No. 17-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, WARDEN
Georgia Diagnostic Prison,

Respondent.

THIS IS A CAPITAL CASE

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

ATTACHMENTS

Brian S. Kammer (Ga. 406322)*
Marcia A. Widder (Ga. 643407)
Georgia Resource Center
303 Elizabeth Street, NE
Atlanta, Georgia 30307
404-222-9202
Fax: 404-222-9212

COUNSEL FOR PETITIONER

*Counsel of Record

Attachment A

SUPREME COURT OF GEORGIA
Case No. S18W0242

Atlanta September 26, 2017

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

KEITH THARPE v. ERIC SELLERS, WARDEN

After a careful review of Tharpes's application for a certificate of probable cause to appeal the dismissal of his second state habeas petition, the Warden's response, Tharpe's reply to the response, and the record in this case, the application is hereby denied as lacking arguable merit because the claims presented in the petition are res judicata or otherwise procedurally barred. See Supreme Court Rule 36.

Tharpe's motion for a stay of execution is also denied.

Hines, C. J., Blackwell, Boggs, Peterson, Grant, JJ., and Judge Charles J. Bethel concur. Melton, P. J., Benham, and Hunstein, JJ., dissent. Nahmias, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk 's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

Attachment B

SUPREME COURT OF GEORGIA
Case No. S18W0242

Atlanta November 2, 2017

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

KEITH THARPE v. ERIC SELLERS, WARDEN

Upon consideration of Tharpe's motion for reconsideration and the included motion to hold this case in abeyance, they are both denied.

Hines, C. J., Blackwell, Boggs, Peterson, Grant, JJ., and Judge Charles J. Bethel concur. Melton, P. J., Benham, and Hunstein, JJ., dissent. Nahmias, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk 's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

Attachment C

SUPREME COURT OF GEORGIA
Case No. S18W0242

Atlanta January 25, 2018

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

KEITH THARPE v. ERIC SELLERS, WARDEN

Upon consideration of Tharpe's request for leave to file a second motion for reconsideration, it is denied.

Hines, C. J., Melton, P. J., Blackwell, Boggs, Peterson, Grant, JJ., and Judge Charles J. Bethel concur. Benham and Hunstein, JJ., dissent. Nahmias, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

Attachment D

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

KEITH THARPE,	*	
	*	**CIVIL ACTION NO.**
Petitioner,	*	**2017-HC-13**
	*	
v.	*	**HABEAS CORPUS**
	*	
ERIC SELLERS, Warden, Georgia Diagnostic and Classification Center,	*	
	*	
Respondent.	*	

ORDER

This is Petitioner's second state habeas petition. Petitioner again argues the same juror racial bias claim previously raised and found to be procedurally defaulted by this Court and again claims he is intellectually disabled, which assertion has already been reviewed and rejected on the merits by this Court. This Court finds Petitioner's claim of juror racial bias is barred as res judicata, and, in the alternative, is still procedurally defaulted. Additionally, Petitioner's claims attendant to his allegation of intellectual disability are barred as res judicata. Accordingly, Petitioner's second state habeas petition is DISMISSED.

Standard of Review for Res Judicata

Bedrock principles of law establish that:

> Res judicata thus "prevents the re-litigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action."

Odom v. Odom, 291 Ga. 811, 812 (1) (2012); *see also Bruce v. State*, 274 Ga. 432, 434 (2) (2001) ("Without a change in the facts or the law, a habeas court will not review an issue decided on direct appeal."); *Hall v. Lance*, 286 Ga. 365, 687 (2010).

Standard of Review for Procedural Default

Under the procedural default doctrine set forth in *Black v. Hardin*, 255 Ga. 239 (1985) and *Valenzuela v. Newsome*, 253 Ga. 793 (1985) and codified at O.C.G.A. § 9-14-48(d), issues which were not raised at trial or on appeal may not be litigated in a habeas corpus proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice. O.C.G.A. § 9-14-48(d); *Black v. Hardin*, *supra*; *Valenzuela v. Newsome*, *supra*; *Hance v. Kemp*, *supra*; *White v. Kelso*, 261 Ga. 32 (1991).

Juror Misconduct Claim

Petitioner's exact claim of juror racial bias was presented in Petitioner's original state habeas petition. This Court previously found the claim to be procedurally defaulted. Petitioner has presented no new facts to overcome this

procedural bar. Instead, Petitioner alleges the United States Supreme Court's recent decision in *Peña-Rodriguez v. Colorado*, __U.S.__, 137 S. Ct. 855 (2017), is new law that requires the re-examination of his juror bias claim. At issue in *Peña-Rodriguez* was a Sixth Amendment challenge to the Colorado evidentiary rule that did not allow impeachment of jury verdicts based upon the internal deliberations of jurors. The Court rejected the continued constitutionality of this evidentiary rule by holding:

> [W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Peña-Rodriguez, 137 S. Ct. at 869.

First, the Court finds that Petitioner has failed to show that *Peña-Rodriguez* is retroactive to his collateral proceeding. Second, the Court notes that while the Court previously found Petitioner's juror testimony evidence was inadmissible under the no-impeachment rule of evidence, the Court also assumed that even if Petitioner's evidence were admissible he had still failed overcome the procedural default of his claim. Specifically, the Court found that Petitioner had failed to show that the juror in question, Barney Gattie, had relied upon any alleged racial bias in sentencing Petitioner to death. (Final Order, December 1, 2008, pp. 102-103). Therefore, even if *Peña-Rodriguez* were retroactive, it does not present new

law or facts to overcome the res judicata bar as this Court already reviewed Petitioner's evidence and found it did not show that racial animus was relied upon to sentence Petitioner.

Accordingly, the Court FINDS Petitioner's juror racial bias claim is barred from review under res judicata and is DISMISSED.

In the alternative, assuming *Peña-Rodriguez* is retroactive, Petitioner's claim is still procedurally defaulted. Petitioner has failed to show cause with any evidence or persuasive authority. Additionally, Petitioner has failed to show prejudice.

While there was evidence that one of Petitioner's jurors, Mr. Gattie, used a racially derogatory term associated with Petitioner's race, when read as a whole, the record does not show that racial animus was relied upon by the jury to convict or sentence Petitioner. The Court specifically credits Mr. Gattie's live deposition testimony, Mr. Gattie's second affidavit presented by Respondent, which Mr. Gattie swore was the truth, and the testimony from the remaining jurors. The Court finds the affidavit from Mr. Gattie presented by Petitioner's counsel to be less than credible given the circumstances under which Mr. Gattie testified it was obtained, specifically his testimony that he did not swear to the truth of the information in the affidavit. Consequently, Petitioner has failed to show prejudice

as he has failed to show a reasonable probability of a different outcome at his motion for new trial or on appeal under the *Peña-Rodriguez* standard.

Consequently, the Court FINDS Petitioner has failed to show cause and prejudice, or a miscarriage of justice to overcome the procedural default of his juror bias claim. Petitioner's juror bias claim is, in the alternative, DISMISSED as procedurally defaulted.

Petitioner's Challenge to Georgia's Burden of Proof for Intellectual Disability Claims.

Petitioner's allegation that Georgia's burden of proof for claims of intellectual disability is unconstitutional is barred from this Court's review as res judicata. This claim was raised and rejected in Petitioner's first state habeas corpus petition before this Court. He has presented no new law or facts to overcome this bar. Petitioner argues that *Moore v. Texas,* 137 S. Ct. 1039 (2017), is new law that allows this Court to review this claim a second time. In *Moore*, the Supreme Court held that diagnostic standards should be consulted in assessing claims of intellectual disability. *Moore* does not dictate burdens of proof and is not new law that overcomes the procedural bar. Accordingly, this Court FINDS this claim is barred by res judicata and the claim is DISMISSED.

Petitioner's Claim that He is Intellectually Disabled

Petitioner's claim that he is intellectually disabled is also barred from this Court's review as res judicata. Petitioner presented extensive evidence on this

claim in his first state habeas proceedings. This Court previously reviewed those claims using the current clinical diagnostic standards. *Moore* does not provide new law and Petitioner has asserted no new facts to overcome that bar. Therefore, this Court FINDS this claim is barred by res judicata and is DISMISSED.

As the Court is able to determine from the face of the pleadings that the claims are barred under res judicata, the DISMISSES the petition without a hearing. *See Collier v. State*, 290 Ga. 456 (2012). Petitioner's request for a stay of execution is DENIED.

SO ORDERED, this the 25 day of September, 2017.

THOMAS H. WILSON
Chief Judge of the Superior Courts
Towaliga Judicial Circuit

Prepared by:
Sabrina D. Graham
Senior Assistant Attorney General

Attachment E

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

KEITH LEROY THARPE,	*	
	*	CIVIL ACTION NO.
Petitioner,	*	93-V-144
	*	
v.	*	HABEAS CORPUS
	*	
HILTON HALL, WARDEN,	*	
Georgia Diagnostic and	*	
Classification Prison,	*	
	*	
Respondent.	*	

Filed 12/04 2008 at 10:00 A.M.
Frances R. Barnes
Clerk, Butts Superior Court

ORDER

Petitioner, Keith Leroy Tharpe, was convicted of malice murder and two counts of kidnapping with bodily injury. (R. 216-218). After finding statutory aggravating circumstances, (R. 221-222), Petitioner was sentenced to death. (R. 223-224). Petitioner's convictions and sentences were affirmed by the Supreme Court of Georgia on March 17, 1992. Tharpe v. State, 262 Ga. 110, 111 (1992). The United States Supreme Court denied Petitioner's Petition for Writ of Certiorari on October 19, 1992. Tharpe v. Georgia, 506 U.S. 942 (1992).

On March 17, 1993, Petitioner filed the above-styled habeas corpus petition. A multitude of attorneys for both the Petitioner and the Respondent have entered and left the case. This has made it difficult for the case to gain any "momentum", and has contributed considerably to the delay in the case's resolution. Evidentiary hearings were held on: May 28, 1998;

August 24, 1998; October 1-2, 1998; December 11, 1998; December 23, 1998; and July 30, 2007. Petitioner and Respondent called witnesses and presented evidence. Depositions were taken of a number of the trial jurors. Following a thorough review of the evidence, arguments and the post-hearing briefs submitted by both parties, this Court hereby ORDERS as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On direct appeal, the Georgia Supreme Court summarized the facts as follows:

> The evidence presented at trial showed the following: Tharpe's wife left him on August 28, 1990 and moved in with her mother. Following various threats of violence made by the defendant to and about his wife and her family, a peace warrant was taken out against him, and the defendant was ordered not to have any contact with his wife or family. Notwithstanding this order, Tharpe called his wife on September 24, 1990 and argued with her saying if she wanted to "play dirty," he would show her "what dirty was."
>
> On the morning of the 25th, his wife and her sister-in-law met Tharpe as they drove to work. He used his vehicle to block theirs and force them to stop. He got out of his vehicle, armed with a shotgun and apparently under the influence of drugs, and ordered them out of their vehicle. After telling the sister-in-law he was going to "f--- you up," he took her to the rear of his vehicle, where he shot her. He rolled her into a ditch, reloaded, and shot her again, killing her. The wife could not remember if the sister-in-law had been shot twice or three times. However, the autopsy established that the victim had been shot three times, once in the arm, once in the chest, and once in the head.
>
> Tharpe then drove away with his wife. After unsuccessfully trying to rent a motel room, Tharpe

parked by the side of the road and raped his wife. Afterward, he drove to Macon, where his wife was to obtain money from her credit union. Instead she called the police.

Tharpe, 262 Ga. at 110-111.

CLAIMS THAT ARE NOT BEFORE THIS COURT FOR REVIEW[1]

A. CLAIMS THAT ARE BARRED FROM REVIEW BY THIS COURT UNDER THE DOCTRINE OF *RES JUDICATA*.

The Court finds that the following claims have been raised and litigated on direct appeal and may not be relitigated by means of a habeas corpus proceeding. See Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974); Gunter v. Hickman, 256 Ga. 315, 348 S.E.2d 644 (1986); Roulain v. Martin, 266 Ga. 353, 466 S.E.2d 837 (1996).

That portion of Claim III, wherein Petitioner alleges that his right to a fair trial and due process were violated by the State's improper and highly prejudicial argument at the close of the guilt phase of the trial, (see Tharpe v. State, 262 Ga. at 113-114(16));

That portion of Claim IV, wherein Petitioner alleges that his constitutional rights were violated by the prosecutor's prejudicial and improper closing argument at the sentencing phase of the trial, (see Tharpe v. State, 262 Ga. at 113-114(16));

That portion of Claim VI, wherein Petitioner alleges that the unified appeal procedure as it was applied to

[1] Petitioner raised Claims I - XXXIII in his Consolidated First Amended Petition for Writ of Habeas Corpus and Motion For Leave to Amend filed on December 31, 1997. Petitioner raised Claims XXXIV - XXXXI in his Second Amended Petition for Writ of Habeas Corpus filed on January 21, 1998.

the Petitioner's case violated his constitutional rights, (see Tharpe v. State, 262 Ga. at 111(2));

That portion of Claim IX, wherein Petitioner alleges that the State exercised its preemptory challenges in a racially discriminatory manner, (see Tharpe v. State, 262 Ga. at 111-112(6));

That portion of Claim XI, wherein Petitioner alleges that the trial court's instructions to the jury in the guilt phase of trial violated Petitioner's constitutional rights, (see Tharpe v. State, 262 Ga. at 113(10-11));

That portion of Claim XII, wherein Petitioner alleges that the trial court's instructions to the jury in the sentencing phase of Petitioner's trial violated his constitutional rights, (see Tharpe v. State, 262 Ga. at 113 (12-13));

That portion of Claim XIV, wherein Petitioner alleges that the exclusion for cause of prospective jurors with moral scruples against the death penalty violated Petitioner's constitutional rights, (see Tharpe v. State, 262 Ga. at 113(14));

That portion of Claim XXI, wherein Petitioner alleges that the State introduced insufficient evidence to convict him beyond a reasonable doubt and that the State failed to adduce sufficient evidence to support the aggravating circumstances alleged, (see Tharpe v. State, 262 Ga. at 111-115(1)(22));

That portion of Claim XXVIII, wherein Petitioner alleges that his sentence of death was imposed arbitrarily and capriciously and pursuant to a pattern and practice of discrimination in the administration and imposition of the death penalty in Georgia, (see Tharpe v. State, 262 Ga. at 115(23)); and

That portion of Claim XXX, wherein Petitioner alleges that his constitutional rights were violated by the State's use of aggravating evidence not set out in the statute and the sentencing jury's reliance upon inadmissible extra judicial evidence in aggravation, (See Tharpe v. State, 262 Ga. at 112-116).

CLAIMS THAT ARE PROCEDURALLY DEFAULTED

The Court finds that the following claims were not raised on direct appeal and Petitioner did not establish cause and prejudice sufficient to excuse the procedural default of these claims in this collateral proceeding. See Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985); O.C.G.A. § 9-14-48(d).

That portion of Claim II, wherein Petitioner alleges that his rights to due process and a fair trial were violated by prejudicial remarks by the prosecution in its opening statement to the jury;

That portion of Claim V, wherein Petitioner alleges that the prosecution failed to disclose to Petitioner evidence in its possession which was material, and exculpatory on issues of guilt and/or punishment;

That portion of Claim VII, wherein Petitioner alleges that the trial court erred in failing to provide counsel with adequate funds for experts to allow counsel to adequately represent Petitioner;

Claim X, wherein Petitioner alleges that his constitutional rights were violated by misconduct involving Petitioner's jury;

That portion of Claim XI, wherein Petitioner alleges that the trial court erred its guilt phase charge to the jury; to the extent these allegations of error were raised on direct appeal and decided adversely to him, they are procedurally barred by the doctrine of *res judicata;*

That portion of Claim XIII, wherein Petitioner alleges that the trial court failed to strike for cause several venire persons whose attitudes toward the

death penalty would have prevented or substantially impaired their performance as jurors;

That portion of Claim XV, wherein Petitioner alleges that the State unconstitutionally interfered with the defense investigation of Petitioner's case

That portion of Claim XVI, wherein Petitioner alleges that the grand jury indictment of Petitioner was invalid;

That portion of Claim XVII, wherein Petitioner alleges that the prosecutor's refusal to allow Petitioner full pretrial discovery of information available violated Petitioner's rights;

That portion of Claim XVIII, wherein Petitioner alleges that his rights to a fair trial and due process were violated when the jury was not sequestered in order to avoid contact with prejudicial publicity, hostility to the defendant, and communications with third parties;

That portion of Claim XIX, wherein Petitioner alleges that his constitutional rights were violated by prejudicially excessive numbers of armed and uniformed law enforcement personnel at his trial;

That portion of Claim XX, wherein Petitioner alleges that his right to confront his accusers was violated by the introduction of hearsay testimony;

That portion of Claim XXII, wherein Petitioner alleges that his death sentence should be set aside on grounds that Petitioner is mentally ill and/or mentally retarded;

That portion of Claim XXVI, wherein Petitioner alleges that the trial court improperly permitted the introduction of inflammatory and unduly prejudicial evidence depriving Petitioner of a fair trial;

That portion of Claim XXVII, wherein it is alleged that the arbitrary abuse of discretion inherent in the prosecution's decision to seek the death penalty violated Petitioner's constitutional rights;

That portion of Claim XXVII, wherein Petitioner alleges that his sentence of death was imposed arbitrarily and capriciously, and pursuant to a pattern and practice of discrimination in the administration and imposition of the death penalty in Georgia, to the extent this claim was raised and adjudicated adversely to Petitioner on direct appeal it is barred by the doctrine of *res judicata;*

That portion of Claim XXIX, wherein Petitioner alleges that he was denied due process of law when the same jury that convicted him was responsible for determining the appropriate sentence; and

That portion of Claim XXXI, wherein Petitioner alleges that the decision makers in his case were motivated by racial animus in violation of Petitioner's constitutional rights.

