No. 19-

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL NANCE,
Petitioner,

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Prison,
Respondent

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**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI**

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CAPITAL CASE

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**INDEX TO APPENDIX**


APPENDIX A United States Court of Appeals for the Eleventh Circuit, Panel Opinion (April 30, 2019) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

APPENDIX B United States District Court for the Northern District of Georgia, Order Denying Relief (August 7, 2018) . . . . . . . . . . . 21

APPENDIX C Order of the Georgia Supreme Court Reversing State Habeas Relief (June 17, 2013) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 59

APPENDIX D Superior Court of Butts County, Final Order Granting Sentencing Relief (September 6, 2012) . . . . . . . . . . . . . . . . . . . 80

APPENDIX E Direct Appeal Decision of the Georgia Supreme Court (Dec. 1, 2005) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 150

APPENDIX F United State Court of Appeals for the Eleventh Circuit, Rehearing Denial (July 11, 2019) . . . . . . . . . . . . . . . . . . . . . . . 156

APPENDIX G Extension of Time to File Petition for Writ of Certiorari . . . . 158

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 17-15361

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D.C. Docket No. 1:13-cv-04279-WBH

MICHAEL WADE NANCE,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent-Appellee.

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

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(April 30, 2019)

Before ED CARNES, Chief Judge, TJOFLAT, and WILLIAM PRYOR, Circuit Judges.

ED CARNES, Chief Judge:

Michael Wade Nance, a convicted murderer under sentence of death in Georgia, appeals the district court's denial of his 28 U.S.C. § 2254 petition. There

are two claims before us. One involves the use of a stun belt security device at his resentencing trial. The other is a sentence stage ineffective assistance claim involving mitigating circumstances, which is a type of claim common in federal habeas challenges to death sentences. What is uncommon about this claim is that the petitioner does not contend that his trial counsel were deficient in any way in uncovering mitigating circumstances. Nor could petitioner credibly do so, given the effort that went into that part of the defense by the time of the resentencing trial. Instead, the claim is one of those rare ones that concedes enough was done to discover mitigating circumstances and questions only the strategic decisions trial counsel made about which circumstances to present and how.

## I. FACTS AND PROCEDURAL HISTORY

The facts of this case have already been thoroughly set out by the Georgia Supreme Court in Nance v. State, 526 S.E.2d 560 (Ga. 2000), Nance v. State, 623 S.E.2d 470 (Ga. 2005), and Humphrey v. Nance, 744 S.E.2d 706 (Ga. 2013). There is no point in our repeating all, or even most, of those facts. It is enough to note here that Nance robbed a bank, and in the process threatened to kill some of the tellers. Nance, 526 S.E.2d at 563. They were not killed, but Gabor Balogh, an innocent driver who was backing his car out of a parking spot at a nearby store, was not as fortunate. Id. at 563–64. In order to steal Balogh's car Nance shot him to death as he was pleading "No, no." Id. at 564.

After a three-week trial in 1997, the jury returned a verdict finding Nance guilty of malice murder and five other crimes and sentenced him to death for the murder. Id. at 562 n.1. The trial court entered a judgment pronouncing him guilty of the crimes and imposing a death sentence. Id. On direct appeal, the Georgia Supreme Court affirmed Nance's convictions but reversed his death sentence "due to a prospective juror being improperly qualified to serve on the jury." Nance, 623 S.E.2d at 472. A new sentencing trial in 2002 resulted in a new death sentence, which the Georgia Supreme Court affirmed on direct appeal. Id.

Nance then filed a petition for collateral relief in the state trial court. That court granted him relief from the death sentence after concluding that Nance had received ineffective assistance of counsel at the resentencing trial. The State appealed, and in 2013 the Georgia Supreme Court reversed. Nance, 744 S.E.2d at 709. At the end of 2013, Nance filed a 28 U.S.C. § 2254 petition in federal district court. In 2017 the district court denied relief but granted a certificate of appealability on two of Nance's claims: "(1) his claim that his trial counsel [were] ineffective in presenting his case in mitigation and (2) his claim that the trial court erred in requiring [him] to wear a stun belt during the [resentencing] trial."

## II. DISCUSSION

The Georgia Supreme Court rejected Nance's ineffective assistance claim when it reversed the state trial court's grant of collateral relief, and it rejected his

stun belt claim when it affirmed the sentence on direct appeal from the resentencing trial. Nance, 744 S.E.2d at 720–31; Nance, 623 S.E.2d at 473. Because both rejections were on the merits, federal habeas relief is barred unless the rejection of one or both claims (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

It was meant to be, and is, difficult for a petitioner to prevail under that stringent standard. Harrington v. Richter, 562 U.S. 86, 102, 131 S. Ct. 770, 786 (2011); see also Burt v. Titlow, 571 U.S. 12, 19, 134 S. Ct. 10, 16 (2013) ("AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court."). Section 2254(d) reflects Congress' decision to restrict federal courts' authority to grant habeas relief to cases in which the state court's decision unquestionably conflicts with Supreme Court precedent. Harrington, 562 U.S. at 102, 131 S. Ct. at 786. To justify federal habeas relief, the state court's decision must be "so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." Burt, 571 U.S. at 19–20, 134 S. Ct. at 16 (quotation marks omitted). "[I]f some fairminded jurists could agree with the state court's decision, although others might disagree, federal

habeas relief must be denied." Meders v. Warden, 911 F.3d 1335, 1349 (11th Cir. 2019) (quoting Holsey v. Warden, 694 F.3d 1230, 1257 (11th Cir. 2012)) (quotation marks omitted).

A. The Ineffective Assistance of Counsel Claim

As we have mentioned, Nance does not contend that his trial counsel should have, or profitably could have, done more to investigate and discover mitigating circumstances evidence for use at his resentencing trial. And it is no wonder that he doesn't.

For the first trial, in addition to consulting with the attorneys who had represented Nance on the related federal bank robbery charges, and reviewing all of their files, Nance's two counsel hired multiple investigators and mitigation specialists to help them conduct their investigation. As part of their investigation, counsel traveled to Nance's hometown in Kansas to interview witnesses about his childhood, mental development, history of drug and alcohol abuse, and the abuse that he suffered at the hands of his adoptive father. They also consulted with two mental health professionals who evaluated Nance before his federal bank robbery trial, retained a toxicologist to calculate the concentration of tear gas in Nance's car after dye packs that had been hidden in the stolen currency exploded, interviewed at least four individuals with expertise in dye packs, subpoenaed information from the dye pack manufacturer, interviewed the state microanalyst

who tested Nance's clothing, inspected the physical evidence in the case, visited the crime scene, examined the material the State provided during discovery, and interviewed the State's experts. Not only that, but Nance's counsel also obtained the state's forensic report, emergency medical technician records, the murder victim's autopsy report, police records, records from federal agencies, prison records, marriage and divorce records, birth and death certificates, medical records, school records, and probation records, among other documents that might be relevant to Nance's case. It is as thorough an investigation into mitigating circumstances as we have ever seen.[1]

Then, in preparing for the resentencing trial, Nance's counsel reviewed their performance in the original trial. Once again, they hired multiple investigators and a mitigation specialist to help them conduct their investigation. One of them traveled to Nance's hometown in Kansas and spent several days interviewing mitigation witnesses. They met with the psychologist who had testified in mitigation at Nance's original trial and, after reviewing his testimony, they concluded that his testimony had not been helpful. Instead of using that psychologist again, with the help of the mitigation specialist, they retained an expert on prison adaptability who conducted neuropsychological and intellectual

[1] Given the excellent job that they did, Nance's two trial counsel deserve to be named here. They are Johnny R. Moore, a sole practitioner from Lawrenceville, Georgia, who is now retired, and Edwin J. Wilson, who is a sole practitioner from Snellville, Georgia.

testing on Nance, interviewed his mother and siblings, and reviewed his records. They believed that this expert's testimony about Nance's prison adaptability would be especially important to the jury because, in their experience, jurors deliberating between a life sentence or death "look into whether or not they think this person is going to be a danger to other prisoners and prison guards." In that vein, they also located several deputies to testify about Nance's good behavior in prison. Over several nights just before the resentencing trial, they met individually with all of the mitigation witnesses to prepare their testimony.

Faced with the impossibility of finding fault with the investigation trial counsel conducted, Nance's present attorneys have claimed that trial counsel were ineffective in how they *used or failed to use* all that they learned in their extensive investigation. More specifically, his present attorneys fault counsel for deciding not to present more of the mitigating circumstance evidence, especially more expert witnesses, than they did.[2]

[2] Nance also argues that his trial counsel were ineffective at the resentencing hearing for failing to adequately present evidence of remorse. The district court denied that claim because it was unexhausted and procedurally defaulted. Nance did not contend otherwise in the district court, and he did not contest the district court's ruling on that claim in his initial brief to this Court. It has been abandoned. See Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1353 (11th Cir. 2005) (explaining that a petitioner's failure to address a procedural bar in his initial brief forfeits any argument against it); Mills v. Singletary, 63 F.3d 999, 1008 n.11 (11th Cir. 1995) ("The law in this circuit is clear that arguments not presented in the district court will not be considered for the first time on appeal.").

It is especially difficult to succeed with an ineffective assistance claim questioning the strategic decisions of trial counsel who were informed of the available evidence. Even a dozen years before there was any AEDPA deference, the Supreme Court noted that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066 (1984); accord, e.g., Hinton v. Alabama, 571 U.S. 263, 274, 134 S. Ct. 1081, 1088 (2014) (per curiam); Knowles v. Mirzayance, 556 U.S. 111, 124, 129 S. Ct. 1411, 1420 (2009).

Decisions about which experts to call and which issues to press during trial are, without a doubt, strategic. See Hinton, 571 U.S. at 275, 134 S. Ct. at 1089 ("The selection of an expert witness is a paradigmatic example of the type of 'strategic choice' that, when made 'after thorough investigation of the law and facts,' is 'virtually unchallengeable.'") (alterations and citation omitted); Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) ("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess."); Raleigh v. Sec'y, Fla. Dep't of Corr., 827 F.3d 938, 956 (11th Cir. 2016) (same); see also Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 5 (2003) (per curiam) ("When counsel focuses on some

issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.").

In the post-AEDPA era, it is even more difficult to obtain federal habeas relief on a strategy-questioning ineffective assistance claim, or any type of ineffectiveness claim for that matter. Strickland mandated one layer of deference to the decisions of trial counsel. 466 U.S. at 689, 104 S. Ct. at 2065 ("Judicial scrutiny of counsel's performance must be highly deferential."); id. ("Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ."). When § 2254(d) was amended by AEDPA in 1996, that added another layer. See Harrington, 562 U.S. at 105, 131 S. Ct. at 788 ("The standards created by Strickland and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so.") (citations omitted). Given the double deference due, it is a "rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." Johnson v. Sec'y, DOC, 643 F.3d 907, 911 (11th Cir. 2011). And, for the reasons we have already discussed, it is rarer still for merit to be found in a claim that challenges a strategic decision of counsel.

This is not one of those rare, or "rarer still," cases. At the resentencing trial, Nance's counsel called no fewer than 23 mitigation witnesses, whose testimony

covered, among other things, his difficult family life; his adoptive father's alcoholism, aloofness, and occasionally abusive behavior; his long-term cognitive difficulties and low IQ; his history with drugs and alcohol, particularly the bad influence of his drug-using uncle; and Nance's adaptability to prison life, including both expert testimony that he was "very adaptable" and the testimony of seven sheriff's deputies that he had been a "model" inmate in jail while awaiting his resentencing trial. Nance, 744 S.E.2d at 718–19, 720–21. Writing for the Georgia Supreme Court, Justice Hunstein thoroughly and convincingly explained why the strategic decisions that Nance's counsel made regarding the resentencing trial did not fall outside the "wide range of reasonable professional assistance" that the Sixth Amendment requires. Harrington, 562 U.S. at 104, 131 S. Ct. at 787 (quotation marks omitted). Her opinion sets out in detail the evidence that trial counsel elicited on Nance's intellectual impairments and the effect of the dye packs, and it explains why their decision not to call an expert about Nance's possible brain damage was reasonable under the circumstances. Nance, 744 S.E.2d at 720–29. It also explains why, even if counsel's performance was somehow deficient, it did not prejudice Nance. Id. at 722–23, 728, 729–31. Having reviewed Justice Hunstein's thoughtful opinion, we cannot say that it was objectively "unreasonable," Schriro v. Landrigan, 550 U.S. 465, 473, 127 S. Ct.

1933, 1939 (2007), or that every fairminded jurist would disagree with it, Harrington, 562 U.S. at 101, 131 S. Ct. at 786. Far from it.

B. The Stun Belt Claim

Nance also claims that the state trial court violated his constitutional rights by requiring him to wear a stun belt under his clothes during the resentencing trial without holding a new evidentiary hearing to determine whether the restraint was necessary, and that the Georgia Supreme Court's holding to the contrary conflicts with clearly established federal law set out by the United States Supreme Court. It did not; and it does not.

A state court's decision cannot be contrary to, or involve an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), unless there is a Supreme Court decision on point. And there is none on this point. The Supreme Court has never addressed whether and under what circumstances a trial court may require a defendant to wear a stun belt. Although a petitioner need not have a Supreme Court precedent with identical facts to succeed, see Panetti v. Quarterman, 551 U.S. 930, 953, 127 S. Ct. 2842, 2858 (2007), he does have to have one that is close enough to clearly establish the law that he claims the state courts unreasonably applied. The decisions Nance cites are not close; they are materially distinguishable. They do not clearly establish the law that his claim needs. See White v. Woodall, 572 U.S.

415, 427, 134 S. Ct. 1697, 1706–07 (2014) ("[R]elief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question.") (quotation marks omitted).

The first three decisions that Nance relies on all involve visible security restraints and the unique constitutional problems they present — namely, the impact that they have on the jury's perception of the defendant and the public's perception of the judicial process. In Deck v. Missouri, 544 U.S. 622, 630–33, 125 S. Ct. 2007, 2013–14 (2005), the Court held that one reason state trial courts could not routinely shackle defendants during trial is that it would undermine the defendant's presumption of innocence in the eyes of the jury, make the defendant appear dangerous to the jury, and threaten the dignity of the judicial process and the public's trust in it. In Holbrook v. Flynn, 475 U.S. 560, 569, 106 S. Ct. 1340, 1346 (1986), the Court held that it was not presumptively unconstitutional to seat additional uniformed officers in the front row of the courtroom because their presence would not necessarily impact the jurors' impression of the defendant. The Court reasoned that because jurors "may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence," the officers "need not be interpreted as a sign that [the defendant] is particularly dangerous or

culpable." Id. And in Illinois v. Allen, 397 U.S. 337, 343–44, 90 S. Ct. 1057, 1060–61 (1970), the Court held that a disorderly defendant could be removed from the courtroom and added in dicta that doing so was preferable to binding and gagging him because "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant" and "be something of an affront to the very dignity and decorum of judicial proceedings."

The visibility of the security measure at issue was central to the reasoning of all three of those decisions, and the Court limited its holdings accordingly. See Deck, 544 U.S. at 624, 125 S. Ct. at 2009 ("We hold that the Constitution forbids the use of visible shackles during the penalty [and guilt] phase . . . unless that use is justified by an essential state interest . . . specific to the defendant on trial.") (quotation marks omitted, first emphasis added); id. at 629, 125 S. Ct. at 2012 ("[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination . . . that they are justified by a state interest specific to a particular trial.") (emphasis added); id. at 632, 125 S. Ct. at 2014 ("[G]iven their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case.") (emphasis added); id. at 633, 125 S. Ct. at 2014 ("[C]ourts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.") (emphasis added); see also

Holbrook, 475 U.S. at 568–69, 106 S. Ct. at 1345–46 ("The first issue to be considered here is thus whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial . . . should be permitted only where justified by an essential state interest specific to each trial.") (emphasis added); id. at 569, 106 S. Ct. at 1346 ("[R]eason, principle, and common human experience counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial.") (citations and quotation marks omitted, emphasis added); id. at 572, 106 S. Ct. at 1347 (explaining that federal courts can only "look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial") (emphasis added). And in Allen the Court explained that "the sight of shackles and gags" might affect the jury to the detriment of the defendant as well as be an affront to the dignity and decorum of the trial. 397 U.S. at 344, 90 S. Ct. at 1061 (emphasis added).

The Georgia Supreme Court concluded that Nance's stun belt was not visible to the jury or the public because it was worn under his clothes. See Nance, 623 S.E.2d at 473 ("Unlike shackles, [the stun belt] is worn under the prisoner's clothes and is not visible to the jury."). And Nance has not pointed to any

evidence to show that finding was "an unreasonable determination of the facts in light of the evidence," 28 U.S.C. § 2254(d)(2).[3]

The holdings in Deck and Holbrook, as well as the dicta in Allen, are not applicable to security devices or measures that are not visible. And a federal habeas court's focus is on Supreme Court holdings, not potential extensions of them. See Woodall, 572 U.S. at 426, 134 S. Ct. at 1706 ("Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error."); id. at 419, 134 S.Ct. at 1701 ("Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions.") (quotation marks and alteration omitted); see also Carey v. Musladin, 549 U.S. 70, 76–77, 127 S. Ct. 649, 653–54 (2006) (holding that a state court did not unreasonably apply clearly established federal law because the Court had not yet extended its existing precedent to the conduct at issue in the petitioner's case). At the very least,

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[3] In the final paragraph of his brief to this Court, Nance does argue that the Georgia Supreme Court's rejection of his stun belt claim was based on an unreasonable determination of the facts. But he makes no assertion that the stun belt was visible. Instead, he argues that a factual error marred the reasoning that led the Georgia Supreme Court to affirm the denial of another evidentiary hearing on whether he should be required to wear a stun belt. The Georgia Supreme Court stated that "the only change in circumstance since the 1996 hearing offered by Nance was the passage of time and this was obvious to the trial court without the need for a second hearing." Nance, 623 S.E.2d at 473. Far from being unreasonable, this determination was accurate; Nance never identified, much less proved, any substantial change in circumstances in support of his request for a new hearing.

fairminded jurists could disagree about whether the holdings of the three decisions that Nance primarily relies on clearly establish that it was constitutional error for the state trial court to require Nance to wear a stun belt that was not visible to the jury.

The other Supreme Court decision that Nance points to is Riggins v. Nevada, 504 U.S. 127, 112 S. Ct. 1810 (1992). The holding of that decision is irrelevant to Nance's case. In Riggins the Supreme Court held that a state trial court could force a mentally ill inmate to continue taking prescribed antipsychotic drugs during the course of his trial if there was an overriding justification and the drugs were medically appropriate. Id. at 134–35, 112 S. Ct. at 1815. The Court did not address security restraints and did not purport to establish a broader rule about court practices that might otherwise interfere with an inmate's ability to participate in the trial. Indeed, the Court noted that its decision was limited to the facts in the record of that case. Id. at 133, 112 S. Ct. at 1814 ("The record in this case narrowly defines the issues before us.").

Finally, Nance cites this Court's own decision in United States v. Durham, 287 F.3d 1297, 1306 (11th Cir. 2002), where we held that the "decision to use a stun belt must be subjected to at least the same close judicial scrutiny required for the imposition of other physical restraints." (Quotation marks omitted.) Unlike the Supreme Court decisions Nance relies on, our Durham decision actually does

involve stun belts. If Nance were a federal prisoner, § 2254(d)(1) would not apply and Durham might require us to vacate his sentence. But he is not a federal prisoner and § 2254(d)(1) does apply. As a result, the "clearly established Federal law" is limited to that which has been "determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court has implied that it is getting a little tired of reiterating that directive "time and again." See Lopez v. Smith, 574 U.S. ___, 135 S. Ct. 1, 2 (2014) (per curiam) ("We have emphasized, time and again, that [AEDPA] prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is 'clearly established.'") (citations omitted); Parker v. Matthews, 567 U.S. 37, 48–49, 132 S. Ct. 2148, 2155 (2012) (per curiam) ("[C]ircuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.' It therefore cannot form the basis for habeas relief under AEDPA.") (citation omitted); Glebe v. Frost, 574 U.S. ___, 135 S. Ct. 429, 431 (2014) (per curiam) (same); Renico v. Lett, 559 U.S. 766, 778–79, 130 S. Ct. 1855, 1865–66 (2010) (same); Putnam v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001) (same); see also, e.g, Allen v. Sec'y, Fla. Dep't of Corr., 611 F.3d 740, 764 n.14 (11th Cir. 2010) ("A federal court of appeals decision, even one with a holding directly on point, does not clearly establish federal law for § 2254(d)(1) purposes.").

Nance argues that we should sidestep this non-side-steppable rule by holding that Durham is enough because it "demonstrate[s]" the law that the Supreme Court has clearly established. Under Nance's "reasoning," every circuit court decision on any point would demonstrate the law the Supreme Court has clearly established on that point, even if the Supreme Court did not yet know it. And § 2254(d)(1) would be effectively rewritten to insert before the semicolon the words "or by any federal court of appeals." And we would need to overrule every one of those decisions in which the Supreme Court has told us "time and again" that the decisions of federal courts of appeals do not clearly establish federal law for § 2254(d)(1) purposes. All of that is beyond our authority. So we will follow the Supreme Court's instruction that circuit precedent may not be used "to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme Court] has not announced." Marshall v. Rogers, 569 U.S. 58, 64, 133 S. Ct. 1446, 1450 (2013).

The Supreme Court — the only Court that can clearly establish federal law for purposes of habeas review — has not yet decided whether the use of stun belts (or materially similar restraints) is constrained by the Constitution, nor has it established a standard for evaluating such claims. For that reason, the Georgia Supreme Court's decision on this issue is not "contrary to" and does not involve

"an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1).

**AFFIRMED.**

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

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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April 30, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-15361-P
Case Style: Michael Wade Nance v. Warden
District Court Docket No: 1:13-cv-04279-WBH

**This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.** Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call David L. Thomas at (404) 335-6171.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

| | | |
|---|---|---|
| MICHAEL WADE NANCE, | : | |
| Petitioner, | : | CIVIL ACTION NO. |
| | : | 1:13-CV-4279-WBH |
| v. | : | |
| | : | DEATH PENALTY |
| WARDEN OF THE GEORGIA | : | HABEAS CORPUS |
| DIAGNOSTIC PRISON | : | 28 U.S.C. § 2254 |
| Respondent. | : | |

# ORDER

Petitioner, a prisoner currently under a sentence of death by the State of Georgia, has pending before this Court his petition for a writ habeas corpus pursuant to 28 U.S.C. § 2254. The parties have completed their final briefs and the matter is now ready for final consideration by this Court.

## I. Background and Factual Summary

After his trial in Gwinnett County Superior Court, a jury convicted Petitioner of malice murder, felony murder, aggravated assault, theft by taking, criminal attempt to commit armed robbery, and possession of a firearm during the commission of a felony on September 26, 1997. After a sentencing hearing, the jury sentenced Petitioner to death. The Georgia Supreme Court affirmed Petitioner's convictions but vacated his sentence based on the court's conclusion that one of the jurors should have

AO 72A
(Rev.8/82)

been removed for cause based on her pro-death penalty beliefs. Nance v. State, 526 S.E.2d 560 (Ga. 2000). After an interlocutory appeal affirming the trial court's ruling that another penalty trial would not violate Petitioner's double jeopardy rights, Nance v. State, 553 S.E.2d 794 (Ga. 2001),[1] the trial court held a second penalty trial which again resulted in a death sentence, and the Georgia Supreme Court affirmed. Nance v. State, 623 S.E.2d 470 (Ga. 2005).

After the United States Supreme Court denied Petitioner's writ of certiorari, Nance v. Georgia, 549 U.S. 868 (2006), Petitioner filed a petition for writ of habeas corpus in the Butts County Superior Court, which court granted the writ as to Petitioner's sentence based on its conclusion that Petitioner's trial counsel had been ineffective in presenting mitigating evidence during the second penalty trial. The Georgia Supreme Court reversed and reinstated Petitioner's death sentence. Humphrey v. Nance, 744 S.E.2d 706, 709 (Ga. 2013). This action followed.

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[1] There was also an interlocutory appeal before the first trial, Nance v. State, 471 S.E.2d 216 (Ga. 1996). As is discussed below, the murder occurred in connection with a bank robbery, and that robbery was tried in federal court. This first interlocutory appeal (in which the state prevailed) concerned the question of whether the federal court's use of the killings in convicting and sentencing Petitioner in relation to the bank robbery charges prevented the state from trying him for the murders under the Double Jeopardy Clause.



AO 72A
(Rev.8/82)

The Georgia Supreme Court provided the following factual summary of Petitioner's crimes:[2]

> The evidence adduced at trial shows that [Petitioner] stole a 1980 Oldsmobile Omega and drove to the Tucker Federal Savings & Loan on December 18, 1993. He entered the bank wearing a ski mask and gloves and carrying a .22 caliber revolver. While ordering the tellers to put money into two pillowcases he had brought with him, he said "no dye money or I'll kill you" and "I'm going to come back and kill you all if the dye thing goes off." Despite [Petitioner]'s threats, the tellers managed to slip two dye packets in with the money. [Petitioner] exited the bank and got into the Oldsmobile where the dye packets activated, emitting red dye and tear gas. [Petitioner] abandoned the Oldsmobile holding the gun in his right hand covered by a plastic trash bag. His ski mask and the dye-stained bags of money were left in the car.
>
> [Petitioner] ran to a liquor store parking lot. Dan McNeal had just made a purchase at the liquor store and was standing in the parking lot. Gabor Balogh had just left the liquor store and was backing his car out of a parking space. Balogh was only halfway out of the parking space when [Petitioner] ran around the front of Balogh's car, yanked open the front driver's-side door, and thrust his right arm into the car. McNeal saw Balogh leaning away from [Petitioner] with his hands on the steering wheel. He heard Balogh screaming and saying "No, no." [Petitioner] shot Balogh in the left elbow and the bullet entered his chest. The medical examiner testified that the bullet moved downward through Balogh's body, passing between the upper and lower lobes of his left lung and lacerating his heart before stopping in his liver.
>
> [Petitioner] then pointed the gun at McNeal and said, "Give me your keys." McNeal ran around the side of the liquor store and [Petitioner] fired another shot. McNeal was not hit. [Petitioner] apparently ran

[2] This factual summary is from Petitioner's second appeal when the Georgia Supreme Court vacated his sentence. In the third appeal, the court used a different summary that is shorter but not as clear.



AO 72A
(Rev.8/82)

> around the other side of the store because the two men encountered each other behind the store. McNeal turned and ran back around the store to the parking lot. He went to Balogh's car and saw Balogh slumped over and gasping for breath. Balogh died before the ambulance arrived.
>
> [Petitioner] ran to a nearby gas station where he held the gun to his head during a one-hour standoff with police. He told the police, "If anyone rushes me, there's going to be war." The police convinced him to surrender. [Petitioner]'s gloves and shirt were stained with the same red dye used in the dye packets. A firearms expert testified that [Petitioner]'s gun, which contained two spent shells, was probably the same gun used to kill Balogh. [Petitioner] confessed to the bank robbery, but said that he had only fired once up in the air to scare Balogh because Balogh was trying to run him over with his car. To show [Petitioner]'s intent and bent of mind, the State presented evidence that [Petitioner] robbed another bank in the same county in September 1993 and issued a similar threat to the teller. In the penalty phase, the State presented evidence that [Petitioner] committed an armed robbery in Kansas in 1984.
>
> The evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt proof of [Petitioner]'s guilt of malice murder, felony murder, aggravated assault, theft by taking, criminal attempt to commit armed robbery, and possession of a firearm during the commission of a felony.

Nance v. State, 526 S.E.2d 560, 563-64 (Ga. 2000) (citation omitted).

## II. Petitioner's Final Brief

In the order of April 26, 2016, [Doc. 38], this Court directed that Petitioner, in his final brief, "must raise all claims, issues, and arguments he wishes the Court to consider. If a matter is not in the final brief, this Court will not consider it." [Id. at 5-6]. In his final brief, Petitioner has not mentioned many of the claims that he raised



AO 72A
(Rev.8/82)

in his amended petition. Accordingly, those claims not discussed in the final brief are deemed abandoned.

Also in the April 26, 2016, order, this Court further directed that Petitioner must change the manner in which he numbered his claims so that those claims are more amenable to review and discussion. Petitioner has chosen, however, not to number his claims in any manner. As such, in the discussion below, this Court will adopt its own numbering system.

## III. Standard of Review

Pursuant to 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus in behalf of a person held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). This power is limited, however, because a restriction applies to claims that have been "adjudicated on the merits in State court proceedings." § 2254(d). Under § 2254(d), a habeas corpus application "shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim":

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



AO 72A
(Rev.8/82)

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

This standard is "difficult to meet," Harrington v. Richter, 562 U.S. 86, 102 (2011), and "highly deferential" demanding "that state-court decisions be given the benefit of the doubt," Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (citation and internal quotation marks omitted), and requiring the petitioner to carry the burden of proof. Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) (citing Visciotti, 537 U.S. at 25. In Pinholster, the Supreme Court further held,

> that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court.

Id.; see also Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003) (State court decisions are measured against Supreme Court precedent at "the time the state court [rendered] its decision.").

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). To determine whether a particular state court decision is "contrary to" then-established law, this Court considers whether that decision "applies a rule that contradicts [such] law" and how the decision "confronts

[the] set of facts" that were before the state court. Id. at 405, 406 (2000). If the state court decision "identifies the correct governing legal principle" this Court determines whether the decision "unreasonably applies that principle to the facts of the prisoner's case." Id., at 413. This reasonableness determination is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. Id. at 410. In other words, it matters not that the state court's application of clearly established federal law was incorrect, so long as that misapplication was objectively reasonable. Id. ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). Habeas relief is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 102 (2011) (internal quotation marks omitted); see Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1294 (11th Cir. 2015). In order to obtain habeas corpus relief in federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103.

This Court's review of Petitioner's claims is further limited under § 2254(e)(1) by a presumption of correctness that applies to the factual findings made by state trial



AO 72A
(Rev.8/82)

and appellate courts. Petitioner may rebut this presumption only by presenting clear and convincing evidence to the contrary.

## IV. Discussion of Petitioner's Claims for Relief

### A. Claim That Trial Counsel Was Ineffective in Presenting Petitioner's Case in Mitigation at the Resentencing Trial

In his Claim One, Petitioner argues that his trial counsel was constitutionally ineffective in presenting mitigation evidence relating to Petitioner's mental impairments and the fact that those impairments would have been exacerbated by his exposure to tear gas contained in the dye packs that exploded in his car. According to Petitioner, his trial counsel failed to present sufficient expert evidence regarding Petitioner's brain damage and borderline mental retardation. Without this evidence, Petitioner claims that the jury did not understand the significance of Petitioner's traumatic upbringing, developmental delays, head injuries, and substance abuse. Petitioner further claims that trial counsel failed to properly frame Petitioner's mental deficits and place them in context in relation to the circumstances of the crime and the fact that Petitioner was exposed to tear gas just before he shot and killed Gabor Balogh. Petitioner contends that if the jury had better understood Petitioner's mental



AO 72A
(Rev.8/82)

deficits and how Petitioner's condition made him react to being exposed to tear gas, they would not have opted for the death penalty.

To be clear, Petitioner does not contend that trial counsel's investigation into Petitioner's mental dysfunction was inadequate. Rather, he admits that counsel was aware of Petitioner's mental condition, but claims that counsel's strategic decisions in how to present this evidence were flawed. [Doc. 43 at 57].

1. Legal Standard

The standard for evaluating claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). See Smith v. Robbins, 528 U.S. 259, 285 (2000) (applying Strickland standard to claims of ineffective assistance of appellate counsel). The analysis is two-pronged, and the court may "dispose of the ineffectiveness claim on either of its two grounds." Atkins v. Singletary, 965 F.2d 952, 959 (11th Cir. 1992); see Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffectiveness claim . . . to address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

Petitioner must first show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The court must be "highly deferential," and must "indulge in a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance." Id. at 689. Furthermore, "[s]trategic decisions will amount to ineffective assistance only if so patently unreasonable that no competent attorney would have chosen them." Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir. 1987).

In order to meet the second prong of the test, Petitioner must further demonstrate that counsel's unreasonable acts or omissions prejudiced him. Strickland, 466 U.S. at 694. That is, Petitioner "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

2. Background and Discussion

To fully understand the analysis of this claim, some background is necessary: As discussed above, Petitioner was tried and convicted in federal court for bank robbery before his state court murder conviction. In preparation for the sentencing hearing in this Court, his trial counsel and their investigators "conducted an extensive mitigation investigation, including having [Petitioner] evaluated by two experts, psychiatrist Barry Scanlon, M.D., and psychologist Robert Shaffer, Ph.D. [Before his first state trial, Petitioner]'s attorneys at the Federal Defender met with his state court attorneys and provided them with all extensive [sic] records pertaining to the



AO 72A
(Rev.8/82)

Defender's investigation of Mr. Nance's mental health and social history." [Doc. 43 at 31]. Trial counsel in Petitioner's state court murder trial received Petitioner's mental health records from the federal court case counsel and also had further mental health evaluations performed. During the guilt phase of Petitioner's first state trial, the evidence against Petitioner was overwhelming, and Petitioner's trial counsel focused on presenting evidence that Petitioner did not intend to kill the victim, knowing that such evidence would not disprove Petitioner's criminal intent to shoot the victim but hoping that the jury would consider the evidence mitigating during the sentencing phase.

After Petitioner was adjudged guilty, his trial counsel at the first sentencing phase built on the guilt phase strategy by presenting testimony regarding Petitioner's troubled childhood, verbal and physical abuse by his alcoholic adoptive father, Petitioner's drug and alcohol abuse that began at an early age, and his mental impairments. In addition to Petitioner's family members, trial counsel used expert testimony from psychologist Dr. Robert Shaffer. Trial counsel also presented testimony to support their argument that, because of his mental impairments, Petitioner was likely to become more confused, agitated, and panicky than normal as a result of the dye pack detonations and tear gas exposure. The jury nonetheless opted to sentence Petitioner to death.



AO 72A
(Rev.8/82)

At the resentencing trial, trial counsel[3] decided to shift their focus somewhat. They still presented evidence regarding Petitioner's mental impairments and troubled upbringing, but they also presented substantial evidence regarding Petitioner's adaptation to the prison environment, including the testimony of Dr. Daniel Grant, a psychologist and expert in prison adaptation, along with several jail officials who testified to Petitioner's good behavior in jail. Trial counsel sought to show the jury that Petitioner would not be a danger to other prisoners and to prison staff if he were given a life sentence. Dr. Shaffer, who testified at the first trial did not testify at the resentencing trial.

Petitioner raised this claim of ineffective assistance in his state habeas corpus petition, and, as noted above, the Butts County Superior Court agreed that trial counsel had been ineffective and vacated Petitioner's sentence. The Butts County court found that

> Although counsel presented numerous lay witnesses to testify regarding Petitioner's difficult family life, substance abuse, and learning disabilities, no witness testified to Petitioner's neurological deficits and borderline mental retardation. Furthermore, the lay witness testimony

[3] Petitioner had the same two-lawyer team for the first trial and the resentencing trial. However, the lawyers switched positions for resentencing, and the lawyer that focused on the guilt phase in the first trial, handled the resentencing trial.



AO 72A
(Rev.8/82)

was presented without explanatory interpretation by a mental health expert.

[Doc. 23-51 at 51-52].

The Georgia Supreme Court, however, reversed and reinstated Petitioner's death sentence. Humphrey, 744 S.E.2d at 709 (Ga. 2013). In reversing the state habeas corpus court in an extensive and well-reasoned discussion, the Georgia Supreme Court first identified the proper standard for evaluating a claim of ineffective assistance under Strickland, Humphrey, 744 S.E.2d at 710, before concluding, generally, that trial counsel's decisions regarding what evidence to present were reasonable strategic decisions for which counsel could not be faulted. The state court further concluded that even if trial counsel had been ineffective, Petitioner suffered no prejudice because the evidence that Petitioner now claims that they should have presented would not have changed the outcome of the resentencing trial. Having carefully reviewed the Georgia Supreme Court's opinion in light of Petitioner's arguments, this Court concludes that the state court's decision was not "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," nor did it result "in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Petitioner is thus not entitled to relief with respect to his first claim of ineffective assistance.



