No. _____

IN THE
Supreme Court of the United States

WARREN KING,

Petitioner,

v.

SHAWN EMMONS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

A Georgia jury convicted and sentenced to death Warren King, a black man, for murdering a white woman during a robbery attempt when he was 18 years old. Abundant evidence demonstrates that the prosecutor discriminated against black and female jurors in selecting King's jury. The prosecutor struck 87.5% of the black jurors in the pool, while striking only 8.8% of white jurors, all women. When the defense challenged his strikes, the prosecutor embarked on not one, but two rants, in which he "angr[ily]" told the court that it was "improper for this Court to tell me that I cannot decide" who to strike, and that *Batson* was unnecessary because often "it was a physical impossibility if you wanted to strike every black off a jury." Pet. App. 46-48a.

On appeal, the Georgia Supreme Court affirmed without mentioning the prosecutor's rants or his grossly disproportionate strike rate, and notwithstanding the prosecutor's inconsistent, flimsy, and factually inaccurate rationales for many of his strikes. On habeas review, a divided Eleventh Circuit panel ultimately held that although the record was "troubling," the state court had not acted unreasonably.

The questions presented are:

1. Whether the Georgia Supreme Court's decision was based on "an unreasonable determination" of the facts. 28 U.S.C. § 2254(d)(2).

2. Whether the Georgia Supreme Court "unreasonably applied." *Batson v. Kentucky*, 476 U.S. 79 (1986). 28 U.S.C. § 2254(d)(1).

RELATED PROCEEDINGS

Trial and Direct Appeal

State v. King, No. C94-10-167 (Appling Cnty. Super. Ct., Sept. 25, 1998)

King v. State, No. S00P1146 (Ga. Nov. 30, 2000), *reh'g denied* (Dec. 15, 2000)

King v. Georgia, No. 00-9976 (S. Ct. Jun. 28, 2002)

State Habeas Proceedings

King v. Upton, Warden, No. 2002-V-816 (Butts Cnty. Super. Ct., Apr. 20, 2010)

King v. Upton, Warden, No. S10E1850 (Ga. Nov. 7, 2011)

King v. Humphrey, Warden, No. 11-9697 (S. Ct. Jun. 11, 2012)

Federal Habeas Proceedings

King v. Warden, No. 2:12-CV-119 (S.D. Ga., Brunswick Div., Jan. 24, 2020)

King v. Warden, Georgia Diagnostic Prison, No. 20-12804 (11th Cir. Jun. 2, 2023), *reh'g denied* (Aug. 18, 2023)

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JURISDICTION

This court has jurisdiction to hear this case under 28 U.S.C. § 1254(1). The Eleventh Circuit denied a petition for rehearing en banc on August 18, 2023. Pet. App. 213a-215a. On November 8, 2023, this Court extended the deadline to file a petition for writ of certiorari to December 18, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides: "No State shall . . . 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."

This case also involves Section 2254 of Title 28 of the U.S. Code, which states in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings 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

(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.

INTRODUCTION

The throughline of this Court's *Batson* jurisprudence is that a decision to strike must be evaluated "in the context of all the facts and circumstances." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2250 (2019) (quoting *Batson v. Kentucky*, 476 U.S. 89 (1986)). The extraordinary facts and circumstances of this capital case present a *Batson* violation of an express character rarely seen.

During jury selection, the prosecutor exhausted his peremptories by striking over 87% of the qualified black jurors (7 of 8), while striking just 8% of white jurors (3 of 34). Pet. App. 9a. He struck every qualified black woman and used his three remaining strikes on white women. *Id.* When the defense challenged those strikes, the prosecutor embarked on the first of what turned out to be two angry rants against the *Batson* decision and this Court's parallel decision prohibiting gender discrimination in selecting a jury, *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994).[1] In his first tirade, immediately after the trial court found a prima facie case of discrimination, the prosecutor insisted that the "statistic[al]" pattern of his strikes was irrelevant, and that "neither this Court nor the Supreme Court nor the defense should be involved in deciding whether or not the State has accurately or effectively performed its strikes." Pet. App. 45a.

[1] This petition refers collectively to both *Batson* and *J.E.B.* when discussing "*Batson*" claims.

At the conclusion of the *Batson* colloquy, the trial court, after reviewing the voir dire tapes for only two of the excluded jurors, found that the prosecutor had in fact discriminated in his first strike of a black juror, Jacqueline Alderman, whom Johnson had struck "main[ly]" because she was a "black female." Pet. App. 10a. The prosecutor became so angry that the court had to instruct him to calm down. At that point, the prosecutor launched yet another, more blistering rant against *Batson.* Among other critiques, he insisted that *Batson* was unnecessary because there were often so many black jurors in the pool it was not possible to strike them all "if you wanted to." Pet. App. 47a. And he repeatedly challenged the authority of the court to adjudicate his strikes: "I take issue with this entire whole process, both to this Court and to the Supreme Court of Georgia. It's improper and it's wrong." Pet. App. 48a.

In other cases where this Court found a *Batson* violation, it probed facts and circumstances outside the particular trial where the strikes were made to assess whether the rationales given for those strikes were pretextual. In *Flowers*, for example, this Court took account of the history of prosecution strikes in the defendant's prior trials, which included prior *Batson* violations. 139 S. Ct. at 2235-38. And in *Miller-El*, this Court placed weight on discriminatory language in the prosecution office's manual to confirm the prosecutors' race-based exclusion of jurors, even though there was no evidence that the prosecutors who actually tried the case had ever reviewed that manual. *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) ("*Miller-El II*") ("[T]he

prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.").

Here, there is no need to look beyond the trial or to speculate what the prosecutor was thinking because the prosecutor's actions in this trial tell the tale. If a past *Batson* violation can be highly probative of a current one, *Flowers*, 139 S. Ct. at 2235-38, then surely an admission from the prosecutor that he was striking his first black juror because she is "black" and "female," resulting in an actual *Batson* violation in the very proceeding in question is even more telling as to the prosecutor's intent in striking others. And if demeanor offers the possibility of inferring discriminatory intent, then surely it is telling that a prosecutor, when confronted with his violation, chose to respond by attacking *Batson* itself and the legitimacy of the judicial system's authority to assess the prosecution's compliance with the Constitution. If relevant facts and circumstances mean anything, they show discrimination here.

The trial court thus correctly found that the prosecutor violated *Batson* in his first strike of a black juror (Alderman), but the prosecutor offered clearly pretextual grounds for striking other black and female jurors. The prosecutor claimed, for example, that he decided to strike another black woman based on her death penalty views after her husband, also in the venire, advised that she was against the death penalty. But the juror's husband had stated that he did not know his wife's views on the death penalty and the juror's own

statement indicated that she believed the death penalty was appropriate in some cases, in just the same way other white jurors had. Pet. App. 57a (Wilson, J., dissenting). With this juror and others, the prosecutor exercised his strikes based on falsehoods or grounds that he inconsistently applied depending on the race of the juror. As this Court has said repeatedly, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers*, 139 S. Ct. at 2244 (citing *Foster v. Chatman*, 578 U.S. 488 (2016)); *see also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). There were more *Batson* violations here than the one the trial court found.

In holding that the trial court did not clearly err in overruling the other *Batson* challenges, the Georgia Supreme Court's direct appeal decision did not even mention the prosecutor's rants against *Batson* or acknowledge the discrimination evident in his first strike of a black woman. Nor did it mention the significant statistical evidence reflecting the racial and gendered disparities in his strike rate, namely that black jurors were ten times more likely to be struck than white jurors (87.5% compared to 8%) and that women were four times more likely to be struck than men (40% compared to 9%). *See* Pet. App. 9a. Instead, the court simply recounted the prosecutor's justifications for the strikes and found in isolation that the trial court did not clearly err in accepting them. Pet. App. 191a-194a. On federal habeas review, a divided Eleventh Circuit panel called the record "troubling," Pet. App. 20a, but found that there was no reason to think that the Georgia Supreme Court had not considered all the relevant facts

and circumstances, and that its determination was therefore not unreasonable. Pet. App. 34a-38a.

Only this Court can now remedy these *Batson* violations. Even if the Georgia Supreme Court did silently consider the prosecutor's rants, strike rate, and the rest of the relevant facts and circumstances indicative of discrimination, it was unreasonable not to find a *Batson* violation. When a prosecutor repeatedly relies on inaccurate or inconsistent rationales to strike jurors, when he has struck black jurors at a rate 10 times higher than white jurors, railed against the *Batson* decision itself, and engaged in adjudicated discrimination against another juror in that very case, it is unreasonable to conclude anything other than that *Batson* was violated.

Review is thus warranted. Indeed, this is the rare case where summary reversal would be warranted given the clarity of the violation.

STATEMENT OF THE CASE

A. The Trial

In September 1994, Warren King, a black 18-year-old with no history of violent crime, was arrested along with his older cousin Walter Smith for the murder of Karen Crosby, a white woman, who was killed by a single gunshot wound during an attempted convenience-store robbery. Pet. App. 2a-3a, 21a. Both young men claimed the other was responsible for Crosby's death. It was undisputed, however, that Smith masterminded the

crime, leaving home with his uncle's gun and a mask, and searching for King around town to bring him along.[2]

Despite these and other factors indicating Smith initiated and planned the crime, Smith received immunity to testify against King and later pled to life *with* parole. Pet. App. 185a; D.21-9:4-12. At trial, King sought to prove his ineligibility for the death penalty because of intellectual disability pursuant to Ga. Code Ann. § 17-7-131(j). The jury rejected this defense and ultimately imposed the death penalty. Pet. App. 8a.

During voir dire, the court and parties questioned jurors in panels and individually to qualify 42 people from whom the jury was selected and three groups of four jurors from which three alternate jurors, one from each group, were selected. Pet App. 8a-9a. The group of 42 qualified jurors from which the petit jury was selected included three black men and five black women. D.16-28:17-18, 20-28. The process was identical to the procedure described in *Foster v. Chatman*, where "the State went first," and "the defense could accept any prospective juror not struck by the State without any further opportunity for the State to use a strike against that prospective juror." 578 U.S. 488, 504 (2016). As a consequence, "the State had to 'pretty well select the ten specific people [it] intend[ed] to strike' in advance." *Id.*

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[2] Unlike King, Smith had a violent criminal record involving firearms and had previously planned to rob the same convenience store. D.14-14:69; D.17-23:4-9; D.19-37:86-87; D.21-2:5-6. Citations to "D.—" refer to the federal district court docket entries and the relevant page numbers therein.

The prosecutor, Assistant District Attorney John Johnson, used seven peremptory challenges to strike all the black jurors except for one black man. Pet. App. 9a. He struck every black woman from the pool and used his three remaining strikes to excuse white women. *Id.* He did not use a single strike to remove any white men, although they comprised 45% (19 of 42) of the qualified pool. *Id.* Overall, black jurors were ten times more likely to be struck than white jurors as Johnson struck 87.5% of the qualified black jurors but just 8.8% of the qualified white jurors. The resulting jury consisted of seven white men, four white women, and one black man; two white women and one black man were selected as alternates after Johnson struck the only black woman in the alternate pool. *Id.*

The defense challenged Johnson's eleven strikes as discriminatory under *Batson*. *Id.* The trial court found a *prima facie* case of discrimination and directed Johnson to explain his strikes. *Id.*

Johnson responded with a lengthy criticism of *Batson* in which he argued that the judicial system should have no role in evaluating his strikes:

> I know the Court's ruling, and I know the issue that has been decided by the Supreme Court of Georgia. I do state for the record that the Supreme Court of Georgia of course does not know how I strike, and that it is improper for them to involve themselves in this unless defense counsel can point to a specific reason why some particular juror was qualified to serve and that I struck them. And I point

> that out merely to support the fact that statistics can never make a prima facie showing. The Supreme Court of Georgia has said that it does, and I just take exception to that, and I do so for the record.
>
> We would suggest, Your Honor, that there is a better approach to this matter, and that is that, if a side wants to raise the *Batson* issue, that that side that raises it should first have to show that their strikes were absolutely non-racially motivated or sexually- or gender-motivated, and only if they did that would it shift to the opposite side to make their strikes known to the Court. I think that becomes very unwieldy, and that's why neither this Court nor the Supreme Court nor the defense should be involved in deciding whether or not the State has accurately or effectively performed its strikes.

Pet. App. 44a-45a. Eventually, however, Johnson proffered reasons for striking each juror. Pet. App. 45a-46a. As each juror's strike was discussed, the defense countered Johnson's proffered reasons and the court, in all but two instances, overruled each challenge before moving on to address the next strike. The court reserved judgment on the strikes of black jurors Jacqueline Alderman and Alnorris Butler until it could review the court reporter's recordings of their voir dire examinations. D:16-28:49-50. After doing so, the court overruled the challenge to Butler's removal, but found

that Johnson's reasons for striking Alderman were pretexts for discrimination and that the strike was "improper." D.16-28:50-54.

Specifically, the court found that Johnson's claim that he struck Alderman because she knew King and his family was disproven by the record, as Alderman had testified that she did not know King and did not really know his family, and that Johnson had largely abandoned his other, extra-record reason, that Alderman's husband had some purported connection to a theft investigation. *See* D.16-28:52, 54. The court accordingly found that Alderman's strike violated *Batson*. Notably, the court did not mention that Johnson had expressly stated at the outset that his "main reason" for striking Alderman was that she was "a black female" from King's hometown – an explanation that is patently *not* race- or gender- neutral.

Johnson's immediate response to the trial court's ruling was outrage so extreme the court had to tell him to "[c]alm down. Get yourself, your thoughts proper and then tell me what you want to tell me." D.16-28:55. Johnson then launched into a second attack on *Batson*:

> I find it improper for this Court to tell me that I cannot decide, when I listen to what somebody says and look at them, that they know the family, that they've been living in this community for 35 years, that that's not a justifiable strike. If that's the case, then 90 percent of the strikes that I've taken, and 100 percent of the strikes the defense takes in a case are irrelevant.

If this lady were a white lady there would not be a reason—there would not be a question in this case. And that's the problem I have with all of this is that it's not racially neutral. There was a time when it was racially neutral and that was before *Batson*. Because I had to act that way when I was in Brunswick because it was a physical impossibility if you wanted to strike every black off a jury for you to do that. And we had an issue just—you had to reform your whole ideas and then *Batson* came out. And *Batson* now makes us look [at] whether people are black or not. Not whether they're black or white, but black or not. And I may be arguing for the Supreme Court in this particular case and not for this [C]ourt, which I probably am, but it just, it is uncalled for to require people to be reseated on a jury that I have a problem with in this case.

This lady sits on this jury and all of a sudden out comes the fact that back during the life of this man's mother and father they were alcoholics, they beat him, or they ignored him, or they—and she sits there and says well I remember that. Then I'm screwed, to use the vernacular. Not because I know that's what's going to happen because my experience is anyone who knows the family and has that much time involved in the community, those are

> the people that hang up a jury. That's my experience. And when I base it on my experience and then this Court says that's not a good enough reason, then I take issue with this entire whole process, both to this Court and to the Supreme Court of Georgia. It's improper and it's wrong.
>
> What I would suggest this Court to do now that I've had my say, and I'm sorry, I'm very angry right now.

Pet. App. 48a.

Having found that Johnson had discriminated in striking Alderman, the court reseated her and removed the last selected juror, a white man. D.16-28:56-60. Notwithstanding its finding that Johnson's proffered race-neutral reasons for striking Alderman directly contradicted the record and that the strike was discriminatory, the court did not reassess any of its prior determinations that Johnson's other strikes were legitimate.

The newly empaneled jury, consisting of ten white and two black jurors, and seven men and five women, convicted King of malice murder and other charges, and sentenced him to death. Pet. App. 3a, 8a.

B. Direct Appeal

The Georgia Supreme Court affirmed the conviction and sentence on appeal. As relevant here, the Georgia Supreme Court held that "the trial court did not abuse its discretion in finding that King failed to carry his

burden of persuasion as to the jurors challenged in this appeal." Pet. App. 191a.

In so holding, the court did not mention any of Johnson's criticisms of *Batson*, including his contention that it was improper for the courts to question his strikes, and his assertion that it was frequently impossible to strike all the black jurors even "if you wanted" to. Pet. App. 47a. The court also did not mention Johnson's pattern of strikes in which he struck 87.5% of the qualified black jurors while striking only 8.8% of the qualified white jurors. Nor did the court discuss the trial court's finding that Johnson had offered pretextual, indeed explicitly discriminatory, reasons for striking Alderman except to recount as a procedural matter that "[t]he trial court found the State's reason for striking Alderman to be insufficient." Pet. App. 191a.

The court then reviewed the reasons given by Johnson for striking six jurors (four black jurors, Burkett, Vann, McCall and Gillis and two white women, Dean and Ford) and held that the trial court did not abuse its discretion in upholding those strikes. This Court denied certiorari from the Georgia Supreme Court decision affirming the conviction and sentence. *King v. Georgia*, 536 U.S. 957 (2002).

C. Habeas Proceedings

Following the Georgia Supreme Court decision on direct appeal, King timely filed a petition for writ of habeas corpus in state court in October 2002. That petition was denied in April 2010. King then petitioned for the Georgia Supreme Court to grant him a

Certificate of Probable Cause to appeal, which was denied in November of 2011.

Following that denial, King filed a timely habeas petition in the Southern District of Georgia in June 2012. In January 2020, the district court denied relief on all claims, including the *Batson* claim, finding that King had not overcome deference under the AEDPA. The district court, however, granted a Certificate of Appealability, to address the *Batson* claim, and King timely appealed to the Eleventh Circuit. Pet. App. 170a-171a.

A divided panel of the Eleventh Circuit affirmed the district court's denial of habeas relief. Although the majority found that the "appeal presents a troubling record and a prosecutor who exercised one racially discriminatory strike and ranted against precedents of the Supreme Court of the United States," Pet. App. 20a-21a, it concluded that the state courts were not unreasonable in finding that King had not proven discriminatory intent and had not unreasonably applied *Batson* in overruling the *Batson* claim on appeal. Pet. App. 40a.

Judge Wilson dissented, arguing that the Georgia Supreme Court unreasonably applied *Batson* in failing to consider all relevant circumstances and that "[t]aking all that [evidence] together and even deferentially reviewing the Supreme Court of Georgia's opinion, no reasonable jurist could have reviewed this record—replete with evidence of racial discrimination—and not found a *Batson* violation." Pet. App. 50a-51a (Wilson, J., dissenting).

The Eleventh Circuit denied a panel rehearing and rehearing en banc. This timely petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

I. This Court's Review Is Warranted Because The Record Clearly Establishes That The State Violated *Batson*.

A. The Relevant Facts And Circumstances Demonstrate That The State Violated *Batson*.

The Georgia Supreme Court's decision upholding the trial court's rejection of all but one *Batson* challenge was "based on an unreasonable determination of facts in light of the evidence." 28 U.S.C. § 2254(d)(2). The "troubling record," Pet. App. 20a, from King's trial clearly establishes that the State violated *Batson* in striking jurors in addition to Alderman. Thus, the trial court's reseating of Alderman did not remedy the violation of King's and the jurors' equal protection rights.

As this Court has said time and again, courts must examine "all of the relevant facts and circumstances taken together" when reviewing an alleged *Batson* violation. *Flowers*, 139 S. Ct. at 2251. This Court consequently outlined several factors that bear on the question of discrimination, including: a prosecutor's prior discriminatory use of peremptory strikes, strike rate against black jurors, misrepresentations of the record, side-by-side comparisons of struck black jurors and non-struck white jurors, and any other relevant

circumstances that indicate racial bias. *Id.* at 2243. A similar inquiry applies for gender-based strikes under *J.E.B.*

All these factors, and more, are present here. This case thus presents "extraordinary facts" on par with those in *Flowers* and *Miller-El*, and other cases where this Court has found a clearly established *Batson* violation. *Id.* at 2251.

Demeanor. Among these "other relevant circumstances," *id.* at 2243, a prosecutor's demeanor is key. In considering the credibility of a prosecutor's proffered race-neutral reasons, "the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge." *Id.* at 2244 (quoting *Snyder*, 552 U.S. at 477). Demeanor may illuminate "whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Id.*

Normally, a reviewing court considering the cold record has limited insight into the prosecutor's demeanor when required to provide race-neutral reasons for strikes. But that is not the case here. Both the content and context of Johnson's rants evince his hostility to *Batson*, hostility to the notion he would need to justify strikes, hostility to judicial review of his actions, and hostility to the trial court's ruling that Alderman needed to be reseated on the jury because his strike against her was discriminatory.

As recounted above, when asked to explain his strikes, Johnson maintained that his "statistic[al]"

pattern of strikes should be irrelevant, and that "neither this Court nor the Supreme Court nor the defense should be involved in deciding whether or not the State has accurately or effectively performed its strikes." Pet. App. 45a. And after the trial court found he had given a pretextual basis for striking Alderman, Johnson doubled down on his criticisms. *After* the Court instructed an "angry" Johnson to "calm down," Johnson insisted that it was "improper for this Court to tell me that I cannot decide" who to strike. Pet. App. 53a. He went on to argue that *Batson* was unnecessary and intrusive because often "it was a physical impossibility if you wanted to strike every black off a jury for you to do that." Pet. App. 47a. He ended by stating that he "t[ook] issue with this entire whole process, both to this Court and the Supreme Court of Georgia. It's improper and it's wrong." Pet. App. 48a.

Johnson's tirades against *Batson* and judicial review of his use of peremptory challenges document his demeanor in a manner that has no precedent in this Court's cases. That demeanor is at least as revealing of Johnson's invidious intent as other factors this Court has found to be particularly compelling proof of the prosecutor's discriminatory animosity. In *Miller-El II*, for example, this Court observed that "the appearance of discrimination is confirmed" by evidence of a "general policy by the Dallas County District Attorney's Office to exclude black venire members from juries." 545 U.S 231, 253 (2005). This evidence involved a manual entitled Jury Selection in a Criminal Case, also known as the Sparling Manual, which included the "admittedly stereotypical" statement that "[m]inority races almost

always empathize with the Defendant." *Id.* at 306 (Thomas, J., dissenting).

If the Sparling Manual "confirmed" "the appearance of discrimination," then Johnson's tirades against *Batson* surely do the same. There was no clear evidence that Miller-El's trial prosecutors had ever read the Sparling Manual, *id.* at 306 (Thomas, J., dissenting). Here, Johnson's attack on *Batson*, revealing his own feelings about the subject, came in open court. Those rants are at minimum "highly probative" of his intent in exercising his strikes.

Other violations. In *Flowers*, this Court emphasized the relevance of the prosecutor's history of striking black jurors in the defendant's prior trials. Referring to the consistent pattern of strikes across the many trials, the Court stated that "[t]he State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers' sixth trial. We cannot ignore that history." *Flowers*, 139 S. Ct. at 2246.

Here, it is not an incriminating history that must be accounted for, but an actual *Batson* violation in the very trial being reviewed. After reviewing the voir dire recordings for only two of the excluded jurors, the trial court found that Johnson discriminated when he struck Alderman from King's jury, on the ground that Johnson's explanation that he struck her because she was from King's hometown and knew his family was pretextual—because Alderman had said that she did not

know King and hardly knew his family.[3] If a prosecutor's history of discriminatory strikes and suspicious strike patterns is strongly indicative of discriminatory intent in a subsequent trial, then surely an *actual Batson* violation in the trial itself—and especially one in which the prosecutor references explicitly race- and gender-based reasons for the strike—is even more material.

Pattern of strikes. Johnson's pattern of strikes is also at least on par with those this Court has found probative in other cases. As noted above, Johnson used all of his strikes to remove black jurors and white women, even though white men accounted for almost half the qualified venire. Indeed, Johnson struck 87.5% of the qualified black jurors while striking only 8.8% of the qualified white jurors. Similarly telling, he used 80% of his strikes on women although they made up less than half of the jury pool. But the intersection of the two is perhaps the most telling: Johnson struck *all* of the black women from the jury (5 out of 5 and one alternate) while striking *none* of the white men. Put another way, Johnson was ten times more likely to strike a black juror than a white one; he was four times more likely to strike a woman than a man; and he never struck a white man at all. And when called out for this pattern of strikes, he ranted against *Batson*'s recognition that strike rate statistics can illuminate discriminatory intent.

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[3] As noted, the trial court did not acknowledge that Johnson had in fact said that his "main reason" for striking Alderman was that she was "a black lady from Surrency," Pet. App. 41a—an explicitly race- and gender-based explanation.

"Happenstance is unlikely to produce this disparity." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) ("*Miller-El I*"). Johnson's 87.5% (7 of 8) strike rate for black jurors approximates the 91% (10 of 11) strike rate that this Court described as "remarkable" in *Miller-El II*. 545 U.S. at 240-41. And it exceeds the 83.3% strike rate (5 of 6) in *Flowers*.

While Johnson accepted one black juror, "that fact alone cannot insulate the State from a *Batson* challenge." *Flowers*, 139 S. Ct. at 2246. As the Court recounted in *Flowers*,

> In *Miller-El II* this Court skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt 'to obscure the otherwise consistent pattern of opposition to' seating black jurors. 545 U. S., at 250 …. The overall record of this case suggests that the same tactic may have been employed here.

Id. The "overall record" of this case, including Johnson's rant against *Batson* and his *Batson* violation regarding Alderman, likewise demonstrates that Johnson's decision to strike all but one of the black jurors indicates "opposition" to seating black jurors and women.

Pretextual Reasons. Johnson's proffered reasons for striking at least five jurors—Sarah McCall, Lillie Burkett, Gwen Gillis, Patricia McTier, and Jane Ford—were also plainly pretextual. Each of these women—four of whom are black—were similarly situated to white and/or male jurors that the prosecutor accepted into the jury pool.

McCall. Johnson told the trial court that he was on the fence about striking McCall based on her testimony "indicating that the death penalty was not her first choice," and only decided to strike her after her husband, who was also in the jury pool, said that he believed she was opposed to the death penalty. D.16-28:24. But McCall's views on the death penalty were no different than several white jurors to whom Johnson asked no follow-up questions and accepted onto the jury. And Johnson's statement that McCall's husband said she was opposed to the death penalty was false and flatly contradicted by the record.

In individual voir dire, McCall noted that the Bible "plainly states that I shall not kill," but said repeatedly that she believed the death penalty is an appropriate punishment, including during follow-up questioning from the prosecutor. D.17-1:44-45, 50-51. Indeed, she stated outright that she "really d[id] believe in some cases that the death penalty *should* be given." D.17-1:44 (emphasis added). This answer is strikingly similar to the one given by white juror Martha Vaughn, who told the trial court that "It may be hard [to vote for death], but I believe [I can], yes, sir." D.17-1:18. Despite this reservation, Johnson did not ask Vaughn any questions about her death penalty views and accepted her as a juror. D.17-1:20-22; D.14-21:59. "[T]he failure to ask [about a purported ground for the strike] undermines the persuasiveness of the claimed concern." *Miller-El II*, 545 U.S. at 250 n.8.

Johnson's statement about McCall's husband's testimony, moreover, was patently false. When questioned by Johnson, McCall's husband testified that

he and his wife had not discussed the death penalty and he did not know how she felt about it. D.16-20:73-74. Yet, Johnson maintained he only "made up his mind" to strike McCall when her husband was questioned and revealed her views opposing the death penalty. D.16-28:23-24. "[A] prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing" can constitute evidence supporting a claim of pretext. *Flowers*, 139 S. Ct. at 2243. "Without checking the record," Pet. App. 57a (Wilson, J., dissenting), as the court had done with Alderman, and which would have revealed Johnson's misrepresentation, the trial court wrongly found Johnson's strike of McCall to be non-discriminatory.

Burkett. Johnson's strike of Burkett, a black woman, notwithstanding her support of the death penalty, has similar indicia of discriminatory intent. The prosecutor claimed he struck Burkett, a full-time housewife, because she was a minister and he "do[es] not take people on juries who are ministers. They have a particular point of view about trying to forgive people and look to the best in them." The prosecutor also claimed that he struck Burkett because she was familiar with King's family. D. 16-28:27.

As an initial matter, the prosecutor asked no questions about Burkett's relationship to King's family and how that relationship might affect her; nor did he follow up his question about her role in the church with questions about what precisely she did for her church and how that might affect her role as a juror. "[U]nless [the prosecutor] had an ulterior reason for keeping [Burkett] off the jury, [one would] think he would have

proceeded differently . . . by asking further questions before getting to the point of exercising a strike." *Miller-El II*, 545 U.S. at 244.

And as with McCall, Johnson did not strike similarly situated white or male jurors. Johnson failed to strike white jurors who were familiar with King and/or his family and accepted several white and male jurors whose roles in their churches were comparable to Burkett's, including one who also described himself as a minister. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* at 241.

Gillis. The prosecutor struck another prospective black, female juror, Gwen Gillis, because she lived down the road from King's "auntie" and "would have lived in the neighborhood where both of the co-defendant's family lived." D. 16-28:27-28. But several white jurors the prosecutor accepted had closer relationships not just with King's family, but King himself. For example, one white juror went to school with King's sister, and her brother went to school with King. D.16-17:80. Another believed that he had taught both King and victim Karen Crosby in middle school. D.16-20:7-8. Another worked in the cafeteria at King's middle school and regularly fed him lunch. D.17-1:20. Yet another regularly interacted with King when he came into the video store where she worked. D.16-14:1. And these are just a subset of the white jurors who knew King.

Moreover, as with these and other white jurors who personally knew King, the prosecutor did not ask any of

them how their relationships with King or his family might affect their jury service—questions he did ask of Gillis, who said that she hardly knew King's "auntie" and that it would not impact her service that they were neighbors. D16-25:3. This disparate treatment relative to white jurors once again evinces the prosecutor's discriminatory intent.

McTier.[4] Johnson maintained that he struck Patricia McTier, a black woman, because her "brother-in-law," or "brother's uncle," or "husband's uncle" Wilma McTier had been prosecuted for an aggravated assault. D.16-28:24-25. But there is no evidence in the record to support this claim. McTier did not volunteer anything about her relative, and when Johnson asked her out of the blue about who he was, she said probably her husband's "second or third cousin." *See* D.17-1:68-69. Yet, during the *Batson* colloquy, the trial court proffered, wrongly, that McTier was "one of two . . . that

[4] The Eleventh Circuit concluded that King failed to exhaust his challenge to the McTier strike because he did not raise her strike as improper on direct appeal. Pet. App. 21a. This was error. In federal habeas proceedings, Respondent waived any argument that the claim is defaulted. King raised the *Batson* claim in his initial and amended petitions and the Warden's response in each indicated that the *Batson* claim was properly before the Court. *See, e.g.*, D. 29:43-44, D. 31:19. Regardless, even if this Court finds that King has not exhausted his claims as to McTier, the facts surrounding her strike are still part of the "totality of the relevant facts and circumstances" of the trial and thus relevant to the *Batson* claim. *See, e.g.*, *Snyder*, 552 U.S. at 478 (noting that, in assessing the strike of one black juror, "a court would be required to consider the strike of [another] for the bearing it might have upon" it).

almost volunteered this information [about a relative's criminal charges]." D.16-28:40.