CLAIMS THAT ARE NON-COGNIZABLE

Petitioner's allegation in **Petitioner's Post-Hearing Brief** that lethal injection is cruel and unusual punishment is non-cognizable in these habeas proceedings as it is not an assertion of a "substantial denial" of Petitioner's constitutional rights "in the proceedings which resulted in his conviction." O.C.G.A. § 9-14-42(a). Even if this Court were to find that this claim is cognizable, which it does not, this claim is without merit because this Court is bound by all decisions of the Georgia Supreme Court holding that lethal injection in Georgia has not been shown to be unconstitutional. See Braley v. State, 276 Ga. 47, 56, 572 S.E.2d 583 (2003), *citing* Dawson v. State, 274 Ga. 327, 335-336, 554 S.E.2d 337 (2001). Moreover, the Georgia Supreme Court has repeatedly upheld the constitutionality of

lethal injection. Braley v. State, 276 Ga. 47, 56, 572 S.E.2d 583 (2002); Franks v. State, 278 Ga. 246, 265, 599 S.E.2d 134 (2004); Riley v. State, 278 Ga. 677, 689, 604 S.E.2d 488 (2004); Lewis v. State, 279 Ga. 756, 766, 620 S.E.2d 778 (2005); Nance v. State, 280 Ga. 125, 127, 623 S.E.2d 470 (2005); Williams v. State, 281 Ga. 87, 90, 635 S.E.2d 146 (2006). As such, this claim is hereby denied.

Additionally, Petitioner's allegation of cumulative error in **Claim XXXIII** is non-cognizable in these habeas proceedings as the Georgia Supreme Court has repeatedly held that there is no cumulative error rule in Georgia. See, e.g., Rogers v. State, 282 Ga. 659, 668 (2007); Schofield v. Holsey, 281 Ga. 809, 812 n. 1 (2007); Smith v. State, 277 Ga. 213, 219 (2003); Head v. Taylor, 273 Ga. 69, 70 (2000). As such, this claim is hereby denied.

CLAIMS RAISED BY PETITIONER THAT ARE MOOT

As electrocution is no longer used as the method of execution in Georgia, Dawson v. State, 274 Ga. 327 (2001), the Court finds that the following claims regarding electrocution are moot:

> **Claim XXIV**, wherein Petitioner alleges that the death penalty by electrocution, is cruel and unusual punishment; and
>
> **Claim XXV**, wherein Petitioner alleges that execution by electrocution is cruel and unusual punishment.

CLAIMS THAT ARE REVIEWABLE BY THIS COURT

As Petitioner had the same counsel throughout trial and appeal, Petitioner's ineffective assistance of counsel claims could not have been raised previously. Ryan v. Thomas, 261 Ga. 661, 409 S.E. 2d 507 (1991); White v. Kelso, 261 Ga. 32, 401 S.E.2d 733 (1991). Accordingly, these claims (Claim I) are properly before the Court for review.

A. PETITIONER HAS FAILED TO CARRY HIS HEAVY BURDEN OF ESTABLISHING, PURSUANT TO THE TWO-PRONG *STRICKLAND* STANDARD, THAT COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT COUNSEL'S REPRESENTATION RESULTED IN PREJUDICE TO PETITIONER.

1. Applicable Standards Governing this Court's Review of Petitioner's Ineffectiveness Claims

In Claim I of Petitioner's Amended Petition for Writ of Habeas Corpus, as well as numerous footnotes throughout the petition, Petitioner alleges that he was denied effective assistance of counsel in violation of his constitutional rights.

This Court denies this claim. This Court finds that Petitioner failed to prove both the deficiency and prejudice prongs of the test for reviewing claims of ineffective assistance of counsel under the applicable standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). Because Petitioner failed to overcome Strickland's intentionally heavy burden of proving ineffectiveness, the writ of habeas corpus is

denied as to Petitioner's claims of ineffective assistance of counsel.

The standards for reviewing allegations of ineffective assistance of counsel were established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must establish *both* that his attorney's performance was deficient *and* that the attorney's error resulted in prejudice to Petitioner's case. See Strickland, 466 U.S. at 698. Unless a petitioner makes both showings, his conviction or death sentence can not be found to be the unreliable result of a breakdown in the adversarial process. Strickland, 466 U.S. at 687. The Strickland standard, which requires that a petitioner must satisfy both performance and prejudice prongs to demonstrate ineffectiveness was adopted by the Georgia Supreme Court in Smith v. Francis, 253 Ga. 782, 783, 325 S.E.2d. 362 (1985); see also Jones v. State, 279 Ga. 854 (2005); Washington v. State, 279 Ga. 722 (2005); Davis v. Turpin, 273 Ga. 244 (2000); Hayes v. State, 263 Ga. 15 (1993). Therefore, the Strickland standard governs this Court's review of Petitioner's ineffective assistance claims.

a. Deficient Performance Prong

In examining the deficient performance prong of the Strickland standard, the United States Supreme Court instructed,

"a court must indulge **a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance;** that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (internal citations omitted)(emphasis added); see also Wiggins v. State, 280 Ga. 627 (2005); Sims v. State, 278 Ga. 587 (2004); Brady v. State, 270 Ga. 574 (1999). The Court in Strickland also stressed that "[c]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690; accord Smith v. Francis, 253 Ga. at 783; see also Zant v. Moon, 264 Ga. 93, 97 (1994).

With regard to this presumption in favor of finding counsel to be effective, the Supreme Court held in Burger v. Kemp that a reviewing court should "address not what is prudent or appropriate, but only what is constitutionally compelled." 483 U.S. 776, 780 (1987); see also Zant v. Moon, 264 Ga. at 97-98. In applying the Strickland standards, the Georgia Supreme Court recognized that "[t]he test for reasonable attorney performance 'has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. **We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at**

trial.'" Jefferson v. Zant, 263 Ga. 316, 318, 431 S.E.2d 110 (1993)(quoting White v. Singletary, 972 F.2d 1218, 1220-1221 (11th Cir. 1992))(emphasis added). See also Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994)(holding, "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioner's to bear, is and is supposed to be a heavy one.").

In addition to the strong presumption in favor of effective assistance of counsel, the United States Supreme Court also has advised that courts reviewing ineffectiveness claims should **"eliminate the distorting effects of hindsight**, to reconstruct the circumstances of counsel's challenge to conduct, and to **evaluate the conduct from counsel's perspective at the time."** Strickland, 466 U.S. at 688 (emphasis added). In Lockhart v. Fretwell, the United States Supreme Court adopted the rule of contemporary assessment of counsel's performance by holding the following:

> Ineffective assistance of counsel claims will be raised only in those cases where a defendant has been found guilty of the offense charged, and from the perspective of hindsight there is a natural tendency to speculate as to whether a different trial strategy might have been more successful. We adopted the rule of contemporary assessment of counsel's conduct because a more rigid requirement "could dampen the ardor and impair the independence of defense counsel,

> discourage the acceptance of assigned cases, and undermine the trust between attorney and client."

506 U.S. 364, 372 (1993)(citing Strickland, 466 U.S. at 690).

b. Prejudice prong

In Strickland, the Supreme Court held that there is prejudice stemming from ineffective assistance of counsel if there is a reasonable probability that, absent the deficiencies, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. The Supreme Court in Lockhart further defined the "prejudice" component of Strickland, holding that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair and unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Lockhart, 506 at 369-370.

In Smith v. Francis, 253 Ga. at 783 (1985), the Supreme Court of Georgia interpreted the prejudice prong to require that a petitioner prove that the outcome of the proceedings would have been different. "In order to establish that trial counsel's performance was so defective as to require a new trial, [the Petitioner] must show that counsel's performance was deficient and that the deficient performance so prejudiced [the

Petitioner] that there is a reasonable likelihood that, absent counsel's errors, the outcome of the trial would have been different." Roberts v. State, 263 Ga. 807, 807-808 (1994). "Regarding death penalties, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Smith v. Francis, 253 at 783-784.

In the instant case, this Court has applied the guiding principles set forth in Strickland and its progeny, as adopted by the Georgia Supreme Court, i.e., according a strong presumption of effectiveness to counsel's conduct; viewing counsel's representation objectively from the perspective of counsel at the time of trial; refusing to engage in hindsight analysis; presuming the reasonableness of judgment calls and trial strategy; acknowledging that even the most qualified counsel would likely represent a capital litigant differently; and recognizing that even the most experienced and effective attorney might be unable to prevent the imposition of the death penalty in a particular case. This Court finds that Petitioner failed to establish that counsel's performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. This Court also finds that Petitioner failed to establish that, but for alleged errors or omissions by counsel, there is a

reasonable probability that the result of the proceeding would have been different. Id. at 694. Accordingly, this Court hereby denies habeas corpus relief as to the entirety of Petitioner's claims of ineffective assistance of counsel.

a. Trial Counsel's Extensive Experience Supports Greater Presumption in Favor of Finding Effective Assistance of Counsel

At trial and on appeal, Petitioner was represented by two experienced attorneys: Charles Newberry and Shane Geeter. Mr. Newberry spent four years at the Ocmulgee District Attorney's office, three of those years serving as the Chief Assistant District Attorney. Id. Mr. Newberry had complete responsibility for the prosecution in four counties, during which time he tried approximately fifty to one hundred cases involving murder, robbery, rape, kidnapping, battery, aggravated battery, aggravated assault, theft, and forgery. (HT, December 11, 1998, Vol. I, pp. 34-35). Before Petitioner's trial, Mr. Newberry was lead defense counsel on three death penalty trials, none of which resulted in the defendant receiving the death penalty. Id. Mr. Newberry also tried three non-death penalty murder cases. Id.

Co-counsel, Shane Geeter, was also an experienced criminal lawyer. Mr. Geeter prosecuted between seven and twelve criminal jury trials, and over one hundred fifty civil bench trials during his years with the District Attorney's Office, and while

in private practice, criminal work consisted of sixty to seventy percent of his cases, some of which were murder cases. (HT, December 23, 1998, p. 9).

In reviewing the reasonableness of the decisions made by Mr. Newberry and Mr. Geeter throughout their representation of Petitioner, this Court has given additional deference to the decisions made by these attorneys as both Mr. Newberry and Mr. Geeter had extensive experience in criminal cases, and Mr. Newberry had considerable experience with capital cases, prior to representing Petitioner. See Chandler v. United States, 218 F. 3d 1305, 1312 (11th Cir. 2000)(en banc)("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger."); see also Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998)("Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel."); Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994)("The more experienced an attorney is, the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense without substantial investigation was reasonable under the circumstances.").

b. Trial Counsel's Experience In The Judicial Circuit In Which Petitioner Was Tried Also Supports The Presumption In Favor Of Finding Counsel's Strategic Decisions Reasonable.

In addition to the greater deference based on experience, in reviewing trial counsel's representation, this Court also considered trial counsel's knowledge of the jury and trial counsel's knowledge of the circuit in which Petitioner's case was tried. As held by the Eleventh Circuit Court of Appeals, "[a]nother factor requiring deference to counsel's judgment call in this case is that it was a decision based upon his perception of how the jury would react to the evidence of hypnosis. We have held that a defense attorney's sense of the jury's reaction to testimony or evidence is a sound basis on which to make strategic decisions. See Card v. Dugger, 911 F.2d 1494, 1511 (11th Cir. 1990); Foster v. Strickland, 707 F.2d 1339, 1344 (11th Cir. 1983), cert. denied, 466 U.S. 993, 104 S. Ct. 2375, 80 L. Ed. 2d 847 (1984); Gates, 863 F.2d at 1499." Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994).

In interpreting and applying the Strickland standard, the Eleventh Circuit has also held:

> Writing for this Court more than a decade ago, Judge Vance observed that in regard to strategy decisions, trial counsel's "position in reaching these conclusions is strikingly more advantageous than that of a federal habeas court in speculating post hoc about his conclusions." Stanley v. Zant, 697 F.2d 955, 970 (11th Cir. 1983), cert. denied, 467 U.S. 1219, 104 S. Ct.

> 2667, 81 L. Ed. 2d 372 (1984). He explained that counsel's knowledge of local attitudes, and "evaluation of the particular jury, his sense of the chemistry of the courtroom are just a few of the elusive, intangible factors that are not apparent to a reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions." Id.

Waters v. Thomas, 46 F.3d 1506, 1521-1522 (11th Cir. 1995), en banc.

Petitioner's case was tried in the Ocmulgee Judicial Circuit where both Mr. Newberry and Mr. Geeter had practiced law for the majority of their careers, including working as Assistant District Attorneys and private practitioners. Thus, this Court granted even greater deference to their strategic decisions based on their knowledge and experience within the circuit in which Petitioner's case was tried.

After applying the proper deference to trial counsel and trial counsel's strategic decision making, this Court finds that Petitioner has failed to show, as required by Strickland, that trial counsel were deficient or that Petitioner was prejudiced and therefore, this Court denies Petitioner relief on his ineffective assistance of counsel claims.

2. Trial Counsel's Reasonable Strategy, Preparation And Investigation

After review of the extensive record developed, this Court finds that trial counsel's approach to investigation and preparation for the guilt phase of trial was reasonable when evaluated using Strickland standards. Petitioner has failed to establish either deficient performance or the requisite prejudice under Strickland in order to establish ineffective assistance of counsel as to the pre-trial proceedings in Petitioner's case or as to trial counsel's preparation and performance for the guilt phase of trial, therefore this Court denies this claim.

A key component of a Strickland analysis involves an examination of defense counsel's investigation. Strickland instructs, with regard to trial counsel's obligation concerning making investigatory efforts, that an attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668 (1984). What investigations are reasonable "may be determined or substantially influenced by the defendant's own statements or actions." Id. See also Mulligan v. Kemp, 771 F.2d 1435, 1442, 1442 (11th Cir. 1985).

It is also significant to note that under Strickland and its progeny that, "[m]ost important, we must avoid second-

guessing counsel's performance. (Cite omitted). As is often said, 'Nothing is so easy as to be wise after the event.'" Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir. 1992). Avoiding hindsight analysis is of particular significance in this case, as the trial took place in early 1991, thus giving Petitioner more than 15 years of the evolution of death penalty cases and defenses as a backdrop for these current proceedings. Thus, as Strickland requires, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

a. Initial Preparation of the Case

Charles Newberry and Shane Geeter were appointed by Judge Hugh Thompson as counsel for Petitioner in October and November 1990, respectively. (HT, December 11, 1998, Vol. I, p. 52; HT, December 23, 1998, pp. 12-13). This Court finds that in addition to bringing their own vast experience to their representation of Petitioner, trial counsel consulted with other attorneys, including many defense attorneys in the Ocmulgee Judicial Circuit who had experience with death penalty case preparation and death penalty trials. (HT, December 23, 1998, p. 19). Trial counsel also consulted other references to assist

in preparation for Petitioner's case including, "Defending a Capital Case in Georgia," a manual written by Stephen Bright, the Executive Director of the Southern Center for Human Rights, Georgia Criminal Trial Practice by William Daniel, and Criminal Trial Practice. (HT, December 23, 1998, pp. 19-20; HT, December 11, 1998, Vol. I, p. 70).

