. Storms based his opinion on Petitioner's "clinically bizarre" behavior and Petitioner's fragmented memory loss as borne out by his interviews with Petitioner and his review of Petitioner's interview with the GBI. Dr. Storms also called attention to Petitioner's discussion of the shooting in military terms.[10] (*Id.* at 585–87.) Dr.

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[10] Specifically, Petitioner used terms such as "engaged with a target, "suppress enemy fire," and "follow[ing] standard infantry doctrine." (Resp. Ex. 25, Trial Tr. at 585.) Dr. Storms

Storms concluded that based upon his observations and Petitioner's history, Petitioner could not distinguish between right and wrong on the day of the murder. (*Id.* at 592–93.)

Lastly, the defense called psychologist Dr. Avrum Guerin Weiss, who is a PTSD expert. Dr. Weiss explained that PTSD is a mental illness characterized by symptoms such as re-experiencing events connected to the initial trauma, having intrusive memories and night terrors ("a literal re-creation of the actual traumatic event"), having a decreased ability to concentrate, and having flashbacks or dissociative episodes. (Resp. Ex. 26, Trial Tr. at 667–71.) He stated that Vietnam intrudes upon Petitioner's daily life. (*Id.* at 744.) Though Dr. Weiss did not meet with Petitioner after his arrest, he opined that Petitioner was in a dissociative state during the crime. (*Id.* at 714–15) Dr. Weiss formed this opinion after his review of Petitioner's military record and medical records, Dr. Carter's report, Dr. Storms's report, the GBI interview, and the videotape. (*Id.* at 667.) Dr. Weiss explained that Petitioner had had an extensive, higher than average combat experience in Vietnam with a high level of combat stress. (*Id.* at 708–09.) He further explained that he must have had extensive combat exposure to have been admitted to the Augusta VA's inpatient PTSD unit for treatment. (*Id.* at 733.) Finally, Dr.

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also testified about Petitioner's use of military terms in describing the shooting to Dr. Carter. For instance, Petitioner spoke of hearing "bamboo clicking" when he reached for the rifle in his truck and of not wanting to "leave [his] men" during the incident. (*Id.* at 638–39.)

Weiss was critical of Dr. Carter's report because during Dr. Carter's interviews with Petitioner, he did not focus on Petitioner's state of mind during the crime but only after the crime. (*Id.* at 677.)

Following these expert witnesses called by the defense, the trial court called Dr. Carter to testify about his evaluation of Petitioner at Central State Hospital. Dr. Carter opined that while he agreed that Petitioner has PTSD, he did not believe that Petitioner was in a dissociative state during the shooting. (*Id.* at 870–72.) Rather, Dr. Carter believed that Petitioner was merely outraged by the traffic stop and acted out of anger. (*Id.* at 808–11, 820–21.) On cross-examination, defense counsel showed that Dr. Carter was wrong in testifying that Petitioner had never been diagnosed as psychotic. (*Id.* at 828–35.) Counsel also pointed out numerous places in Petitioner's GBI interview in which Petitioner was unable to remember details of the shooting incident indicating a fragmented memory. (*Id.* at 839–42.) Counsel then cross-examined Dr. Carter about Petitioner's reference to "clicking bamboo," "foliation," "his men," and other possible references to Vietnam and military tactics during Petitioner's recount of the shooting incident. (*Id.* at 858–70.) Finally, counsel pointed out to Dr. Carter that his staff noted behavior consistent with PTSD while Petitioner was evaluated at Central State Hospital, which was inconsistent with Dr. Carter's testimony that Petitioner did not exhibit any such behavior while at the hospital. (*Id.* at 876–79.)

Following Dr. Carter's testimony, the trial moved into closing arguments. In the defense's closing, Mr.

Taylor reiterated that Petitioner suffered from PTSD—a mental illness. (Resp. Ex. 27, Trial Tr. at 989.) He explained how Petitioner was exposed to trauma, death and violence in Vietnam as noted by every doctor who had reviewed Petitioner's medical records.[11] (*Id.* at 990.) Mr. Taylor read excerpts from his medical records indicating that Petitioner had long suffered from PTSD. (*Id.* at 1001–06.) He reiterated Dr. Storms's expert testimony that Petitioner did not know right from wrong on the day of the shooting incident. (*Id.* at 988–89.) He also pointed out that Petitioner "had just started re-taking [his] medication [the day of the shooting]." Petitioner had taken one prescribed drug that morning but was not due to take the other prescribed drug until that evening. (*Id.* at 997–98.) Mr. Taylor asked the jury to return a verdict of not guilty by reason of insanity. (*Id.* at 1012.)

The jury was given four alternatives on the verdict form: (1) not guilty; (2) not guilty by reason of insanity; (3) guilty; or (4) guilty but mentally ill.

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[11] Specifically, Mr. Taylor stated:

> You've heard that [Petitioner] was exposed to trauma and death and violence in Vietnam. You've heard that from the doctors who've reviewed his medical records that he persistently re-experiences that trauma in the form of flashbacks and night terrors and dissociative episodes. And you saw the video tape and you saw how the most innocuous, idiosyncratic encounter between a police officer and this man resulted in this re-experiencing of the trauma.

(Resp. Ex. 27, Trial Tr. at 990.)

(Resp. Ex. 3, at 1176.) After almost 5 hours of deliberation, the jury returned a verdict of guilty.

The trial of the case moved into the sentencing phase the morning after the verdict. The prosecution first presented a neighbor who lived next to Petitioner's camp house. The neighbor testified that Petitioner had inexplicably fired three rifle shots over his truck one evening when he was driving down a road adjacent to Petitioner's property line. Resp. Ex. 28, Trial Tr. at 1188–89.) The prosecution then called three detention officers, who testified about various encounters they had had with Petitioner designed to show that Petitioner was not a model prisoner but rather a dangerous one.[12] (*See generally id.* at 1198–1260.) Finally, Deputy Dinkheller's wife testified about the effect the deputy's death had had on her and her young family. (*Id.* at 1278–82.)

In addition to Petitioner's mother, the defense called five friends and neighbors of Petitioner's mother,[13] who testified about Petitioner's good

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[12] For instance, one detention officer testified that Petitioner had charged at him and refused to allow another inmate to be placed in his prison cell. (Resp. Ex. 28, Trial Tr. at 1199–1203.) Another officer testified that the razor blade had been improperly removed from Petitioner's razor. (*Id.* at 1218–19.) A third officer discovered that Petitioner had not been taking his psychotropic medication as directed. (*Id.* at 1225.) This same officer found other contraband in Petitioner's cell to include knotted plastic bags, an insulated cup with a heating element, four small pieces of metal, and two pieces of cardboard wrapped in tape with a razor blade at the end. (*Id.* at 1226–35.)

[13] Petitioner lived with his mother "most of the time" in a house that the family moved to when Petitioner was young. On occasion, Petitioner would not be there because he was either

upbringing with loving parents, his devotion to his father when he had terminal cancer, his dedication to his mother following his father's death, and the death of his two brothers.[14] (Resp. Ex. 28, Trial Tr. at 1286–87; 1294–95, 1309, 1312.) A long-time neighbor, Betty Moseley, testified that Petitioner would help two widows who lived in the neighborhood when needed. (*Id.* at 1287.) A long-time family friend described Petitioner as 'a man who loved animals, was very shy but was great, both with his nieces and with my children. . . . [The murder] doesn't jive with the Andrew Brannan that I've known for thirty-one years . . . ." (*Id.* at 1313.) They also spoke of Petitioner's desire to be alone, his shyness, his nervous laugh, and his dislike of crowds or gatherings. (*Id.* at 1288, 1300, 1311, 1313.) The witnesses spoke of Petitioner's interests in hiking for long periods of time and in doing yard work. (*Id.* at 1287–88, 1292–93, 1304–06.) Almost every witness testified that they feared Petitioner's death would be extremely difficult for his mother. (*See generally id.* at 1284–1313.)

Finally, Petitioner's mother, Esther Brannan, testified. She told the jury that Petitioner had graduated from college with a major in geology and a minor in computer science. (*Id.* at 1321.) She told the jury that Petitioner had gone to Officer Candidate School and became an officer in the United States

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hiking or staying in his newly constructed camp house. (Resp. Ex. 28, Trial Tr. at 1285, 1318–19.)

[14] Petitioner's younger brother committed suicide and his older brother died in a plane crash. (Resp. Ex. 28, Trial Tr. at 1315–16.)

Army. (*Id.* at 1324.) She described Petitioner's relationship with his father as "very close." (*Id.* at 1327.) She also described the day of the murder in which she had had lunch with Petitioner prior to his leaving to go to his camp house. (*Id.* at 1319–20.) The defense then introduced several family and school photographs and United States Army commendations through Ms. Brannan's testimony. (*Id.* at 1315–33.) Finally, Ms. Brannan read a letter that she had written to the family of Deputy Dinkheller, and then she appealed to the jury to show sympathy to her and her son. (*Id.* at 1331–33.)

After four hours of deliberation over a Saturday night and Sunday morning, the jury returned a verdict of death by electrocution. The jury found the following statutory aggravating circumstances beyond a reasonable doubt: (1) the murder was committed against a peace officer while engaged in the performance of his official duties; (2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of Petitioner; (3) the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture to the victim before death; (4) the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind of Petitioner; and (5) the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved aggravated battery to the victim before death. (Resp. Ex. 3, at 1178–79.)

D. Direct Appeal

Petitioner appealed his conviction and sentence to the Supreme Court of Georgia. Relevant here, Petitioner raised as error on appeal that the state had committed a *Batson* violation by discriminating on the basis of race during jury selection. The Supreme Court of Georgia rejected this ground, first explaining that because the state had given reasons for the seven peremptory strikes of African-American jurors, "a preliminary showing of prima facie discrimination" was rendered moot. *Brannan v. State*, 561 S.E.2d at 422 (citing *Hernandez v. New York*, 500 U.S. 352 (1991)). The Supreme Court then examined the proffered race-neutral reasons given by the state, and upon finding that the reasons were supported by the record, it found no error in the trial court's ruling that Petitioner had not met his burden of showing that the state acted with discriminatory intent. *Id.*

Petitioner's conviction and sentence was affirmed by the Supreme Court of Georgia on March 25, 2002. His petition for a writ of certiorari to the United States Supreme Court was denied on November 12, 2002. *Brannan v. Georgia*, 537 U.S. 1021 (2002).

E. State Habeas Case

On May 2, 2003, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, pursuant to O.C.G.A. § 9-14-141 *et seq*. Petitioner was granted indigent status for purposes of pursuing his state habeas petition.

The state habeas court conducted an evidentiary hearing from August 21–23, 2006. At the hearing, both of Petitioner's trial attorneys testified. Petitioner called Dr. Carter, who had testified at trial, and elicited testimony that had he been asked at trial, he would have opined that Petitioner met the criteria for the defense of guilty but mentally ill. (Resp. Ex. 125, State Habeas Trial Tr. at 294–97.) Petitioner also presented the testimony of a psychiatrist hired by his habeas counsel, Dr. Keith A. Caruso, who opined that Petitioner was guilty but mentally ill at the time of the crime. (Resp. Ex. 126, State Habeas Trial Tr. at 597.)

Dr. Boyer, who was not called by the defense at trial, testified at the state habeas hearing that Petitioner suffers from moderate to severe bipolar disorder and PTSD. (Resp. Ex. 124, State Habeas Trial Tr. at 148, 182–83.) He testified that these illnesses significantly affected Petitioner's behavior, judgment, ability to cope with the ordinary demands of life, and ability to recognize reality. (*Id.* at 157.) He also explained that Petitioner was anxious and depressed in their last meeting in December of 1997, five weeks before the crime. (*Id.* at 146.) Finally, he testified that if Petitioner did not take his medications, the risk of relapse or recurrence of PTSD and bipolar disorder symptoms would be greatly increased though he could not say with a reasonable degree of medical certainty that Petitioner would be adversely affected. (*Id.* at 159, 177–78.)

Petitioner also presented Dr. Paul S. Koller, a psychologist who examined Petitioner in 2005, who testified that Petitioner is severely and chronically mentally ill due to bipolar disorder and PTSD. (Resp. Ex. 125, State Habeas Trial Tr. at 240–42.) He opined that "the offense would not have happened if

[Petitioner] weren't suffering from the PTSD and bipolar disorder." (*Id.* at 262–63.)

Additionally, Petitioner tendered 181 exhibits that included eight affidavits of family, friends, and Vietnam veterans who served with Petitioner. The exhibits also included items from the trial attorneys' notes and case files, and the depositions of Mr. Taylor, Mr. Duttweiler, Assistant District Attorney Larsen, GBI Agent Alan Watson, Dr. Carter, Dr. Koller, and Dr. Caruso.

In a written order entered on March 17, 2008, the state habeas trial court concluded that Petitioner's trial counsel had been ineffective in several respects and granted Petitioner's writ of habeas corpus. (Resp. Ex. 190.) In sum, the state habeas trial court concluded that Petitioner's trial counsel focused too narrowly upon the defense of not guilty by reason of insanity based upon his PTSD as opposed to guilty but mentally ill based upon both PTSD and bipolar disorder. In this regard, the state habeas trial court specifically noted the following errors: (1) the failure to call Dr. Boyer, Petitioner's treating psychiatrist; (2) the disregard of Petitioner's bipolar disorder; (3) failure to present evidence that Petitioner was not medicated at the time of the crime; and (4) failure to adequately cross-examine Dr. Carter at trial with respect to the guilty but mentally ill defense. The state habeas trial court ultimately vacated Petitioner's death sentence.[15]

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[15] As noted by the Georgia Supreme Court, it is unclear whether the state habeas trial court also vacated Petitioner's conviction. *See Hall v. Brannan*, 670 S.E.2d at 91.

The state appealed the State Habeas Order of March 17, 2008, to the Georgia Supreme Court. Petitioner filed a cross-appeal. On November 3, 2008, the Georgia Supreme Court reversed the decision of the state habeas trial court, concluding that Petitioner's trial counsel did not perform deficiently, and that to the extent they did so, Petitioner's defense was not prejudiced thereby. *Hall v. Brannan*, 670 S.E.2d 716 (2008) It is this Order that is under review in this federal habeas proceeding.

II. LEGAL STANDARD OF REVIEW

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides federal courts with specific standards of review of claims adjudicated on the merits in state court. *See* 28 U.S.C. § 2254(d)(1), (2). A federal habeas court may grant a writ of habeas corpus if the state court decision, here the decision of the Georgia Supreme Court, "(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*

A. Contrary to or Involved an Unreasonable Application of Federal Law

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have independent meaning. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts governing law set forth in [Supreme Court] cases" or "confronts a set of facts that are materially indistinguishable from" a Supreme Court case, yet reaches a different result. *Brown v. Paton*, 544 U.S. 133, 141 (2005) (citing *Williams*, 529 U.S. at 405).

A state court's decision may be "an unreasonable application" of clearly established Supreme Court precedent in either of two respects: (1) if the state court identifies the correct governing legal principle from the Court's cases "but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. The Supreme Court has stated that the "unreasonable application" inquiry is an objective one, *id.* at 409–10, and has instructed that "an unreasonable application of federal law is different from an incorrect application of federal law," *id.* at 410 (emphasis in original) Thus, a federal habeas court may not grant relief simply because it concludes "in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. Elaborating on this standard, the Supreme Court recently stated that a habeas court may only "issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington v. Richter*, --- U.S. ---, 131 S.

Ct. 770, 786 (2011) ("[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable."). If the state court correctly identifies the governing legal rules, only the unreasonable application clause is relevant.

B. Unreasonable Determination of Facts

The factual findings of the .state court also may be challenged in a federal habeas petition under § 2254(d)(2) but they are subject to a deferential review. Factual findings by the state court shall be presumed to be correct; a presumption may be rebutted only by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Thus, this Court's review of findings of fact by the state court is even more deferential than under a clearly erroneous standard of review. *Wood v. Allen*, 542 F.3d 1281, 1285 (11th Cir. 2008) (quoted source omitted).

III. INEFFECTIVE ASSISTANCE OF COUNSEL (GROUND I)

Petitioner's first ground for relief, ineffective assistance of counsel, is multi-faceted in that Petitioner attacks not only trial counsel's preparation and presentation of evidence to mitigate against a punishment of death in the penalty phase of the trial, he also attacks trial counsel's presentation of evidence and Petitioner's defense in the guilt/innocence phase.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Strickland* established the familiar two-pronged analysis under which a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby *prejudices* the defense." *Yarborough v. Gentry*, 540 U.S. 1, 3 (2003) (emphasis added); *see also Wiggins v. Smith*, 539 U.S. 510, 520 (2003) "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

To establish deficient performance, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 687. The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct." *Wiggins*, 539 U.S. at 521. Instead, "[t]here are countless ways to provide effective assistance in any given case. *Strickland*, 466 U.S. at 689. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. In reviewing ineffectiveness claims, "judicial scrutiny of counsel's performance must be highly deferential," *id.* at 689, and courts afford counsel a "strong presumption of competence," *Cullen v. Pinholster*, --- U.S. ---, 131 S. Ct. 1388 1407 (2011). *See also Premo v. Moore*, --- U.S. ---, 131 S. Ct. 733, 742 (2011) ("[S]ubstantial deference must be accorded to counsel's judgment."); *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (recognizing the "heavy measure of deference to counsel's judgments"). Even when the record fails to explain all of trial counsel's decision making, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Bell v. Cone*, 535 U.S. 685, 698 (2002) (quotation omitted); *see also Yarborough*, 540 U.S. at 8 ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.").

To establish actual prejudice, a petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694; *see also Wiggins*, 539 U.S. at 534. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *See Strickland*, 466 U.S. at 689; *Wiggins*, 539 U.S. at 534. The court does not consider prejudice in a vacuum. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.

A. The Investigation and Presentation of Mitigation Evidence During the Penalty Phase

Petitioner contends that his trial counsel failed to adequately investigate and present a case for the jury to return a verdict of life as opposed to death. Petitioner takes issue with the paucity of testimony in the mitigation phase. He complains that the defense's mitigation witnesses testified more, in quality and quantity, about Petitioner's mother and father as opposed to Petitioner. Petitioner refers to this testimony as superficial. He further complains that defense counsel presented no testimony about Petitioner's mental illnesses or any other evidence about Petitioner's state of mind at the time of the offense. He complains that defense counsel did not present powerful and persuasive evidence of Petitioner's service in the Vietnam War. Finally, he complains that defense counsel did not explain that Petitioner was unmedicated at the time of the offense.[16]

In addressing Petitioner's complaints of ineffectiveness of counsel, the Georgia Supreme Court concluded that counsel had effectively presented evidence of Petitioner's military combat service, his unmedicated state during the crime, and his mental illnesses. *See generally Hall v. Brannan*, 670 S.E.2d 87. In moving to Petitioner's complaints of ineffectiveness relating to the mitigation phase, the Georgia Supreme Court concluded that trial counsel properly reminded the jury that the evidence from the guilt/innocence phase carried over into the mitigation phase. *Id.* at 95. The Georgia Supreme Court also noted trial counsel's presentation of lay testimony supporting Petitioner's good character. *Id.*

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[16] Importantly, most of the complaints that Petitioner lodges against his trial counsel during the mitigation phase are similar to his complaints about their performance during the guilt/innocence phase of the trial. That is, Petitioner claims that trial counsel were ineffective during the guilt/innocence phase in failing to more fully develop the details of Petitioner's combat service in Vietnam, in failing to present evidence that Petitioner was unmedicated during the crime, and in failing to present a more comprehensive account of Petitioner's mental illnesses, particularly his bipolar disorder. These claims are more fully addressed in Section III.B., III.C., and III.D., *infra*.

Thus, the Georgia Supreme Court concluded that trial counsel did not perform deficiently in mitigation under *Strickland*. *Id.*

The issue before this Court now is whether the Georgia Supreme Court unreasonably applied the *Strickland* standard in consideration of Petitioner's claim that his counsel was ineffective during the mitigation phase. That is to say, because of the added layer of deference that AEDPA requires of this Court, Petitioner "must do more than satisfy the Strickland standard. He must show that in rejecting his ineffective assistance of counsel claim the state court 'applied *Strickland* to the facts of his case in an objectively unreasonable manner.'" *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (11th Cir. 2004) (quoting *Bell v. Stone*, 535 U.S. 685, 699 (2002)).

The Eleventh Circuit has explained that in addressing a habeas claim that trial counsel should have done something more, a court should first look at what the attorney actually did. *See Grayson v. Thompson*, 257 F.3d 1194, 1218–19 (11th Cir. 2001). This is not a case where trial counsel did little or nothing in preparation and presentation of Petitioner's mitigation case before the jury. Indeed, a review of the record shows that trial counsel conducted an adequate investigation into Petitioner's past. Trial counsel knew from the start that the case would revolve around Petitioner's mental health. (Resp. Ex. 124, State Habeas Trial Tr. at 40–41, 55, 104–05.) They sought and obtained Petitioner's medical records and military records. They spoke with Petitioner's treating psychiatrist on several occasions.[17] (*Id.* at 107, 110–11; Resp. Ex. 144, Taylor Dep. at 66.) They spent a considerable amount of time locating expert witnesses that would support their theory of defense, not guilty by reason of insanity. (Resp. Ex. 124, State Habeas Trial Tr. at 55–57.) Indeed, they found two independent experts to support their defense in Dr. Storms and Dr. Weiss. (*Id.*) They spoke to Petitioner's mother, his ex-wife, and friends of the family many times. They met with potential witnesses to assess their worth to the defense. (*Id.* at 83–84, 94–95; Resp. Ex. 145, Duttweiler Dep. at 25, 32–33.) For instance, they determined that Petitioner's ex-wife and an ex-roommate named Richard Riley would not make good witnesses because they could testify about violent episodes involving Petitioner. (Resp. Ex. 124, State Habeas Trial Tr. at 91–93.) Additionally, Mr. Riley had indicated that he thought Petitioner was simply using his Vietnam experience as an excuse. (*Id.* at 93; Resp. Ex. 144, Taylor Dep. at 98–99.)

With respect to their mitigation phase strategy, Mr. Taylor explained that they simply wanted to portray Petitioner as a "real, live human being, with a troubled past, that was worthy of being saved." (Resp. Ex. 124, State Habeas Trial Tr. at 136.) Mr. Duttweiler stated that they wanted to emphasize that Petitioner came from a good family and had a favorable history as a good person but was a war veteran who had become disabled because of his mental health issues. (Resp. Ex. 145, Duttweiler Dep. at 19, 21.) The family and friends presented by the

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[17] The testimony at the state habeas hearing was in conflict on this point. (*See* note 40 *infra*.)

defense certainly testified to Petitioner's helpful nature and his good family life, as detailed above. On the other hand, these same witnesses lent support to Petitioner's abnormal behaviors in discussing his tendency to be isolated and in mentioning his nervous laugh." The witnesses were able to emphasize the tragedies that befell Petitioner's family in losing his father to cancer, one brother to suicide and his other brother to an airplane crash. Finally, Petitioner's attorneys presented documentary evidence such as family photographs, school records, and Army commendations. (*See generally* discussion of mitigation evidence at Section I.C., *supra*.)

Mr. Duttweiler also explained that they decided to "soft-pedal" any mental health issues during the mitigation phase because the jury had already rejected Petitioner's mental illness as a defense and counsel did not want to offend the jury or lose credibility with the jury. (Resp. Ex. 125, State Habeas Trial Tr. at 424; Resp. Ex. 145, Duttweiler Dep. at 21–22.) Nevertheless, counsel explained to the jury in closing that it could still reject the death sentence based upon Petitioner's mental illness despite having rejected verdicts of not guilty by reason of insanity and guilty but mentally ill. (Resp. Ex. 29, Trial Tr. at 1404–05.)

In this ineffectiveness claim, Petitioner argues that the Georgia Supreme Court's decision is contrary to or an unreasonable application of several Supreme Court cases involving the effectiveness of counsel during the mitigation phase of a death penalty trial. Importantly, however, the instant case does not present the type of circumstances encountered by the habeas courts in the cited Supreme Court cases. For instance, in *Porter v. McCollum*, --- U.S. ---, 130 S. Ct. 447 (2009), the Supreme Court reversed the Eleventh Circuit's decision to deny habeas relief where trial counsel failed to investigate and present evidence of Porter's military service in two Korean war battles, of his troubled childhood, and of his brain dysfunction. Porter's counsel made no attempt to uncover this information even though it was obtainable. In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court found that Williams's counsel had not begun to prepare for sentencing until a week before the trial, failed to present *any* evidence of Williams's borderline mental retardation, and failed to uncover juvenile and social services records depicting Williams's nightmarish childhood. Similarly, in *Wiggins v. Smith*, 539 U.S. 510 (2003), the Supreme Court faulted Wiggins's trial counsel for their failure to obtain *any* information about his background despite a report that Wiggins had a miserable childhood spent in foster care. Further investigation would have revealed that Wiggins had an abusive and alcoholic mother and suffered physical and sexual abuse in more than one foster home. And finally, in *Rompilla v. Beard*, 545 U.S. 374 (2005), the Supreme Court granted habeas relief based upon Rompilla's attorney's failure to uncover evidence of a miserable and abusive childhood, psychological tests that pointed to schizophrenia and other disorders, and Rompilla's organic brain damage and impaired cognitive function.

In this case, despite a claim that counsel "failed to investigate," Petitioner has not argued that his trial counsel failed to uncover some relevant "bombshell" about his background. For instance, Petitioner did not suffer at the hands of a physical, mental or sexual abuser as a child. He did not suffer from a life-long addiction to drugs or alcohol. Indeed, he did not suffer from some *unexplored* mental illness or retardation. By all accounts, Petitioner had a normal childhood with a loving military family, the benefit of an education, and training and experience in the United States military. The traumatic experiences of war and losing family members were explored at trial, either during the mitigation phase or the guilt/innocence phase. Indeed, all the relevant information about Petitioner came out during the trial of the case in one form or another. For this reason, it cannot be said that trial counsel's investigation into his background was objectively unreasonable.

Petitioner also takes issue with the depth at which certain aspects of his background were explored and detailed before the jury. [18] In this Court's estimation, however, Petitioner's ineffectiveness claim focuses upon the strategic choices his counsel made after a thorough investigation into any mitigating evidence. "[S]trategic choices made after thorough

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[18] For instance, Petitioner feels that his military combat experience should have been portrayed in greater detail. This claim, as well as Petitioner's other claims that certain aspects of Petitioner's mental state and mental illness were insufficiently explored before the jury, are addressed *infra*.

investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Thus, for example, the Court cannot conclude that counsel's failure to introduce further evidence of Petitioner's mental illness during mitigation was objectively unreasonable in light of the strategic choice counsel made to "soft-pedal" the issue.

Moreover, in order to constitute ineffective assistance, counsel's alleged failures must have prejudiced the defense. *Id.* at 692. "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. In assessing a claim of prejudice, the Court must re-weigh the aggravating evidence against all of the mitigating evidence adduced at trial and during the state habeas proceedings. *Wiggins*, 539 U.S. at 534.

In this case, the prosecution had the most compelling piece of evidence in aggravation—the videotape. As previously indicated, the jury found 5 different aggravating circumstances—all borne out by the videotape. More specifically, in the videotape the jury could see that Petitioner shot a police officer engaged in his official duties. Also, the aggravating circumstance of Petitioner interfering with or avoiding arrest is unassailable. More importantly, the jury could see Petitioner retrieve his rifle and take numerous shots[19] at Deputy Dinkheller. While the video shows little of Deputy Dinkheller himself, the audio portion reveals that he begged Petitioner to stop shooting at one paint. Thereafter, Deputy Dinkheller's screams of abject terror and agony are audible, yet Petitioner continued to advance upon and shoot Deputy Dinkheller. Finally, with the command of "die, mother fucker," Petitioner fired a final shot, silencing Deputy Dinkheller's screams; gurgling blood sounds could be heard for moments following this shot as Petitioner sped away. The medical examiner testified that there were ten different projectile entry wounds with corresponding exit wounds in the body of Deputy Dinkheller. (Resp. Ex. 25, Trial Tr. at 448–49.) He further testified that one particular shot shattered the deputy's leg and would have incapacitated him. (*Id.* at 444–45.) It is rather obvious from the audio portion of the videotape at what point Deputy Dinkheller suffered this injury. Yet, the videotape reveals that Petitioner continued to shoot Deputy Dinkheller as he undoubtedly lay on the ground. As the prosecution accurately described, Petitioner quickly and inexplicably "turned a simple traffic stop into a vicious, terrifying and brutal murder" that was witnessed by the jury through the videotape. (*See* Resp. Ex. 29, Trial Tr. at 1368.) Based on this evidence, the three remaining aggravating circumstances, i.e. that the murder was outrageously

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[19] Based upon the number of shell casings found at the scene, GBI Investigator Rodney Wall testified that Petitioner fired his weapon at least thirty times. (Resp. Ex. 24, Trial Tr. at 163.)

or wantonly vile, horrible or inhuman in that it involved torture and aggravated battery to the victim, as well as depravity of mind of Petitioner, were clearly established by the prosecution and were uncontested at the mitigation phase. Moreover, additional evidence presented by the prosecution at the mitigation phase painted Petitioner as a continuous threat to society and the orderly administration of a correctional facility.

