No. 19-

IN THE

Supreme Court of the United States

JEROME BURGESS,

Petitioner,

v.

PHIL HALL, WARDEN TELFAIR STATE PRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Georgia Supreme Court err in failing to find that Petitioner's appellate counsel provided ineffective assistance by failing to argue on appeal that the State's failure to disclose exculpatory evidence violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963)?

2. Did the Georgia Supreme Court err in failing to find that Petitioner's appellate counsel provided ineffective assistance by failing to argue on appeal that trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to cross-examine Petitioner's codefendant about his plea of guilty but mentally retarded, his IQ test scores, and evidence that he had malingered during psychological testing related to his plea of incompetence?

PARTIES TO THE PROCEEDING

Jerome Burgess, Plaintiff/Appellant/Petitioner

Phil Hall, Warden Telfair State Prison/Appellee/Respondent

RELATED CASES

Burgess v. Hall, Georgia Supreme Court, Docket No. S19A0041 (2019). Judgment entered April 15, 2019.

Burgess v. Danforth, Superior Court of Telfair County, Docket No.15-HC-008, judgment entered April 10, 2017.

Burgess v. State, Georgia Supreme Court, Docket No. S13A0114 (2013). Judgment entered April 29, 2013.

Burgess v. State, Superior Court of Clayton County Jury Trial, Docket No. 2009-CR-1364-5. Judgment entered on October 26, 2010.

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SUPREME COURT JURISDICTION

The judgment of the Georgia Supreme Court, of which Petitioner seeks review, was entered on April 15, 2019. Mr. Burgess seeks review of a judgement of the Georgia Supreme Court pursuant to 28 U.S.C. 1257. Pursuant to United States Supreme Court Rule 13.4, Mr. Burgess' Petition for Writ of Certiorari was due in this court July 15, 2019.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment, United States Constitution, which provides:

> Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due

> process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment, United States Constitution, which provides:

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

STATEMENT OF THE CASE

In October 2010, Petitioner Jerome Burgess was convicted in Clayton County, Georgia of felony murder, six counts of aggravated assault, and possession of a firearm during the commission of a crime. Mr. Burgess timely filed a Motion for New Trial, which was subsequently amended. That motion was denied in January 2012. Mr. Burgess appealed those convictions on direct appeal to the Georgia Supreme Court, which affirmed his convictions on April 29, 2013. *See Burgess v. State*, 292 Ga. 821 (2013).

Mr. Burgess filed a petition for writ of habeas corpus on January 23, 2015. The Superior Court of Telfair County denied the petition for habeas relief on April 10, 2017.

Mr. Burgess appealed the denial to the Georgia Supreme Court, which entered a decision affirming the Superior Court's denial of habeas relief on April 15, 2019.

A. Habeas Proceeding which is material to the questions presented before this Court

Mr. Burgess filed a state habeas petition in Telfair County, Georgia. raising two claims that raised federal questions and relied on precedent set in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Specifically, the issues were: (1) appellate counsel was ineffective for failing to argue on appeal that trial counsel was ineffective for failing to cross-examine Mr. Burgess's codefendant, Andre Weems, about the fact that he had pled guilty but mentally retarded, that his IQ was in the range of 52-55, and that he had malingered during the psychological testing related to his plea of incompetence; and (2) appellate counsel was ineffective for failing to argue that the State violated *Brady v. Maryland* by failing to disclose the same information to counsel prior to trial.

The Superior Court handling the habeas denied relief and the decision was appealed to the Georgia Supreme Court again raising timely state and federal questions and precedent in *Brady* and *Strickland.*

At the habeas hearing, Mr. Burgess introduced the transcript of Weems' jury trial on his plea of incompetence and the related exhibits. (*Id.* at 32-33, 35; Petitioner's Exh. 1). Mr. Burgess' trial attorney, Robert Mack, testified that he was never provided with information related to Weems'

intellectual and psychological testing prior to trial. (Tr. at 7-8). He realized that Weems had pleaded guilty a few weeks prior to Mr. Burgess' trial, but he did not investigate the plea or request additional information prior to trial. (*Id.* at 8-9). He had requested *Brady* material, but the State never provided any discovery related to Weems' psychological testing or plea. (*Id.* at 9).

Mr. Mack testified that if he had known about Weems' IQ and the related information, "I could have used that to cross-examine a whole lot more and maybe convince the jury that they had a retarded person that was on the stand and maybe show also that the State didn't even believe him." (*Id.* at 10). Mr. Mack agreed that he made a mistake in not checking the records of a codefendant who was testifying against his client, and that it was something that he should have done. (*Id.* at 11).

Mr. Burgess' appellate attorney, Steven Frey, then testified that, during his representation of Mr. Burgess, he had learned that Weems had pleaded guilty but mentally retarded, but he did not seek out any additional information or documentation related to that plea. (*Id.* at 17-18). If he had known that there was a plea of incompetence, related psychological evaluations, and evidence that Weems had an IQ between 52 to 55, Mr. Frey would have raised that issue on direct appeal. (*Id.* at 19). He agreed that he had done an "incomplete job" by not looking at the Clayton County courthouse to get those records. (*Id.*). He acknowledged that he could have gotten the plea transcript and court records from the clerk's office. (*Id.* at 27).

Mr. Frey testified that he asked Mr. Mack about his limited cross-examination of Weems, but Mr. Mack "wrote it off as trial strategy." (*Id.* at 22). Mr. Frey stated that he "probably backed away a little too early with Robert Mack's trial strategy response," and that if he had known what he knew now, he "would have done a great deal more." (*Id.* at 26). When asked if the decision not to call Mr. Mack ineffective was a strategic decision, Mr. Frey testified, "I didn't have any idea about this issue, the IQ." (*Id.*). Mr. Frey had no other explanation for why he did not raise any related issues on appeal. (*Id.* at 30).

B. Evidence Presented at Trial

In October 2008, Mr. Burgess was seventeen years old and a senior in high school. He drove himself and a few of his friends to a football game. (Tr. at 323-24; 327-38). One of the friends was Andre Weems, his codefendant. (*Id.* at 396). After the game, Mr. Burgess drove to Weems' cousin's house. (*Id.* at 403). Mr. Burgess and a friend stayed in the truck while everyone else got out. (*Id.* at 403). Eventually, Weems returned and suggested that they go to a party. (*Id.* at 404). Several people got in the truck at that point while other people were in another car that followed the truck. (*Id.* at 404-05). After attending first party for a few minutes, the group left for another party, but Mr. Burgess did not know where that party was. (*Id.* at 337,405). Weems was directing Mr. Burgess. (*Id.* at 405-06; 181, 183 (Alexis Galovich)).

