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Honorable D. Scott Mitchell
Clerk Of The Court

No. CR-13-1835

(Death Penalty)

IN THE ALABAMA COURT OF CRIMINAL APPEALS

Willie Dorrell Minor,

Appellant,

v.

State of Alabama,

Appellee.

On Appeal from the Circuit Court of Tuscaloosa County

No. CC95-1118.60

BRIEF OF APPELLANT WILLIE DORRELL MINOR

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June 17, 2016

ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

This is a death penalty case involving an innocent man who has been incarcerated for 21 years. Oral argument is appropriate to address the many constitutional deprivations that led to Minor's wrongful conviction. Foremost among them, the case can be resolved easily and narrowly because exculpatory microscopic evidence, which was suppressed in violation of *Brady* until Rule 32 proceedings, exonerates Minor of killing his two-month-old son. Based on when that evidence proves the baby's injuries occurred, the theory on which Minor's conviction was obtained is invalid.

The State's expert, the former Director and Chief Medical Examiner of the Alabama Department of Forensic Sciences (ADFS), repeatedly testified at trial that there was not an inflammatory reaction to E'bious's injuries. He based this on his introduction of photos of certain microscopic samples. The State's expert told the jury that the absence of inflammation proved that the baby's injuries could not be many hours old, but instead must have been inflicted in the hour before the baby arrived at the hospital. The State contended Minor harmed the baby during that period, the only time they were alone together.

Yet, the State's expert's testimony was based on an egregious misrepresentation, since the State never disclosed that inflammation was present on other microscopic evidence. That evidence of inflammation was not disclosed to Minor's trial counsel, and was not discovered until Rule 32 proceedings when Minor learned of its existence from an ADFS Senior Medical Examiner. She had reviewed the ADFS file and discovered that her predecessor had not only misrepresented the evidence, but, in her words, his misrepresentations and analysis led to "mistiming of injuries and a significant miscarriage of justice." The previously suppressed evidence proves that the baby's injuries were many hours old, and therefore were not sustained while the baby was alone with Minor. This led to Minor's wrongful conviction.

Oral argument is appropriate to address this injustice, and to address the other constitutional deficiencies that deprived Minor of a fair trial and due process of law, including the ineffectiveness of his counsel and ADFS's destruction of critical evidence from the autopsy.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

TABLE OF RECORD ABBREVIATIONS

The record for the present appeal consists of four sets of volumes, which Minor cites as follows:

Original Clerk's Record on Appeal (50 Volumes): C.__

Supplemental Clerk's Record (19 Volumes): SC.__

Second Supplemental Clerk's Record (2 volumes): 2SC.__

Third Supplemental Clerk's Record (2 volumes): 3SC.__

Appendix B provides a key for determining volume number based on the page number of the record cited.

The transcript for the evidentiary hearing the Circuit Court conducted on Minor's Rule 32 claims appears at SC.2974-3618 (these pages bear the original pagination from that hearing transcript, i.e., pp. 1-645, by which the transcript is cited in the parties' post-hearing briefs and the Order denying Minor's Third Amended Rule 32 Petition and its Addenda), and is cited as SC.___. All other transcripts during Rule 32 proceedings are appended to the end of the Original Record on Appeal after C.9029 and are cited as R.__.

Additionally, references to the clerk's records and reporter's transcripts of Minor's direct appeals to this

Court, which were filed in 1996 (CR-95-1968) and 2001 (CR-00-1300), respectively, are cited throughout this brief as follows:

1996 clerk's record:	96-C.__
1996 supplemental clerk's record	96-SC.__
1996 reporter's record:	96-R.__
2001 clerk's record:	01-C.__
2001 reporter's record:	01-R.__

STATEMENT OF ISSUES PRESENTED

I. Whether the Order denying relief under Rule 32 should be reversed for lack of independence and impartiality?

II. Whether that Order should be reversed and Minor granted a new trial because:

- **A.** under *Brady*, the State suppressed microscopic evidence?
- **B.** counsel failed to obtain microscopic evidence?
- **C.** counsel failed to investigate and show that the State destroyed autopsy evidence, which violated due process?
- **D.** counsel failed to challenge a biased juror?
- **E.** counsel failed to investigate and discredit Dr. Warner?
- **F.** counsel failed to investigate and prepare for the guilt-phase of trial and preserve guilt-phase evidence?
- **G.** counsel failed to move to exclude demonstrative presentations?
- **H.** newly discovered scientific evidence about Shaken Baby Syndrome would have made acquittal probable?

III. Whether that Order should be reversed and Minor granted a new sentencing trial because counsel:

- **A.** failed to investigate and prepare a mitigation case,
- **B.** insulted the jury, and
- **C.** failed to object to and appeal erroneous instructions.

IV. Whether that Order should be reversed and the case remanded because the court excluded evidence of counsel's disciplinary records and related litigation?

V. Whether that Order should be reversed under Rule 32.1(e)?

VI. Whether a dismissal order should be reversed because, *inter alia*, the former circuit judge should have recused and

erred by resolving fact issues on the pleadings?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Shortly after 11 p.m. on April 15, 1995, Willie Minor and Lakeisha Jennings (now Bunkley) brought their two-month-old son, E'bious, to the ER at Druid City Hospital (DCH) in Tuscaloosa because he was short of breath. Upon arrival, he had no pulse and was not breathing, so life-saving measures were performed. Around 11:40 p.m., based solely on E'Bious's retinal hemorrhaging, a pediatrician diagnosed Shaken Baby Syndrome (SBS). During treatment, the ER doctors found that E'bious was in shock due to blood loss from severe internal abdominal injuries, which they attributed to blunt force trauma. E'bious had a fractured skull and ribs. He died at 12:34 a.m. on April 16.

Loretta German (now Lowery), a Youth Aid Investigator for the Tuscaloosa Police Department (TPD), and Steve Baten of the Department of Human Resources (DHR) Child Protective Services arrived at DCH at around midnight. After E'bious passed away, they were joined by two Homicide Unit officers--Stan Bush, of the TPD, and Rocky Montgomery, a Tuscaloosa County Sheriff's Department (TCSD) Deputy.[1]

[1] C.4475-76, 4482, 7628-29 ¶¶2-6; 01-C.976; 01-R.92:9-94:6.

Neither parent admitted to harming E'bious. Jennings had been alone with E'bious and her other two children for the entire day and early evening of April 15, with visits from her grandmother (Dorothy Jennings Richardson) and Kelly Walker (a/k/a Kelly Bonner), a family friend.[2] Jennings called Minor's mother's house at 4:31 p.m., 5:32 p.m., and 6:12 p.m. while Minor was away.[3] She testified that she called Minor to "tell him to come home," 96-R.704:24-705:01, after E'bious supposedly fell off the couch, *id.* 703:15-20.[4] After Minor came home, he was alone with E'bious for approximately 15-30 minutes between 9:30 and 10:30 p.m.[5] Thus, the critical question in Minor's prosecution became whether E'bious's injuries were inflicted hours before he was taken to the ER (implicating Jennings), or within the short period beforehand when Minor was alone with him.

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[2] 01-R.1061:12-1062:6, 1191:13-23, 1244:5-19; 01-C.978. Minor left their apartment that morning or early afternoon, and did not return until 6:30 or 7:00 p.m. 01-C.474, 773; 01-R.1062:2-6, 1063:2-14, 1189:6-23, 1192:1-5, 1196:2-4, 1207:5-15; 96-R.683:5-6.

[3] 01-C.475; 01-R.1063:15-24; 96-R.704:24-705:1; C.7505.

[4] She testified both that E'bious could not roll over, 96-R.693:20-694:01, and that she did not know how E'bious "fell" but "[h]e could have [rolled over]." *Id.* 704:17-21.

[5] 01-R.1069:18-24, 1070:18-22, 1072:24-1075:10, 1075:22-23, 1086:16-18, 1116:5-24; 01-C.976-77, 1036.

Despite that an autopsy had not been conducted and the evidence addressing that critical question had not been obtained, less than 90 minutes after E'bious died, at 1:55 a.m. on April 16, Bush eliminated Jennings as a suspect. 96-R.1034:8-1035:2. Bush simultaneously concluded that Minor was the only possible perpetrator. *Id.* Bush did so after only brief discussions with Jennings and Minor, DCH personnel, and Jennings' aunt, who was a member of the TPD. According to Bush, he understood (wrongly, *infra* § II.F.2.a) from ER doctors that E'bious must have been injured by Minor just before arriving at DCH. 96-R.1031:1-5, 1035:9-18.

On April 17, Minor, Jennings and Diana Pitts, Jennings' mother, went to the TCSD. Montgomery and another investigator encouraged Jennings and Pitts to implicate Minor (they did not). C.7221-29; C.7242-64. Bush and Montgomery interrogated Minor (who denied any wrongdoing), and arrested him for murder at the end of interrogation. 01-C.472-504.

Minor was convicted in 1996 based on purely circumstantial evidence, 96-C.311, and Judge Thomas S. Wilson sentenced him to death, *id.* 315. The court appointed L. Dan Turberville for the appeal, 96-C.11. After this Court af-

firmed (780 So. 2d 707), the Alabama Supreme Court reversed Minor's conviction (780 So. 2d 796).

Judge Wilson appointed Turberville and Cynthia Bockman for re-trial, 01-C.2, which began on January 29, 2001. Again, the trial was purely circumstantial, but unlike the first, focused on forensic medical evidence. It was "in large part, a battle of experts," and, as alluded to, "the key question to determining who had inflicted the injuries was when Ebious sustained his injuries." *Minor v. State*, 914 So. 2d 372, 385, 398 (Ala. Crim. App. 2004).

Relying on the testimony of the then-Director and Chief Medical Examiner of the ADFS, Dr. James Claude Upshaw Downs, M.D., the State asserted: (1) E'bious's injuries were sustained in the 60 minutes before he arrived at DCH,[6] and (2) Minor must have inflicted those injuries while he was alone with E'bious. 01-R.2195:9-11. However, Downs could make those claims only because the State had suppressed exculpatory and impeaching microscopic evidence from the autopsy, namely, inflammation that proves E'bious was injured many hours earlier (when he was alone with Jennings). *Infra* § II.A.

[6] 01-R.1697:24-1698:5, 1713:9-11, 1721:25-1722:3, 2208:24-2209:3.

The defense's attempt to show that E'bious had been injured before Minor was alone with him also was severely hamstrung by counsel's ineffectiveness--particularly their failure to prepare for the inevitable battle of experts. Turberville and Bockman were appointed on June 7 and August 10, 2000, respectively, and recognized immediately that forensic medical evidence would be essential. C.6671. Yet, on October 13, Turberville told the court he had not reviewed any evidence in the case. 01-R.37:17-39:21. Counsel did not attempt to find an expert until December, and failed to retain one until Friday, December 29, 2000, just a month before trial.[7] Counsel then failed to provide the expert, Dr. Charles V. Wetli,[8] with any forensic medical evidence, transcripts of testimony from the 1996 trial, or E'bious's complete medical records. C.7693-94 ¶¶3, 7; 01-R.1513:14-16. Bockman then recruited Dr. Kamal Nagi, a forensic psychiatrist, a week before trial to consult on forensic medicine. C.7639-40. Nagi testified about medical issues, despite being unprepared to do so. *Id.*; C.6576 at 234:19-236:8. The State attacked Wetli and Nagi for not reviewing evidence

[7] 01-R.226:16-21; C.5011:23-5013:18, C.5260-61, C.6619.
[8] Wetli was then the Chief Medical Examiner and Director of Forensic Sciences for Suffolk County, N.Y.

and for testifying outside their qualifications. 01-R.1502-03, 1906-07, 1909, 2191-94.

Counsel damaged Minor's defense in other ways too, including by failing to point out, or explain the significance of, non-forensic evidence supporting that E'bious was injured before Minor was alone with him. That evidence shows that hours before Minor was alone with him, E'bious had symptoms associated with head and abdominal trauma: vomiting, sleeping all day and evening, diarrhea, not eating between afternoon and around 10 p.m., having an odd appearance when he opened his eyes, and uncharacteristically, not crying when Jennings changed his diaper.[9]

Although Minor's counsel tried to attack the policework, they failed to submit any evidence (rather than argument) that the police investigation was deficient and had prematurely identified the wrong suspect. Indeed, counsel did not introduce Bush's testimony that he had (improperly) eliminated Jennings as a suspect within 90 minutes of E'bious' death. Counsel also failed to investigate or present now well-documented evidence that Jennings tried to miscarry E'bious, or that she abused her other children.

[9] *E.g.*, 01-C.800, 981; 01-R.1116, 1557, 1860; 96-R.687-90; C.7222, C.7246, C.7249.

On February 6, 2001, the jury convicted Minor; the penalty phase began and ended the next day, and a jury split 10-2 recommended death. 01-C.407-08; 01-R.2563-64. Counsel again were ineffective. After not investigating mitigation or preparing their witnesses, they insulted the jury and failed to secure correct jury instructions. *Infra* § III.

Judge Wilson sentenced Minor to death. 01-C.414-17. He appointed Turberville and Bockman as appellate counsel. *Id.* 417.[10] This Court affirmed, *Minor*, 914 So. 2d 372, and the Alabama Supreme Court denied review. Newly represented by the undersigned, Minor sought certiorari, which was denied on June 30, 2006. 548 U.S. 925 (2006).

In the interim, on April 25, 2006, Minor filed a Rule 32 petition.[11] After a December 21, 2007 oral argument on a motion for partial dismissal of the Third Amended Petition, on January 28, 2008, Judge Wilson entered an order (the MTD Order) dismissing claims, finding others required an evidentiary hearing, and recusing from deciding others because

[10] During the appeal, Turberville was suspended from practicing law. *Infra* § IV.

[11] The State filed an Answer and Partial Motion to Dismiss on January 24, 2007. To address alleged flaws in the 180-page petition, Minor filed, in short order, an Amended Petition and opposition to the motion, a Second Amended Petition, and, on November 19, 2007, a Third Amended Petition.

he was by then Bush's step-brother. C.4400-50; *infra* § VI.A. Judge Wilson then retired.[12] On February 15, 2008, Minor moved to reconsider the MTD Order. On August 6, 2010, Judge M. Bradley Almond denied reconsideration. C.213.

Based on continued investigation, Minor filed a Second Addendum to the Third Amended Petition on December 16, 2011. The State answered, closing the pleadings. An evidentiary hearing was held on March 26-28, 2012 (the Hearing).[13]

On July 31, 2014, the court entered an order denying relief on Minor's Third Amended Rule 32 Petition and its two Addenda. C.3771-3857 (the Order). The court adopted a proposed order it solicited *ex parte* from the State. *Infra* § I. On August 15, 2014, the court denied Minor's objection and request to vacate the Order. C.3990. Minor now appeals.

STANDARDS OF REVIEW

De novo review applies when a claim in a Rule 32 petition is resolved "upon the 'cold trial record,'" *Ex parte*

[12] In the interim, Minor had filed an Addendum to the Third Amended Petition on January 2, 2008.

[13] At the hearing, 16 witnesses testified live. SC.2974-3618. The court admitted testimony of four witnesses Minor deposed (Turberville, Bockman, Baten, and Dr. Richard Powers, M.D., a neuropathologist who testified for the State at trial), the deposition exhibits, hundreds of other exhibits submitted by Minor, including dozens of affidavits, and one State's exhibit. *Id.* 2978-81.

Hinton, 172 So. 3d 348, 352-53 (Ala. 2012), and to "pure questions of law," *Ex parte White*, 792 So. 2d 1097, 1098 (Ala. 2001), but denial of a Rule 32 petition is generally reviewed for abuse of discretion. *Shouldis v. State*, 38 So. 3d 753, 761 (Ala. Crim. App. 2008). Abuse of discretion exists if the court errs in applying the law or if the record lacks evidence on which the court "rationally could have based [its] decision." *Hodges v. State*, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005). For claims dismissed without a hearing, *infra* § VI, the facts are assumed true. *Ex parte Williams*, 651 So. 2d 569, 572-73 (Ala. 1992).[14]

With several exceptions, including the *Brady* claim regarding suppressed microscopic evidence, *infra* § II.A, this appeal centers on ineffective assistance of counsel (IAC). "[T]he performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland v. Washington*, 466 U.S. 668, 698 (1984). Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the pro-

[14] *See Daniel v. Comm'r, Ala. Dep't of Corr.*, --- F.3d ---, 2016 WL 2849481, *8 (11th Cir. 2016). "[A] petitioner is entitled to an evidentiary hearing 'to determine disputed issues of material fact,'" *Ex parte Thomas*, --- So. 3d ---, 2015 WL 3935236, *4 (Ala. 2015).

ceeding would have been different." *Id.* at 694. As now-Chief Judge Carnes has explained, the prejudice analysis is "a cumulative one as to the effect of all of the failures of counsel that meet the performance deficiency requirement." *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1269 (11th Cir. 2012). In assessing prejudice from deficient penalty phase performance, a court must "'evaluate the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation.'" *Daniel*, 2016 WL 2849481, *22.

SUMMARY OF ARGUMENT

The Order presents many grounds requiring reversal and a new trial. This Court, however, can and should resolve the case--easily--based on an egregious *Brady* violation. The State failed to disclose microscopic slides from the autopsy that show inflammation and therefore exonerate Minor by proving E'bious sustained his injuries many hours before he was alone with Minor. Worse yet, using a selective and misleading set of photos of <u>other</u> microscopic evidence, the then-Director of ADFS testified that the microscopic evidence shows the <u>opposite</u> (*i.e.*, no inflammation)

of what the suppressed evidence reveals.

ARGUMENT

I. THE COURT SHOULD REVERSE THE POST-HEARING ORDER BECAUSE IT IS ADVOCACY THE STATE WROTE, NOT JUDICIAL WORK.

The Order is invalid because it does not reflect "the independent and impartial findings and conclusions of the trial court." *Ex parte Scott*, --- So. 3d ---, 2011 WL 925761, *6 (Ala. 2011). Months after the Hearing and subsequent briefing, the court solicited *ex parte* an order from the State, C.3872, 3395-96. It adopted the State's draft with minor revisions. C.3880-3989 (redlines reflecting revisions); SC.2733-2835 (proposed order); C.3771-3857 (Order). The Order regurgitated the State's post-hearing brief, failing to correct blatant errors that Minor's reply identified. *Compare* C.3771-3857 (Order), *with* C.3136-3235 (brief); *see* C.3237-3394 (reply).[15]

The Order is advocacy masquerading as judicial work. It calls itself "this brief," describes its reasoning as "Arguments," C.3850, and purports to "respond[] to Minor's

[15] The few substantive changes were striking facts, C.3883-86; deleting disposition of claims, C.3979-87; rejecting negative credibility findings and ad hominem attacks, C.3900-02, 3904, 3910, 3916, 3935-38; and rejecting the State's assertion that it had evidence to rehabilitate an impeached witness (Dr. Kenneth Warner), C.3908.

claims," *id.* 3802. It does not cite any legal authority or record materials except those in the State's draft, and adopts the State's formatting to the letter. Worse, the Order does not address Minor's showings, ignores unrefuted evidence, and includes flagrant errors of fact and law. These "patently erroneous" findings "undermine[] any confidence that the [Order is] the product of the trial judge's independent judgment and … reflects the findings and conclusions of that judge." *Ex parte Ingram*, 51 So. 3d 1119, 1125 (Ala. 2010). Because it lacks the independent and impartial judicial findings that Alabama law and the U.S. Constitution require, the Order should be reversed. *Id.* at 1124-25; *Scott*, 2011 WL 925761, *6-7; *In re Paradyne Corp.*, 803 F.2d 604, 611-12 (11th Cir. 1986). The Circuit Court erred in denying Minor's request to vacate it. C.3990.

II. MINOR'S CLAIMS REQUIRE A NEW TRIAL.

A. The State Violated *Brady* By Failing To Disclose Favorable And Material Microscopic Evidence.

The State violated *Brady* by suppressing exculpatory and impeaching microscopic evidence from E'bious's autopsy. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *Brady v. Md.*, 373 U.S. 83, 86-90 (1963). To prevail under *Brady*, the evidence must be (1) favorable to the defense, (2) material,

and (3) suppressed by the State. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012); *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Minor clears each hurdle easily.

The State suppressed ADFS's slides containing tissue samples sectioned from E'bious's body at autopsy, which, viewed microscopically, show prominent inflammatory reactions. The inflammation proves that E'bious was injured at least 6-12 hours before he arrived at DCH, thus exonerating Minor. Minor was convicted on the theory because inflammation was not present, E'bious necessarily was injured less than an hour before arriving at DCH, and therefore Minor, who was alone with him within that period, must have been the perpetrator.[16] The State staked this theory on Downs, who testified at least six times that the microscopic evidence did not show inflammation.[17] Downs testified the absence of inflammation was "significan[t]," and that the presence of inflammation would have meant E'bious was injured hours before he arrived at DCH. 01-R.2017:23-2018:5.

[16] 01-R.2021:21-23 (Downs: E'bious suffered his injuries "within an hour of his presentation to the [ER]"); *id.* 1697:24-1698:5, 1713:9-11, 1721:10-1722:3, 2208:24-2209:3.
[17] 01-R.2013:16-17 ("I don't see a prominent acute inflammatory response"); *id.* 2015:9-10 ("Q. Any area of inflammatory response there? A. None …."); *id.* 2015:22-23, 2017:6-8, 2017:20-22, 2020:5-8 (similar).

The State-drafted Order did not (and could not) disagree that the microscopic evidence showing inflammation satisfied *Brady*'s favorability and materiality prongs. C.3772-75. The Order instead denied relief by finding there was no suppression, C.3773-75, and the claim was procedurally barred, C.3772-73. Because these holdings rest on fundamental legal errors and lack any basis in the record, *infra* §§ II.A.3-4, the Order should be reversed.

1. The Microscopic Evidence Was Favorable To Minor.

a. The Microscopic Evidence Was Exculpatory.

Four experts testified here that microscopic evidence (*i.e.*, "histology") is critical to determining "when E'Bious suffered his injuries," *Minor*, 914 So. 2d at 397:

(1) Dr. Powers, who was a State trial expert;

(2) Janice Ophoven, M.D., Minor's forensic pathology and pediatric pathology expert in Rule 32 proceedings;[18]

(3) Karen Kelly, M.D., who was an ADFS Senior Medical Examiner when she first reviewed the evidence;[19] and

[18] Ophoven was qualified without objection. SC.3003:19-22. She, *inter alia*, co-authored *Potter's Pathology of the Fetus, Infant, and Child*, *id.* 3001:2-21; C.8526, 8880-8980, which Powers agreed is "a classic … text." C.6281:11-16.

[19] Dr. Kelly, who was qualified without objection, SC.3101:1-3102:21, first reviewed the ADFS file, including microscopic evidence, while the Rule 32 proceedings were pending (before the court granted discovery, C.224). SC.3101:1-3102:3, 3104:24-3105:10, 3110:19-3111:2. After leaving ADFS for East Carolina University, Kelly worked on the case *pro bono*. *Id.* 3111:7-19. Wetli also worked *pro bo-*

(4) Dr. Wetli, who was Minor's trial expert.

The experts agreed that "reviewing histology [is] the nuts and bolts of dating injury,"[20] and inflammation visible microscopically is the key to confirming hours-old injury.[21]

The experts testified that the microscopic evidence that the State had suppressed showed inflammation. Wetli testified that E'bious's "liver shows focal inflammation, which is the body's reaction to the trauma." C.7700 ¶3; *id.* ¶8 ("prominent inflammatory response"). Drs. Ophoven and Kelly agreed.[22] The experts testified that such significant inflammation proves that E'bious's injuries were 6-12 or 8-12 hours old.[23] This "plainly qualifies as evidence advanta-

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no during collateral review. C.7701 ¶9. By the Hearing, Ophoven had spent "over a hundred hours" on the case, and was reimbursed only "$3,500 to cover … internal expenses" and $600 "for a two-day trip to Montgomery." SC.3060:23-3061:15 ("the remainder of [her] time" was "volunteered," except for time in court).

[20] SC.3113:25-3114:2 (Kelly); *accord id.* 3114:5-6; SC.3008:7-22, 3009:14-3011:10 (Ophoven); C.6204:4-14; C.7694, 7695-96 ¶¶6, 12, 14 (Wetli).

[21] SC.3109:7-20, 3113:21-3114:7 (Kelly); *id.* SC.3010:17-25 (Ophoven); C.6207:14-6208:3, 6209:5-6213:25 (Powers); *see also* 01-R.2013:23-25 (Downs); *id.* 1471:9-1472:5 (Wetli).

[22] SC.3015:5-21, 3018:3-3019:12, 3109:14-20.

[23] Kelly testified that the "diffuse inflammation" on the newly disclosed microscopic evidence meant "it's been 6 to 12 hours" since injury. SC.3109:14-20; *id.* 3107:23-3108:16. Ophoven testified that it shows "focal" and "fairly dramatic inflammation on the liver," indicating that the injury "must be hours [old]." SC.3015:5-3016:4; *id.* 3018:15-18.

geous to [Minor]." *Banks*, 540 U.S. at 671.

b. The Microscopic Evidence Was Impeaching.

This microscopic evidence revealing inflammation directly impeaches Dr. Downs' testimony. During the State's rebuttal at trial, Downs selectively presented photographs of portions of the microscopic evidence from E'bious's autopsy. Using those excerpts, Downs testified that there was no inflammation and, thus, E'bious must have been injured "within an hour of his presentation to the emergency room." 01-R.2021:18-23; *accord supra* 14 n.16. The new microscopic evidence impeaches this testimony. As Wetli explained, it:

> demonstrates that Dr. Downs was wrong to testify that E'bious Jennings must have been injured in the 60 minutes before he arrived at the emergency room. In fact, on pages 2014 and 2018 of the trial transcript, Dr. Downs admitted that after an injury, inflammation takes hours to develop. However, at trial, Dr. Downs did not show these liver sections depicting the focal

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She added that it was reasonable to estimate that 8 to 12 hours passed between E'bious's injuries and arrival at DCH. *Id.* 3094:4-12; 3010:23-25 ("a substantial amount of time in hours has elapsed"); *see* C.7700 ¶3 (Wetli: "This focal inflammation is significant because it demonstrates that E'bious Jennings was injured at least several hours before he arrived at the emergency room."). Powers testified that he reviewed Kelly's affidavit (C.7615-20), concluding "she's pretty much saying the same thing that I'm saying or maybe I'm saying the same thing she's saying." C.6242:1-22; C.6207:22-6208:3. Kelly's affidavit stated inflammation was "clearly present," and "indicates that [E'bious's] injuries were sustained anywhere from six to twelve hours before his death." C.7617 ¶13.

> inflammation. Instead, Dr. Downs showed the jury images of other microscopic sections that he said did not have 'a prominent acute inflammatory response' (Transcript, p. 2013), did not depict 'inflammatory response' that he could see at the magnifications he photographed (pp. 2015, 2017), or were 'without a prominent inflammatory' response/reaction (pp. 2015, 2017, 2020).

C.7700 ¶¶3-4 (emphases added).[24] The other experts agreed.[25]

The State offered nothing to rehabilitate Downs at the Hearing. Around the time of the Hearing, Downs was in Georgia to oppose a motion to bar his testimony and exclude autopsy-related evidence based on his failure to provide discovery.[26] The court dismissed the murder indictment with prejudice, extensively criticizing Downs' department's handling of evidence. *Ga. v. Buckner*, No. CR11-0672-FR, slip op. at 16 n.46, 35 (Ga. Sup. Ct. May 30, 2012) (calling

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[24] Wetli was called at trial without having seen any microscopic evidence, and then saw only the photos Downs presented during rebuttal, C.7694 ¶7; C.7700-01 ¶¶4-6.