Petitioner's trial counsel's mitigation strategy failed. The jury rejected Petitioner's mitigating evidence in favor of the death penalty. In now reweighing the evidence, this Court finds that none of the additional mitigation evidence proffered here would have altered the jury's finding that the murder was especially heinous or atrocious. The notion that the result would have been different had counsel presented more detailed evidence of Petitioner's combat service or his mental illness is unattainable in light of the aggravating evidence before the jury. In point of fact, the jury had heard about Petitioner's mental illness and combat service in the days prior to its verdict of death. The additional evidence proffered by habeas counsel would not have changed the prosecution's portrayal of Petitioner as dangerous, fully culpable, and a continuing threat to society. Having already rejected the insanity defense, harping on Petitioner's mental health may not have helped explain how a man who came from a good family with every fair opportunity shot and killed a young, polite police officer without provocation or justification. In fact, it was not objectively unreasonable for trial counsel to believe that providing more detailed information about

Petitioner's combat service, his mental illness, or his mental state at the time of the crime may have been counterproductive and harmful to Petitioner's mitigation case. Petitioner has simply not shown a reasonable probability that additional, more detailed evidence of his mental health problems or his combat service would have changed the balance of aggravating and mitigating circumstances. Accordingly, habeas relief based upon counsel's performance at the mitigation phase must be denied.

B. The Investigation and Presentation of Petitioner's Military Service History

Petitioner contends that trial counsel's investigation into his military service was minimal and thus the presentation of the insanity defense, which was based upon the PTSD he suffered as a result of his military service, was ineffective. Petitioner complains that counsel did nothing beyond relying upon his military records and his VA medical records to inform themselves on his military experience. Petitioner explains that the military records do not contain any detail about the intensity of his combat experience or the emotional impact of his service. Moreover, while his medical records contain accounts of the specific traumas he suffered, these accounts are solely the result of Petitioner's self-reporting. According to Petitioner, counsel's failure to present corroborative and more detailed evidence made his self-reporting the only evidence of his traumatic military service; thus, it was likely that the jury completely discounted the severity of his PTSD.[20]

[20] For the most part, Petitioner's claim as it relates to trial counsel's failure to present more details concerning his military experience primarily focuses upon its impact on his mitigation case. He argues that had trial counsel presented the testimony of fellow servicemen, "there is a reasonable probability that at least one juror would have found [Petitioner] deserving of a life sentence." (Pet.'s Br. at 28.) Indeed, Petitioner's sole focus in reply is a mitigation argument. In the reply brief, Petitioner enumerates the ways in which he served his country, listing his heroic achievements and specifying the many traumas he suffered in Vietnam. (Pet.'s Reply Br. at 12–15, 20–25.)

As explained in Section III.A. *supra*, however, while extolling Petitioner's wartime experiences from nearly 30 years prior to the murder may have served to better humanize Petitioner, it would have done little to mitigate the uncontested aggravating factors found by the jury. Accordingly, the Court need not determine here which party has presented the more accurate depiction of Petitioner's wartime experience. Rather, the Court accepts as true Petitioner's portrayal of himself as a wartime officer and hero who experienced danger and violence, witnessed the death of comrades and commanding officers, and faced his own death, which ultimately resulted in his development of PTSD.

Finally, this Court is constrained to note that this jury was not devoid of military experience although not necessarily combat related. In fact, of the twelve jurors and three alternates, two had served in the Army, one in the Marines, one in the Air Force and one in the Georgia Air National Guard. (Resp. Ex. 16 (Mr. Theodore Evans), Resp. Ex. 19 (Mr. David F. Thompson and Mr. Adam Johnson), Resp. Ex. 20 (Mr. Jackie McKenzie), Resp. Ex. 22 (Mr. Freddie Fairley).) One juror stated that he knew veterans of World War 11, Vietnam and Korea. (Resp. Ex. 16 (David L. Lewis).) One juror's father was a combat veteran, having served in all three wars. (Resp. Ex. 17 (Ms. Linda M.S. Gordon).) Another juror was married to a Korean War veteran and knew a Vietnam veteran. (*Id.* (Ms. Wynell C.

Petitioner believes counsel should have attempted to learn more about his unit, its missions and the combat and violence he experienced. Petitioner believes counsel should have interviewed the soldiers with whom he served and attempted to corroborate his account of the trauma he suffered in Vietnam. During the state habeas proceedings, Petitioner presented the testimony of soldiers with whom he served and additional records from the United States Army and the National Archives that allegedly would have corroborated Petitioner's extensive combat experience. Petitioner also argues that trial counsel should have interviewed Dr. Christian Lemmon, a treating psychologist from the VA, to whom Petitioner had discussed his traumatic combat experiences.

The Georgia Supreme Court found that counsel's presentation of evidence to explain why Petitioner developed PTSD, i.e., evidence of his war experience, was sufficient. In other words, in applying the *Strickland* standard, the Georgia Supreme Court did not find counsel's performance in this regard deficient, acknowledging that counsel presented

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Logue).) Two other jurors mentioned that they knew Vietnam veterans. (*Id.* (Janice C. Phelps); Resp. Ex. 20 (Sharon K. Wise).) Petitioner's argument here, that a more detailed account of his military experience was necessary for this jury to understand his background, underestimates the jurors' own experiences. The Vietnam War is an ineluctable legacy of American history, etched on black granite at the National Mali as well as the collective consciousness of the American people. Moreover, as pointed out, a number of jurors in this case either made, or bore close witness to, the self-sacrifice demanded of our service members.

evidence that Petitioner "had a long history of treatment for [PTSDI that was related to his war experiences." *Hall v. Brannan*, 670 S.E.2d at 94.

Because Petitioner claims that counsel failed to thoroughly investigate his military service, contrary to the effectiveness standard set forth in *Strickland*, *Rompilla*, and *Porter v. McCollum*, this Court will again look first to what trial counsel actually did in the presentation of Petitioner's military service as it relates to the PTSD defense. *Grayson*, 257 F.3d at 1218–19.

In large part, defense counsel relied upon the testimony of Dr. Storms in relating how and why Petitioner developed PTSD. Dr. Storms's testimony about Petitioner's military background was derived from interviewing Petitioner. (Resp. Ex. 25, Trial Tr. at 573–74.) In the interviews, Dr. Storms learned that Petitioner entered the Army in 1968 and graduated from Officer Candidate School, specializing in artillery. Petitioner was later stationed at Fort Bragg, North Carolina, in the *52nd Airborne Division* for a year prior to being sent to Vietnam with the *23rd Infantry Division, an artillery division.*[21] (*Id.* at 575.) Petitioner's point of entry in

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[21] Some suspicions as to the accuracy of the testimony of Dr. Storms prompted the presiding judge to undertake a meticulous review of the military records of this Petitioner, which were submitted to the state habeas court. (*See generally* Resp. Ex. 127, Exs. 4–8.) For example, Dr. Storms (who had obtained his historical information from Petitioner himself) had referred to the "*52nd* Airborne Division" and the "*23rd* Infantry Division, an artillery division." The apparent anomalies of Dr. Storms's testimony might have been due to a transcription error by the Court Reporter, a misunderstanding on the part of Dr.

Storms, or some incorrect recollection on the part of Petitioner. In any event, the review of Petitioner's military (non-medical) records was revealing in many respects.

Petitioner was inducted into the United States Army on August 1, 1968, taking his basic training at Fort Benning, Georgia. Thereafter, he volunteered for and completed a 3 week course in Airborne training at Fort Benning, after which he was qualified as a parachutist and received his "jump wings." Petitioner entered Officer Candidate School for the Artillery Branch at Fort Sill, Oklahoma on February 16 1969, and was commissioned as a Second Lieutenant, Artillery, an July 29, 1969. Thereafter, Petitioner was assigned to First Battalion, 319th Artillery, a component of the *82nd* Airborne Division at Fort Bragg, North Carolina where he remained until he was promoted to First Lieutenant and ordered to serve in Vietnam beginning in July 1970.

While service in the 82nd Airborne Division, one of the most distinguished elements of the United States Army, is noteworthy and important, the records disclose that this duty was stateside—most likely intensive training. On July 13, 1970, Petitioner was assigned to the 23rd Infantry Division (Americal) in the Republic of Vietnam. Dr. Storms's comment notwithstanding, the 23rd Infantry Division is not an *artillery* division. Petitioner was assigned to an artillery component within the infantry division, specifically, the First Battalion, 14th Artillery. It was during this assignment that Petitioner underwent his combat experience. Petitioner was, from all appearances, an excellent soldier and a good officer. He had extensive training and expert badges as a rifleman, machine gunner, and grenadier. On most occasions he received very good evaluations by his superiors. His combat duty spanned a period of approximately 6 months (from July to December of 1970) In December of 1970, he was assigned to the 723rd Maintenance Battalion of the 23rd Infantry Division to complete his tour of duty in Vietnam through June 3, 1971.

Petitioner returned to the United States and was released from active duty at Fort Lewis, Washington, on June 7, 1971. After his separation from active duty, Petitioner served in the Army Reserves, attending several annual two-week stints of

Vietnam was Chu Lai. Petitioner was a "commanding officer of D battery," and his job was "reconnaissance in what was known as the demilitarized zone," which required that he "go out on basically scouting missions for six months at a time . . . to set booby traps and ambushes for the Viet Cong." (*Id.*) Petitioner was discharged from the Army in 1971. (*Id.*)

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active duty or "summer camp." During these he received admirable efficiency reports. As late as 1975, commanding officers in reserve units commented on Petitioner's service in the following manner:

- LT. Brannan performed his duties in an exemplary manner.
- LT. Brannan provided much expertise to a critical area of this unit's test tea. His observations were timely and reliable. He assumed responsibility beyond what is expected of an officer of his rank.
- Following assumption of his duties, 1LT Brannan immediately took charge of his section, organized and supervised their daily activities. . . . [H]e was outstanding in his professional conduct and performance. Using his experience, 1LT Brannan constantly advised the battery during all unit exercises . . . . 1LT Brannan was always concerned for the welfare of his subordinates.
- 1LT Brannan constantly displayed a willingness to accept the responsibility to better the Battery. He has all the necessary qualities to make an outstanding officer. During all Battery exercises he added knowledge and experience to the unit. The example he set by his conduct and bearing, particularly during training exercises was excellent.

Petitioner was discharged from service in the United States Army Reserve on June 4, 1975.

Dr. Storms then related that after his discharge, Petitioner had a nervous breakdown and began to live a nomadic lifestyle.[22] Petitioner married in 1975 but was divorced six years later purportedly due to his PTSD symptoms. Petitioner became increasingly reclusive and was eventually given a 100% service connected disability because of his PTSD. (*Id.* at 575–76.)

In evaluating the PTSD, Dr. Storms reviewed Petitioner's medical records and provided the jury with greater detail. Specifically, Dr. Storms testified that Petitioner had

> a well documented history of combat related post traumatic stress disorder. . . . He ha[d], you know, associated symptoms of depression, some of manic depression,, another psychiatric diagnosis that we call hypomania which is close to or which is just below mania. He had a history of flashbacks. He had a history of recurrent intense anxiety, a history of intrusive dreams about Vietnam, a history of] chronic guilt over various incidents that occurred in Vietnam, and basically just a general paranoia of feeling in danger a lot when there was no objective reason to feel in danger.

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[22] The nomadic lifestyle to which Dr. Storms referred seems at odds with Petitioner's military record while in the United States Army Reserve until 1975. However, Dr. Storms' later noted that the onset of Petitioner's PTSD was delayed because he had been unable to talk about it when he first left active service. (Resp. Ex. 25, Trial Tr. at 578.)

(*Id.* at 578.) Dr. Storms also explained that Petitioner had been hospitalized at both the Decatur and Augusta VA hospitals on account of his PTSD. (*Id.* at 579.) Dr. Storms further explained that it was well-documented through the past fifteen years that Petitioner had "combat related" PTSD from serving in Vietnam. (*Id.* at 579–80.) And, although Petitioner had not recounted the specifics of his combat experience to him, Petitioner had done so with his treating psychiatrists, as was detailed in his medical records. Dr. Storms gave the jury an example of how Petitioner took responsibility for one of his commanding officer's death. (*Id.* at 580.) Independently assessing his mental health, Dr. Storms concluded from his interviews with Petitioner and the medical records that Petitioner had PTSD and was not malingering. (*Id.*)

Dr. Avrum Weiss also testified about Petitioner's combat experience as it relates to his PTSD. Upon review of his medical records, Dr. Weiss concluded that Petitioner had extensive combat exposure. (Resp. Ex. 26, Trial Tr. at 708.) Dr. Weiss opined that Petitioner would not have been admitted to the inpatient PTSD unit at the Augusta VA hospital if he did not have extensive combat exposure. (*Id.* at 733.) When cross-examined about the extent of his combat exposure, Dr. Weiss explained that the medical records are full of references to Petitioner's combat experience and that that experience had never been questioned by any physician. (*Id.*)

The medical records that trial counsel reviewed prior to trial with the assistance of their experts included numerous references to the trauma

Petitioner suffered in Vietnam. For example, in a 1989 psychiatric interview, Petitioner explained:

> 'I do have one persistent flashback, one persistent dream. I don't recall how long we'd been there, but we were on a mission, trying to surround some Viet Cong, and the captain stepped on a mine. I had to go help him. I can still see him. He had a leg blown off. He was practically blown to pieces. Of course, he didn't live. That's something that's with me always.'

(Resp. Ex. 128, at 922.) The trauma and guilt that Petitioner experienced with the death of his captain are reported several times in his medical records. (*See, e.g.*, *id.* at 908, 968, 1126, 1164 ("[Petitioner] found that having to deal directly with the death of his commanding officer was his most vivid and direct involvement with the impact of combat on human life. This is the incident to which he most frequently has flashbacks.").) Petitioner also explained that he was in charge of men, "sending them to death." (*Id.* at 909.) On one form in which Petitioner had to self-describe the source of his PTSD, he wrote: "Forward Observer, combat, care and concern of [enlisted men], death, killing, violence control, night fighting, fire control, XO, command and divisional aircraft repair responsibilities." (*Id.* at 920.) Petitioner reported narrowly escaping death on several occasions in Vietnam. (*Id.* at 1052.) Yet, now, Petitioner claims that trial counsel should have further investigated his combat experience in an effort to corroborate the traumatic events noted in his medical records. For instance, Petitioner presented to the state habeas court the testimony of four Vietnam veterans, which show the combative, violent nature of their reconnaissance missions and explain the horrific and traumatic circumstances of their commanding officer's death.

This Court concludes, however, that the failure to investigate and find corroborative evidence was not deficient when the relevant evidence, i.e. the combative and violent Vietnam experience, appeared in Petitioner's medical records. Trial counsel was not given any reason to doubt the veracity of what the medical records contained in this regard; accordingly, they had no duty to investigate beyond those records to find evidence that they already had. Indeed, it was not objectively unreasonable for counsel to stand pat on the evidence of Petitioner's military service appearing in the medical records. *Strickland* and its progeny does not require counsel to corroborate evidence, particularly evidence that is unchallenged and thirty years old.[23]

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[23] As Petitioner points out, his Vietnam experience as recorded in the medical records only contain his version of his combat service. At trial, any other account would have had to come from the testimony of witnesses who would have been subject to cross examination and who may have provided an account less hyperbolic than Petitioner in his effort to gain a 100% disability rating. Further, the presentation of live testimony from servicemen who had experienced the same trauma as Petitioner, yet appeared unaffected (having jobs and families), could have adversely impacted Petitioner's claim of PTSD so severe that he did not know shooting a police officer was wrong on the day in question. (*See, e.g.*, Resp. Ex. 127, Hawley Aff. ¶ 1 ("For the past twenty five years, I have worked on the railroad for Canadian National. After many years in management, I currently serve as a Conductor."); Hardy Aff. ¶ 1

Moreover, Petitioner's present claim mischaracterizes the issue before the jury and therefore misdirects the focus of this Court. While Petitioner states that his "military service was the cornerstone of the defense" (*see* Pet.'s Br. At 26), the PTSD was actually the cornerstone of Petitioner's defense. That is to say, the issue before the jury was not whether the trauma Petitioner suffered in Vietnam was sufficient to cause his PTSD. Indeed, there was no evidence to suggest that Petitioner did not suffer from PTSD.[24] Rather, the issue before the jury was whether the PTSD he suffered was sufficient to legally excuse the murder of Deputy Dinkheller. In this respect, Petitioner had two experts testify on his behalf that his PTSD was a

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(Upon returning from Vietnam, I resumed working for General Motors Corporation. I retired from General Motors in 2001. I currently reside in Hemlock, Michigan with my wife and stepson."); Underwood Aff. ¶ 1 ("I currently reside in Boyne City, Michigan with my wife. I am employed at DCL of Charlevoix, a fabrications company.") Suffice it to say that defense counsel's decision not to present the corroborative evidence suggested by habeas counsel was not objectively unreasonable.

[24] Petitioner argues that the prosecution consistently raised suspicions that he did not experience the intensity of combat that he claimed and then cites to the record of the prosecution's opening and closing statements. (Pet.'s Br. at 30–31.) However, these record cites refer to instances when the prosecution accused Petitioner of lying during his GBI interview following the murder. More importantly, there was no evidence at trial to suggest that Petitioner lied about his combat experience in relating it to his treating health care professionals. As suggested in note 22, there was an inherent risk in attempting to validate Petitioner's combat experience when there was no real challenge to it in the first instance.

valid defense. Moreover, Dr. Carter agreed at trial that Petitioner suffered from PTSD even though he was not of the opinion that it was so severe to result in 5 dissociative state on the day of the murder. (Resp. Ex. 26, Trial Tr. at 870–74.)

Accordingly, even if trial counsel's failure to further investigate Petitioner's military service background was deficient, such failure did not prejudice his defense at trial. In short, the Georgia Supreme Court's conclusion that trial counsel's performance was not deficient because counsel had presented evidence of Petitioner's long history of treatment for combat-related PTSD is neither an erroneous finding of fact nor an unreasonable application of the *Strickland* standard. This claim of ineffective assistance of counsel therefore must be denied.

C. Failure to Present Evidence that Petitioner was not Properly Medicated

Petitioner claims that trial counsel was ineffective in failing to inform the jury that he had not taken his prescribed psychotropic medication at the time of the offense, which would have "exacerbated [his] psychiatric symptoms, increased his impulsivity, intensified his depression, and ultimately. led him to engage in suicidal behavior and thinking." (Pet.'s Br. at 51.) indeed, the only mention of Petitioner's lack of medication at trial was made by his counsel in the closing argument of the quilt/innocence phase when he was attempting to discredit Dr. Carter's testimony. At that time, counsel pointed out that Petitioner had told Dr. Carter that he had not taken his medication for about five days prior to the shooting, and counsel then challenged the doctor's testimony as follows:

> The medical doctor is questioning him regarding the lead up to these events. And he says, I hadn't taken one of my two medications for about five days. Did the medical doctor comment on that? Did he address the potentially negative effects from [Petitioner] having been off his medication for a period of five days? Absolutely not. Did they bring it out? Absolutely not.

(Resp. Ex. 27, Trial Tr. at 997–98.)

In addressing this claim of ineffectiveness, the Georgia Supreme Court first concluded that trial counsel had made a reasonable strategic choice not to open up the matter during the trial because the record showed that Petitioner's failure to obtain his medication was due to his having an argument with a man in line at the pharmacy and further, that Petitioner had a history of failing to take his medication. *Hall v. Brannan*, 670 S.E.2d at 93. The Georgia Supreme Court concluded that, an any event, Petitioner's defense was not prejudiced by the failure to present evidence of his lack of medication because Dr. Boyer had testified pre-trial that the lack of medication "would have simply made [Petitioner] more depressed," and Dr. Carter had testified at the habeas hearing that the lack of medication "would have simply made him more irritable." *Id.*

Petitioner contends here that the Georgia Supreme Court's findings of fact are erroneous. This Court's review of the record, however, shows they are not. Moreover, in consideration of the facts as borne out by the record, counsel's performance was not deficient for failing to explore the lack of medication issue in depth before the jury; rather, it was an objectively reasonable strategic decision.

In assessing trial counsel's performance, the Court must consider the circumstances at that time and indulge in a strong presumption that counsel's conduct fell within the wide range of reasonably professional assistance. *Strickland*, 466 U.S. at 689–90. To show counsel's performance was unreasonable, a habeas petitioner must establish that "no competent counsel would have taken the action that his counsel did take." *Grayson*, 257 F.3d at 1216. As previously stated, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Moreover, "it matters not whether the challenged actions of counsel were the product of a deliberate strategy or mere oversight." *Gordon v. United States*, 496 F.3d 1270, 1281 (11th Cir. 2007). "The relevant question is not what actually motivated counsel, but what reasonably could have motivated counsel." *Id.* There are no "absolute rules" for determining whether counsel's actions were reasonable, as "absolute rules would interfere with counsel's independence . . . and would restrict the wide latitude counsel have. in making tactical decisions." *Putnam v. Head*, 268 F.3d 1223, 1244 (11th Cir. 2001). Moreover, [t]o uphold a lawyer's strategy, [a habeas court] need not attempt to divine the lawyer's mental processes underlying the strategy." *Chandler v. United States*, 218 F.3d 1305, 1315 n.16 (11th Cir. 2000) (en banc); *see also*

Roe v. Fiores-Orteg, 528 U.S. 470, 481 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.")

With these concepts in mind, the Court now turns to the circumstances known to trial counsel during the trial with respect to Petitioner's medication. There has been little dispute that Petitioner had not taken his medication as prescribed at the time of the incident. As reflected in their notes, Petitioner told his trial counsel on at least two separate occasions that he had not taken his medications for a week prior to the murder because he had misplaced them. (Resp. Ex. 172, at 13626, 13644.) Petitioner told counsel he had found the medications the day before the murder and had taken Depakote, a mood stabilizer, that night and Effexor, an antidepressant, the morning of the incident.[25] (*Id.* at 13644.) With respect to taking his medication in general, Petitioner told trial counsel that without it, he felt passive, nervous, and depressed. (*Id.* at 13644–45.) Petitioner told trial counsel that he did not take medication for a long time because "if he felt the way he did it was meant to be." (*Id.* at 13644.) He stated his mother talked him into taking the medication. (*Id.*) Petitioner also told trial counsel that there were delays in receiving his medication so he would stretch out or thin out his medication. (*Id.* at 13645.) He also related that he once "[s]napped at another vet in line for [the] pharmacy." (*Id.* at 13626.) Petitioner's mother

[25] At trial, Petitioner told the court that he had found his medication on the day of the murder and had taken the Effexor but not the Depakote. (Resp. Ex. 27, Trial Tr. at 923.)

similarly told the GBI that Petitioner had been disgusted with the long line at the pharmacy and left without his medication. (Resp. Ex. 142, at 5020–21.) She confirmed that he had not taken his medication as prescribed prior to the murder. (*Id.*)

At a pretrial hearing on August 18, 1998, Dr. Boyer explained that Petitioner told him during their last consultation five weeks prior to the murder that he had not taken his medication for the preceding two weeks because he had run out. (Resp. Ex. 8, at 63–64.) Dr. Boyer explained that there was a likelihood that a lack of medication would have an adverse effect on Petitioner's mental health. (*Id.* at 58.) However, Dr. Boyer qualified this "likelihood" as only a 20 to 35 percent chance; he could not say with reasonable medical certainty that the lack of medication would have adverse effects. (*Id.* at 66–67.) The primary effect of the lack of medication would be severe depression. (*Id.* at 66.)

Finally, the medical records to which trial counsel had access reflect Petitioner's failure to medicate. (Resp. Ex. 162, at 11,007; 11,093; and 11,100.) Of particular note, Petitioner had hoarded his Depakote rather than taking it as prescribed while incarcerated awaiting trial. (Resp. Ex. 158, at 10048.)

During the habeas proceedings, Mr. Duttweiler testified about his and Mr. Taylor's view of the medication issue: "[N]either of us [was] feeling very good about the idea that [Petitioner was] making a conscious decision to not medicate himself or running out or whatever it was would be very sympathetic." (Resp. Ex. 145, Duttweiler Dep. at 118–19.) Mr.

Duttweiler further elaborated: [W]e thought that [the jury] would feel like if [Petitioner] was aware of it and medicated for it, then coming off of medications is taking a risk that something like this would happen." (*Id.* at 120.) Given Petitioner's documented failure to medicate, counsel were understandably unenthusiastic about not emphasizing the medication issue with the jury, which might be reactive to Petitioner voluntarily placing himself in a harmful position.

Upon review of the circumstances known to counsel at the time of trial, and in light of Mr. Duttweiler's reasonable articulation of counsel's concern,[26] this Court finds that the evidence supports the Georgia Supreme Court's conclusion that counsel made a reasonable strategic decision not to argue or present evidence that Petitioner was not properly medicated at the time of the incident. The reasonableness of this decision is bolstered by the fact that Petitioner's treating psychiatrist, Dr. Boyer, testified prior to trial that he could not say with medical certainty that Petitioner's failure to take his medication would have adverse effects.[27] In other

[26] In his habeas reply brief, Petitioner takes issue with the use of Mr. Duttweiler's testimony because he was second chair and testified that Mr. Taylor was responsible for decisions regarding mental health evidence at trial. However, to suggest that Mr. Duttweiler is not competent to testify about counsel's collective representation because he was not "responsible" for that portion of the trial is to suggest that the attorneys never consulted with each other. This is an implausible suggestion.

[27] Of note, Dr. Boyer similarly testified at the habeas hearing. That is, while Dr. Boyer testified that the failure to take medication could greatly increase the "risk of relapse or

words, the decision becomes more reasonable because Petitioner's treating physician could not say with reasonable medical certainty that there was a causal relationship between the lack of medication and the murder.

In short, Petitioner has not established that no competent counsel would have failed to present evidence that he was not properly medicated at the time of the murder. *See Grayson*, 257 F.3d at 1216. Accordingly, the Georgia Supreme Court's decision that counsel was not ineffective in this regard is not contrary to or an unreasonable application of established law. This claim of ineffective assistance of counsel therefore must be denied.

D. Investigation and Presentation of Petitioner's Mental Illnesses

Under Petitioner's current assessment in this habeas proceeding, his trial counsel were deficient in failing to present "compelling and detailed evidence of the development of [his] mental illness and the thirteen years of treatment he received prior to the offense." (Pet.'s Br. at 60–61.) Instead, according to Petitioner, trial counsel offered a "weak, vague and unsubstantiated presentation of [his] mental health development, history and treatment." (*Id.* at 98.) Petitioner reasons that this failure allowed the prosecution to effectively argue or insinuate that

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recurrence of [PTSD] symptoms," he affirmed his prior testimony that he could not say with medical certainty that Petitioner would be adversely affected. (Resp. Ex. 124, at 158–59, 177–78.)

Petitioner's disability based upon PTSD was not legitimate but instead contrived.[28]

At the outset, it is readily apparent from the record that this claim involves a question of counsel's performance in the *presentation* of the mental illness defense as opposed to its *investigation*. The information Petitioner now wishes to have had his counsel present had already been in the hands of his counsel at the time of trial. In his habeas brief, Petitioner offers thirty-six pages of a detailed account of Petitioner's life and his mental health progression, starting in June of 1971 when he returned from Vietnam until the month prior to his crime. (*Id.* at 61–97.) This biography, which includes statements made by Petitioner, Is taken almost entirely from his medical records and treatment notes, which were in the possession of his trial counsel.[29] (*See generally* Resp. Exs. 127–129.)

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[28] Petitioner also argues that counsel's failure to present a more detailed account of his mental health progression prejudiced his mitigation case during the penalty phase because a proper presentation would have lessened his moral culpability in the jurors' eyes. As discussed in Section III.A., *supra*, in light of the tortuous and aggravating nature of this crime, there is not a reasonable probability that the sentence would have been different if the jury had heard greater detail about his mental illnesses. Moreover, as previously determined, counsel's decision to "soft-pedal" the mental health issues during the penalty phase was not unreasonable.

[29] The detailed account also includes testimony from family members obtained by habeas counsel that describe a few odd incidents the affiants witnessed of Petitioner in the years before the murder.