Mr. Burgess drove down a road and saw two males and a female on the side of the road, so he asked Weems if they were now at the party. (*Id.* at 407-09). Weems told Mr. Burgess to stop in a cul-de-sac and to turn around, and that he would check with the people in the other car

to see if they were in the right place. (*Id.*). Weems got out of Mr. Burgess' truck, went to the other car, which had been following the truck, and then returned to the truck and asked to get in the front seat. (*Id.* at 407-10). Mr. Burgess thought Weems wanted to be in the front to give him better directions. (*Id.* at 410-11).

Shortly after Weems got into the truck, Mr. Burgess saw that Weems now had an AK-47, which he had apparently obtained from the other car. (*Id.* at 411). Mr. Burgess told Weems that he was not going to drive if Weems had the AK-47. (*Id.* at 411). Mr. Burgess and Weems went back and forth briefly, and Weems pointed the gun at Mr. Burgess and told him to drive. (*Id.* at 412). Weems nudged Mr. Burgess with the barrel of the gun. (*Id.* at 450). Mr. Burgess was scared. (*Id.* at 412). He had no intention of being involved in a shooting. (*Id.*).

Sensing what was about to happen, Mr. Burgess flashed his lights a few times in an attempt to warn the people ahead of him to get out of the way. The evidence that he flashed the lights included his statement and was corroborated by several witnesses including witnesses who were friends of the victim who testified at trial that the lights flashed several times. (*Id.* at 412-13; 52-53 (testimony of Sankeytoe Dunn); 171 (Anissa Johnson); 321).

Weems began to shoot out of the window. (*Id.* at 413). Mr. Burgess sped up, driving fast in hopes that Weems would not be able to hit anyone. (*Id.*). Mr. Burgess did not know of Weems' plan before Weems pointed the gun at him, and he only drove because he feared for his life. Mr. Burgess did not want Weems to shoot anyone, and he flashed his lights and drove quickly to try to avoid anyone getting hurt. (*Id.* at 473).

Weems testified that they were looking for a rival gang member who had been at the football game earlier. (Tr. at 327, 329-30). When they left, they stopped at his cousin's home, where Weems retrieved the AK-47. (*Id.* at 332-33). Initially, he put the AK-47 in the car that was following Mr. Burgess' truck. (*Id.* at 333). Weems testified that he saw someone he thought could be in the rival gang, so the cars stopped and he went to the car and got the gun out of the car before getting back in the truck. (*Id.* at 337). Weems got in the front seat of the truck. (*Id.* at 338). Mr. Burgess drove the truck, while Weems shot the gun. (*Id.* at 340). Weems testified that everyone in the truck knew what the plan was, and that he never pointed the gun at Mr. Burgess. (*Id.* at 365).

At trial, the State asked Weems the following:

> Q And did you plead guilty to the shooting?
>
> A Yes.
>
> Q Did you – so you didn't go to trial?
>
> A No, ma'am.

(*Id.* at 341). At no point during the trial did the State clarify and ask the witness or tell the jury that Weems had plead guilty but mentally retarded. The State also asked if it was Weems' idea to wait two years to plead guilty, and he stated that it was his attorney's decision, but that he knew everyone was going to testify against him so he knew he had "no chance of winning." (*Id.* at 367). Again, the State simply used the wording "plead guilty" without any reference to the actual plea entered of guilty

but mentally retarded. The State then asked Weems if he had anything to gain by telling the jurors that he never put a gun to Mr. Burgess' head, to which he responded that he did not. (*Id.* at 342).

Felix Irving testified that he had spoken with Weems, and that Weems had told him that Mr. Burgess had nothing to do with the shooting and that the incident was not planned. (*Id.* at 381). Weems told Mr. Irving that he was not going to let Mr. Burgess go to jail for something that Mr. Burgess did not do. (*Id.*).

C. Motion for New Trial and Appeal

Mr. Burgess timely filed a generic motion for new trial. (Tr. at 53). His appellate counsel Mr. Frey subsequently amended the motion, including a claim that trial counsel was ineffective for failing to "effectively cross-examine Andre Weems, the testifying co-defendant, as to his previous claims of incompetency and his final plea of guilty, but mentally retarded." (*Id.* at 56). The motion alleged that the failure to cross-examine Weems was prejudicial because Weems was "the only witness to testify [as to] the defendant's gang involvement and his culpability on the instant offense." (*Id.*).

At the hearing on the motion for new trial, Mr. Mack testified that he was aware that Weems had entered a guilty but mentally retarded plea. (*Id.* at 588-89). He found out that there had been a trial on the issue of Weems' competency shortly before Mr. Burgess' trial. (*Id.* at 589). Mr. Mack did not then believe that the fact of Weems' plea of guilty but mentally retarded would have "influence[d] the jury one way or the other." (*Id.* at 589-90).

D. Weems' Competency Trial

Weems initially entered a special plea of incompetence and went to a jury trial on that issue. (Tr. at 641). There, Dr. James Powell testified Weems had a composite IQ of 53, with a 43 on the vocabulary test and a 70 on the non-verbal IQ. (*Id.* at 798). The records and testing indicated he had a learning disability. (*Id.*). Weems had a long history of a seizure disorder, which is shown to lower one's IQ. (*Id.* at 787-88). Weems "produced a cry for help profile." (*Id.* at 793). He blamed other people for starting fights in the jail and denied any responsibility for the fights occurring. (*Id.* at 795). Weems reported that while he could tell some of the details of the crime, he could not recount all of them. (*Id.* at 796). Weems also had a history of uncontrolled violent behavior. (*Id.* at 820). Dr. Powell did not believe that Weems would be able to testify cogently. (*Id.* at 827, 861).

Weems told Dr. Powell that this incident was his first time in court, when in reality, he had prior convictions. (*Id.* at 850-52). He told Dr. Powell that he did not understand what a negotiated plea was, but he had previously entered a negotiated plea. (*Id.* at 854). He told Dr. Powell that he did not have a job, but in his request for an attorney, he indicated that he did have a job. (*Id.* at 860).

According to the State's doctor, Don Hughey, Weems had an IQ of 55, but Dr. Hughey did not consider that to be a valid test score. (*Id.* at 949). This was due in part to the fact that, in 1995, he had an IQ of 86, which was almost average. (*Id.*). Weems claimed to Dr. Hughey that he could not read or write. (*Id.* at 950). However, at the time of his arrest, he had written a 1.5-page statement. (*Id.*). Weems reported auditory hallucinations, the feeling

of something crawling on him, and a feeling that the television was looking at him. (*Id.* at 951-52). His behavior was inconsistent with hearing voices. (*Id.* at 953). Weems indicated to the doctor that he had symptoms that were clearly absurd or improbable. (*Id.* at 958).