[25] SC.3107:23-3108:4, 3110:5-13 (Kelly: Downs' 60-minute timeframe was "[a]bsolutely not" supported by the evidence; and claim of no "prominent inflammatory response" was irreconcilable with the evidence); C.7616-17 ¶¶8, 11-14 (Kelly); SC.3022:4-17 (Ophoven: similar); *see also* C.6242:2-25 (Powers: "I don't know how Dr. Downs came to that conclusion [that the injuries were sustained in the 60 minutes before E'bious arrived at the hospital], but you simply can't make those kinds of predictions.").

[26] *E.g.*, Savannah Morning News, *Bobby Buckner Challenges ID of Body in Ashleigh Moore Slaying* (Mar. 16, 2012) ("Dr. James Downs has failed to turn over forensic examination material, autopsy files and email records to the defense despite an order from [the trial court] that he do so.").

"the general conduct and behavior of the State … both remarkable and troubling"),[27] *aff'd*, 738 S.E.2d 65 (Ga. 2013).

2. The Newly Disclosed Evidence Is Material.

Materiality (which is sometimes called prejudice, *see Banks*, 540 U.S. at 691), requires a petitioner to "show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016). "Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury." *Id.* (internal quotations omitted). One "can prevail even if … the undisclosed information may not have affected the jury's verdict." *Id.* n.6.

The State's timing case hinged on Downs' testimony that there was no evidence of inflammation and that, therefore, E'bious must have been injured within the hour before he arrived at the hospital. The newly disclosed evidence disproved that theory and impeached Downs, unraveling the State's case and upsetting entirely the basis for Minor's

[27] *Id.* at 30 ("destruction of [evidence]"); *id.* at 31-32 ("questionable manner in which the State continued to handle the disclosure of discovery"); *id.* at 33-34 ("missing pages"). *See Hinton v. Ala.*, 134 S. Ct. 1081, 1090 (2014) (noting "fraudulent prosecution forensic experts" pose a "threat to fair … trials," and statistics showing "'invalid forensic testimony contributed'" to 60% of convictions later overturned through "'exonerating evidence'").

conviction. *Supra* § II.A.1. Such evidence is consistent with that which the U.S. Supreme Court and Alabama courts have held undermines confidence in the verdict. *Banks*, 540 U.S. at 700-01 (new trial because suppressed evidence would have "cast in large doubt" testimony "crucial to the prosecution" and "the State could not have underscored" a point that it made "three times").[28] Materiality is met.

3. The Order Erred In Finding No Suppression.

In violation of *Brady*, the State did not provide Minor before trial--and Minor did not receive until Rule 32 proceedings--the microscopic evidence showing inflammation. Minor proved, *inter alia*, that

1. the State did not disclose <u>any</u> microscopic evidence before trial, C.5553 ¶5 (Turberville: "[W]e never received from the State any histology slides or any other raw medical data used to prepare its reports."); C.5043:3-5045:13; *accord* C.7701 ¶5, 7694 ¶7 (Wetli).
2. Minor was permitted in court on the guilt-phase's last day to review <u>only</u> the photos of portions of microscopic evidence that Downs showed in rebuttal, C.5045:2-13 (Turberville: "Q And these were pictures that had been shown to a witness, correct? A Yes, sir. Q They weren't the physical slides? A No. Q This is a photograph Dr. Downs had taken and was putting up, correct? A Right. Q And so giving you the opportunity to discuss them with your expert, did that -- that <u>only let you discuss what</u>

[28] *State v. Ellis*, 165 So. 3d 576, 586 (Ala. 2014) (materiality where key witness had given inconsistent statements); *State v. Ziegler*, 159 So. 3d 96, 110 (Ala. Crim. App. 2014) (granting *Brady* claim where suppressed evidence would have impeached key witness); *see Wearry*, 136 S. Ct. at 1006.

Dr. Downs had chosen to show, correct? A That's right.") (emphasis added); C.7701 ¶¶5-6 (Wetli).

3. the prominent inflammation shown on the newly disclosed microscopic evidence was not depicted in the photos that Downs presented in rebuttal, C.7700-01 ¶¶4, 6, 8 (Wetli); SC.3096:20-25(Ophoven: "[t]here's no question" that this evidence demonstrating inflammation "was not shown" by Downs); SC.3109:21-3110:4 (Kelly).

In fact, at trial, the prosecutor and Minor's counsel confirmed that even the limited microscopic evidence that Downs photographed to show in rebuttal had not been provided to Minor. 01-R.1980:7-8 (prosecutor: "I am well aware that they have not seen this"); *id.* 1981:14-16 (Turberville: "I have never seen it. These slides he [Downs] is going to show, we have yet to see them ….").

Without addressing Minor's showings, or acknowledging the prosecutor's admission, the Order says "the microscopic slides were not suppressed." C.3773.[29] It bases this finding on (1) the existence of an "open file policy," C.3773-74, and (2) a claim that counsel and Wetli "were aware of the [microscopic] slides, were afforded an opportunity to re-

[29] This illustrates the absence of impartial judicial work. *Supra* § I. After Minor presented this evidence, the State's brief claimed "Minor did not present any evidence that would tend to show that the prosecution suppressed the microscopic slides that are the subject of this claim." C.3149. Minor's reply brief proved the State was wrong. C.3242, 3244-47. Yet, the Order has the same counterfactual statement as the State's brief. C.3774.

view them, and made a choice not to do so," *id.* 3774-75.

That conclusion rests on a gross misunderstanding of the law and lacks any basis in fact. First, the Order fails to recognize that the State has a "duty to disclose" exculpatory and impeaching evidence "even though there has been no request by the accused." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (emphasis added, citations omitted).[30] It is undisputed that Minor never received, and the State never produced, the evidence showing inflammation. That should have ended the inquiry, and the Order should be reversed.

a. The Open File Policy Is Irrelevant.

The Order erred in rejecting suppression because "the State agreed to an open-file policy." C.3773. The existence of an open-file policy is beside the point. On the law, the Supreme Court and this Court have recognized that an open-file policy does not obviate *Brady* violations, and the prosecution still must ensure that the exculpatory or impeaching evidence is provided. *Strickler*, 527 U.S. at 285, 289; *Ziegler*, 159 So. 3d at 107 (granting *Brady* relief where "the trial court 'entered an "open file" order'").

[30] *Ex parte Monk II*, 557 So. 2d 832, 837 (Ala. 1990) ("prosecutor has a constitutional duty to disclose"); *Ex parte Womack*, 541 So. 2d 47, 64 (Ala. 1988) (noting "duty on the prosecutor to volunteer certain exculpatory matter").

On the facts, the State did not contend--and the Order did not find--that the microscopic slides were in the "open-file." The evidence proved they were not. ***First***, Minor's counsel testified, consistent with his statements at trial, that the State disclosed no microscopic evidence. C.5042:19-5045:13, 5049:3-5050:2; C.5553 ¶5. ***Second***, at trial the prosecutor said he was "well aware" Minor had "not seen" even the limited microscopic evidence Downs introduced in rebuttal through his photos (arguing the evidence was inculpatory and without inflammation). 01-R.1980:7-8.[31] ***Third***, these unique slides containing samples from E'bious's body are not now and have never been in the court file. On the contrary, Dr. Kelly found the slides in

[31] The prosecutor's statement would make no sense if the open file contained the microscopic evidence--two one-of-a-kind slides containing several samples of E'bious's tissues that were stained and affixed to glass, C.8519 (photo of the two slides)--photographed by Downs. The prosecutor's principal ground for arguing that the defense could not complain about the belated disclosure of the supposedly inculpatory evidence was not that the microscopic slides had been provided or were in the open file, but that microscopic evidence was "referenced in the autopsy report that [the defense] had." 01-R.1980:7-11; *id.* 1981:17-22, 1984:12-15. Even if, *arguendo*, such a "reference" mattered under *Brady* (it does not), it would not help the State here because the report does not reveal (i) that microscopic evidence was preserved, or (ii) whether inflammation existed. 01-C.918; *compare* C.7847-49 (Downs' autopsy from another case noting that 162 sections were preserved on microscopic slides and that there was "heavy inflammatory infiltrate").

ADFS's files during her employment there. SC.3102:23-3105:12. When the undersigned counsel sought to photograph the evidence after Minor's experts reviewed it at ADFS, ADFS said "because this is the only original histology slide we 'must' maintain physical custody." C.397, 383-84.

In short, the record provides no basis upon which to find that the microscopic evidence was in the "open file." The State suppressed the evidence showing inflammation.

b. *Brady* Is Not Satisfied Simply Because Wetli Allegedly Could Have Requested To Review Evidence.

The Order acknowledges that, before trial, Dr. Wetli "was provided with the autopsy report and the microscopic report," but neither he nor Minor received the microscopic slides. C.3774. It says there was no suppression because Wetli did not "request[] permission to conduct his own microscopic examination," and because Ophoven viewed the evidence at ADFS at the Rule 32 stage. *Id.* This confirms the Order's failure to comprehend that *Brady* requires the State to affirmatively disclose exculpatory evidence.

The constitutional obligation to disclose exculpatory evidence before trial does not depend on a defendant's request (let alone a decision made by an expert with no authority to bind defendant). *Strickler*, 527 U.S. at 280.

That Minor obtained evidence on collateral review is irrelevant to whether the State fulfilled its constitutional obligation to disclose favorable evidence.

In any event, in claiming that Wetli did not request permission from the State to review the microscopic evidence, the Order ignores Wetli's testimony that he relied on Downs' misrepresentations that there were no slides from the area of injury, 01-R.1503:16-1504:8, and hence thought there were no "microscopic sections of tissues that would give an indication as to time of injury," *id.* 1471:10-14.[32] The Order erred in implying that Minor's counsel and expert knew of slides showing the area of injury, let alone exculpatory ones, and chose not to review them.[33]

4. The Court Erred In Finding Procedural Default.

The Order says that this *Brady* "claim was raised at trial and could have been but was not raised on direct ap-

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[32] The prosecutor admitted that no one told Minor's counsel that any slides existed. 01-R.1984:12-25. Rather, Downs first disclosed to Wetli on January 12, 2001--weeks before trial, months after Minor's counsel had been appointed, and years after the indictment--that "micros existed" (albeit micros not from the areas of injury). *Id.* 1984:15-18.

[33] Nor would it be a defense if only Downs (but not the DA) knew that the withheld slides were exculpatory. The duty to disclose exculpatory evidence extends to evidence held by those "acting on the government's behalf." *Kyles*, 514 U.S. at 437-38; *accord Ziegler*, 159 So. 3d at 107, 109.

peal, and as such, it is procedurally barred from review, under Rules 32.2(a)(2) and (5)." C.3772-73. It cites nothing to support the assertion, which is legally and factually wrong. The evidence showing inflammation was not known to Minor until Dr. Kelly (while at ADFS) discovered it years into Rule 32 proceedings. The Order cannot sidestep this by implying that because Minor's counsel challenged the State's belated disclosure of photos of some supposedly inculpatory microscopic evidence in rebuttal, Minor is procedurally barred from asserting a *Brady* claim based on Downs' failure to disclose the exculpatory portions of the evidence--which counsel did not even know existed.

That is a remarkable holding, and one that guts *Brady* and expands Rule 32.2(a) beyond recognition. No law supports it. The point of *Brady* is that the State may not selectively withhold exculpatory evidence. *Banks*, 540 U.S. at 696-700 (finding no procedural default and rejecting "[a] rule … declaring 'prosecutor may hide, defendant must seek,' [as] not tenable in a system constitutionally bound to accord defendants due process").[34] The Alabama Supreme

[34] *Reynolds v. State*, 2015 WL 5511503, *11-13 (Ala. Crim. App. Sept. 18, 2015) (*Brady* claim was not procedurally

Court has rejected the argument that because counsel knew of some forensic evidence, it should have raised claims about other forensic evidence:

> [W]e cannot say … that Ward or his counsel should have suspected at trial or when he filed his first Rule 32 petition that any additional forensic test results existed or that further investigation would be anything more than a mere fishing expedition.

Ex parte Ward, 89 So. 3d 720, 726 (Ala. 2011). These principles apply: Downs and the State repeatedly claimed that the absence of inflammation on the microscopic evidence proved that E'bious was injured within 60 minutes before he arrived at DCH, while failing to disclose microscopic evidence that showed the opposite. Minor had "no reason … to assume that … [Downs and] the prosecutor made a misleading jury argument that was contradicted by undisclosed evidence in the State's possession." *Id.* It was the State's duty to disclose to Minor that the exculpatory evidence existed.

Additionally, the prosecution affirmatively misrepresented that no exculpatory evidence existed. After Minor's counsel complained about the failure to disclose portions of the autopsy reports, the prosecution told the jury "the state has withheld nothing from the defense in this case

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barred where "the facts underlying it were unknown to [defendant]"); *Ziegler*, 159 So. 3d at 106-10.

nor will we ever." 01-R.2176:3-2177:24. Thus, no procedural bar could apply here. *Banks*, 540 U.S. at 692-93, 695 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."); *Strickler*, 527 U.S. at 289.

B. Minor's Counsel Were Ineffective And Prejudiced Minor By Failing To Obtain Microscopic Evidence.

Regardless of how the *Brady* claim is resolved, counsel were deficient and prejudiced Minor by failing to obtain microscopic evidence. The Order, which did not reach performance, erred in concluding that the evidence of inflammation was not prejudicial. C.3775-79.

1. Counsel Performed Deficiently.

Counsel's failure to obtain and review the microscopic evidence during discovery is textbook IAC. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (failure to do discovery); *Elmore v. Ozmint*, 661 F.3d 783, 786, 824, 852-54, 861-64 (4th Cir. 2011) (failure to review forensic evidence).[35] Minor's counsel knew the importance of establish-

[35] *Rivas v. Fischer*, 780 F.3d 529, 547-51 (2d Cir. 2015) (failure to review documents relied on by forensic pathologist); *see State v. Terry*, 601 So. 2d 161, 164 (Ala. Crim. App. 1992) ("[e]ffective representation … involves the independent duty to investigate and prepare").

ing the timing of E'bious's injuries and the relevance of microscopic evidence. C.5047:12-15 ("theory of the case" was "these injuries were hours old").[36] After being appointed, Bockman wrote Turberville about hiring a forensic medical expert, stressing "it was very important to not just have a report" describing forensic evidence, but "to have copies of the actual" evidence. C.6671.

Yet, counsel did not obtain any forensic evidence. After the court granted Minor discovery, *see* 01-C.2-3; 01-R.43:5-7, 51:13-52:2, counsel did not try to obtain microscopic evidence. Counsel's only discovery request to ADFS, in a subpoena issued four days before trial, sought production of personnel records. 01-C.351.

The failure to obtain any forensic evidence was unreasonable. Turberville's only explanation was his belief that any microscopic evidence had to be disclosed under *Brady* and pursuant to the discovery request. C.5044:3-5045:24. While the State was obligated to provide the evidence under *Brady* because it turned out to be favorable to Minor, his failure to attempt to obtain the evidence irrespective of

[36] Turberville knew the theory depended on scientific evidence. C.5006:3-21. Having handled cases involving forensic evidence, he also "underst[ood] that microscopic slides could be used to date injuries." C.5009:7-24.

what it showed was inexcusable, and thus, deficient. *Supra* 29 n.36. The Fourth Circuit found IAC in a like setting:

> The case was a real "who-done-it" in which Elmore was asserting his innocence, the State's case against him largely hinged on the forensic evidence, and, at least as far as Elmore's lawyers knew, the prosecutor was maintaining an open file. Yet Elmore's lawyers conducted no more examination of the forensic evidence than to ask a day or two before the 1982 trial to see the exhibits that the State intended to introduce. The lawyers did not look behind the State's proposed exhibits, did not investigate the other (possibly exculpatory) evidence that the State was bypassing, and did not conduct an independent analysis of a single item of forensic evidence in the State's arsenal.

Elmore, 661 F.3d at 861-62, 864 (finding IAC).

2. Counsel's Performance Was Prejudicial.

Counsel's performance caused prejudice by failing to present evidence of inflammation. The microscopic slides prove E'bious's injuries were many hours old and would have impeached Downs. *Supra* § II.A.1.

The Order concluded that there was no prejudice because the jury had heard testimony about "the degeneration of red blood cells." C.3776; *id.* 3776-79. This misses the point. Wetli and Downs made clear at trial that (i) inflammation and (ii) degeneration of red blood cells are two distinct scientific concepts and reveal different information about an injury's age, *e.g.*:

> [T]he only way you could really [determine how old

> an injury is] would be to look at it under the microscope, and, again, you will see the – earlier changes, breaking down of red blood cells. When it's very fresh, the red blood cells, you could see them individually. As they sit there for a period of a couple of hours, then they begin to break down and it kind of looks like a diffused red pigment almost. And then other things begin to happen and you get inflammatory cells and so forth. That is how you will have to get a better idea as to the age of the lesion.

01-R.1474:8-25 (Wetli) (emphasis added).[37]

The upshot is simple: the inflammation evidence is not similar to or cumulative of the red-blood-cell-degradation evidence noted in the Order. Instead, and as explained at

[37] Wetli testified red cells appear when an injury is fresh, then break down, and then inflammation occurs. Where "inflammatory cells … responded to the injured area, that tells you assuredly this had to have occurred hours earlier." *Id.* 1471:22-25 (emphasis added). Downs agreed, distinguishing the visible "red blood" cells and cellular breakdown, 01-R.2008:23-2009:7, 2013:7-14, 2015:1-8, 2019:2-17, from the absence of inflammation, *id.* 2013:15-17, 2015:9-14; *id.* 2015:22-23 ("Diffuse infiltration of red blood cells without a prominent inflammatory response.") (emphasis added); *id.* 2019:23-2020:12 (noting "significan[t]" fact that cellular breakdown was "without a prominent associated inflammatory reaction").

Fundamentally, the two processes involve different blood cells: whereas the breakdown noted in the Order involves red cells, the physiological process of inflammation is driven by white cells. *See, e.g.*, Merck Manuals, *Home Health Handbook*, Defenses Against Infection ("During inflammation, … [t]he walls of blood vessels become more porous, allowing fluid and white blood cells to pass into the affected tissue. … The white blood cells attack the invading microorganisms and release substances that continue the process of inflammation.") (emphases added).

length, the absence of evidence of inflammation was a crucial gap in Minor's defense. 01-R.2017:23-2018:5 (Downs: "the significance of the absence of a prominent inflammatory reaction" is "that this didn't happen, many, many hours before"); *id.* 1471:22-1472:5 (Wetli: inflammation "takes away some of the guesswork and speculation of [dating injury]" and can provide "absolute proof [that injury] occurred, say, at least six hours earlier").[38]

If counsel had performed competently by obtaining the microscopic evidence through discovery, it would have proved with scientific certainty that E'bious's injuries were not sustained in the hour before he arrived at DCH, and impeached Downs. This alone establishes "a reasonable probability that … the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Elmore*, 661

[38] The Order wrongly says Downs conceded "that E'bious was injured within 'a couple of hours' of his presentation at DCH" based on the red blood cell degradation evidence. C.3777-78. Downs did not. *E.g.*, 01-R.1721:1-1722:3 ("[T]here is no way this child could have lived more than an hour to get to the hospital. And I will be honest, I'm being charitable at saying out to an hour."); *accord supra* 14 nn.16-17. The Order misleadingly quotes Downs' statement that cellular breakdown in the form of "'acute shock reaction'" occurs "'[w]ithin [*i.e.*, may be less than] a couple of hours [of the injury]. It's very unpredictable." C.3777 (quoting 01-R.2019:14-17) (emphases added).

F.3d at 869-70 (failure to investigate forensic evidence).[39]

C. IAC In Failing To Show ADFS Destroyed Critical Evidence, Which Deprived Minor Of Due Process.

Because of counsel's deficient preparation, they failed to realize that ADFS destroyed critical autopsy evidence in violation of due process under Alabama law, *Ex parte Gingo*, 605 So. 2d 1237, 1241 (Ala. 1992), the Constitution, *Ariz. v. Youngblood*, 488 U.S. 51, 57-58 (1988) (intentional destruction violates due process), and ADFS's Standard Operating Procedures (SoPs) and practices.[40]

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[39] The Order misapprehends the "reasonable probability standard" and quotes this Court's direct appeal decision out of context in saying there was "'an abundance of evidence, both medical and nonmedical, establishing that E'bious's injuries were inflicted while Minor was alone with E'bious.'" C.3779 (quoting *Minor*, 914 So. 2d at 403). This Court said that in rejecting that newly discovered evidence "impeach[ing] the credibility of Dr. Hardin," a witness who did not testify about inflammation, was prejudicial. *Minor*, 914 So. 2d at 402. Indeed, Downs' (now impeached) testimony provided the "abundance" of "medical" evidence upon which this Court relied. *Id.* 402-03; *id.* 386 ("Downs … testified that … Ebious's injuries were inflicted within one hour of Ebious's arrival at the emergency room, *i.e.*, sometime after 10:00 p.m.").

[40] The Order gives no indication that the IAC claim is based on due process violations under *Gingo* and *Youngblood*. C.3779-87. It does not mention due process or the cases, and errs by treating the claim as solely predicated on Minor's ability to introduce evidence about "deficiencies in the autopsy." C.3783, 3779 (noting "destruction of autopsy evidence [in] violat[ion of] [A]DFS's [SoPs] and practices," without mentioning due process). It ignores that a successful *Gingo*/*Youngblood* claim required dismissal of the

In *Gingo*, the Alabama Supreme Court found due process was violated where the State destroyed scientific samples critical to defending a criminal case. 605 So. 2d at 1239-41. *Gingo* held that Alabama due process is violated when "the defendant is unable to prove that the State acted in bad faith but [where] the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." *Id.* at 1241 (internal quotation and citation omitted). This standard is satisfied because ADFS destroyed forensic evidence of E'bious's injuries critical to Minor's defense, making trial unfair both given the significance of the evidence and the State's use of autopsy evidence against him.

First, at the Hearing, the experts and ER doctors testified that the destroyed evidence derived from multiple areas of injury, and was central to establishing when the injuries occurred. For example, Dr. Powers testified: the failure to preserve the spinal cord, eyes, and microscopic evidence of the head injuries precluded dating E'bious's injuries, C.6200:21-6204:18, 6209:5-6215:7, 6295:14-20, and

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prosecution or reversal of a conviction; the failure to make the claim thus prejudiced Minor more severely than the Order contemplates on its face. C.3779.

the lack of microscopic evidence prevented analyzing whether the brain's nerve fibers were torn (*see infra* 37 & n.47), C.6250:18-6252:25, 6260:5-62:13, 6264:7-19.[41]

Second, the destruction of this evidence was more egregious than in *Gingo*, where the agency had "no standard operating procedure for keeping evidence." 605 So. 2d at 1238. Here, Dr. Warner's autopsy violated ADFS's SoPs and its medical examiners' practices in abuse cases. *E.g.*:

(1) ADFS's SoPs stated "[f]ull body X-rays should be made in all cases" of suspected child abuse, C.7804; *see* SC.3115:12-21, 3117:12-22, and medical examiners, including Warner and Downs, took autopsy x-rays in such cases long before this one;[42]

(2) ADFS's SoPs required: "If shaken baby syndrome is a possibility, save the eyes and spinal cord and incise the posterior neck for soft tissue hemorrhage." C.7804. Indeed, as early as 1991, Warner had removed and saved the eyes, spinal cord and brain, and conducted "detailed brain microscopics" in child abuse autopsies.[43] Other ADFS medical examiners, Downs in-

[41] *Accord* SC.3106:22-3107:18, 3108:17-20, 3114:6-3115:1, 3129:19-3130:8 (Kelly: failing to preserve evidence was "very significant"); *id.* 3095:10-3096:25, 3115:2-3116:22; SC.3008:23-3009:10, 3012:11-3015:18, 3035:20-3036:10 (Ophoven); C.7624 ¶12 (Lovelady: rib fractures); C.7627 ¶9 (Lovely: same).

[42] C.8142 (autopsy x-rays in 1986); SC.3122:5-6 (discussing C.8136-43); SC.3125:25-3126:14 (discussing C.7835-55); C.8568, 8983-84, 8989, 8995 (x-rays and fracture analyses); C.7847-49 (Downs' exam of 8 rib microscopic samples).

[43] C.7823 ¶5, 7827, 7829-30, 7832-33; SC.3025:14-24, 3122:5-3124:7 (discussing C.7819-34); C.6199:16-6204:17 (Powers: it "absolutely" was important to do such an exam).

cluded, consistently did so;[44] and

(3) ADFS's SoPs instructed that "[i]n infants and children, elongated cuts may be necessary to demonstrate soft tissue hemorrhage in the back, buttocks and extremities." C.7804. ADFS consistently did so, and examined them microscopically.[45]

The existence of those SoPs, and their mandate that certain steps be taken in certain types of autopsies (and that ADFS regularly did so in practice in its other cases), make plain the forensic significance of the evidence.

Third, as in *Gingo*, 605 So. 2d at 1241, the State used the autopsy, including by relying on destroyed evidence, against Minor. Downs showed a PowerPoint depicting eye, brain, and rib injuries that E'bious purportedly sustained.[46] He claimed that the autopsy supported his conclusion that "Ebious sustained all of these injuries within about an hour of his presentation at the emergency room."

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[44] C.8142 (14 microscopic sections of brain in 1986); C.8141 (neck); C.8568, 8571 (brain & neck in 1991); C.7837 ¶I.E (Downs' 1997 exam of brain & eyes), 7847 (samples of eye, brain & nervous system), 7849 (examining 110 additional slides, including eye, brain & nervous system); C.8994.

[45] C.7837 ("healing skin … wounds"), 7838-40 (abrasions and contusions), 7847 (samples of soft tissue, back, arms, chest & leg), 7848 (microscopic exam of skin & soft tissue samples); C.8986, 8989 (cutting beneath bruises, "cut down" on left arm and exam of blood "beneath" abrasions and contusions); C.8996-97 (microscopic exam of 33 sections, including skin, and noting "[n]o inflammatory reaction").

[46] 01-R.1676:1-21, 1668:15-23, 1684:16-20, 1687:2-12, 1688:10-22; C.6466-72, 6475-90.

01-R.1697:24-1698:5.[47] And, within the limited set of tissue sections Dr. Warner preserved, there were no samples of multiple areas of injury (including areas discussed in the SoPs). SC.3012:11-3013:14, 3014:2-21, 3114:8-3115:13. This precluded Minor from demonstrating that the injuries were likely many hours old (as the newly disclosed microscopic slides showed of other injuries, *supra* § II.A.1). Downs increased the unfairness of the destruction by testifying (falsely) that not preserving the evidence in question was consistent with ADFS policy and practice. *Infra* § II.C.2.

Thus, due process was violated under *Gingo*, 605 So. 2d at 1241.[48] Counsel performed deficiently and prejudiced Minor by failing to raise a due process claim about ADFS's destruction of evidence, and, if that claim was denied, to

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[47] For example, using the PowerPoint's depiction of E'bious's alleged "diffuse axonal injury" ("DAI")--*i.e.*, torn "nerve fibers in the brain," 01-R.1694:6--Downs claimed that once the fibers were torn, E'bious's brain was "not going to work any more" and "the effects … are immediate." *Id.* 1699:14-20. As Powers explained, this testimony had no foundation, because DAI must be identified microscopically but there were never brain microscopics here. C.6261:15-6262:13, 6264:7-6265:8.

[48] Because *Gingo* does not require intent, it is not necessary to reach whether the destruction violated *Youngblood*. Yet, based on the flagrant violations of ADFS's SoPs and Downs' misleading testimony about Alabama practice, *infra* § II.C.2, there is ample basis for finding prejudice based on counsel's failure to assert a federal due process claim.

show the jury the impropriety of the destruction (while preserving the due process issue for appeal).