While I will not replicate Petitioner's account here, an overview is necessary to my point. In his account, Petitioner explains that he was unable to continue service in the Army Reserves or to attend school upon returning from war because he was overwhelmed by thoughts of Vietnam and feelings of guilt. (Pet.'s Br. at 61–62.) His older brother Bobby was killed in a plane crash in 1975, which devastated both Petitioner and his younger brother Sam. Petitioner explained that his mental condition continued to deteriorate, and in 1980 he was divorced. He displayed increasingly odd and irritable behavior at this time. "[Petitioner] began isolating himself, having mood swings and acting paranoid." (*Id.* at 62–65.) In 1984, his younger brother Sam committed suicide, causing further deterioration. His parents then sought help for Petitioner through the VA. At this time, he was assigned a 10% disability rating based upon the mental disorder of PTSD. (*Id.* at 66–68.) Petitioner attended various outpatient and inpatient counseling and psychotherapy sessions in hopes of allaying his severe depression. In these sessions, he explained his struggle to meet the expectations of his parents and his guilt of having to rely upon his parents for support as well as his persistent flashbacks to Vietnam. Petitioner would find some solace in the isolation of hiking alone for long periods of time. However, Petitioner continued to struggle with daily stresses and withered under the perceived expectations of his parents. (*Id.* at 69–72.)

In or around 1989, Petitioner voluntarily committed himself to the VA hospital in Decatur for several weeks. At the conclusion of this hospitalization, his primary psychiatrist recommended he be placed in an inpatient, specialized PTSD program at the Augusta VA. (*Id.* at 73–75.) About this time, the VA found Petitioner to be 30% disabled. Petitioner was readmitted to the Augusta VA for his mental illness in February 1991 and was hospitalized for five months. In July of 1991, the VA determined that Petitioner was 100% disabled based upon his PTSD, retroactive to October 1990. (*Id.* at 73–84.)

In February of 1992, Petitioner was living with his parents and helping care for his terminally ill father, who died in 1993. He continued to live with his mother thereafter. With respect to his mental illness, Petitioner continued psychotherapy treatment as well as taking a regimen of psychotropic drugs designed to alleviate his symptoms. Despite the therapy and medication, Petitioner continued to struggle with depression and mood swings. He was unable to form close relationships and was uncomfortable interacting with people. These struggles continued through the mid-1990s. In 1996, Dr. Boyer diagnosed Petitioner with bipolar disorder as well as PTSD on account of his mood swings. (*Id.* at 84–93.)

The months prior to the murder are described this way:

> [Petitioner's] mental health rapidly deteriorated. [Petitioner] had spent the last three decades struggling to cope with traumas he experienced in Vietnam and the subsequent debilitating mental illness he suffered. The month of December was

> always especially difficult for [Petitioner], and he commonly succumbed to his deepest periods of depression during this time. Even though Captain Shaw, Bobby, and Sam had all been dead well over ten years, [Petitioner's] feelings of their loss and his struggles with PTSD had not been resolved. Typically, [Petitioner] struggled more than usual during the month of December, which is the time of year when Captain Shaw and his brother died.

(*Id.* at 95–96 (cited sources and quotation omitted).)

On December 5, 1997, Petitioner visited Dr. Boyer for the last time, at which time he offered "several stories of how he narrowly escaped death in Vietnam, which was the first time he offered such highly emotional material." (*Id.* at 96 (quoting Resp. Ex. 129, at 1243.)) Petitioner also related that he had run out of his medication two weeks earlier, which made him somewhat more irritable." He had denied any episodes of physical violence, however. (Resp. Ex. 129, at 1243.)

Deputy Dinkheller would lose his life approximately five weeks later.

As mentioned, this account was derived almost entirely from Petitioner's medical records and included quotes from the observations of his treating psychiatrists or from Petitioner himself as recorded by the treating psychiatrists. These records were in the possession of Petitioner's trial counsel from the beginning because, as Mr. Taylor explained, he knew from the start that the case would revolve around

Petitioner's mental health. (*See* Resp. Ex. 124, State Habeas Trial Tr. at 40–41, 55 104–05.) Mr. Taylor testified that he extensively reviewed these records. (*Id.* at 108.) Further, as demonstrated by his handwritten notes from one of his first meetings with Petitioner, Mr. Taylor knew that Petitioner's "life changed most" in Vietnam; that his commanding officer was killed alongside of him; that he dropped out of college upon his return from Vietnam; that he had been overwhelmed with thoughts of Vietnam; that he could not have relationships with others; that he had been hospitalized at the Augusta VA; that he had been "held together" by hiking; that he had not worked since 1984 and was disabled; and that he had PTSD and bipolar disorder. (Resp. Ex. 146, at 6461–70.) Mr. Taylor also spoke with a representative of a veterans organization to gain a better understanding of the VA, how veterans seek treatment, and its disability ratings process. (Resp. Ex. 144, Taylor Dep. at 60.) Finally, counsel spoke with treating physicians as well as expert witnesses to develop their defense. (*Id.* at 22–23, 49, 63–66; Resp. Ex. 124, State Habeas Trial Tr. at 79–80, 104–05, 110–12.) In short, there is very little pertaining to Petitioner's mental illnesses that trial counsel did not know prior to the trial of the case. Thus, counsel were in no way deficient in investigating Petitioner's mental health issues.[30]

[30] The Georgia Supreme Court correctly concluded: 'The record is very clear that counsel prepared thoroughly to present their mental health evidence . . . ." *Hall v. Brannan*, 670 S.E.2d at 94.

With respect to counsel's presentation of Petitioner's mental health issues, this Court will again look first to what counsel actually presented at trial. At trial, Dr. Storms testified as follows regarding Petitioner's mental health history. Petitioner left the Army in 1971 due to "psychological reasons." (Resp. Ex. 25, Trial Tr. at 576.) Petitioner had a nervous breakdown while attending college upon his return from Vietnam and would sit in a corner for hours at a time without moving. (*Id.* at 575.) Petitioner thereafter had a "nomadic life." (*Id.* at 576.) Petitioner's marriage ended in divorce because of his PTSD. Petitioner was unable to work in an "established routine" and became very reclusive for the next seven or eight years. (*Id.*) In 1989 or 1990, Petitioner was rated 100% disabled based upon his PTSD. (*Id.*) Petitioner purchased the land in Laurens County because he was uncomfortable with a routine or living around others. Petitioner always felt somewhat anxious during his drive to this property.[31] Petitioner's "head had never really gotten out of the service." (*Id.* at 576–77.)

Dr. Storms explained to the jury that Petitioner had a lifelong history of depression and required antidepressant medications. (*Id.* at 577.) He testified that his review of Petitioner's medical records showed a well-documented history of combat-related PTSD. (*Id.* at 578.) The onset of Petitioner's PTSD was delayed because Petitioner was unable to talk about it when he first got out of the military. (*Id.*) Petitioner had a history of flashbacks, recurrent and

[31] Petitioner was driving to the Laurens County camp house on the day of the murder.

intense anxiety, intrusive dreams about Vietnam, chronic guilt regarding various incidents that occurred in Vietnam, and general paranoia of feeling in danger when there was no reason to feel threatened. (*Id.*) Petitioner had been hospitalized in Decatur and Augusta. Petitioner was involved in psychotherapeutic treatment on an inpatient/outpatient basis for years. (*Id.* at 579.)

Dr. Storms further testified that Petitioner's PTSD had been well-documented throughout the past ten to fifteen years. Petitioner had discussed his Vietnam experiences with psychiatrists, including his guilt from the death of his commanding officer. (*Id.* at 580–81.)

At the conclusion of his testimony, Dr. Storms explained that he is typically very skeptical of using PTSD as a criminal defense because the signs are easily malingered.[32] However, based upon Petitioner's long history of treatment from reputable programs and his own observations, Dr. Storms concluded that Petitioner suffered from PTSD on the day of the murder and could not distinguish right from wrong at the time of the crime.[33] (*Id.* at 585.)

In closing argument Mr. Taylor pointed to the "hundreds of pages of medical records . . . saying

[32] Dr. Storms referred to Petitioner's case as "extremely compelling," however. (Resp. Ex. 25, Trial Tr. at 585.)

[33] Petitioner's other expert, Dr. Weiss, similarly explained the symptoms of PTSD to the jury. He then concluded, after review of Petitoner's military record and medical records, that Petitioner was in a dissociative state on account of his PTSD during the crime.

[Petitioner] is a sick man . . . diagnosed for over a decade as suffering from chronic, severe, post traumatic stress disorder . . . . (Resp. Ex.. 27, Trial Tr. at 992.) He explained that only the "sickest of the sick" get a 100% disability rating. (*Id.* at 993.) He then read several excerpts from Petitioner's medical records to the jury to emphasize Petitioner's history of mental illness and used charts with highlighted portions of the medical records beginning in 1984. (*Id.* at 1001–06.)

Upon its review of the trial record, the Georgia Supreme Court concluded: "[C]ounsel did not perform deficiently . . . regarding evidence of [Petitioner's] personal tragedies and his medical history as those things pertain to post-traumatic stress disorder, particularly in light of the evidence and argument counsel presented that [Petitioner] had a long history of treatment for post-traumatic stress disorder that was related to his war experiences." *Hall v. Brannan*, 670 S.E.2d at 94. Given the testimony of Dr. Storms and the closing argument of counsel as outlined above, the Georgia Supreme Court's findings of fact are not unreasonable and conclusions of law on this point are not contrary to or an unreasonable application of clearly established federal law.

Petitioner now argues that more "compelling details" of his psychiatric history should have been relayed to the jury. However, the test of ineffectiveness

> 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. . . . We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220–21 (11th Cir. 1992) (citation omitted). In the present case, counsel's presentation to the jury of Petitioner's mental health history did not fall below the standard of reasonable professional performance. Indeed, all relevant information was before the jury even though it may not have been as compellingly presented as habeas counsel, with the benefit of 20/20 hindsight and time and resources, argues it should have been.

Finally, Petitioner contends that the prosecution was able to argue without rebuttal that his PTSD was contrived because of counsel's deficient presentation of his mental illness history. Petitioner points to the prosecution's argument in closing:

> [T]he VA does not hand out a hundred percent disability like candy. And, that's a fact. [Petitioner] had to work pretty hard to get his. He first found out about it . . . from one of his roommates who had some literature on it . . . . He got to studying it, and he got himself a ten percent disability. And he worked a little harder and he got it up to thirty percent. And then after his mama cut off his money while he was going on his hiking trips, he finally got all the way up to a hundred percent. He had to work pretty hard to get declared a hundred

> percent disabled. He was going to the VA to get that hundred percent disability money.

(Resp. Ex. 27, Trial Tr. at 1015.)

The Georgia Supreme Court concluded that counsel did not fail to rebut the prosecution's argument that Petitioner was malingering. *Hall v. Brannan*, 670 S.E.2d at 95. This conclusion is supported by the trial testimony of Dr. Harris and Dr. Storms. Specifically, Dr. Harris testified that Petitioner's MMPI testing showed no evidence of malingering. In fact, Dr. Harris concluded that Petitioner was defensive and downplayed his problems and symptoms. (Resp. Ex. 25, Trial Tr. at 545–49.) Second, Dr. Storms opined that based upon his own professional experience, his observations of Petitioner, and Petitioner's long history of treatment for PTSD from reputable programs, Petitioner was not malingering. (*Id.* at 590.) Thus, the record shows that trial counsel was aware of the potential for a malingering argument and offered evidence at trial to rebut it.

In conclusion, "[w]hile there is undoubtedly always something more that could have been said in every case," *see Grayson*, 257 F.3d at 1223, trial counsel's performance in presenting issues pertaining to Petitioner's mental health is far from unreasonable in this case.

E. Examination of the Court-Appointed Psychiatrist, Dr. James Gary Carter

The trial court appointed Dr. James Gary Carter to evaluate Petitioner's mental health status prior to trial.[34] In his report, Dr. Carter diagnosed Petitioner with PTSD and bipolar disorder. (*See generally* Resp. Ex. 2, at 632–62.) Dr. Carter testified as to his findings at the trial of the case as the court's witness. Petitioner asserts herein that his trial counsel were ineffective in their cross-examination of Dr. Carter.

According to Petitioner, his counsel were "dismayed" by the fact that Dr. Carter did not believe Petitioner was mentally insane at the time of the offense, and therefore, counsel failed to elicit the favorable opinions of Dr. Carter. (Pet.'s Br. at 101.) If they had delved deeper, Petitioner contends, Dr. Carter would have testified that Petitioner was a severely mentally ill man, which would have brought into play a verdict of guilty but mentally ill. Dr. Carter would also have testified that had Petitioner been properly medicated at the time of the offense, he would have been less likely to commit the crime because in his unmedicated state, Petitioner had impaired judgment and a diminished ability to cope.

Dr. Carter was appointed by the trial court only after Petitioner filed a notice of his intent to raise an insanity defense under O.C.G.A. § 17-7-130.1. Thus, in accordance with Georgia law, Dr. Carter was asked to determine (1) whether he had the mental capacity to distinguish right from wrong at the time of the crime; or (2) whether a delusional compulsion overmastered his will to resist committing the

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[34] Specifically, Dr. Carter was directed to assess Petitioner's competency to stand trial, criminal responsibility, and potential dangerousness if released on bond, as well as offer treatment recommendations. (Resp. Ex. 2, at 632.)

crime.[35] (Resp. Ex. 1, at 473–74.) These are elements of an insanity defense. Dr. Carter answered both of these questions in the negative in his report of July 20, 1999. (*Id.* at 632–62.)

At the time this report was released, trial counsel had already retained Dr. Storms and had determined to focus on a. not guilty by reason of insanity defense based upon Petitioner's PTSD.[36] Dr. Carter's report completely discounted this theory. Thus, at the trial of the case, defense counsel did not call Dr. Carter as a defense witness. Rather counsel reasonably tried to discredit Dr. Carter's opinion on the insanity defense. In evaluating the cross-examination on this point, the Georgia Supreme Court concluded:

> [T]rial counsel ably cross-examined Dr. Carter regarding his doubts about [Petitioner's] alleged mental illness, including by confronting Dr. Carter with specific items from [Petitioner's] medical records showing diagnoses of various forms of mental illness such as post-traumatic stress disorder and bipolar disorder and even by pointing out to Dr. Carter that he himself had made a diagnosis of post-traumatic stress disorder. In light of the testimony counsel actually elicited, we conclude as a matter of law that counsel did

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[35] *See* O.C.G.A. § 17-7-131(a)(1) (incorporating therein O.C.G.A. § 16-3-2 and § 16-3-3).

[36] The propriety of this decision is discussed in Section III.H., *infra*.

> not perform deficiently regarding Dr. Carter's testimony and that [Petitioner's] defense was not prejudiced by counsel's handling of his testimony.

Hall v. Brannan, 670 S.E.2d at 95. The record supports this finding. In his testimony, Dr. Carter expressed doubt over the severity of Petitioner's PTSD. He opined that Petitioner had never been delusional; he had never been diagnosed as psychotic; and his memory was not fragmented. (Resp. Ex. 26, at 795, 804, 821.) On cross-examination, defense counsel presented Dr. Carter with medical records showing a diagnosis of psychotic behavior and of paranoid type schizophrenia characterized primarily by the presence of delusions. (*Id.* at 830, 833–36.) Defense counsel directed Dr. Carter's attention to several instances in Petitioner's GBI interview where he indicated he could not remember details of the incident. (*Id.* at 837–43.) Also pointed out by defense counsel, Petitioner could not remember things during his interview with Dr. Carter. (*Id.* at 844–50.) Defense counsel also questioned Dr. Carter about Petitioner's repeated military references in explaining the shooting incident. (*Id.* at 858–70.) Finally, defense counsel had Dr. Carter concede that Petitioner was a chronic PTSD sufferer who had even exhibited signs of PTSD during his hospitalization for the court evaluation. (*Id.* at 870–71, 876–77.) In short, defense counsel vigorously cross-examined Dr. Carter and was able to establish certain shortcomings or inconsistencies in his testimony.

In this proceeding, Petitioner does not necessarily take issue with the cross-examination that was conducted; rather, he argues that trial counsel should have also elicited the more favorable opinions that Dr. Carter expressed subsequent to trial: (1) that had Petitioner been properly medicated, he may not have committed the crime; and (2) that the combined effect of Petitioner's bipolar disorder and PTSD caused him to be severely and chronically mentally ill at the time of the crime.[37]

With respect to Dr. Carter's opinion on Petitioner's unmedicated state, this Court has rejected any notion that trial counsel was ineffective for failing to present detailed evidence about Petitioner's failure to take his medication. (*See* Section III.C., *supra*.) Thus, the Court will only address here Dr. Carter's opinion that Petitioner was severely and chronically mentally ill at the time of the crime.

With the benefit of hindsight, Petitioner submits evidence, via Dr. Carter's post-trial affidavit and deposition and habeas court testimony, that had he been asked the right questions, he would have testified to Petitioner's severe mental illness. As the Eleventh Circuit has pointed out, this tactic is not unusual in habeas cases. Indeed, the existence of such after-the-fact evidence such as affidavits, "artfully drafted though they may be, usually proves little of significance. . . . That other witnesses could have been called or other testimony elicited usually

[37] Under Georgia law, a person is "mentally ill" if he has "a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." O.C.G.A. § 7-7- 131(b)

proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." *See Waters v. Thomas*, 46 F.3d 1506, 1513–14 (11th Cir. 1995). Petitioner's claim here, however, suffers from more than just the reasonable skepticism that accompanies post hoc criticism of a criminal defense because Dr. Carter's post hoc opinion is equivocal at best.

In the affidavit submitted to the state habeas court, dated July 15, 2005, Dr. Carter opined that if asked at trial, he would have testified that Petitioner "qualifies for a verdict of guilty but mentally ill under Georgia law . . . [because] at the time of the offense . . . [Petitioner's] behavior and judgment were substantially impaired by his Bipolar Disorder and his Post-Traumatic Stress Disorder." (Resp. Ex. 144, Carter Aff. ¶ 9.) In paragraph 11 of his affidavit, Dr. Carter stated: "Had I been asked to address these topics, I would have explained that someone with PTSD and Bipolar Disorder, like [Petitioner], is never without either of these disorders and that at the time of [Petitioner's] offense the disorders together substantially impaired his judgment and behavior." (*Id.* ¶ 11.) Yet, at his subsequent deposition, Dr. Carter admitted that when a person with a mental health disorder is not "experiencing the full blown symptoms" of that disorder, the person's judgment is not impaired. (*Id.*, Carter Dep. at 18.) Dr. Carter next admitted that, just as he testified at trial, Petitioner was not suffering from a hypomanic episode at the time of the shooting.[38] He instead reiterated that Petitioner was "irritable." (*Id.* at 19–22.) Most telling, Dr. Carter recanted paragraph 11 of his affidavit, stating that if a person is not suffering from symptoms, there would be no impairment of judgment or behavior. (*Id.* at 23.) In fact, Dr. Carter admitted that his opinion about whether Petitioner's mental disorders substantially impaired his Judgment and behavior at the time of the offense in his affidavit contradicts his trial testimony and that his findings at trial would be more accurate. (*Id.* at 24.) Finally, when asked directly at the habeas court hearing whether Petitioner met the criteria for guilty but mentally ill at the time of the offense, Dr. Carter stated yes. (Resp. Ex. 125, Habeas Trial Tr. at 296.) Yet, thereafter, Dr. Carter expressed several times that Petitioner's behavior could be characterized by anger or irritability. (*Id.* at 306–09, 313.) The state habeas court asked: "I hear you saying at the time of the occurrence [Petitioner] was not controlled so much by mental illness but by anger. Now, explain that." Dr. Carter responded: "Okay. I think that you see an increased tendency toward anger and poor judgment with mental disorders. That's what I see clinically. What someone makes of that legally is up to interpretation." (*Id.* at 314.) Given this equivocal testimony, this Court cannot conclude that Petitioner suffered any prejudice in not having these conclusions drawn out of Dr. Carter at the trial of the case.

Further, it is necessary to examine trial counsel's performance at the time of trial, rather than through

[38] Hypomania is a symptom of bipolar disorder.

the prism of hindsight. *Strickland*, 466 U.S. at 689. At trial, Dr. Carter testified that Petitioner's actions were reasoned, calculated and planned. (Resp. Ex. 26, Trial Tr. at 815, 820.) He emphatically testified several times that Petitioner was simply "extremely angry" (*id.* at 808–10, 820–21); and this anger was not a result of any manic or hypomanic state or psychosis, but rather it was "a direct result of this incident and his perception of the incident" (*id.* at 821) Dr. Carter also testified that he did not feel that Petitioner's PTSD was severe. (*Id.* at 874.) Upon hearing this testimony at trial, it would only be reasonable for defense counsel to conclude that Dr. Carter did not believe Petitioner was a man with a debilitating mental illness. Thus, counsel could not be reasonably expected to delve into the issue of guilty but mentally ill with this witness, especially when they had chosen a different course for the defense.

In conclusion, Petitioner's expectation for the cross-examination of Dr. Carter is misguided and unreasonable given the above circumstances. Accordingly, his claim of ineffectiveness involving Dr. Carter must be denied.

F. Failure to Present Evidence Concerning Petitioner's Laugh

Throughout the years of psychiatric treatment, mental health professionals reported Petitioner's laughter as a symptom of his mental illness. In one medical note, a clinician noted that Petitioner "laugh[ed] frequently and inappropriately, apparently as a way of [di]verting emotions with which he feels uncomfortable (e.g., depression, embarrassment, fear)." (Resp. Ex. 28, at 1201.) During therapy sessions, Petitioner would laugh loudly and inappropriately when counseled on matters that were personal or emotional. (Resp. Ex. 129, at 1339.) Dr. Lemmon testified as follows at the habeas hearing:

> [Petitioner] had a laughter that was actually quite annoying, but he had a very strong laughter, and he oftentimes laughed in an inappropriate way. Where most people would be kind of sad or upset, he would laugh, and that was sort of one of his defense mechanisms . . . . [H]is laughter was more prominent when he was experiencing aversive emotions: anger, sadness, grief, upset, anxiety—emotions we usually don't want to feel.

(Resp. Ex. 125, State Habeas Trial Tr. at 348, 354.)

According to Petitioner, it was this laugh that the jury heard (24 separate times) during the taped interview of Petitioner with the GBI. (*See* Resp. Ex. 30, at 1606–36.) Petitioner's laugh was again noted in the transcript of the interview between Dr. Carter and Petitioner when they were discussing the shooting incident. (Resp. Ex. 26, Trial Tr. at 858–59.) Petitioner contends that trial counsel's failure to present expert testimony explaining that his laughter was a symptom of his mental illness constituted ineffective assistance because without an explanation, Petitioner appeared flippant to the jury.

The Georgia Supreme Court noted that the jury was informed in multiple ways during the guilt/innocence phase and the penalty phase regarding Petitioner's laugh. Thus, counsel was not deficient in failing to present additional evidence regarding the laugh. *Hall v. Brannan*, 670 S.E.2d at 95. The Georgia Supreme Court also stated that Petitioner's defense was not, in any event, prejudiced by counsel's failure to present additional evidence about the laugh. (*Id.*)

Here, Petitioner complains that notwithstanding mention of his nervous laugh at trial, what the Georgia Supreme Court failed to recognize and address is that without expert testimony, those references were meaningless.

The first mention of Petitioner's nervous laugh was made by defense counsel in the opening statement. In listing the symptoms of Petitioner's PTSD, counsel explained that he has "uncontrolled bizarre laughter." (Resp. Ex. 24, Trial Tr. at 26.) The next time the jury heard of the laugh was in its review of the transcript of Petitioner's GBI interview, which noted the places that Petitioner laughed during the interview. (*Id.* at 275–315.) The jury reviewed this transcript in conjunction with listening to the audiotape of the interview. During the interview, in the middle of Petitioner's explanation of why he shot Deputy Dinkheller, Petitioner stated: "Ah, God (laugh) I don't mean to laugh like that, it's a nervous laugh. I know some people get offended by it, but it's just, instead of crying I laugh like that and so that's just the way it is." (*Id.* at 292.) The only other time this laugh is mentioned during the guilt/innocence phase was during Dr. Carter's testimony as he read the transcript of his interview of Petitioner. In particular, the transcript noted the few times Petitioner laughed as he explained his fear in Vietnam and his fear of being shot by Deputy Dinkheller. (Resp. Ex. 26, Trial Tr. at 858–59.) Finally, during closing arguments, Petitioner's trial counsel directed the jury to certain portions of Petitioner's medical records, one of which observed that Petitioner had "[f]requent inappropriate laughter." (Resp. Ex. 27, Trial Tr. at 1002.)

Petitioner argues that the prosecution "built upon" Petitioner's "seemingly flippant confession" to argue at closing that Petitioner "took great delight in doing that to the young deputy." (Pet.'s Br. at 116 (citing Resp. Ex. 27, Trial Tr. at 1016–17).) However, the Court is not prepared to adopt Petitioner's characterization of the prosecution's case based solely upon a one-time reference to the word "delight" in closing argument. The prosecution, in fact, never mentioned Petitioner's laugh at any point during the case except in referring to a transcript that denotes his laughter. Indeed, there was no evidence or argument to suggest that Petitioner's laughter was anything other than a symptom of his PTSD.[39]

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[39] Of note, during the penalty phase, a defense witness testified about Petitioner:

> Always got the feeling that there was something wrong [with Petitioner]. And to give you an example, I mentioned that we met frequently at funerals and frequently at joyous occasions. And the behavior was the same. You would not be able to tell whether it was a funeral or whether it was a wedding. [Petitioner] was kinda nervous, was having nervous laughter. A lot of times it was at inappropriate moments when you wouldn't expect it. . . . It just—

The prosecution did not rebut defense counsel's representation that Petitioner's laughter was a symptom of his PTSD, or at the very least, an unintentional nervous response as described by Petitioner himself. Thus, defense counsel was not ineffective in failing to offer expert testimony that the laugh was caused by his mental illness. Moreover, because the prosecution did not make an issue out of the laugh, the failure to present further evidence on the issue was not prejudicial to the defense. Therefore, Petitioner's claim of ineffective assistance of counsel for failing to present expert testimony about his laugh is denied.

G. Failure to Call Petitioner's Treating Psychiatrist, Dr. William Boyer

Petitioner next claims that his counsel was ineffective for failing to present the testimony of Dr. William Boyer, his treating psychiatrist at the VA hospital from 1994 to 1997. (Resp. Ex. 124, State Habeas Trial Tr. at 145.) Dr. Boyer was the last physician to treat Petitioner prior to the crime. Moreover, Dr. Bayer was the doctor who diagnosed Petitioner with bipolar disorder in 1996 during the course of his treatment. (*Id.* at 148, 174.)

The record shows that Dr. Bayer was subpoenaed for the trial and was willing to testify. (*Id.* at 161–62.) Indeed, during the defense's opening statement, Mr. Taylor indicated to the jury: "I believe you'll hear from Dr. Boyer during the course of these

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> couldn't put my finger on it but .something just didn't always seem right.

(Resp. Ex. 28, Trial Tr. at 1311.)

proceedings." (Resp. Ex. 24, Trial Tr. at 28.) Nevertheless, Dr. Boyer was not called as a witness either during the guilt phase of the trial or in mitigation in the penalty phase.

According to Petitioner, and as reflected in his testimony during the state habeas proceedings, Dr. Bayer would have testified about the severity of Petitioner's mental illnesses and opined that Petitioner was not malingering. In particular, Dr. Boyer would have described the manifestations of Petitioner's moderate to severe PTSD and bipolar disorder to include recurrent thoughts of trauma, unwanted thoughts, nightmares, anxiety, elevated mood, insomnia, periods of depression, increased potential for self-harm, and a tendency to be isolated. (Resp. Ex. 124, State Habeas Trial Tr. at 147–49.) Dr. Bayer also would have related that a month before the crime, Petitioner presented himself as anxious, depressed, and severely mentally ill. (*Id.* at 146–47.) Indeed, during this visit, Petitioner "related several stories of how he narrowly escaped death in Vietnam, which was the first time he offered such highly emotional material" to Dr. Bayer. (*Id.* at 155.) In sum, Dr. Bayer would have testified that both mental illnesses significantly affected Petitioner's behavior, his judgment, and his ability to cape with the ordinary demands of life. (*Id.* at 157.)

While the state habeas trial court found counsel ineffective for failing to call Dr. Boyer, employing the *Strickland* standard of ineffectiveness, the Georgia Supreme Court reversed this decision. The Georgia Supreme Court concluded that trial counsel had made a reasonable strategic decision not to call Dr.

Boyer. *Hall v. Brannan*, 670 S.E.2d at 93–94. The Georgia Supreme Court also held that trial counsel's representation in opening statement that he would call Dr. Bayer was not prejudicial because Dr. Boyer's evaluation and treatment of Petitioner was discussed by other expert witnesses. *Id.* Because the Georgia Supreme Court correctly applied the Strickland standard, the issue here is whether its denial of Petitioner's present claim is an unreasonable application of *Strickland*.