Dr. Hughey then administered the test for malingering. (*Id.* at 952). "The test has eight primary scales. Of those eight scales, three were in the definite range for malingering and five were in the probable range for malingering. I would say there's a [99.9]-percent chance he was malingering." (*Id.*). Malingering is defined as "the deliberate fabrication or exaggeration of symptoms for the purpose of secondary gain." (*Id.*). The jury found Weems competent to proceed to trial.

ARGUMENT AND CITATION OF AUTHORITY

A. Mr. Burgess' appellate attorney was ineffective for failing to raise the issue that Mr. Burgess's due process rights under the United States Constitution were violated when the state withheld exculpatory evidence in violation of *Brady v. Maryland*.

i. The State failed to meet its obligations under *Brady*.

In *Brady*, this Court held that the government violates the Constitution's Due Process Clause "if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 565 U.S. 73, 75, 132 S. Ct. 627, 181 L. Ed. 2d. 571 (2012), *Turner v. United States*, 582 U.S. ___, 137 S. Ct. 1885, 198 L. Ed. 2d 443 (2017). The State's suppression of

"evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83.

Brady's requirement to disclose favorable evidence to defendants extends to evidence that bears upon the credibility of a government witness. *Giglio v. United States*, 405 U.S. 150, 153–54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Here, the State violated *Brady* by failing to disclose to the defense the information related to co-defendant Weems' plea of incompetence, including the State's psychiatric evaluation of him, the determination by the forensic psychiatrist that he was malingering, and the other information from Weems' competency jury trial.

First, the State obviously possessed the exculpatory material because the same prosecutor conducted an entire jury trial about it. (*See* T1 at 67, T3 at 638).

Second, before trial, Mr. Burgess did not possess the information and could not obtain it with any reasonable diligence. Specifically, he filed a notice of election to participate in reciprocal discovery as provided by Georgia law, which Georgia Courts have held is sufficient to meet this prong. *See, e.g., Walker v. Johnson*, 282 Ga. 168, 169 (2007). Beyond that, the information related to Weems' private psychological analysis, which was not available to the general public before the transcripts were filed on the docket. Notably, the transcripts from Weems' jury trial on competency were not filed until January 2011, after Mr. Burgess was convicted at a jury trial. (*See* Tr. 3 at 637).

Accordingly, while there was publicly available evidence about Weems' plea of guilty but mentally retarded, the deeper and much more material information at issue here was not publicly available or accessible by to trial counsel in any way.

Third, there is no question that the State withheld the evidence, as it had it available but failed to disclose it, despite the relevant requests by Mr. Burgess. Notably, the State tried to hide the information from the jury at trial, as it asked Weems about his guilty plea but never clarified that he pleaded guilty but mentally retarded or tell the jury that Weems went to trial on his incompetence plea.[1] (T.2 at 341).

Finally, there is a reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different. To meet this prong of *Brady*, a defendant must show that "the government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* (quotation omitted). A *Brady* violation exists even when there is

1. The State also asked Weems if he had any reason to lie about not pointing the gun at Mr. Burgess, to which Weems responded that he did not, but this does not appear to be true, as Weems received the same sentencing recommendation as Mr. Burgess due to his cooperation in this case despite his much greater culpability. This has long been held to be a violation of a defendant's Fourteenth Amendment rights. *See Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959).

sufficient evidence to convict the defendant. *Id.* at 434-35 ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the disclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict.").

Mr. Burgess testified at trial that he did not initially know that Weems intended to commit a drive-by shooting, that he was scared for his life when he saw Weems with an AK-47, that Weems then nudged him with the AK-47 while telling him to drive, and that he did what he could to avoid any harm to the people standing on the side of the street, including flashing his lights and driving quickly past them. This testimony shows that Mr. Burgess did not have the sufficient intent to be guilty of these crimes. *See Guyse v. State*, 286 Ga. 574, 576-77 (2010) (holding that the State must prove a "general intent to injure" when the defendant is accused of committing aggravated assault through the use of a deadly weapon); *Jordan v. State*,[2] 272 Ga. 395, 396 (2000) (explaining that, to be guilty as a party to a crime, the parties must have a "common criminal intent," and that the jury must be able to "infer from the conduct that the defendant intentionally encouraged the commission of the criminal act").

The impeachment evidence is favorable to Mr. Burgess because Weems provided the only evidence that contradicted Mr. Burgess' testimony at trial. *See Danforth v. Chapman*, 297 Ga. 29, 31 (2015) ("Since White was the only witness who said Chapman confessed to arson, the

2. *Jordan* was overruled on other grounds by *Nalls v. State*, 815 S.E.2d 38 (2018).

evidence described above, which impeached and/or cast doubt on White's credibility, was material to Chapman's defense."). Weems denied pointing the gun at Mr. Burgess or coercing Mr. Burgess into acting, and testified that Mr. Burgess knew what was going to happen, although he also testified that Mr. Burgess had no role in the offense. The information about Weems' mental limitations, as well as the potential that he was malingering during his psychological testing, was exculpatory because it casts doubt on Weems' ability, or willingness, to accurately remember and honestly convey a truthful account of the night in question. If the jury had heard about Weems' violent outbursts, his IQ, and his documented malingering/lying, at minimum, a reasonable probability that the jury would have acquitted Mr. Burgess on all charges would have existed. *See United States v. Thompson*, 976 F.2d 666, 671 (11th Cir. 1992) (cross-examination regarding mental issues is highly probative of the witness' credibility). Because Mr. Burgess can meet all four prongs of the *Brady* test, he has shown that the State violated his due process rights.

ii. Appellate counsel was ineffective for failing to raise a *Brady* claim on appeal.

The Sixth Amendment right to counsel "is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Evitts v. Lucey*, this Court extended criminal defendants' constitutional right to effective assistance to first appeals as of right pursuant under the Due Process Clause. 469 U.S. 387, 396, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985) ("A first appeal as of right therefore is not adjudicated in accord with due process of law if

the appellant does not have the effective assistance of an attorney"). *Strickland* provides the proper standard for addressing whether appellate counsel was ineffective. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Under *Strickland's* two-prong test, a "defendant who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice." *Buck v. Davis*, 137 S.Ct. 759, 775, 197 L.Ed.2d 1 (2017) (citing *Strickland*, 466 U.S. at 687).