Not only did defense counsel consult other experienced capital litigation attorneys and research capital issues, but trial counsel also utilized their prior experience with the prosecutor's office in representing Petitioner. Both Mr. Newberry and Mr. Geeter were former Assistant District Attorneys under District Attorney Joe Briley, who prosecuted Petitioner's trial. (HT, December 11, 1998, Vol. I, p. 33; HT, December 23, 1998, p. 7).

As the evidence reflects, there was no official division of duties between Petitioner's counsel, however, counsel unofficially divided responsibilities depending on their respective strengths or who was conveniently located to a potential witness. (HT, December 11, 1998, Vol. I, p. 53). The initial contact with witnesses was assigned to a particular attorney, but both Mr. Newberry and Mr. Geeter spoke with all the witnesses at one time or another. Id.

Further, trial counsel conferred with each other regarding which motions should be filed, and assigned themselves the

preparation of the specific motions. (HT, December 11, 1998, Vol. I, pp. 53-54).

b. Initial Investigation of the State's Case

Early in the investigation, trial counsel met with Joe Briley, the District Attorney of Jones County. (HT, December 11, 1998, Vol. I, p. 54). It is clear from the record that both Mr. Newberry and Mr. Geeter were familiar with the District Attorney's Office under Mr. Briley, as they were both former Assistant District Attorneys in the Ocmulgee Circuit. (HT, December 11, 1998, Vol. I, p. 33; December 23, 1998, p. 7).

Mr. Briley discussed with Petitioner's trial counsel aspects of the State's case, including the prosecution's trial strategy. Id. Mr. Briley also had an open file policy in death penalty cases, and allowed Mr. Newberry and Mr. Geeter to review and copy the District Attorney's file. Id. Additionally, trial counsel received a copy of the State's witness list, and was referred to local sheriff's investigators, as well as, GBI investigators involved in the investigation of Ms. Freeman's murder. (HT, December 11, 1998, Vol. I, p. 55).

Trial counsel also interviewed each of the investigators, as well as every individual on the State's witness list including the State's ballistics expert, Kelly Fite, and forensic pathologist, Dr. Thomas Young. (HT, December 11, 1998, Vol. I, pp 55-56). The defense reviewed photos and inspected

the physical evidence located at the District Attorney's Office and the GBI Office. (Id; HT, December 23, 1998, p. 15). In addition to reviewing the evidence in the custody of the GBI and the District Attorney's Office, trial counsel testified that they also visited the crime scene on at least two occasions. (HT, December 11, 1998, Vol. I, pp. 55-56).

c. Investigation and Challenge to the Criminal Charges

This Court finds that after reviewing investigative reports and the autopsy report, trial counsel conducted extensive research on the elements of the crimes of which Petitioner was accused. (HT, December 23, 1998, p. 21). Trial counsel attacked the indicted charges to support the defense theory that the State over-indicted Petitioner and utilized the "shot gun approach" in trying Petitioner. (T. 2009).

Trial counsel argued that the armed robbery charge was not supported by the evidence presented by the State. (T. 2329). Ultimately, trial counsel were successful as to this offense, and the State withdrew the armed robbery charge. (T. 2329).

Additionally, this Court finds that contrary to Petitioner's assertions, Mr. Newberry and Mr. Geeter also investigated the elements of the kidnapping charges as to both Ms. Tharpe and Ms. Freeman. (HT, December 23, 1998, p. 21). At trial, trial counsel argued that the charge of kidnapping as to Ms. Freeman was not supported by the evidence, and presented a

theory that there was no kidnapping or bodily injury to Ms. Tharpe. (T. 2331-2332).

d. Plea Negotiations

The evidence before this Court clearly exhibits that, while continuing to investigate and prepare for trial, counsel also attempted to negotiate a plea on Petitioner's behalf based in part on a plea negotiated in a similar case. (HT, December 11, 1998, Vol. I, p. 70). Shortly before Petitioner's trial, District Attorney Briley agreed to a negotiated plea in the case against Robert Dannenburg. Id. Mr. Dannenburg was accused of murder, aggravated assault, and kidnapping. (Pre-trial proceedings, December 17, 1990, pp. 68-70). Mr. Newberry argued during pre-trial proceedings that it would be unconstitutional for the District Attorney to offer a negotiated plea to Mr. Dannenburg, but not to Petitioner, as the facts were similar in both cases. (Id. at 70).

Trial counsel additionally filed a motion requesting that the Court bar the State from requesting the imposition of the death penalty against Petitioner stating that counsel "does not believe that there is sufficient reason to justify any different treatment for this Defendant from the treatment of Dannenburg." (R. 63-64). The trial court heard argument on the motion on December 17, 1990, during which Mr. Briley distinguished the Dannenburg case from Petitioner's case. Mr. Briley argued that

in Dannenburg there was evidence that Mr. Dannenburg was mentally ill, unlike Petitioner. (Pre-trial proceedings, December 17, 1990, pp. 218-222). The trial court denied the defendant's motion for a negotiated plea. (HT, December 11, 1998, Vol. I, p. 71).

e. Communicating and Conferring with Petitioner

The record before this Court reflects that trial counsel met with Petitioner numerous times throughout the investigation and preparation for trial, and conferred with Petitioner about every detail of the case. (HT, December 11, 1998, Vol. I, pp. 62-63). Trial counsel testified that during their many conversations with him, Petitioner seemed reasonably intelligent and able to participate in his defense, including strategy discussions. (HT, December 23, 1998, pp. 31-37). For example, trial counsel spoke with Petitioner about whether he should testify at the guilt phase and/or sentencing phase of trial. (HT, December 11, 1998, Vol. I, pp. 62-63). Petitioner agreed that he should not testify at the guilt phase, but should testify during sentencing. Id. Overall, the record is clear that Petitioner was in agreement with the defense strategy. (HT, December 23, 1998, p. 31).

A major factor trial counsel had to consider in preparing for the guilt phase of trial was that Petitioner's account of the crimes differed only slightly from the living victim's

account. Accordingly, as trial counsel testified before this Court, there was little defense in the guilt phase of the trial aside from arguing the charges in the indictment and the number of shots actually fired. (HT, December 11, 1998, Vol. I, pp. 68-69; HT, December 23, 1998, pp. 20-21).

The State's evidence showed that Petitioner stopped the victims, Migrisus Tharpe and Jackie Freeman, in their car while the two women were on their way to work. Petitioner stopped the women in an attempt to reunite with his wife, Migrisus Tharpe. Thereafter, Petitioner shot the victim, Jackie Freeman three times. (HT, December 11, 1998, Vol. I, p. 62). The murder was witnessed by Migrisus Tharpe. (HT, December 11, 1998, Vol. I, p. 61).

The record before this Court reflects, Petitioner's own account of the crimes was similar. However, to the extent that the State presented evidence that Ms. Freeman was shot three times, Petitioner claimed there were only two shots. (HT, December 11, 1998, Vol. I, pp. 68-69).

f. <u>Choosing a Reasonable Trial Strategy</u>

After conducting their investigation, trial counsel chose a strategy to portray Petitioner as acting on emotion and passion, thus attempting to convince the jury that voluntary manslaughter was a more appropriate charge for Petitioner's actions. (HT, December 11, 1998, Vol. I, p. 72; HT December 23, 1998 p. 28).

Trial counsel testified that, after evaluating the State's evidence and based on Petitioner's own account of the crime, there was little defense they felt could be presented in the guilt phase of the trial. (HT, December 11, 1998, Vol. I, pp. 73-74, 247). Therefore, the defense focused on preparing for the sentencing phase of trial. Id.

3. Petitioner Has Failed To Establish That Trial Counsel's Investigation And Presentation Of Mitigating Evidence Constituted Deficient Performance Or that He Was Prejudiced By Trial Counsel's Representation.

This Court finds that Petitioner failed to prove that trial counsel's investigation and strategy for presentation of mitigating evidence during the sentencing phase of Petitioner's death penalty trial was ineffective. The evidence presented to this Court establishes that trial counsel were not deficient in their investigation and presentation of mitigation evidence, therefore, this Court denies this claim.

As has been repeatedly stated in various cases comprising the Strickland progeny, "[t]he fact that [Petitioner] and his present counsel now disagree with the difficult decisions regarding trial tactics and strategy made by trial counsel does not require a finding that [Petitioner] received representation amounting to ineffective assistance of counsel." Stewart v. State, 263 Ga. 843, 847, 440 S.E.2d 452 (1994) (citing Van Alstine v. State, 263 Ga. 1, 4-5 (1993)). See also

Griffin v. Wainwright, 760 F.2d 1505, 1513 (11th Cir. 1985); Rogers v. Zant, 13 F.3d 384 (1994).

This Court finds that trial counsel conducted an investigation of Petitioner's background, developed a reasonable strategy of mitigation and effectively presented this strategy to the jury. Therefore, Petitioner's claim of ineffective assistance of counsel in the sentencing phase of Petitioner's trial is denied.

a. Trial Counsel's Mitigation Investigation

i. Sentencing Phase Theory

This Court finds that trial counsel developed a strategy in the sentencing phase of trial to portray Petitioner in the best light possible, and to convince the jurors that Petitioner did not intend to commit any crime the day of the murder, but instead, acted on emotion upon separating from his wife. (HT December 11, 1998 p. 72-73, 111). To this end, trial counsel intertwined the evidence from the guilt phase on the "domesticity of the case, the emotion, the passion, the doubt" to persuade the jury that this murder case was distinguishable from a death penalty case. Id. Further, trial counsel attempted to show that Petitioner had "some value and worth as a person … worthy of his life being spared" through testimony from family and friends that Petitioner is a "person of reasonable intelligence, of decent family, just a nice guy." Id.

Trial counsel testified that this strategy was "presented to [them] by the facts and the evidence in the case," and that it seemed the best course to take after giving it considerable thought. (HT, December 11, 1998, Vol. I, p. 74). Furthermore, trial counsel, "limited by what [they] had in front of [them] … thought that was the best route to go … and didn't really think there was another route [they] could have taken".[2] Id. Therefore, based on the record and evidence presented, this Court finds that trial counsel investigated possible mitigation strategies and made a reasonable strategic decision, after a reasonable investigation, to choose the sentencing phase theory supported by the facts in Petitioner's case.

ii. Reasonable Investigation into the State's Aggravating Evidence and Petitioner's Background

This Court finds that trial counsel reasonably investigated the State's case and Petitioner's background. The evidence presented during these habeas proceedings establishes that, in order to prepare for the sentencing phase of trial, trial counsel investigated Petitioner's background including Petitioner's family, his social history, his criminal history and his work history. (HT, December 23, 1998, pp. 13-14).

[2] Notably, trial counsel still thought that the strategy they utilized at trial was the best route to take at the time of trial counsel's testimony at the evidentiary hearing in 1998. (HT, December 11, 1998, Vol. I, p. 74).

This Court finds that trial counsel prepared for the sentencing phase of trial by anticipating the State's case to be presented in aggravation of sentence. Trial counsel were aware of Petitioner's past criminal convictions for being a "habitual violator". (HT, December 23, 1998, p. 14). Accordingly, trial counsel researched these previous cases against Petitioner as part of their preparation for trial. Id.

Additionally, trial counsel investigated Petitioner's background by speaking with Petitioner and interviewing numerous potential mitigating witnesses. Trial counsel interviewed Petitioner's family and friends, whose names were provided to counsel by Petitioner. (HT, December 23, 1998, p. 23). While some family members, specifically Petitioner's mother and aunt, were cooperative, others were reluctant to testify for Petitioner. (HT, December 23, 1998, p. 100). In light of the circumstances of the crime, trial counsel felt it would be best to avoid delaying the trial as they were concerned that some witnesses, particularly Petitioner's wife, would refuse to testify because they feared that as time passed, what sympathy they had for Petitioner, would also diminish, which this Court found to be a reasonable decision. (HT, December 11, 1998, Vol. I, pp. 82-83).

Significantly, during their investigation for mitigation witnesses, trial counsel found that every prospective mitigation

witness presented a positive view of Petitioner's childhood. (HT, December 11, 1998, Vol. I, pp. 99-100). There were not any statements from any prospective witnesses depicting abuse or neglect of Petitioner from his family and friends. Id. Moreover, Petitioner himself reported to his trial counsel that he had a good upbringing. (HT, December 23, 1998, p. 23). This information from prospective witnesses supported the defense theory that Petitioner acted in an emotional state, but was otherwise a kind and gentle person, deserving of mercy. (HT, December 11, 1998, Vol I, pp. 71-72).

This Court finds that, during their investigation, trial counsel discovered and was aware of Petitioner's past and present alcohol abuse. (HT, December 11, 1998, Vol. I, p. 106; HT, December 23, 1998, p. 30). Trial counsel specifically discussed whether to present Petitioner's alcohol abuse as mitigating evidence, but ultimately determined that Petitioner's elicit alcohol use would not garner sympathy with the jury. (HT, December 11, 1998, Vol. I, pp. 44-46, 48; December 23, 1998, p. 31). This Court finds that this determination was not predicated only on trial counsel's vast criminal experience, but additionally on Mr. Newberry's vast experience with the Jones County jury pool. Id. (See Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994) ("We have held that a defense attorney's sense of the jury's reaction to testimony or evidence

is a sound basis on which to make strategic decisions."); Waters v. Thomas, 46 F.3d 1506, 1521-1522 (11th Cir. 1995), en banc).

Additionally, this Court finds that the record reflects that, in preparing for trial, trial counsel also investigated Petitioner's work history. However, the evidence shows that following their investigation, trial counsel determined that this avenue would be unhelpful as Petitioner's own account of his work history, along with information from Petitioner's former employers, revealed an unstable work history. (HT, December 11, 1998, Vol. II, p. 227).

The record supports this Court's finding that trial counsel conducted a reasonable investigation into Petitioner's background, including interviewing family, friends and previous employers and specifically including an investigation into the possibility of presenting Petitioner's alcohol abuse as mitigating evidence.

It is also clear to this Court that Petitioner's counsel made reasonable, strategic decisions as to what mitigation evidence to present from family, friends and prior employers, by reasonably weighing the potential benefit of calling these witnesses against the potential harm of presenting these witnesses. As the Georgia Supreme Court has held, those strategic decisions, made after a thorough investigation are

"virtually unchallengeable." Ferrell v. Head, 261 Ga. 115, 120 (1991). See also Strickland, 466 U.S. at 689.

iii. Investigation into a Possible Mental Health Defense

In addition to the other mitigation investigation, the record before this Court clearly establishes that trial counsel also investigated for a possible mental heath defense to present at trial. Mr. Geeter testified that, based on his past legal experience and information gathered from the death penalty manual, he researched the possibility that Petitioner suffered from mental health disorders. (HT, December 23, 1998, pp. 22-23). Trial counsel also considered the possibility of any head injuries sustained by Petitioner, which was quickly undermined by Petitioner's report to his counsel that he had not sustained any significant head injuries. Id.

Despite Petitioner's reports to his attorneys, as part of the standard practice in death penalty cases, Mr. Newberry arranged for Petitioner to be evaluated by a psychologist, Dr. Archer Moore. (R. 22; HT, December 11, 1998, Vol. I, p. 111). Dr. Moore had been retained by Mr. Newberry as an expert witness in a previous murder trial, during which Dr. Moore testified in, what Mr. Newberry felt was, a favorable manner for Mr. Newberry's prior client. (HT, December 11, 1998, Vol. I, p. 94).

As part of his evaluation of Petitioner, Dr. Moore conducted an interview of Petitioner. During that portion of the evaluation, Petitioner related an account of the crime that was similar to that given to trial counsel and presented by the State. (HT, December 11, 1998, Vol. II, Res. Ex. 3.; HT, December 11, 1998, Vol. II, Res. Ex. 4). Dr. Moore found that Petitioner was somewhat defensive in his responses, but "certainly articulate enough to make himself understood," an observation which was consistent with trial counsel's own experience with Petitioner. (Id.; HT, December 11, 1998, Vol. I, pp. 112-113; HT, December 23, 1998, p. 37).