During the state habeas proceedings, Petitioner's counsel, Mr. Taylor, testified that he had spoken with Dr. Bayer multiple times.[40] (Resp. Ex. 124, State Habeas Trial Tr. at 107, 110–11; Resp. Ex. 144, Taylor Dep. at 66.) Mr. Taylor stated that he had discussed an insanity defense with Dr. Boyer but had never settled an using him as a witness. (Resp. Ex.

[40] Contrarily, Dr. Boyer testified at the state habeas hearing that he did not speak with Petitioner's counsel about any substantive issues. (Resp. Ex. 124, State Habeas Trial Tr. at 160–62.) The state habeas trial court seemed to seize upon this testimony in finding that trial counsel had not made a *fully informed* strategic decision not to call Dr. Bayer. However, Dr. Bayer's statement directly conflicts with defense counsel's testimony. Thus, for the Georgia Supreme Court to discount Dr. Bayer's testimony in favor of defense counsel an the issue of whether trial counsel was fully informed is not an unreasonable finding of fact. Indeed, when performing its review under § 2254(d), the federal court must bear in mind that any "determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Pointing to a conflict in the evidence does not suffice to rebut the presumption of correctness by clear and convincing evidence.

124, State Habeas Trial Tr. at 114.) Mr. Taylor testified as follows: "I was uncomfortable as to what [Dr. Bayer] might testify to on the issues directly relating to insanity, I don't know that he would have supported us on that. I also had a sense that perhaps Dr. Boyer was being a little protective of the VA and himself, and I thought I wouldn't use him. It was sort of evolving thought about whether to use him or not.[41] (*Id.*)

Mr. Taylor's co-counsel, Mr. Duttweiler, testified that they chose to use Dr. Storms over Dr. Bayer on the insanity defense because Dr. Storms was 'strong and unwavering" that Petitioner was insane at the time of the offense. Dr. Bayer, on the other hand, "resisted" this opinion.[42] (Resp. Ex. 125, State Habeas Trial Tr. at 426; Resp. Ex. 145, Duttweiler Dep. at 29.) Mr. Duttweiler further testified that, although not 100 percent clear, he recalls being worried that Dr. Bayer could testify about Petitioner's problems with authority. (Resp. Ex. 145, Duttweiler Dep. at 45–46.) Dr. Boyer was under subpoena and present at trial. He was not used. The

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[41] The record indicates that trial counsel may have had some difficulty getting in touch with Dr. Bayer; Mr. Taylor even asked Dr. Bayer to call him at home in one letter. (Resp. Ex. 165, Ex. 21 in the State Habeas Hrg.)

[42] Of note, the prosecution's notes of a pre-trial interview with Dr. Bayer indicate that Dr. Bayer was of the opinion that Petitioner was 'in touch with reality" and that "depression does not normally lead to not knowing right from wrong." (Resp. Ex. 148, Pet. Ex. 140 in the State Habeas Hrg.) These notes seem to support defense counsel's testimony that Dr. Bayer would not have supported their insanity defense.

conclusion 15 inescapable that the decision not to use Dr. Bayer was tactical.

Because the defense's focus was on the insanity defense, and because they were "uncomfortable" with Dr. Boyer, counsel specifically chose to rely upon other experts to establish Petitioner's mental health history and his mental health status at the time of the crime. Indeed, through this expert testimony, trial counsel introduced the same evidence Petitioner wanted to introduce through Dr. Boyer, including evidence of Petitioner's treatment, evaluation and medical history, and the severity of his mental illness. Moreover, Petitioner's medical records, including those of Dr. Bayer, were in the record.

The strategic decision to call or not call witnesses is at the attorney's discretion. "A decision whether to call a particular witness is generally a question of trial strategy that should seldom be second guessed." *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004); *see also Dorsey v. Chapman*, 262 F.3d 1181, 1186 (11th Cir. 2001) (holding that petitioner did not establish ineffective assistance based on defense counsel's failure to call an expert defense witness in that counsel's decision was not so patently unreasonable that no competent attorney would have chosen the strategy) Accordingly, "[c]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978).

In sum, as the Georgia Supreme Court found, defense counsel's decisions regarding which experts should testify was both reasonable and strategic in nature, and counsel cannot now be deemed ineffective for failing to call Dr. Boyer to testify. The Georgia Supreme Court's ruling is not contrary to, nor an unreasonable application of, the Strickland standard. Nor is the ruling based on an unreasonable determination of the facts as outlined above. Accordingly, the claim is denied.

H. Basing the Defense on a Theory of Not Guilty by Reason of Insanity

Petitioner's final ineffectiveness claim is that his counsel unreasonably pursued the defense of not guilty by reason of insanity, which was not legally or factually supported by the evidence, rather than pursue a guilty but mentally ill defense.

In assessing this claim in the state habeas proceeding, the Georgia Supreme Court found that trial counsel's special focus on an insanity defense was reasonable in light of the fact that a guilty but mentally ill verdict would not have precluded the death penalty. *Hall v. Brannan*, 670 S.E.2d at 94–95. This conclusion is supported by the record, especially where Mr. Taylor testified at the habeas trial that his primary focus was to save Petitioner's life. (*See* Resp. Ex. 144, Taylor Dep. at 55.)

The record further demonstrates that defense counsel's focus on the insanity defense was not unreasonable in that the evidence supported the defense. The defense theory of the case pressed by trial counsel was that Petitioner suffered from longstanding and severe PTSD, which caused him to be in a dissociative state, i.e., a flashback to Vietnam, at the time he shot Deputy Dinkheller and rendered him unable to distinguish between right and wrong. Petitioner's medical records certainly bore this out. As Mr. Duttweiler stated, Petitioner's longstanding diagnosis of PTSD was so well documented that it would seem sincere and not contrived for the defense of the case. (Resp. Ex. 125, Habeas Trial Tr. at 424–25.) Petitioner also had mental health experts testify in support of the insanity defense. Without repeating Dr. Storms's testimony here, suffice it to say that Dr. Storms was "strong and unwavering" in his opinion that Petitioner was insane at the time of the crime. (*See* Resp. Ex. 145, Duttweiler Dep. at 29.) Thus, Petitioner's contention that the insanity defense was not supported legally or factually is wholly without merit.

Moreover, defense counsel's trial strategy did not preclude a verdict of guilty not mentally ill. To the contrary, the defense presented three mental health experts and extensive medical records that showed Petitioner suffered from the longstanding mental illnesses of bipolar disorder and PTSD. These disorders were referred to as mental illnesses throughout the trial. In his closing, Mr. Taylor emphasized several times that Petitioner suffered from a mental illness. (Resp. Ex. 27, at 988–89, 993, 995, 1006, 1010–11.) Thus, the defense was charged to the jury and available, even if trial counsel chose not to emphasize it. As the Eleventh Circuit has stated: "[C]onstitutionally sufficient assistance of counsel does not require presenting an alternative—not to mention unavailing or inconsistent—theory of the case. Reasonableness, indeed, suggests that a trial counsel would weigh competing theories and choose to present the most compelling theory among the various options." *Dill v. Alien*, 488 F.3d 1344, 1357 (11th Cir. 2007); *see also Chandler*, 218 F. 3d at 1318 ([C]ounsel's reliance on particular lines of defense to the exclusion of others—whether or not he investigated those other defenses—is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable.").

In this case, trial counsel weighed a theory supported by the medical records and expert testimony which would have spared their client's life against a theory that even Dr. Carter could not unequivocally support with the benefit of hindsight, and a theory that, with the existence of videotape evidence in aggravation, would have most certainly resulted in a death sentence. The resulting decision to focus on the insanity defense was not unreasonable. Accordingly, this claim of ineffectiveness is denied.

IV. PROSECUTORIAL MISCONDUCT—THE BATSON CHALLENGE (GROUND II)

The United States Supreme Court set forth a three-part test to evaluate the validity of challenges to peremptory strikes in *Batson v. Kentucky*, 476 U.S. 79 (1986). First, a moving party must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. *Id.* at 95–97. Second, if this prima facie showing is made, the nonmoving party must offer a race-neutral explanation for striking the juror. *Id.* at 97–98. This reason need not be persuasive or even plausible so long as it is not inherently discriminatory. *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995) ("Unless a discriminatory intent is inherent in the [striking party's] explanation, the reason offered will be deemed race neutral."). Third, the trial court then determines whether the moving party has proved purposeful discrimination. *Batson*, 476 U.S. at 98. The final step involves evaluating "the persuasiveness of the justification" proffered by the striking party, but the "ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768.

In this case, Petitioner was tried by a jury that included three black jurors following the prosecution's use of seven of its ten peremptory challenges to strike black prospective jurors. After the striking process, Petitioner challenged the selection of the jury on the basis that the prosecution's use of seven strikes against black jurors violated *Batson*. The prosecution immediately offered race-neutral reasons for striking each black juror in turn. After each stated justification, defense counsel was given an opportunity to respond. Immediately thereafter, with respect to each individual juror, the trial court denied the *Batson* challenge.

On direct appeal to the Georgia Supreme Court from his murder conviction, Petitioner raised a *Batson* claim. Upon examination of the record, the Georgia Supreme Court specifically noted the following with respect to the prosecution's proffer of race-neutral reasons:

> Five of the prospective jurors expressed reservations about imposing the death penalty, in addition to other valid race-neutral reasons, such as previously charged with a criminal offense, claiming hardship due to bankruptcy or physical disability, or having a relative currently facing criminal prosecution. The sixth prospective juror learned in nursing school about post-traumatic stress disorder, which was to figure prominently in [Petitioner's] defense, and the district attorney's office had previously prosecuted her for fraud. . . . The seventh prospective juror served four years in the Marine Corps in the 1960's, including a tour in Vietnam as a truck driver. He said that he had known Marines with post-traumatic stress disorder ("PTSD") who would "freak out" or "snap," and that he knew they had PTSD because "the corpsman said they had [it]." The State explained that a white Vietnam veteran they did not strike was not similarly situated. That prospective juror had served 21 years in the Marine Corps as a sergeant, including a combat tour in Vietnam in the infantry and, when asked about PTSD, said, "I ain't never had the problem with that."

Brannan v. State, 561 S.E.2d at 422 (citations omitted). The Georgia Supreme Court then concluded that Petitioner had not met his burden of showing that the prosecution acted with discriminatory intent. *Id.*

Now, in his § 2254 federal habeas petition, Petitioner claims that the prosecution struck jurors based on race in violation of *Batson* and the United States Constitution. Petitioner's challenge to the Georgia Supreme Court's rejection of his *Batson* claim is two-pronged. First, under § 2254(d)(1) Petitioner argues that the Georgia Supreme Court's adjudication of his *Batson* claim is an unreasonable application of clearly established precedent, i.e., *Batson*. Second, under § 2254(d)(2), Petitioner argues that the Georgia Supreme Court's decision is based on an unreasonable determination of the facts. I will now address each argument.

A. Unreasonable Application of *Batson* (§ 2254(d)(1))

Petitioner claims that the Georgia Supreme Court, as well as the trial court, unreasonably applied *Batson* because they failed to engage in the third step of the analysis. Specifically, Petitioner argues that the state courts failed to make specific fact findings required under the third prong of *Batson*. When a Claim's focus is on a state court's alleged failure to follow *Batson*'s three steps, relief is appropriate under § 2254(d)(1) if the state court's application of *Batson* is unreasonable.[43]

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[43] Both the trial court and the Georgia Supreme Court correctly determined the the governing legal principle" of Petitioner's challenge to jury selection to be the *Batson* case. Moreover, Petitioner has not argued that either the trial court or the Georgia Supreme Court has failed to follow any established Supreme Court precedent materially indistinguishable from the instant case. Thus, the issue here is not whether the disposition of Petitioner's *Batson* claim is

There is no question here nor was there on appeal to the Georgia Supreme Court that the trial court had found a prima facie case of discriminatory motive in the prosecution's use of its peremptory challenges. *See McGahee v. Ala. Dep't of Corrections*, 560 F.2d 1252, 1259 n.7 (11th Cir. 2009) ("Although the trial judge did not explicitly find that the defendant had made out a prima facie case of discrimination . . . 'where the trial court requires the prosecution to explain its peremptory challenges without first finding the existence of a prima facie showing of discrimination, we may fairly conclude that the inquiry implied such a finding, and shifted the burden of justification to the prosecutor.'" (quoted source omitted)). Further, there is no question that the prosecution provided race-neutral reasons for striking each challenged black juror. *See Rice v. Collins*, 546 U.S. 333, 338 (2006) (stating that the prosecution's proffer does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices."); *Hernandez*, 500 U.S. at 360 (stating that a prosecutor's reason will be deemed race neutral unless a discriminatory intent inheres in the explanation). Thus, the state courts' application of the first two steps of *Batson* is not unreasonable.

Instead, Petitioner takes issue here with both the trial court's and state appellate court's failure to make any specific findings as to the third Batson inquiry, i.e., whether Petitioner established purposeful discrimination. At this step of Batson, the

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contrary to clearly established law but whether it involves an unreasonable application of *Batson*.

persuasiveness of the prosecution's explanations for the peremptory challenges is relevant and their credibility must be examined. *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 338–39 (2003) In assessing the credibility of the prosecution's explanations, a court may look to, among other things, the prosecutor's demeanor, the reasonableness or improbability of the explanations, and whether the reason has some basis in accepted trial strategy.[44] *Id.* at 339. In this case, Petitioner contends that the trial court and the Georgia Supreme Court simply accepted the prosecution's race-neutral reasons as true, denied the challenge, and thereby impermissibly collapsed steps two and three of the *Batson* analysis.

This contention is not new to the landscape of *Batson* challenges addressed in habeas appeals to the Eleventh Circuit Court of Appeals. Indeed, the Eleventh Circuit has expressly rejected the notion that a state court must *explicitly* make a finding that there was no discriminatory intent in the prosecution's use of peremptory challenges. Most notably, in *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006), the majority opinion addressed the dissent's identical contention that the state courts rendered decisions which unreasonably applied *Batson* because both the trial court and the appellate court did not carry out the third step by failing to

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[44] It should be noted here that a state court's finding as to the credibility of the prosecution's race-neutral reasons and the corollary finding of whether there is discriminatory intent are findings of fact, which will be reviewed in the next section addressing Petitioner's *Batson* challenge under § 2254(d)(2).

find credible the prosecution's race-neutral explanations for its strikes. *Id.* at 1072 n.9. The majority stated:

> The dissent fails to recognize, however, that a trial court's dispositive ruling may contain implicit findings, which, though unstated, are necessary to that ruling. . . . In this case, the trial court, after assuming that Hightower had made out a prima facie case of racial discrimination, expressly found that the prosecutor had provided an "articulable, nonrace related reason" for each strike, and overruled Hightower's *Batson* objection. The trial court's overruling of Hightower's *Batson* objection would have defied logic had the court disbelieved the prosecutor's race-neutral explanations. We may therefore make "the common sense judgment"—in light of defense counsel's failure to rebut the prosecutor's explanations and the trial court's ultimate ruling-that the trial court implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry.

Id. (citations omitted). Recently, in a panel opinion without dissent, the Eleventh Circuit affirmed this principle from *Hightower* when it rejected a habeas petitioner's claim that both the trial court and the Georgia Supreme Court misapplied Batson because "neither made specific fact findings about purposeful discrimination." *Greene v. Upton*, 644 F.3d 1145, 1155 (11th Cir. 2011) ("*Batson* does not require elaborate factual findings." (citing *Milier-El I*, 537

U.S. at 328–29, and *Hightower*, 459 F.3d at 1072 n.9)).

In this case, the trial court listened to race-neutral explanations from the prosecution on each individual black juror peremptorily challenged, and after hearing rebuttal to some of these challenges from defense counsel, overruled Petitioner's *Batson* objection with respect to each juror. The Georgia Supreme Court thereafter affirmed the race-neutral explanations on appeal and held that Petitioner had "failed to carry his burden of proving purposeful discrimination." *Brannan v. State*, 561 S.E.2d at 422. Thus, following the guidance of the Eleventh Circuit in *Hightower* and *Greene*, this Court concludes that the trial court and the Georgia Supreme Court properly applied, albeit implicitly, the third step of the *Batson* analysis.

Upon the foregoing, Petitioner has not shown that either the trial court or the Georgia Supreme Court unreasonably applied clearly established federal law.

B. Unreasonable Determination of Facts (§ 2254(d)(2))

In cases where the state court has properly applied *Batson*'s three-step analysis and denied relief, a federal court can grant habeas relief only "if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge." *Rice*, 546 U.S. at 338–39. "The evaluation of a prosecutor's race-neutral explanations under *Batson* is a 'pure issue of fact . . . peculiarly within a trial judge's province.'" *McGahee*, 560 F.2d at 1255 (quoted source omitted). Moreover, AEDPA provides that a habeas petitioner challenging state court factual findings must establish by clear and convincing evidence that the state court's findings were erroneous. 28 U.S.C. § 2254(e)(1); *see Rice*, 546 U. S. at 338–39 ("State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'"); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 240 (2005) ("W]e presume the Texas court's factual findings to be sound unless Miller-El rebuts the 'presumption of correctness by clear and convincing evidence.'"). However, it is only the state court's factual findings, not its ultimate decision, that are subject to § 2254(e)(1)'s presumption of correctness. *Miller- El I*, 537 U.S. at 341–42. Thus, this Court will consider the reasonableness of the Georgia Supreme Court's ultimate decision that Petitioner had failed to show purposeful discrimination.[45]

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[45] As stated, the credibility determination regarding the prosecution's race-neutral explanations is a factual issue peculiarly within the trial court's province. Indeed, in this case, the Georgia Supreme Court affirmed the race-neutral explanations in summary form, and it then affirmed the trial court's finding that Petitioner had not shown purposeful discrimination without further discussion. Thus, this Court's review focuses on the trial court's factual determinations, even where, as here, there is a state appellate court opinion addressing the claim on direct review. That is to say, even though this Court's inquiry is the reasonableness of the last reasoned decision of a state court-the Georgia Supreme Court the discussion here will focus on the trial court's factual determinations supporting the denial of Petitioner's *Batson* claim, which were affirmed on direct appeal.

In this case, Petitioner contends that the trial court's determination that there was no discriminatory motive behind the prosecution's strikes was unreasonable for two reasons: (1) the prosecution offered false statements in support of its strikes, and (2) the trial court did not consider all relevant circumstances in that it failed to compare the answers of struck black jurors with the answers of similarly-situated white jurors who were not struck.[46]

At the outset, the Court finds the Eleventh Circuit's decision in *Atwater v. Crosby*, 451 F.3d 799 (11th Cir. 2006) dispositive of Petitioner's comparative juror contention. In *Atwater*, a defendant objected at trial to the prosecution's use of a peremptory challenge to remove the only black juror on the venire. The prosecution offered a race-neutral reason for the strike—the juror's reluctance to serve and general demeanor—which the court accepted. In his federal habeas petition, the defendant pointed out that other non-black jurors expressed reluctance to serve and were not struck. The defendant argued that "a comparative juror analysis compels the conclusion that [the black juror] was struck because of her race." *Id.* at 805. The Eleventh Circuit noted, however, that this comparative juror argument was not made at the time of the *Batson* challenge in the trial court. *Id.* at

[46] In *Miller-El II*, 545 U.S. at 241, the Supreme Court noted that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination."

807 ("[C]onspicuously absent from the trial record is some argument or evidence of comparability at the time that the Batson challenge was made to refute the prosecutor's reason for the strike.") Thus, the *Atwater* defendant's *Batson* claim failed. *Id.* ("'[T]he lesson to claimants of *Batson* violations and prosecutors is that comparisons must be made between the black jurors removed from jury service and the white jurors remaining for service.'" (quoted source omitted)).

Upon review of the transcript of voir dire in this case, the Court finds no comparability argument by defense counsel at the time of the *Batson* challenges between the potential black juror who was struck and a white juror who was not struck except in the case of Juror Erika L. Moore. Also, the prosecution compared black Juror Julius Johnson with white Juror Benny Garcia of its own accord in offering its race-neutral explanation for striking Mr. Johnson. Accordingly, with *Atwater* in mind, any comparative analysis offered in this federal habeas review by Petitioner will not be considered in this Court's determination of the reasonableness of the trial court's rejection of Petitioner's *Batson* challenges except with respect to Jurors Moore and Johnson.

This Court will now consider whether the record supports as reasonable the determination that the prosecution's race-neutral explanations for each struck juror were not racially motivated.

1. *Darrell M. Lampkin*

The prosecution offered the following race-neutral explanation for striking this juror:

> Mr. Lampkin . . . wanted to be excused because of his physical condition. Mr. Lampkin told us at that time that his back hurt him, he didn't want to sit here. That if he sat for long, his back hurt him. He was in pretty bad pain. He was standing crooked. . . . Mr. Lampkin told us further . . . words to the effect, I don't want to be involved in this shit. Now that demonstrated his attitude about the thing. Don't want to be involved in this shit. He stated that he did not want to give the death penalty. . . . [H]e's told us he's got a business to run, can't keep his mind on this for his business . . . . He does not want to be involved in making the decision, does not want to be involved in a. death penalty. He said he could vote the death penalty, earlier on in his voir dire he said no at first.

(Resp. Ex. 23, Trial Tr. at 2033–35.) The prosecution also added that they did not like his general demeanor. (*Id.*)

Petitioner contends this explanation is pretextual because Mr. Lampkin never stated that he did not want to be "involved in this shit." Rather, Mr. Lampkin stated he was "hoping" he would not have to serve. (Resp. Ex. 15, Voir Dire Tr. at 160.) Petitioner also contends that while Mr. Lampkin had a back injury and a business to run, he never stated that either would prevent him from serving as a juror. Instead, Mr. Lampkin said that he had "learned to deal with" his back discomfort. (*Id.* at 142.)

Petitioner understates Mr. Lampkin's desire to be excused from the jury. The record shows that Mr. Lampkin asked to be excused from jury service prior to voir dire because of his back pain, stating that it is "very painful."[47] (Resp. Ex. 14, Hrg. Tr. at 10–11.) At the start of the voir dire session, Mr. Lampkin was brought back before the court and offered that "[p]rolonged sitting aggravates my back." (Resp. Ex. 15, Voir Dire Tr. at 34.) Mr. Lampkin also stated at that time that he owned a landscaping business and that he had to be there "just about every day." (*Id.* at 33, 36.) Immediately thereafter, the prosecutor expressed concern about Mr. Lampkin's ability to concentrate on the case. (*Id.* at 37.) During his individual voir dire later that morning, Mr. Lampkin again expressed that his back hurt, and he was visibly leaning. (*Id.* at 141–42.)

When first asked about his ability to render a death penalty verdict during his voir dire, Mr. Lampkin stated: "I can say I don't want to be involved in making a decision like that, I don't." (*Id.* at 134.) He expressed this sentiment again and again. "I don't want to get involved in making a decision like that on that guy. I don't want the death penalty on nobody . . . ." (*Id.* at 134–35.) "I mean I don't want to make a decision on that. I don't want to have nothing to do with that. That's a hard decision." (*Id.* at 135.) When pressed further about whether he could serve as a juror and render a fair decision, Mr.

[47] Prospective jurors were asked to report to the trial court on January 6, 2000, prior to the start of the trial of the case on January 18, 2000, if they sought an excuse from service. (Resp. Ex. 2, at 842–43.)

Lampkin answered various questions with “I guess” seven times in succession. (*Id.* at 135–36.) Mr. Lampkin continued in this vein although he also stated that if he was made to serve as a juror, he could consider the death penalty.

> [F]or me to sit here and tell you that I would love to sit over here and judge this guy, no, I’m not going to tell you that, because I don’t want to. . . . I don’t want to be involved in making the decision to send this guy to the electric chair or to the pen for thirty years. I don’t want to have nothing to do with that. I can sit here and tell you, yeah, I’d love to do that. I don’t want to do it.
>
> . . . .
>
> I mean I have no choice. If I wasn’t showed up here, ya’ll would have a bench warrant or whatever kind of warrants ya’ll serve and have me picked up to be here.

(*Id.* at 146–47.) When asked if he could render a verdict, Mr. Lampkin responded: “I guess I’ll be sitting here for fourteen days, listening to ya’ll guys go at it; I’d come up with some kind of decision.” (*Id.* at 147–48.)

This review of the voir dire transcript amply shows that the prosecution’s concern about Mr. Lampkin’s attitude toward serving on the jury was warranted. Mr. Lampkin exhibited a strong aversion to service with his unwavering expression of not wanting to be there and his lackadaisical responses to many of the questions. This general sentiment, coupled with his request to be excused because of his back injury, leads to the inescapable conclusion that the prosecution's reasons for striking Mr. Lampkin were not only reasonable but legitimate. The fact that the prosecution may have incorrectly expressed Mr. Lampkin's general sentiment in crude terms does not negate the fact that Mr. Lampkin exhibited antipathy to serving on the jury. The prosecution's concern about Mr. Lampkin's ability to concentrate on the trial given his physical and financial worries only adds to the legitimacy of the strike. In short, while the prosecution may not have been flawless in its articulation of race-neutral reasons, the reasons are amply supported by the record, and it was not unreasonable to conclude that they were credible.

2. *Willie R. Murray*

The prosecution offered the following race-neutral explanation for striking this juror:

> [W]hen he's asked initially about the death penalty, instead of answering, he shook his head negatively and frowned in response. And that was even when he said he thought he could do that. But a bigger reason than that, his stepson was arrested for aggravated assault and is in jail right now.

(Resp. Ex. 23, Trial Tr. at 2037.)

Petitioner complains that Mr. Murray never indicated that he was inclined against the death penalty. The problem is that negative shakes of the head and frowns do not appear on a transcript. Of import here is that defense counsel made no effort to correct this statement at the time. Instead, defense counsel stated: "We don't have any response." (*Id.*)

Thus, given the great deference afforded the determination of the trial court which was in position to observe the juror, this Court cannot reach the conclusion that the trial court's decision to credit this reason was unreasonable.[48]

Additionally, the prosecution offered an even "bigger reason" for striking Mr. Murray. Indeed, the record shows that Mr. Murray's stepson had been incarcerated locally for several months pending trial at the time of voir dire. (Resp. Ex. 16, Voir Dire Tr. at 460–64.) Petitioner has not rebutted this reason except to offer a new argument that Mr. Murray is similarly situated to three non-black jurors who were not struck by the prosecution. The failure of defense counsel to assert this comparative analysis at the time of the *Batson* challenge precludes this Court's consideration of the same. *See Atwater*, 451 F.3d at 805–07. Moreover, this stated reason cannot be said to be implausible or incredible. Thus, based on the record, it was not unreasonable for the trial court to credit the race-neutral reasons offered by the prosecution with respect to Mr. Murray.

3. *Erika L. Moore*

The prosecution offered the following race-neutral explanation for striking this juror:

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[48] Importantly, the United States Supreme Court has unanimously reversed a circuit court's decision that a state trial judge must reject a demeanor-based explanation for a challenge unless that judge personally observed and recalled that aspect of the juror's demeanor. *See Thaler v. Haynes*, --- U.S. ---, 130 S. Ct. 1171, 1174 (2010)

> She had an aggravated assault, shoplifting charge against her in 1989. Initially, she did not approve of capital punishment, she was very hesitant in doing so. She said she believed in: do unto others as you would have them do unto you. At one time she stated she would always go for life without parole. Now, I understand she was equivocal and went back and forth, but these are statements she made. . . . She also had a forgery charge that was found out from talking with the local officials that she paid off and was dropped . . . .

(Resp. Ex. 23, Trial Tr. at 2037–38.)

Petitioner contends that the stated reasons are pretext because the prosecution did not strike a white juror, Juror Adam Johnson, who had been arrested and charged with assault of a police officer. Petitioner offered this comparison in response to the race-neutral explanation during voir dire. (*Id.* at 2038.) Petitioner further contends the prosecution's explanation regarding Ms. Moore's response to death penalty questions is false.

A review of the voir dire transcript reveals a juror whose answers may contain some equivocation as stated by the prosecution. Initially, during the opening part of the individual voir dire session, Ms. Moore expressed that she was not conscientiously opposed to the death penalty and that she did not have "a problem for the death penalty because of the fact that it's a murder case." (Resp. Ex. 21, Voir Dire Tr. at 1481–84.) Yet, the prosecution noted a hesitancy in her initial response, to wit:

Q: Now, let me ask you this, I notice when they first asked you are you opposed to the death penalty, you had a long hesitation. Okay, what's the long hesitation?

A: Why the long hesitation?

Q: Yes ma'am, what is that, why the long hesitation? You seem to not know whether you really were for it or really were not for it?