1. Counsel Performed Deficiently.

Even though counsel hoped at trial to undermine the probity of Warner's autopsy, they made no effort to "research[] the Alabama Medical Examiner's autopsy protocols or other standard operating procedures," which made clear that the destroyed evidence was critical, particularly in child abuse cases.[49] And despite admitting that it is "the attorney's job to research what th[e other side's] experts have testified to in the past," C.5024:9-14, counsel "did not" "research[] Dr. Warner's or Dr. Downs' testimony in other published cases." *Id.* 5034:2-5.[50] That testimony and those other ADFS cases show that the destruction of evidence here was extraordinary and contrary to their own past practices. *Infra* § II.C. Any reasonable counsel familiar with the facts and the law would have raised a destruction-based due process claim seeking dismissal of the case or

[49] C.5554 ¶8; C.7695 ¶10; *see State v. Smith*, 85 So. 3d 1063, 1082 (Ala. Crim. App. 2010) ("Counsel's obligation is to conduct a 'substantial investigation into each of the plausible lines of defense.'"); *Williams v. Allen*, 542 F.3d 1326, 1340 (11th Cir. 2008).

[50] *Contra*, *e.g.*, *Kimmelman*, 477 U.S. at 384; *Terry*, 601 So. 2d at 164; *Elmore*, 661 F.3d at 869-70 (failure to investigate forensic evidence and procedures).

preclusion of any autopsy-related evidence and testimony.[51]

2. Minor Was Prejudiced As A Result.

Counsel's failures prejudiced Minor. Foremost, they failed to raise this meritorious destruction-based due process claim. As shown *supra* II.C.1, a due process violation of this type requires dismissing the prosecution or precluding the State's evidence on the same subject (making conviction impossible given the importance of injury-timing). Had the State's autopsy evidence been admitted over Minor's objection and led to a conviction--which is doubtful for reasons shown below--there is a reasonable probability that the conviction would be reversed on appeal.[52]

> It is not in the interest of justice to permit the prosecution, in its unfettered discretion, to determine the favorable or unfavorable nature of potentially exculpatory evidence, and then allow the prosecution to

[51] *Grissom v. State*, 624 So. 2d 706, 708 (Ala. Crim. App. 1993) (where critical evidence is destroyed "ordinarily, the only feasible remedies are dismissal of the prosecution or, if the missing evidence could have been used only to impeach a particular item of prosecution evidence, exclusion of that evidence"); *Gingo*, 605 So. 2d at 1241 (precluding evidence related to destroyed samples).

[52] *Ex parte Dickerson*, 517 So. 2d 628, 630-31 (Ala. 1987) (reversing conviction because State violated due process by destroying potentially exculpatory video); *Gurley v. State*, 639 So. 2d 557, 567-69 (Ala. Crim. App. 1993) (reversing conviction under *Gingo* where State introduced evidence despite destruction of related forensic evidence).

> destroy the evidence, thereby forcing the defendant to establish the favorable nature of evidence that no longer exists.

Dickerson, 517 So. 2d at 630.

The Order ignores Minor's prejudice showings related to these failures. C.3780-87; *contra* Ala. R. Crim. P. 32.9(d). The Order first has no findings on prejudice from the violation of due process. The Order also errs because it says nothing about the effect at trial had counsel shown (i) the autopsy destroyed evidence in violation of ADFS's SoPs and practices, and (ii) Downs (again) falsely testified that the autopsy was proper under Alabama practice. Instead, the Order declares that prejudice is lacking because counsel cross-examined Warner for longer than in the 1996 trial.[53] This analysis is wrong and misses the point of Minor's showings. *Elmore*, 661 F.3d at 870 (prejudice for failing to show "gross violations of standard procedures for the handling of forensic evidence").

Although the Order acknowledges a dispute at trial on whether the autopsy was competent and comprehensive enough to support Downs' claims that E'bious's injuries were no

[53] C.3780-83 (some favorable testimony elicited from Warner); C.3783-84 ("point[ed] out the perceived shortcomings in Dr. Warner's autopsy" through Wetli (emphasis added)).

more than 60 minutes old, C.3780-83, it ignores that Downs testified that the evidence the autopsy preserved was consistent with ADFS practice at the time. 01-R.1747:5-1750:19. Yet, the evidence relevant to the destruction showed that Downs' claims were patently false.

X-rays: Responding to Wetli's criticism that autopsy x-rays should have been taken to date injury, 01-R.1459:14-1466:15, 1471:9-19, 1480:2-1481:21, Downs claimed: "When this autopsy was done in 1995, Dr. Warner did not physically have the equipment to do x-rays, so he didn't do them." *Id.* 1747:25-1748:2. This is false. The evidence shows:

(i) ADFS's SoPs required x-rays in 1995, C.7804;

(ii) this Court recognized that in **1993** Warner took autopsy x-rays at the same facility where he conducted E'bious's autopsy in 1995. *See Davis v. State*, 718 So. 2d 1148, 1161 (Ala. Crim. App. 1995); SC.3132:10-3133:22; and

(iii) ADFS consistently took x-rays in pre-1995 autopsies, C.8568 (1991); *supra* 35 & n.42.

Tissue preservation: In defending against Wetli's charges that the eyes, ribs, and other samples should have been removed, examined and preserved, and cuts should have been made to examine the body for bruises, 01-R.1470:22-1483:24, Downs asserted that while those practices may have been proper under "2001 standards," "in 1995, in Alabama, I

don't believe that societal ethics really favored doing that extensive an examination of the body." 01-R.1750:2-16. This too was false. It is irreconcilable with:

(i) the SoPs in place in 1995, which directed elongated cuts and removal of the eyes and spinal cord, C.7804.

(ii) Warner's **1991** autopsy of Infant Thrash in which the eyes, spinal cord, and brain were removed, C.7819-34, which this Court addressed in *State v. Mason*, 675 So. 2d 1 (Ala. Crim. App. 1993); *see* SC.3025:14-24, 3122:5-3124:12;

(iii) ADFS's extensive examinations in many child autopsies before E'bious', C.7819-34, *id.* 8136-43, *id.* 8562-78, *id.* 8981-9004; *supra* 35-36 & nn.42-45; and

(iv) Downs' 1997 autopsy in the Infant Ward case, *see* C.7835-55, where he removed the rib cage, took 162 microscopic sections (including the eyes, ribs, and brain), and, as this Court described, showed the jury "photographs and videotaped footage of the ribcage, which had been removed from the body," *Ward v. State*, 814 So. 2d 899, 907 (Ala. Crim. App. 2000).[54]

[54] The Order makes no sense in saying that Dr. Kelly lacked "independent knowledge" that permitted her to testify in response to Downs' references to so-called Alabama societal ethics in 1995. C.3786; *see* SC.3116:17-22, 3123:2-4. If the Order means that Kelly lacked percipient knowledge, that is irrelevant because she was testifying as an expert, and had "sufficient facts or data" to support her testimony. Ala. R. Evid. 702(b)(1); *see* SC.154:13-19 (basing opinion on SOPs "[she] reviewed and the other ADFS autopsies [she] reviewed," which were introduced into evidence); *id.* 3115:14-24, 3116:23-3118:11, 3119:18-3127:19. Also, far from "initially insist[ing] that she was working in Alabama [in 1995,]" C.3786, Dr. Kelly misspoke and promptly corrected herself: "I'm sorry. I am incorrect. It was 2005 instead of '95." SC.3146:12-22. Kelly previously explained that she

Counsel's failures were prejudicial, because showing that the evidence was destroyed contrary to ADFS's SoPs and practices would have: (i) undermined the competence of the autopsy and the State's reliance upon it, and (ii) destroyed any of Downs' lingering credibility. *See Elmore*, 661 F.3d at 870; C.5023:21-5024:1 (Turberville: key to winning was showing "one expert is credible while the other is not" or that an expert is "mistaken"). Contrary to the Order's suggestion, C.3780-82, neither cross-examining Warner about the autopsy nor Wetli's criticism diminished prejudice. Indeed, Downs rehabilitated Warner and undermined Wetli (falsely) on all of these points (which the Order ignores). The failure to investigate left Wetli with no basis to convince the jury that Downs was wrong,[55] whereas ADFS's SoPs and practices proved Downs was incredible. Yet, as the State's closing emphasized, Wetli seemed "not very well informed," and "came down here and, bottom line, he was a very, very expensive Monday morning quarterback in an area

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had practiced forensic pathology since 1990 and that autopsy standards did not differ by region or over time. SC.3118:7-3119:17; C.8552 (C.V.).

[55] Counsel acknowledged that the absence of objective evidence made it likely that the jury would believe Downs, who, in Bockman's words, "played well with the jury" rather than the "Yankee," who "didn't." C.6575-76 at 232:14-233:1.

that he was not qualified to address." 01-R.2192:5-8, 2209:24-2210:3. The jury wrongly believed Downs.

Finally, the Order's discussion of ER x-rays in addressing prejudice is a red herring. C.3785-87 (contrasting expert testimony at the Hearing that x-rays showed healing rib fractures with radiologist's trial testimony that fractures all were new). First, whether the ER x-rays showed healing rib fractures and whose testimony interpreting those fractures was more persuasive, C.3786-87, is largely irrelevant to Minor's claim that he was prejudiced by the failures (i) to show destruction of evidence, and (ii) to impeach Downs' assertions about the autopsy, including that autopsy x-rays could not be done. Second, the competing opinions about the rib fractures on the ER x-rays illustrate the significance of the evidence's destruction. The SoPs mandate--and ADFS pathologists take--autopsy x-rays precisely because, as Warner testified in *Davis*, 718 So. 2d at 1161, they are superior to hospital x-rays, and microscopic evidence would have proven whether there were old fractures. Importantly, as the Order ignored, three medical providers at DCH questioned whether the fractures were all

new.[56] Moreover, there is nothing inherently noteworthy about disagreement among doctors in interpreting x-rays.[57]

D. Counsel Were Ineffective For Challenging Juror M.M.

Counsel were deficient and prejudiced Minor by failing to challenge for cause or strike M.M. *First*, M.M.'s juror questionnaire revealed that she was unfit to serve. In answering what the punishment should be for murdering a child, M.M. wrote: "Chair." C.6063. The State concluded she was "[f]or death if child murder." *Id.* 6054. M.M. added that the "death penalty is used … too seldom," summarizing: "I am in favor of capital punishment, except in a few cases where it may not be appropriate." *Id.* 6064. *Second*, *voir dire*

[56] (1) Dr. Lovely: "We were discussing the x-rays … and I remember either thinking or saying … I wonder if those could be old injuries …." 96-R.827:19-828:2; *accord* C.7627 ¶9; (2) Nurse Wilson: "there are old rib [fractures,]" C.7215; and (3) Dr. Evans: some fractures showed "healing," 96-SC.263. Ignoring this, the Order declares Ophoven's testimony that the x-rays showed healing fractures was "less credible" than the radiologist who testified at trial. C.3785. It also ignores the record and appropriate context in suggesting that Ophoven was wrong to disagree with the AAG's statement that an infant's ribs "'tend not to break.'" *Id.* Her testimony is consistent with forensic pathologists' views: "A common type of injury seen in child abuse are rib fractures." C.8865 (emphasis added); *accord* C.7837 ("[m]ultiple rib fractures"); C.8983 ("[m]ultiple old fractured ribs"); *see also* C.3245-51 & n.11.

[57] C.8809 ("fractures may be missed on X-rays"); C.6326 ("it is always wise to perform the autopsy and 'see the injury with your own eyes' instead of relying on radiology reports"); C.8851 (similar).

confirmed bias. M.M. said the chair is "used too seldom," 01-R.617:14-25, and where a child is killed, the punishment should be "Death." *Id.* 619:6-11. The failure to challenge M.M. was deficient.[58] Bockman admitted, "I don't know why [M.M.] wouldn't have been struck for cause[,]" and "this one would need to have been struck for cause," C.6563 at 182:7-9, 182:16-17). Minor was prejudiced because "the seating of any juror who should have been dismissed for cause … would require reversal." *U.S. v. Martinez-Salazar*, 528 U.S. 304, 316 (2000); *accord Virgil*, 446 F.3d at 613-14,

The Order found no deficiency, stating "[M.M.] was not a biased juror." C.3828.[59] This is error, and has no support in the record. The Order fails to mention M.M.'s written responses, and ignores the relevant passages in *voir dire*. C.3830-32. Instead, it cribs a portion of the *voir dire* where M.M. merely said she could "consider a recommendation of life without parole" if she "found the mitigating [cir-

[58] *Virgil v. Dretke*, 446 F.3d 598, 609-10 (5th Cir. 2006); *Miller v. Webb,* 385 F.3d 666, 675-78 (6th Cir. 2004).

[59] It said that while M.M. "initially stated that she would vote to recommend the death penalty for a defendant who is found guilty of capital murder for killing a child … she later clarified her position by testifying that she could and would follow the trial court's instructions and that she could vote to recommend life without parole for such a defendant." C.3830; *see* C.3831-32 (similar).

cumstances] outweighed the aggravating." C.3830. But Alabama law requires a juror to vote for life unless she finds that aggravating circumstances outweigh mitigating circumstances. Ala Code. §§ 13A-5-49, 13A-5-46(e). When asked if she could apply the law's balancing test, M.M. equivocated "I think I could," stressing that she "couldn't forget that" a baby had been killed. 01-R.653:14-24. Asked if she could overcome her biases, M.M. said: "I could try my best." *Id.* 653:25-654:3. But:

> For a juror to say, "I think I could be fair, but …," without more, however, must be construed as a statement of equivocation. It is essential that a juror "swear that [she] could set aside any opinion [she] might hold and decide the case on the evidence." *Patton* [*v. Yount*], 467 U.S. [1025,] 1036 [(1984)]. If a juror does not make such an unequivocal statement, then a trial court cannot believe the protestation of impartiality.

Miller, 385 F.3d at 675.[60] Thus, the court's ruling, C.3832, was wrong as a matter of law and in light of the evidence.

E. IAC For Failure To Investigate And Discredit Warner.

Counsel failed to investigate and present evidence about Warner's "professional competence" and "expertise." C.4437; C.5051:19-20. Counsel failed to do so despite be-

[60] *Accord Ex parte Land*, 678 So. 2d 224, 240 (Ala. 1996) ("it [must be] ultimately determined that the person can set aside his or her opinions") (emphasis added)).

lieving that Warner was a weakness for the State, C.7694 ¶5, and even though experts' qualifications and competence are critical jury considerations. *Henderson v. State*, 715 So. 2d 863, 865 (Ala. Crim. App. 1997). This was deficient. *Rivas*, 780 F.3d at 547-50 (IAC for failure to research forensic pathologist's qualifications and background).

The Order errs in finding no prejudice. C.3791-92. ***First***, although Warner testified he was board certified,[61] ADFS and American Board of Pathology records reveal that this was false.[62] Because the Order does not mention the false testimony, C.3788-92, reversal is warranted. Ala. R. Crim. P. 32.9(d); *see Wearry*, 136 S. Ct. at 1006-08 (reversing decision that "failed even to mention" certain prejudicial evidence). ***Second***, ADFS's 1995-96 evaluation rated Warner "unsatisfactory" in "compl[ying] with rules[,]" and found he only "partially meets standards" overall and in examining bodies and in submitting reports. C.7862; *see* C.8361 (Warner fell below "professional standard of care, conduct and performance"). Dr. Kelly testified

[61] 01-R.1445:9-10 ("Q Are you certified in pathology? A Yes, sir."). *Accord* 96-R.1043:3-4; C.6735:17-18.

[62] C.8468 (ADFS Director: "we received a letter from the American Board of Pathology which stated Dr. Warner is not certified by their Board"); C.9029 (Warner "has not been certified by The [American] Board [of Pathology].").

that these ratings "would be very significant deficiencies in the pathologist's competency and one I would be very concerned about," and that she had not seen a worse ADFS evaluation. SC.3127:23-3129:18. Misapplying the prejudice inquiry, the Order dismisses the evaluation because Warner had other favorable reviews. C.3789-3791; *contra Porter v. McCollum*, 558 U.S. 30, 43 (2009) ("it was not reasonable to discount entirely the effect that [evidence] might have had" simply because "the State's experts identified perceived problems with [it] and the conclusions that [defendant] drew").[63] ***Finally***, the Order's reference to "plenty of positive information" wrongly relies on inadmissible, irrelevant, and unknown evidence. C.3789.[64]

Had counsel investigated and introduced this evidence,

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[63] *Accord Elmore*, 661 F.3d at 871. In any event, there is no basis to conclude that more weight would be given to ADFS's other evaluations of Warner than his negative 1995-1996 evaluation. *See id.* at 869-70. The 1995-96 evaluation governs Warner's work here. C.7862 ("from 08/01/95 to 08/01/96"); C.8451 (reports finalized on Nov. 21, 1995).

[64] First, it cites a letter noting two colleagues' faint praise that Warner "'would never deliberately' make a mistake." But it wrongly suggests that the individuals could have rehabilitated Warner, C.3791-92, because (i) "character witness" testimony (*id.*) would be inadmissible, Ala. R. Evid. 404, 608, and (ii) they were not qualified in forensic pathology, C.8360. Second, the Order says Warner "presented affidavits of support" during a disciplinary hearing, C.3790, but ignores that they are not in evidence.

especially given the totality of the medical evidence, *see supra* §§ II.A-C; *Elmore*, 661 F.3d at 868, there is a reasonable probability of a different outcome.

F. Failing To Prepare For Guilt-Phase Witnesses And Failing To Preserve Evidence Was Ineffective.

Minor showed IAC based on counsel's failures to prepare for trial and to adduce and preserve evidence for appeal.

1. Deficiency In Preparing For The Guilt-Phase.

As to witnesses that counsel called at trial, cross-examined, or should have called, counsel breached the "duty to investigate and prepare." *Terry*, 601 So. 2d at 164.[65] First, although the court granted counsel's request for expenses to hire an investigator on September 7, 2000, 01-R.6:24-7:16; C.4990:17-4991:3, they waited more than four months--until seven days before trial--to do so. C.7661 ¶¶1-2. Because of this delay, Shereen Slapikas, the investigator, testified: "I was unable to do a proper investigation." *Id.* 7662 ¶9; *id.* 7661-62 ¶¶3-6. Second, counsel themselves did not do the necessary work; they failed to:

(1) investigate, interview, and prepare witnesses called by the State who would have offered favorable testimo-

[65] *Accord Smith*, 85 So. 3d at 1076-77, 1080-81; *Goodwin* v. *Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982) ("duty to interview potential witnesses").

ny[66] and Minor's own guilt-phase witnesses;[67]

(2) investigate additional witnesses who would have given favorable guilt-phase testimony;[68] and

(3) prepare to competently cross-examine Jennings and Officer Teena Williams, as well as to obtain, proffer and preserve for appeal evidence of Jennings' abuse.

Despite Minor's showings of deficient investigation and

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[66] C.7621-24 ¶14 (**Dr. Steve Lovelady**); C.7625-27 ¶10 (**Dr. Perry Lovely**); *see* C.5040:10-5041:4 ("I did not contact [Lovelady or Lovely]."); C.6570 at 209:5-210:18, 212:1-213:2, 213:10-214:10 (similar). SC.3154:5-24, C.6584 at 241:11-243:7 (**Montgomery**); C.7214, 7216 (**Nurse Wilson**: failure to introduce her statement that Minor "appeared upset" when he learned E'bious's condition).

[67] Of Minor's 12 guilt-phase witnesses, counsel had not: met or spoken with three (**1. Baten**, their first witness, C.4519-20 212:13-213:22, **2. Banks,** 01-R.1839:19-20 ("You haven't met me before. I am Cynthia Bockman."); C.7529 ¶¶4-6, and **3. Rice**, C.7653-57 ¶¶2-4, C.6572 at 219:23-220:10, *id.* 6573 at 221:2-17); met four for the first time in court (**4. Walker**, C.7687 ¶13, **5. Lakeisha Minor,** C.6171-6176, C.5185:6-18, **6. Marcus Minor**, C.6160-62, and **7. LaToya Franks**, SC.3440:1-12, 3441:12-23, 3442:3-14 (attorneys did not interview her before trial or prepare her to testify); C.5139:4-8; C.6567 at 199:1-200:19); and did little, if anything, to prepare for these and the rest of the witnesses' testimony (**8. Dorothy Minor**, SC.3410:11-3411:3, 3412:16-3413:8 (spoke to counsel "briefly" once), C.5181:9-15, **9. Nevels,** C.7641-43 ¶2 (met "for a few minutes" two days before trial), C.6574 at 226:17-227:3, **10. Melba Wilson,** C.6166 ¶3, C.5185:6-18, **11. Nagi**, C.7639-40 ¶¶2-9 (met with counsel a week before trial and spoke briefly, but did not discuss the subject of his testimony or prepare to testify). Dr. Wetli--the only witness counsel met with for more than 15 minutes--"characteriz[ed]" the case as a "rush job," because he was contacted "so shortly before trial." C.7695 ¶8. He described his work as "very unusual" because counsel "had very little contact with [him], and took few steps to ensure that we were on the same page." *Id.*

[68] *See* C.3069-71 **(Angela Burton)**; C.3072-73 **(Captain Loretta Lowery)**; C.3074-77 **(Police Procedures Expert)**.

preparation, the Order fails to:

- acknowledge Slapikas' testimony;
- make any findings regarding counsel's investigation;
- acknowledge any of the governing law regarding the duties to investigate and prepare, *see* C.3771-3857; or
- apply those legal principles to the record.[69]

Therefore, the Order's findings that counsel were not deficient are an abuse of discretion.

2. Counsel's Failures Caused Prejudice.

Counsel's failures prevented them from eliciting favorable testimony central to the defense strategy and rebutting the State's case, and from adducing and preserving favorable evidence for appeal. Absent counsel's failures, the jury would have heard, *inter alia*,

- E'bious could have lived for hours after being injured;
- observations about E'bious's behavior on April 15 that were consistent with a baby experiencing trauma;
- testimony that Bush's investigation was flawed;
- Jennings tried to miscarry and wished to abort E'bious;
- Jennings "disciplined" her kids with blunt force; and
- Minor was deeply distraught when E'bious died.

Minor was prejudiced because the jury heard none of this. The Order's errors in discussing prejudice (and witness-specific performance-related errors) are discussed below,

[69] *E.g.*, C.3816 (discussing "fail[ure] to elicit testimony," but not underlying failure to investigate); C.3820 (similar); C.3823-24 (ignoring failure to interview witness).

but as an overarching matter, the Order should be reversed for disaggregating the prejudice from each deficiency, rather than cumulatively assessing the resulting prejudice from all the deficiencies. *Evans*, 699 F.3d at 1269.

a. Prejudice Related To The Guilt-Phase Witnesses.

i. Drs. Lovelady and Lovely treated E'bious at the ER, and, if interviewed, would have testified favorably for Minor in at least three ways. *First*, they would have emphasized what a baby is capable of doing after trauma--even with a very low hematocrit level (*i.e.*, percentage of red cells in one's blood), which E'bious had when he arrived at DCH--and how a child with significant blood loss and other injuries can appear to caregivers. Lovelady testified that a patient with a very low hematocrit level can sustain "basic life functions for a period of hours," that "it can be difficult for an observer to distinguish between an infant that merely is asleep and one who is suffering" from blood loss, and that symptoms like "vomiting" "can be an indicator of head trauma."[70] Given caregivers' observations

[70] C.7623 ¶10; *see* C.7626 ¶7 (Lovely: similar); C.8779 & tbl.13-3 (with loss of more than 25% of their blood, baby may only be "irritab[le] or letharg[ic]"); C.8789-90. Powers, Kelly, and Ophoven confirmed that these and other symptoms E'bious exhibited were relevant to whether he had

about E'bious throughout April 15, *supra* 7, this testimony was important to persuading the jury that E'bious had been injured many hours before he arrived at DCH. As Turberville admitted, this evidence "certainly" would have supported that theory. C.5080:11.[71]

Second, they would have criticized ADFS's failure to preserve and date the rib fractures at autopsy. C.7623-24 ¶¶9-10, 12; C.7627 ¶9.

Third, they would have testified that E'bious's injuries were not necessarily sustained in the 60 minutes before he arrived at DCH, C.7622-23 ¶¶7, 11; C.7626 ¶¶6-7, and contradicted Downs' testimony that E'bious's low hematocrit indicated an injury less than an hour old. 01-

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been injured earlier. C.6278:23-6279:22; SC.3049:7-22, 3085:20-3086:7 (Ophoven); *id.* 3148:25-3149:16 (Kelly).

[71] There was no credible evidence that E'bious was well before he was alone with Minor. While Jennings' mother (Pitts) testified that E'bious raised his head up and smiled at her just before Minor was alone with him, 01-R.1307:3-11, Pitts' testimony would have easily been debunked by prepared counsel, as detailed in Minor's post-hearing brief. C.3048-50 ((1) Pitts' April 15 statement said nothing about E'bious raising his head or smiling, (2) on April 17, Pitts told police "He was laying down on his stomach. He never totally raised up like a normal baby." (3) Jennings disputed that E'bious raised his head or smiled, and (4) at the Hearing, Dorothy Jennings Richardson newly testified that she (not Pitts) saw E'bious "lift his head and smile[]" on April 15, but she saw E'bious hours before Minor was alone with him, SC.3585:18-3586:18); *see also infra* § II.H (discussing lucid intervals).

R.1719:12-1722:3.[72] This is significant because the jury was erroneously led to believe that experts legitimately disagreed over whether hematocrit falls rapidly or slowly, *Minor*, 914 So. 2d at 397-98.[73] It also would have shown that Bush misunderstood the ER doctors, whose comments supposedly led Bush to exclude Jennings as a suspect and conclude that E'bious was harmed while alone with Minor. *Supra* 4.

The Order's findings (C.3792-96) that failure to obtain the doctors' testimony was not prejudicial constitute an abuse of discretion. *First*, it errs as a matter of law by neglecting to address prejudice from the failure to elicit testimony that E'bious was capable of functioning after trauma and how he would have appeared. *Second*, it fails to address that criticism of the autopsy would have lent credibility to Wetli and undermined Downs. *Third*, in the only context in which it considers prejudice, the Order errs in finding testimony about hematocrit's unreliability in da-

[72] Lovelady and Lovely testified that hematocrit is not "a reliable indicator of the time of injury." C.7622-23 ¶¶7-9, 11; C.7626 ¶¶6-7 (multiple unpredictable variables affect fall in hematocrit).

[73] It is well established that, contrary to Downs' claims, "hemoglobin and hematocrit do not fall immediately [upon blood loss]. It can be 48 or 72 hours after the hemorrhage until the full extent of the red cell loss is apparent." C.8790; *accord* C.8879; C.8781; C.8876; C.7609 ¶2.

ting injury "would have undermined [the defense's] own theory of the case," C.3793, which was based on a misreading of the record, and is a demonstratively incorrect statement.[74]

ii. Deputy Sheriff Montgomery's testimony would have supported the defense strategy of demonstrating the police investigation was inadequate. SC.3164:17-19, 3169:4-15.[75] Montgomery would have testified that before ruling out Jennings as a suspect, Bush failed to take essential investi-

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[74] The Order wrongly asserts that "[Minor's] counsel – not the prosecution" contended that "E'bious's hematocrit level [was] a reliable indicator" of when he was injured. C.3792. The Order did so based on *dicta* from this Court that "[t]he State presented no testimony during its case-in-chief regarding the significance of Ebious's hematocrit level with respect to the timing of Ebious's injuries)." *Minor*, 914 So. 2d at 398 (*quoted in* C.3793). The *dicta* misread the record. The State first introduced hematocrit in questioning Downs, 01-R.1719:12-19, who testified that E'bious's low hematocrit showed that "there is no way this child could have lived more than an hour to get to the hospital. And I will be honest, I'm being charitable at saying out to an hour." *Id.* 1721:10-1722:3. Downs' testimony followed the State's attempt to lead him by stating E'bious's hematocrit was "one of the bases for your belief that these injuries occurred within an hour." *Id.* 1720:15-1721:1-8. Although Wetli and Nagi testified about hematocrit, *Minor*, 914 So. 2d at 398, they first did so 150 transcript pages later. 01-R.1873-86 (Nagi); *id.* 1935 (Wetli).