Even after making these general observations, Dr. Moore administered a battery of tests including the Wechsler Adult Intelligence Scale Revised (WAIS-R), the Bender Visual Motor Gestalt Test, the Rorschach test, and the House-Tree-Person test, to determine Petitioner's general intellectual functioning, and to ascertain whether there was evidence of gross organic impairment in the brain or symptoms of a major mental illness. The record reflects that it was determined that Petitioner's full scale score on the WAIS-R was 74, which Dr. Moore described as borderline intellectual functioning, "**not** mentally retarded." (HT, December 11, 1998, Vol. II, Res. Ex. 3.; HT, December 11, 1998, Vol. II, Res. Ex. 4).

Based on their own interaction with Petitioner and after consulting with Dr. Moore and reviewing his psychological reports, trial counsel determined Dr. Moore's evaluation of Petitioner was not beneficial to a mental health defense, and reasonably decided that they would not present testimony from Dr. Moore at trial. (HT, December 23, 1998, p. 123).

However, Petitioner was also evaluated by the State's psychologist, Dr. Storms. (HT, December 11, 1998, Vol. II, Res. Ex. 2). Of import is the fact that, in that evaluation, Dr. Storms found that Petitioner "exhibited no signs of mental retardation." Id. Moreover, Dr. Storms determined that the results of his administered MMPI were invalid because they indicated that Petitioner was malingering. Id.

Significantly, both Dr. Moore and Dr. Storms described Petitioner as "mean" during conversations with trial counsel. (HT, December 11, 1998, Vol. I, pp. 122-124). Additionally, during a subsequent consultation with trial counsel, Dr. Moore described Petitioner as a "mean son of a bitch". (HT, December 11, 1998, Vol. I, p. 125).

As there was little dispute as to the facts of the crime and as their investigation, based on the evaluation of two experts, indicated that a mental health strategy would not be successful in mitigating the case, trial counsel's strategy was to present Petitioner's family and friends at sentencing, to

show he was, "of reasonable intelligence", a "nice guy" from a "decent family," and worthy of being spared execution. (HT, December 11, 1998, Vol. I, pp. 71-72). In light of the results of the two expert evaluations prior to trial and their conversations with Petitioner and his family and friends, this Court finds the adoption of this strategy was reasonable and counsel were clearly not deficient.

b. Petitioner Has Failed To Establish That Trial Counsel's Presentation Of Mitigation Evidence Was Unreasonable or that Petitioner was Prejudiced.

i. Mitigating Evidence Supporting Defense Theory

This Court finds that Petitioner failed to prove that trial counsel rendered ineffective assistance of counsel with regard to their presentation of mitigating evidence during the penalty phase of trial. This Court finds that trial counsel adhered to a reasonable strategy which was developed after a thorough investigation. That theory, as evidenced by the record in these proceedings, was to present evidence that Petitioner was a decent, nice guy who acted out on emotion and did not intend to commit any crime the day of the murder. (HT, December 11, 1998, Vol. I, pp. 72-73, 111). Trial counsel presented thirteen witnesses, including Petitioner himself, during the sentencing phase of Petitioner's trial to support and present their mitigation theory.

The record establishes that trial counsel presented numerous witnesses to support their mitigation theory that Petitioner deserved mercy. This Court finds that trial counsel attempted to mitigate Petitioner's crimes by offering witnesses that would articulate to the jury that Petitioner was not mean-spirited by nature, but that Petitioner's crimes were due to passion. (T. 2551-2644). The record shows that the mitigation witnesses called by the defense testified to the fact Petitioner loved his wife and was distraught when she left their home, thus further supporting the defense theory that Petitioner was an overall decent man, deserving of mercy.

ii. No Deficiency or Prejudice

The evidence presented to this Court established that trial counsel were not deficient in their selection and preparation of the mitigation witnesses. In making this finding, this Court relies upon Strickland where it is instructed, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (citations omitted) (quoted in Bowley, 261 Ga. at 280). The Court stressed the importance of this deferential posture required of a reviewing court by reiterating that in judging

claims of ineffective assistance, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690; accord Smith v. Francis, 253 Ga. at 783; see also Zant v. Moon, 264 Ga. 93, 97, 440 S.E.2d 657 (1994).

This Court also notes that numerous decisions of state and federal courts have made clear that, "at a sentencing proceeding, counsel is not required to present all mitigation evidence, even if additional mitigation evidence would have been compatible with counsel's strategy." Putman, 268 F.3d at 1244. "Counsel's complete failure to present mitigation evidence does not necessarily constitute deficient performance, even if mitigation evidence is available." Id. Osborne v. Terry, 466 F.3d 1298, 1306 (11th Cir. 2006).

This is not a case where trial counsel did not present mitigation witnesses and it is not a case where trial counsel did not prepare these witnesses. Petitioner merely asserts trial counsel should have presented more witnesses to testify at Petitioner's trial and that those who did testify should have testified to something different. However, the Georgia Supreme Court has expressly held that trial counsel is not ineffective for not introducing cumulative evidence. DeYoung v. State, 268 Ga. 780, 786 (5), 493 S.E.2d 157 (1997). See also Devier v. Zant, 3 F.3d 1445, 1452 (11th Cir. 1993)(finding counsel not

ineffective where trial counsel called five mitigation witnesses, and Petitioner alleged more should have been called, the Court found "These additional witnesses would have testified to essentially the same impressions and sentiments about Devier that his close relatives had already related at trial and would have added little to the weight of the mitigating evidence.").

Further, the Eleventh Circuit Court of Appeals has held that counsel is not ineffective for failing to elicit more testimony from witnesses because perfection is not required. Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995), en banc. See also Waters, 46 F.3d at 1511, en banc, (noting that no absolute duty exists to present all possible mitigating evidence available). "Our decisions are inconsistent with any notion that counsel must present all available mitigating circumstance evidence. Considering the realities of the courtroom, more is not always better...Good advocacy requires 'winnowing out' some arguments, witnesses, evidence and so on, to stress others." Chandler v. United States, 218 F.3d 1305, 1319 (11th Cir. 2000) (citing Rogers v. Zant, 13 F.3d 384, 388 (11th Cir. 1994).

The affidavits submitted by Petitioner in support of his claim that trial counsel were ineffective in their presentation of mitigating life history evidence are insufficient to prove deficiency. This Court finds that trial counsel made a reasonable presentation of Petitioner's life history in

mitigation, especially when viewed from trial counsel's perspective at the time of trial. Furthermore, this Court finds that the trial counsel were reasonable in their selection and preparation of the mitigation witnesses, and that counsel were reasonable in their chosen mitigation strategy and the testimony that they elicited from these witnesses.

From a review of the entire record, this Court finds that trial counsel were not deficient or Petitioner prejudiced by trial counsel's investigation and presentation of Petitioner's background and "good character" as they presented numerous witnesses to testify to these factors during the sentencing phase of Petitioner's trial.

c. Petitioner Failed to Establish that Trial Counsel Were Deficient Or Petitioner Suffered Prejudice with Regard to the Motions Filed by Trial Counsel

This Court finds that Petitioner's allegation that trial counsel's performance was deficient and that Petitioner suffered prejudice with regard to the motions filed by trial counsel has no merit, and thus the claim is denied.

The record establishes that trial counsel filed numerous motions on behalf of Petitioner, both in the early stages of pre-trial and continuing through the trial proceedings. Those motions include, but are not limited to: Motion to Send Jurors Questionnaire; Motion for Psychiatric Assistance; Motion for Funds to Hire an Investigator; Motion to Strike and Quash as

Unconstitutional the Georgia Statutes Providing for the Imposition of the Death Penalty and O.C.G.A. §15-12-164(a)(4) and §15-12-164(c); and numerous Motions in *Limine* to exclude prejudicial, inflammatory and irrelevant evidence. (Record Index).

For assistance in determining which motions to file, trial counsel consulted the Southern Center for Human Rights Death Penalty manual, "Defending a Capital Case in Georgia," which outlined motions to be considered for filing in death penalty cases. The trial court heard argument on the pre-trial motions on November 29, 1990 and December 17, 1990. The court also heard argument on outstanding motions and issues as the trial proceeded, as evidenced by the numerous defense motions for mistrial. (T. 2035-2036; 2040-2042; 2075-2078; 2124-2128; 2254-2256; 2274-2275).

This Court finds that Petitioner has clearly failed to carry his burden of establishing this claim as he has failed to even set out the basis of this claim. See Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994)("This burden, which is petitioner's to bear, is and is supposed to be a heavy one"). This Court denies relief.

d. Trial Counsel's Investigation and Presentation of Evidence Surrounding the Kidnapping of Ms. Freeman and Ms. Tharpe Was Not Deficient and Trial Counsel's Representation Did Not Prejudice Petitioner.

This Court finds that contrary to Petitioner's allegation that trial counsel's performance was deficient in investigating and presenting evidence surrounding the charges of kidnapping with bodily injury as to the victims, Ms. Freeman and Ms. Tharpe, trial counsel did in fact investigate the charges and vigorously argued that the evidence did not support the charges being presented to the jury.

The record reflects that trial counsel asserted in their Motion for Directed Verdict that Petitioner was entitled to a directed verdict on the Kidnapping with Bodily Injury, (Counts 1 and 3). (T. 2231). As the charge pertained to Ms. Freeman (Count 1), the bodily injury alleged by the State was the wound to Ms. Freeman's arm. Id. Trial counsel argued that the evidence suggested that the wound to Ms. Freeman's arm was, in fact, the same shot as the "death-dealing blow," thus removing the "bodily injury" component of the charge as it related to Ms. Freeman. Id. Further, trial counsel argued that there was not even a kidnapping of Ms. Freeman as Petitioner told her "you can't go with us" and would not allow Ms. Freeman to get in the truck. (T. 2333-2334).

The trial court determined that there was sufficient evidence to support the kidnapping based, at the least, on the evidence that Petitioner approached the victims holding a rifle and ordered them "under his tutelage" over to Petitioner's car. (T. 2335). Furthermore, the trial court determined that the "bodily injury" component was a question for the jury, and that there was sufficient evidence to present the charge to the jury. Id.

Trial counsel then went on to argue that Petitioner was entitled to a directed verdict on the "kidnapping with bodily injury" charge as it related to Petitioner's wife, Migrisus Tharpe, (Count 3). Trial counsel's contention was that there was no rape of Ms. Tharpe, thus removing the bodily injury component, and that Ms. Tharpe went in the truck with Petitioner freely, eliminating the kidnapping altogether. (T. 2337-2339).

Trial counsel asserted even further that if the trial court determined there was sufficient evidence of a rape and kidnapping, that the rape took place in a county other than Jones County, and thus could not be used as a component in the Jones County charge. (T.2338-2340). The trial court disagreed and, again, determined that there was sufficient evidence to present the kidnapping with bodily injury of Ms. Tharpe to the jury. (T. 2342).

Trial counsel also made an argument to the trial court that there was not sufficient evidence to convict Petitioner of Count 4, armed robbery, as it was unclear how Ms. Freeman's pocketbook ended up in the borrowed truck. (T. 2329). After review of the evidence and argument of trial counsel, the State agreed to withdraw the charge. Id.

Trial counsel went even further by requesting that the trial court explain to the jury that they should not interpret the withdrawal of the armed robbery charge as the State's agreement to dismiss *all* claims that were "iffy," (T. 2345), as trial counsel did not want the jurors to believe the remaining charges were necessarily supported by sufficient evidence. (T. 2345).

The record clearly illustrates that trial counsel did, in fact, investigate and thoroughly argue that the charges of kidnapping with bodily injury and armed robbery were not supported by the evidence, properly applying Strickland, trial counsel's performance can not be found deficient.

Additionally, this Court finds that Petitioner can not prove that he was prejudiced by the investigation and presentation of evidence as the Georgia Supreme Court held on direct appeal that there was sufficient evidence to support the jury's findings of guilt to both of these charges. Tharpe v. State, 262 Ga. 110, 115 (1992).

e. Petitioner Failed to Establish that Trial Counsel Were Deficient or That Petitioner Suffered Prejudice with Regard to the Examination of Potential Jurors.

Petitioner alleges that trial counsel's performance was deficient and that Petitioner suffered prejudice with regard to the examination of potential jurors. This Court finds that Petitioner has established neither deficient performance nor the requisite prejudice under Strickland.

The Georgia Supreme Court has recognized that the trial counsel's conduct in the voir dire proceeding is a matter of strategy which generally insulates this conduct from constituting ineffective assistance of counsel. The Georgia Supreme Court has stated, "[b]y their nature, trial counsel's conduct of voir dire and the decision on whether to interpose challenges are matters of trial tactics. See Hammond v. State, 264 Ga. 879 (7) (b) (452 S.E.2d 745) (1995); Williams, 258 Ga. at 289." Head v. Carr, 273 Ga. 613, 623 (2001).

This Court finds, in this case, that trial counsel had a reasonable approach to the conducting of the voir dire proceedings, as, at the beginning of the pre-trial proceedings, trial counsel filed a motion to allow counsel to send questionnaires out through the Clerk of the Superior Court to all of the potential jurors. (HT, December 11, 1998, Vol. I, p. 84). Trial counsel formulated their voir dire questions "based on [their] thoughts on the subject, plus questions [they] had

seen done before, questions [they] had used before and on the manual [they] had and other information in [their] hands." Id. Trial counsel presented the questionnaire to the trial court and received approval with only some minor changes, all of which the trial court told trial counsel they could ask on individual voir dire, just not in a general juror questionnaire. (December 17, 1990, Motions hearing, pp. 102-117).

In addition to obtaining information about prospective jurors by using their juror questionnaire and voir dire, trial counsel also spoke with various people in Gray, Georgia about the list of potential jurors, specifically those whom trial counsel did not know, in order to "to get ideas about them." Id.

Furthermore, as to the composition of the jury they were attempting to obtain, trial counsel testified that they were particularly looking for "any kind of black juror as a rule, unless they come across as being law enforcement … or whether they appear dogmatic or too conservative oriented" as these jurors "are more willing to support a black person … in trouble, even in a case like this where there was a black victim." Id.

This Court finds that trial counsel reasonably prepared for the voir dire proceedings and attempted, by using juror questionnaires and talking to people in the community, to obtain jurors who would be open to consideration of their presentation

of Petitioner's defense. Therefore, the record does not support the assertion that trial counsel rendered deficient performance with respect to voir dire proceedings. Further, the fact that Petitioner was convicted and received a death sentence, does not establish the requisite Strickland prejudice. This Court denies any relief to this claim.

f. Petitioner Failed to Establish that Trial Counsel Were Deficient Or Petitioner Suffered Prejudice with Regard to Evidence that was Offered into Evidence at Both Phases of Trial.

Petitioner alleges that trial counsel's performance was deficient and that Petitioner suffered prejudice with regard to the evidence that was presented at trial. However, this Court finds that Petitioner did not raise this claim with any specificity and does not present any evidence in support of any such claim, thus it is denied.

g. Petitioner Failed to Establish that Trial Counsel Were Deficient Or Petitioner Suffered Prejudice by not Objecting to the Prosecutor's Closing Argument in Either Phase of Trial.

This Court finds that contrary to Petitioner's allegation that trial counsel's performance was deficient and that Petitioner was prejudiced because trial counsel did not object to the State's closing argument in either the guilt or sentencing phase of trial, the record establishes that trial counsel were not deficient and Petitioner was not prejudiced, thus the claim is denied.

Furthermore, this Court notes that on direct appeal Petitioner raised the claim that the prosecutor's closing arguments were improper at both phases of the trial. The Georgia Supreme Court held that under the ruling in Todd, "the test for reversible error is … whether the improper argument in reasonable probability changed the result of the trial." Tharpe v. State, 262 Ga. 110 (1992) (citing Todd v. State, 261 Ga. 766 (2a) (1991)). The Georgia Supreme Court found that there was nothing in the State's closing arguments that would rise to being "so harmful as to warrant relief," and thus denied Petitioner's claim. Id. at 114.

This Court finds that, as trial counsel raised this claim on direct appeal, they were not deficient. Further, as shown by the opinion by the Georgia Supreme Court, Petitioner can not show that he was prejudiced by the arguments and thus his claim for relief is denied.

h. Petitioner Failed to Establish that Trial Counsel Were Deficient and Petitioner Suffered Prejudice Based on the Charges given by the Trial Court to the Jury.

i. Charges to the Jury at Guilt Phase

Petitioner complains that trial counsel were ineffective because they did not raise the "proper objections" to "improper charges" given by the trial court to the jury at the conclusion of the guilt phase of trial. This Court finds that Petitioner

does not raise these allegations with any specificity or evidence to support his claims, thus the claim is denied.