In the current case, the State withheld exculpatory evidence in violation of its obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct.1194, 10 L. Ed. 2d 215 (1963). Appellate counsel's failure to raise the State's *Brady* violation on appeal was both deficient and prejudicial for Mr. Burgess' appeal, meaning that counsel's failure to raise this issue on appeal deprived Mr. Burgess of effective appellate representation. Failing to raise the *Brady* violation was deficient because it was significantly stronger than the issues that appellate counsel actually raised on appeal. *See Davila v. Davis*, 137 S.Ct. 2058, 2067, 198 L.Ed.2d 603 (2017) ("Declining to raise a claim on appeal, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court.") (*citing Smith*); *Banks v. Reynolds*, 54 F.3d 1508, 1515–1516 (C.A.10 1995) (finding both parts of *Strickland* test satisfied where appellate counsel failed to raise *Brady* violation). On appeal, Appellant counsel raised issues related only to the trial court's erroneous admission of irrelevant evidence that suggested that Mr. Burgess was a gang member. *See Burgess v. State*, 292 Ga. 821 (2013). None of this evidence impeached the testimony of Weems, who provided nearly all of the evidence against Mr. Burgess.

Mr. Frey, the appellate counsel, acknowledged that his performance was deficient at the habeas hearing. He testified that, if he had known of the information contained in Weems' trial transcripts, he would have raised that issue on appeal. (*Id.* at 19). Further, he acknowledged that he could have obtained the relevant documents from the clerk's office, and that he had done an "incomplete job" by not getting those records. (*Id.* at 19, 27). Appellate counsel's deficient performance prejudiced Mr. Burgess because if appellate counsel had investigated and litigated a *Brady* claim based on the information presented at Weems' competency trial, there is a reasonable probability that he would have ultimately prevailed on appeal.

B. Alternatively, Mr. Burgess's appellate attorney was ineffective for failing to argue that his trial attorney was ineffective for failing to investigate and cross-examine Weems with the information stemming from his special plea of incompetence.

i. Trial counsel was ineffective for failing to investigate Weems' plea of guilty but mentally retarded and for failing to cross-examine Weems with the information stemming from his special plea of incompetence.

Even if the Court concludes that the State did not withhold information related to co-defendant Weems' plea of incompetence because trial counsel could have obtained some of these materials, trial counsel was ineffective for failing to investigate and discover these highly relevant and probative documents. In *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), this Court held that a defendant's trial counsel was deficient

for failing to obtain a readily available court file on a similar prior offense committed by the defendant, when counsel knew that the prosecution intended to rely on that offense at a death penalty sentencing hearing. The Court concluded that "[n]o reasonable lawyer would forgo examination of the file thinking he could do as well" by simply asking around for helpful information. *Id.* at 389.

Upon learning that the primary witness against one's client had initially entered a special plea of incompetence and then pleaded guilty but mentally retarded, any competent attorney would have sought out information related to that plea. *See* ABA Standards for Criminal Justice 4-4.1 (describing defense counsel's duty to investigate, including "potential avenues of impeachment of prosecution witnesses"). Although trial counsel knew that Weems had pleaded guilty but mentally retarded, he never sought out the relevant documents from that plea, including the evaluations or the results of the trial on his special plea of incompetence. If he had done so, trial counsel would have discovered the following facts and then cross-examined Weems with them: that Weems was prone to random, uncontrollable acts of violence and that he lied repeatedly to the psychologists for his own benefit. Trial counsel would have also learned that the State allowed Weems to plead guilty but mentally retarded even though their own expert concluded that Weems was not a person with an intellectual disability. This failure was plainly deficient, as no reasonable attorney would have failed to investigate records that directly addressed Weems' credibility, when it was clear that Weems' testimony was going to be central to the State's case against Mr. Burgess.

Trial counsel had no basis for failing to investigate this information, which went directly to Mr. Burgess' theory of defense—that Weems suddenly decided to commit a violent crime, that Mr. Burgess was scared for his life, and that he had no intent to further Weems' actions. At the habeas hearing, Mr. Burgess' trial attorney agreed that, if he had investigated the issue further, he "could have used that to cross-examine a whole lot more and maybe convince the jury that they had a retarded person that was on the stand and maybe show also that the State didn't even believe him." (Tr. 1 at 10). Mr. Mack agreed that he made a mistake in not investigating the records related to Weems, and that it was something that he should have done. (*Id.* at 11). This deficient performance resulted not from an intentional strategic decision, but from inattention and a lack of diligence.

While Mr. Mack testified at the motion for new trial hearing that he did not think that the jury would have been impacted by learning of Weems' plea of guilty but mentally retarded, this testimony occurred when neither he nor appellate counsel had the information currently before the Court—the transcript from Weems' jury trial on his special plea of incompetence. There is no dispute that, at the time of his motion for new trial testimony, Mr. Mack did not know about the information at the crux of this appeal—that Weems had repeatedly lied during his psychological testing for his own benefit, that he was prone to random violent outbursts, and that notwithstanding the near certainty that he was not intellectually disabled, the State permitted him to plead guilty but mentally retarded. Therefore, Mack's decision on how to cross-examine Weems at trial and his testimony at the motion for new trial hearing were both uninformed. Consequently, any decision is not subject to the deference generally afforded thoughtful and intentional strategic decisions.

Further, trial counsel's deficient performance prejudiced Mr. Burgess because, but for the deficient performance, it is "reasonable probable" that "at least one juror would have harbored a reasonable doubt" about his guilt. *Buck*, 137 S.Ct. at 776. As discussed previously, Weems' testimony was crucial to the State's efforts to prove intent.

ii. Appellate counsel was ineffective for failing to argue that trial counsel was ineffective.

Appellate counsel was ineffective for not arguing on appeal that trial counsel was ineffective for not investigating and presenting the critical impeachment evidence described above. Appellate counsel's performance was deficient because he did not raise the claim of ineffective assistance against trial counsel, even though the claim is and was meritorious for the reasons described above. Appellate counsel's decision not to raise a claim of ineffective assistance of trial counsel was also based on ignorance and a lack of reasonable investigation, as he did not know of the information from Weems' jury trial on his special plea of incompetence until the habeas proceedings. Accordingly, appellate counsel's decision cannot be strategic.

Further, appellate counsel's deficient performance prejudiced Mr. Burgess because if counsel had raised that issue, there is a reasonable probability that the outcome of the appeal would have been different. There is at least a reasonable probability that, on appeal, this Court would have vacated Mr. Burgess' convictions if presented with the claim that trial counsel was ineffective for failing to investigate and to impeach Weems. Notably, the Georgia Supreme Court's decision affirming Mr.

Burgess' convictions relied heavily on Weems' testimony. *See Burgess*, 292 Ga. 821. Therefore, even aside from the claim of ineffective assistance of counsel, evidence that destroyed Weems' credibility as a witness would have been useful to the evaluation of Mr. Burgess' other claims on appeal. Because appellate counsel performed deficiently and because that deficient performance prejudiced Mr. Burgess, Mr. Burgess is entitled to a new trial.