[75] Counsel deficiently did so only through argument, C.5092:4-12; 01-R.2143-44, 2150:9-10, not evidence or testimony. Turberville admitted that he did not ask Montgomery or any other officer to evaluate the quality of Bush's investigation. C.5098:8-16.

gative steps of interviewing: (1) Minor's and Jennings' families, and (2) everyone who cared for E'bious in the 48 hours preceding his death. SC.3158:4-6, 3158:15-3159:1, 3244:16-3245:2, 3438:12-17. These failures were significant both because of what Minor's family had observed about Jennings' abuse of her children, *infra* 67-68 & n.95. (relevance of past abuse), and because the caregivers' observations supported that E'bious had been injured many hours before he was alone with Minor, *supra* 7, 53-56 & n.70. Montgomery also criticized Bush's reliance on the purported statements of ER physicians to rule out Jennings as a suspect. SC.3171:7-11; *see supra* 4.[76]

iii. Kelly Walker: Despite telling the trial court that Walker was "a critical witness for the defense[,]" 01-C.390, counsel failed to elicit testimony that:

(1) he was at Jennings' apartment during the morning and evening of April 15 and E'bious was asleep "the whole time [he] was there that evening." C.7688 ¶7; and

(2) Jennings said "the doctors killed her baby," and "[e]ven after Willie was arrested, [she] continued to

[76] The Order's finding of no prejudice (R.3816-17) because "Montgomery's testimony at the March 2012 hearing reveals the lengths to which he and other officers went in investigating E'bious's death," *id.* 3816, ignores Minor's showing that Montgomery's testimony would have undercut Bush's investigation. That is what counsel admittedly set out--but failed--to do, so the failure was prejudicial.

say that the people at DCH killed E'bious." *Id.* ¶9. The Order found no deficient performance[77] or prejudice as to (1) because Walker supposedly said the same thing at trial. C.3828. That is baseless. Counsel elicited testimony that E'bious was asleep when Walker left, 01-R.1860:11-19, 1862:17-19, not that he slept the "whole time [Walker] was there that evening." C.7688 ¶7. This is material given the hours-old injury defense.

As to (2), the Order rejected the testimony as hearsay. C.3828. This is legal error, because the evidence is "offered for [a] purpose other than to prove the truth of its factual assertion.'" *Brannon v. State*, 549 So. 2d 532, 539 (Ala. Crim. App. 1989). The statements were not offered to prove that doctors killed E'Bious, but to show Jennings' attempts to deflect attention from herself and her recognition that Minor did not harm E'bious.[78] The failure to elicit the testimony was prejudicial.

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[77] The Order ignored counsel's failure to prepare. No competent counsel would have called Walker, who was imprisoned on a homicide conviction, to testify without interviewing him and preparing him for that testimony.

[78] Assuming *arguendo* that the statements were hearsay, they fall within a hearsay exception because the out-of-court statement concerns the "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." Ala. R. Evid. 803(3).

iv. Witnesses Testifying About Minor's Emotional Reaction to E'bious's Death**:** Minor was prejudiced by counsel's failure to elicit evidence from four witnesses that he was distraught by E'bious' death, including testimony from LaToya Franks, Pharm.D., his ex-girlfriend, who saw Minor crying on the street and repeatedly saying "my baby [is] gone, my baby [is] gone." SC.3435:1-11.

In finding no prejudice, the Order violated *Strickland*. It required Minor to prove "the outcome of [his] trial would have been different if only his counsel had elicited testimony … that he was crying and emotional." C.3824; *see* C.3825, 3826, 3827 (similar); *contra Strickland*, 466 U.S. at 694-95; *Evans*, 699 F.3d at 1269. The evidence counsel failed to elicit would have "alter[ed] the entire evidentiary picture." *Strickland*, 466 U.S. at 695-96. The jury did not hear that Minor was distraught after E'bious's death; it repeatedly was told the opposite and that it meant Minor was guilty. *E.g.*, 01-R.2214:15-2215:14 (Minor's failure to cry, in contrast to Jennings who was "a puddle on the floor[,]" meant that "he knew what had happened").

Finally, despite that counsel failed to investigate and prepare as to these witnesses, the Order suggested there

was no deficient performance because:

> Minor's counsel decided to call certain fact witnesses at the guilt phase of the trial but also made the strategic decision to limit the questions that they asked of those witnesses to prevent the prosecution from eliciting harmful testimony on cross-examination.

C.3823. This is legal error. Strategic choices receive deference only to the extent they are based on informed decisions. *Strickland*, 466 U.S. at 690-91. The law "rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate" *Baxter v. Thomas*, 45 F.3d 1501, 1514 (11th Cir. 1995).[79] Because there was no investigation on the subject or as to these witnesses, there is no "strategy" owed deference.

b. Other Individuals Would Have Testified Favorably.

i. Angela Burton, would have testified that:

(1) she witnessed Jennings crying because she did not want to be pregnant with E'bious, SC.3395:8-3396:8;

(2) Jennings sought to miscarry and attempted to do so by jumping down the stairs, *id.* 3396:9-20, and by drinking turpentine, *id.* 3397:6-18;

(3) Jennings was "trying to [raise] the money for an abortion" while pregnant; *id.* 3397:22-3398:6.

The failure to obtain the testimony was prejudicial because

[79] *See Ex parte Whited*, 180 So. 3d 69, 75, 81-82 & n.2 (Ala. 2015)(reversing denial of IAC where counsel did not articulate a "strategic" rationale); *Womack*, 541 So. 2d at 71-72.

Jennings' motives for harming her son were material.[80]

The Order found no prejudice, C.3812-14, stating that Burton's testimony would have been inadmissible "hearsay and speculation." C.3813. That is wrong. *First*, Burton's testimony was not speculative. It was based on events she witnessed and statements Jennings made. *Second*, the statements were not offered to prove the truth of the matter asserted (*e.g.*, Jennings saved money for an abortion), but rather suggested she did not want E'bious. *Supra* 58.[81]

The Order also suggests that prejudice may not exist because "this Court"--not a jury--"would not be inclined to credit [Burton's] testimony." C.3813-14. The skepticism rests on an invalid conviction.[82] The Order acknowledges

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[80] *See*, *e.g.*, *Coral v. State*, 628 So. 2d 954, 983 (Ala. Crim. App. 1992) (relevance of motive of other potential perpetrator). Investigators testified that Burton's knowledge about Jennings' motives would have been relevant to them. (Lowery: C.7630 ¶9); (Baten: C.4491 at 99:5-100:5, C.4516 at 199:20-200:7) ("evidence that Ms. Jennings tried to raise money to get an abortion or tried to induce a miscarriage" would "have changed" his conclusion about "the alleged perpetrator"); SC.3163:13-3164:1 (Montgomery).

[81] Assuming *arguendo* that the statements were hearsay, the testimony is relevant to prove, *inter alia*, motive for harming E'bious, and thus admissible. Ala. R. Evid. 803(3).

[82] The Order acknowledges (grudgingly, C.3813) that the Alabama Supreme Court reversed Burton's hindering prosecution conviction and entered an acquittal because the State failed to "prove[] a prima facie case." *Ex parte Burton*, 783 So. 2d 887, 888 (Ala. 2000). But it uncritically adopts

"the State could not have used Ms. Burton's hindering-prosecution conviction to impeach her if she had been called" and "could not have informed the jury about the details of her crime [i.e., her acquittal]." C.3813. Thus, whatever "the Court" thought about the (non-existent) "conviction" is irrelevant; credibility was for a jury.[83]

ii. Captain Loretta Lowery would have testified that:

(1) "in [her] professional opinion and based on the investigation we conducted," when Bush excluded Jennings as a suspect at 1:55 a.m. on April 16, "there was no evidence at that time that would have eliminated Ms. Jennings as a suspect," C.7629-30 ¶6, 9, and

(2) based on Jennings' inconsistent and incomplete reports, she would have had serious concerns that Jen-

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the State's advocacy (*see supra* § I) by discussing the non-existent "conviction" at length, treating allegations--from an acquitted charge--as proven facts. C.3813-14; *contra Burton*, 783 So. 2d at 888 ("allegedly rendering criminal assistance"); *id.* at 891, 893 (similar).

[83] Without making any findings, the Order editorializes that because Minor's counsel "obviously knew who Angela Burton was and what she had done," "the Court is not at all surprised that they chose not to call her at his trial." C.3814 (emphasis added). Beyond wrongly treating allegations as proven facts, there is no basis for claiming counsel "chose" anything. Counsel never made contact with Burton, SC.3399:9-17; C.5117:8-5120:23; C.6569-70 at 208:16-209:4. Slapikas did not obtain the written statement Burton gave Minor's counsel in connection with the 1996 trial (which accords with her Hearing testimony) until days before the 2001 trial. C.7666, 7668, 7672-75. Slapikas first tried to contact Burton after trial had begun (and failed). *Id.* 7677, 7679 (Jan. 30, 4:05 p.m.; Jan. 31, 9:31 a.m.). Turberville testified that he would have wanted to introduce Burton's testimony. C.5121:24-5121:17, 5121:20-5122:4.

nings abused E'bious, C.7630-31 ¶¶10-11.

The failure to introduce the testimony was prejudicial, because it directly supported counsel's unsuccessful strategy of attacking the police investigation, for which no evidence was introduced. *Supra* 58 n.75.

The Order found no prejudice based on another "if only" analysis. C.3815-16; *see supra* 59. That again is contrary to *Strickland* because it considers the new evidence in isolation and imposes a more likely than not requirement. Even standing alone, Captain Lowery's testimony would have rendered the verdict suspect. *Kimmelman*, 477 U.S. at 374.[84]

iii. Police Procedures Expert: Despite counsel's strategy of attacking the police, counsel prejudiced Minor by failing to obtain police procedures and to consult with

[84] The Order also errs in finding no deficient performance by "presum[ing] that [counsel] acted reasonably in deciding against calling Captain Lowery as a witness at Minor's 2001 trial." C.3815 (emphasis added). The sole basis for the Order's statement is that when Turberville was asked--in questioning about whether he investigated the policework in the case--if he remembered talking to Lowery, he replied: "The only time I can recall is when we were at trial." C.5095:23-96:2. His testimony made no sense because Lowery did not testify at trial, and it does not suggest that Turberville made a strategic decision not to call her (especially in light of her views and counsel's lack of similar evidence). *See Whited*, 180 So. 3d at 75, 81-82. Turberville's testimony shows he failed to make any decision before trial. *Contra Williams v. Taylor*, 529 U.S. 362, 395 (2000).

a police procedures expert. *Smith*, 85 So. 3d at 1079-80 (prejudice where defense makes policework a central issue but fails to support the strategy with evidence). An expert, like Dr. William Gaut, Ph.D., who was available for Minor's trial, would have testified that Bush erred significantly in investigating E'bious's death. *See, e.g.*, SC.3230:19-3231:14, 3232:4-3233:15, 3244:7-3245:2, 3247:4-12, 3250:11-3251:18; *Smith*, 85 So. 3d at 1079-80 (Gaut's testimony "would have been extremely important"). Gaut testified that Bush's failure to follow procedures compromised the investigation, SC.3245:9-11, and, based on the record, he "would have considered Ms. Jennings a primary suspect." *Id.* 3266:15-21; *id.* 3247:13-18.

The Order denied relief by finding the MTD Order dismissed this claim. C.3817-18. That is wrong. The MTD Order did not address the testimony of a police procedures expert, C.4409-10, which was pleaded post-MTD Order.[85] The Order also errs in adopting the MTD Order's analysis. *First*, it repeats Judge Wilson's legal error that, contrary to *Strickland*, Minor had to show "'the result of the trial would have been … different.'" C.3818 (quoting C.4409-10).

[85] C.291 ¶15, 300-02 ¶¶37-38; C.3275 n.28. The State did not raise preclusion based on the MTD Order. C.6379 ¶14.

Second, the MTD Order is premised on the statement: "petitioner argues that several witnesses were interviewed [by police] on the eve of trial, but fails to point how the result of the trial would have been any different if they had been interviewed earlier." C.3818 (emphasis added). Minor's claim has nothing to do with how witnesses would have testified if police had interviewed them earlier. Rather, had a police expert testified about Bush's failures, the jury would have understood that Bush acted unreasonably in eliminating Jennings and immediately declaring Minor guilty.

c. Deficiencies In Cross-Examination Preparations.

i. Jennings**:** Counsel's theory was that Jennings killed E'bious.[86] Attacking her and showing inconsistencies in her statements and testimony was important. C.5104:22-5106:25. Contrary to the Order's suggestions, C.3802-12, Minor was prejudiced by failures[87] to show that Jennings:

(1) had a history of using physical discipline;
(2) gave misleading information about E'bious's condition, and had a pattern of giving incomplete or inconsistent information about her children's medical care; and
(3) may have hit E'bious's head against the door frame.

First, although counsel tried to show that Jennings

[86] 01-R.773:11-16, 802:24-03:4.
[87] Minor was also prejudiced by counsel's failure to preserve for appeal any abuse evidence the court excluded.

physically harmed her children (whereas Minor did not use and was opposed to corporal punishment, SC.3414:16-3415:11, SC.3432:11-25),[88] they failed to ask how she defined "discipline" and whether it included corporal punishment as her testimony had strongly suggested.[89] At the Hearing, when asked to define "discipline," Jennings first said that her children "got spankings" when "out of line," then equated "spanking" as "hit[ting] … with a switch." SC.3372:17-25; *id.* 3373:25-3374:2. The testimony would have increased the likelihood that the jury would conclude Jennings inflicted E'bious's blunt force injuries.[90] The Order denied relief, wrongly stating that the evidence would be inadmissible because it was not specific to E'bious. C.3807-09 (C.4420). Jennings' testimony about "discipline" did not exempt

[88] However, counsel's deficient investigation meant they lacked evidence of abuse. SC.3399:9-17, 3412:14-3413:8; C.7641-42 ¶¶2, 5; C.7689-90 ¶¶13-14.

[89] In 1996, Jennings testified that Minor did not abuse or spank her children and had a good relationship with them, 96-R.682:3-9, rather "[she] discipline[d] [her] kids[,]" *id.* 682:13. At the 2001 trial, she testified similarly. 01-R.1206:24-1207:4, *id.* 1206:24-1207:4; *see* C.4420.

[90] Investigators testified that "it [is] relevant in an abuse investigation to find out how a parent disciplines his or her child," C.4490 at 95:12-96:1 (Baten); SC.3256:10-3257:14, 3265:9-3266:21 (Gaut).

E'bious. And it mirrored her admitted trial testimony.[91]

Even if counsel were precluded by the trial court's *in limine* ruling (01-C.372) from questioning Jennings about her "children," C.3807,[92]--despite the already-admitted trial testimony on the subject of the treatment of Jennings' children--the Order committed reversible error under Ala. R. Crim. P. 32.9(d) and *Ex parte McCall*, 30 So. 3d 400, 404 (Ala. 2008), by failing to address Minor's showings of IAC for failure to make a record through proffer and then to challenge on appeal the exclusion of abuse evidence.[93] Those failures were deficient and prejudicial. The available evidence of abuse was plentiful,[94] and contradicted Jennings' denials about such conduct. SC.3372:21-3374:9. Proffering any such evidence and challenging its exclusion on appeal

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[91] 01-R.1206:24-1207:4 ("Did Willie ever discipline the children? … No. And you disciplined the children? Yes.").

[92] They were not. The *in limine* ruling applied only to DHR reports about abuse. 01-C.372, 01-R.245:8-249:3.

[93] *See* C.6568 at 203:4-9 (Bockman: proffer was necessary to preserve any appellate challenge to the exclusion of abuse evidence); C.3066-67 & n.31-32; 3SC.297 ¶314.

[94] *See, e.g.,* SC.3394:2-9 (Burton: testifying that she saw Jennings lose patience with her children and hit them); SC.3411:20-3412:13 (Dorothy Minor: she witnessed Jennings shove her young son hard enough to knock him under a table); C.7685-86 ¶5 (Walker: "I often saw [Jennings] hit the kids."); C.7642 ¶5 (Nevels: Jennings "often yelled at [her children] and … hit her kids very hard.").

would been meritorious because: (1) under Alabama law, evidence that a parent abused one child is admissible with respect to allegations concerning a related child,[95] and (2) the confrontation clause guarantees the right to present such evidence to show third-party guilt.[96] The Order therefore should be reversed.

Second, counsel failed to investigate and introduce evidence that Jennings withheld from police and medical personnel E'bious's potential symptoms of trauma--including vomiting, diarrhea, sleeping for lengthy periods, not eating normally, *supra* 7--before Minor was alone with him, and then to confront Jennings with the inconsistencies in her statements regarding those symptoms and E'bious's medical history.[97] C.3060-63. Jennings had a history of inconsistent

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[95] *Biles v. State*, 715 So. 2d 878, 883-84 (Ala. Crim. App. 1997) (evidence of prior abuse against child unrelated to the victim is admissible to prove the identity of the victim's abuser (citing McElroy's Alabama Evidence § 69.01(8)));*Dabbs v. State*, 518 So. 2d 825, 829 (Ala. Crim. App. 1987) (abuse of a victim's sibling is admissible to show motive and intent to kill the victim); *Phelps v. State*, 435 So. 2d 158, 163 (Ala. Crim. App. 1983).

[96] *Chambers v. Mississippi*, 410 U.S. 284, 297 (1973); *Ex parte Griffin*, 790 So. 2d 351, 353-54 (Ala. 2000).

[97] Jennings told investigators at DCH that "E'bious had not been sick at all that day," 01-C.1036, and "denied the baby being sick," 01-C.978; *see* SC.3361:7-17, 3371:15-16. But Jennings (1) told police on April 17 that E'bious had been throwing up his milk on April 15, C.7249; *see* SC.3388:22-

statements and misrepresentations about her children's medical care. C.3068-69.[98] Yet, the State wrongly suggested that Minor's reports to law enforcement and medical personnel were inconsistent. *E.g.*, 01-R.769:21-770:6, 2084:1-14. Counsel's failures to show Jennings' inconsistent statements about E'bious and her children were prejudicial.[99]

The Order erred in rejecting prejudice related to this evidence. C.3802-12. There is no basis to find that the "record evidence supports her testimony that E'Bious was not 'sick' on April 15," C.3803, or that Jennings' testimony and statements have always been consistent, C.3804.[100]

3389:1, and (2) told her grandmother during a telephone call on the evening of April 15 that E'bious had diarrhea, 01-C.981.

[98] At the 1996 trial, Jennings testified that her daughter's medical records showed that she had a dislocated leg at birth. 96-R.736:22-737:10. That is not true. 96-SC.354; *see id.* 437; C.7227-28 (Pitts: injury occurred later). At the Hearing, Jennings gave more inconsistent testimony about these injuries and contradicted herself about them. SC.3379:17-20, *id.* 3380:15-25, *id.* 3380:18-21. Jennings also made three competing statements about her surviving son's hospital visit when he was 3 for a head contusion and head laceration. SC.3383:9-10 ("fell off a car,"); *id.* 3383:5-7 ("f[ell] off a toilet"); *id.* 3382:25-3384:13; *id.* 3381:18-3382:6 ("fell … off the second floor of the hallway" at school).

[99] Baten and Lowery testified that Jennings' inconsistent statements would have been material to their investigations. *E.g.*, C.4513 at 188:2-6, C.7629-32 ¶¶6-15.

[100] The Order ignores the evidence cited *supra* 69 n.97 that Jennings said E'bious was vomiting and had diarrhea, and

Third, despite recognizing that it was a significant issue at trial and that the prosecution suggested Minor's statements about this subject incriminated him,[101] counsel prejudiced Minor by failing to confront Jennings with her inconsistent statements on whether she struck E'bious's head on a door frame. The Order denied relief on the basis that "Jennings never stated or testified that she hit E'bious's head on a doorframe" and "none of E'bious injuries are consistent with someone hitting his head on a doorframe." C.3807. This conflicts with the record.[102]

Counsel's failures in preparing for and examining Jen-

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the inconsistencies about even those subjects alone. Further, inconsistencies aside, the Order fails to address Minor's showings that Jennings withheld information from medical professionals and investigators at DCH about E'bious's condition despite the importance of doing so. *See* C.3048 n.20, C.3060-62; 01-R.968, *id.* 1036, C.7267.

[101] 01-R.769:21-770:6, 791:18-792:5, 2084:1-14. Turberville testified that an "issue at trial [was] inconsistencies over whether the baby's head hit the door," but wrongly claimed "I had no way" to disprove Jennings' denial. C.5109:20-5110:16.

[102] (1) Medical records say "the mother … stated that … the infant's head was accidentally bumped against the door[,]" 01-C.801 (emphasis added), (2) Bush testified at a pretrial hearing that he "ha[d] a statement from Ms. Lakeisha Jennings she hit the baby's head on the door when she was exiting the apartment," 96-R.32:8-33:10 (The statement Bush mentions has never been produced.), and (3) the radiologist whose testimony the Order elsewhere credits said E'bious's skull fracture "certainly" could have been caused by the door frame. 96-R.855:10-17 (Lovett).

nings alone--given her unique importance--and in combination with counsel's other deficiencies create a reasonable probability of a different result.

ii. Officer Williams: Minor showed that counsel were ineffective for failing to investigate and introduce evidence that Jennings' aunt, TPD Officer Teena Williams, improperly inserted herself into the case, including the investigation of E'bious's abuse and death,[103] which was consistent with Officer Williams' actions in at least one other criminal investigation involving her family.[104]

Jennings and her family summoned Williams to the hospital shortly after E'bious arrived at DCH, *see* 96-R.864:9-

[103] C.5104:11-15 (did not investigate Williams); C.310-13 ¶¶52-57; C.30-33 ¶¶1-7. Counsel set out to attack Williams at trial and recognized the importance of doing so. 01-R.805:11-17; C.6579 at 260:7-12; C.5110:11-5111:8.

[104] That investigation involved her then-husband TCSD Deputy Fred Williams ("Fred"). In October 1996, TPD officers discovered marijuana in Fred's home. When Williams found out, she "beeped [Fred] … advised [him] what had occurred at his apartment and further advised [that] he needed to go to the apartment." C.8585. Officer Williams steered the inquiry away from her husband by telling investigators that Fred found the marijuana while working and called her to ask "whether he ha[d] enough for a case and [she] told him he didn't." C.8587. According to Williams, Fred did not report the marijuana because there was insufficient evidence to support a prosecution. *Id.* Although Fred first corroborated Officer Williams' claim, he later recanted. C.8586; C.8591.

14,[105] despite that they supposedly knew nothing about E'bious's injuries. Once at DCH, Williams--consistent with her actions in the 1996 investigation of her husband--used her position to gain special access, *see* 96-R.864:9-19; 01-R.1347:3-19, violating DCH and police procedures.[106] This evidence would have cast further doubt on the reliability of Bush's decision to so swiftly eliminate Jennings as a suspect, suggesting that his decision was swayed, whether directly or subconsciously, by the influence of Jennings' relatives in law enforcement.[107] The Order's rejection of the claim is an abuse of discretion.[108]

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[105] The jury never heard that Jennings' mother or grandmother requested that Lonny Boshell, the on-duty security guard at DCH who was in his TPD uniform on the night of E'bious's death, summon Officer Williams to DCH. C.7335 ¶¶3, 5.

[106] *See*, *e.g.*, C.7624 ¶13; SC.3178:9-24, SC.3188;13-25; SC.3253:14-3254:2, SC.3336:24-3337:16 (Gaut: "[O]nce [family members] act in their official capacity, *i.e.*, being on duty and being admitted into the trauma room, that crosses a line that we refer to as taking an active part in the investigation, and that's improper.").

[107] Fred Williams also inserted himself into investigation. 01-C.980.

[108] Without addressing Minor's prejudice showings, the Order denied relief by wrongly suggesting that Minor's claim was "based solely on the false premise that Officer Williams was involved in that [sic] investigation." C.3818. The only false premise is in the Order. Williams admitted "I was on duty," 96-R.864:10-11, was called to the hospital by the dispatcher, and used her police credentials to gain access

G. Failure To Move To Preclude Demonstratives Was IAC.

The Order erred in holding that the MTD Order precluded Minor's IAC claim regarding the failure to move *in limine* to bar witnesses from shaking dolls and presenting other inflammatory demonstrative evidence about SBS. C.3801-02 (citing Rule 32.7(d)).[109] Judge Wilson "dismissed [the motion *in limine* claim] without prejudice to the petitioner, and leave of cou[r]t is granted … to replead this claim." C.4434-35 (emphasis added). Minor repleaded the claim, SC.309-10 ¶¶49-51, and the State answered, SC.341 ¶16 (no preclusion). The Order therefore must be reversed.

H. Minor Is Entitled To A New Trial Based On Newly Discovered Evidence Bearing On His Innocence.

A new trial is warranted based on newly discovered scientific evidence on SBS that has emerged since Minor's 2001 trial. *See* Ala. R. Crim. P. 32.1(e).[110] The State claimed

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to areas off limits to family and the public, 96-R.864:9-19; C.7353 ¶3; C.7624 ¶13; 01-R.1346:12-19.

[109] Counsel knew that the State's witnesses would violently shake dolls as at the 1996 trial, C.5061:3-7, the Eleventh Circuit had held such SBS demonstrations were inadmissible because they have "overwhelm[ing] … unfairly prejudicial effects," *U.S. v. Gaskell*, 985 F.2d 1056, 1060-61 (11th Cir. 1993) (reversing conviction), and Turberville testified that "there's no question that [the doll shaking] was prejudicial, highly prejudicial." C.5061:21-5062:3.

[110] Under Rule 32.1(e), a conviction must be vacated where, as here, the facts: (1) were not known at trial, *Ward*, 89 So. 3d at 725, (2) are not cumulative, *id.* at 726, (3) are

E'bious must have been injured within the hour before he arrived at DCH because (i) he was shaken and (ii) a baby's injuries are "immediately obvious" thereafter, 01-R.2204:4-11 (summation),[111] and that Minor--who was alone with E'bious before his respiratory distress was recognized--must be guilty, *id.* 2204:4-2205:9.[112]

New science on "lucid intervals," however, shows that a baby's injuries are <u>not</u> always immediately apparent after shaking or head trauma. Children who suffer "'fatal head trauma may present as lucid before death.'" C.6277:1-6278:3 (Powers: discussing Arbogast et al., *Initial Neurologic Presentation in Young Children Sustaining Inflicted and Unintentional Fatal Head Injuries*, 116 Pediatrics 180, 181 (2005) [C.6504-6508]).[113] "[T]he current literature shows that there may be a lucid interval," meaning that "the baby may be unconscious shortly and then become conscious again

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not merely impeachment evidence, *id.*, (4) "go to the issue of the defendant's innocence," *id.* at 727-28. As to Rule 32.1(e)'s requirement that "'the result probably would have been different,'" *id.*, the petitioner does not need to show that the newly discovered evidence alone would have proved innocence. *Id.* at 727-28.

[111] The State relied on Downs, 01-R.1699 ("immediate"), and Powers, *id.* 1173:4-14 ("immediately clinically apparent").

[112] This ignored that E'bious was rarely seen lucid (not "sleeping") on April 15 before Minor was alone with him.