Rather than correct the court's error, Johnson ran with it, suggesting McTier raised her hand when jurors were asked about whether they or their family had been crime victims and that counsel had then followed up on her affirmative response. D.16-28:40-42. (McTier had not, in fact, raised her hand when the question was asked. D.16-16:30-31.) And when defense counsel stated that his notes did not reflect that McTier had volunteered that information, the Court did not review the voir dire record, D. 16-28:42-43, in overruling the strike. Had the court done so, as it had done with Alderman, it would have seen Johnson had spun yet another falsehood about a qualified black female juror.

Ford. The prosecutor's strike of Jane Ford, a white female prospective juror, also smacked of pretext. The prosecutor claimed he struck her because she was a single mother with no family who had "no one to care for [her] children," and because, as a former substitute special education teacher, she was "the only person [in the jury pool] who indicated that she enjoyed that relationship," which might make her sympathetic to King's intellectual disability claim. D.16-28:25.

The first reason was untrue: Ford testified that her children—a 20-year-old son and a 17-year-old daughter—did not need care. D.16-19:14-15. And her work with people with intellectual disability was not unique to Ford: There were at least two seated male jurors who had personal relationships with people with intellectual disabilities, both of whom acknowledged that people with intellectual disabilities faced significant

challenges in society. D.16-15:16-17, 23; D.16-16:84. Ford made no such observation about such challenges and yet the prosecutor struck her but not similarly-situated male jurors. Johnson, moreover, did not ask Ford any questions about whether her former job as a substitute teacher might affect her service on the jury. Indeed, he did not ask her a single question at all.

B. The Georgia Supreme Court Made An Unreasonable Determination When It Found No *Batson* Violation.

Given the wealth of proof evincing Johnson's discriminatory intent, the Georgia Supreme Court made an unreasonable determination under § 2254(d)(2) when it found that the trial court did not clearly err in overruling King's *Batson* challenges. AEDPA's "standard is demanding but not insatiable," *Miller-El II*, 545 U.S. at 240, and it is satisfied here.

The lower courts' error "largely comes down to whether we look at the … strike[s] in isolation or instead look at the … strike[s] in the context of all the facts and circumstances." *Flowers*, 139 S. Ct. at 2250. This Court's "precedents require … the latter." *Id.* Here, the Georgia Supreme Court never even mentioned Johnson's extraordinary rants against *Batson* or his pattern of striking nearly 90% of the qualified black jurors. Nor did it discuss the import of Johnson's *Batson* violation concerning Alderman; the court only noted in the procedural section of its discussion of the *Batson* arguments that the prosecutor's reasons for striking her were "insufficient to rebut the prima facie showing of discrimination," and she had been reseated. Pet. App. 191a. Instead of reviewing Johnson's proffered reasons

for striking jurors against this backdrop, the Georgia Supreme Court looked at Johnson's rationales for striking the other jurors in isolation.

When "all the relevant facts and circumstances" are accounted for, it was unreasonable for the Georgia Supreme Court to conclude that none of the challenged strikes were the product of Johnson's discriminatory intent. "[W]hen considered with other evidence of discrimination, a series of factually inaccurate explanations for striking black prospective jurors can be telling. So it is here." *Flowers*, 139 S. Ct. at 2250.

The panel majority in the Eleventh Circuit defended the Georgia Supreme Court's failure to discuss these relevant facts and circumstances on the ground that no precedent requires "state courts to show their work in *Batson* decisions by mentioning every relevant circumstance." Pet. App. 22a. That is certainly true, but it misses the point. What matters is that, even assuming that the Georgia Supreme Court did silently take account of all the relevant facts and circumstances, it could not have reasonably determined that a Batson violation was not clearly established. *See, e.g.*, *Miller-El I*, 537 U.S. at 347 (noting that the state court's failure to mention relevant evidence of discrimination "does not diminish its significance").

The panel majority below also contended that even if Johnson engaged in "misguided and futile" "rant[s] against precedents of the Supreme Court of the United States," the rants were not relevant to the *Batson* inquiry because they were simply attacks on the "procedures that the Supreme Court of the United States has crafted to detect and remedy racial

discrimination" and not evidence of animus itself. Pet. App. 26a.

That is not a reasonable interpretation of Johnson's statements (nor of course is it a determination that the Georgia Supreme Court made given that that court did not even mention Johnson's statements). Johnson, who had just been adjudicated to have violated *Batson*, angrily challenged the authority of the judicial system to scrutinize his actions or to remedy those violations. When his remarks are combined with the trial court's finding that Johnson had in fact discriminated in his strike of this black female juror, and his striking of over 87% of the black jurors in the case, his statements "strongly suggested that [he] would continue to violate *Batson* if it weren't for the enforcement mechanism put in place by the courts." Pet. App. 53a (Wilson, J., dissenting).

The panel majority was also wrong to conclude that the Georgia Supreme Court reasonably determined that Johnson's rationales for striking the other jurors were sufficient. In justifying the McCall strike, the panel majority characterized the statements by the white jurors who expressed hesitation with the death penalty as "little more than that they would want to see all the evidence in a case before imposing the death penalty." Pet. App. 27a. But McCall expressed the same nuanced view. McCall said that she "really do[es] believe in some cases that the death penalty should be given," and that, while she "wouldn't want" to impose death, she would if "she found that the circumstances were sufficient." D.17-1:44-45, 50-51. That statement is nearly identical to, for example, Martha Vaughn's statement that it "may be

hard" to impose death but that she "believe[ed]" that she could. D.17-1:18. Moreover, Johnson asked several follow up questions of McCall, but *none* of the qualified white jurors who expressed similar views. And of course, a substantial part of Johnson's reason for striking McCall—the purported statements of her husband—was completely false. *See supra* at 22-23.

For Burkett, whom Johnson struck because she was a "minister," the Eleventh Circuit relied on the Georgia Supreme Court's conclusion that Johnson "consistently questioned male and female jurors of all races during voir dire about the roles they served in their churches" and "none of the other prospective jurors were ministers." Pet. App. 28a-29a. However, "there were many other potential jurors with leadership positions in the church" and Johnson "never asked any [of them] the details of and how long they had served in their respective church leadership positions." Pet. App. 61a (Wilson, J., dissenting). Indeed, Johnson did not reserve a strike for white male juror Thomas Lightsey, who was also a minister.[5] The real difference between Burkett

[5] The Eleventh Circuit concluded that Lightsey was not a relevant comparator because the prosecutor never had a chance to strike him because he was second to last in the venire. Pet. App. 29a. The only reason he was not reached, however, was because the defense did not exhaust its own peremptory strikes. When Johnson exercised all ten of his strikes to seat the jury, he could not have known that Lightsey would not be reached. Thus, while Johnson technically had no opportunity to "accept" Lightsey as a juror, the fact that he did not strike Lightsey indicates that Lightsey was in fact acceptable to him. As the Supreme Court explained in *Foster*, when analyzing an identical strike process where "the State went first" and had no further opportunity to strike jurors if the defense then accepted

and the prospective jurors who were also ministers or deacons was that she was a black woman, and they were white men.

The Eleventh Circuit's justification of the Gillis strike is similarly flawed. It concluded that the fact Gillis lived down the street from King's "auntie" was a closer relationship, and thus ran a higher risk of bias, than numerous white jurors who had direct relationships with King. Pet. App. 30a-31a. But this again ignores the fact that Johnson asked potential bias questions of Gillis, a black woman, but not of numerous white jurors who had direct connections to King. Perhaps, taken in isolation, it is not unreasonable to conclude that a neighbor of an "auntie" has a higher chance of bias than a former teacher—though it is hardly clear that is correct. But when combined with the fact that Johnson directed his questions of qualified jurors regarding the potential impact of a relationship to King *only* to black jurors, it is unreasonable to conclude that his reasoning for striking Gillis was not pretextual.

Finally, the Eleventh Circuit concluded that the Georgia courts were not unreasonable to accept the prosecutor's proffered reasons for striking Ford.[6] But the Eleventh Circuit, like the Georgia Supreme Court, ignored the fact that Johnson wholly mischaracterized the burden service would place on Ford: She stated outright that her 17- and 20-year-old children could look

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them, "the State had to 'pretty well select the ten specific people [it] intend[ed] to strike' in advance." 578 U.S. at 504.

[6] The Eleventh Circuit did not discuss the propriety of the McTier strike because it considered the claim waived. Pet. App. 21a.

after themselves. Indeed, the Georgia Supreme Court did not address this reason at all—instead creating its own reason for Ford's removal: that as a single mother, she would have been financially burdened by her jury service—a justification Johnson did not provide and which made her no different from any other working juror tasked with jury service.

The Eleventh Circuit also determined that the Georgia courts were not unreasonable to credit Johnson's explanation that Ford said she "enjoyed" working with intellectually disabled people. But her enjoyment could no more reasonably be considered evidence of bias than the multiple other jurors who had relationships with people with intellectual disabilities, many of them close, personal relationships and expressed that those individuals had a difficult time in life. But again, even if that were not the case, both the Georgia Supreme Court and Eleventh Circuit ignored the fact that Johnson did not ask a single question of Ford—showing he was totally disinterested and unconcerned with her qualifications.

When all of the relevant circumstances are actually taken into account, Johnson's reasons for striking jurors do not hold water. Johnson struck black jurors at a rate that dwarfed his strikes of their white counterparts. When challenged regarding the basis for his strikes, Johnson lashed out twice at the court, insisting that only he and not the judicial system, could determine whether his grounds for striking were valid. And Johnson had already been found to have engaged in illegal discrimination with respect to one juror in the case. Against that background, it was unreasonable for the

Georgia Supreme Court to conclude that the prosecutor's strikes of McCall, Burkett, Gillis, McTier, and Ford were not clearly motivated by animus. This Court should correct the Eleventh Circuit's error and grant habeas relief in this case.

II. At A Minimum, The Georgia Supreme Court Unreasonably Applied *Batson* By Failing To Consider The Relevant Facts and Circumstances.

Review is also warranted because at a minimum the Georgia Supreme Court unreasonably applied *Batson* and thus the case should be remanded to the Eleventh Circuit for a *de novo* assessment of the *Batson* claims. 28 U.S.C. § 2254(d)(1). As discussed above, *Batson* requires that a court consider the "totality of the relevant facts" when determining whether a *Batson* violation occurred. *Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986). Indeed, this Court has "made it clear that in considering a *Batson* objection, *or in* reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster v, Chatman*, 578 U.S. 488, 501 (2016) (emphasis added) (quoting *Snyder*, 552 at 478).

Here, the Georgia Supreme Court plainly did not consider all the relevant facts and circumstances. It made no mention of the prosecutor's rants against the *Batson* decision. Nor did it discuss the prosecutor's strike record, in which he used 100% of his strikes against black and/or female jurors and struck black jurors at a rate ten times greater than white jurors. And neither did the court account for the fact that the prosecutor had violated *Batson* in that very case. That

violation was mentioned only in passing in recounting the procedural history of the *Batson* dispute—and did not address the fact that that strike was discriminatory, instead merely noting that the trial court found the prosecutor's reason "insufficient to rebut the prima facie showing of discrimination." Pet. App. 191a.

Those omissions left the Georgia Supreme Court to assess the prosecutor's rationales for striking in isolation, without consideration of the relevant facts and circumstances. In essence, the state court adjudicated the *Batson* claim without taking account of the very kinds of extraordinary facts that this Court has held must be considered.

The Eleventh Circuit dismissed these omissions by observing that state courts are not required to "show their work" in order to survive habeas review, and that "[n]othing in the Supreme Court of Georgia's opinion suggests that it did not consider Johnson's rant or the obvious racial overtones in King's case." Pet. App. 22a, 23a. While a state court need not affirmatively discuss every conceivable relevant consideration to reasonably apply this Court's precedents, the omissions here were of a character and degree that they cannot be said to have been a reasonable application of *Batson*. Extraordinary facts warrant at least basic consideration in the form of some recognition of their import and application to the case. Where a court's reasoned *Batson* decision fails to address any "circumstances that bear upon the issue of racial animosity," *Snyder*, 552 U.S. at 478, while focusing solely on evidence that would defeat a claim of discrimination, it is fair to say that the court

has not considered the totality of relevant circumstances.

Here, at minimum, the Georgia Supreme Court failed to take account of key relevant factors, and thus unreasonably applied this Court's *Batson* case law. Vacatur and remand to allow the Eleventh Circuit to conduct a *de novo* review based on those factors is warranted.

III. Summary Reversal Would Be Appropriate In Light Of The Clarity of The Violation.

This is the rare instance where the Court may wish to consider a disposition of summary reversal. Summary reversal is appropriate "for cases where 'the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.'" *Pavan v. Smith*, 582 U.S. 563, 567-68 (2017) (Gorsuch, J., dissenting) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)). This case presents such a situation. The standard for applying *Batson* is settled, and the violation is patent in this case. While this Court has granted plenary review in other cases involving analogous *Batson* challenges, *e.g.*, *Miller-El-II*, *Flowers*, *Foster*, the facts of this "troubling" record are clear, and summary reversal would be a warranted outcome.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

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Appendix A

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-12804

WARREN KING,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 2:12-cv-00119-LGW

Before WILLIAM PRYOR, Chief Judge, and WILSON and GRANT, Circuit Judges.

WILLIAM PRYOR, Chief Judge:

Warren King, a Georgia prisoner sentenced to death, appeals the denial of his petition for a writ of habeas corpus. King contends that the Georgia courts unreasonably adjudicated his objection that the prosecutor exercised discriminatory strikes during jury selection, unreasonably concluded that King received effective assistance of counsel in the investigation and presentation of his mental-health and mitigation evidence, and unreasonably rejected his challenge to the procedure for establishing intellectual disability in capital cases. King also argues that the district court erred when it ruled that he forfeited any further claim based on his alleged intellectual disability. We affirm.

I. BACKGROUND

This background section contains four parts. First, we explain King's crime of conviction. Second, we describe his counsel's preparation for trial, the trial itself, and sentencing. Third, we describe the jury selection and objections. Fourth, we describe King's unsuccessful appeal and state and federal habeas corpus petitions.

A. King's Crime

A little after midnight on September 14, 1994, Karen Crosby closed the convenience store where she worked and walked to her car. But before she arrived there, Warren King and his cousin, Walter Smith, ordered her at gunpoint to surrender the keys to the store. *See King*

v. State, 539 S.E.2d 783, 789 (Ga. 2000). Smith entered the store to rob it and left King outside with Crosby and the gun. *Id.* Smith set off the store's alarm and ran from the store. *Id.* According to King's testimony at sentencing, "Smith yelled at him repeatedly to shoot Crosby," but he instead gave the gun back to Smith, who killed Crosby. *Id.* Smith testified at trial that he heard King shoot Crosby while he attempted to rob the store and saw her already falling to the ground when he turned to look. *Id.*

A jury convicted King of malice murder, armed robbery, burglary, aggravated assault, false imprisonment, and possession of a firearm during the commission of a crime. At trial, King attempted to paint Smith as the leader of the robbery and the shooter, and, in the alternative, he sought a verdict of "guilty but mentally retarded" to avoid a death sentence. *See* GA. CODE § 17-7-131(c)(3), (j) (1998). But the jury found him "guilty" and eligible for the death penalty. *See King*, 539 S.E.2d at 788 & n.1.

B. Pre-Trial Investigation and Presentation of Evidence Regarding Intellectual Disability

After King's arrest and indictment, the trial court appointed George Terry Jackson and George Hagood to represent King. Jackson, the lead counsel, had participated in over 50 capital cases and at least 15 capital trials. But Jackson provided ineffective assistance in one of those capital cases, tried three years before King's trial. *See Terry v. Jenkins*, 627 S.E.2d 7, 8, 10 (Ga. 2006). King's defense team met "at least once a week" during the investigation to coordinate. They acquired educational materials, attended seminars, and

met with representatives from the Southern Center for Human Rights and from the public defender's office to discuss best practices for intellectual-disability defenses.

Counsel investigated and prepared two defense theories. First, they sought to prove that Smith, not King, led the crime and shot Crosby. Second, they sought to prove that King was intellectually disabled and ineligible for the death penalty.

To support these two theories, they collected records pertinent to King's mental capacity, background, and disposition as a "follower." They interviewed King, who gave his account of events and biographical information but denied receiving psychiatric treatment or being abused by his parents. Counsel also interviewed King's sister, Juanita King, who later testified at sentencing. Juanita informed King's counsel about the King family's poverty and their lack of parental supervision and said that he "talk[ed] to himself" and "act[ed] strange," especially after his mother passed away. Counsel also secured records about King's background and mental health, including jail records, hospital files, youth detention center records, and jail psychiatric records. But counsel did not obtain King's file from the Georgia Department of Family and Children's Services, a file that King now asserts had further helpful information and the identity of other witnesses who knew him and his family.

In 1995, jail officials found King lying in the fetal position and in an unresponsive and psychotic state and sent him to a hospital for inpatient psychiatric treatment. After he was discharged, the trial court

granted the prosecutor's motion to send King to a state hospital for an evaluation of his competency to stand trial. One doctor diagnosed King with schizophrenia; another doctor suspected him of malingering and diagnosed him with an antisocial personality disorder; a third doctor found him to be competent to stand trial; and a fourth doctor summarized the results of the other hospital evaluations. The records from these evaluations were not presented at trial, nor did the doctors who attended to King testify or explain the breakdown to the jury. Jackson could not recall later whether he had called the doctors from the state hospital, but he testified that his earlier experiences with the hospital convinced him that the staff there were not helpful to capital defendants.

Two years later, in 1997, King saw Dr. C.E. Beck, a psychiatrist working with inmates at the jail, who evaluated King in several 15-minute sessions. Dr. Beck diagnosed King with schizophrenia and prescribed him corresponding medication. The records from this treatment were not used at trial or in the preparation of the defense's expert witnesses.

King's counsel hired forensic psychologist William Dickinson to evaluate King. Counsel provided Dr. Dickinson with the indictment, King's and Smith's statements, medical records, jail records, juvenile records, school records, and the state hospital records. Dr. Dickinson performed several tests and testified that King fell between being mildly intellectually disabled and the "borderline defective range of measured intellectual functioning." He testified that people with King's capacities, especially those who grow up without

proper parental supervision, are easily led. He also stated that King exhibited some symptoms of schizophrenia. He testified that King was taking medication for schizophrenia, heard voices, and had been huffing gas since he was a child. Dr. Dickinson concluded that King was not malingering.

Counsel also hired Dr. Ernest Miller, a psychiatrist. Counsel provided Dr. Miller with extensive records and Dr. Dickinson's report, and they prepared a letter describing King's history and the breakdown that he suffered in jail. Dr. Miller examined King and diagnosed him with "a borderline intellectual handicap and a personality disorder of mixed type" but did not reach a conclusion as to schizophrenia. He testified that King mentioned hallucinations but that these hallucinations were likely exaggerated.

At Dickinson's and Miller's recommendation, counsel then hired neurologist Dr. Ronald Schwartz. Dr. Schwartz evaluated King and reported that he had a normal neurological examination. But Dr. Schwartz struggled to assess King because he suspected that King was not being completely honest in response to questions.

On Dr. Schwartz's recommendation, counsel hired Dr. Shirley Koehler for a neuropsychological examination, but Dr. Koehler "turned out to be a disappointment," as King's counsel put it during later habeas proceedings. Counsel provided Dr. Koehler with records and medical reports. She administered a series of tests and a CT scan and interviewed King. The CT scan was normal. And based on the tests and interview, Dr. Koehler concluded that King was malingering. Dr.

Koehler's tests suggested that King was not intellectually disabled. She testified against King at trial in support of the State's theory that King was malingering.

At the close of evidence, King moved for a directed verdict on the question whether he was "mentally retarded." The trial court denied the motion. The jury found King guilty of murder and other charges related to the store robbery. *See King*, 539 S.E.2d at 788 & n.1.

At sentencing, King's counsel largely relied on mitigation evidence about his difficult upbringing. They reminded the jury that it could consider the guilt-stage evidence at sentencing. King testified that he participated in the robbery only out of fear and that Smith was the murderer. He also apologized to the victim's family.

Juanita King testified that she cared for King while their mother worked and their father was absent. She explained that their parents were alcoholics and that their father abused their mother. She also testified to the condition of the home King grew up in, which had no running water or telephone. Juanita testified that King had difficulty with basic tasks and needed help to dress himself and to make his bed. She asked the jury to have mercy.

Marjorie Cox, King's former foster mother, spoke positively about King and described him as a happy, respectful child who was simply "very slow." She testified that King never talked about his parents and never wanted to visit them. She testified that King was "definitely a follower," not a leader. Miriam Mitchum, a

social worker who assisted King after he was expelled from Cox's home, described King's house as a dilapidated wooden structure. In her visits to that house, she could not recall a time when King's parents were sober, and she witnessed domestic violence in the home on one of her visits. She corroborated Cox's testimony that King "did much better" in Cox's home than in his parents' and that he was more of a follower than a leader. King's counsel unsuccessfully tried to locate other mitigation witnesses.

King's counsel asked for a sentence of life imprisonment or life imprisonment without parole. Counsel highlighted King's remorse over his crime and his being forced to grow up in a "house of hate" with alcoholic parents. He also made a brief plea for mercy. The jury sentenced King to death for the murder charge.

C. Jury Selection and King's Batson *and* J.E.B. *Objections*

King objected to several of the prosecutor's strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). He argued that the prosecutor discriminated against the prospective jurors on the bases of race and sex. The trial court sustained one of King's objections but overruled the others.

After preliminary for-cause strikes of prospective jurors, the parties used peremptory strikes to select 12 jurors out of a pool of 42. Georgia law provided the State with 10 peremptory strikes and the defense with 20. With respect to the 12 potential alternate jurors, the State had three peremptory strikes, and the defense had

six. One by one, each potential juror stood. The State marked either "excuse" or "accept" on the strike sheet. If the State marked "accept," the defense could mark "excuse" or "accept." If both the State and the defense marked accept, then the individual became a member of the petit jury. Selection stopped when 12 jurors had been selected.

Of the 42 members of the main jury pool, there were eight black potential jurors: one black man and seven black women. The State used seven of its peremptory strikes to strike black prospective jurors from this pool, which left only one black potential juror. The State used its remaining three strikes against white women. The State used the only alternate-juror strike it exercised against a black woman. Although white men comprised 45% of the venire pool, the prosecutor did not use any peremptory challenges to remove a white man. The petit jury consisted of seven white men, four white women, and one black man. The three alternate jurors were two white women and one black man.

King challenged the State's strikes as discriminatory because it used seven of its strikes to remove seven of the eight black members of the jury pool, the remaining three strikes to remove women, and an alternate-juror strike against a black woman. The trial court found that the defense had made a prima facie case of unlawful discrimination and required the State to provide race- and sex-neutral reasons for its strikes. *See Batson*, 476 U.S. at 96–97; *J.E.B.*, 511 U.S. at 144–45. Johnson objected to the use of statistical information to establish a prima facie case of discrimination as unfair to the prosecution and, though acknowledging that binding

precedent dictated otherwise, "suggest[ed]" that a higher burden be placed on defendants. But he immediately proceeded to provide the required race- and sex-neutral justifications. We recount only those explanations relevant to this appeal.

The State used its second strike on Jacqueline Alderman, a black woman. The prosecutor, Assistant District Attorney John Johnson, stated that the "main reason . . . [for the strike was] that this lady is a black female, she is from [King's hometown of] Surrency, [and] she knows the defendant and his family." At one point during his justification of the Alderman strike, Johnson mentioned that the State was investigating her husband in an unrelated case, but he quickly backed off of that statement and said it was not the main reason for the strike; the main reason was that she was from Surrency and knew King's family. The trial court concluded that the strike violated *Batson*. It reasoned that Johnson's rationales were shifting and unreliable and that Alderman did not actually know King's family as Johnson had argued.

Johnson then delivered a "soliloquy," in the words of the district court. Johnson called it "improper" for the trial court to tell him that he could not exercise a strike based on where the juror was from. He said that "[i]f this lady were a white lady there . . . would not be a question in this case" and "that's the problem [he] ha[d] with all of this." Johnson criticized *Batson* as "not racially neutral." Before *Batson*, Johnson said, he "had to act . . . [in a racially neutral] way when [he] was in Brunswick because it was a physical impossibility if you wanted to strike every black off a jury for you to do

that." But in Johnson's view, "*Batson* now makes us look whether people are black or not" and prevents legitimate strikes, so it was "improper and . . . wrong." Although Johnson was "very angry," he suggested seating Alderman on the jury to avoid restarting the striking process. The trial court agreed and seated Alderman.

The trial court overruled the rest of King's objections, five of which King cites for the purposes of this appeal. Johnson used his sixth strike on Sarah McCall. He explained that "[s]he is a black female. She indicated that the death penalty was not her first choice. She had a lot of hesitancy about her." Johnson mistakenly stated that her husband, also in the jury pool, said that she opposed the death penalty. But her husband said that they had never discussed the topic. The trial court left the strike in place.

Johnson used his seventh strike on Patricia McTier. He explained that "[s]he is a black female. I struck her because we have prosecuted Wilma McTier for an aggravated assault." Johnson admitted there was some confusion about Patricia McTier's relation to Wilma McTier: Johnson initially thought Wilma was Patricia McTier's brother-in-law instead of her husband's uncle. The trial court overruled King's *Batson* objection.

Johnson used his eighth strike on Jane Ford. Johnson explained that "[s]he is a white female" with two problems as a potential juror. First, "she was a single mother, had no family here, [and] had children and no one to care for those children," and second, she said that she worked with special-education children and

enjoyed that work. The trial court overruled King's *J.E.B.* objection to Johnson's strike of Ford.

Johnson used his tenth strike on Lillie Burkett, a black woman. Johnson provided two justifications for striking her. First, he said that "[s]he is a minister" and he "do[es] not take people on juries who are ministers" because they emphasize forgiveness and tend to be overly lenient. Moreover, he said, she knew King's family, and King's family background would be relevant to the trial. The only other minister in the pool was Thomas Lightsey, a white minister whom the parties did not reach because he was the 41st in the lineup and the jury had been selected before he was called. The trial court allowed the Burkett strike.

Finally, Johnson used his alternate-juror strike on Gwen Gillis, a black woman. Gillis, he said, "lived very near" King's aunt and near Gary Andrews, who was Smith's uncle and was the owner of the house where the murder weapon was found. Johnson also asserted that he struck Gillis in order to reach and accept the more favorable prospective alternate juror who followed her. The trial court overruled King's *Batson* objection.

D. King's Appeal and Habeas Proceedings

King appealed to the Supreme Court of Georgia on several grounds, two of which are relevant here. He argued that Georgia's requirement that a defendant prove his intellectual disability beyond a reasonable doubt in order to avoid the death penalty violated the federal and state constitutions. And he argued that the trial court had allowed *Batson* and *J.E.B.* violations in his jury selection.

The Supreme Court of Georgia affirmed his convictions and sentence. It held that Georgia's procedure for arriving at a "guilty but mentally retarded" verdict was constitutional. *King*, 539 S.E.2d at 798 (citing *Palmer v. State*, 517 S.E.2d 502, 506 (Ga. 1999)); *see also Mosher v. State*, 491 S.E.2d 348, 353 (Ga. 1997). With respect to *Batson* and *J.E.B.*, the court acknowledged that King made his prima facie case of discrimination and that the trial court ordered that Alderman be seated on the jury. *King*, 539 S.E.2d at 795. It reviewed King's *Batson* challenges with respect to McCall, Ford, Burkett, and Gillis, but it did not discuss McTier because King did not challenge that strike on direct appeal. *Id.* at 795–96.

As to McCall, the Supreme Court of Georgia found that Johnson had misstated the record in the course of explaining his strike, but it held that the trial court did not abuse its discretion in overruling King's *Batson* objection. Johnson erroneously said that McCall's husband characterized her as opposed to the death penalty, but "this mistake does not show that the explanation was a mere pretext" for racial discrimination, the court ruled. *Id.* at 796.

As to Ford, the Supreme Court of Georgia affirmed the trial court's decision to allow the strike. Ford was a single mother, so jury service would be a "financial[] burden[]," the court reasoned. *Id.* And it also held it reasonable to credit Johnson's citation of Ford's positive relationship with intellectually disabled children. As the court explained, "[a]lthough seven other jurors, four of them women and one an African-American male, described some exposure to mentally retarded persons,"

Ford "was the only person who indicated that she enjoyed that relationship." *Id.*

The Supreme Court of Georgia also held that it was not an abuse of discretion to credit Johnson's explanation of the Burkett strike. Johnson "consistently questioned male and female jurors of all races during voir dire about the roles they served in their places of worship." *Id.* at 795. Moreover, the court found, "none of the other prospective jurors were ministers." *Id.* The record confirmed that Burkett "stated that she knew King's family, a factor that. . . the State was permitted to consider." *Id.*

Finally, the Supreme Court of Georgia affirmed the trial court's ruling that Johnson's strike of Gillis was not discriminatory. The court assumed that, even though Gillis was a prospective alternate juror, erroneously overruling an objection to striking her would not be harmless. *Id.* at 796. But the court concluded that the trial court did not abuse its discretion. *Id.* Gillis not only lived near someone involved in the case but also had "specific personal acquaintances that might have tended to make her sympathetic to the defense." *Id.* (citing *Congdon v. State*, 424 S.E.2d 630 (Ga. 1993)). The court "carefully noted King's argument that other jurors who knew him or members of his family were not stricken by the State" but did not conclude from this fact that Johnson's strike was discriminatory. *Id.* It found credible Johnson's argument that "other factors, which did not apply to those other jurors, contributed to" his decision to strike Gillis. *Id.* The Supreme Court of the United States denied certiorari. *King v. Georgia*, 536 U.S. 957 (2002).