Furthermore, this Court notes, the Georgia Supreme Court held on direct appeal, (Tharpe v. State, 262 Ga. 110), "there were no errors in the trial court's instructions on reasonable doubt; there were no infirmities in the instruction that the jury should not be concerned at the guilt-phase of the trial with the effect of its verdict; and the voluntary intoxication instruction was not incomplete." Tharpe v. State, 262 Ga. 110 (1992) (citing Potts v. State, 261 Ga. 716 (14)(410 S.E.2d 89)(1991), Walker v. State, 254 Ga. 149, 158 (327 S.E.2d 475)(1985)).

As these instructions were properly charged to the jury at the time of Petitioner's trial, Petitioner failed to show prejudice or any deficiency as there existed no error in the instructions at the time of Petitioner's alleged violation. This Court also finds that Petitioner failed to show prejudice because given the heinous nature of his crimes, the substitution of new instructions, although Petitioner has not proposed any new instructions, would be unlikely to change the outcome of the trial. Petitioner's claim is denied.

ii. Charges to the Jury at the Sentencing Phase

Petitioner alleged in his petition, in Claim XII, that the trial court erred in its instructions to the jury during the

sentencing phase of trial. After a review of the sentencing phase jury instructions, in their entirety, this Court finds that Petitioner failed to show that the trial court erred in its sentencing phase instructions to the jury, as was stated in Tharpe v. State, 262 Ga. 110 (1992). Therefore, these claims are without merit.

Further, Petitioner alleges that trial counsel were ineffective in failing to object to the allegedly erroneous jury instructions at trial. This Court finds that, as Petitioner's claim regarding the sentencing charges have no merit, trial counsel is not deficient, nor is Petitioner prejudiced by trial counsel not objecting to the proper charges. See Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, this Court rules that Petitioner's claim of ineffective assistance of trial counsel with regard to sentencing phase jury instructions is without merit.

i. Petitioner Failed to Establish that Trial Counsel Were Deficient Or Petitioner Suffered Prejudice with Regard to Trial Counsel's Closing Argument.

i. Closing Argument in the Guilt Phase

The record before this Court establishes that trial counsel's thorough investigation and presentation of evidence during the guilt phase culminated in the defense's closing argument by Mr. Newberry. (T. 2414-2433). This Court finds

that the closing argument was reasonable and did not prejudice Petitioner, thus the claim is denied.

The record establishes that trial counsel's goal was to convince the jury that the indicted charges were not supported by the evidence and that Petitioner should be convicted of voluntary manslaughter, not murder. (T. 2417). Importantly, trial counsel argued to the jury that Petitioner did not intend to kill and did not have the capacity to premeditate or plan the crimes, but instead was overcome with emotion and anger at Ms. Freeman's interference with his attempts to reconcile with his wife. (T. 2428-2430). In support of this portion of the argument, Mr. Newberry referred to Ms. Tharpe's testimony that Petitioner "acted like a child" after the shooting and followed her instructions. (T. 2428-2439).

In order to mitigate the State's evidence that Petitioner planned his crimes, trial counsel explained to the jury that the description of the manner in which Petitioner held the gun was not consistent with the intent to kill and that other physical evidence presented by the State was of no consequence. (T. 2420-2423). Furthermore, Mr. Newberry characterized Petitioner's statement to Michael Harley, indicating Petitioner planned to harm members of Migrisus Tharpe's family, as simply an example of Petitioner "spouting off," and attacked Mr. Harley's credibility by reminding the jury that Mr. Harley did

not contact authorities to report Petitioner's statements before or after Ms. Freeman's murder. (T. 2431).

Mr. Newberry also argued to the jury that the State's assertion that Petitioner was under the influence of drugs was not supported by evidence as the State never performed a drug test. (T. 2421-2422, 2426-2427). Trial counsel argued that this suggestion was offered by the State only to inflame the emotions of the jury along with testimony from Ms. Freeman's husband regarding discovering his wife's body. Id.

Mr. Newberry concluded his closing argument by imploring the jury not to allow emotion, elicited by the tragic nature of Ms. Freeman's death, to prevent the fair result of the trial, which would be a conviction of manslaughter, not murder. (T. 2431-2433).

This Court determines, that based on the evidence presented in the guilt phase of trial, Mr. Newberry made a reasonable argument by challenging the charges against Petitioner as being too harsh and imploring the jury to find that Petitioner had acted out of passion and emotion, and was thus guilty of only manslaughter. The record before this Court belies that trial counsel's closing argument was unreasonable or prejudicial to Petitioner and relief is denied.

ii. Closing argument in Sentencing phase

As the record reflects, it was trial counsel's goal, early on, to focus on the sentencing phase argument in an attempt to save Petitioner's life by presenting Petitioner in the best light possible. In furtherance of that goal, Mr. Newberry used the closing remarks of the sentencing phase to convince the jury that Petitioner should be sentenced to life imprisonment, as Petitioner's actions were the result of an emotional domestic dispute, and execution would be a disproportionate sentence given the questions surrounding the State's case. (T. 2667-2681).

In order to compel the jury to sentence Petitioner to life imprisonment, Mr. Newberry remarked that Petitioner's case was distinguishable from one where a death sentence is appropriate and that Petitioner's criminal history consisted of mainly traffic violations. (T. 2671, 2676). Trial counsel attempted to mitigate the kidnapping as to Ms. Freeman by noting that to the extent there was a kidnapping it was very brief, whereas, regarding the kidnapping of Migrisus Tharpe, Mr. Newberry offered the fact that the gun was eventually unloaded and thrown away as evidence Petitioner did not intend to harm Ms. Tharpe. (T. 2677-2678).

In light of the aggravated characterization of Petitioner's crimes presented by the State, Mr. Newberry asked the jury to

consider it noteworthy that Petitioner's wife testified on Petitioner's behalf during sentencing. (T. 2674). Trial counsel concluded the sentencing phase closing remarks by advising the jury that Petitioner's family, particularly Petitioner's mother and daughters would suffer if Petitioner were sentenced to death. (T. 2675). Mr. Newberry further cautioned that given the questions surrounding the State's case and the lack of intent to commit the crime a life sentence would be appropriate. (T. 2679-2681).

This Court finds that trial counsel's closing argument highlighted each of the points and evidence that trial counsel presented as mitigation during the sentencing phase. Most importantly to their strategy, trial counsel implored the jury to remember that Petitioner, a man in deep emotional distress when the crime was committed, had a family who would suffer deeply if he received a death sentence. This Court determines that the argument was clearly reasonable and did not prejudice Petitioner, thus Petitioner has not met his burden under Strickland and the claim is denied.

j. Trial Counsel's Strategic Decision Not to Stress Petitioner's Substance Abuse Problem was Reasonable and Petitioner was not Prejudiced.

After a complete review of the record, this Court finds that trial counsel were aware of Petitioner's substance abuse problem and made the reasonable strategic decision not to stress

this issue to the jury. Trial counsel testified that they knew that Petitioner had a history of substance abuse problems and knew of his "habitual violator" status concerning numerous offenses of driving under the influence. (HT, December 11, 1998, Vol. I, p. 106). Mr. Newberry testified that trial counsel wanted "as little said about drugs and alcohol as possible." (HT, December 11, 1998, Vol. I, p. 109). In fact, trial counsel went so far as to object at numerous stages both pre-trial and throughout the trial to prevent the State from offering any evidence surrounding Petitioner's habitual violator driving offenses. Id.

Trial counsel testified that they made the strategic decision not to present this history during the sentencing phase because trial counsel felt it would only "exacerbate the problem." (HT, December 11, 1998, Vol. I, p. 107). Mr. Newberry testified that there was no evidence that Petitioner's drinking was "to the extent that it affected his mind or anything." Id. Further, trial counsel knew that whether Petitioner was intoxicated on the morning of the crime was not a legal and justifiable defense, thus trial counsel were concerned that the information might have the opposite effect, and become an aggravator in the minds of the jury, particularly "a Jones County jury." (HT, December 11, 1998, Vol. I, p. 107).

As previously set forth, a "factor requiring deference to counsel's judgment call" is "his perception of how the jury would react to the evidence." Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994). As held by the Eleventh Circuit Court of Appeals, "a defense attorney's sense of the jury's reaction to testimony or evidence is a sound basis on which to make strategic decisions. See Card v. Dugger, 911 F.2d 1494, 1511 (11th Cir. 1990); Foster v. Strickland, 707 F.2d 1339, 1344 (11th Cir. 1983), cert. denied, 466 U.S. 993, 104 S. Ct. 2375, 80 L. Ed. 2d 847 (1984); Gates, 863 F.2d at 1499." Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994). "Counsel's knowledge of local attitudes, and 'evaluation of the particular jury, his sense of the chemistry of the courtroom are just a few of the elusive, intangible factors that are not apparent to a reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions.'" Waters v. Thomas, 46 F.3d at 1521-1522.

"One of the circumstances that bears upon the reasonableness of an investigation is the information supplied by counsel's own client. Just as information supplied by the defendant may point to the need for further investigation, the lack of information supplied may also indicate that further investigation would be unnecessary or fruitless." Waldrop v. Thigpen, 857 F.Supp. 872, 915-916 (D. Ala. 1994) citing Mulligan

v. Kemp, 771 F.2d 1436 (11th Cir. 1985). As Petitioner never informed trial counsel that he came from an abusive home or environment, and as none of Petitioner's family members or friends reported such conditions from Petitioner's childhood, this Court concludes that trial counsel is not deficient.

The Court in Strickland instructed, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (citations omitted) (quoted in Bowley, 261 Ga. at 280). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690; accord Smith v. Francis, 253 Ga. at 783; see also Zant v. Moon, 264 Ga. 93, 97, 440 S.E.2d 657 (1994).

As the Court in Strickland also instructed, the proper focus of a court reviewing a claim of ineffective assistance of counsel is to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, **and to evaluate the conduct from counsel's perspective at the time.**" Strickland v. Washington, 466 U.S. at 688. (Emphasis added).

This Court concludes, that trial counsel conducted an investigation of Petitioner's background prior to trial by interviewing Petitioner, Petitioner's family and Petitioner's friends, and were told that Petitioner came from a good, Christian home, that his mother was a "fine lady" and that Petitioner was "raised right." Trial counsel testified that during their investigation, they never heard anything about Petitioner growing up in a "shothouse." (HT, December 11, 1998, Vol. II, pp. 301-302). Mr. Newberry testified that all of Petitioner's family members described Petitioner as having come from a good, Christian home. Id.

Moreover, this Court finds that trial counsel were not deficient in not presenting the conflicting testimony that is now presented by habeas counsel and Petitioner has failed to prove that he was prejudiced, thus the claim is denied.

Furthermore, this Court notes that the evidence presented during these habeas proceedings, particularly from affidavits of family and friends of Petitioner, submit that Petitioner grew up in an abusive, alcohol-laden environment. This evidence directly contradicts the testimony presented during the sentencing phase of Petitioner's trial and the defense strategy to save Petitioner's life. Accordingly, this Court finds that there is no prejudice to Petitioner and denies relief.

k. Trial Counsel Conducted a Reasonable Investigation into Petitioner's Background, Including Mental Health.

Petitioner alleges trial counsel were ineffective for failing to present evidence during the sentencing phase of trial attempting to prove he was mentally retarded or had other mental health problems. However, this Court finds that prior to trial, there was not evidence that was reasonably discoverable or provided to trial counsel that would give trial counsel any reason to suspect Petitioner was mentally retarded or suffered from other mental health problems. (HT, December 11, 1998, Vol. I, pp. 112-113; 125; HT, December 11, 1998, Vol. II, Res. Ex. 3, HT, December 11, 1998, Vol. II, Res. Ex. 4). In fact, this Court finds that the record establishes that trial counsel investigated Petitioner's mental health and it was specifically determined that Petitioner was ***not*** mentally retarded and that he did not suffer from any other "psychosis". (HT, December 11, 1998, Res. Ex. 2; Res. Ex. 3; Res. Ex. 4).

i. Pre-trial Anecdotal Evidence Establishes No Mental Retardation

A thorough review of the record before this Court illustrates that trial counsel's investigation into Petitioner's background for the purposes of presenting mitigation evidence revealed that Petitioner was a well-adjusted member of society portraying no symptoms of mental retardation or other mental

health problems and thus counsel were not deficient and Petitioner was not prejudiced.

The evidence presented to this Court establishes that prior to trial and during trial, Petitioner's family described Petitioner as follows: "smart"; "a smart man"; a well-behaved child and teenager; graduated from high school with "good grades"; ran track on the high school track team; a good worker; would paint or do odd jobs when he was not working elsewhere; would help others when their cars were broken down on the road; raised and was knowledgeable about dogs; had good relationships with his entire family and had many friends; had maintained a marriage to his wife for over eleven years; and nearly every mitigation witness talked about how he had a good heart and was friendly. (T. 14:3010-11, 3012, 3016-17, 3022. 3024, 3069-70,3077-78, 3080, 3088, 3099-100, 3101-102, 3153, 3154-55, 3175, 3191, 3198, 3220-22, 3228, 3252-55). In fact, during the sentencing phase of Petitioner's trial, prior to being sentenced to death, family and friends described Petitioner as a "good student." (HT, December 11, 1998, Vol. I, pp. 112-116; HT, December 11, 1998, Vol. I, pp. 96-97). Naomi Tharpe, Petitioner's mother, testified that Petitioner graduated from Northeast High School and described him as a "smart" student who made good grades. (T. 2258-2259).

Additionally, this Court notes that in contrast to Petitioner's newly drafted affidavits, trial counsel testified that when speaking with Petitioner and Petitioner's family prior to trial, including Petitioner's sister and aunt, they all spoke of Petitioner's childhood and educational background in positive terms. (HT, December 11, 1998, Vol. I, p. 99). Even Petitioner's own sister, Audrey Pope, with whom Mr. Newberry spoke on several occasions, never claimed that Petitioner's childhood was anything other than good and never claimed Petitioner was "slow." (HT, December 11, 1998, Vol. I, p. 102).

The evidence reflects that trial counsel were aware that there was some suspicion from the State's psychologist that Petitioner was "socially promoted" in school. However, that suggestion was never corroborated by Petitioner or any of his family members, who continually reported to trial counsel that Petitioner was a good student. (HT, December 11, 1998, Vol. I, p. 95). Further, trial counsel acknowledged that they never spoke with Petitioner's teachers, who testified by affidavit in these proceedings, that Petitioner was "slow." However, trial counsel further clarified that they had no basis for speaking with these teachers as the psychological evaluations conducted by two separate experts and trial counsel's interaction with Petitioner affirmed that Petitioner's intellectual functioning

was never in doubt. (HT, December 11, 1998, Vol. 1, pp. 296-297).

This Court finds that, based upon the entirety of the information gathered by trial counsel, they had no indication or basis to attempt to present a claim of mental retardation. Instead, based on their interactions with Petitioner and the reports from Petitioner's family and friends, trial counsel determined that "there was never a … basis at all for going with this guy is so slow mentally that he can't be held responsible for what he did, or that it would bring about sympathy, empathy for him and keep him out of the chair." (HT, December 11, 1998, Vol. I, p. 130).

Additionally, Mr. Newberry testified that during his extensive legal career, he has dealt with "many, many people who were borderline of low intelligence or borderline retarded, borderline mentally defective from Alzheimer's or various other problems," and has had to make decisions "countless times" about someone's competency to sign a legal document. (HT, December 11, 1998, Vol. I, p. 115). Based on this experience and their investigation, as well as talking with Petitioner on numerous occasions, Mr. Newberry testified that he had "no doubt" that Petitioner was not mentally retarded. Furthermore, Mr. Newberry testified that he had dealt with mental health issues in other cases about fifteen to twenty times. (HT, December 11, 1998,

Vol. I, pp. 113-115). Mr. Newberry testified that his opinion of the suggestion that Petitioner is mentally retarded was "fairly preposterous." Id.

ii. Pre-trial Expert Evaluations Established No Mental Retardation

The record before this Court establishes that trial counsel hired Dr. Archer Moore to conduct a mental health evaluation of Petitioner to determine if there were any possible mental health defenses to present at trial. Dr. Moore concluded in his evaluation that Petitioner "does not meet the criterion for a psychosis, nor, in truth, for a neurotic disorder such as depression or anxiety." (HT, December 11, 1998, Vol. II, RES. EX. 4). Dr. Moore did opine that Petitioner had a drug and alcohol problem, which trial counsel determined would not be mitigating, but possibly aggravating evidence. Id. Most significantly, to Petitioner's claim of alleged mental retardation, Dr. Moore specifically found that Petitioner's intelligence "falls in the borderline range, but, here again, **should not be considered mentally retarded.**" Id. (Emphasis added).