[113] *Accord Aleman v. Village of Hanover Park*, 662 F.3d 897, 902-03 (7th Cir. 2011) (citing Arbogast (2005)).

and be basically normal. It's somewhat like a football player having a concussion." SC.3136:15-3137:11 (Kelly); *see id.* 3052:10-3054:7 (Ophoven).

As other state courts have held under analogous statutes, such evidence "probably would change the result at trial" because "doctors now know children can remain lucid for much longer periods of time after suffering the injury." *In re Fero*, 367 P.3d 588, 598 (Wash. Ct. App. 2016). Because the jury was not "adequately advised about the possibility of a lucid interval," a new trial is warranted.[114] The new evidence bears on Minor's innocence, addresses when E'bious was injured, and, considered with "the other evidence presented to the jury," "the result probably would have been different." *Ward*, 89 So. 3d at 728.

The Order denied relief, claiming the lucid intervals evidence (1) "is not new," C.3796, and (2) is irrelevant because Minor's claim "incorrect[ly]" is "premised on the assumption that the State's guilt-phase theory was that E'bious suffered from SBS," whereas he "died from blunt force trauma." C.3798. Both points are wrong. *First*, the

[114] *Wis. v. Louis*, 332 Wis. 2d 803, 2011 WL 867677, at *3 (Wis. Ct. App. 2011); *see Fero*, 367 P.3d at 593-97 (same, and relying on Dr. Ophoven); *Wis. v. Edmunds*, 746 N.W.2d 590, 596 (Wis. Ct. App. 2008) (same).

lucid interval science is new. At least five courts have recognized the same science is new in cases post-dating this one,[115] and, as noted, Powers, Ophoven and Kelly all testified the science post-dates trial.[116] *Second*, the assertion that the State did not pursue an SBS theory (C.3798-99) is absurd (as Minor pointed out post-hearing, but the Order ignores, *see supra* § I). The State's summation alone said "this child was shaken," 01-R.2202:17-18, "we know

[115] *Fero*, 367 P.3d at 597-98 (conviction from 2003); *Louis*, 2011 WL 867677, *3-5 (child died in March 2005); *Aleman*, 662 F.3d at 902-03 (child died in September 2005); *Del Prete v. Thompson*, 10 F. Supp. 3d 907, 954-58 (N.D. Ill. 2014) (2003 trial); *Moore v. Newton-Embry*, 2011 WL 5143080, *5 (W.D. Okla. 2011) (2004 trial).

[116] The Order cites no contrary evidence, but concludes "Dr. Powers was well aware that scientific literature in 2001 supported" a "'lucid'" interval. C.3799 (emphasis added, citing 01-R.1173). This lacks any basis. Powers explained at the Hearing that his trial testimony was based on "the New England Journal [of Medicine] article from 1998 that summarized shaken baby." C.6220:17-21. That article stated: "there is no evidence of a prolonged interval of lucidity between the injury and the onset of symptoms in children …. Thus, an alert, well-appearing child has not already sustained a devastating acute injury that will become clinically obvious hours to days later." A.C. Duhaime et al., *Nonaccidental Head Injury in Infants: The 'Shaken-Baby Syndrome,'* 338 N. Engl. J. Med. 1822, 1825 (1998) (emphasis added). As in the article, Powers said at trial that the injuries would have been "almost immediately clinically apparent." 01-R.1173:14-1174:9. During Powers' Hearing testimony, he acknowledged that new science--in particular, the study by Arbogast "published in 2005"--demonstrates that young victims of fatal head trauma may present as lucid. C.6276:12-6278:3. Because that science was not available at trial, he did not consider it. *Id.*

that this child was shaken," *id.* 2203:3-4, "this child was shaken" and "Ebious was shaken," *id.* 2203:8-9.

III. MINOR'S IAC CLAIMS REQUIRE REVERSAL OF HIS SENTENCE.

A. The Order Erred In Rejecting Penalty Phase IAC.

1. Counsel's Penalty Phase Performance Was Deficient.

Ignoring the thrust of Minor's claim--*i.e.*, counsel conducted little, if any, mitigation investigation--and the law, the Order errs in finding no deficient performance. C.3833-34.[117] The law requires "a thorough investigation of the defendant's background" for "all reasonably available mitigating evidence," *Wiggins v. Smith*, 539 U.S. 510, 522-24 (2003); *accord Williams*, 529 U.S. at 396, including obtaining "'information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like.'" *Daniel*, 2016 WL 2849481, *9 (alterations in original omitted).

Counsel did not fulfill these duties. Although they acknowledged that preparing a mitigation case "'is extremely time consuming'" and takes months,[118] Turberville did not bill any time to mitigation until the day Minor was con-

[117] Instead, the Order relied on the number of witnesses called (ignoring they were not prepared) and the number of pages of testimony (ignoring its content). C.3833.
[118] C.4991:9-12, 5202:8-17; C.6534 at 65:7-20.

victed. C.5140:2-7; *see also* C.6622 (Bockman). Nor did counsel hire an investigator or expert to prepare a mitigation case.[119] Thus, counsel failed to:

- seek or obtain education, mental health, health or correctional records.[120]
- investigate Minor's faith. C.5176:16-20.
- meet with Minor until November 29, 2000, or to do a mitigation interview with him or his family.[121]
- familiarize themselves with the mitigating evidence obtained by Minor's attorneys for his 1996 trial, including evidence the court credited as mitigating factors. 96-C.313-15; *Contra Wiggins*, 539 U.S. at 527.

As to the 14 penalty phase witnesses whose existence alone the Order cites as evidence of effectiveness, each witness who testified during the Hearing attested that counsel did not interview or prepare them to testify at trial.[122] Thus,

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[119] Turberville and Bockman blamed each other for the failure. C.5136:4-10, 5201:24-5202:1; C.6537-38 at 78:18-82:17, 6566 at 193:17-194:8.

[120] 01-C.339, 341, 344-53; C.5137:11-23, 5138:13-15.

[121] C.5139:9-17; C.6543 at 102:7-103:8; *contra Daniel*, 2016 WL 2849481, *10 ("no competent attorney in 2003 would have failed to conduct timely and thorough background interviews with the defendant and his immediate family members"). Thus, Turberville did not know, for example, Minor had regularly seen a psychologist. C.5137:21-23.

[122] *See* SC.3570:9-3571:25 (Prince); C.6171 ¶¶2-3 (Lakeisha Minor); SC.3410:13-3413:6 (Dorothy Minor); C.6160 ¶¶2-3 (Marcus Minor); C.6163-6164 ¶¶3-4 (Cunningham); C.7548-49 ¶¶3-4 (Duncan); C.6149-50, ¶¶3-5 (Vadell Washington); C.6166 ¶3 (Melba Wilson); C.6169 ¶8 (Madison); SC.3440:5-3442:17 (Franks); C.7608 ¶15 (Franks). Rule 32 counsel was unable to obtain testimony from the last three witnesses

these individuals testified as mere character witnesses. *See Ferrell v. Hall*, 640 F.3d 1199, 1228-29 (11th Cir. 2011) (IAC because counsel "did not seek any non-character mitigating evidence" from witnesses).

2. Minor Was Prejudiced As a Result.

The Order erred in rejecting prejudice. First, reversal is required because in violation of settled law and ignoring Minor's showings (*e.g.*, C.3021, 2SC.179-81), the Order assessed each mitigating factor in isolation, not prejudice from the whole mitigation record. C.3836, 3839, 3842, 3844-45, 3847, 3849. But a court must assess whether:

> the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence.

Williams, 529 U.S. at 399.[123]

Second, the Order ignored the increased likelihood of a different outcome because two jurors voted for life. *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1356 (11th Cir.

(Bryant, McMiller, and Johnson), but there is no basis to believe that counsel prepared these three individuals given their conduct with the others. C.4519-20 at 212:19-213:9.

[123] *Id.* at 397-98 ("fail[ure] to evaluate the totality of the available mitigation evidence"); *Wiggins*, 539 U.S. at 534; *Porter*, 558 U.S. at 39; *Daniel*, 2016 WL 2849481, at *22.

2011) (finding prejudice "[g]iven that some jurors nonetheless 'were inclined to mercy even with having been presented with so little mitigating evidence'").[124]

Third, the totality of mitigation evidence demonstrates a reasonable probability of a different outcome because:

- The evidence would have disproved the thrust of the State's aggravation case, *i.e.*, Minor was a danger to his fellow inmates and society, which it emphasized by calling Minor a "monster" and "a man born without a conscience." 01-R.2220:12, 2384:3-5, 2401:14-16, 2413:6-12, 2423:10-2424:8. Alabama Department of Corrections (ADOC) records proved Minor's exemplary conduct in prison and the absence of future dangerousness. C.6814-27, 6830.[125] These are factors so critical to mitigation that they "may not be excluded from the sentencer's consideration." *Skipper v. S.C.*, 476 U.S. 1, 5 (1986); *see Hammond v. Hall*, 586 F.3d 1289, 1337 (11th Cir. 2009). Prison ministry volunteers confirmed that Minor posed no danger, and dispelled the

[124] *Accord Williams*, 542 F.3d at 1343; *Hardwick v. Crosby*, 320 F.3d 1127, 1191 & n.218 (11th Cir. 2003).

[125] Dr. Karen Salekin, Ph.D, explained that the records showing Minor's exemplary prison discipline were significant to "understanding … who he is in terms of his behavior within a very stressful environment," and predict a lack of dangerousness. SC.3515:7-9; *id.* 3511:19-3513:1.

State's claims. *E.g.*, SC.3464:21-3465:5 ("A man without a conscience couldn't be the kind of man, the personality, the way he cares for other people that Willie Minor is.").[126]

- At least five witnesses would have testified about Minor's religious devotion before prison and participation in Kairos prison ministry. *Williams*, 529 U.S. at 396 (finding "prison ministry program" participation significant mitigating evidence). They provided compelling testimony about Minor's longstanding strong faith.[127] Religion was central at trial (01-R.2285:8-17, 2376:22-2377:3, 2504:21-2505:17), and Turberville testified that "religion was a potential way to get through to" jurors. C.5173:11-17, 5174:9-12.[128]

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[126] *Accord* C.7659 ¶9 ("In all the hours I have spent with Willie, I have never witnessed any violent tendencies. He has a steady, warm, and friendly presence."); SC.3464:10-20; SC.3476:21-77:4 (non-violent). In addition to the failure to assess prejudice related to this evidence alongside other mitigation evidence, *Williams*, 529 U.S. at 397-99, the Order's assertion the evidence was cumulative is baseless. C.3836. Testimony from relatives and neighbors that Minor was not dangerous before his imprisonment years earlier (*id.*) is not comparable to ADOC records and up-to-date testimony about Minor's conduct in prison.

[127] *E.g.*, C.7659 ¶¶5, 8; 3353:20-3355:4, SC.3460:18-3461:9, SC.3471:3-3473:6, 3580:8-23.

[128] In addition to wrongly considering its potential prejudice in a vacuum, C.3839; *supra* 79-80, the Order categorically dismisses this evidence because Minor had been found guilty. C.3839. This makes little sense. Mitigation evi-

- Medical records showed Minor long struggled with mental health issues and substance abuse. C.6809, 6828-29, 6875-7130. They detail multiple in-patient hospital treatments, suicide attempts and a diagnosis of adjustment disorder with depression. C.6875-7130. The records also demonstrate that Minor began using drugs and alcohol as a young teenager, and by age 19, Minor had a "long history of alcoholism, marijuana and crack cocaine abuse." *E.g.*, C.6934. They also show that after several attempts, Minor overcame his crack cocaine addiction. C.6809, 6828-29, 6875-7130. The failure to present such mitigating evidence is prejudicial. *Rompilla v. Beard,* 545 U.S. 374, 390-93 (2005); *Ferrell*, 640 F.3d at 1230-35; C.5143:19-5144:4 (Turberville: evidence of early drug use is "extremely important" to mitigation).[129]

- Official records of Minor's prior convictions would have diminished the State's attempt to prove aggravation.

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dence always is presented post-conviction and sways jurors nonetheless (and two jurors already had been persuaded).

[129] The Order again errs not only by considering the evidence in isolation, but also by deeming medical and psychological records--and Dr. Salekin's testimony about them (*e.g.*, SC.3521:15-3522:24)--cumulative of one witness's convoluted testimony about Minor's addiction. C.3844; *see* 01-R.2389:11-25.

Rompilla, 545 U.S. at 383. First, the State repeatedly used the term "rape" without context, suggesting that Minor was a violent predator.[130] But the defense failed to show, using the records, that the second-degree rape conviction was statutory rape. As a teen, Minor had sexual intercourse with a willing, though below the age of consent, 15-year-old whose father pressed charges when she thought she was pregnant. C.5928-30. Failing to provide context is prejudicial because "[r]ape is, of course, highly inflammatory." *Daniel*, 2016 WL 2849481, *22.[131] Second, records show the assault conviction resulted from a group altercation and was arguably self-defense. C.5931-32.

- Evidence about Minor's social history and formative years showed the challenges he faced in his neighborhood, which preceded his addiction, and his progress, thus humanizing Minor in a way never done at trial.[132]

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[130] 01-C.2323:23-2324:7, 2447:2-12, 2480-19, 2522:13-2523:1, 2526:13-2527:4.

[131] The suggestion that State records describing Minor's statutory rape conviction are cumulative of his testimony about it is a farce. C.3847. Records gave his partner's perspective, and had objectivity that Minor did not.

[132] C.6161-62 ¶¶5, 11-12, C.7608 ¶15; C.8756-76, 3416:20-3417:7, 3436:11-3437:19, SC.3481:1-10, 3490:12-16. Again erroneously considering this evidence in isolation, C.3845, 3849, and despite admitting that it is "different" from the

In sum, Minor adduced evidence on significant mitigation subjects--supported by impartial testimony and records--about which the jury did not hear. Prejudice exists as a result, especially given the split jury.

B. Counsel's Attacks On The Jury Require Reversal.

Minor showed IAC because Turberville attacked the jury during penalty phase opening statements and summation. C.3117-18; 2SC.199-201. Because the Order ignores the claim, C.3771-3857, reversal is warranted. Ala. R. Crim. P. 32.9(d); *Ex parte McCall*, 30 So. 3d 400, 404 (Ala. 2008). The deficiency also merits a new sentencing trial.

Rather than humanizing Minor or providing a roadmap to weighing aggravating and mitigating circumstances, Turberville opened by saying he had no respect for the jury's guilt phase decision, 01-R.2280:14-18, mocking them for convicting Minor and still "[getting] home on time for dinner," *id.* 2283:11-16, and accusing them of being the

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trial evidence, C.3845, the Order claims that testimony from Dr. Salekin and teacher Willie Cammack would have been no more persuasive than testimony from friends and family. C.3845, 3849. This evidence far surpasses generic anecdotes about Minor being nice to neighbors. It humanizes Minor in many important aspects of his life. C.3478:15-22, 3481:1-18, 3489:12-22, 3524:8-25 (school); *id.* 3483:17-3488:17, 3519:17-25, 3521:15-3529:20 (violent and drug-filled community); *id.* 3525:5-3532:24 (addiction and recovery).

most bloodthirsty group of people he ever saw in voir dire, *id.* 2284:14-2285:7. His summation escalated the insults by comparing jurors to Charles Manson. *Id.* 2489:6-14.

No reasonable attorney would make such statements. They supported no mitigation strategy and "did not focus the jury's attention on [the petitioner's] character and record or the circumstances underlying the crime." *Dobbs v. Turpin*, 142 F.3d 1383, 1389 (11th Cir. 1998). They were inflammatory and turned jurors against Minor. *King v. Strickland*, 748 F.2d 1462, 1464 (11th Cir. 1984).

C. The Order Erred In Denying The IAC Claim About Counsel's Failure To Object To Or Appeal Instructions.

The Order wrongly denied relief on Minor's IAC claim based on failures to object to and/or appeal three erroneous jury instructions. C.3850-57. Failing to secure correct instructions is IAC. *Kuk v. State*, 602 So. 2d 1213, 1216 (Ala. Crim. App. 1992).

1. The Court Failed to Instruct That An Aggravating Factor Must Be Found Unanimously.

Counsel were ineffective because rather than correctly telling the jury that it had to unanimously find aggravating circumstances, the court instructed: "In this proceeding, your verdict need not be unanimous. At least ten jurors must vote for death before you can recommend a sen-

tence of death," 01-R.2539:8-11 (emphasis added); *id.* 2537:21-25 (death permissible if "at least ten jurors find [] statutory aggravating circumstances").[133]

These instructions violated Alabama law. The Alabama Supreme Court's pattern instructions required:

> [B]efore you can even consider recommending that the defendant's punishment be death, each and every one of you must be convinced beyond a reasonable doubt based upon the evidence that at least one or more of the aggravating circumstances exist.

C.8439 (emphasis added). Thus, the failure to object was ineffective. *Kuk*, 602 So. 2d at 1216.

The Order erroneously held otherwise. First, it stated that this Court "held that the trial court 'properly instructed' the jury regarding the 'applicable law' at the penalty phase of the trial," including "'the finding of any aggravating and mitigating circumstances [and] the weighing of those circumstances.'" C.3851 (quoting *Minor*, 914 So. 2d at 444). But counsel had not challenged the instructions on direct appeal. The quoted language is boilerplate regarding

[133] The court also did not instruct that a life sentence was required if any juror found that the State did not prove an aggravating circumstance. Rather, the court said the jury could not recommend life without unanimously finding "either that no aggravating circumstances exist or that one or more aggravating circumstances exist but do not outweigh the mitigating circumstances." *Id.* 2541:3-8 (emphasis added).

the duty to independently review the record for plain error. *Minor*, 914 So. 2d at 444. This Court's *sua sponte* statement is not a holding on the correctness of the jury instructions now at issue.[134]

Second, invoking *Ex parte McNabb*, 887 So. 2d 998 (Ala. 2004), the Order said there was no error because:

> by instructing the jurors that they were not required to unanimously find the existence of any mitigating circumstances, the trial court put the jurors on notice that they were in fact required to unanimously find the existence of an aggravating circumstance.

C.3853 (emphasis added). There is no support for this reasoning, because the trial court here suggested that the jury was required to unanimously find mitigating circumstances.[135] The Order wrongly describes the instruction as "all but identical to the instruction" in *McNabb*. C.3852. The *McNabb* court explicitly instructed: "unlike aggravation, you are not required to unanimously agree in order to consider evidence mitigating." 887 So. 2d at 1005-06 (emphasis in original). Judge Wilson's instructions did not contrast mitigation and aggravation, or say that life was required

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[134] Even where a direct appeal raises a claim waived at trial, plain error review is a different standard than, and thus does not foreclose, prejudice under *Strickland. Ex parte Taylor*, 10 So. 3d 1075, 1078 (Ala. 2005).

[135] 01-R.2533:4-15, 2536:6-15, 2540:25-2541:8.

if a single juror did not find an aggravating circumstance. 01-R.2541:3-8 ("If the jury determines … no aggravating circumstances exist ….") (emphasis added). The failure to object was deficient and prejudicial.

2. The Jury Was Wrongly Instructed That Mitigating Factors Had To Outweigh Aggravating Factors.

Counsel did not object to instructions--and the DA's comments reiterating them--that "it is only if the mitigating circumstances outweigh the aggravating that you should return a recommendation of life without parole." 01-R.2527:15-18. The instructions and DA's statement were plainly wrong under Alabama law. A jury can return a death verdict only if it finds that "one or more aggravating circumstances … exist and that they outweigh the mitigating circumstances." Ala. Code § 13A-5-49; *id.* § 13A-5-46(e).

> This statutory law entitles a defendant to a recommendation of life imprisonment without parole even if the mitigating circumstances do not outweigh the aggravating circumstances, if the mitigating circumstances at least equal the aggravating circumstances.

Ex parte Bryant, 951 So. 2d 724, 728 (Ala. 2002). *Bryant* holds that it is plain error to fail to instruct that a life sentence is required if the mitigating and aggravating circumstances are equal. *Id.* at 727-30. Minor's jury lacked these instructions. Counsel's failure was prejudicial. *Id.*

The Order denied relief, wrongly stating that Judge Wilson dismissed this claim. C.3853-54. *First*, this ignored that the MTD Order explicitly held that Minor's "claim regarding the DA's statement [reiterating the erroneous weighing instruction] is left intact for an evidentiary hearing." C.4442. *Second*, the MTD Order never addressed Minor's IAC claim related to the court's erroneous instruction that any mitigating circumstance may be sufficient to support a life sentence "provid[ed] that the mitigating circumstances outweigh any aggravating circumstance or circumstances." 01-R.2538:23-25 (emphasis added); *id.* 2556:21-23 (same). Instead of ruling on that challenged instruction's incorrect statement, Judge Wilson noted that he had instructed the jury correctly at one point. C.4442. But that does not nullify the later misstatements, especially because the last instruction was wrong. 01-R.2556:18-23.

3. The Court Erroneously Instructed That The Jury Had To Unanimously Find Mitigating Factors.

Counsel were ineffective for failing to object to the instruction that the jury had to unanimously find mitigating circumstances. 01-R.2549-62. The Order claims that the jury was "never instructed" it had to do so. C.3854. That is baseless. When the jury was first charged, Minor's coun-

sel successfully objected to an instruction requiring unanimity for mitigating circumstances. 01-R.2545-46. The court amended its instructions, stating "you don't all have to agree as to whether that mitigating circumstance exists." *Id.* 2546:13-20. After that instruction, the jury could not reach a verdict and was re-charged. *Id.* 2549. In re-charging, although the court omitted the lack of unanimity instruction, counsel did not object. *Id.* 2549-62.

This was deficient and prejudicial. *McKoy v. N.C.*, 494 U.S. 433, 439-44 (1990) (requiring unanimity as to mitigation is unconstitutional). Indeed, the jury could not reach a verdict when correctly instructed, but then immediately returned a verdict of death after being wrongly re-charged.

4. Failure To Challenge Instructions On Appeal.

Counsel were ineffective on appeal for failing to raise incorrect instructions. The Order is unsupported by the record and wrong as a matter of a law. C.3854-57.

First, appellate counsel were ineffective for failing to challenge the instruction that did not advise what verdict was required if aggravating and mitigating factors were equal. As shown *supra* III.C.2, the Alabama Supreme Court held that indistinguishable instructions required re-

versal for plain error. *Bryant*, 951 So. 2d at 728, 730.

Second, despite that counsel submitted a supplemental brief on appeal regarding *Ring v. Arizona*, 536 U.S. 584 (2002), they did not raise that the instructions here violated the then-newly issued decision in *McNabb* applying *Ring*. This was ineffective. *McNabb* requires a defendant be sentenced to life unless the jury unanimously finds beyond a reasonable doubt at least one aggravating factor. 887 So. 2d at 1004-05 (citing *Ring*, 536 U.S. at 609). Minor was prejudiced because the erroneous instructions failed to ensure that all jurors found an aggravating circumstance. *See id.* at 1005. The Order denied relief, again wrongly saying the instructions tracked those approved in *McNabb*. C.3855.

IV. THE COURT ERRED IN REFUSING TO CONSIDER EVIDENCE OF TURBERVILLE'S DISCIPLINARY PROCEDEEDINGS AND DISBARMENT.

The court erred in denying admission of exhibits Minor tendered at the Hearing regarding disciplinary proceedings, civil litigation and other distractions Turberville faced while representing Minor. C.3001.[136] These events culminated

[136] C.8080-135, C.8175-359, C.8676-81, C.8688-755 (exhibits). During his work on this case, Turberville was litigating civil and disciplinary proceedings brought by Integrity Capital, which Turberville failed to reimburse for cash advances. C.8080-8119. After winning a compensatory damages award against Turberville, C.8308, Integrity Capital won a

in a series of suspensions by the Alabama Bar against Turberville while Minor's appeal was pending. C.8688, 8734-55. In 2008, Turberville pleaded guilty to more than a dozen disciplinary charges. He was disbarred, retroactive to January 6, 2004, as a result. C.8688, C.8743-55.

The evidence was relevant to assessing whether Turberville provided competent counsel or could make strategic decisions. Ala. R. Evid. 401, 402. Indeed, during periods significant to his representation, Turberville was defending himself against the Integrity Capital-related litigation and disciplinary proceedings, and other Disciplinary Commission complaints.[137] Contemporaneous with that activity, Turberville went significant periods in which he spent few hours on *Minor*. C.5253-54, 5259.[138]

Despite the record and uniform holdings that "counsel's

$1.5 million punitive damages award that was affirmed while Minor's appeal was pending, C.8346.

[137] For example, two days before Minor's September 7, 2000 pretrial conference, Turberville moved the Disciplinary Commission to reconsider a formal reprimand against him. C.8123-26; *see* C.8127-29 (activity in September).

[138] Turberville had not reviewed any evidence in Minor's case by October 13, 2000, but spent only 1.4 hours on the case between October 13-23, and did no more work until November 3 (.25 hours). C.5259. Similarly, amidst disciplinary activity and litigation just before trial, *see* C.8271; C.8690-91, Turberville charged no time between December 30, 2000 and January 10, 2001. C.5261.

disciplinary history provides background that must be considered" in assessing IAC,[139] the court refused to admit the evidence. The IAC claims, at minimum, should be reversed and remanded for the court to consider whether the disciplinary proceedings and civil litigation contributed to or caused Turberville to perform deficiently.

V. THE POST-HEARING ORDER MUST BE VACATED BECAUSE IT FAILS TO ADDRESS ALL OF THE CLAIMS MINOR PRESENTED.

The Order says it denies relief on the entirety of the governing petition and its addenda, but lacks findings on several IAC claims upon which Minor submitted evidence after they survived dismissal. This requires reversal. Ala. R. Crim. P. 32.9(d); *McCall*, 30 So. 3d at 404; *Hartzog v. State*, 733 So. 2d 461, 462 (Ala. Crim. App. 1997).

The Order says nothing about Minor's IAC claims that counsel failed to introduce evidence to attack Bush's credibility, qualifications and potential bias in investigating this abuse case. Judge Wilson recused himself from resolving these claims in the MTD Order, C.4437-38, and, based on subsequent investigation, Minor's Second Addendum added

[139] *Gosselin v. Warren*, 2014 WL 5285937, at *12 (E.D. Mich. 2014) (citation omitted); *accord Sanders v. Ratelle*, 21 F.3d 1446, 1460 (9th Cir. 1994); *Thompson v. Quarterman*, 629 F. Supp. 2d 665, 680 n.9 (S.D. Tex. 2007).

more detail about them (C.320-21 ¶¶72-75). Competent counsel would have shown that by the time of trial Bush had resigned from the TPD--to avoid being fired--after being (1) arrested for sexually harassing (i.e., fondling against her wishes) a minor who was working in his yard, and (2) previously suspended from duty for (i) using his police car to chase a woman who ended an affair with him, and (ii) a domestic violence incident involving his ex-wife. C.8144-52; *State v. Bush*, No. 99060079, Ala. Uniform Incident/Offense Report (Tuscaloosa Dist. Ct. 1999).[140]

This evidence would have undermined Bush's competence, credibility and stature as an officer, which were central considerations at trial. Despite that counsel's arguments attacked Bush and sought to show that his judgment was suspect, counsel failed to introduce any evidence to show that Bush repeatedly had abused the public trust, had been disciplined by the TPD for his own domestic violence and sexual abuse and therefore may have been predisposed to believe that another man (Minor) was more apt than Jennings to commit abuse, and did not deserve the jury's trust. The

[140] This case file is not sealed although it identifies the minor. Thus, counsel requested judicial notice of those records, Ala. R. Evid. 201(b), rather than injecting them into another public record given their sensitive content.

failure to address this and other claims (C.117-18 n.60, 136-48, 2SC.162-70) requires reversal.