Several years later, King filed a state petition for a writ of habeas corpus. King alleged eight grounds for relief. Only some are relevant to this appeal.

First, King argued that he was denied adequate assistance of counsel at trial and sentencing. *See Strickland v. Washington*, 466 U.S. 668 (1984). In support of this claim, King presented affidavits, reports, and testimony from his family members and psychological experts. Competent counsel, King argued, could have more persuasively argued that he was schizophrenic and not malingering and would have presented better mitigating evidence counseling against a death sentence. In particular, he argued that the records of Dr. Beck's examination of King, which included a firmer schizophrenia diagnosis, or the Central State Hospital records should have been provided to the experts used at trial or directly to the jury. One of the hospital doctors testified that he would have testified that King was not malingering, and another said she would have changed her malingering conclusion and testified in King's favor if she had been provided with more records. Dr. Dickinson testified that testimony from one of King's neighbors corroborated King's schizophrenia. And Dr. Miller testified that further records persuaded him that King "perhaps" was "pre-psychotic" when Dr. Miller evaluated him before trial. King also argued that counsel should have obtained records from the Department of Family and Children's Services that would have provided more background information on King's difficult family background and the behavior of his family. And competent counsel would have developed and presented evidence of his abuse as a

child. Finally, King argued that Mitchum and Cox should have testified at the guilt stage and not just at sentencing.

The superior court rejected King's *Strickland* arguments in a lengthy order. It reasoned that King had the benefit of experienced counsel and that Jackson's prior ineffectiveness in another case was irrelevant to whether he was ineffective in this one. The court found that there was no reliable information about King's being abused as a child or having a family history of mental illness that should have alerted counsel to a need to investigate those issues further. King's experts were given ample records about King to make their diagnoses; the additional materials he pointed to were merely cumulative. The court determined that his experts' testimony that they now had more confidence in a schizophrenia diagnosis did not mean that counsel could have elicited better testimony from them at trial by providing them with more of the same kind of records that they received. The court considered King's citation of Dr. Beck's schizophrenia diagnosis unpersuasive, as Beck's sessions with King lasted only 15 minutes and counsel's hired experts spent far more time with him. And the court ruled that it was a reasonable strategic decision to avoid relying on the hospital that negatively evaluated King and to decline to introduce childhood records that could have opened up King's character for attack by the prosecution. The court concluded that reserving Mitchum's and Cox's testimony for sentencing was a reasonable strategic decision because they were lay witnesses who were not qualified to opine on King's mental capacity.

The court ruled in the alternative that King had not established prejudice from his counsel's alleged errors. Instead, King "merely assert[ed] trial counsel should have presented more witnesses to testify at [his] trial and that those who did testify should have testified to something different." That argument, the court found, was not sufficient to establish ineffective assistance of counsel.

The state habeas court also rejected King's renewed challenge to the state law, GA. CODE § 17-7-131(c)(3) (1998), that required a defendant seeking the "guilty but mentally retarded" verdict to prove his intellectual disability beyond a reasonable doubt. It first ruled that it was bound by the Supreme Court of Georgia's decision on the issue. See King, 539 S.E.2d at 798. And it also concluded that the intervening decision by the Supreme Court of the United States in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that states may not execute intellectually disabled defendants, did not change the outcome of King's claim. In *Atkins*, the state court explained, the "[Supreme] Court specifically referenced Georgia's statute requiring proof of mental retardation beyond a reasonable doubt when it explicitly left to the states the task of developing their own procedures." *Id.* at 313–14, 317. The Supreme Court of Georgia and Supreme Court of the United States denied King's requests for further review. *King v. Humphrey*, 567 U.S. 907 (2012).

King filed a federal petition that alleged nine grounds for relief, and the district court rejected all nine. The district court ruled that King could not overcome the deference federal courts owe to state-court

adjudications under the Antiterrorism and Effective Death Penalty Act, *see* 28 U.S.C. § 2254, as to his *Batson* and *Strickland* claims or his argument that Georgia's burden of proof for an intellectual-disability verdict was unconstitutional. It also determined that King had forfeited his other arguments based on his intellectual disability, such as his argument that he was entitled to a directed verdict as to his intellectual disability. The district court denied King's motion to alter or amend its judgment but granted a certificate of appealability for King's *Batson* claims. We later expanded the certificate to include King's *Strickland* claims, his challenge to the intellectual-disability burden of proof, and the determination that King had forfeited his other intellectual-disability arguments.

II. STANDARDS OF REVIEW

We review the denial of a petition for a writ of habeas corpus *de novo*. *Jamerson v. Sec'y for Dep't of Corr.*, 410 F.3d 682, 687 (11th Cir. 2005). Our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254. Under that Act, "state-court decisions [must] be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citation omitted). If a state court adjudicated a claim on the merits, we cannot set aside that adjudication unless it was "either 'contrary to, or involved an unreasonable application of, clearly established federal law'" or was an unreasonable determination of the facts in the light of the evidence. *Raulerson v. Warden*, 928 F.3d 987, 995 (11th Cir. 2019) (alteration adopted) (quoting 28 U.S.C. § 2254(d)(1)); *see also* 28 U.S.C. § 2254(d)(2).

A state court unreasonably applies federal law "only if no fairminded jurist could agree with the state court's determination or conclusion." *Raulerson*, 928 F.3d at 995 (internal quotation marks and citation omitted). We evaluate the reasons offered by the court, but if we can justify those reasons on a basis the state court did not explicate, the state-court decision must still stand. *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1036 (11th Cir. 2022) (en banc). If the last state court to address an issue did not explain its decision, we "look through" that decision and base our decision on the last reasoned decision provided by a state court. *Wilson v. Sellers*, 138 S. Ct. 1188, 1193–94 (2018). Factual determinations are "presumed to be correct," and that presumption can be overcome only by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). If a state court unreasonably applied federal law or unreasonably determined the facts in a case, we review the underlying claim *de novo*. *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1250 (11th Cir. 2013).

III. DISCUSSION

We take each of King's four claims in turn. First, we explain that the Georgia courts reasonably adjudicated King's *Batson* and *J.E.B.* claims. Second, we explain that the Georgia courts reasonably rejected King's Strickland claims. Third, we explain that the Georgia courts reasonably rejected King's challenge to Georgia's burden of proof for a guilty-but-intellectually-disabled verdict. And fourth, we affirm the ruling that King forfeited his other intellectual-disability arguments.

A. King's Batson *Claims*

The Supreme Court has established a three-step process for evaluating objections that a prosecutor exercised his peremptory strikes on the basis of race or sex. *See J.E.B.*, 511 U.S. at 144–45. At the first step, "the defendant must establish a prima facie case by producing evidence sufficient to support the inference that the prosecutor exercised peremptory challenges on the basis of race [or sex]." *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1199 (11th Cir. 2013). At the second step, "the burden shifts to the State to come forward with a neutral explanation" for its strikes. *Id.* (quoting *Batson*, 476 U.S. at 97). At the third step, the trial court must find, as a matter of fact, whether the defendant has established purposeful discrimination. *Id.* Typically, "the decisive question will be whether counsel's race- [or sex-]neutral explanation for [the] peremptory challenge should be believed." *Id.* (citation omitted).

The trial court must "consider all relevant circumstances" at the third step, and the conviction cannot stand if even one of the strikes was discriminatory. *Id.* at 1199–1200. When a court considers a *Batson* claim in an appeal or a state habeas proceeding, the "state court's written opinion is not required to mention every relevant fact or argument" for its merits determination to receive deference on review by a federal court. *Id.* at 1223. Instead, the petitioner must prove that the state court failed to consider that argument or fact. *See id.* at 1222–23.

King has not met the high standard required to set aside the Georgia courts' adjudications of his objections. Although this appeal presents a troubling record and a

prosecutor who exercised one racially discriminatory strike and ranted against precedents of the Supreme Court of the United States, King's argument that the Supreme Court of Georgia failed to consider all relevant circumstances fails. Moreover, the district court correctly found that King failed to exhaust his challenge to the McTier strike when he declined to raise those arguments on direct appeal. And a fairminded jurist could agree with the decision to reject King's challenges with respect to prospective jurors McCall, Ford, Burkett, and Gillis. There is no clear and convincing evidence to overcome the presumption that the factual determinations regarding those prospective jurors were correct.

1. King Has Not Established that the Georgia Courts Failed to Consider All Relevant Circumstances.

King first argues that we should review the Georgia courts' decisions *de novo* because they unreasonably applied *Batson*. *See Adkins*, 710 F.3d at 1250. He cites our decision in *McGahee v. Alabama Department of Corrections*, 560 F.3d 1252 (11th Cir. 2009), where we explained that the "failure to consider 'all relevant circumstances' as required by *Batson* [is] an unreasonable application of law," *id.* at 1262. King contends that the Supreme Court of Georgia failed to consider the discriminatory Alderman strike, the statistical evidence of discrimination by Johnson, Johnson's speech about *Batson*, and the racial overtones of a trial of a black defendant for the murder of a white woman. To support his conclusion that the Supreme Court of Georgia did not consider these circumstances, King points out that the court did not explicitly discuss

them and argues that consideration of those circumstances would lead any reasonable court to accept his claims. We agree that these circumstances are relevant to the *Batson* inquiry, but King has not established that the Supreme Court of Georgia failed to consider them.

Neither *McGahee* nor any other of our precedents requires state courts to show their work in *Batson* decisions by mentioning every relevant circumstance. *See Lee*, 726 F.3d at 1219 ("The state court's unreasonable application of *Batson* [in *McGahee*] was not the failure to mention, but the failure to even implicitly consider [relevant circumstances.]"). A petitioner must do more than prove that the state court failed to "mention" evidence in order to prove that the state court failed to consider that evidence. *Id.* at 1223. This "no-grading-papers, anti-flyspecking rule" stems from "'the presumption that state courts know and follow the law' and [section 2254(d)'s] 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1350 (11th Cir. 2019) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)); *see also Pye*, 50 F.4th at 1036–38; *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1311–12 (11th Cir. 2016) ("[W]e will not presume that a state court misapplied federal law, and absent indication to the contrary will assume that state courts do understand clearly established Federal law as determined by the Supreme Court of the United States."(internal quotation marks and citation omitted)).

King has also not established that "[t]he court clearly limited its review" to some reasons and "did not implicitly review" the circumstances King proffers. *Cf. McGahee*, 560 F.3d at 1264. The Supreme Court of Georgia acknowledged the Alderman strike and that King had established a prima facie case of discrimination based on the pattern of strikes. *See King*, 539 S.E.2d at 795. Nothing in the Supreme Court of Georgia's opinion suggests that it did not consider Johnson's rant or the obvious racial overtones in King's case, so we must presume that the court did consider the circumstances King cites.

The dissent's conclusion that the Supreme Court of Georgia did not reasonably apply the *Batson* framework relies on a misunderstanding of how we evaluate state-court *Batson* decisions. According to the dissent, the same circumstances on which King relies, taken together, required that the Supreme Court of Georgia find at least one, perhaps several, *Batson* violations. But the dissent does not specify which adjudication was unreasonable and instead evaluates King's individual *Batson* claims *de novo*. Dissenting Op. at 8–15; *cf.* 28 U.S.C. § 2254(d)(1). Moreover, as the dissent at times acknowledges, we do not review the reasonableness of state-court *Batson* decisions in gross based on a judgment that the prosecutor must have engaged in some discriminatory strike somewhere; instead, "*Batson* violations are evaluated juror-by-juror." Dissenting Op. at 11. Neither *McGahee* nor *Adkins*, on which the dissent relies, dictate otherwise.

The dissent argues that the Alderman strike means that this appeal is similar to *McGahee*, in which this

Court held that the Alabama Court of Criminal Appeals was not entitled to deference because it "fail[ed] . . . to consider the State's articulation of an explicitly racial reason for striking" a juror, 560 F.3d at 1263–64. *See* Dissenting Op. at 10 ("[T]he trial court's finding that Alderman was struck for a racially discriminatory reason represents the sort of explicit racial discrimination evidence that was dispositive in *McGahee*.") But this case is nothing like *McGahee*. There, the Alabama court's opinion, by its own terms, clearly limited its analysis to exclude the explicitly racial rationale for a strike. *See McGahee*, 560 F.3d at 1264 (quoting from the Alabama court's opinion, which "read the record as providing two reasons," and not the racially explicit reason, for the strike). The Supreme Court of Georgia, in contrast, never said that it considered only the facts that it explicitly mentioned in its *Batson* analysis. And in *McGahee*, the state appellate court's error was ignoring crucial evidence about a strike that the trial court *upheld* at *Batson* step three. *McGahee*, 560 F.3d at 1264. The error was not failing to infer another *Batson* violation from a discriminatory strike that was *remedied*, as the Alderman strike was.

Adkins likewise does not support the dissent's argument. Like *McGahee*, the *Adkins* decision held only that the application of *Batson* to a specific prospective juror was unreasonable. *See Adkins*, 710 F.3d at 1251–52. And in *Lee*, we cautioned that "a significant part of the . . . rationale and analysis in *Adkins* [was] inconsistent with Supreme Court and our Circuit precedent." *Lee*, 726 F.3d at 1220–21. The holding was acceptable only because in *Atkins* "[e]ven if we were to

indulge every maximum factual inference from th[e] evidentiary record and credit every reason given, it would not be good enough to make the no-discrimination ruling reasonable." *Id.* at 1223.

The dissent purports to review whether the Supreme Court of Georgia properly applied the *Batson* framework, but in substance it only disagrees with the factual determination about Johnson's credibility. Contrary to the dissent's framing, we must review the reasonableness of the state courts' bottom-line *factual* finding about Johnson's reasons for his strikes under the standards Congress has prescribed in section 2254(d)(2). *Contra* Dissenting Op. at 9–10 (applying section 2254(d)(1) instead of section 2254(d)(2)). We address that argument in the following section, keeping in mind of course, the background facts about Johnson's other strikes. *Cf. Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (explaining that a prosecutor's past discriminatory behavior is relevant to evaluating the credibility of race-neutral explanations for strikes).

2. The Supreme Court of Georgia Reasonably Adjudicated the Facts.

We now turn to King's arguments that the state courts "accepted demonstrably false reasons as legitimate grounds for the removal of qualified black jurors and white female jurors" and so made unreasonable determinations of fact. *See* 28 U.S.C. § 2254(d)(2). King faces a high hurdle at this stage. We cannot review King's arguments *de novo* unless he has provided "clear and convincing evidence" that the state court was wrong to credit Johnson's non-discriminatory justifications for his strikes. *Id.* § 2254(e)(1); *see also*

Rice v. Collins, 546 U.S. 333, 338–39 (2006) (explaining that a state court's decision at *Batson* step three is a presumptively correct factual determination).

As *Batson* requires, we evaluate the state-court decision in the light of all the relevant circumstances, including the four that we have already discussed, but we emphasize that two of them, the Alderman strike and Johnson's rants, cannot bear the weight that the dissent places on them, especially when the trial court was witness to both. The trial court found the Alderman strike discriminatory but found the other strikes lawful, and we should hesitate to second-guess its distinction among the strikes. Likewise, unlike the dissent, we do not treat Johnson's rants as decisive evidence that Johnson would discriminate against black jurors if *Batson* did not stop him. *See* Dissenting Op. at 12–13. We must draw inferences in favor of the state court's adjudication, and if we do, the rants, while inappropriate, do not prove that Johnson wanted to discriminate based on race. Johnson complained that statistics should be used evenhandedly to show discrimination by both the prosecution and the defense. And he complained that *Batson* required him to focus on a juror's race to address a potential *Batson* challenge, though before *Batson* he could ignore race. These—to be clear, misplaced and futile—arguments attack the procedures that the Supreme Court of the United States has crafted to detect and remedy racial discrimination in jury selection, but they do not necessarily support an inference that the prosecutor wanted to be free to racially discriminate in jury selection.

We do not reach the merits of overruling King's objection to the McTier strike. The district court ruled that King did not exhaust his state remedies for his objection to the McTier strike, although it incorrectly labeled King's failure to exhaust as "procedural default." *See* 28 U.S.C. § 2254(b)(1)(A). That ruling is not properly before us. The district court did not include it in its certificate of appealability, and although we granted King's request to expand that certificate, our expansion did not reach the McTier strike because King did not mention it in his request. King now asks in his brief for a *second* expansion of the certificate of appealability, but he does not argue that this appeal is an "extraordinary" situation that warrants expanding the certificate of appealability after briefing. *See Hodges v. Att'y Gen., State of Fla.*, 506 F.3d 1337, 1341 (11th Cir. 2007). Nonetheless, the facts of the McTier strike are relevant background when assessing the reasonableness of the Georgia courts' other *Batson* adjudications.

The Georgia courts reasonably rejected King's objection regarding McCall. King points to white jurors who had reservations about the death penalty but were not rejected. But the prospective jurors he identifies said little more than that they would want to see all the evidence in a case before imposing the death penalty. It was reasonable for the Supreme Court of Georgia to conclude that, although Johnson was mistaken about an aspect of the record regarding McCall's husband's voir dire, he was not inventing a pretext for a racial motive. *King*, 539 S.E.2d at 796; *cf. Lee*, 726 F.3d at 1226 (holding it reasonable to conclude that "an honestly mistaken but

race-neutral reason for striking [a potential juror] did not violate *Batson*").

We also hold that the state courts reasonably addressed the Ford strike. The Supreme Court of Georgia credited Johnson's explanation that Ford's status as a single mother would make jury service a burden on her and that Ford was the only person who said she *enjoyed* working with intellectually disabled people. *King*, 539 S.E.2d at 796. King has provided no clear and convincing evidence that the Georgia courts were wrong to accept this explanation. King is correct that at the *Batson* hearing Johnson focused on the burdens of jury service on Ford's childcare, not the financial concerns that the Supreme Court of Georgia identified. But that difference does not make the Georgia court's decision unreasonable. It was reasonable for the court to infer that the financial burdens of jury service would affect a single parent disproportionally. And Johnson's primary rationale for the strike, in any event, was that Ford enjoyed her work with special-needs children. This rationale, which the Supreme Court of Georgia also considered, *id.*, is all the more plausible because King mostly compared Ford to *other women* who also worked with intellectually disabled people but did not say that they enjoyed that work. The Supreme Court of Georgia was reasonable to reject the argument that Ford's sex was the reason for the strike.

Johnson said that he struck Burkett based on his strict rule against having ministers on juries and because she knew King's family. The Supreme Court of Georgia affirmed the trial court's acceptance of these

rationales and explained that Johnson "consistently questioned male and female jurors of all races during voir dire about the roles they served in their places of worship" and that "none of the other prospective jurors were ministers." *Id.* at 795. The Supreme Court of Georgia also stated that although her connections were not uniquely close as compared to other prospective jurors, Burkett had connections to King's family. *Id.*

The Georgia courts reasonably applied *Batson*. King does not provide any evidence that the family connections played no role in the strike; he can only prove what the Georgia court acknowledged: that Burkett's connections were not unique enough, standing alone, to explain striking her. *Id.* But the family connections were not the only explanation for the strike.

King argues that Johnson did not save a strike to use against Thomas Lightsey, a white member of the venire pool who was also a minister. So, according to King, Lightsey must have been acceptable to Johnson. The Supreme Court of Georgia, he argues, was wrong to say that "none of the other prospective jurors were ministers," and we should conclude that Johnson's no-minister rule was pretextual. *Id.* We disagree.

As the district court correctly explained, Lightsey was the 41st juror in the venire list, the second to last, so it was highly unlikely that he would be reached before 12 jurors were selected. And he was not reached. If we give the Supreme Court of Georgia the benefit of the doubt, as we must, *Meders*, 911 F.3d at 1350, it might not have considered Lightsey a "prospective" juror because of how unlikely it was that he would be reached and selected. But even if the Supreme Court of Georgia

misread the record, that error would not entitle King to relief. As we explained recently, we review not "the particular *justifications* that the state court provided" but the broader "*reasons*" for the decision. Pye, 50 F.4th at 1036. The district court was correct to supply an alternative *justification*—Lightsey's place in the list of potential jurors—for the state court's *reason* for the decision: that it was not an abuse of discretion for the trial court to accept Johnson's explanation of the strike. We cannot rely on a possible misstatement by the Supreme Court of Georgia to set aside its decision when King has otherwise failed to prove that the no-minister rule was pretextual.

Finally, we affirm the ruling as to prospective alternate juror Gillis. Gillis, Johnson explained, was neighbor to both King's aunt and Smith's uncle. King argues that Gillis's residence could not have been the real reason for her strike because Johnson did not strike white jurors who also had connections to King and his family. He suggests that a prosecutor concerned about family or personal connections would have struck other prospective jurors who, respectively, ran a video store at which King was a customer, conducted a medical procedure on King, went to school with King's sister but had no contact with King, worked at the lunchroom at King's middle school, and possibly taught King and his sister in middle school. We consider it reasonable to distinguish between, on the one hand, living close to King's close family member and a close family member of his co-defendant and, on the other hand, any of the acquaintances the other prospective jurors had. *Cf. King*, 539 S.E.2d at 796. And even if drawing those

distinctions was not sound trial strategy on Johnson's part, it was reasonable for the Georgia courts to have credited them as Johnson's sincere, if misguided, reason for striking Gillis. We lack authority to set aside that decision.

King's *Batson* challenges fail. "[H]abeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (internal quotation marks and citation omitted). The Georgia courts reasonably applied *Batson* when they rejected King's remaining objections after sustaining one of them, which was corrected by seating the improperly stricken juror. King has not proved that the Georgia courts generated an "extreme malfunction" in his case.

B. The Georgia State Court Reasonably Rejected King's Strickland *Claims.*

To prevail on a claim of ineffective assistance of counsel, King must prove that his counsel's performance was objectively deficient and that this deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. King argued that his trial counsel inadequately investigated and presented evidence of his mental illness at trial and mitigating childhood-adversity evidence at sentencing. The state court rejected these arguments on the merits, so we must defer to the state court's decision—here, that of the Georgia superior court because it gave the last reasoned decision on the merits, *see Wilson*, 138 S. Ct. at 1193–94—unless it was "not only erroneous, but objectively unreasonable," *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *see* 28 U.S.C. § 2254(d). And

Supreme Court precedents "require that the federal court use a doubly deferential standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (internal quotation marks and citation omitted).

The superior court applied the correct legal standards and reasonably found that King's counsel conducted an extensive investigation to prepare for trial and adequately presented a case for intellectual disability, mental illness, and mitigating circumstances. King's criticisms of his counsel's trial decisions do not establish that "no fairminded jurist," *Raulerson*, 928 F.3d at 995 (internal quotation marks and citation omitted), could find that King's counsel performed at "an objective standard of reasonableness," *see Strickland*, 466 U.S. at 688. Because we defer to the state court's reasonable determination that King's counsel performed competently, we need not address whether better assistance of counsel would have changed the outcome of King's trial. *See Carey v. Dep't of Corr.*, 57 F.4th 985, 989 (11th Cir. 2023) ("Because a petitioner must prove both deficient performance and prejudice, a court need not address one element if it determines that the petitioner has failed to prove the other.").

1. The State Court Applied the Correct Legal Standards.

King's criticisms of the Georgia court's understanding of the governing law fail. To begin, it was not unreasonable for the superior court to count Jackson's extensive capital-defense experience in his favor. When we evaluate counsel's performance, the presumption in favor of trial counsel "is even stronger"

for "an experienced trial counsel." *See Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464, 478 (11th Cir. 2012) (citation omitted). Of course, "even the very best lawyer could have a bad day," *id.* (citation omitted), so the superior court could not afford Jackson's experience conclusive weight. But it did not do so; it took that experience into consideration as the background for its evaluation. That deference to counsel's experience, required of federal courts in our Circuit, was not an unreasonable application of *Strickland*.

King also argues that the court should have considered that Johnson was found ineffective under *Strickland* in another case. Failure to do so, he argues, unreasonably disregarded *Strickland*'s command that courts consider "all the circumstances" when evaluating deficient performance. 466 U.S. at 688. And it is not fair, King argues, to consider an attorney's experience as a factor weighing against a finding of ineffective assistance while refusing to consider past failures as a factor weighing in favor of such a finding. We disagree.

The state court could have reasonably read *Strickland*'s reference to "all the circumstances" in the light of the requirement that reasonableness must be evaluated "on the facts of the particular case." *Id.* at 690. One past instance of ineffective assistance does little to establish whether King's rights were violated, so it was not an unreasonable application of *Strickland* for the state court not to consider it. Nor does Supreme Court precedent foreclose taking extensive past experience into account while ignoring a single failure on counsel's part.

Finally, King argues that "the fact that [his] counsel conducted some mitigation [investigation] cannot, on its own, preclude a finding of ineffectiveness." By "focusing on what trial counsel presented," he says, "the state habeas court's analysis was also unreasonable" because it ignored what counsel "*could have* presented to King's sentencing jury." Again, King's argument is misplaced.

The state court did not apply the wrong standard. Counsel's investigation before trial "need not be exhaustive" but only "adequate." *Raulerson*, 928 F.3d at 997. So "[t]o determine whether trial counsel should have done something more in their investigation, we first look at what the lawyers did in fact." *Id.* (alteration adopted) (internal quotation marks and citation omitted). The superior court correctly considered King's criticisms of his counsel's performance in the light of counsel's actions and not based on King's suggestions of ideal trial strategy.

2. The State Court's Conclusions Were Reasonable.

King challenges the superior court's treatment of his *Strickland* claims regarding both deficient performance and prejudice. He argues that the state court "unreasonably discounted" his evidence of mental illness. King contends that counsel could have presented a stronger case for schizophrenia at trial and rebutted charges of malingering. And competent counsel could have presented a more sympathetic mitigation case by highlighting other aspects of King's difficult childhood. He argues that the state court unreasonably determined that he was not prejudiced at sentencing by the lack of mitigating evidence. And he argues that the state court unreasonably found that he was not prejudiced by the

presentation of certain witnesses only at the sentencing phase and not at the guilt stage. Because King's arguments about deficient performance fail, we need not reach his arguments about prejudice.

Fairminded jurists could agree with the conclusion that King's counsel performed in a constitutionally adequate manner. *See Richter*, 562 U.S. at 102. As to King's family and background, counsel conducted a lengthy background investigation, and the superior court reasonably discounted King's argument that counsel should have presented evidence of childhood abuse or familial mental illness. Although counsel may have been vaguely aware of mental illness in King's family, counsel reasonably focused their limited resources on King's mental health, especially because neither King nor his sister revealed any parental abuse in their interviews, nor any specific family history of mental illness. "An attorney does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him." *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999). King also takes issue with the amount of detail the jury was provided regarding King's childhood, but the superior court reasonably concluded that the jury was informed that King had an extremely difficult background and that King had not proved that his counsel performed inadequately by "not presenting evidence that could be potentially aggravating . . . [or] cumulative." *See Rhode v. Hall*, 582 F.3d 1273, 1287 (11th Cir. 2009).

It was also reasonable to reject King's argument that counsel should have employed additional expert

witnesses or supplied the expert witnesses with more records. Jackson could reasonably decline to rely on hospital records and doctors from a source that he had found unreliable in the past and that had evaluated King negatively. And King does not explain why the records that he presented to the experts in relation to his state habeas petition are fundamentally different from what his experts reviewed in preparation for trial, so he cannot prove that counsel's performance was the reason for the weaker schizophrenia case he made at trial.

King had to prove that "from counsel's perspective at the time," a competent attorney would have crafted a better case for schizophrenia. *See Strickland*, 466 U.S. at 689. At most, King brought evidence that some doctors were more confident of King's schizophrenia in *2012*, but the possibility of proving schizophrenia in 2012 does not establish that counsel unreasonably failed to provide better evidence of schizophrenia at trial in 1998. The superior court reasonably found that King failed to satisfy his *Strickland* burden and instead merely "later secured a more favorable opinion of an expert than the opinion" his trial counsel presented. *See McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008). And although King now argues that counsel should have called Dr. Beck, who was more confident about King's schizophrenia during the relevant, pre-trial period, the superior court correctly rejected that argument. King's counsel was reasonably concerned that Dr. Beck, who had spent so little time with King compared to his other experts, was vulnerable to credibility attacks by the prosecution. And regardless, counsel is not ineffective

whenever more witnesses could have been called. *See Rhode*, 582 F.3d at 1285.

Contrary to King's arguments, the superior court did not reach its conclusion based on an unreasonable categorical rule against affidavit evidence. The court weighed those affidavits against the live testimony of King's counsel that they could not have secured further mitigation or mental-illness witnesses and chose to give trial counsel's testimony greater weight. That decision was reasonable, especially in the light of the often-recognized tendency of petitioners to submit self-serving affidavits that do not accurately reflect the circumstances at the time of trial. *See Waters v. Thomas*, 46 F.3d 1506, 1513–14 (11th Cir. 1995) (en banc) ("It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence . . . . But the existence of such affidavits . . . usually proves little of significance.").

King falls far short of establishing that a reasonable court would have been compelled to find that his counsel conducted a "profoundly incomplete investigation" that deprived him of his Sixth Amendment rights. *Cf. Ferrell v. Hall*, 640 F.3d 1199, 1227 (11th Cir. 2011). As the district court observed, King does little more in his federal habeas petition than reiterate the arguments that he made before the state court and contend that the state court should have accepted them. And those arguments, as the superior court concluded, do little more than suggest "that other witnesses might have been available or that other testimony might have been elicited from those who testified." (Quoting *Williams*,

185 F.3d at 1236). These arguments are "not . . . sufficient ground[s] to prove ineffectiveness of counsel." *Williams*, 185 F.3d at 1236 (citation omitted).

We need not reach King's argument about the rejection of his contention that trial counsel should have called Cox and Mitchum at the guilt phase of trial and not only at sentencing. The superior court found that the decision "was a reasonable strategic decision made after a thorough investigation." The state court addressed prejudice in the alternative. But King addresses only the prejudice ruling and makes no argument about deficient performance. Because King does not argue that the performance ruling was unreasonable, we lack power to disturb the state court's adjudication of this issue. *See Shinn v. Kayer*, 141 S. Ct. 517, 524 (2020) ("Federal courts may not disturb the judgments of state courts unless *each* ground supporting the state court decision is examined and found to be unreasonable." (internal quotation marks and citation omitted)).