C. The Georgia Supreme Court err in failing to find that appellate counsel provided ineffective assistance.

In *Burgess v. Hall*, 827 S.E.2d 271 (2019), the Georgia Supreme Court concluded that Mr. Burgess prevailed in neither ineffectiveness claim because he did not satisfy the prejudice prong of *Brady* or *Strickland*. The Court reasoned that because trial counsel impeached Weems during the trial with other evidence, the additional impeachment evidence adduced at Weems' competency trial would not have necessarily helped Mr. Burgess' case, meaning that "there is no reasonable probability that the outcome of his trial would have been different" had the State produced or trial counsel discovered the evidence. *Id*. at 276.

To an extent, the Court is correct: the withheld evidence was for impeachment; the trial transcript shows that counsel impeached Weems extensively; and diagnosis of an intellectual disability does not by itself make a witness less credible. However, their characterization of the withheld evidence as more-of-the-same impeachment evidence is overly reductive. The detective's testimony that he thought Weems lied to him is of a different character than the withheld evidence. Further, this Court should reject the Georgia Supreme Court's unstated premise

that because one type of impeachment was ineffective, no impeachment could have been effective.

The State permitted Weems to plead guilty but mentally retarded even though a prior IQ test and malingering test suggested a 99.9 percent chance that he was not mentally retarded. Notwithstanding this evidence, the State permitted Weems to plead guilty but mentally retarded. At trial, the State suborned Weems' misleading testimony that he "pleaded guilty," not guilty but mentally retarded. Because trial counsel did not know about the particulars of Weems' plea, either because the State withheld evidence or he did not adequately investigate the matter, he could not correct the record or ask Weems about the circumstances surrounding his plea.

More importantly, Weems testified that he had nothing to gain by testifying that he never put a gun to Mr. Burgess' head. If trial counsel had known that the State negotiated Weems' plea of guilty but mentally retarded even though it knew that Weems was almost certainly not intellectually disabled, counsel could have cross-examined him substantially more effectively about the veracity of his testimony. Trial counsel could have used evidence of Weems' malingering coupled with the specifics of his plea to suggest that Weems may have indeed had something to gain from the content of his testimony. While the State may not have encouraged Weems to alter his testimony with the promise of a more favorable plea, their failure to disclose evidence to Mr. Burgess deprived him of the opportunity to explore this possibility. Certainly, there is a reasonable probability that evidence impeaching Weems' motivation for testifying as he did could have caused at least one juror to view Weems' testimony in a different light even though other, arguably less compelling impeachment evidence did not.

CONCLUSION

In his dissent in *United States v. Olsen*, 737 F. 3rd 625, 626 (9th Cir. 2013), former Chief Judge Alex Kozinski acknowledged what every criminal defense attorney knows : "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." The continued repeated instances of success across the country by such organizations as The Innocence Project in which many years later defendant's are freed when hidden evidence is later discovered should have prosecutors changing their ways, but it has not. In this case, Mr. Burgess is asking this Court to put a stop to the type of conduct in this case: misrepresentation of the plea by the co-defendant who testified against him and the failure of the State in discovery to provide the *Brady* evidence that showed a psychiatric examination in which the co-defendant manipulated and malingered his responses. Accepting this case for review and reversing the wrongs would be a loud call to judges in the lower courts to stop *Brady* violations.

Respectfully submitted, this 15th day of July 2019.

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF GEORGIA, DATED APRIL 15, 2019

IN THE SUPREME COURT OF GEORGIA

S19A0041

BURGESS

v.

HALL.

April 15, 2019, Decided

PETERSON, Justice.

Following a jury trial in October 2010, Jerome Burgess was convicted of felony murder, three counts of aggravated assault, and possession of a firearm during the commission of a crime, and we affirmed his convictions. *Burgess v. State*, 292 Ga. 821 (742 SE2d 464) (2013). Burgess later filed a petition for a writ of habeas corpus, alleging that appellate counsel was ineffective for failing to argue on appeal that (1) trial counsel was ineffective for failing to cross-examine effectively a testifying co-defendant and (2) the State committed a *Brady* [1] violation for failing to disclose impeachment evidence against that co-defendant. The habeas court denied Burgess relief. We granted Burgess's application for a certificate of probable

1. *Brady v. Maryland*, 373 U. S. 83 (83 SCt 1194, 10 LE2d 215) (1963).

cause, but we affirm because the habeas court correctly rejected Burgess's claims.[2]

1. Relevant background

The crimes for which Burgess has been convicted stem from a drive-by shooting of three teenagers, one of whom died. *Burgess*, 292 Ga. at 822 (1). The State's evidence showed that, in October 2008, Burgess drove fellow members of the Murk Mob gang, including his co-defendant Andre Weems, to a Clayton County neighborhood in search of the leader of a rival gang with whom they had had an altercation earlier that night. *Id.* at 821-822 (1). When that effort proved unsuccessful, the group instead decided to assault the three teenagers who happened to be in the vicinity, so that Weems could "get his stripes"; Weems opened fire as Burgess drove. *Id.* at 822 (1).

Burgess and Weems were indicted together. Burgess pleaded not guilty, and Weems pleaded guilty and testified for the State at Burgess's October 2010 trial. Weems testified that everyone in the vehicle knew about the plan to commit the drive-by shooting and that he never pointed a gun at Burgess. Weems admitted during his trial testimony that he had pleaded guilty to the shooting, but the jury did not hear that he pleaded guilty but intellectually disabled.

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2. In addition to asking whether appellate counsel was ineffective, we also asked whether coercion is a defense to felony murder, but our resolution of the ineffectiveness claims does not require us to answer this second question.

Burgess testified and presented a different version of events. Burgess testified that he did not know Weems intended to commit a drive-by shooting, he did not want to drive the vehicle, and Weems coerced him by pointing the gun or nudging him with it and directing him to drive. Burgess also called Felix Irving to testify in his defense. Irving testified that Weems had called him after the shooting to say that the shooting was not planned, Burgess did not have anything to do with it, and Weems was going to "straighten it out" so Burgess would not get punished for something he did not do. At the conclusion of Burgess's trial, the jury found him guilty of felony murder and other crimes, and we affirmed his convictions. *Burgess*, 292 Ga. 821.

Burgess filed a habeas petition claiming that his appellate counsel was ineffective in his handling of issues regarding purported witness impeachment evidence that the State allegedly did not disclose and that trial counsel failed to uncover. The evidence Burgess cites as impeachment evidence relates to the testimony of two psychologists introduced at Weems's competency trial that occurred about a month before Burgess's criminal trial. The defense expert, Dr. James Powell, testified that Weems had a composite IQ of 53, a learning disability, a history of violent outbursts, and a seizure disorder. Dr. Powell also testified that Weems had given conflicting and incoherent accounts of the shooting and his prior criminal convictions, but Dr. Powell could not determine whether Weems was intentionally lying, confused, or simply could not remember.