VI. THE MTD ORDER MUST BE REVERSED.

A. The MTD Order Should Be Reversed Because Judge Wilson Should Have Recused Himself From The Case.

The MTD Order should be reversed in full because Judge Wilson should have recused himself from deciding any claims in the case under Alabama Canon of Judicial Ethics 3(C)(1)(a). "[R]ecusal is required where facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge." *Acromag-Viking v. Blalock*, 420 So. 2d 60, 61 (Ala. 1982) (emphasis added). Judge Wilson recused himself from ruling on multiple claims involving Bush because they are stepbrothers. C.4437-38, 4448.[141]

Without explaining why the same relationship did not make it "reasonable" to question how Judge Wilson could rule impartially on any claims given Bush's central role in the case or identifying a basis for partial recusal, Judge

[141] Judge Wilson did not reveal that Bush is his stepbrother until the December 21, 2007 motion to dismiss hearing. R.87:17-24, C.118-20, 4438 (his father married Bush's mother 2-3 years earlier). Judge Wilson initially said he would not recuse based on the relationship, R.87:17-24, before partially recusing himself in the MTD Order. C.4438.

Wilson dismissed many Rule 32 claims. But the Eleventh Circuit has held--and Alabama courts have suggested--that there is no partial recusal: "When a district judge considers recusal, he must consider his potential conflict with regard to the overall case, not just his potential conflict for each separate issue …." *Murray v. Scott*, 253 F.3d 1308, 1310-11 (11th Cir. 2001); *see Ex parte City of Dothan Pers. Bd.*, 831 So. 2d 1, 6 (Ala. 2002) (recusal applies to "particular case").

B. The MTD Order Erred In Dismissing IAC Claims.

The MTD Order's dismissal of many IAC claims also requires reversal because Judge Wilson, *inter alia*, misapplied *Strickland*'s prejudice analysis, failed to recognize the difference between deficient investigation/preparation, and resolved factual disputes on the pleadings. The dismissal of claims regarding counsel's failure to investigate the deficient work of law enforcement and the failure to prepare for medical evidence at trial are illustrative.

1. Despite counsel's strategy of showing the police investigation and Bush were unreliable and untrustworthy,[142]

[142] 01-R.773:2-10, 803:1-5, 2140:24-2141:2 ("[Bush] said, … let's see how we can convey to the jury that this person

Minor pleaded counsel were deficient for failing to investigate or present evidence on this subject, 3SC.166-202 ¶¶152-82, which was prejudicial, *id.* ¶¶153, 155, 159, 169-71, 173, 177, 179, 182. The court erred in dismissing on the basis that counsel was not deficient. C.4409-14.

First, even if partial recusal were permissible, *supra* § VI.A, Judge Wilson had to recuse because this claim hinged on Bush.[143] *Second*, Judge Wilson erred by dismissing the claim based on his analysis of counsel's in-court performance, C.4409-10, despite that Minor's claim was based on counsel's out-of-court failures to investigate and prepare. 3SC.166-67 ¶ 152 ("counsel were ineffective in their inquiry into the investigations")[144]; *see Kimmelman*, 477 U.S. at 385-86 ("vigorous cross-examination, attempts to discredit witnesses, and effort to establish a different version of the facts" does not overcome failure to investigate and prepare). Thus, the court improperly resolved evidentiary issues about counsel's deficient preparation and in-

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was guilty from minute one."); *id.* 2143:22-2144:9, 2149:10-2150:10 ("Ol' Bush, he's slick, too.").

[143] *E.g.*, 3SC.167-69 ¶154 ("fail[ure] to collect … evidence … to persuade the jury that Mr. Bush … lacked credibility").

[144] 3SC.169 ¶155 (failure to "adequately review[]" evidence); *id.* 187 ¶¶171-72 (lack of familiarity with evidence and failure to investigate); C.4409 (preparations).

vestigation against Minor on the pleadings.[145] *Third*, the court applied the wrong prejudice standard. C.4409-10 (requiring showing that "the result of the trial would have been any different"); *contra Strickland*, 466 U.S. at 693; *Evans*, 699 F.3d at 1269. *Fourth*, the MTD Order does not acknowledge that counsel prejudiced Minor because they presented no evidence to support their argument that Bush and the investigators rushed to judgment, despite that the evidence existed.[146] As Minor pleaded, these failures were prejudicial because the evidence would have discredited the policework--a proven strategy for winning trials (and one counsel selected here). *Kyles*, 514 U.S. at 445-57. Whether alone or in combination with the evidence omitted because of counsel's other instances of ineffectiveness, there is a reasonable probability of a different outcome. 3SC.201-02

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[145] *See supra* 10 n.14; *Ex parte Brooks*, 695 So. 2d 184, 191 (Ala. 1997).

[146] For example, the MTD Order ignores Minor's pleadings, 3SC.166-73 ¶¶152-59, regarding failure to review and use Bush's 1996 testimony that he closed his investigation within 90 minutes of E'Bious's death. 96-R.1034:8-1035:1. Bush's testimony proves that the policework was unreliable even if eventually they "interviewed every witness who would have had knowledge of the victim's injuries." C.4409-10. It would have showed that as Turberville described--without evidence--these were after-the-fact efforts to validate Bush's "deci[sion that] Willie Minor is the guilty one." 01-R.2143:22-2144:4.

¶182.

2. Judge Wilson made similar errors in dismissing Minor's nearly 100 pages of allegations that counsel failed to investigate the medical evidence and theories before trial, 3SC.67-164 ¶¶64-149;[147] *see* C.4405-06, 4407, 4408, 4409 (dismissing the claims in just several sentences). Although acknowledging that the claims were based on "preparation [that] was inadequate," "[f]ailure[s] to adequately investigate," and failures to "[p]repare," Judge Wilson reasoned that because he saw the trial, he could dismiss based on lack of deficient performance.[148] This is erroneous

[147] Minor pleaded, *e.g.*, that counsel: failed to research relevant medical literature, 3SC.68-70 ¶¶65-66, failed to prepare experts to testify, *id.* 62-87 ¶¶59, 76-77, 79-81, unreasonably called a forensic psychiatrist to testify about forensic pathology, *id.* 83-89 ¶¶78-79, 82 & n.40, and did not learn the medical concepts, *id.* 68-70 ¶¶65-66; *see id.* 60-166 ¶¶60, 72, 75, 77-78, 82 & n.40, 83, 96-97, 108, 148-49, 151 (prejudice). Among those medical issues for which counsel did not prepare were the doll shaking demonstrations, which as shown *supra* § II.G would have been prevented pursuant to *Gaskell*, 985 F.2d at 1060-62. The MTD order dismisses Minor's IAC claim (applying the wrong prejudice standard, no less) that counsel failed to object to the State's doll shaking demonstrative, C.4405-06, had counsel objected at trial. 3SC.90-127 ¶¶110-112.

[148] For example, the MTD Order says "the [trial] record refutes [Minor's] claims" of "[f]ailure to adequately investigate" and failure to "[p]repare." C.4405. Every passage dismissing claims is in the same vein. *Id.* 4407 (resolving claim that counsel "did not investigate" based on trial testimony); *id.* 4405-06, 4408, 4409.

for the reasons just shown *supra* 97-98. Reversal also is required because the MTD Order again applies the wrong prejudice standard. C.4406 (requiring showing that "the result of the trial would have been different"); *id.* 4405 (same).

3. Consistent with the showings *supra* § II.F.1.c regarding the failure to proffer abuse evidence, the MTD Order erred by dismissing the IAC claims regarding counsel's failure to competently advocate for the admission of any such evidence, which was not barred by the *in limine* ruling and is admissible under Alabama law. C.4416.[149]

CONCLUSION

For all these reasons, Minor is entitled to a new trial or, in the alternative, a new penalty phase trial. In the further alternative, the Order should be reversed and remanded because the court did not address all of Minor's claims. In the further alternative, the MTD Order should be reversed and the claims therein set for hearing.

[149] The MTD order also erred in dismissing IAC claims about the failure to show Minor's devotion to Jennings' children. C.4420. The MTD Order mischaracterizes the evidence as irrelevant despite that "tender care and kind treatment" of someone defendant is alleged to have harmed is admissible. C.W. Gamble et al., *McElroy's Alabama Evidence* § 45.01(9) (6th Ed. 2009); 3SC.234-37 ¶¶224-28.

June 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of June, 2016, served a copy of the above and foregoing document by United States Mail and the Alabama Court Online Information Service ("ACIS") on the following:

Hon. Henry M. Johnson
Hon. Thomas R. Govan, Jr.
Hon. Richard D. Anderson
Assistants to the Attorney General
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501 Washington Avenue
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/s/ Eamon P. Joyce

Appendix A

SUMMARY OF RULINGS AND ACTIONS ADVERSE TO APPELLANT
(Ala. R. App. P. 28(a)(5))

Record Page No	Summary
C.4400-4450	Partially dismissing Minor's Third Amended Rule 32 petition
C.213	Denying Minor's Motion for Reconsideration of the order partially dismissing Minor's Third Amended Rule 32 petition
C.3001	Refusing to consider Minor's offering of evidence of Turberville's disciplinary proceedings and disbarment, which were concurrent with and likely contributed to his constitutionally deficient performance
C.3771-3857 [C.3880-3989]	Adopting the State's Proposed Order denying Minor's Rule 32 Petition [Redline comparing the Circuit Court's Order and the State's Proposed Order]
C.3990	Denying Minor's Objection to the Circuit Court's adoption of the State's proposed order denying Minor's Third Amended Rule 32 petition

Appendix B

RECORD PAGE AND VOLUME KEY

Record Volume	Pages of the Record Volume	Supplemental Record Volume	Pages of the Supplemental Record	Second Supplemental Record Volume	Pages of the Second Supplemental Record	Third Supplemental Record Volume	Pages of the Third Supplemental Record
1	C.1-200	1	SC.1-200	1	2SC.1-200	1	3SC.1-200
2	C.201-400	2	SC.201-400	2	2SC.201-221	2	3SC.201-400
3	C.401-600	3	SC.401-600	[redacted]		3	3SC.401-415
4	C.601-800	4	SC.601-800				
5	C.801-1000	5	SC.801-1000				
6	C.1001-1200	6	SC.1001-1200				
7	C.1201-1400	7	SC.1201-1400				
8	C.1401-1600	8	SC.1401-1600				
9	C.1601-1800	9	SC.1601-1800				
10	C.1801-2000	10	SC.1801-2000				
11	C.2001-2200	11	SC.2001-2200				
12	C.2201-2400	12	SC.2201-2400				
13	C.2401-2600	13	SC.2401-2600				
14	C.2601-2800	14	SC.2601-2800				
15	C.2801-3000	15	SC.2801-2973; SC.2974-3000				
16	C.3001-3200	16	SC.3001-3200				

17	C.3201-3400	17	SC.3201-3400
18	C.3401-3600	18	SC.3401-3600
19	C.3601-3800	19	SC.3601-3618; SC.3619-3627
20	C.3801-4000		
21	C.4001-4200		
22	C.4201-4400		
23	C.4401-4600		
24	C.4601-4800		
25	C.4801-5000		
26	C.5001-5200		
27	C.5201-5400		
28	C.5401-5600		
29	C.5601-5800		
30	C.5801-6000		
31	C.6001-6200		
32	C.6201-6400		
33	C.6401-6600		
34	C.6601-6800		
35	C.6801-7000		
36	C.7001-7200		

37	C.7201-7400	[redacted]
38	C.7401-7600	
39	C.7601-7800	
40	C.7801-8000	
41	C.8001-8200	
42	C.8201-8400	
43	C.8401-8600	
44	C.8601-8800	
45	C.8801-9000	
46	C.9001-9029; R.1-171	
47	R.172-371	
48	R.372-571	
49	R.572-771	
50	R.772-932	

Appendix C

REPRODUCTION OF CITED STATUTES AND UNREPORTED CASE

Code of Alabama
Title 13a. Criminal Code. (Refs & Annos)
Chapter 5. Punishments and Sentences. (Refs & Annos)
Article 2. Death Penalty and Life Imprisonment Without Parole. (Refs & Annos)

Ala.Code 1975 § 13A-5-46

§ 13A-5-46. Sentence hearing -- Conducted before jury unless waived; trial jury to sit unless impossible or impracticable; separation of jury; instructions to jury; advisory verdicts; vote required; mistrial; waiver of right to advisory verdict.

Currentness

(a) Unless both parties with the consent of the court waive the right to have the sentence hearing conducted before a jury as provided in Section 13A-5-44(c), it shall be conducted before a jury which shall return an advisory verdict as provided by subsection (e) of this section. If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without an advisory verdict from a jury. Otherwise, the hearing shall be conducted before a jury as provided in the remaining subsections of this section.

(b) If the defendant was tried and convicted by a jury, the sentence hearing shall be conducted before that same jury unless it is impossible or impracticable to do so. If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing before a jury, a new jury shall be impanelled to sit at the sentence hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case.

(c) The separation of the jury during the pendency of the sentence hearing, and if the sentence hearing is before the same jury which convicted the defendant, the separation of the jury during the time between the guilty verdict and the beginning of the sentence hearing, shall be governed by the law and court rules applicable to the separation of the jury during the trial of a capital case.

(d) After hearing the evidence and the arguments of both parties at the sentence hearing, the jury shall be instructed on its function and on the relevant law by the trial judge. The jury shall then retire to deliberate concerning the advisory verdict it is to return.

(e) After deliberation, the jury shall return an advisory verdict as follows:

(1) If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(2) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

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(3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

(f) The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors. The verdict of the jury must be in writing and must specify the vote.

(g) If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of Section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have an advisory verdict from a jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury.

Credits
(Acts 1981, No. 81-178, p. 203, § 8.)

Ala. Code 1975 § 13A-5-46, AL ST § 13A-5-46
Current through Act 2016-376 of the 2016 Regular Session. Also includes Acts 2016-378, 2016-381, 2016-389, 2016-391, 2016-394, 2016-399, 2016-401, 2016-405, 2016-410, 2016-413, 2016-418, 2016-419 and 2016-421 of the 2016 Regular Session.

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Code of Alabama
Title 13a. Criminal Code. (Refs & Annos)
Chapter 5. Punishments and Sentences. (Refs & Annos)
Article 2. Death Penalty and Life Imprisonment Without Parole. (Refs & Annos)

Ala.Code 1975 § 13A-5-49

§ 13A-5-49. Aggravating circumstances.

Currentness

Aggravating circumstances shall be the following:

(1) The capital offense was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping;

(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital offense was committed for pecuniary gain;

(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(8) The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses;

(9) The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct; or

(10) The capital offense was one of a series of intentional killings committed by the defendant.

Credits
(Acts 1981, No. 81-178, p. 203, § 11; Acts 1982, No. 82-567, p. 945, § 1; Act 99-403, p. 683, § 1.)

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Ala. Code 1975 § 13A-5-49, AL ST § 13A-5-49
Current through Act 2016-376 of the 2016 Regular Session. Also includes Acts 2016-378, 2016-381, 2016-389, 2016-391, 2016-394, 2016-399, 2016-401, 2016-405, 2016-410, 2016-413, 2016-418, 2016-419 and 2016-421 of the 2016 Regular Session.

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CHATHAM COUNTY GA.

IN THE SUPERIOR COURT OF THE EASTERN JUDICIAL CIRCUIT

STATE OF GEORGIA

STATE OF GEORGIA,	]	
	]	
-vs-	]	Case No. CR11-0672-FR
	]	
BOBBY LAVON BUCKNER,	]	
Defendant.	]	

ORDER ON DEFENDANT'S MOTION 143:
MOTION FOR DISCHARGE PURSUANT TO THE
SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Currently pending before the Court is Defendant's Motion 143 in which he prays that the above-styled indictment against him be dismissed and an Order of Discharge be entered because of an alleged violation of his Sixth Amendment right to a speedy trial.

STANDARD OF REVIEW

The principles that guide a court's consideration of whether a delay in bringing a defendant to trial constitutes a deprivation of the right to a speedy trial are set out in *Barker v. Wingo*[1] and *Doggett v. United States.*[2] As a preliminary matter, the Court must first consider whether the delay is long enough to raise a presumption of prejudice and to warrant a more searching judicial inquiry into the length, causes, and consequences of the delay.[3] If, and when, a more searching judicial inquiry is indeed required, it must then be considered (1) whether the delay before trial was uncommonly long, (2) whether the government or the

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[1] 407 U.S. 514, 92 S. Ct. 2182 (1972).

[2] 505 U.S. 647, 112 S. Ct. 2686 (1992).

[3] *Doggett*, 505 U.S. at 651-52; *Williams v. State*, 282 Ga. 561, 563, 651 S.E.2d 674, 678 (2007).

criminal defendant is more to blame for that delay, (3) whether, in due course, the defendant asserted his right to a speedy trial, and (4) whether the defendant suffered prejudice as a result of the delay.[4] Of these four factors, no one factor is dispositive; rather, a court must weigh all of the factors, along with any other relevant circumstances, in "a difficult and sensitive balancing process," in which the conduct of both the prosecution and the defendant are to be weighed.[5]

THRESHOLD INQUIRY AS TO LENGTH OF DELAY

The right to a speedy trial attaches at the time of arrest or formal accusation or indictment, whichever occurs first, and the courts measure the delay from the time the right attaches.[6] The length of the delay that will draw a presumption of prejudice is, however, "necessarily dependent upon the peculiar circumstances of the case."[7] For serious crimes that do not involve unusual complexities, "one year generally marks the point at which expected deliberateness in the prosecution of a criminal matter turns into a presumptively prejudicial delay."[8]

Defendant Bobby Buckner was first indicted for the Child Molestation, Kidnapping with Bodily Injury, and Murder of Ashleigh Moore on December 12th, 2007.[9] Only subsequent to this indictment was Defendant served with, and arrested on, a bench warrant resulting from the

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[4] *Doggett*, 505 U.S. at 651; *Barker*, 407 U.S. at 530-33; *Ruffin v. State*, 284 Ga. 52, 56, 663 S.E.2d 189, 195 (2008).

[5] *Barker*, 407 U.S. at 533.

[6] *Scandrett v. State*, 279 Ga. 632, 633, 619 S.E.2d 603, 605 (2005).

[7] *Barker*, 407 U.S. at 530-31.

[8] *Ruffin*, 284 Ga. at 55, 663 S.E.2d at 195 (citing *Doggett*, 506 U.S. at 652).

[9] For further reference, refer to Appendix A. *See also* Order Supplementing Record, May 30th, 2012.

indictment.[10] Thus, since the first date of formal indictment until the date of this order, approximately 53 months have passed without Defendant receiving a trial. While certainly some delay in the trial of a case such as this is to be expected given the seriousness of the allegations, the Court finds a delay of 53 months is indeed presumptively prejudicial.[11]

BARKER BALANCING TEST

Having now determined the length of the delay to be presumptively prejudicial, the Court turns to the "difficult and sensitive balancing process," in which the conduct of both the prosecution and the defendant will be weighed. The Court now specifically considers the four factors enunciated in *Barker*, as well as all other relevant circumstances, and finds as follows:

I. WHETHER THE LENGTH OF DELAY WAS UNCOMMONLY LONG

It is well accepted that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."[12] It cannot be said that the crimes charged against Defendant are simple ones. Rather, the charges against Defendant revolve around serious, and apparently somewhat complicated, allegations of child molestation, statutory rape, kidnapping with bodily injury, and murder. Nonetheless, the peculiar circumstances of this case are not any more, or less, serious or complicated than many other

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[10] *See* Order Supplementing Record, May 30th, 2012.

[11] *See Ruffin*, 284 Ga. 52, 663 S.E.2d 189 (finding delay of two years, two months, and twenty-three days presumptively prejudicial in prosecution for murder and connected crimes); *Brannen v. State*, 274 Ga. 454, 553 S.E.2d 813 (2001) (finding 52-month delay in murder prosecution presumptively prejudicial); *Nelloms v. State*, 274 Ga. 179, 549 S.E.2d 381 (2001) (finding 51-month delay presumptively prejudicial in prosecution for murder and other crimes); *Goffaux v. State*, 313 Ga. App. 428, 721 S.E.2d 635 (2011) (finding delay of almost 48 months in child molestation prosecution presumptively prejudicial); *Harrison v. State*, 311 Ga. App. 787, 717 S.E.2d 303 (2011) (finding 22-month delay presumptively prejudicial in prosecution for rape and aggravated child molestation); *Ditman v. State*, 301 Ga. App. 187, 687 S.E.2d 155 (2009) (finding 36-month delay in prosecution for aggravated child molestation and child molestation presumptively prejudicial).

[12] *Barker*, 407 U.S. at 531.

cases involving a sexual assault, crime against a child, and/or murder. Notably, based on everything appearing in the record, it appears that the State completed its investigation, including any planned forensic testing and interviews of witnesses, prior to the first indictment in this case.[13] Further, compared to other prosecutions for child molestation, sexual assault, statutory rape, and/or non-capital murder in this jurisdiction, the length of delay in the prosecution of this case is noteworthy. While a case such as Defendant's might regularly be expected to take more than a year, or even two years, to reach trial, the Court finds a delay of 53 months to be uncommonly long.[14] As such, this factor weighs against the State.

II. WHETHER THE GOVERNMENT OR THE DEFENDANT IS MORE TO BLAME FOR THE DELAY

In determining which party is more to blame for the delay, it is appropriate for the Court to assign different weights to the different reasons for delay.

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify proper delay.[15]

Thus, in making a determination of whether the State or Defendant is more to blame for the

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[13] *Ruffin*, 284 Ga. at 58-59, 663 S.E.2d at 197. Although two witnesses, Montranece Woodard and Jaleel Coleman, were interviewed in early 2011 by the Chief Assistant District Attorney and an Assistant District Attorney, the record indicates that these witnesses were initially interviewed in 2003, and the 2011 interviews were simply done in preparation for trial on the 2009 indictment. Indictment No. CR11-0672-FR, Mot. Hr'g Tr. 37, 51-52, June 13, 2011.

[14] Notably, the State filed two briefs related to this motion, dated December 28th, 2011 and March 29th, 2012, respectively. Neither brief, however, makes any factual or legal argument as to whether such a delay should be considered acceptably or uncommonly long.

[15] *Barker*, U.S. 407 at 531.

delay, it is necessary for the Court to review in full the history of this case and the individual reasons for the delay.

Notably, this Court only began presiding over the matter on April 7th, 2011. Prior to that date, the case was prosecuted under two separate indictments, in addition to the current indictment, and was assigned to another judge. From a review of the records in those two prior indictments, the Court has compiled, and has included as Appendix A to this Order, a comprehensive accounting of the events which occurred prior to the case being assigned to this Court. Appendix A is hereby incorporated into this Order as if set out fully herein.[16]

December 12th, 2007 - January 8th, 2009. Defendant was originally indicted on December 12th, 2007 on Indictment Number CR07-3027-BR for Child Molestation, Kidnapping with Bodily Injury, and Murder. The case was first set for trial on February 25th, 2008. Though the record is silent as to the reason, the case did not proceed to trial at that time and was, instead, rescheduled for trial on May 27th, 2008. Again on May 27th, 2008, without a reason being reflected in the record, the case did not proceed to trial and was rescheduled for August 18th, 2008. Without explanation, the same again occurred on that date and the case was rescheduled for November 10th, 2008. On that date, again the case was continued, without explanation being reflected in the record, until January 8th, 2009.

In total, these continuances, all occurring without any explanation being reflected in the record, constituted a delay of approximately thirteen months from the time of indictment. "Where no reason appears for a delay, we must treat the delay as caused by the negligence of

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[16] Further, the Court has included via its Order Supplementing the Record, dated May 30th, 2012, the relevant documents from the prior two indictments on which the Court has relied in making such an accounting.

the State in bringing the case to trial."[17] As such, these initial thirteen months of delay will be weighed against the State. The weight of this thirteen month delay, however, is deemed rather benign.[18]

January 8th, 2009 - July 17th, 2009. On January 8th, 2009, the record reflects that the case was both set for Pretrial Motion Hearings and Trial, presumably with one to immediately precede the other. On January 8th, 2009, the presiding judge granted a continuance of the Pretrial Motion Hearings, noting that the parties had reached an agreement as to the continuance, but also noting "most particularly the repeated failure of the Chatham County Detention Center to obey this Court to hold Defendant at the Chatham County Detention Center until the final disposition of his case, thus preventing him from assisting his counsel in the preparation of his defense."[19] The case was then rescheduled for trial on July 17th, 2009.[20]

Despite the record reflecting that the parties "agreed" to continuance of the case from January 8th, 2009 until July 17th, 2009, thereby delaying the case approximately six months, it simply cannot be said that Defendant had any meaningful part in such a delay when, contrary to the express Order of the presiding Judge, the Defendant was not held at a local facility so that

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[17] *Brannen*, 274 Ga. at 455, 553 S.E.2d at 814 (citing *Boseman v. State*, 263 Ga. 730, 733, 438 S.E.2d 626, 629 (1994)).

[18] *See id.* at 456, 553 S.E.2d at 815 (citing *Perry v. Mitchell*, 253 Ga. 593, 595, 322 S.E.2d 273, 275 (1984)).

[19] Indictment No. CR07-3027-BR, Order Granting Consent Mot. for a Continuance of Pretrial Mot. Hr'gs, Jan. 8, 2009.

[20] It should be noted that in between the granting of this continuance and the anticipated trial date of July 17th, 2009, the case was indicted for a second time. Under the second indictment, CR09-1091-BR, Defendant was charged with Statutory Rape, Kidnapping with Bodily Injury, and Murder. As a result, there were then two active indictments against Defendant revolving around the same alleged conduct against Ashleigh Moore.

he could confer with counsel. Further, the State, not the Defendant, is ultimately responsible for the behavior of other State actors, such as the Chatham County Detention Center. As a result, this six month delay will be weighed against the State. Again, however, as there is no indication that such delay was a deliberate attempt to delay the trial in order to hamper the defense, the delay will be weighted lightly.[21]

July 17th, 2009 - January 11th, 2010. On July 17th, 2009, the case again did not proceed to trial. Rather, as a result of a continuance jointly requested by the State and the Defendant because of a civilian witness being unavailable, the case was continued six more months until January 11th, 2010. Given the justifiable reason for this six month delay, it will not be weighed against either party.

January 11th, 2010 - May 3rd, 2010. On January 8th, 2010, three days before the scheduled trial date, the parties entered into a consent agreement for the case to be continued. The case was then rescheduled for trial on May 3rd, 2010. As it appears the parties mutually agreed, with neither party being more at fault for the delay than the other, this approximate four month delay will weigh against neither party.

May 3rd, 2010 - November 29th, 2010. On March 10th, 2010, prior to the next scheduled trial date, the State filed for, and was granted, a continuance.[22] The case was then rescheduled for November 29th, 2010.

Though the motion reflects defense counsel did not object to this Motion for Continuance, it is clear that the sole reason for the continuance was the State's need to

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[21] *Barker*, 407 U.S. at 531; *State v. Carr*, 278 Ga. 124, 126, 598 S.E.2d 468, 470 (2004).

[22] Indictment No. CR09-1091-BR, Mot. for Continuance, Mar. 10, 2010.

substitute counsel. This continuance ultimately caused the case to be delayed for approximately six and a half months. In light of the reason for the continuance, the resulting six and a half month delay will weigh more against the State than the Defendant, though benignly.[23]

November 29th, 2010 - April 4th, 2011. On November 29th, 2010, the case again did not proceed to trial. The record is silent as to the reason for the continuance, but reflects the parties gathered for a motion hearing on December 8th, 2010. On that date, the Court orally quashed the first indictment, CR07-3027-BR, and memorialized that ruling one day later on December 9th, 2010.