C. The Georgia Courts Reasonably Rejected King's Challenge to Georgia's "Guilty but Mentally Retarded" Statute.

King contends that it is unconstitutional for Georgia to require a defendant to prove his intellectual disability beyond a reasonable doubt in order to secure the immunity from the death penalty that the "guilty but mentally retarded" verdict provides. *See* GA. CODE § 17-7-131(c)(3), (j) (1988). King argues that he is entitled to *de novo* review of this claim because, he contends, it was not adjudicated on the merits by the state courts. *Cf.* 28 U.S.C. § 2254(d) (requiring deference only to state court adjudications on the merits). The Supreme Court of

Georgia rejected King's direct appeal before the Supreme Court of the United States decided in *Atkins v. Virginia* that the Eighth Amendment prohibits the execution of intellectually disabled defendants. *See Atkins*, 536 U.S. at 321. But the superior court denied King's petition for a writ of habeas corpus ten years after *Atkins* was decided. And although the superior court addressed King's challenge under Georgia law as an issue of *res judicata*, it also rejected King's federal-law *Atkins* argument on the merits because the *Atkins* Court implicitly approved Georgia's statute by citing it favorably. *See id.* at 313–14, 317.

King admits, as he must, that his challenge fails if the state court adjudicated his claim on the merits. We have already held that a state-court rejection of an *Atkins* challenge to the Georgia statute is reasonable. *See Raulerson*, 928 F.3d at 1001–03; *Hill v. Humphrey*, 662 F.3d 1335, 1347 (11th Cir. 2011) (en banc). *Atkins* "did not address the burden of proof to prove intellectual disability, much less clearly establish that a state may not require a defendant to prove his intellectual disability beyond a reasonable doubt." *Raulerson*, 928 F.3d at 1001.

D. King Forfeited Any Direct Challenge to His Conviction Based on His Intellectual Disability.

The district court correctly rejected King's other arguments based on his intellectual disability. The district court found that those arguments "were not briefed, and thus King cannot satisfy his burden." King challenges this forfeiture ruling. He argues that he presented the basic facts supporting his claim in his petition for federal relief, if not in his actual brief, and

contends that he did not have to brief his claim to preserve it. King is mistaken: ordinary forfeiture rules, under which a party forfeits an argument by failing to adequately brief it, apply to habeas proceedings in the district court. *See Butts v. GDCP Warden*, 850 F.3d 1201, 1208 (11th Cir. 2017). So King had to make more than the skeletal argument in his petition to preserve these issues. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). The district court had the discretion to reject King's arguments without reaching the merits. *See United States v. Campbell*, 26 F.4th 860, 872–73 (11th Cir. 2022) (en banc).

IV. CONCLUSION

We **AFFIRM** the denial of King's petition for a writ of habeas corpus.

WILSON, Circuit Judge, dissenting:

The majority correctly notes that a state court need not "discuss every fact or argument to be a reasonable application of *Batson* under § 2254(d)." *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1214 (11th Cir. 2013). But *Lee* also notes that when there is truly an "abundan[ce of] racial discrimination evidence" in the record, we may find the state court's *Batson* decision was indeed unreasonable. *Id.* This is one of those cases.

There were eight black potential jurors in King's venire. Assistant District Attorney (ADA) John Johnson struck seven of them. When King argued that ADA Johnson's strikes reflected racial bias in violation of the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), ADA Johnson launched into two lengthy soliloquies suggesting his open disdain and outright contempt for *Batson*. King made a prima facie case of racial bias as to each of ADA Johnson's strikes. The trial court found that ADA Johnson acted improperly when he struck Jacqueline Alderman because she was: "a black female from Surrency." This is clear evidence of racial discrimination. According to *Lee*, we can and should find that the Supreme Court of Georgia unreasonably applied *Batson*.

In my view, because King overcomes the Antiterrorism and Effective Death Penalty Act (AEDPA) deference, he is entitled to de novo review of his claim. *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1250 (11th Cir. 2013). Consequently, I would find

that he has proven a *Batson* violation, and thus King is entitled to habeas relief.[1]

First, I will highlight some relevant facts from jury selection. Second, I will address the relevant circumstances that the Supreme Court of Georgia failed to consider in conjunction with one another and thus unreasonably applied *Batson*. Lastly, because I believe King overcomes AEDPA deference, I will review the record de novo.

I.

Jury selection began with a pool of 168 potential jurors from which fifteen would be selected: twelve as members of the petit jury and three as alternate jurors. Ultimately, fifty-four potential jurors were found qualified to serve, and the remaining potential jurors were excused.

Before the peremptory strikes, the racial makeup of the venire included thirty-four white potential jurors and eight black potential jurors.[2] Of the forty-two potential jurors, seven jurors raised their hand indicating they knew King, knew who King was, knew of King, or knew of any member of King's family. Four of those jurors were white—Rebecca Griffin, Martha Vaughn, James Edwards, and Connie Arnold. Three of

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[1] Because I would reverse on King's *Batson* claim, I would not decide King's remaining claims. *See Conner v. Hall*, 645 F.3d 1277, 1294 (11th Cir. 2011).

[2] In the alternate pool, there were ten white jurors and two black jurors. Based on the striking sheet, ADA Johnson accepted seven white jurors and one black juror. ADA Johnson did not excuse any white jurors but struck one black juror, Gwen Gillis.

those jurors were black—Jacqueline Alderman, Lillie Burkett, and Maurice Vann.

Of the forty-two potential jurors, twenty-four raised their hand showing they held various positions of leadership in their church. Sixteen of those jurors were white, including James Orvin and Aubrey Lynch, who were deacons, and Thomas Lightsey, a minister. Eight of those jurors were black, including Jaqueline Alderman, a deaconess, and Lillie Burkett, a minister.

In total, ADA Johnson used only three of his ten strikes for white potential jurors and the remaining seven strikes for black potential jurors. He did not strike a single white potential juror who raised their hand to indicate that they knew of King and his family, but he struck all three black jurors who did the same. ADA Johnson accepted fourteen white jurors who held leadership positions in their church. The two remaining white jurors were not reached during the selection process. ADA Johnson struck seven black jurors who held a position of leadership within their church. Following the exercise of the peremptory strikes, the petit jury consisted of eleven white jurors and one black juror.

In asserting a *Batson* challenge, King argued that ADA Johnson's use of peremptory strikes supported a prima facie case of discrimination because ADA Johnson struck seven of eight black qualified jurors. King brought juror-specific *Batson* challenges to each of the seven black qualified jurors.

At *Batson* Step One, the trial judge found that King established a prima facie case of discrimination for ADA

Johnson's exercise of his peremptory strikes. ADA Johnson responded:

> First, let me say this, Your Honor: that I object to the Court finding that, and I object to the Court's finding based on the fact that it's simply on statistical analysis that the State struck eight blacks and three whites, and that has no rational basis on whether a prima facie case of discrimination has been established in this particular case. I state that for the record. I know the Court's ruling, and I know the issue that has been decided by the Supreme Court of Georgia. I do state for the record that the Supreme Court of Georgia of course does not know how I strike, and that it is improper for them to involve themselves in this unless defense counsel can point to a specific reason why some particular juror was qualified to serve and that I struck them. I have always objected to the use of statistics to establish the fact that a prima facie case has been laid. If I wanted to point to statistics, I could show and point out that defense counsel struck only white people. That's all he ever struck. He had the option, the ability, to strike two in the main panel, in the alternates, to strike two people who were black, and he did not do so, one of which, Mr. Carzell Rooks[,] sat there and said over and over and over and

> over and over again that if a certain set of facts were established he'd have to vote for the death penalty, which, I would assume, be the reason, if I raised the issue, he would have struck a lot of other people, and I might be able to show that his strikes therefore would be pretextual. And I point that out merely to support the fact that statistics can never make a prima facie showing. The Supreme Court of Georgia has said that it does, and I just take exception to that, and I do so for the record.
>
> We would suggest, Your Honor, that there is a better approach to this matter, and that is that, if a side wants to raise the Batson issue, that that side that raises it should first have to show that their strikes were absolutely non-racially motivated or sexually- or gender-motivated, and only if they did that would it shift to the opposite side to make their strikes known to the Court. I think that becomes very unwieldy, and that's why neither this Court nor the Supreme Court nor the defense should be involved in deciding whether or not the State has accurately or effectively performed its strikes.

After ADA Johnson expressed his views about *Batson*, he proffered nondiscriminatory, race-neutral reasons for exercising each of his peremptory strikes under *Batson* Step Two. The trial judge found that the

strike of Jaqueline Alderman was improper but the remaining strikes, including Sarah McCall and Lillie Burkett, were proper.

As to the strike of Alderman, the record demonstrates that the trial court found ADA Johnson's reasons to be dubious, and that Alderman did not really know King's family and she did not know King. The trial judge further found that ADA Johnson engaged in purposeful discrimination under *Batson* Step Three.

Upon the trial judge's finding that ADA Johnson's strike of Alderman was discriminatory, the following exchange occurred:

> Mr. Johnson: [W]hy should we do that? Why not just—I mean I don't have—first of all, I have a problem that if I say, find out that somebody knows the family and I can't—excuse me—give me a moment.
>
> The Court: Calm down. Get yourself, your thoughts proper and then tell me what you want to tell me.

After taking a moment, ADA Johnson again started on his views about having to comply with *Batson*:

> I find it improper for this Court to tell me that I cannot decide, when I listen to what somebody says and look at them, that they know the family, that they've been living in this community for 35 years, that that's not a justifiable strike. If that's the case, then 90 percent of the strikes that I've

taken, and 100 percent of the strikes the defense takes in a case are irrelevant.

If this lady were a white lady there would not be a reason—there would not be a question in this case. And that's the problem I have with all of this is that it's not racially neutral. There was a time when it was racially neutral and that was before *Batson*. Because I had to act that way when I was in Brunswick because it was a physical impossibility if you wanted to strike every black off a jury for you to do that. And we had an issue just—*you had to reform your whole ideas and then Batson came out*. And *Batson* now makes us look [at] whether people are black or not. Not whether they're black or white, but black or not. And I may be arguing for the Supreme Court in this particular case and not for this [C]ourt, which I probably am, but it just, it is uncalled for to require people to be reseated on a jury that I have a problem with in this case.

This lady sits on this jury and all of a sudden out comes the fact that back during the life of this man's mother and father they were alcoholics, they beat him, or they ignored him, or they—and she sits there and says well I remember that. Then I'm screwed, to use the vernacular. Not because I know that's what's going to happen because my experience is anyone

> who knows the family and has that much time involved in the community, those are the people that hang up a jury. That's my experience. And when I base it on my experience and then this Court says that's not a good enough reason, then I take issue with this entire whole process, both to this Court and to the Supreme Court of Georgia. It's improper and it's wrong.
>
> What I would suggest this Court to do now that I've had my say, and I'm sorry, I'm very angry right now.

(emphasis added). Next, ADA Johnson stated that he would not change his strikes, but the parties agreed to remove the selected twelfth juror and reseat Alderman to remedy ADA Johnson's discriminatory strike.

The jury convicted King of malice murder. *King v. State*, 539 S.E.2d 783, 788–89 (Ga. 2000). The next day, the trial judge accepted the jury's recommendation to sentence King to death. *Id.* at 788 n.1. On November 30, 2000, the Supreme Court of Georgia denied King's *Batson* claims on direct appeal and affirmed King's convictions and sentence. *Id.* at 795–96, 802.

When addressing King's *Batson* claims, the Supreme Court of Georgia noted that the trial judge found King met the prima facie showing of discrimination but then found that "the trial court did not abuse its discretion in finding that King failed to carry his burden of persuasion as to the jurors challenged in this appeal." *Id.* at 795. Despite King arguing that the trial court failed to consider relevant

circumstances, the Supreme Court of Georgia neglected to discuss how those relevant circumstances did or did not support King's *Batson* claim. Next, the Supreme Court of Georgia pointed to the race-neutral reasons provided by ADA Johnson related to each challenged juror to support its holding. *Id.* at 795–96.

II.

King argues that the Supreme Court of Georgia unreasonably applied *Batson* by failing to consider: (1) ADA Johnson's discriminatory strike against Alderman—the reseated black juror; (2) ADA Johnson's statements, comments, and actions during the *Batson* hearing; and (3) a racially disproportionate striking pattern.

In *Batson*, the Supreme Court ruled that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." 476 U.S. at 89. In turn, to protect the core guarantee of equal protection, *Batson* established a three-step inquiry to evaluate the prosecutor's use of peremptory strikes.[3] *Id.* at 96–98.

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[3] The Supreme Court summarized the three steps of *Batson*'s inquiry in *Miller-El v. Cockrell*:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

537 U.S. 322, 328–29 (2003) (*Miller-El I*) (internal citations omitted).

King's appeal focuses predominately on *Batson* Step Three. This step requires the trial judge to determine whether the defendant has established purposeful discrimination, "the decisive question will be whether [the prosecutor's] race-neutral explanation . . . should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion).

Since "the concern is that a state court failed to follow *Batson*'s three steps," my analysis is under AEDPA § 2254(d)(1). *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1256 (11th Cir. 2009). An "unreasonable application" results where there are "explicit racial statements and strong evidence of discriminatory purpose," such that no reasonable and fairminded jurist could have considered "all relevant circumstances" and still found no *Batson* violation. *See Lee*, 726 F.3d at 1213.

Applying this framework, I would hold that the Supreme Court of Georgia's decision was an unreasonable application of *Batson* and its progeny because the Supreme Court of Georgia failed to consider all relevant circumstances. *See Batson*, 476 U.S. at 96. Particularly, the trial court's finding that Alderman was struck for a racially discriminatory reason represents the sort of explicit racial discrimination evidence that was dispositive in *McGahee*. And further, in my view, the trial transcript showing ADA Johnson's clear hostility to *Batson* and the statistical evidence of racial bias is "strong evidence" of a discriminatory purpose infecting ADA Johnson's whole scheme of striking. *Adkins*, 710 F.3d at 1253. Taking all that together and even deferentially reviewing the Supreme Court of Georgia's opinion, no reasonable jurist could have

reviewed this record—replete with evidence of racial discrimination—and not found a *Batson* violation. Accordingly, King has carried his burden under AEDPA.

First, the Supreme Court tells us that *Batson* challengers may present evidence of a "relevant history of [the prosecutor's] peremptory strikes in past cases." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). Relevant history of prior peremptory strikes based on race bears on the question of present discrimination. *See id.* Yet even in the absence of a history of unconstitutional strikes, any discriminatory strikes within the same case are highly relevant evidence bearing on discriminatory intent and provide strong evidence that the prosecutor may have struck other jurors for discriminatory reasons as well. *See id.* And we have discussed how the articulation of an "explicitly racial reason for striking" a juror factors into the relevant circumstances analysis at *Batson* Step Three. *McGahee*, 560 F.3d at 1264.

King points to ADA Johnson's strike of Alderman. The trial court concluded that ADA Johnson's proffered reason for striking Alderman was not credible and ruled that this strike was unconstitutional under *Batson*. I am unpersuaded by the State's contention, advanced at oral argument, that the trial court did not find Alderman was struck for an explicitly racial reason. Once the prima facie case of discrimination has been made at *Batson* Step One, the State has only one obligation if it in-fact acted for a nondiscriminatory purpose: proffer its truthful reason for striking the juror. *See Miller-El I*, 537 U.S. at 328. If the trial court concludes, as it did for

Alderman, that the State is being untruthful, then that is a finding that the State acted for a discriminatory reason. *See McGahee*, 560 F.3d at 1264.

Because *Batson* violations are evaluated juror-by-juror, I do not suggest that one *Batson* violation in a case necessarily renders all other jury strikes *Batson* violations. But just as a prosecutor's discriminatory strikes in other cases can suggest they acted discriminatorily in this case, a finding of discriminatory intent within the same trial is also probative. *See Miller-El I*, 537 U.S. at 346. It is very strong evidence and must be considered when evaluating challenges to the other strikes at *Batson* Step Three. As a result, ADA Johnson's improper strike of Alderman within the same case is a relevant circumstance to be considered.

Second, "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez*, 500 U.S. at 365. But the Supreme Court noted that "[t]here will seldom be much evidence bearing on that issue." *Id.* So "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Id.*

There is ample evidence here of ADA Johnson's demeanor. As excerpted above, ADA Johnson's two separate soliloquies show his hostility and disdain for having to comply with *Batson*. After the trial court found a prima facie case of discrimination, ADA Johnson's prolonged speech ended with the fact that he believed the courts should not "be involved in deciding whether or not the State has accurately or effectively performed its strikes." Then, after the trial court found

ADA Johnson's strike of Alderman was improper because it amounted to purposeful discrimination, ADA Johnson again launched into a speech about why he finds it improper for the court to tell him who he can and cannot strike from the jury because "*Batson* now makes us look [at] whether people are black or not."

ADA Johnson's rants demonstrated, at a minimum, that he was reluctant to abide by the requirements of *Batson*. Further, those speeches strongly suggested that ADA Johnson would continue to violate *Batson* if it weren't for the enforcement mechanisms put in place by the courts. ADA Johnson's demeanor, as demonstrated by his lengthy speeches, is highly probative evidence when considering all the relevant circumstances at *Batson* Step Three.

Lastly, as *Batson* explained: "total or seriously disproportionate exclusion of [blacks] from jury venires is itself such an unequal application of the law . . . as to show intentional discrimination." 476 U.S. at 93 (internal quotations and citation omitted). Further, "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Id.* at 97; *see also Miller-El I*, 537 U.S. at 342 (finding that "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason" where the prosecution struck 91% of the eligible black venire members with ten of their fourteen peremptory strikes). "[I]n the statistical analysis courts must consider the statistics in the context of other factors in a case, such as: the racial composition of the venire from which the jurors were struck, the racial composition of the ultimate jury, the

substance of the voir dire answers of jurors struck by the State, and any other evidence in the record." *Lee*, 726 F.3d at 1224.

The racial composition of King's jury pool (not including the alternates) consisted of eight black jurors and thirty-four white jurors. During the peremptory striking process, ADA Johnson used seven of the State's ten peremptory strikes to remove seven qualified black jurors while striking only three qualified white jurors. Statistically, when looking at the composition of the jury pool (again without alternates), 19% of the jurors were black and 81% were white. But after ADA Johnson's strikes, 8% of the jurors were black (i.e., only one black juror) and 92% were white (i.e., eleven white jurors). ADA Johnson struck 87.5% of the qualified black jurors while striking only 8.8% of the qualified white jurors. As a result, the percentage of black jurors in the pool decreased by 57% while the number of white jurors increased.

This pattern constitutes strong evidence that qualified black jurors were removed far more often than qualified white jurors. *See McGahee*, 560 F.3d at 1265. Moreover, the statistical information about ADA Johnson's race-based striking also provides strong evidence of the disproportionate exclusion of black jurors against which *Batson* cautioned. This statistical evidence is highly relevant when conducting the *Batson* Step Three analysis.

These three relevant factors play off and reinforce each other and provide strong evidence of racial discrimination. Even allowing for AEDPA deference afforded to the Supreme Court of Georgia, a reasonable

and fair-minded jurist could not have considered all of this evidence under the totality of the circumstances and concluded that *Batson* was not violated. *See Lee*, 726 F.3d at 1213 (explaining that this court's decisions in *McGahee* and *Adkins* held that a state court's decision denying *Batson* relief was an unreasonable application of *Batson* due to "the explicit racial statements and strong evidence of discriminatory purpose in each case"). Consider, ADA Johnson was found to have purposefully discriminated in striking Alderman. That finding on its own does not categorically invalidate the rest of his strikes, but then ADA Johnson went on not one, but two unprompted rants critiquing *Batson*. Those rants were not mere complaints or objections about a trial judge's ruling ADA Johnson didn't like but instead rants demonstrating his hostility to *Batson* as a rule of law that he had to follow. His rants make the explicit finding of racial discrimination in striking Alderman all the more relevant to each and every *Batson* analysis for the other stricken jurors. Further, the statistics showing that ADA Johnson struck 87.5% of all qualified black jurors provides strong confirmatory evidence of Johnson's racially discriminatory intent. Since this record consists of an "abundan[ce of] racial discrimination evidence," I would find the state court's *Batson* decision was indeed unreasonable. *Lee*, 726 F.3d at 1214.

The Supreme Court of Georgia is required, under *Batson*, to consider "all relevant circumstances." *See id.* at 1212. Based on this record and considering all the evidence that was before that court (including the pretextual nature for excluding other black jurors), no

reasonable and fairminded jurist could have considered all of this evidence and found that *Batson* was not violated as to the other black jurors stricken from King's jury pool. Thus, I would conclude that the Supreme Court of Georgia unreasonably applied clearly established federal law.

III.

Because I would have determined that the Supreme Court of Georgia's decision is an unreasonable application of federal law under AEDPA, I would review the record de novo to determine whether ADA Johnson violated *Batson* during jury selection. I consider the following: (1) ADA Johnson's striking of potential black jurors because of their familiarity with King or his family; (2) the relevant circumstances discussed above; and (3) the lack of support for ADA Johnson's proffered neutral reasons for striking black jurors. Lastly, I review ADA Johnson's reasons for striking Lillie Burkett, finding that strike was motivated by discriminatory intent.

First, of the potential jurors who knew of King or his family, only black potential jurors were struck. ADA Johnson asked the familiarity-related questions to panels of jurors in a broad manner, asking whether they knew "of " King or his family. Three white potential jurors—Griffin, Vaughn, and Edwards—discussed their familiarity with King or his family, but ADA Johnson did not strike any of them. ADA Johnson only struck a juror for familiarity with King when the potential juror was both familiar *and* black. No white jurors who were familiar with King were struck, but all black jurors who were familiar with King were struck. *See Miller–El I*,

537 U.S. at 344–45 (discussing the evidence of a prosecutor's disparate questioning and investigation of black and white potential jurors in the case).

Next, as I discussed above, the record contains several relevant circumstances that weigh against ADA Johnson's proffered race-neutral reasons for exercising a challenged peremptory strike. *See id.* at 342 (considering the statistical evidence about a prosecutor's strikes of black potential jurors versus white potential jurors); *Hernandez*, 500 U.S. at 365 (explaining that "the best evidence often will be the demeanor of the attorney who exercises the challenge"); *Flowers*, 139 S. Ct. at 2243 (finding that the relevant history of the State's peremptory strikes supports a *Batson* claim).

Furthermore, ADA Johnson's proffered neutral reasons for striking black jurors are not supported by the record. Take, for instance, Sarah McCall. ADA Johnson said he struck Sarah McCall because "[s]he indicated that the death penalty was not her first choice. She had a lot of hesitancy about her. I did not make up my mind about [Sarah] McCall until after we voir-dired her husband, who was Richard McCall and in the next panel."

But Richard McCall testified that he did not know his wife's position on the death penalty. Without checking the record, the trial judge found no discrimination in the strike of Sarah McCall. But the strike of Sarah McCall is another instance where ADA Johnson misstated the record to support his strike of a black potential juror. *See Snyder v. Louisiana*, 552 U.S. 472, 482–83 (2008) (considering when the record

contradicts a prosecutor's explanations for striking jurors).

A de novo review of the record also reveals the pretextual nature of ADA Johnson's explanations for striking Lillie Burkett.[4] Burkett explained that she lived in Surrency, and that she knew both the families of King and Crosby, but that she did not personally know King. Burkett also served as a minister in her church.

During the *Batson* hearing, ADA Johnson explained:

> I said that this lady fell into the same category like Ms. Alderman does, that she knew the family and knew the defendant in this case, and I did not feel that, because of that relationship and the fact that she's a minister and my feeling about ministers and what their position in the community is, that that would make her a fair juror, and that's why she was struck. Two reasons, not just one.

First, ADA Johnson claimed that he struck Burkett, in part, because she knew King's family. Although Burkett stated that she knew King's family, ADA Johnson did not ask Burkett a single question about her familiarity with King's family nor about how that relationship might impact her ability to serve as a juror. Indeed, ADA Johnson's failure to engage in any

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[4] I would also conclude that the record reveals that ADA Johnson impermissibly struck alternate juror Gwen Gillis in violation of *Batson*. Simply put, the race-neutral reasons proffered by ADA Johnson, as well as his further explanations of the Gillis strike, are unfounded.

meaningful voir dire examination on a subject about which he allegedly was concerned is evidence suggesting that the proffered race-neutral explanation is pretext for discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005) (*Miller-El II*) (finding it "difficult to credit" a prosecutor's reasons for striking a juror because they "reek[ed] of afterthought" and had "pretextual timing"). Burkett's testimony, elicited by the trial judge, indicated that she knew King's family, but she specifically stated that she did not know King "personally."

But later, when further defending his strike of Burkett in light of the record and the outcome of the *Batson* hearing, ADA Johnson made a peculiar comparison between Burkett and Alderman as excerpted above. The comparison appears to me that ADA Johnson sought to use familiarity with King or his family as a way to cover up his striking of black jurors.

Furthermore, many white potential jurors were familiar with King, his family, or both, but these ties only warranted a peremptory strike when the potential juror was black. For instance,[5] white qualified juror Rebecca Griffin, who was accepted by both ADA Johnson and King's counsel and served on the jury, went to school with one of King's sisters, and King went to school with Griffin's brother. Like Burkett, Griffin agreed with the

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[5] Other examples include two qualified white jurors who were accepted by ADA Johnson but struck by King: Martha Vaughn explained that she knew King "when he was coming through" middle school because she worked in his middle school's lunchroom and had contact with King during the lunch period, and James Edwards believed he had possibly taught King during middle school.

prosecutor that it would be fair to say that she had no personal contact with King himself, but the record does show familiarity with King's family—far more than what was elicited from Burkett by the trial judge or ADA Johnson during individual voir dire.

Second, ADA Johnson claimed that he struck Burkett, in part, because she was a minister. But the record shows that there was another minister among the potential jurors: Thomas Lightsey. During the parties' preemptory strike process, Lightsey was the forty-first juror out of forty-two who were qualified to sit on the petit jury. In exercising their strikes, the parties considered thirty-nine jurors. In exercising all of his ten strikes to seat the jury, ADA Johnson—despite his adamant refusal to accept ministers—left it to chance whether Lightsey would be reached.

Thus, while ADA Johnson technically had no opportunity to "accept" Lightsey as a juror, his exhaustion of State peremptory challenges during jury selection suggests Lightsey was likely acceptable to him. This is reinforced by the fact that ADA Johnson did not ask Lightsey, a minister at Big Creek Primitive Baptist Church (a fact elicited by King's counsel, not ADA Johnson), about the leadership position that he held in a church. In fact, during the general voir dire, when ADA Johnson asked Lightsey's panel whether anyone held a position in the church, Lightsey raised his hand. The record shows that ADA Johnson asked Lightsey only one follow-up question, whether he had any opinion about which way the case should go, a fact reflecting that Lightsey's position in the church was inconsequential to ADA Johnson.

ADA Johnson's (and the majority's) argument that Lightsey does not matter because he was not reached during striking is neither here nor there. The point is, ADA Johnson offered as his race-neutral reason for striking Burkett that he adamantly refused to seat ministers. The fact that ADA Johnson appeared indifferent to a white minister on the jury undercuts that race-neutral reason.

Moreover, there were many other potential jurors with leadership positions in the church. Specifically, two white jurors who were deacons sat on the jury: James Orvin and Aubrey Lynch. Orvin was "the deacon and chairman of [his] deacon board." Lynch, who served as the jury foreperson, testified that he was a deacon at Satilla Baptist Church. ADA Johnson never asked any other potential juror the details of and how long they had served in their respective church leadership positions. Thus, the contention that ADA Johnson cared about Burkett's position as a minister is diminished. The record reflects that ADA Johnson was aware of white individuals who participated in their respective church communities, and yet ADA Johnson did not appear to have an issue with them serving on the jury.

When "[c]onsidering all of the circumstantial evidence that 'bear[s] upon the issue of racial animosity,' [I am] left with the firm conviction that [ADA Johnson's strike of Burkett was] 'motivated in substantial part by discriminatory intent.'" *Foster v. Chatman*, 578 U.S. 488, 512–13 (2016) (quoting *Snyder*, 552 U.S. at 478, 485).

ADA Johnson used seven out of his ten peremptory strikes to exclude seven out of the eight black jurors from the jury venire. A side-by-side comparison of

individual reasons for striking black jurors with white jurors who were not struck reveals a substantial likelihood of race-based considerations in the exercise of those strikes. Thus, the overwhelming evidence in this record compels a finding that ADA Johnson's use of its peremptory strikes to dismiss Burkett constituted purposeful discrimination and violated King's rights under the Equal Protection Clause and clearly established federal law under *Batson*. "Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers*, 139 S. Ct. at 2242.

IV.

For these reasons, I would reverse the district court's order denying King's federal habeas petition.

I respectfully dissent.

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

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June 02, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-12804-P
Case Style: Warren King v. Warden GDP
District Court Docket No: 2:12-cv-00119-LGW

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. *Although not required*, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website. 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.

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OPIN-1 Ntc of Issuance of Opinion

Appendix B

In the United States District Court for the Southern District of Georgia Brunswick Division

WARREN KING, Petitioner, v. WARDEN, Georgia Diagnostic Prison, Respondent.	CV 2:12-119

ORDER

This matter is before the Court on Petitioner Warren King's Motion to Alter or Amend Judgment under Rule 59(e) of the Federal Rules of Civil Procedure and a Request for an Expansion of the Certificate of Appealability ("COA"). Dkt. No. 85. His motion specifically challenges the Order entered by this Court in January 2020 denying King's Petition for a Writ of Habeas Corpus but granting King a COA on certain issues (the "Habeas Order"). *See* Dkt. No. 83. The Court will assume the parties' familiarity with the facts and procedural history of this case, which is laid out in detail in the Habeas Order. For the reasons set forth below, King's motion will be **DENIED**.

The only grounds for granting a motion to amend or alter judgment under Rule 59(e) are "newly-discovered evidence or manifest errors of law or fact." *United*

States v. Marion, 562 F.3d 1330, 1335 (11th Cir. 2009) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)). Such a motion is not a means to "relitigate old matters, or to raise arguments or to present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008). Instead, the movant must "demonstrate why the court should reconsider its decision and 'set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'" *United States v. Battle*, 272 F. Supp. 2d 1354, 1357 (N.D. Ga. 2003) (quoting *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294, 294 (M.D. Fla. 1993)).

Here, King identifies three issues that he argues merit alterations or amendments to the Habeas Order. First, he contends that this Court erred in failing to address the merits of certain arguments related to his alleged intellectual disability. Specifically, King argues that even though he raised several grounds for relief in Claim II of his amended habeas petition to this Court (the "Habeas Petition"), the Court only addressed one of those grounds in the Habeas Order, namely, that the 'beyond a reasonable doubt' standard of proof the state applied to his intellectual disability claim at trial violated the Eighth and Fourteenth Amendments to the United States Constitution (the "Standard of Proof Claim").