AO 72A
(Rev.8/8
2)

a. Petitioner's Arguments that the Georgia Supreme Court Erred in Determining that Trial Counsel was not Ineffective

In contending that the Georgia Supreme Court's ruling that Petitioner's counsel was not ineffective is not entitled to deference under § 2254(d), Petitioner first states that

> [i]n Georgia, the failure to present available evidence of the defendant's psychiatric treatment history or mental health problems, especially when counsel is aware of such information, or to make that a part of what an expert shares with the jury about a defendant's mental health status, falls below prevailing professional norms for capital representation.

[Doc. 43 at 107].

This Court first points out that a blanket constitutional requirement to use all available mental health evidence during the sentencing phase of a death penalty trial does not exist. Instead, the "principal concern . . . is not whether counsel should have presented a mitigation case, [but] whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the Petitioner]'s background was itself reasonable." Wiggins v. Smith, 539 U.S. 510, 522-23 (2003). As with all types of evidence that may be available, trial counsel must evaluate mental health evidence and determine whether it helps the defendant's cause and whether using it is consistent with trial strategy. For example, trial counsel in preparing a mitigation case will





AO 72A
(Rev.8/82)

typically avoid presenting evidence of a diagnosis that their client has psychopathic tendencies.

Moreover, the three cases that Petitioner cites in support of his contention do not voice such a requirement and are clearly distinguishable. In Turpin v. Lipham, 510 S.E.2d 32, 40-41 (Ga. 1998) and Martin v. Barrett, 619 S.E.2d 656 (Ga. 2005), trial counsel failed to have the defendant's mental health records evaluated by an expert. In Head v. Thomason, 578 S.E.2d 426, 429-30 (Ga. 2003), trial counsel promised to give a mental health expert the defendant's school, medical, and institutional records as well as information about the crime for a forensic evaluation but never followed through. Also in Thomason, trial counsel gave up on using expert mental testimony when his request for funding was denied by the trial court after trial counsel did not present the motion properly, despite the facts that the expert was willing to testify for much less and that trial counsel knew that the expert could give favorable mitigation testimony. Here, there is no question that trial counsel's investigation into Petitioner's mental status met constitutional requirements, and Petitioner merely attempts to fault his trial counsel for failing to present all the evidence they could have.

In further attempting to show that this Court should not defer to the Georgia Supreme Court's conclusion, Petitioner next argues that

> In concluding that trial counsel performed reasonably by omitting the critical mitigating evidence that Dr. Shaffer could have provided the jury,



AO 72A
(Rev.8/82)

> the Georgia Supreme Court relies in part on the notion that state expert [Dr.] Theresa Sapp could have been called to rebut it. However, the Court mischaracterizes her testimony as being at odds with Dr. Shaffer's, when in fact they are largely consistent.
>
> . . . . Despite the general agreement regarding [Petitioner]'s brain damage, borderline intellectual functioning, and substance dependency, the Georgia Supreme Court concluded that trial counsel reasonably opted not to present Dr. Shaffer's testimony to avoid possible testimony from Dr. Sapp even though trial counsel never testified to such reasoning. This unreasonable finding unreasonably misrepresents the lower court's fact findings and fails as a reasonable justification for counsel's failure to present readily available and highly mitigating evidence to his 2002 sentencing jury.

[Doc. 43 at 108-09].

This argument is plainly misleading. The discussion in the Georgia Supreme Court's opinion that Petitioner refers to does not discuss why it was reasonable for trial counsel not to call Dr. Shaffer. Rather, the court explains why trial counsel was not ineffective for failing to solicit testimony from Dr. Grant that Petitioner was "borderline mentally retarded" or that he had "borderline mental functioning" because "the psychological diagnosis of 'borderline mental retardation' has been eliminated because it is no longer considered to be 'relevant terminology.'" Humphrey, 744 S.E.2d at 720 (citing, *inter alia*, AMERICAN PSYCHIATRIC ASSN., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 41-45 (Text Rev. 4th ed. 2000)).

The Georgia Supreme Court noted that trial counsel presented substantial evidence regarding Petitioner's low intellectual functioning. However,



AO 72A
(Rev.8/82)

Dr. Grant still did not use the terms "borderline intellectual functioning" or "borderline mental retardation" to describe [Petitioner]'s level of intelligence as Dr. Shaffer did in the original trial, and trial counsel could have reasonably concluded that, if he did so, the State likely would present their own expert, Dr. Theresa Sapp, to testify in rebuttal, as it did in the original trial, to explain to the jurors that "borderline mental retardation" is not mental retardation and to explain the difference that exists between "borderline intellectual functioning" and mild mental retardation. Specifically, at the sentencing phase of [Petitioner]'s original trial, Dr. Sapp, who had conducted a pretrial evaluation of [Petitioner], testified that [Petitioner]'s score of 77 on the IQ test administered to him by Dr. Shaffer "f[e]ll[ ] within what is known as the borderline range of intellect." Then she explained the following:

> In that range of intellect, a person is generally capable of achieving secondary education. They may have to repeat certain classes, but they're generally able to hold down a job, they're able to live independently.

Dr. Sapp differentiated persons with mild mental retardation by stating that they were usually incapable of achieving beyond the sixth grade level. She testified that [Petitioner] was unclear about what grade he completed in school but that he did tell her that he completed his GED while in prison.

Dr. Sapp also testified that she asked [Petitioner] about his work history, that she determined from his responses that [Petitioner] did what he perceived to be in his best interests, and that she did not get the sense that [Petitioner] was ever forced out of a job or unable to work because of factors other than his own choices. Moreover, had Dr. Sapp been called again by the State as a rebuttal witness, she likely would have testified, as she did at the original trial, that she perceived indications that [Petitioner] was malingering during her evaluation of him. Based on the foregoing, we fail to see how trial counsel were deficient in not ensuring that Dr. Grant or another expert used the term "borderline intellectual functioning" or "borderline mental retardation" when describing [Petitioner]'s impairments.



AO 72A
(Rev.8/82)

Humphrey v. Nance, 744 S.E.2d 706, 722 (Ga. 2013).

Accordingly, it is clear that the Georgia Supreme Court did *not* aver that Dr. Sapp would have rebutted Dr. Shaffer's testimony or that trial counsel made a strategic decision not to call Shaffer to the stand because Dr. Sapp would rebut that testimony.

Petitioner's assertion that the Georgia Supreme Court concluded that trial counsel was "reasonable in omitting evidence of [Petitioner]'s borderline intellectual functioning," [Doc. 43 at 109], is again misleading. The Georgia Supreme Court did *not* make that conclusion. Instead, the court dedicated substantial discussion to its finding that "that trial counsel did present significant evidence at the resentencing trial regarding [Petitioner]'s low intelligence and how it affected his life." Humphrey, 744 S.E.2d at 721-22.

Petitioner next faults the Georgia Supreme Court for its conclusion that trial counsel's failure to present evidence of Petitioner's frontal lobe impairment was the result of a strategic decision of trial counsel. However, as this Court has stated, there is no dispute that trial counsel's investigation in preparation for the resentencing trial was more than adequate, and, because trial counsel presented the frontal lobe evidence at the first trial, it is obvious that trial counsel new about the impairment. See Strickland, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.").



AO 72A
(Rev.8/82)

Accordingly, the law strongly presumes that counsel's decision to forego presentation of that evidence was grounded in reasonable trial strategy, id. at 689; see also Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000), and, in order to be accorded relief, Petitioner must overcome that strong presumption, which he has failed to do. As a result, Petitioner's argument that the Georgia Supreme Court's finding is not supported by the record in insufficient.

Petitioner also argues that the Georgia Supreme Court erred in concluding that trial counsel acted reasonably in deciding not to present the testimony of Dr. Shaffer in the resentencing trial because trial counsel felt that Dr. Shaffer had been effectively discredited on cross examination. According to Petitioner, trial counsel cited only one instance in which Dr. Shaffer had been discredited, and he claims that further study by Dr. Shaffer would have enabled Dr. Shaffer to more effectively confront the prosecution's efforts to impeach his testimony. At the outset, it is clear that Petitioner minimizes the degree to which the prosecution discredited Dr. Shaffer in the first trial. Dr. Shaffer had based his diagnosis, in part, on events – head injuries, illnesses, and abuse – that either had insufficient testimonial support or were contradicted by other testimony presented at the first trial. More importantly, trial counsel testified at the state habeas corpus hearing that the decision not to put Dr. Shaffer on the stand was entirely strategic. Given the fact that Dr. Shaffer had been discredited the first time he



AO 72A
(Rev.8/82)

testified, it cannot be said that no reasonably competent lawyer would agree with trial counsel's decision. Whether Dr. Shaffer would have testified better at the resentencing trial is an unknown, and it is not as if trial counsel eschewed expert mental health testimony altogether. Dr. Grant, having performed his own evaluation of Petitioner as well as reviewing Dr. Shaffer's report, testified, and the fact that Dr. Grant's testimony might not have been as productive as Dr. Shaffer's potentially could have been is not the fault of trial counsel and does not render trial counsel's assistance ineffective. This Court further questions how effective Dr. Shaffer's testimony at the resentencing trial would have been when considering the fact that he would have changed his testimony from the first trial, which is something that the prosecution certainly could have pointed out to the jury.

In response to Petitioner's next argument that the Georgia Supreme Court erred in determining that trial counsel acted reasonably in deciding not to present expert testimony on the effect of tear gas on Petitioner, this Court notes that Petitioner fails to effectively rebut the basis of the state court's reasoning. The court pointed out that trial counsel was never asked why they did not present the tear gas expert's testimony and noted that "trial counsel also elicited testimony at the resentencing trial similar to that elicited at the original trial to support their theory that [Petitioner] became



AO 72A
(Rev.8/82)

panicked as a result of the dye packs' detonation, that he did not intentionally shoot the victim, and that he never intended to harm anyone." Humphrey, 744 S.E.2d at 729.

Petitioner's argument on this point focuses on what an expert could have said at the resentencing trial. However, even if the testimony of the expert that testified for Petitioner at the state habeas corpus hearing might have benefitted Petitioner at the resentencing, Petitioner failed to overcome the presumption that trial counsel's decision not to use such an expert was grounded in reasonable strategy. In response to cross-examination by Respondent, trial counsel testified at the state habeas corpus hearing that, because of the notations that he made in his notes, he must have spoken to the tear gas expert prior to the first trial, even though he did not remember doing so or why he did not call that expert as a witness. [Doc. 17-57 at 43-44]. Trial counsel further testified that he used other witnesses to get his point across to the jury that Petitioner had been exposed to the tear gas and the effect that it would have had on Petitioner. [Id. at 44-46].

While trial counsel might not have recalled the specifics regarding the expert, the record makes clear that trial counsel knew about the expert and what the expert had to say. See Strickland, 466 U.S. at 690–91. As a result, the decision not to call the expert to testify is the "epitome of a strategic decision." Conklin v. Schofield, 366 F.3d 1191, 1204 (11th Cir. 2004).



AO 72A
(Rev.8/82)

Petitioner's next argument that the Georgia Supreme Court erred fails because he again mischaracterizes the state court's conclusion. Petitioner claims that the state court suggested that Petitioner's mental impairments would not have been mitigating. In fact, what the court said was that

> there was not enough of a difference between the evidence presented during the resentencing trial and the evidence presented in the habeas proceeding regarding [Petitioner]'s low level of intelligence to establish a reasonable probability of a different outcome and that [Petitioner] was not prejudiced by the fact that no expert used [the terms "borderline mental retardation" or "borderline intellectual functioning"] in his resentencing trial to describe his mental impairments.

Humphrey, 744 S.E.2d at 722.

In other words, the state court concluded that trial counsel had elicited sufficient evidence and testimony on Petitioner's mental impairments so that the additional evidence presented at the state habeas corpus hearing would not have made a difference.

Likewise, Petitioner's argument that the Georgia Supreme Court erred by suggesting "that a diagnosis of borderline intellectual functioning would have undermined counsel's strategy regarding prison adaptability," [Doc. 43 at 149], also mischaracterizes what the court said. The court was commenting on the possible strategic reasons that trial counsel might have decided not to present the evidence – rather than expressing its own opinion – and deeming the strategy to be reasonable in



AO 72A
(Rev.8/82)

light of the other mitigating evidence presented. Humphrey, 744 S.E.2d at 727. While this may seem to be a thin distinction, courts must confer wide latitude in the evaluation of trial counsel strategy without the distorting effects of hindsight. Strickland, 466 U.S. at 669.

b. Petitioner's Arguments that the Georgia Supreme Court Erred in Determining that He Was Not Prejudiced by Trial Counsel Ineffectiveness

Petitioner also argues that the Georgia Supreme Court's prejudice analysis was contrary to or an unreasonable application of federal law for a variety of reasons.[4] He first claims that the state court improperly considered evidence of Petitioner's organic brain damage and his borderline retardation in isolation, thereby ignoring "the significance of how together they would have reduced [Petitioner]'s moral culpability."

As Respondent points out, however, under the heading "Collective Assumed Prejudice Regarding the 2002 Resentencing Trial," the state court did, indeed, assess the cumulative weight of Petitioner's psychological/brain function evidence (in addition to evidence regarding Petitioner's exposure to tear gas):

> In sum, even if counsel had referred to [Petitioner]'s low average intelligence as "borderline intellectual functioning" and "borderline

[4]This Court notes that Petitioner has failed to demonstrate that the state court erred in determining that trial counsel was not ineffective. Accordingly, the prejudice discussion is not really necessary.



AO 72A (Rev.8/82)

> mental retardation" and had presented evidence of [Petitioner]'s organic brain damage and the testimony of [the tear gas expert] in mitigation during [Petitioner]'s 2002 resentencing trial, we conclude that there is no reasonable probability that the outcome would have been different.

Humphrey, 744 S.E.2d at 731.[5]

This Court is further unmoved by Petitioner's argument that the evidence that he believes his trial counsel should have presented would have reduced Petitioner's moral culpability in the mind of the jurors "for a crime that was already clearly un-premeditated." [Doc. 43 at 152]. As noted by the Georgia Supreme Court,

> the officer who negotiated [Petitioner] into surrendering to police testified . . . that [Petitioner] told him: "I tried to get a car and the man started yelling at me and I shot at him a couple of times, and do you know if he's hurt or if anybody's hurt." [According to Petitioner]'s own statement and McNeal's eyewitness testimony . . . [Petitioner] yanked open the door of Balogh's moving car, . . . he argued with Balogh, . . . Balogh raised his arm defensively and shouted "no, no, no," and . . . [Petitioner] turned to McNeal immediately after he shot Balogh and demanded McNeal's keys . . . .

Humphrey, 744 S.E.2d at 731-32.

While Petitioner might not have intended to hurt anyone when he entered the bank that day, the jury heard plenty of testimony to support the theory that, when he

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[5] This Court further notes that this case is not analogous to Ferrell v. Hall, 640 F.3d 1199, 1234 (11th Cir. 2011), which Petitioner cites in support of his argument. In Ferrell, the Eleventh Circuit found that trial counsel's "unreasonably constricted mitigation investigation fail[ed] to uncover relevant mental health evidence in Ferrell's favor." Id. at 1230. In this case, Petitioner concedes that trial counsel's investigation was adequate.



AO 72A
(Rev.8/8
2)

was bent on avoiding apprehension after he left the bank, Petitioner was acting in a controlled and calculating manner, and this Court is not at all convinced that the introduction of evidence of Petitioner's mental deficiencies and the effect of the tear gas on Petitioner would have changed the outcome of the resentencing trial. Accordingly, this Court cannot conclude that the Georgia Supreme Court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," Harrington v. Richter, 562 U.S. 86, 103 (2011).

With respect to the remainder of Petitioner's arguments that the Georgia Supreme Court's prejudice analysis is not entitled to § 2254(d) deference, this Court notes that none of the evidence that Petitioner presented in the state habeas corpus trial was so compelling as to undermine this Court's confidence in the outcome of the resentencing trial. Trial counsel made a good case in mitigation considering what they had to work with , and whether the jury would have been decisively swayed by different evidence is impossible to say. Accordingly, this Court has no basis to find fault with the state court's conclusions.

Moreover, this Court returns to the discussion above, and points out that, based on the depth of trial counsel's investigation and level of preparation for the resentencing trial as well as the clear choices that trial counsel made, it is clear that



AO 72A
(Rev.8/8
2)

trial counsel was not ineffective under Strickland in the first instance. As such, the discussion regarding prejudice is entirely moot.

**B. Claims That Trial Counsel Was Ineffective in Failing to Object to, Rebut, and Mitigate State Evidence in Aggravation that Undermined Petitioner's Theory of Remorse.**

1. Claim that Trial Counsel Failed to Object to Video

During the resentencing trial, the state played a video taken from media coverage of Petitioner's standoff with police after the bank robbery and murder. In his Claim Two, Petitioner complains that trial counsel failed to object to the fact that prosecutors had heavily edited the video prior to playing it for the jury and that the portions of the video that prosecutors removed contained mitigating statements that would have shown Petitioner's remorse.

Respondent has demonstrated that this claim is unexhausted and thus procedurally defaulted, see Bailey v. Nagle, 172 F.3d 1299, 1303 (11th Cir. 1999) (noting that a claim is procedurally defaulted when petitioner never raised the claim in state court and it is clear the claim would be procedurally barred in state court), and Petitioner obviously concedes the default because he failed to argue otherwise. Moreover, Petitioner's contention is not properly developed to state a claim. Petitioner



AO 72A
(Rev.8/82)

argues that trial counsel failed to object to demonstrating the edited video to the jury, but he entirely fails to show that the objection would be valid. Indeed, the comments that Petitioner now claims should have been left on the news footage video for the jury to hear were all either commentary by a reporter or were statements made by a police spokesman, and it would appear that those statements were properly removed before the video was aired for the jury. Petitioner further failed to solicit any testimony from trial counsel as to why they failed to object to the redacted version of the video. See Williams v. Allen, 598 F.3d 778, 794 (11th Cir. 2010) ("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption of counsel's competency. Therefore, where the record is incomplete or unclear about counsel's actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.").

2. Claim that Trial Counsel Erred by Failing to Argue Mitigating Nature of Petitioner's Federal Conviction

As mentioned above, before he was prosecuted in state court, he pled guilty and was convicted and sentenced in this Court for two counts of bank robbery. He received a life sentence. During Petitioner's resentencing trial, prosecutors introduced the federal convictions and argued that, because Petitioner was already subject to a life



AO 72A
(Rev.8/82)

sentence, anything short of a death sentence would give Petitioner "a free ride for murder." [Doc. 16-10 at 34-35]. In Claim Three, Petitioner argues that his trial counsel erred in failing to point out the mitigating qualities of the federal convictions in that they demonstrated Petitioner's acceptance of responsibility.

As with Petitioner's previous claim, (1) Respondent has demonstrated that this claim is unexhausted and therefore procedurally defaulted, and Petitioner has failed to argue otherwise, and (2) Petitioner has failed to perfect the claim because he failed to ask trial counsel why he failed to bring the argument. This Court also points out, as noted by Respondent, that trial counsel did present substantial evidence of Petitioner's remorse for the murder, and this Court is not convinced that the argument that Petitioner claims trial counsel should have made was at all compelling or would have swayed the jury.

**C. Claim That the State Court Improperly Applied Proportionality Review**

In Claim Four, Petitioner asserts that his rights were violated when the Georgia Supreme Court failed to properly conduct the proportionality review required by state law. In affirming Petitioner's sentence after his resentencing trial, the Georgia Supreme Court held that Petitioner's "death sentence is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes



AO 72A
(Rev.8/82)

and the defendant." Nance v. State, 623 S.E.2d at 476 (listing cases that were comparable to Petitioner's). The court cited to O.C.G.A. § 17–10–35(c)(3) which requires the court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In approving Georgia's death penalty scheme, the United States Supreme Court cited favorably to the proportionality review requirement as a "provision to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," Gregg v. Georgia, 428 U.S. 153, 204 (1976), and noted that "[i]t is apparent that the Supreme Court of Georgia has taken its [proportionality] review responsibilities seriously," id. at 205. The Court also noted that

> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Id. at 206.

It may well be, as Petitioner claims, that in recent years the Georgia Supreme Court's proportionality reviews has become little more than a rubber stamp and that Petitioner's extensive discussion of other armed robbery cases in Georgia demonstrates



AO 72A
(Rev.8/82)

that the state court might have determined that the sentence imposed in his case was disproportionate. This Court stresses, however, that the United States Supreme Court has concluded that proportionality review is not required by the Constitution "where the statutory procedures adequately channel the sentencer's discretion," McCleskey, 481 U.S. at 306 (citing Pulley v. Harris, 465 U.S. 37, 50-51 (1984)), and Georgia's statutory procedures are adequate. Collins v. Francis, 728 F.2d 1322, 1343 (11th Cir. 1984) ("[I]t appears clear that the Georgia [death penalty] system contains adequate checks on arbitrariness to pass muster without proportionality review.") (internal quotations and citations omitted); see also Walker v. Georgia, 129 S.Ct. 481, 482-83 (2008) (Thomas, J., concurring in the denial of cert.) ("Proportionality review is not constitutionally required in any form. Georgia simply has elected, as a matter of state law, to provide an additional protection for capital defendants.") (citing Pulley, 465 U.S., at 45). As the proportionality review is not required by the Constitution, Petitioner cannot claim relief under § 2254 for the Georgia Supreme Court's purported failure to properly carry out its statutory mandate. Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987) ("[W]e refuse to mandate as a matter of federal constitutional law that where, as here, state law requires [proportionality] review, courts must make an explicit, detailed account of their comparisons."). Put more simply, Petitioner's proportionality claim fails to state a claim for federal habeas corpus relief.



AO 72A
(Rev.8/82)

As to Petitioner's implicit argument that this Court should disagree with the Georgia Supreme Court, this Court concludes that Petitioner has failed to overcome the hurdle imposed by § 2254(d). Given the fact that proportionality review is not mandated by the Constitution, there simply is no basis for this Court to conclude that the state court's holding "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." While Petitioner may argue that the state court's factual determination was unreasonable "in light of the evidence presented in the State court proceeding," this Court cannot perform its own proportionality determination because under McCleskey (cited above) where the state statutory procedures adequately channel the sentencer's discretion, comity and federalism prevent review of a state law decision.

**D. Claim Regarding Trial Court's Denial of Petitioner's Motion to Preclude the use of a Stun Belt and Petitioner's Assertion that he is Entitled to a Hearing**

At Petitioner's first trial, the trial court held a hearing on Petitioner's motion to preclude the state from requiring Petitioner to wear a stun belt during the trial. State witnesses testified that they considered Petitioner to be a significant flight risk and that Petitioner had threatened to bite a prosecutor. The state presented further evidence regarding the operation of the stun belt – including the fact that activation of the stun



AO 72A
(Rev.8/8
2)

belt can result in self urination and defecation. Petitioner testified that the stun belt "made him anxious and distracted, interfering with his ability to pay attention to the proceedings, consult meaningfully with his attorneys, and concentrate or think clearly." [Doc. 43 at 223 (citing Doc. 11-17 at 65-66)]. After the hearing, the trial court denied Petitioner's motion and required him to wear the belt.

Petitioner filed the same motion before the resentencing trial, and when Petitioner brought up the issue again during a motions hearing, the trial court noted that he remembered the evidence from the prior hearing and denied the motion without affording Petitioner a second evidentiary hearing. In Claim Five, Petitioner now claims that the trial court violated his rights in failing to hold another hearing prior to the resentencing trial before ruling on his motion.

Petitioner raised this claim in his direct appeal. The Georgia Supreme Court discussed the claim as follows:

> [Petitioner] claims the trial court erred by refusing his request to conduct a hearing on whether he should be required to wear a stun belt during his 2002 sentencing trial. A stun belt is an electronic security device worn by a prisoner that can be activated by a remote transmitter which enables law enforcement personnel to administer an incapacitating electric shock if the prisoner becomes disruptive. Unlike shackles, it is worn under the prisoner's clothes and is not visible to the jury. [Petitioner] had worn a stun belt at his 1997 trial. Before the 1997 trial, the trial judge, who also presided at the 2002 sentencing trial, agreed to the State's request that [Petitioner] wear a stun belt in court after conducting a pretrial hearing where evidence was received that [Petitioner] had threatened to "bite the nose off" the prosecuting attorney during the trial. At that hearing,



AO 72A
(Rev.8/82)

witnesses testified about the mechanics of the stun belt, its advantages, and possible alternatives, and [Petitioner] testified about the alleged impact a stun belt would have on his comfort and ability to concentrate. The trial judge stated in 2002 he remembered the evidence from the 1997 stun belt hearing and said he could not disregard [Petitioner]'s threat, even after the passage of several years. He denied [Petitioner]'s request to conduct another hearing and allowed the use of a stun belt as a security measure at [Petitioner]'s sentencing trial.

It is "well established that the use of extraordinary security measures to prevent dangerous or disruptive behavior which threatens the conduct of a fair and safe trial is within the discretion of the trial court." Young v. State, 499 S.E.2d 60 (1998). The trial court conducted a hearing in this case to determine the necessity of a stun belt and concluded the use of a stun belt was warranted by the threat and would not interfere with the ability of the defendant to receive a fair trial. See id. The trial court did not err by failing to hold a second hearing in 2002; the only change in circumstance since the 1997 hearing offered by [Petitioner] was the passage of time and this was obvious to the trial court without the need



AO 72A
(Rev.8/82)

for a second hearing. We find no abuse of discretion by the trial court in its ruling on this issue.

Nance, 623 S.E.2d at 474.

Petitioner contends that the Georgia Supreme Court's decision is not entitled to deference under § 2254(d) because the court's decision was contrary to and involved an unreasonable application of clearly established federal law and was grounded in factual findings that were unreasonable in light of the evidence. This Court disagrees.

The factual findings relied on by the state court were that Petitioner was an escape risk based upon his criminal history and his federal sentence and that Petitioner had made threats against the prosecutor. Petitioner argues that, because six years had passed since the trial court's initial ruling, the finding that Petitioner was an escape risk should have been reevaluated by the court. During that six-year period, Petitioner claims that he demonstrated that he was not an escape risk by being a model prisoner.

The problem with Petitioner's argument is that the trial court could have reasonably determined that no matter how well-behaved Petitioner had been in the intervening years – in other words, no matter what evidence Petitioner presented at a new hearing – the evidence produced by the state at the 1996 hearing nonetheless weighed in favor of requiring the restraint. See Landers v. Warden, 776 F.3d 1288, 1297 (11th Cir. 2015) ("[A]n evidentiary hearing in state court cannot be a requirement for § 2254(d)(2) deference for all disputed factual issues in a state court proceeding.").



AO 72A
(Rev.8/82)

Moreover, based on the trial court's discussion of the matter at the 2002 motions hearing, [see Doc. 15-7 at 13-14], it is clear that the judge believed that Petitioner had made a threat against a prosecutor. While Petitioner may argue that he did not make such a threat, the evidence presented at the 1997 hearing was certainly sufficient for the court to make the finding that Petitioner had, indeed, made the threat, and this Court may not disturb that finding. See Jones v. Walker, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008) (an unreasonable determination of the facts occurs when there is nothing in the record to support the state court's finding). In light of that threat, it was reasonable for the court to deny Petitioner's motion, and this Court is thus precluded from reaching a different outcome under § 2254(d).

Turning to Petitioner's request to present evidence regarding this claim, because this claim was adjudicated in state court, it must be analyzed under § 2254(d). As this Court noted above, review of claims analyzed under § 2254(d) "is limited to the record that was before the state court that adjudicated the claim," Pinholster, 563 U.S. at 181, and this Court may not use evidence that the state courts did not have access to in rendering a decision. A hearing is thus not permitted. French v. Warden, 790 F.3d 1259, 1266 (11th Cir. 2015).

**E. Petitioner's Request for Discovery and/or a Hearing with Respect to his Proportionality and Ineffective Assistance of Counsel Claims**



AO 72A
(Rev.8/82)

Finally, Petitioner seeks to conduct discovery and present evidence regarding his claims that his death sentence is disproportionate and that his trial counsel was ineffective in presenting mental health evidence during the resentencing trial. This Court has already determined, however, that petitioner is not entitled to relief on these claims, and Petitioner has failed to present argument that convinces this Court that the evidence that petitioner is reasonably likely to present would have any effect on the outcome of his case.

As to Petitioner's proportionality claim, as discussed above, that claim fails to raise a cognizable § 2254 claim. In the case of the ineffective assistance claim, Petitioner seeks to have a positron emission tomography (PET) scan of Petitioner's brain to "thoroughly investigate Mr. Nance's mental/emotional health in order to competently evaluate and present his constitutional claims in post-conviction proceedings." [Doc. 43 at 237]. This Court is at a loss, however, to imagine what a PET scan might show that could possibly change the outcome of this action. Petitioner has made no assertion that trial counsel was ineffective for failing to secure a PET scan prior to the resentencing trial, and there is no indication in the record that one of Petitioner's mental health experts hired before the trial had recommended a PET scan. As such, trial counsel cannot be faulted for the failure to obtain a PET scan.

Additionally, Petitioner has not suggested that his mental/psychological state is such that he is ineligible to be executed.[6]

Petitioner states that

> [t]his testing may not only reveal evidence that will substantiate the portion of Mr. Nance's ineffective assistance of counsel claim relating to his brain damage and its substantial impact on his choices and behavior at the time of the crime but also may open new avenues of investigation.

[Id. at 239].

This Court's determination that trial counsel was not ineffective, however, was based upon the efficacy of trial counsel's investigation, what trial counsel knew at the time of the resentencing trial, and what strategic choices trial counsel made in light of that knowledge. Regardless of what the testing might show, it cannot affect any of those three determinations.

Petitioner further states that he "does not seek to acquire neuroimaging in order to establish that the [Georgia Supreme C]ourt's determinations are unreasonable," [id.], with respect to that court's conclusion that trial counsel was ineffective. Because establishing the unreasonableness of the state court's determination is the sole avenue of relief under § 2254 for a claim that has been decided on the merits in state court, it

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[6] Even if a PET scan did show that petitioner is now not subject to execution such a claim would properly be raised in a 42 U.S.C. § 1983 civil rights action.

is further clear that permitting Petitioner to undergo a PET scan could not possibly change the outcome of this action.

For these reasons, this Court concludes that petitioner has not demonstrated that he is entitled to a hearing or to conduct discovery.

## V. Conclusion

As discussed, this Court concludes that petitioner has failed to establish that he is entitled to relief under § 2254. Accordingly, his petition for a writ of habeas corpus is **DENIED**. The Clerk is **DIRECTED** to **ENTER JUDGMENT** in favor of Respondent and to **CLOSE** this action.

**IT IS SO ORDERED,** this 7th day of August, 2017.

WILLIS B. HUNT, JR.
Judge, U. S. District Court



AO 72A
(Rev.8/82)

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# Humphrey v. Nance

Supreme Court of Georgia

June 17, 2013, Decided

S13A0201, S13X0202.

**Reporter**

293 Ga. 189 *; 744 S.E.2d 706 **; 2013 Ga. LEXIS 552 ***; 2013 Fulton County D. Rep. 1828; 2013 WL 2928123

HUMPHREY v. NANCE; and vice versa.

**Subsequent History:** US Supreme Court certiorari denied by Nance v. Chatman, 134 S. Ct. 1026, 188 L. Ed. 2d 124, 2014 U.S. LEXIS 878 (U.S., 2014)

**Prior History:** Murder, etc. Butts Superior Court. Before Judge Jordan from Chattahoochee Circuit.

Nance v. State, 272 Ga. 217, 526 S.E.2d 560, 2000 Ga. LEXIS 124 (2000)

**Disposition:** [***1] Judgment affirmed in Case No. S13X0202. Judgment reversed in Case No. S13A0201.

**Counsel:** *Samuel S. Olens, Attorney General, Patricia B. Attaway Burton, Deputy Attorney General, Sabrina D. Graham, Mitchell P. Watkins, Assistant Attorneys General*, for appellant.

*Brian Kammer, Kirsten A. Salchow*, for appellee.

**Judges:** HUNSTEIN, Chief Justice. All the Justices concur.

**Opinion by:** HUNSTEIN

## Opinion

[*189] [**709] HUNSTEIN, Chief Justice.

In 1997, Michael W. Nance was convicted of malice murder, felony murder, aggravated assault, theft by taking, criminal attempt to commit armed robbery, and possession of a firearm during the commission of a felony, and he was sentenced to death for the malice murder. This Court affirmed Nance's convictions but reversed his death sentence and remanded the case for resentencing because a prospective juror was improperly qualified to serve on the jury. See *Nance v. State*, 272 Ga. 217 (526 SE2d 560) (2000) (unanimously affirming the convictions and reversing the death sentence with Carley and Hines, JJ., concurring specially as to one guilt/innocence phase issue). In 2002, Nance was sentenced to death a second time, and on the second appeal this Court unanimously affirmed his death sentence for the malice murder conviction. See *Nance v. State*, 280 Ga. 125 (623 SE2d 470) (2005). In 2007, Nance filed a petition for a writ of habeas corpus, which he amended on January 17, 2008. An evidentiary hearing was held on August 19-21, 2008, and, [***2] in an order filed on September 6, 2012, the habeas court denied relief with respect to Nance's convictions, but vacated Nance's death sentence based upon its finding that his trial counsel had been prejudicially [*190] deficient in presenting mitigating evidence at his resentencing trial. The Warden appeals the habeas court's vacation of the death sentence in case number S13A0201, and Nance cross-appeals in case number S13X0202, claiming that the habeas court should have also granted relief regarding his malice murder conviction. In the Warden's appeal, this Court reverses and reinstates Nance's death sentence. In Nance's cross-appeal, this Court affirms.

I. *Factual Background*

The evidence presented at the guilt/innocence phase of the 1997 trial showed the following. Nance stole a 1980 Oldsmobile [**710] Omega and drove to a bank in Gwinnett County on December 18, 1993. After entering the bank at approximately 11:00 a.m., Nance pulled a ski mask over his face, waved a .22 caliber revolver, and demanded that the tellers place cash in two pillowcases that he was carrying. Nance made several threats to the tellers, including threatening to kill them if they used dye packs. The tellers nevertheless slipped [***3] two dye packs into the pillowcases with the money. Nance exited the bank and got into the Omega where the dye packs detonated, emitting red dye and tear gas. Grabbing a black trash bag containing the gun, Nance abandoned the Omega and went across the street to a liquor store parking lot where Gabor Balogh was backing his car out of a parking space. Dan McNeal, who had just left the liquor store behind Balogh, was standing nearby. He saw Nance run around the front of Balogh's car, yank open the driver's door, and thrust his right arm with the plastic bag into Balogh's car. Then McNeal heard arguing and Balogh saying, “no, no, no,” as he leaned away from Nance and raised his left arm defensively. Nance shot Balogh in the left elbow, and the bullet entered his chest and caused his death a short time later. Nance then pointed the gun at McNeal and demanded his keys. Instead of complying, McNeal ran around the side of the liquor store. Nance fired another shot, but McNeal was not hit. Nance then ran around the opposite side of the liquor store, confronted McNeal behind the store, and pointed the gun at him. As McNeal ran back to the front of the store, Nance turned and ran to a nearby Chevron [***4] station, where he entered into a standoff with police, telling them, “If anyone rushes me, there's going to be war.” Over an hour passed before police persuaded Nance to surrender. The State also presented evidence that Nance had robbed another Gwinnett County bank three months earlier where he had made a similar threat to kill the teller and that he had pleaded guilty in federal court to committing both Gwinnett County bank robberies.