However, Mr. Newberry continued to seek some possible mitigating evidence from Dr. Moore's evaluation. Mr. Newberry inquired of Dr. Moore, "… is there anything that you could point out as a witness that could be of assistance here, something

that you could say or some peculiarity that would reflect …." (HT, December 11, 1998, Vol. I, pp. 124-125). Mr. Newberry testified that Dr. Moore replied, "If I get up there, you know, the State is going to question me, too … [Petitioner] is a 'mean son-of-a-bitch'." Id.

After consultation with Dr. Moore, trial counsel determined not to utilize Dr. Moore for trial. Mr. Newberry testified that he determined that there were "no psychological problems, mental problems like that, no other problems that the [Petitioner] had that would have helped me in trial and benefit [Petitioner], or benefit our case." (HT, December 11, 1998, Vol. I. p. 123). Dr. Moore's findings may not have been seen as mitigating, and quite possibly, could have been aggravating. Strategic decisions, made after an investigation, such as this, are "virtually unchallengeable." Ferrell v. Head, 261 Ga. at 120.

Furthermore, trial counsel had the results of a court-ordered pre-trial psychological evaluation by Dr. Robert Storms. In addition to other opinions, including "there was no reason to believe that Mr. Tharpe experienced a disorder of mood or thought that interfered with his ability to distinguish right from wrong or illegality from legality," Dr. Storms opined that Petitioner "exhibited no signs of mental retardation and his IQ score on the Ravens Progressive Matrices is 87, which places him

in the average range of intelligence." (HT, December 11, 1998, Vol. II, RES. EX. 2).

This Court concludes, after a review of all of the evidence, that trial counsel conducted an investigation into Petitioner's background by hiring an independent expert to evaluation Petitioner for mental health problems, specifically including mental retardation, and there was no evidence that Petitioner was mentally retarded or exhibited signs of other mental health problems. This Court finds that Petitioner has failed to prove trial counsel's investigation and presentation of evidence on this topic was deficient.

Furthermore, this Court finds that Petitioner has failed to establish, utilizing his invalid and easily rebutted evidence, that twelve jurors would have unanimously found, beyond a reasonable doubt, that he was mentally retarded Petitioner has also failed to prove prejudice and the claim is denied.

1. Trial Counsel's Strategic Decision to Not Present the Testimony of Dr. Moore at Trial was Reasonable and Petitioner was not Prejudiced

This Court finds that a review of the record reflects that trial counsel conducted a reasonable investigation into Petitioner's mental health and determined that there was nothing that would be beneficial to mitigate their case. This Court finds that as a result of this reasonable investigation, trial counsel made the strategic decision not to call Dr. Moore to

testify at trial, thus Petitioner fails to show that trial counsel's performance was deficient or that he was prejudiced by the decision, thus the claim is denied.

This Court finds that trial counsel made a reasonable decision when counsel determined that showing the jury that Petitioner may be of some limited intelligence would not be beneficial. Trial counsel testified, "we considered that we wouldn't get anywhere with that defense … we had a lot better case saying, here is a normal guy that has got great value to him and that is, he is a person, he thinks like we do, he has emotions like we do." (HT, December 11, 1998, Vol. I, p. 129).

Further, not only did trial counsel make the determination, based on consultation with Dr. Moore that raising mental health issues would not be beneficial to Petitioner's case, trial counsel determined that calling Dr. Moore may produce aggravating evidence. Mr. Newberry testified that during his consultation with Dr. Moore, regarding the doctor's findings, Dr. Moore told Mr. Newberry that Petitioner is a "mean son-of-a-bitch." (HT, December 11, 1998, Vol. I, p. 125). Dr. Storms expressed similar sentiment about Petitioner from his evaluation. Id. Trial counsel determined that whatever benefit they might receive by having Dr. Moore testify was greatly outweighed by the detriment of the possible cross-examination by the District Attorney and having the State present evidence from

both experts that Petitioner was "mean." (HT, December 11, 1998, Vol. I, p. 128). Furthermore, as trial counsel stated that the defense theory in the sentencing phase was to portray Petitioner as a nice, gentle, decent man, Dr. Moore's testimony clearly contradicted that theory.

The Court in Strickland instructed, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (citations omitted) (quoted in Bowley, 261 Ga. at 280). The Court stressed the importance of this deferential posture required of a reviewing court by reiterating that in judging claims of ineffective assistance, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690; accord Smith v. Francis, 253 Ga. at 783; see also Zant v. Moon, 264 Ga. 93, 97 (1994) and Harris v. State, 280 Ga. 372 (3) (2006)(decisions by trial counsel amounting to reasonable trial strategy do not constitute deficient performance).

Furthermore, as trial counsel, specifically Mr. Newberry, had dealt with mental health issues in numerous cases this Court heeds the advice in Williams v. Head, 185 F.3d 1223,

1228-29 (1999), "Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel."

This Court finds that Petitioner has not overcome the presumption to show that this strategy was unreasonable and that Petitioner was prejudiced, thus the claim is denied. See Green v. State, 281 Ga. 322, 324 (2006) ("Under those circumstances, we conclude Green has not borne "the burden of showing that 'but for the deficient performance, there was a reasonable likelihood that the outcome of the trial would have been different.' [Cit.]" Riggins v. State, 279 Ga. 407, 409, 614 S.E.2d 70 (2005).").

B. PETITIONER IS NOT MENTALLY RETARDED THEREFORE HIS EXECUTION IS NOT BARRED UNDER *ATKINS V. VIRGINIA*.

Petitioner alleges he is mentally retarded and is ineligible for the death penalty under the holding in Atkins v. Virginia, 536 U.S. 304 (2002). Petitioner also alleges that trial counsel were ineffective in not investigating or attempting to present this claim of mental retardation.

In making its determination, this Court is bound by well-established Georgia law which states that in order to establish his substantive claim of mental retardation, Petitioner has to prove he is mentally retarded beyond a reasonable doubt.

Jenkins v. State, 269 Ga. 292(17) (1998) (citing Burgess v. State, 264 Ga. 777, 789(36) (1994)).[3]

Insofar as Petitioner disagrees with the standard as enacted by the General Assembly and upheld by the Georgia Supreme Court, this is not the proper avenue for Petitioner to attempt to change the current law.

In order to meet the mandates of Strickland, Petitioner had to prove that trial counsel were deficient and he was prejudiced by not investigating or attempting to present this claim of mental retardation. To establish the prejudice prong of Strickland, Petitioner had to show there was a reasonable probability that **every juror** on his jury would have found that the evidence Petitioner presented to this Court established beyond a reasonable doubt that Petitioner was mentally retarded. Petitioner has failed to carry his heavy burden.

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[3] Petitioner now asserts that this Court should wholly ignore Georgia law and precedent, which clearly establishes that it is Petitioner's burden to prove mental retardation beyond a reasonable doubt. Petitioner attempts to have this Court adopt a new standard lessening the burden to a preponderance of the evidence, however as it is the duty of this Court to apply the law as it exists this claim should be denied and this Court should apply the standard of "beyond a reasonable doubt." Insofar as Petitioner disagrees with the standard as enacted by the General Assembly and upheld by the Georgia Supreme Court, this is not the proper avenue for Petitioner to attempt to change the current law.

The standard in Georgia and in Atkins for determining mental retardation is as follows:

> Our statutory definition of "mentally retarded" is consistent with that supplied by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (Third Edition 1980) (hereinafter DSM III). The essential features of mental retardation are (i) significantly subaverage general intellectual functioning, (ii) resulting in or associated with impairments in adaptive behavior, and (iii) manifestation of this impairment during the developmental period. O.C.G.A.. § 17-7-131 (a) (3).
>
> "Significantly subaverage intellectual functioning" is generally defined as an IQ of 70 or below. DSM III, supra at 36. However, an IQ test score of 70 or below is not conclusive. At best, an IQ score is only accurate within a range of several points, and for a variety of reasons, a particular score may be less accurate. **Moreover, persons "with IQs somewhat lower than 70" are not diagnosed as being mentally retarded if there "are no significant deficits or impairment in adaptive functioning."** DSM III, supra at 37.

Stripling v. State, 261 Ga. 1, 4 (1991). (Emphasis added). Based on this standard and the record before this Court, this Court finds that Petitioner is not mentally retarded.

1. Experts Prior To Trial Determined Petitioner Not Mentally Retarded

The record before this Court establishes that prior to trial in late 1990 into early 1991, Petitioner was evaluated by two mental health professionals, Dr. Archer Moore and Dr. Robert Storms. Dr. Moore was hired as an independent defense expert to perform an overall mental heath evaluation to determine whether there were any possible mental health defenses that could be

used by the defense for mitigation purposes. Dr. Moore found Petitioner to be of "borderline [intelligence] range" but **"should not be considered as mentally retarded."** (HT, December 11, 1998, Vol. II, RES. EX. 4). (Emphasis added). Petitioner was also evaluated by Dr. Storms, a senior psychologist at Central State Hospital, who was ordered by the trial court to conduct a pretrial psychological evaluation for the purposes of determining competency to stand trial, criminal responsibility and recommendations for disposition. Similar to Dr. Moore, Dr. Storms ultimately determined that Petitioner **"exhibited no signs of mental retardation."** (HT, December 11, 1998, Vol. II, RES. EX. 2). (Emphasis added). After a review of the record, this Court finds that the two experts prior to trial determined that Petitioner is not mentally retarded.

2. Petitioner's I.Q. Not Determinative of Mental Retardation

During discovery for the habeas proceedings, Petitioner was evaluated by three additional mental health professionals, Dr. Marc Zimmerman, Dr. Barry Crown, Petitioner's mental health experts, and Dr. Glen King, Respondent's mental health expert. Petitioner's expert, Dr. Zimmerman, administered several psychological tests to determine Petitioner's I.Q. (HT, July 30, 2007, Vol. II, PET. EX. 98, pp. 549-551). The results of the WAIS-III administered by Dr. Zimmerman in 1998, yielded a

full scale I.Q. score below 70. (HT, July 30, 2007, Vol. II, PET. EX. 98, p. 549). Respondent's mental health expert, Dr. King also administered the WAIS-III, although a number of years later, which resulted in a full scale I.Q. score below 70. (HT, July 30, 2007, Vol. V, RES. EX. 8, p. 1729).

There is little dispute among the numerous mental health professionals who have evaluated Petitioner over the years that Petitioner has low intelligence, with scores falling anywhere from average, to borderline to subaverage intelligence. (HT, December 11, 1998, Vol. II, RES. EX. 2, RES. EX. 4; HT, July 30, 2007, Vol. V, RES. EX. 8; HT, July 30, 2007, Vol. II, PET. EX. 98). However, as held by the Georgia Supreme Court, persons "with IQs somewhat lower than 70" are not diagnosed as being mentally retarded if there "are no significant deficits or impairment in adaptive functioning." Stripling v. State, 261 Ga. at 4. This Court finds that it can not make a determination of mental retardation solely on Petitioner's IQ score, thus this Court looked to Petitioner to determine whether the other two prerequisite for a diagnosis of mental retardation, which if he does not prove exist beyond a reasonable doubt, his claim fails.

3. Petitioner Failed To Establish Limitations in Adaptive Functioning.

As established in the record before this Court, Georgia law requires that, in order to establish mental retardation, a

defendant must prove **beyond a reasonable doubt** that, before the age of 18, he had impairment in two of ten adaptive functioning categories listed in the Diagnostic and Statistical Manual of Mental Disorders (hereinafter, "DSM-IV-TR"). (Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, American Psychiatric Association, Fourth Edition, 2000). This Court determined that Petitioner failed to establish the requisite adaptive deficits or that these deficits occurred prior to age 18, thus he has failed to support his claim of alleged mental retardation and thus it is denied.

The record before this Court establishes that adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. (DSM-IV-TR, p. 42). Adaptive functioning can also be influenced by various factors, such as, education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Id. It is measured by gathering information from a variety of independent sources, including teacher evaluation, medical history and developmental history. It is important that the adaptive behavior be examined in the context of the individual's own culture that may influence

opportunities, motivation and performance of adaptive skills. (Mental Retardation, "Definition, Classification, and Systems of Supports", American Association for Mental Retardation, 10th Edition, 2002, p. 75).

The evidence shows that the most recent publications of the American Association for Mental Retardation (hereinafter, "AAMR") also require that for the diagnosis of mental retardation, "significant limitations in adaptive behavior should be established through the use of standardized measures []." Id. at 76. This testing is important as it "compare[s] a person's abilities to those of a normative sample and give[s] you a criterion for which you make a decision about whether they fall into a substantially impaired range or not." (HT, July 30, 2007, Vol. I, p. 244).

The ten adaptive functioning categories that are assessed for mental retardation evaluations are: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Petitioner's expert, Dr. Zimmerman, found deficits in five of the ten adaptive functioning categories: home living, social/interpersonal skills, functional academics, self-direction and work. (HT, July 30, 2007, Vol. I, p. 118). Respondent's expert, Dr. King, found, just as the two experts did prior to trial, that Petitioner was not mentally retarded.

Dr. King concluded that Petitioner did not have significant deficits in any area of adaptive functioning. (HT, July 30, 2007, Vol. V, RES. EX. 8, p. 1729). Dr. King testified, "bottom line: he can take care of himself, he can get a job, he can get his own place to live, he can feed himself, he can clothe himself, he can maneuver around the system and take, basically, take care of himself." (HT, July 30, 2007, Vol. I, p. 253, 251). Thus, this Court concludes that Petitioner does not meet the burden of proving beyond a reasonable doubt that he has "significant limitations in adaptive functioning," for the diagnosis of mental retardation as defined in the DSM-IV-TR and applied in Georgia law to diagnose someone as mentally retarded, and therefore his claim is denied. (DSM-IV-TR, O.C.G.A. § 17-7-131 (a) (3)).

The record before this Court establishes that in assessing Petitioner's adaptive functioning, Dr. King administered the Adaptive Behavior Assessment System, (hereinafter, "ABAS-II"), to objectively measure Petitioner's adaptive functioning. This test is a structured interview broken into a number of different domains. (HT, July 30, 2007, Vol. I, p. 245). In each domain there is a series of questions that the interviewer asks the interviewee to rate himself on a zero to three point scale. Id. There are also questions that are assumed to be truthful by the interviewer as illustrated by the observation that the

interviewee actually says those names. (HT, July 30, 2007, Vol. I, p. 246). The function of the test is to actually indicate the interviewee's capacity to perform the tasks. Id.

This Court finds that the statement by Dr. Zimmerman that a test given to Petitioner because he is incarcerated, "can not be considered", are wholly inaccurate as the manual for the ABAS-II, specifically mentions that it is appropriate for use in prisons. (HT, July 30, 2007, Vol. I, p. 246). Further, one of Petitioner's affiants, Dennis Keyes, questions the reliability of this recognized test because of the potential "cloak of competence," which refers to people who have mental retardation or limited cognitive skills as portraying themselves as having more abilities than they really have in order to look good or be acceptable. (HT, July 30, 2007, Vol. II, PET. EX. 95; HT, July 30, 2007, Vol. I, pp. 266-267). This Court finds, based on the evidence presented, that this "cloak of competence" did not affect the reliability of the test in Petitioner's case. Dr. King testified that, in his experience, this attempt to look one way tends to be "done across the board with all skills; oh, they can do everything, they can do it well, they can do it perfectly, and so on." (HT, July 30, 2007, Vol. I, p. 267). However, Dr. King testified, this attempting to "look good" was not a concern with Petitioner's results as Petitioner was "perfectly willing on numerous occasions throughout the

assessment device to indicate the he didn't do things always and sometimes he never did them, and he was quick to admit it." Id. Furthermore, Dr. King testified that when asked the questions, Petitioner "thought about [the question] and varied his responses," he did not give every question the same response of a one or two or three, which indicated that Petitioner was listening to the question and "giving the best answer he could." (HT, July 30, 2007, Vol. I, p. 252).

The DSM IV-TR and all of the mental health professionals involved in Petitioner's case agree that an assessment of Petitioner's adaptive functioning is not complete by relying solely on one report, whether that is the ABAS-II test, family accounts, or teacher accounts alone. Specifically, Dr. King testified that he would have a "concern about relying on any one specific data set, including other people's memories." (HT, July 30, 2007, Vol. I, p. 265). Thus this Court finds reliability in Dr. King's assessment of Petitioner's adaptive functioning as, in addition to the results of the ABAS-II, results which were corroborated by the independent sources, Dr. King reviewed several other sources, such as other history data, medical records, school records, police records, and other affidavit information in making his assessment as to Petitioner's adaptive functioning. (HT, July 30, 2007, Vol. I, pp. 264-265).