In the Habeas Order, the Court found that King's argument concerning the Standard of Proof Claim had been rejected by the Eleventh Circuit and that the Court was therefore bound by that holding. Dkt. No. 83 at 68-69. The Court further rejected the remaining arguments in Claim II of the Habeas Petition because

"they were not briefed, and thus King [could not] satisfy his burden." *Id.* at 69. King argues that briefing on the merits of the Habeas Petition was not necessary to obligate a court to consider them.[1] In support, he cites to an Eleventh Circuit holding that the habeas rules do not require a court to allow briefing before it rules on the merits of a petition. Dkt. No. 85 at 5-6 (citing *McNabb v Comm'r Ala. Dep't of Corr.* 727 F.3d 1334, 1340 (11th Cir. 2013)).

However, the *McNabb* decision was not about whether courts may disregard arguments that petitioners fail to raise in briefing; rather, *McNabb* simply addressed whether the Court may rule on arguments raised in the petition *before* they are briefed. King has not cited any authority for the proposition that courts are required to consider arguments abandoned in briefing.[2] Moreover, at least one circuit court has held that "[e]ven a capital defendant can waive an argument

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[1] King argues, in the alternative, that "the merits briefing before this Court provided significant additional pertinent information demonstrating [his] intellectual disability." Dkt. No. 85 at 6. However, merely because there may have been facts in his briefing that he might have relied upon to formulate certain arguments does not mean those arguments were raised.

[2] King also cites to *Stewart v. Martinez-Villareal* for the proposition that petitioners are "entitled to an adjudication of all of the claims presented" in an application for habeas relief. 523 U.S. 637, 643 (1998). However, this holding was meant to address whether a district court was required to consider a *prior* habeas application rather than arguments that had been abandoned in briefing. Likewise, *Cunningham v. Fla. Dep't of Corr.*, on which King also relies, did not address the distinction between claims raised in a petition and those raised in briefing.

by inadequately briefing an issue." *Fairchild v. Trammell*, 784 F.3d 702, 724 (10th Cir. 2015) (quoting *Grant v. Trammell*, 727 F.3d 1006, 1025 (10th Cir. 2013)). Accordingly, the Court cannot find that King has demonstrated "manifest errors of law or fact" that would merit an altered judgment. *Marion*, 562 F.3d at 1335 (internal quotations omitted).

Furthermore, even to the extent that King was entitled to have the Court consider his unbriefed arguments in Claim II of the Habeas Petition, the Court finds that those arguments are procedurally barred because King did not exhaust them at the state level. It is well-settled that "before seeking habeas relief under § 2254, a petition 'must exhaust all state court remedies available for challenging his conviction.'" *Preston v. Sec'y, Fla. Dep't of Corr.*, 758 F.3d 449, 457 (11th Cir. 2015) (quoting *Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342, 1351 (11th Cir. 2012)). In Claim II, King alleges that the trial Court erred in finding that he was not intellectually disabled because the state's only witnesses to rebut his expert witnesses' testimony on this topic "admitted that his opinion was based on flawed testing and no information concerning adaptive functioning." Dkt. No. 29 at 22-23. However, in his brief to the state habeas court, King's only argument with respect to his intellectual disability was the Standard of Proof Claim. *See* Dkt. No. 65 at 319-33. Because his other claims were not alleged before the state habeas court, the Court cannot consider them here.[3]

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[3] The Court declines to consider King's additional argument that executing him would be a "miscarriage of justice" in light of his intellectual disability. Dkt. No. 85 at 10. Indeed, King does not

Next, King argues that the Court should expand the COA to include both the Standard of Proof Claim and the remaining intellectual disability issues raised in Claim II of the Habeas Petition. As it concerns the Standard of Proof Claim, King essentially argues that because the Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002)—a decision that postdated his direct appeal—found that the execution of individuals with disabilities violated the Eighth Amendment, the state habeas court erred in concluding that the claim was barred by res judicata. As noted above, this Court rejected the Standard of Proof Claim in the Habeas Order, finding that it had been rejected in *Raulerson v. Warden*, an Eleventh Circuit decision that specifically addressed the *Atkins* decision. Dkt. No. 83 at 68-69 (citing 928 F.3d 987 (11th Cir. 2019)). Thus, King's argument with respect to *Atkins* is nothing more than an effort to relitigate a matter already decided in its prior decision, which this Court declines to do. *See Baker*, 554 U.S. at 485 n.5.

King argues that the Standard of Proof claim is nonetheless sufficiently "debatable" to justify a COA, particularly because the *Raulerson* decision was pending before the Supreme Court on a petition for certiorari. Dkt. No. 85 at 14, 14 n. 5. However, on March 30, 2020, the Supreme Court denied the petition in that case, effectively solidifying *Raulerson*'s holding as the law in the Eleventh Circuit. *Raulerson v. Warden*, 206 L. Ed. 2d 498 (2020). As such, this Court cannot find that "jurists of reason could disagree with [this Court's]

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identify any particular factual or legal error from the Habeas Order that would justify any sort of finding on his Rule 59 motion.

resolution of [King's] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). The Court also declines to expand the COA for the remaining issues raised in Claim II because, as discussed above, those issues were unbriefed in the Habeas Petition and are otherwise procedural barred.

Finally, King argues that the Court should expand the COA to include certain ineffective assistance of counsel claims. In support, King points to several facts and legal contentions that he argues show his counsel's performance was deficient. However, King does not contend that any of these facts are the product of "newly-discovered evidence," nor does he point to any "manifest errors of law or fact" from the Habeas Order. *Marion*, 562 F.3d at 1335 (internal quotation omitted). Instead, his argument is primarily a critique of several alleged errors by the state habeas court. As noted above, the role of a Rule 59 motion is not to "relitigate old matters, or to raise arguments or to present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co.*, 554 U.S. at 485 n.5. The Court will not review and reconsider its entire ineffective assistance analysis from the Habeas Order merely because King disagrees with the outcome of that decision. Accordingly, King's Motion to Alter or Amend Judgment and Request for an Expansion of the COA is **DENIED.**

SO ORDERED, this 22nd day of June, 2020.

/s/ Lisa Godbey Wood
HON. LISA GODBEY WOOD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

Appendix C

In the United States District Court for the Southern District of Georgia Brunswick Division

WARREN KING, Petitioner, v. WARDEN, Georgia Diagnostic Prison, Respondent.	CV 2:12-119 Signed 01/24/2020

ORDER

Before the Court is Petitioner Warren King's Amended Petition for Writ of Habeas Corpus, dkt. no. 29. For the reasons provided below, King's Petition is **DENIED.**

BACKGROUND

The Underlying Crime, Conviction, and Direct Appeal[1]

[1] The Court presumes that the Georgia Supreme Court's factual findings are correct unless they are rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of

> Warren King was convicted of malice murder, armed robbery, burglary, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony. The jury fixed his sentence for the murder at death after finding the following statutory aggravating circumstances to exist: the murder was committed during the commission of the capital felony of armed robbery and during the commission of a burglary; the murder was committed for the purpose of receiving money or other things of monetary value; and the murder was committed by King as the agent of another, Walter Smith. O.C.G.A § 17-10-30 (b)(2), (4), (6) . . . .
>
> A surveillance camera videotape and witness testimony identifying the persons recorded on the videotape, showed that on the night of September 13, 1994, King and his cousin, Walter Smith, visited a convenience store in Surrency, Georgia, at approximately 10:45 p.m. Smith testified that he found King later that night and that King suggested they rob the convenience store. Smith had previously obtained a .380 caliber handgun from a relative's home, and, according to Smith's

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rebutting the presumption of correctness by clear and convincing evidence.").

> testimony, King took the handgun from the seat of Smith's vehicle and carried it with him as the two parked and walked to the convenience store.
>
> Shortly after midnight on September 14, 2000, Karen Crosby, an employee of the convenience store, set the store's alarm, locked the door, and walked toward her automobile. King and Smith confronted her in the store's parking lot, and King ordered her at gunpoint to "give it up." Crosby recognized King and spoke to him by name. Crosby then threw her keys to Smith, who entered the convenience store as King continued to hold Crosby at gunpoint. The store's surveillance camera recorded Smith entering the store, the sounding of the store's alarm, Smith running from the store, and, approximately twenty-four seconds later, the sound of two gunshots. King testified, during the sentencing phase, that Smith yelled at him repeatedly to shoot Crosby but that he, instead, handed the gun to Smith. However, Smith testified that, as he was running from the store, he heard the two shots, turned, and saw Crosby falling to the ground. Smith also testified that, as he and King were fleeing the scene, King exclaimed, "I hope I killed the bitch."

King v. State, 539 S.E.2d 783, 788-89 (Ga. 2000).

The crimes occurred shortly after midnight on September 14, 1994. King was indicted on October 4, 1994, by an Appling County grand jury for malice murder, armed robbery, burglary, two counts of felony murder, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony. The State filed written notice of its intent to seek the death penalty on January 6, 1995. King's trial began on September 14, 1998, and the jury found him guilty of malice murder, armed robbery, burglary, aggravated assault, false imprisonment, and possession of a firearm during the commission of the felony of false imprisonment on September 24, 1998. On September 25, 1998, the jury fixed the sentence for the murder at death. Also on September 25, 1998, the trial court ordered the death sentence for the murder and the following consecutive prison terms for King's other crimes: life imprisonment for armed robbery; twenty years for burglary; twenty years for aggravated assault; ten years for false imprisonment; and five years for possession of a firearm during the commission of a felony. King filed a motion for a new trial on October 28, 1998, and, in an order filed on November 19, 1998, the trial court directed that the motion be deemed as timely filed. King amended his motion for new trial on

> November 24, 1999, and the trial court denied the amended motion in an order filed on February 7, 2000. King filed his notice of appeal on February 28, 2000. His appeal was docketed in [the Supreme Court of Georgia] on March 29, 2000, and orally argued on July 17, 2000.

Id. at 788 n.1.

On November 30, 2000, the Supreme Court of Georgia affirmed the trial court's decision. *Id.* at 802. King's subsequent petition to the United States Supreme Court for a writ of certiorari from the Supreme Court of Georgia's order was also denied. *King v. Georgia*, 536 U.S. 957 (2002).

Habeas Proceedings

On October 28, 2002, King filed his state habeas petition in the Superior Court of Butts County (the "state habeas court") , dkt. no. 25-3 at 2; he subsequently filed an amended petition with that same court, dkt. no. 19-35. From December 15, 2008 to December 17, 2008, an evidentiary hearing was held. Dkt. No. 19- 37 at 1. On April 20, 2010, the state habeas court denied King's first amended petition. Dkt. No. 25-3 at 73. On July 22, 2010, King applied to the Georgia Supreme Court for a certificate of probable cause to appeal the state habeas court's order. Dkt. No. 25-5. On November 7, 2011, the Georgia Supreme Court summarily denied King's application. Dkt. No. 25-10. King again petitioned the United States Supreme Court for a writ of certiorari, dkt. no. 25-11, and King's petition was again denied by that Court, *King v. Humphrey*, 567 U.S. 907 (2012).

After filing this petition in this Court in 2012, dkt. no. 1, King filed an amended petition on May 2, 2013, dkt. no. 29. King filed his initial brief in support of his amended petition on November 13, 2018, dkt. no. 62; he then filed a corrected brief on November 19, 2018, dkt. no. 65. The State filed its response on April 3, 2019, dkt. no. 72. King has since filed his reply, dkt. no. 78, and a supplemental brief, dkt. no. 79. King's amended petition is fully briefed and ripe for review.

DISCUSSION

King's Amended Petition sets forth nine broad claims (some of which contain numerous sub-claims), but in his brief in support of his amended petition, King only presents arguments on four of his nine claims. King has explicitly withdrawn three of his claims: Claims Three, Six, and Nine. *See* Dkt. No. 40. Further, King did not provide any argument on Claims Seven or Eight in his briefs in support of his amended petition. Thus, King cannot satisfy his burden on these claims. The remaining claims, then, are Claims One, Two, Four, and Five, and they are addressed in turn.

I. Ineffective Assistance of Counsel Claims (Claim One)

As an initial matter, where the state's highest court issues an unexplained, summary decision on appeal of a reasoned lower court decision, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). "It should then presume that the unexplained decision adopted the same reasoning." *Id.* at 1192. Here, King

applied to the Georgia Supreme Court for a Certificate of Probable Cause to Appeal after the state habeas court denied his First Amended Petition for Writ of Habeas Corpus. *See* Dkt. Nos. 25-4; 25-5. The Georgia Supreme Court then summarily denied King's application. Dkt. No. 25-10. The Court thus focuses on the reasonableness of the state habeas court's decision, even though it was not the last state-court "adjudicat[ion] on the merits," 28 U.S.C. § 2254(d). Finally, the Court "presume[s]" that the Georgia Supreme Court's summary denial "adopted the superior court's reasoning unless the state 'rebut[s] the presumption by showing that the [summary denial] relied or most likely did rely on different grounds." *Raulerson v. Warden*, No. 14-14038, 2019 WL 2710051, at *5 (11th Cir. June 28, 2019) (quoting Wilson, 138 S. Ct. at 1192).

A. Standard of Review

"The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges (in a federal habeas court) a matter 'adjudicated on the merits in State court' to show that the relevant state-court 'decision' (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or (2) 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Wilson*, 138 S. Ct. at 1191 (quoting 28 U.S.C. § 2254(d)). Here, King's claims are controlled by AEDPA. When determining whether the state habeas court committed either of these two errors or both, the Court must "'train its attention on the particular reasons–both legal and factual–why [the state habeas court] rejected [King's]

federal claims,'" *id.* at 1191-92 (quoting *Hittson v. Chatman*, 135 S. Ct. 2126, 2126 (2015) (Ginsburg, J., concurring in denial of certiorari)), and "give appropriate deference to [the state habeas court's] decision," *id.* at 1192. "This narrow evaluation is highly deferential, for a state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Wilson v. Warden, Ga. Diagnostic Prison*, 898 F.3d 1314, 1321 (11th Cir. 2018) (citation and quotation marks omitted). Indeed, the Court must not ask "whether a federal court believes the state court's determination was correct but whether that determination was unreasonable–a substantially higher threshold." *Id.* (citation and quotation marks omitted). In other words, the Court must "focus not merely on the bottom line ruling of the decision but on the reasons, if any, given for it." *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1349 (11th Cir. 2019). "However, where the petitioner makes the required § 2254(d) showing as to a state court decision, we owe no AEDPA deference to that decision and instead review the claim *de novo*." *Johnson v. Upton*, 615 F.3d 1318, 1329-30 (11th Cir. 2010). Because the Georgia Supreme Court was the last court to decide King's *Batson* claims in a "decision on the merits in a reasoned opinion," the Court "simply reviews the specific reasons given by [the Georgia Supreme Court] and defers to those reasons if they are reasonable." *Wilson*, 138 S. Ct. at 1192.

"A state court's decision is contrary to federal law if it contradicts the United States Supreme Court on a settled question of law or holds differently than did that

Court on a set of materially indistinguishable facts–in short, it is a decision substantially different from the Supreme Court's relevant precedent." *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1355 (11th Cir. 2009) (internal quotation marks and citation omitted). "A state court's decision involves an unreasonable application of federal law if it identifies the correct governing legal principle as articulated by the United States Supreme Court, but unreasonably applies that principle to the facts of the petitioner's case, unreasonably extends the principle to a new context where it should not apply, or unreasonably refuses to extend it to a new context where it should apply." *Id.* (internal quotation marks and citations omitted).

As to factual issues, AEDPA requires the Court to "'presume[ ]' that the state court's findings of fact are correct." *Whatley v. Warden, Ga. Diagnostic & Classification Ctr.*, No. 13-12034, 2019 WL 2536841, at *19 (11th Cir. June 20, 2019) (quoting 28 U.S.C. § 2254(e)(1)) (alteration in original). King's challenges to a decision of the state habeas court that are based on factual findings "must overcome two hurdles": (1) King must show by "'clear and convincing evidence'" that a particular factual finding was not correct; and (2) King "must overcome the deference that we give to the state court's legal decision under § 2254(d)." *Id.* (quoting 28 U.S.C. § 2254 (e)(1)).

Turning to the elements of an ineffective assistance of counsel claim, King must establish that his trial counsels' "'performance was deficient, and that the deficiency prejudiced [his] defense.'" *Wilson v. Warden*, 898 F.3d at 1322 (alteration in original) (quoting *Wiggins*

v. Smith, 539 U.S. 510, 521 (2003)). To satisfy the first prong, the deficient performance prong, "a defendant must show that his counsel's conduct fell 'below an objective standard of reasonableness' in light of 'prevailing professional norms' at the time the representation took place." Johnson, 615 F.3d at 1330 (quoting *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009)). Further, "[j]udicial review of a defense attorney's [performance] is [ ] highly deferential–and doubly deferential when it is conducted through the lens of federal habeas." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). "This is because, as the Supreme Court told us in *Strickland*, counsel's performance is itself due a base level of deference: 'Judicial scrutiny of counsel's performance must be highly deferential.' When we layer the 'deferential lens of § 2254(d)' atop that first level of deference, the end result is 'doubly deferential' review of counsel's performance." *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1333 (11th Cir. 2013) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Knowles v. Mirzayance*, 556 U.S. 111, 121 n.2 (2009)).

On the other hand, with the prejudice prong, there is (other than AEDPA deference) no underlying deference and the "question is, in the end, a legal one." *Id.* at 1334. A defendant has been prejudiced when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between

Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (internal quotation marks and citation omitted). The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

1. Whether the State Habeas Court Unreasonably Applied Federal Law by Ignoring Jackson's Ineffectiveness in Another Case

King argues that the Court must review his *Strickland* claims *de novo* because the state habeas court unreasonably applied clearly established federal law by finding that another case in which King's lead trial counsel, G. Terry Jackson, was found to have rendered deficient performance had "no bearing on the [state habeas court's] determination of performance" in King's case. Dkt. No. 25-3 at 8 n.1. The other case is *Terry v. Jenkins*, 627 S.E.2d 7 (Ga. 2006). In *Jenkins*, the petitioner had been convicted in September 1995 of malice murder, *id.* at 8, which he committed in January 1993, *Jenkins v. State*, 498 S.E.2d 502, 507 (Ga. 1998). There, the Georgia Supreme Court affirmed a lower state habeas court's order that G. Terry Jackson and Kenneth Carswell, Jackson's co-counsel, were unconstitutionally deficient by failing to investigate and establish the petitioner's main defense during the guilt/innocence phase. *Terry v. Jenkins*, 627 S.E.2d 7 (Ga. 2006). The state habeas court also found in *Jenkins* that the petitioner's trial counsel were "ineffective in investigating and presenting mental retardation evidence in the guilt/innocence and sentencing phases or

by operating under a conflict of interest" and that "the prosecution improperly suppressed material evidence." *Id.* at 12. The Georgia Supreme Court, sitting in review of the state habeas court, did not address these issues because it affirmed the state habeas court's holding that Jackson and Carswell were ineffective by failing to investigate and establish the petitioner's main defense during the guilt/innocence phase. *Id.*

King argues that the state habeas court's finding that *Jenkins* has no bearing on this case unreasonably applied *Strickland*'s holding that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms . . . . considering *all the circumstances*." Dkt. No. 65 at 130 (quoting *Strickland*, 466 U.S. at 688). King elaborates that *Strickland* requires courts to "reconstruct the circumstances of counsel's challenged conduct." 466 U.S. at 689. Thus, King argues, a necessary component of reconstructing the circumstances is considering Jackson's unconstitutional performance in another death penalty case, the timing of which overlapped with the pendency of King's case.[2] King argues, then, that the state habeas court's failure to take into account Jackson's prior unconstitutional performance was an unreasonable application of *Strickland*. Such a finding would require the Court to address King's *Strickland* claims *de novo*. *See McGahee v. Ala. Dep't of Corr.*, 560

[2] Jenkins was convicted in September 1995 of malice murder, which he committed in January 1993. *Jenkins*, 498 S.E.2d at 507. Karen Crosby was murdered September 14, 1994. King was arrested the same month–September of 1994. King was not tried and convicted until September 1998.

F.3d 1252, 1266 (11th Cir. 2009) ("Where we have determined that a state court decision is an unreasonable application of federal law under 28 U.S.C. § 2254(d), we are unconstrained by § 2254's deference and must undertake a *de novo* review of the record.").

The state habeas court's finding that *Jenkins* did not affect its decision on King's *Strickland* claims was not an unreasonable application of federal law. As the Supreme Court and Eleventh Circuit have repeatedly recognized, "the *Strickland* test of necessity requires a case-by-case examination of the evidence." *Johnson v. Secretary, DOC*, 643 F.3d 907, 931 (11th Cir. 2011) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 196 n.17 (2011)). As *Strickland* states, "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. Thus, it is the evidence "in each case" that must be examined. *Johnson*, 643 F.3d at 931. Because *Strickland* repeatedly instructs that deficiency must be determined by focusing on the facts of the particular case, the state habeas court's finding that Jackson's deficient performance in a separate case "ha[d] no bearing" on King's case, dkt. no. 25-3 at 8 n.1, is not an *unreasonable* application of federal law. In other words, a reasonable interpretation of *Strickland* is that the facts of *Jenkins*, a separate case, did not impact the facts of King's case, and, thus, that deficient performance in the former

should not be considered when determining whether deficient performance occurred in the latter.[3]

2. The State Habeas Court's Discussion of King's Trial Counsel's Experience

King also argues that he is entitled to *de novo* review of his *Strickland* claims because the state habeas court relied on Jackson's "purportedly 'extensive experience in the representation of capital defendants' to bolster the presumption that Mr. King's counsel had performed competently." Dkt. No. 65 at 131-32 (quoting Dkt. No. 25-3 at 9-10). King cites to case law establishing the proposition that counsel may be found ineffective in a particular case even if that counsel had extensive experience.

King's argument fails for numerous reasons. First, irrespective of whether experience is dispositive on the question of trial counsel's effectiveness, experience can at least bolster the presumption that a trial counsel's conduct was objectively reasonable. King points to case law to establish that "[e]xperience is no guarantee of effectiveness." Dkt. No. 65 at 132 n.56. Then, King argues that based on this case law, the state habeas court improperly bolstered the presumption that King's

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[3] The Court notes that an "incorrect" or "erroneous" application of federal law is not necessarily unreasonable. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000) ("[A]n *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law.") (O'Connor, J., concurring). Thus, even if the state habeas court was incorrect in failing to consider Jackson's conduct in *Jenkins*, such failure was not an unreasonable application of clearly establish federal law. To be clear, the Court has no opinion on whether the state habeas court's decision was correct or incorrect.

trial counsel performed competently. These two propositions are not mutually exclusive: a trial counsel with extensive experience can be presumed to have acted reasonably, but that presumption can be rebutted. Thus, King has not shown that a presumption of effectiveness based on experience is improper based on case law stating that experience is no guarantee of effectiveness.

Second, King has not shown that the state habeas court bolstered the presumption that King's trial counsel was competent by relying on trial counsel's experience. The record shows only that the state habeas court *discussed* King's trial counsel's experience. Finally, the Eleventh Circuit has stated that "[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." *Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464, 478 (11th Cir. 2012) (alteration in original) (quoting *Chandler v. United States*, 218 F. 3d 1305, 1316 (11th Cir. 2000) (en banc)); *see also Fugate v. Head*, 261 F. 3d 1206, 1216 (11th Cir. 2001) (finding that the presumption that "counsel's conduct falls within the wide range of reasonable professional assistance ... is even stronger when the reviewing court is examining the performance of an experienced trial counsel"). Thus, the state habeas court's discussion of Jackson's experience was proper. For these reasons, the state habeas court's discussion of King's trial counsel's experience (and any reliance on the trial counsel's experience to bolster the presumption in favor of competency) was not an unreasonable application of clearly established federal law.

Because King has failed to establish that AEDPA deference does not apply, the Court will apply AEDPA deference to his *Strickland* claims.

B. Trial Counsel Failed to Retain a Crime Scene Expert

King argues that his trial counsel performed deficiently by failing to retain or even consult a crime scene reconstruction expert–even though such an expert was recommended to trial counsel by the Multi-County Public Defender. Indeed, before trial, the Multi-County Public Defender's office faxed to King's lead counsel, G. Terry Jackson, the curriculum vitae of a crime scene reconstruction expert and two ballistics/firearms experts. Dkt. No. 21-6 at 19-28; Dkt. No. 19-40 at 91. King argues that his trial counsel were deficient in this respect because a crucial issue at trial was a 24-second delay from when Walter Smith exited the convenience store to the first gunshot being heard on the surveillance tape. While King acknowledges that Jackson cross-examined Smith on this issue at trial, attempting to discredit Smith's testimony on what occurred, King argues that he was deficient because a crime scene expert would have been much more powerful and persuasive to the jury. Further, he argues that even if his trial counsel retained experts to testify as to the angle and trajectory of the bullets (as they attempted to do), such expert testimony would have done nothing to exploit the 24-second delay that was crucial to discrediting Smith's testimony. In other words, King argues that even if his trial counsel had retained a firearms/ballistics expert, his trial counsel

would have still been unconstitutionally deficient by failing to also retain a crime scene reconstruction expert.

The state habeas court found that King's trial counsel did not perform deficiently by failing to contact the crime scene reconstruction expert who was recommended by the Multi-County Public Defender office. The state habeas court first reasoned that trial counsel contacted other experts, including firearms/ballistics experts, so their failure to contact the crime scene expert was not deficient. *See* Dkt. No. 25-3 at 31 ("[T]o be effective, counsel is not required to pursue every path until it bears fruit or until all hope withers[.]"); *see also Lovett v. State of Fla.*, 627 F.2d 706, 708 (5th Cir. 1980) (same). The state habeas court also found that trial counsel were not deficient in failing to retain a crime scene expert because it found that the 24-second time lapse was obvious from the surveillance tape, that Jackson suggested to the jury through cross-examination of Smith and other witnesses that it was impossible for the crime to have occurred the way Smith testified that it occurred, and that for these two reasons a lay person could have understood the significance of the time lapse such that this "was not the type of evidence that would require expert testimony." *Id.* at 32.

Considering that "[e]ven 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,'" *Nance v. Warden, Georgia Diagnostic Prison*, No. 17-15361, 2019 WL 1907856, at *3 (11th Cir. Apr. 30, 2019) (quoting *Strickland*, 466 U.S. at

690), the Court cannot say that the state habeas court's determination was unreasonable. King's trial counsel's investigation of the issues surrounding the circumstances of the shooting, including the implausibility of the timing of Scott's version of events, was thorough. King's trial counsel made significant efforts to retain a ballistics expert but was unable to secure the necessary funding.[4] Further, King's lead trial counsel, Jackson, testified that he "cross-examined the heck" out of Smith. Dkt. No. 21-10 at 33. Indeed, the trial transcripts show that Jackson intensely cross-examined Smith on the implausibility of the timing of his version of events. *See* Dkt. No. 18-3 at 133-46. Thus, King's trial counsel were aware of this issue and still decided not to retain a crime scene expert but instead attempted to retain a ballistics expert. Accordingly, because King's trial counsel made an informed, strategic decision to not retain a crime scene expert, the state habeas court's holding that King's trial counsel were not constitutionally deficient for their strategic decision was

[4] King's trial counsel retained one expert, Dr. Sandra Conradi, to testify on the angle of the shot that killed the victim and had requested and obtained funds for a ballistics and firearms expert, Rees Smith. Nevertheless, Rees Smith accepted a position with the Fulton County Solicitor's Office and did not complete any work on the case. Jackson, in a letter dated April 21, 1997, informed the trial judge of Smith's recusal and the fact that Jackson "still need[ed] a ballistics expert." Dkt. No. 22-2 6 at 27. Jackson's co-counsel George Hagood soon after informed Jackson that he had "exhausted [their] sources trying to find [them] a firearms expert that will test for the moneys already approved," and that with the trial judge "in the frame of mind he is now, [Hagood did] not see [the trial judge] approving additional funds . . . to get an expert to verify the GBI's testing." Dkt. No. 22-17 at 12.

not unreasonable especially given the "doubly deferential" procedural posture applicable here. *Yarborough*, 540 U.S. at 6.

C. Trial Counsel Failed to Develop and Present to the Jury Information of Mental Impairments in Members of King's Immediate Family

King next argues that his trial counsel performed deficiently (and presumably that the state habeas court's finding to the contrary was unreasonable) by failing to develop possible mental impairments in members of King's immediate family. First, King establishes that training manuals instruct capital defense attorneys to inquire into a defendant's family members' medical and criminal backgrounds, "with a particular focus on any mental disorders for which family members have been diagnosed or merely suspected of having." Dkt. No. 65 at 217. Second, King notes that his trial counsel were on notice that King's family had a history of mental impairments and that such evidence was important to rebutting the State's anticipated malingering allegation and to establishing that King had a mental impairment. Third, King argues that evidence showing that King's family members had mental impairments was readily available. Finally, King argues that his trial counsel's "failure to follow up on the red flags indicating a significant family history of mental illness . . . clearly fell below reasonable attorney performance." *Id.* at 219; *see also id.* at 218 (arguing that "the failure [of King's trial counsel] to develop and present readily available evidence of a family history of mental illness was unreasonable attorney performance which prejudiced

the defense"). King goes so far as to argue that "nothing was done by the defense to develop this critical evidence" that King's family had a history of mental illness. *Id.* at 219.

In support of his position, King first provides testimony from his sister Juanita King showing that she, her mother, and her half-brothers had symptoms of mental illness. Regarding King's mother, Juanita King testified that their mother would often see people that were not there and call the names of people who did not exist. Dkt. No. 19-37 at 40. Juanita King testified that this behavior "started happening frequently" when she, Juanita, was in her early twenties. *Id.* Juanita King also testified that beginning in her childhood and continuing after King's trial she would hear voices that she would talk to and that she would experience paranoia. *Id.* at 53-54. Turning to her brothers, Juanita King testified that her half-brother, Edert (or Elwood), would bust out grinning and giggling and "would just continually shake. He just [could not] stop it." *Id.* at 43. Finally, Juanita King testified that her other half-brother, Henry, would act like he was talking to someone who was not there. *Id.* Next King provides testimony from his brother, Andy King, Jr., about Andy's struggles with mental illness. Andy King, Jr., testified that he heard voices while in prison telling him to cut and kill himself and that he acted on these voices by trying to cut himself but was stopped by guards. *Id.* at 90. Andy King, Jr., further testified that he has since been diagnosed with paranoia and schizophrenia. *Id.* at 91. Again, King argues that his trial counsels' failure to develop and present this evidence constituted deficient performance.