[*191] II. *Ineffective Assistance of Counsel Claim at the 2002 Resentencing Trial*

In case number S13A0201, the Warden appeals the habeas court's determination that trial counsel were ineffective at Nance's resentencing trial in 2002 for failing to adequately present mitigating evidence regarding Nance's borderline intellectual functioning, organic brain damage, and exposure to tear gas.

A. *Applicable Law*

(1) To prevail on an ineffective assistance of counsel claim, a petitioner must show that counsel's performance was not reasonable under the circumstances and that actual prejudice resulted. See *Strickland v. Washington*, 466 U. S. 668, 691 (104 SCt 2052, 80 LEd2d 674) (1984); *Smith v. Francis*, 253 Ga. 782, 783 (1) (325 SE2d 362) (1985). Under the rules and presumptions [***5] set down in *Strickland*,

> (2) “(j)udicial scrutiny of counsel's performance must be highly deferential[.]” … [A]ny ineffective assistance inquiry [must begin] with “a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” …(3) Because constitutionally acceptable performance is not narrowly defined, but instead encompasses a “wide range,” a petitioner seeking to rebut the strong presumption of effectiveness bears a difficult burden.

(Citations omitted.) *Waters v. Thomas*, 46 F3d 1506, 1511-1512 (11th Cir. 1995). (4) To show sufficient prejudice to prevail on his claim, a petitioner must show that “there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” (Citation omitted.) *Smith*, 253 Ga. at 783 (1). (5) In reviewing a habeas court's ruling on an ineffective assistance claim, “[w]e accept the habeas court's findings of fact unless clearly erroneous and independently apply the law to those facts.” *Head v. Hill*, 277 Ga. 255, 266 (VI) (587 SE2d 613) (2003).

(1) The Warden contends that the habeas [***6] court erred as a matter of law by applying the principle enunciated in its order that “[c]ompetent defense counsel presents the jury with the *totality* of reasonably available [**711] mitigation evidence, consistent with the defense strategy,” in determining that Nance's trial counsel were constitutionally deficient at his resentencing trial in omitting the mitigating evidence presented in his habeas proceeding. (Emphasis supplied.) We agree [*192] that the principle articulated by the habeas court is contrary to the law. (6) In *Strickland*, the United States Supreme Court noted that “[t]here are countless ways to provide effective assistance in any given case” and that “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U. S. at 689. Accordingly, the Supreme Court eschewed “rigid requirements for acceptable assistance,” like the requirement that the habeas court here erroneously applied. Id. at 690. (7) Trial counsel are not constitutionally deficient as a matter of law simply because they do not present all reasonably available mitigating evidence, even if the omitted evidence is consistent with their chosen strategy. See *Hall v. Lee*, 286 Ga. 79, 80-81 (II) (B) (1) (684 SE2d 868) (2009); [***7] *Chandler v. United States*, 218 F3d 1305, 1319 (XI) (11th Cir. 2000). Rather, in reviewing trial counsel's performance, “ ‘[w]e ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.’ ” (Citation omitted.) *Jefferson v. Zant*, 263 Ga. 316, 318 (3) (a) (431 SE2d 110) (1993).

(2) (8) Critical to the question of whether a reasonable lawyer could have decided to forego presenting readily available mitigating evidence is the thoroughness of the investigation supporting that decision. See *Wiggins v. Smith*, 539 U. S. 510, 522 (123 SCt 2527, 156 LE2d 471) (2003) (stating that the Court's (9) “principal concern” in deciding whether counsel exercised reasonable professional judgment was not whether counsel should have presented a mitigation case but whether the investigation supporting the decision not to do so was reasonable). In that regard, the Warden contends that the habeas court also failed to give proper deference to its own finding, amply supported in the record, that trial counsel made a reasonable investigation before deciding what evidence to present and, conversely, what evidence to omit at Nance's resentencing trial. After [***8] an independent review of the record, we agree with the Warden's argument for the reasons discussed below.

B. *The 1997 Original Trial*

Even though the Warden challenges the habeas court's ruling that Nance's trial counsel were ineffective in his *resentencing trial*, trial counsel's investigation and presentation of evidence in his *original trial* are relevant because trial counsel's actions and what occurred in the original trial reasonably affected their investigation and presentation of mitigating evidence in the resentencing trial. [*193] Thus, we begin with a review of the original trial in 1997.[1]

(1) *Investigation for the 1997 Trial*

Nance was originally represented by lead counsel Donald Hudson and co-counsel Edwin Wilson. Before Nance was tried in Gwinnett County, he pled guilty in federal court to both of the Gwinnett County bank robberies and to possession of a firearm by a convicted felon. Nance was represented in his federal case by counsel from the

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[1] The review of the evidence presented in the original trial will also be relevant below in our discussion of Nance's cross-appeal, which concerns trial counsel's presentation at the guilt/innocence phase of the original trial.

Federal Public Defender Program. [***9] After Nance was sentenced in federal court, the Gwinnett County trial court granted Hudson's request to be dismissed as Nance's attorney for reasons not directly related to Nance's case. The court appointed Johnny Moore, a former Gwinnett County chief assistant district attorney, to replace Hudson as lead counsel. Moore informed the court at his appointment that he had been "involved in death penalty cases for about 24 years." Wilson was also a former prosecutor, had been practicing criminal law for approximately 20 years, and had experience in death penalty litigation.

The record shows that Nance's federal defense team completed a significant amount of investigation of the case, including an investigation into Nance's mental health and social history for the purpose of developing mitigating evidence. Trial counsel testified that [**712] they received what they believed to be the entire file from the Federal Public Defender Program at the conclusion of Nance's federal case and that they used the material from the file as "a starting point" to conduct their own investigation. The record supports the habeas court's findings that counsel used multiple investigators and mitigation specialists in [***10] investigating and preparing Nance's case for the original trial and that counsel consulted with Michael Mears and Pamela Leonard, the director and the senior mitigation specialist, respectively, of the Multi-County Public Defender's Office regarding Nance's case. Prior to the original trial, Moore and an investigator traveled to Nance's home state of Kansas to interview his family members and develop mitigating social history evidence. Among other things, trial counsel also obtained records relevant to the case and Nance's history, examined the State's discovery, met with the district attorney in an attempt to obtain a plea offer for Nance to plead [*194] guilty in exchange for a life without parole sentence,[2] inspected the physical evidence in the case and the crime scene, viewed the videotapes of the bank robbery and the standoff, and interviewed the State's experts and thus were prepared to elicit favorable testimony on cross-examination.

The attorneys testified that Wilson was in charge of the guilt/innocence phase, that Moore handled the sentencing [***11] phase and expert testimony, and that they worked well together. They also testified that the charges against Nance were "basically indefensible," as there was never any question as to his guilt, and that their guilt/innocence phase strategy was to present evidence that Nance never intended to murder the victim. As a part of that strategy, trial counsel attempted to show that the effects of the dye packs' detonation caused Nance to be confused and disoriented at the time that he abandoned the Omega, went across the street, and shot the victim. Trial counsel testified that they realized such evidence would not disprove Nance's criminal intent to shoot the victim but that they hoped that the jury would consider the evidence mitigating in the sentencing phase.

Regarding any mental health defenses, trial counsel had in their possession the reports of Drs. Barry Scanlon and Robert Shaffer, who had been retained in 1994 to conduct mental health evaluations of Nance as part of his federal case. After conducting a psychological evaluation of Nance, Dr. Shaffer had diagnosed Nance with cognitive disorder not otherwise specified, possible pervasive developmental disorder, polysubstance dependence, [***12] borderline intellectual functioning, and mixed personality disorder with schizoid or autistic features. Dr. Scanlon had conducted a forensic psychiatric evaluation of Nance, and he had concluded that diagnoses of pervasive developmental disorder, cognitive disorder not otherwise specified, and cocaine, alcohol, and polysubstance dependence "appear[ed] applicable" to Nance. After consulting with both experts, trial counsel retained Dr. Shaffer in July 1997 to assist in the original trial, specifically requesting that he conduct additional testing of Nance and "look for anything that might be mitigating even if [it were] not a defense to the crime."

The record supports the habeas court's findings that, in pursuing an investigation into the dye packs so as to obtain evidence to support their theory for the original trial, trial counsel took the following actions: obtained funds from the trial court to retain an expert in this area; obtained the curriculum vitae of several experts and spoke with [*195] at least four individuals who had expertise in dye packs, including a representative from the dye packs' manufacturer; successfully subpoenaed the material safety data sheet from the manufacturer, [***13] which listed the main ingredients contained in the dye packs as being red dye, o-chlorobenzylidene malononitrile ("CS tear gas"), and potassium chlorate and which described the potential effects of those ingredients; retained a toxicologist to review the toxicity information on CS tear gas, review the facts of the case, and perform a calculation of the CS tear gas

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[2] Nance had already received a sentence of life without parole in his federal case. See *Nance v. State*, 266 Ga. 816, 816, n. 1 (471 SE2d 216) (1996).

concentration in the Omega's passenger compartment; spoke with the medical examiner, Dr. Joseph Burton, to obtain his opinion regarding the [**713] potential effects of the CS tear gas; and interviewed Larry Peterson, the microanalyst from the Georgia Bureau of Investigation Crime Lab who examined and tested Nance's items of clothing for the presence of red dye from the dye packs. The record also supports the habeas court's finding that trial counsel reviewed the information that they had obtained regarding the dye packs and had a number of conversations regarding their investigation. Based on the foregoing, we find that the habeas court did not err in concluding that "trial counsel's approach to investigation and preparation for the guilt-innocence phase of the original trial was reasonable when properly evaluated using the *Strickland* [***14] standards."

(2) *Presentation at the Guilt/Innocence Phase of the 1997 Trial*

Consistent with trial counsel's guilt/innocence phase theory, Wilson told the jury in opening statements at the original trial that the evidence would show that the dye packs' sudden detonation caused Nance to panic and become confused, that he fled across the street where "the pistol went off" when he encountered an "intoxicated [Balogh]" whom he perceived to be attempting to run over him, that he never fired at McNeal but only shot into the air "at some point," and that he was remorseful. Wilson concluded that Nance "never intended to shoot anyone" and "certainly never intended to kill anyone."

During the presentation of the State's case, trial counsel elicited through cross-examination of bank tellers and law enforcement officers the following testimony regarding the dye packs and the possible effects of their detonation: *two* dye packs were placed in the pillowcases; the dye packs contained dye and CS tear gas; Nance was in the vehicle when red smoke billowed from it, arguably showing that he had at least some exposure to CS tear gas; and exposure to CS tear gas causes burning eyes and stinging skin.

[*196] On direct [***15] examination, Dr. Burton, who was qualified as an expert in the field of forensic pathology, testified that he "ha[d] some training and some expertise in what ... tear gas is and what [its] effects [on human beings] are" and that he was specifically familiar with CS tear gas. He also testified that exposure to CS tear gas irritated the mucus membranes and caused immediate tearing of the eyes and involuntary shutting of the eyelids; coughing and irritation of the throat, trachea, airway, and lungs if inhaled; and possible tightness of the chest or a possible asthma attack. When asked on direct examination for his opinion as to whether Nance was significantly exposed to the CS tear gas, Dr. Burton first noted that Nance was able to exit his car, "cross[ ] a parking lot," approach a vehicle, make a specific request of the driver, turn to face a second person, make a specific request of him, and then run around a building, "which would require that [he] have at least probably some visual contact with the environment and make a deliberate act to move in a particular direction." Dr. Burton concluded that the described actions demonstrated that Nance was not visually impaired or significantly [***16] disoriented and, thus, that there was "no evidence that the expected reaction to exposure with CS spray was apparent in [Nance]." During cross-examination, Moore elicited Dr. Burton's testimony clarifying that he had not opined on direct examination that Nance "didn't possibly have some exposure" to the CS tear gas but that, instead, "there was no evidence that that exposure was having any significant effect on him," that the dye packs' detonation could also cause panic, and that the experience of being in the presence of the actual detonation would not affect everyone in the same way. Trial counsel also elicited Dr. Burton's testimony that the angle at which the bullet entered the victim's body was not inconsistent with a scenario in which the victim was sitting in the car when the shooter unintentionally pulled the trigger while the gun was against the victim's arm.

GBI microanalyst Peterson testified that he first visually examined unaided and then under a low-powered microscope Nance's clothing items, including his gloves, socks, boots, denim jacket, red shirt, and jeans. He conducted no further tests on Nance's shirt or jeans because he did not detect any red or pink stains on [***17] those items. However, further testing of the other items confirmed the [**714] "faint" presence of the dye used in dye packs at the ends of both sleeves of Nance's jacket and on the tops of both of his socks, a heavier presence on two circular areas of each sock that corresponded with the cut-outs on Nance's boots, and a very heavy presence on Nance's gloves. On cross-examination, trial counsel elicited Peterson's testimony that the tear gas component of the dye pack dissipates much more rapidly than the dye dissipates and that the person wearing the items that he [*197] examined "would have to be ... either in the actual smoke or in an environment that was

heavy with the material" because the red dye was present on several of the items. Moreover, Peterson opined that the person wearing Nance's socks, gloves, and jacket was, in fact, exposed to the dye packs' ingredients.

The State's firearm expert, Kelly Fite, testified that the .22 caliber bullet that was removed from the victim was "probably" fired from the gun recovered from Nance and that a gun had been fired from inside the black trash bag that was recovered from the Chevron station. During cross-examination, Moore elicited Fite's testimony [***18] that it took approximately one-third less pressure to pull the trigger of the gun used by Nance when the gun was cocked, as the evidence showed that it had been when it was recovered from Nance, thus increasing the chances of an unintentional trigger pull. Fite's testimony on cross-examination also showed that it was more likely that a person wearing gloves, as the evidence showed Nance had been, would unintentionally pull the trigger.

Trial counsel also elicited testimony from various State witnesses to support their theory that Nance never intended to harm anyone and that he was remorseful, including testimony showing the following: despite Nance's threats to the tellers, he never attempted to reenter the bank; he made repeated threats to shoot himself and never pointed the gun at anyone other than himself during the standoff; he had the gun aimed at his own head at the one time that he made a statement to the effect that there would be "war" if anyone "rushe[d]" him; he inquired of the Gwinnett County police sergeant who negotiated with him and convinced him to surrender to police whether anyone had been injured at the bank or the liquor store, cried, and inquired about his wife [***19] and family; he assured the negotiator that he did not want to die and that he would not harm the negotiator; he appeared remorseful to the detective who took his statement; and, according to Nance's statement, he grabbed what he believed was the money but was actually a black trash bag containing the gun when the dye packs detonated, ran across the street where he perceived the victim as trying to run over him, tried to scare the victim by firing a single shot into the air from inside the bag, and did not remember firing two shots or shooting anyone.

After the State rested its case in the guilt/innocence phase of the original trial, the parties announced to the jury that they had reached a stipulation that the results of a blood alcohol test on blood drawn from the deceased victim was .09 grams percent. Trial counsel presented testimony establishing that the victim was "dead for all intents and purposes" when emergency medical personnel arrived at the scene. A Gwinnett County officer who encountered Nance behind [*198] the Chevron station where a Lilburn officer had chased him, testified that Nance "had been running," was "breathing heavily," was excited, had a gun in "a bag" and what appeared [***20] to be red dye on his face, threatened to kill himself, started to hyperventilate, and never pointed the gun at anyone but himself. Finally, a former Lilburn police officer testified to the following: as an officer responding to the scene, he first saw Nance as Nance crossed the highway and arrived at the Chevron station; Nance looked "[b]ewildered, confused," and "like he was wanting to fight" when the officer initially approached him; and his expression changed upon seeing the officer, and he said, "Just go ahead and kill me."

At closing, Wilson conceded that the State had established that Nance robbed a bank and engaged in a standoff with police, but he argued that the State had failed to prove that Nance committed a murder in the time between those two events. In support, Wilson first pointed to the evidence showing that McNeal could not identify what the argument [**715] between Nance and the victim was about, that Nance made no attempt to take the victim's car after the victim was shot, and that the gun was inside the black trash bag when it was fired, indicating that Nance did not display the gun to the victim, as he had done when he robbed the bank and as most armed robbers would do. [***21] Wilson then argued that there were several reasons to doubt the State's case, including inconsistencies between McNeal's testimony and testimony by other State witnesses, instances allegedly demonstrating that the State's investigation was incomplete, and the State's failure to present the recording of Nance's statement to police and the testimony of anyone who observed Nance immediately after the dye packs' detonation. Finally, Wilson reminded the jury of Dr. Burton's testimony regarding the physical effects of tear gas and his testimony that "even one of those … dye packs just going off can cause one to be frightened or disoriented," and he concluded that, while both the State's version and the defense's version of the shooting "w[ere] entirely possible and plausible," the State had the burden of proof. The jury returned a verdict finding Nance guilty on all counts, including malice murder and felony murder.

(3) *Presentation at the Sentencing Phase of the 1997 Trial*

Wilson testified at the habeas evidentiary hearing that trial counsel's mitigation theory at the original trial in 1997 involved "expanding on" their guilt/innocence defense theory. A review of the trial record shows [***22] that trial counsel attempted to do so by presenting testimony regarding Nance's troubled childhood that included verbal and physical abuse by his alcoholic adoptive father, Nance's own drug [*199] and alcohol abuse, and his mental impairments and then arguing that the effects of the dye packs' detonation were exacerbated in Nance because of his impairments, causing him to act out of panic when he crossed the highway and shot the victim. To support their mitigation theory, trial counsel presented the testimony of two of Nance's family members and Dr. Shaffer.

We need not recite all the testimony of Nance's family members for the purposes of our analysis here. It is sufficient to note that the testimony of Nance's mother, Ellen Nance, and older brother, Johnny Nance, informed the jury that Nance was the middle of Ellen Nance's three sons; that Nance's mother married Jim Nance, who was not the father of her first two sons, shortly after Nance's birth; that Jim Nance adopted Nance and his older brother and was the only father that Nance knew; and that Nance's troubled childhood included developmental delays, an episodic alcoholic father, ostracization at school because of his mother's involvement [***23] with the Jehovah's Witnesses, significant learning problems, verbal abuse and physical punishment, a lack of display of affection from his parents, alcohol and drug abuse, three failed relationships with women, and a difficult work history.

Finally, trial counsel presented the testimony of Dr. Shaffer, who was qualified as an expert in the field of clinical psychology. His testimony showed that he initially had concerns that Nance might have a neuropsychological disorder or impairment because of a history of developmental delays and two significant childhood head injuries that resulted in unconsciousness. Therefore, when he initially met Nance in the mid-1990s, Dr. Shaffer completed a psychological evaluation of him that included the Halstead-Reitan Neuropsychological Test Battery, which is a specialized series of tests designed to examine the effects of brain injury or impairment on individuals. The results of those tests demonstrated that Nance scored in the impaired range on five out of eight tests, and Dr. Shaffer testified that his "overall impression … was that [Nance] does have a moderate degree of neuropsychological impairment consisting partially in the frontal lobes to [***24] the brain." He further explained that individuals with compromised frontal lobes do not make good decisions and do not appreciate the outcome of their decisions.

Dr. Shaffer also administered two standard IQ tests to Nance. Nance scored 77 on the Wechsler Adult Intelligence Scale-Revised (WAIS-R) and 76 on the Stanford Binet, Fourth Edition, and Dr. Shaffer explained that both scores are "considered to be what we call the borderline range of IQ, [**716] meaning borderline mentally defective." Dr. Shaffer testified that the more recent IQ test that he administered to Nance "confirmed the results of the first test almost to the point" [*200] and that "the pattern of scoring was almost identical, too, lending a certain credibility" to his belief that Nance was not malingering. He testified that Nance's scores were consistent with an individual capable of doing manual labor or warehouse work. Because Nance's IQ tests were "approaching 70, which is considered the cutoff for mental retardation," Dr. Shaffer explained that he assessed Nance's adaptive living skills and that it was his "impression" that Nance fell "roughly" in the ten-to-thirteen-year age group "in some aspects."

Dr. Shaffer testified that [***25] he had also conducted a personality assessment of Nance in which "[he] relie[d] quite intensively on the social history and the information provided by other informants who ha[d] had an opportunity to observe Michael Nance throughout his life." He stated that he spent 17 to 20 hours conducting the evaluation and that he obtained social history information from the family, from Nance, and from interviews with knowledgeable parties by investigators with the federal courts. Dr. Shaffer then recounted an extensive social history that included developmental delays, high fevers, childhood head injuries, and a dysfunctional family life with "an alcoholic, abusive stepfather who would routinely abuse the sons with types of punishment that were quite excessive, whippings using belts, switches that had thorns in them, wire hangers resulting in bleeding with welts on Michael Nance's body," Nance's being "pushed to the periphery of his father's experience," and an "oppressive atmosphere in the home" where "[t]he father did not tolerate conversation." He stated that Nance's maternal uncle, Jerry Chaffin ("Uncle Gene"), "picked up [Nance] from his elementary school class and began giving him alcohol, [***26] marijuana, and cocaine" and thus concluded that Nance "was taking cocaine and alcohol before he was out of elementary school," "had graduated to intravenous use of cocaine, crystal, crank, and occasionally heroin" by the age of 14, and that, "at age 15, there were two suicide attempts near his own home, each of which was thwarted by his brothers." He opined that Nance had not "had a chance to make choices in the way that most of us had a

chance to make choices," because "his understanding[,] … judgment[,] and … reasoning ha[d] been impaired by these various neuropsychological deficits and by the severe psychological factors that ha[d] influenced him." On cross-examination, Dr. Shaffer also opined that "exposure to a situation such as a dye bomb going off or chaotic stimulus going on around [Nance]" would result in "his judgment [being] further impaired."

In closing argument at the sentencing phase of the original trial, Moore argued that the jury had heard credible evidence concerning Nance's brain impairments that manifested in developmental delays and learning problems, his ostracization at school because of his [*201] religion, "his borderline retardation," and his alcoholic father's [***27] "yell[ing] at him and call[ing] him stupid all the time, abus[ing] the mother and the children, … not allow[ing] affection for the children," and lack of "parental skills which might have helped [Nance] if they had been there." Moore contended that, "[i]n that environment, given his inabilities, [Nance] looked to … Uncle Gene for that affection … [that] he wanted [from] a father that loved him" and that, instead of giving Nance the nurturing that he needed, Uncle Gene took Nance, whom he described as "a person in a 13-year-old body … who's actually about seven years old," and "g[ot] him high on alcohol and drugs at an age when … he[ wa]s not old enough … to make mature decisions." Moore concluded that Nance's case was not a death penalty case. Rather, he contended that a sentence of life without parole was a severe punishment that would demonstrate the fact that "we, as human beings, do not kill people who have problems that are beyond their control." However, the jury rejected trial counsel's theory and recommended that a death sentence be imposed after finding that the State had proven beyond a reasonable doubt that Nance had a prior record of conviction [***28] for a capital felony and that Nance had committed the murder while he was engaged in the commission of another capital felony, the armed robbery of [**717] Balogh's vehicle. See OCGA § 17-10-30 (b) (1), (2). This Court affirmed Nance's convictions, reversed his death sentence, and remanded the case for resentencing. See *Nance*, 272 Ga. at 224 (6).

C. *The 2002 Resentencing Trial*

Moore testified in the habeas proceeding that he and Wilson decided to switch roles after Nance's death sentence was vacated by this Court on direct appeal because, "[b]asically, the things that [he] had thought [they] ought to do didn't work, and [they] decided to see if [Wilson] had something that he could do differently that would work." Moore also testified that, while he and Wilson did not fundamentally disagree about how to present the sentencing phase, their mitigation strategy in 2002 "may have changed somewhat" in that Wilson took a slightly different approach. Wilson testified that, while their mitigation theory remained "pretty much the same concept" in both trials, they "tried to broaden [their] attack, and do it better the second time" [***29] because the jury in the original trial had recommended a death sentence.

(1) *Investigation for the 2002 Resentencing Trial*

Wilson testified that counsel's mitigation theory at both trials involved Nance's mental impairments, childhood abuse and neglect, [*202] and substance abuse. However, he explained that a significant difference at the resentencing trial was that trial counsel presented Dr. Daniel Grant, who was referred to them by their mitigation specialist, to testify regarding his research into prison adaptation and his opinion that Nance was adapting well to the prison environment instead of Dr. Shaffer as they had done at the original trial. Wilson also explained that he believed that jurors considered whether a defendant would present a danger to others if incarcerated rather than executed as a significant factor in determining whether to vote to impose a death sentence. Trial counsel also located several deputies who, if subpoenaed, would testify regarding Nance's good behavior while incarcerated awaiting his resentencing trial. Wilson testified that this testimony was important to show that Nance had adapted to the point that the deputies did not consider him to be dangerous and [***30] that he would not, in fact, present a danger in the prison system. Wilson also indicated that, as Dr. Grant was qualified as an expert in both prison adaptability and psychology and had conducted his own testing and evaluation of Nance, trial counsel did not abandon "the mental health defense." Rather, they intended to present evidence of Nance's "borderline intelligence" through Dr. Grant and the testimony of numerous lay witnesses, particularly Nance's family members.

Moore testified at the habeas evidentiary hearing that, when he and the defense investigator went to Kansas prior to the original trial to develop mitigating background evidence, Nance's family members, including his mother, were

"very uncooperative" about admitting "the abuse or the shortcomings of the stepfather."[3] However, after the attorneys switched roles, Wilson and the defense team's new investigator/mitigation specialist traveled to Kansas, where they were "more successful" than Moore in getting family members to meet with them, provide information, and agree to testify. As a result, more of Nance's family members testified for the defense at the resentencing trial. Furthermore, the record supports the habeas [***31] court's finding that trial counsel met with the witnesses, including Dr. Grant, prior to the resentencing trial to prepare them to testify. After an independent review of the record, we conclude that the habeas court did not err in concluding that trial counsel conducted a thorough investigation prior to the resentencing trial.

[*203] (2) *Presentation at the 2002 Resentencing Trial*

In his opening statement at Nance's 2002 resentencing trial, Wilson told the jury that the defense intended to present evidence about Nance's family, "how he grew up," his learning difficulties, a biological father that he never knew, his "introduction to alcohol [**718] and drugs at an early age," his "stepfather's alcoholism," and, finally, Nance's behavior during his most recent incarceration. Although the 2002 proceeding was a resentencing trial, the State presented basically the same evidence that it had presented in its case-in-chief in the guilt/innocence phase of the original trial to establish that Nance [***32] had committed Balogh's murder and the additional crimes of which he was convicted at that time. See *Hance v. State*, 254 Ga. 575, 577 (3) (332 SE2d 287) (1985) (10) ("[I]n a resentencing trial … , while the state has no legal burden to establish guilt, as a practical matter the state must present sufficient evidence to allow this jury to independently satisfy itself of the defendant's guilt, as well as determine what punishment should be imposed."). Therefore, the State again presented evidence that Nance had committed the armed robbery of the Tucker Federal Bank as part of the facts surrounding the murder, as well as statutory aggravating evidence. Evidence that Nance had committed a prior Gwinnett County bank robbery and a 1984 armed robbery in Kansas was also again presented as statutory aggravating evidence. The State also introduced victim impact testimony and non-statutory aggravating evidence that Nance had felony convictions in Kansas for burglary and theft.

During cross-examination of several of the State's witnesses, trial counsel elicited testimony similar to that elicited at the original trial to support their theory that Nance did not intentionally shoot the victim and never [***33] intended to harm anyone. Also during cross-examination, trial counsel again elicited testimony about the contents of the dye packs and the possible effects of their detonation on an individual. Specifically, the jury heard that the dye packs were contained in "regular money," generally could not be recognized without training, and were activated only after they passed through the bank's door frame, thereby indicating that Nance had no reason to suspect that the pillowcases contained dye packs and thus was startled by their detonation. The jury also learned that the dye packs contained CS tear gas, red dye, potassium chlorate, and chemicals designed to produce an incendiary reaction; that persons directly exposed to tear gas may experience tearing and burning of the eyes, significant congestion, and difficulty breathing; and that an investigator counted the money from the pillowcases three to four hours [*204] after the dye packs' detonation in an open area and that even this limited exposure irritated the investigator's sinuses.

GBI microanalyst Peterson testified for the State again at the resentencing trial, and trial counsel elicited his testimony on cross-examination that the stains on [***34] Nance's gloves were "very heavy" and that "the most common sense" reason for those stains was that Nance's gloves were "extremely near, if not touching," one of the dye packs when it detonated. Dr. Burton again testified on direct examination that he had training and experience in tear gas as part of his background in basic forensics and that he was familiar with CS tear gas that is typically present in a standard bank dye pack and its possible effects on an individual. He testified that, when a dye pack detonates, the following may occur: the individual is often startled by the detonation itself; the dye may get on the individual, "which startles [the individual] even further"; and CS tear gas can cause burning and tearing of the eyes, reflexive closure of the eyelids, reflexive coughing, irritation of the throat and lungs, and an asthma attack if an

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[3] Although trial counsel repeatedly referred to Jim Nance both at trial and in the habeas proceeding as Nance's "stepfather," the record clearly establishes that Jim Nance legally adopted Nance when he was a child.

individual is asthmatic. On cross-examination, trial counsel elicited Dr. Burton's testimony that, "even if you know [a dye pack] is going off, it still may be somewhat startling" and that the fact that there was more than one dye pack in Nance's case could cause the detonation to be even more startling. Unlike in the original trial, [***35] Dr. Burton did not express an opinion as to whether Nance demonstrated that he was significantly affected by the CS tear gas.

Trial counsel presented 23 witnesses to support their mitigation theory involving Nance's troubled childhood, early drug use, learning difficulties, and prison adaptability. Numerous family members and Nance's third grade teacher testified regarding Nance's developmental delays and learning difficulties. The family members also testified about Nance's troubled background, including his abuse of drugs, the detrimental [**719] influence that his uncle had on him, and his adoptive father's binge drinking, abusive conduct, and dissatisfaction with him. Trial counsel also presented the testimony of the widow of Nance's deceased biological father, who testified that she reacted with anger when Nance came to their home approximately 20 years earlier to announce that he was her husband's son, that her husband had never had any contact with Nance prior to that day, and that he never established a relationship with Nance. Her daughter testified that she had only recently learned that Nance was her half-brother. Both women expressed support for Nance, and Nance's half-sister asked [***36] the jury for mercy so that she and her children could have the opportunity to get to know Nance. Nance's former fiancée testified that she met Nance in 1977 at a meeting of Jehovah's Witnesses when Nance was approximately 16 years old, that they were engaged to be [*205] married in 1980, and that she called off the engagement shortly before their wedding date because "[Nance] wasn't making wise decisions."

Trial counsel presented seven Gwinnett County sheriff's deputies, who testified regarding Nance's good behavior while incarcerated in the Gwinnett County Detention Center for approximately a year and a half awaiting his resentencing trial. Their testimony showed that during this time period, Nance had been selected by the floor deputies to be a unit worker in the J-Pod, which was the maximum security unit of the detention center. Unit workers were selected by the floor deputies based on their good behavior and calm demeanor, were allowed to move about the entire pod, and had access to brooms, mops, and cleaning material. As a unit worker, Nance assisted the floor deputy with the upkeep of the pod, did general errands, and passed out food trays and clean uniforms to inmates, and he had earned [***37] the weekly award for keeping the cleanest pod in the detention center several times. The deputies described Nance as a "model" and an "ideal" inmate who obeyed the rules and regulations, cooperated, worked hard, never caused a problem, and once advised a young man who was touring the detention center that "[he'd] end up in jail" if he continued to disobey his father. Two ministers who had become spiritual mentors to Nance testified that he was remorseful, was a changed man, had "given his heart to the Lord," wanted to be baptized, and was very involved in Bible study.

Finally, trial counsel presented the testimony of Dr. Grant, who explained the methods and procedures that the Department of Corrections would employ in assessing and classifying Nance and the ways in which the prison system deals with discipline problems and provides for the community's safety. Dr. Grant also testified that he had reviewed all of Nance's jail and prison records and that he had spoken with members of Nance's family and officers at the detention center, and he opined that Nance "would make a good adjustment to prison life based on all the available information." He also testified that he was not surprised [***38] by Nance's recent good behavior at the detention center, opined that his behavior in prison would be similar, noted that the disciplinary actions against inmates for aggressive or violent behavior generally decrease significantly as inmates reach the ages of 40 to 46 years, and then testified that Nance was 41 years old. Dr. Grant also testified regarding Nance's mental impairments and employment limitations, and that testimony is discussed in detail below.

In closing arguments at the end of the resentencing trial, Wilson acknowledged that Nance was responsible for Balogh's death and deserved to be punished for that crime. However, he argued that a [*206] sentence of life without parole was a severe enough punishment, pointing out that the evidence presented regarding Nance's childhood had definitely shown some verbal abuse and an "episodic alcoholic father in the home." He reminded the jury of family members' testimony describing Nance as "the lost child," who was affectionate, a slow learner, neither parent's favorite, and unable to please his father. He also pointed to the testimony about Nance's developmental delays and difficulties at school, his father's frustration with him and resultant [***39] labeling of him as "stupid," his mother's devotion to her work and to church at the expense of being at home with Nance, his father's taking Nance

with him to bars, [**720] his introduction to drugs and alcohol and to stealing to support his drug use by the uncle who was his only male authority figure, his learning the startling news as a young man that Jim Nance was not his real father followed closely in time by experiencing the rejection of his biological father and then his fiancée, and his struggles maintaining a job.

Wilson also argued that the evidence supported an inference that, while Nance intended to rob the bank, he never intended to harm anyone, and he recited the State's own experts' testimony to support his contention that Nance "was indeed startled, scared, teary eyed, a little bit dazed from that concussion, the dye, the smoke, and the tear gas as he ran across the street toward that liquor store." Wilson further argued that, while "there's pretty good evidence [that Nance] was trying to take [Balogh's] car from him" at the liquor store,[4] the evidence showing that the gun was still in the black trash bag at the time, that Nance did not remove Balogh from the car and take [***40] the vehicle, and that the bullet first entered Balogh's elbow all supported an inference that the shot that killed Balogh was unintentional. Wilson reminded the jury of the deputies' testimony regarding Nance's good behavior while incarcerated; Dr. Grant's testimony that Nance was adjusting well to incarceration; the testimony of Nance's two spiritual mentors that he worked hard to correspond with them, study his Bible lessons, and improve himself; and the evidence that Nance was and continued to be remorseful for his actions. He then concluded that Nance was not the type of person for whom the death penalty was designed. Nevertheless, the jury found that the State had proven the presence of the same two statutory aggravating circumstances as found in 1997 and recommended a death sentence for Balogh's murder.

[*207] (3) *The Habeas Court's Conclusions Regarding the 2002 Resentencing Trial*

The habeas court concluded that Nance received ineffective assistance of counsel at his resentencing [***41] trial because trial counsel did not present testimony like that of Dr. Shaffer's 1997 testimony regarding Nance's mental impairments or testimony like that of Dr. Leslie Hutchinson in the habeas proceeding regarding the possible effects of the dye packs' detonation on Nance. This Court reviews those conclusions de novo. See *Dewberry v. State*, 271 Ga. 624, 625 (2) (523 SE2d 26) (1999) (holding that (11) what witnesses to call is a tactical decision and that whether an attorney's trial tactics are reasonable is a question of law, not fact).

(a) *Omission of Testimony at the 2002 Resentencing Trial Regarding Nance's "Borderline Mental Retardation" and "Borderline Intellectual Functioning"*

The habeas court first concluded that trial counsel were ineffective in not presenting expert testimony at the resentencing trial to "make clear to the jury that [Nance]'s intellectual limitations amounted to borderline mental retardation." However, Nance's own expert, Dr. Scanlon, testified at the habeas evidentiary hearing that the psychological diagnosis of "borderline mental retardation" has been eliminated because it is no longer considered to be "relevant terminology." See American Psychiatric Association, *Diagnostic [***42] and Statistical Manual of Mental Disorders* ("DSM-IV-TR"), 41-45 (Text Rev. 4th ed. 2000) (providing no reference to "borderline mental retardation" in the section listing and describing the various severities of "mental retardation"); id. at 740 (defining an IQ in the 71-84 range as "borderline intellectual functioning"); see also *Carroll v. Crosby*, No. 6:05-cv-857-Orl-31KRS, 2008 U. S. Dist. LEXIS 120926, at *44, n. 12, 2008 WL 2557555, at *15, n. 12 (M.D. Fla. June 20, 2008) (noting that the DSM-IV-TR does not provide a clinical definition of "borderline mental retardation").

