APPENDIX A

IN THE SUPERIOR COURT OF

BUTTS COUNTY, GEORGIA

JAMES RANDALL ROGERS,	*	CIVIL ACTION NO. 87-V-1007
PETITIONER,	*	
Vs.	*	HABEAS CORPUS
RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	*	
RESPONDENT.	*	

JUDGMENT

Petitioner, James Randall Rogers, was convicted after a trial by jury in the Superior Court of Floyd County of the offenses of malice murder and aggravated assault. After a finding by the jury of the existence of two statutory aggravating circumstances, Petitioner was sentenced to death for the malice murder and to ten years consecutive imprisonment for the aggravated assault. Petitioner's convictions and sentences were affirmed by the Supreme Court of Georgia, Rogers v. State, 256 Ga. 139, cert. denied, _____ U.S. ____, 107 S. Ct. 600 (1986). Petitioner filed the instant petition for writ of habeas corpus on May 13, 1987. As amended, the petition alleges twenty two grounds for relief. After hearing evidence and argument of counsel for both parties, the Court finds:

THE EVIDENCE AT TRIAL

At approximately 11:45 p.m. on May 21, 1980, Edith Polston

FILED Feb. 13 1989 at 9:30 AM
Georgia Healy CHIEF DEP. CLERK
BUTTS SUPERIOR COURT

returned from her job as a health technician to the home which she shared with Grace Perry at East 19th Street in Rome, Georgia. Upon arriving home, Ms. Polston found on the front steps of the house a rake with a liquid-like substance on the handle. Upon investigation, she found Grace Perry in a bedroom in the house on the floor. Ms. Polston was then grabbed from behind, forced to remove her clothes, and told to lay down beside Ms. Perry. Ms. Polston was then taken outside by her assailant, at which time she was struck in the side of the face, but then managed to free herself and run away. The police were then called.

The first policeman on the scene arrived at approximately 11 minutes after midnight on the morning of May 22, 1980. On arriving at the scene, the police investigated the outside of the house and found the Petitioner attempting to climb a fence at the rear of the victim's property.

The Petitioner was then handcuffed to the railing of the front porch and the officers began to search the murder victim's home. At the back of the house, the officers found the murder victim lying naked on a back bedroom floor with a large puddle of blood between her legs.

The Petitioner was then given the Miranda warnings and placed in a patrol car for transportation to the police station. Petitioner's mother came to the crime scene. Ms. Polston overheard Petitioner tell his mother, "Ma-Mama, I'm gone this time; I'm gone." En route to the police station, the Petitioner volunteered, "I killed her, I killed her," and "There's not anything you can do about it, I'm crazy and I've got papers to prove it." The

Petitioner made this same statement over and over en route to the police station. The Petitioner was thereafter transported from the police station to a local hospital where blood and hair samples were taken from him.

On May 22, 1980, an autopsy was performed on Grace Perry. An external examination of the body revealed a large amount of dry blood on the legs and that there had been a "traumatic infliction of some wounds to the lower portion of the body . . ." An internal examination disclosed a laceration to the back exterior portion of the vagina which was approximately an inch and one half long. The autopsy further disclosed a "total perforation of the wall of the vagina," which perforation extended through the liver, the diaphragm and the right lung. This perforation caused a sudden and massive amount of hemorrhaging into the right chest cavity which caused the death of the victim. Testimony was produced that the injury was possibly caused by a blunt object in the shape of a pole which was at least two feet in length and no more than two inches in diameter. Testimony was also introduced that it would take "a considerable purposeful force, to cause the injury."

On the morning of May 22, 1980, officers recovered a rake which had been on the front porch of the victim's home. The officer who recovered the rake testified that approximately two to four feet of the rake was covered with what looked like blood and fluid. The rake was subsequently turned over to the State Crime Lab.

A fingerprint taken from the rake handle was subsequently identified as being that of the Petitioner. The blood that was

found on the rake was established to be human blood consistent with the blood of the murder victim. Hair, which had been taken from the back of the Petitioner, was also tested and found to be consistent with known head hairs of the murder victim. Testimony was also introduced that bite marks on the arm of the Petitioner were consistent with dentures worn by the murder victim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For ready reference, this Court will refer to the grounds alleged by Petitioner by the same number assigned thereto in the petition for the writ of habeas corpus as amended.

1. The issues raised in grounds two (2), three (3), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15), of the habeas petition "were actually litigated, i.e., raised and decided, in the [Petitioner's] direct appeal, and cannot be reasserted in habeas corpus proceedings. Gunter v. Hickman, 256 Ga. 315(1)." Davis v. Williams, 258 Ga. 552(3). Since there has been no showing of any change in the facts or the law which would allow reconsideration of these grounds, the Court concludes that said grounds are precluded from review in this habeas action.

2. The issues raised in grounds one (1), four (4), five (5), seven (7), eight (8), nine (9), nineteen (19), twenty (20), and twenty two (22), were not properly preserved for collateral review and are, therefore, procedurally defaulted. O.C.G.A. 9-14-48(d). This Court finds that the issues raised in these said grounds were not preserved for review by any timely motion or objection at trial

and on appeal in accordance with Georgia procedural rules, which said rules afforded Petitioner a full and fair opportunity to preserve same by timely motion or objection. Moreover, there has been no showing of cause or prejudice by Petitioner for his failure to preserve these claims, and this Court finds none. Furthermore, this Court finds no miscarriage of justice in this case arising from such failure or otherwise. The mere fact that counsel for the Petitioner failed to recognize a factual or legal basis for a claim and, therefore, failed to preserve it for review, or subsequently failed to raise the claim despite recognizing it, does not amount to nor constitute "cause" for a procedural default. Murray v. Carrier, _____ U.S. _____, 106 S. Ct. 2639, 2645 (1986). Additionally, the deliberate tactical decision not to pursue a particular claim does not excuse a procedural default. Smith v. Murray, _____ U.S. _____, 106 S. Ct. 2661, 2666 (1986). Absent a showing of both cause and prejudice by the Petitioner for his failure to preserve the claims hereinbefore enumerated by timely motion or objection at trial and on appeal, a procedural default occurs and the claims cannot be litigated on their merits. Valenzuela v. Newsome, 253 Ga. 793, (2-4); Black v. Hardin, 255 Ga. 239; Davis v. Williams, 258 Ga. 552(1).

3. In grounds six (6), sixteen (16), seventeen (17), eighteen (18), and twenty one (21), Petitioner contends that his constitutional rights were violated because of ineffective assistance of counsel.

Georgia follows the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 Led. 2d 674 (1984),

in determining whether there has been actual ineffective assistance of counsel. Brogdon v. State, 255 Ga. 64, 67(3). Petitioner must show both that counsel's performance was deficient and that this deficiency prejudiced his defense to the extent that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's unprofessional errors. Strickland v. Washington, supra; Smith v. Francis, 253 Ga. 782, 783. The burden of proof is upon Petitioner to show this, Strickland v. Washington, supra; Smith v. Francis, supra; Brown v. State, 257 Ga. 277(2), and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct and that all significant decisions were made in the exercise of reasonable professional judgment. Brogdon v. State, supra. The constitutional right to effective assistance of counsel guarantees "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F2d 592, 599; Pitts v. Glass, 231 Ga. 638, 639. The Supreme Court of the United States approved this standard of "reasonably effective assistance" set forth in Pitts v. Glass, supra, in its Strickland decision. Brogdon v. State, supra.

This Court finds that Petitioner has failed to meet his burden of proving that his attorneys were deficient in their performance of representing him. The record demonstrates that Petitioner's attorneys investigated, prepared, and conducted Petitioner's case in conformance with the standard of reasonably effective assistance, that their performance was not so deficient as to

prejudice Petitioner's defense, and certainly not deficient to the extent that there is any reasonable probability that the outcome of the proceedings would have been different but for the alleged unprofessional errors on the part of counsel. This Court finds that Petitioner's attorneys were not deficient in their conduct of Petitioner's defense, that their conduct of the case and Petitioner's defense was well within the range of reasonable professional conduct, and that all significant decisions were made in the exercise of reasonable professional judgment.

Viewing the totality of circumstances from the attorneys' perspective, this Court concludes that the conduct of Petitioner's attorneys was both effective and reasonable, and that the allegations of ineffective assistance of counsel are totally without merit.

4. Petitioner contends in ground nineteen (19) that three photographs and a tape recording which were in the possession of the prosecution constituted exculpatory evidence which was material and beneficial to the Petitioner, but were not provided to him prior to or during the trial in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194. The three photographs are merely cumulative of testimony presented at trial concerning Petitioner's being hit with a flashlight after his arrest, and Petitioner's trial attorneys have acknowledged that these photographs may have been among the many photographs contained in the District Attorney's file when they conducted their in camera inspection of that file. The tape recording is allegedly a recording of a

statement made by the Petitioner while in custody. This tape is totally inaudible and would have in no way been beneficial or exculpatory to the defense. Evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682; 105 S. Ct. 3375, 3379. Petitioner has failed to show that the photographs or the tape recording were material, beneficial, or exculpatory, and has failed to show that same were withheld from him or suppressed in any way. This Court finds that these contentions are without merit.

This Court Concludes that none of Petitioner's constitutional rights were or are being violated, and that the Petition for the Writ of Habeas Corpus should be denied.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED, that said Petition for the Writ of Habeas Corpus be, and the same is hereby, **Denied**, and that Petitioner , James Randall Rogers, be, and he is hereby, remanded to the custody of the Respondent Warden for the imposition of his lawful sentences.

SO ORDERED, this 10th day of February, 1989.

GEO. A. HORKAN, JR.,
PRESIDING JUDGE, SUPERIOR COURT,
BUTTS COUNTY, GEORGIA.

xc: Mr. Michael A. O'Quinn, Attorney
Mr. Dennis R. Dunn, Assistant Attorney General

APPENDIX B

ATTORNEY GENERAL'S OFFICE
Applic. No. 4816

Dennis Dunn, A.A.G.

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DKD

SUPREME COURT OF GEORGIA

ATLANTA May 24, 1989

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JAMES RANDALL ROGERS V. RALPH KEMP, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur.

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.

Joline B. Williams Clerk.

APPENDIX C

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

JAMES RANDALL ROGERS,	*	
	*	**CIVIL ACTION NO.**
Petitioner,	*	**2009-V-407**
	*	
v.	*	**HABEAS CORPUS**
	*	
CARL HUMPHREY, Warden, Georgia Diagnostic and Classification Prison,	*	
	*	
Respondent.	*	

Filed 4/11/2014 at 10:00 M.
Chief Dep. Clerk, Butts Superior Court

FINAL ORDER

COMES NOW before the Court, Petitioner's Amended Petition for Writ of Habeas Corpus as to his sentence in the Superior Court of Floyd County. Having considered Petitioner's original and Amended Petition for Writ of Habeas Corpus (hereinafter "Amended Petition"), the Respondent's Answer and Amended Answer, relevant portions of the appellate record, as well as the evidence and arguments presented by both parties, this Court hereby makes the following findings of fact and conclusions of law as required by O.C.G.A. §9-14-49. As explained in detail in this order, this Court denies the petition for writ of habeas corpus as to Petitioner's death sentence.

I. PROCEDURAL HISTORY

On June 22, 1985, Petitioner was convicted in the Superior Court of Floyd County of murder and aggravated assault. Petitioner was sentenced to death for the murder and ten years for the aggravated assault. Petitioner filed a motion for new trial on July 18, 1985, which was denied on September 13, 1985. On June 25, 1986, the Georgia Supreme Court affirmed Petitioner's convictions and sentences. Rogers v. State, 256 Ga. 139 (1986), cert. denied, 479 U.S. 995 (1986).

Petitioner filed a habeas corpus petition in the Superior Court of Butts County, Georgia on May 13, 1987, and an amended petition on June 10, 1988. This Court denied Petitioner's petition for habeas corpus relief in its entirety on February 13, 1989.

Petitioner's application for a certificate of probable cause to appeal from the denial of habeas corpus relief was filed in the Georgia Supreme Court on March 15, 1989. On April 19, 1989, the Supreme Court remanded the case to this Court and directed the Court to make separate findings of fact and conclusions of law as to each assertion of ineffective assistance of counsel. The Court entered a supplemental order denying relief, which included findings of fact and conclusions of law, on May 1, 1989. Thereafter, the Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal on May 24, 1989. Petitioner then filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 16, 1989. Rogers v. Kemp, 493 U.S. 923 (1989).

Petitioner filed a federal habeas corpus petition in the United States District Court for the Northern District of Georgia on August 28, 1990 and an amended petition on January 18, 1991. On March 31, 1992, the United States District Court entered an order finding ineffective assistance of counsel at the sentencing phase. Rogers v. Zant, Case No. 4:90-CV-231-HLM (N.D. Ga. Mar. 31, 1992). The Eleventh Circuit Court of Appeals reversed the district court's grant of relief as to the sentence and affirmed all other denials of relief on January 21, 1994. Rogers v. Zant, 13 F.3d 384 (1994), cert. denied, 513 U.S. 899 (1994).

On November 29, 1994, Petitioner filed a second state habeas petition wherein he alleged that he is mentally retarded. On May 22, 1995, this Court remanded Petitioner's case to the Superior Court of Floyd County for a jury trial on the issue of Petitioner's alleged mental

retardation under the procedure set forth by the Georgia Supreme Court in Fleming v. Zant, 259 Ga. 687 (1989).

Before the commencement of a jury trial on Petitioner's claim of mental retardation, Petitioner wrote a letter to the remand court asking for dismissal of the proceedings. The court held a hearing on Petitioner's request during which Petitioner denied being mentally retarded. The remand court found that Petitioner knowingly and voluntarily waived the right to a jury trial on the issue of mental retardation. Subsequently, with new counsel, Petitioner sought to set aside the dismissal and withdraw the waiver. However, before the remand court ruled on the motion, Petitioner again wrote a letter seeking dismissal of the trial. The court again found a waiver of Petitioner's right to a mental retardation trial. However, on appeal, the Georgia Supreme Court held that Petitioner's trial for a capital offense was prior to July, 1, 1988; and, as such, once the habeas court found a genuine issue regarding mental retardation, the issue must be reviewed and was not subject to waiver. Rogers v. State, 276 Ga. 67 (2003).

Petitioner's mental retardation claim proceeded to a jury trial on August 1-11, 2005. Following the presentation of evidence by Petitioner and by the State, the jury returned a verdict finding Petitioner was not mentally retarded. The Georgia Supreme Court affirmed the jury's finding on November 5, 2007. Rogers v. State, 282 Ga. 659 (2007), cert. denied, 552 U.S. 1311 (2008).

Petitioner filed this instant habeas corpus petition on April 13, 2009, and his Amended Petition on June 22, 2010. An evidentiary hearing was held on October 18 and 28, 2010 wherein Petitioner offered 103 exhibits and Respondent offered 169 exhibits.

II. STATEMENT OF FACTS

On direct appeal, the Georgia Supreme Court found the evidence at the criminal trial established the following:

> At approximately 11:45 p.m. on May 21, 1980, Edith Polston, the assault victim, returned from work to the home she shared with the murder victim, Grace Perry. She found a rake on the front steps with a liquid substance on the handle and Ms. Perry lying on a bedroom floor. Before she could summon the police, she was seized from behind, forced to remove her clothing and to lie down beside Ms. Perry. She then was taken outside and struck in the face. She managed to escape, and the police were called.
>
> The first investigating officer arrived on the scene at approximately eleven minutes after midnight on the morning of May 22, 1980, and found Rogers attempting to climb a fence at the rear of the victim's property. The officer employed moderate force to subdue Rogers, then handcuffed Rogers to the railing of the front porch while he began a search of the house. He found Ms. Perry lying naked on the floor of a bedroom with a large puddle of blood between her legs. He then gave Rogers *Miranda* warnings and placed him in a patrol car for transportation to police headquarters.
>
> Rogers' mother came to the crime scene. Ms. Polston overheard Rogers tell his mother, 'Ma -- Mama, I'm gone this time; I'm gone.' En route to the police station, Rogers volunteered that he had killed Ms. Perry but 'there's not anything you can do about it, I'm crazy and I've got papers to prove it.'
>
> The autopsist testified that an external examination of the victim's body revealed a large amount of dry blood on the legs and traumatic infliction of wounds on the lower portion of the body. An internal examination disclosed a laceration to the back exterior portion of the vagina, which was approximately an inch and a half long. The autopsy further revealed a total perforation of the wall of the vagina. This perforation also extended through the liver, the diaphragm and into the right lung. The autopsist testified that the perforation caused a sudden and massive hemorrhaging into the right chest cavity which, in turn, caused the death of the victim.
>
> Testimony indicated that the trauma to the victim's body was consistent with the use by the assailant of a blunt instrument in the shape of a pole which was at least two feet long and no more than two inches in diameter. Testimony indicated that the trauma would have required a considerable, purposeful force to be employed. The officer who recovered the rake from the front porch testified that two to four feet of the rake's handle was covered with what appeared to be blood and other fluid.
>
> A fingerprint taken from the handle of the rake subsequently was identified as Rogers'. Human blood found on the handle of the rake, and hairs found on

> Rogers' body, were consistent with Ms. Perry's. Bite marks on one of Rogers' arms were consistent with the dentures worn by the elderly victim.

Rogers v. State, 256 Ga. at 140-141.

On direct appeal from Petitioner's mental retardation remand trial, the Georgia Supreme Court found the following:

> James Randall Rogers was convicted of murder and sentenced to death in 1985. See Rogers v. State, 256 Ga. 139 (344 SE2d 644) (1986). Rogers thereafter sought habeas corpus relief alleging that he is mentally retarded. Pursuant to Fleming v. Zant, 259 Ga. 687 (4) (386 SE2d 339) (1989), see also Rogers v. State, 276 Ga. 67 (1) (575 SE2d 879) (2003), a jury determined in 2005 that Rogers is not mentally retarded. He appeals. Finding no reversible error, we affirm.

Rogers v. State, 282 Ga. 659 (2007).

III. SUMMARY OF RULINGS ON PETITIONER'S CLAIMS FOR STATE HABEAS CORPUS RELIEF

Petitioner's Amended Petition enumerates thirteen (13) claims for relief. As stated in further detail below, this Court finds: (1) some claims asserted by Petitioner are procedurally barred due to the fact that they were litigated on direct appeal; (2) some claims are procedurally defaulted, as Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; (3) some claims are successive, as Petitioner failed to timely raise the alleged errors in his prior habeas proceedings; (4) some claims are non-cognizable and, (5) some claims are neither barred nor defaulted and therefore, are properly before this Court for habeas review.

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CLAIMS THAT ARE *RES JUDICATA*

This Court finds that the following claims are not reviewable based on the doctrine of *res judicata* as the claims were raised and litigated adversely to Petitioner on his direct appeal to the Georgia Supreme Court, at either his original direct appeal, Rogers v. State, 256 Ga. 139 (1986), or on direct appeal of his mental retardation trial, Rogers v. State, 282 Ga. 659 (2007) and this Court is precluded from reviewing such claims. See Elrod v. Ault, 231 Ga. 750 (1974); Gunter v. Hickman, 256 Ga. 315 (1986); Hance v. Kemp, 258 Ga. 649(6) (1988); Roulain v. Martin, 266 Ga. 353 (1996).

> **Claim IV**, wherein Petitioner alleges that he is mentally retarded and as such, his sentence of death is unconstitutional, was addressed and decided adversely to Petitioner at his mental retardation trial. This holding was subsequently upheld by the Georgia Supreme Court. Rogers v. State, 282 Ga. 659(1).
>
> That **portion of Claim V**, wherein Petitioner alleges juror misconduct during the original trial in that there were unspecified improper communications with the jury bailiffs. To the extent Petitioner alleges that the trial court erred in denying his motion for mistrial that was based upon a communication between a bailiff and a juror during dinner at a restaurant, this claim was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 256 Ga. at 145(6).
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> That **portion of Claim VII**, wherein Petitioner alleges that the trial court excused unspecified potential jurors for allegedly improper reasons. To the extent Petitioner alleges that the original trial court erred in excusing for cause jurors Floyd and Barton, this claim was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 256 Ga. at 142-143(3).
>
> That **portion of Claim VII**, wherein Petitioner alleges that the remand court erred in admitting the testimony of corrections officers that concerned Petitioner's adaptive functioning and the testimony of James Mills and Samuel Perri concerning the 2000 administration of psychological testing to Petitioner at Central State Hospital, was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 282 Ga. at 664-665, 667-668(7) and (10);
>
> That **portion of Claim VII**, wherein Petitioner alleges that the trial court erred in refusing to strike unspecified prospective jurors who were allegedly unqualified for reasons that included bias against Petitioner. To the extent Petitioner alleges that the original trial court erred in refusing to excuse juror Compton, this claim was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 256 Ga. at 141-142(1).

That **portion of Claim VII**, wherein Petitioner alleges that the remand court improperly compelled both prejudicial and incriminating testimony and the disclosure of privileged information by admitting the 1980 evaluation of Petitioner conducted by Dr. Richard Hark while he served as a retained expert for Petitioner, was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 282 Ga. at 662-664(6);

That **portion of Claim VII**, wherein Petitioner alleges that the remand court erred in declining to submit special interrogatories enumerating diminished capacities and their related jury instructions and verdict form, was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 282 Ga. at 660-661(2);

That **portion of Claim VII**, wherein Petitioner alleges that the remand court improperly considered correspondence and statements by Petitioner and improperly allowed Petitioner's correspondence into evidence, was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 282 Ga. at 667(9);

That **portion of Claim VII**, wherein Petitioner alleges that the remand court erred in limiting the number of Petitioner's attorneys who were permitted to present arguments on his behalf as well as limiting which of his attorneys would be permitted to present argument to the court, was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 282 Ga. at 661(3);

That **portion of Claim VII**, wherein Petitioner alleges that the remand court erred in conducting the mental retardation trial as a civil proceeding, was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 282 Ga. at 661-662(4);

That **portion of Claim VII**, wherein Petitioner alleges that the remand court erred in restricting the use of peremptory challenges and compelling Petitioner to exercise his challenges first, was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 282 Ga. at 661-662(4) and (5);

That **portion of Claim VII**, wherein Petitioner alleges that the trial court declined to administer unspecified curative instructions. To the extent Petitioner alleges that the remand court erred by refusing to give a curative instruction during the mental retardation remand trial regarding Dr. Hark's 1977 report, this claim was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 282 Ga. at 663(6)(a).