The state habeas court's bottom line ruling is that King "failed to prove that trial counsel were deficient in their investigation or presentation of the chosen mental health testimony." Dkt. No. 25-3 at 52. The state habeas court's reasoning was: (1) "that trial counsel spoke with family members, [and] obtained all available medical and mental health records," *id.* at 53; (2) that "trial counsel were not ineffective as they provided their experts with the means available to them to uncover a detailed family history," *id.* at 54; and (3) that King and Juanita King "did not reveal a detailed history of mental illness or abuse within the family," *id.* at 55.

The Court finds that King has failed to meet his burden of showing that no fair-minded jurist could agree with the state habeas court's decision. *See Hosley v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012) ("In our en banc decision in *Hill* we phrased this standard 'more simply and maybe a little more clearly: if some fairminded jurists could agree with the state court's decision, although others might disagree, federal habeas relief must be denied.'" (quoting *Hill v. Humphrey*, 662 F.3d 1335, 1346 (11th Cir. 2011))). King utilizes the testimony of his sister, Juanita King, to show that she, King's mother, and King's half-brothers, Edert and Henry, had signs of mental illness. King argues that this testimony thus shows that King's immediate family had a history of mental illness. Nevertheless, the state habeas court found that King's trial counsel were not deficient in failing to elicit this testimony from Juanita King or King himself because trial counsel and Dr. Dickinson interviewed Juanita King and King numerous times, but neither Juanita King

nor King revealed this family history of mental illness. First, investigator David Arsenault interviewed Juanita King, who provided him with information on potential witnesses. *See* Dkt. No. 22-16 at 87-92. Second, Jerry Caldwell, who was initially appointed as second chair but later withdrew as counsel because he took a job with the Attorney General's Office, conducted an extensive interview with [King] four months after his arrest. *See* Dkt. No. 22-24 at 110-75. One of the topics Caldwell explored with King was King's family and home life. *Id.* at 120-24. Third, according to Jackson, Hagood "spent a good bit of time" with Juanita King. Dkt. No. 21-10 at 48. Jackson also testified that Hagood "went down to see [Juanita] several times." Dkt. No. 19-40 at 44. Hagood testified that he personally picked up Juanita King from her house in Surrency and drove her to Savannah to interview with one of the defense's mental health experts, Dr. Dickinson. Dkt. No. 21-10 at 141-42. Hagood also testified that he interviewed Juanita himself. *Id.* at 123. Critically, Hagood was aware of the importance of showing a family history of mental illness, and he testified to the lengths to which he went in order to develop such evidence. *Id.* at 140-46; Dkt. No. 21-11 at 1-2. Hagood also testified to the defense team's efforts to develop and then present records to Dr. Dickinson to aid in Dr. Dickinson's evaluation of King. Dkt. No. 21-10 at 143-46; Dkt. No. 21-11 at 1-2. Finally, Hagood and another associate from Jackson's firm interviewed Andy King, Jr. Dkt. No. 21-6 at 13-16. While the contents of that interview focused on the circumstances of the crime, the state habeas court's factual finding–that King and Juanita King never revealed "a detailed history of mental illness or abuse

within the family," dkt. no. 25-3 at 55, even though both were interviewed on this topic many times–remains unrebutted. In short, King has not met his burden under the AEDPA. Indeed, the state habeas court's bottom-line ruling and the reasons given for it have not been rebutted but are instead supported by the record.[5]

D. Trial Counsel Failed to Present to the Jury Certain Evidence Regarding King's Mental Health Causing Accusations of Malingering to be Unrebutted

1. Trial Counsel Failed to Inform the Jury about King's Psychotic Episode at the Wayne County Jail

On October 16, 1995, at 8:00 a.m., King was placed on suicide risk watch at the Wayne County Jail. Dkt. No. 20-3 at 37. The suicide-risk-watch log notes that King was "sitting on [the] floor talking to himself and shaking." *Id.* at 38. On that day, King was seen by counselors of Pineland Mental Health Services. Dkt. No. 21-5 at 43. When seen by the Pineland counselors, King was brought to an office. *Id.* In the office, he would not respond to questions. *Id.* At one point, he was staring at the warden, but he turned to look at another counselor when the warden spoke about the other counselor. *Id.* The counselor noted that he was suicidal and diagnosed him with a "[p]sychotic disorder NOS" (not otherwise specified). *Id.* at 45. The notes by the counselors also

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[5] Notably, King's reply brief does not focus on the state habeas court's factual findings or decision but, instead, exclusively addresses the Respondent's arguments on this claim. *See* Dkt. No. 78 at 40-44.

stated that King "had been acting strangely for the past several weeks, i.e. talking to himself." *Id.* at 43. That morning he was talking to himself "saying things like, '[i]t's time to die, come on out' etc." *Id.* Finally, the notes stated that King was put on suicide watch and into isolation that morning and that since going into isolation he had not spoken, eaten, drank, or requested to go to the bathroom. *Id.*

On October 17, 1995, Dr. Hargett of the Wayne County Jail noted at 11:38 a.m. that King had not eaten or drank since the early morning of October 16 and that total communication was suspended. Dkt. No. 20-3 at 41. Dr. Hargett described that King would often sit "in semi fetal position with repeated bobbing of head and infantile type crying with catatonic like position attitude and stations." *Id.* Further, a Pineland counselor noted at 1:20 p.m. that he or she received a call from Dr. Hargett who said King continued to not eat, drink, or talk. Dkt. No. 21-5 at 44. Soon after that note was drafted, King was admitted to the Appling General Hospital at 1:45 p.m. Dkt. No. 20-3 at 30. The admittance note stated that King was housed at the Wayne County Jail where he had exhibited catatonic symptoms since October 16, 1995. *Id.* at 35. It also stated that he had not eaten since that time. *Id.* At the hospital, a Dr. Gene Graham diagnosed King with "[a]cute hysteria" and "[a]cting out." Dkt. No. 20-3 at 30. That record noted that King was admitted with the diagnosis of acute hysteria. *Id.*

On October 18, a nurse's note at 7:50 a.m. stated that King was unresponsive to painful stimuli, looked straight out in front of himself, and avoided all eye

contact. *Id.* at 59. Later at 10:15 a.m. the same day, a nurse noted that King was being given a bed bath when he asked for a nurse; the nurse giving the bath said "I am the nurse," and King responded: "I want to call my lawyer." *Id.* at 59. On that day, Dr. Graham noted that King was given I.V. fluids and he ordered that King be transferred back to jail. *Id.* at 34. A note titled "Discharge Plan" stated that King was discharged on October 18, 1995 to go back to the Appling County Jail. *Id.* at 52.

King describes these events as a "harrowing mental breakdown" and argues that his trial counsel were defective in failing to present this evidence to the jury. Dkt. No. 65 at 163. By presenting this evidence to the jury, King argues, the defense would have successfully rebutted the prosecution's malingering argument because "[i]t is simply more difficult to believe" that King was faking his symptoms by not eating, drinking, or using the restroom. *Id.*

The state habeas court's bottom-line decision that King's trial counsel were not deficient in their presentation to the jury during the guilt/innocence phase is not unreasonable. Turning the Court's attention to the reasons given for this bottom-line decision, the state habeas court–after thoroughly discussing and detailing trial counsel's presentation of the evidence during the guilt-innocence phase of the trial–reasoned that King's trial counsel "presented a cohesive theory for the guilt/innocence phase of trial," which included "presenting evidence to the jury that [King] was mentally retarded" and "present[ing] the testimony of two thoroughly experienced and prepared

mental health experts to support this theory." Dkt. No. 25-3 at 31. For this claim, King has not shown or even argued that the state habeas court's decision involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence. Instead, King has merely repeated the same arguments, almost verbatim, that King set forth in his post-hearing brief in the state habeas court, which of course was not constrained by AEDPA. *Compare* Dkt. No. 24-28 at 63-65, *with* Dkt. No. 65 at 161-63. Having rejected King's arguments that the Court should review King's *Strickland* claims *de novo*, *see supra* I.A., the Court must analyze this claim through the lens of AEDPA. King, however, has not identified how the state habeas court's decision violated AEDPA. Because King has not met his burden under 28 U.S.C. § 2254(d)(1) or (d)(2), the petition with respect to this claim is due to be denied.

2. King's Evaluations at Central State Hospital

After the incident leading to King's hospitalization at Appling General Hospital in October 1995, the prosecutor moved for and the trial court ordered that King be evaluated at Central State Hospital for competency to stand trial. Dkt. No. 20-7 at 30-33. On October 27, 1995, King was admitted to Central State Hospital, where he would stay until he was discharged to the Appling County Jail on November 22, 1995. *Id.* at 5. Ultimately, four different doctors evaluated King in some capacity. First, Dr. Mike Whang evaluated King when he was first admitted to Central State. Then, Dr. Anita-Rae Smith evaluated King and diagnosed his

condition. Third, Dr. Donald Gibson evaluated King but only on the narrow issue of whether King was competent to stand trial. Finally, Dr. Tirath Gill prepared King's final summary and included his own diagnoses of King, but it is unclear whether Dr. Gill saw King before making his diagnoses.

The admitting physician at Central State was Dr. Mike Whang. *Id.* at 18. He diagnosed King with "Schizophrenia, Undifferentiated Type, Unspecified." *Id.* Dr. Whang's mental status examination reportedly stated that King was "in no acute distress" and was "alert and tense." *Id.* at 21. Nevertheless, King laughed inappropriately, presented with delusions and hallucinations, and responded to voices telling him to kill himself. *Id.* Regarding his intellectual ability, while his memory was intact and he was "well oriented in three spheres," "[h]is general intellectual functioning [was] below the average," and his "[r]easoning and judgment [were] [imp]aired." *Id.* The admission note by Dr. Whang also reportedly stated that King's speech was "normal in quantity, soft and quiet; [that he] is able to carry brief conversation but exhibits poor concentration and comprehension." *Id.* at 10. King was also noted to have delusions and hallucinations, as well as voices in his head that told him to kill himself. *Id.* Along this line, King also stated that he saw warriors. *Id.*

Within 48 hours of King's admission, Dr. Anita-Rae Smith saw King. Dkt. No. 19-38 at 6. Dr. Smith was a Forensic Psychiatrist with the Forensic Services Division. Dkt. No. 20-7 at 10. When evaluating King, Smith did not have the benefit of any background materials about King's life that would typically be

provided by the defense, the prosecution, or the referring court. Dkt. No. 19-38 at 11. Instead, Dr. Smith had only the background information that King provided and some progress notes from Dr. Donald Gibson stating that King had been exhibiting strange behavior in jail, such as "sit[ting] in the corner crying." Dkt. No. 20-7 at 9.

Turning to Dr. Smith's Medical-Behavioral Assessment and History report, she noted in the Developmental/Past History section that King did not know whether he was a full-term or a premature baby, whether he had any birth injuries or defects, whether he was immunized, whether he ever had mumps, measles, chickenpox, or any other childhood illness, or when he began to walk, talk, or became potty trained. Dkt. No. 20-7 at 10. Further, King denied knowing anything about his childhood, his educational history, his work history, his religious history, his sexual history, or whether his family had any history of mental illness or serious physical illnesses. *Id.* King also denied ever using drugs or alcohol. *Id.* Under the section "rehabilitation potential," Dr. Smith noted that King was "[v]ery guarded." *Id.*

Dr. Smith noted that King "seemed to be playing games, would not respond to the questions, [and] said that he did not know anything that was being asked of him." Dkt. No. 20-7 at 10. Along this line, Dr. Smith observed that King seemed to be "laughing to himself," and that he "voluntarily appeared to [be] laughing to himself and acting in an inappropriate manner." *Id.* Under the "diagnosis" subsection, Dr. Smith diagnosed King under "Axis I" as malingering but also noted to

"[r]ule out Psychotic disorder," meaning that it was questionable whether he had a psychotic disorder such that it needed to be ruled out. *Id.*; Dkt. No. 19-38 at 10. Under "Axis II," Dr. Smith diagnosed King with "[a]ntisocial personality disorder." Dkt. No. 20-7 at 10.

Dr. Smith also completed a "Mental Status Exam." Dkt. No. 20-7 at 11-12. Under the subsection "Attitude," Dr. Smith stated that King "presents as though he is malingering, manipulative, pretending, laughs to himself inappropriately, responds poorly to questions and was not cooperative." *Id.* at 11. Under "Use Of Language," Dr. Smith stated that King's "communication was good when he decided to cooperate." *Id.* Under "Hallucinations," Dr. Smith noted that King was "having auditory hallucinations and seeing warriors that no one else sees," but Dr. Smith found that King "was not descriptive of the warriors or descriptive of the visual hallucinations." *Id.* King was also noted as having been "oriented as to person, place, time and legal situation" and "was functioning [at] below average intelligence." *Id.* Regarding "Reality Reasoning and Judgment," King "had only fair reality testing" and "limited insight and poor judgment." *Id.* at 12. Dr. Smith's final diagnoses were the same: Dr. Smith diagnosed King under "Axis I" as malingering and also noted to "[r]ule out Psychotic disorder"; and under "Axis II," Dr. Smith diagnosed King with "[a]ntisocial personality disorder." *Id.* Dr. Smith testified at the evidentiary hearing in the state habeas court that the malingering diagnosis went "toward the diagnosis of a perhaps borderline or mild mental retardation or to a psychotic diagnosis." Dkt. No. 19-38 at 13-14.

Turning to the purpose for King's transfer to Central State, King was interviewed by the Forensic Evaluation Team on October 31 and November 14, 1995 to determine whether he was competent to stand trial. Dkt. No. 20-7 at 13. Dr. Donald Gibson completed the report, and he reported that King was found to be competent to stand trial. *Id.* at 15. Under the subsection "Mental Status Examination," Dr. Gibson reported:

> At the time of admission on mental status examination, he was alert, oriented and appeared cooperative. [King] would not answer all questions but admits to a history of auditory hallucinations since childhood. He was vague about the contents of the hallucinations except to reveal that lately they have been telling him to kill himself. He reports visual hallucinations of a warrior but was again not very forthcoming about the details. It is significant that prior to his transfer to this facility he had been tearful, laughing inappropriately and expressing suicidal ideation. On interview, his affect was appropriate to his mood which he described as good. He denied suicidal or homicidal ideation. He did, however, sometimes laugh inappropriately and his affect was sometimes not appropriate to the conversation. He was able to abstract. His judgment and insight were poor. He could not or would not perform simple calculations. His recent and remote memory were intact. His speech was normal in rate and rhythm.

Id. at 14.

On November 22, 1995, King was discharged from Central State. *Id.* at 5. The final summary report was created by Dr. Tirath Gill. *Id.* at 8. Dr. Gill was also a forensic psychiatrist in the forensic division. Dkt. No. 19-37 at 157. Dr. Smith would have created the final summary, but she was likely absent when King was discharged. Dkt. No. 19-38 at 13-14. According to Dr. Smith, Dr. Gill took her evaluation, "added a little to it at the end," and came "up with his own diagnosis." *Id.* at 15. The "little" that Dr. Gill added was to note under the section "Course of Patient with Regard to Each Clinical Problem" that King's first problem of "[a]ltered sensory perception related to disturbance in thought evidence by auditory hallucinations . . . was resolved as he did not have any thought disorder and was felt to be malingering and improved without any medications." Dkt. No. 20-7 at 7. Under "Final Diagnosis," the only change Dr. Gill made to Dr. Smith's diagnoses is that Dr. Gill removed "[r]ule out psychotic disorder." *Compare id.* at 8 *with* Dkt No. 20-7 at 12. Dr. Smith testified that thought disorders are "a category of mental illness that involve a break with reality, where a person is having experiences or thoughts that aren't real." Dkt. No. 19-39 at 19.

Even though Dr. Gill found that King's problem of altered sensory perception was resolved, Dr. Smith testified at the state habeas evidentiary hearing that the fact that King stabilized does not rule out a psychotic disorder. Dkt. No. 19-38 at 16-17. Dr. Smith elaborated that a person with a psychotic disorder may have stabilized at Central State because it is a more relaxed environment than a jail; the more relaxed environment

can help the patient "go into the flight of reality." *Id.* at 17. Thus, if Dr. Smith had completed the final summary, she would have still included "rule out psychotic disorder." *Id.* at 16.

As to his stint at Central State Hospital, King argues that his trial counsel were deficient in two intertwined respects. First, King argues that his trial counsel were deficient in failing to provide the Central State doctors with other available evidence showing King was mentally impaired. Second, King argues that his trial counsel were deficient by failing to speak with the Central State doctors and elicit information from them regarding their evaluations of King. These alleged deficiencies are connected by King's factual representation that his trial counsel never contacted the Central State doctors who evaluated King. Presumably, King also argues that the state habeas court's determination that King's trial counsel were deficient in neither respect was unreasonable.

Regarding the first deficiency, King argues that his trial counsels' failure to provide the Central State doctors with background information, which would have fully informed their evaluations, fell below the prevailing norms of capital defense representation. In support, King points to Dr. Smith's testimony that the doctors at Central State "[u]sually" got a package of information regarding a patient from the prosecution and defense. Dkt. No. 19-38 at 11. Nevertheless, Dr. Smith then immediately stated that "[s]ometimes we do, and sometimes we don't." *Id.* Dr. Smith later clarified that "[m]ost of the time" attorneys provided background information, but that "sometimes the attorneys didn't."

Id. at 22-23. Dr. Gibson also testified at the state habeas evidentiary hearing that it was "most definitely" "[m]ore likely" that he would be provided with background information by defense attorneys in death penalty cases. Dkt. No. 19-40 at 13. Notably, King does not explain how or argue that the state habeas court's decision violated either § 2254(d)(1), (d)(2), or both.

Regarding the second deficiency, King argues that his trial "counsel had a duty to do everything reasonably likely to uncover evidence to rebut the anticipated argument by the state that" King was malingering. Dkt. No. 65 at 170. Further, King argues that under the prevailing norms of capital defense in Georgia such reasonable efforts "included contacting the doctors at Central State to discuss their diagnosis and provide helpful information." *Id.* Along this line, King argues that even if his trial counsel made the strategic decision to not provide the Central State doctors with information, they were still deficient in failing to at least contact the Central State doctors and gain information from them that could have helped rebut the malingering diagnosis. King continues that "[e]ven a cursory review of the Central State records indicates that making contact with the Central State doctors 'would [not] have been fruitless.'" Dkt. No. 65 at 173 (quoting *Wiggins*, 539 U.S. at 525) (alteration provided by King). In support, King points to the state habeas evidentiary hearing where Dr. Gibson testified that he did not agree with the malingering diagnoses of the other Central State doctors.

The state habeas court found with regard to these alleged deficiencies that King's trial counsel were not

deficient because they "independently gathered all records relevant to [King's] background and obtained their own independent mental health evaluation." Dkt. No. 25-3 at 59. In addition, the state habeas court found that "trial counsel would not want to potentially open the door for an even more aggravating diagnosis by providing more information to the State's potential experts." *Id.* at 60.

The state habeas court's decision does not violate § 2254(d)(1) or (d)(2) considering Jackson's testimony at the state habeas evidentiary hearing. First, Jackson testified that he did not know whether he called the Central State doctors. *See* Dkt. No. 19-40 at 111 ("I don't know if I called them. I don't know."). Second, Jackson testified that he "called Central State doctors before, and they are the most high and mighty people you'll ever talk to [ ] in your life." *Id.* at 110-11. He stated that he had "called them [in the past] and gotten that kind of reaction." *Id.* at 111. As to Jackson's experience of providing Central State doctors with information on his clients, Jackson testified that "[s]ometimes" he would provide them with information, but that it "depends on what the information is." *Id.* at 54. He continued: "If it had something to do with his psychiatric and it didn't have any detrimental information and I had the opportunity, then I would. Not that they would look at it. You get the reports and they're like they change the name and age and everybody's fine." *Id.* at 54-55. Finally, the record shows (from notes that Jackson placed in King's Central State records) that Jackson reviewed King's Central State records.

Taking these facts together, they show that Jackson was aware of King's time at Central State and those doctors' evaluations and diagnoses, that Jackson had dealt with Central State doctors several times while representing others, that Jackson's experiences dealing with Central State doctors were very negative, that Jackson would have (and may have in King's case) provided the Central State doctors with information on King if that information would not have been detrimental to King, and that Jackson may have contacted the Central State doctors in King's case. King, then, has not even shown that his trial counsel did not contact the Central State doctors, which is the core factual basis of these claims. Further, Jackson had a strategic reason, based on experience, for not sharing what he deemed to be detrimental information with the Central State doctors. Indeed, Jackson testified that he would provide Central State doctors with information when he deemed it appropriate. For these reasons, King has fallen short of his burden of showing that no fairminded jurist could agree with the state habeas court's decision that King's trial counsel were not deficient with respect to giving and receiving information from the Central State doctors.

E. The Gateway Records

King next argues that his trial counsel were unconstitutionally deficient by failing to provide the Central State doctors, King's experts, and the jury with the Gateway Records. On July 24, 1997, King completed an intake assessment at the Gateway Center for Human Development. Dkt. No. 20-7 at 47-48. The "Individualized Service Plan" completed by King's case

coordinator at Gateway stated that Gateway was to provide King with individual counseling, psychiatric evaluation, and a medication evaluation . Dkt. No. 20-8 at 1. King's intake assessment on July 24, 1997 lasted for 1.5 hours. *Id.* at 2. King next came to Gateway on August 6, 1997, when he was evaluated for a total of fifteen minutes by Dr. C.E. Beck. Dkt. No. 20-7 at 74; Dkt. No. 20-8 at 2. Dr. Beck diagnosed King with schizophrenia undifferentiated type. Dkt. No. 20-7 at 74. He also prescribed to King Thioridizine (Mellaril), an anti-psychotic, and amitryptiline (Elavil), an anti-depressant. *Id.* at 74, 75; Dkt. No. 20-1 at 34. Dr. Beck saw King five more times over the next year, each time for a total of fifteen minutes, and each time Dr. Beck diagnosed King with schizophrenia undifferentiated type and prescribed the same medications. Dkt. No. 20-7 at 69-74; Dkt. No. 20-8 at 2. On September 14, 1998, King's trial counsel received these Gateway records. Dkt. No. 20-7 at 47. King argues that his trial counsel's failure to provide these records to his experts or to present these records to the jury constituted deficient performance.

The state habeas court rejected this claim on five grounds: (1) "the Gateway records document the same experiences and symptoms that are documented throughout [King's] other hospitalizations and jail records, which were all provided to defense experts," dkt. no. 25-3 at 66, "including that [King] was prescribed antipsychotic medication," *id.* at 68; (2) "the Central State Hospital records reveal that [King] was initially diagnosed as suffering from schizophrenia, undifferentiated type and there is no question that

[King]'s mental health experts were provided with those records," *id.* at 69; (3) "Dr. Beck's examination was no more thorough or accurate than any of the other evaluations of [King]," *id.* at 67; (4) "there would have been credibility concerns with Dr. Beck's testimony based on the limited resources utilized by him in his evaluation and the fact that he only met with [King] for a total of an hour and a half over a one year period," *id.*; and (5) trial counsel's "own experts did not see a diagnosis of schizophrenia," *id.*

First, King argues that the state habeas court unreasonably discounted Dr. Smith's opinion because Dr. Smith stated she would have given a different diagnosis had she had King's Gateway records (from 1997) at the time of her evaluation (in 1995). This argument, however, mischaracterizes the state habeas court's reasoning. The state habeas court did note that Dr. Anita-Rae Smith, who evaluated King at Central State, testified at the state habeas evidentiary hearing that her findings from her evaluation of King at Central State would have changed if she had the Gateway records, and the state habeas court also noted that the Gateway records were not in existence at that time. However, the state habeas court did not reject King's claim on the ground that Dr. Smith's assertion was based on a mistake of fact; the court simply pointed out that Dr. Smith's testimony was fallacious because she could not have had the Gateway records from 1997 at the time she evaluated King in 1995. Indeed, the state habeas court recognized King's argument that his trial counsel should have provided these records to the Central State evaluators *at any point prior to trial* in 1998, and the

state habeas court accordingly analyzed this claim from that posture. *See* Dkt. No. 25-3 at 69 (finding that King's trial counsel were not deficient in failing to provide the Gateway records to the Central State doctors or his own experts).

Next, King argues that the state habeas court unreasonably applied clearly established law by "'discount[ing] entirely the effect that [Dr. Smith's] testimony might have had on the jury,'" dkt. no. 65 at 195 (alterations in original) (quoting, *Porter v. McCollum*, 558 U.S. 30, 43 (2009)), and by finding that Dr. Beck's credibility would have been challenged. On the first point, King points to Dr. Smith's testimony at the state habeas evidentiary hearing; there, Dr. Smith testified that if she had had the Gateway records and had heard Dr. Beck testify about those records when she diagnosed King, then she "would have definitely taken out the diagnosis of malingering, and [ ] would have made the diagnosis of a psychotic disorder." Dkt. No. 19-38 at 20. King represents that *Porter* found that a hypothetical challenge to a habeas witness's credibility is a "flatly unreasonable basis on which to 'discount entirely' or 'to irrelevance' evidence and expert testimony documenting a defendant's major mental illness." Dkt. No. 65 at 195-96 (quoting *Porter*, 558 U.S. at 43). In *Porter*, the United States Supreme Court indeed found that the state habeas court "did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing" that the petitioner had "a brain abnormality and cognitive defects." 558 U.S. at 42-43. Nevertheless, the Supreme Court was analyzing *Strickland*'s *prejudice* prong, not

the deficient performance prong at issue here. Thus, the portion of *Porter* that King relies on is not instructive on the deficient performance prong, and the state habeas court could not have unreasonably applied it with regard to its deficient performance analysis.[6]

Nevertheless, the state habeas court did not unreasonably discount the testimony of Dr. Smith. Rather, the state habeas court first noted that Dr. Smith's testimony relied on the flawed assumption that it was possible for her to have had the Gateway records when she made her diagnosis. This was, of course, not possible because the Gateway records did not exist at the time Dr. Smith made her diagnosis. Second, the state habeas court found that Dr. Smith had the same materials as the Gateway evaluators, but Dr. Smith made the diagnosis she did. King does not address this finding. The state habeas court then noted that Dr. Smith spent more time with King before making her diagnosis and that Dr. Beck only spent *fifteen minutes* with King before making his diagnosis. Finally, the state habeas court discounted Dr. Smith's testimony at the

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[6] The Court notes that even if King were addressing the prejudice prong of *Strickland*, his characterization of *Porter* as standing for a *per se* rule that a habeas court cannot discount a habeas witness's testimony over credibility concerns is incorrect. *See Whatley v. Warden, Ga. Diagnostic & Classification Ctr.*, No. 13-12034, 2019 WL 2536841, at *25-26 (11th Cir. June 20, 2019) (holding that the Supreme Court of Georgia did not unreasonably discount two experts' affidavits where the petitioner did not rebut the Supreme Court of Georgia's factual finding that the two experts would have been "of questionable credibility and value" if they had testified at the petitioner's trial (quoting *Whatley v. Terry*, 668 S.E.2d 651, 659 (Ga. 2008))).

evidentiary hearing in part because she was testifying more than 10 years after her evaluation of King. Thus, the state habeas court did not *unreasonably* discount Dr. Smith's testimony but did so on reasonable bases. For these reasons, then, the state habeas court's finding on this issue was not based on an unreasonable application of clearly established law.

As to the second point, King argues that the state habeas court unreasonably applied clearly established law by finding that Dr. Beck's credibility would have been challenged. For clearly established law, King again looks to the portion of Porter that analyzed prejudice. King represents that *Porter* found that the "fact that [a] doctor's conclusions about [a] defendant's mental impairments would have been subject to [a] credibility challenge was not [a] reasonable basis for [the] state court to conclude [that] counsel [was] not deficient for failing to present it," dkt. no. 65 at 196 (citing *Porter*, 558 U.S. at 43). As just discussed, this part of *Porter* addresses the prejudice prong. Because *Porter* was analyzing *Strickland*'s prejudice prong, the state habeas court could not have unreasonably applied *Porter* when analyzing this claim under *Strickland*'s deficiency prong.

Nevertheless, the state habeas court may have "discounted entirely" the testimony of Dr. Beck, but it did not do so "unreasonably." Rather, the state habeas court considered the effect of Dr. Beck's testimony and found that it had serious credibility concerns. For this reason, the state habeas court *reasonably* discounted the effectiveness of Dr. Beck's testimony when it addressed whether King's trial counsel were deficient by not presenting Dr. Beck's testimony to the jury. While

King may disagree with the state habeas court's findings on this matter, King has not shown why that finding was unreasonable. For these reasons, the Court finds that the state habeas court did not unreasonably apply *Porter* or clearly established federal law.

King also argues that the state habeas court made two unreasonable findings of fact: (1) that the Gateway records had credibility concerns, and (2) that the Gateway records and Dr. Beck's testimony contained no new information.

As to the first purportedly unreasonable finding of fact, King only argues that it is "patently unreasonable." Dkt. No. 65 at 196. Such a conclusory argument falls far short of showing by clear and convincing evidence that this factual finding was incorrect.

As to the second finding of fact, King has not shown that the state habeas court's decision on this issue was based on this factual determination. As already discussed, the state habeas court found that "it is clear that trial counsel were not deficient . . . by[ ] not presenting the testimony of Dr. Beck [or by extension the Gateway records] as there would have been credibility concerns with Dr. Beck's testimony based on the limited resources utilized by him in his evaluation and the fact that he only met with [King] for a total of an hour and a half over a one year period." Dkt. No. 25-3 at 67. The state habeas court also determined that King's trial counsel were not deficient in providing the Gateway records because it was "entirely reasonable for trial counsel to rely on their experts' assessments of [King]." *Id.* at 69. The state habeas court based this determination on the factual finding that King's trial

counsel enlisted four mental health experts, "all of whom diagnosed [King] as malingering, or at least having malingering tendencies." *Id.* Thus, King has not shown that the state habeas court's decision–that King's trial counsel were not deficient in failing to provide the Gateway records or Dr. Beck's testimony to King's experts, the Central State doctors, or the jury–"was *based* on" the allegedly unreasonable determination of facts that the Gateway records and Dr. Beck's testimony contained no new information. 28 U.S.C. § 2254(d)(2) (emphasis added). Rather, the state habeas court's decision shows that it was based on the different finding of facts listed above.