Furthermore, Dr. Grant testified at the resentencing trial that, according to his testing, Nance had an intelligence quotient of 82, and although he did not use the term "borderline intellectual functioning" to describe Nance's low IQ, he testified that Nance's IQ [**721] placed him in the twelfth percentile of functioning and explained that 88 percent of those individuals who took the same IQ test that he administered to Nance scored better than Nance did. Regarding language skills, Dr. Grant testified that Nance's scores on oral expression and listening comprehension were lower than his general level of intelligence, and he indicated that Nance's skills in those [***43] areas were

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[4] Nance was convicted and sentenced for criminal attempt to commit armed robbery in connection with this incident at his original trial, and that conviction was affirmed by this Court. See *Nance*, 272 Ga. at 217, 224 (6).

comparable to those usually seen in early adolescence. Dr. Grant also testified that [*208] Nance's reading was at an early fourth grade level, that his reading comprehension was also at the fourth grade level, that he was "a very slow reader," that he scored "at the [0].2 percentile" in memory functioning, and that he had difficulty encoding information, requiring "more repetition" to grasp information.

When asked by trial counsel how Nance's level of functioning would have caused him problems in his ability to work, follow rules, and keep a job, Dr. Grant responded that, beginning in school, Nance likely would have been classified either as a "slow learner" or placed in a learning disability program and that his ability to function was at a lower level. Dr. Grant explained that Nance's problems with memory and learning made it harder for him to learn job skills and that teaching him those skills required repetition and patience on the part of his employer. Dr. Grant noted that Nance's younger brother had said that he had once completed a job application for Nance because Nance appeared unable to do so. Dr. Grant concluded that Nance was employable but that his job choices were [***44] necessarily limited to lower level, repetitive type work.

Trial counsel also presented testimony from Nance's third grade teacher at the resentencing trial. She testified that she recognized from the beginning of the school year that he had problems in reading, math, and other major areas and that she, Nance's mother, and the principal decided together that Nance should be retained. She testified that school policy at that time prevented her from writing personal comments into school records, but she recalled being aware of Nance's lack of progression with the rest of the class and her inability to identify the problem. She also testified that Nance was not a lazy student and worked at the requirements set before him; it just appeared to her that the work was too hard for him. She explained that she had had no training in how to identify learning problems in children and the school had no special education programs at the time that she taught Nance. However, based on her experience and the training that she subsequently received, she opined that Nance probably had learning disabilities at the time and that he would have benefitted significantly from special education classes. Trial [***45] counsel introduced Nance's third grade school records, and his former teacher pointed out from those records that Nance's reading grades were "a total failure in [his] first year" of third grade, that his grades in the remaining major subject areas were all in the "needs improvement" range, and that he did not show improvement until midway through the second semester of his second year in the same curriculum.

In addition to this testimony, several family members testified at the resentencing trial that Nance had always been "slow." Nance's [*209] mother again testified concerning his developmental delays and his learning difficulties in school. Nance's maternal aunt, who lived with Nance when he was seven, eight, and nine years old and again when he was approximately thirteen years old, testified that "[Nance] was really slow," "had a learning disability," and "was like almost retarded." She testified that she often helped Nance with his schoolwork, that she always had to go through his studies with him and repeatedly explain "a lot of things" to him "a lot more often" than she did with his brothers, and that Jim Nance "would get after [Nance] a lot more [than he got after his brothers] because … [***46] of his not being able to comprehend things as well as the other boys."

Both of Nance's brothers testified that Nance's grades were always poor, which frustrated Nance's father, and that Nance's father called him names and physically punished him as a result. Describing the same situation as Dr. Grant, Nance's younger brother, Doyle, testified that he assisted [**722] Nance, then a young man, in completing his job application. Doyle also testified that Nance was called "Sped" by fellow students in junior high school because he was in special education reading classes. Nance's older brother, Johnny, described the difficulties that Nance had maintaining a job after he was paroled from a Kansas prison and came to live with Johnny in Georgia. A minister testified that he noticed when he began an individual Bible study with Nance that he had difficulty with retention.

This review of the record shows that trial counsel did present significant evidence at the resentencing trial regarding Nance's low intelligence and how it affected his life. Furthermore, on cross-examination, Dr. Grant indicated in response to the district attorney's specific questioning that Nance's IQ score placed him in the [***47] low average range in intelligence and *not* in the mental retardation range, and he explained that Nance's low IQ did not mean that he was incapable of living in society, holding a job, and being a law-abiding citizen. However, Dr. Grant still did not use the terms "borderline intellectual functioning" or "borderline mental retardation" to describe Nance's level of intelligence as Dr. Shaffer did in the original trial, and trial counsel could have reasonably concluded that, if he did

so, the State likely would present their own expert, Dr. Theresa Sapp, to testify in rebuttal, as it did in the original trial, to explain to the jurors that "borderline mental retardation" is *not* mental retardation and to explain the difference that exists between "borderline intellectual functioning" and mild mental retardation. Specifically, at the sentencing phase of Nance's original trial, Dr. Sapp, who had conducted a pretrial evaluation of Nance, testified that Nance's score of 77 on the [*210] IQ test administered to him by Dr. Shaffer "f[e]ll[ ] within what is known as the borderline range of intellect." Then she explained the following:

> In that range of intellect, a person is generally capable of achieving [***48] secondary education. They may have to repeat certain classes, but they're generally able to hold down a job, they're able to live independently.

Dr. Sapp differentiated persons with mild mental retardation by stating that they were usually incapable of achieving beyond the sixth grade level. She testified that Nance was unclear about what grade he completed in school but that he did tell her that he completed his GED while in prison.

Dr. Sapp also testified that she asked Nance about his work history, that she determined from his responses that Nance did what he perceived to be in his best interests, and that she did not get the sense that Nance was ever forced out of a job or unable to work because of factors other than his own choices. Moreover, had Dr. Sapp been called again by the State as a rebuttal witness, she likely would have testified, as she did at the original trial, that she perceived indications that Nance was malingering during her evaluation of him. Based on the foregoing, we fail to see how trial counsel were deficient in not ensuring that Dr. Grant or another expert used the term "borderline intellectual functioning" or "borderline mental retardation" when describing [***49] Nance's impairments.

Moreover, on the question of possible prejudice, we conclude that there was not enough of a difference between the evidence presented during the resentencing trial and the evidence presented in the habeas proceeding regarding Nance's low level of intelligence to establish a reasonable probability of a different outcome and that Nance was not prejudiced by the fact that no expert used those terms in his resentencing trial to describe his mental impairments. See *Schofield v. Holsey*, 281 Ga. 809, 813-814 (II) (642 SE2d 56) (2007) (finding no prejudice where counsel failed to supply materials to their mental health expert that would have enabled the expert to testify that, while not mentally retarded, the petitioner had borderline intellectual functioning, because trial counsel presented *other* evidence of the petitioner's mental slowness and because the new testimony would not have made a significant contribution to his mitigation evidence in light of the evidence that counsel actually presented); *Herring v. Secretary, Dept. of Corrections*, 397 F3d 1338, 1351 (11th Cir. 2005) (finding no prejudice where counsel did not introduce two psychological reports regarding [**723] petitioner's [***50] mental [*211] disability and emotional problems, because, among other things, the reports were "cumulative" of the petitioner's mother's trial testimony that he had a low IQ and a learning disability).

(b) *Omission of Testimony at the 2002 Resentencing Trial That Nance Has Organic Brain Damage*

The habeas court also found that Nance's counsel were ineffective at his resentencing trial for omitting any expert testimony that Nance has organic brain damage. As discussed above, trial counsel testified that presenting evidence of Nance's "mental impairments" remained a part of their mitigation theory at the 2002 resentencing trial and specifically stated that presenting evidence of his "borderline intelligence" was a part of that theory. However, our review of the trial and habeas records reveals no evidence to support the habeas court's conclusion that evidence of Nance's "brain damage" continued to be a part of the defense strategy at the resentencing trial. Moreover, to demonstrate deficient performance, Nance must "show that counsel's representation fell below an objective standard of reasonableness" and that, "in light of all the circumstances, the identified acts or omissions were outside the [***51] wide range of professionally competent assistance." *Strickland*, 466 U. S. at 688, 690. Thus, an attorney's testimony on such an issue is not determinative. (12) A review of the trial transcript indicates that a reasonable lawyer under the circumstances could have strategically chosen not to present such evidence. See *Waters*, 46 F3d at 1516-1517 (noting that, even though testimony at the habeas evidentiary hearing was ambiguous, acts at trial indicated that counsel exercised sound judgment).

Furthermore, the habeas court erred as a matter of law when it concluded that trial counsel's deliberate decision not to present Dr. Shaffer's testimony in the resentencing trial was not "tactical or reasonable." The habeas court based this conclusion on its findings that "[t]rial counsel's sole stated reason for failing to present Dr. Shaffer's mitigating

testimony [at the 2002 resentencing trial] was that his credibility had been 'impeached' on cross-examination at the 1997 trial," that trial counsel were concerned that the district attorney would be able to discredit his testimony in the resentencing trial in the same way, and that trial counsel could have provided Dr. Shaffer with the investigative [***52] materials that they collected to support their 2002 mitigation theory to ensure that his findings would not be challenged in the way that they were in 1997. However, as the following discussion shows, the record supports Moore's testimony that the credibility of Dr. Shaffer's testimony was attacked in several ways at the 1997 trial and that trial counsel had a legitimate concern that it would be susceptible to the same attacks in the resentencing trial. Our review of the record also shows that the new information [*212] that trial counsel had collected for the resentencing trial would not have made Dr. Shaffer's testimony less susceptible to attack than it was in the 1997 trial.

(i) *Counsel's Decision Not to Present Dr. Shaffer's Testimony at the 2002 Resentencing Trial*

In explaining the decision not to present Dr. Shaffer's testimony at the resentencing trial, Moore testified at the habeas evidentiary hearing that "Dr. Shaffer's testimony did not go well" at the original trial because it was discredited. While unable to recall "the specifics," Moore indicated that there were issues involving "the origin" of some of Dr. Shaffer's information upon which he based his opinions. Moore acknowledged [***53] that it would be virtually impossible for a psychologist to personally interview every witness on whose statement the psychologist relied and that no court would approve the "astronomical" funding that doing so would require. He also acknowledged that some of the information about which Dr. Shaffer was impeached might not have been critical to the outcome of his evaluation and that Dr. Shaffer "fought back a little" by explaining to the jury that mental health experts commonly rely on statements obtained in interviews contained in investigators' reports. Nevertheless, Moore testified that, "when an expert witness does not know the underlying facts in the case, [he] believe[d that] it compromise[d] [the expert's] credibility with the jury," that there were "a number of things" [**724] that successfully challenged Dr. Shaffer's testimony, that the district attorney succeeded in making the point to the jury "that everything that Dr. Shaffer had was basically hearsay based on what somebody told him," that Moore considered the district attorney's point a legitimate one, and that he and Wilson agreed that "Dr. Shaffer's testimony had been compromised in the case." See *Whatley v. Terry*, 284 Ga. 555, 565 (V) (A) (668 SE2d 651) (2008) (13) [***54] (although an expert witness may rely on others' statements in forming an opinion, the opinion should be given weight only to the extent that those statements are found reliable, and an expert witness must *not* be permitted to serve merely as a conduit for hearsay).

Moore also testified that he and Wilson reviewed the transcript of the 1997 trial and that the defense team held multiple strategy meetings to discuss what they had done at the 1997 trial and what they should or should not do differently at the resentencing trial. The record also shows that, approximately six months before the resentencing trial, Moore and Wilson held a meeting with Dr. Shaffer, where they reviewed Nance's previous psychological evaluations and discussed the possibility of Dr. Shaffer testifying in the resentencing trial. Moore testified that trial counsel chose not to present Dr. [*213] Shaffer's testimony again because they decided "that the cross-examination that [the district attorney] had done in the first trial would affect [Dr. Shaffer's] testimony in the second trial." Moore could not recall Dr. Shaffer's opinion on the matter, but he did recall that Dr. Shaffer felt that "[the [***55] district attorney] had successfully discredited some of his testimony." Based on the foregoing discussion, we conclude that the habeas court erred as a matter of law in concluding that trial counsel's decision not to present Dr. Shaffer's testimony at the resentencing trial was not a tactical decision.

(ii) *Discrediting of Dr. Shaffer's 1997 Testimony*

Furthermore, a review of the 1997 trial transcript shows that a reasonable attorney could have concluded that Dr. Shaffer's testimony had been discredited. Without citing to every instance that could be construed as discrediting his testimony, we note that during cross-examination the district attorney challenged the source and veracity of several alleged events in Nance's history — such as two childhood head injuries resulting in unconsciousness, "a series of illnesses with high fevers," and severe physical and emotional abuse — that Dr. Shaffer recounted and relied on to form his diagnoses. The district attorney based his challenges on the fact that there had been little or no testimony from the family members who had testified to substantiate the alleged events or the fact that, in some instances, there had even been arguably contradictory [***56] testimony from those family members.

The district attorney also questioned witnesses about information contained in Dr. Shaffer's report, and some of their responses undermined the credibility of Dr. Shaffer's report. For instance, in response to the district attorney's questioning on cross-examination, Johnny Nance testified that he had not personally spoken with Dr. Shaffer but had indirectly provided him with information regarding Nance's childhood. Referring to Dr. Shaffer's report, the district attorney then asked Johnny Nance if he had been the one who had relayed to Dr. Shaffer that Nance was called on by family members to kill injured animals, which was an alleged part of Nance's childhood that Dr. Shaffer relied on to support his conclusion that Nance "was not hampered by emotional attachment." Johnny Nance responded, "No, I didn't say it like that." He then described to the jury a childhood incident that presented an entirely different picture of Nance and his background than the one that Dr. Shaffer described in his report and testimony.

Based on the foregoing, as well as a thorough review of the remainder of the testimony at the sentencing phase of the 1997 trial, and considering [***57] the fact that the jury that heard that testimony recommended that Nance receive a death sentence, we conclude that [*214] a reasonable lawyer could have decided that Dr. Shaffer's testimony had been discredited and that the mitigation theory should be adjusted accordingly.

[**725] (iii) *How the New Material Would Have Affected Dr. Shaffer's Testimony*

Finally, contrary to the habeas court's finding that trial counsel could have provided Dr. Shaffer with the new material that they collected in support of their 2002 mitigation theory to ensure that his findings would not be challenged in the way that they were in 1997, our review of the 2002 trial transcript shows that, because of the new material presented in support of their mitigation theory at the 2002 resentencing trial, Dr. Shaffer's testimony likely would have been *even more discredited* had it been presented at the resentencing trial. For example, Dr. Shaffer opined that Nance's "difficult" home life "resulted in … an emotional distancing by [Nance]," that Nance "tended to withdraw, to shut down, [and] to not have the usual range of feelings of attachment or connection to people." This testimony would have been contradicted by the testimony [***58] of many of the family members in the resentencing trial who testified that Nance was "a very loving, affectionate person," was "the most friendly, the most affectionate … , [and] had the … warm[est] personality of the three [boys]," was "compassionate," and "really loved people."

The family members' testimony at the resentencing trial regarding Nance's early drug use would have also been damaging to the credibility of Dr. Shaffer's testimony. As discussed above, Dr. Shaffer testified at the 1997 trial that one of the factors in Nance's background that he relied on in making his diagnoses was "Uncle Gene" Chaffin's influence in introducing Nance to drug use at an extremely early age. According to the history that Dr. Shaffer relied on and relayed to the jury in 1997, Chaffin "picked up [Nance] from his elementary school class and began giving him alcohol, marijuana, and cocaine." Dr. Shaffer explained that such an early abuse of drugs by Nance was significant because it led to "an arrested development … in a young boy who basically stop[ped] all opportunity at this point for normal interactions with peers and with society and with parents due to the fact that he's ingesting [***59] drugs."

The witnesses at the resentencing trial generally agreed that Chaffin introduced Nance to drugs; however, no witness testified that he did so as early as elementary school age. Unlike in 1997 when Nance's mother testified that she "underst[oo]d" that Chaffin had picked Nance up from elementary school and taken him to do drugs but had no personal knowledge of that fact, Nance's mother testified at the resentencing trial that Nance was "[p]robably … 17 or 18" [*215] when he started spending time with Chaffin. Chaffin himself testified at the resentencing trial that he supplied Nance with drugs beginning when Nance was approximately 19 years old. While Chaffin may have had an incentive to lie to protect himself, Beverly Metcalf, his ex-wife who was married to him during the relevant time period, also testified at the resentencing trial, and she would have had no apparent reason to be untruthful. Moreover, given that she had been a certified chemical dependency counselor since 1980, was the president and CEO of a company that provided chemical dependency treatment and prevention services in both community-based and correctional settings throughout the state of Kansas, and testified [***60] that she considered Chaffin's influence on a young Nance "unconscionable," the jury likely found her testimony regarding Nance's drug use highly credible. Metcalf testified that she first met Nance when Chaffin was 19 years old and Nance was approximately 12 years old, shortly after she and Chaffin began their relationship, and Chaffin started "hanging out" with Nance when Nance was 18 or 19 years old. While Metcalf acknowledged that Nance could have

been "as young as 16[ or] 17," she specifically denied that he was an 11- or 12-year-old child when Chaffin began influencing him to become involved with drugs. Finally, numerous family members testified that Nance's drug use began at approximately 16 to 20 years of age, but no one testified that he began using drugs near elementary school age, including Nance's younger brother who testified that he had used drugs with Nance and Chaffin.

The witnesses' testimony at the resentencing trial regarding Nance's childhood abuse from his alcoholic father also would have undermined the credibility of Dr. Shaffer's [**726] testimony. After Nance's mother testified on cross-examination that Jim Nance "just threatened" to strike Nance, trial counsel questioned [***61] her on redirect about seeing Jim Nance "get violent" toward Nance. She testified that "it was mostly yelling," that Jim Nance "probably put [Nance] up against the wall once or maybe twice," that "[Jim Nance] picked up something like a ball bat … one time and threatened [Nance] with it" after Nance had grown bigger than his father, and that she had been present when Jim Nance used his belt to discipline the boys but did not recall his having ever used a switch. Nance's maternal aunt, who lived with the family for portions of Nance's childhood, testified that she watched the boys and helped them with their homework, that Jim Nance was "gruff" and "grouchy," that he "holler[ed]" at Nance more than at his brothers, that he spanked the boys sometimes, but that she only saw Jim Nance get drunk "a few times" in the years that she lived with them and that she never saw him physically abuse Nance or do anything more than spank the boys when disciplining them.

[*216] Although one of Nance's maternal uncles, who lived with the family for eight months when Nance was approximately nine years old, testified that Nance would drink for three to four days at a time and then remain sober for a week and [***62] that the boys were called names like "[d]ummy, stupid, MF, [and] idiot" and were spanked with a belt and on occasion with a hose, he also testified that "[he] was disciplined in the same way when [he] was a boy," that he never considered contacting police or child protective services, and that he considered Jim Nance "a good father," although "his drinking kind of clouded his responsibilities a lot." In fact, only the testimony of Chaffin approached Dr. Shaffer's description of physical abuse. Chaffin testified that he had seen all three of the Nance boys beaten by Jim Nance, who "might" be sober two days a month; that Nance got most of the abuse and was a "terribly abused child"; that Jim Nance often beat Nance with a hanger and that one of his favorite "whipping tools" was "a board with holes in it"; and that, in his opinion, he "wasn't any father at all." Aside from the fact that Chaffin admitted that he "didn't like" Jim Nance, as the district attorney pointed out in closing argument, there are several reasons why the jury reasonably could have found Chaffin's testimony incredible. According to the testimony of Nance's brothers, Jim Nance would binge drink an average of three to [***63] five days every one to two months; their mother, and *not* their father, whipped Nance one time with a hanger; and Jim Nance did not even own a board with holes in it to use for spanking them. Nance's brothers also testified that Jim Nance was a strict disciplinarian who was concerned with his sons' grades and disciplined them by grounding them, taking their allowance away, or spanking them with a belt or a switch, depending on the circumstances; that Nance often brought home poor grades; and that their father would punish Nance by grounding him, yelling at him, and sometimes calling him "dumb" or "stupid." Doyle Nance testified that his father "occasional[ly]" struck Nance with his hands when he was drinking, but the only specific instance that he could recall was one time when his father "put a nice big handprint right on Michael's back" when "he hit him pretty hard." Johnny Nance testified that he never saw Nance beaten with a switch with thorns in it.

In addition to this testimony, multiple other witnesses, including Nance's third grade teacher and Chaffin's former wife, who was a counselor familiar with abused individuals, testified that they never saw any evidence that Nance was [***64] severely physically abused. Therefore, a reasonable lawyer could have concluded that the type of testimony of severe physical abuse on which Dr. Shaffer had partially [*217] relied in forming his opinion in 1997 regarding Nance's deficits was not supported by the evidence available to present at the resentencing trial.[5]

Finally, it is noteworthy that in the resentencing trial counsel deliberately adjusted their mitigation theory to include a defense [**727] that described Nance as a changed person. The jury heard from several witnesses who described Nance as having reformed his conduct, turned to religious studies following his incarceration, and established a

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[5] In fact, Wilson told the jurors in his opening statement that they "might" hear testimony about Nance's abusive father. In closing, Wilson told the jury that "[p]erhaps" the evidence showed some physical abuse.

good disciplinary record while incarcerated in the detention center awaiting his resentencing trial. It is a reasonable conclusion, and within trial counsel's purview of professional judgment, that evidence of frontal lobe damage to explain Nance's behavior at the time of the murder would have undermined their mitigation theory that he [***65] was a changed man, had adapted to prison life, was learning to make wise decisions, and would make "an ideal inmate." Specifically, Dr. Shaffer testified in 1997 that persons with neuropsychological test scores similar to Nance's scores did not make good decisions, because they did not "seem to understand what the results of certain actions are going to be." He also testified that Nance's understanding, judgment, and reasoning were impaired as a result of his brain damage to the point that he had not had an opportunity "to make choices in the way that most of us have had a chance to make choices." A reasonable lawyer could have believed that the jury would view Dr. Shaffer's testimony as aggravating in light of Dr. Grant's testimony regarding prison adaptability and Nance's prospects of adapting in a prison environment.

When explaining prison behavior, Dr. Grant testified that "[e]very behavior that is appropriate or is not appropriate has a consequence so that people learn to adjust or … they have a lot of problems." Dr. Grant also opined that a person like Nance, who had been impulsive and made bad decisions in the past, could learn to follow the strict rules in the prison system [***66] because of the consistent consequences that were attached to inappropriate behavior. On cross-examination, he responded to the district attorney's inquiries about past disciplinary actions against Nance by citing examples that he asserted demonstrated that Nance was learning to control his impulsivity and make good decisions. A reasonable lawyer could have viewed Dr. Shaffer's testimony as undermining that of Dr. Grant, given that Dr. Shaffer would have testified that Nance's impulsivity and past bad [*218] decisions were due to his frontal lobe damage, something over which he had no choice. See *Rhode v. Hall*, 582 F3d 1273, 1285-1286 (11th Cir. 2009) (holding that counsel were not deficient for not presenting evidence of defendant's organic brain damage where counsel "tried to show that [the defendant] could adapt to prison" and reasonably believed that the jury would see the evidence as aggravating).

Thus, we conclude that trial counsel's decision not to present the testimony of Dr. Shaffer or any other expert[6] that Nance has brain damage, given the availability of other mitigating evidence, falls within the bounds of sound trial strategy. See *Martinez v. Dretke*, 404 F3d 878, 890 (5th Cir. 2005) [***67] (holding that counsel's decision not to present evidence of organic brain damage, "given the availability of other, less damaging, mitigating evidence, fell well within the bounds of sound trial strategy").

[**728] (iv) *Prejudice Analysis*

Moreover, even assuming that trial counsel's strategies fell below professional norms, they cannot form the basis of an ineffective assistance of counsel claim, because there is no evidence that they prejudiced Nance. In assessing prejudice, we "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U. S. at 695. In addition to mitigating evidence presented by the defense, the jury also had before it the following [***69] State's evidence, much of which the district attorney cited to support his closing argument that Nance was "a smart bank robber." In committing the bank robbery, Nance wore gloves and used a gun and a vehicle that he did not own,

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[6] The habeas court found that trial counsel could have presented testimony that Nance has frontal lobe damage "through any number of experts, including … Dr. Grant … , or even the State's expert Dr. Sapp." However, Dr. Grant did not prepare a report of his evaluation of Nance, he did not testify at trial that he diagnosed Nance with frontal lobe damage, and he averred in the habeas proceeding that "[his] memory remains very vague" about his evaluation because he is now unable to locate and review his file on Nance. Thus, there is no evidence in the record that Dr. Grant has ever diagnosed Nance with frontal lobe damage. Dr. Sapp, who is not a neuropsychologist and conducted only a mental status examination of Nance, stated in her report that she would only diagnose Nance with polysubstance dependence, personality disorder, and borderline intellectual functioning, and she did not testify that she agreed with Dr. Shaffer's diagnosis that Nance suffered frontal lobe damage. In [***68] fact, she noted in her report that "no residual effects of possible organic impairments were noted" other than Nance's inability to recall certain facts, including "events leading up to the charges and arrest." Dr. Sapp opined that "a plausible explanation" for Nance's lack of memory was "that some facts were not stored because of lack of interest and intoxication." We also note that Dr. Scanlon, who relied on Dr. Shaffer's evaluation to tentatively diagnose Nance with "cognitive disorder not otherwise specificed" in his 1994 report, testified when asked about Dr. Shaffer's diagnosis in the habeas proceeding: "[A]s far as I know, there's no concrete evidence that [Nance] has actual structural damage to the frontal lobes."

which would have made it difficult to connect the gun and the vehicle to him if there had been no dye packs placed in the pillowcases. He [*219] entered the bank with the gun loaded with nine live rounds, had nine more live rounds in his pocket enabling him to fully reload the gun, presented himself as a customer, and did not pull the rolled-up ski mask down to cover his face, pull out his gun, and identify himself as a bank robber until he had an opportunity to observe who was in the bank and the circumstances that existed there. He specifically targeted a teller who was on the telephone at the time with a threat that she would be "the first to die" if the police came, in an apparent attempt to prevent her from calling the police. He threatened to come back and kill the tellers if they placed dye packs in with the money. He shot one victim and assaulted another in attempting to steal a getaway car after the dye packs' detonation sprayed the vehicle that he was driving [***70] with tear gas. He kept his gun pointed away from any officer and refrained from doing anything to endanger himself during the hour-plus standoff, and he was able to negotiate police into allowing him to make a telephone call to his wife before finally surrendering. Within hours of his arrest, he denied any involvement in the prior Gwinnett County bank robbery and wanted to know "what kind of deal [he could] get." The jury also had before it evidence of Nance's numerous other convictions, including a robbery in which Nance also threatened the teller if she placed a dye pack in with the money. The evidence depicted a man capable of planning and executing criminal acts and willing to victimize anyone who would get in his way, which was more than sufficient to belie any "no choice" defense that Nance could have asserted.

(c) *Omission of Dr. Hutchinson's Testimony Regarding the Dye Packs at the 2002 Resentencing Trial*

The habeas court also found that trial counsel were ineffective for omitting the testimony of Dr. Leslie Hutchinson, a medical doctor specializing in environmental and occupational medicine, at the resentencing trial. The record shows that trial counsel met with Dr. Hutchinson [***71] immediately prior to the 1997 trial and that they disclosed their intention to call Dr. Hutchinson as a witness in the case "to testify as to the effects of tear gas on human beings" on the first day of trial. However, trial counsel did not call Dr. Hutchinson or any other expert to testify in this area in 1997. At the habeas evidentiary hearing, Dr. Hutchinson was qualified as an expert in the field of toxicology and chemical weapons, and he testified that, based on Nance's mental impairments and his opinion that Nance was significantly exposed to CS tear gas, "[Nance's] statement that he didn't know that he had actually fired the gun is plausible and more likely than not true."

[*220] (i) *Trial Counsel's Performance*

At the habeas evidentiary hearing, Moore testified that the defense team investigated obtaining a forensic toxicologist to testify at the guilt/innocence phase of the 1997 trial but that, after "talking to a number of people," including the manufacturer of the dye packs, "[they] were never able to find an expert [they] felt like [they] could use." Neither of Nance's attorneys could recall the details of their meeting with Dr. Hutchinson. Dr. Hutchinson testified that he gave trial [***72] counsel only "an oral report of a calculation … of the concentration of CS [tear gas that] would [have been] in an enclosed car," but that he would have been willing and able to testify at the original trial in the same way that he testified in the habeas evidentiary hearing had he been provided the material that habeas counsel provided to him, including [**729] police reports, the safety data sheet on the dye packs, and Dr. Shaffer's report. Thus, there is evidence in the record to support the habeas court's finding that Dr. Hutchinson's testimony was readily available to trial counsel prior to the resentencing trial.

Wilson testified at the habeas evidentiary hearing that he could not recall the reason why counsel did not present Dr. Hutchinson's testimony but that he knew at the time of trial why Dr. Hutchinson was not called. Wilson did recall that the defense was able to elicit "some information about tear gas and its effects from State's witnesses who testified." As previously discussed, trial counsel elicited significant testimony at the 1997 trial regarding the effects of tear gas and GBI microanalyst Peterson's opinion testimony that Nance was exposed to the dye packs' components. [***73] Furthermore, after explaining Nance's mental impairments to the jury in the sentencing phase of the 1997 trial, Dr. Shaffer testified that "exposure to a situation such as a dye bomb going off or chaotic stimulus going on around [Nance]" would result in "his judgment [being] further impaired." The record supports the habeas court's finding that counsel repeatedly discussed their strategy for the resentencing trial, taking into account what they did in the original trial. Trial counsel were never asked why they did not present Dr. Hutchinson's testimony at the resentencing trial. We note, however, that trial counsel also elicited testimony at the resentencing trial similar to

that elicited at the original trial to support their theory that Nance became panicked as a result of the dye packs' detonation, that he did not intentionally shoot the victim, and that he never intended to harm anyone.

" 'It is well established that the (14) decision as to which defense witnesses to call is a matter of trial strategy and tactics.' " (Citation omitted.) *Hubbard v. State*, 285 Ga. 791, 794 (683 SE2d 602) (2009). [*221] In particular,

> [t]he (15) decision of how to deal with the presentation of an expert witness by the [***74] opposing side, including whether to present counter expert testimony, to rely upon cross-examination, to forego cross-examination and/or to forego development of certain expert opinion, is a matter of trial strategy which, if reasonable, cannot be the basis for a successful ineffective assistance of counsel claim.

*Thomas v. State*, 284 Ga. 647, 650 (3) (b) (670 SE2d 421) (2008). Based on the evidence in the record and the deference owed to trial counsel's strategic decisions, we conclude that the omission of Dr. Hutchinson's testimony at the resentencing trial was the result of a reasonable strategic decision made after a thorough investigation into the dye packs and the possible effects of their detonation on Nance and, thus, that the habeas court erred in finding trial counsel performed deficiently in this area. See *Williams v. Head*, 185 F3d 1223, 1228 (11th Cir. 1999) (16) ("[W]here the record is incomplete or unclear about [trial counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.").

(ii) *Actual Prejudice*

Moreover, even assuming that trial counsel's strategies fell below professional norms, we conclude as a matter [***75] of law that the omission of Dr. Hutchinson's testimony did not prejudice Nance. The habeas court found that, as a result of not presenting Dr. Hutchinson's testimony, trial counsel failed to inform the jury that exposure to the dye packs exacerbated "[Nance's] cognitive limitations and therefore his impulsivity and poor judgment" and, accordingly, "substantially diminished his culpability by reducing the 'volitional nature' of the shooting."

GBI microanalyst Peterson opined at the resentencing trial that "very heavy" stains from the red dye were present on Nance's gloves because they and, impliedly, Nance were "extremely near, if not touching," one of the dye packs when it detonated. Thus, through cross-examination, trial counsel elicited a State expert's opinion that Nance was significantly exposed to the dye packs' components. However, the State's uncontroverted evidence also showed that the dye packs detonated while inside the pillowcases as Nance placed them between the passenger door and the seat upon entering the vehicle, [**730] that he never closed the driver's door, and that he immediately abandoned the vehicle. Had Dr. Hutchinson testified at the resentencing trial, the district attorney [***76] surely would have [*222] elicited on cross-examination the same acknowledgment from him that was elicited on cross-examination at the habeas evidentiary hearing, namely, that getting away from the tear gas and into the open air would diminish its effects.

Moreover, Dr. Hutchinson's most significant testimony regarding Nance's culpability was his assertion that "[Nance's] statement that he didn't know that he had actually fired the gun is plausible and more likely than not true." However, a review of the record shows that Dr. Hutchinson misconstrued Nance's statement. While the officer who took Nance's post-arrest statement did testify that Nance stated to him "that he could not remember shooting," the officer also testified that Nance stated the following:

> I thought I only shot once. I looked down at the barrel later and I seen that I shot twice. … I was on the side. The guy was trying to run me over. I was just going to scare him.

Thus, Nance did not state that he did not know that he had actually fired the gun but rather that he did not recall shooting twice. Moreover, the Gwinnett County police sergeant who negotiated Nance's surrender to police testified that one of the first things [***77] that Nance said to him at the Chevron station was to ask if anyone at the liquor store was hurt. When the negotiating officer asked Nance why he asked, Nance stated: "[W]hen I run over across the street to the liquor store, I tried to get a truck [sic]. And this guy started yelling at me, and *I shot at him* a couple of times." (Emphasis supplied.) Thus, even had Dr. Hutchinson testified at the resentencing trial as he did at the habeas evidentiary hearing, there is no reasonable probability that the jury would have found persuasive his testimony regarding the veracity of Nance's alleged statement that he did not know that he actually fired the gun in

light of the contradictory testimony of two different law enforcement officers recounting Nance's separate statements.

The habeas court also found that Nance was prejudiced because Dr. Hutchinson's testimony would have rebutted the district attorney's argument that Nance was "a smart bank robber." However, Dr. Hutchinson's opinion testimony that Nance exhibited signs that the exposure to CS tear gas was having a significant impact on him would not have been supported by the evidence that was presented in the resentencing trial. Specifically, [***78] Dr. Hutchinson testified that "[Nance's] effects, his confusion, running through the traffic, almost getting run over, the way he behaved over the next 15, 20 minutes were entirely consistent with the effects of a large dose of exposure to CS." However, there was *no* testimony presented in the resentencing trial that [*223] Nance appeared confused and bewildered after the dye packs' detonation.[7] There was *no* evidence presented at either trial that Nance was almost run over while crossing the highway after the dye packs detonated. Furthermore, multiple witnesses who came into contact with Nance shortly after the detonation testified that Nance did not exhibit any of the symptoms associated with exposure to tear gas.

Instead, the evidence showed the following. Nance immediately jumped out of the car into the open air, grabbed the black trash bag containing the gun, and crossed the highway, apparently without incident. Once in the liquor store parking lot, he ran around the front of the victim's car as the victim was backing out of a parking place, yanked the door of the victim's moving car open, argued with the victim, and fired one shot at him, [**731] resulting in his death a short time later. Then Nance turned and confronted a nearby witness, demanding, "Give me your keys." When the witness ran around the side of the liquor store, Nance fired a shot, then ran around the other side of the store, confronted the witness at the back of the store, and "squared off" with the witness, pointing the gun at him. When the witness ran, Nance also [***80] turned, ran up the hill, successfully crossed the highway again, and arrived at the Chevron station. There he was soon surrounded by law enforcement personnel, including numerous SWAT team members, who all had their weapons aimed at him and were prepared to shoot him. The negotiating officer testified that he explained to Nance that the surrounding officers would shoot him if he moved the gun away from himself or started to point it toward the negotiating officer, that Nance asked him what would happen if he ran toward an officer, and that the negotiating officer told Nance that that was not an option that he wanted to consider. While Nance threatened that there would be "war" if anyone "rush[ed]" him, he never pointed the gun at anyone but himself, thus demonstrating sufficient self-control, good judgment, and awareness of his circumstances to refrain from doing anything to cause the officers to fire at him.