That **portion of Claim VII**, wherein Petitioner alleges that the trial court erred in admitting unspecified privileged material into evidence. To the extent Petitioner alleges the remand court erred in admitting the testimony and materials of the Dr.

Richard Hark, this claim was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 282 Ga. at 662-664(6);

That **portion of Claim VII**, wherein Petitioner alleges that the remand court erred in failing to make a timely ruling as to the admissibility of the 1977 evaluation of Petitioner by Dr. Richard Hark, was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 282 Ga. at 662-663(6)(a);

That **portion of Claim XI**, wherein Petitioner alleges that his death sentence is disproportionate, was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 256 Ga. at 147(16);

That **portion of Claim XI**, wherein Petitioner alleges that his death sentence was imposed in an arbitrary and capricious manner and pursuant to the pattern and practice of discrimination in the administration and imposition of the death penalty in Georgia, was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 256 Ga. at 147(15); and

That **portion of Claim XII**, wherein Petitioner alleges cumulative error with regard to the mental retardation remand trial, was addressed and decided adversely to Petitioner on direct appeal. Rogers v. State, 282 Ga. at 668(11).[1]

Mental Retardation Claim

In Claim IV of his Amended Petition[2], Petitioner alleges that he is mentally retarded and as such, his sentence of death is unconstitutional. This Court finds Petitioner's mental retardation claim is barred by the doctrine of *res judicata* as a jury already found Petitioner was not mentally retarded, and this finding was affirmed on direct appeal by the Georgia Supreme Court. See Rogers v. State, 282 Ga. 659 (2007). This Court can only review an issue that was decided on direct appeal when there has been a change in the facts or law regarding the issue. Bruce v. Smith, 274 Ga. 432, 434 (2001). There has been no change in the law and Petitioner has not presented this Court with any new facts or evidence relating to his mental retardation claim. Accordingly, Petitioner's mental retardation claim is barred from this Court's review by

[1] Further, Georgia does not recognize the cumulative error rule. Schofield v. Holsey, 281 Ga. 809, 812, n. 1 (2007); Rogers v. State, 282 Ga. at 668(11).

[2] The Court notes that this claim is referred to as Claim V in Petitioner's post-hearing brief.

the doctrine of *res judicata*. Furthermore, even if Petitioner's claim of mental retardation was properly before this Court for review, it would fail as Petitioner cannot meet the requirements to prove he is mentally retarded.

In order to establish his claim of mental retardation, Petitioner must prove he is mentally retarded beyond a reasonable doubt. Jenkins v. State, 269 Ga. 282(17) (1998) (citing Burgess v. State, 264 Ga. 777, 789(36), 450 S.E.2d 680 (1994)).[3] Under Georgia law, mental retardation has three components. First, the defendant must have "significantly subaverage general intellectual functioning." O.C.G.A. §17-7-131(a)(3). Second, the defendant's intellectual deficits must "result[] in" or be "associated with impairments in adaptive behavior." Id. The third component is that the deficits must manifest during the developmental period, meaning prior to the age of 18. Id. See also Atkins v. Virginia, 536 U.S. 304, 318 (2002).

Petitioner's mental health expert, Dr. Marc Zimmerman, testified during these proceedings that "IQ tests are designed so that the perfectly average person has an IQ of 100" and the range for mild mental retardation is 70 to 55. (HT, Vol. 1:43, 45). In calculating an IQ score, there is a standard error of measurement of five points, which Dr. Zimmerman explained is "the difference in score a person might get if they take the test today as opposed to yesterday or tomorrow." (HT, Vol. 1:43-44). The record shows that Petitioner has achieved the following IQ scores: a 78 in first grade, an 84 in 1980, an 85 in 1984, a 68 in 1994, a 66 in 1995, and an 89 in 2000. (MR TT, Vol. 5:902, 909-911, 927; Vol. 6:1223, 1246; Vol. 7:1387, 1436). Therefore, even assuming that there is a standard error of measurement of approximately five points, the majority of Petitioner's IQ scores still place Petitioner outside the range of mental retardation.

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[3] In Hill v. Humphrey, 662 F.3d 1335 (2011), the 11th Circuit found that this burden of proof (beyond a reasonable doubt) passes the test of constitutional scrutiny. The United States Supreme Court denied cert. in this case at 2012 U.S. LEXIS 4252 (2012).

Furthermore, Petitioner has failed to show that he has impairments in adaptive behavior which manifested during the developmental period. (See O.C.G.A. § 17-7-131; see also MR TT, Vol. 7:1493; Vol. 8:1621-1630, 1632-1649, 1650-1668, 1672-1683, 1735; Vol. 9:1818-1819, 1874). Adaptive functioning is "a person's ability to function independently in their community...[a]nd [] involves all the skills that we put together that one would have to have to survive well." (HT, Vol. 1:45-46). For a diagnosis of mental retardation, there must be "significantly subaverage general intellectual functioning," as discussed above, accompanied by "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety." (PX 84, Vol. 53:13847; see also HT, Vol. 1:45-46). Dr. Zimmerman testified in these proceedings that he found Petitioner deficient in the academic and work categories. (HT, Vol. 1:62-63, 88). However, this Court finds that there is evidence in the record that contradicts Dr. Zimmerman's findings. (See MR TT, Vol. 7:1493; Vol. 8:1621-1630, 1632-1649, 1650-1668, 1672-1683, 1735; Vol. 9:1818-1819,1874). Therefore, based on the entirety of the record, this Court finds that Petitioner has failed to meet the requisite prongs required under Georgia law for a claim of mental retardation, and his claim fails.

B. CLAIMS THAT ARE PROCEDURALLY DEFAULTED

This Court finds that Petitioner failed to raise the following claims on direct appeal and has failed to establish cause and actual prejudice, or a miscarriage of justice, sufficient to excuse his procedural default of these claims. Black v. Hardin, 255 Ga. 239 (1985); Valenzuela v.

Newsome, 253 Ga. 793 (1985); O.C.G.A. § 9-14-48(d); Hance v. Kemp, 258 Ga. 649(4)(1988); White v. Kelso, 261 Ga. 32 (1991).[4]

That **portion of Claim II,** wherein Petitioner alleges that the prosecution presented arguments to the jury during the mental retardation remand trial that it knew or should have known were false or misleading;

That **portion of Claim II,** wherein Petitioner alleges that the State allowed its witnesses to convey a false impression to the jury during the mental retardation remand trial;

That **portion of Claim II,** wherein Petitioner alleges that the State knowingly or negligently presented false testimony in the pretrial and trial proceedings of the mental retardation remand trial;

That **portion of Claim V,** wherein Petitioner alleges juror misconduct during the mental retardation remand trial. This alleged misconduct includes:

a) improper consideration of matters extraneous to the proceeding;

b) false or misleading responses of jurors on voir dire;

c) improper biases of jurors which infected their deliberations;

d) improper exposure to the prejudicial opinions of third parties;

e) improper communications with third parties;

f) improper communications with jury bailiffs;

g) improper ex parte communications with the trial judge; and

h) improperly prejudging the ultimate issues in the proceedings;

Claim V, n. 3, wherein Petitioner alleges that the remand court was implicated in or aware of any of the alleged jury misconduct, and failed to advise Petitioner or correct the alleged misconduct;

That **portion of Claim VII,** wherein Petitioner alleges remand court error during the mental retardation remand trial. Specifically, Petitioner alleges that the remand court:

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[4] The Court notes that many of the claims in Petitioner's Amended Petition did not specify as to whether the alleged error occurred during the original trial or the mental retardation remand trial. Therefore, out of an abundance of caution, this Court has addressed these claims as both occurring during the original trial and the mental retardation remand trial.

a) excused unspecified potential jurors for allegedly improper reasons;

b) restricted voir dire relating to relevant areas of inquiry;

c) gave the jury erroneous, misleading, inappropriate or inapplicable instructions;

d) failed to inquire adequately into the possibility of juror misconduct and to remedy such misconduct;

e) refused to give proper instructions to Petitioner's jury;

f) refused to strike unspecified prospective jurors who were allegedly unqualified for reasons that included bias against Petitioner;

g) failed to curtail unspecified improper and prejudicial arguments by the State;

h) permitted the proceedings to go forward without an adequate assessment of Petitioner's competence;

i) failed to require the State to disclose certain items of unspecified evidence in a timely manner so as to afford the defense an opportunity to conduct an adequate investigation;

j) excluded unspecified relevant and material evidence as hearsay;

k) allowed the State to present unspecified false and misleading testimony;

l) interjected during the testimony of unspecified witnesses;

m) relied upon misunderstandings of the law in its rulings, report and findings;

n) allowed the State to present unspecified testimony that was prejudicial and irrelevant to the issues before the court;

o) failed to inform the jury correctly of the legal consequences if they returned a verdict concluding that Petitioner suffers from mental retardation, particularly as to its effect on his continued confinement;

p) allowed the State to make unspecified improper and prejudicial arguments;

q) permitted the jurors to interact with the alternate jurors during deliberations;

r) failed to declare a mistrial or issue curative instructions when the State made unspecified improper and prejudicial statements;

s) allowed the State to introduce unspecified improper, unreliable and irrelevant evidence for which Petitioner had not been provided adequate notice or that had been concealed from him; and

t) allowed the jury to be exposed to unspecified inaccurate, incomplete, misleading and prejudicial information, which included information regarding Petitioner's convictions, incarceration and sentence;

Claim VIII, wherein Petitioner alleges that the remand court erred by failing to provide him with the necessary assistance of competent and independent experts in violation of Ake v. Oklahoma, 470 U.S. 68 (1985); and

That **portion of Claim IX**, wherein Petitioner alleges that the remand court's instructions to the jury during the mental retardation remand trial were unconstitutional. Specifically, Petitioner alleges that the remand court:

a) gave unconstitutionally vague definitions of terms allegedly critical to the jury's deliberations;

b) imposed allegedly improper burdens of proof upon Petitioner;

c) gave an allegedly improper charge on impeachment of witnesses;

d) instructed the jury on allegedly inappropriate and inapplicable matters;

e) incorrectly instructed the jury on the consequences of its possible verdicts;

f) incorrectly instructed the jury on the implications of their verdict upon Petitioner's continued confinement; and

g) failed to provide the jury with adequate and accurate information as to Petitioner's legal status.

Juror Misconduct Claim

Petitioner alleges in Claim V of his Amended Petition that the jurors in his remand trial had knowledge of and improperly relied upon extra-judicial information regarding Petitioner's crimes during deliberations. This claim is procedurally defaulted as Petitioner failed to raise it during a motion for new trial or on direct appeal. Further, Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome his default of this claim.

To support his claim of juror misconduct, Petitioner relies upon the testimony of Juror Albert Spivey and Juror Summer Frenya. However, Petitioner has not shown that Jurors Spivey and Frenya were unavailable to testify during Petitioner's motion for new trial or direct appeal to the Georgia Supreme Court. Therefore, Petitioner has failed to establish cause to overcome his procedural default of this claim.

Furthermore, this Court finds that Petitioner has also failed to show prejudice. Petitioner claims that Juror Spivey's habeas testimony shows that he was aware of Petitioner's crimes during voir dire and provided false testimony by stating that he did not know of Petitioner. Additionally, Petitioner claims that Juror Spivey told Ms. Goodwill[5] that he had read about Petitioner's crimes in the newspaper several years before serving as a juror. However, Juror Spivey testified during the evidentiary hearing before this Court that he "thought [he] read something in the paper but what [he] read in the paper was a different trial...it was two black people. This wasn't no white people." (HT, Vol. 2:189, 194). Further, Ms. Goodwill testified that, prior to the habeas proceedings in this case; Juror Spivey informed her that he was mistaken when he originally thought he had read about Petitioner's crime in the newspaper. (HT, Vol. 2:221).

In order for Petitioner to be entitled to habeas relief due to false information provided by a juror during voir dire, Petitioner must show "that the juror failed to answer the question truthfully and that a correct response would have been a valid basis for a challenge for cause." Sears v. State, 270 Ga. 834, 840 (1999), citing Royal v. State, 266 Ga. 165, 166 (1996); Gardiner v. State, 264 Ga. 329, 333 (1994); Isaacs v. State, 259 Ga. 717, 740 (1989). During the habeas proceedings before this Court, Juror Spivey testified repeatedly that he did not know about

[5] Melanie Goodwill is an investigator for Petitioner's habeas counsel.

Petitioner's crime during the trial. (See HT, Vol. 2:189, 190, 191, 192, 194, 196). Therefore, Petitioner has failed to prove that Juror Spivey gave false testimony during voir dire. Moreover, even if Juror Spivey had known about Petitioner's crimes during voir dire, knowledge of the underlying crimes does not establish prejudice. See Edmond v. State, 267 Ga. 285, 290 (1996).

Additionally, Petitioner relies upon the testimony of Juror Frenya to support his juror misconduct claim. Juror Frenya stated that, during the remand trial, she overheard Juror Spivey discuss Petitioner's crimes with a female juror and another male juror, who was later taken off the jury.[6] (HT, Vol. 2:186-187; PX 78). However, the record shows that when originally visited by a member of Petitioner's habeas team, Juror Frenya did not report hearing any jurors discussing Petitioner's crimes. (HT, Vol. 2:171-172).[7] Moreover, the numerous inconsistencies between the statements in Juror Frenya's affidavit and her testimony before this Court render her testimony unreliable. (See PX 78, Vol. 50:12957 compare with HT, Vol. 2:185; see also HT, Vol. 2:184 compare with HT, Vol. 2:186; PX 78, Vol. 50:12956-12957 compare with HT, Vol. 2:176-177).[8]

Furthermore, even if this Court were to consider Juror Frenya's testimony credible, Petitioner has still failed to show prejudice. Juror Frenya testified that she never overheard

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[6] The record shows that Mr. Reuben Finley was removed from the jury after the testimony of remand counsel's first witness because Mr. Finley had knowledge of the underlying crime. (See MR TT, Vol. 6:1102-1117).

[7] Juror Frenya reported overhearing the conversation regarding Petitioner's crimes the second time she was visited by habeas counsel for Petitioner, which was two years after she was originally contacted. (HT, Vol. 2:171-172).

[8] Additionally, Juror Frenya's conviction of first degree forgery further undermines the credibility of her testimony. (RX 168, Vol. 81:21495-21497).

anyone say Petitioner was under a death sentence.[9] (HT, Vol. 2:173-174). Juror Frenya also testified that the facts of Petitioner's crimes, which she allegedly overheard, did not affect her deliberations in Petitioner's mental retardation remand trial. (HT, Vol. 2:179). Additionally, every juror, except Juror Frenya, testified in the evidentiary hearing before this Court that they did not know about Petitioner's crimes. (HT, Vol. 2:191, 200-201, 203-204, 205, 207, 209, 211, 213-214; RX 165, Vol. 81:21489; RX 166, Vol. 81:21491; RX 169, Vol. 81:21500). Therefore, Petitioner has failed to present reliable evidence that the jury knew about Petitioner's crime or considered the facts of Petitioner's crime and death sentence in determining whether or not Petitioner was mentally retarded.[10] Accordingly, this Court finds Petitioner has failed to demonstrate cause and prejudice or a miscarriage of justice to overcome the procedural default of his juror misconduct claim.

Preliminary Instructions Claim

Petitioner alleges in Claim VII of his Amended Petition that the remand court gave erroneous preliminary instructions to a venire panel, rendering nine jury members biased in violation of Petitioner's due process rights. Petitioner failed to raise this claim in a motion for new trial or in his direct appeal to the Georgia Supreme Court; therefore, this claim is procedurally defaulted. See Rogers v. State, 282 Ga. 659 (2007); see also Black v. Hardin,

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[9] The Court notes that every juror, including Juror Frenya, testified that they did not know that Petitioner was under a death sentence when they served on his jury. (HT, Vol. 2:173-174, 196, 200-201, 203, 205, 207, 210, 211, 214; RX 165, Vol. 81:21489; RX 166, Vol. 81:21491; RX 169, Vol. 81:21500).

[10] The Court also notes that Petitioner has failed to provide any case law that states that a jury in a mental retardation remand trial is rendered impartial if it does learn of the individual's crimes. See Foster v. State, 272 Ga. 69, 70-71 (2000). Additionally, considering that evidence of Petitioner's crime would be introduced in a normal death penalty trial in which the same jury deciding guilt would also decide mental retardation, Petitioner cannot show the jury would be rendered impartial even if they had learned of the facts of Petitioner's crimes.

supra. Furthermore, Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome his default of this claim. See Perkins v. Hall, 288 Ga. 810, 822 (2011).

Petitioner challenges the following "preliminary instructions" given to one venire panel, from which nine jurors were drawn:

> The style of this case is – the style of the case, that just means its title. It is called the State of Georgia against James Randall Rogers. And Mr. Rogers is charged with a crime. He is not being tried for that crime. He is not being tried for it. This is a civil proceeding. I have given you a civil jury oath only. It is a separate civil proceeding in order to determine whether or not Mr. Rogers is or is not mentally retarded. That is all you have got to concentrate upon. This decision has to be made before any further proceedings may go forward in this case.

(MR TT, Vol. 1:27). The Georgia Supreme Court in Foster v. State, 272 Ga. 69, 70-71 (2000), held that it is not reversible error to inform jurors in a mental retardation remand trial that the individual had committed a crime. In both Petitioner's case and in Foster, the challenged instructions informed the jury that the mental retardation issues arose out of a criminal proceeding. However, these instructions "did not in any manner impede the jury from 'focusing strictly on the mental condition of the defendant and deciding that issue without being concerned about the consequences of its finding.'" Foster, 272 Ga. 69, 70-71 (quoting State v. Patillo, 262 Ga. 259, 260 (1992)). Furthermore, the remand court explained that the statement that Petitioner had committed a crime was necessary to ensure that any jurors who may have known about Petitioner's crime were identified. (MR TT, Vol. 1:64-66). Therefore, as the remand court's statement informing the jury that Petitioner had been charged with a crime was not improper, Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome his default of this claim.[11]

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[11] Additionally, Petitioner claims that remand counsel were ineffective in failing to object, request a remedy, or move for a mistrial when the trial court gave the allegedly erroneous instruction. This claim is addressed below on pp. 52-54.

Petitioner also claims that the remand court, by informing the prospective jurors that Petitioner's criminal trial may or may not go forward, essentially informed the prospective jurors that Petitioner would escape prosecution if found mentally retarded. The remand court stated that the decision of Petitioner's mental retardation had to be decided "before any further proceedings may go forward in this case." (MR TT, Vol. 1:27). However, there was never any indication that further proceedings may not go forward.

Additionally, Petitioner argues that "[a]t least two jurors observed Mr. Rogers being transported to the courthouse in the back seat of a marked sheriff's car." (Petitioner's post-hearing brief, p. 35). Petitioner asserts that this evidence supports his claim that the jury thought Petitioner would escape prosecution if found to be mentally retarded. The record shows that during the course of trial, remand counsel informed the court that it was their belief that some of the jurors may have seen Petitioner being transported to the courthouse in the back of a police vehicle. (MR TT, Vol. 7:1359-1360). Thereafter, the remand court asked the jury whether anyone had read anything about the case or seen Petitioner before court that morning. (MR TT, Vol. 7:1364-1365). Two jurors stated that they had seen Petitioner arriving to court and the remand court individually questioned the two jurors. (MR TT, Vol. 7:1365-1369).

Outside the presence of the other jurors, Juror Jennifer Braden told the court that she was not sure, but she believed she had seen Petitioner arrive in a police vehicle. (MR TT, Vol. 7:1367-1368). However, Juror Braden testified that the fact that she saw Petitioner in a police vehicle "absolutely" would not affect her ability to fairly consider the evidence in Petitioner's case. (MR TT, Vol. 7:1368). Juror Braden also testified that she could still be fair to both sides on the question of Petitioner's mental retardation. (MR TT, Vol. 7:1368). Likewise, Juror Jeffrey Ballard testified that he had seen Petitioner arrive in a police vehicle, but that it would

"not at all" affect his ability to fairly consider the evidence in Petitioner's trial. (MR TT, Vol. 7:1368-1369). Juror Ballard also stated that he could "absolutely" still be fair to both sides and concentrate on the issue of Petitioner's mental retardation. (MR TT, Vol. 7:1369). Moreover, there is no indication in the record that Jurors Braden or Ballard inferred from seeing Petitioner arrive in a police vehicle that Petitioner would escape prosecution if found mentally retarded. As trial counsel, Jimmy Berry, stated based on the jurors' statements, there was not a "basis to attempt to withdraw either one of [the] two jurors." (MR TT, Vol. 7:1369).

Furthermore, the remand court, in giving its preliminary instructions, never stated or implied that Petitioner would be ineligible for the death penalty if found mentally retarded. As Petitioner stated in his post-hearing brief, "no information came out during the mental retardation trial regarding the consequences of a finding of mental retardation," and "absolutely no information presented during Mr. Rogers's mental retardation trial referenced his death sentence or eligibility for a death sentence." (Petitioner's post-hearing brief, p. 43). Therefore, this Court finds that Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome his procedural default of these claims.

C. CLAIMS THAT ARE NON-COGNIZABLE

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

> **Claim I,** wherein Petitioner alleges that he is actually innocent of the murder of Grace Perry;
>
> **Claim VI,** wherein Petitioner alleges that execution by lethal injection is cruel and unusual punishment. Alternatively, this Court finds that this claim is without merit. See Baze v. Rees, 553 U.S. 35, 128 S.Ct. 1520 (2008); and

Claim XIII, wherein Petitioner alleges that the length of time he has spent on death row constitutes cruel and unusual punishment.[12]

Actual Innocence Claim

In Claim I, Petitioner alleges that he is actually innocent of the crime for which he received the death penalty. For Petitioner's allegation of actual innocence to be cognizable in this proceeding, it must be coupled with an allegation of constitutional error. See Schlup v. Delo, 513 U.S. 298, 321 (1995); Murray v. Carrier, 477 U.S. 478, 496 (1986). As held by the United States Supreme Court, a finding of actual innocence does not entitle a petitioner to habeas corpus relief, as the purpose of habeas corpus relief is not to review or correct errors of fact, but to address the question of whether a petitioner's constitutional rights have been violated. See Herrera v. Collins, 506 U.S. 390, 400-401 (1993). Thus, this Court finds Petitioner's actual innocence claim is not properly before this Court for review and is, therefore denied.