The parties again gathered for a motion hearing on February 16th, 2011. On that date, it appears the Court convened with the expectation that various motions would be heard. Instead, however, general discussion ensued about the state of the evidence in regard to a motion to introduce similar transactions.[24] During that discussion, the State, through Chief Assistant District Attorney (ADA) David Perry, indicated the State had questions or concerns about what evidence the State did, or did not, have available to present.[25]

The parties were again scheduled to convene on March 15th, 2011 for the purpose of a motion hearing. It appears, however, that such a hearing did not occur. Rather on March 23rd, 2011, the State indicted the Defendant for the third, and final time, under Indictment Number CR11-0672-BR, charging Defendant with Murder, Felony Murder, Kidnapping with Bodily Injury, Child Molestation, and Statutory Rape. That case, along with the prior indictment, CR09-1091-

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[23] *Barker*, 407 U.S. at 531; *Carr*, 278 Ga. at 126, 598 S.E.2d at 470.

[24] Indictment No. CR09-1091-BR, Mot. Hr'g Tr. 9, 15, Feb. 16, 2011.

[25] *Id.*

BR, were scheduled for jury trial on April 4th, 2011.[26]

In sum, the record is silent as to the reason for the trial being continued from November 29th, 2010 until April 4th, 2011. "Where no reason appears for a delay, we must treat the delay as caused by the negligence of the State in bringing the case to trial."[27] As such, the approximate four month delay that occurred as a result of the November 29th, 2010 continuance will be weighed against the State, though benignly.[28]

April 4th, 2011 - February 1st, 2012. On April 4th, 2011, the case again did not proceed to trial. Though the Court convened, the State instead announced its intent to seek the death penalty against Defendant on the newest indictment, CR11-0672-BR.[29] Consequently, in compliance with the Eastern Judicial Circuit's March 13th, 2002 Standing Order, the case was reassigned from the former judge to the current judge. Likewise, the case immediately became guided by the Unified Appeal procedures and Defendant was appointed new counsel, who were appropriately experienced to handle such a case, from the Capital Defenders' Office.

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[26] As noted in Appendix A, though the Court cannot locate any transcript or document endorsed by the presiding judge that definitively reflects a trial date was scheduled for April 4th, 2011, the record of CR09-1091-BR reflects the State filed its "Master List" of "Police Officers and Witnesses Subpoena List" indicating a trial date of April 4th, 2011. Likewise, the Defendant asserted the existence of this same trial date in his Brief in Support of Bobby Buckner's Motion for Discharge Pursuant to the Sixth Amendment of the United States Constitution. Further, the record reflects that indeed the parties were gathered together in open court on April 4th, 2011, though the ultimate conclusion of that gathering was the announcement of the State's intent to seek the death penalty in CR11-0672-BR. Finally, the Court takes judicial notice that the computerized case management system also memorializes that Jury Trial was indeed scheduled for this date.

[27] *Brannen*, 274 Ga. at 455, 553 S.E.2d at 814 (citing *Boseman*, 263 Ga. at 733, 438 S.E.2d at 629).

[28] *See id.* at 456, 553 S.E.2d at 815 (citing *Perry*, 253 Ga. at 595, 322 S.E.2d at 275).

[29] The State did not at that time present a request to Nolle Prosequi Indictment Number CR09-1091-BR, indicating instead that a plea offer remained outstanding related to this prior indictment. Indictment No. CR09-1091-BR, Announcement of Intent to Seek Death Penalty Tr. 4-5, Apr. 4, 2011.

On May 20th, 2011, the case was heard for the first time since the State's announcement of its intent to seek the death penalty. Near the outset of that hearing, the State requested, and the Court entered, an Order of Nolle Prosequi on Indictment Number CR09-1091-BR, leaving only the current indictment outstanding.

On August 24th through 26th, 2011, the Court convened with the intention of addressing a variety of the approximately 128 motions filed by Defendant prior to that date.[30] Shortly after beginning the hearing on August 24th, 2011 and inquiring with counsel as to their recommendations about the order in which to proceed, the State, through Chief ADA David Perry, requested that the Court meet with counsel in chambers.[31] Defense counsel joined in that request and, following the Defendant's waiver of his presence and a waiver of the court reporter's presence, such a meeting was held.[32] The proceedings did not resume until the next day.[33]

Upon the case resuming on August 25th, 2011, the Defendant and the State submitted to the Court their "Consent Agreement Between the State of Georgia and the Accused to Proceed Under Senate Bill 13 (2009)". The State then explained that it would no longer be seeking the death penalty as punishment and that Senate Bill 13 "opened up an opportunity for life without parole without having to go through the horrendously burdensome and expensive

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[30] Only motion hearings substantively relevant to the ultimate ruling of this Order will be discussed from this point forward, but it should be noted that numerous other court dates did in fact occur, as reflected by the transcripts of those hearings included in the record.

[31] Indictment No. CR11-0672-FR, Mot. Hr'gs Tr. 9, Aug. 24-26, 2011.

[32] *Id.* at 9-11.

[33] *Id.* at 11.

process of seeking the death penalty in order to eventually possibly end up with a life without parole sentence."[34] The State also went on to represent that as it "proceeded to the hearings today, some issues arose."[35] Finally, the State, through its Chief ADA, said:

> I think it'd be improper to discuss any evidentiary issues or anything of that nature at this point in time, but given all of the issues we've discussed with the Court, the time frame that we had to operate under, and the fact that under Senate Bill 13, we'd be able to seek life without the possibility of parole, and the State has conferred with all of the family members of the victim in this case, the father, the mother, the grandmother, the aunt, all of whom were caregivers for the child, and they're all in agreement with that position. . . . [T]he State has elected to go with Senate Bill 13 and seek life without the possibility of parole.[36]

The motion hearing then proceeded normally with the Court hearing evidence and argument on a wide variety of Defendant's motions.

On October 12th, 2011, the Court entered a Scheduling Order setting the case for jury trial on February 1st, 2012. From the date of the last scheduled jury trial until the trial scheduled for February 1st, 2012, approximately ten months passed. As this delay occurred solely as a result of the State's decision to seek punishment beyond that previously sought, this ten month delay weighs against the State. Unlike the other delays outlined above, however, such delay cannot, and will not, be weighed benignly.

While the State is empowered with the discretion to seek the punishment it deems appropriate in a given case, the Court simply cannot ignore that the State opted not to exercise this discretion until the eve of trial in a case that had already been outstanding for forty months.

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[34] *Id.* at 15. The Court takes judicial notice that Senate Bill 13, while indeed offering the alternative described by the State, has been in effect since April of 2009. Hence, such punishment, if deemed appropriate by the State, could have been sought at the outset of the second indictment.

[35] *Id.* at 15-16.

[36] *Id.* at 16.

In its March 29th, 2012 brief on the subject motion, the State asserts, in relevant part, the following about the decision to seek the death penalty:

> The case file was being reviewed and witnesses interviewed in preparation for trial.
>
> From the interview of the children that were awakened by Ashleigh on the morning of her disappearance and the interview of Agent Ziegler[, the State] felt that the case now not only met the statutory demands of a Death Penalty but was strong enough to withstand residual doubt. At that time the case was re-indicted and was set to be a death penalty case.
>
> As the case was moving toward trial, a number of issues including over 100 motions filed by the defense arose relating to the evidence that caused the State to rethink the penalty issue. Because of the evidentiary issues that [sic] State withdrew the Death Penalty and agreed to sever the offenses. As the decision was based on preserved evidence and in no way was a means to gain a continuance [sic].[37]

Despite the State's apparent assertion that the decision to seek the death penalty was not made in an attempt to gain a continuance of the trial, the State knew, and should have known, that the consequence of such an announcement would be the continuance of the trial for an extended period of time. The law is well settled that certain special procedures must be followed in a case in which the death penalty is sought.[38] Likewise, it is well known that a defendant against whom the death penalty is sought will be appointed counsel with specific death penalty expertise, and such counsel will file a myriad of motions to preserve that defendant's rights.

In the appropriate circumstance, the late announcement of the State's intent to seek the death penalty would not, in and of itself, cause the delay to weigh anything more than benignly against the State. Meaning, the Court recognizes the possibility that the State could, in theory,

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[37] State's Resp. to Def. Mot. for Discharge Pursuant to the 6th Amend. of the U.S. Const. 2. The State goes on to note that "[t]he reason for the withdrawal of the Death penalty was due to problems with evidence not being available or of less value than anticipated." *Id.* at 3.

[38] *See* Unified Appeal; Standing Order *in re* Assignment of Death Penalty Cases (E. Jud. Cir. Mar. 13, 2002).

discover new evidence, or information equally notable, that would cause a reasonable prosecutor in a case to reconsider the issue of punishment, even late in the prosecution of a case. However, the Court simply cannot ignore that this considerable delay, which occurred late in an already significantly delayed case, was apparently altogether unnecessary.

The State announced its intent to seek the death penalty on the very date that the case was set to go to trial for the tenth time. As of that date, given the length of time the State had been prosecuting the case, the State was aware of the quality of the evidence it had available to present to prove Defendant's alleged guilt. Indeed, the record reflects that at the February 16th, 2011 hearing, two months prior to the announcement of the State's intent to seek the death penalty, the State, through Chief ADA David Perry, indicated it had questions or concerns about what evidence the State did, or did not, have.[39] The Court cannot now find that the delay that resulted because of the State's election to seek the death penalty was because of mere negligence when the State knew (or should have, by it's own admission, known) that problems existed with the evidence.[40]

In sum, the ten month delay that resulted from the continuance of the trial from April 4th, 2011 until February 1st, 2012 will be weighed against the State. Further, because this delay was the result of a deliberate decision by the State and something more than mere negligence, the

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[39] Indictment No. CR09-1091-BR, Mot. Hr'g Tr. 9, Feb. 16, 2011.

[40] "Our cases reflect that negligence is entitled to minimal weight against the State only where it results either from the prosecution's inadvertent neglect of the case or from solely administrative factors over which the prosecution has no control, such as overcrowded court dockets or understaffed law enforcement agencies. We have further recognized, however, that delays resulting from deliberate decisions made by the State, strategic or otherwise, cannot be considered benign and must be weighted more heavily against the State." (citations omitted) *Hayes v. State*, 298 Ga. App. 338, 344, 680 S.E.2d 182 (2009).

Court cannot weigh this delay benignly, but rather weighs it more heavily.

February 1st, 2012 - April 25th, 2012. Again, the case did not proceed to trial on the scheduled date of February 1st, 2012. Prior to that date, Defense Counsel submitted a notice of conflict in compliance with the Uniform Superior Court Rules, causing the case to be rescheduled to April 25th, 2012. Though such delay will be weighed benignly, this approximately two and a half month delay weighs against the Defendant.

April 25th, 2012 - Date of Order. On April 19th, 2012, this Court, recognizing the need for additional time to consider the complex and difficult issues involved in Defendant's Motion 143 and other outstanding motions, issued a Scheduling Order changing the date of trial to June 11th, 2012. As this delay was the result of a decision by the Court and not by request of either party, this approximately one month delay will weigh against neither party.

Summary of Findings

As outlined more fully above, the thirteen month delay between December 12th, 2007 and January 8th, 2009 weighs against the State, though benignly. The same is true of the subsequent six month delay between January 8th, 2009 and July 17th, 2009. The next six month delay, which occurred between July 17th, 2009 and January 11th, 2010, does not weigh against either party. Likewise, the four month delay between January 11th, 2010 and May 3rd, 2010 does not weigh against either party. The subsequent six and a half month delay between May 3rd, 2010 and November 29th, 2010 and the four month delay between November 29th, 2010 and April 4th, 2011 weigh against the State, though, again, benignly. The ten month delay between April 4th, 2011 and February 1st, 2012 weighs against the State, but more heavily. The two and a half month delay between February 1st, 2012 and April 25th, 2012 weighs against the Defendant,

though benignly. The delay between April 25th, 2012 and the date of this order weighs against neither party.

In total, two and a half months weigh against the Defendant. Eleven months do not weigh against either party. The bulk of the delay, totaling thirty-nine and a half months, weighs against the State. As such, this factor on the whole must be weighed against the State. Further, because a significant portion of the delay, which occurred remarkably late in the prosecution, was due to deliberate action on the part of the State and not as a result of mere negligence, this factor will weigh more heavily against the State than if such delay was due solely to the State's negligence.

III. WHETHER, IN DUE COURSE, DEFENDANT ASSERTED HIS RIGHT TO A SPEEDY TRIAL

The relevant question for purposes of the third *Barker* factor is whether the accused has asserted the right to a speedy trial "in due course."[41] "This requires a close examination of the procedural history of the case with particular attention to the timing, form, and vigor of the accused's demands to be tried immediately." [42]

The record of this case is clear that the Defendant did not assert his right to a speedy trial until late in the prosecution of the case against him. The records of CR07-3027-BR and CR09-1091-BR are devoid of any objection from the defendant as to the numerous continuances of the case. The record of CR11-0672-FR, however, reflects the Defendant repeatedly appeared ready, and willing, for the various scheduled proceedings. On December 9th, 2011, Defendant filed the motion that is the subject of this order, Motion 143: Motion for Discharge

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[41] *Ruffin*, 284 Ga. at 63, 663 S.E.2d at 200 (citing *Doggett*, 505 U.S. at 651).

[42] *Id.* (citing *Barker*, 407 U.S. at 528-29).

Pursuant to the Sixth Amendment of the United States Constitution. The filing of this motion is essentially the first time Defendant indicated he had a specific interest in a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution.[43]

"It is the defendant's responsibility to assert the right to trial, and the failure to exercise that right is entitled to strong evidentiary weight against the defendant."[44] There are, however, times when the late assertion of the right to a speedy trial may be mitigated.[45]

In the case at hand, Defendant repeatedly demanded that the State comply with requests for discovery and follow through on consent agreements to provide certain documents and evidence to the Defendant.[46] As a result, the Court finds that the Defendant's late assertion of his right to a speedy trial is indeed somewhat mitigated by his insistence that the State comply with its discovery obligations. The Court, however, does not entirely excuse Defendant's late assertion of his right. Instead, the Court finds that this third factor of the *Barker* analysis weighs heavily against Defendant, but not as heavily as it would have if not mitigated by Defendant's insistence on his right to discovery.

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[43] Notably, despite the Court's specific request to both parties to identify the date on which each party believed Defendant first asserted his right to a speedy trial, Defendant has failed to do so. Instead, in his "Brief in Support of Bobby Buckner's Motion for Discharge Pursuant to the Sixth Amendment of the United States Constitution," Defendant simply asserts various reasons he believes should mitigate a late demand for speedy trial.

[44] *Brannen*, 274 Ga. at 456, 553 S.E.2d at 815 (citations and quotations omitted).

[45] *See State v. Brown*, No. A11A1932, 2012 WL 917599, at *5 (Ga. App. Mar. 20, 2012); *State v. Shirley*, 311 Ga. App. 141, 146, 714 S.E.2d 636, 641 (2011); *State v. Ivory*, 304 Ga. App. 859, 862-63, 698 S.E.2d 340, 345 (2010).

[46] Pretermitting whether Defendant was entitled to each and every item the State agreed to provide or that Defendant demanded, the record reflects that the State never objected to providing items to the Defendant on the basis that Defendant was not entitled to them. Rather, the State consistently agreed to provide the requested and demanded items, but then regularly failed to do so, such that the Court had to repeatedly intervene and preside over the exchange of discovery.

IV. WHETHER THE DEFENDANT SUFFERED PREJUDICE AS A RESULT OF THE DELAY

In considering whether the defendant suffered prejudice as a result of the delay, prejudice "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect": 1) preventing oppressive pretrial incarceration, 2) minimizing anxiety and concern of the defendant, and 3) limiting the possibility that the defense will be impaired.[47] Of these, "an injury to the last is the most serious, 'because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'"[48]

Preventing Oppressive Pretrial Incarceration and Minimizing Anxiety and Concern

The Court finds that the delay in this case had only a minor effect on the Defendant's interests in preventing oppressive pretrial incarceration and minimizing the Defendant's anxiety and concern. To begin, the Court takes judicial notice that Defendant is, and would be, incarcerated regardless of this pending indictment, as the Defendant has previously been convicted and sentenced to imprisonment for a variety of other crimes.[49] Moreover, the Defendant has failed to offer any evidence on either of these issues, leaving the Court to conclude that he has suffered no more anxiety and concern than any other defendant.

Limiting the Possibility That The Defense Will Be Impaired

Presumptive Prejudice. "Consideration of prejudice is not limited to the specifically demonstrable, and . . . affirmative proof of particularized prejudice is not essential to every

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[47] *Barker*, 407 U.S. at 532.

[48] *Brown*, 2012 WL 917599 at *6 (citing *Barker*, 407 U.S. at 532).

[49] *Williams v. State*, 279 Ga. 106, 610 S.E. 2d 32 (2005); *Salahuddin v. State*, 277 Ga. 561, 592 S.E.2d 410 (2004); *Treadwell v. State*, 233 Ga. 468, 211 S.E.2d 760 (1975); *Herndon v. State*, 277 Ga. App. 374, 626 S.E.2d 579 (2006).

speedy trial claim."[50] "Under *Doggett*, a substantial delay gives rise to a presumption of actual prejudice, because 'greater pretrial delays simultaneously increase the degree of prejudice presumed and decrease the expectation that the defendant can demonstrate tangible prejudice to his or her ability to present a defense.'"[51] Georgia courts have generally agreed that a delay in excess of five years entitles a defendant to a strong presumption of prejudice which need not be accompanied by any particularized showing of prejudice.[52]

> Given that the *Barker-Doggett* analysis is a balancing test, however, requiring the trial court to analyze each case based upon its own unique facts, it necessarily forbids the application of any 'bright-line' rules. Thus, the fact that the delay in this case was less than the five years does not automatically foreclose a presumption of actual prejudice. Rather, in determining whether a pre-trial delay gives rise to a presumption of actual prejudice, the trial court must examine the delay relative to all other factors, including the complexity of the case and the evidence existing on the date the State initiated the prosecution. In short, the extent to which a defendant must prove prejudice from a delay in prosecution is directly related to the government's reasonableness in its pursuit of that defendant.[53]

Based upon the specific facts of this case, including the complexity of the case being comparable to other murder and sexual assault cases, and that there has been no apparent change in the State's evidence from the original date of indictment, as well as the State's deliberate decision to complicate the procedural posture of the case unnecessarily when it knew - - or should have known - - that there were "evidentiary problems," the Court finds there is indeed a presumption of prejudice in this case. Accordingly, this prong would weigh against the

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[50] *Arbegast v. State*, 301 Ga. App. 462, 466, 688 S.E.2d 1, 6 (2009) (citing *Doggett*, 505 U.S. at 655).

[51] *Hayes*, 298 Ga. App. at 347-48, 680 S.E.2d at 191 (citing *Williams v. State*, 277 Ga. 598, 601, 592 S.E.2d 848, 851 (2004)).

[52] *Id.* at 348, 680 S.E.2d at 192 (citing *Moore v. State*, 294 Ga. App. 570, 574, 669 S.E.2d 498, 502 (2008)).

[53] *Id.* at 348-49 (citations omitted).

State.

Actual Prejudice. Pretermitting whether Defendant can be presumed to have been prejudiced by the delay in this case, however, the Court also finds the Defendant has indeed demonstrated a particularized showing of prejudice as a result of the delay. The Court makes these findings based on the facts and the record as it presently stands in this particular case and the unique circumstances in which the Defendant has been placed.

Approximately nine years ago, an investigation was launched into whether there had been evidence tampering in this case. As part of this very important inquiry, four witnesses were interviewed. Now, nine years later, the witnesses are either deceased or cannot remember the pivotal events, and the investigator who conducted the initial interviews cannot remember what the witnesses said about those pivotal events. To make matters worse, the independent tapes of these interviews have been lost by the State. As a result, Defendant has demonstrated a particularized inability to sufficiently explore, and present, as part of his defense that there was tampering with the evidence, and specifically, the alleged crime scene, in this case.

The record reflects that on October 10th, 2003, then Chief ADA David T. Locke requested the Georgia Bureau of Investigation (GBI) to conduct an inquiry into allegations that tampering with evidence may have occurred at the victim's residence on the day the child was reported missing, with possible involvement of a law enforcement officer from the Chatham County Police Department, and with at least one Thunderbolt Police Officer being present.[54] On March 14th, 2012, at the continuation of the motion hearing on the subject motion, former law enforcement officer Florence Glover testified. Ms. Glover was the apparent subject of the tampering with

[54] Def.'s Ex. 22, Mar. 14, 2012.

evidence investigation conducted by the GBI.[55] Ms. Glover is also the cousin of Michelle Moore, the mother of Ashleigh Moore.[56] At the time of the alleged crime, Ms. Glover was a sergeant or lieutenant with the Chatham County Police Department.[57] Ms. Glover, as well as Tanyula Jones, a law enforcement officer, and Carolyn Bryant, a law enforcement officer, went to the victim's house at some point following Michelle Moore reporting Ashleigh Moore missing, but before the alleged crime scene was secured by law enforcement.[58]

Ms. Glover testified that she did not have any recollection as to whether she did, or did not, 1) go into the victim's room and shut the door, 2) stamp around in the room to see if there was noise generated outside of the room, and/or 3) give Michelle Moore the sheets from the alleged victim's bed.[59] She affirmatively denied that she told Michelle Moore to keep her visit a secret.[60] Ms. Glover also testified that Carolyn Bryant and Tanyula Jones searched around the premises, but that she could not say what specifically either of the women did at each moment.[61] Notably, the State did not ask any questions whatsoever of Ms. Glover.[62]

Michelle Moore, Ashleigh Moore's mother, also testified at the March 14th, 2012 hearing. She testified that it was probably midday when Glover, Bryant, and Jones arrived at her house,

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[55] Def.'s Ex. 22.

[56] Indictment No. CR11-0672-FR, Mot. Hr'gs Tr. 156, Mar. 14, 2012.

[57] *Id.* at 155.

[58] *Id.* at 156-61.

[59] *Id.* at 159-61.

[60] *Id.* at 161.

[61] *Id.* at 161-62.

[62] *Id.* at 165.

but she was not confident about who called Glover to come to the house.[63] She also stated she was not confident about the time line of whether a certain piece of evidence, the alleged victim's eyeglasses, was found before or after they arrived at the house.[64]

Though she testified generally on direct examination that the events occurred nine years prior and that she did not know whether she could remember everything clearly or whether she was having trouble remembering the details, Ms. Moore offered the following on cross-examination:

> Q: Now, you had some friends and/or relatives, I believe, that worked with the police department that came to the house that morning?
>
> A: Yes. Florence Glover is my cousin.
>
> Q: Did they come before the police came, that the incident was reported to?
>
> A: Okay, see, now, there was two different incidents, two different reports, I'm guessing or calling, since when I called to report my daughter missing, a officer showed up and just, you know, kinda nonchalantly said, you know, she'll be back. He didn't really do anything.
>
> Q: Right.
>
> A: And I don't think the detectives truly showed up until my cousin, Glover, actually put a call out, saying that somebody needs to get there, something's wrong.
>
> Q: Was your cousin, Glover, at the house when she called the police?
>
> A: Yeah, but once again, that was several - - that was later that day, but, yes.
>
> Q: Okay. Now, at some point in time, Ms. Glover and one of the other people that were police officers - -

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[63] *Id.* at 108-09.

[64] *Id.* at 109. The timing of when such evidence was located, in light of the allegations of tampering with evidence, is significant given that the State appears to rely on this evidence to show that the alleged victim was forcibly taken from her home and did not leave voluntarily.

A: Carolyn Bryant.

Q: - - they cleaned the room up. Is that correct? You don't know?

A: You'd have to ask them. Once again, I'm not caring about that stuff.[65]

Subsequently, Carolyn Bryant, a retired officer with the Thunderbolt Police Department, testified.[66] Ms. Bryant explained that she went to the alleged victim's house on the date in question because Michelle Moore's mother (Ashleigh Moore's grandmother) called her and asked her to do so.[67] While at the house, Ms. Bryant walked into Ashleigh Moore's room and looked around to determine if anything was missing.[68] According to Ms. Bryant, both Florence Glover and Tanyula Jones, were present in the room at that time.[69] Ms. Bryant, however, had no recollection as to whether any of the women shut the door when they were in the room by themselves.[70] She likewise indicated that she did not have a good recollection of the events at all and would characterize her memory of the events that day as "fair."[71] She indicated that she specifically "blocked everything out" in regard to the case after Ashleigh Moore was found.[72] Again, the State did not ask the witness any questions.

Tanyula Jones, also a Thunderbolt Police Department officer at the time of the alleged

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[65] *Id.* at 112-13.

[66] *Id.* at 165.

[67] *Id.* at 167.

[68] *Id.*

[69] *Id.* at 167-68.

[70] *Id.* at 168.

[71] *Id.* at 167-68.

[72] *Id.* at 169-70.

victim's disappearance, did not testify. On March 15th, 2012, the State and the Defendant stipulated that Ms. Jones is deceased and not available for interview.

The final witness to testify on March 14th, 2012 was former GBI Agent Wolfgang Ziegler.[73] Agent Ziegler was the case agent on Defendant's case "as far as the disappearance of Ashleigh Moore" and initially became involved in the case when the GBI was "called in because there was a possible involvement of some law enforcement officers that maybe were called to the house and maybe covering up something or hidden some evidence."[74]

As part of his duties, Agent Ziegler interviewed Florence Glover, Tanyula Jones, Michelle Moore, and Carolyn Bryant, the first individuals on the scene after the victim was discovered missing.[75] Agent Ziegler could not remember the questions he asked the witnesses, nor could he remember their answers.[76]

Subsequent to Agent Ziegler's testimony, the State entered into a "Joint Stipulation of Facts Not in Dispute" on March 15th, 2012, acknowledging that the State "cannot locate audio video recorded interviews" of Michelle Moore, Carolyn Bryant, and Tanyula Jones on certain dates, or "make them available to Defendant Bobby Buckner to assist in his Defense." The stipulation likewise acknowledged that Tanyula Jones is now deceased and unable to be interviewed by the Defense.

As Agent Ziegler's testimony proceeded on March 14th, it became clear that Agent Ziegler, though trying his very best, could not recall the majority of the details pertaining to the

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[73] *Id.* at 178.

[74] *Id.* at 179-80.

[75] *Id.* at 180-81.

[76] *Id.* at 182.

investigation of tampering with evidence in this case. To multiple questions posed by the Defense, Agent Ziegler responded that in order to provide an answer, he would need to review his investigative summary.[77] At one point, Agent Ziegler stated, "I am only aware of what I have in my investigative summaries and I would have to review those, and I do not have those."[78]

During his testimony, it was revealed that Agent Ziegler went to the District Attorney's Office on the morning of the hearing in an attempt to review the file, presumably to refresh his recollection, prior to testifying.[79] In response to his attempt to review the file, Agent Ziegler was apparently provided some sort of documentation to review, but that documentation is not part of the record.[80] When asked whether he could not remember anything unless he reviewed the files, Agent Ziegler responded:

> No. I'm saying I don't remember specific things that you may be asking me. If I remember something that you're asking me, I'll be more than happy to answer the question, but with a degree of certainty and specificity, I need to review my investigative file since I'm the one on the stand.[81]

At various points while testifying, Agent Ziegler was given an opportunity to refresh his memory using Defendant's Exhibit 22, which was identified as the tampering with evidence investigatory report from the GBI and was admitted into evidence as such without objection from the State.[82]

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[77] *Id.* at 184.

[78] *Id.* at 185-86.

[79] *Id.* at 186-87.

[80] *Id.*

[81] *Id.*

[82] It is worth noting that Defendant's Exhibit 22 appears to be the result, and the subject matter, of Defendant's Motion 126 which was addressed multiple times with the Court due to the Defendant's concern that he did not have, and was having trouble independently obtaining, a full copy of the GBI's case file pertaining to the tampering with evidence investigation.