In contrast to Dr. King's reliance on multiple sources, Dr. Zimmerman relied, in large part, on the post-trial affidavits to determine Petitioner's adaptive functioning. This Court takes notice that these affidavits were provided to each expert by Petitioner's habeas counsel and prepared for the purposes of Petitioner's habeas case. Moreover, these affidavits from family members and friends, given after Petitioner was sentenced to death, contradict the testimony and the information these same witnesses gave to trial counsel prior to trial. Accordingly, this Court at least questions the reliability of these affidavits.

No significant Deficits in Home Living

In 1990 when the crime occurred, Petitioner had been married to his wife, Migrisus Tharpe, for more than 11 years and had five daughters. (T. 2038). Dr. Zimmerman testified that Petitioner was only able to perform any household functions "upon direction." Inexplicably, this finding ignores Ms. Tharpe's testimony that Petitioner cooked, cleaned and took care of the children. (HT, July 30, 2007, Vol. I, p. 71; HT, July 30, 2007, Vol. I, p. 142). While Petitioner may not have cooked gourmet meals, Ms. Tharpe testified that Petitioner would cook basic meals without any direction from her. (HT, July 30, 2007, Vol. I, p. 155). Additionally, Petitioner also self-reported that he knew how to operate small appliances, such as a

microwave and stove, and made simple meals. (HT, July 30, 2007, Vol. V, RES. EX. 8, p. 1762).

Ms. Tharpe also testified that she did not have to tell Petitioner what chores to do and that at times she would come home from work to find the house cleaned and clothes in the washer. (HT, July 30, 2007, Vol. I, pp. 142-144, 160). Petitioner also reported that, "always when needed," he could perform regular cleaning functions, like using a washing machine, sweeping, taking out the trash, cleaning bathrooms, making the bed, and making minor repairs around the house. (HT, July 30, 2007, Vol. V, RES. EX. 8, p. 1763).

Testimony from Petitioner's trial also revealed that Petitioner is skilled at fixing cars. (T. 2575; 2605). Petitioner also picked up odd jobs around other people's houses, like mowing the yard or painting the house, when needed. (T. 2566).

Petitioner's experts point to the fact that Petitioner's wife handled most of the family finances as evidence that Petitioner is mentally retarded. (HT, July 30, 2007, Vol. I, p. 71). However, as Dr. Zimmerman conceded, Petitioner could handle some money matters, such as writing checks and delivering payments. Id. There is no evidence that Petitioner did not routinely handle these matters based on an inability to perform the function, but instead, that Petitioner's wife handling the

finances was simply a common division of marital roles. (HT, July 30, 2007, Vol. I, p. 110).

Further, supporting Petitioner's ability to handle money and belying Petitioner's habeas expert's findings, Ms. Tharpe testified that she observed Petitioner counting money, as well as measuring and selling drugs. (HT, July 30, 2007, Vol. I, p. 159). She also testified that they did not really have a budget during their marriage as they basically lived paycheck to paycheck, however, Petitioner understood the concept of paying the bills and would sometimes help to pay them when they were in dire circumstances. (HT, July 30, 2007, Vol. I, pp. 147-148, 155). Petitioner would also go to the grocery store when needed and knew what food to buy without anyone necessarily telling him what to do. (HT, July 30, 2007, Vol. I, p. 146; HT, July 30, 2007, Vol. V, RES. EX. 8, p. 1761).

Furthermore, Petitioner had a driver's license, passing both the written and driving portion of the driving test, and even had his license re-instated on two separate occasions after it was taken away. (HT, July 30, 2007, Vol. I, p. 234).

It is reported by one of Petitioner's affiants, Patty Baxter, that Petitioner "had a very hard time with directions." (HT, July 30, 2007, Vol. II, PET. EX. 85, p. 329). However, Ms. Tharpe, Petitioner's wife, testified that Petitioner could follow directions and rarely got lost. (HT, July 30, 2007, Vol.

I, p. 160). Furthermore, as exhibited by Petitioner's actions on the day of the crime, Petitioner knew his way around Monroe and Jones County. (T. 2104).

Ms. Baxter also reports that Petitioner frequently walked to his mother's house instead of taking the bus "because the bus required two transfers and I think he got confused." (HT, July 30, 2007, Vol. II, PET. EX. 85, p. 330). Clearly, Ms. Baxter's cannot testify to what Petitioner felt and her testimony in this regard is inadmissible. Beyond this inadmissible, opinion testimony, Petitioner puts up no evidence that he walked instead of taking the bus because he "got confused." There is just as much evidence to support the supposition that Petitioner walked instead of taking the bus because taking the bus with two transfers was more of a hassle, or because he did not have the money, or possibly because he just wanted to walk.

Dr. King points out that, even though Petitioner is incarcerated, Petitioner still has the ability to show adaptive functioning in "home living" by how he conducts himself in prison. There are rules and standards which must be followed, particularly with regard to cleaning one's cell and keeping a made bunk. Presumably, Petitioner is able to perform these functions as otherwise Petitioner's Department of Corrections record would be littered with disciplinary reports for not following the rules.

This Court finds that Petitioner has failed to show beyond a reasonable doubt that he has significant deficits in the area of home living. There may be many instances where Petitioner does not perform a particular task, however, Petitioner has not presented evidence that this is because he can not perform the task. As Dr. King testified, it is "not whether he does it all the time, but whether he has the capacity to do it and does it when needed." (HT, July 30, 2007, Vol. I, p. 258).

No Significant Deficits in Social/Interpersonal Skills

Petitioner alleges that he has significant deficits in the area of social/interpersonal skills. However, this Court finds that Petitioner does not present any specific evidence regarding this allegation, thus Petitioner has not met his burden to prove that there are deficits in this area.

Petitioner's expert, Dr. Zimmerman, alleged that Petitioner is deficient in his communication because Petitioner's "comments in conferences with the [trial court] were often largely incoherent, and reveal deficiencies in communication skills." (HT, July 30, 2007, Vol. II, PET. EX. 98, p. 217). However, when pressed on the issue, Dr. Zimmerman conceded that he was not present at those conferences, never spoke with trial counsel about the conferences, and would expect one of the attorneys or the Judge to notice if the comments were "incoherent." (HT,

July 30, 2007, Vol. I, pp. 115-117). Thus, Petitioner utterly failed to support this allegation.

However, there is ample evidence in the record before this Court that Petitioner is not deficient in the area of social skills. Petitioner, himself, reported to Dr. King, that he interacts with other inmates to negotiate the television programming of the television that is visible to the inmates in his area. (HT, July 30, 2007, Vol. I, p. 258). Petitioner also reported that he keeps a stable group of friends and refrains from saying things that might embarrass or hurt others, and apologizes if he does hurt their feelings. (HT, July 30, 2007, Vol. V, RES. EX. 8, p. 1766).

Petitioner's family and friends also provided numerous examples of Petitioner's adaptive social skills. Petitioner's family reported that Petitioner always had friends when he was growing up. (T. 2559). Some of those friends even testified on his behalf at trial, reporting that Petitioner had a "good heart" and was a "good friend". (T. 2584; 2604). They also described how he would stop and help people whose cars were broken down on the side of the road. (T. 2575; 2605).

After a day of fishing, Petitioner would sometimes take the fish that he had caught over to an elderly friend's house. (T. 2583). Further, Petitioner would sometimes take friends with him to go fishing. (HT, July 30, 2007, Vol. I, p. 156). If he

was not going fishing with friends, sometimes they would just hang around the house and play cards. Id.

Most significantly, at the time of the crime, Petitioner had been married to his wife for over 11 years. They had separated on occasion, but Petitioner's family described that they had the "usual problems like any married couple". (T. 2561-2562). Petitioner's wife described that Petitioner would do nice things for her, like clean the house, or take her out to dinner and the movies or to a party. (HT, July 30, 2007, Vol. I, pp. 160-161). Petitioner also bought the family gifts for Christmas and would praise the kids when they did something good. Id.

Petitioner has not presented evidence to meet his burden and support his claim that he has significant deficits in the area of social/interpersonal skills. This Court finds the evidence before this Court to show just the contrary.

No Significant Deficits in Functional Academics

Petitioner's experts allege that Petitioner has significant deficits in the area of functional academics. However, Petitioner's experts seem to focus solely on Petitioner's school records and his I.Q. score in coming to this conclusion. (HT, July 30, 2007, Vol. I, p. 65). The expert testimony reflects that it is important to look at a variety of sources and recognize that just because someone has low grades, it does not

necessarily follow that he has significant deficits in his **functional** academics.[4]

Dr. Zimmerman places great import on Petitioner's class placement in concluding that Petitioner has significant adaptive deficits. Petitioner's school records indicate that Petitioner was "socially promoted" or "placed" from one grade to another on four occasions. (HT, July 30, 2007, Vol. II, PET. EX. 110). These instances took place when Petitioner was in grade school and there are no indications of "placement" during Petitioner's high school years.

Furthermore, as there is and was no guidance about when and why a student should be promoted, Petitioner's experts have only speculated as to the reasons. One of Petitioner's teachers, Jo Bess Grenga, stated in an affidavit for Petitioner that Petitioner was promoted to "keep him with kids his own age." (HT, July 30, 2007, Vol. II, PET. EX. 80). Other than Ms. Grenga's affidavit, Petitioner does not present any evidence of reasons behind those "social promotions."

Furthermore, Dr. Zimmerman concedes that one can not rely on grades to determine someone's academic abilities as grades

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[4] Functional academics refer to reading and mathematics skills that are used frequently in everyday life (e.g., reading signs or instructions, counting change, or taking measurements). Definition of Mental Retardation, American Association of Intellectual and Developmental Disabilities, http://www.aaidd.org/Policies/faq mental retardation.shtml.

are not standardized among classes. (HT, July, 30, 2007, Vol. I, p. 97). An "A" in one class could be the equivalent of a "B" in another class. Dr. King further testified that grades can be affected by the effort put forth by the student on any given day, as can drug and alcohol use by a student. (HT, July 30, 2007, Vol. I, p. 98, 102). Petitioner does not present any evidence that these factors did not come into play and affect Petitioner's grades. Without clearer guidelines, one can not rely on these things alone when assessing a student's adaptive abilities.

This Court also notes that Petitioner's experts point to Petitioner's participation in "fundamental" classes as evidence that he has significant adaptive deficits in academic functioning. However, Eddye Mae Booth, who was a counselor for senior boys at Northeast High School, and Fred Persley, a science teacher at Northeast High School, recall that a class titled "fundamental" did not necessarily mean that it was a class for slow learners. (HT, July 30, 2007, Vol. V, RES. EX. 23; RES. EX. 24). Mr. Persley also indicated that students had a choice of which classes to enroll. (HT, July 30, 2007, Vol. V, RES. EX. 23). Dr. Zimmerman also conceded, "I don't know if [fundamental] was the lowest class" that someone could be placed and further admitted that he had no direct knowledge of how

someone came to be placed in any class which they were enrolled. (HT, July 30, 2007, Vol. I, pp. 100-101).

This Court determined that it can not place great import on evidence from the numerous affiants, who are not qualified to testify about Petitioner's mental health that Petitioner was "slow" as there is nothing in the record before this Court to quantify the meaning of "slow." Petitioner's mother could be stating that Petitioner was "slow" as compared to his sister who excelled at school and developed quickly. The teachers who refer to Petitioner as "slow" could be comparing Petitioner to students of theirs who were in the highest placement classes. Without an objective and professional understanding of the meaning of "slow," Petitioner can not prove that this indicates he has significant deficits in his academic functioning.

Dr. King testified that he found Petitioner's school records to illustrate that Petitioner does not have any deficiencies in adaptive functioning in this area. He stated:

> I think that any individual who sticks with school for 12 years and shows up, even if he was struggling, and there's been no question about that, I think that shows adaptive behavior. He stuck with the school system until he completed what he needed to complete. He also was engaged in organized sports while he was there, so he had social interactions with other students and faculty. I think all of that is indication for reasonable adaptive functioning."

(HT, Vol. 1, p. 254).

Petitioner also reported to Dr. King that he did fail some classes, but made those up at summer school, indicating that he followed through on what was necessary to pass the course. Id.

The results of the ABAS-II that Dr. King administered to Petitioner corroborate Dr. King's finding that Petitioner does not have significant deficits in functional academics. For example, Petitioner reported writing letters to pen pals, being able to read time on a clock, giving a clerk the correct amount of money when making a purchase, and accurately keeping score when he is playing a game. (HT, July 30, 2007, Vol. V, RES. EX. 8, p. 1762).

Dr. Zimmerman's findings again ignore the testimony o f Petitioner's wife. Migrisus Tharpe testified that Petitioner has intermittently written letters and made phone calls to his daughters while he has been incarcerated. (HT, July 30, 2007, Vol. I, pp. 159-160).

This Court concludes that all of these actions clearly illustrate that Petitioner has adequate adaptive functioning in the area of academic functioning.

No Significant Deficits in Self-Direction

Petitioner's experts allege that Petitioner has significant deficits in self-direction. This Court finds that Petitioner

has not met his burden to prove that such significant deficit exists.

Specifically, Petitioner's supposed "reliance" on his wife after the crime in terms of directing Petitioner where to drive and telling Petitioner what they needed to tell the police, led Dr. Zimmerman to make this assumption. (HT, July 30, 2007, Vol. I, pp. 112-113). However, that example is taking Petitioner's behavior out of context.

On the morning of the crime, Petitioner planned to intercept his wife as she drove to work. (T. 2596). Arguably, Petitioner planned this meeting the night before as he told Ms. Baxter the night prior to the murder that he was going to see his wife the next day. Further, Petitioner requested to borrow the truck from Lewis Horne the night prior to the murder. (T. 2596).

In furtherance of his goal to intercept his wife on her way to work, Petitioner got into the borrowed truck with a loaded rifle, found his way to the specific road that his wife would take on her route to work, at the exact time when she would pass by, saw his sister-in-law's car coming down the road, pulled out in front of the car and blocked the road so that the victims could not pass. (T. 2051). Contrary to Petitioner's claim of lack of self-direction, the record and evidence clearly establish that Petitioner knew exactly what he was doing and

what he wanted to gain during the time period surrounding the crime.

Further, Petitioner's behavior the day of the crime, and more generally his trying to reunite with his wife all together, illustrate that Petitioner was able to set a goal and take the steps to reach that goal without the necessity of someone else directing him.

As for Petitioner's behavior after he shot and killed Ms. Freeman, Petitioner's experts focus on the assumption that Petitioner relied on his wife. However, Dr. Zimmerman fails to take into account that Petitioner's wife testified that "most of the time, after he used, and he'll start acting, like, sort of, to me, like a child." (T. 2069). As with the majority of Petitioner's habeas experts' findings as to alleged adaptive deficits, the experts ignore the effect of Petitioner's substance abuse throughout his life as well as on the day of the crime, even when specifically highlighted by Petitioner's wife.

This Court also noted when determining that Petitioner had no significant deficits in self-direction, the evidence that when Petitioner stopped to try and get a hotel room after the murder, he instructed his wife that they needed to save two dollars for gas to return to Macon, Georgia. (T. 2070). Dr. King testified that this indicates that Petitioner was "planning ahead and had some concept of money and what he'd need for a

return trip." (HT, July 30, 2007, Vol. I, p. 256). Dr. King testified, "I think those are basic kinds of adaptive skills." Id.

Petitioner's experts allege that Petitioner exhibits these deficits because he did very little budgeting and would only pay a bill if his wife gave him specific direction. (HT, July 30, 2007, Vol. I, p. 113). However, this finding ignores Petitioner's wife's testimony, in which she testified that she took care of the bills because "I didn't think he couldn't handle it, I did it because I felt like if I did it, it would get paid on time, it would get paid, because sometimes he would, well, most of the time he was kind of careless with his money. He used his money for what he wanted to use it for." (HT, July 30, 2007, Vol. I, p. 148). This Court finds that it was not that Petitioner could not do things without direction, but that he sometimes acted selfishly when it came to money and looked out for his own desires. This Court notes that this selfishness could be described as a clear example of using self-direction as Petitioner knew what he wanted and found ways to get it.