A Because again I say that it's not that I'm opposed of it, and it's not that I totally agree on it. But it all depends on what the situation and the circumstances are. I'm not going to say that no, you shouldn't put that person to death because you don't—it all depends on the evidence and that's why I hesitated. It all depends on the evidence.

Q: Okay, if you were picked as a juror and evidence was presented and you had a choice between life and death, would you always go life or would you always go death or what would be your feeling in that?

A: I probably would say life without parole.

Q: You would always go with life without parole?

A: Poss—yeah. I probably would go with life without parole.

Q: Okay, and the—you don't believe in 'em getting parole, but you don't believe in executing 'em either. If you were faced with the decision of life without parole or death, would you always go with life without parole, where they'd be locked away forever?

A: No, again, it all depends on the circumstances. It really does, it all depends on the circumstances.

(*Id.* at 1485–87.) Certainly it can be said that Ms. Moore offered an appropriate explanation for any perceived hesitancy, and she seemed to be of the ultimate opinion that she could consider the death penalty if the circumstances warranted it. Yet, there is also a reasonable inference to be drawn by some of her responses that she was inclined to oppose the death penalty if given an option of life without parole.

This "equivocation" was not the only basis of Ms. Moore's strike, however. While Ms. Moore was not initially questioned about it by either patty, the prosecution noted to the trial judge out of Ms. Moore's presence that she had revealed. An arrest for aggravated assault on her juror questionnaire. The prosecution was concerned that she may be a convicted felon. (*Id.* at 1497–1500.) Nevertheless, Ms. Moore was not questioned any further.

In short, the record supports the race-neutral reasons offered by the prosecution. It was reasonable for the prosecution to infer equivocation in Ms. Moore's views toward the death penalty, and she had indicated a prior arrest for aggravated assault that may have lent itself to a bias against the prosecution. Moreover, the prosecution had learned that Ms. Moore had also been arrested for forgery. Thus, contrary to Petitioner's contention, the .stated reasons were not false.

A finding of pretext Is not warranted after comparing Juror Adam Johnson and Ms. Moore. According to the parties, Mr. Johnson had been charged with assault of a police officer, though there is no evidence of the charge's resolution.[49] (Resp. Ex. 23, Trial Tr. at 2039.) Of note, Mr. Johnson denied that he had any bad feelings toward law enforcement. (Resp. Ex. 19, Voir Dire Tr. at 1083–84.) More importantly, upon review of the voir dire of Mr. Johnson, this Court has concluded that the jurors were not similarly situated in that Mr. Johnson expressed absolutely no hesitancy, equivocation, or other ambiguity in responding to the death penalty questions. Instead, he was forthright and direct. Thus, the prosecution's failure to strike Mr. Johnson does not demonstrate pretext.

Upon the foregoing, it was not unreasonable for the trial court to credit the race-neutral reasons offered by the prosecution in striking Ms. Moore.

4. *Rosa D. Gasgue*

The prosecution offered the following race-neutral explanation for striking this juror:

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[49] It appears that the parties and the trial judge assumed that the charges against both Ms. Moore and Mr. Johnson were either dropped or reduced to misdemeanors since they both had appeared in the county's jury wheel.

> She initially stated she was opposed to the death penalty. She told us that she may hold it against the State because of her brothers' murders in which she didn't think justice was served in the murder cases of two of her brothers. . . . She also wrote a letter . . . telling the Court that she could not sit here, that she could not afford to sit here. That she had been in a bankruptcy reorganization, that she had just gotten her first job . . . .

(Resp. Ex. 23, Trial Tr. at 2040–41.) The prosecution added that she shook her head when she found out that the jury determined the sentence. (*Id.*)

Petitioner claims that these reasons are not supported by the record. This Court disagrees.

When Ms. Gasque was initially asked whether she conscientiously opposed the death penalty, she responded "Yes, I am." (Resp. Ex. 21, Voir Dire Tr. at 1536.) She explained that she had had two brothers murdered and that "the person that killed 'em was never punished. And I just have mixed feelings about it." (*Id.* at 1537.) When more specifically questioned about the murders, Ms. Gasque stated that one person was arrested "and served only five years for it." (*Id.* at 1542.) When asked whether she had any bias in the case because of this, she responded: "I really, I honestly can't say because I never served on a murder trial since these incidents happened. And I really don't know how I would feel. I really don't." (*Id.*; *see also id.* at 1543.) The transcript also reveals that when asked whether she had any reason she could not return a verdict of life with a possibility of parole or life with no possibility of parole, she responded, “No, I don’t think so.” But when asked if she could return a verdict of death, she sighed. (*Id.* at 1549–50.) Later, when asked again if she could vote for death, she responded: “I don’t think so. I really don’t think so, even though I’ve been through all that I have been through in my personal life, I don’t think 60.” (*Id.* at 1553.) When asked again, she responded: “I don’t think so. I really don’t. I really don’t.” (*Id.* at 1554.)

After a brief recess, the following colloquy took place with Ms. Gasque:

Q: Did I understand you to tell me that no matter how terrible the murder was, that you, in good conscience, could just not return a verdict of death, I mean a sentence of death?

A: Is that what you asked?

Q: Yes, that’s what I’m asking?

A: Like I said, I’ve never been in this situation and I can only go by what I feel now. I don’t think I could. You said we would be responsible for making a judgment on him going, put to death, right?

Q: Yes, I said the jury in this case will make that decision, not the Judge.

A: Not the Judge.

. . . .

> A: I think I said I really don't think so. I think I said that. That I didn't think I could do that. Knowing that I, my vote would be the, so to speak the sealing vote.
>
> Q: Knowing without your vote it wouldn't happen?
>
> A: Knowing with my vote it would happen, too.

(*Id.* at 1564–66.) Following her voir dire, the prosecution moved to dismiss Ms. Gasque for cause. The motion was denied because Ms. Gasque never unequivocally stated that she could not vote for the death penalty. (*Id.* at 1574–76.)

This record clearly supports the prosecution's concern about the juror's role in the imposition of the death penalty. The prosecution also exposed some reservation on the part of Ms. Gasque related to the treatment of her brothers' murders. These race-neutral explanations are especially credible in light of the prosecution's challenge to Ms. Gasque for cause. Moreover, defense counsel did not object to or rebut the prosecution's reference to Ms. Gasque's bankruptcy reorganization letter. (Resp. Ex. 23, Trial Tr. at 2040.) Indeed, the record shows that Ms. Gasque had requested to be excused from service on January 6, 2000 because of her financial hardship. (Resp. Ex. 14, Hrg. Tr. at 51–52.) Accordingly, this Court cannot conclude that the trial court's decision to credit the prosecution's race-neutral explanations was unreasonable.

5. *Julius Johnson*

The prosecution offered the following race-neutral explanation for striking this juror:

> [He] was a Vietnam vet. . . . [H]e was not a lifer. He stayed in a little while, he was in Vietnam. Said he saw some combat and said he had seen these people with PTSD. He said, he had seen people freak out on you. Said these people would get in fights very quickly. . . . [T]he y had quick tempers and such. Bad nerves. He seemed to us to be a gentleman who had some pre-conceived ideas in regard to PTSD . . . .

(Resp. Ex. 23, Trial Tr. at 2041–42.) During the Batson hearing, the prosecution differentiated between Mr. Johnson and another long serving Vietnam veteran, Juror Benny Garcia, who was not struck. (*Id.*)

Here, Petitioner contends that striking Mr. Johnson was pretextual because the prosecution did not strike two other jurors, Juror Janice Phelps and Juror David Lewis, who both testified that they either personally knew or knew about combat veterans with PTSD. Petitioner does not compare Mr. Johnson with Mr. Garcia for good reason: the two are not similarly situated as aptly noted by the Georgia Supreme Court and supported by the voir dire transcript. Moreover, because defense counsel did not raise the comparability of Mr. Johnson to Jurors Phelps and Lewis during his Batson challenge, this Court is precluded from consideration of the same here. *See Atwater*, 451 F.3d at 805–07.

Failing a comparative analysis demonstrating pretext or racial motive it was not unreasonable for the trial court to credit the race-neutral explanation offered by the prosecution in striking Mr. Johnson.

6. *Douglas L. Williams*

The prosecution offered the following race-neutral explanation for striking this juror:

> He initially said he was opposed to capital punishment, later said he had mixed feelings The State was somewhat hesitant or fearful of this hesitation . . . . He said his main problem though was some people had been sentenced to death and then to go on and find out they were innocent. . . . We're concerned about apparently a lack of ability on his part to return a sentence of death with a free conscience. . . . He also said some—in regards to the questions about PTSD and such, that he knew sometimes things just happen real quick before you thought about 'em.

(Resp. Ex. 23, Trial Tr. at 2042–43.)

Petitioner contends that the prosecution's concern about Mr. Williams's reluctance to impose the death penalty is unsupported by the record. This Court disagrees. When Mr. Williams was asked whether he conscientiously opposed the death penalty, he responded: "Yes, Your Honor. I have mixed feelings about it." (Resp. Ex. 17, Voir Dire Tr. at 563.) Later Mr. Williams testified that his feelings about the death penalty concern an apprehension that the convicted person would actually be innocent.

(*Id.* at 576.) While Mr. Williams testified throughout that he would be able to vote for the death penalty if warranted, there is some basis for the prosecution's concern. More importantly, given the deference accorded to the trial court's findings of fact, this Court cannot conclude that it was unreasonable for the trial court to overrule the Batson challenge with respect to Mr. Williams.

7. *Dorothy A. Jackson*

The prosecution offered the following race-neutral explanation for striking this juror: 'She said she had some training as a nurse. In that training, she had gotten information or been instructed on PTSD . . . ." (Resp. Ex. 23, Trial Tr. at 2044.) The prosecution also noted that she had been prosecuted by the state for fraud in obtaining public assistance. (*Id.*)

Petitioner contends that this reason is pretextual because an examination of the entirety of Ms. Jackson's testimony reveals that she knew very little about PTSD. In truth, the sum total of Ms. Jackson's testimony on the subject reveals very little about the depth of her knowledge:

> Q: Do you know what post traumatic stress disorder is, PTSD?
>
> A: Yeah.
>
> Q: Okay, what is it?
>
> A: Well, I did graduate from nursing school, it's been a long time. When you be stressed out, like sort of stressed out over certain things.

Q: Do you have any friends or relatives or just acquaintances that have ever been diagnosed as having this PTSD?

A: No.

(Resp. Ex. 17, Voir Dire Tr. at 615.) The Court finds that the fact that she learned about PTSD in nursing school is enough to cause the prosecution concern. Moreover, Petitioner has wholly failed to rebut the prosecution's other stated reason to strike Ms. Jackson, namely the fraud charge. Accordingly, it was not unreasonable for the trial court to reject Petitioner's *Batson* challenge by crediting the prosecution's race-neutral explanation.

In short, the record supports the race-neutral explanations of the prosecution. And, while the persuasiveness of the prosecution's explanations for the peremptory strikes is the critical issue here, the burden of persuasion regarding possible racial motivation "rests with, and never shifts from" Petitioner. *See Atwater*, 451 F.3d at 806. On this record, Petitioner has simply failed to carry this burden. More specifically, it was not unreasonable for the state court to credit the race-neutral explanations of the prosecution and overrule his *Batson* challenges.

In conclusion, the Georgia Supreme Court's rejection on the merits of Petitioner's *Batson* claim on appeal is not the result of an unreasonable determination of facts in light of the evidence presented. On the contrary, the state trial court's implicit factual finding regarding the credibility of the prosecution's numerous race-neutral explanations for striking seven black jurors is fully supported by the record from the voir dire portion of Petitioner's trial. Moreover, this Court has determined that the Georgia Supreme Court's rejection of the *Batson* claim is not contrary to or an unreasonable application of clearly established federal law. Accordingly, Petitioner is not entitled to habeas relief based upon Petitioner's claim that the prosecution violated *Batson* at jury selection.[50]

V. THE EIGHTH AMENDMENT CHALLENGE (GROUND III)

In his final claim, Petitioner contends that the execution of a severely mentally ill person is violative of the Eighth Amendment's prohibition against cruel and unusual punishment. In making this argument, Petitioner essentially asks this Court to extend the holding of *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment prohibits the execution of mentally retarded persons, to the execution of defendants who are mentally ill at the time of their offenses.

In the state habeas case, the Georgia Supreme Court held:

> [U]nlike the case of juvenile offenders and mentally retarded persons, there is no

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[50] In this case, Petitioner has filed a motion to expand the record, asking that the juror questionnaires completed by prospective jurors prior to the trial of the case be made part of the this Court's record. Because examination of or even reference to these questionnaires was not necessary to the disposition of Petitioner's Batson claim, the motion to expand the record (doc. no. 35) is **DENIED**.

> consensus discernible in the nation or in Georgia sufficient to show that evolving standards of decency require a constitutional ban, under either the Constitution of the United States or under the Georgia Constitution, on executing all persons with mental illnesses . . . .

Hall v. Brannan, 670 S.E.2d at 96–97.

To be sure, the United States Supreme Court has not held that *Atkins* extends to those with mental illnesses. Further, the Eleventh Circuit has addressed and rejected a similar argument of a death row inmate in *Carroll v. Sec'y, Dep't of Corrs.*, 574 F.3d 1354 (11th Cir. 2009). In *Carroll*, the Eleventh Circuit held:

> *Atkins* did not explicitly address the suitability of capital punishment within the context of mentally ill individuals. Carroll, however, requests this Court extend *Atkins* to prohibit the execution of the mentally ill. Such an extension would constitute a new rule of constitutional law. . . . Under AEDPA, however, this Court cannot create new rules of constitutional law within the context of a habeas petition by a state prisoner. *See* 28 U.S.C. § 2254(d)(1) (stating a federal court may not grant habeas relief to a state prisoner unless the adjudication of his claim in state court resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"

> (emphasis added)). Accordingly, saris a decision from the Supreme Court barring the execution of mentally ill prisoners, we reject Carroll's claim that he is exempt from execution because he is mentally ill.

Id. at 1370.

Upon the foregoing, the Georgia Supreme Court's rejection of Petitioner's Eighth Amendment claim is not contrary to nor an unreasonable application of federal law. Therefore, this claim is denied.

VI. CERTIFICATE OF APPEALABILITY

The AEDPA bars appellate review of a § 2254 motion unless a district or circuit court certifies specific issues for appeal. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. Rule 22(b). Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

COA may issue when an inmate "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El I*, 537 U.S. at 335–36 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) Petitioner in this case has not made the requisite showing. Thus, this Court will not certify any issue for consideration by the Eleventh Circuit. Finally, because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis*.

VII. CONCLUSION

Upon the foregoing, the Petition for Writ of Habeas Corpus is **DENIED**. The Clerk is directed to **ENTER JUDGMENT** in favor of Respondent and **CLOSE** this case.

ORDER ENTERED at Augusta, Georgia, this 9th day of March, 2012.

/s/

UNITED STATES DISTRICT JUDGE

Appendix C

March 9, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

ANDREW HOWARD BRANNAN, Petitioner, v. CARL HUMPHREY, Warden, Georgia Diagnostic and Classification Center, Respondent.	**JUDGMENT IN A CIVIL CASE** CASE NUMBER: CV 309-041

* * *

Decision by Court. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that in accordance with the Order of this Court Entered on March 9, 2012, the Petition for Writ of Habeas Corpus is DENIED. Judgment is hereby ENTERED in favor of Respondent and this case stands CLOSED.

March 9, 2012	/s/
Date	*Clerk*
	/s/
	(By) Deputy Clerk

Appendix D

May 1, 2012

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

ANDREW HOWARD BRANNAN,	*	
Petitioner,	*	CV 309-041
v.	*	Death Penalty Case
CARL HUMPHREY, Warden,[1] Georgia Diagnostic and Classification Center,	*	
Respondent.	*	

ORDER

Petitioner, Andrew Howard Brannan, is a convicted prisoner under a sentence of death imposed by a court of the State of Georgia. His petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 was dismissed and all relief denied by Order entered March 9, 2012. On April 6, 2012, Petitioner filed a "Motion to Alter and Amend Judgment," citing Federal Rule of Civil Procedure Rule 59(e).

[1] The Court takes judicial notice that Carl Humphrey is the Warden of the Georgia Diagnostic and Classification Prison. The Clerk is **DIRECTED** to substitute Mr. Humphrey as the proper party respondent in the case.

While the Order of March 9, 2012, addressed nine separate assertions of ineffective assistance of trial counsel, Petitioner's present motion focuses on his assertion that his trial counsel was ineffective in failing to present the testimony of Dr. William Boyer, Petitioner's treating psychiatrist at the time he committed the crime. In the alternative to granting relief, Petitioner seeks a certificate of appealability.

Grounds warranting relief under Rule 59(e) include the following: (1) the correction of manifest errors of law or fact; (2) newly discovered or previously unavailable evidence is presented; (3) the judgment would result in manifest injustice; or (4) there is an intervening change in controlling law. *See, e.g.*, *Prevatte v. French*, 499 F. Supp. 2d 1321, 1327 (N.D. Ga. 2007). Thus, a motion to alter or amend judgment is appropriate where a court has misapprehended the facts, a party's position, or the controlling law. It is not appropriate to relitigate issues already addressed or advance arguments that could have been raised in prior briefing. *Michael Linet, Inc. v. Village of Wellington, Fl.*, 408 F.3d 757, 763 (11th Cir. 2005).

In the instant motion, Petitioner argues that this Court inappropriately determined that trial counsel made a strategic decision not to call Dr. Boyer at trial. He also argues that this Court failed to properly consider the effect that trial counsel's representation that they would call Dr. Boyer had upon the jury. Petitioner's contentions in this regard, however, are not new arguments or evidence. Moreover, Petitioner has not presented an intervening change in the law that was previously unavailable. Finally, Petitioner has failed to convince the Court that it must alter or amend its judgment to correct clear error or prevent manifest injustice. In short, Petitioner's motion does nothing more than reargue the merits of this particular ineffective assistance of counsel claim. The Court's reasons for rejecting this claim are adequately explained in its March 9, 2012 Order.

Petitioner's alternative motion for a certificate of appealability is principally governed by the provisions of 28 U.S.C. § 2253. That statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("'AEDPA"), provides that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, Petitioner 'must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In this case, Petitioner seeks a certificate of appealability on his ineffective assistance of counsel claims. He points to the fact that the state habeas court granted Petitioner's request for relief; thus, in Petitioner's estimation, reasonable jurists could and have disagreed on his claims. However, this Court does not consider the state habeas court's conclusions to be a reasonable application of the *Strickland* standards. Accordingly, these claims do not warrant a certificate of appealability.

Upon the foregoing, Petitioner's motion for reconsideration and his motion for a certificate of appealability is hereby **DENIED**.

ORDER ENTERED at Augusta, Georgia, this 9th day of March, 2012.

/s/
UNITED STATES DISTRICT JUDGE

Appendix E

November 8, 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 12-13039-P

ANDREW H. BRANNAN,

Petitioner-Appellant,

versus

GDCP WARDEN,

Respondent-Appellee.

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

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

Before: HULL, WILSON, and MARTIN, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/s/

UNITED STATES DISTRICT JUDGE

Appendix F

November 19, 2013

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

No. 12-13039

District Court Docket No. 3:09-cv-00041-DHB

ANDREW H. BRANNAN,

Petitioner-Appellant,

versus

GDCP WARDEN,

Respondent-Appellee.

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: August 08, 2013

For the Court: John Ley, Clerk of Court

By: Jenifer L. Tubbs

Issued as Mandate:
November 19, 2013

Appendix G

March 25, 2002

**IN THE SUPREME COURT
STATE OF GEORGIA**

S01P1789. BRANNAN v. STATE.

CARLEY, Justice.

A jury found Andrew Brannan guilty of malice murder for the shooting death of Deputy Sheriff Kyle Dinkheller. The jury recommended a death sentence after finding the following aggravating circumstances: the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim before death; the offense of murder was committed against a peace officer while engaged in the performance of his official duties; and, the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant. OCGA § 17-10-30(b)(7), (8), (10). Brannan's motion for new trial was denied and he appeals.[1]

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[1] The murder occurred on January 12, 1998, and the Laurens County grand jury indicted Brannan for malice murder on April 7, 1998. The State filed its notice of intent to seek the death penalty on April 30, 1998. By agreement of the parties, the indictment was dismissed and the grand jury re-indicted Brannan on October 26, 1998. After venue was transferred to Glynn County, the trial took place from January 18–30, 2000. The jury convicted Brannan on January 28, 2000, and recommended a death sentence on January 30, 2000. Brannan filed a motion for new trial on February 29, 2000, and amended it on November 9, 2000. The trial court denied the motion for

General Grounds

1. The evidence presented at trial showed the following: Andrew Brannan left his mother's house in Stockbridge, Georgia, to drive to his house in Laurens County in the afternoon of January 12, 1998. He was driving his white pickup truck 98 miles per hour on Interstate 16 when Laurens County Deputy Sheriff Kyle Dinkheller clocked his speed with a radar gun. Brannan exited the highway and stopped on a rural stretch of Whipple Crossing Road after the deputy caught up to him. During the pursuit, Deputy Dinkheller activated a video camera which is aimed through his windshield. The camera captured almost all of Brannan's actions during the ensuing traffic stop. Deputy Dinkheller also wore a microphone. The deputy stopped his patrol car about 20 feet behind Brannan's truck. Brannan exited his truck and stood near the driver's side door with his hands in his pockets. The right side of Deputy Dinkheller is visible on the tape as he stood next to his driver's side door.

Deputy Dinkheller said, "Driver, step back here to me. Come on back here to me." Brannan said, "Okay," but did not move. The deputy said, "Come on back. How are you doing today?" Brannan said that he was okay and asked how the deputy was doing, but still did not move. Deputy Dinkheller said he was good and repeated, "[C]ome on back here and keep your hands out of your pockets." Brannan asked why

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new trial on July 2, 2001, and Brannan filed a notice of appeal on July 27, 2001. The case was docketed in this Court on August 24, 2001, and orally argued on November 20, 2001.

and the deputy again said, "Keep your hands out of your pockets, sir." Brannan responded, "Fuck you, Godamit, here I am. Shoot my fucking ass." He then began dancing in the street, saying, "Here I am, here I am." The deputy ordered, "Come here. Sir, come here," but Brannan responded, "Shoot me," and kept dancing.

Deputy Dinkheller radioed for assistance on his belt-mounted radio, and the defendant stopped dancing and approached him. The deputy said, "Sir, get back." Brannan replied, "Who are you calling, motherfucker?" and then rushed the deputy and a confrontation ensued to the left of the patrol car and off camera. The deputy ordered Brannan to get back nine more times. Brannan replied with "Fuck you" four times and at one point shouted, "I am a goddam Vietnam combat veteran."

Brannan then ran back to his truck and began rummaging around behind the driver's seat. Deputy Dinkheller remained beside his patrol car and ordered, "Sir, get out of the car." The right side of the deputy is briefly visible during this time. The deputy had drawn his baton, but not his firearm. Brannan replied that he was in fear of his life. The deputy shouted, "I'm in fear of my life! Get back here now!" Brannan said, "No," and then pulled a .30 caliber M1 carbine from his truck. The deputy radioed for help and shouted for him to put the gun down. Instead, Brannan crouched by his open driver's side door. The deputy shouted for Brannan to put the gun down three more times. Brannan opened fire and the deputy returned fire.

Deputy Dinkheller was hit and shouted, “Shoot, shoot, stop now!” Brannan continued firing and advanced to the front of the patrol car. The deputy apparently tried to take cover behind the patrol car. Brannan exhausted one magazine, reloaded, and continued firing. The microphone recorded the sounds of the deputy being shot. At trial, the medical examiner testified that by this time Deputy Dinkheller had been struck by at least nine bullets, in the arms, legs, buttocks, chest, and head. The medical examiner opined that the deputy, although still breathing into the microphone, had lost consciousness because he was no longer returning fire or crying out when shot. The video shows Brannan cease crouching, take careful aim with his carbine, say “Die, Fucker,” and fire one last shot. Brannan then fled the scene in his truck.

Brannan was found hiding in the woods about 100 yards from his house, and he made incriminating statements after his arrest. He had a gunshot wound to his abdomen. The police found the murder weapon in his house. Brannan claimed that he was not guilty by reason of insanity, and presented experts who testified that he had been unable to distinguish right from wrong because post-traumatic stress disorder had triggered a flashback to Vietnam. However, the court-appointed psychiatrist concluded that Brannan was sane, and the jury could have inferred from comments made by Brannan during the crime and after his arrest that he shot the victim because he believed the 22-year-old deputy was not showing him a sufficient amount of respect. Regarding his dancing during the altercation, Brannan explained to the police that he once defused a tense situation with an angry man by dancing and saying "shoot me." He also later told a psychiatrist that he had seen Mel Gibson act that way in the movie "Lethal Weapon." By its verdict the jury rejected Brannan's insanity defense. The evidence was sufficient to enable a rational trier of fact to find proof of Brannan's guilt of malice murder beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The trial court did not err by denying Brannan's motion for a directed verdict of acquittal. *Jackson v. Virginia*, *supra*; *Raulerson v. State*, 268 Ga. 623, 625(1), 491 S.E.2d 791 (1997). *See also* OCGA § 17-9-1(a).

Pre-Trial Issues

2. Brannan complains that the trial court erroneously denied four of his pre-trial motions.

(a) *Motion to Exclude the Death Penalty on Account of the Arbitrary Use of Prosecutorial Discretion in the Plea Bargaining Process*. Brannan contends that the State has too much discretion in choosing to seek the death penalty or to offer a plea bargain. This contention is without merit. *See Gregg v. Georgia*, 428 U.S. 153, 199(IV)(B)(1), 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jenkins v. State*, 269 Ga. 282(2), 498 S.E.2d 502 (1998). Georgia law authorizes the death penalty for Brannan's crime, and he has failed to show that the prosecutor acted in an unconstitutional manner with respect to his case. *See Jenkins v. State*, *supra*; *Rower v. State*, 264 Ga. 323(1), 443 S.E.2d 839 (1994).

(b) Motion to Suppress Evidence. Brannan urges that the trial court should have suppressed several pieces of evidence that were used against him at trial. With regard to a blood sample drawn pursuant to a search warrant, Brannan has failed to demonstrate that the hospital employee who spontaneously informed the police that Brannan's emergency room toxicology screen was positive for marijuana was acting as an agent of the State, or that the toxicology screen was for purposes other than medical diagnosis and treatment of his gunshot wound. *See Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001). The subsequent search warrant to obtain Brannan's blood sample was therefore proper and based on probable cause.

The two searches of Brannan's home were also proper. After determining the location of Brannan's house that he built by himself in the woods, the police arrived with an arrest warrant for Brannan, but could not find him in the house as he was hiding in the woods. They observed two rifles leaning against a wall, one of which was the murder weapon, and properly seized them. *See Payton v. New York*, 445 U.S. 573, 603(IV), 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) ("[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."); *May v. State*, 181 Ga.App. 228(1), 351 S.E.2d 649 (1986) (a police officer inside a suspect's home pursuant to a valid arrest warrant may seize evidence in plain view). The officers also noticed that the white pickup truck parked next to the house contained bullet holes and blood stains. They obtained a search warrant for the house and curtilage, and the resulting search of the house and truck uncovered ammunition, a shell casing, and marijuana. *See Owens v. State*, 202 Ga.App. 785(1), 415 S.E.2d 704 (1992) (vehicle parked next to house considered part of the curtilage and may be searched pursuant to a search warrant for the residence). The trial court did not err by admitting the evidence obtained during these searches.

(c) *Motion to Dismiss the Case or Exclude Evidence due to Prosecutorial Misconduct*. After Brannan's arrest, the police impounded his white pickup truck and photographed the bullet holes in it. A private towing company under contract with the police then towed the truck to the company's parking lot. On May 8, 1998, Brannan filed a motion to preserve, inspect, and examine all physical evidence. In November 1998, when defense counsel asked the prosecutor about inspecting the truck, both attorneys learned for the first time that the towing company had released the truck to the lienholder, a large national bank, on May 1, 1998. The truck had been repaired and resold. Brannan filed a motion requesting dismissal of the indictment due to prosecutorial misconduct or, in the alternative, an order prohibiting the State from presenting any evidence or argument about the truck. Brannan claimed that the failure to preserve the truck prevented his expert from determining bullet trajectories and extrapolating from the trajectories the actions of the deputy during the shooting.