[*224] In light of the evidence presented at the resentencing trial regarding Nance's actions immediately after the dye packs' detonation and his own statements regarding the shooting, there is no reasonable probability that the jury would have found credible or persuasive Dr. Hutchinson's [***81] testimony concerning the effects of the exposure to CS tear gas on Nance, including his opinion testimony that Nance's statement that he did not know that he fired the gun was "more likely than not true." (17) Thus, there is no reasonable probability that the outcome would have been different even had Dr. Hutchinson's testimony been presented at the resentencing trial.

(d) *Collective Assumed Prejudice Regarding the 2002 Resentencing Trial*

In sum, even if counsel had referred to Nance's low average intelligence as "borderline intellectual functioning" and "borderline mental retardation" and had presented evidence of Nance's organic brain damage and the testimony of Dr. Hutchinson in mitigation during Nance's 2002 resentencing trial, we conclude that there is no reasonable

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[7] While a Lilburn police officer did testify for the defense at the 1997 trial that Nance appeared confused, trial counsel did not present him as a witness at the resentencing trial. A review of his testimony shows that a reasonable lawyer could have decided that his testimony had been impeached at the original trial. The State elicited testimony on cross-examination that the officer had not included any information concerning Nance's "confused" state in his report, that the first [***79] time that the officer had relayed that information to anyone was shortly before he testified, that the officer no longer worked for the Lilburn Police Department and had been unable to obtain another job in law enforcement, and that he was upset that another officer had received the Officer of the Year award that he felt he deserved for his part in Nance's apprehension.

probability that the outcome would have been different. See *Schofield v. Holsey*, 281 Ga. at 811-812, n. 1 (holding that (18) the combined effect of trial counsel's deficiencies should be considered).

III. *Ineffective Assistance of Counsel Claim at the Guilt/Innocence Phase of the 1997 Trial*

Nance contends in his cross-appeal that the habeas court erred in denying his claim that trial counsel were also ineffective in not presenting [***82] Dr. Hutchinson's testimony at the guilt/innocence phase of the 1997 trial. However, for the reasons stated above, trial counsel's decision not to present Dr. Hutchinson's testimony at the guilt/innocence phase of the 1997 trial was a reasonable strategic decision made after a thorough investigation.

Furthermore, Nance was not prejudiced by the omission of this testimony. Trial counsel elicited opinion testimony from the State's expert, GBI microanalyst Peterson, that Nance was exposed to the dye packs' components, as trial counsel also later did in the resentencing trial. For the same reasons stated above, there is no reasonable probability that the jury would have found credible Dr. Hutchinson's testimony that, due to that exposure and Nance's mental impairments, Nance's statement that he did not know that he fired the gun was "more likely than not true."

Moreover, Nance was also charged with felony murder with the underlying felony being the attempted armed robbery of Balogh's car. "[T]he jury did not have to find that [Nance] acted with an intent to kill in order to find him guilty of felony murder, as intent to kill … is [*225] not an element of the offense of felony murder." *Brockman v. State*, 292 Ga. 707, 730 (16) (739 SE2d 332) (2013). [***83] Similar to 2002, the officer who negotiated Nance into surrendering to police testified in the 1997 trial that Nance told him: "I tried to get a car and the man started yelling at me and I shot at him a couple of times, and do you know if he's hurt [**732] or if anybody's hurt." In light of Nance's own statement and McNeal's eyewitness testimony that Nance yanked open the door of Balogh's moving car, that he argued with Balogh, that Balogh raised his arm defensively and shouted "no, no, no," and that Nance turned to McNeal immediately after he shot Balogh and demanded McNeal's keys, there is no reasonable probability that the jury would not have again convicted Nance of the attempted armed robbery of Balogh's car and of felony murder. See id. at 728 (15) (stating that a (19) defendant is not entitled to a jury charge on the affirmative defense of accident "unless there was evidence to support a finding that [the defendant acted] without any 'criminal scheme or undertaking, intention, or criminal negligence'") (quoting OCGA § 16-2-2). Furthermore, even had Nance been convicted only of felony murder and not malice murder, he would have remained eligible for the death penalty. See OCGA § 16-5-1 (c), [***84] (d); *Brockman*, 292 Ga. at 731-732 (18), 738-739 (29); *Blankenship v. State*, 258 Ga. 43, 47 (13) (365 SE2d 265) (1988); *Jefferson v. State*, 256 Ga. 821, 829 (A) (353 SE2d 468) (1987). Thus, we conclude that there is no reasonable probability that the outcome would have been different even had trial counsel presented Dr. Hutchinson's testimony in the guilt/innocence phase of the original trial.

*Judgment affirmed in Case No. S13X0202. Judgment reversed in Case No. S13A0201. All the Justices concur.*

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**IN THE SUPERIOR COURT OF BUTTS COUNTY**
**STATE OF GEORGIA**

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|---|---|---|
| **MICHAEL W. NANCE,** | * | |
| | * | **CIVIL ACTION NO.** |
| **Petitioner,** | * | **2007-V-250** |
| | * | |
| **v.** | * | **HABEAS CORPUS** |
| | * | |
| **CARL HUMPHREY, Warden,** | * | |
| **Georgia Diagnostic and** | * | |
| **Classification Prison,** | * | |
| | * | |
| | * | |
| **Respondent.** | * | |

FILED
BUTTS SUPERIOR COURT
2012 SEP -6 P 1:42
BY Rhonda Smith
RHONDA SMITH, CLERK

## FINAL ORDER

Following a three day evidentiary hearing and after the review of Petitioner's original and amended Petition for Writ of Habeas Corpus, as well as the evidence and arguments presented by both parties, the Court hereby enters the following findings of fact and conclusions of law. As explained in detail in this Order, this Court GRANTS the Writ of Habeas Corpus as to Petitioner's death sentence.

## STATEMENT OF THE CASE

On September 25, 1997, Petitioner was convicted in the Superior Court of Gwinnett County of malice murder, felony murder, aggravated assault, theft by taking, criminal attempt to commit armed robbery, and possession of a firearm during commission of a felony. Following the sentencing phase of trial, on September 26, 1997, the jury found the following statutory aggravating circumstances to impose the death penalty: 1) the offense of murder was committed by a person with prior record of conviction for a capital felony; and 2) the murder was committed while the defendant was engaged in the commission of another capital felony. The jury recommended a sentence of death. The trial court then sentenced Petitioner to death. In

addition to the death sentence, Petitioner was also sentenced to twenty years for aggravated assault, concurrent sentences of twenty years for theft by taking and ten years for criminal attempt to commit armed robbery, and a consecutive sentence of five years for possession of a firearm during the commission of a felony. The felony murder conviction was vacated by operation of law.

Petitioner filed a motion for new trial on October 24, 1997, and an amendment to that motion on March 18, 1999. Petitioner's amended motion for new trial was denied on March 24, 1999.

Petitioner appealed his convictions and sentences. On February 28, 2000, the Georgia Supreme Court affirmed Petitioner's convictions and remanded the case for re-sentencing, finding that the trial court erred by failing to excuse a prospective juror for cause. Nance v. State, 272 Ga. 217, 526 S.E.2d 560 (2000). A timely motion for reconsideration was denied May 23, 2000. Thereafter, Petitioner filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 16, 2000. Nance v. Georgia, 531 U.S. 950 (2000).

Prior to the re-sentencing trial, Petitioner filed a motion to bar the State from seeking to retry him or from seeking to impose the death penalty as Petitioner claimed it would constitute double jeopardy. The trial court denied Petitioner's motion, and the Georgia Supreme Court affirmed the trial court's decision on October 1, 2001. Nance v. State, 274 Ga. 311, 553 S.E.2d 794 (2001).

At the re-sentencing trial, the issue of sentencing was determined by a jury. Petitioner's re-sentencing trial occurred on August 29 to September 20, 2002, and the jury again recommended a death sentence for the malice murder conviction finding the same aggravating circumstances as in the original trial. Petitioner filed a motion for new trial on October 18, 2002.

Petitioner subsequently amended the motion for new trial on September 24, and October 1, 2004. The motion for new trial was denied by the trial court on March 11, 2005.

Petitioner filed a notice of appeal on April 11, 2005. On December 1, 2005, the Georgia Supreme Court affirmed Petitioner's sentence of death. Nance v. State, 280 Ga. 125, 623 S.E.2d 470 (2005). A timely filed motion for reconsideration was denied January 17, 2006. Thereafter, Petitioner filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 2, 2006. Nance v. Georgia, 549 U.S. 868 (2006). Petitioner then filed a petition for rehearing in the United States Supreme Court, which was denied on November 27, 2006.

Petitioner filed this instant habeas corpus petition on March 8, 2007, and his amended petition on January 16, 2008. An evidentiary hearing was held on August 19-21, 2008, wherein Petitioner presented seven witnesses and 193 exhibits. Respondent offered 145 exhibits.

## 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, Nance v. State, 272 Ga. 217 (2000), or on direct appeal of his re-sentencing, Nance v. State, 280 Ga. 125 (2005), and this Court is precluded from reviewing such claims. 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).

a) That **portion of Claim III**, wherein Petitioner alleges that the trial court erred in failing to require the jury to find aggravating evidence existed beyond a reasonable doubt, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 126 (2);

b) That **portion of Claim III**, wherein Petitioner alleges that the trial court erred by failing to find Georgia's practice of execution by lethal injection unconstitutional, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 127(4);

c) That **portion of Claim III**, wherein Petitioner alleges that the trial court erred in allowing harmful prejudicial testimony by a State expert during the guilt phase of Petitioner's trial in violation of Estelle v. Smith, 451 U.S. 454 (1981), was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 272 Ga. at 218-221(2);

d) That **portion of Claim III**, wherein Petitioner alleges that the trial court erred in failing to excuse jurors who would not fairly consider all sentencing options, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 128-130(7);

e) That **portion of Claim III**, wherein Petitioner alleges that the trial court erred in permitting prejudicial evidence of prior bad acts and similar transactions involving Petitioner, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 272 Ga. at 221(4) and Nance v. State, 280 Ga. at 130-131(8) and (9);

f) That **portion of Claim III**, wherein Petitioner alleges that the trial court erred in permitting the State to require that Petitioner wear a stun belt during both phases of trial and failed to hold a hearing on use of the stun belt at Petitioner's re-sentencing, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 126-127(3);

g) That **portion of Claim III**, wherein Petitioner alleges that the trial court erred in admitting materials relating to Petitioner's federal charges, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 272 Ga. at 221(4) and Nance v. State, 280 Ga. at 130(8);

h) That **portion of Claim III**, wherein Petitioner alleges that the trial court erred in refusing to give a jury instruction on voluntary manslaughter, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 272 Ga. at 221(3);

i) That **portion of Claim III**, wherein Petitioner alleges that the trial court erred in failing to rule that Petitioner could not be retried at his guilt trial or re-sentencing under the Double Jeopardy Clause, was addressed and decided adversely to Petitioner by the Georgia Supreme Court. Nance v. State, 266 Ga. 816 (1996) and Nance v. State, 274 Ga. 311 (2001);

j) That **portion of Claim V**, wherein Petitioner alleges that the death penalty in Georgia is imposed arbitrarily and capriciously and amounts to cruel

and unusual punishment, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 126, 131(2) and (12);

k) That **portion of Claim V**, wherein Petitioner alleges that his sentence of death was sought and imposed arbitrarily and capriciously, and pursuant to a pattern and practice of discrimination in the administration and imposition of the death penalty in Georgia and his death sentence is disproportionate, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 131(13);

l) That **portion of Claim VII**, wherein Petitioner alleges that his death sentence was arbitrarily imposed and is a disproportionate punishment, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 131(13);

m) That **portion of Claim IX**, wherein Petitioner alleges that the trial court erred in failing to instruct the jury on manslaughter, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 272 Ga. at 221(3);

n) **Claim XI**, wherein Petitioner alleges that he was denied due process of law when he was required to wear a stun belt during both phases of his trial, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 126-127(3); and

o) **Claim XIII**, wherein Petitioner alleges that lethal injection is unconstitutional, was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 127(4).[1]

## 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). The following claims are procedurally defaulted:

[1] This Court finds that in addition to being barred by the doctrine of res judicata, Petitioner's claim is also non-cognizable in a habeas proceeding.

a) **Claim II,** wherein Petitioner alleges prosecutorial misconduct in that:

1) the State suppressed information favorable to the defense at Petitioner's original trial and re-sentencing in violation of Brady v. Maryland, 373 U.S. 83 (1963) and Kyles v. Whitley, 514 U.S. 419 (1995);

2) the State argued to the jury that which it knew or should have known to be false and/or misleading;[2]

3) the State failed to disclose benefits or promises extended to State witnesses in exchange for their testimony and allowed witnesses to convey a false impression to the trial judge and the jury;

4) the State failed to objectively and impartially prosecute Petitioner;

5) the State failed to objectively and impartially assess whether Petitioner should be permitted to enter a plea agreement;

6) the State failed to objectively and impartially determine whether a death sentence should be sought against Petitioner;

7) the State elicited false and/or misleading testimony from State witnesses in violation of Napue v. Illinois, 360 U.S. 264 (1959);

8) the State knowingly or negligently presented false and/or misleading testimony, including mischaracterizing mitigating evidence to the jury, exaggerating aggravating evidence, leading the jury to believe that it could not hear a recording of Petitioner's statements, and eliciting improper testimony from the State's mental health expert;[3]

9) the State improperly used its peremptory strikes to systematically exclude jurors on the basis of race and/or gender;

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[2] To the extent Petitioner alleges that the prosecutor's definition of mitigating evidence during voir dire was misleading, this claim was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 127(5).

[3] To the extent Petitioner alleges prosecutorial misconduct in that the State presented testimony of Dr. Theresa Sapp in the guilt phase of his trial regarding Petitioner's statement that he had consumed cocaine, Dom Perignon and marijuana on the morning of the murder, this claim was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 272 Ga. at 218-221(2).

10) the State made improper, misleading arguments and presented irrelevant, prejudicial evidence at trial and during pretrial proceedings, including unsubstantiated arguments that Petitioner needed to be confined with shackles and/or a stunbelt;

11) the State elicited extensive information about the victims and improper victim impact testimony and introduced into evidence prejudicial photographs and a redacted and altered video of the scene of the standoff;[4]

12) the State attempted to remove from the jury's consideration Petitioner's history of mental health and substance abuse;

13) the State improperly sought a death sentence,[5] refused to accept a plea offer, and allowed personal conflicts of interest to inform prosecution decisions;

14) the State made improper, prejudicial, and misleading remarks in its argument at trial and pretrial proceedings;[6]

15) the jury bailiff's and/or sheriff's deputies and/or other State agents who interacted with jurors at the trial engaged in improper communications with jurors; and

16) State agents improperly communicated with Petitioner, questioning him after he had invoked his constitutional rights and acted improperly in regards to Petitioner's behavior and statements in jail;

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[4] To the extent Petitioner alleges that the State improperly elicited victim impact testimony during the guilt phase of Petitioner's trial through the witness Dan McNeal, this claim was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 272 Ga. at 221-222(5).

[5] To the extent Petitioner alleges that his case is not a death penalty case, this claim was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 272 Ga. at 224(7).

[6] In footnote 4, wherein Petitioner alleges that to the extent that the court attempted to cure the improper comments by instructing the jury, the court's instruction failed to cure the error and actually exacerbated it by drawing the jury's attention to the improper comments, and that the trial court improperly failed to correct these errors on its own motion, these claims are procedurally defaulted as they were not raised on direct appeal and therefore, absent a demonstration of cause and prejudice sufficient to excuse Petitioner's procedural default of these claims, these claims are not properly before this Court for review on the "merits."

b) **Claim III**, wherein Petitioner alleges trial court error in that:

1) the trial court allowed the introduction of illegally obtained statements and evidence;

2) the trial court failed to possess and employ an accurate and proper understanding of what constitutes mitigation and what constitutes aggravation;

3) the trial court failed to curtail the improper and prejudicial arguments by the State;

4) the trial court admitted into evidence various items of unspecified prejudicial, unreliable, unfounded, unsubstantiated and/or irrelevant evidence tendered by the State;[7]

5) the trial court admitted unspecified improper evidence despite proper objections;

6) the trial court refused to allow unspecified admissible evidence;

7) the trial court imposed an unconstitutional and disproportionate sentence;[8]

8) the trial court 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;

9) the trial court failed to require the State to disclose certain items of unspecified evidence of an exculpatory or impeaching nature to the defense;

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[7] To the extent Petitioner alleges that the trial court erred in admitting evidence of Petitioner's December 1993 bank robbery during the guilt phase of Petitioner's trial, this claim was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 272 Ga. at 221(4). To the extent Petitioner alleges that the trial court erred in admitting into evidence Petitioner's convictions for two bank robberies in federal court and portions of Petitioner's prison records, these claims were addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 130-131(8) and (9).

[8] To the extent Petitioner alleges that his death sentence is disproportionate, this claim was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 131(13).

10) the trial court allowed the State to present false and misleading testimony;

11) the trial court failed to act upon known improprieties of defense counsel thereby allowing Petitioner to receive ineffective assistance of counsel;

12) the trial court failed to provide Petitioner with adequate counsel;

13) the trial court permitted the prosecution to elicit extensive, irrelevant victim impact evidence;[9]

14) the trial court impermissibly injected comments during the testimony of witnesses and impermissibly questioned witnesses himself;

15) the trial court admitted improper hearsay evidence;[10]

16) the trial court relied on a misunderstanding of the law in the court's rulings, report, and findings;

17) the trial court excused potential jurors for improper reasons under the rubric of hardship;

18) the trial court restricted voir dire relating to several areas of inquiry;[11]

19) the trial court used improper definitions of mitigation during voir dire;

20) the trial court admitted into evidence prejudicial and irrelevant photographs and videos;

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[9] To the extent Petitioner alleges that the trial court erred in allowing the State to elicit victim impact testimony during the guilt phase of Petitioner's trial through the witness Dan McNeal, this claim was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 272 Ga. at 221-222(5).

[10] To the extent Petitioner alleges that the trial court erred in admitting into evidence portions of Petitioner's prison records which contained hearsay, this claim was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 130-131(9).

[11] To the extent Petitioner alleges that the trial court erred in not allowing defense counsel to question a prospective juror on specific circumstances of Petitioner's case, this claim was addressed and decided adversely to Petitioner on direct appeal. Nance v. State, 280 Ga. at 127-128(6).

21) the trial court placed the burden on Petitioner to prove that he was not eligible for the death penalty;

22) the trial court failed to inquire into the possibility of juror misconduct and remedy such misconduct;

23) the trial court permitted Petitioner's involuntary statements while in police custody to be admitted during the guilt phase and at the re-sentencing;

24) the trial court refused to give proper jury instructions requested by Petitioner, including instructions on accident;

25) the trial court refused to strike prospective jurors who were unqualified for reasons such as bias against the defense;

26) the trial court gave the jury erroneous and misleading instructions;

27) the trial court provided the jury with misleading and prejudicial forms on which to note their verdicts and findings as to aggravation;

28) the trial court permitted the jurors to interact with the alternate jurors during deliberations;

29) the trial court improperly rehabilitated prospective jurors;

30) the trial court failed to declare a mistrial or issue curative instructions when the State made improper and prejudicial statements in argument;

31) the trial court allowed the prosecution to introduce unspecified improper, unreliable and irrelevant evidence, including evidence of which the defense had not been provided adequate notice and which had been concealed from the defense; and

32) the trial court failed to provide Petitioner with a neutral jury;

c) **Claim IV**, wherein Petitioner alleges juror misconduct.[12] This alleged misconduct includes:

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[12] In footnote 6, wherein Petitioner alleges that to the extent the trial court was implicated in or aware of any jury misconduct and yet failed to advise Petitioner or correct the misconduct, the court's actions constitute an independent violation of Petitioner's rights and wherein Petitioner alleges that to the extent the State, through any of its entities, was implicated in or aware of any

1) improper consideration of matters extraneous to the trial;

2) improper racial attitudes which infected the deliberations of the jury;

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

4) improper biases of jurors which infected their deliberations;

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

6) improper communications with third parties;

7) improper communication with jury bailiffs;

8) improper *ex parte* communications with the trial judge; and

9) improperly prejudging Petitioner's guilt, his defense, and his claims;

d) **Claim VI**, wherein Petitioner alleges that the Unified Appeal Procedure is unconstitutional;

e) That **portion of Claim VII**, wherein Petitioner alleges that the proportionality review conducted in Georgia is constitutionally infirm in general and as applied;

f) That **portion of Claim VIII**, wherein Petitioner alleges that death qualification is unconstitutional;

g) That **portion of Claim VIII**, wherein Petitioner alleges trial court error in failing to bifurcate the guilt and sentencing phases of Petitioner's trial;

h) That **portion of Claim IX**, wherein Petitioner alleges that he was denied due process of law by the instructions given to the jury at the guilt phase. This alleged trial court error in the guilt phase instructions included the following:

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jury misconduct, the State's actions or omissions also deprived Petitioner of his constitutional rights, these claims are procedurally barred as they were not raised at the earliest opportunity, and therefore absent a showing by Petitioner of cause and actual prejudice sufficient to overcome the procedural default or of a miscarriage of justice, these claims are not properly before this Court for review.

1) incorrectly charging the jury on the burden of proof beyond a reasonable doubt;

2) giving an improper charge on impeachment of witnesses;

3) instructing the jury on inappropriate and inapplicable matters;

4) incorrectly instructing the jury on the consequences of certain verdicts;

5) improperly instructing the jury on charges which merged into one offense;

6) improperly charging vague and essentially standardless definitions of statutory terms; and

7) improperly charging the jury on the offenses charged in the indictment.

Accordingly, as Petitioner did not raise these issues at trial and/or appeal and did not make a showing of cause and actual prejudice or of a miscarriage of justice which would be sufficient to excuse his procedural default of these claims, the claims are procedurally defaulted and therefore are not reviewable by this Court.

## CLAIMS THAT ARE NON-COGNIZABLE

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

a) **Claim XII**, wherein Petitioner alleges cumulative error[13]. This claim is non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings that resulted in Petitioner's convictions and sentences; and

[13] There is no cumulative error rule in Georgia. Head v. Taylor, 273 Ga. 69, 70, 538 S.E.2d 416 (2000).

b) **Claim XIII**, wherein Petitioner alleges that lethal injection is cruel and unusual punishment. Alternatively, this Court finds this claim is without merit (See Baze v. Rees, 553 U.S. 35, 128 S.Ct. 1520 (2008)).

## CLAIMS THAT ARE REVIEWABLE BY THIS COURT

### Ineffective Assistance Of Counsel

Petitioner's claim of ineffective assistance of counsel is properly before this Court for review. To prevail on his ineffectiveness claim, Petitioner must show this Court the following:

> That trial counsel's performance was deficient. This requires showing that trial counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, Petitioner must show that the deficient performance prejudiced the defense. This requires showing that trial counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> 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 (1984). See also Wiggins v. Smith, 539 U.S. 510 (2003) (reaffirming the Strickland standard as governing ineffective assistance of counsel claims).

As to the first prong, Petitioner must show that counsel's representation "fell below an objective standard of reasonableness," which is defined in terms of "prevailing professional norms." Wiggins v. Smith, 539 U.S. 510, 521 (2003) (citing Strickland, 466 U.S. at 688). In Strickland, the Court established a deferential standard of review for judging ineffective assistance claims by directing that "judicial scrutiny of counsel's performance must be highly deferential...A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689 (1984).

The prejudice prong requires that a petitioner establish that the outcome of the proceedings would have been different, but for counsel's errors. Smith v. Francis, 253 Ga. 782, 783 (1985). The Georgia Supreme Court has relied on the Strickland test which requires that to establish actual prejudice, a petitioner "must show that there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Smith, 253 at 783. See also Head v. Carr, 273 Ga. 613, 616 (2001). See also Hall v. Terrell, 285 Ga. 448, 450 (2009).

"Regarding death penalties, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Smith v. Francis, 253 at 783-784. Furthermore, "[u]nder Georgia's death penalty laws, which provide for an automatic sentence less than death if the jury is unable to reach a unanimous sentencing verdict, a reasonable probability of a different outcome exists where 'there is a reasonable probability that at least one juror would have struck a different balance.'" Humphrey v. Morrow, 289 Ga. 864, 867 (2011) (quoting Wiggins, 539 U.S. at 537).[14]

Petitioner was represented at both the 1997 and 2002 proceedings by Edwin Wilson and Johnny R. Moore, both of whom testified in this proceeding by deposition and live at the state habeas evidentiary hearing. Both Mr. Moore and Mr. Wilson have had lengthy careers practicing primarily in criminal law, and both had also handled death penalty cases prior to Petitioner's case. Mr. Wilson had been counsel in two other cases in which the defendants

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[14] See Miller v. State, 237 Ga. 557, 559 (1976) ("[I]f the convicting jury is unable to agree on which of those two sentences to impose, the trial judge must impose the lesser, life imprisonment.").

received the death penalty, while Mr. Moore's prior capital clients had pled to or received life sentences. (RX 2 at 14-16; RX 1 at 10-12). In Petitioner's case, Mr. Moore was lead counsel at the first trial, but became co-counsel for the second trial. (HT 86). At both proceedings, Mr. Moore "headed up" the mental health components of the case. (HT 254).

**Guilt-Innocence Phase Effectiveness**

**Strategy, Preparation and Investigation**

This Court finds that trial counsel's approach to investigation and preparation for the guilt-innocence phase of the original trial was reasonable when properly evaluated using Strickland standards. Petitioner has failed to establish either deficient performance or the requisite prejudice under Strickland in order to establish ineffective assistance of counsel as to trial counsel's preparation and performance for the guilt-innocence phase of the original trial.

Following his appointment to the case, Mr. Moore testified that they "started basically from scratch and filed the motions and prepared for the trial." (RX 1 at 18). Prior to the appointment of Mr. Moore, there had not been a significant amount of work performed on Petitioner's case as Messrs. Hudson and Wilson were waiting for the completion of the federal proceedings. (RX 2 at 23, 26). Mr. Wilson explained:

> Well, there's certain mitigation investigation we postponed. There's an old saying, you never want to peak too early, I guess, but some of our — instead of going to Kansas in 1994, we waited. We didn't know how long this federal thing was going to take, and the Federal Defenders Office had a lot better resources than we did, and we got a lot of information from them.

(HT 265).

The record establishes that trial counsel utilized several investigators and mitigation specialists in investigating and preparing Petitioner's case for the original trial. Specifically, trial counsel retained the services of Shirley Whitman, Michael Finn, Burt Bauer, Ed Sills and Larry

Titshaw. (HT 101, 120, 123, 243, 264, 266-267; RX 1 at 21-23, 60; RX 2 at 22-23, 32, 34). With regard to the funds authorized by the trial court, the record shows that trial counsel received approximately twenty-five thousand dollars for their investigation during the original trial. (RX 4 at 30, 44, 79, 94, 99, 104, 107).

In addition to retaining numerous investigators, trial counsel also consulted with Michael Mears of the Multi-County Public Defender's Office regarding Petitioner's case. (HT 120; RX 1 at 16, 44). Trial counsel had known Mr. Mears for a number of years, and they frequently sought his assistance on death penalty cases. (HT 262, RX 1 at 16; RX 2 at 19).

Trial counsel also spoke with Pam Leonard, who was the senior mitigation specialist and investigator for the Multi-County Public Defender's Office, numerous times about Petitioner's case. (HT 120, 169, 264; RX 1 at 20-21; RX 2 at 27-28; RX 4 at 198; RX 170 at 6). Trial counsel trusted Ms. Leonard and noted that she was "the best there was at that time." (HT 120-121). With regard to the assistance provided by Ms. Leonard, trial counsel stated that she testified during an *ex parte* hearing wherein trial counsel was attempting to obtain funds for a mitigation specialist. (RX 1 at 79; RX 4 at 198-205). Ms. Leonard also supplied trial counsel with the names of experts, and she provided them with some ideas regarding Petitioner's case. (HT 120; RX 1 at 21). In addition, Ms. Leonard met with Petitioner at the jail on one occasion. (HT 264; RX 2 at 28; RX 4 at 199-200).

In preparing for the guilt-innocence phase of the original trial, trial counsel developed a reasonable strategy and conducted a thorough investigation into possible defenses. Trial counsel testified that the guilt or innocence of Petitioner was "basically indefensible" as there was never any question as to Petitioner's guilt. (HT 88; RX 1 at 46, 59). Trial counsel, however, sought to present evidence to the jury that Petitioner never intended to murder the victim. (HT 89; RX 1 at

39). Specifically, they tried to show that Petitioner had consumed alcohol and drugs on the morning of the crime, and that the firearm was inside a black plastic bag at the time it was fired. (HT 89-90; RX 1 at 39-40). Petitioner, who was unable to see the sights on the weapon, pointed the firearm in the direction of the victim and pulled the trigger. Id.

Petitioner was cooperative and assisted trial counsel during their investigation. Mr. Moore testified that he had a "good relationship" with Petitioner, and that he got to know Petitioner "fairly well." (RX 1 at 40-41). In addition, Mr. Moore stated that Petitioner was cooperative and provided him with relevant information. (HT 87; RX 1 at 41). In describing Petitioner, Mr. Moore stated that Petitioner understood that he had "severe mental limitations," and he was good at covering up his limitations to other people. (RX 1 at 42).

Trial counsel frequently met with Petitioner during their investigation of the case. (HT 256; RX 1 at 41). This testimony is supported by the billing records contained in trial counsel's files. (RX 170-172). During their meetings with Petitioner, trial counsel talked about "what we were doing on the case, what was happening in Kansas, what we were doing to prepare, asked him questions about things that we had encountered." (RX 1 at 41). Trial counsel also spoke with Petitioner about the crime and found him to be truthful during those discussions. (RX 1 at 43-44). Furthermore, the defense investigators occasionally met with Petitioner at the jail. (RX 1 at 41).

During their investigation, trial counsel consulted with the Federal Defender Program, who represented Petitioner on the federal charges, numerous times about Petitioner's case.[15] (HT 85, 264-265; RX 1 at 19-20, 57-58; RX 2 at 26). Trial counsel also received numerous

[15] Petitioner, whose federal case had been resolved prior to the appointment of Mr. Moore, pled guilty in federal court and received a life sentence without the possibility of parole for bank robbery. (HT 84, 248; RX 1 at 19-20).

documents from the Federal Defender Program related to their representation of Petitioner.[16] (HT 85, 121, 125, 265; RX 1 at 26, 58, 70-71; RX 2 at 26-27; RX 39; RX 41; RX 43; RX 44; RX 45; RX 46; RX 107). Trial counsel reviewed the records that they received from the Federal Defender Program; however, they did not solely rely upon the investigation performed by the Federal Defender Program. (HT 125-126, 270). Trial counsel testified that the Federal Defender Program's file was used as a starting point, and that they conducted their own investigation in preparing Petitioner's case for trial. Id.

In addition to the documents received from the Federal Defender Program, trial counsel also obtained the following records that were relevant to both phases of the original trial: investigative documents regarding Kansas bank robberies; Tucker Federal Bank records; Lilburn Police Department records; Bureau of Alcohol, Tobacco and Firearms records; Bank South investigative records and surveillance photographs; Snellville Police Department records regarding K-Mart incident involving stun gun; Gwinnett County Police Department records; Georgia Bureau of Investigation forensic report; Federal Bureau of Investigation records; Gwinnett County EMT records; autopsy report; photographs of vehicle; Kansas Department of Corrections records; criminal history and fingerprint cards from Kansas Bureau of Investigation; Georgia Board of Pardons and Paroles file; National Crime Information Center records; Gwinnett County Detention Center records; marriage and divorce records; death certificates; birth certificates; medical records; school records; Kansas probation records; Federal Bureau of Prisons file; videotape of standoff; and certified copies of convictions on various witnesses. (RX 6-9, 11-18, 20-38, 42, 76, 80, 86-91; RX 157 at 28-29).

[16] Mr. Wilson testified that the Federal Defender Program provided them with their entire file. (RX 2 at 26-27).

Trial counsel also received discovery from the State. Regarding the discovery provided by the State, Mr. Moore testified that the District Attorney provided them "with everything that he had in the case." (RX 1 at 45). Trial counsel also met with the District Attorney and reviewed the physical evidence in the case. (RX 170 at 6-7; RX 172 at 12).

As part of their guilt-innocence phase investigation, trial counsel also conducted witness interviews, viewed the crime scene, requested background checks on State witnesses and reviewed the videotapes of the bank robbery and standoff. (RX 1 at 46, 48; RX 4 at 182; RX 48 at 44-45; RX 108 at 31, 57-62; RX 109 at 6; RX 114 at 5-6, 12-13; RX 115 at 6; RX 116 at 3; RX 117 at 1-6, 8-15, 19, 21-23, 27-32; RX 125 at 15-18; RX 149 at 15; RX 172 at 10). With regard to the interviews of the guilt-innocence phase witnesses, trial counsel's files contained numerous memoranda documenting the information received from various witnesses. (RX 83 at 27-30, 45-48, 82, 84; RX 108 at 31; RX 109 at 8-11; RX 114 at 5-6, 12-13; RX 115 at 6; RX 116 at 3; RX 117 at 1-6, 8-15, 19, 21-23, 27-32; RX 125 at 15-18). Significantly, one of the witnesses interviewed by the defense team was Kelly Fite, a firearms examiner employed by the Georgia Bureau of Investigations. (HT 158; RX 109 at 6; RX 149 at 15). In explaining the importance of interviewing Mr. Fite about the firearm used during the crime, Mr. Moore stated that Petitioner had the firearm in a cocked position during the standoff, and there was a "great deal of difference with a revolver and the amount of pressure that's needed on the trigger to fire the gun if it's cocked or if it's not cocked if it's double action." (HT 158). In speaking with Mr. Fite, trial counsel learned that it would have taken four and a half pounds of pressure to fire the weapon when the firearm was cocked, and it would have taken eleven and a half pounds of pressure when the firearm was uncocked in order to fire the weapon. (HT 159).

In addition, trial counsel conducted an investigation into the dye packs and their potential effects on Petitioner. Mr. Wilson knew that the chlorine gas in the dye packs could be debilitating to an individual and could cause disorientation. (RX 2 at 38). In making the decision to incorporate the effects of the dye pack on Petitioner into their guilt-innocence phase theory, Mr. Wilson explained:

> Well, he was charged with malice murder, and I thought the fact that he'd been in close proximity to a dye pack going off, both the concussion from the initial explosion and the release of both this colored gas and the tear gas components in there, that all that would contribute to a state of confusion on his part that would lessen his intent, lessen his malice, that would detract from the State's, you know, proof on malice.

(HT 272).

During their investigation of the dye packs, trial counsel obtained the curriculum vitae of numerous experts as they were looking for someone to assist them on the dye pack issue, and they spoke with numerous individuals who had expertise in dye packs. (HT 272, 290-291; RX 1 at 40; RX 2 at 38; RX 59 at 4-18; RX 78 at 4-8). Specifically, trial counsel spoke with a representative from ICI Americas who manufactured the dye packs. (HT 272). Trial counsel also obtained the material safety data sheet from ICI Americas, which listed the ingredients of the dye packs and the potential effects of those ingredients. (HT 165-166, 272-273; RX 59 at 24-27). Additionally, trial counsel consulted with the following experts regarding the dye packs: Dr. Leslie Hutchinson; Peter Parsonson; Rick Brown; and Dr. Dave Stafford. (HT 160, 275-276, 291-292, 297-298; RX 59 at 19; RX 172 at 21, 32). With regard to the work performed by these experts, the record establishes that Mr. Parsonson met with trial counsel, reviewed the material safety data sheet from ICI Americas and conducted research. (HT 292-294; RX 59 at 19, 21). In addition, the forensic toxicologist reviewed the toxicity information on CS, reviewed the facts of the case, spoke with trial counsel, received information from defense investigators and the

manufacturer of the dye bomb and performed a calculation of the CS concentration in the passenger compartment of the Omega. (RX 100 at 1).