Because King has failed to show that the state habeas court's adjudication of this claim violated either 28 U.S.C. § 2254(d)(1), (d)(2), or both, King's claim fails.

F. Trial Counsel Mistakenly Presented Lay Witness Testimony Regarding King's Intellectual Limitations and Vulnerability to Manipulation During the Sentencing Phase but not the Guilt-Innocence Phase

King next argues that the state habeas court's finding–that his trial counsel were not unconstitutionally deficient by failing to present Marjorie Cox, Mr. King's former foster mother, and Miriam Mitchum,[7] Mr. King's Department of Juvenile

[7] The state habeas court refers to Mitchum as "Marion Mitchum." Dkt. No. 25-3 at 37. King refers to Mitchum as "Marrion Mitcham." Dkt. No. 65 at 239. The transcript from the sentencing phase of King's trial refers to Mitchum as "Miriam Mitchum." Dkt. No. 17-9

Justice case worker, as witnesses at the guilt-innocence phase of King's trial–was unreasonable. While Cox and Mitchum testified at the Sentencing Phase, they did not testify at the guilt-innocence phase of trial. King argues that at the guilt-innocence phase "their testimony would have made a difference in terms of convincing jurors that Mr. King was genuinely mentally retarded beyond a reasonable doubt." Dkt. No. 65 at 226 (emphasis omitted). King goes on to argue that his trial counsel had no strategic basis for not calling Cox and Mitchum at the earlier phase and that Jackson even testified during the state habeas evidentiary hearing to this effect.

The state habeas court held that King's trial counsel were not deficient in failing to call Cox or Mitchum at the guilt-innocence phase. The Court reasoned that "after a thorough investigation" King's trial counsel made "a reasonable strategic decision" to not call these witnesses during the guilt-innocence phase. Dkt. No. 25-3 at 41. The state habeas court further reasoned that trial counsels' strategic decision was based on the facts that "[b]oth lay witnesses had little to offer to [King's] substantive claim of mental retardation, and what little they could add, the defense experts covered in their testimony." *Id.*

First, the state habeas court's determination that King's trial counsel made a "reasonable strategic decision" not to call Cox or Mitchum during the guilt-innocence phase was not an "unreasonable determination of the facts in light of the evidence

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at 3, 109. The Court will follow the transcript from the sentencing phase.

presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), nor has King shown by "clear and convincing evidence" that this factual determination was incorrect, 28 U.S.C. § 2254(e)(1). As an initial matter, "'[t]he question of whether an attorney's actions were actually the product of a tactical or strategic decision is an issue of fact, and a state court's decision concerning that issue is presumptively correct.'" *Fotopoulos v. Sec'y, Dep't of Corr.*, 516 F.3d 1229, 1233 (11th Cir. 2008) (quoting *Provenzano v. Singletary*, 148 F.3d 1327, 1330 (11th Cir. 1998)). Further, although not directly on point, it is relevant to note that "because ineffectiveness is a question which we must decide, admissions of deficient performance by attorneys are not decisive." *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989). Along this line, "even counsel's own hindsight regarding what might have influenced the jury cannot support a finding of deficient performance." *Grayson v. Thompson*, 257 F.3d 1194, 1222 (11th Cir. 2001).

With the distorting effects of hindsight in mind, King cannot satisfy his burden of showing that the state habeas court's factual finding was unreasonable or incorrect. King first argues that Cox and Mitchum "were objective, impartial and credible observers of Mr. King's level of intellectual functioning, who, as all trial attorneys acknowledged, would have added much needed credibility to the intellectual disability case at the guilt-innocence phase of trial." Dkt. No. 65 at 225. King then points to Jackson's testimony at the state habeas hearing. There, Jackson testified that he "[a]bsolutely" should have called Cox and Mitchum as witnesses during the guilt-innocence phase, and that he

did not have a strategic reason for not doing so. Dkt. No. 19-40 at 96. Jackson, however, also testified as to a strategic reason why he did not call Cox and Mitchum during the guilt/innocence phase: he "didn't know what they were going to say." Dkt. No. 21-10 at 69; *see also* Dkt. No. 19-40 at 96 (Jackson testified "what did I know about what [Cox and Mitchum] were going to say during the guilt/innocence phase is the only question I have"). Jackson established the reasonableness of this strategic reason for not calling Cox and Mitchum with an anecdote from another case where Jackson "had a teacher . . . who we felt was going to be wonderful who got on the stand and went off, you know." Dkt. No. 21-10 at 66. The record shows that Jackson contradicted his testimony of not having a strategic reason by setting forth a strategic reason for not calling Cox and Mitchum during the guilt-innocence phase. Thus, King has not sufficiently rebutted the state habeas court's factual finding that King's trial counsel made a "reasonable strategic decision." Dkt. No. 25-3 at 41. Accordingly, King cannot show that the state habeas court's decision was based on an unreasonable determination of the facts in light of the record evidence.

G. Trial Counsel Failed to Investigate and Present a Complete and Accurate Life Profile of King in Mitigation

King next argues that his trial counsel unreasonably failed to investigate and present a complete and accurate life profile of King in mitigation of punishment at sentencing. King represents that the jury "heard incomplete and ultimately misleading testimony at sentencing" from Juanita King and Miriam Mitchum,

dkt. no. 65 at 282-83, and that the jury never heard from other readily available mitigation witnesses. Ultimately, King contends that his trial counsel were deficient in failing "to convey a far more accurate, complete, and dire picture of the circumstances of Mr. King's upbringing to paint him in a far more sympathetic light." *Id.* at 284.

As to Juanita King, King argues that while she provided at sentencing "rudimentary facts about the impoverished circumstances" of the King siblings' "upbringing with their alcoholic parents," she "could have offered far more detailed and compelling information about the chaos of her family's circumstances during her and Mr. King's childhood." Dkt. No. 65 at 284. King then details numerous points about which Juanita King testified at the state habeas evidentiary hearing but that the jury did not hear at any phase of King's trial. *Id.* at 284-87.

King also argues that had his trial counsel been even "minimally conscientious about seeking out and speaking with *other* available witnesses," then trial counsel would have spoken with Andy King Jr., King's friend James Moore, and King's neighbors Mildred Wallace, Verdell Thomas, Katie Pressley, Sally Mae Hayes, and Deborah Hayes, who all "could have offered harrowing details about the neglect, violence, and chaos" of King's childhood home. Dkt. No. 65 at 289. King then recounts the testimony that these potential witnesses could have given at King's sentencing. *Id.* at 289-98.

As to King's trial counsels' investigation of mitigating evidence claim, the state habeas court determined that King's trial counsel "conducted a

thorough investigation of [King's] background," dkt. no. 25-3 at 33, and that King "failed to prove, even with the new evidence presented in [the state] habeas proceedings, most of which is cumulative and of questionable credibility, that trial counsel were deficient in their investigation," *id.* at 40. As to the presentation of mitigating evidence claim, the state habeas court's bottom-line ruling was that King's "trial counsel's presentation of mitigation evidence was not unreasonable . . ., particularly in light of trial counsel's thorough investigation, their strategic decisions, 'eliminat[ing] the distorting effects of hindsight' and reviewing trial counsel's conduct from counsel's perspective at the time." Dkt. No. 25-3 at 51 (alteration in original) (quoting *Strickland*, 466 U.S. at 690). The state habeas court reasoned that King's case was "not a case where trial counsel did not present mitigation witnesses." *Id.* Instead, the court reasoned that King "merely assert[ed] [that] trial counsel should have presented more witnesses to testify . . . and that those who did testify should have testified to something different." *Id.*

Looking through the lens of "doubly deferential" review of trial counsels' investigation and presentation of King's life profile, King has not met his burden under 28 U.S.C. § 2254(d). *See Yarborough*, 540 U.S. at 6 ("Judicial review of a defense attorney's [performance] is therefore highly deferential–and doubly deferential when it is conducted through the lens of federal habeas."). The state habeas court detailed the thorough investigation that King's trial counsel undertook to uncover King's life profile and mitigating evidence

related thereto. *See* Dkt. No. 25-3 at 35-40. In this claim, King focuses on his trial counsels' alleged failure to "seek[ ] out and speak[ ] with *other* available witnesses." Dkt. No. 65 at 289. In essence, King argues that his trial counsel should have done more.

"To determine whether 'trial counsel should have done something more' in their investigation, 'we first look at what the lawyer[s] did in fact.'" *Raulerson v. Warden*, No. 14-14038, 2019 WL 2710051, at *5 (11th Cir. June 28, 2019) (quoting *Grayson*, 257 F.3d at 1219) (alteration in original). The state habeas court found that King's trial counsel (1) used a checklist that identified areas of investigation, (2) interviewed numerous individuals, and (3) attempted to interview anyone they could find that knew anything about King, including individuals identified from their review of the records. *See* Dkt. No. 25-3 at 35. The state habeas court also recognized that King's trial counsel had much difficulty locating potential mitigating witnesses because King and his family members "did not direct counsel to these types of potential witnesses." *Id.* at 36. Notably, King *does not* challenge these factual findings, which are presumed correct. Based on these factual findings, the state habeas court's decision that King's trial counsels' investigation was constitutionally adequate was reasonable. *See Raulerson*, 2019 WL 2710051, at *6 ("Although [the petitioner] has presented additional affidavits from extended family members, teachers, and acquaintances that counsel could have interviewed, that more investigation *could* have been performed does not mean his counsel's investigation was inadequate.").

King next argues that his trial counsel were deficient in their presentation of mitigating evidence related to his life history at sentencing. The state habeas court, however, reasonably determined that King's trial counsel were not deficient. Even though King identifies *some* evidence that did not reach the jury, "more is not always better." *Chandler v. United States*, 218 F.3d 1305, 1319 (11th Cir. 2000). Indeed, King's life history was detailed by Cox and Mitchum. Mithcum's testimony was particularly adept at presenting King's life history. Mitchum delineated the decrepit, dilapidated house in which the King family resided. *See* Dkt. No. 17-9 at 112-13. Mitchum described the extent of King's parents' alcoholism: "As to the, the parents, there was not a time that I can recall in my memory that I ever spoke with them either in person or on the phone that they were sober." *Id.* at 113; *see also id.* at 114 (testifying that she spoke with King's parents "[t]wenty or thirty or more times"). Finally, Mitchum and Juanita King testified at sentencing to the rampant fighting that occurred between King's mother and father, and how King would often be caught in the middle of it all. *Id.* at 84, 114-15.

Cox's and Mitchum's testimonies also highlighted the dangers of testifying on a defendant's life history; the government can hit back–and it did. Through its cross-examination of Cox and Mithcum, the State highlighted King's checkered past, including numerous criminal violations throughout his childhood. As the Eleventh Circuit recently explained:

> "The type of 'more-evidence-is-better' approach advocated by [the petitioner] might seem appealing–after all, what is there to lose?"

> *Wong v. Belmontes*, 558 U.S. 15, 25, 130 S. Ct. 383, 175 L.Ed.2d 328 (2009). But there can be a lot to lose. *Id.* By presenting a "heavyhanded case" of mitigation evidence, counsel "would have invited the strongest possible evidence in rebuttal." *Id.* A lawyer can reasonably "fear that character evidence might, in fact, be counterproductive." *Chandler*, 218 F.3d at 1321. Particularly right before the jury decides a defendant's penalty, counsel can reasonably limit the mitigating evidence he presents to avoid exposure "to a new string of [g]overnment witnesses who could testify to Petitioner's bad acts." *Id.* at 1323.

Raulerson, 2019 WL 2710051, at *6 (second alteration in original). For example, King argues that his trial counsels' failure to argue and draw out testimony from Juanita King that King's mother's death "triggered a significant acceleration of his developing psychotic illness," dkt. no. 65 at 286, constituted deficient performance. But considering that such evidence could have backfired due to evidence of King's behavior both criminally and mentally prior to his mother's death (and by the obvious fact that the death of a loved one is not an excuse for murder), King has not shown that the state habeas court's decision was unreasonable.

For these reasons, the state habeas court's decisions that King's trial counsel were not deficient in their investigation or presentation of mitigating evidence about King's life history were reasonable.

H. Trial Counsel Failed to Use Certain Records to Rebut the Malingering Allegation, Support King's Intellectual Disability Argument, and Provide Mitigating Factors

1. King's School Records

King argues that his trial counsels' failure "to present readily available mitigating information from the school records in all of its tragic detail was unreasonable and prejudicial in that it deprived the jury of a full and accurate profile of Mr. King's mental health status and life history." Dkt. No. 65 at 236. The state habeas court found that King's trial counsel were not deficient in this respect. After noting that King's school records were tendered as defense exhibits at trial, the state habeas court reasoned that King's "trial counsel made a reasonable, strategic decision in not sending the records as exhibits with the jury." Dkt. No. 25-3 at 32. This factual finding has not been rebutted by King. King merely recasts his same arguments that he presented to the state habeas court. *Compare* Dkt. No. 24-29 at 20-23, *with* Dkt. No. 65 at 232-37. The Court is not reviewing this claim *de novo* but instead must focus on the decision and reasoning of the state habeas court. King must abide by the dictates of AEDPA, and his failure to satisfy either § 2254(d)(1) or (d)(2) is fatal to this claim.

2. The Department of Youth Services and Baxley Wilderness Institute Records

King argues that the state habeas court's decision–that King's trial counsel were not deficient for failure both to highlight for the defense experts and to

present to the jury records from the Department of Youth Services ("DYS") and the Baxley Wilderness Institute ("BWI")–was unreasonable. King contends that these records "repeatedly reference strange behavior manifested by Mr. King long before his arrest in his case," which would have rebutted the State's malingering argument. *See* Dkt. No. 65 at 199. Further, King argues that these records would have supported the defense's theory that King was a follower and that he followed Smith the night of the robbery.

This claim suffers the fatal flaw of not showing how the state habeas court's decision satisfies 28 U.S.C. § 2254(d)(1), (d)(2), or both; again, King merely recasts this claim in this Court as he did in the state habeas court–as if this Court were reviewing it *de novo*. Turning to the state habeas court's decision and reasoning, the state habeas court first noted that King's school records were tendered as defense exhibits at trial and then found that King's "trial counsel made a reasonable, strategic decision in not sending the records as exhibits with the jury." Dkt. No. 25-3 at 32. The state habeas court further found that "the defense experts clearly testified about the information contained within those records." *Id.* The state habeas court concluded that the evidence from these records "would have been cumulative, providing [no][8] more information about [King's] background, however, as trial counsel was also concerned about the possible aggravating nature of the records, [King] failed to establish that trial counsel were deficient in their use of these record[s] prior to or during

[8] It appears the trial court's failure to include "no" was a typo.

trial." *Id.* at 33. King has not shown how the state habeas court's decision was unreasonable. Thus, King's claim must fail.

Nevertheless, the state habeas court's decision was, in fact, reasonable. While the Department of Youth Services and BWI records contain information that can be construed to support King's defenses of intellectual disability and being a follower, the records also contain information supporting the theory that King was more than capable of being a model citizen but that at times, especially when he was living at home, he chose not to be. This theory can be flipped to support the defense theory of highlighting the negative effects that King's homelife had on him. It was not unreasonable, however, to make the strategic decision to not publish such evidence on the basis that the jury would not be so moved but would instead focus on how King could control his behavior when he wanted to (significantly undercutting his intellectual disability defense). Indeed, King characterizes the BWI records as showing that King "*thrived* at BWI and wanted to be in that environment." Dkt. No. 65 at 255 (emphasis added). Further, these records contain information on King's criminal past, which is of course aggravating. By ignoring the aggravating information in these records that–as the state habeas court found–led King's trial counsel to make the reasonable and strategic decision to not present these records to the jury or focus on these records when questioning Dr. Dickinson on the witness stand, King cannot show how the state habeas court's decision was unreasonable.

3. The Department of Family and Children's Services Records

King argues that his trial counsel were deficient in failing to obtain and utilize records on King's family from the Department of Family and Children's Services ("DFACS"). King continues that the state habeas court's decision to the contrary was both based on an unreasonable factual determination and constituted an unreasonable application of clearly established federal law. The state habeas court's factual finding at issue was that the DFACS "records largely contained the same information as was included in other records gathered by trial counsel, and ultimately contained information which could be aggravating to [King]." Dkt. No. 25-3 at 14. As to the alleged unreasonable application, King argues that this factual finding "unreasonably applies *Strickland* in that merely because the records contain some negative commentary about a teenaged Mr. King[, the court] cannot reasonably justify 'discounting to irrelevance' the potential mitigating impact of the records substantively or as a springboard for further mitigation investigation." Dkt. No. 65 at 264 (quoting *Porter*, 558 U.S. at 43). As to whether this factual finding was unreasonable, King argues that it was for two reasons. First, it was unreasonable because "the records contain some of the only truly detailed descriptions (generated by a government agency) of the destitution and chaos of the King family home, especially during Mr. King's early teen years." Dkt. No. 65 at 264. Second, King argues that the finding was unreasonable "because they contain valuable information about

additional family members and neighbors whom counsel could have contacted." *Id.*

King's claim fails because the state habeas court did not base its decision at issue on this factual finding. The factual finding at issue is whether the DFACS records were cumulative and aggravating. This factual finding, however, was only made in relation to the *prejudice* prong of this ineffective assistance of counsel claim. To begin, the state habeas court couched its discussion of the DFACS records in relation to the broader idea of ineffectiveness, which encapsulates both of *Strickland*'s prongs i.e., deficient performance and prejudice. *See id.* at 14 ("[King] now alleges that trial counsel were *ineffective* for failing to obtain DFACS records regarding [King's] family." (emphasis added)). While the state habeas court did not explicitly link this factual finding to either of the two prongs, the factual finding that the DFACS records were cumulative and aggravating only makes sense in relation to the *prejudice* prong. A trial counsel's *performance* is not any less deficient by failing to obtain records that should obviously be obtained–even if those records turn out to be worthless. Nevertheless, such worthless records would not lead to a finding of ineffectiveness because the *prejudice* prong would bar such a finding. Thus, if the state habeas court's finding that the DFACS records were both cumulative and aggravating was correct, then the state habeas court's holding that trial counsel were not ineffective (because King was not prejudiced) would also be correct. Nevertheless, the Court need not reach that issue because the state habeas court found that King's trial counsel did not *perform* deficiently in their

mitigation investigation; thus, fatally to this claim, the state habeas court's decision of no deficient performance is not based on the factual finding that the DFACS records were cumulative and aggravating.

Turning to the deficient performance prong, the state habeas court found that King's trial counsel did not perform deficiently in their investigation of mitigating evidence. Regarding the investigation of mitigating records, such as the DFACS records, the state habeas court found that King's trial counsel were not deficient. Looking through the lens of "doubly deferential" review of trial counsels' mitigation investigation, King has not met his burden under 28 U.S.C. § 2254(d). *See Yarborough*, 540 U.S. at 6 ("Judicial review of a defense attorney's [performance] is therefore highly deferential–and doubly deferential when it is conducted through the lens of federal habeas.").

"To determine whether 'trial counsel should have done something more' in their investigation, 'we first look at what the lawyer[s] did in fact.'" *Raulerson*, 2019 WL 2710051, at *5 (quoting *Grayson*, 257 F.3d at 1219) (alteration in original). The state habeas court found that King's trial counsel attended numerous seminars on mitigation, "consulted with a number of mitigation workers including Pamela Leonard, Michael Mears and Stephen Bright," dkt. no. 25-3 at 35 (internal quotation marks omitted), interviewed anybody they could find with information about King, tried to interview King's family members, foster mother, probation officer and teachers, and obtained juvenile records, school records, Wayne County Jail records, Appling General Hospital records, South Georgia Medical Associates records,

youth detention center records, Baxley Wilderness Institute records, Pineland Mental Health/Mental Retardation Services records, Central State Hospital records, and Gateway Center records. *See id.* at 12, 35. Additionally, King's trial counsel requested records from Tidelands Community Mental Health Center and from the Social Security Administration. *Id.* at 12-13. The state habeas court also recognized that King's trial counsel had much difficulty locating potential mitigating witnesses because King and his family members "did not direct counsel to these types of potential witnesses." *Id.* at 36. Notably, King does not challenge these factual findings, which are presumed correct. Based on these factual findings that show an extensive investigation, the state habeas court's decision that King's trial counsels' investigation was constitutionally adequate was reasonable–especially considering that the DFACS records at issue were not King's file but were cases where his mother, father, and brother were the clients. Dkt. No. 21-1 at 2-20.

I. Trial Counsel Failed to Use Mental Health Experts to Explain in Mitigation King's Traumatic Upbringing, Intellectual Impairment, and Psychotic Illness

Finally, King claims that his trial counsel were deficient in their presentation of King's mental impairments in conjunction with his traumatic upbringing. King argues that his trial counsel should have utilized King's mental health experts to effectively present mitigating evidence of his mental impairments that were amplified and caused by his traumatic childhood. King argues that his trial counsel instead had

the mental health experts focus solely on the issue of King's intellectual impairment. Further, King argues that "had counsel conducted a competent investigation and effectively marshaled and used the readily available life history and mental health related evidence . . . [they] could have firmly rebutted or even prevented malingering from becoming such a devastating issue at trial." Dkt. No. 65 at 312. This would, in turn, have alleviated Jackson's concerns over recalling Dr. Dickinson and Dr. Miller at the sentencing phase. *See* Dkt. No. 19-40 at 117 ("I could have put Dickinson and Miller back up but, once again, the jury has already seen them, they've already heard them, they've already decided what they're saying is not the truth.").

As an initial matter, the Court has already determined that the state habeas court's decisions regarding the investigation and presentation of King's mental health–including rebutting the malingering argument–were not unreasonable. Consequently, King cannot rely on that argument here. The issue, then, becomes whether the state habeas court's decision–that King "failed to prove that trial counsel were deficient in not presenting additional expert mental health testimony, or further utilizing the mental health records in their possession," dkt. no. 25-3 at 70–was reasonable. King has not met his burden of showing that it was not reasonable.

King's main argument is not that King's trial counsel failed to elicit mitigating evidence regarding King's mental impairments from King's mental health experts; rather, King argues that his trial counsel failed to elicit the right type of mental health evidence from his

experts. King argues that it was unreasonable and deficient performance for his trial counsel to not have had his experts connect King's traumatic life history to King's mental health. The state habeas court rejected these arguments and determined that "it was reasonable that trial counsel, after having [King] examined by numerous mental health professionals, rel[ied] on their experts to provide them with an accurate assessment of [King]." Dkt. No. 25-3 at 69. The Court further noted that "each of the experts' diagnoses were consistent, giving even less reason for trial counsel to question their own experts' conclusions." *Id.*

King, however, implicitly argues that the state habeas court missed the point: the point is not that King's trial counsel relied on his experts' testimony, but that King's trial counsel did not elicit additional mitigating evidence from his experts. King goes so far as to show that his trial counsel even ignored such evidence when it was provided by Dr. Miller in a letter to counsel. *See* Dkt. No. 20-1 at 72 (Dr. Miller stated in his affidavit, "I did indicate to counsel in a letter dated August 28, 1998, that [King] had numerous deficits in areas such as abstract reasoning, social judgment and comprehension. In other words, he had significant deficits in his ability to cope with daily life.").

King's arguments fail, however, because he does not show that the state habeas court's decision was unreasonable under 28 U.S.C. § 2254(d)(1) or (d)(2). Specifically, King does not point to a single unreasonable determination of fact in relation to this claim. Indeed, the record shows that Dr. Dickinson and Dr. Miller testified as to King's adaptive behavior, which is one of

the components of an intellectual disability. Further, King's citations to clearly established federal law do not show that the state habeas court unreasonably applied clearly established federal law. For example, in *Ferrell v. Hall*,

> [n] either the jury nor the sentencing judge was ever told, because defense counsel never discovered that Ferrell suffers from extensive, disabling mental health problems and diseases including organic brain damage to the frontal lobe, bipolar disorder, and temporal lobe epilepsy. Nor did they learn that the defendant had attempted suicide at age eleven, or that because of these mental health issues, Ferrell exhibits increased impulsivity and decreased sound judgment; that his conduct was not entirely volitional; or that his judgment and mental flexibility were significantly impaired by organic brain damage. Nor, finally were they ever told that Ferrell's father was physically abusive to his children, especially to Ferrell, waking them in the middle of the night to beat them (sometimes after stripping them naked) with razor strops, fan belts, and old used belts; that the family was repeatedly evicted from their homes and hungry, and lived in fear of those to whom the father owed gambling debts; or that Ferrell's mother suffered from clinical depression, suicidal ideations, rage blackouts, and urges to physically injure her children.

640 F.3d 1199, 1203 (11th Cir. 2011). Regarding Ferrell's mental health investigation, the Eleventh Circuit found

trial counsel's performance deficient with regard to the only mental health expert he had at trial.

> Notably, Allsopp [the petitioner's mental health expert] had *not* been asked to look for evidence of brain damage, was provided *no* material from counsel other than school records, and was *not* asked to perform a clinical interview, or do anything else for possible use in mitigation. In fact, Allsopp's marching orders focused only on Ferrell's [the petitioner] ability to interact with the police; counsel did not ask, nor did Allsopp look for whether Ferrell had any mental illness that may have affected him during the crime. Counsel's use of Allsopp was unreasonably constricted in this case because of the wide range of mental health issues other than retardation and competency that could have been relevant (and were relevant) to Ferrell's mitigation investigation, *and* the many red flags that had been raised about Ferrell's mental health throughout the proceeding.

640 F.3d at 1227. Here, King's trial counsel provided his mental health experts with numerous and thorough records, and they sought help from four experts on the issue of not just intellectual disability but, more broadly, mental illness. In short, *Ferrell* is distinguishable with respect to the mental health investigations at issue.[9]

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[9] So is King's citation to *Brownlee v. Haley*. *See Brownlee v. Haley*, 306 F.3d 1043, 1070 (11th Cir. 2002) ("Under the facts of this case, we are compelled to conclude that counsel's failure to investigate, obtain, or present *any* mitigating evidence to the jury, let alone the

King's remaining case cites are inapposite. King's citation to *Williams v. Taylor* involved the prejudice prong of *Strickland* and found that the state habeas court failed to take into account mitigating evidence when undertaking the prejudice inquiry. *See Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (finding that "the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence–both that adduced at trial, and the evidence adduced in the habeas proceeding–in reweighing it against the evidence in aggravation"). King's citation to *Wiggins v. Smith* involved a trial counsel's unreasonable decision "to abandon their investigation at an unreasonable juncture." 539 U.S. 510, 527 (2003). Here, King argues that his trial counsel did not present the right kind of evidence via his experts, not that his trial counsel unreasonably abandoned his mental health investigation.

King cannot overcome the doubly deferential review of his trial counsel's performance. This is especially so here, where all four of King's mental health experts found some evidence of malingering. King "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The state habeas court reasonably determined that King's trial counsels' challenged actions of focusing

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powerful mitigating evidence of Brownlee's borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse, undermines our confidence in Brownlee's death sentence.").

their mental health experts on the intellectual disability defense and on not recalling Dr. Dickinson and Dr. Miller during the sentencing phase fell "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. After all, "[i]t is '[r]are' that constitutionally competent representation will require 'any one technique or approach,'" *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) (second alteration in original) (quoting *Richter*, 562 U.S. at 106), which King seems to advocate for in this claim.

II. Georgia's Reasonable Doubt Standard for Determining Mental Retardation (Claim Two)

When King was tried in 1998, Georgia law required that a defendant claiming that he was intellectually disabled (then the term used was "mentally retarded") must prove such disability to the jury beyond a reasonable doubt. *See* O.C.G.A. § 17-7-131(c)(3) (1998). On direct appeal, the Georgia Supreme Court rejected King's challenge to the constitutionality of Georgia's beyond-a-reasonable-doubt standard. *King*, 539 S.E.2d at 798. King's claims that the standard violates both the Eighth and Fourteenth Amendments have been rejected by the Eleventh Circuit. Because the Court is bound by the holdings in published decisions of the Eleventh Circuit, it must deny King's petition with respect to these claims. *See Raulerson*, 2019 WL 2710051, at *9 ("According to [the petitioner], the Supreme Court's holdings in *Atkins* and *Cooper* clearly establish that the application of Georgia's beyond-a-reasonable-doubt standard to his claim of intellectual disability violated his right to due process under the Fourteenth Amendment by failing to protect his Eighth

Amendment right not to be executed if intellectually disabled. Because neither *Atkins* nor *Cooper* so held, this argument fails."). The Court also rejects the remaining claims King sets forth in Claim Two of his petition because they were not briefed, and thus King cannot satisfy his burden.

III. Whether King's Death Penalty is Disproportionate Punishment (Claim Four)

In Claim Four, King argues that his rights were violated when the Georgia Supreme Court failed to properly conduct a proportionality review of King's death penalty as required by state law. The Georgia Supreme Court found that King's sentence "was neither excessive nor disproportionate to the penalties imposed in similar cases in this State." *King*, 539 S.E.2d at 802 (citing O.C.G.A. § 17-10-35 (c)(3)). The Georgia Supreme Court cited to O.C.G.A. § 17-10-35(c)(3), which required it 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."

Even if the Georgia Supreme Court's proportionality reviews of King and other cases have become "perfunctory" as King argues, 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 v. Kemp*, 481 U.S. 279, 306 (1987) (citing *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984)). Georgia's statutory procedures have been found adequate. *See 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*, 555 U.S. 979, 987 (2008) ("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." (Thomas, J., concurring in the denial of cert.) (citing *Pulley*, 465 U.S. at 45)).

In essence, King is challenging the Georgia Supreme Court's alleged failure to properly carry out its *statutory* duties and argues that this Court should disagree with the Georgia Supreme Court's findings that were reached in undertaking those duties. Such challenges, however, are not proper under 28 U.S.C. § 2254. *See Mills v. Singletary*, 161 F.3d 1273, 1282 n.9 (11th Cir. 1998) ("[A] federal habeas court should not undertake a review of the state supreme court's proportionality review . . . It is the state's responsibility to determine the procedure to be used, if any, in sentencing a criminal to death." (quoting *Moore v. Balkcom*, 716 F.2d 1511, 1518 (11th Cir. 1983))); *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."). Accordingly, King fails to state a claim for federal habeas corpus relief with respect to Claim Four.