It is apparent both from the testimony of Agent Ziegler and from a review of Defendant's Exhibit 22 that Agent Ziegler's reports do not in fact appear within that file. Rather, Agent Ziegler was left to refresh his memory from the reports of others, which, though permissible, is not what Agent Ziegler indicated was necessary in order for him to specifically answer questions related to the investigation.

In sum, based on his clearly limited memory of the events, Agent Ziegler was able to testify that Lieutenant Florence Glover went into the victim's room and removed sheets from the victim's bed and gave the sheets to Michelle Moore.[83] He also testified, after refreshing his memory utilizing the reports of other agents, that Lieutenant Glover advised Michelle Moore not to tell anyone that Lieutenant Glover, Officer Jones, or Officer Bryant entered the victim's bedroom.[84] Agent Ziegler then stated, in response to questioning:

> A: . . . but from what I see right there [in Defendant's Exhibit 22] and from what I'm reading from Agent Sands'[85] report, a law enforcement officer on duty going into a potential crime scene and doing this, it's tampering with a crime scene.
>
> Q: You would agree that it was tampering.
>
> A: Yes.
>
> Q: Okay. And based upon that information right there and the fact that not only has she given the sheets to Michelle, but she had asked Michelle to not tell anyone, what actions did you take?

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[83] *Id.* at 184.

[84] *Id.* at 189.

[85] The Court notes that the Defendant also called Agent Tracy Sands to testify at the March 14th, 2012 motion hearing. *Id.* at 172-177. His testimony, however, shed little light on the actual tampering with evidence investigation. Instead, Agent Sands indicated his involvement in the investigation was limited to locating the sheets, bed sheets, and bedspread from the residence of Ashleigh Moore. Upon locating the sheets and forwarding them to the agency investigating the homicide, and forwarding his findings to the District Attorney's office, his involvement in the investigation ceased.

A: Again, I didn't take any actions at that point in time. I was building a case. I have to verify information. There's a long process.

Q: Okay. Well, did you verify that that had actually occurred?

A: On that day and time, I don't know. I would have to, again, look at my investigative summaries.

Q: Okay. What would you need - - I mean, is that - - would you be interested in asking Mr. Perry if he would give you copies of the - - of your investigative summaries?

A: Mr. Perry knows I need to review my investigative summaries. I have not seen them since - - it's been several years.

Q: And so, unless you're given the summaries by Mr. Perry, you really can't answer questions specifically, can you?

A: I can answer certain questions that I remember specifically if - - if asked that, but with any degree of specificity on each question, I can't. I mean, there's some things I remember about the case that stuck out and there's some things that didn't. It's just human nature.

Q: And is that partly because this was nine years ago?

A: Absolutely.

Q: Okay. Would this have been fresher in your mind four years ago?

A: Some things very well may have been. I don't know. It's not something that I think about on a daily basis.[86]

Notably, the State neither provided the witness with copies of his investigative summaries, nor asked the witness any questions at all.

At the conclusion of the Defendant's presentation of evidence at the motion hearing, the State did not present any evidence whatsoever, and as a result, did not rebut or explain Agent Ziegler's conclusions that tampering with evidence at the crime scene had occurred. Moreover,

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[86] *Id.* at 190-91.

the State did not present any testimony or evidence to establish that any tampering with evidence was inconsequential.

Instead, in its March 29th, 2012 brief, the State seems to make two arguments in response to Defendant's concern that his defense has been impaired. First, the State argues that it is unknown when the recorded statements of the witnesses were lost, and, second, that it is "highly unlikely that any evidence favorable to the defendant has been lost."[87]

While it is true that the record is silent as to when the recordings of the various interviews went missing, it is also true that, as it stands now, the witnesses, including most notably the law enforcement officer who investigated tampering with evidence, can no longer recall important and material details of their actions. Moreover, as for the State's assertion that it is unlikely evidence favorable to the Defendant has been lost, the Court rejects this argument. The Defendant has definitively shown he has been deprived of information and evidence related to the corruption of the alleged crime scene in this case, and the State has done no more than offer conclusory statements without reference to the record. Further, in order to believe that this unrebutted information would not be favorable to the Defendant, one would have to implicitly assume Defendant to be guilty. Certainly, a corrupted crime scene could help a guilty defendant, but conversely it must be recognized that a corrupted crime scene would most likely hurt an innocent defendant. This is an important distinction in light of the fact that the defendant, having not yet been tried, is presumed to be innocent.

In reaching a final determination on the issue of prejudice, this Court takes note of the decision of the Supreme Court of Georgia in *State v. Gleaton*, 288 Ga. 373, 703 S.E.2d 642

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[87] State's Resp. To Def. Mot. For Discharge Pursuant to the 6th Amend. Of the U.S. Const. 4.

(2010), in which the Court considered an appeal by the State from the grant of a joint motion of defendants Gleaton and Clark to bar their trial due to the violation of the constitutional right to a speedy trial. There, the defendants were arrested approximately two months after the alleged murder, but not indicted by a grand jury until almost four years later. According to the trial court, the reason for the delay was the State's negligence, and, in particular, the State's apparent "lack of desire to prosecute a case that was severely lacking in evidence."[88]

In analyzing the prejudice prong of the *Barker* analysis, the Court agreed with the trial court's assessment that the delay in indictment resulted in impairment and prejudice to the defense because the apartment complex, which was the scene of the alleged crime, had been condemned and closed, thereby making "it impossible for the defense to investigate the case in any meaningful manner."[89] Essentially, the defendant "was prevented from obtaining any forensic or other evidence the crime scene might hold and was faced with the practical impossibility of locating other viable witnesses to the murder by virtue of their residence or presence at the now condemned property."[90]

In the case at hand, like in *Gleaton*, the Defendant is prevented from investigating the case in any meaningful manner as it relates to the crime scene and any tampering with evidence that may have occurred. Because of the passage of time, fading memories of the witnesses, and the State's apparent loss of the evidence, the Defendant is in the unique position of not just speculating, but knowing, that there was tampering with the evidence at the alleged crime scene, but being prevented from identifying and showing what aspects of the

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[88] *State v. Gleaton*, 288 Ga. 373, 375, 703 S.E.2d 642, 645 (2010).

[89] *Gleaton*, 288 Ga. at 377, 703 S.E.2d at 646.

[90] *Id.*

scene, and what specific pieces of evidence, have been altered or manipulated.

Unlike in *Gleaton*, however, where there was some concern that the Defendants should have taken steps themselves to investigate the alleged crime scene at the time of their arrests rather than waiting for indictment, such a concern is inapplicable in the case at hand. The Defendant here was not arrested until nearly four years after the alleged crime. During that period of time, Defendant was incarcerated on other charges and was not at liberty to personally ensure the alleged crime scene was investigated on his behalf. Further, Defendant, who was indigent, was not at that time represented by counsel and, therefore, had no representative who could have investigated in his absence. Finally, unlike in *Gleaton* where the defendants were arrested fairly soon following the alleged crime, the Defendant here was not yet charged with the crimes alleged in the pending indictment and, therefore, did not yet have an interest in investigating the alleged crime scene.

In sum, the Court finds that, as a result of the delay, the Defendant has clearly been prejudiced by his inability to sufficiently explore what pieces of evidence at the crime scene were altered or manipulated. Accordingly, this factor will weigh against the State.

OTHER RELEVANT CIRCUMSTANCES

As part of the balancing test, in addition to the four factors enunciated in *Barker*, it is appropriate for the Court to consider other relevant circumstances in making its final determination as to whether the Defendant's right to a speedy trial has been violated.[91] Though none of the following circumstances would be, in and of themselves, dispositive, the Court finds a number of additional circumstances, as outlined below, relevant.

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[91] *Barker*, 407 U.S. at 533.

Period of Time Preceding Indictment

Notably, the allegations in each of the indictments against Defendant accuse conduct arising from events allegedly occurring in April of 2003. The first indictment against Mr. Buckner was not returned until December of 2007, thereby giving the State nearly fifty-six months to complete its investigation prior to presenting the case to a grand jury. Though the calculation of the length of delay is confined to the period of time from the first indictment until the date of this order, it is nonetheless notable that the State had this additional period of time prior to indictment to assess and prepare the evidence to be presented against the Defendant. This circumstance makes it all the more concerning that the State would announce on the eve of trial nearly eight years later that it was only then seeking the death penalty against the Defendant, and then four months later, withdraw its intent to seek the death penalty, at least partially on the basis that the State discovered problems with the evidence.

Deterioration of the Evidence

In Defendant's Motion 143 and subsequent supporting brief, Defendant urges the Court to consider Defendant prejudiced by a number of evidentiary issues, in addition to the tampering with evidence investigation outlined more fully above. These issues include the apparent loss of fingerprint evidence,[92] the destruction of hairs recovered from the alleged victim's body,[93] and the fading memories of the witnesses, including in particular the memories of Montranece Woodard and Jaleel Coleman, both of whom were children at the time of the

[92] The Court does not make any finding as to whether in fact such fingerprint evidence has been lost or destroyed. Rather, the Court notes that the allegation was made, and is at least somewhat supported by the record. Further, the Court notes that the State did not present any evidence on the issue, nor did the State address the issue in its briefs on the subject motion.

[93] At least one of these hairs was known to be of Caucasian origin. Notably, neither the Defendant nor the alleged victim are Caucasian.

alleged crime. Though the Court declines to find actual prejudice to Defendant's ability to prepare a defense as a result of these additional evidentiary issues, the Court does find each of these circumstances troubling. Again, while none of these circumstances, standing alone, would lead the Court to a conclusion that the Defendant's right to a speedy trial has been violated, when considered together, along with the four *Barker* factors outlined above, the Court finds such circumstances notable.

Actions of the State since April 4th, 2011

As explained more fully above, up until April 4th, 2011 when the State announced its intent to seek the death penalty, the cases against Defendant, though proceeding slowly, followed a procedural course not unlike that of many of the violent felonies prosecuted in this jurisdiction. Upon the announcement of the State's intent to seek the death penalty, however, the course of Defendant's case deviated considerably from that of other violent felony cases.

In the months following the State's announcement, in order to move the case toward trial, the Court was compelled to repeatedly intervene in ongoing discovery disputes between the parties as the result of the prosecutor's actions. Specifically, despite the State's representation that it was operating in good faith and providing Defendant with any and all documentation in the State's possession, the Court became concerned after the State served Defendant with Bates-stamped discovery which clearly indicated multiple pages were missing from the documentation.[94] When requested to address the issue, the State behaved cordially but rationalized the errors were by operation of the volume of material, rather than acknowledging the mistake and expeditiously correcting the errors so as to ensure the case

[94] See Def.'s Mot. 127; Mot. Hr'gs Tr. 31-32, 35-44, Aug. 24-26, 2011.

was not delayed.[95]

Even following the exchange over the Bates-stamped discovery, disputes lingered because of the questionable manner in which the State continued to handle the disclosure of discovery, thereby ultimately causing the Court to enter its October 12th, 2011 Order on Disclosure of Discovery. In this Order, the Court required the parties to file their discovery disclosures into the record of this case so that, at the time of trial, it could be definitively determined what items were, and were not, disclosed by each party. The parties were instructed to include a specific notice, which was outlined verbatim in the Court's Order, on the first page of each disclosure notifying the Clerk of Superior Court that such filing was to be sealed in conformity with Uniform Superior Court Rule 21. Despite the Court's written direction to the parties, and corresponding oral instruction at the time of the issuance of the order, the State nonetheless failed to comply with the Court's Order, necessitating the Court to again address the issue with the parties in open court at a later date.[96]

Similarly, following a request by the Defendant, without any objection from the State, the Court conducted an *in camera* inspection of the State's work product in order to determine whether the materials being withheld by the State were items to which the Defendant was entitled. The State then delivered a large number of documents to the presiding judge's chambers for review and filed what was apparently supposed to be a copy of those documents with the clerk.[97] The Court then reviewed both sets of documents and discovered that the items delivered to the judge's office and those filed with the clerk were not identical, but, rather, the

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[95] Mot. Hr'gs Tr. 31-32.

[96] Mot. Hr'gs Tr. 11, Dec. 14, 2011. *See also* Mot. Hr'g Tr. 65-69, Oct. 12, 2011.

[97] Work Product Filing, Nov. 7, 2011.

Court's copy contained a variety of documents not filed into the record. Though the Court ensured that the error was corrected,[98] these type of incidents are nonetheless extremely concerning.

Further, despite the State appearing at multiple proceedings and announcing at the outset that it was ready to proceed, the State repeatedly behaved to the contrary. Initially on February 16th, 2011 at a Motion Hearing in CR09-1091-BR, the State, through Chief ADA David Perry, indicated he was uncertain of what evidence the State would have available to present at trial against Defendant.[99] The State likewise indicated that while it was not ready for trial at that moment, it would be by the time of trial.[100] Then, on August 25th, approximately six months later and well after the State announced, and then withdrew, its intent to seek the death penalty, the State, again through its Chief ADA, indicated the following when asked about missing pages of a GBI case evidence report,

> I honestly do not know whether or not the document he is describing is in the volume of documents that we have. As the Court is aware, when I became involved in this case, I was working with an attorney that had been involved in the case from day one, and that ADA is no longer with our office, but is in, you know, another D.A.'s office,[101] so as far as what she did. I'm a little short on, you know, knowing about that, so I'll either have to contact her, see if she knows where it is, if we've got it, or - -[102]

Then, following the Court's acknowledgment that certainly the State had reviewed all of the

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[98] Mot. Hr'gs Tr. 7-8, Dec. 14, 2011.

[99] Mot. Hr'g Tr. 9, 15, 17-18, Feb. 16, 2011.

[100] *Id.* at 15-16.

[101] Despite the prosecutor's representation, a review of CR07-3027-BR, CR09-1091-BR and CR11-0672-FR reveals that no one Assistant District Attorney remained with the case from its inception as described. Instead, the case was handled by no less than five Assistant District Attorneys, with the original Assistant leaving the prosecution of this case in March of 2010, approximately twenty-six months prior to the date of this Order.

[102] Mot. Hr'gs Tr. 50-51, Aug. 24-26, 2011.

discovery by that point in the proceedings, the State responded:

> No, ma'am. I haven't. As I represented to the Court a moment ago, up until a few weeks ago, there was an Assistant in this case that was handling the major portion of the paper work and that type of - - that area of this case, and I have just had to jump into the full role on this, so, no, I have not examined all of the documents in this case as of yet. I've got - - I've got to either bring someone else in with me and bring them up to speed - -[103]

On October 12th, 2011, a total of eight months since the initial representation that the State was uncertain of its evidence, when discussing with the Court whether certain witness information which was the subject of a defense motion had been disclosed, the State, again through its Chief ADA, stated:

> As the Court is aware, my - - actually, I considered myself at that point in time second chair, even though I was the Chief ADA rather than the ADA, but my previous associate had been with this case from the beginning,[104] and I was depending on her quite heavily on these kinds of matters, to locate stuff in the file and get it ready. But I did not know he had not been provided with [the witness information]. I will get on that immediately and get him that information.[105]

As the proceeding continued, it again became apparent that the State was unsure of what information the State had available and whether that information had been disclosed to the Defendant.[106]

As the disclosure of discovery and preparation for motion hearings is a condition precedent to any criminal trial, the Court is left to conclude, based upon the record and the State's pattern of behavior since April of 2011, that the State lacks any interest in a timely trial

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[103] *Id.* at 53-54.

[104] *See supra*, footnote 101.

[105] Mot. Hr'g Tr. 54, Oct. 12, 2011.

[106] *See id.* at 59-60.

of the Defendant. Rather, it appears that the State's initial announcement of its intent to seek the death penalty may have simply been an attempt to gain leverage to persuade the Defendant to enter into a negotiated plea agreement.[107] While this may be a valid, albeit high stakes, exercise of the State's discretion, it appears that when this attempt failed the State was unwilling, or unprepared, to deal with the necessarily heightened level of detail-oriented work that is required in any case in which the State elects to seek the death penalty. Though the State later withdrew its intent to seek the death penalty, this act simply could not undo the natural consequences of the State's initial announcement, including over one hundred motions filed prior to the State's withdrawal of its intent to seek the death penalty. The State then simply continued to be unwilling, or unprepared, to deal with this reality and, instead, repeatedly inhibited the case from progressing toward trial by failing to properly handle the disclosure of discovery and otherwise sufficiently preparing for motion hearings in this case.

Though not dispositive of the outcome of the ultimate issue of this motion, the general conduct and behavior of the State since April 4th, 2011 is both remarkable and troubling.

CONCLUSION

Of the four factors in the *Barker* analysis, no one factor is dispositive; rather, a court must weigh all of the factors, along with any other relevant circumstances, in a "difficult and sensitive balancing process," in which the conduct of both the prosecution and the defendant are weighed.[108] As more fully outlined above, the Court finds that the defendant's late assertion of his right to a speedy trial weighs significantly against the Defendant, while the uncommonly

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[107] *See* Indictment No. CR09-1091-BR, Announcement of Intent to Seek Death Penalty Tr. 4-5, Apr. 4, 2011.

[108] *Doggett*, 505 U.S. at 65; *Barker*, 407 U.S. at 530-533; *Ruffin*, 284 Ga. at 55, 663 S.E.2d at 195

long delay, the reasons for the delay, and the defendant's suffering prejudice as a result of the delay all weigh against the State. Weighing each of the factors and the unique circumstances of this case, with no one factor being considered dispositive, the Court finds the Defendant has been deprived of his Sixth Amendment right to a speedy trial.

This Court has struggled with the issues in this motion, not because of the clarity of the law or the undisputed facts of this case, but because the remedy for a violation of the Defendant's Sixth Amendment right is so extreme. As best said by the United States Supreme Court, the consequence for the violation of a defendant's right to a speedy trial leads to the "unsatisfactorily severe remedy" of dismissal, which means "that a defendant who may be guilty of a serious crime will go free, without having been tried."[109] Nonetheless, "it is the only possible remedy" allowed under the law. [110] Accordingly, as the Defendant's Sixth Amendment right has indeed been violated, the Court hereby **GRANTS** Defendant's Motion 143 and further **ORDERS** Indictment Number CR11-0672-FR against Defendant to be dismissed and an Order of Discharge to be entered.

SO ORDERED THIS 30 DAY OF May, 2012.

Penny Haas Freesemann, Judge
Superior Court, E.J.C. of Georgia

PHF: 12

cc: all parties

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[109] *Barker*, 407 U.S. at 522.

[110] *Id.*

Appendix A

December 12th, 2007 through November 10th, 2008

- Indictment Number CR07-3027-BR

- CR07-3027-BR (12/19/07) Order for Production of State Prisoner for Trial
- Record silent as to reason for continuance.

- CR07-3027-BR (03/17/08) Order for Production of State Prisoner
- Record silent as to reason for continuance.

- CR07-3027-BR (06/05/08) Order for Production of State Prisoner
- Record silent as to reason for continuance.

- CR07-3027-BR (09/04/08) Order for Production of State Prisoner for Trial
- Record silent as to reason for continuance.

KEY:

1. The shaded arrows show relevant case events (i.e. trials, indictments, etc.), and the timing of such events, not found in the record of Indictment Number CR11-0672-FR. However, for reference purposes, trial dates scheduled under CR11-0672-FR are also included.
2. The first bullet point beneath each arrow indicates the document from which the Court derived such information, including the Indictment Number and date of such document. Each of these documents has been made a part of the record via this Court's Order Supplementing Record dated May 30th, 2012.
3. The second bullet point beneath each arrow indicates the reason, if any, for the continuance of the listed event.

November 11th, 2008 through July 17th, 2009

01/08/09 * Pretrial Motion Hearings	01/08/09 Trial	05/13/09 Second Indictment	07/17/09 Trial
• CR07-3027-BR (01/08/09) Order Granting Consent Motion for a Continuance of Pretrial Motion Hearings	• CR07-3027-BR (11/25/08) Order for Production of State Prisoner	• Indictment Number CR09-1091-BR	• CR07-3027-BR (01/07/09) Hold Order and CR09-1091-BR (07/16/09) Motion for Continuance
• Continuance granted by consent of the parties and "most particularly the repeated failure of the Chatham County Detention Center to obey this Court to hold Defendant at the Chatham County Detention Center until the final disposition of his case, thus preventing him from assisting his counsel in the preparation of his defense."	• Record silent, except as can be otherwise implied from the reading of the Court's 01/08/09 Order Granting Consent Motion for a Continuance of Pretrial Motion Hearings, as to reason for continuance.		• Continuance requested jointly by the District Attorney and Defense Attorney (per 07/16/09 Motion for Continuance) based on a civilian witness being unavailable.

* Though the Order itself does not state that Pretrial Hearings were to be held on this date, the Order Granting Consent Motion for a Continuance of Pretrial Motion Hearings was indeed signed by the Court on this date. Additionally, the Court takes judicial notice that the computerized case management system further memorializes that Pretrial Hearings were indeed scheduled on this date.

July 18th, 2009 through November 29th, 2010

- CR09-1091-BR (02/17/11) Motion Scheduling Order (Footnote 1), as well as transcript of motion hearing found in both CR07-3027-BR and CR09-1091-BR.

- CR09-1091-BR (12/14/09) Order (for witness to be delivered to Chatham County); CR09-1091-BR (03/10/10) Motion for Continuance; and CR07-3027-BR (01/11/10) Consent Order for Continuance

- Per theCR07-3027-BR (01/11/10) Consent Order for Continuance, the parties reached an agreement that additional time was needed for preparation of the case.

- CR09-1091-BR (03/10/10) Motion for Continuance

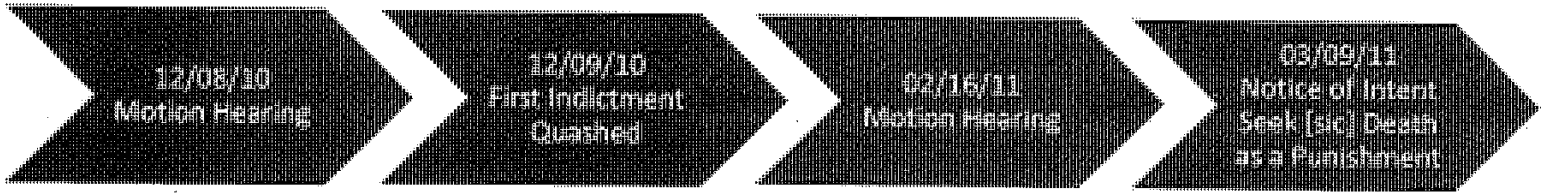
- Trial continued in order to allow State to substitute counsel. As indicated in the court's granting of the motion, the case was then rescheduled for trial on November 29th, 2010.

- CR07-3027-BR & CR09-1091-BR (04/28/10) Notice of Status Hearing

- CR09-1091-BR (03/10/10) Motion for Continuance

- Record silent as to reason for continuance.

November 30th, 2010 through March 9th, 2011



- Various motions heard, per transcript found in CR07-3027-BR and CR09-1091-BR

- CR07-3027-BR (12/09/10) Order Granting Defendant's Motion to Quash Indictment

- CR09-1091-BR – Transcript of Motion Hearing.

- Though it appears the Court believed various motions would be heard on this date, ultimately no motions were heard. Rather, general discussion ensued about the state of the evidence in regard to a motion to introduce similar transactions, during which the State, through Chief ADA David Perry, appears to concede he has questions or concerns about what evidence the State does and does not have.

- CR09-1091-BR (03/09/11) Notice of Intent Seek [sic] Death as a Punishment*

* The Court includes this event as it appears to indicate that this was the time at which the State consciously decided to seek the punishment of death. The Court, however, notes that of course such "Notice" is legally incorrect and insufficient as such document was filed well after arraignment in CR09-1091-BR and likewise does not reflect that it was ever served upon Mr. Buckner or his counsel.

March 10th, 2011 through April 4th, 2011

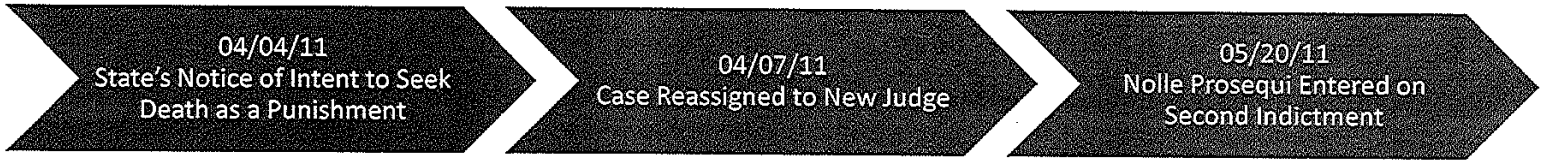
- CR09-1091-BR (02/17/11) Motion Scheduling Order
- The record is devoid of any transcript to represent that such a hearing was ever held, despite the clear indication from the 02/17/11 Motion Scheduling Order that indicates a hearing was indeed scheduled for this date.

- Indictment Number CR11-0672-BR

- CR09-1091-BR (02/25/11) Master List of Police Officers and Witnesses Subpoena List filed by the State; CR11-0672-FR (03/27/12) Defendant's Brief in Support of Bobby Buckner's Motion for Discharge Pursuant to the Sixth Amendment of the United States Constitution; CR11-0672-FR (04/04/11) Transcript of Announcement of Intent to Seek Death Penalty
- Continued as a result of the State's announcement to seek the death penalty.

* Though the Court can not locate any transcript or document endorsed by the presiding judge that definitively reflects a trial date was scheduled for April 4th, 2011, the record of CR09-1091-BR reflects the State filed its "Master List" of "Police Officers and Witnesses Subpoena List " indicating a trial date of April 4th, 2011. Likewise, the Defendant asserted the existence of this same trial date in his Brief in Support of Bobby Buckner's Motion for Discharge Pursuant to the Sixth Amendment of the United States Constitution. Further, the record reflects that indeed the parties were gathered together in open court on April 4th, 2011, though the ultimate conclusion of that gathering was the announcement of the State's intent to seek the death penalty in CR11-0672-BR. Finally, the Court takes judicial notice that the computerized case management system also memorializes that Jury Trial was indeed scheduled for this date.

April 4th, 2011 through May 20th, 2011



- CR11-0672-BR (04/04/11) Notice of Intent to Seek Death as a Punishment and per transcript in CR09-1091-BR and CR11-0672-BR of Announcement of Intent to Seek Death Penalty

- CR11-0672-BR (04/07/11) Order to Reassign Case*
- All events hereafter, except for the Nolle Prosequi of CR09-1091-BR, are reflected as part of the record in CR11-0672-FR.**

- CR09-1091-FR (05/20/11) Petition for Nolle Prosequi

* As an administrative matter, the reassignment of the case from Judge Brannen to Judge Freesemann incidentally resulted in the final two letters of the indictment changing from "BR" to "FR".

** The record will reflect that as part of CR11-0672-FR, this case was initially set for trial on February 1st, 2012, but was continued as a result of a conflict in the schedule of Defense counsel. The case was again set for trial beginning on April 25th, 2012.

May 21st, 2011 through Present Day

- CR11-0672-FR (08/24-26/11) Transcript of Motion Hearings

- CR11-0672-FR (10/12/11) Scheduling Order
- Continued as a result of conflict notice sent by Defense counsel. Case continued in compliance with Uniform Superior Court Rule 17.1.

- CR11-0672-FR Transcript of Motion Hearings on March 14th, 2012

* As an administrative matter, the reassignment of the case from Judge Brannen to Judge Freesemann incidentally resulted in the final two letters of the indictment changing from "BR" to "FR".

** The record will reflect that as part of CR11-0672-FR, this case was initially set for trial on February 1st, 2012, but was continued as a result of a conflict in the schedule of Defense counsel. The case was again set for trial beginning on April 25th, 2012.