During their investigation of the dye packs, trial counsel also spoke with State witnesses. Specifically, trial counsel spoke with Dr. Joseph Burton, who was the medical examiner, about the dye packs and the potential effect of the tear gas on Petitioner. (HT 273-275; RX 97 at 3; RX 157 at 19). According to a memorandum contained in trial counsel's files, Dr. Burton "agreed that dye bomb and tear gas could contribute to defendant's confusion, but would fall way short of establishing any real defense, such as temp insanity." (RX 157 at 19). Additionally, trial counsel conducted an interview of Larry Peterson who was employed at the Georgia Bureau of Investigation crime lab. (RX 109 at 6; RX 172 at 12).

In addition to consulting with numerous experts regarding the dye packs, the record shows that trial counsel reviewed the information obtained regarding the dye packs and had a number of conversations regarding the dye pack investigation. (HT 167-169; RX 149 at 15; RX 170 at 2-5; RX 172 at 11). Trial counsel could not specifically recall why they did not present an expert during the original trial to testify about the dye packs. (HT 276-278; RX 1 at 57).

This Court finds that trial counsel conducted a thorough investigation for presentation at the guilt-innocence phase of Petitioner's trial. As trial counsel testified, there was little doubt as to Petitioner's guilt, thus the focus revolved around the deliberate nature of the crime. Based on the record as whole, this Court finds that trial counsel were not deficient and Petitioner was not prejudiced by the guilt-innocence phase investigation.

Trial counsel also made reasonable attempts to negotiate a plea with the District Attorney. Specifically, trial counsel testified that they met with the District Attorney numerous times in an attempt to negotiate a plea to a sentence of life without parole. (HT 94, 250; RX 1 at

45; RX 2 at 45). Initially, Mr. Moore was responsible for attempting to negotiate a plea with the District Attorney as he was the former Chief Assistant District Attorney and had a "longer-standing relationship with the District Attorney, Mr. Porter." (HT 250). However, the record shows that Mr. Wilson also met with the District Attorney starting in early 1994 and until the conclusion of the re-sentencing proceedings. (HT 95; RX 2 at 45-46). Despite Petitioner's willingness to accept a life without parole sentence, there was never any plea offer from the District Attorney. (HT 94-95, 250-251; RX 1 at 45; RX 2 at 46).

In addition to trial counsel's numerous attempts to negotiate a plea with the District Attorney, the record shows that the trial court also engaged in a discussion with the District Attorney prior to the original trial regarding his willingness to accept a guilty plea in exchange for a life without parole sentence. (RX 4 at 166-169). The District Attorney informed the trial court that he was unwilling to accept a guilty plea to life without parole. Id. The District Attorney explained to the trial court that he was seeking the death penalty for Petitioner due to his "prior record as well as the nature of this crime." (RX 4 at 167). The Court concludes that trial counsel were not deficient and Petitioner was not prejudiced in trial counsel's inability to negotiate a plea of less than death for Petitioner.

**Reasonable Presentation During the Guilt-Innocence Phase of the Original Trial**

This Court finds that trial counsel did not believe that the jury would return a not guilty verdict as there was never any question about Petitioner's guilt, thus they sought to present evidence to the jury that Petitioner did not intend on murdering the victim. Consistent with their guilt-innocence phase theory, trial counsel stated to the jury during their opening statements that Petitioner never intended to murder the victim. (Vol. I, T. 73). Trial counsel also asserted that

they would present evidence regarding the effects of the dye packs on Petitioner. (Vol. I, T. 73-74).

During the guilt-innocence phase of the original trial, trial counsel did not present any witnesses to testify regarding the effects of the dye packs. However, trial counsel cross-examined numerous witnesses presented by the State regarding the dye packs. During the cross-examination of these witnesses, trial counsel was able to elicit the following testimony: two dye packs were placed with the money; red dye and tear gas were contained in the dye packs; Petitioner made several threats but never went back inside the bank; Petitioner was observed exiting the vehicle after the dye packs went off; there was a significant amount of red smoke coming from the car following the explosion of the dye packs; and the tear gas contained in the dye packs can cause burning eyes and stinging skin. (Vol. I, T. 106-107, 115-116, 132-133, 140). In addition, one of the detectives testified on cross-examination that there was a noticeable odor on the money recovered from the vehicle about three to four hours after the crime which irritated his sinuses. (Vol. II, T. 122).

Trial counsel also brought out through cross-examination of the microanalyst from the Georgia Bureau of Investigation that red dye was found on Petitioner's jean jacket, gloves and socks. (Vol. III, pp. 16, 18). The microanalyst also testified that the dye packs contained tear gas, which could cause eye tearing and difficulties in breathing. (Vol. III, p. 18).

In support of their theory that Petitioner never intended to harm or murder anyone and was remorseful, trial counsel brought out during their cross-examination of various witnesses that: Petitioner made repeated threats to shoot himself; Petitioner never pointed the gun at anyone other than himself; Petitioner's gun was in a cocked position, Petitioner inquired as to whether anyone had been hurt at the bank and liquor store; Petitioner was crying during the

standoff, and Petitioner voluntarily surrendered to law enforcement. (Vol. II, T. 60-61, 65-66, 74-76, 84). Additionally, trial counsel elicited testimony that Petitioner was crying during the police interview and appeared remorseful. (Vol. II, T. 158, 161-162). Further, trial counsel were able to bring out testimony that Petitioner was scared as he thought the victim was trying to run over him, and he fired one shot in the air in an attempt to scare the victim. (Vol. II, T. 162-164). Petitioner stated that he fired one shot in the air as he did not want to hit anyone. Id.

In further support of their theory that the shooting of the victim was unintentional, trial counsel brought out through the State's ballistics expert that it would be more likely for a person wearing gloves to accidentally pull the trigger on a firearm. (Vol. III, T. 32). Also, if the firearm was in a cocked position, then it would decrease the amount of force required to pull the trigger and would increase the chances of an unintentional trigger pull. (Vol. III, T. 32-33).

Trial counsel then presented the testimony of three witnesses during the guilt-innocence phase of the original trial. The first witness presented by the defense was Clay Blair. Mr. Blair, who was employed by the Gwinnett County Fire Department, testified that the victim was deceased upon their arrival. (Vol. III, T. 95-96). Trial counsel then presented Brad Smith. Mr. Smith, who was employed by the Gwinnett County Police Department, testified that he encountered Petitioner at the rear of the gas station. (Vol. III, T. 97-98). At that time, Officer Smith noticed that Petitioner appeared to have red dye on his face. (Vol. III, T. 98). During that encounter, Petitioner threatened to kill himself. Id. Mr. Smith stated that Petitioner never pointed the gun at him or anyone else, and that Petitioner only pointed the gun at himself. (Vol. III, T. 99).

The final witness presented by trial counsel was Officer Danny Moates. Officer Moates, who was employed by the Lilburn Police Department, testified that Petitioner appeared to be

"bewildered, confused" when he initially encountered Petitioner at the gas station. (Vol. III, T. 104, 106). Petitioner then repeatedly asked Officer Moates to kill him. (Vol. III, T. 106). Officer Moates testified that Petitioner never pointed the gun at him or anyone else, and that Petitioner only pointed the gun at himself. (Vol. III, T. 106-108). Furthermore, Officer Moates testified that Petitioner never threatened anyone. (Vol. III, T. 108).

During their guilt-innocence phase closing arguments, trial counsel asserted that Petitioner never intended to murder the victim, and he was remorseful. (Vol. IV, T. 20-31). In addition, trial counsel stated to the jury that Petitioner never threatened anyone during the standoff. (Vol. IV, T. 30). Regarding the effect of the dye packs on Petitioner, trial counsel reminded the jury of the testimony that the tear gas could cause tearing of the eyes, irritation of the throat and lungs, coughing and tightness in the chest. (Vol. IV, T. 31). The dye packs could have also caused Petitioner to become panicked, frightened and disoriented. Id. In concluding, trial counsel urged the jury to consider the evidence, which would show that Petitioner was not guilty of felony murder. (Vol. IV, T. 32).

This Court finds that trial counsel presented a defense in line with their reasonable strategy in an attempt to challenge the intended nature of the murder and that trial counsel were not deficient or Petitioner prejudiced by their presentation.

**Sentencing Proceedings**

**Strategy**

Trial counsel's strategy for both the 1997 penalty phase and the 2002 re-sentencing involved presenting evidence of Petitioner's difficult background and mental health problems as well as evidence that the shooting was unintentional and partially the result of Petitioner's exposure to the toxic dye packs. During the sentencing phase of the original trial, trial counsel

sought to present evidence to the jury that Petitioner suffered from borderline intellectual functioning and other mental impairments. (HT 99, 252; RX 1 at 29). Additionally, trial counsel wanted to present evidence of Petitioner's difficult family life, which included an abusive stepfather and substance abuse. (HT 99-100, 252; RX 1 at 29). Trial counsel testified that they wanted to convey to the jury that Petitioner was a "troubled young man who had very little help." (RX 1 at 33). In addition, trial counsel's sentencing phase theory included the presentation of evidence that Petitioner's case was not a death penalty case in that he never intended to harm or murder anyone. (HT 143-144, 252; RX 2 at 49). Furthermore, trial counsel wanted to show that Petitioner was remorseful, and that he would be punished by spending the rest of his life in prison. (HT 247-248, 252).

Ed Wilson, who was lead counsel at the re-sentencing, testified that counsel's mitigation theory remained the same from the 1997 trial to the 2002 re-sentencing: "[W]e tried to broaden our attack, and do it better the second time. But, no, I can't – I didn't see any real change in theory; it was pretty much the same concept." (HT 252). Johnny Moore, who acted as lead counsel at the first state trial but second-chair counsel at the re-sentencing, described the defense's mitigation theory at the 2002 re-sentencing:

> Michael [] was borderline mentally retarded, and it wasn't something that started when we started representing him. The evidence showed that beginning in grade school, he was not able to keep up with the other children . . . [W]hen he was a baby, he did not speak until after he was two years old. They took him to doctors, and tried to find out why he was not like a normal child speaking. And in school he was not able to do the work in grade school . . . He failed most things in school. And he never was able to hold a job. And I believe that was because of his mental abilities. He just simply was not able to do well at all. And our theory was that you put that with the fact that he was horribly abused by his stepfather, and his mother was pretty much never around.

(HT 99-100).

Mr. Wilson testified that he and Mr. Moore believed the offense was a "robbery gone bad" and wanted to mitigate Petitioner's culpability by proving to the jury that he did not intend to kill the victim. Mr. Wilson identified several indications of Petitioner's lack of intent:

> [T]hat there was a dye pack that went off when Mr. Nance left the bank; that within that dye pack there was a tear gas element; that he was shocked by the concussion and by the tear gas; ran across the street; he confronted Mr. Balogh, the decedent, and tried to take his car away from him; but in doing so Michael was wearing gloves, he had his gun inside a black plastic bag, and in his confrontation with the man, trying to get his car, the gun went off, but the gun went off inside the plastic bag.
>
> So, to me, it seemed as though it was close upon an accidental shooting. I don't believe Michael meant to shoot the man. I'm not sure he even meant to shoot the gun. But the bullet entered the man's arm, left arm. And, obviously, anyone who intends upon shooting someone will place a gun up side their head or close to the heart, some other way, they're not going to shoot you through the elbow. But it seems as though an accidental shooting because the gun's still inside the bag when it went off.

(HT 244). Co-counsel Moore agreed that they wanted to show Petitioner's lack of intent to kill the victim and the impact the tear gas had on him:

> Well, Michael was obviously at that point very frightened and trying to get away. And we felt like the tear gas might have disoriented him even more, and given his mental limitations and the tear gas, we felt like that may have done – had a lot to do with what happened.

(HT 90).

Both of Petitioner's attorneys stressed that they did not abandon the mental health evidence after the first trial. Trial counsel stated that they intended to present evidence of brain damage and borderline intellectual functioning again at the re-sentencing, and that they wanted to supplement that evidence with testimony about Petitioner's prison adaptability. (HT 281; RX 1 at 43).

Thus, based on the record, the Court finds counsel's strategy at both trials involved presenting Petitioner's mitigating mental health diagnoses, his traumatic life history, and his exposure to CS tear gas as well as the interplay of these factors. At the re-sentencing, counsel sought to present these same matters, as well as Petitioner's adaptability to prison life.

**Mitigation Investigation**

While the original sentence was overturned on appeal by the Georgia Supreme Court, this Court also considered trial counsel's investigation of mitigation for the first trial as all of the information uncovered prior to the original trial was still known and influenced trial counsel in Petitioner's re-sentencing trial. Based on the record before it, this Court finds that trial counsel conducted a reasonable investigation in support of its chosen strategy. Trial counsel obtained numerous records during their investigation. In addition to obtaining records, trial counsel and their investigators traveled to Kansas to interview mitigation witnesses as they were looking for any information about Petitioner's "childhood, his mental abilities, his drug and alcohol abuse, his abuse by — we had heard about the abuse by his stepfather; we were looking for anybody who could testify to that." (HT 101, 124-125; RX 1 at 19, 21, 30-31; RX 2 at 31).

Trial counsel also conducted an investigation into Petitioner's mental health. (RX 1 at 49). Prior to his first trial, Petitioner was evaluated by three mental health professionals. First, at the request of his Federal Defender attorneys, Petitioner was evaluated by Drs. Barry Scanlon and Robert Shaffer. Then, at the request of the State, Petitioner was evaluated pretrial by Theresa Sapp, Ph.D., who was then a psychologist at Georgia Regional Hospital.

As part of their mental health investigation, trial counsel consulted with Drs. Scanlon and Shaffer. (HT 127-128, 255; RX 2 at 35-36; RX 93). This Court notes that these are the same experts with whom Petitioner consulted and who testified during these proceedings. In addition

to meeting with Drs. Scanlon and Shaffer, trial counsel had their reports that were prepared for the Federal Defender Program. (RX 46 at 15; RX 93 at 1-24; RX 94 at 7-11, 13-17; RX 99 at 2-19).

Dr. Scanlon evaluated Petitioner at the request of the Federal Defender Program in 1994, but did not testify at either of Petitioner's capital trials. Citing Petitioner's delayed early childhood development as a key factor, Dr. Scanlon diagnosed Petitioner with Pervasive Developmental Disorder. He further diagnosed Petitioner with Cognitive Disorder Not Otherwise Specified, Cocaine Dependence, Alcohol Dependence, and Polysubstance Dependence. (PX 23 at 17-18). Dr. Scanlon concluded in his report that Petitioner's impairments were a significant mitigating factor with regard to the crime:

> With respect to the "diminished responsibility" interpretation of the principle of diminished capacity, I certainly think that Mr. Nance's mental disorders, separately and combined, especially his Pervasive Developmental Disorder, would have had some direct bearing on his degree of responsibility with respect to any crimes he has been charged with, as compared to someone else who did not suffer from those disorders.

(PX 23 at 17).

Trial counsel spoke with Dr. Scanlon about Petitioner's case and had him review some materials. (HT 112). The record shows that trial counsel engaged in a discussion as to whether or not to present Dr. Scanlon at trial; however, trial counsel could not recall why they did not present Dr. Scanlon as a witness. (HT 112; RX 1 at 36-37).

Petitioner was also evaluated by Dr. Shaffer in 1994, at the request of the Federal Defender Program. In his report, Dr. Shaffer concluded:

> The actions or behaviors performed by Mr. Nance are compromised by impairment of judgment and reasoning functions mediated by the frontal lobes of the brain. For this reason he is prone to display problems with impulse control and is likely to perform actions without full appreciation of the consequences of

> those actions, particularly when [he] is actively involved in novel or unpredictable situations. This impairment is probably the result of some combination of the following events: congenital, prenatal, or perinatal neurological deficits revealed in developmental delays including language delays; three apparent head injuries resulting in varying degrees of unconsciousness; and early onset of persistent and pervasive ingestion of massive quantities of drugs.
>
> Mr. Nance's history is noted to reflect severe psychopathology including abnormal emotional and social detachment, depression, and suicide attempts. Excessive abnormal drug usage demonstrate attempts at self-medication and alternately, heroic suicidal behavior. Psychological testing also demonstrates impaired reality testing.

(PX 22 at 5-6). Dr. Shaffer diagnosed Petitioner with Cognitive Disorder Not Otherwise Specified, Possible Pervasive Developmental Disorder, and Polysubstance Dependence.

Trial counsel retained Dr. Shaffer to assist in the original trial. (HT 128-129, 254). In July of 1997, trial counsel requested that Dr. Shaffer perform a psychological evaluation and "look for anything that might be mitigating even if they are not a defense to the crime." (HT 128; RX 94 at 91). At that time, trial counsel also provided Dr. Shaffer with materials related to the case. Id. With regard to Dr. Shaffer's evaluation, trial counsel testified that they were looking for how the "things that Michael had been subjected to as a child and growing up affected him as an adult and his ability to make decisions and to make good decisions in cases, and any mental illnesses that might be present." (HT 129). As set forth below, trial counsel did present the testimony of Dr. Shaffer during the original trial.

In addition to Petitioner's mental health problems, trial counsel's mitigation strategy involved showing the jury that Petitioner was disoriented and impaired at the time of the crime such that the discharge of the gun was unintentional. (HT 90, 244). Trial counsel sought to show not only that Petitioner was wearing gloves and carrying the gun inside a plastic garbage bag at the time of the shooting, but also that he was disoriented as a result of his exposure to tear gas after the dye bombs exploded.

Six months before the trial, in April of 1997, defense counsel began investigating the dye packs and how their explosions affected Petitioner. (PX 45 at 4, 6; PX 54 at 8). Counsel also began to search for information on the chemical formulas of the dye bombs. (PX 93 at 38). On April 15, 1997, the trial court granted Defendant's *Ex Parte Motion for Funds to Hire an Independent Expert in Toxicology* and authorized the defense to spend up to $2000 on such an expert. (PX 12 at 36). During the spring and summer months of 1997, counsel continued to discuss and investigate issues related to the dye bombs, their composite chemicals, and effects of exposure. (PX 45 at 6-10).

In July 1997, trial counsel subpoenaed information from ICI Security Systems, the manufacturer and supplier of the dye packs. Counsel specifically sought the "production information sheet on the security dye pack, which includes the chemical breakdown" and "all documents that include material handling aspects of the security dye packs." (PX 83 at 2, 4). ICI agreed to provide the subpoenaed information, and within a week counsel received the Material Safety Data Sheet from ICI. (PX 83 at 10-11, 14).

The data sheet revealed that the dye pack contains red dye, CS tear gas, potassium chlorate, and nonhazardous materials. (PX 84 at 2). The sheet further revealed that a dye pack "releases clouds of red dye and CS tear gas when ignited" and listed a number of physical hazards associated with exposure. (PX 84 at 2-3). The data sheet explained that an explosion will also result in demotivation and "a feeling of panic," though "[m]ajor discomfort should disappear within 15 to 30 minutes." (PX 84 at 3-4). Trial counsel did not place the data sheet, or any other materials it gathered regarding the effects of the dye packs and tear gas, into evidence at either trial.

In August 1997, trial counsel obtained the funds to hire Bert Bauer, an investigator who assisted counsel in the two months leading up to and during the trial. (PX 58 at 7). Mr. Bauer immersed himself in the case, conducting his own investigation and building upon the work done by the prior investigators. Shortly thereafter, trial counsel met with the prosecutors to view the evidence. They learned that the pillow cases that held the stolen money had red dye all over them and had burn holes in them. (PX 92 at 4). The jean jacket Petitioner had been wearing during the offense had visible red dye on both sleeves and the right cuff; both of his socks also had red dye on them. (PX 92 at 4-5; PX 93 at 36).

By August 28, 1997, Mr. Bauer had prepared a memorandum that set out a plan for the penalty phase. He was clear that "[a]n effective mitigation strategy" would combine Petitioner's personal characteristics with the circumstances of the offense. (PX 59 at 9). Petitioner had a documented history of "borderline intellectual functioning,...poor impulse control, rigid thought processes, poor judgment, [and] lack of problem solving abilities." (PX 59 at 9).

> [Mr. Nance's] limited intellectual functioning was put to the test on December 18. The day he initiated a bank robbery [gone] wrong. He could not think quick[ly] enough due: (1) to his limited mental ability, (2) the stress of being in an unfamiliar situation, (3) [being] overdosed with gas, and (4) being confronted by an intoxicated man . . .. The path of the bullet indicates that this was an accident. . . . The behavior [of] Michael was that of a person who was out of control and irrational.

(PX 59 at 7).[17] To support this strategy, Mr. Bauer suggested that, in addition to a few lay witnesses, trial counsel call Dr. Shaffer to testify about "Michael's intellectual, cognitive, neurological, and problem-solving deficits" and an "[e]xpert" to testify about "the neurological

[17] Trial counsel essentially adopted Mr. Bauer's mitigation theory: "... we felt like the tear gas might have disoriented him even more, and given his mental limitations and the tear gas, we felt like that may have done -- had a lot to do with what happened." (HT 90).

effects of gas on the nervous system and the impairment of neurological process." (PX 59 at 7-8).

Mr. Bauer looked for an expert to fill this role. He interviewed numerous experts to gain an understanding of the effects of a dye bomb and how exposure to the gas impacts a person, and he researched the issue. (PX 58 at 12; PX 59 at 1-3, 11). On September 9, he and trial counsel specifically spoke with a chemist about what effect CS gas would have on the neurological system of a person with borderline intellectual functioning. (PX 60 at 22; PX 75). Then, Dr. Frumpkin, the Chairman of the Department of Occupational and Environmental Medicine at Emory University referred trial counsel to Leslie Hutchinson, M.D., MPH. (HT 404).

Dr. Hutchinson proved to be uniquely qualified to testify to the issues presented in Petitioner's case. As he testified in this proceeding, Dr. Hutchinson is a medical doctor with a medical degree and a Master's of Public Health from Johns Hopkins University. His professional experience led to his specialized expertise in the effects of chemical exposure on humans:

> I spent seven years with the Centers for Disease Control, the National Institute for Occupational Safety and Health, and the Agency for Toxic Substances and Disease Registry. And there I dealt in many capacities with evaluating the effects of chemicals, the medical and human health effects of chemicals in workplace settings and in environmental settings, and also conducting epidemiological studies of communities that had contamination with chemicals, radiation, other hazards, to determine not as yet known effects.
>
> And while I was with the Agency for Toxic Substances and Disease Registry, I was also the coordinator and the head of the four expert consensus groups to define the current state of knowledge of the neuropsychological effects of chemical exposures in environmental settings.

(HT 389). Dr. Hutchinson subsequently taught at Emory University and joined HLM Consultants, the firm where he worked when contacted by trial counsel. He explained that HLM

consults for numerous state and federal agencies evaluating the effects of human exposure to various chemical agents. (HT 390-391).

On September 19, 1997, Mr. Bauer spoke with Dr. Hutchinson about getting involved in Petitioner's case. In a fax he sent to Dr. Hutchinson, Mr. Bauer explained that, "[d]uring a bank holdup, two dye packs were placed in a bag with money. While in the car with the windows rolled up, the dye pack exploded." (PX 12 at 1). Mr. Bauer asked a specific referral question: "Would you look at the Material Safety Data Sheet and see if you can determine the potential effects of this substance on a person's respiratory and neurological system?" (PX 12 at 1). Mr. Bauer specifically explained to Dr. Hutchinson that Petitioner "has a documented history of functioning at an intellectual level of borderline with a history of impaired learning process and judgment." (PX 12 at 1).

On September 21, 1997, Dr. Hutchinson met with trial counsel and the defense investigator. (PX 12 at 35; PX 44 at 25). Trial counsel's notes from that meeting reflect Dr. Hutchinson's opinion that the dye bombs would cause Petitioner to become disoriented. (PX 12 at 40). Then, on September 22, the first day of trial, the defense added Dr. Hutchinson to its witness list:

> The Defense hereby discloses that it intends to call as a witness at trial, Dr. Leslie J. Hutchinson, MD, MPH, to testify as to the effects of tear gas on human beings.

(PX 12 at 29).[18]

The file of the District Attorney's Office documents the prosecution's knowledge of Dr. Hutchinson's medical conclusions. (PX 115). Dr. Hutchinson told the prosecution that a recipient of the CS gas would become disoriented. In Petitioner's case specifically, the dye

[18] Dr. Hutchinson continued to work on the case. On September 23 and 24, he spent several hours reviewing "information from attorney's investigators and from manufacturer of dye bomb," "toxicity information on CS," and the "facts of [the] case." (PX 12 at 35).

bombs would "incapacitate[] by impairing vision," cause "confusion due to difficulty in breathing" and "difficulty thinking." He explained that dye bombs "should not [be] use[d] in enclosed spaces," but in Petitioner's case, the packs "exploded close to [his] face." Dr. Hutchinson further told the prosecution that Petitioner would "be very susceptive to confusion" because of his borderline mental retardation. (PX 115). Dr. Hutchinson's testimony would have been helpful in explaining how exposure of the dye packs affected Petitioner's actions on the day of the crime, however, as discussed in detail below, counsel never called Dr. Hutchinson as a witness at either trial. (HT 276; PX 12 at 29).

**Presentation at the Original Sentencing Trial**

This Court takes note of what was presented at the original sentencing phase even though the sentence was overturned, as that presentation is relevant in considering counsel's performance at Petitioner's re-sentencing. The strategy for the original sentencing was to inform of Petitioner's developmental delays, borderline intellectual functioning, substance abuse and difficult home life. (Vol. IV, T. 125-133). Trial counsel utilized three witnesses to present this information to the jury.

The first witness presented by trial counsel was Johnny Ray Nance. Mr. Nance, who was Petitioner's brother, testified that he and his two brothers grew up in Kansas and described the conditions in which they lived. (Vol. V, T. 51-52, 54, 66-68). Additionally, Mr. Nance explained to the jury that there was no affection shown in their household and that their father was a binge drinker. (Vol. V, T. 53, 55).

Trial counsel then elicited testimony regarding Petitioner's developmental delays and borderline intellectual functioning. Mr. Nance testified that Petitioner had a speech problem when he was a young child. (Vol. V, T. 57-58). Petitioner was sent to a speech therapist, and he

was able to speak in a normal manner by the age of four or five. (Vol. V, T. 58). Mr. Nance testified that Petitioner performed poorly in school. (Vol. V, T. 52). Petitioner's father would chastise him when he brought home bad grades as he did not believe that Petitioner was trying in school. (Vol. V, T. 53).

Mr. Nance testified that the family moved to Hutchinson, Kansas when Petitioner was about thirteen or fourteen years old. (Vol. V, T. 61). During that time, Petitioner experienced difficulties fitting in at his new school, and he started having problems with the law. (Vol. V, T. 62-63). Around this time period, Petitioner's maternal uncle, who was named Gene, took Petitioner "under his wing and molded some of his thinking." (Vol. V, T. 63). Mr. Nance testified that Uncle Gene, who used drugs and bought and sold firearms, introduced Petitioner to drugs and taught him "how to live on some of the dark side of life." (Vol. V, T. 63-64).

Trial counsel then presented the testimony of Petitioner's mother, Mary Ellen Nance. Regarding Petitioner's developmental delays, Ms. Nance testified that Petitioner was very quiet and did not talk. (Vol. V, T. 97). She stated that Petitioner did not make any of the typical baby sounds, and he used one word for everything. (Vol. V, T. 97-98). When Petitioner was two years old, he was sent to a speech therapist because he still did not talk. (Vol. V, T. 97). Petitioner went to a speech therapist for about one to one and one-half years. Id. In addition to the developmental delays, Ms. Nance testified that Petitioner was in a motorcycle accident that resulted in a head injury and a broken foot or leg. (Vol. V, T. 115).

With regard to his intellectual functioning, Ms. Nance testified that Petitioner experienced difficulties in school. (Vol. V, T. 99). Petitioner performed well in kindergarten and first grade as he was able to grasp "repetitious things." Id. However, Petitioner had problems when "he had to use his thinking abilities." Id.

The final witness presented by trial counsel during the sentencing phase of the original trial was Dr. Robert Shaffer. Dr. Shaffer, who was a clinical psychologist, testified that he conducted an evaluation of Petitioner around 1994 or 1995. (Vol. V, T. 127, 129). During this evaluation, Dr. Shaffer learned that Petitioner experienced developmental delays as a child which began at birth. (Vol. V, T. 130). Specifically, Petitioner did not coo or babble as an infant, and he was only using one word by the age of two. Id. Petitioner went to a speech therapist for about three or four years. Id. As a child, Petitioner also suffered two head injuries that resulted in unconsciousness. (Vol. V, T. 131). One head injury was sustained when Petitioner fell out of a tree, and the other head injury was from a bicycle accident. Id.

Given Petitioner's history, Dr. Shaffer administered the Halstead-Reitan Neuropsychological Test Battery (hereinafter "Halstead-Reitan"). (Vol. V, T. 129-130). The results of the Halstead-Reitan showed that Petitioner scored in the impaired range on five of the eight tests, which was in the moderate range of neuropsychological impairment.[19] (Vol. V, T. 131-132). Dr. Shaffer testified that Petitioner's scores on the Halstead-Reitan were indicative of anterior brain impairment, which was consistent with the evidence of two head injuries suffered by Petitioner as a child that resulted in unconsciousness. (Vol. V, T. 134).

Dr. Shaffer's opined that Petitioner had a "moderate degree of neuropsychological impairment consisting partially in the frontal lobes to the brain." (Vol. V, T. 134). He explained to the jury that this type of impairment can have an impact on a person's ability to "take the right actions in rapidly-changing situations, especially when there's new information being presented and an ongoing situation that the person is unfamiliar with." (Vol. V, T. 134-135). When the

[19] Dr. Shaffer testified that Petitioner scored in the impaired range on the following tests: Category Test; Tactual Perform Test; Seashore Rhythm Test; Speech Sounds Perception Test; and Finger Tapping Test. (Vol. V, T. 132-134).

frontal and parietal lobes of the brain are compromised, then the individual will make poor decisions and will not appreciate the outcome of their decisions. (Vol. V, T. 135).

In addition to the Halstead-Reitan, Dr. Shaffer also administered the Stanford Binet Intelligence Scale, Fourth Edition (hereinafter "Stanford Binet"), Wechsler Adult Intelligence Scale, Revised (hereinafter "WAIS-R") and the Wechsler Memory Scale. (Vol. V, T. 135-136). Regarding the scores on the intelligence tests, Dr. Shaffer testified that Petitioner scored a 76 on the Stanford Binet, and he scored a 77 on the WAIS-R. (Vol. V, T. 136). Both of these scores fall in the borderline range for intelligence. Id. These test scores were consistent with an individual who could perform manual labor or work in a warehouse. (Vol. V, T. 137).

As Petitioner's scores on the intelligence tests were close to the range of mental retardation, Dr. Shaffer administered the Vineland Adaptive Behavior Scales (hereinafter "Vineland"). (Vol. V, T. 138). The scores from the Vineland revealed that Petitioner had "delayed development" in the areas of communication, socialization and daily living skills. Id. Dr. Shaffer testified that the results of the Vineland showed that Petitioner's development was that of a preadolescent individual between the ages of ten and thirteen. (Vol. V, T. 138-139).

Dr. Shaffer also performed a personality assessment on Petitioner. (Vol. V, T. 139). In performing this assessment, Dr. Shaffer administered the following tests: clinical analysis questionnaire; Rorschach Inkblot Test; and Thematic Apperception Test. Id. In forming an opinion as to Petitioner's personality, Dr. Shaffer also relied upon social history information received from Petitioner, Petitioner's family, third grade teacher and an investigator with the Federal Defender Program. (Vol. V, T. 140-141).

Trial counsel then elicited testimony regarding the social history information that Dr. Shaffer relied upon in forming his opinion. Specifically, Dr. Shaffer testified that Petitioner

experienced developmental delays that involved speech problems and delays in walking. (Vol. V, T. 141). These delays continued into elementary school and were observed by teachers. Id. With regard to his school performance, the school records showed "insufficient performance during those first years of school." Id. The records also showed that Petitioner was held back in the third grade. Id.

Dr. Shaffer also testified that Petitioner had incidents of high fever with illnesses, which could contribute to brain impairment. (Vol. V, T. 141). In addition, Dr. Shaffer stated that Petitioner suffered a head injury with unconsciousness at the age of five or six when he fell out of a tree. Id. Petitioner also suffered a head injury with unconsciousness following a bicycle accident. (Vol. V, T. 141-142). During his adult years, Petitioner was involved in a motorcycle accident that resulted in a brain injury. (Vol. V, T. 142). There was also an incident wherein Petitioner jumped out of a car that was traveling at fifty miles per hour. (Vol. V, T. 147). Dr. Shaffer opined that there were a number of "brain insults or brain injury exposures" that could account for the neuropsychological scores that Petitioner obtained on the testing. (Vol. V, T. 142).

Dr. Shaffer testified that Petitioner was raised by a "mother who was extremely devoted and conscientious and did an extremely caring job of attempting to expose Michael to religious faith and to bring him up in the right way." (Vol. V, T. 142). However, Dr. Shaffer believed that the "influence in the home was more colored by an alcoholic, abusive stepfather who would routinely physically abuse the sons with types of punishment that were quite excessive, whippings using belts, switches that had thorns in them, wire hangers resulting in bleeding with welts on Michael Nance's body." Id. Additionally, Dr. Shaffer testified that there was favoritism shown towards the natural son of that marriage, and Petitioner was "pushed to the

periphery of his father's experience." Id. As to Petitioner's father, Dr. Shaffer informed the jury that he did not "tolerate conversation," and he did not like to repeat himself. Id. Petitioner was also subject to his father's "moodiness and rage episodes." (Vol. V, T. 143). Dr. Shaffer further testified that Petitioner's father would not tolerate any "affection or demonstrations of support." Id.

Dr. Shaffer testified that the behavior of Petitioner's father had an extensive effect on the family. (Vol. V, T. 143). Specifically, Petitioner's mother took medication for a nervous condition, and Petitioner withdrew from the family. Id. Petitioner would "shut down" and did not have "the usual range of feelings of attachment or connection to people." Id.

In addition to the problems at home, Petitioner also experienced difficulties at school. (Vol. V, T. 143). Some of Petitioner's problems at school were due to the fact that his participation in the Jehovah's Witness faith required him to be pulled from the classroom during any school activities that concerned holidays. (Vol. V, T. 143-144). Petitioner's inability to participate in holiday activities at school caused him to feel shame and isolation from his peers. (Vol. V, T. 144). In addition, Petitioner's peers at school would tease him and call him "witness brother." Id.

Petitioner's upbringing resulted in him being a child with "very low self-esteem and extreme amount of neediness." (Vol. V, T. 144). As he wanted the attention of an adult male, Petitioner turned to his uncle. Id. Petitioner's uncle introduced him to alcohol and drugs. Id. Dr. Shaffer noted that Petitioner was using both cocaine and alcohol prior to his completion of elementary school. Id. By the age of fourteen, Petitioner was intravenously using cocaine, crystal, crank and heroin. (Vol. V, T. 145). With regard to Petitioner's ingestion of drugs, Dr. Shaffer testified that he would put LSD in his eye or put drugs in his skin that had been cut open.

(Vol. V, T. 146). Petitioner would also take three or four drugs at one time. Id. Dr. Shaffer testified that Petitioner's manner in which he consumed drugs would have created "havoc in his nervous system" and could "further lead to neurological damage and certainly can lead to psychological damage." Id.