Insofar as Petitioner is attempting to couple his actual innocence claim with allegations of prosecutorial misconduct[13], this claim remains noncognizable as Petitioner has failed to establish constitutional error. Petitioner has not presented this Court with any credible evidence to support his allegations of misconduct. Furthermore, Petitioner has failed to present any "new reliable evidence" to prove he is "actually innocent" of the crimes for which he was convicted. See Schlup v. Delo, 513 U.S. at 324. As the United States Supreme Court has noted "experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. [] To be credible, such a claim requires petitioner to support

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[12] Additionally, as Petitioner failed to raise this claim in a motion for new trial or on direct appeal, this claim is procedurally defaulted. Further, this Court finds that Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default of this claim.

[13] See Petitioner's post-hearing brief, pp. 25-28.

his allegations of constitutional error with new reliable evidence [] that was not presented at trial." Id. Accordingly, as Petitioner has failed to present a constitutional claim to accompany his "actual innocence" claim or any "new reliable evidence" that proves Petitioner is innocent of the crimes for which he was convicted, this Court finds this claim is non-cognizable and, in the alternative, **DENIED** as it is without merit.

Furthermore, this Court notes that even if Petitioner's actual innocence claim was cognizable in these habeas corpus proceedings, it would be barred by Georgia's successive petition statute, which states:

> All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

O.C.G.A. §9-14-51.

The record shows that Petitioner was convicted of murder and sentenced to death in 1985. See Rogers v. State, 256 Ga. 139 (1986). Thereafter, his case was remanded to the trial court solely on the issue of his mental retardation. (See MR TT, Vol. 5:857). Petitioner's guilt was not an issue and was not litigated in his mental retardation trial. (See MR TT, Vols. 5-10). Therefore, any alleged constitutional violation regarding Petitioner's actual innocence could only arise from Petitioner's second death penalty trial[14] during which his actual innocence was litigated. During his direct appeal of the conviction and death sentence received at his second trial, Petitioner failed to raise a claim of actual innocence or dispute the physical evidence

[14] In 1982, Petitioner was convicted of murder and aggravated assault and sentenced to death; however, Petitioner's conviction and sentence were overturned on the ground of a disparity of women in the grand jury pool. See Rogers v. State, 250 Ga. 652 (1983). In 1985, Petitioner was tried again and was convicted of murder and aggravated assault and sentenced to death.

linking him to the murder of Grace Perry. The Georgia Supreme Court found the following regarding the physical evidence proving Petitioner's guilt:

> A fingerprint taken from the handle of the rake subsequently was identified as Rogers'. Human blood found on the handle of the rake, and hairs found on Rogers' body, were consistent with Ms. Perry's. Bite marks on one of Rogers' arms were consistent with the dentures worn by the elderly victim.
>
> The sufficiency of the evidence was not raised on appeal. However, we have reviewed the evidence pursuant to Rule IV (B)(2) of the Unified Appeal Procedure, and find it sufficient to sustain the convictions.

Rogers v. State, 256 Ga. 139, 141.

Petitioner subsequently filed a state habeas petition from his second death penalty trial; however, he neither raised an actual innocence claim nor alleged a claim regarding the physical evidence. Therefore, Petitioner's actual innocence claim would be barred as successive absent a showing that such claim could not reasonably have been raised in the original state habeas corpus action or that the claim is constitutionally non-waivable. See O.C.G.A. §9-14-51.

D. SUCCESSIVE CLAIMS

Georgia law requires that all grounds for habeas corpus relief be raised in the original or amended habeas corpus petition or a procedural default occurs. O.C.G.A. §9-14-51; Smith v. Zant, 250 Ga. 645 (1983). Litigation on the merits of such claims not previously raised is barred absent a showing that the claims could not reasonably have been raised in the original state habeas corpus action or that the claims are constitutionally non-waivable. Id. See also Gaither v. Sims, 259 Ga. 807 (1990). Further, those habeas corpus claims already decided may not be relitigated in a subsequent habeas corpus action. Stevens v. Kemp, 254 Ga. 228 (1985).

Insofar as any of Petitioner's claims set forth in his petition refer to alleged constitutional violations originating from Petitioner's original trial, they are not properly before this Court for review as they are barred by the successive petition law.

The following claims raised in Petitioner's petition are successive and not properly before this Court:

That **portion of Claim II,** wherein Petitioner alleges that the State suppressed unspecified evidence favorable to his defense during the original trial in violation of Brady v. Maryland, 373 U.S. 667 (1965) and Kyles v. Whitley, 514 U.S. 419 (1995);[15]

That **portion of Claim II,** wherein Petitioner alleges that the prosecution presented arguments to the jury during the original trial that it knew or should have known were false or misleading;

That **portion of Claim II,** wherein Petitioner alleges that the State allowed its witnesses to convey a false impression to the jury during the original trial;

That **portion of Claim II,** wherein Petitioner alleges that the State knowingly or negligently presented false testimony during the original pretrial and trial proceedings;

Claim II, n. 1, wherein Petitioner alleges that trial counsel failed to obtain and effectively utilize allegedly suppressed favorable evidence;[16]

That **portion of Claim V,** wherein Petitioner alleges juror misconduct during the original trial. This alleged misconduct includes:

a) improper consideration of matters extraneous to the proceeding;

b) false or misleading responses of jurors on voir dire;

c) improper biases of jurors which infected their deliberations;

d) improper exposure to the prejudicial opinions of third parties;

e) improper communications with third parties;

f) improper communications with jury bailiffs;

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[15] To the extent Petitioner alleges that the State withheld three photographs of Petitioner taken on the night of his arrest and a tape recorded statement of Petitioner, this claim is procedurally barred as it was addressed and decided adversely to Petitioner during his original state habeas proceedings, Rogers v. Kemp, Superior Court of Butts County, Civil Action No. 87-V-1007.

[16] To the extent Petitioner alleges that trial counsel failed to obtain and effectively utilize three photographs of Petitioner taken on the night of his arrest and a tape recorded statement of Petitioner, this claim is procedurally barred as it was addressed and decided adversely to Petitioner during his original state habeas proceedings, Rogers v. Kemp, Superior Court of Butts County, Civil Action No. 87-V-1007.

g) improper ex parte communications with the trial judge; and

h) improperly prejudging the ultimate issues in the proceedings;

Claim V, n. 3, wherein Petitioner alleges that the trial court was implicated in or aware of any of the alleged jury misconduct, and failed to advise Petitioner or correct the alleged misconduct;

Claim V, n. 4, wherein Petitioner alleges that trial counsel failed to argue, develop or present a claim of alleged juror misconduct, failed to adequately preserve objections thereto, or failed to effectively litigate these issues on direct appeal;

That **portion of Claim VII,** wherein Petitioner alleges trial court error during the original trial. Specifically, Petitioner alleges that the trial court:

a) improperly restricted voir dire relating to relevant areas of inquiry;

b) admitted unspecified items of allegedly improper, inadmissible, false, prejudicial, unreliable, unsubstantiated and irrelevant evidence and testimony tendered or elicited by the State;

c) gave the jury erroneous, misleading, inappropriate or inapplicable instructions;

d) failed to inquire adequately into the possibility of juror misconduct and remedy such misconduct;

e) refused to give proper instructions to Petitioner's jury;

f) failed to curtail unspecified improper and prejudicial arguments by the State;

g) improperly compelled both prejudicial and incriminating testimony and the disclosure of privileged information;

h) declined to submit special interrogatories enumerating diminished capacities, along with their related jury instructions and verdict form;

i) improperly considered correspondence and statements by Petitioner and improperly allowed Petitioner's correspondence into evidence;

j) permitted the proceedings to go forward without an adequate assessment of Petitioner's competence;

k) failed to require the State to disclose certain items of unspecified evidence in a timely manner so as to afford the defense an opportunity to conduct an adequate investigation;

l) improperly limited the number of Petitioner's attorneys who were permitted to present arguments on his behalf as well as improperly limiting which of his attorneys would be permitted to present argument to the court;

m) declined to administer unspecified curative instructions;

n) excluded unspecified relevant and material evidence as hearsay;

o) allowed the State to present unspecified false and misleading testimony;

p) impermissibly interjected during the testimony of unspecified witnesses;

q) relied upon misunderstandings of the law in its rulings, report and findings;

r) allowed the State to present unspecified testimony that was prejudicial and irrelevant to the issues before the court;

s) allowed the State to make unspecified improper and prejudicial arguments;

t) permitted the jurors to interact with the alternate jurors during deliberations;

u) failed to declare a mistrial or issue curative instructions when the State made unspecified improper and prejudicial statements;

v) allowed the State to introduce unspecified improper, unreliable and irrelevant evidence for which Petitioner had not been provided adequate notice or that had been concealed from him; and

w) allowed the jury to be exposed to inaccurate, incomplete, misleading, and prejudicial information;

Claim VII, n. 5, wherein Petitioner alleges that trial counsel failed to argue, develop or present a claim of alleged trial court error, failed to adequately preserve objections thereto, or failed to effectively litigate these issues on direct appeal of his original trial;

Claim VIII, wherein Petitioner alleges that the original trial court erred by failing to provide him with the necessary assistance of competent and independent experts in violation of Ake v. Oklahoma, 470 U.S. 68 (1985);

Claim VIII, n. 6, wherein Petitioner alleges that trial counsel failed to object during his original trial and/or failed to preserve on appeal a claim that the trial court erred by failing to provide him with the necessary assistance of competent and independent experts in violation of Ake v. Oklahoma, 470 U.S. 68 (1985);

That **portion of Claim IX**, wherein Petitioner alleges that the trial court's instructions to the jury during the original trial were unconstitutional.[17] Specifically, Petitioner alleges that the trial court:

a) gave unconstitutionally vague definitions of terms allegedly critical to the jury's deliberations;

b) imposed allegedly improper burdens of proof upon Petitioner;

c) gave an allegedly improper charge on impeachment of witnesses;

d) instructed the jury on allegedly inappropriate and inapplicable matters;

e) incorrectly instructed the jury on the consequences of its possible verdicts;

f) incorrectly instructed the jury on the implications of their verdict upon Petitioner's continued confinement; and

g) failed to provide the jury with adequate and accurate information as to Petitioner's legal status;

Claim IX, n. 7, wherein Petitioner alleges that trial counsel failed to preserve objections to the original trial court's charge or effectively litigate this issue on appeal;

Claim X, wherein Petitioner alleges that the proportionality review performed by the Georgia Supreme Court following his original trial is unconstitutional;

Claim XI, n. 10, wherein Petitioner alleges that trial counsel failed to raise and/or adequately litigate during his original trial or on appeal a claim that his death sentence is disproportionate and was imposed in an arbitrary and capricious manner;

That **portion of Claim XII**, wherein Petitioner alleges cumulative error with regard to the original trial[18]; and

Claim XII, n. 11, wherein Petitioner alleges that trial counsel failed to litigate effectively during his original trial or on appeal a claim of cumulative error.

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[17] To the extent Petitioner alleges that the trial court improperly charged the statutory aggravating circumstances and gave an improper instruction in response to the jury's question regarding the consequences of returning a life imprisonment sentence, these claims were found to be procedurally defaulted by the state habeas court. Rogers v. Kemp, Civil Action No. 87-V-1007.

[18] Additionally, this Court notes that the state of Georgia does not recognize the cumulative error rule. Head v. Taylor, 273 Ga. 69, 70 (2000).

Accordingly, the above claims are not reviewable by this Court as Petitioner failed to raise these claims in prior proceedings.

E. CLAIMS THAT ARE PROPERLY BEFORE THIS COURT FOR REVIEW

1. Alleged *Brady* Violation

Petitioner alleges in Claim II of his Amended Petition that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by not providing remand counsel[19] with documents that were subsequently located after Petitioner's trial. In 2003, prior to Petitioner's mental retardation trial, Assistant District Attorney Martha Jacobs was assigned to Petitioner's case. (RX 150A, Vol. 75:19903). Following her assignment to the case, Ms. Jacobs realized that there were trial

[19] This Court notes that James C. Wyatt and Lee Henley were originally appointed to represent Petitioner at his mental retardation trial in the Superior Court of Floyd County. (See PX 44B, Vol. 12:2606). However, shortly before the scheduled jury trial, Petitioner notified the court that he wished to withdraw the issue of mental retardation. Id. The court held a hearing on February 20, 2001 to determine whether Petitioner could withdraw the issue of mental retardation. Id. On February 21, 2001, the court entered an order finding that Petitioner waived his right to a jury trial on the issue of mental retardation. (See PX 44B, Vol. 12:2608). On March 23, 2001, Thomas H. Dunn and Angela S. Elleman filed a motion on behalf of Petitioner to vacate the order dismissing his mental retardation trial, to permit him to withdraw the waiver and to reinstate the mental retardation trial. Id. The court held a hearing on the motions filed by attorneys Dunn and Elleman on June 20, 2001 and denied the motion filed on behalf of Petitioner. (See PX 44B, Vol. 12:2609-2611). Mr. Dunn and Ms. Elleman, as attorneys for Petitioner, then filed a notice of appeal to the Supreme Court of Georgia, which was dismissed. (See PX 44B, Vol. 12:2611). However, while the appeal was pending, Petitioner filed State Bar grievances against Mr. Dunn and Ms. Elleman after which they withdrew from representation. (PX 44B, Vol. 12:2554). On January 4, 2002, Ralph Knowles and Rebecca Smith, as counsel for Petitioner, filed a motion in the Floyd County Superior Court requesting an order to allow the filing of an out of time appeal. (PX 44B, Vol. 12:2612). The Floyd County Superior Court granted Petitioner's motion on January 17, 2002. (PX 44B, Vol. 12:2616). On January 13, 2003, the Supreme Court of Georgia reversed and remanded Petitioner's case to the Floyd County Superior Court for a jury trial on the issue of Petitioner's mental retardation. (PX 44B, Vol. 12:2736-2742; Rogers v. State, 276 Ga. 67 (2003)). Thereafter, Ralph Knowles and Jimmy Berry were appointed to represent Petitioner at his mental retardation remand trial.

preparation materials missing.[20] (RX 150A, Vol. 75:19904). Ms. Jacobs testified in her affidavit that she contacted every individual working in the District Attorney's office and searched the warehouse where Floyd County records were archived; however, she was unable to locate the missing materials. Id. Ms. Jacobs then contacted Petitioner's remand attorney, Ralph Knowles, and informed him that there were materials missing from the trial preparation file and that she was not sure what the materials included. Id. Ms. Jacobs also contacted Judge Pope, the presiding judge during Petitioner's mental retardation remand trial, to notify him of the missing file.[21] (RX 150A, Vol. 75:19904, 19909). Remand counsel also filed a motion for continuance on September 24, 2004 which stated "[t]he State is still unable to locate a large portion of their file which we believe contains exculpatory information." (PX 44D, Vol. 14:3069)

The record shows that the missing file was not located and turned over by the State until February of 2008, after Petitioner's direct appeal to the Georgia Supreme Court was complete. (RX 150A, Vol. 75:19905, 19911). Petitioner could not have raised this Brady claim on direct appeal because he did not know what was contained in the missing boxes and "thus could only have speculated about the withheld material." Head v. Stripling, 277 Ga. 403, 406 (2003). Therefore, this portion of Petitioner's Brady claim is not procedurally defaulted as he could not have raised this claim before learning about the contents of the file. Further, even if this Court were to find that this claim was procedurally defaulted, Petitioner has established cause for the default as he did not receive the contents of the missing file from the district attorney until the direct appeal of his mental retardation trial was complete.

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[20] The missing file had been gathered by another attorney in the District Attorney's office who had previously worked on the case. (RX 150A, Vol. 75:19904).

[21] The record shows that remand counsel and the State mutually requested a continuance on the motions hearing scheduled for November 5, 2003 for reasons including the documents missing from the State's file. (See RX 150A, Vol. 75:19909).

In order to establish a breach of a defendant's due process rights in violation of Brady v. Maryland and its progeny, Petitioner must show:

> (1) that the State possessed evidence favorable to the defense; (2) that the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different.

Zant v. Moon, 264 Ga. 93, 100 (1994) (citing United States v. Meros, 866 F.2d 1304 (11th Cir. 1989), *cert. denied*, 493 U.S. 932 (1989)). It is undisputed that the State failed to turn over the missing file until after the conclusion of Petitioner's direct appeal. However, this Court finds that Petitioner's Brady claim fails as he has failed to carry his burden of proving materiality. See Upton v. Parks, 284 Ga. 254, 256 (2008) (holding that the petitioner's "failure to carry his burden to prove materiality defeats both his Brady claim and his attempt to overcome procedural default").[22]

To establish a Brady violation, Petitioner must show "that the evidence allegedly suppressed by the State was material to his defense." Upton v. Parks, 284 Ga. at 256. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." U.S. v. Bagley, 473 U.S. 667, 682 (1985). Therefore, a Brady violation is not established where "there is a reasonable *possibility* that [the suppressed material] might have produced a different result, either at the guilt or sentencing phases ... petitioner's burden is to establish a reasonable *probability* of a different result." Strickler v. Greene, 527 U.S. 263, 291 (1999) (emphasis in original).

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[22] Additionally, the question of prejudice, for purposes of procedural default with respect to an alleged Brady violation, "turns on whether the suppression of evidence was significant enough to constitute a Brady violation." Upton v. Parks, 284 Ga. 254, 255 (2008).

Upon locating the file in 2008, Ms. Jacobs immediately contacted trial counsel, Ralph Knowles. (RX 150A, Vol. 75:19905-19906). Mr. Knowles described Ms. Jacobs as "extremely forthcoming," and testified that Ms. Jacobs waited to go through the file until Mr. Knowles was present. (HT, Vol. 1:145). However, the records from the file that were ultimately found and turned over to remand counsel were either not material or duplicates of records that had already been located by remand counsel. (HT, Vol. 1:145; RX 153, Vol. 78:20682; RX 150A, Vol. 75:19905). Ms. Jacobs testified in her affidavit that the missing box contained "school and psychological records; records from Jackson State Prison, the Floyd County Sheriff's Office, and Central State Hospital; juvenile court records; and miscellaneous correspondence and attorney notes....the materials in the box were duplicates of materials that had been produced and shared between the State and the accused through discovery during the lengthy history of the first two guilt/innocence trials and subsequent motions and hearings, or at the retardation trial itself." (RX 150A, Vol. 75:19905). Mr. Knowles testified that "there were documents in the box that were certainly relevant and material to the issues in the case. However those were duplicates of what we already had. Any of the documents that I thought were substantively valuable to Mr. Rogers' case were duplicative or I would have gone forward on, you know, trying to show prejudice as a result of the documents not being turned over." (RX 153, Vol. 78:20682). Therefore, as Petitioner has failed to prove materiality, his Brady claim fails.[23]

Petitioner also claims that the missing box "contained documents that would have alerted trial counsel to the existence of evidence that they did not obtain until the eve of trial." (Petitioner's post-hearing brief, p. 135). Petitioner argues that trial counsel did not know about

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[23] Even considering the materiality of all documents contained in the withheld box collectively, Petitioner's *Brady* claim still fails. (See Kyles v. Whitley, 514 U.S. 419, 436 (1995)(holding that materiality is to be examined "in terms of suppressed evidence considered collectively, not item by item.")

the testing administered by Mr. Mills in 2000 until two weeks before trial and learned of Dr. Hark's 1980 WAIS during voir dire. However, Petitioner has failed to demonstrate how any of the documents in the missing box would have alerted counsel to the existence of either Dr. Hark's 1980 WAIS or the testing administered by Mr. Mills in 2000.

Furthermore, to the extent Petitioner is alleging that the State violated Brady by failing to turn over these two records earlier, this claim also fails. There is no requirement that Brady materials be disclosed a specific number of days before trial or even before the start of the trial. Castell v. State, 250 Ga. 776, 781 (1983); see also Jenkins v. State, 269 Ga. 282, 293 (1998)("A Brady violation does not exist where the information sought by the defendant becomes available at trial."). Further, the late disclosure of evidence only amounts to a Brady violation when the "'disclosure came so late as to prevent the defendant from receiving a fair trial.'" Parks v. State, 254 Ga. 403, 407 (1985) (quoting United States v. Sweeney, 688 F.2d 1131, 1141 (7th Cir. 1982)); see also Sears v. State, 259 Ga. 671, 672 (1989).

This Court finds that Petitioner has not shown that an earlier disclosure of Dr. Hark's 1980 WAIS test and Mr. Mills's 2000 WAIS-III test would have changed the outcome of his trial. The record shows that remand counsel had ample time to adequately review and analyze Dr. Hark and Mr. Mills's tests after the tests were disclosed by the State. (HT, Vol. 1:131-132; RX 104). Remand counsel's experts also had time to review the data from both Mr. Mills's 2000 test and Dr. Hark's 1980 test. (See MR TT, Vol. 5:904, 911-912, 949-950; Vol. 6:1123, 1127, 1135-1143, 1145-1147, 1202-1208, 1270-1271, 1273-1274; RX 39, Vol. 58:15310). Accordingly, Petitioner has failed to show that the outcome of his trial would have been different if the tests had been disclosed earlier and therefore, has failed to show prejudice or a Brady violation.

2. Ineffective Assistance of Counsel

Petitioner alleges in Claim III of his Amended Petition and various footnotes to claims that he received ineffective assistance of counsel at trial and on appeal. Petitioner was represented at his mental retardation trial by Ralph Knowles and Jimmy Berry. (HT, Vol. 1:102-103; RX 153, Vol. 78:20678-20679). Mr. Knowles represented Petitioner on direct appeal of his mental retardation trial as well. Petitioner's allegations of ineffective assistance of mental retardation trial counsel, which were neither raised nor litigated adversely to Petitioner on direct appeal, nor procedurally defaulted, are properly before this Court for review on their merits. Additionally, Petitioner's allegations of ineffective assistance of appellate counsel are properly before this Court for review on their merits.

Unless otherwise specified, to the extent that Petitioner has not briefed the other claims of ineffective assistance of counsel, this Court finds that Petitioner has failed to establish the requisite prongs of Strickland as to these claims.[24]

A. Standard of Review

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

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

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[24] The Court has considered the prejudice of remand counsel's alleged errors cumulatively on page 69.

> Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

Under Strickland, counsel's performance is constitutionally deficient if it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. Furthermore, the Court in Strickland established a strong presumption in favor of effective assistance of counsel and instructed that 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." Id. at 689. The prejudice prong requires a petitioner to show "that there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Smith v. Francis, 253 Ga. 782, 783 (1985).

B. Reasonable Investigation

Petitioner was represented at his mental retardation trial by Ralph Knowles and Jimmy Berry, who were both experienced counsel. (HT, Vol. 1:101-102, 143; PX 44B, Vol. 12:2552-2559, 2562-2566; RX 153, Vol. 78:20677-20679). Remand counsel communicated with one another regularly and had a good working relationship. (RX 153, Vol 78:20679). Mr. Knowles testified that he handled the expert witnesses and Mr. Berry handled the fact witnesses. (HT, Vol. 1:105; RX 153, Vol. 78:20679). Remand counsel also received assistance from attorneys Leslie Bryan, Rebecca Smith, Cooper Knowles, and Adam Princenthal. (HT, Vol. 1:104; RX 153, Vol. 78:20679).

Additionally, remand counsel consulted with the Georgia Capital Defender's Program, who assisted with the investigation and provided suggestions for voir dire questions. (RX 27, Vol. 57:15117-15127). Remand counsel also consulted with the Georgia Resource Center, who provided remand counsel with numerous documents material to the case and with disks that contained pretrial motions. (HT, Vol. 1:105-106; RX 25, Vol. 57:15027-15029; RX 26, Vol. 57:15115-15116; RX 136, Vol. 68:18340-18341; RX 153, Vol. 78:20680). Further, remand counsel spoke with attorney Robert Finnell, who had previously represented Petitioner. (HT, Vol. 1:106; RX 153, Vol. 78:20680). The record shows that Mr. Finnell assisted remand counsel in locating potential witnesses. (HT, Vol. 1:113; RX 25, Vol. 57:15044; RX 32, Vol. 57:15229).

Additionally, remand counsel retained the investigative services of Denise de La Rue, who was a highly recommended and experienced investigator. (HT, Vol. 1:107; RX 25, Vol. 57:15007; RX 153, Vol. 78:20683; RX 161, Vol. 80:21058-21061). Remand counsel also hired Rasheed & Associates to assist in the investigation and retained the services of Investigator Joe Stellmack of T.S.I and Associates to assist in locating witnesses. (HT, Vol. 1:107-108; RX 40, Vol. 58:15326-15328; RX 98, Vol. 68:18176; RX 129, Vol. 68:18278-18280).

Mr. Knowles had considerable experience dealing with mental retardation and mental health issues prior to representing Petitioner. (HT, Vol. 1:143). Remand counsel also performed extensive research on the issue of mental retardation and Petitioner's mental health. (See HT, Vol. 1:143-144; RX 79, Vol. 65:16982-17149; RX 80, Vol. 66:17152-17197; RX 81, Vol. 66:17198-17489; RX 82, Vol. 67:17492-17586; RX 83, Vol. 67:17587-17631; RX 87, Vol. 67:17673-18116; RX 153, Vol. 78:20682-20683). Additionally, the State provided remand

counsel with a copy of its file, which contained a number of records relating to Petitioner. (HT, Vol. 1:145; RX 153, Vol. 78:20682, 20685).[25]

Furthermore, remand counsel investigated the facts of the crime as Petitioner maintained his innocence; however, they were unable to find evidence to support Petitioner's claim of innocence. (HT, Vol. 1:109; RX 100, Vol. 68:18181-18185; RX 102, 18191-18197; RX 153, Vol. 78:20681-20682). As his focus was on saving Petitioner's life, Mr. Knowles stated that he did not spend a lot of time "chasing something that I believed firmly did not exist." (HT, Vol. 1:109; RX 153, Vol. 78:20682). Therefore, remand counsel made a reasonable decision to focus their time and resources on issues material to Petitioner's mental retardation remand trial.

Communications with Petitioner

During their investigation, remand counsel or a member of the remand counsel team, met with Petitioner at least six times and had one conference call with Petitioner. (RX 137, Vol. 68:18346, 18349, 18351, 18352, 18353, 18356). However, Petitioner was "not cooperative," "hostile," and threatened to fire remand counsel "probably 10 or 20 times." (HT, Vol. 1:113-114; RX 4, Vol. 55:14423; RX 153, Vol. 78:20679, 20681). The record shows that Mr. Knowles also performed "brief research on continuing representation when a client 'fires' attorneys and is mentally retarded." (RX 137, Vol. 68:18346).

Eventually remand counsel were able to gain Petitioner's trust, but Petitioner remained uncooperative throughout remand counsel's representation. (See HT, Vol. 1:117; RX 45, Vol. 58:15358; RX 153, Vol. 78:20681). Furthermore, Petitioner was unable to provide remand counsel with the names of any potential witnesses to contact other than inmates. (RX 153, Vol. 78:20684). Petitioner also refused to sign authorizations for the release of his records, except for

[25] Remand counsel reported having an "excellent" working relationship with the State. (RX 153, Vol. 78:20682).

his Department of Corrections and Central State Hospital records, and refused to submit to an evaluation, an MRI, or any type of mental health testing. (HT, Vol. 1:114-115; RX 25, Vol.57:14997; RX 29, Vol. 57:15198; RX 34, Vol. 58:15270; RX 66, Vol. 63: 16521; RX 67, Vol. 63:16522; RX 153, Vol. 78:20691). Therefore, this Court finds that Petitioner's refusal to cooperate limited remand counsel's investigation. See Strickland v. Washington, 466 U.S. 668, 691 (1984) ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on...information supplied by the defendant.").

Adaptive Functioning

Petitioner alleges in Claim III, Section gg, of his Amended Petition that remand counsel failed to investigate Petitioner's adaptive functioning. However, this Court finds that remand counsel performed an extensive investigation to locate witnesses, records, and additional information that could be presented to show that Petitioner had the requisite adaptive deficits.

Mr. Knowles testified that gathering evidence regarding Petitioner's adaptive skills was "very difficult" as Petitioner had been incarcerated for an extensive period of time. (RX 153, Vol. 78:20679, 20683, 20693). Remand counsel tried to locate individuals who knew Petitioner in his formative years; however, many of the potential witnesses were either unavailable or deceased. (RX 153, Vol. 78:20683). Additionally, Petitioner was unable to provide remand counsel with any names of childhood friends or former co-workers. (RX 153, Vol. 78:20684-20685). Mr. Knowles explained that since Petitioner had been incarcerated for twenty-five years, remand counsel did not see searching for co-workers "as a fruitful way to spend a lot of money and time." Id.

Remand counsel attempted to locate family members who could testify regarding Petitioner's adaptive functioning; however, at the time of remand counsel's representation of Petitioner, Petitioner's parents were deceased. (RX 153, Vol. 78:20685). Remand counsel located Petitioner's sister Regina Harvey, although she was hostile and did not want to assist remand counsel.[26] (HT, Vol. 1:118-119; RX 19, Vol. 56:14873-14874, 14884; RX 28, Vol. 57:15135; RX 42, Vol. 58:15331-15333; RX 153, Vol. 78:20681, 20683-20684). Remand counsel also located Petitioner's aunt, Fleta Cootes; however, Ms. Cootes lacked any knowledge regarding Petitioner's adaptive skills at an early age. (HT, Vol. 1:119; RX 125, Vol. 68:18274; 20684). Additionally, Mr. Knowles tried several times to locate Petitioner's ex-wife Patricia Ramsey, but was unable to locate Ms. Ramsey. (RX 25, Vol. 57:15094, 15327).

Remand counsel also tried to locate Petitioner's school teachers, although it was difficult given how much time had passed. (HT, Vol. 1:119-120). Investigator de La Rue contacted the Rome City school system and learned that one of Petitioner's former teachers, Carolyn Riley, was deceased. (RX 32, Vol. 57:15238-15239). Additionally, the record shows that Mr. Finnell was able to locate Mary Hudson, but Ms. Hudson had only taught Petitioner for six months.[27] (RX 32, Vol. 57:15229-15230). Remand counsel also made contact with Petitioner's childhood preacher, Billy Patterson; however, Mr. Patterson failed to provide the information that he promised. (HT, Vol. 1:121-122; RX 25, Vol. 57:15043, 15050).

Further, the record shows that remand counsel were in possession of numerous records concerning Petitioner's adaptive functioning. (See RX 19, Vol. 56:14878-14883; RX 20, Vol.

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[26] Ms. Harvey signed an affidavit during Petitioner's previous habeas proceedings, which is dated December 7, 1994. See RX 19, Vol. 56:14878-14883.

[27] The record shows that Ms. Hudson signed an affidavit on November 22, 1994, during Petitioner's previous habeas proceedings. See PX 28; RX 32, Vol. 57:15230.

56:14887-14893; RX 25, Vol. 57:15009; RX 51, Vol. 59:15629-15858; RX 52, Vol. 59:15859-15863; RX 53, Vol. 59:15864-15865; RX 54, Vol. 59:15866-15868; RX 55, Vol. 59:15869-15863; RX 56, Vol. 59:15884-15903; RX 58, Vol. 60:15921-15968; RX 59, Vol. 60:15969-15975; RX 60, Vol. 60:15976-15981; RX 61, Vol. 60:15983-16032, 16045-16071, 16078; RX 62A, Vol. 61:16081-16086, 16097-16127, 16173-16177, 16179-16181, 16203-16223, 16239-16242, 16248, 16260-16273, 16276-16296; RX62B, Vol. 62:16299-16410, 16412-16460, 16461-16473, RX 64; RX 68; RX 69; RX 70; RX 71; RX 72; RX 73; RX 75; RX 76). Additionally, remand counsel were in possession of numerous affidavits filed in previous proceedings in Petitioner's case by Petitioner's family members. (See RX 62A, Vol. 61:16184-16187, 16189-16193, 16195-16201, 16224-16235, 16250-16258). Remand counsel also obtained what minimal school records were still available. (HT, Vol. 1:120; RX 74; RX 153, Vol.78:20685-20686).

Additionally, remand counsel investigated what they anticipated the State would present on adaptive functioning. (See RX 84, Vol. 67:17632-17655). Remand counsel consulted with a librarian as they knew that the State was going to present evidence that Petitioner checked out books in prison. (HT, Vol. 1:139-140; RX 84, Vol. 67:17653-17655). Mr. Knowles explained that it "might be valuable to have a librarian come in to basically say, based upon what else he or she knew about Jimmy Rogers, that these books would not have been appropriate. Appropriate in the sense of him being able to read and comprehend." (HT, Vol. 1:140). Remand counsel also conducted research on handwriting experts as they were aware that the State was going to offer letters into evidence and utilize a handwriting expert to prove that these letters were written by Petitioner. (RX 153, Vol. 78:20692).

Based on the entirety of the record, this Court finds that remand counsel performed a reasonable investigation including searching for witnesses who could testify to Petitioner's adaptive skills, locating records that might demonstrate Petitioner's adaptive functioning, and investigating what they anticipated the State would introduce regarding adaptive functioning. Thus, Petitioner has failed to establish deficient performance with regard to this portion of his ineffective assistance of counsel claim. Further, Petitioner has not presented this Court with any additional evidence of adaptive functioning that remand counsel did not discover. The evidence of Petitioner's alleged adaptive deficits presented during these habeas proceedings was either cumulative or would not have been admissible during Petitioner's mental retardation remand trial. Therefore, this Court finds that Petitioner has failed to demonstrate prejudice resulting from remand counsel's investigation of adaptive functioning.

Mental Health Experts

Remand counsel also consulted with and hired numerous mental health experts to assist in their mental health investigation. (HT, Vol. 1:117-118; RX 153, Vol. 78:20684, 20686-20690). Mr. Knowles testified that "it was clear that the only issue was going to be whether or not [Petitioner] under Georgia law was mentally retarded and therefore could not be executed by the State." (RX 153, Vol. 78:20684). Mr. Knowles stated that since he knew many mental health experts prior to representing Petitioner, he "called upon those people to help sort of guide [him] through it." (HT, Vol. 1:117-118).

Initially, Mr. Knowles contacted Dr. Carl Clements, who was a forensic psychologist. (HT, Vol. 1:124; RX 153, Vol. 78:20686). Mr. Knowles sent materials to Dr. Clements and requested that he review the facts of Petitioner's case. (HT, Vol. 1:124; RX 37, Vol. 58:15283; RX 153, Vol. 78:20687). Mr. Knowles also sent Dr. Clements the testimony of the State's

psychologist, Dr. Robert Connell, as Mr. Knowles was interested in "any interplay between 'mental retardation' and 'brain dysfunction or damage.'" (RX 37, Vol 58:15285).

Additionally, the record shows that Dr. Clements, in assessing Petitioner's case, conferred with a colleague, Dr. Karen Salekin, who had "real expertise on the MR/capacity/death penalty issues." (RX 37, Vol. 58:15293). Dr. Clements expressed concern over the conflicting IQ scores and noted that obtaining "adaptive behavior estimates retrospectively" would be a challenge. (HT, Vol. 1:125-126; RX 37, Vol. 58:15293). Dr. Clements also found that the "neuro battery certainly suggests impairment, perhaps in the judgment/executive functioning areas which is different from the MR question, per se, but in combo should raise a question of diminished capacity if nothing else." (RX 37, Vol. 58:15293). Further, Dr. Salekin concluded that "the MR issue is going to be really hard to put forth. There are too many IQ scores that suggest Borderline MR rather than Mild." (RX 37, Vol. 58:15293). The record shows that Dr. Clements declined to serve as an expert witness in Petitioner's case, but provided remand counsel with the names of other potential mental health experts. (HT, Vol. 1:124; RX 37, Vol. 58:15283; RX 153, Vol. 78:20687).

Remand counsel also consulted with Dr. Brad Fisher, who was a psychologist that had testified for the defense in a number of death penalty cases.[28] (HT, Vol. 1:124, 137; RX 153, Vol. 78:20686, 20690). Mr. Knowles asked Dr. Fisher to review the file and provide an opinion, which Dr. Fisher ultimately did. (HT, Vol. 1:137-138; RX 153, Vol. 78:20690). Dr. Fisher also provided remand counsel with a critique of Drs. Hark and Perri's evaluations of Petitioner as well as a list of questions to ask them on cross-examination. (RX 33, Vol. 57:15249-15252). Further, Dr. Fisher provided remand counsel with a list of questions and answers for his

[28] Dr. Fisher had previously evaluated Petitioner and was deposed during Petitioner's second state habeas proceeding. (See RX 62A, Vol. 61:16276-16296; RX 62B, Vol. 62:16299-16410).

testimony and the WAIS-R scoring manual. (RX 10, Vol. 55:14650-14668; RX 25, Vol. 57:15022; RX 33, Vol. 57:15255-15258).

Remand counsel also consulted with Dr. Mark Zimmerman, who had been involved in Petitioner's prior state habeas proceeding. (HT, Vol. 1:137, 139, 141; RX 12, Vol. 56:14699-14700, 14706-14713; RX 38, Vol. 58:15298-15300; RX 153, Vol. 78:20686). Mr. Knowles provided Dr. Zimmerman with the materials and results of the mental health testing previously administered to Petitioner.[29] (HT, Vol. 1:136, 141). Mr. Knowles asked Dr. Zimmerman to review the files and provide an opinion on mental retardation, which Dr. Zimmerman did. (HT, Vol. 1:136). Dr. Zimmerman also prepared a table for remand counsel regarding the subtests on the Halstead-Reitan and Luria Nebraska, and provided remand counsel with information on the MMPI validity scales. (RX 38, Vol. 58:15297, 15300).

Additionally, remand counsel consulted with Dr. Anthony Stringer, who was a well-known psychologist at Emory.[30] (HT, Vol. 1:130; RX 39, Vol. 58:15323; RX 153, Vol. 78:20689). Mr. Knowles asked Dr. Stringer to review the psychological materials and testing and provide his opinion as to whether or not Petitioner was mentally retarded. (HT, Vol. 1:130; RX 39, Vol. 58:15303, 15324-15325; RX 153, Vol. 78:20689). Remand counsel also provided Dr. Stringer with the results from the 2000 WAIS-III and Dr. Stringer had the test rescored to see if he could challenge the results. (RX 39, Vol. 58:15310). Dr. Stringer concluded the test was scored accurately and that based on this test score he could not testify that Petitioner was mentally retarded. (HT, Vol. 1:131; RX 39, Vol. 58:15310, 15322; RX 153, Vol. 78:20689).

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[29] Mr. Knowles testified during the evidentiary hearing in these proceedings that he put together a packet of materials that he provided to all of the potential mental health experts. (HT, Vol. 1:136).

[30] Mr. Knowles testified that "Dr. Stringer had historically testified in a few death penalty cases." (HT, Vol. 1:130).

Although Dr. Stringer was unable to testify that Petitioner was mentally retarded, the record shows that he assisted remand counsel in preparing for the mental retardation trial. (See HT, Vol. 1:131-134; RX 25, Vol. 57:14986; RX 39, Vol. 58:15303, 15305-15317).

Further, remand counsel consulted with Dr. David Schwartz, a clinical and neuropsychologist that helped devise the WAIS-I, II and III tests. (HT, Vol. 1:129; RX 45, Vol. 58:15368; RX 153, Vol. 78:20688). Mr. Knowles testified that Dr. Schwartz was not willing to testify because the company that Dr. Schwartz worked for, the company that developed the WAIS test, did not want Dr. Schwartz to reveal proprietary information. (HT, Vol. 1:129-130). However, Dr. Schwartz assisted remand counsel in their direct appeal to the Georgia Supreme Court. (HT, Vol. 1:129, 132; RX 16, Vol. 56:14765-14767).

Remand counsel also consulted with Dr. David Ryback, who was a psychologist that had previously been involved in Petitioner's 1994 state habeas proceeding. (HT, Vol. 1:136; RX 153, Vol. 78:20689-20690). Similar to the other experts, remand counsel requested that Dr. Ryback review the evidence in the case and provide an opinion as to Petitioner's mental retardation. (RX 153, Vol. 78:20690). After reviewing Petitioner's case, Dr. Ryback opined that Petitioner was mentally retarded. Id.

Additionally, remand counsel spoke with Dr. Connell, who had been hired by the State. (RX 9, Vol. 55:14505; RX 25, Vol. 57:14985-14986; RX 153, Vol. 78:20686). Mr. Knowles testified in his deposition that Dr. Connell was "very helpful" to remand counsel even though he ultimately testified for the State that Petitioner was not mentally retarded. (RX 153, Vol. 78:20686-20687). Remand counsel also located Karen Stevenson, a psychologist who had seen Petitioner as a youth when he was at Central State Hospital; however, Ms. Stevenson recalled very little about Petitioner. (RX 32, Vol. 57:15238). Additionally, remand counsel spoke with

Dr. Richard Hark, a psychologist that had previously evaluated Petitioner in 1977 and 1980. (RX 153, Vol. 78:20691). Dr. Hark was ultimately called by the State at trial and testified that Petitioner was not mentally retarded. Id.

Remand counsel also investigated the possibility that Petitioner suffered from Fetal Alcohol Syndrome, (hereinafter "FAS"), and consulted with experts Dr. Sandra McPherson and Dr. Claire Coles regarding the possibility of FAS. (HT, Vol. 1:115-116, 126-127; RX 25, Vol. 57:15004; RX 34, Vol. 58:15264; RX 153, Vol. 78:20687-20688). At remand counsel's request, Dr. Coles drafted an affidavit stressing the need for an MRI on Petitioner's brain, which remand counsel planned to attach to a motion for an MRI. (RX 25, Vol. 57:15005; RX 35, Vol. 58:15277-15281). However, the record shows that Petitioner would not agree to an MRI of his brain. (HT, Vol. 1:114-115; RX 25, Vol. 57:15103-15104; RX 153, Vol. 78:20691).

Ultimately, Dr. Coles did not diagnose Petitioner with mental retardation. (RX 153, Vol. 78:20688). Dr. Coles informed remand counsel that FAS could cause "low intelligence and developmental disorders; however, she was not able to testify that that's what had happened in [Petitioner's] case." (HT, Vol. 1:127; RX 153, Vol. 78:20688). Dr. McPherson was also unable to determine whether Petitioner exhibited signs of FAS. (HT, Vol. 1:126-127; RX 14, Vol. 56:14731). Thus, remand counsel made a strategic decision not to present testimony on FAS as there were no experts who could testify that Petitioner had FAS. (HT, Vol. 1:115-116). Additionally, Mr. Knowles testified that he thought testimony about FAS would likely detract from Petitioner's claim of mental retardation. (HT, Vol. 1:123).

Remand counsel also investigated and researched areas of neuropsychology, including Oppositional Defiant Disorder, Cockayne Syndrome, Goldenhar Syndrome, and Gorlin Syndrome. (RX 82, Vol. 67:17492-17586, 17614; RX 83, Vol. 67:17609-17614). Additionally,

remand counsel researched the effects of brain injuries on moral judgment. (RX 83, Vol. 67:17615).

This Court finds that, based on the record, remand counsel made reasonable efforts to consult with and hire mental health experts to evaluate Petitioner's mental health. Accordingly, remand counsel's mental health investigation was not deficient. Furthermore, Petitioner has failed to demonstrate prejudice resulting from remand counsel's investigation of his mental health.

Investigation of Remand Counsel's Expert Witnesses

Petitioner alleges that remand counsel were ineffective for failing to investigate the credibility of remand counsel's expert witnesses. Specifically, Petitioner claims remand counsel failed to discover that Dr. Ryback's psychology license was suspended for six months in 1993 and that Dr. Ryback was on a two-year probationary status in 1994 when he provided an affidavit on Petitioner's behalf during Petitioner's second state habeas proceedings. The record shows that remand counsel met with Dr. Ryback on several occasions and researched Dr. Ryback's webpage, but were never informed of his previous professional troubles. (RX 11, Vol. 56:14674, 14688; RX 137, Vol. 68:18353, 18357). Remand counsel also obtained Dr. Ryback's curriculum vitae and a "data sheet" on Dr. Ryback, neither of which indicated that Dr. Ryback's license had been suspended or that he had been placed on a probationary status. (RX 11, Vol. 56:14681-14687).