The State's expert, Dr. Don Hughey, also testified at Weems's competency trial that Weems scored low on an IQ test, but he did not consider the result to be valid because Weems had scored an 86 on a prior test and there was no evidence that Weems had an intervening factor, such as a serious head injury, to explain the drop in his IQ score. Dr. Hughey also performed a malingering test on Weems after Weems reported auditory hallucinations, and Dr. Hughey concluded that there was a 99.9 percent chance that Weems was malingering.

Burgess argued that the experts' testimony provided information that would have affected the jury's assessment of Weems's credibility, including whether he acted alone or whether Burgess participated in the shooting. Following a hearing, the habeas court denied Burgess's habeas petition, concluding that Burgess failed to show that appellate counsel was deficient as to Weems's cross-examination or that any deficiency prejudiced him. The habeas court also denied relief on Burgess's claim that appellate counsel was ineffective for failing to raise a *Brady* claim on appeal, concluding that appellate counsel, despite being aware of Weems's guilty plea, made a considered choice to raise the issues that were most likely to lead to a reversal of Burgess's convictions; the habeas court also concluded that Burgess made no showing of prejudice.

2. Burgess argues that the habeas court erred in denying his claim that appellate counsel was ineffective regarding trial counsel's failure to investigate Weems's competency and guilty pleas and then cross-examine Weems with the information introduced at Weems's competency trial. We disagree.

Appendix A

For Burgess to prevail on an ineffective assistance of counsel claim, he must satisfy the familiar standard of *Strickland v. Washington*, 466 U. S. 668 (104 SCt 2052, 80 LE2d 674) (1984). Under that standard, Burgess must prove that his lawyer's performance was constitutionally deficient and that he was prejudiced by the deficient performance. *Id.* at 687. To show deficient performance, Burgess must prove that his counsel acted or failed to act in an objectively unreasonable way, considering all the circumstances and in the light of prevailing professional norms. See *id.* at 687-690. "This is no easy showing, as the law recognizes a strong presumption that counsel performed reasonably," and to overcome this presumption, Burgess "must show that no reasonable lawyer would have done what his lawyer did, or would have failed to do what his lawyer did not." *Davis v. State*, 299 Ga. 180, 183 (2) (787 SE2d 221) (2016) (citation and punctuation omitted).

"Where the issue is the ineffective assistance of appellate counsel, the showing of prejudice calls for a demonstration that a reasonable probability exists that, but for appellate counsel's deficient performance, the outcome of the appeal would have been different." *Gramiak v. Beasley*, 304 Ga. 512, 513 (I) (820 SE2d 50) (2018) (citing *Humphrey v. Lewis*, 291 Ga. 202, 211 (IV) (728 SE2d 603) (2012)). When a defendant claims that his appellate counsel was ineffective for failing to raise a claim on direct appeal that trial counsel was ineffective, there are two layers of *Strickland* analysis. *Gramiak*, 304 Ga. at 513 (I). To show that appellate counsel was ineffective for failing to argue that trial counsel was ineffective, a defendant must show that trial counsel was deficient and the deficiency prejudiced the trial.

Here, Burgess's appellate counsel did raise the issue of trial counsel's ineffectiveness in Burgess's motion for new trial and questioned trial counsel about his cross-examination of Weems during the motion for new trial hearing. Trial counsel testified at the motion for new trial hearing that prior to trying Burgess's case, he became aware that there had been a trial on Weems's competency and that Weems had pleaded guilty but intellectually disabled. Trial counsel stated that he did not believe Weems's guilty plea would have influenced the jury's credibility determination in any way, and that he had more effective points on which to cross-examine Weems, including Weems's statements to a detective.

The transcript from Burgess's trial reflects that trial counsel indeed impeached Weems's credibility extensively. In particular, through cross-examination, Weems admitted that he first told the detective he did not know anything about the shooting, then said Burgess and a young woman "set[] everything up," claimed that Burgess was the shooter, and finally admitted that he was the shooter. Trial counsel also elicited testimony from Weems that he told the detective, "if I'm going down, everybody's going down," because he was mad that people had "ratted [him] out." While cross-examining the detective, trial counsel elicited testimony that the detective knew that Weems was lying when he claimed to not be involved in the shooting and named Burgess as the shooter, and the detective described Weems's initial statements as being part of his "lies and deception."

Appellate counsel testified at the habeas hearing that he did not pursue the ineffectiveness claim on appeal because trial counsel had claimed that his cross-examination of Weems was a matter of trial strategy, and appellate counsel did not believe he could satisfy both *Strickland* prongs on appeal. Appellate counsel also stated that had he known about Weems's low IQ, he "would have done a great deal more" and that he backed away from the ineffectiveness issue a little too quickly in retrospect. Trial counsel similarly testified at the habeas hearing that had he known about Weems's diminished mental abilities, he would have used that information to cross-examine Weems "a whole lot more" and "maybe" show that even the State did not believe Weems. Trial counsel considered his failure to investigate Weems's records to amount to ineffective assistance of counsel.

Trial counsel's hindsight assessment of his own performance does not control. See *Kennedy v. State*, 304 Ga. 285, 288 (2) (818 SE2d 581) (2018). But even if we agreed with trial counsel that he was deficient on this point, Burgess cannot show prejudice. Weems's credibility was severely impeached at trial with his prior inconsistent statements to the detective, so much so that trial counsel got the detective to say that Weems's initial statements to the detective were "lies and deception." Any additional attack on Weems's credibility would have had marginal value.

Before the habeas court, Burgess argued that evidence of Weems's intellectual disabilities could have been used to impeach him. But a witness's low IQ, by itself, does not make the witness incredible. Even considering IQ as

a factor in an overall credibility determination, Burgess fails to show that Weems's low IQ would have damaged Weems's credibility any more than it already was.

Although Burgess did not focus on the evidence of Weems's malingering in questioning appellate or trial counsel, this evidence is probably the best impeachment evidence that could have been obtained from Weems's competency trial. But even this evidence would have had marginal value to Burgess, as it would only have been additional evidence supporting the already well-established pattern of Weems's "lies and deception." See *McCoy v. State*, 303 Ga. 141, 143 (2) (810 SE2d 487) (2018) (evidence with marginal impeachment value does not establish prejudice). Even when considered cumulatively, the evidence from Weems's competency trial would have made little difference to Weems's noted lack of credibility.