Dr. Shaffer explained to the jury that Petitioner became increasingly depressed and continued to use drugs as a way to self-medicate. (Vol. V, T. 146). Petitioner attempted suicide on two occasions at the age of fifteen. Id. Both of these attempts were thwarted by his brothers. Id.

In addition to the drug use, Dr. Shaffer informed the jury that Petitioner had an intimate relationship with a woman twice his age who was also using drugs. (Vol. V, T. 147-148). Dr. Shaffer opined that this relationship was a "substitute for a need of nurturance, a need of affection and acceptance." (Vol. V, T. 148).

In describing Petitioner, Dr. Shaffer testified that he was a person "desperately longing for some kind of approval," and he ended up getting involved in a "bizarre use of drugs, show[ed] signs of self-destruction and suicide." (Vol. V, T. 147). Petitioner used drugs in a "self-destructive manner, as if he was either blanking out the pain or wanting to end his life or at least wanting to draw attention, as a cry for help." Id. As Petitioner did not receive any treatment, he continued in this "highly emotionally disturbed manner until the present time and the present situation." Id.

In concluding his testimony, Dr. Shaffer stated to the jury that Petitioner did not have the opportunity to "make choices in the way that most of us have had a chance to make choices." (Vol. V, T. 149). He further stated that Petitioner's understanding, judgment and reasoning were

"impaired by these various neuropsychological deficits and by the severe psychological factors that have influenced him." Id.

During their sentencing phase closing arguments, trial counsel urged the jury to consider the evidence presented of Petitioner's difficult upbringing, abusive father, developmental delays, borderline intellectual functioning and substance abuse. (Vol. V, T. 200-211). Trial counsel requested that the jury extend mercy to Petitioner and sentence him to life without parole. (Vol. V, T. 211-212).

Following the jury's return of a death sentence, Mr. Wilson filed an appeal in the Georgia Supreme Court. (HT 256; RX 1 at 18; RX 2 at 17). On February 28, 2000, the Georgia Supreme Court affirmed Petitioner's convictions and remanded the case for re-sentencing, solely on a finding that the trial court erred by failing to excuse a prospective juror for cause. Nance v. State, 272 Ga. 217, 526 S.E.2d 560 (2000).

**Mitigation Investigation For The 2002 Re-sentencing Trial**

Trial counsel then undertook to retry the sentencing phase of Petitioner's trial in an attempt to obtain a life sentence. This Court finds that in addition to all of the information that trial counsel had previously compiled from their original investigation, trial counsel began investigation again. This Court finds that the investigation was reasonable.

Trial counsel had numerous meetings regarding their strategy for the re-sentencing trial. (HT 147). During these meetings, trial counsel discussed what they did in the original trial and what they should or should not do during the re-sentencing trial. Id. Trial counsel's theory during the re-sentencing trial was the same theory that was used during the original trial. (HT 252, 280-281; RX 2 at 35). Due to the fact that Petitioner had received the death penalty in the original trial, counsel believed that they needed to do a better job in their presentation of

mitigation evidence during the re-sentencing trial. (HT 151, 252, 280-281; RX 1 at 38; RX 2 at 35, 38).

During the re-sentencing trial, Mr. Wilson served as lead counsel and was responsible for the majority of the presentation of the mitigation evidence. (HT 86, 104, 254; RX 1 at 12, 25, 50; RX 2 at 16, 25). Mr. Moore, who served as second chair during the re-sentencing trial, also assisted in the mitigation investigation. (HT 86; RX 1 at 25, 50; RX 2 at 16, 49). Investigators Sills and Titshaw worked on the investigation for the re-sentencing trial. (RX 1 at 23; RX 108 at 46).

In addition to Investigators Sills and Titshaw, trial counsel also utilized Hector Guevara who served as a mitigation specialist during the re-sentencing trial. (HT 146, 243, 282; RX 1 at 25, 62; RX 2 at 32-34). In preparing for the re-sentencing trial, Messrs. Wilson and Guevara traveled to Kansas and spent several days interviewing mitigation witnesses. (HT 104-105, 147, 252; RX 1 at 31, 62; RX 2 at 31).

Mr. Guevara conducted a thorough mitigation investigation. Mr. Guevara made two trips to Kansas to interview mitigation witnesses. Mr. Guevara also prepared a family tree and a detailed forensic assessment of Petitioner. (RX 119 at 8-84; RX 120). Prior to the re-sentencing trial, Mr. Guevara provided trial counsel with a list of witnesses, which was broken down into those who were willing to testify and those who were reluctant to testify. (RX 119 at 2-7).

Trial counsel's preparation for the re-sentencing trial also included an investigation into Petitioner's mental health. The record shows that trial counsel met with Dr. Shaffer and discussed the possibility of having him testify again during the re-sentencing trial. (HT 171-172; RX 94 at 33; RX 170 at 16). Trial counsel, however, did not present the testimony of Dr. Shaffer during the re-sentencing trial as they believed that the cross-examination from the original trial

would affect his testimony in the re-sentencing trial. (HT 110, 172, 254; RX 1 at 34; RX 2 at 35). Instead of using Dr. Shaffer again during the re-sentencing proceedings, trial counsel utilized Dr. Daniel Grant who had been recommended by Mr. Guevara. (HT 110, 254-255; RX 1 at 34-35, 61-63; RX 2 at 35). Trial counsel retained Dr. Grant to provide testimony regarding prison adaptability. (HT 111, 281; RX 1 at 50; RX 2 at 36). In explaining the reason for presenting evidence of prison adaptability, trial counsel stated that "…jurors look into whether or not they think this person is going to be a danger to other prisoners and prison guards and other people if they're incarcerated as opposed to being executed." (HT 153).

Dr. Grant's work on the case included neuropsychological and intellectual testing, interviews of Petitioner's mother and siblings and a review of records. (HT 152-153; RX 95 at 3-4). Following his evaluation, Dr. Grant concluded that Petitioner would be "very adaptable to the prison environment" and would be a "productive prisoner." (RX 2 at 36). As discussed below, trial counsel presented the testimony of Dr. Grant during the re-sentencing trial.

With regard to the preparation of witnesses, trial counsel testified that they met with all of the witnesses and prepared them for their testimony. (HT 151). Mr. Moore testified that they spent "several nights at the Holiday Inn after they got into town going over their testimony again." Id. Prior to his testimony, trial counsel spent several hours with Dr. Grant reviewing a list of questions. (HT 111, RX 1 at 62-63). In addition, trial counsel's files contained a document that provided helpful suggestions for the witnesses. (RX 102).

This Court finds that a review of the entire record shows that trial counsel's investigation was thorough and that trial counsel were not deficient and Petitioner was not prejudiced by that investigation.

**Deficient Presentation at the Re-sentencing**

This Court finds that trial counsel did not make a reasonable presentation based on their strategy and the information discovered during their investigation. By the time of Petitioner's re-sentencing, trial counsel had a wealth of information in their possession regarding Petitioner's mental impairments and mitigating life history. Although counsel presented additional lay witnesses to testify to Petitioner's troubled childhood, his stepfather's abuse and his learning difficulties, no expert testimony was presented to explain the clinical significance of the lay witnesses' observations, to relate those observations to Petitioner's mental impairments or to explain the mitigating significance of Petitioner's longstanding drug dependency. Trial counsel did not abandon their strategy of presenting the relationship of Petitioner's brain damage and borderline mental retardation to his actions during the offense; however counsel failed to present any evidence in support of that theory. (HT 152, 281).

Trial counsel's theory for the re-sentencing trial was similar to the theory used during the original trial. With regard to the mitigation evidence, trial counsel stated that they would present evidence of Petitioner's learning difficulties, an abusive stepfather, substance abuse that started at an early age and his adaptation to the prison environment. (9/16/02, Vol. II, RT 25-26).

Trial counsel cross-examined several State witnesses about possible effects of exposure to the dye packs, however, they presented no witnesses of their own. With regard to the dye packs, trial counsel brought out that the discharge of a dye pack can cause an individual to be startled. (9/17/02, Vol. II, RT 57). Trial counsel also briefly cross-examined two state witnesses regarding the physical effects of tear gas eliciting that it could cause the following: breathing difficulties if subject to prolonged exposure; eye watering and burning; and significant nasal

congestion.[20] (9/16/02, Vol. II, RT 43; 9/17/02, Vol. I, RT 81; 9/17/02, Vol. II, RT 26). Following the presentation of the State's case, trial counsel presented the testimony of twenty-three witnesses including Petitioner's family members, friends, third grade teacher and an expert on prison adaptability.

Petitioner's mother, Mary Ellen Nance, testified regarding Petitioner's developmental delays. (9/18/02, Vol. I, RT 11, 13). Ms. Nance also testified that Jim Nance was an alcoholic who was "very, very disturbing and abusive" when he was drunk. (9/18/02, Vol. I, RT 22-23). With regard to the abuse, Ms. Nance stated that Jim was verbally and mentally abusive. Id. This abuse was mostly directed towards Ms. Nance. Id. Jim, however, was also violent towards Petitioner. (9/18/02, Vol. I, RT 56). Ms. Nance testified that Jim mostly yelled at Petitioner, and he "put him up against the wall once or maybe twice." Id. He also threatened Petitioner with a baseball bat on one occasion and used a belt on Petitioner. Id.

Jerry Chaffin, Petitioner's maternal uncle, testified that he was nine years older than Petitioner, and that he and Petitioner used to drink beer and party together. (9/18/02, Vol. I, RT 62). As to Petitioner's learning difficulties, Mr. Chaffin stated that Petitioner was slow in school and was in special education classes. (9/18/02, Vol. I, RT 65). Mr. Chaffin did not encourage Petitioner to skip school; however, he did observe Petitioner on the streets when he should have been in school. Id.

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[20] On direct examination, the State elicited testimony from Dr. Joseph Burton regarding the effects of tear gas on an individual. Specifically, Dr. Burton testified that the discharge of the dye pack would initially startle the individual. (9/17/02, Vol. II, RT 54). If the tear gas were to get in the face of the individual, it could cause "burning of the eyes, tearing of the eyes, reflex closure of the eyelids." Id. If the tear gas were to get into the nose or airway, then it could cause reflex coughing. Id. Dr. Burton explained that tear gas irritates the throat, lungs, nose and eyes. (9/17/02, Vol. II, RT 54-55).

At some point, Mr. Chaffin lived with Petitioner's family for about one or two months. (9/18/02, Vol. I, RT 65). Petitioner's mother was "always gone" in that she worked all day and was at church in the evening. (9/18/02, Vol. I, RT 66). Mr. Chaffin opined that Petitioner's mother intentionally stayed away from home because of Jim Nance. Id. Jim was a "terrible alcoholic" in that there were probably two days a month where he was sober. Id. In addition, Mr. Chaffin described Jim as a "[t]erribly controlling" person. (9/18/02, Vol. I, RT 71, 74-75). Mr. Chaffin stated that Jim "bark[ed] order to all three of them" and controlled the money in the household. (9/18/02, Vol. I, RT 71-72). Furthermore, Mr. Chaffin testified that Jim would not allow the showing of affection in the home. (9/18/02, Vol. I, RT 73). Mr. Chaffin opined that Jim did not like the showing of affection as he was an "uncaring person." (9/18/02, Vol. I, RT 74).

Mr. Chaffin testified that Jim treated Petitioner and his brothers differently, and that Petitioner received the most abuse from Jim. (9/18/02, Vol. I, RT 70-71). Jim frequently called Petitioner "you little bastard" and "you son of a bitch." (9/18/02, Vol. I, RT 66). Jim also called Petitioner "stupid, imbecile, ignorant." (9/18/02, Vol. I, RT 67). Mr. Chaffin observed physical abuse by Jim on Petitioner "[m]any, many times." Id. Specifically, he observed Petitioner being beat with a hanger, hose, leather belt and a board with holes. Id.

Trial counsel also presented Albert R. Chaffin, who was Petitioner's maternal uncle. At some point, Petitioner worked for Mr. Chaffin who was a construction superintendent. (9/18/02, Vol. I, RT 90-91). Mr. Chaffin described Petitioner as a good worker, but he was unable to perform the job. (9/18/02, Vol. I, RT 91).

With regard to Jim Nance, Mr. Chaffin testified that he was an abusive drunk. (9/18/02, Vol. I, RT 91-92). Jim would drink for days at a time. (9/18/02, Vol. I, RT 97). Mr. Chaffin

testified that Jim frequented all the bars in the area and would have to be picked up by others as he needed a way home and was unable to drive. (9/18/02, Vol. I, RT 92). When Jim was drunk, he became argumentative with Petitioner and his brothers. (9/18/02, Vol. I, RT 97). Mr. Chaffin testified that he threw Jim out of his house several times as he was "drunk, belligerent, cussing, throwing-up." (9/18/02, Vol. I, RT 97-98).

Mr. Chaffin lived with Petitioner's family for about eight months. (9/18/02, Vol. I, RT 93). Jim treated all three boys poorly in that he was physically and verbally abusive. (9/18/02, Vol. I, RT 93-94). In addition, Mr. Chaffin testified that Jim was a controlling person and "ruled his house with an iron fist." (9/18/02, Vol. I, RT 94). Specifically, Jim would not allow Petitioner's mother to move the furniture in the house, and he took Petitioner's mother's paycheck and provided her with an allowance. Id.

Trial counsel also presented Donna Markley, who was Petitioner's third grade teacher. Ms. Markley testified that Petitioner struggled in school and was retained in the third grade. (9/18/02, Vol. II, RT 45, 51-52). Ms. Markley explained that, at that time, she lacked the ability to identify a learning disability, and they did not have any special education programs for Petitioner even if a learning disability had been identified. (9/18/02, Vol. II, RT 52, 56). Based upon her experience and the training that she later received, Ms. Markley opined that Petitioner had a learning disability. (9/18/02, Vol. II, RT 53).

Trial counsel also presented the testimony of Petitioner's two brothers, Johnny and Doyle Nance. Petitioner's oldest brother, Johnny Nance, explained to the jury that their mother worked long hours, and their father was home when they got out of school. (9/19/02, Vol. I, RT 25). Regarding their father, Mr. Nance testified that he was a severe binge drinker. Id. Mr. Nance stated that everything was "magnified" when their father was drinking. (9/19/02, Vol. I, RT 26).

Doyle Nance testified that Petitioner did not perform well in school. (9/18/02, Vol. II, RT 111). With regard to Petitioner's learning difficulties, Mr. Nance testified that he had memory difficulties and was retained in the third grade. (9/18/02, Vol. II, RT 104). In junior high school, Petitioner was in a special reading class. (9/18/02, Vol. II, RT 126). The kids at school used to call Petitioner "sped" because he was in that special class. Id. Mr. Nance also stated that his daughter has been diagnosed with ADHD. (9/18/02, Vol. II, RT 115).

The final witness presented by trial counsel was Dr. Daniel Grant. Dr. Grant, who was qualified as an expert in psychology and prison adaptability, testified that he conducted a psychological evaluation on Petitioner to determine his level of functioning and adaptability to prison life. (9/19/02, Vol. I, RT 99-100). As part of his evaluation, Dr. Grant administered numerous psychological tests. (9/19/02, Vol. I, RT 101-102). With regard to Petitioner's intellectual functioning, Dr. Grant testified that he had a full scale IQ of 82. (9/19/02, Vol. I, RT 102). Dr. Grant explained to the jury that his full scale IQ placed him in the twelfth percentile. Id. On the language scales, the testing revealed that Petitioner's listening comprehension was that of an early adolescent. (9/19/02, Vol. I, RT 103). In addition, Petitioner's oral expression was lower than his general level of intelligence. Id. Dr. Grant testified that Petitioner had "good use of language," but his language level was lower than what one would expect from the general population. Id.

With regard to memory and spelling, Dr. Grant testified that Petitioner's reading was at a fourth grade level. (9/19/02, Vol. I, RT 103). Petitioner was a slow reader, and his reading comprehension was at the fourth grade level. (9/19/02, Vol. I, RT 104). As to his memory functioning, Dr. Grant explained to the jury that Petitioner experienced difficulty with "encoding

the information." (9/19/02, Vol. I, RT 104-105). Dr. Grant stated that it took "more repetition to get the information in" but "once it's in there, it pretty much stays." (9/19/02, Vol. I, RT 105).

As to prison adaptability, Dr. Grant explained to the jury that the Department of Corrections would assess Petitioner in an effort to determine the appropriate facility. (9/19/02, Vol. I, RT 106-107). Dr. Grant spoke with Petitioner's family, officers at the jail and reviewed jail and prison records. (9/19/02, Vol. I, RT 108). Following his evaluation, Dr. Grant opined that Petitioner would "make a good adjustment to prison life based on all the available information." Id. Dr. Grant testified that prison life was very structured, and the inmates are not afforded the opportunity to make many decisions. (9/19/02, Vol. I, RT 109). In prison, all behavior has a "consequence so that people learn to adjust or either they have a lot of problems." Id. Dr. Grant stated that the prisons were equipped to deal with any problems, which included restriction, cell confinement, loss of privileges and visitation. Id. Furthermore, Dr. Grant stated that the "seriously problematic inmate" was always handcuffed when outside of his/her cell and was escorted by two officers. (9/19/02, Vol. I, RT 109-110).

Dr. Grant opined that Petitioner's prison behavior would be similar to the good behavior exhibited in the county jail. (9/19/02, Vol. I, RT 110). Dr. Grant also noted that the disciplinaries for aggressive or violent behavior decrease as the inmate grows older, particularly between the ages of forty and forty-six. Id. Trial counsel then elicited testimony that Petitioner was forty-one years old. Id. In addition, Dr. Grant testified that an individual who has made bad decisions in the past can learn to follow the strict rules of the prison. (9/19/02, Vol. I, RT 110-111). The best environment for a person who was impulsive was a "[h]ighly structured, rule-bound setting." (9/19/02, Vol. I, RT 111). With regard to community safety, Dr. Grant

explained to the jury that inmates leaving the facility are always handcuffed and have an armed escort. (9/19/02, Vol. I, RT 112-113).

### A. Deficient Performance

Competent defense counsel presents the jury with the totality of reasonably available mitigation evidence, consistent with the defense strategy:

> Ineffective assistance of counsel is established when counsel has failed to provide the jury with the "totality of the available mitigation evidence ... [to] []weigh[] ... against the evidence in aggravation," including a "graphic description of [the defendant's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' [which] might well ... influence[] the jury's appraisal of his moral culpability."

Carr v. Schofield, 364 F.3d 1246, 1265 (11th Cir. 2004) (citing Williams v. Taylor, 529 U.S. at 397-98); see also Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011) (finding prejudice where counsel presented testimony of family members but omitted evidence of brain damage and borderline mental retardation). "'By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s a petitioner's] ability to receive an individualized sentence.'" Brownlee v. Haley, 306 F.3d 1043, 1074 (11th Cir. 2002) (alterations in original) (quoting Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir.1991)).

#### 1. Failure to Present Petitioner's Organic Brain Damage and Borderline Mental Retardation

The testimony of both trial attorneys in these habeas proceedings made clear that the defense's mental health strategy remained unchanged from the first trial to the re-sentencing. At the re-sentencing, however, counsel wanted to "do it better" and to supplement the evidence with Dr. Grant's expert testimony about Petitioner's prison adaptability. (HT 252). Despite their intentions, counsel did not present evidence of Petitioner's brain impairments and their effects at the re-sentencing. Although counsel presented numerous lay witnesses to testify regarding

Petitioner's difficult family life, substance abuse, and learning disabilities, no witness testified to Petitioner's neurological deficits and borderline mental retardation. Furthermore, the lay witness testimony was presented without explanatory interpretation by a mental health expert. In failing to present expert testimony on the extent of Petitioner's impairments and their impact on his life and actions on the day of the incident, counsel rendered deficient performance. Hall v. McPherson, 284 Ga. 219, 228-229 (2008); Turpin v. Lipham, 270 Ga. 208, 219 (1998); Ferrell v. Hall, 640 F.3d 1199, 1234-36 (11th Cir. 2011).

"The average juror is not able, without expert assistance, to understand the effect [Petitioner's] troubled youth, emotional instability and mental problems might have had on his culpability for the murder." Bright v. State, 265 Ga. 265, 276 (1995). Petitioner's re-sentencing jury was never told how his "neuropsychological deficits" and "severe psychological factors" related to the circumstances of the offense. In a case where the jury was already faced with a guilty verdict, such evidence was critical in trial counsel's efforts to persuade them that a sentence less than death was appropriate.

Petitioner's case involved consistent conclusions of experts who had evaluated Petitioner throughout his adult life. As habeas expert Michael Herkov, Ph.D. noted:

> "[T]here was remarkable consistency in this case," and "there's really little disagreement" among the experts who have evaluated Mr. Nance.

(HT 351). Trial counsel could have presented evidence of Mr. Nance's frontal lobe damage and borderline intellectual functioning through any number of experts, including Dr. Shaffer who testified at the first trial, Dr. Grant who testified at the re-sentencing, or even the State's expert Dr. Sapp. Counsel's stated strategy was to inform the jury of these kinds of mitigating factors. Counsel therefore "had every reason to develop the most powerful mitigation case possible" along these lines. Wiggins v. Smith, 539 U.S.

510, 526 (2003). Counsel's omission of Dr. Shaffer's findings, which not only provided mental health diagnoses but mitigated the crime itself, was unreasonable under the circumstances.

In this case, Dr. Shaffer was trial counsel's chosen expert at the 1997 trial. His evaluation of Mr. Nance resulted in two highly mitigating diagnoses that trial counsel knew were important to their mitigation presentation. Accordingly, this case involves trial counsel neglecting to present critical mitigating mental health diagnoses of which they have direct knowledge. For this reason, Petitioner's case is analogous to the line of cases where trial counsel has been found ineffective for failing to present the testimony of prior treating or evaluating mental health experts whose evaluations and diagnoses were mitigating and reasonably available. See Hall v. McPherson, 284 Ga. 219, 231 (2008) (holding trial counsel to be ineffective for failing to investigate and present prior evaluating mental health expert); Head v. Thomason, 276 Ga. 434, 436-37 (2003) (same); Martin v. Barrett, 279 Ga. 593, 595 (2005) (same).

Trial counsel's sole stated reason for failing to present Dr. Shaffer's mitigating testimony was that his credibility had been "impeached" on cross-examination at the 1997 trial. (HT 110). However, Mr. Moore testified during the state habeas evidentiary hearing that Dr. Shaffer's diagnoses were not discredited by the State's cross-examination. Mr. Moore stated that the only issue upon which Dr. Shaffer was questioned was the basis of his knowledge about Mr. Nance's childhood due to his reliance in part on Federal Defender Program memos:

> Q. So, the cross-examination was more an attack on the knowledge of the underlying historical facts, and not Dr. Shaffer's expertise?
>
> A. That's correct. I'll continue to use Dr. Shaffer. It was not his fault, what happened in that case.
>
> Q. Now, did he testify at the 2002 re-sentencing?

> A. No, he did not. We felt like that because of what had happened in the original trial that Mr. Porter [the prosecutor] would be able to discredit his testimony in the second trial the second re-sentencing.
>
> Q. In the same way?
>
> A. In the same way.

(HT 109-10).

Therefore, counsel could have provided Dr. Shaffer with the investigative materials they had already collected in furtherance of their mitigation theory to ensure his findings would not be challenged in the way they were in 1997. During the habeas hearing, Dr. Shaffer acknowledged that the additional corroborative materials he reviewed in this proceeding strengthened the findings he made at the first trial:

> Q. Have [the new background materials] in any way changed your opinion from your diagnosis and conclusions at the time of trial?
>
> A. Well, no, they haven't. And, interestingly, I feel assured today about the corroboration of the facts that were given to me during the original evaluation by the federal investigators, and now being able to read the Court testimony from all of these observers and the family and teachers and other people, former friends of the defendant, there's very strong corroboration for my original findings.

(HT 334-35).

Mr. Moore acknowledged that Dr. Shaffer was a "good expert,"[21] and he further explained the importance of presenting a capital defendant's mental illnesses in mitigation of punishment:

> [I]t's my opinion that that's a critical part of the mitigation if there are -- if there are any mental illnesses; even if they don't rise to the level that would be a defense in the case, they're something that the jury might use to decide not to give the death penalty in a case.

[21] HT 108.

(HT 127). Accordingly, this Court cannot find counsel's omission of the key mental health issues in this case tactical or reasonable.

Finally, Dr. Grant's purportedly "unhelpful" testimony was not cited as a reason that mitigating mental health testimony was omitted in this case. Trial counsel opined that Dr. Grant proved to be an unhelpful witness during the re-sentencing trial. Regarding Dr. Grant's testimony, Mr. Moore stated:

> Dr. Grant's testimony was totally unsatisfactory and unhelpful in the case. I met with him the night before he was to testify, spent several hours with him going over the questions that would be asked and we would expect him to answer. And when he testified, he gave me this blank look on everything and said, "What are you talking about?" So I started leading him, trying to get him to say what he told me the night before. The district attorney heatedly objected to it, and the judge allowed it anyway. But he was not helpful at all. He came into court and acted like he didn't know what I was talking about when we'd spent hours going over it the night before.
>
> * * *
>
> He didn't testify very much at all. Because he kept saying, "What do you mean by that?" And we had gone over the questions the night before, and he had indicated that the answers would be very different than what he gave in court. He was a very unhelpful witness.

(RX 1, HT 35-36). However, Mr. Moore, who handled the mental health experts at both proceedings, explained that the "focus" of Dr. Grant's testimony was always intended to be on prison adaptability, rather than on Petitioner's brain damage or borderline mental retardation:

> Dr. Grant's focus was – he was presented to us as an expert in presenting to a jury what it's really like to be in prison, how bad it is, how it's not what the public thinks, that people just sit around and watch television all day and get free meals, and don't – basically, don't do anything.

(HT 111).

Mr. Moore testified that although he had difficulty with Dr. Grant on the stand, the questions that Dr. Grant purportedly failed to answer as expected pertained only to prison

adaptability and not to any issues related to Petitioner's mental impairments. (HT 154). Consequently, the poor trial performance that Mr. Moore attributed to Dr. Grant neither explains nor excuses counsel's failure to present the issues of brain damage and borderline mental retardation.

### 2. Deficient Performance for Failing to Present Dr. Hutchinson's Testimony to Mitigate the Crime

Another ground of ineffectiveness in this case stems from counsel's failure to present the mitigating testimony of Dr. Leslie Hutchinson, an expert who counsel specifically located, retained, interviewed, and subpoenaed to testify at Mr. Nance's 1997 trial. An expert qualified in the field of chemical weapons, Dr. Hutchinson could have informed the sentencing jury (a) that Petitioner had significant exposure to the CS tear gas, (b) that Petitioner would have been disoriented by this exposure, (c) that Petitioner's frontal lobe impairments would have exacerbated the effects of the tear gas, and, most importantly, (d) that Petitioner's statement that he did not know he fired the gun was "more likely than not true." (HT 393). Dr. Hutchinson's testimony fit perfectly into trial counsel's theory that the offense was unintentional. Trial counsel summarized their theory for the Court:

> [T]here was a dye pack that went off when Mr. Nance left the bank; ... within that dye pack there was a tear gas element; ... he was shocked by ... the tear gas; ran across the street; [] confronted Mr. Balogh, the decedent, and tried to take his car away from him; but in doing so – Michael was wearing gloves, he had his gun inside a black plastic bag, and in his confrontation with the man, trying to get his car, the gun went off, but the gun went off inside the plastic bag. ... [I]t seemed as though it was close upon an accidental shooting. . . . [T]he bullet entered the man's arm, left arm. . . . And then after the shot, Mr. Nance did not move the man out of the car, remove him from the vehicle and take the vehicle. He [was] obviously shocked.

(HT 244).

Trial counsel had a duty to present this readily available evidence to Mr. Nance's jury as it would have strongly supported their mitigation theory. See Head v. Thomason, 276 Ga. 434, 436-37 (2003) (counsel ineffective for failing to present expert testimony counsel knew was mitigating). Dr. Hutchinson could have offered persuasive medical opinions regarding Petitioner's exposure to the CS tear gas. Furthermore, no other witness offered similar expert opinions and this testimony was consistent with counsel's strategy, therefore trial counsel were deficient in failing to present it.

During the habeas proceedings, when Mr. Wilson was asked why trial counsel did not call Dr. Hutchinson to testify in 1997, he answered: "I'm not sure why we didn't call Dr. Hutchinson. I remember we -- we did get some information about tear gas and its effects from State's witnesses who testified." (HT 276). While counsel did cross-examine numerous prosecution witnesses on this issue in 1997, counsel were unable to elicit any information regarding the connection between Petitioner's brain impairments, his exposure to tear gas, and the resulting effects on his actions on the day of the incident. Specifically, State pathologist Dr. Burton, while having some training on tear gas, testified that he lacked the expertise to discuss mental health-related issues. (Vol. III, T. 61). In 2002, counsel minimally cross-examined a bank teller, a police officer, and a micro-analyst about the physical effects of tear gas, and failed altogether to cross-examine Dr. Burton on this issue.

Accordingly, not only were counsel in possession of the mitigating psychological and medical testimony available from Dr. Hutchinson by 2002, they were also on notice that no State witness could provide comparable testimony.

**B. Actual Prejudice**

Having found counsel deficient for failing to present available evidence key to their

mitigation theory, this Court must now consider whether Petitioner was prejudiced by counsel's unreasonable conduct. This Court notes that trial counsel did present a number of family members, as well as Dr. Grant and several guards on the issue of prison adaptability. This Court further notes that the jury heard some information from lay witnesses about Petitioner's learning difficulties and life history. However, the jury heard nothing about the mental health implications of Petitioner's life history, nor about the nexus between Petitioner's mitigating brain impairments and the crime itself. Because the expert testimony presented during this proceeding would have substantially strengthened Petitioner's case in mitigation, while substantially weakening the State's case in aggravation, this Court finds that Petitioner has met his burden of proving actual prejudice.

In considering the prejudice prong of the Strickland standard, a reviewing court analyzes "'the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding' – and 'reweigh it against the evidence in aggravation.'" Porter v. McCollum, 130 S. Ct. 447, 453-454 (2009) (citing Williams v. Taylor, 529 U.S. 362, 397-398). A petitioner needs to "show only 'a reasonable probability' of a different outcome, not that a different outcome would have been certain or even 'more likely than not.'" Schofield v. Gulley, 279 Ga. 413, 416 (2005) (citing Strickland, 466 U.S. at 693). Further, when states such as Georgia require unanimity to impose a death sentence, the petitioner satisfactorily demonstrates prejudice by showing "a reasonable probability that at least one juror would have struck a different balance." Wiggins, 539 U.S. at 537.

Furthermore, as the Eleventh Circuit has held, "the presentation of some mitigating circumstance evidence [at sentencing does not] always insulate counsel's performance from being condemned as ineffective." Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995). The

United States Supreme Court recently reaffirmed the principle in a Georgia capital case: "We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." Sears v. Upton, 130 S.Ct. 3259, 3266 (2010); see also Turpin v. Christenson, 269 Ga. 226, 237-239 (1998) (finding deficient performance where counsel failed adequately to investigate and present mitigating mental health evidence despite presenting nineteen mitigation witnesses, "includ[ing] Christenson's parents, grandfather, aunts, uncles, cousins and Little League baseball coaches," at sentencing); Stephens v. Kemp, 846 F.2d 642, 653-54 (11th Cir. 1988) (finding prejudice where defendant's mother testified about his apparent mental instability, but counsel failed to substantiate mental health condition with evidence of psychiatric hospitalization).

**1. Omission of Petitioner's Brain Damage and Borderline Mental Retardation and its Relation to the Crime.**

In this case, the evidence of Petitioner's organic brain damage and borderline mental retardation is undisputed by any of the evaluating experts. Both Georgia and federal courts have recognized these diagnoses as particularly mitigating in capital cases. See e.g. Ferrell v. Hall, 640 F.3d 1199, 1234 (11th Cir. 2011) (counsel ineffective for failing to present evidence of brain damage and borderline mental retardation); Head v. Thomason, 276 Ga. 434, 436-37 (2003) (counsel unreasonably failed to present and explain, through expert, evidence of borderline intelligence and depression).

As Dr. Shaffer testified at the first trial, Petitioner's social history provided signs of brain injury, including developmental problems, head injuries, and drug abuse beginning at a young age, and was corroborated through neuropsychological testing. (Vol. V, T. 130-31, 144-146). Furthermore, the types of brain injuries in Petitioner's history are often the source of frontal lobe

impairment, evidence of which courts have found to be mitigating. See Ferrell, 640 F.3d at 1235; Sears, 130 S. Ct. at 3262-63. Dr. Shaffer further explained the significance of frontal lobe impairments on an individual like Petitioner:

> [The frontal lobes control] skills that operate in a person's judgment and reasoning, their ability to anticipate the consequences of an action, and their ability to change a course of action when new information comes in. They -- people tend to perseverate; that is, to continue the same course of action when they have problems with the frontal lobes of their brain. Our frontal lobes allow us to assess alternative actions and make decisions to change what we're doing, when they're functioning properly.

(HT 319-20).

Dr. Shaffer explained that when the frontal lobes are "compromised," people with such injuries "don't make good decisions. They don't appreciate the outcome of their decisions. They don't seem to understand what the results of certain actions are going to be, particularly when things are happening quickly and moving rapidly around them." (Vol. V, T. 135).[22] This testimony directly supported the defense theory that Petitioner was disoriented and confused at the time of the shooting and did not intentionally shoot the victim. However, at Petitioner's re-sentencing, the jury was not aware of Petitioner's neurological deficits.

Although some lay witnesses discussed Petitioner's head injuries and drug use, they were not qualified to offer expert opinions about how those events resulted in impairments to Petitioner's frontal lobes or about the impact that Petitioner's brain damage had on his behavior and mental health. Critically, the lack of expert testimony regarding Petitioner's brain damage deprived the jury of an opportunity to understand the nexus between Petitioner's brain impairments and the crime itself, a significant factor in the jury's consideration of Petitioner's

[22] Dr. Michael Herkov, who testified at state habeas proceedings, concurred with Dr. Shaffer's findings and explained how a person's frontal lobes, which control "reasoning [and] the abstract thinking," develop into adulthood. (HT 359-60).

moral culpability. See Ferrell, 640 F.3d at 1235 (counsel ineffective for failing to present evidence of defendant's brain damage that reduced the "volitional nature" of the crime); see also Christenson, 269 Ga. at 242 (capital defendant prejudiced by counsel's failure to present mitigating mental health evidence that may have provided an explanation of the crime). With regard to the specific circumstances of Petitioner's case, Dr. Shaffer opined:

> Any time events happen and new information comes in, a person with frontal lobe impairment has trouble considering alternate plans. Usually, it's kind of like loading up and going in one direction without changing, like a railroad track, whereas the frontal lobes typically would allow a lot of different choice points, where one could consider the outcome of each of those choices, but with frontal lobe impairment, everything is much more instinctive and automatic, and people with frontal lobes are known to have—exhibit very impulsive behaviors for that reason.

(HT 334). Dr. Shaffer further summarized his findings as they related to the circumstances of the crime:

> I certainly don't see that Michael had a chance to make choices in the way that most of us have had a chance to make choices. [] [H]is understanding and his judgment and his reasoning have been impaired by these various neuropsychological deficits and by the severe psychological factors that have influenced him.