Remand counsel were not aware of Dr. Ryback's prior disciplinary issues at the time of trial. However, even if this Court were to find remand counsel's investigation of Dr. Ryback deficient, Petitioner has failed to show prejudice resulting from remand counsel's failure to learn of Dr. Ryback's prior suspension or probationary status. Dr. Ryback's license was not

suspended nor was he on a probationary status at the time remand counsel hired him or when he testified at Petitioner's mental retardation trial. Furthermore, at the mental retardation trial, remand counsel pointed out to the jury on redirect examination of Dr. Ryback that Dr. Ryback's prior suspension and probation of his license did not affect his ability to evaluate Petitioner's case. (MR TT, Vol. 6:1208-1209). Accordingly, this portion of Petitioner's ineffective assistance of counsel claim fails.

Petitioner also alleges that remand counsel were ineffective for failing to uncover a scoring error in Dr. Fisher's WAIS-R, which was administered to Petitioner in 1995. During Petitioner's remand trial the State pointed out that in totaling Petitioner's verbal IQ on the WAIS-R, Dr. Fisher failed to change the score from the raw score of 68 to a scaled score of 71. (MR TT, Vol. 5:1045, 1047-1048). However, the record shows that when Dr. Fisher was asked if this was a significant difference, he testified "No. That's within the margin of error for IQ, 5." (MR TT, Vol. 5:1048). Further, Dr. Fisher testified that the error did not change his opinion that Petitioner was mentally retarded. (MR TT, Vol. 5:1070, 1084).[31] Therefore, this Court finds that even if remand counsel were deficient in failing to uncover Dr. Fisher's scoring error prior to trial, Petitioner has failed to establish resulting prejudice.

Independent Investigation

Petitioner alleges that remand counsel were ineffective for failing to conduct an independent investigation into Petitioner's intellectual and adaptive functioning, background, and history of mental health evaluations. This Court finds that although remand counsel considered the investigation conducted prior to their appointment to Petitioner's case, they

[31] The Court notes that remand counsel pointed out an abundance of scoring errors made by the State's expert witnesses. (See MR TT, Vol. 6:1135-1137, 1143-1145, 1347-1349; Vol. 7:1450-1452, 1605-1606; Vol. 8:1763).

elaborated upon the investigation that had already been completed. Mr. Knowles testified during these proceedings that he was already aware of Petitioner's background prior to beginning his investigation. (HT, Vol. 1:118). However, the record shows that remand counsel performed an independent investigation of Petitioner's adaptive functioning, which included locating members of Petitioner's family, Petitioner's former teachers, and other potential witnesses from Petitioner's formative years who might know of Petitioner's adaptive functioning. See Supra, pp. 36-38.

Furthermore, remand counsel consulted with and hired numerous mental health experts regarding mental retardation, including several experts who were not involved in any of Petitioner's former legal proceedings. See supra, pp. 39-44. However, as Petitioner refused to be retested, remand counsel relied upon the testing conducted by the experts who had previously evaluated Petitioner. (RX 153, Vol. 78:20691). Therefore, this Court finds that it was reasonable for remand counsel to begin with the evidence that they were provided from prior proceedings and conduct their independent investigation from that point. Further, Petitioner has failed to show that he was prejudiced either by remand counsel's reliance on the investigation performed prior to remand counsel's appointment or by remand counsel's independent investigation.

Investigation of the State's Case

Petitioner alleges that remand counsel provided ineffective assistance by failing to conduct an independent and thorough investigation into the evidence the State intended to present at trial. Specifically, Petitioner claims that remand counsel rendered deficient performance regarding intelligence testing previously administered to Petitioner by Dr. Hark and Mr. Mills. As explained below, this Court finds that Petitioner's claim of ineffective assistance of counsel in this regard fails.

Dr. Hark

The record shows remand counsel investigated and prepared a reasonable defense to exclude the 1977 WAIS administered by Dr. Hark in which Petitioner was determined to have an IQ of 80. (MR TT, Vol. 5:951-954; Vol. 6:1285-1296; Vol. 7:1537-1541, 1546-1548). Remand counsel filed a motion in limine to exclude Dr. Hark's testing materials and testimony and the court deferred its ruling until the State sought to introduce this testimony and evidence during trial, when Dr. Hark would be available for voir dire. Ultimately, remand counsel were successful in keeping the 1977 WAIS score from being admitted. (MR TT, Vol. 7:1560).

Petitioner now alleges that, rather than attempting to exclude the 1977 WAIS, remand counsel should have argued to the jury that, when adjusted to account for the Flynn Effect and the standard error of measurement, Petitioner's score actually placed him within the mentally retarded range. However, the record shows that although the 1977 WAIS was not admitted, testimony regarding the Flynn Effect in relation to the 1977 WAIS was presented to the jury. When questioned regarding the 1977 WAIS, Dr. Zimmerman testified as follows: "the problem is that test was approximately twenty-two years old. And research in what's now called the Flynn effect would say that for each year a test exists after it's published and it hasn't been renormed that you add .3 or you subtract .3 from the score....So if my math is correct, we take about 7 points off of this, it would come down to about a 73." (MR TT, Vol. 6:1309). Therefore, this Court finds that remand counsel's strategic decision to exclude Dr. Hark's 1977 WAIS was reasonable and Petitioner has failed to show deficient performance or resulting prejudice.[32]

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[32] Petitioner also alleges remand counsel were deficient in failing to obtain timely rulings from the trial court regarding the admissibility of the 1977 evaluation of Petitioner by Dr. Hark. As the Georgia Supreme Court held on direct appeal, "'a trial court has an absolute right to refuse to decide the admissibility of evidence...prior to trial. [Cits.]'" Rogers v. State, 282 Ga. 659, 663. Accordingly, this Court finds that Petitioner has failed to show deficient performance or resulting prejudice.

Petitioner also alleges that remand counsel were deficient in failing to uncover Dr. Hark's 1980 WAIS, in which Petitioner scored an 84, prior to the State providing the test to remand counsel. Further, Petitioner claims remand counsel failed to discern that the 1980 test would have supported a finding that Petitioner was mentally retarded. This Court finds that remand counsel performed a reasonable investigation and that Petitioner's score on the 1980 WAIS would not have aided remand counsel in arguing that Petitioner was mentally retarded.

The record is void of any indication that Petitioner informed remand counsel he had been given the WAIS in 1980. Further, the record shows that Dr. Hark never wrote a formal report of his 1980 testing of Petitioner and did not, until the eve of trial, mention to the State or remand counsel that he had performed an evaluation of Petitioner in 1980. (MR TT, Vol. 2:270-271, 273-274). Additionally, Jimmy Berry attempted to locate all prior testing that had been administered to Petitioner, but was not provided or told about Dr. Hark's 1980 testing. (MR TT, Vol. 2:275).

Furthermore, after learning of Dr. Hark's 1980 testing, remand counsel requested a one day continuance, which was granted on August 3, 2005, in order to depose Dr. Hark and review his 1980 test. (MR TT, Vol. 2:290; RX 163, Vol. 81:21267-21327). Remand counsel also had Dr. Ryback review Dr. Hark's 1980 test. (See MR TT, Vol. 6:1135-1143). At trial, remand counsel presented Dr. Ryback, who effectively attacked Dr. Hark's 1980 test and pointed out several mistakes in the scoring of the test. (See MR TT, Vol. 6:1127, 1135-1141).[33]

Petitioner also claims that remand counsel could have used the Flynn Effect to show that Petitioner's 1980 IQ score of 84 placed him in the mentally retarded range; however, the record shows that this evidence was presented to the jury. Dr. Zimmerman testified that "[o]n the 1980

[33] Additionally, Dr. Ryback explained to the jury how the WAIS has evolved over the years. (MR TT, Vol. 6:1141).

test with the full-scale score of 84, [the Flynn Effect] would bring it to 76." (MR TT, Vol. 6:1309-1310). Dr. Zimmerman then explained to the jury that 8 points would be subtracted from the score since the test was 25 years old when given to Petitioner. (MR TT, Vol. 6:1310). Additionally, this Court notes that Petitioner's adjusted score of 76 is still above 70, even when adjusted for the standard error of measurement.[34] Therefore, remand counsel is not deficient for failing to present evidence that does not prove Petitioner is mentally retarded. Furthermore, even if this Court were to find that remand counsel's investigation of Dr. Hark's 1980 test was deficient, Petitioner has failed to show resulting prejudice.

Petitioner also argues that the practice effect could have been applied to Petitioner's score; however, this Court finds Petitioner's argument unpersuasive. The record shows that when Petitioner was administered the WAIS in 1980, Petitioner had not taken another WAIS in the last three years. (HT, Vol. 1:57). The manual for the Wechsler states that research "has indicated that practice effects on the Performance subtests are minimized after an interval of 1-2 years; for Verbal subtests, that interval is shorter." (PX 79, Vol. 50:13003-13004). Thus, the practice effect would not have applied to the 1980 WAIS and remand counsel were not ineffective for declining to present such evidence.[35]

Additionally, Petitioner alleges that remand counsel were ineffective for failing to assert work product privilege to bar the discovery of Dr. Hark's 1980 evaluation of Petitioner. However, this Court finds that Petitioner waived any work product privilege regarding Dr. Hark's 1980 evaluation when he filed his habeas petition in 1987 alleging ineffective assistance

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[34] The standard error of measurement, which "provides an estimate of the amount of error in an individual's observed test score," is plus or minus five points. (MR TT, Vol. 6:1316-1317; PX 80, Vol. 51:13261).

[35] Furthermore, Petitioner has failed to show resulting prejudice as this testimony would have been inapplicable at Petitioner's mental retardation remand trial.

of trial counsel. Furthermore, even if remand counsel were deficient, Petitioner has failed to show resulting prejudice. Dr. Hark's 1980 score of 84 was cumulative of other tests on which Petitioner scored in the 80s, including the testing administered by Dr. Connell in 1984 and Mr. Mills in 2000. (See RX 104, Vol. 68:18200). Additionally, during Petitioner's remand trial, Dr. Zimmerman argued that Dr. Hark's score of 84 would actually be a score of 76 when the Flynn Effect was taken into account. (See MR TT, Vol. 6:1310). Thus, as Petitioner has failed to show deficient performance or resulting prejudice, his ineffective assistance of counsel claim regarding Dr. Hark's 1980 evaluation is denied.[36]

Mr. Mills

Petitioner also claims that remand counsel conducted a deficient investigation into the State's case concerning the WAIS-III given to Petitioner in 2000 by Mr. Mills[37] in which Petitioner received a score of 89. Specifically, Petitioner alleges that remand counsel did not discover, until two weeks prior to trial, that Mr. Mills had administered the WAIS-III to Petitioner, and did not request a continuance in order to review the WAIS-III. (See Petitioner's post-hearing brief, pp. 79-87).

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[36] Additionally, this Court notes that the work product privilege only applies to civil cases under the Civil Practice Act; however, in Claim III, subsection hh of his Amended Petition, Petitioner alleges that remand counsel were ineffective in failing to object to conducting Petitioner's mental retardation trial as a civil proceeding. (See O.C.G.A. §9-11-26).

[37] In 2000, the trial court asked Dr. Perri to conduct an assessment of Petitioner to determine whether he was mentally retarded and competent to make legal decisions. (MR TT, Vol. 8:1722). Petitioner was then sent to Central State Hospital from March 15-29, 2000, by order of the court, for testing. (MR TT, Vol. 8:1723). While at Central State Hospital, a WAIS-III was administered to Petitioner by Mr. Mills, a licensed counselor. (MR TT, Vol. 7:1374, 1376). Mr. Mills testified at trial that he administered the WAIS-III to Petitioner on March 22 and 23, 2000 and scored the test himself. (MR TT, Vol. 7:1387, 1435). Once Mr. Mills prepared the test results, he gave them to Dr. Harris, his supervising psychologist, for review. (MR TT, Vol. 7:1384, 1439). The test results were then forwarded to Dr. Perri, which he used in forming his opinion. (MR TT, Vol. 7:1439).

The record shows that Dr. Perri testified regarding the 2000 WAIS-III during a February 20, 2001 motions hearing. (PX 44B, Vol. 12:2625-2626). The Court notes that this hearing occurred prior to remand counsel's representation of Petitioner; however, remand counsel were clearly aware of the hearing as they attached a transcript to their *Motion to Supplement the Record* filed on October 18, 2001. (See PX 44A, Vol. 11:2354-2355).[38] Therefore, this Court finds that remand counsel should have been aware of this testing prior to the State's disclosure in July of 2005. However, Petitioner has failed to demonstrate prejudice resulting from remand counsel's failure to discover the 2000 WAIS-III prior to the State's disclosure. Additionally, Petitioner has failed to show prejudice resulting from trial counsel's decision not to request a continuance of time based on the discovery of Mr. Mills's testing.

The record shows that remand counsel had ample time to review Mr. Mills's 2000 test, including having the test rescored and critiqued by their retained experts. (See PX 1, Vol. 3:285-286; RX 39, Vol. 58:15310-15315; RX 104, Vol. 68:18199-18202, 18207-18208, 18212-18213). Further, at Petitioner's trial, remand counsel presented detailed testimony from their mental health experts challenging the test. (MR TT, Vol. 6:1141-1143, 1178-1182, 1273-1274).[39] Remand counsel also introduced a chart comparing Petitioner's subtest scores on Mr. Mills's 2000 test to the subtest scores Petitioner achieved on other versions of the WAIS. (MR TT, Vol. 10:2011). Additionally, remand counsel thoroughly cross-examined Mr. Mills regarding his administration of the WAIS-III.[40] (MR TT, Vol. 7:1449-1471, 1473-1487). Thus, as Petitioner

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[38] Furthermore, the Court notes that Mr. Knowles acknowledged that he should have been aware of the testing in a draft affidavit. (See RX 148, Vol. 69:18531).

[39] Mr. Knowles also cross-examined Dr. Connell regarding the credibility of Mr. Mills's test. (See MR TT, Vol. 9:1852-1855; 1859).

[40] Although Petitioner alleges remand counsel should have presented the testimony Dr. Schwartz provided in his affidavit that was presented to the

has failed to show resulting prejudice, this portion of his ineffective assistance of counsel claim fails.

C. Pre-Trial

The Remand Court's Preliminary Instructions

Petitioner alleges that remand counsel were ineffective in failing to object, request a remedy, or move for a mistrial when the remand court gave the following preliminary instructions:

> The style of this case is – the style of the case, that just means its title. It is called the State of Georgia against James Randall Rogers. And Mr. Rogers is charged with a crime. He is not being tried for that crime. He is not being tried for it. This is a civil proceeding. I have given you a civil jury oath only. It is a separate civil proceeding in order to determine whether or not Mr. Rogers is or is not mentally retarded. That is all you have got to concentrate upon. This decision has to be made before any further proceedings may go forward in this case.

(MR TT, Vol. 1:27). Petitioner argues that the instruction informed the venire panel that Petitioner "was charged with a crime and that if they found he suffered from mental retardation, he would escape prosecution for that crime." (Petitioner's post-hearing brief, p. 116). As Petitioner acknowledges in his brief, remand counsel expressed concern to the court regarding the instruction. Mr. Berry stated:

> ....Judge, just for the record []: I think the Court in giving its preliminary - - wasn't really an instruction but talking with the jurors preliminarily - - indicated that Mr. Rogers is charged with a crime, but they would not be dealing with that crime, they would be trying a civil case. So, we were a little concerned over the fact that they might now know that he does have a pending crime involved in this civil case which may make them believe - - and I think we are going to have to go into it a good bit - - that they are here only to look at the issue of mental retardation. We don't want them to second guess or try to make some determination that this might get him out of being prosecuted for a case. This is

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Georgia Supreme Court during Petitioner's direct appeal, Mr. Knowles testified that Dr. Schwartz was unwilling to testify at trial. (HT, Vol. 1:129-130).

not an incompetency trial, showing that he is incompetent. We are a little concerned over that.

(MR TT, Vol. 1:64-65). To which the court responded as follows:

> The - - as I mentioned to you, I had looked at the Foster transcript and - - because a case much like this one was tried before, that was a pre-1988 case, very similar to this particular proceeding. And Judge Matthews had tried it and the Supreme Court ruled on that issue in Headnote 3 of the Foster case, 272 Ga. at 69. And this - - and I think, perhaps, that the process that I used in beginning the voir dire there - - beginning the process, making the first statements to the jury may have caused one of the jurors, Ms. Rogers, you know, to disclose the fact that she knew something about this case, even though what I stated was minimal, and I think was also called upon for me to determine whether they could - - the jurors could put aside in their thinking anything about a crime versus the fact that they have to concentrate on mental retardation and to get that - - so, I don't think that's a problem.

(MR TT, Vol. 1:65).

Even if this Court were to find that remand counsel performed deficiently in this regard, Petitioner has still failed to demonstrate resulting prejudice. The Georgia Supreme Court in Foster v. State, 272 Ga. 69, 70-71 (2000), held that it is not reversible error to inform jurors in a mental retardation remand trial that the individual had committed a crime. In both Petitioner's case and in Foster, the challenged instructions informed the jury that the mental retardation issues arose out of a criminal proceeding. However, these instructions "did not in any manner impede the jury from 'focusing strictly on the mental condition of the defendant and deciding that issue without being concerned about the consequences of its finding.'" Foster, 272 Ga. 69, 70-71 (quoting State v. Patillo, 262 Ga. 259, 260 (1992)). Further, the remand court explained that the statement that Petitioner had committed a crime was necessary to ensure that any jurors who may have known about Petitioner's crime were identified. (MR TT, Vol. 1:64-66).

Therefore, as the remand court's statement informing the jury that Petitioner had been charged with a crime was not improper, Petitioner cannot show resulting prejudice.[41]

Conducting the Trial as a Civil Proceeding Instead of a Criminal Proceeding

Petitioner alleges that remand counsel were ineffective for requesting, agreeing and failing to contest that his mental retardation trial was conducted as a civil proceeding, rather than a criminal proceeding. Specifically, Petitioner argues that conducting the mental retardation trial as a civil proceeding prejudiced Petitioner by requiring him to accept or reject each juror prior to the State and by reducing the number of peremptory challenges he received.[42] Even if this Court were to find that remand counsel performed deficiently, Petitioner has failed to establish prejudice resulting from his mental retardation trial being conducted as a civil proceeding.

At Petitioner's remand trial, the following exchange took place once voir dire was completed and counsel were preparing to strike the jury:

> Mr. Berry: And who goes first?
>
> The Court: Well, you get to go first.
>
> Mr. Berry: We would like for the State to go first.
>
> The Court: Well, you know, this - - you are going to get to make the first opening statement. You are going to get to open and close of the final argument. I think in this case, even though there is a new - - you know, there is a new rule about

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[41] The Court notes that Petitioner also claims remand counsel were ineffective in failing to object to Petitioner's case being tried as a civil, rather than a criminal proceeding. However, if Petitioner's case had been tried as a criminal proceeding, the jury would have been aware of the fact that Petitioner had been involved in a crime prior to his mental retardation trial.

[42] The Court notes that on direct appeal, appellate counsel argued that the trial court erred by conducting Petitioner's mental retardation remand trial as a civil, rather than a criminal, proceeding. The Georgia Supreme Court held that Petitioner had "waived any objection to the trial court conducting his *Fleming* trial as a civil proceeding and to the order of the exercise of his peremptory challenges." Rogers, 282 Ga. at 662.

> criminal cases where the State always gets to close. But, you know, it just - - this is, we say a civil case, it is a quasi-civil case and a quasi-criminal case. It is a mixed type of case. There is no sense saying it is a purely civil case or a purely criminal. And so, I'm switched over to the civil rules to the extent that I can possibly do that. So, you know, that being the case, you know, you are going to have to go first.
>
> Mr. Berry: I understand, Judge.

(MR TT, Vol. 3:712-713). Petitioner now argues that remand counsel were ineffective for failing to request that his mental retardation trial be conducted as a criminal proceeding so that the State would have to accept or reject each potential juror prior to Petitioner. However, as the Georgia Supreme Court has held, "[a] party cannot during the trial ignore what he thinks to be an injustice, take his chance on a favorable verdict, and complain later." Pye v. State, 269 Ga. 779, 787 (1998).

Furthermore, Petitioner's claim that he would have received twenty peremptory challenges, while the State would have had just ten, if the case had been tried as a criminal proceeding, also fails. (See Petitioner's post-hearing brief, p. 119). After reviewing both the trial transcript and O.C.G.A. §15-12-165, which Petitioner cites in support of his claim, this Court finds that the remand court did follow the criminal jury selection process in Petitioner's remand trial. O.C.G.A. §15-12-165 states that "in any case in which the state announces its intention to seek the death penalty, the accused may peremptorily challenge 15 jurors and the state shall be allowed the same number of peremptory challenges." However, O.C.G.A. §15-12-122(b), which governs jury selection in civil proceedings, states: "[i]n all civil actions in the superior courts, each party may demand a full panel of 24 competent and impartial jurors from which to select a jury…In all cases the parties or their attorneys may strike alternately, with the plaintiff exercising the first strike, until a jury of 12 persons is impaneled to try the case." Therefore, as the record reflects that both parties received fifteen peremptory strikes at

Petitioner's remand trial, it is clear that the remand court followed the criminal jury selection process. (See MR TT, Vol. 3:713).

To the extent that Petitioner's claim could be construed as an allegation that remand counsel were ineffective in failing to object to the retroactive application of the amended version of O.C.G.A. §15-12-165, Petitioner's claim still fails.[43] "[T]he prohibition of ex post facto laws applies only to substantive, but not procedural, rights." Hamm v. Ray, 272 Ga. 659 (1) (2000) (quoting Cannon v. State, 246 Ga. 754, 755 (1) (1980)). Further, "[s]tatutes that only govern the procedure of the courts are given retroactive effect absent an expressed intention to the contrary." Barner v. State, 263 Ga. 365, 367 (1993). Therefore, as peremptory strikes are procedural and not substantive in nature, Petitioner was not deprived of a protected right by the retroactive application of O.C.G.A. §15-12-165. Madison v. State, 281 Ga. 640, 642 (2007). Accordingly, this portion of Petitioner's ineffective assistance of counsel claims is denied.

D. Reasonable Presentation

At Petitioner's mental retardation trial, remand counsel presented the testimony of three mental health experts: Dr. Mark Zimmerman, Dr. Brad Fisher and Dr. David Ryback. Remand counsel also effectively attempted to rebut the State's presentation. As explained in detail below, this Court finds that Petitioner's claims challenging remand counsel's presentation of evidence fail to meet either prong of Strickland.