"In dealing with the failure of the state to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence." *Walker v. State*, 264 Ga. 676(3), 449 S.E.2d 845 (1994). *See also Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). To be material, the evidence must have had an apparent exculpatory value before it was lost, and be of such a nature that the defendant cannot obtain comparable evidence by other reasonable means. *Walker v. State*, *supra*. The trial court held a hearing and both sides presented evidence. On the issue of bad faith, the evidence showed that the lienholder, seeking release of the truck, had phoned the DA's office, defense counsel, the GBI, and the sheriff's office. Through a series of misunderstandings, the truck was released. The key misunderstanding occurred when the GBI contacted the assistant district attorney about the need for the truck. The prosecutor stated that he did not need to look at the truck, and the GBI agent interpreted this to mean that the truck could be released. Six months later, both the prosecutor and defense counsel were surprised to learn that the bank had repossessed the truck. On the issue of materiality, two crime scene experts testified that an examination of the five bullet holes in the truck could not reveal who fired first, the distance the deputy was from the truck, or whether the deputy was advancing or retreating. Furthermore, one of the experts testified that it would be impossible to put the truck back in the exact position it was in during the shooting in order to determine accurate bullet trajectories. The trial court found no due process violation in the release of the truck, due to a lack of bad faith on the part of the State and a lack of exculpatory value in the truck. *See Arizona v. Youngblood*, *supra*; *Walker v. State*, *supra*. For the same reasons, the trial court also determined that the State had not violated its discovery obligations under OCGA § 17-16-4. The trial court did not err in denying the motion to dismiss or to exclude evidence.

(d) *Motion to Present Mitigating Evidence Concerning the Death Penalty*. Brannan asserts that the trial court erred by refusing to allow him to present penalty phase evidence about the death penalty in general, including subjects such as international treaties, the abolition of the death penalty in other countries, religious teachings, and the method of execution. The trial court properly denied this motion. *See Barnes v. State*, 269 Ga. 345(27), 496 S.E.2d 674 (1998); *Franklin v. State*, 245 Ga. 141(7), 263 S.E.2d 666 (1980) (proper mitigating evidence involves evidence about the particular defendant and not evidence about the death penalty in general).

3. The trial court ordered a change of venue to Glynn County for trial. After Brannan's trial, newspaper articles reported that Glynn County experienced difficulty in the compilation of jury lists after switching to a new jury selection computer program. Brannan challenged the traverse jury list, but the evidence showed that the list from which prospective jurors were selected for his trial was created under the "old" program. The evidence did not support Brannan's allegation that the array was vitiated by the failure to purge felons, the deceased, and the mentally incompetent from the traverse jury list. *See* OCGA §§ 15-12-40, 15-12-40.2, 15-12-42.

Moreover, the challenge to the traverse jury array was untimely. *See Clark v. State*, 255 Ga. 370(2), 338 S.E.2d 269 (1986). We find no error.

4. A month before trial, the State filed a notice of its intent to present non-statutory aggravating circumstances involving several incidents that occurred while Brannan was in jail awaiting trial. Contrary to his contention, this notice and the supplement to the witness list were not untimely. *See* OCGA §§ 17-10-2, 17-16-8(a); *Terrell v. State*, 271 Ga. 783(12), 523 S.E.2d 294 (1999). The trial court did not abuse its discretion by denying a motion for a continuance filed by Brannan. *See Johnson v. State*, 271 Ga. 375(8), 519 S.E.2d 221 (1999).

Jury Selection

5. Brannan contends that the State violated *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), by discriminating on the basis of race during jury selection. The State used seven of its ten peremptory strikes to remove African-American prospective jurors from the panel. There were eleven African-Americans on the panel before jury selection, and three African-Americans served on the jury. The State gave reasons for the seven peremptory strikes, rendering a preliminary showing of prima facie discrimination moot. *Hernandez v. New York*, 500 U.S. 352, 359(II)(A), 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); *Lewis v. State*, 262 Ga. 679(2), 424 S.E.2d 626 (1993). The trial court ruled that Brannan did not meet his burden of showing that the State acted with discriminatory intent. This ruling will be affirmed unless clearly erroneous. *Turner v. State*, 267 Ga. 149(2), 476 S.E.2d 252 (1996).

Five of the prospective jurors expressed reservations about imposing the death penalty, in addition to other valid race-neutral reasons, such as being previously charged with a criminal offense, claiming hardship due to bankruptcy or physical disability, or having a relative currently facing criminal prosecution. *See Jenkins v. State*, *supra* at 290(11), 498 S.E.2d 502; *Sears v. State*, 268 Ga. 759(8), 493 S.E.2d 180 (1997). The sixth prospective juror learned in nursing school about post-traumatic stress disorder, which was to figure prominently in Brannan's defense, and the district attorney's office had previously prosecuted her for fraud. These were valid race-neutral reasons for the State to strike her. *See Jenkins v. State*, *supra*; *Jackson v. State*, 265 Ga. 897(2), 463 S.E.2d 699 (1995) ("'Unless a discriminatory intent is inherent in the . . . (proponent's) explanation, the reason offered will be deemed race neutral.' [Cit.]"). The seventh prospective juror served four years in the Marine Corps in the 1960's, including a tour in Vietnam as a truck driver. He said that he had known Marines with post-traumatic stress disorder ("PTSD") who would "freak out" or "snap," and that he knew they had PTSD because "the corpsman said they had [it]." The State explained that a white Vietnam veteran they did not strike was not similarly situated. That prospective juror had served 21 years in the Marine Corps as a sergeant, including a combat tour in Vietnam in the infantry, and, when asked about PTSD, said, "I ain't never had the problem with that." The trial court did not err by finding that this reason was race-neutral. *See Jackson v. State*, *supra*; *Foster v. State*, 272 Ga. 69(5), 525 S.E.2d 78 (2000).

Since Brannan failed to carry his burden of proving purposeful discrimination by the State during jury selection, this enumeration of error is without merit.

6. Brannan further contends that the trial court erred by failing to excuse for cause three prospective jurors who were allegedly biased in favor of the death penalty. *See Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Greene v. State*, 268 Ga. 47, 485 S.E.2d 741 (1997). "The proper standard for determining the disqualification of a prospective juror based upon his views on capital punishment 'is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."' [Cit.]" *Greene v. State*, *supra* at 48, 485 S.E.2d 741 (quoting *Wainwright v. Witt*, *supra* at 424(II), 105 S.Ct. 844). As a general proposition, a prospective juror is not disqualified "merely because he states that he is leaning for or against a death sentence." *Mize v. State*, 269 Ga. 646(6)(d), 501 S.E.2d 219 (1998). "The relevant inquiry on appeal is whether the trial court's finding that a prospective juror is disqualified is supported by the record as a whole." *Greene v. State*, *supra* at 49, 485 S.E.2d 741. An appellate court must pay deference to a trial court's finding that a prospective juror is qualified or disqualified, which includes the trial court's resolution of any equivocations or conflicts in the responses on voir dire. *Greene v. State*, *supra*. "Whether to strike a juror for cause is within the discretion of the trial court and the trial court's rulings are proper absent some manifest abuse of discretion." *Greene v. State*, *supra* at 50, 485 S.E.2d 741.

Although all three prospective jurors expressed a preference for the death penalty for a convicted murderer, and one of them also expressed a reluctance to impose life imprisonment with the possibility of parole, they indicated that they could vote for all three possible sentences and consider mitigating evidence. *See Greene v. State*, *supra* at 48–50, 485 S.E.2d 741. One prospective juror, whose daughter worked as an agent for the Department of Justice, responded in the negative when asked an awkwardly-phrased question about whether it was fair to a person charged with the murder of a police officer to have her on the jury. However, the trial court's determination of this prospective juror's qualification was not limited to her opinion of her own impartiality. *See Raulerson v. State*, *supra* at 629(4), 491 S.E.2d 791; *Burgess v. State*, 264 Ga. 777(7), 450 S.E.2d 680 (1994). Her other responses showed her to be qualified. *See Greene v. State*, *supra*. Two of the prospective jurors also expressed skepticism about an insanity defense, but indicated that they could consider such a defense. We conclude that the trial court did not abuse its discretion by finding that these three prospective jurors were qualified to serve.

Brannan also argues that the trial court improperly "rehabilitated" these prospective jurors by asking them questions designed to ensure that they were qualified. *See Walker v. State*, 262 Ga. 694(2), 424 S.E.2d 782 (1993); *Cannon v. State*, 250 Ga. App. 777(1), 552 S.E.2d 922 (2001); *Walls v. Kim*, 250 Ga.App. 259, 549 S.E.2d 797 (2001). The voir dire transcript does not support this argument. This Court and the United States Supreme Court have long recognized that ascertaining prospective jurors' views on the death penalty is no easy task. *See Wainwright v. Witt*, *supra* at 424–425(II), 105 S.Ct. 844 ("What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings."); *Spivey v. State*, 253 Ga. 187, 197, 319 S.E.2d 420, fn. 3 (253 Ga. 187, 319 S.E.2d 420) (1984). Many prospective jurors have given little thought to capital punishment and are unfamiliar with the procedures of a death penalty trial and the jury's role in the sentencing determination. *See Nance v. State*, 272 Ga. 217(6), 526 S.E.2d 560 (2000); *Spivey v. State*, *supra*. For this reason, prospective jurors, some of whom are struggling to formulate and articulate their views for the first time, may give confusing or equivocal responses to the lawyers' questions. *See Spivey v. State*, *supra* (prospective jurors in death penalty cases will frequently provide answers which are confusing, ambiguous, and contradictory because they have never before been required to formulate and express their views on the death penalty). Under these circumstances, the trial court may ask questions, as it did in Brannan's case, designed to clarify the prospective juror's views before ruling on qualification. The trial court's questions in this case were not an attempt to achieve a desired answer, but rather were a "neutral attempt to determine the juror's impartiality." *Walker v. State*, *supra* at 696(2), 424 S.E.2d 782. The record as a whole shows these jurors to be properly qualified. *See Greene v. State*, *supra*. *Compare Cannon v. State*, *supra* at 779–780, 552 S.E.2d 922. Accordingly, we find no error.

7. During the voir dire of prospective juror Lampkin, defense counsel asked him if he was aware that jurors would have to vote individually for a death sentence. Mr. Lampkin replied, "Yes, that's what everybody in the back was talking about." Defense counsel followed up by asking, "Any particular discussions about what life sentences or death sentences mean or what the process is among these fifteen or sixteen folks [on your jury panel]?" Mr. Lampkin said, "No, I'm the one who brought it up." Brannan objected that the 16 prospective jurors on that jury panel had discussed the case in violation of the trial court's instructions. He requested that the jury panel be questioned on this subject. The remaining 15 prospective jurors were brought into the courtroom and questioned about whether there had been any discussions about the case. Only prospective juror Tucker, an attorney, responded affirmatively. He was separately questioned and stated that Mr. Lampkin had said, "[W]e're here on the fellow who shot the police officer over in Laurens County, or Dublin." Mr. Tucker said that at that point he told Mr. Lampkin that he was not supposed to form an opinion yet. There were no other discussions about the case. Mr. Tucker said, "I don't think any of these folks are tainted. Nobody has expressed an opinion about . . . the death penalty or anything of that nature." When individually questioned by the trial court, each juror stated that he or she could put aside anything said in the jury

room and decide the case based solely on the evidence and the trial court's instructions. We conclude that Brannan has failed to demonstrate juror misconduct sufficient to upset the verdict. *See Holcomb v. State*, 268 Ga. 100(2), 485 S.E.2d 192 (1997); *Todd v. State*, 261 Ga. 766(5), 410 S.E.2d 725 (1991). The alleged statements did not involve deliberation or any discussion of the merits of the case and were harmless beyond a reasonable doubt. *See Holcomb v. State*, *supra*. In fact, the trial court, in its instructions to all the prospective jurors at the beginning of voir dire, covered the substance of the alleged statements: that the case was from Laurens County, that Brannan was charged with the murder of a police officer, and that the State was seeking the death penalty.

8. The trial court did not improperly restrict Brannan's voir dire questioning of prospective jurors. *See Gissendaner v. State*, 272 Ga. 704(4), 532 S.E.2d 677 (2000); *Barnes v. State*, *supra* at 351–352(10), 496 S.E.2d 674. "The scope of voir dire is largely left to the trial court's discretion, and the voir dire in this case was broad enough to ascertain the fairness and impartiality of the prospective jurors." *Barnes v. State*, *supra*.

9. Brannan complains that the trial court erroneously excused seven prospective jurors for cause. Six of these were properly excused because they firmly and repeatedly stated that, regardless of the evidence and the trial court's instructions, they could not vote to impose a death sentence. *See Greene v. State*, *supra* at 48–50, 485 S.E.2d 741. The remaining prospective juror was excused for cause on

Brannan's motion. Assuming that the juror was qualified, such invited error is not grounds for reversal. *See Barnes v. State*, *supra* at 356(19), 496 S.E.2d 674. This enumeration is without merit.

10. The death qualification of prospective jurors is not unconstitutional. *DeYoung v. State*, 268 Ga. 780(11), 493 S.E.2d 157 (1997).

The Guilt-Innocence Phase

11. Brannan claims that the trial court erred by allowing testimony from a Central State Hospital psychiatrist, Dr. Carter, who evaluated Brannan pursuant to a court order because he intended to raise an insanity defense. *See* OCGA § 17-7-130.1. He argues that Dr. Carter was biased in favor of the State and, therefore, that he was not the neutral court-appointed expert contemplated by OCGA § 17-7-130.1. *See Tolbert v. State*, 260 Ga. 527, 528, 397 S.E.2d 439 (1990) ("A court-appointed medical expert cannot be classified as an agent of the state, but must be considered as an independent and impartial witness."). The basis for this argument was the allegation that Dr. Carter cooperated with the State in turning over records from his pre-trial evaluation of Brannan, including an audiotape of an interview, but refused to cooperate with the defense by turning over the same materials to them. At the beginning of trial, the assistant district attorney relayed a request from Dr. Carter that he be allowed to sit in the courtroom during the testimony of the defense experts so that he "can assist us in cross-examination, as well as . . . testify more fully himself." The trial court refused this request and expressed concern that Dr. Carter was only supposed

to report what he found in his examination. After Brannan objected and sought to exclude Dr. Carter's testimony on the grounds of bias, the trial court stated that it would hold a hearing on this issue before Dr. Carter testified.

During the hearing, Dr. Carter explained that he heard that Brannan had hired an expert on post-traumatic stress disorder. A colleague told him that he might be asked to "take the role of a rebuttal witness," so he called to see if he could sit in during the trial since he had no reports available. When responding to a question by defense counsel about this phone request, Dr. Carter stated, "My understanding only had to do with any information I might need to help my—to help further validate any testimony that I might give. It wasn't intended for the purpose of assisting anyone." He said that he called the DA's office because "we try not to bother the judge unless it's necessary" and he believed the DA would relay the request to the judge. When the judge reminded him that he was just to give his facts and opinions and not favor any side, Dr. Carter replied, "That's, you know, that's the nature of my work. That's my moral and ethical duty. I'd never do otherwise." Dr. Carter further explained, with regard to Brannan's difficulty in obtaining records before trial from Dr. Carter's evaluation, that the hospital legal department, and not he, handles requests for documents. In fact, Dr. Carter called defense counsel after receiving a subpoena to "find out what I needed to bring because I'm not in control of the medical records." Despite the apparent discovery confusion, defense counsel received before trial Dr. Carter's report, his handwritten notes, and a transcript of his interview with Brannan. The trial court denied Brannan's motion to bar Dr. Carter's testimony after finding that he would be fair and impartial. This ruling was not error, and Brannan was able to cross-examine Dr. Carter with regard to possible bias. *See* OCGA § 24-9-64; *Moore v. State*, 220 Ga.App. 434(3), 469 S.E.2d 211 (1996). Brannan also argues that Dr. Carter testified that Brannan was sane during the crime even though the defense presented evidence that he was not. However, a court-appointed expert does not become "biased" because he arrives at a conclusion that conflicts with a party's position.

12. Deputy Don Matecun, a friend of the victim, was the first law enforcement officer to arrive at the murder scene. In the guilt-innocence phase, he testified about finding the victim lying in the road with a female passerby trying to help him. After being shown a crime scene photograph, Deputy Matecun began crying and the prosecutor stopped questioning him and allowed him to leave. Brannan objected to the deputy's emotional display and moved for a mistrial, claiming that the State had put the deputy on the stand for the purpose of making him cry before the jury. In support of this claim, he alleged that the deputy could also be heard crying on the portion of the videotape not shown to the jury. The prosecutor responded that Deputy Matecun was a relevant witness because he was the first officer at the scene, and that he did not react emotionally when shown the crime scene photograph before trial. "Demonstrations and outbursts which occur during the course of a trial are matters within the trial court's discretion unless a new trial is necessary to insure a fair trial." *Dick v. State*, 246 Ga. 697(14),

273 S.E.2d 124 (1980). Although the witness cried, there is no evidence that he became hysterical or made any prejudicial comments. *Dick v. State*, *supra*. The trial court did not abuse its discretion by denying the motion for a mistrial. *See Dick v. State*, *supra*.

13. The trial court did not err by admitting photographs of the victim and the crime scene. The photographs were relevant and admissible to show the nature and location of the wounds on the victim's feet, legs, buttocks, arms, torso, and head caused by being struck by ten bullets, and the location of the victim's body in relation to crime scene evidence such as shell casings, blood stains, and the patrol car. *See Barnes v. State*, *supra* at 357(25), 496 S.E.2d 674.

14. While cross-examining a GBI crime scene specialist, Brannan asked whether the blood spatter and the location of blood stains around the victim indicated that he had remained in a fairly confined area during the shooting since there were no blood stains on the road more than seven feet away from the body. During examination of the following police witness, the prosecutor sought to admit the victim's blood-stained uniform pants to show that they were made from a material that may have soaked up blood from a wound, thereby inhibiting the flow of blood onto the ground. The trial court did not err by admitting the pants over defense objection. *See Baker v. State*, 246 Ga. 317(3), 271 S.E.2d 360 (1980) (the admission of evidence is a matter which rests largely within the trial court's discretion).

After the pants were admitted, defense counsel objected and moved for a mistrial, asserting that the victim's mother silently doubled over in pain when the pants were displayed and that ten jurors looked at her while she reacted. The trial court denied the motion and issued the following curative instruction:

> Ladies and gentlemen of the jury, let me give you this short instruction. Before you were brought in the room this morning, I admonished any family members or spectators not to show any emotion or outcry or any demonstration whatsoever during the presentation of the evidence and during this trial.
>
> There may have been some reaction to this exhibit, and I just want you, as jurors, to not be affected in any way whatsoever from any reaction from the audience, and I've asked that it not happen, and . . . if there's anyone who can't control their emotions or whatever, I'll ask that they leave the courtroom and not try to influence the jurors in any way whatsoever.

Under these circumstances, the curative instruction was sufficient to cure any error resulting from the alleged reaction of a spectator to the display of the victim's pants. *See Lowe v. State*, 267 Ga. 410(3), 478 S.E.2d 762 (1996). The trial court did not err by denying Brannan's motion for mistrial. *Lowe v. State*, *supra*; *Byrd v. State*, 262 Ga. 426(1), 420 S.E.2d 748 (1992).

15. Before trial, the trial court ordered that the videotape of the murder be stopped at a certain point so that the jury would not hear the reactions of passersby and police officers arriving at the murder

scene. As the prosecutor was setting up the equipment to play the tape, the trial court asked, "Has the tape been set to stop at the appropriate place, Mr. Larsen?" The prosecutor responded that he was going to oversee that. The trial court reminded, "I would ask that you arrange where it can be stopped if it doesn't do it automatically." Brannan objected and moved for a mistrial, claiming that the trial court's remarks would cause the jurors to speculate about the portion of the tape they would not see. We conclude that the trial court did not err by denying the motion because its innocuous comments about stopping the tape could not have prejudiced Brannan. In addition, the trial court instructed the jury that those comments were an attempt "to operate the Court in an orderly manner and move it along" and that they were to disabuse their minds of those comments and "just view the tape and draw whatever you would draw from it." This enumeration is without merit.

16. Although Brannan contends that the videotape of the murder was emotionally charged and prejudicial, it was evidence in the case and the prosecutor could properly show it during the guilt-innocence phase closing argument. *See Brown v. State*, 268 Ga. 354(8), 490 S.E.2d 75 (1997) (counsel in closing argument may replay a portion of a videotape admitted into evidence).

17. Brannan complains about certain statements made by the prosecutor during the guilt-innocence phase closing argument. Brannan asserts that it was improper for the prosecutor to disparage his insanity defense. However, Brannan did not object to the

prosecutor's criticism of his insanity defense during trial and, therefore, this issue is waived on appeal with regard to guilt. *See Gissendaner v. State*, *supra* at 713(10)(b), 532 S.E.2d 677; *Miller v. State*, 267 Ga. 92(2), 475 S.E.2d 610 (1996). Moreover, it is not improper for a prosecutor to take issue with the findings and conclusions of defense experts during closing argument.

At one point, while arguing that perceived lack of respect was the motive for the murder, the prosecutor argued that Brannan was like Lucifer when he was kicked out of heaven and became the Devil. The prosecutor said that Brannan wanted respect when he left the Army, but was not getting it, and that he was determined to get it from the victim. Brannan did not object to this argument at the time it was made or at the conclusion of the closing argument. His objection was not made until after the trial court's charge and, thus, was not timely. *See Butler v. State*, 273 Ga. 380(8), 541 S.E.2d 653 (2001). Even if the objection was timely, the prosecutor's analogy, when viewed in context, would not provide a basis for the reversal of the murder conviction. *See Simmons v. State*, 266 Ga. 223(6)(b), 466 S.E.2d 205 (1996) (flights of oratory and figurative speech are permissible during closing argument). For the same reasons, the trial court did not err in overruling the defense objection that the prosecutor called the victim brave and kind due to his actions during the traffic stop. *See Butler v. State*, *supra*; *Simmons v. State*, *supra*. Because none of these arguments was improper, we need not determine whether there was a reasonable probability that they changed the result of the sentencing phase. *Carruthers v. State*, 272 Ga. 306(11), 528 S.E.2d 217 (2000); *Hicks v. State*, 256 Ga. 715(23), 352 S.E.2d 762 (1987). *See also* OCGA § 17-10-35(c)(1).

18. The trial court instructed the jury, "Every person is presumed to be of sound mind and discretion, but this presumption may be rebutted." *See* OCGA § 16-2-3. This presumption of sanity is not unconstitutionally burden-shifting. *See Parker v. State*, 256 Ga. 363(1), 349 S.E.2d 379 (1986). A lengthy charge on the defense of insanity followed. We find no error in the guilt-innocence phase jury charge.

19. OCGA § 16-5-1 is constitutional. *Speed v. State*, 270 Ga. 688(48), 512 S.E.2d 896 (1999).

The Sentencing Phase

20. Brannan contends that the trial court erred in allowing the State to present victim-impact evidence. This type of evidence is constitutional and generally admissible. *See Pickren v. State*, 269 Ga. 453(1), 500 S.E.2d 566 (1998); *Livingston v. State*, 264 Ga. 402(1)(c), 444 S.E.2d 748 (1994). Before the victim's widow read her brief written statement to the jury, the trial court reviewed it and ordered several redactions of material that might be considered inflammatory or unduly prejudicial. *See Turner v. State*, 268 Ga. 213(2)(a), 486 S.E.2d 839 (1997). The statement was not improper. *See Turner v. State*, *supra* at 215–216(2)(b), 486 S.E.2d 839; *Simpkins v. State*, 268 Ga. 219(3), 486 S.E.2d 833 (1997). Furthermore, there is no indication in the record that the sentencing phase witnesses for the

State showed excessive emotion, and the trial court is not required to issue a prophylactic order against displays of emotion. *See Jones v. State*, 267 Ga. 592(2)(b), (c), 481 S.E.2d 821 (1997). We find no error in the victim-impact evidence.

21. The State called Rickey Horne, a Baldwin County detective and former security officer at the Binion Building at Central State Hospital in Milledgeville. The Binion Building houses patients who are facing criminal charges and are sent to Central State to be mentally evaluated by the psychiatric staff. It also houses people found not guilty by reason of insanity and some inmates who were found guilty but mentally ill. Detective Horne began to discuss the lax security measures at the Binion Building. Brannan objected and moved for a mistrial on the ground that he did not receive pretrial notice of this evidence in aggravation. *See* OCGA § 17-10-2. The trial court sustained Brannan's objection and ordered the witness to step down. The trial court instructed the jury, "I ask that you disregard any evidence from this witness, not consider it in making your verdict whatsoever. Don't have it—let it have any effect on you and disabuse your mind from it." We conclude that the trial court's instructions cured any harm resulting from the brief, irrelevant testimony of this witness. The trial court did not abuse its discretion by denying the motion for mistrial. *See James v. State*, 270 Ga. 675(4), 513 S.E.2d 207 (1999).

22. Brannan urges that the prosecutor made several improper arguments that require the reversal of the death sentence.

(a) *Insinuating that a life sentence burdens taxpayers*. The prosecutor stated that Brannan should pay for his acts, and then argued, "And not by saying, let's put him in the penitentiary and leave him there and let him eat and let him breathe and let him read and let him play and let him play ping pong and let him do push ups and let him grow fat off our land." Brannan objected and moved for a mistrial. The trial court sustained the objection, admonished the prosecutor, and instructed the jury to disregard the argument. The trial court's instruction cured any possible harm from the argument, even assuming that it was improper. *See Pace v. State*, 271 Ga. 829(32)(b), (d), 524 S.E.2d 490 (1999); *Williams v. State*, 258 Ga. 281(7), 368 S.E.2d 742 (1988). The trial court did not abuse its discretion by denying the motion for mistrial. *See James v. State*, *supra*.

(b) *Arguments concerning the victim*. The prosecutor argued that the victim was a police officer who did a difficult job for little pay, that he remained respectful and did not swear once during the altercation, and that he was a hero and a peacekeeper. These arguments were not improper and, therefore, we conclude that no harm was suffered by Brannan, who did not object during or after the prosecutor's penalty phase closing argument. *See Gissendaner v. State*, *supra* at 715(13), 532 S.E.2d 677.

(c) *Arguments concerning the worth or status of Brannan*. In the context of arguing the devotion of police officers to their job, the prosecutor stated that Deputy Dinkheller was being paid only $52 a day. The prosecutor also said that Brannan was receiving almost $2,000 a month in disability payments for claiming to suffer from post-traumatic stress disorder. Both amounts are taken directly from the evidence. On appeal, Brannan contends that the prosecutor was comparing the worth and status of the defendant and the victim when arguing for a death sentence. *See Ingram v. State*, 253 Ga. 622(10), 323 S.E.2d 801 (1984). However, Brannan did not object to this argument until after the trial court's penalty phase jury charge. The objection was therefore untimely. *Butler v. State*, *supra*. Accordingly, the standard of review to be applied is whether there was a reasonable probability that the argument, if improper, changed the jury's exercise of discretion in choosing between life imprisonment or death. *See Hicks v. State*, *supra* at 730(23), 352 S.E.2d 762. We conclude that there was no such reasonable probability because, when viewed in context, the prosecutor's statements did not urge the imposition of the death penalty based upon wealth or social status. *See Hicks v. State*, *supra*; *Ingram v. State*, *supra*.

(d) *Descriptions of the defendant*. Brannan complains that the prosecutor described him as a coward, a beast, and an animal, and as wicked and evil. Brannan did not object to these arguments when they were made, and we conclude that these descriptions did not, in reasonable probability, alter the jury's discretion when choosing between life imprisonment or death. *See Hicks v. State*, *supra*. Even if objected to in a timely fashion, the metaphorical characterizations would not be reversible error. *See Simmons v. State*, *supra*.

23. The sentencing phase jury charge was proper. The trial court adequately charged on mitigating circumstances and instructed the jurors that they could impose a life sentence for any reason or no reason. The trial court is not required to charge the jury on specific mitigating circumstances or to instruct that there need not be unanimity in determining their existence. *Terrell v. State*, *supra* at 788(11), 523 S.E.2d 294; *Jenkins v. State*, *supra* at 296, 498 S.E.2d 502.

24. The trial court instructed the jury to select their sentencing verdict on the verdict form with a check mark and then "X" out the two options they did not choose. When the trial court received the completed verdict form indicating a death sentence, the other two options had not been crossed out. The trial court asked the foreman to "X" out the two options not chosen, which the foreman did in the courtroom. On appeal, Brannan contends that the failure to return the jury to the jury room to complete the verdict form was reversible error. However, any confusion over the verdict form was inconsequential and harmless to the defendant. The jury clearly selected the death penalty on the verdict form, and no deliberation remained to be conducted. The jury was twice polled as to its verdict and all indicated that they voted for a death sentence. We find no error.

25. Brannan's enumeration regarding the constitutionality of execution by electrocution is moot. *Dawson v. State*, 274 Ga. 327, 554 S.E.2d 137 (2001).

26. The Georgia statutes providing for the imposition of the death penalty are not unconstitutional. *Pruitt v. State*, 270 Ga. 745(6), 514 S.E.2d 639 (1999).