This Court finds other examples of adequate self-direction are evident in the description of Petitioner's home living. Petitioner was able to cook and clean, go to the grocery store, take care of the children and would perform those tasks when

necessary, without direction. (HT, July 30, 2007, Vol. I, p. 143, 155).

Petitioner also self-reports proper self-direction by stating that he relies on himself to travel in the community on his own, orders his own meals when eating out, carries enough money for small purchases, walks alone to nearby locations, and shops for friends and family who are unable to shop. (HT, July 30, 2007, Vol. V, RES. EX. 8, p. 1761).

The trial testimony of Patti Baxter also reflects that Petitioner was very knowledgeable about and raised litters of dogs. (T. 2593). He also partook in proper leisure activities which he was interested in, such as fishing and just "hanging out." (HT, July 30, 2007, Vol. V, RES. EX. 8, p. 1764).

The record reflects that Petitioner was involved in a construction union, which required Petitioner to be actively engaged in the hiring and selection process to obtain work. (HT, July 30, 2007, Vol. I, p. 106). Petitioner's wife testified that she assumed Petitioner applied for jobs "because he would come home and say, 'I got a job, you know, working here….'" (HT, July 30, 2007, Vol. I, p. 150). Petitioner went out on his own, without his wife's direction, to obtain employment and because of the nature of his employment, he had to apply for jobs on a frequent basis. Id.

This Court finds that all of these examples reflect Petitioner's ability to use self-direction to achieve his goals, thus Petitioner has not met his burden of proving that he has significant deficits in this area.

No Significant Deficits in Work

Petitioner's habeas mental health experts allege that Petitioner has significant deficits in the adaptive functioning category of work by relying in large part on Petitioner's history of low-skilled employment and the short duration of those jobs. (HT, July 30, 2007, Vol. I, p. 68). Petitioner's experts, however, fail to take into account other factors as explanations for this history, such as Petitioner's substance abuse problems, as opposed to Petitioner's supposed mental retardation. This Court concludes that when taking these other factors into account, it is clear that Petitioner does not exhibit significant deficits in this area.

Dr. Zimmerman testified that Petitioner had "low skill jobs, such as laborer, cutting grass, that sort or type of job." (HT, July 30, 2007, Vol. i, p. 68). He testified that "most of the jobs were of short duration, a few months, three or four months or less," which Dr. Zimmerman testified is "consistent with a person who has mild mental retardation." Id. It is unquestionable that one cannot conclude that a person with this work history **is**, in fact, mentally retarded.

When the Court asked Dr. Zimmerman if "everybody that cuts grass is retarded," Dr. Zimmerman responded that "if I had an I.Q. score of 70 or below one of the things I would look at is the person the kind of person that somebody comes and picks them up and they cut grass, or are they the person that's running the business." (HT, July 30, 2007, Vol. I, pp. 68-69). Perhaps Dr. Zimmerman presumes that anyone who works doing manual labor, but does not run their own business, is mentally retarded.

Dr. Zimmerman also failed to address the other factors that come into play to successfully acquire and maintain a job, including education and effort. The record clearly shows that Petitioner does not hold any advanced degree, and has low intellectual abilities. This does not lead to the ultimate conclusion that someone is mentally retarded, just that they have a different skill set that is necessary for his jobs. Petitioner never reported to Dr. Zimmerman, or anyone else, that Petitioner held the jobs that he did because he could not do anything else. (HT, July 30, 2007, Vol. I, p. 107).

This Court also notes that another key component when discussing duration of Petitioner's employment is to understand the nature of the employment. Petitioner was employed for some time with a construction union where the potential employee would show up at a designated location and, based on availability, be sent out to a work site. (HT, July 30, 2007,

Vol. I, p. 106). Typically, once the job was completed, the process for being placed on a job site would be repeated. Id. The record reflects that a member of the union, in this case, Petitioner, had complete control over when, or if, he would go back to be placed on another job, thus it was up to the employee to determine the frequency of his employment.

This Court also notes that the record establishes there were other jobs that Petitioner held prior to his involvement with the construction union, all of which he left for one reason or another. Petitioner's wife testified that "some of [his jobs] he probably did quit but, you know, he got laid off or the job would end, or different things like that, is what he would tell me."[5] (HT, July 30, 2007, Vol. I, p. 150). Petitioner reported his first gainful employment outside of the family at the age of 15. (HT, July 30, 2007, Vol. I, p. 235). At the age of 19, Petitioner began working at the mill, where he was employed for approximately two years. Id. Subsequently, Petitioner was employed at the Wilbur Vault Company for a little over six months, doing burial work and construction of vaults. Id. Petitioner was also employed at LJL Truck Center as a

[5] Petitioner's wife corrects her previous affidavit, (HT, May 28, 1998, PET. EX. 12), where it states "sometimes he would quit because other workers would crack jokes about him when he couldn't keep up the pace on the job". Ms. Tharpe testified, "I never said that" because she had never heard that before. (HT, July 30, 2007, Vol. I, p. 150).

porter for an unclear amount of time, but no less than six months. (HT, May 28, 1998, PET. EX. 37).

This Court finds that Petitioner does not present any evidence to show that he was fired from any of these jobs because of his inability to perform the task at hand. One particular example is Petitioner's employment at LJL Truck Center. The records from LJL reflect that "[Petitioner] was picked up by the police at LJL Truck Center on 2/3/88. Keith never called or came back to work. His position could not be held open." (HT, May 28, 1998, PET. EX. 37). Clearly, Petitioner was not fired from that job because he was unable to perform the job at hand. Furthermore, notes from trial counsel's investigation reveal that, Frank Jones, one of Petitioner's supervisors, reported that Petitioner was "often in rages" on the job and that he brought a gun to the place of employment on occasion. (HT, July 30, 2007, Vol. VI, RES. EX. 9, p. 1784).

This Court concludes that Petitioner has not presented any evidence to support Dr. Zimmerman's assertion that Petitioner has significant deficits in the adaptive functioning area of work. The record before this Court clearly shows that Petitioner held fairly consistent employment prior to his incarceration at age thirty two. The Court finds that this employment was consistent with his intellectual functioning, as

well as other factors, such as effort and his drug and alcohol abuse, thus Petitioner has not met his burden to establish significant deficits in this area.

4. Petitioner Failed to Establish Significantly Sub-average Intellectual Functioning Before Age 18.

The final prerequisite for a valid diagnosis of mental retardation is that the significantly sub-average intellectual functioning exhibits itself before age 18. This Court finds that the absence of any IQ score below 70 prior to age 18 in Petitioner's life history, Petitioner's school records and the absence of any finding that Petitioner may be mentally retarded prior to Dr. Zimmermann's conclusion is compelling evidence that Petitioner does not meet the requirements for a finding of mental retardation, thus Petitioner has not met his burden of establishing significantly sub-average intellectual functioning in existence prior to the age of 18.

5. Petitioner Failed To Carry His Burden as to His Claim of Alleged Mental Retardation

Ultimately, this Court finds that Petitioner failed to establish beyond a reasonable doubt that he met the required prongs for a finding of mental retardation under Georgia law. Whereas, intellectual testing, alone, places Petitioner in the sub-average range of intellectual functioning as required for a finding of mental retardation, Petitioner does not prove beyond a reasonable doubt that the onset was prior to age 18 and that

he has significant adaptive deficits. The definition of mental retardation requires that the three prongs be proven in the conjunctive, not disjunctive. The DSM-IV-TR clearly states that "mental retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning." (DSM-IV-TR, p. 42). Thus a finding that Petitioner has a low intelligence score, does not prove beyond a reasonable doubt that he is mentally retarded, and this Court denies Petitioner relief as to this substantive claim. Furthermore, without proving that Petitioner is in fact mentally retarded, Petitioner necessarily does not prove that trial counsel were ineffective for not presenting evidence that Petitioner was mentally retarded, and thus this claim fails.

C. PETITIONER HAS NOT ESTABLISHED BY ANY COMPETENT EVIDENCE THAT PETITIONER'S VERDICT WAS THE RESULT OF JUROR MISCONDUCT

Petitioner has submitted the testimony of several jurors to attempt to support Petitioner's juror misconduct claims. However, this Court finds that this testimony is inadmissible and the claims are procedurally defaulted and not properly before this Court for review. Insofar as the Court reviews any of these claims, it is clear that Petitioner has failed to carry his burden of establishing that these claims have any basis or merit.

1. Juror Testimony Including the Juror Depositions and Affidavits Inadmissible

Petitioner has submitted testimony of Petitioner's trial jurors to attempt to impeach the verdict in this case. With very limited exceptions, impeachment of a jury verdict by this type of evidence is not allowed under Georgia law. The distinction between what will fall within one of the limited exceptions to the rule prohibiting juror testimony to impeach the verdict depends largely upon whether the alleged events in question were "internal" or "external" to the jurors and their deliberations. Therefore, the fact that some jurors exhibited certain prejudices, biases, misunderstandings as to the law, or other characteristics that are not conducive to neutral and competent fact-finding is not a basis for impeaching the jury's verdict.

The Georgia Supreme Court has made clear that the affidavits, such as those submitted by Petitioner to this Court, are not admissible. In Spencer v. State, 260 Ga. 640 (1990), the Georgia Supreme Court held:

> The general rule is that "affidavits of jurors may be taken to sustain but not to impeach their verdict." O.C.G.A § 17-9-41. **Exceptions are made to the rule in cases where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations.** See, e.g., Hall v. State, 259 Ga. 412 (3) (383 S.E. 2d 128) (1989) and cases cited therein. Compare FRE 606 (b). (Footnote omitted) The affidavit here does not fit within these exceptions to the rule.

> Compare Shillcutt v. Gagnon, 827 F2d 1155 (II) (7th Cir. 1987). See also *Wright & Gold, Federal Practice and Procedure*, Ch. 7, § 6074 at pp. 431-32. ("Most authorities agree … that **the rule precludes a juror from testifying that issues in the case were prejudged,** a juror was motivated by irrelevant or improper personal considerations, **or racial or ethnic prejudice** played a role in jury deliberations." (Footnotes omitted.))

Spencer, 260 Ga. at 643. See also Oliver, 265 Ga. at 654(3) (limited exchange between jurors regarding "news story" of a murdered prosecution witness during trial did not amount to exception to the prohibition against juror impeachment of verdict); Gardiner v. State, 264 Ga. 329, 332(2) (1994) (allegations that a juror was familiar with family members of victim, that jurors misunderstood instruction regarding reasonable doubt, and that a juror provided legal information which unfairly influenced other jurors did not fall within an exception to the rule against impeachment of verdicts); Joachim v. State, 263 Ga. 816, 817(3) (1994) (juror's negative comment about witness based on knowledge from juror's employment as a teacher at school attended by witness did not amount to an exception to the prohibition against juror impeachment of verdict); Hall v. State, 259 Ga. 412, 414 (3) (1989) (that two jurors changed their vote from sentence of life imprisonment to the death penalty because "other jurors in the juror room informed [them] that there was no such thing as life imprisonment without parole" did not fall within any exception

to the rule against juror impeachment of verdict); Williams v. State, 252 Ga. 7, 8 (1984) (juror comment during deliberations that defendant had been involved in previous shoplifting, based on juror's personal knowledge, did not warrant finding an exception to the prohibition against juror impeachment of verdict); Hill v. State, 250 Ga. 277, 285(7) (1982) (allegations based on hearsay and "possibilities" that verdict was motivated by fear did not warrant exception to the prohibition against juror impeachment of verdict); Emmett v. State, 243 Ga. 550, 554(6) (1979) (juror comment that "this was the guy whose last wife and child had disappeared and the law officers had not found the bodies" and "this knowledge with the evidence presented makes it appear that his is the type who would do it" did not warrant exception to rule against juror impeachment of verdict); Stokes v. State, 232 Ga. App. 232 (1998) (jury foreman's testimony that the jury considered an unsupported comment did not entitle defendant to a new trial).

Accordingly, this Court finds that as the juror depositions and Petitioner's affidavits with regard to these claims are inadmissible, Petitioner has failed to prove, with any competent evidence, that there was any juror misconduct, and his claims fail.

2. Petitioner Procedurally Defaulted These Claims.

Further, even if Petitioner had admissible evidence to support his claims of juror misconduct, this Court finds that the claims are procedurally defaulted as Petitioner failed to raise them at the motion for new trial or on appeal. Black v. Hardin, supra. Moreover, Petitioner has failed to establish the requisite cause and prejudice to overcome the default of these claims.

As Petitioner could have raised these claims on direct appeal, just as Petitioner has now raised them in his habeas corpus petition, Petitioner has failed to establish any State action as cause preventing him from raising these claims.

Insofar as Petitioner is alleging ineffective assistance of counsel as cause, this Court finds that Petitioner has failed to establish the requisite deficiency or prejudice.

Petitioner has tendered the affidavit of juror Barnie Gattie to attempt to establish that a member of his jury was allegedly racially biased and prejudiced against Petitioner and thus, impeach the jury's verdict. However, this Court concludes that Petitioner has failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner, as required by the ruling in *McCleskey*. See McCleskey v. Kemp, 481 U.S. 279 (1987). In fact, Mr. Gattie testified in his affidavit that he "did not vote to impose the death penalty because [the

Petitioner] was a black man" and that "at no time was there any discussion about imposing the death sentence because [Petitioner] was a black man." (HT, December 11, 1998 Vol. II, RES. EX. 1). This Court finds that Petitioner has failed to establish any prejudice with regard to this claim.

Petitioner claims that the jury improperly considered evidence that Petitioner was on probation for having previously shot a man in Macon, Georgia, however a review of all of the juror depositions and affidavits by this Court establishes that there is no evidence to support this allegation. None of the jurors recalled discussing or even hearing that Petitioner had shot a man in Macon, Georgia. (HT, October 1 and 2, 1998).

This Court concludes that during the juror depositions, Petitioner's habeas counsel muddled this issue by broadly asking "did you discuss … probation." (HT, October 1 and 2, 1998). Some of the jurors responded, "no", while others said that there may have been some discussion concerning probation. At no time did any juror indicate they was any discussion about probation as it related to Petitioner having shot a man in Macon, Georgia. However, there was evidence presented during the sentencing phase of trial that Petitioner had a criminal history. Thus, this Court determines that it is likely that any discussion concerning probation was merely a discussion of the evidence presented by the State in sentencing. This Court finds that

Petitioner has clearly failed to establish the basis of this allegation, much less resulting prejudice.

As to Petitioner's allegation that one of the jurors sent a note to Judge Thompson asking for sentence clarification, this Court finds that there is no evidence to support this claim, thus it is denied. When asked about the note, only one juror remembered a note being sent to the trial judge. (HT, October 1 and 2, 1998, Vol. II, pp. 302-303). She indicated that it was an elderly lady who sent the note; however, each of the females on the jury testified that they did not write and/or send a note to the judge. Id. Further, each of the male jurors also denied having written a note to the Judge. The bailiffs in charge of the jurors also testified that they were with the jurors at all times and never received a note. (HT, July 30, 2007, Vol. V, REX. EX. 5A, 5B). The bailiffs discussed their ample training in this area and were adamant in their testimony that each bailiff would take any note directly to the judge. Id.

Accordingly, as to each of these juror misconduct claims, this Court finds that Petitioner has failed to carry his burden of establishing deficiency of counsel or prejudice resulting from counsel's representation. Thus, Petitioner has failed to establish cause or prejudice to overcome his default of these claims, and habeas relief is denied.

CONCLUSION

After considering all of Petitioner's allegations made in the habeas corpus petition and at the habeas corpus hearing, this Court concludes that Petitioner has failed to carry his burden of proof in demonstrating any denial of his constitutional rights as set forth above.

WHEREFORE, it is hereby ORDERED that the petition for a writ of habeas corpus be denied and that Petitioner be remanded to the custody of Respondent for the service and execution of his lawful sentence.

The Clerk is directed to mail a copy of this Order to counsel for the parties.

SO ORDERED, this 1st day of December, 2008.

HONORABLE RICHARD T. WINEGARDEN
Superior Court of Butts County
Sitting by Designation

Attachment F

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 25, 2018

Mr. Brian S. Kammer
Georgia Resource Center
303 Elizabeth St. NE
Atlanta, GA 30307

Re: Keith Tharpe
v. Eric Sellers, Warden
Application No. 17A767

Dear Mr. Kammer:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on January 25, 2018, extended the time to and including April 1, 2018.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Jacob A. Levitan
Case Analyst