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[43] Prior to July 1, 1992, O.C.G.A. §15-12-165 provided that criminal defendants could exercise twenty peremptory strikes while the state had only ten. See Barner v. State, 263 Ga. 365, 367 (1993). However, an amendment which took effect on July 1, 1992, reduced both the defendant and state's number of strikes to twelve and six, respectively. Id. O.C.G.A. §15-12-165 was again amended in 2005 to reflect the current language and was applicable "to all trials which commence on or after July 1, 2005." (See O.C.G.A. §15-12-165). The record reflects that Petitioner's mental retardation trial began on August 1, 2005. (See MR TT, Vol. 1).

Dr. Mark Zimmerman

Petitioner alleges that remand counsel ineffectively utilized the expert assistance of Dr. Zimmerman. However, this Court finds that Petitioner has failed to prove each of his challenges as to remand counsel's employment of Dr. Zimmerman.

Petitioner alleges that Dr. Zimmerman was only provided Mr. Mills's 2000 test material to review and nothing else. However, the record shows that Dr. Zimmerman reviewed numerous documents and testing other than Mr. Mills's 2000 test material. (See HT, Vol. 1:55-56, 58, 61, 72-74; MR TT, Vol. 6:1224-1225, 1285). Additionally, Dr. Zimmerman had previously reviewed many documents in preparation for his evaluation of Petitioner in 1994. (See RX 12, Vol. 56:14708-14709). Further, even if the record did not reflect that Dr. Zimmerman reviewed numerous documents in preparation for trial, Petitioner has not shown that Dr. Zimmerman requested additional records or information. (See RX 12, Vol. 56:14701-14702); see also Head v. Carr, 273 Ga. 613, 631 (2001) (holding "It is simply not reasonable to put the onus on trial counsel to know what additional information" a mental health expert needs and "a reasonable lawyer is not expected to have a background in psychiatry."). Thus, Petitioner has failed to show that remand counsel did not provide Dr. Zimmerman with adequate materials and as such has failed to establish either of the requisite prongs under Strickland necessary to prove ineffective assistance of counsel.

Furthermore, Petitioner has failed to prove his claim that remand counsel did not provide Dr. Zimmerman with enough time to analyze and address Mr. Mills's 2000 test. Dr. Zimmerman testified at trial that he had reviewed the test and had concerns. (MR TT, Vol. 6:1273-1274, 1284-1285). Further, Petitioner has made no showing that Dr. Zimmerman, a seasoned expert witness who had testified in numerous death penalty cases, requested more time to review Mr.

Mills's test. (HT, Vol. 1:36). As Petitioner has not shown what other testimony could have been elicited regarding Mr. Mills's 2000 test, Petitioner cannot establish the necessary deficiency and prejudice required to prove ineffective assistance of counsel as to this claim.

Petitioner's claim that remand counsel only asked Dr. Zimmerman to testify to his own 1994 evaluation of Petitioner also fails. The record shows that Dr. Zimmerman testified to other aspects of Petitioner's case. (See MR TT, Vol. 6:1242-1243, 1253-1254, 1269; HT, Vol. 1:77-87, 90-92, 94, 98). Furthermore, contrary to Petitioner's claim that Dr. Zimmerman did not testify to the testing performed by other mental health experts, Dr. Zimmerman testified at the remand trial that he reviewed data from Dr. Fisher's testing of Petitioner, Dr. Hark's 1980 report, Mr. Mills's 2000 testing and Dr. Connell's report of Petitioner. (MR TT, Vol. 6:1224, 1253, 1284-1285; see HT, Vol. 1:73-74). Although Dr. Zimmerman did not testify to the specifics of the testing performed by other mental health experts, this does not constitute deficient performance by remand counsel. See Strickland v. Washington, 466 U.S. 668 at 689 (1984) (finding no requirement that a specific act be performed as "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."). Further, Petitioner cannot show resulting prejudice as each of the experts at the trial testified to the specifics of their own testing and their own reports.

Therefore, this Court finds Petitioner has failed to prove deficiency or prejudice as to remand counsel's utilization of Dr. Zimmerman as an expert witness during the remand trial.

The Psychological Principles of Intellectual Testing

Petitioner alleges that remand counsel did not explain the structure and origin of intellectual testing to the jury as well as the practice effect, Flynn Effect, and standard error of

measurement. However, this Court finds that remand counsel, through their expert witnesses, presented this exact testimony.

The record shows that Dr. Zimmerman testified to the origins and history of psychological testing. (MR TT, Vol. 6:1243-1244). Additionally, Dr. Zimmerman explained the theory of IQ testing to the jury. (MR TT, Vol. 6:1242, 1328-1329). Dr. Zimmerman's testimony also addressed the Flynn Effect and how it applied to several of Petitioner's IQ scores. (MR TT, Vol. 6:1309-1312). Petitioner alleges remand counsel were ineffective because the first mention of the Flynn Effect was during the State's cross-examination of Dr. Zimmerman. (Petitioner's post-hearing brief, p. 67). However, even if this Court were to find deficient performance, Petitioner has still failed to demonstrate prejudice as this information was ultimately elicited at trial.

Furthermore, the record shows that Dr. Fisher, Dr. Ryback, and Dr. Zimmerman all testified regarding the practice effect and how it could change Petitioner's IQ scores. (MR. TT, Vol. 5:1000-1001; Vol. 6:1206-1208, 1211-1212, 1313-1314). Drs. Fisher and Zimmerman also testified regarding the standard error of measurement on IQ tests. (MR TT, Vol. 5:908-909; Vol. 6:1316-1317). Therefore, as Petitioner has failed to show deficient performance or resulting prejudice, these claims fail.

Petitioner's IQ Scores

Furthermore, this Court finds no merit in Petitioner's allegation that remand counsel presented Petitioner's test scores to the jury "in a manner that suggested that [Petitioner]'s scores were not within the range of mental retardation." (Petitioner's post-hearing brief, p. 68). The record shows that remand counsel argued that each IQ test Petitioner had been given demonstrated that Petitioner was mentally retarded. Extensive testimony was elicited through all

of the expert witnesses including the State's expert witnesses, Dr. Connell and Mr. Mills, that there were problems in the administration and scoring of each of the IQ tests on which Petitioner had scored above 70. (See MR TT, Vol. 5:909-911; Vol. 6:1127-1141, 1143-1146, 1175-1177, 1179-1182, 1242-1243, 1273-1275, 1308-1312, 1328-1329; Vol. 7:1450-1452; Vol. 9:1852-1855). Further, in addition to addressing the validity of Petitioner's IQ scores above 70, remand counsel also informed the jury that they must consider Petitioner's adaptive functioning deficits as well. (MR TT, Vol. 5:858-859; Vol. 9:1950). Remand counsel also presented testimony, through Dr. Fisher and Dr. Zimmerman, that under Georgia law the determination of whether Petitioner suffered from mental retardation was within the sole discretion of the jury, and that the jury was not "bound by the opinion testimony of expert witnesses, or by test results," and that they could "weigh and consider all evidence bearing on the issue of mental retardation." (MR TT, Vol. 5:905-906; Vol. 6:1229, 1245-1246).

Therefore, this Court finds that Petitioner has failed to show deficient performance as he has not demonstrated how these scores could have been better attacked by remand counsel. Further, Petitioner has failed to show resulting prejudice by remand counsel's attempts to argue that each of Petitioner's IQ scores placed him in the mental retardation range.

Comprehensive Assessment of Petitioner's Mental Health Issues

Petitioner alleges that remand counsel should have presented an expert witness, such as Dr. David Price, in an effort to present a comprehensive picture of Petitioner's mental health issues in arguing mental retardation. Specifically, Petitioner claims that remand counsel failed to present testimony regarding brain dysfunction and cognitive dysfunction, adaptive functioning[44],

[44] Petitioner's claims of ineffective assistance of counsel regarding remand counsel's presentation of adaptive functioning evidence are discussed in the next section.

onset of symptoms prior to age 18, and delusional beliefs. This Court finds that Petitioner has failed to show deficient performance or resulting prejudice as the majority of Dr. Price's testimony is cumulative. As the Georgia Supreme Court has held, trial counsel is not ineffective for failing to present cumulative evidence. DeYoung v. State, 268 Ga. 780, 786 (1997).

The record shows that remand counsel investigated and presented evidence of Petitioner's brain dysfunction and cognitive dysfunction to the jury. (See RX 12, Vol. 56:14702; RX 14, Vol. 56:14731; RX 17, Vol. 56:14777; RX 37, Vol. 58:15285; RX 82, Vol. 67:17492-17586; see also MR TT, Vol. 5:862-863, 936-940; Vol. 6:1239-1240, 1249-1255; Vol. 9:1821, 1823, 1830-1841, 1847). Dr. Fisher and Dr. Zimmerman explained the relevancy of brain dysfunction when determining whether someone is mentally retarded. (MR TT, Vol. 5:936-937; Vol. 6:1250-1251).[45] Drs. Fisher and Zimmerman also explained the two standard tests given to measure brain dysfunction, the Halstead-Reitan and the Luria-Nebraska Neuropsychological Battery, and how those tests are scored.[46] (MR TT, Vol. 5: 938-940; Vol. 6:1251-1252, 1254). Additionally, Dr. Zimmerman testified that Petitioner has "significant dysfunction" that is "diffuse" and "goes to both sides of the brain." (MR TT, Vol. 6:1252). Dr. Zimmerman explained that "it involves those areas in which he takes in and processes information. Where the information comes in and we try to make sense of it." Id. Therefore, Dr. Price's testimony pertaining to Petitioner's brain and cognitive dysfunction is cumulative, and Petitioner cannot show deficient performance or resulting prejudice as to this claim.

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[45] Additionally, remand counsel elicited testimony from Dr. Connell on cross-examination regarding Petitioner's brain dysfunction. (See MR TT, Vol. 9:1823, 1830-1841).

[46] Dr. Zimmerman also testified that research "seems to indicate that there may be a genetic component" to being mentally retarded. (MR TT, Vol. 6:1269).

Remand counsel also presented testimony, through Dr. Zimmerman, that the Peabody test was a limited instrument not normally used as an IQ test. (MR TT, Vol. 6:1242-1243, 1308-1309). Dr. Zimmerman explained that the Stanford-Binet was the first IQ test and that the Peabody test does not meet the same standard as the Stanford-Binet. (MR TT, Vol. 6:1243). Further, on cross-examination, Dr. Zimmerman testified that "you really can't compare the Peabody because it's - - it's not a - - it's an indicator but it's not an IQ test per se." (MR TT, Vol. 6:1308-1309). Thus, this Court finds that remand counsel presented the exact testimony Petitioner alleges Dr. Price could have provided. Accordingly, Petitioner cannot demonstrate deficient performance or prejudice.

Petitioner also claims that Dr. Price could have testified that the "'best reflection' of [Petitioner's] abilities came from the Stanford-Binet administered by Dr. Zimmerman" because the Flynn Effect and the Practice Effect would not alter Petitioner's score of 68 on the Stanford-Binet. (Petitioner's post-hearing brief, p. 100). The record shows that, at Petitioner's trial, Dr. Zimmerman testified that he administered the Stanford-Binet instead of the WAIS because Petitioner had been given one or two WAIS IQ tests prior to his examination, but had never taken the Stanford-Binet, thereby limiting the practice effect. (MR TT, Vol. 6:1236).[47] Dr. Price's testimony regarding the Flynn Effect is not cumulative; however, Petitioner has failed to show resulting prejudice. As Dr. Price testified in his deposition, the Flynn Effect would not have applied to the Stanford-Binet administered by Dr. Zimmerman, on which Petitioner scored a 68. (PX 3, Vol. 3:376). Therefore, as Petitioner's score already placed him within the IQ range for mental retardation, Dr. Price's testimony stating that the Flynn Effect would not raise or

[47] Additionally, Dr. Zimmerman testified that Georgia does not use an arbitrary number in determining whether a person has significantly subaverage intellectual functioning. (MR TT, Vol. 6:1245-1246).

lower this score; would not have, in reasonable probability, changed the outcome of Petitioner's trial. See Smith v. Francis, 253 Ga. 782, 783 (1985).

Petitioner also alleges that Dr. Price could have testified that Petitioner suffered from delusions in support of a finding of mental retardation. Dr. Price testified during his deposition that delusional thoughts are "not a specific symptom of mental retardation but mentally retarded people are four times as likely as the general population to have other psychiatric disorders." (RX 152, Vol. 78:20587). Therefore, as evidence of delusional thoughts does not support a finding of mental retardation, remand counsel were not deficient in failing to present this evidence.

Furthermore, remand counsel were not deficient in failing to present evidence that Petitioner abused drugs and alcohol. The evidence that Petitioner now claims Dr. Price could have provided was largely elicited by the State on cross-examination and was prejudicial to Petitioner. (See MR TT, Vol. 5:1013-1014; Vol. 6:1322; see also RX 152, Vol. 78:20580-20581). Further, the additional evidence Dr. Price could have presented on this issue would not have, in reasonable probability, changed the outcome of Petitioner's trial. Therefore, Petitioner has failed to show deficient performance or prejudice under Strickland and these claims fail.

Remand Counsel's Presentation of Adaptive Functioning Evidence

Petitioner alleges that remand counsel failed to adequately investigate, develop and present evidence of deficits in Petitioner's adaptive functioning. The record shows that there was testimony elicited through Dr. Fisher, Dr. Ryback, Dr. Zimmerman and the State's witness, Dr. Connell, that Petitioner had deficits in four categories of adaptive skills: academic

performance, independent living, communication skills, and work skills.[48] (See MR TT, Vol. 5:918-921, 924-926, 1006-1009; Vol. 6:1123-1124, 1256-1258, 1345; Vol. 9:1864-1867). On cross-examination of State witness, Dr. Connell, remand counsel also elicited testimony that Petitioner is unable to process complex information readily and is likely to be "very impulsive" and "to experience some confusion and frustration when receiving several sources of stimulation simultaneously or when fast-paced stimulation occurs." (MR TT, Vol. 9:1830-1831).[49] Therefore, Dr. Price's adaptive functioning testimony is cumulative of testimony presented to the jury at Petitioner's mental retardation trial.

Additionally, this Court notes that Dr. Price did not apply the correct standard in addressing Petitioner's deficits in adaptive functioning. (See RX 152, Vol. 78:20572-20573, 20575-20577). The record shows that Dr. Price relied upon the Social Security Guidelines and AMA guides to determine whether Petitioner had impairment in his adaptive functioning. (See RX 152, Vol. 78:20576-20577). Dr. Price testified in his deposition during these proceedings that "I'm rating his adaptation using the AMA guides, the Rating of Permanent Impairment and the Social Security guidelines which are what you use in the real world not simply the ones for mental retardation...DSM has no specific guidelines on how you rate adaptive functioning." (RX 152, Vol. 78:20576). However, Dr. Price acknowledged that a Social Security determination of mental retardation is different than the standard under Atkins v. Virginia, 536 U.S. 304 (2002). (RX 152, Vol. 78:20612). Furthermore, Dr. Price never made a formal diagnosis of mental retardation. (RX 152, Vol. 78:20561).

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[48] Remand counsel also elicited expert testimony that Petitioner's adaptive functioning deficits were present prior to age 18. (See MR TT, Vol. 6:1147, 1256-1258).

[49] Further, Petitioner has failed to provide this Court with additional evidence of adaptive deficits that remand counsel failed to discover or present at trial.

Petitioner also alleges that remand counsel were ineffective for failing to request a hearing or an opportunity to brief the admissibility of affidavit testimony remand counsel sought to introduce through their expert witnesses at trial. This Court finds that the affidavit testimony from Petitioner's family and teachers, which Petitioner alleges remand counsel were ineffective for being unable to admit, were affidavits taken by Petitioner's previous attorneys during Petitioner's second state habeas proceedings. See Rogers v. State, 282 Ga. at 666. The record shows that by the time remand counsel became involved in Petitioner's case the affiants were either deceased, unavailable, or were no longer willing to testify on Petitioner's behalf.[50] (See HT, Vol. 1:118; RX 42, Vol. 58:15331; RX 153, Vol. 78:20681, 20683-20685).

Further, this Court finds that remand counsel presented an extensive argument for admitting the affidavit testimony. (MR TT, Vol. 5:923, 1076-1081; Vol. 6:1225). The record shows that remand counsel argued that several of the affiants were deceased. (MR TT, Vol. 5:1079; Vol. 9:2004). Remand counsel also argued that they were offering the affidavits under O.C.G.A. § 24-9-67.1, which at the time was new court reform legislation. (MR TT, Vol. 5:1077-1078). Therefore, remand counsel's efforts to admit the affidavit testimony were not deficient.

Furthermore, this Court finds that Petitioner cannot establish the requisite prejudice necessary under Strickland to prove ineffective assistance of counsel as to this claim. Petitioner has failed to show that there were additional arguments remand counsel could have made that would have resulted in the remand court admitting the affidavits. Further, the Georgia Supreme Court upheld the remand court's ruling regarding the affidavits and held that "the little probative information the affidavits contained was cumulative of other evidence and not needed to explain

[50] This Court notes that Petitioner did not present these affiants at the habeas hearing during these proceedings.

the basis for the experts' opinions." See Rogers v. State, 282 Ga. at 666. Therefore, Petitioner has failed to show prejudice resulting from the exclusion of these affidavits.

The State's Adaptive Functioning Evidence

Petitioner claims that remand counsel failed to adequately litigate the admissibility of the State's adaptive functioning evidence. The record shows that on August 1, 2005, remand counsel filed a *Motion in Limine* in an attempt to preclude the State from introducing any witnesses who had dealt with Petitioner in prison. (See PX 44E, Vol. 15:3516-3517). Specifically, remand counsel stated "[w]e've got an expert that can testify that Adaptive Skills really need to be looked at in an environment other than the prison because, obviously, you are told when to get up, told when to go to bed, when to eat, when not to eat. So it's not much adapting when you're in the prison system." (MR TT, Vol. 4:752). Additionally, prior to the testimony of Albert Cecil Smith, remand counsel again reiterated their objection in stating "[y]our Honor, we wanted to put on the record that we object to this whole line of people that they are going to be bringing in based on our motion in limine that we have filed. The Court has indicated that you will allow this type of adaptive, I guess, testimony in. So we just want to have a continuing objection..." (MR TT, Vol. 8:1617). The remand court then responded "I'll grant your continuing objection about this—about his conduct or actions while he has been wherever he has been." (MR TT, Vol. 8:1620). Therefore, this Court finds that remand counsel did attempt to exclude the State's adaptive functioning evidence.

Furthermore, even if this Court were to find that remand counsel failed to adequately litigate this motion, this claim still fails as Petitioner has failed to show resulting prejudice. On Petitioner's direct appeal from his remand trial, the Georgia Supreme Court upheld the State's introduction of Department of Corrections' employees who testified to Petitioner's adaptive

functioning in prison. Rogers v. State, 282 Ga. at 667-668. Regarding this issue, the Georgia Supreme Court held that "[t]he officer's testimony was relevant to the issue of [Petitioner's] adaptive skills, however, and was not unduly prejudicial because the officer clarified that he was not diagnosing anyone." Id. Therefore, this Court finds that Petitioner has failed to prove deficient performance or prejudice as to this issue.

Petitioner also alleges that remand counsel did not prepare their expert witnesses to rebut the State's adaptive functioning evidence and could have requested that Dr. Zimmerman provide rebuttal testimony. This Court finds that remand counsel prepared several of their expert witnesses to present testimony rebutting the State's evidence. Further, the rebuttal testimony Petitioner now alleges remand counsel should have elicited from Dr. Zimmerman at trial was presented at trial by other expert witnesses.

The record shows remand counsel presented testimony through Dr. Fisher that most of the standards for judging adaptive functioning were developed based upon reviewing how a person interacts in society, not prison. (MR TT, Vol. 5:916). Anticipating that the State would introduce evidence that Petitioner had checked out library books in prison, remand counsel also presented testimony through Dr. Fisher and Dr. Zimmerman that mentally retarded individuals can read and write. (MR TT, Vol. 5:942; Vol. 6:1237). Dr. Zimmerman also testified that Petitioner "read at the sixth grade level, which is the eighth percentile" and clarified that this score is based on reading recognition, not reading comprehension. (MR TT, Vol. 6:1237-1238). Dr. Zimmerman explained that "comprehension means you read something and you understand it. Reading recognition means you can sound out the word, you know how to pronounce it. Two different things." (MR TT, Vol. 6:1238). Further, on cross-examination of the State's witnesses, remand counsel elicited that there was no evidence to show that Petitioner had

checked out the reading material from the prison library for himself or read the material. (See MR TT, Vol. 8: 1630-1631, 1659, 1666-1668, 1710).

Additionally, during cross-examination of the State's adaptive functioning witnesses, remand counsel elicited testimony that the rules in prison are simple and made so that anyone can understand the rules. (MR TT, Vol. 8:1645, 1647-1648, 1660). Remand counsel also had the State's witness, Jackie Bedsole, testify that the prison procedures for phone calls, store accounts and clothing requests are made so that even a person with mental retardation can follow them. (MR TT, Vol. 8:1647-1648). Further, remand counsel presented the rebuttal testimony of Thomas Dunn, Petitioner's second state habeas counsel, who testified that Petitioner received assistance in prison in writing letters. (MR TT, Vol. 9:1910-1911). This served to rebut the State's introduction of letters Petitioner had written in prison and the State's argument that Petitioner's letters were evidence of his adaptive functioning.

Therefore, this Court finds that remand counsel were not deficient in rebutting the State's adaptive functioning evidence. Petitioner has also failed to show resulting prejudice as the record shows that remand counsel presented the same rebuttal testimony he now alleges should have been presented. Further, the only new testimony Petitioner alleges remand counsel could have presented would not have been relevant to the adaptive functioning evidence presented by the State, and thus could not have rebutted the State's evidence. Specifically, Petitioner claims remand counsel should have presented testimony that "mental retardation would not be obvious for an untrained person such as the [DOC] employees who testified to detect." (Petitioner's post-hearing brief, p. 107). However, the Department of Corrections' employees did not make a diagnosis regarding Petitioner's mental retardation. (See MR TT, Vol. 8:1621-1713; see also Rogers v. State, 282 Ga. at 668). The State's Department of

Corrections' witnesses merely testified to events they had witnessed or seen in prison concerning Petitioner's adaptive functioning. Accordingly, this Court finds that remand counsel's presentation of evidence countering the State's evidence of adaptive functioning was not deficient and Petitioner was not prejudiced.