Moreover, despite his attempts to undercut Weems's credibility, Burgess also simultaneously sought to rely on statements Weems made, and he continues to do so on appeal. To corroborate his own testimony that he had nothing to do with the crime, Burgess cites the testimony of Felix Irving that Weems told Irving that Burgess had nothing to do with the shooting and Weems was going to make sure Burgess did not get punished for something he did not do. Burgess wants to credit Weems's statement that Burgess was not involved in the shooting but discredit Weems on other points. Given these circumstances, there is no reasonable probability that additional impeachment of Weems would have made any difference to the outcome of the trial. See *Barrett v. State*,

292 Ga. 160, 177-178 (3) (C) (4) (733 SE2d 304) (2012) (given trial counsel's cross-examination of witness regarding the inconsistencies between her testimony and prior statement to police, appellant failed to show a reasonable probability that result of trial would have been different with additional impeachment of witness).

Because Burgess cannot demonstrate that he was prejudiced by trial counsel's failure to obtain additional impeachment evidence and cross-examine Weems with it, he cannot establish that appellate counsel was ineffective for not pursuing an ineffectiveness claim against trial counsel. See *Rozier v. Caldwell*, 300 Ga. 30, 33 (3) (793 SE2d 73) (2016) ("Because appellate counsel could not have prevailed on a claim that trial counsel provided ineffective assistance by not pursuing such a cross-examination, appellant cannot show prejudice on his claim that appellate counsel was ineffective in failing to assert such a claim on appeal.").

3. Burgess next argues that appellate counsel was ineffective for failing to argue on appeal that the State violated *Brady* by failing to disclose the impeachment evidence noted above. Because Burgess's claims relate to appellate counsel's purported ineffectiveness, he must establish a reasonable probability that the outcome of the appeal would have been different but for appellate counsel's deficient performance. See *Gramiak*, 304 Ga. at 513 (I). This he cannot do.

To prove a *Brady* violation, a defendant must show that:

> (1) the State, including any part of the prosecution team, possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) a reasonable probability exists that the outcome of the trial would have been different had the evidence been disclosed to the defense.

Anthony v. State, 302 Ga. 546, 552 (III) (B) (807 SE2d 891) (2017) (citation and punctuation omitted).

Burgess cannot establish the fourth *Brady* prong. Burgess claims the undisclosed information could have been used to impeach Weems, but, as discussed above, Weems's testimony had been significantly impeached at trial and further impeachment would not necessarily have helped Burgess's case. As a result, even if the relevant materials had been disclosed to Burgess, there is no reasonable probability that the outcome of his trial would have been different, and a *Brady* claim would have failed. See *Whatley v. Terry*, 284 Ga. 555, 560-561 (II) (B) (2) (668 SE2d 651) (2008) (finding no *Brady* violation from State's failure to disclose police interview of eyewitness that the defendant claimed could have been used for "enhanced" cross-examination, because it was established at trial that eyewitness could not be relied upon). Accordingly, Burgess's claim that appellate counsel was ineffective on this ground fails.

Judgment affirmed. All the Justices concur.

APPENDIX B — FINAL ORDER OF THE SUPERIOR COURT OF TELFAIR COUNTY STATE OF GEORGIA, DATED APRIL 6, 2017

IN THE SUPERIOR COURT OF TELFAIR COUNTY STATE OF GEORGIA

CIVIL ACTION NO: 15-HC-008
HABEAS CORPUS

JEROME BURGESS GDC-0000557229,

Petitioner,

v.

PHIL HALL, WARDEN,

Respondent.

FINAL ORDER

Petitioner, JEROME BURGESS, filed this petition for Writ of Habeas Corpus challenging the validity of his October 21, 2010, Clayton County jury trial convictions for felony murder, six (6) counts of aggravated assault, and possession of a firearm during commission of a crime. Based upon the record as established at the October 20, 2015, evidentiary hearing, this Court denies relief based upon the following findings of fact and conclusions of law.

Appendix B

PROCEDURALLY HISTORY

Petitioner was indicted by the Clayton County Grand Jury on or about June 4, 2009, for malice murder, felony murder, nine (9) counts of aggravated assault, and possession of a firearm during the commission of a crime. (Habeas Hearing Transcript October 20, 2015, pp. 41-45, hereinafter "HT"). Following a jury trial on October 26, 2010, Petitioner was found guilty of felony murder, six (6) counts of aggravated assault, and possession of a firearm during the commission of a crime. (HT 49). Petitioner was sentenced to life with the possibility of parole. (HT 49).

Petitioner filed his Motion for New Trial, through counsel, on November 16, 2010, in the Superior Court of Clayton County, alleging the following errors:

1. Because the verdict and sentences are contrary to the evidence and without evidence to support it;

2. Because the verdict and sentences are decidedly and strongly against the weight of the evidence; and

3. Because the verdict and sentences are contrary to law and the principles of justice and equity. (HT 51).

Petitioner filed his Amended Motion for New Trial, through counsel, on December 9, 2011, in the Superior Court of Clayton County, alleging the following errors:

1. The introduction of gang related testimony;

2. The introduction of several unauthenticated photos;

3. Ineffective assistance of counsel, because counsel was unable to counter the unsubstantiated claims of gang involvement; and

4. Trial counsel was ineffective in his failure to effectively cross-examine Andre Weems, the testifying co-defendant, as to his previous claims of incompetency and his final plea of guilty, but mentally retarded. (HT 55-56).

An Order denying Petitioner's Motion for New Trial and Amended Motion for New Trial was issued by the Superior Court of Clayton County on January 26, 2012. (HT 59).

Petitioner filed his Motion to Supplement Motion for New Trial, through counsel, on June 8, 2012, alleging that there was newly discovered evidence as Petitioner's co-counsel, Andrew Weems, had recanted his trial testimony. (HT 61). An Order dismissing Petitioner's Motion to Supplement Motion for New Trial for lack of jurisdiction, as Petitioner had a pending appeal in the Supreme Court of Georgia, was issued by the Clayton County Superior Court on June 14, 2012. (HT 63).

Petitioner's convictions were affirmed on appeal by the Supreme Court of Georgia. (HT 630-633); *Burgess v. State*, 292 Ga. 821 (2013). On appeal Petitioner alleged the following errors:

1. The trial court erred when, over appellant's objection, it allowed Clayton County police officer David Ricks to be qualified as an expert in gang identity and investigation;

2. The trial court erred when it permitted Officer Ricks to testify about a map of gang territories which he created and which was used as a demonstrative exhibit during trial;

3. The trial court erred when it allowed the admission of a document Officer Ricks had printed as part of his investigation from the social media website MySpace;

4. The trial court erred when it allowed the admission of evidence that appellant was wearing colors and making signs associated with the Murk Mob gang; and

5. The trial court erred when it allowed the admission of evidence concerning the altercation that took place at the football game hours before the shooting occurred. *Id.*

Petitioner filed the instant habeas petition, through counsel, in the Superior Court of Telfair County on January 23, 2015. An evidentiary hearing was held on October 20, 2015, at which trial counsel and appellate counsel testified and were subjected to cross-examination.