27. The Unified Appeal Procedure is not unconstitutional. *Heidler v. State*, 273 Ga. 54(24), 537 S.E.2d 44 (2000).

28. The death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. OCGA § 17-10-35(c)(1). The evidence was sufficient to authorize the jury to find beyond a reasonable doubt the three statutory aggravating circumstances which supported the death sentence for the murder. OCGA § 17-10-35(c)(2); *Jackson v. Virginia*, *supra*. Considering both the crime and the defendant, the death sentence is not disproportionate to the penalty imposed in similar cases. OCGA § 17-10-35(c)(3). In addition to the evidence of the murder, which included the videotaped depiction of Brannan deliberately shooting a wounded, unconscious police officer, the State presented evidence that Brannan had shot in the direction of his neighbor during an altercation, and fashioned a crude weapon in jail using a razor blade. The similar cases listed in the Appendix support the imposition of the death penalty in this case, in that all involve the murder of a police officer in the performance of his official duties.

Judgment affirmed.

All the Justices concur.

Appendix H

March 13, 2002

IN THE SUPERIOR COURT OF BUTTS COUNTY STATE OF GEORGIA

ANDREW HOWARD BRANNAN, Petitioner,	* * * *	CIVIL ACTION FILE NO. 2003-V-408
v.	*	
HILTON HALL, Warden, Georgia Diagnostic and Classification Prison, Respondent.	* * * * *	HABEAS CORPUS

ORDER

This case comes before the Court on a Petition for a Writ of Habeas Corpus by Andrew Howard Brannan. Petitioner was convicted of malice murder on January 28, 2000 and sentenced to death on or about January 30, 2000.[1] Petitioner's motion for new

[1] *See Brannan v. State*, 275 Ga. 70 (2002). The underlying case is unique because of the compelling and chilling video and audio recordings from the deceased's police cruiser and person which established in graphic and frightening detail the death of Deputy Kyle Dinkheller at the hands of the petitioner, following a rather routine traffic stop on January 12, 1998 near Dublin, Laurens County, Georgia. The petitioner, a Vietnam veteran, had 110 prior criminal history and previously had been declared 100% disabled by the Veterans Administration due to diagnoses

trial was denied; the Georgia Supreme Court affirmed his conviction and sentence on March 25, 2002 with reconsideration denied on April 10, 2002.[2]

Habeas Corpus Standard of Review and Procedurally Barred and Defaulted Claims

> One imprisoned after conviction of a crime and seeking discharge by means of a writ of habeas corpus has the burden of proving by a preponderance of the evidence that the judgment attacked is invalid because the prisoner's constitutionally-protected rights were violated in obtaining the judgment. The habeas proceeding begins with the presumption the petitioner's judgment of conviction is valid, and that judgment of conviction may not lightly be set aside. [A]ny issue raised and ruled upon in the petitioner's direct appeal may not be reasserted in habeas corpus proceedings[, as] . . . any issue that could have been raised in that appeal but was not[] is procedurally barred from consideration in habeas corpus proceedings absent a showing of adequate

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of bipolar disorder and post-traumatic stress disorder. The traffic stop escalated wildly into a gun fight between the petitioner and the deputy, wherein both discharged more than twenty-five (25) rounds at the other from a relatively close range, requiring each to reload their respective weapons approximately three (3) times in a span of time, no more than thirty (30) seconds. The petitioner was shot once in the stomach by Deputy Dinkheller. Petitioner shot the deputy ten (10) times with a .30 caliber carbine, two times while the deputy was in the prone position and probably disabled.

[2] *Id.*

cause for the failure to raise it earlier[, along with] . . . a showing of actual prejudice[3]

<u>*Claims for Relief*</u>[4]

<u>*Ineffective Assistance of Counsel—Fifth, Sixth, Eighth, and Fourteenth Amendments to U.S. Constitution and corresponding provisions of Georgia Constitution*</u>

Petitioner contends that he was denied his right to effective assistance of counsel through: 1) counsel's consent to the admission of unduly prejudicial videotape evidence;[5] 2) counsel's failure to present evidence of the petitioner's remorse; 3) counsel's failure to effectively utilize the court-appointed psychiatrist to enable the jury to find that at the time of the offense the petitioner suffered from longstanding, severe mental illness and that he qualified for a verdict of guilty but mentally ill; 4) counsel having inadequately investigated, prepared, and presented a defense of post-traumatic stress disorder (PTSD), bipolar disorder or a combination thereof; 5) counsel's failure to present evidence that the petitioner was not medicated at the time of the offense and was suicidal; 6) counsel's failure to investigate, prepare, and present an

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[3] *Gaither v. Gibby*, 267 Ga. 96, 97 (1996) (internal citations removed).

[4] *See* Petitioner's Post-Hearing Brief, pages iii–vi.

[5] On direct appeal, the video was found to be admissible. However, there is no mention in the opinion whether any consideration was given of any effect, if any, of counsel's stipulation to the admission. *See Brannan*, 275 Ga. 70, 82 (2002).

accurate chronology of the events leading up to the shooting; 7) the failure to call Dr. Boyer, a defense psychiatrist to testify even though the jury was informed about this expert during counsel's opening argument; 8) the failure of counsel to rebut the State's argument that the petitioner was malingering so as to receive disability benefits; 9) the unreasonable decision of counsel to base Petitioner's entire defense on insanity when the evidence did not support said verdict; and 10) counsel's failure to adequately investigate, prepare, and present mitigating evidence during sentencing.

As it appears that Petitioner's trial counsel represented him on direct appeal, this Court finds that the above-listed claims are not procedurally barred or defaulted by his direct appeal. *See White v. Kelso*, 261 Ga. 32 (1991).

Prosecutorial Misconduct—Fifth. Sixth. Eighth. and Fourteenth Amendments to U.S. Constitution and corresponding provisions of Georgia Constitution[6]

Petitioner contends that the State violated his rights to due process and a fair trial by engaging in improper, inflammatory, and unsubstantiated arguments through: 1) falsely arguing that Petitioner had malingered and exaggerated symptoms of PTSD; 2) suggesting that a death sentence would serve as a deterrent to others; 3) Petitioner's future dangerousness that was not based on opinion and conjecture and not based on future conduct in prison;

[6] *See* Petitioner's Post-Hearing Brief, pages 160–64.

and 4) comparisons of worth between the victim and petitioner as improper victim impact evidence.

After review of Petitioner's direct appeal, this Court finds that the first claim is duplicative of claim eight raised in the proceeding section and thus covered there. The second and third claims would appear to be procedurally defaulted due to failure to raise them on direct appeal. The fourth claim was addressed on direct appeal and thus barred from consideration here.[7]

Cruel and Unusual Punishment—Eighth and Fourteenth Amendments to U.S. Constitution and corresponding provisions of Georgia .Constitution[8]

Petitioner contends that: 1) execution will violate the Eighth Amendment and Georgia law as each prohibits execution of persons with severe mental illness; 2) his sentence is grossly disproportionate to his personal Culpability; 3) his sentence lacks penological justification; 4) his sentence is cruel and unusual because of his severe mental illness.

With regards to claim four, the law distinguishes between mentally retarded defendants who are convicted of capital crimes and defendants who are mentally ill. Mental retardation is a bar to imposition of a death sentence[9] while mental illness, regardless

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[7] *See Brannan*, *supra* at 84–5.

[8] *See* Petitioner's Post-Hearing Brief, page vi.

[9] *See Atkins v. Virginia*, 536 U.S. 304 (2002). Additionally, there has been no showing that mental retardation was or should be an issue in this case, such that the miscarriage of justice exception for failure to raise mental retardation does not

of severity is not itself a bar to a sentence of death.[10] Thus, claims one and four are found to be without merit.

Claims two and three appear to have been addressed in the direct appeal and as such would be procedurally barred from consideration here.[11]

Factual History

At trial, Petitioner was represented by Richard Taylor (Taylor) and Larry Duttweiler (Duttweiler). Designated as lead counsel, prior to this case, Taylor had not represented a client in death penalty proceedings.[12] As second chair, with prior death penalty experience, Duttweiller's role was "primarily selecting a jury, . . . [and] . . . preparing for presenting the penalty phase."[13]

Early on, Taylor became aware that mental health issues would play a significant role in the case as borne out in Taylor's testimony during the habeas hearing. Within a week of the crime, at his mother's request, Taylor visited the petitioner at Fairview Park Hospital.[14] He avers that Petitioner appeared "a bit manic" and was "unfocused in his conversation,

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appear to be present. *See Foster v. State*, 2008 WL 215204 (January 28, 2008) and *Head*, *supra* at 409–10.

[10] *See Lewis v. State*, 279 Ga. 756, 764 (2005).

[11] *See Brannan*, *supra* at 85.

[12] *See* Transcript of Habeas Hearing, Vol. I, August 22, 2006, pages 37, 40.

[13] *See* Transcript of Habeas Hearing, Vol. I, August 22, 2006, pages 37, 39 and Vol II, page 405.

[14] *See* Transcript of Habeas Hearing, Vol. I, August 22, 2006, page 38.

and he was frightened."[15] Counsel testified that he "had strong suspicions [of Brannan's mental health issues] after having met with him on the first time."[16]

Notes from visits with the petitioner recount particular mental disorders, including depression, bipolar disorder; PTSD (post-traumatic stress disorder) and schizophrenia.[17] As well, Taylor's notes are replete with Petitioner's: 1) inability to deal with people or establish relationships; 2) inability to maintain employment; 3) in-patient history at a veterans' hospital in Augusta, Georgia for mental health issues; and 4) issue of possibly not being properly medicated at the time of the crime.[18] In conclusion, testifying about the period of time between January 12, 1998, the date of the offenses and trial, Taylor states, "Andrew was sick. Andrew is mentally ill and he was always mentally ill during that two year period."[19]

Duttweiller states that he also personally became aware that "mental illness would be a critical factor in the defense of Mr. Brannan" during his first meeting with the petitioner, "only weeks into the case."[20] Indications included Petitioner's preoccupation with war and his inability to focus?[21] These indications continued throughout Duttweiller's

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[15] *Id.* at page 41.

[16] *Id.*

[17] *Id.* at pages 43–51, 53.

[18] *Id.*, *See also* page 80 and 112–13.

[19] *Id.* at page 52.

[20] *See* Transcript of Habeas Hearing, Vol. II, page 405–06.

[21] *Id.*

interactions with the petitioner for the duration of the case.[22]

As far as the documented history of Petitioner's claims of mental illness, counsel had received records from various facilities, including Veterans Administration (VA) hospitals in Decatur and Augusta, Georgia, Baldwin County Jail, Fairview Hospital and military and school records.[23] Further, Taylor testified about educating himself on mental illness, particularly PTSD, and interviewing VA personnel, an attorney representing the VA, physicians and nurses, including Dr. Boyer, Petitioner's most recent treating psychiatrist at the time.[24] During the course of their investigation, counsel prepared a report of Petitioner's claim of mental illness to assist them at trial.[25]

Mental health experts testifying at trial were Dr. Donald Harris, Dr. Robert Storms, Dr. Avrum Weiss and Dr. Gary Carter.[26] In his opening argument, Taylor opined, "1 believe you'll hear from Dr. Boyer during the course of these proceedings:[27] Dr. Boyer did testify during a Jackson-Denno pre-trial hearing regarding the petitioner's unmedicated state at the time of crime and was subpoenaed subsequently for trial but did not testify.[28] In the habeas hearing, Dr.

[22] *Id.*

[23] *See* Transcript of Habeas Hearing, Vol. I, page 106, 113.

[24] *Id.* at page 104, 107, 110–15.

[25] *Id.* at page 108–10.

[26] *See* Transcript of Trial, Vol. II–IV.

[27] *See* Transcript of Trial, Vol. I, pages 22–43.

[28] *See* Transcript of Habeas Hearing, Vol. I, page 114.

Boyer testifies to counsel's total failure to confer with the psychiatrist before and during trial regarding the mental disorders of Brannan and counsel's failure to call Dr. Boyer at trial.[29]

During the habeas hearing, in answer to questions as to why Dr. Boyer was not called to testify during trial, Taylor averred that he was never comfortable as to what he might testify to on the issues directly relating to insanity.[30] "I don't know that he would have supported us on that."[31] However Taylor acknowledged that Dr. Boyer did not evaluate the petitioner "on the issue of whether Andrew was insane at the time of the commission of the offense."[32] On the other hand, Taylor states, "You know, he had lots of information about Andrew's history and I think that information would have been helpful."[33]

Shortly after that, he returns to his initial view that Dr. Boyer would not have been helpful, even though the psychiatrist had information on the "diagnoses that he had made and the treatment history and knowledge of medications."[34] Specifically, the record developed during the habeas hearing with regards to Dr. Boyer is replete with references to Petitioner's diagnosis for the bipolar disorder and PTSD and Petitioner's unmedicated state.[35] Dr.

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[29] *Id.* at 145–184.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 115, 123.

[34] *Id.*

[35] *Id.*at 145–184.

Boyer's testimony did during the habeas hearing, and could have at trial, connected these issues to the behavior exhibited by Petitioner on the video and Petitioner's moods and personality, such as the symptomatic laughing by the petitioner.[36]

The knowledge possessed by Dr. Boyer and counsel's failure to call the psychiatrist is highlighted in a particularly cogent response to Petitioner current counsel's questioning during the habeas hearing of Dr. Gary Carter, a psychiatrist designated at trial as a court witness then employed at Central State Hospital where the petitioner was incarcerated prior to trial. Dr. Carter stated, "The issue of guilty but mentally ill was not considered as a factor in Mr. Brannan's case."[37] The question that Dr. Carter was answering dealt with issues that the psychiatrist thought should have come up during trial but that defense counsel, at least, failed to raise.[38]

Later, during the habeas hearing, when asked whether he believed that Petitioner was mentally ill at the time of the crime, Dr. Gary Carter responded, "Yes, sir, I do."[39] The psychiatrist's assessment was based on the presence of the bipolar disorder and

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[36] *Id.* For a partial listing of the incidents of laughing, see Transcript of Trial, starting at page 280 and continuing through to page 310, with occasional skips in pages and then at pages 914 and 925.

[37] *See* Transcript of Habeas Hearing, Vol. II, page 294.

[38] *Id.* at 295.

[39] *Id.* at 296.

PTSD as well as Petitioner's unmedicated state at the time of offense."[40]

During the opening statement, which would mirror his closing, referring to the petitioner, Taylor defined insanity as, "so mentally ill I lacked mental capacity to distinguish between right and wrong at the time of the events."[41] Counsel then related times when Petitioner had been diagnosed with PTSD and bipolar manic depressive disorder, treatment in various hospitals starting in 1984 and continuing forward until five weeks before the incident, the medications prescribed for Petitioner, the alleged effect of his military service and other defining events.[42] Taylor also delves into PTSD as well as Petitioner's insanity defense and what the jury would hear regarding both.[43]

Counsel offered that the video of the underlying occurrence was informative as to the allegedly bizarre behavior exhibited by Petitioner when viewed in connection with the experts' testimony regarding Petitioner's history of mental illness.[44] Attempting to link the video to Petitioner's mental illness and the insanity defense, counsel opines, "[D]espite fifteen years of continuous mental health treatment, he was managed at best, not cured, and he remains mentally ill today."[45]

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[40] *Id.* at 297.

[41] *See* Transcript of Trial, Vol. I, pages 23.

[42] *See* Transcript of Trial, Vol. I, pages 24–43.

[43] *Id.*

[44] *Id.* at page 36.

[45] *Id.* at page 28.

At the conclusion of his opening statement, Taylor relates that Petitioner's mental illness is the basis for the insanity right/wrong defense.[46]

In the closing argument, Taylor reiterates this by telling the jury, "This case is about insanity. This is an insanity case. . . . This is a case involving the right/wrong test of insanity."[47] Counsel then reviewed the expert testimony, distinguishing between favorable and unfavorable testimony, as well as describing PTSD.[48] There is one mention of bi-polar disorder and brief commentary on Petitioner not being medicated at the time of the offense, neither of which is linked with Petitioner's defense.[49] Taylor also tells the jury that the court-appointed psychiatrist, Dr. Gary Carter, failed to investigate more thoroughly the issue of Petitioner's medications before trial and then the failure of "they" to bring this issue out during trial.[50] The "they" Taylor appears to be referring to is the State or Dr. Carter, not defense counsel, which is odd, given that the burden of establishing insanity or the level of mental illness would have been on the defense.[51]

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[46] *Id.* at page 43.

[47] *See* Transcript of Trial, Vol. IV, pages 986–87.

[48] *Id.* at 998–1012.

[49] *Id.* at 991, 998.

[50] *Id.* at 998.

[51] *Id.* at 998. *See also* Transcript of Trial, Vol. IV, pages 915, 923–24, 928, 932 (During the colloquy between the court, after the close of evidence, with counsel for both sides and the petitioner present, the petitioner attempted to raise issues of mental impairment, not being medicated, Vietnam and Dr. Boyer).

In the charge conference, the emphasis continued as counsel Duttweiler told the court that a verdict of guilty but mentally ill was what "neither side want[ed].[52] The conference proceeded along the lines of the insanity right/wrong defense.[53]

Charging the jury, Judge Towson told the jury that a plea of insanity had been filed, described Petitioner's burden to establish insanity by a preponderance of evidence and the State's rebuttal burden of proof beyond a reasonable doubt to disprove insanity, and the rebuttal presumption of sound mind and discretion.[54] The court listed the four options, not guilty, not guilty by reason of insanity, guilty beyond a reasonable doubt, or guilty beyond a reasonable doubt but mentally ill and then noted the distinction between being insane and being mentally ill at the time of act.[55]

Next, the charge consisted of defining insanity, essentially whether the petitioner could distinguish between right from wrong at the time of the act, the states and conditions of the mind that would not be sufficient, lucid intervals, the inability to form the intent to do the act charged by reason of mental impairment and definition of preponderance of the evidence.[56] At this point, the judge instructed on the disposition of the petitioner if an insanity verdict was

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[52] *See* Transcript of Trial, Vol. IV, page 949.

[53] *Id.* at 940–64.

[54] *Id.* at 1065–72.

[55] *Id.* at 1072–73.

[56] *Id.* at 1072–75.

returned.[57] The charge appears to be in accord with O.C.G.A. § 17-7-131(b)(3)(A)

Then, the court charged on guilty but mentally ill, defining it and stating the disposition if this verdict was returned.[58] The charge appears to be in accord with O.C.G.A. § 17-7-131(b)(3)(B), as it was written at the time.[59] In concluding this section, the court noted that evidence in this regard was to be considered by the jury along with all other evidence in the case.[60] Of course, there was no subst [sic]

After the jury was charged but before the recharge, Taylor then objected to the language regarding the disposition of the petitioner if a verdict of guilty but mentally ill at the time of the crime was returned.[61] In particular, as voiced to the Court, counsel's concern appeared to be that the jury would think that a guilty but mentally ill at the time of the crime verdict would be seen as a lesser sentence.[62]

The Law

Ineffective Assistance of Counsel (IAC)—Standard of (Review)

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[57] *Id.* at 1075. The court next charged on delusional compulsion, which is a species of the insanity verdict. *See* pages 1076–78.

[58] *Id.* at 1078–79.

[59] *See Spraggins v. State*, 258 Ga .32 (1988). In 2006, this section was amended further defining disposition.

[60] *Id.* at 1079–80.

[61] *See* Transcript of Trial, Vol. IV, pages 1084–85.

[62] *Id.*

In *Smith v. Francis*, 253 Ga. 782, 783 (1985), the Georgia Supreme Court adopted the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984), for "judging a defendant's contention that the Sixth Amendment requires a conviction or death sentence to be set aside because of actual ineffective assistance of counsel at trial or sentencing."

"'First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.' The Court emphasized that the burden is on the defendant to make both showings, and that a reviewing court could fmd lack of sufficient prejudice without deciding whether counsel's performance was deficient."[63]

Concerning the first step, the test is whether "counsel's assistance was reasonable considering all the circumstances, and . . . every effort must be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time.[64] "Circumstances knowable only through hindsight are not considered."[65] "[C]ounsel is entitled to a 'strong presumption' (which the defendant must overcome) that counsel's conduct falls within the wide range of reasonable professional conduct and

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[63] *Id.* Not present here but excluded are cases where there is interference with counsel's ability to render assistance from the State and counsel conflict's of interest impairs his ability to effectively represent the client.

[64] *Id.* (internal citations removed and emphasis in the original).

[65] *Terry v. Jenkins*, 280 Ga. 341 (2006).

that all significant decisions were made in the exercise of reasonable professional judgment."[66]

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." "Counsel's failure to investigate is unreasonable where . . . it resulted from inattention and not from reasoned strategic judgment[or] . . . where counsel's 'investigation into their own theory of the case [i]s entirely inadequate."[67]

With regards to the prejudice prong, "the defendant must show 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."[68] It "is to show only 'a reasonable probability' of a different outcome, not that a different outcome would have been certain or even 'more likely than not.'"[69]

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[66] *Id.* (internal citations removed and emphasis in the original).

[67] *Terry*, *supra* at 346.

[68] *Id.* (internal citations removed and emphasis in the original).

[69] *Terry*, *supra* at 347.

Regarding the penalty of death, 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."[70] In doing so, "a sentencing jury must be able to give a 'reasoned moral response' to a defendant's mitigating evidence-particularly that evidence which tends to diminish his culpability-when deciding whether to sentence him to death." *Brewer v. Quarterman*, 127 S.Ct. 1706, 1709 (2007). Special issues that can be considered in mitigation of culpability are "alcoholism, drug abuse, bad family background, bipolar disorder, low I.Q., substance abuse, head injury, paranoid personality disorder and child abuse . . . . " *Id.* at 1716 (citing cases as far back as 1993).

In sum, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668,686 (1984).

Mental Illness—Selective Presentation of Defense and IAC

To support a claim that trial counsel was so deficient as to warrant a finding of ineffective assistance of counsel, Petitioner is required to established that counsel's performance "completely undermined" his mental health defense through

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[70] *Smith*, *supra* at 783 (internal citations removed emphasis in the original).

failure to [fully] investigate or inappropriate trial strategy. *See Tumin v. Bennett*, 272 Ga. 57, 58 (2000); *Tumin v. Christenson*, 269 Ga. 226, 234–42 (1998).

Where a petitioner claims that counsel's presentation of a mental health defense was inadequate, particularly if counsel minimizes or does not present evidence of an alleged critical issue, it must be shown that but for counsel's inattention, not permissible strategy, this was or should have been an issue at trial. *See Christenson*, *supra* at 234–241; *Head v. Taylor*, 273 Ga. 69 (2000); *Turpin v. Lipham*, 270 Ga. 208 (1998) (mitigation evidence); *Curry v. Zant*, 258 Ga. 527, 528 (1988); *Crowe v. Terry*, 426 F.Supp.2d 1310, 1321–22 (N.D. Ga. 2005).

Findings of Fact and Conclusions of Law—Preoccupation with Insanity Right-Wrong Defense

During the habeas hearing, Taylor stated, "I wanted to save Andrew's life."[71]

Counsel clearly did not accomplish this. The record establishes that Taylor focused on information that was in accord with the defense of insanity entirely based on PTSD. As counsel soon learned, while this information, if found credible by the jury, could contribute to the possibility of a verdict of not guilty by reason of insanity, the same evidence would not necessarily require that a verdict of not guilty by reason of insanity be returned. Such a verdict would only be required if the jury found the petitioner did not know right from wrong at a limited time, that is during the commission of the offense. Counsel

[71] *See* Transcript of Habeas Hearing, Vol. I, page 68.

suspected that a not guilty by reason of insanity verdict would be a tough sale to the jury.[72] Indeed, the jury presumably found that by the relatively low burden, a preponderance of the evidence, as charged by the court,[73] that a verdict of insanity was not required, that is, the petitioner knew right from wrong when he killed the deputy.

The overriding focus on the not guilty by reason of insanity verdict appears to be exacerbated by two assumptions not grounded in reality. First, counsel's presentation of the evidence does not appear to allow for a defense of mental illness that presumes a person sane, that is he knew right from wrong, but still significantly mentally ill. Second, it appears that counsel incorrectly determined that a guilty but mentally ill verdict would be seen by the jury to be a step-down from the insanity verdict, with less severe implications and consequences for the petitioner and presumably more adverse consequences for society.[74] However, because the jurors were told that a verdict of not guilty by reason of insanity could include the possible future release of the petitioner,[75] counsel's assumption was erroneous. The implications, severity and consequences of a verdict of a "not guilty by

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[72] *See* Transcript of Trial, Vol. I, pages at 24–25.

[73] *See* Transcript of Trial, Vol. IV, page at 1075.

[74] *See* Transcript of Trial, Vol. IV, page at 1085.

[75] *See* Transcript of Trial, Vol. IV, page 2.t 1078. O.C.G.A. § 17-7-131(b)(3)(A) provides, "I charge you that should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, that the court is satisfied that he or she should be released pursuant to law."

reason of insanity" verdict, as the death penalty could not then have been imposed, presumably were determined by the jury as inappropriate. The option, a verdict of guilty but mentally ill, if adequately presented, would have allowed the jurors to impose either life imprisonment or a death sentence.

As a result, counsel's actions, and perhaps resulting from his inexperience with death penalty cases and mental health issues,[76] in effect forced the jury to reject the insanity verdict and return the only verdict they thought then available—that of guilty.

However, based on *Christenson*, this Court finds that with sufficient evidence of: 1) bi-polar and PTSD disorders that was well-documented and evidenced by a 100% disability rating of the petitioner given by the VA; 2) the lack of medication at the time and the effect thereof; and 3) the testimony of Dr. Boyer, Petitioner's treating psychiatrist, who presumably could have testified regarding the combination of Petitioner's bi-polar disorder, its effect on PTSD and the confrontation that ensued and Dr. Carter's testimony, if asked, counsel could have suggested that the jury consider a verdict of guilty but mentally ill at the time of crime, or later proceeded to use that verdict, or after a "Guilty" verdict, and admitted evidence of Petitioner's mental illness in mitigation at the penalty phase to convince the jury that Petitioner's life was worth saving, even though the death penalty was still an option.

Second, regarding Taylor's failure to call the treating psychiatrist, Dr. Boyer, who presumably

[76] *See* Transcript of Habeas Hearing, Vol. I, page 37.

would have testified regarding Petitioner's bi-polar disorder and its effect on or in combination with PTSD and as to the effects of both disorders during confrontational scenes, counsel's opening statement told the jury that they would possibly hear from the expert. The Georgia Court of Appeals has recently somewhat addressed this issue.

In *Brown v. State*, 288 Ga.App. 671 (2007), the court cited *McAleese v. Mazurkiewicz*, 1 F.3d 159 (3rd Cir. 1993). *McAleese* cited *Anderson v. Butler*, 858 F.2d 16, 18–19 (C.A.1 (Mass.) (1988)), where the failure to call a certain psychiatrist was deemed by the appellate court as "manifestly unreasonable" after it was promised in counsel's opening statement testimony.

The court, in *Anderson*, went onto to note:

> This much is clear: it was not necessary to mention the doctors in the opening in order to preserve the right to call them. There is no principle, or requirement, that one must name all one's witnesses, (as distinguished from announcing an insanity defense) in the opening; indeed, some defendants' lawyers choose not to open at all. One keeps options open by keeping silent. Counsel "preserved" nothing but a potential embarrassment in case he changed his mind, with no offsetting benefit. *Id.* at 18 (emphasis in the original).

Further, court, in *Anderson*, found:

> By the end of the trial, counsel concluded to abandon it, [one defense among many] and the court held he was not chargeable as

> ineffective in so doing. The difference between that case [(citing a distinguishable case)] and the one at bar is that counsel here did not abandon a defense sometimes a plausible move-but continued to assert defendant's mental condition, indeed as his principal defense. His action was greatly to weaken the very defense he continued to assert[.]

The court in Anderson took issue with the trial court's declining to consider the effect of counsel's calling to a jury's attention certain witnesses who would testify and then not producing them at trial, particularly where there was a record of an opening statement available for review. *Id.* at 17–19.