Cumulative Error Claim

Petitioner argues that the alleged errors and omissions of remand counsel taken cumulatively establish deficient performance and prejudice. This Court has considered the combined effects of remand counsel's alleged errors in evaluating Petitioner's claims of ineffective assistance of counsel; however, these claims fail when the prejudice from these alleged errors is considered cumulatively. See Schofield v. Holsey, 281 Ga. 809, 812 n. 1 (2007).

V. CONCLUSION

After considering all of Petitioner's allegations made in the habeas corpus petition and at the habeas corpus hearing and all of the evidence and argument presented to this Court, 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 is 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 7th day of April, 2014.

Clerk to serve all parties with a copy of this order.
H. Frederick Mullis, Jr.
Chief Judge, Oconee Judicial Circuit

H. Frederick Mullis, Jr.
Sitting by designation in Butts County Superior Court

APPENDIX D

SUPREME COURT OF GEORGIA
Case No. S15E0034

Atlanta, October 19, 2015

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

JAMES RANDALL ROGERS v. CARL HUMPHREY, WARDEN

From the Superior Court of Butts County.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur.

Trial Court Case No. 09V407

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.

Sue C. Fulton , Chief Deputy Clerk

APPENDIX E

News-Tribune

Latest Complete News Coverage For Rome And The Coosa Valley

Rome, Georgia, Monday, March 1, 1982

ert alleges link between Devier, victim

By DAVID ROYAL, News-Tribune Staff Writer

Miss Stoner's body was found in December, 1979.

State Crime Lab officials earlier said a vial of material they tested indicated it contained a secretion that could have come from Devier.

However, they testified, those secretions were the type that come from about 40 percent of the general population with Type-A blood.

Concerning the fluids, Dr. Howell said, "I was reasonably sure it was male seminal fluid. I concluded her death must have come soon after intercourse."

Blood stains

Dr. Howell testified there was the presence of bloody material around the victim's nose and mouth, and on several rocks at the site where her body was found had blood stains on them.

"There was splattered blood as far as 10 feet away from the body," Dr. Howell testified.

He said the Stoner girl had bruises all about her head, neck and on the inside of her thighs.

He placed the time of death at between 5 p.m. and 5:30 p.m. Nov. 30, 1979 — the day the young girl disappeared after stepping off a school bus near her home.

Dr. Howell said the Stoner girl died of strangulation or from head injuries, believed caused by large rocks.

"Either one of the injuries (choking or head blows) could have been fatal," Dr. Howell said, but added, "It's hard to say which one it was."

Miss Stoner reportedly suffered two blows to the head, one with such force that her head was depressed into the ground.

Dr. Howell said his medical examination of Miss Stoner showed two torn places in the vaginal area and bruises along the inside of her legs.

Cross examination

The defense was also expected to get a chance today to cross examine a law enforcement officer who, last week, quoted rape-murder defendant as having admitted to abducting the 12-year-old victim just before her death.

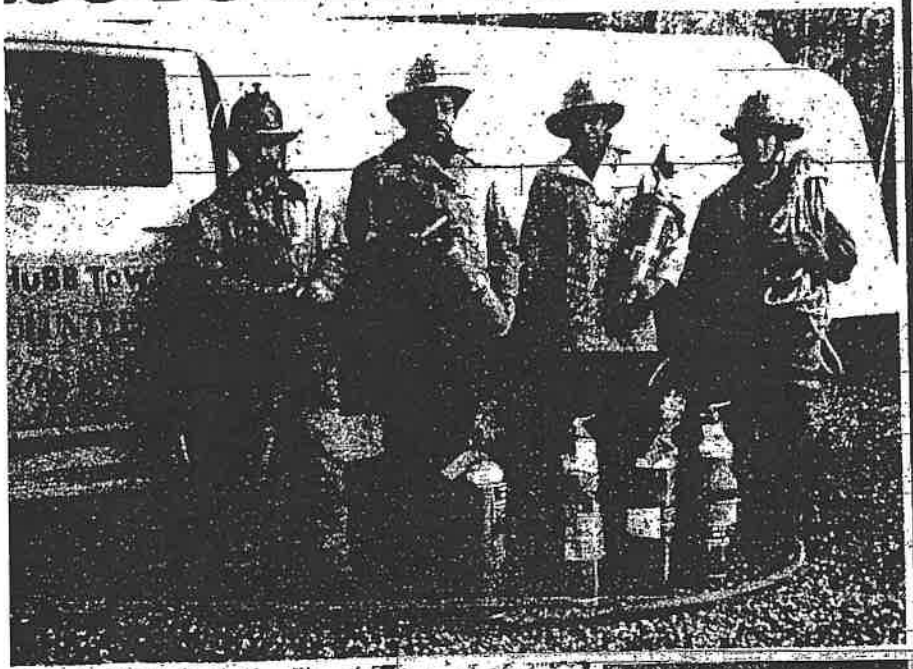
Devier's trial entered its third week today w the prosecution expected to continue trying link to the defendant the massive amount physical evidence accumulated in the case.

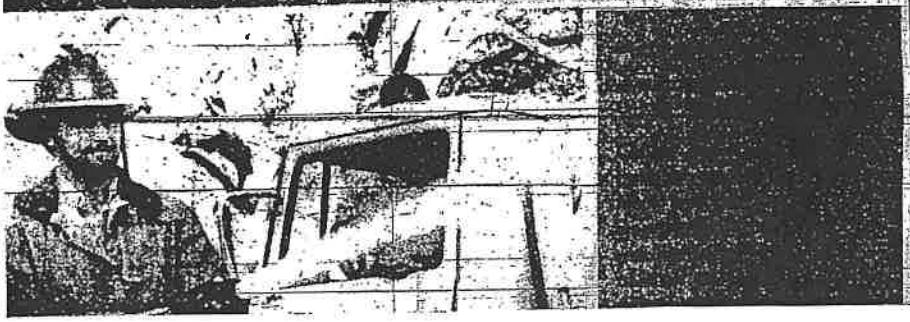
Two law enforcement officers have quoted murder defendant as saying he abducted Stoner girl just after she got off a Bartow Cou bus over two years ago.

Friday, Floyd County Sheriff's Deputy Be Barrett testified that as Devier was being boo into the county jail in Dec.; 1979, he admit abducting the victim and having slapped her a

See DEVIER pag

bb Town volunteers





Floyd lawmakers back extension for life sentences

Floyd solons are hopeful a bill will be passed this year that would increase the number of years a person given a life sentence would have to serve before becoming eligible for parole.

State Rep. John Adams said he personally would like to see the amount of time a convicted murderer would have to serve before parole consideration increased to 25 years.

Presently, a prisoner serving life is eligible to be considered for parole after serving seven years.

"Twenty-five years might be too long, but certainly seven is not long enough," Adams said in the wake of Ronald Anthony Duck's conviction for the stabbing death of Jane Townes Autry and aggravated assault on her daughter, Shammah Autry.

Duck sentence

Duck was given a life sentence for the murder conviction after the jury weighing whether or not to impose the death penalty deadlocked at 11 to 1 in favor of death by electrocution.

The "hold-out" juror gave no reason to the 11 others as to why he would not vote for the death penalty.

Assistant District Attorney Steve Lanier is seeking a transcript of the jury selection phase to determine if the juror committed perjury, but he indicated he doubted a charge would be made.

Lanier, however, said the state had reason to believe the juror lied when he said he would vote for the death penalty if circumstances warranted it, "and if any case warranted the death penalty this one did," Lanier said about the

lic." But, he said, "Our judicial syst has stood the test of time and chan are not easy to bring about."

Adams referred to a bill introduced in 1981 which called f person to serve 15 years before b considered for parole under a sentence, saying it is still in commit

He pointed to a bill passed by House which voters will have to de at the polls in November if it passes Senate. The bill, Adams noted, w give the legislature the right to se how and when a person given two sentences would be eligible for pa

"And I assure, if I have the oppor ty to vote on this and a person has life sentences, I'm going to vot life...I'm a firm believer in a pe who has a life sentence be incarcer for at least 25 or 30 years.

"The Pardon and Parole Board to us when we talk to them particular individuals and oppos granting of parole, 'Oh, He's b model prisoner. Why he's even dent of the local Jaycee chapter. prison system,'" Adams said.

Lanier said he plans to send t by-14 color photos of Mrs. A slashed body to the Pardon and P Board and is asking the commun back his efforts to see that Duck is released from prison.

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See DEVIER page 5

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Assistant District Attorney Steve Lanier is seeking a transcript of the jury selection phase to determine if the juror committed perjury, but he indicated he doubted a charge would be made.

Lanier, however, said the state had reason to believe the juror lied when he said he would vote for the death penalty if circumstances warranted it, "and if any case warranted the death penalty this one did," Lanier said about the stabbing 26 times of a young woman whose daughter was cut eight times but survived the attack.

But, Lanier said after the deadlock was announced Friday afternoon, legislation pending could have resolved that problem.

Legislation

Among those legislative bills is a measure which would allow the court to dismiss a jury which deadlocks in the sentencing phase of a trial and empanel a new jury solely for the purpose of determining a sentence.

Rep. E.M. (Buddy) Childers said had that statute been available, the bill would have addressed the deadlock which occurred Friday after the jury deliberated more than nine hours.

The bill before the legislature, Childers said, is a direct response to a Dekalb county's woman's slaying where the jury, as in the Duck case, deadlocked 11-to-1 in favor of the death penalty with one juror opposing the imposition of capital punishment.

Childers, too, would like to see persons given a life sentence be required to serve 25 years before being eligible for parole.

About Lanier's public call to assure Duck is not released from prison, Rep. Adams noted, "Certainly the legislature pays attention to the public." But, he said, "Our judicial system has stood the test of time and changes are not easy to bring about."

Adams referred to a bill he introduced in 1981 which called for a person to serve 15 years before being considered for parole under a life sentence, saying it is still in committee.

He pointed to a bill passed by the House which voters will have to decide at the polls in November if it passes the Senate. The bill, Adams noted, would give the legislature the right to set up how and when a person given two life sentences would be eligible for parole.

"And I assure, if I have the opportunity to vote on this and a person has two life sentences, I'm going to vote for life...I'm a firm believer in a person who has a life sentence be incarcerated for at least 25 or 30 years.

"The Pardon and Parole Board says to us when we talk to them about particular individuals and oppose the granting of parole, 'Oh, He's been a model prisoner. Why he's even president of the local Jaycee chapter in our prison system,'" Adams said.

Lanier said he plans to send the 11-by-14 color photos of Mrs. Autry's slashed body to the Pardon and Paroles Board and is asking the community to back his efforts to see that Duck is never released from prison.

"He will be a model prisoner," Lanier said. "He'll do everything they ask him to," he added about Duck.

Roaming Roman Hears...

Good afternoon:

The regular monthly meeting of Armuchee Booster club will be at 7:30 p.m. today in the school library.

Darlington Boosters Club's meeting, previously scheduled for today, has been postponed until Monday, March 15.

All members of the Rome High class of 1952 are invited to attend a reunion meeting today at 7 p.m. in the board room of the Rome Area Chamber of Commerce.

The "Coping with Cancer" group will meet at Redmond Park Hospital in the second floor classroom today at 7:30 p.m. Clinical psychologist Dr. Steve Davis will speak.

The Rome Toastmaster's Club will meet at 7 a.m. Tuesday at Shoney's. For additional information call 235-0555.

The Childbirth Education Association of Rome will meet for the first of seven sessions Tuesday at 7:30 p.m. in the conference room at Floyd Medical Center. To register call 232-6081 or 232-1605.

The East Rome High School Gladiator Club will meet at 7 p.m. Tuesday in the school library. No board meeting meeting will be held.

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But, he said, in discussions with
ounty officials, "They're not sure
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olunteer department to organize in
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About the department's response
o fires, Tate said, "It's not a real
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ntil we can work something better
ut, it will have to do.

acher to be named

Rome News-Tribune **Area** / *Local News* / *Obituaries*

SUNDAY, FEB. 28, 1982

Duck penalty angers 11 jur

By NANETTE PAYNE, News-Tribune Staff Writer

Eleven angry jurors left the Floyd County Courthouse Friday afternoon after some 10 hours of deliberation which left them deadlocked on imposition of the death penalty on convicted murderer Ronald Anthony Duck.

They said they were angry, mainly, because the one individual who would not vote for death by electrocution gave no reason.

The prosecution had declined Duck's offer of a guilty plea some months back, thinking of the parole possibilities under a life sentence.

That prompted the state's notice it would seek the death sentence — which if never carried out would have assured that Duck would not be released.

The mistrial in the sentencing phase on Duck — convicted of killing Jane Townes Autry by inflicting 28 stab wounds, and found guilty of attacking her daughter, Shammah, who received eight knife wounds — has left Assistant District Attorney Steve Lanier "bitter."

The jury returned to the courtroom around 2:10 p.m. Friday, reporting it was hopelessly deadlocked on the sentence to be imposed and did not foresee reaching a unanimous decision.

11-to-one for death

Eleven of those jurors, the foreman later reported, favored the death penalty in what has been described by Lanier as one of the most vile acts ever seen in Floyd County.

Judge John A. Frazier Jr. sentenced Duck to 10 years imprisonment for the aggravated assault on Shammah Autry and a life sentence, as demanded by Georgia law, for the death of the girl's mother, Mrs. Autry.

He set life sentence to begin after the 10-year prison term, adding, "This court highly recommends against parole due to the circumstances and nature of the offense."

In setting sentence, Judge Frazier noted the law "demands" sentencing the defendant to life on the murder charge when the jury cannot reach a unanimous decision.

But for the life sentence, Judge Frazier emphasized, "for and during the balance of (Duck's) life to follow (the aggravated assault charge)."

Tears

As members of Duck's and relief that a death se Defense Attorney Larry hoping this would be the it is a fair and just one."

Barkley had tried to guilty on a previous oc insure the life sentence attorney's office declinec the death penalty.

Duck's court-appointec did not believe he would

However, Duck com courtroom that he was c case.

Hugging Barkley, Len

News-Tribune staff photo by Paul Efird

The paradox of fickle Mother Nature

The winter of 1982 continued its topsy turvey ways this weekend by sending an ice storm into North Georgia — right on the heels of a brief taste of spring. This sleet encrusted bloom tends to illustrate that paradox. Yet, while power outages temporarily hit some 1,500 area residences, the effects were not nearly so severe as those brought by January's storm.

Judge asked to d against Devier in r

By DAVID ROYAL, News-Tribune Sta

A motion asking dismissal of rape-murder charges against Darrell Gene Devier Sr. has been filed before Superior Court Judge Robert Royal, it was disclosed in open court Saturday.

The motion reportedly centers on information from at least one young witness who allegedly changed testimony after the time of the initial investigation.

Two students were on hand for the Saturday hearing, which was not held because of the absence of the key witness.

During trial testimony, the students provided descriptions of a vehicle they reportedly saw near the residence of the 12-year-old victim, Mary Frances Stoner, the date she disappeared.

Also "available" for the hearing were several investigators who initially probed the case and the Bartow County District Attorney, Floyd District Attorney Larry Salmon pointed out.

Judge Royal said the court will set a hearing date later to resolve the "very serious charges being made. At least one other hearing date had already been set and cancelled because the same witness was unavailable, he said.

James Everett Smith, Cartersville, the key witness in the latest motion was picked up in Bartow County and placed in Floyd County Jail later Saturday order, presumably to ensure his availabilit the weighty matter.

Prosecutorial misconduct?

The contents of the dismissal motion — not made available to the News-Tribune by Court's office — apparently claims new unearthed by defense attorneys indicates have been prosecutorial misconduct in the

The role of the two school children, who the trial, was not disclosed by court offici

In the trial, the youngsters testified Ha man in a Ford Pinto near the Stoner resid day the victim disappeared, after stepping County school bus.

New witness?

Harl Duffey Jr. said defense attorneys fi to dismiss charges based on information t from Smith.

Duffey said Smith was interviewed after he received a phone call Mon Cartersville attorney who said Smith had relating" to the case.

He said Attorney Harvey Brown subseq viewed the man.

Pape 'honored' to assume judgeship

Newly appointed Floyd County Juvenile Court Judge Timothy Pape said it is an honor to serve in the position, if for no other reason than because the Rome circuit's three superior local legislation in the General Assembly that will call for the election of Floyd's juvenile court judge with balloting to be scheduled for November.

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Tears of joy

As members of Duck's family shed tears of joy and relief that a death sentence was not imposed, Defense Attorney Larry Barkley said, "I was hoping this would be the decision...I strongly feel it is a fair and just one."

Barkley had tried to plea-bargain his client guilty on a previous occasion in an attempt to insure the life sentence. However, the district attorney's office declined the trade-off and sought the death penalty.

Duck's court-appointed defense attorney said he did not believe he would be appealing the case.

However, Duck commented as he left the courtroom that he was considering appealing the case.

Hugging Barkley, Lenora Duck, the convicted

See DUCK, page 8B

JANE TOWNES AUTRY

ed to drop charges
vier in rape-murder

y DAVID ROYAL, News-Tribune Staff Writer

ced in Floyd County Jail later Saturday under court
er, presumably to ensure his availability to resolve,
weighty matter.

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earthed by defense attorneys indicates there may
ve been prosecutorial misconduct in the case.
The role of the two school children, who testified in
trial, was not disclosed by court officials.
In the trial, the youngsters testified having seen a
n in a Ford Pinto near the Stoner residence on the
y the victim disappeared, after stepping off a Bartow
unty school bus.

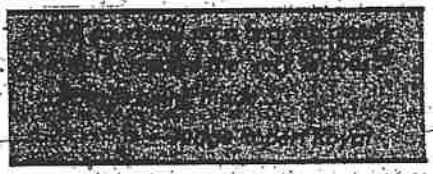
New witness?

Harl Duffey Jr. said defense attorneys filed a motion
dismiss charges based on information they received
om Smith.
Duffey said Smith was interviewed last Tuesday
ter he received a phone call Monday from a
rtersville attorney who said Smith had "information
lating" to the case.
He said Attorney Harvey Brown subsequently inter-
ewed the man.

The defense attorneys have filed a motion asking dismissal of charges against Devier "for prosecutorial overreaching and/or former jeopardy."

Judge Royal indicated the court will try to resolve the matter outside school hours for the convenience of the school children.

Judge Royal on Saturday afternoon informed both prosecution and defense attorneys that he had



authorized Floyd Sheriff Bill Hart to arrest and hold Smith when he was found.
[illegible] the sheriff that Smith did not know of the court hearing Saturday.

Defense attorney Brown, however, said he had telephoned the prospective witness at least twice to inform him of the weekend hearing.

★ ★ ★

Deputy testifies Devier told
of victim's cries for mother

Candidate Ryles levels charge at Johnnie Caldwell

Charging that incumbent Johnnie Caldwell has been "a little too cozy with some members of the insurance industry," Tim Ryles brought his campaign for state comptroller general to The News-Tribune Friday.

Caldwell has held the office since 1970, and Ryles — head of the state's Office of Consumer Affairs — alleged that "the people have been kept in the dark about the comptroller general's office for 11 years. I don't think there's been good stewardship in the office."

Ryles' claim that Caldwell has been "a little too cozy" centered around a banquet which raised more than $267,000 for Caldwell's campaign. "The amount is not all that important," Ryles said.

"The source (the insurance industry) is what's important. He (Caldwell) would prefer to be known as the insurance commissioner, evidently...I will be more supportive, I think, of competition in the insurance industry," Ryles said.

The challenger said his experience in the Office of Consumer Affairs provides "a natural transfer of interests and skills" to the post of comptroller general.

"I like dealing with issues that affect the common man," Ryles said. "I think the fire marshal function, particularly, deserves a lot more attention. Arson inspections haven't been what they should be," Ryles said.

News-Tribune staff photo

Street marker honors Jewell Frost

Jewell Frost at one time said she was the "loudest mouth out there in the bleachers" when it came to supporting Little Leagues and players. In 1959 a street was named in her honor near the baseball fields, but the street signs later disappeared. Recently, however, a brief ceremony was held to replace those signs, which stand at the entrance and exit of Riverview Park. Pictured, at rededication ceremonies, with Mrs. Frost is Horace Anthony, Recreation Authority member.

DUCK LIFE SENTENCE

Cont'd from page 1B

man's mother, said, "You saved his life."

Later, to her own mother, Mrs. Duck cried, "They didn't kill him, did they..."

Prosecutor 'bitter'

The outcome of the sentencing phase has left Lanier "very bitter" and especially so with respect to jurors.

"I compliment, wholeheartedly, the 11 people who stood firm (for death)," Lanier said late Friday.

"Their expression to me, through their tears, is they knew what they did was right, but on the other side, it concerns me more that the juror who held out gave no reason, did not try to reconciliate," Lanier said.

Lanier was at the Moultrie St. residence of Jane Autry around 2 a.m. on June 5, 1961, as police began gathering evidence from the bloody attack scene.

The district attorney's office has been under constant attack to push death penalty cases, Lanier said.

The prosecutor called the Autry slaying the "most graphic, heinous crime" presented to a Floyd County jury, "and one juror prevents us."

Shaking his head, Lanier lamented, but when 150 jurors of 300 summoned can get off duty — "for excuses ranging from being a business president to a flower show judge... what was left?"

One-hundred-fifty of 300 people got out of it and it took another 85 to get 15. We were left with what I thought were 12 strong jurors," Lanier said.

Tried to plea

Lanier pointed to five death penalty cases now pending in Floyd Superior Court, including we said 'No' simply because we knew he would be eligible for parole in seven years," Lanier said.

The 11 jurors who sought to impose the death penalty, Lanier said, expressed fears to him after the sentence was imposed that Duck would be released from prison at a future date.

Though glad to be going home after two weeks of seclusion, the jurors expressed anger at the inability to sway the 12th juror to their side.

"He wouldn't give a reason," the jury foreman said.

trial until Monday morning.

The recess was ordered around 3:30 p.m. to allow one juror to make a doctor's appointment and also because of concern about adverse weather conditions.