Appendix B

GROUND ONE

In Ground One, Petitioner alleges he received ineffective assistance of appellate counsel for counsel's failure to raise ineffective assistance of trial counsel for trial counsel's failure to cross-examine Petitioner's co-defendant, who testified he was guilty but was mentally ill, and alleges trial counsel failed to cross-examine Petitioner's co-defendant, who pled guilty but was mentally ill.

FINDINGS OF FACT

Petitioner was represented at the trial level by Robert Lee Mack, Jr. (HT 7). Petitioner was represented by Steven Frey at the appellate level. (HT 15). Appellate counsel was admitted to the State Bar of Georgia in 1993 and has handled between fifteen and twenty appeals. (HT 15, 20). Appellate counsel testified that in preparation for Petitioner's appeal, counsel read through the transcript twenty or thirty times, reviewed discovery, and discussed the case with trial counsel. (HT 20-21).

Appellate counsel testified that in his review of the trial transcript he had noted that trial counsel had done a very limited cross-examination of Petitioner's co-defendant, Andre Weems, and he raised this issue in Petitioner's Motion tor New Trial, but once trial counsel indicated that this was merely trial strategy, appellate counsel did not press the issue any further. (HT 22). Appellate counsel further testified that while there were things that he would have done differently than trial counsel, he did not identify

any errors by counsel that would have altered the outcome. *Id*. Counsel testified that it had occurred to him to raise claims regarding ineffective assistance of trial counsel, but he ultimately chose not to raise any ineffective assistance claims. (HT 26). Counsel testified that he believes that he was aware that Petitioner's co-defendant, Andre Weems, had pled guilty but mentally retarded. (HT 29). Counsel further testified, that based on what he knew, he raised the issues that he felt were most likely to lead to a reversal of Petitioner's convictions. (HT 30).

CONCLUSIONS OF LAW

The test for establishing ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this two-prong test, Petitioner must show (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment, *Strickland*, 466 U.S. at 687; and (2) that this deficient performance prejudiced the defense, that is, that counsel's errors were so serious as to deprive Petitioner of a fair trial with a reliable result. *Id*. at 694. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision not to raise a particular issue was an unreasonable decision which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." *Shorter v. Waters*, 275 Ga. 581 (2002).

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Petitioner has failed to show that appellate counsel's performance was deficient or that he was prejudiced by it. The record shows that appellate counsel testified that in his review of the trial transcript he had noted that trial counsel had done a very limited cross-examination of Petitioner's co-defendant, Andre Weems, and he raised this issue in Petitioner's Motion for New Trial, but once trial consul indicated that this was merely trial strategy, appellate counsel did not press the issue any further. Appellate counsel further testified that while there were things that he would have done differently than trial counsel, he did not identify any errors by counsel that would have altered the outcome. Counsel testified that it had occurred to him to raise claims regarding ineffective assistance of trial counsel, but he ultimately chose not to raise any ineffective assistance claims. Counsel testified that he believes that he was aware that Petitioner's co-defendant, Andre Weems, had pled guilty but mentally retarded. Counsel further testified, that based on what he knew, he raised the issues that he felt were most likely to lead to a reversal of Petitioner's convictions. Further, Petitioner has failed to show a likelihood that the outcome would have been different had appellate counsel represented Petitioner differently, and thus has failed to show that appellate counsel was ineffective.

Accordingly, Ground One provides no basis for relief.

Appendix B

GROUND TWO

In Ground Two, Petitioner alleges he received ineffective assistance of appellate counsel for counsel's failure to raise *Brady* violations when the State failed to provide exculpatory evidence that the shooter, Petitioner's co-defendant, pled guilty despite being mentally retarded, a fact the State failed to provide in discovery, including the co-defendant's psychiatric reports which summarized his mental retardation.

FINDINGS OF FACT

Petitioner was represented at the trial level by Robert Lee Mack, Jr. (HT 7). Petitioner was represented by Steven Frey at the appellate level. (HT 15). Appellate counsel was admitted to the State Bar of Georgia in 1993 and has handled between fifteen and twenty appeals. (HT 15, 20). Appellate counsel testified that in preparation for Petitioner's appeal, counsel read through the transcript twenty or thirty times, reviewed discovery, and discussed the case with trial counsel. (HT 20-21).

Appellate counsel testified that it had occurred to him to raise claims regarding ineffective assistance of trial counsel, but ultimately chose not to raise any ineffective assistance claims. (HT 26). Counsel testified that he believes that he was aware that Petitioner's co-defendant, Andre Weems, had pled guilty but mentally retarded. (HT 29). Counsel testified that he did not have reason to believe that clerk's records would be different from what the State provided in discovery. (HT 31). Counsel further testified,

that based on what he knew, he raised the issues that he felt were most likely to lead to a reversal of Petitioner's convictions. (HT 30).

CONCLUSIONS OF LAW

The test for establishing ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this two-prong test, Petitioner must show (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment, *Strickland*, 466 U.S. at 687; and (2) that this deficient performance prejudiced the defense, that is, that counsel's errors were so serious as to deprive Petitioner of a fair trial with a reliable result. *Id.* at 694. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision not to raise a particular issue was an unreasonable decision which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." *Shorter v. Waters*, 275 Ga. 581 (2002).

Petitioner has failed to show that appellate counsel's performance was deficient or that he was prejudiced by it. The record shows that appellate counsel testified that it had occurred to him to raise claims regarding ineffective assistance of trial counsel, but he ultimately chose not to raise any ineffective assistance claims. Counsel testified that he believes that he was aware that Petitioner's co-

defendant, Andre Weems, had pled guilty but mentally retarded. Counsel testified that he did not have reason to believe that clerk's records would be different from what the State provided in discovery. Counsel further testified, that based on what he knew, he raised the issues that he felt were most likely to lead to a reversal of Petitioner's convictions. Further, Petitioner has failed to show a likelihood that the outcome would have been different had appellate counsel represented Petitioner differently, and thus has failed to show that appellate counsel was ineffective.

Accordingly, Ground Two provides no basis for relief.

CONCLUSION

Wherefore, the instant petition for a Writ of Habeas Corpus is **DENIED**.

If Petitioner desires to appeal this Order, Petitioner must file a written application for certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the date of the filing of this Order. Petitioner must also file a Notice of Appeal with the Clerk of the Superior Court of Telfair County within the same thirty (30) day period.

The Clerk of the Superior Court of Telfair County is hereby DIRECTED to mail a copy of this Order to Petitioner, Respondent, and Special Assistant Attorney General Daniel M. King Jr.

Appendix B

SO ORDERED this 6th day of April, 2017

/s/
C. MICHAEL JOHNSON, Judge
Oconee Judicial Circuit