(Vol. V, T. 149). Although Dr. Grant testified to some low test scores; it was never made clear to the jury that Petitioner's limitations amounted to borderline mental retardation, a diagnosis that has been found mitigating by the courts. Williams v. Taylor, 529 U.S. 362, 398 (1999) ("[T]he reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of [Petitioner's] moral culpability"); Ferrell, 640 F.3d at 1235; Brownlee v. Haley, 306

F.3d 1043 (11th Cir. 2002).[23] Dr. Shaffer specifically explained to this Court how Petitioner's impairments relate to his life skill1ls:

> I administered the Vineland Adaptive Behavior Scale, and this is a structured interview that asks questions in three different domains of development. It looks at daily living skills, . . . communication, and . . . socialization skills. . . . [T]he results of that were very clear that as an adult Michael was not demonstrating developmental skills at a level that was even close to average.
>
> The scores were so low, in fact, that . . . a seven-year-one-month-old typical United States child would score the same on communication skills; [on] daily living skills, a seven-year-four-month-old [child] would obtain a similar score; and in his socialization abilities, a nine-year-six-month-old [child] would obtain a similar skill. . . . [That] demonstrate[s] how low his developmental functioning was right up to his adult age. As a matter of fact, his overall global score was lower than one tenth of one percentile for the general population. That means that nine hundred ninety-nine out of a thousand individuals in the United States exceeded his ability to function in the world.

(HT 315-16).

Petitioner's exceptionally low functioning even within his borderline status would have been particularly significant and mitigating had it been presented at his re-sentencing. See Williams, 529 U.S. at 398; Brownlee, 306 F.3d at 1070 (explaining that counsel's failure to present defendant's borderline mental retardation, substance abuse, and other psychiatric disorders undermined confidence in the death sentence). Thus, because Dr. Grant's brief testimony about Petitioner's test scores was limited to the context of prison adaptability and failed to inform the jury that Petitioner had organic brain damage and was borderline mentally

[23] In Brownlee, the Eleventh Circuit noted that borderline mental retardation is particularly mitigating because of the similarities between it and full mental retardation, which renders individuals ineligible for the death penalty: "[I]t is abundantly clear that an individual 'right on the edge' of mental retardation suffers some of the same limitations of reasoning, understanding, and impulse control as those described by the Supreme Court in Atkins [v. Virginia]." Brownlee, 306 F.3d at 1073.

retarded, this Court finds the new evidence not cumulative of what was presented at the 2002 re-sentencing.

At the re-sentencing, Dr. Grant briefly referenced Petitioner's low IQ and test scores solely in the context of his prison adaptability. (9/19/02, Vol. I, RT 105-106). The entirety of Dr. Grant's testimony was offered in the context of Petitioner's adaptability to the prison environment. Mr. Moore asked Dr. Grant only one question about Petitioner's test results, then followed up immediately by asking Dr. Grant how these scores related to Petitioner's prison adaptability. (9/19/02, Vol. I, RT 105).

Further, as a result of counsel's failure to present Petitioner's frontal lobe impairment and borderline mental retardation to the jury, the State was able to argue that Petitioner was like anyone else with a "learning disability" who had simply chosen a life of crime:

> [Mr. Nance] wants you to believe [] that he has a learning disability that prevented him from working, I guess. That prevented him from honestly making a living. That prevented him from making rational choices. When we talk about the State's evidence, I want to address this again, but I want you to think about the facts of the two armed robberies that this Defendant has been convicted of and the crime that occurred that day. And you decide whether or not he's capable of making rational choices. And I would submit to you that this Defendant is absolutely capable of making rational choices and he absolutely understands what he was doing that day.

(9/19/02, Vol. II, RT 23-24).

This argument illustrates the prejudicial effect of trial counsel's omissions of psychiatric mitigation evidence. The omission of evidence as to Petitioner's brain damage and borderline mental retardation left the jurors unaware of the severity of Petitioner's mental impairments, instead leading them to believe his social and mental health history amounted to nothing more

than a man growing up "a little slow" and possibly with a learning disability.[24] The law is clear that evidence of severe mental impairments such as brain damage and borderline functioning are considerably more mitigating than a learning disability and thus their omission more prejudicial in capital cases. Compare Williams, 529 U.S. at 398 (finding prejudice based in part on failure to present borderline mental retardation); Brownlee (same); Thomason (same); Ferrell, 640 F.3d at 1235 (finding prejudice based in part on failure to present brain damage); Perkins, 288 Ga. at 812, 816-18 (same) with Hall v. Lee, 286 Ga. 79 (2009) (finding no prejudice from omissions in mental health presentation where evidence largely consisted of learning disabilities); Herring v. Sec'y Dept. of Corrections, 397 F.3d 1338 (11th Cir. 2007) (same); Windom v. Sec'y Dept. of Corrections, 578 F.3d 1227 (11th 2009) (same); see also Kimbrough v. Sec'y Dept. of Corrections, 565 F.3d 796 (11th Cir. 2009) (same).

Based on the difference between the evidence presented to the jury in 2002 and the evidence presented in this proceeding, this Court must disagree that the evidence is cumulative of that presented at the 2002 re-sentencing. Accordingly, this Court finds there is a reasonable probability of a different outcome at Petitioner's 2002 re-sentencing had the omitted evidence been presented.

### 2. Omission of Dr. Hutchinson's Testimony Regarding Petitioner's Exposure to Tear Gas

Based on the record before it, this Court finds that Dr. Hutchinson's testimony was not cumulative of evidence presented at the 2002 re-sentencing. As discussed above, Dr. Hutchinson

[24] Trial counsel's mental health presentation was further undermined by presenting lay testimony that suggested he was plagued only by a childhood learning disability. Mr. Nance's mother and brother both equated Mr. Nance's impairments with two family members who had been diagnosed with Attention Deficit Hyperactive Disorder (ADHD). (9/18/02, Vol. I, RT 12; 9/18/02, Vol. II, RT 115). This inaccurate characterization of Mr. Nance's mental health again resulted from counsel's failure to present expert testimony of Mr. Nance's well-documented impairments.

possessed expert qualifications that allowed him to credibly testify to matters regarding Petitioner's toxic exposure in a way that no State witness could have or did. Further, counsel's cross-examination of State witnesses was limited to the physical effects that are generally the result of exposure to the tear gas released from the detonation of a dye pack. The jury did not hear about the neurological effects of exposure to the tear gas. Most importantly, the jury did not hear any expert testimony about how someone like Petitioner – with brain damage and borderline mental retardation – would have been uniquely impaired by exposure to CS tear gas. Finally, as the preceding discussion reflects, the State's ability to credibly argue that Petitioner was neither exposed to nor affected by CS tear gas at the time of the crime shows that counsel's omission of Dr. Hutchinson's testimony completely undermined the efficacy of the defense mitigation theory on this issue. Indeed, Dr. Hutchinson's testimony would likely have prevented the State from making such argument altogether. Accordingly, this Court finds actual prejudice from counsel's omission of Dr. Hutchinson's testimony.

Dr. Hutchinson was in a position to offer unique testimony that no trial witness offered or was even qualified and capable of offering. The jury heard lay testimony from a bank teller and law enforcement officers that exposure to a dye pack can irritate one's eyes, make breathing difficult, and irritate one's sinuses. As a medical doctor with training in neuropsychology and toxicology, Dr. Hutchinson could have testified to how the dye pack explosion and release of CS gas would have affected someone like Petitioner who already suffered from cognitive deficits and neurological impairments:

> Mr. Nance has frontal lobe dysfunction . . . and frontal lobe dysfunction means that he would have trouble making decisions and judgments about his behavior and actions, more trouble than the average, normal person. Additionally, he'd be less flexible in novel, rapidly-changing situations. And so he would tend to become more confused and disoriented and not know what to do, not know what the consequences of his actions might be, be able to be less precise in judging

what the consequences of his actions might be in a novel, rapidly-changing situation that required flexibility.

* * * *

[Mr. Nance] would be more prone to be confused and disoriented. And that seems to be exactly what happened. When he came out of the car, he went across a crowded street, and barely avoided being hit quite a number of times. A number of witnesses said he looked disoriented or confused. And his statement that when he pointed the gun at Mr. Balogh and it went off, and he did not know he had shot the gun, is very, very plausible in that setting because he had gloves on. He wouldn't have known the pressure that he was putting on the trigger or not putting on it. He would have been – any average person would have been very confused. He would be even more confused and less able to judge what the consequences of his actions might be.

(HT 402-403).

The jury did not hear this testimony or any testimony roughly equivalent. None of the witnesses who discussed the dye packs had information about Petitioner's preexisting brain damage and borderline mental retardation and thus could not tell the jury how exposure to a dye pack exacerbated his cognitive limitations and therefore his impulsivity and poor judgment. Counsel's failure to inform Petitioner's sentencing jury of this evidence that would have substantially diminished his culpability by reducing the "volitional nature" of the shooting was prejudicial. See Ferrell, 640 F.3d at 1235.

Mitigating evidence that establishes a nexus between a petitioner's mental impairments and his actions at the time of the offense can be particularly critical to a jury's sentencing decision in a capital case. In Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011), in which the Eleventh Circuit found that the state court's finding of no prejudice was objectively unreasonable, this point was made explicitly:

Cumulatively, say the experts, Ferrell has increased impulsivity, decreased sound judgment, and takes actions that are not entirely volitional. Thus, the mental health expert opinions would have served to reduce the volitional nature of the crime, as well as Ferrell's ability to plan and act rationally, and as a result,

> undercut the senselessness and cold-blooded nature of the crime . . . Significantly all of these circumstances would have been relevant as mitigating evidence under Georgia law. . .

Ferrell v. Hall, 640 F.3d 1199, 1235 (11th Cir. 2011); see also Turpin v. Christenson, 269 Ga. 226, 242 (1998) (finding counsel ineffective for presenting mitigating lay witness testimony that "provided no explanation for the crime" where they omitted mental health evidence that may have explained it).

### 3. Omission of Expert Evidence to Rebut the State's Theory of Aggravation

The expert findings of both Drs. Shaffer and Hutchinson were important not only to the defense's own case in mitigation, but to rebutting the State's arguments in favor of death. The State argued that Petitioner was a "smart" criminal and had acted in a calculated manner during the crime. (9/19/02, Vol. II, RT 27-28). The State specifically told the jury that Petitioner had not been exposed to CS tear gas and that it had no impact on him at the time of the crime:

> And when he fled, there was some questioning about disorientation when the dye pack went off, the irritation from the red dye and the tear gas. But one thing I want you to look at. Look back – when you go back to the jury room and look at this jacket and look at these blue jeans and remember the testimony of Larry Peterson. There was no dye residue on those items, the items that Michael Nance was wearing that day. The items that he was wearing when the dye went off between the seat and the door on the passenger's side of the stolen car and what does that tell you?
>
> Be CSI for just a second. What does that tell you? It tells you Michael Nance was out of that car before the tear gas spread across it because there was none on his clothes. And if you're out of the car before the tear gas spreads, the tear gas doesn't disorient you.
>
> So when Michael Nance went across that street he was in complete control of his faculties...

(9/19/02, Vol. II, RT 29).

However, Dr. Hutchinson addressed this issue at the habeas hearing and specifically opined that the amount of red dye on Petitioner's clothing indicated he was exposed to tear gas:

> Because of the nature of the incendiary devices, when they burn at 400 degrees, the CS itself is designed to disperse as a powder very quickly, and fill a large volume of air, go out into a large space, even without a pyrotechnic device. When you have this device heating up to 400 degrees to create a lot of hot air, it explosively billows out. It disperses even more quickly. He was sitting not that far away from it. The red dye particles were also explosively billowing out. The fact that he had red dye on his shirt, on his glove, on his face, on the gun, means that a significant amount of material had reached him before he exited the car. Also, his effects, his confusion, running through the traffic, almost getting run over, the way he behaved over the next 15, 20 minutes, were entirely consistent with the effects of a large dose of exposure to CS.

(HT 411-412).

This testimony would have refuted the State's theory that Petitioner had not been exposed to the CS tear gas. Dr. Hutchinson's testimony would have provided a scientific opinion confirming that Petitioner was exposed to the gas. Further, Dr. Hutchinson explained how the State's pathologist erred in concluding that the dye pack would have sprayed only on the passenger seat because the pathologist believed that the tear gas was in the form of a spray, rather than an explosive:

> You know, Dr. Burton had testified that it all sort of stayed down there in the seat, but I think he was confused. He was talking about a spray, you know, like a mace spray can, where the CS is suspended in a solvent or a carrier, and that might stay down near the seat, but the explosive pouring out of smoke, if it wasn't going up near this white thing, then it was going out somehow because it would not stay down in that well. It would pour out of there.

(HT 418-419).

Dr. Hutchinson further made clear that the driver's door being open would not have prevented Petitioner's exposure to tear gas, but would in fact have exacerbated the exposure because the smoke would have moved towards the open door:

> As I understand it, the dye packs were near the passenger door. So, there wouldn't really be any material moving toward the passenger door. It would have been blocked in that direction. It would have been billowing out in Mr. Nance's direction and toward the back and the front of the car radially outward. But it would – it would not have been evenly dispersed.

(HT 412).

The prosecution characterized Petitioner as the quintessential candidate for execution, a "smart" defendant who had "built a life of crime." (9/19/02, Vol. II, RT 17-19, 36). Furthermore, the State asserted that Petitioner's contention that the shooting was accidental was an "insult" to the evidence presented. (9/19/02, Vol. II, RT 23). Had trial counsel called Drs. Hutchinson and Shaffer, counsel could have relied on their testimony to effectively rebut these damaging characterizations of Petitioner.

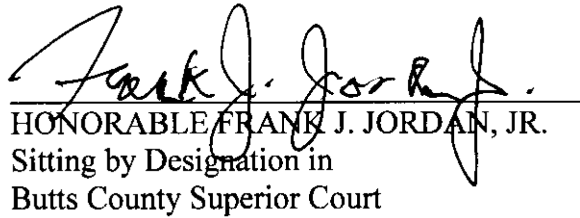
Because trial counsel neglected to present the testimony of Dr. Hutchinson, counsel could not argue that characterizing the shooting as an accident was not "an insult" but rather a professional medical opinion corroborated by scientific evidence regarding tear gas and its effects on a brain that already has damage to its frontal lobes. Moreover, the jury could not have been persuaded that Petitioner was a "smart" criminal had it been informed of his brain impairments and borderline mental retardation. Thus, had the jury understood—through the presentation of Drs. Hutchinson and Shaffer's findings regarding Petitioner's impairment at the time of the crime—the extent of Petitioner's diminished moral culpability, there is a reasonable probability that he would not have been sentenced to death.

## **CONCLUSION**

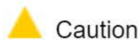
After considering all of Petitioner's allegations made in the habeas corpus petition and at the habeas corpus hearing and all the evidence and argument presented to this Court, this Court concludes that Petitioner is entitled to a new sentencing trial.

WHEREFORE, it is hereby ORDERED that the petition for a writ of habeas corpus is GRANTED and Petitioner's death sentence in Case No. 95-B-2461-4 is hereby VACATED. The Clerk is directed to mail a copy of this Order to counsel for the parties.

SO ORDERED, this 30th day of August, 2012.



HONORABLE FRANK J. JORDAN, JR.
Sitting by Designation in
Butts County Superior Court

 Caution
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# Nance v. State

Supreme Court of Georgia

December 1, 2005, Decided

S05P1438.

**Reporter**
280 Ga. 125 *; 623 S.E.2d 470 **; 2005 Ga. LEXIS 855 ***; 2005 Fulton County D. Rep. 3742

NANCE v. THE STATE.

**Subsequent History:** [***1] Reconsideration denied January 17, 2006.

US Supreme Court certiorari denied by Nance v. Georgia, 127 S. Ct. 168, 166 L. Ed. 2d 119, 2006 U.S. LEXIS 6966 (U.S., Oct. 2, 2006)

**Prior History:** Murder. Gwinnett Superior Court. Before Judge Clark.

Nance v. State, 274 Ga. 311, 553 S.E.2d 794, 2001 Ga. LEXIS 764 (2001)

**Disposition:** Judgment affirmed in part and vacated in part.

**Counsel:** *Edwin J. Nelson, Sharon L. Hopkins, Johnny R. Moore*, for appellant.

*Daniel J. Porter, District Attorney, Phil Wiley, Assistant District Attorney, Thurbert E. Baker, Attorney General, Christopher D. Helms, Assistant Attorney General*, for appellee.

**Judges:** Benham, Justice.

**Opinion by:** Benham

## Opinion

[**472] [*125] BENHAM, Justice.

A jury convicted Michael W. Nance in 1997 of malice murder, felony murder, aggravated assault, theft by taking, criminal attempt to commit armed robbery, and possession of a firearm during the commission of a felony. He was sentenced to death for malice murder. This Court affirmed the convictions, but reversed the death sentence due to a prospective juror being improperly qualified to serve on the jury. *Nance v. State*, 272 Ga. 217 (6) (526 SE2d 560) (2000). In the 2002 sentencing trial that followed the reversal of the imposition of the death penalty, a jury recommended a death sentence for Nance after finding the existence of two statutory aggravating circumstances beyond a reasonable doubt: the offense of murder was committed by a person with a prior record of conviction for a capital felony; and the murder was committed while the defendant was engaged in the commission of another capital felony. OCGA § 17-10-30 (b) (1), [***2] (2). Finding no error, we affirm the death sentence. [1]

1. The evidence adduced at trial showed that Nance stole a 1980 Oldsmobile Omega and drove to a bank in Gwinnett County on December 18, 1993. He entered the bank wearing a ski mask and gloves and carrying a .22 caliber revolver, and demanded cash. He told the head bank teller she would be the first one to die if the police came. Despite Nance's threats to kill them if they used dye packets, the tellers slipped two dye packets into the bags with the money. Nance exited the [***3] bank and got into the Oldsmobile where the dye packets activated, emitting red dye and tear gas. Nance abandoned the Oldsmobile, taking his gun with him and leaving his ski mask and the dye-stained bags of money in the car.

Nance ran across the street to a liquor store parking lot where Dan McNeal, who had just made a purchase at the liquor store, was standing. Gabor Balogh had just left the liquor store and was backing his car out of a parking space when Nance ran around the front of Balogh's car, yanked open the driver's door, and thrust his gun into the car. McNeal heard arguing and Balogh saying, “no, no” as he leaned away from Nance and raised his left arm defensively. Nance shot Balogh in the left elbow and the bullet entered his chest and damaged his heart, which caused his death shortly thereafter.

[*126] Nance then pointed the gun at McNeal and demanded his keys. Instead of complying with the demand, McNeal ran around the side of the liquor store, causing Nance to fire a shot at him. McNeal was not hit and ran back around the store to the parking lot where he went to Balogh's car and saw him slumped over and gasping for breath as he died. Nance ran to a nearby gas station [**473] where [***4] he surrendered after a standoff with police.

In addition to the facts surrounding the murder of Gabor Balogh, the State presented evidence that Nance had robbed another bank in Gwinnett County three months earlier, during which he had made a similar threat to kill the teller. The State established that Nance pled guilty in federal court to committing the two bank robberies, and also presented evidence that Nance had been convicted of armed robbery in Kansas in 1984.

(1) The evidence was sufficient to authorize the jury to find the statutory aggravating circumstances beyond a reasonable doubt. *Jackson v. Virginia*, 443 U. S. 307 (99 S. Ct. 2781, 61 LE2d 560) (1979); OCGA § 17-10-35 (c) (2).

2. The Georgia death penalty statutes are not unconstitutional. *Gregg v. Georgia*, 428 U. S. 153 (96 S. Ct. 2909, 49 LE2d 859) (1976); *Riley v. State*, 278 Ga. 677, 686 (8) (604 SE2d 488) (2004). The Georgia death penalty scheme does not violate the Sixth Amendment because the jury must find beyond a reasonable doubt the statutory

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[1] Nance's sentencing trial took place from August 29 to September 20, 2002, when the jury recommended a death sentence for the malice murder conviction. Nance filed a motion for new trial on October 18, 2002, which he amended on September 24 and October 1, 2004. The trial court denied the amended motion for new trial on March 11, 2005, and Nance filed a timely notice of appeal on April 11, 2005. The case was docketed in this Court on May 19, and was orally argued on September 6, 2005.

aggravating circumstances necessary to make a defendant eligible for the death penalty. See *Ring v. Arizona*, 536 U. S. 584, 609 (122 S. Ct. 2428, 153 LE2d 556) (2002); [***5] *Henry v. State*, 278 Ga. 617 (2) (604 SE2d 826) (2004). (2) Contrary to Nance's assertion, there is no requirement that non-statutory aggravating evidence be proven beyond a reasonable doubt. "While ***statutory*** aggravating circumstances must be proved beyond a reasonable doubt, the jury is not required to 'evaluate each and every evidentiary vignette pursuant to the reasonable doubt standard.' [Cit.]" (Emphasis in original.) *Ward v. State*, 262 Ga. 293, 301 (29) (417 SE2d 130) (1992). The trial court in this case properly instructed the jury it must find beyond a reasonable doubt the existence of one or more statutory aggravating circumstances in order to impose death or life imprisonment without parole, and that it could impose life imprisonment with the possibility of parole for any reason or no reason. See *Ward*, supra. We find no error.

3. Nance claims the trial court erred by refusing his request to conduct a hearing on whether he should be required to wear a stun belt during his 2002 sentencing trial. A stun belt is an electronic security device worn by a prisoner that can be activated by a remote transmitter which enables law enforcement [***6] personnel to administer an incapacitating electric shock if the prisoner becomes disruptive. Unlike shackles, it is worn under the prisoner's clothes and is not [*127] visible to the jury. Nance had worn a stun belt at his 1997 trial. Before the 1997 trial, the trial judge, who also presided at the 2002 sentencing trial, agreed to the State's request that Nance wear a stun belt in court after conducting a pretrial hearing where evidence was received that Nance had threatened to "bite the nose off" the prosecuting attorney during the trial. At that hearing, witnesses testified about the mechanics of the stun belt, its advantages, and possible alternatives, and Nance testified about the alleged impact a stun belt would have on his comfort and ability to concentrate. The trial judge stated in 2002 he remembered the evidence from the 1997 stun belt hearing and said he could not disregard Nance's threat, even after the passage of several years. He denied Nance's request to conduct another hearing and allowed the use of a stun belt as a security measure at Nance's sentencing trial.

It is "well established that the use of extraordinary security measures to prevent dangerous or disruptive behavior [***7] which threatens the conduct of a fair and safe trial is within the discretion of the trial court." *Young v. State*, 269 Ga. 478 (2) (499 SE2d 60) (1998). The trial court conducted a hearing in this case to determine the necessity of a stun belt and concluded the use of a stun belt was warranted by the threat and would not interfere with the ability of the defendant to receive a fair trial. See id. The trial court did not err by failing to hold a second hearing in 2002; the only change in circumstance since the 1997 hearing offered by Nance was the passage of time and this was obvious to the trial court without the need for a second hearing. (3) We find no abuse of discretion by the trial court in its ruling on this issue.

[**474] 4. After conducting hearings on the procedures employed by the State of Georgia while carrying out an execution by lethal injection, the trial court ruled that these procedures are not unconstitutional. We find no error. See *Riley v. State*, supra, 278 Ga. at 689 (15). See also *Dawson v. State*, 274 Ga. 327, 334-335 (554 SE2d 137) (2001).

5. During individual voir dire, the prosecutor explained to each prospective juror [***8] the State would go first and present aggravating evidence and the defendant would then present mitigating evidence. The prosecutor also provided brief definitions of what constituted aggravating and mitigating evidence. Nance claims the definitions of mitigating evidence were sometimes misleading, but he never objected at trial to any of these comments by the prosecutor so this claim is waived on appeal. See *Rhode v. State*, 274 Ga. 377, 380-381 (7) (552 SE2d 855) (2001); *Earnest v. State*, 262 Ga. 494, 495 (1) (422 SE2d 188) (1992).

6. During the individual voir dire of prospective juror Johnson, Nance's counsel asked a question that listed the specific circumstances of Nance's case and then inquired of the prospective juror whether she could vote for a life sentence under those circumstances. [*128] Contrary to Nance's contention on appeal, the trial court properly sustained the State's objection that the question called for prejudgment. See *Sallie v. State*, 276 Ga. 506, 509-510 (3) (578 SE2d 444) (2003) ("[Q]uestions that call for prejudgment are improper in a voir dire examination.").

7. Nance claims five prospective jurors were erroneously [***9] qualified to serve on the jury because they were opposed to voting for one of the sentences authorized by law. "The proper standard for determining the

disqualification of a prospective juror based upon his views on capital punishment 'is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Greene v. State*, 268 Ga. 47, 48 (485 SE2d 741) (1997), quoting *Wainwright v. Witt*, 469 U. S. 412, 424 (II) (105 S. Ct. 844, 83 LE2d 841) (1985). A prospective juror is not disqualified because he or she is leaning for or against a death sentence or another possible sentence. *Mize v. State*, 269 Ga. 646, 652 (6) (d) (501 SE2d 219) (1998). However, the prospective juror is disqualified if possessed with an unwavering bias in favor of or against one of the possible sentences authorized by law such that the prospective juror could not meaningfully consider one of the three possible sentences as a verdict. See *Sallie v. State*, supra, 276 Ga. at 508 (2); *Lance v. State*, 275 Ga. 11, 15 (8) (560 SE2d 663) (2002). On appeal, our inquiry is [***10] whether the trial court's qualification of the prospective juror is supported by the voir dire record as a whole. *Greene v. State*, supra, 268 Ga. at 49. An appellate court must pay deference to the finding of the trial court and this deference includes the trial court's resolution of any equivocations or conflicts in the prospective juror's responses on voir dire. Id. "Whether to strike a juror for cause is within the discretion of the trial court and the trial court's rulings are proper absent some manifest abuse of discretion." Id. at 50.

A. *Prospective juror Kenerly*. Mr. Kenerly indicated his mother had been murdered in 1979 and that he regularly banked at the bank branch robbed by Nance minutes before he killed Mr. Balogh in December 1993. He stated that neither circumstance would affect his ability to be fair and impartial in this case. Although he said in response to one question he could not consider parole for someone convicted of murder and other crimes, he stated several other times he could vote for all three possible sentences, including life imprisonment with the possibility of parole, depending on the evidence. (4) Since the prospective [***11] juror stated he could vote for all three possible sentences, the trial court did not abuse its discretion by finding that he was qualified to serve. *Sallie v. State*, supra, 276 Ga. at 508 (2). See *Greene v. State*, supra, 268 Ga. at 48-50.

[*129] B. *Prospective juror Barrett.* Nance argues Mr. Barrett should have been excused for cause because he was opposed to a sentence of life with the possibility of parole. [**475] Mr. Barrett stated in voir dire he could vote for all three possible sentences and that the death penalty was appropriate in some cases. In response to a question by Nance's counsel, Mr. Barrett said he could not consider life with the possibility of parole for someone convicted of malice murder. In later questioning, however, Mr. Barrett said he was a religious man and he believed someone convicted of murder could be forgiven and rehabilitated. He then reconsidered life with parole and said he could vote for life with parole for someone convicted of malice murder. Despite his equivocation, the totality of Mr. Barrett's responses showed he could consider and vote for all three possible sentences. Accordingly, the trial court did not abuse its discretion [***12] by finding that he was qualified to serve. See *Greene v. State*, supra, 268 Ga. at 48-50.

C. *Prospective juror Eberhardt*. Mr. Eberhardt stated he could vote for all three possible sentences, but he was "90 percent" opposed to life with the possibility of parole for a convicted murderer. He said he believed in an eye for an eye even though he also believed that not all murderers should receive the death penalty. He later said he could vote for life with parole if it was justified. In response to questioning by Nance's counsel, he stated he could give a sentence of life with the possibility of parole depending on the circumstances of the case, such as self-defense or a "thousand other [circumstances]." When Nance's counsel reminded him Nance had been convicted of malice murder and there were no longer any defenses to that conviction, Mr. Eberhardt maintained he could vote for life with the possibility of parole. Although Mr. Eberhardt indicated he was leaning away from a sentence of life with the possibility of parole, he stated several times he could consider and vote for such a sentence. We conclude, based on his total responses, that the trial court did not abuse it discretion by finding that Mr. Eberhardt was qualified [***13] to serve. See *Greene v. State*, supra, 268 Ga. at 48-50; *Mize v. State*, supra, 269 Ga. at 652 (6) (d).

D. *Prospective juror Syall.* Ms. Syall said that "if you cause death, death should come to you. You reap what you sow." However, she also stated she could consider all three possible sentences for a convicted murderer. She later stated she did not believe someone convicted of a violent crime could be rehabilitated, and believed a convicted murderer should never be considered for parole. But, when asked again if she could consider life with parole, she responded, "I could probably give that. ..." When asked how she could square her ability to consider a sentence of

life with the possibility of parole with her opposition to parole for a convicted murderer, she replied, "I feel like I'm being asked two different questions. My belief is that if you killed someone, you should get death. But I think, too — until the evidence [*130] is given to me, I can make that decision that, yes, he could get parole, but that's only with the evidence." She repeated several times, under questioning from both parties and the trial court, that she could consider life with the possibility of parole for someone convicted of murder. [***14] When asked by defense counsel if she could *give* a life with parole sentence in a case involving deliberate malice murder, she said, "Yes; with the evidence." Compare *Nance v. State*, supra, 272 Ga. at 222 (6). The trial court denied Nance's motion to disqualify her for cause after noting that, although Ms. Syall had taken inconsistent positions throughout her voir dire questioning, she had repeatedly stated she could consider all three sentencing options. We find no abuse of discretion. See *Sallie v. State*, supra, 276 Ga. at 508 (2); *Lance v. State*, supra, 275 Ga. at 16 (8) (a).

E. *Prospective juror Burke*. Mr. Burke stated he could fairly consider all three possible sentences. In response to a question by defense counsel about whether people who have committed violent crimes could be rehabilitated, he said everybody should get a second chance. Defense counsel asked if those convicted of "intentional and deliberate" malice murder should ever be considered for parole, and Mr. Burke said no, but he also said he could consider a sentence of life with the possibility of parole in this case because he did not know the evidence. When asked [***15] how he could reconcile those two positions, Mr. Burke described a situation where he could give a life with the possibility [**476] of parole sentence to a defendant who had a mental disorder. He stated several times he could fairly consider all three possible sentences, including life with the possibility of parole, and could vote for life with the possibility of parole for someone convicted of malice murder. We conclude that the trial court did not abuse its discretion by finding Mr. Burke qualified to serve on the jury. See id.

8. During the sentencing trial, the State tendered certified copies of Nance's convictions for the two bank robberies in federal court. Nance objected on the ground that the certified copies of the convictions included his sentences on those convictions. The trial court overruled the objection and we find no error. When a certified copy of a prior conviction is admitted in a capital sentencing trial, the sentence received by the defendant is admissible as part of the conviction. See *Davis v. State*, 241 Ga. 376, 383 (6) (247 SE2d 45) (1978). Nance's objection at trial to the admission of the sentences in the certified copies of his Kansas convictions for [***16] armed robbery, burglary, and theft was without merit for the same reason. Id.

9. Nance claims on appeal that the trial court erred by admitting into evidence portions of Nance's prison records containing hearsay and statements by Nance regarding disciplinary infractions. However, Nance's counsel stated at trial he had no objection to the [*131] admission of these documents, thus waiving any claim of error on appeal. See *Earnest v. State*, supra, 262 Ga. 494 (1).

10. Nance claims the trial court in the 2002 sentencing trial should have charged the jury on similar transactions because the evidence of his September 1993 bank robbery was admitted as a similar transaction at his 1997 murder trial. This claim is without merit; no such limiting instruction was required because evidence of Nance's first bank robbery was admitted as aggravating evidence at his 2002 sentencing trial, not as a similar transaction.

11. Appellant contends the trial court erred when it imposed two death sentences on appellant, one for felony murder and one for malice murder, pursuant to the jury's recommendation. We noted in appellant's first appeal that the felony murder conviction was vacated by [***17] operation of law because the victim was the same for Nance's malice murder and felony murder convictions. *Nance v. State*, supra, 272 Ga. 217, n. 1. For reasons unknown to this Court, the vacated felony murder conviction as well as the malice murder conviction were submitted to the jury upon remand of the case for retrial of the penalty phase. (5) Accordingly, the sentence imposed on the vacated conviction is hereby vacated.

12. (6) OCGA § 17-10-30 is not unconstitutional. *Morrow v. State*, 272 Ga. 691 (15) (532 SE2d 78) (2000).

13. Nance's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. OCGA § 17-10-35 (c) (1). Although Nance claims there have been several similar cases in Gwinnett County where the defendant did not receive a death sentence, this Court's review "concerns whether the death penalty 'is excessive per se' or if the death penalty is 'only rarely imposed … or substantially out of line' for the type of crime

involved and not whether there *ever* have been sentences less than death imposed for similar crimes." (Emphasis in original.) *Gissendaner v. State*, 272 Ga. 704, 718 (19) (a) (532 SE2d 677) (2000) [***18] . Nance's death sentence is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. OCGA § 17-10-35 (c) (3). The evidence showed that, before he murdered Gabor Balogh, Nance had robbed two banks during which he threatened to kill bank employees if they interfered, and he had convictions in Kansas for armed robbery, burglary, and theft. While fleeing the second bank robbery, Nance shot and killed Mr. Balogh at close range while trying to take his car as a getaway car, and he shot at another man for the same reason. The similar cases listed in the Appendix support the imposition of the death penalty in this case, in that they involve a murder committed during an armed robbery or a murder committed by someone with a previous conviction for a capital felony.

[*132] [**477] *Judgment affirmed in part and vacated in part. All the Justices concur.*

APPENDIX.

*Perkinson v. State*, 279 Ga. 232 (610 SE2d 533) (2005); *Raheem v. State*, 275 Ga. 87 (560 SE2d 680) (2002); *Butts v. State*, 273 Ga. 760 (546 SE2d 472) (2001); *King v. State*, 273 Ga. 258 (539 SE2d 783) (2000); [***19] *Jones v. State*, 273 Ga. 231 (539 SE2d 154) (2000); *Wilson v. State*, 271 Ga. 811 (525 SE2d 339) (1999); *Lee v. State*, 270 Ga. 798 (514 SE2d 1) (1999); *Cromartie v. State*, 270 Ga. 780 (514 SE2d 205) (1999); *Whatley v. State*, 270 Ga. 296 (509 SE2d 45) (1998); *Jones v. State*, 267 Ga. 592 (481 SE2d 821) (1997); *Carr v. State*, 267 Ga. 547 (480 SE2d 583) (1997); *McClain v. State*, 267 Ga. 378 (477 SE2d 814) (1996); *Greene v. State*, 266 Ga. 439 (469 SE2d 129) (1996); *Mobley v. State*, 265 Ga. 292 (455 SE2d 61) (1995); *Burgess v. State*, 264 Ga. 777 (450 SE2d 680) (1994); *Potts v. State*, 259 Ga. 96 (376 SE2d 851) (1989); *Moon v. State*, 258 Ga. 748 (375 SE2d 442) (1988); *Ford v. State*, 257 Ga. 461 (360 SE2d 258) (1987).

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

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 11, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-15361-P
Case Style: Michael Wade Nance v. Warden
District Court Docket No: 1:13-cv-04279-WBH

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 17-15361-P

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MICHAEL WADE NANCE,

Petitioner - Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON

Respondent - Appellee.

---

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

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

BEFORE: ED CARNES, Chief Judge, TJOFLAT and WILLIAM PRYOR, Circuit Judges

PER CURIAM:

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

ENTERED FOR THE COURT:

/s/Ed Carnes
CHIEF JUDGE

ORD-42

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

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

September 25, 2019

Ms. Vanessa Judith Carroll
Georgia Resource Center
303 Elizabeth Street NE
Atlanta, GA 30307

Re: Michael Wade Nance
v. Benjamin Ford, Warden
Application No. 19A339

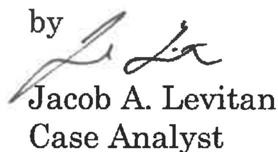
Dear Ms. Carroll:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on September 25, 2019, extended the time to and including December 8, 2019.

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

Sincerely,

**Scott S. Harris**, Clerk

by 
Jacob A. Levitan
Case Analyst

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

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

NOTIFICATION LIST

Ms. Vanessa Judith Carroll
Georgia Resource Center
303 Elizabeth Street NE
Atlanta, GA 30307

Clerk
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303