Here, in a case where counsel's trial strategy clearly focused on insanity, the mention to the jury during opening statements of Dr. Boyer seems illogical. As noted *supra,* counsel knew prior to the opening statement that Dr. Boyer could not testify on the issue of insanity as he had not evaluated Petitioner on this basis. However, had counsel not narrowly focused on the insanity right/wrong defense,[77] in light of Petitioner's documented mental history, Dr. Boyer could presumably have placed in the jury's mind a more comprehensive review of the Petitioner's mental health, that of the intersection

[77] *Compare Turpin*, *supra,* at 233, where the Court found no evidence to support defense counsel's assertion in his opening statement in reference to drug dealing on the part of the victim and a scarcity of evidence to support counsel's other theory.

between bi-polar, PTSD and lack of medication and the confrontation as exhibited on the video.[78]

Counsel's mention of Dr. Boyer during opening statements was compounded during trial. The jury was reminded of Dr. Boyer when two experts, Defense witness Dr. Robert Storms and court appointed psychiatrist, Dr. Gary Carter, mentioned Dr. Boyer as well as Petitioner's bi-polar or manic states, which counsel appeared to disregard, thereafter redirecting the testimony back to PTSD and the insanity right/wrong defense.[79]

Third, concerning Taylor's failure to present evidence on whether Petitioner was medicated at the time of the act, this factor was never addressed by counsel during examination of the experts but was only brought up by counsel during his closing argument as well as by the petitioner during a colloquy with the court after the close of evidence.[80] Counsel had been apprised of this circumstance early on in the investigation of the case.[81] Additionally, Taylor testified during the habeas hearing that Dr. Boyer had knowledge of the medications prescribed for the petitioner.[82] If he was not medicated at the time of act, in light of the video, which counsel described as bizarre, presumably Dr. Boyer or other experts could have testified to the causal connection

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[78] *See* Transcript of Habeas Hearing, Vol. I, pages 147–84.

[79] *See* Transcript of Trial, Vol. II and III, pages 572–593 and pages 803–881.

[80] *See* Note 51, *supra*.

[81] *See* Note 18, *supra*.

[82] *See* Note 24, *supra*.

between the conduct reflected by the video and Petitioner's non-medicated state, and his bi-polar and PTSD as compared to Petitioner's "relatively stable" medicated state while he was evaluated at Central State Hospital, after the incident.[83]

Thus, in the face of extensive documented history of Petitioner's mental illness, much of which was not adequately explored by counsel, this Court finds that counsel "completely undermined" Petitioner's mental health defense by unreasonably limiting it to the insanity right-or-wrong defense and by failing to adequately prepare a defense of guilty but mentally ill that ultimately left Petitioner's actions on the video unexplained,[84] when a credible explanation was readily available. Counsel's adherence to the insanity right/wrong defense is highlighted even more by Dr. Gary Carter's testimony at the habeas hearing that at the time of trial he thought Petitioner was mentally ill.[85] But for counsel's lack of preparation and investigation in this regard, the psychiatrist's findings in this regard would presumably have come out on cross-

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[83] *See* Note 78, *supra*. *See* Transcript of Habeas Hearing, Vol. II, pages 291. *See Howerton v. Danenberg*, 279 Ga. 861 (2005)("counsel failed to reasonably investigate the possible side effects of medication Danenberg was taking at the time of the crimes").

[84] Unaware of the extent of Petitioner's non-medicated state, for approximately five (5) days prior to the act, the jury was left with no basis to determine that the acts of the petitioner were not the product of conscious rational deliberation.

[85] *See* Notes *supra* 38–41.

examination.[86] The magnitude of the consequences to Petitioner is comparable to that in *Tumill v. Christenson*, 269 Ga. 226 (1988) and *Turpin v. Lipham*, 270 Ga. 208 (1998).

Accordingly, this Court finds ineffective assistance of counsel with regards to claims one, three, four, five, seven, eight, nine, and ten of that section. Therefore, Petitioner's Petition for a Writ of Habeas of Corpus is GRANTED. Pursuant to O.C.G.A. § 9-14-48(d), Petitioner's Death Sentence is VACATED for purposes of retrial. [87]

SO ORDERED this 13th day of March 2008.

/s/
Richard C. Sutton, Judge

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[86] *Id.*

[87] *See State v. Hernandez-Cuevas*, 202 Ga.App. 861 (1992) (Where the writ of habeas corpus is granted for a defect in the trial, the effect is not to exonerate the defendant of the charges in the indictment and entitle him to be released, but to invalidate the defendant's confinement under the existing judgment and sentence, and remand him to the trial court for retrial.) *Contra Newsome v. Black*, 258 Ga. 787, 788 (1989) (Hence, the statute does not authorize the superior court in a habeas corpus proceeding to remand the proceeding to another superior court.) Given the above finding, this Court finds that issues two and six within the "Ineffective Assistance of Counsel" section are MOOT.

Appendix I

November 3, 2008.

IN THE SUPREME COURT
STATE OF GEORGIA

S08A1211, S08X1212. HALL v. BRANNAN; and vice versa.

Thompson, Justice.

A jury convicted Andrew Howard Brannan of the murder of Kyle Dinkheller and sentenced him to death, and this Court unanimously affirmed on direct appeal. *Brannan v. State*, 275 Ga. 70, 561 S.E.2d 414 (2002). Brannan filed a petition for writ of habeas corpus on May 2, 2003, which he amended on August 4, 2005. An evidentiary hearing was held on August 21–23, 2006. The habeas court filed a final order on March 17, 2008. The order clearly vacates Brannan's death sentence; however, it is unclear whether it also vacates Brannan's conviction. The warden appeals in Case No. S08A1211, and Brannan cross-appeals in Case No. S08X1212. For the reasons set forth below, we reinstate Brannan's death sentence and, to the extent that it is necessary to do so, we also reinstate his conviction.

I. Factual Background

On January 12, 1998, Brannan was stopped for driving his truck at 98 miles per hour by Kyle Dinkheller, a Laurens County Deputy Sheriff. Dinkheller's patrol cruiser was equipped with a video recorder, and Dinkheller was wearing a microphone. The recording shows that Brannan exited his truck and addressed Dinkheller with relative cordiality.

However, Brannan became angry with Dinkheller when he ordered Brannan to take his hands out of his pockets. Brannan shouted, "Fuck you, goddamn it, here I am. Shoot my fucking ass." Brannan then began dancing around in the street, yelling, "Here I am, here I am . . . [s]hoot me." When Dinkheller placed a call on his radio for assistance, Brannan yelled, "Who are you calling, motherfucker?" Brannan then charged at Dinkheller repeatedly as Dinkheller ordered him to get back and drew his baton. Brannan yelled, "Fuck you," repeatedly, and he then yelled, "I am a goddamn Vietnam combat veteran." Brannan then began rummaging behind the driver's seat of his truck, ignoring Dinkheller's orders for him to stop. Brannan yelled that he was in fear for his life, and Dinkheller replied that he was in fear for his own life. Brannan took a .30 caliber carbine rifle from his truck, crouched at the door of his truck, and pointed the rifle at Dinkheller. After Dinkheller repeatedly ordered Brannan to put the rifle down, shots were fired by both men. Dinkheller was hit, and he attempted to retreat and take cover behind the patrol cruiser. Brannan pursued Dinkheller, firing repeatedly and reloading. Brannan was shot once in the abdomen. Dinkheller had been shot nine times and had likely lost consciousness when Brannan took careful aim, said, "Die fucker," and fired a final shot. Brannan then fled in his truck. He was discovered hiding in the woods outside his home and was arrested. He gave statements to GBI agents indicating that he regretted what had happened but that he believed Dinkheller had provoked him with an aggressive and disrespectful approach.

II. Alleged Ineffective Assistance of Counsel

The warden argues in his appeal that the habeas court erred in granting relief based on a number of Brannan's ineffective assistance of trial counsel claims, and Brannan argues in his cross-appeal that the habeas court erred by not granting relief on additional grounds of alleged ineffective assistance. To succeed on an ineffective assistance of trial counsel claim, Brannan must show that his trial counsel rendered constitutionally-deficient performance and that actual prejudice of constitutional proportions resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (III), 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. Francis*, 253 Ga. 782, 783–784(1), 325 S.E.2d 362 (1985). To show sufficient prejudice, Brannan must show 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, 253 Ga. at 783 (1), 325 S.E.2d 362. On appeal, we accept the habeas court's findings of fact unless they are clearly erroneous; however, we apply those facts to the law de novo. *Head v. Carr*, 273 Ga. 613, 616(4), 544 S.E.2d 409 (2001). For the reasons set forth below, we conclude as a matter of law that the absence of counsel's deficiencies would not in reasonable probability have changed the outcome in Brannan's case. *See Schofield v. Holsey*, 281 Ga. 809, 812, n.1, 642 S.E.2d 56 (2007) (holding that the combined effect of trial counsel's professional deficiencies should be considered); *Lajara v. State*, 263 Ga. 438, 440(3), 435 S.E.2d 600 (1993) (holding that an ineffective assistance of counsel claim can be decided based solely on the absence of prejudice of constitutional proportions).

A. Evidence Presented at Trial

Before discussing the actions that trial counsel allegedly *failed* to take, we first briefly summarize the evidence trial counsel actually presented.[1]

Counsel presented testimony from Dr. Donald Harris, a psychologist who had conducted a court-ordered evaluation of Brannan. Dr. Harris indicated that Brannan had not shown any signs of malingering, that Brannan had an elevated score on a test for paranoia, and that persons found insane at trial are housed in a maximum security area at Central State Hospital.

Counsel presented testimony from Dr. Robert Storms, a psychologist who had evaluated Brannan at counsel's request. Dr. Storms testified that Brannan had

> twelve or fifteen years of medical history comprised of maybe four or five hundred

[1] Throughout our discussion of alleged ineffective assistance of counsel, we focus on the testimony and documentary evidence that was actually presented to the jury by defense counsel without addressing as to each item whether it *should* have been accepted by the trial court as admissible evidence. We find this approach appropriate in the specific context of considering the adequacy of the defense actually presented and the effect that additional evidence may or may not have had on the jury's deliberations if such additional evidence had been presented.

> documented pages of past psychiatric disorders, specifically post traumatic stress disorder.

Dr. Storms detailed Brannan's military history, which included "set[ting] booby traps and ambushes for the Viet Cong" and the death of one of his commanding officers, which occurred under circumstances for which Brannan felt responsible. Dr. Storms testified that Brannan had a history of manic depression, otherwise known as bipolar disorder, and that Brannan's post-traumatic stress disorder had led to the dissolution of his marriage, to his inability to work "an established routine," to his becoming a recluse, to his living in a remote area in a house with military features, to his being declared 100 percent disabled by the Department of Veterans Affairs, to his having intrusive thoughts of Vietnam, to his having flashbacks to Vietnam wherein he had the experience of reliving events from the war, to his having severe anxiety and chronic guilt, to his feeling in danger for no objective reason, and to his being hospitalized. Dr. Storms concluded that Brannan was not malingering, that he had committed the murder while in a flashback, and that he did not have the mental capacity to distinguish right and wrong during the murder. Dr. Storms also testified that Brannan was likely in a hypomanic state, a state of arousal just below a manic state, at the time of the murder.

Counsel presented testimony from Dr. Avrum Weiss, a psychologist, on the subject of post-traumatic stress disorder. Dr. Weiss testified about Brannan's past exposure to combat and about how persons who experience a flashback "will actually re-live a piece of [their past] traumatic experience." Dr. Weiss testified that he had concluded from his review of the records, from his evaluation of Brannan, from Brannan's statements to the GBI, and from the video recording of the murder that Brannan was in a flashback during the murder. Dr. Weiss also criticized the report of Dr. Gary Carter, the court-appointed psychiatrist who evaluated Brannan, claiming that Dr. Carter had incorrectly focused on Brannan's conduct after the murder and had ignored signs that Brannan had experienced a flashback during the murder.

Pursuant to a joint stipulation, counsel entered Brannan's medical records from the Department of Veterans Affairs and his military records into evidence.

Dr. Gary Carter testified that he did not believe Brannan had experienced a flashback or was insane during the murder. Dr. Carter explained that Brannan's actions were better understood as "taunting" and "rage" and that Brannan had simply relied on his past training in combat to carry out the murder efficiently. He testified that Brannan's dancing in the street was similar to behavior Brannan had used in the past to diffuse a dangerous encounter with an armed person. He also testified that he did not believe Brannan was in a manic or hypomanic state but, instead, that Brannan's driving at 98 miles per hour was a reasonable means of testing a repair on his truck before the warranty expired and that Brannan's demeanor during the encounter with Dinkheller could be better described as "irritability" and "anger." On cross-examination, trial counsel elicited testimony from Dr. Carter showing that Brannan had a number of diagnoses of bipolar affective disorder, depression, and psychotic behavior, which contradicted Dr. Carter's earlier testimony that Brannan was not subject to manic symptoms and his testimony that Brannan had no prior diagnoses of psychosis. Counsel also cross-examined Dr. Carter on his testimony that Brannan's memory of the murder had been sound, showing multiple instances where Brannan had made statements indicating a fragmented memory, which is a symptom of a flashback. Counsel also countered Dr. Carter's claim that Brannan did not truly have post-traumatic stress disorder by showing that Dr. Carter's own report made that diagnosis.

In his opening remarks at the beginning of the sentencing phase, after the jury had rejected a not guilty by reason of insanity verdict or a guilty but mentally ill verdict by finding Brannan guilty, counsel stated the following to the jury:

> we certainly respect your decision in this case and we're going to do nothing in this stage of the proceedings to say anything other than that.

Counsel presented testimony from neighbors, a family friend, and family members, ending with testimony from Brannan's mother. The testimony described Brannan as a caring son who had assisted his father in his dying days and who had shown kindness to several widows and a child in the neighborhood. The testimony emphasized the impact that Brannan's execution would have on his mother, who had already lost her firstborn son in an airplane crash, her youngest son to suicide, and her husband to cancer. Counsel also built on the expert mental health testimony from the guilt/innocence phase with lay testimony regarding Brannan's abnormal behaviors, his strange and isolated living conditions, and his odd "nervous laughter." Counsel's closing in the sentencing phase emphasized Brannan's alleged mental illness and the fact that the jury could decline to impose a death sentence based on mental illness despite the fact that it had rejected the insanity defense and a guilty but mentally ill verdict.

B. Mental Health Evidence that Allegedly Should Have Been Presented at Trial

The habeas court faulted trial counsel for failing to present evidence that Brannan had not taken his medications for several weeks prior to the murder. Trial counsel testified in the habeas court that he and co-counsel had discussed Brannan's medications but that Brannan's failure to obtain his medications on one occasion was due to his having an argument with a man in line at the pharmacy that required the police to come and that Brannan had a history of failing to take his medications. Under the circumstances, we find that trial counsel did not perform deficiently by declining to open up the matter of *why* Brannan had not had his medications; instead, counsel reasonably opted simply to note the fact that Brannan had not taken his medications by referring to Brannan's evaluation by Dr. Carter. Furthermore, Brannan was not prejudiced by counsel's failure to call Dr. William Boyer, who had been Brannan's psychiatrist before the murder, to testify regarding the effects of Brannan's lack of medication: as Dr. Boyer's pretrial testimony shows, he believed that the lack of medication would have simply made Brannan depressed. In that same vein, we note that Dr. Carter, the trial court's expert, testified in the habeas proceedings that Brannan's alleged lack of medication would have simply made him more irritable.

The habeas court found fault in counsel's decision not to call Dr. Boyer as a witness on matters other than Brannan's lack of medication. However, counsel testified as follows:

> I was uncomfortable as to what he might testify to on the issues directly relating to insanity, I don't know that he would have supported us on that. I also had the sense that perhaps Dr. Boyer was being a little protective of the VA and himself, and I thought I wouldn't use him. It was sort of evolving thought about whether to use him or not.

In light of counsel's reasonable strategic concerns, we conclude as a matter of law that counsel did not perform deficiently by failing to call Dr. Boyer as a witness. The habeas court further found that counsel rendered ineffective assistance by stating during his opening statement in the guilt/innocence phase that he "believe[d]" that Dr. Boyer would testify but then not calling him as a witness. *See Anderson v. Butler*, 858 F.2d 16, 18–19 (1st Cir. 1988) (finding ineffective assistance where trial counsel unnecessarily announced his intention to call a certain witness but then failed to do so). Pretermitting whether counsel performed deficiently by announcing the likelihood that he would call Dr. Boyer as a witness while his decision on whether to do so was, in his own words, "evolving," we conclude as a matter of law that trial counsel's actions did not prejudice Brannan's defense to a significant degree, particularly in light of the fact that Dr. Boyer's evaluation and treatment of Brannan was discussed by other expert witnesses.

The habeas court found that trial counsel rendered ineffective assistance by not emphasizing Brannan's diagnoses of bipolar disorder. This finding ignores, first of all, the fact that counsel did present testimony showing Brannan's history of manic and hypomanic symptoms, depression, and bipolar disorder. Furthermore, counsel reasonably chose to focus their efforts largely on showing post-traumatic stress disorder, which, unlike a showing of bipolar disorder, could potentially support both a not guilty by reason of insanity verdict and a guilty but mentally ill verdict and which was more consistently supported by Brannan's medical records. The record is very clear that counsel prepared thoroughly to present their mental health evidence by interviewing Brannan and his mother repeatedly to learn about his personal history, obtaining all available medical records, obtaining jail records, obtaining school records, researching mental health information, and presenting the expert testimony described above and that their chosen mental health strategy was reasonable.

Brannan argues that counsel failed to present sufficient evidence to explain why he developed post-traumatic stress disorder. Brannan argues that counsel failed to adequately research his combat experience; however, in light of the testimony and documentary evidence presented at trial, we conclude as a matter of law that Brannan's defense was not prejudiced by counsel's failure to present evidence like the affidavit testimony Brannan has presented in the habeas court from other persons who served in Vietnam. Similarly, we conclude as a matter of law that counsel did not perform deficiently and that Brannan's defense was not prejudiced regarding evidence of Brannan's personal tragedies and his medical history as those things pertain to post-traumatic stress disorder, particularly in light of the evidence and argument counsel presented that Brannan had a long history of treatment for post-traumatic stress disorder that was related to his war experiences.

The habeas court found that counsel's actions in the guilt/innocence phase forced the jury to reach a guilty verdict once they chose not to select a not guilty by reason of insanity verdict. Our review of counsel's arguments at trial do not support this finding. Furthermore, the fact that a verdict of not guilty by reason of insanity would have barred a death sentence whereas a verdict of guilty but mentally ill would not confirms that counsel acted reasonably in placing a special focus on insanity while still not entirely abandoning the possibility of a verdict of guilty but mentally ill. *See Lewis v. State*, 279 Ga. 756, 764(12), 620 S.E.2d 778 (2005) (holding that "the statute that provides for a verdict of guilty but mentally ill does not preclude a death sentence as the result of such a verdict"). Thus, we conclude as a matter of law that counsel did not perform deficiently and that Brannan's defense was not prejudiced by counsel's conduct regarding the three possible verdicts in the guilt/innocence phase.

The habeas court found that counsel rendered ineffective assistance by failing to elicit testimony from Dr. Carter regarding whether Brannan was guilty but mentally ill. Our review of Dr. Carter's testimony reveals that trial counsel ably cross-examined Dr. Carter regarding his doubts about Brannan's alleged mental illness, including by confronting Dr. Carter with specific items from Brannan's medical records showing diagnoses of various forms of mental illness such as post-traumatic stress disorder and bipolar disorder and even by pointing out to Dr. Carter that he himself had made a diagnosis of post-traumatic stress disorder. In light of the testimony counsel actually elicited, we conclude as a matter of law that counsel did not perform deficiently regarding Dr. Carter's testimony and that Brannan's defense was not prejudiced by counsel's handling of his testimony.

The habeas court found that counsel rendered ineffective assistance by failing to rebut the State's argument that Brannan was malingering. However, our review of the trial record reveals that counsel presented testimony from Dr. Harris and Dr. Storms specifically stating that they had evaluated Brannan for malingering and had concluded that he had not done so. Accordingly, we conclude as a matter of law that counsel did not perform deficiently regarding malingering and that Brannan's defense was not prejudiced by counsel's handling of the subject.

The habeas court found that trial counsel rendered ineffective assistance by failing to present additional testimony about Brannan's idiosyncratic laugh that would appear when he was anxious. Our review of the record reveals that the jury was informed in multiple ways during both the guilt/innocence phase and the sentencing phase regarding Brannan's laugh. Accordingly, we conclude as a matter of law that counsel did not perform deficiently by failing to present additional evidence regarding Brannan's laugh and that Brannan's defense was not prejudiced by counsel's failure to do so.

The habeas court found that counsel failed to present mental health evidence in the sentencing phase. However, as we noted above, trial counsel presented lay testimony that supported the expert testimony presented in the guilt/innocence phase along with other testimony about Brannan's good character. Counsel also reminded the jury that the evidence from the guilt/innocence phase carried over to the sentencing phase. *See Berryhill v. State*, 249 Ga. 442, 450–451(11), 291 S.E.2d 685 (1982) (noting that the jury properly reconsiders all evidence from the guilt/innocence phase in the sentencing phase). Accordingly, we conclude as a matter of law that trial counsel did not perform deficiently and that Brannan's defense did not suffer any prejudice from counsel's actions.

<u>C. Other Instances of Alleged Ineffective Assistance of Counsel</u>

The habeas court found that counsel rendered ineffective assistance by stipulating to the admissibility of the portion of the video recording that depicts the murder, Brannan's fleeing, and sounds of Dinkheller's dying breaths. Although the recording is deeply disturbing, it was admissible evidence of Brannan's actions and of the death of the victim. *See Cohen v. State*, 275 Ga. 528, 530–531(3), 570 S.E.2d 301 (2002) (holding that "the gruesome or inflammatory aspect of the pictorial evidence," which included a video recording, "stemmed entirely from [the defendant's] own acts" and was admissible). We conclude as a matter of law that counsel did not perform deficiently by not raising a meritless objection to the portion of the video recording admitted at trial and that Brannan's defense did not suffer prejudice by their failure to do so. *See Hampton v. State*, 282 Ga. 490, 492(2)(a), 651 S.E.2d 698 (2007); *Fults v. State*, 274 Ga. 82, 87(7), 548 S.E.2d 315 (2001).

Brannan argues in his cross-appeal that trial counsel rendered ineffective assistance by successfully moving to suppress a portion of his statement to the GBI that contained statements of remorse. However, our review of the statements reveals that the unsuppressed portion also contained statements of remorse and that the suppressed portion contained statements partially fixing blame on the sheriff's office and the victim for not following better procedures. Under these circumstances, we conclude as a matter of law that trial counsel did not perform deficiently by having a portion of the interview suppressed and that Brannan's defense was not prejudiced by counsel's doing so.

Brannan also argues in his cross-appeal that counsel rendered ineffective assistance by failing to obtain testimony, like testimony he presented in the habeas court, showing that the victim fired the first shot and that the victim failed to comply with proper police procedures. Counsel testified in the habeas court, however, that he had believed all along that the victim had fired first but that he saw no need for testimony on that subject because it was clear that the victim, being confronted with an armed and belligerent person who refused to put down his assault rifle, *should* have fired first. He also testified that, in his judgment, the question of who shot first would not affect Brannan's insanity defense. Dr. Storms, the defendant's most-important expert witness, testified that he believed Brannan had entered into a flashback while he was rummaging in his truck looking for his rifle, long before any shots were fired. Furthermore, testimony from Dr. Carter, the trial court's expert, and questions to Dr. Carter by the prosecutor both seemed to assume that the victim had shot first. Under these circumstances, we conclude as a matter of law that counsel did not perform deficiently and that Brannan's defense was not prejudiced by counsel's failure to seek expert testimony regarding who shot first. Likewise, because the jury very likely would have been offended by an argument that the victim was somehow responsible for his own death because he failed to confront Brannan even more aggressively than he did, we conclude as a matter of law that counsel did not perform deficiently and that Brannan's defense was not prejudiced by counsel's failure to introduce evidence about proper police procedures like the evidence Brannan presented in the habeas court.

D. Collective Effect of Trial Counsel's Deficiencies

Considering the collective prejudicial effect of all of counsel's deficiencies that we have either found or assumed in the discussion above, we conclude as a matter of law that the absence of those deficiencies would not in reasonable probability have changed the outcome of either phase of Brannan's trial. *See Holsey*, 281 Ga. at 812, n.1, 642 S.E.2d 56 (holding that the combined effect of trial counsel's professional deficiencies should be considered).

III. Execution of Mentally Ill Persons

Brannan argues that his execution would be unconstitutional because it is unconstitutional to execute any persons who are severely mentally ill. This claim is barred by procedural default because it was not raised on direct appeal, and, therefore, it can be considered on habeas corpus only if Brannan can satisfy the cause and prejudice test to overcome that bar. *Head v. Ferrell*, 274 Ga. 399, 401–402(III), 554 S.E.2d 155 (2001); OCGA § 9-14-48(d). The jury in Brannan's case rejected his claim that he committed the murder as a result of severe mental illness by finding him guilty rather than guilty but mentally ill. *See* OCGA § 17-7-131(b)(1) and (c)(2). As the discussion above demonstrates, Brannan's trial counsel did not render ineffective assistance in their presentation of mental health evidence. Because Brannan has failed to show that his trial counsel rendered ineffective assistance in failing to prove that he was mentally ill at trial, he cannot show cause for his inability to raise a claim based on such a verdict on direct appeal. *See Ferrell*, 274 Ga. at 402, 554 S.E.2d 155(III) (noting that ineffective assistance of counsel can be used to satisfy the cause portion of the cause and prejudice test where a claim is procedurally defaulted). Furthermore, as an independent, alternative holding, we conclude that, unlike the case of juvenile offenders and mentally retarded persons, there is no consensus discernible in the nation or in Georgia sufficient to show that evolving standards of decency require a constitutional ban, under either the Constitution of the United States or under the Georgia Constitution, on executing all[2] persons with mental illnesses, particularly persons who have shown only the sort of mental health evidence that Brannan has shown. *Compare Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (declaring the execution of juvenile offenders to violate the Constitution of the United States); *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (declaring the execution of mentally retarded persons to violate the Constitution of the United States); *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989) (declaring the execution of mentally retarded persons to violate the Georgia Constitution). Having found, as an

[2] We address here only whether it is unconstitutional to execute all persons with mental illnesses. We acknowledge, of course, that it is both unconstitutional and unlawful under Georgia statutory law to execute persons who are insane at the time of their executions. *Ford v. Wainwright*, 477 U. S. 399, 409–410(II)(B) (106 S.Ct. 2595, 91 L.Ed.2d 335) (1986). *See also* OCGA § 17-10-60 *et seq*.

alternative holding, that Brannan's underlying claim is meritless, we conclude that he cannot show prejudice from his trial counsel's failure to raise it on direct appeal. Because Brannan has failed to show cause for his failure to prove at trial and complain on direct appeal that he was guilty but mentally ill and because he has failed to show prejudice stemming from that failure, we hold that his claim that his execution would be unconstitutional based on his alleged severe mental illness is barred by procedural default.

IV. Allegedly-improper Arguments by the Prosecutor

Brannan argues that the prosecutor made several improper arguments at trial. This claim is barred by procedural default because it was not raised at trial and on direct appeal, and it can be considered on habeas corpus only if Brannan can satisfy the cause and prejudice test. *Ferrell*, 274 Ga. at 401–402, 554 S.E.2d 155(III); OCGA § 9-14-48(d). Brannan correctly argues that a showing of ineffective assistance of counsel can satisfy the cause portion of the cause and prejudice test. *See Ferrell*, 274 Ga. at 402, 554 S.E.2d 155 (III). However, none of the arguments Brannan complains about were improper and, therefore, trial counsel did not render ineffective assistance by failing to make objections to them. *Hampton*, 282 Ga. at 492(2), 651 S.E.2d 698 (a); *Fults*, 274 Ga. at 87(7), 548 S.E.2d 315. In arguing that Brannan had systematically sought out a designation as disabled from the Department of Veterans Affairs, the prosecutor merely suggested a reasonable deduction from the evidence. *See*

Gissendaner v. State, 272 Ga. 704, 712(9), 532 S.E.2d 677 (2000) ("Counsel certainly are permitted to argue reasonable inferences from the evidence presented at trial"). Similarly, the prosecutor made a reasonable deduction from the evidence in suggesting that Brannan would pose a future danger in prison based on the evidence presented at the sentencing phase showing that while in jail Brannan had surreptitiously obtained razor blades, had attached razor blades to the ends of pieces of cardboard, had concealed pieces of metal that could potentially be used to open handcuffs, and had charged at a guard with his fists clenched as if he were going to strike the guard. *Compare Henry v. State*, 278 Ga. 617, 618-620(1), 604 S.E.2d 826 (2004). Finally, the prosecutor did not argue improperly by stating that a death sentence for Brannan would deter similar crimes by others. *Pace v. State*, 271 Ga. 829, 844(31)(f), 524 S.E.2d 490 (1999) ("It was not improper for the prosecutor to argue that a death sentence would 'send a message' and deter other killers"). Because none of these arguments were improper, Brannan cannot show cause, through a claim that trial counsel rendered ineffective assistance by not objecting at trial, or prejudice sufficient to overcome the bar to this defaulted claim.

Judgment affirmed in Case No. S08X1212. Judgment reversed in Case No. S08A1211.

All the Justices concur.

Appendix J

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254

State custody; remedies in Federal courts

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) the claim relies on—

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

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

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

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

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

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

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