The testimony marked the conclusion of the second week in the Devier trial. Defense attorneys, who have been arguing law enforcement authorities entrapped the defendant, are expected to begin presenting their side sometime next week.

Prosecutors, during the later part of the week, had introduced into evidence physical articles gathered at the crime scene and other locations and including clothing items of both the victim and suspect.

Thus far, District Attorney

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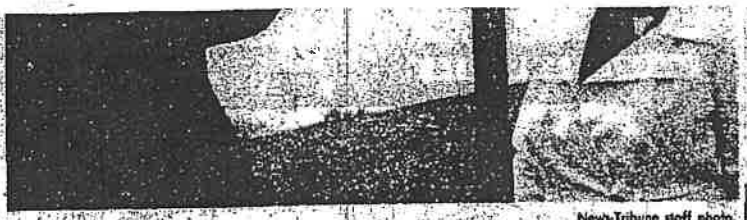

News-Tribune staff photo

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Tried to plea

Lanier pointed to five death penalty cases now pending in Floyd Superior Court, including murder-rape defendant Darrell Gene Devier.

About the plea of guilty Duck and his attorney offered in exchange for a life sentence, Lanier said, it appears "either way you go, you're damned if you don't and damned if."

Lanier said, "We wanted a sentence that would insure he would not get out of prison."

A bill put before the Georgia General Assembly, now in committee, would allow a new jury to be struck for the sentencing phase when the trial panel deadlocked.

And another bill, still pending, would have given jurors an option of issuing a life sentence without parole.

"But life without parole, when passed, won't be retroactive" to include such convicted killers as Duck.

"When he offered the plea we said 'No' simply because we knew he would be eligible for parole in seven years," Lanier said.

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APPENDIX F

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

JAMES RANDALL ROGERS,
Petitioner

v.

ERIC SELLERS, WARDEN
Respondent

2017-HC-1

COPY

TRANSCRIPT OF HABEAS CORPUS HEARING

HEARD BEFORE THE HONORABLE THOMAS H. WILSON
CHIEF JUDGE, SUPERIOR COURTS
TOWALIGA JUDICIAL CIRCUIT
BUTTS COUNTY COURTHOUSE
JACKSON, GEORGIA
JANUARY 4, 2018

APPEARANCES OF COUNSEL:

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Attorney at Law
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Atlanta, Georgia 30303

On Behalf of the Respondent:
Ms. Sabrina Graham
Sr. Assistant Attorney General
40 Capitol Square S.W.
Atlanta, Georgia 30334

****

TERESA MURNER, B-2352
OFFICIAL COURT REPORTER
TOWALIGA JUDICIAL CIRCUIT
P. O. BOX 258
SMARR, GEORGIA 31086
(478) 994-7658

P R O C E E D I N G S

(Whereupon, the following proceedings were held in open court beginning at approximately 1:05 p.m. on January 4, 2018.)

The Court: Are y'all ready to proceed?

Ms. Graham: Yes, Your Honor.

Mr. King: Yes, Your Honor.

The Court: If you will, again, tell me your names for the record everybody.

Mr. King: I am Gerald King, Your Honor, with the Federal Defender Program.

The Court: Okay.

Mr. Morrison: I'm Bill Morrison on behalf of Mr. Rogers.

The Court: Okay.

Ms. Graham: Sabrina Graham on behalf of the State.

The Court: We're here in the Superior Court of Butts County, State of Georgia, petitioner James Randall Rogers versus Eric Sellers, G.D.C.P. Warden, civil action 2017-HC-1. I'm reading my order back from October of last year. Did we want to address supposedly certain concerns of the petitioner about his counsel before we start?

Mr. King: I think we can take care of that pretty quickly, Your Honor. We spoke with Mr. Rogers. He is pleased with his counsel. As you know, he was unhappy

with us for seeking an extension of the time to file the merits brief because he is so anxious for this case to move forward. But we've talked about that extensively. He's happy with his representation and I think we're good to proceed.

The Court: Do you agree?

Petitioner: Yes, sir.

The Court: Okay.

Ms. Graham: I'm fine with that, Your Honor. Thank you.

The Court: You may proceed.

Mr. King: Well, Your Honor, if I may, I believe it's the Attorney General's show. We've got a motion from them to have a hearing on the procedural defenses that they've raised here. We are happy to respond as to why we think those procedural defenses don't apply, but as they are the moving party, I just assumed you would go first.

Ms. Graham: I'm fine with that, Your Honor.

The Court: Whichever way you want to do it.

Ms. Graham: Okay. That's fine, Your Honor. Actually, let's start off with the first procedural defense. Actually, it's not even a procedural defense. It's a successive petition bar. As we set out in our brief in response, this is petitioner's fourth state habeas. His trial occurred in 1985. In 1985, the prosecutor struck all

black potential jurors from the trial, from the jury pool. Petitioner did not raise a claim challenging those peremptory strikes at trial and direct appeal, in his first state habeas, the second state habeas, or his third state habeas. So, we're here on his fourth state habeas.

Pursuant to O.C.G.A. 9-14 or is it -- it's 9-14-5, it states that all claims that are reasonably available must be brought as part of the first petition. That's not an affirmative defense that the State is raising. That is the law which states they must bring it and if they do not and they do not show that it wasn't reasonably available during their first state habeas, then this court is barred from looking at that claim. That is state law. Like I said, it's not an affirmative defense.

So, petitioner has not shown that his -- he's essentially raised three claims which he's argued are all one claim and the warden agrees. They are all one claim. The claim is that the prosecutor had a glitch unwritten policy to strike all black potential jurors from capital cases. The cases that he relies upon are Strauder, Swain and Batson. At the time of the petitioner's trial in 1985, Batson had not been decided. However, it was decided while he was seeking cert in the U.S. Supreme Court, so it was in the pipeline. So, it would be retroactive. So, petitioner knew, at the time of his trial, that all the

black potential jurors were struck. The law at the time, Strauder and Swain, existed during trial. Batson came out while it was on appeal to the U.S. Supreme Court. So, the legal basis for his claim was there when he filed his first state habeas petition. It was certainly there when he filed his second state habeas petition and his third state habeas petition, but he did not raise that claim.

From what I understand from petitioner's argument, he's stating that the policy makes it a new claim so that he can bypass the successive petition bar. But the policy is just evidence in support of why the prosecutor struck the jurors in a discriminatory fashion. So, the legal basis for the claim is the striking, not the prosecutor's unwritten policy. That's just the prosecutor's thought process. That doesn't create a claim by itself, contrary to what petitioner has argued. Not until the prosecutor actually struck the jurors did he have a claim and once the prosecutor struck the jurors, then he had a claim. And he knew about that claim thirty-two years ago. So, he could've raised it thirty-two years ago or at least by his third state habeas petition. He's not explained why he did not raise that claim. All he has stated is that the policy somehow created a new claim, but there is no law to support that. The law is very clear. If you don't raise a Batson claim at trial, it is waived when you go up on

direct appeal and procedurally defaulted. He knew the evidence was there. The jurors were struck. All of them were struck. The claim was reasonably available during his first state habeas petition. So, under that scenario, the claim is barred under the successive petition bar.

If the Court does not find that it is barred under the successive petition bar, it is also procedurally defaulted. Under *Gibson versus Head*, a Supreme Court case from 2010, it states that even if it gets past the successive petition bar, then you also have to look at whether or not the claim is procedurally defaulted. So, the first issue there is did petitioner, not the State, not the warden -- we do not have to show cause and prejudice. It is up to petitioner to show cause and prejudice to overcome the procedural bar. Under cause, the Court has said that if a claim is not so novel that it wasn't being raised at the time, then you haven't shown cause. At the time of petitioner's trial -- let me go back and say that at the time of petitioner's trial, he was a white gentleman who was challenging the striking of a race not of his own. Georgia law, at that time, did not afford him a cause of action. There were several cases that had gone up at that time and they denied it. Then in 1991, the United States Supreme Court in *Powers versus Ohio* states that a defendant could raise a claim, a Fourteenth

Amendment claim, to the striking jurors of a different race. However, neither the Georgia Supreme Court nor the federal courts have held that case to be retroactive.

Petitioner alleges that there's a case from the 1970s that gave him a cause of action there, but it did not. Otherwise, *Powers versus Ohio* would be superfluous. Why would the Court have decided that? Why would the Georgia Supreme Court and the Eleventh Circuit all say it's not retroactive, if there are any existing cause of action for a defendant to raise a claim against someone of a different race?

So, as I said, this wasn't a novel claim in 1985 for a white juror to challenge the peremptory strikes of a race not of his own. Therefore, he hasn't shown cause to overcome the default. And if he had shown cause to overcome the default, he can't show prejudice because the cause of action, *Powers versus Ohio*, is not retroactive. So, he could never show that there's a reasonable probability of a different outcome at trial or on direct appeal because the law didn't exist at that time that affords him relief for that claim.

So, in essence, those are our two bars, successive petition bar and procedural default bar. We would ask that the Court dismiss his fourth state habeas for failure to bypass those bars.

The Court: Mr. King?

Mr. King: Your Honor, I think that lays out the disagreement between us pretty concisely. The policy, the disclosure of the policy, in late 2015 by Harold Chambers, who is a federal judge, who formerly worked as an assistant district attorney with Mr. Lanier, who was the district attorney for Floyd County, that is the basis of the claim, so much as the claim does not exist until that policy is disclosed. We're going to have to disagree a good bit, obviously, on what the Supreme Court precedent is.

The premise of the Attorney General's argument is that subsequent to Batson and Powers, no other claim is available to Mr. Rogers except a Batson or a Powers claim, and that's simply not the case. We're relying, as I think our briefs lay out, on precedent that goes back for more than a hundred years before Mr. Rogers was tried. There's a series of Supreme Court cases, all decided in 1880, in the wake of the adoption of the 1875 Civil Rights Act, which makes clear a constitutional precept, which the Supreme Court reaffirms again and again and again over literally a century of cases, which is that racial discrimination in jury selection is unconstitutional. The parties harmed are not merely a defendant of the same race as the excluded jurors, but the excluded jurors themselves

and the community at large. The excluded jurors are prevented from participating in the judicial system which they are entitled to do as citizens of the United States, and representative democracy, confidence in the justice system, are all undermined by this notion that when critical issues are being decided in the courts only white people will have a say. That's the thrust of this holding and it is reaffirmed again and again in a number of subsequent cases. What makes Mr. Rogers' situation unusual is that by the time he comes to trial, the Supreme Court believes, as it has said in Batson, that there is no state law on the books still that is systematically excluding African-Americans from participating in jury service. But in Floyd County, there is an informal policy. There's an informal law. There is a policy by the district attorney, who has the power to enforce that, in every capital trial that no African-American juror will be seated in a capital trial. So, they are incorrect in that assumption.

And we need to go back and talk about how the different pieces of this claim fit together, I think, to help understand where our difference of opinion is here. You go all the way back to these 1880 cases which establish this principles. You can't have racial discrimination in jury selection and there are a wide range of constitutional harms that result in doing it,

limited not just to the defendant. The next case of import -- again, there is a litany of cases, which I won't run through for you, in our briefing of how many times that principle is reaffirmed as the Court is again and again called to deal with the exclusion of African-Americans from jury service, in the grand juries, in the petit juries, every stage along the way, shifting methods of trying to exclude, systematically, African-Americans from jury service. The Court again and again affirms this principle and it again and again says the harms are not just limited to the defendant.

Fast-forward to the Swain, which is a 1965 case. This is the first time the Court takes up the question of peremptory challenges and whether peremptory challenges have to yield to this principle of no racial discrimination in jury selection. And they emphatically state, yes, they do have to yield to that principle. You cannot discriminate in jury selection with peremptory challenges. The exact language is, a state's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the equal protection laws. So, at that point, it is clear in 1965, you cannot use peremptory challenges to discriminate on the basis of race in seating jurors. That is now an edict by the Supreme Court. Now what the

Attorney General is talking about is Swain's trouble with the evidentiary burden that they were going to impose when a defendant had not presented evidence of systematic exclusion. They said what do we do when we have a case where it appears that peremptory challenges are being used to remove African-Americans, but we can't show systematic exclusion, either because there isn't a record of exclusion over many, many cases, or for example, that there isn't knowledge of a policy of such exclusion. They said in that case, you couldn't even pose the question. So, that's where we are post-Swain. You can't do this. But the evidentiary burden for showing that the district attorney might be doing it, is very, very high.

1972 we have the *Peters v Kiff* case, which the Attorney General mentioned. This is a white defendant from Georgia who says there is evidence of systematic exclusion of African-Americans in his grand and petit juries. The state's position -- the appellate court's position is, you are a white defendant. You have no standing to challenge the exclusion of African-Americans. Six justices of the court, in two separate opinions, conclude that is incorrect because of the wide range of constitutional harms that the exclusion of African-Americans cause, including to the jurors themselves, to the justice system, to the community at large. The race of the defendant, the

circumstances of the defendant does not deprive him of standing to raise a challenge of systematic exclusion. So, that's where we are.

As of 1972, we have these three pieces in place. You cannot use peremptory challenges to discriminate on the basis of race. Let me back up and do those in order again. We have these three things in place. First, racial discrimination in jury selection is unconstitutional. Second, you cannot use peremptory challenges to discriminate on the basis of race. Third, the race of the defendant is not a precondition to challenging systematic exclusion. So, when Mr. Rogers comes to trial in 1985, it is as clear as can be that a policy of excluding African-American jurors from serving is unconstitutional. And if the evidence had been available to Mr. Rogers at that time, to his counsel -- if that policy had been known, there's absolutely no way this trial proceeds with the jury comprised as it was. There's just no way.

Now what respondent is doing, by talking about Batson, is to suggest that the evidentiary test that Batson adopted in the wake of Swain is now the only avenue through which a challenge like this can be presented. That's not the case, but I'll explain why. By the time of Batson, the Court is looking back over the cases since Swain and saying, we set the bar too high. By requiring

this evidence of use of peremptory challenges over many cases, by requiring evidence of systematic exclusion, by saying you can't challenge the prosecutor's use of peremptory challenges in a specific case without some evidence of a larger pattern, we set the bar too high. So, we're going to have a test, a subtler test, that allows you to identify racial discrimination in a particular case and that's the Batson standard that we all know. And that's what they lay out. Now that is a perfectly fine test. If Mr. Rogers were being tried today, he would ace every stage of that test with the jury that was seated to try him in 1985.

Batson is also a very important case because it reaffirms these constitutional principles that we've been talking about, that racial discrimination in jury selection is unconstitutional. But what you can't say is that unless you can prove systematic racial discrimination -- unless you can prove the Batson standard -- unless Batson is available to you, you are ineligible for relief. You can't say that. Mr. Rogers was subjected to an older form, a less subtle form of discrimination, one that the court, by the time of Batson, thought no longer existed anywhere. And indeed, it should not have existed in Floyd County in 1985 because it had been clear -- I mean the most generous statement you could make is it had been

clear since 1972 that it was unconstitutional. Now, it might have been possible to believe in 1985 that a defendant could not prove racial discrimination in jury selection under Swain, but you could not conclude that the use of peremptory challenges to remove every African-American juror from Mr. Rogers' case was constitutional. You could not conclude that in 1985. And if that evidence had been available, the trial is over before it starts.

So, we say that this is not evidence that corroborates the State's use of peremptory challenges. This does not corroborate the statistical analysis that we provided to underscore the improbability to the point of impossibility that these strikes were made for other reasons. It is the claim -- the policy is the claim. And again, we have presented uncontroverted evidence from a federal judge who served in this office, that this policy existed. That's the claim. That evidence was certainly not available to Mr. Rogers in 1985 because it's a policy of the district attorney's office. So, now that that evidence has been disclosed, we are here presenting these violations that frankly feel like they're from another era. But here we are.

And we've addressed this, I think, pretty thoroughly in our briefs. We think we come over the successive petition bar because this is a new claim. This is new

evidence that was not previously available that also provides cause to overcome any procedural default. And we certainly believe that we can show prejudice because, again, with the revelation of this policy, this case simply doesn't go forward.

He's entitled to a new trial, as Mr. Foster was entitled to a new trial. And I do want to spend some time on this. This is the second case that we are dealing with from Floyd County District Attorney's Office in this era with Mr. Lanier. Exhibit 23 to our petition contains the district attorney's files in Mr. Foster's case, which shows the meticulous notations Mr. Lanier was making to make sure that every African-American prospective juror was identified and, as with Mr. Rogers, was removed. Now there are no such records in Mr. Rogers' district attorney files. There are no records at all about jury selection in Mr. Rogers' district attorney file. But we know now, again, from the affidavit testimony of Judge Chambers, that there was a policy. We're not going to have African-Americans on juries in capital cases. We know that policy was applied to Mr. Rogers' case. We know it was applied to Mr. Foster's. There was an opportunity to apply it to Mr. Wright's, but it was in place when Mr. Wright was tried.

This is a brand new claim and it's a very, very serious claim. I don't even think, honestly, the

procedural defenses should be raised to this claim. This is one of those times where this is such egregious unconstitutional misconduct that, yes, granting a new trial is a strong remedy to that misconduct, but it's necessary because they are literally violating precepts that were in place for a century before Mr. Rogers' trial.

So, I think we have enough to overcome the procedural defenses. I think we have enough to overcome the successive petition bar. I'm not going to bore you with a long recitation of my briefs. I've given enough long recitations, but I'm happy to answer any questions that you have.

The Court: What's y'alls position if I rule for the State in this, this fourth habeas is over with?

Ms. Graham: Yes, Your Honor.

The Court: If I rule in your favor, what's y'alls position?

Mr. King: It obviously depends on what you rule, but if you rule that these claims don't make it past the successive petition bar or are procedurally defaulted, then there are no -- these are the only claims that are in the petition.

Ms. Graham: We would certainly appeal that decision, Your Honor.

The Court: Really I need to stop here and rule

and then y'all tell me the way y'all are going.

Ms. Graham: The law states that Your Honor has to first determine whether or not he's overcome the successive petition bar before we get to the merits.

The Court: Okay. Do y'all need to submit anything else?

Ms. Graham: I would like to say a few words in response to Mr. King.

The Court: Okay.

Ms. Graham: Again, I will state, the policy is not a claim. The policy by itself is no more than the district attorney thinking to himself, I want to strike these jurors. Until he struck the jurors, petitioner has no claim. The claim does not give rise -- the policy, or the alleged unwritten policy, does not give rise to the claim. The test under the successive petition bar is whether or not the claim was reasonably available during the first petition. It was reasonably available when he struck the jurors, when the prosecutor struck all the black jurors. So, it was reasonably available first, second, or third state habeas petition.

From what I've heard from Mr. King, he has not argued anything to show that it was not reasonably available. He's simply trying to make it into a new claim so he can overcome the successive petition bar. That is a very

different thing. I also think that he is greatly misleading this Court about what the state of the law was. In 1991, the United States Supreme Court held for the first time that a white juror could challenge the peremptory strikes of a prosecutor of a different race. In 1986, when Mr. Rogers' case was tried on direct appeal, the Georgia Supreme Court stated in *Pope versus The State, 256 Georgia 195,* that, in that particular case, it was a white defendant and he was challenging the peremptory strikes of the prosecutor of African-American jurors. And the Court said you don't have a cause of action here. You do not have a due process violation. You do not have a Fourteenth Amendment equal protection claim here -- I'm sorry, not due process, equal protection. So, the Court, at that time in Georgia, said you do not have a claim. And if that were unconstitutional and, indeed, the U.S. Supreme Court had ruled otherwise, then they could not have said that in 1986. It was not until 1991 that the United States Supreme Court said that he had a right, under the Fourteenth Amendment to challenge the peremptory strikes of the prosecutor. That's what we're here for, the peremptory strikes. A policy, by itself, unwritten, not carried out, does not create a claim. We just want to be very clear about that, Your Honor.

Mr. King: Your Honor, may I respond briefly?

Batson is a test to determine whether a constitutional violation has occurred. It's a way of finding evidence of a constitutional violation when there isn't other overt evidence, such as a policy in a district attorney's office to remove every African-American juror. Batson is a test. You can swab for gunpowder residue. You don't need to swab for gunpowder residue if the guy has a smoking gun in his hand and tells you that he fired it. The gunpowder residue test will come back positive, just as a Batson test in this case, would've come back positive. But the unconstitutional conduct predates Batson by a hundred years.

I think we are extremely accurate on the state of the law. I think the inaccuracy in the presentation here is this notion that constitutional protections have contracted from 1880 to 1985, so that now only Batson and Powers remain. That's simply not the case. When Mr. Rogers was tried in 1985, Batson and Powers might've been unavailable to him as a test, but a Swain claim would've been available had this policy been disclosed to him. I'll add to -- and again, we've relied on it in our brief, but I don't understand the notion that a policy -- the district attorney's policy of striking African-American jurors, as the affidavit details, against the advice of some of his colleagues in his office, that that's

reasonably available to Mr. Rogers. I don't understand how the existence of that policy is reasonably available because of the use of the challenges, particularly given that at the time of this trial, the governing standard is Swain and there's no way to show the kind of systematic exclusion just from the use of strikes under Swain at that time.

So, we obviously have a disagreement that I think has been laid out in some detail in the briefs. I'm happy to answer any questions you have, but I did want to respond to that.

The Court: Anything else we need to do today?

Ms. Graham: No, Your Honor. We have a proposed order, if you would like that.

The Court: Have you got a proposed order?

Mr. King: I'm happy to draft one for Your Honor.

The Court: You can have one by tomorrow?

Mr. King: Sure.

The Court: I'll rule Monday. Give me the orders. If you will, get with Amy if you need to email yours and I'll rule by Monday. Y'all have a good day.

(Hearing concluded at 1:35 p.m. on January 4, 2018.)

CERTIFICATE OF REPORTER

STATE OF GEORGIA:

I, Teresa Murner, Official Certified Court Reporter, in and for the State of Georgia, Towaliga Judicial Circuit, do hereby certify that the foregoing transcript was taken down by me, as stated in the caption; that the foregoing pages 2 through 20, inclusive, represent a true, correct and complete transcript of the evidence given; that I am not a relative, employee, attorney, or counsel of any of the parties; nor am I financially interested in the outcome of the action.

This 30th day of January, 2018.

Teresa Murner

Teresa Murner, CCR, B-2352