IV. *Batson* and *J.E.B.* Claims (Claim Five)

A. The *Batson* and *J.E.B.* Framework

"It is clearly established federal law that, under the Equal Protection Clause, a criminal defendant has a constitutional 'right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.'" *Adkins v. Warden*, 710 F.3d 1241, 1250 (11th Cir. 2013) (quoting *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986)). A violation of the Equal Protection Clause based on the State's striking of jurors has been coined a *Batson* violation.[10] When determining whether such a violation has occurred, courts undertake a three-step process:

> First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial [or gender] exclusion by offering permissible race-neutral [or gender-neutral] justifications for the strikes. Third, if a race-neutral [or gender-neutral] explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial [or gender] discrimination.

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[10] For simplicity's sake, even though King is arguing that the prosecution violated both *Batson* and *J.E.B.*, the Court will refer to these claims as arising under *Batson*–i.e., a *Batson* claim or challenge. *See J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 144-45 (1994) (holding that *Batson*'s prohibition on racially discriminatory strikes applies to gender-based discriminatory strikes).

Madison v. Comm'r, 677 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Johnson v. California*, 545 U.S. 162, 168 (2005)).[11]

Neither party disputes that Petitioner established a *prima facie* case of purposeful discrimination or that the state proffered race-neutral and gender-neutral reasons for striking the jurors at issue. Thus, the Court focuses on *Batson*'s third step.

Regarding the third step, "it is a defendant's burden to prove purposeful discrimination." *Adkins*, 710 F.3d at 1250. When determining whether the defendant has met this burden, "the trial court should *consider all relevant circumstances*." *Id.* (quoting *Batson*, 476 U.S. at 96). Along this line, "a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93 (internal quotation marks and citation omitted). "[A] state court's failure to consider 'all relevant circumstances' at *Batson*'s third step is an unreasonable application of *Batson* under § 2254(d)(1)." *Adkins*, 710 F.3d at 1251 (citing *McGahee v. Ala. Dep't Of Corr.*, 560 F.3d 1252, 1261-62 (11th Cir. 2009)).

B. *Batson*, *J.E.B.*, and AEDPA

It is well-established that a state court's "evaluation of a prosecutor's race-neutral or gender-neutral explanation for a strike under *Batson* is a 'pure issue of fact . . . peculiarly within a trial judge's province.'" *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330,

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[11] The *Batson* three-step process also applies to allegations of gender-based discrimination. *See J.E.B.*, 511 U.S. at 144-45.

1344 (11th Cir. 2019) (quoting *McNair v. Campbell*, 416 F.3d 1291, 1310 (11th Cir. 2005)). Because the Court is thus reviewing a factual finding through the lens of AEDPA, "[King] may obtain relief only by showing the [Georgia] conclusion to be 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting 28 U.S.C. § 2254(d)(2)). Thus, "[t] o succeed under § 2254(d)(2), [King] must show that it was unreasonable for the state court to credit the prosecutor's proffered explanations for the strikes." *Smith*, 924 F.3d at 1346. Finally, because the issue is a factual one, and because factual findings are presumed correct on federal habeas corpus review, King "bears the burden of rebutting that presumption by 'clear and convincing evidence.'" *Id.* at 135 (quoting 28 U.S.C. § 2254(e)(1)).

C. Whether King is Entitled to *De Novo* Review Under 28 U.S.C. § 2254(d)(1)

Before reaching the factual determinations at issue, King first attempts to proceed under § 2254(d)(1). If successful, King would be entitled to *de novo* review of his *Batson* claims that are properly before the Court. *See Johnson*, 615 F. 3d at 1329-30 ("However, where the petitioner makes the required § 2254(d) showing as to a state court decision, we owe no AEDPA deference to that decision and instead review the claim *de novo*."). King argues that "the Georgia courts unreasonably misapplied *Batson*'s step-three analysis and reached unreasonably wrong determinations of fact as a result." Dkt. No. 65 at 71. King argues *Batson* was unreasonably applied because its third step requires courts to consider

"all relevant circumstances." *Batson*, 476 U.S. at 96. King argues that the Georgia Supreme Court, sitting in review on direct appeal of the trial court, unreasonably failed to take into account the following circumstances: (1) that the trial court discredited the prosecutor's race-neutral explanation regarding Juror Jacqueline Alderman; (2) that the trial court found that the prosecutor's strike of Alderman was purposeful discrimination; (3) the strong statistical discrimination in this case; (4) the prosecutor's outrage when the trial court found a *prima facie* case of discrimination; (5) "the prosecutor's inappropriate amusement at the challenge to his strike of Barbara Dean," dkt. no. 65 at 78; (6) the prosecutor's "intemperate, racially charged attack on *Batson* when the trial court found he had purposefully discriminated in striking Jacqueline Alderman," *id.*; and (7) that King was charged with killing a white woman.

King relies on *McGahee* to establish that the Georgia Supreme Court unreasonably applied *Batson* by not considering all relevant circumstances. To the extent King argues *McGahee* stands for the proposition that a court must *discuss in its opinion* every relevant circumstance in order to satisfy *Batson*'s third-step, King is incorrect. The Eleventh Circuit has clarified *McGahee*'s holding and has found that *McGahee* does not hold "that AEDPA deference does not apply to state court decisions accompanied by opinions that do not discuss all the evidence, circumstances, or arguments." *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1214 (11th Cir. 2013). Indeed, "[u]nder Supreme Court and [Eleventh] Circuit precedent, a state court's written opinion is not required to mention every relevant fact or

argument in order for AEDPA deference to apply." *Id.* at 1223.

Looking at the first alleged error, King argues that the Supreme Court of Georgia unreasonably applied *Batson* by "unreasonably transform[ing] the trial court's finding of intentional discrimination with respect to the strike of Juror Alderman into an innocuous event to which it gave no consideration." Dkt. No. 65 at 75. King goes on to argue that "in finding a *Batson* violation, the trial court in fact found that the defense had proven purposeful discrimination and that the prosecutor had been untruthful in claiming he had struck this juror for reasons other than her race and/or gender." *Id.* at 76. Looking at the trial court record, the trial court discounted the prosecutor's race-neutral explanation as not being consistent with the record. The trial court then found Alderman "to have been an improper strike." Dkt. No. 16-28 at 54. The trial court did not explain its decision in terms of the *Batson* framework, but it was not unreasonable for the Georgia Supreme Court to ground the trial court's decision in *Batson*'s second step: that the trial court found that the prosecutor did not adequately explain Alderman's exclusion with a permissible race-neutral justification. In other words, it was not unreasonable for the Georgia Supreme Court to find that the trial court held that the race-neutral reason given by the prosecution was inadequate. Nevertheless, however the trial court's finding is couched, the Georgia Supreme Court's discussion of Alderman shows that it was aware that the trial court found that the prosecutor's reasons for striking Alderman were discredited by the trial court and that the prosecutor's

strike violated *Batson*. Thus, King has not met his burden of showing that the Georgia Supreme Court did not take this circumstance into account.

Regarding the other circumstances, with the exception of statistical evidence (which is discussed next), King has not shown that the Georgia Supreme Court did not take these circumstances into account. Again, the Georgia Supreme Court was not required to discuss *or even mention* these circumstances. Further, *McGahee* does not control because this case is not like *McGahee*. There, after a *Batson* objection in the state trial court, the prosecution gave only general explanations for striking only black venire members (except in the case of one venireman). *McGahee* 560 F.3d at 1258. The trial court, however, still denied the *Batson* challenge. *Id.* at 1259. After the verdict, the prosecution gave "individualized, specific reasons for its peremptory strikes," but the state trial court never ruled on any of them. *Id.* at 1259-60. While the prosecution gave three reasons for striking one of the veniremen, the state appeals court never addressed one of the reasons, which was an "explicitly racial reason for striking" the veniremen. *Id.* at 1264. The *McGahee* court concluded that the state appeals court "clearly limited its review to only . . . two reasons *and did not implicitly review any other reasons*." *Id.* (emphasis added). Thus, the *McGahee* court explicitly recognized that a court may properly implicitly review circumstances (and thus need not discuss or mention those circumstances). That did not occur in *McGahee*: that court found that the state court did *not* consider an explicitly racial reason, which was in contravention of *Batson*. King, however, has

pointed to no evidence that the Georgia Supreme Court failed to consider the circumstances listed above–other than the fact that the Georgia Supreme Court did not mention these circumstances: such evidence is insufficient to show an unreasonable application of *Batson*'s third step. *See Greene v. Upton*, 644 F.3d 1145, 1155 (11th Cir. 2011) ("[The petitioner] relies on our decision in *McGahee*, 560 F.3d 1252, to argue that the Supreme Court of Georgia applied *Batson* unreasonably because it did not explicitly discuss each reason offered by the state in support of the peremptory challenges, but *McGahee* does not stand for that proposition.").

Turning to the statistical evidence in this case, *McGahee* is also distinguishable even though it dealt with a similar issue. *McGahee* found that the state appellate court unreasonably applied *Batson* because it "failed to consider the fact that 100% of the African-American potential jurors were removed from the jury by the State." *Id.* at 1265. The state appellate court unreasonably applied *Batson* because although it "noted that '[t]he State used sixteen of its twenty-two strikes to exclude all of the black venire members from the jury,' the court never discussed the fact that all of the black venire members had been removed by the prosecution through the challenges for cause and peremptory challenges, and never discussed this pattern or the significance thereof." *Id.* (quoting *McGahee v. State*, 554 So. 2d 454, 459 (Ala. Crim. App. 1989), *aff'd*, 554 So. 2d 473 (Ala. 1989)). Thus, it was the fact that the state court noted this disparity without giving it any weight that made that court's analysis unreasonable. Here, however, the Georgia Supreme Court did not misstate

the extent of the exclusion of black venire members. Rather, the Georgia Supreme Court did not discuss this circumstance. The Court cannot say, based solely on the Georgia Supreme Court's lack of discussion of this circumstance, that the Georgia Supreme Court unreasonably applied *Batson*. Rather, the Court begins with the presumption that the Georgia Supreme Court reasonably applied *Batson* by taking into account the statistical evidence. Thus, the Court presumes that even taking into account this circumstance (and the others listed above) the Georgia Supreme Court still found that King could not satisfy his burden. Whether this factual finding by the Georgia Supreme Court is unreasonable will be discussed below. *See infra* Part IV.G.

For these reasons, King is not entitled to *de novo* review of his *Batson* claims under 28 U.S.C. § 2254(d)(1).

D. Trial Judge's Application of *Batson* and *J.E.B.*

This section gives the factual background on the jury selection process that occurred at King's trial. After taking roll call and swearing in the potential jurors, the trial judge instructed the venire on the procedures by which the petit jury would be chosen. Dkt. No. 16-10 at 35-36. The judge explained that the 168 potential jurors[12] were to be divided into jury panels,[13] that each panel would be questioned separately, and that each juror would then be further

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[12] *See* Dkt. No. 16-10 at 29 (calling Juror 168).

[13] A total of 12 panels were created. *See* Dkt. No. 16-10 at 95 (excusing Panel 12).

separated and questioned individually. *Id.* at 35-36. The trial judge also introduced the parties. *Id.* at 37. Assistant District Attorney John Johnson represented the State. *Id.* G. Terry Jackson was lead counsel for the defense; he represented King along with his co-counsels George Hagood, Patty Williams, and Steven Sparger. *Id.* at 37-38. After more preliminary instructions, the judge placed the potential jurors into panels, told each panel when they would likely need to return to the courthouse for voir dire, and then excused the panels. *Id.* at 35-95.

The actual voir dire–the questioning of the venire members–occurred over the next week. The process was for each panel, moving sequentially from Panel 1, to be seated in the jury box as a group. The trial judge would then ask a series of questions to the entire panel (titled "General Exam" in the transcripts) and the venire members would raise their hands to signify an answer in the affirmative; after the court's inquiries, the prosecutor and then the defense were each given the same opportunity to ask questions to the whole panel whereby a panel member would raise his or her hand in the affirmative, with some follow up questions at times. *See e.g.*, dkt. no. 16-13 at 14-42 (questioning Panel 1 in this manner). After the entire panel was questioned, the panel was removed to the jury room, and an individual venire member was retrieved. The potential juror would then be questioned by the trial judge, then the prosecutor, and finally the defense. Throughout the process, potential jurors were excused for various reasons.

After fifty-four potential jurors were qualified (with Panel 6 being the final panel questioned), that portion of the process was complete, and the striking portion began the following Monday. *See* Dkt. No. 16-26 at 157; Dkt. No. 16-28 at 12. At the time of trial, Georgia law provided that the state had ten peremptory strikes and the defense had twenty. *See* O.C.G.A. § 15-12-165 (1994) ("[I]n any case in which the state announces its intention to seek the death penalty, the person indicted for the crime may peremptorily challenge 20 jurors and the state shall be allowed one-half the number of peremptory challenges allowed to the accused."). Further, out of the fifty-four potential jurors selected, three groups of four were created by which three alternates would be selected (the state having one strike from each group and the defense having two). *See* O.C.G.A. § 15-12-169 (1994) ("The defendant shall be entitled to as many peremptory challenges in an amount twice greater than the additional peremptory challenges of the state."). Deducing from the clerk's copy of the strike list and the transcript, the Court finds that the striking process was as follows: the first potential juror would stand; the State would then mark either "excuse" or "accept" on the strike sheet; "excuse" meant that person was struck; if the State marked "accept," then the defense was given the option to either mark "excuse" and strike that person or mark "accept" and have that person become a member of the petit jury. Dkt. No. 14-21 at 58-60; Dkt. No. 16-28 at 12-14.

After the striking process was completed, the lead defense counsel, Jackson, made a *Batson* objection to the State's strikes. Dkt. No. 16-28 at 17. Jackson argued his

prima facie case, explaining that "[i]n the main panel, there were eight black jurors," that "[t]he State struck seven of those," who were all females, and that the State used only one of its four available strikes for the alternates, which was to strike a black female. *Id.* The Court found that the defense had satisfied its burden of making a *prima facie* case of discriminatory intent. *Id.* at 18. The burden then shifted to the State to explain permissible neutral justifications for its strikes, which the prosecutor did for each of his ten peremptory strikes and his alternate strike. *Id.* at 20-29.

After the State set forth its non-discriminatory justifications for its strikes, the trial court turned to the defense to rebut such bases and to prove that the prosecution was motivated in substantial part by discriminatory intent. After each rebuttal argument, the Court would make its decision (with two exceptions) as to whether the defense satisfied its burden. After discussing Jacqueline Alderman, however, the trial judge reserved its ruling, stating that he would come back to that challenge. *Id.* at 32. Likewise, with Alnorris Butler, the trial judge again did not rule right away. *See id.* at 35. Nevertheless, with the rest of the jurors, the trial court found that the defense had not met its burden of proving purposeful discrimination. Retuning to Alderman and Butler, the trial court found that the defense did not meet its burden as to Butler. *Id.* at 51-52. As to Alderman, the trial court found a *Batson* violation. *Id.* at 54.

Having found that the strike of Alderman violated *Batson*, the Court ordered that the jury be re-struck–an order that angered the prosecutor. The exchange began:

> *Johnson*: -- why should we do that? Why not just -- I mean I don't have -- first of all, I have a problem that if I say, find out that somebody knows the family and I can't -- excuse me - give me a moment.
>
> *The Court*: Calm down. Get yourself, your thoughts proper and then tell me what you want to tell me.

Id. at 55. Johnson then elaborated on his position, which is reproduced in its entirety so as to not take any portion of it out of context:

> I find it improper for this Court to tell me that I cannot decide, when I listen to what somebody says and look at them, that they know the family, that they've been living in this community for 35 years, that that's not a justifiable strike. If that's the case, then 90 percent of the strikes that I've taken, and 100 percent of the strikes the defense takes in a case are irrelevant.
>
> If this lady were a white lady there would not be a reason -- there would not be a question in this case. And that's the problem I have with all of this is that it's not racially neutral. There was a time when it was racially neutral and that was before *Batson*. Because I had to act that way when I was in Brunswick because it was a physical impossibility if you wanted to strike every black off a jury for you to do that. And we had an issue just -- you had to reform your whole ideas and then *Batson* came out. And *Batson*

> now makes us look whether people are black or not. Not whether they're black or white, but black or not. And I may be arguing for the Supreme Court in this particular case and not for this court, which I probably am, but it just, it is uncalled for to require people to be reseated on a jury that I have a problem with in this case.
>
> This lady sits on this jury and all of a sudden out comes the fact that back during the life of this man's mother and father they were alcoholics, they beat him, or they ignored him, or they -- and she sits there and says well I remember that. Then I'm screwed, to use the vernacular. Not because I know that's what's going to happen because my experience is anyone who knows the family and has that much time involved in the community, those are the people that hang up a jury. That's my experience. And when I base it on my experience and then this Court says that's not a good enough reason, then I take issue with this entire whole process, both to this Court and to the Supreme Court of Georgia. It's improper and it's wrong.
>
> What I would suggest this Court to do now that I've had my say, and I'm sorry, I'm very angry right now.

Id. at 55-56. After Johnson's soliloquy, the defense, the prosecutor, and the Court agreed that the proper remedy was to reseat Ms. Alderman on the jury. *Id.* at 56-60. The previous twelfth juror was removed from the

jury to make room for Ms. Alderman. *Id.* The jury process was then complete.

E. The Georgia Courts' Rulings

Following his conviction and sentence of death, King filed a motion for new trial and then an amended motion for new trial. Dkt. No. 14-22 at 22-24, 52-70. In the amended motion, King argued, among other things, that the trial court violated King's due process and equal protection rights by "allowing the prosecutor to run criminal history checks on family members of Afro-American jurors, while not running similar checks on family members of white jurors." *Id.* at 59. King further argued that the trial court erred in not granting his *Batson* challenges on racial and gender grounds as to Barbara Dean, Alnorris Butler, Peggy Tillman, Maurice Vann, Patricia McTier, Jane Ford, Vondola Barney, Lillie Burkett, and Gwen Gillis. *Id.* at 60. The trial court summarily denied the motion. *Id.* at 82.

On direct appeal to the Georgia Supreme Court of the trial court's denial on his motion for new trial, King again argued that the trial court erred in finding that there was no *Batson* violation; this time, however, King also identified Juror Sarah McCall as having been unlawfully struck, in addition to Jurors Burkett, Vann, Dean, Ford, and Gillis. Dkt. No. 18-8 at 35-61. King did not expressly challenge the strikes of Butler, Tillman, McTier, and Barney, as he had in his motion before the trial court.[14] The Georgia Supreme Court held that the

[14] In his appeal, King did mention, in passing, the strikes of Butler and Barney as part of his argument with regard to Burkett. *Id.* at

trial court did not abuse its discretion in finding no discrimination with respect to Jurors Burkett, Vann, McCall, Dean, Ford, and Gillis. *King v. State*, 539 S.E.2d 783, 795-96 (Ga. 2000).

King's next bite at the apple was his petition for a writ of habeas corpus with the state habeas court.[15] There, King–in his amended petition–again challenged the prosecutors strikes, but King did not specify which strikes he was challenging. King, however, included a footnote to his claim stating: "To the extent trial counsel failed adequately to raise and litigate this issue at trial or on appeal, counsel was ineffective, and Petitioner was prejudiced thereby." Dkt. No. 19-35 at 30 n.9. In King's post-hearing brief in support of his petition, however, King did not argue his *Batson* or *J.E.B.* claim. Dkt. Nos. 24-28, 24-29. Rather, the brief was entirely silent on the issue. Likewise, King's proposed order filed in the state habeas court did not include any findings of fact or conclusions of law with respect to his *Batson* or *J.E.B.* claims. Dkt. Nos. 25-1, 25-2. The state habeas court did find, however, that King's *Batson* and *J.E.B.* claims were barred by the doctrine of *res judicata* because "the claims were raised and litigated adversely to [King] on his direct appeal to the Georgia Supreme Court." Dkt. No. 25-3 at 2; *see also id.* at 3 (finding barred by *res judicata* "[t]hat portion of Claim V, wherein [King]

44-45. However, he did not expressly identify those jurors as part of his challenge on appeal.

[15] King did petition the United State Supreme Court for a writ of certiorari, but the petition was summarily denied. *King v. Georgia*, 536 U.S. 957 (2002).

alleges that the prosecution improperly used its peremptory strikes to systematically exclude unspecified jurors on the basis of race and/or gender"). Finally, King's application to the Georgia Supreme Court for a certificate of probable cause to appeal was summarily denied. Dkt. No. 25-10.

F. Procedural Default of This Claim with Respect to Juror Patricia McTier

Under AEDPA, a federal habeas petition must first have "exhausted the remedies available in the courts of the State," before he or ·she may apply for a writ of habeas corpus. 28 U.S.C. § 2254(b)(1)(A). Here, on direct appeal of his conviction to the Georgia Supreme Court, King never challenged the trial court's denial of his *Batson* challenge as to Juror Patricia McTier. King agrees that his "[a]ppellate counsel did not specifically challenge the removal of Ms. McTier in Mr. King's direct appeal." Dkt. No. 65 at 87 n.37.

Even though this claim was not exhausted within the meaning of AEDPA, the Court may still consider it if King properly challenged his appellate counsels' failure to appeal this claim in the state habeas court under a theory of ineffective assistance of counsel. If King had, then King would have been on the path of properly exhausting, within the meaning of § 2254(b)(1)(A), the ineffective assistance of counsel claim. But, King did not, so any claim that his counsel on direct appeal was ineffective must also fail per failure to exhaust.[16] *See Fults v. GDCP Warden*, 764 F. 3d 1311,

[16] King's argument that the State waived these procedural defaults is nonsensical because King never raised a *Batson* claim with

1317-18 (11th Cir. 2014) ("[A] cause and prejudice argument which is not presented in state court is itself procedurally defaulted and cannot be raised for the first time on federal habeas (unless, of course, there is cause and prejudice for that particular default as well)." (citing *Henderson v. Campbell*, 353 F.3d 880, 895-99 (11th Cir. 2003))).

G. The Remaining *Batson* and *J.E.B.* Claims

1. Overarching Relevant Circumstances

King argues that statistical evidence supports a finding that the prosecution's strikes were motivated in substantial part by discriminatory intent. King's trial counsel established a *prima facie* violation of *Batson* by pointing to the racial disparity in the prosecution's strikes. The defense argued that of the eight black jurors in the main panel, the prosecution used seven of its ten strikes to strike black females. Dkt. No. 16-28 at 17.[17] The defense also noted that of the alternates, the prosecution struck one potential alternate, who was black. *Id.* at 18. These facts are indeed evidence suggesting racial discrimination that this Court must take into account. *See Miller-El v. Cockrell*, 537 U.S. 322, 342, (2003) (finding that "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason," where the prosecution

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respect to McTier in his amended state habeas petition. Indeed, the amended petition never even mentions *McTier*–let alone a *Batson* claim or an ineffective assistance of counsel claim grounded in the removal of McTier. *See* Dkt. No. 19-35.

[17] This is not accurate: two of the seven strikes were against black males, Maurice Vann and Alnorris Butler.

struck "91%" of the eligible black venire members with 10 of their 14 peremptory strikes); *Batson*, 476 U.S. at 97 (finding that a "'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination").

Further, the Court must take into consideration the trial court's finding that the prosecution violated *Batson* with its strike of Alderman. The Court must also consider that, in so doing, the trial court discredited the prosecution's explanation for its strike and found it was unconstitutionally based. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (finding that in reviewing *Batson* challenges defendants may present evidence of a "relevant history of the State's peremptory strikes in past cases").

As to the circumstances of the prosecutor's reactions to the trial court finding a *prima facie* case, to the trial court finding purposeful discrimination on the strike of Ms. Alderman, and to the *Batson*/*J.E.B.* challenge of Barbara Dean, the Court notes that "the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge," and that the Supreme Court has "recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province." *Flowers*, 139 S. Ct. at 2244 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). Nevertheless, the Court will take these circumstances into account–as it must.

Even though the Patricia McTier claim is procedurally defaulted, King argues that the Court must consider the prosecutor's alleged misconduct as a relevant circumstance. First, without any prompting

from McTier, the prosecutor asked McTier whether she was "related to Wilma McTier through [her] husband." Dkt. No. 17-1 at 68. McTier confirmed that she was related by marriage to Wilma and then clarified that Wilma was "probably" her husband's "second or third cousin[]." *Id.* at 68-69. When asked during the *Batson* inquiry to provide a nondiscriminatory reason for striking McTier, the prosecutor stated that his office had prosecuted Wilma McTier for an aggravated assault. Dkt. No. 16-28 at 24. When describing the relationship between Wilma and Patricia McTier, the prosecutor bumbled over its nature: "Wilma McTier is related to Ms. McTier. My understanding was that that was her brother. She indicated it was her husband's - some other relationship.· My indication was it was her brother-in-law. She indicated it was like her brother's uncle." *Id.* The prosecutor then clarified that he looked through the office's records and "determine[d] that we did in fact prosecute Wilma McTier for aggravated assault." *Id.* at 24-25. The trial court then told the prosecution that if Wilma was Patricia's brother's uncle, then Wilma would also be Patricia's uncle. *Id.* at 25. The prosecution again attempted to clarify the relationship: "I'm sorry, no, her husband's uncle. I thought it was her brother-in-law, her husband's brother. She thought it was her husband's uncle." *Id.* The prosecutor then immediately reiterated that he had "look[ed] that up in our records, and we have prosecuted Wilma McTier. She did acknowledge that they were related." *Id.*

The defense then requested that the trial court determine whether the prosecution ran searches on all of the black jurors' relatives to determine whether they

had been prosecuted by the district attorney's office. The trial judge responded that he thought "as [he] remember[ed] it, that [McTier] almost volunteered this information, I think, from misunderstanding the question that was asked." *Id.* at 40. The trial court continued, "I think the question was actually asked in another manner, as I'm remembering it, where they were asking –"; at this point the prosecution interrupted and offered, "[a]re you a victim." *Id.* The exchange that followed is long but is necessarily reproduced in almost its entirety (with a small portion omitted as irrelevant):

> *The Court*: And I can't remember whether it was the State or the defense that asked it, but somebody asked a question that was actually looking for an opposite answer, --
>
> *Johnson*: Yes, sir, yes, sir.
>
> *The Court*: -- and I think the jurors misunderstood the question and volunteered that they, a member of their family had been prosecuted or was in custody.
>
> *Johnson*: As the Court remembers, in individual voir dire-
>
> *The Court*: Oh, I think it was something, maybe a question, that had been asked on the thing about who - had anybody ever had any problems with law enforcement.
>
> *Johnson*: No, sir.
>
> *The Court*: Okay, go ahead.
>
> *Johnson*: When defense counsel began his individual voir dire, he asked every juror had

they ever been a victim of a crime, and what I did was -

The Court: Victim.

Johnson: . . . The question was asked, has any member - you or your immediate family ever been a victim of a crime.

The Court: Then he followed up in his individual and said you said you were a victim of a crime, and Ms. McTier responded to say - I think she misunderstood that, and I think there was one other juror -

Johnson: Ms. Barney

The Court: -- that misunderstood and answered similarly, disclosing that there had been some member of their family that was in fact prosecuted, not a victim, but had been prosecuted.

Jackson: Well, my notes don't reflect that as to this jury, Your Honor.

The Court: Okay. Initially, I find no discrimination there. If I'm going to listen to one, I may listen to that just to be sure, but I'm thinking that that - My memory is that that was a volunteered thing. The state has noted that they have prosecuted a family member, and they have stated that - They have, to be sure, even though they asked the question, have verified that. Go ahead.

. . .

> *Johnson*: Your Honor, if I just can say in response to that, regardless of whether it was said or not, I happen to know that Wilma McTier was prosecuted by our office. Because of the relationship of the names, I had a right to ask and did ask are you related to Wilma McTier, and she stated her relationship. I happen to know that Barbara Dean's stepson was shot by Darren Crosby. I don't have to ask them and embarrass them about that information. I don't have to go into it. If I know it and can reasonably verify it's accurate, I've got a right to rely on that no matter what, just like defense counsel does.

Id. at 41-43.

The record shows that Patricia McTier did not volunteer any information about Wilma McTier prior to being questioned by Johnson during individual voir dire. Thus, Johnson and the trial court's recollection was incorrect, as was Johnson's representations of the degree of Wilma and Patricia's familial relationship. The prosecution's incorrect recollection of both that Patricia first raised the prospect of Wilma being prosecuted and of the degree of Patricia and Wilma's familial relationship is relevant when determining whether the prosecution's other strikes were "motivated in substantial part by discriminatory intent." *Foster v. Chatman*, 136 S. Ct. 1737, 1742 (2016) (quoting *Snyder*, 552 U.S. at 485); *see also*, *Flowers*, 139 S. Ct. at 2243 (finding that a defendant can support a *Batson* challenge with evidence of "a prosecutor's misrepresentations of

the record when defending the strikes during the *Batson* hearing").

All of the circumstances discussed in this section must be considered under *Batson*'s third step. Thus, they will be considered by the Court when determining whether the Georgia Supreme Court's findings were reasonable.

2. Sarah McCall

The prosecutor's race-neutral reasons for striking McCall were that the death penalty was "not her first choice," that she "had a lot of hesitancy about her," and that her husband (who was in the venire in a different panel) felt that she was opposed to the death penalty. Dkt. No. 16-28 at 23-24. However, the prosecutor's third reason[18]–that McCall's husband said she was opposed to the death penalty–is contradicted by the record. The exchange was as follows:

> *Johnson*: Have you and your wife talked about - Well, first let me ask you this. The feelings that you have, are they based on, are they based in part on, your religious principles -
>
> *Mr. McCall*: Yes.

[18] The prosecutor explained to the trial court: "I did not make up my mind about Ms. McCall until after we voir-dired her husband, who was Richard McCall and in the next panel. If the Court remembers, I believe I asked him the question, when we were dealing with his death penalty opposition, did he feel his wife was opposed to it also, and he said he thought she would be, and for those reasons, that she is against the death penalty or would not consider it equally, I struck her." Dkt. No. 16-28 at 24.

> *Johnson*: -- about the death penalty.
>
> *Mr. McCall*: Yes, sir, yes.
>
> *Johnson*: Okay. Have you and your wife talked about that?
>
> *Mr. McCall*: No, sir.
>
> *Johnson*: So whatever decisions you and she make, you either could have different points of view or the same points of view, but you don't know how she feels about it?
>
> *Mr. McCall*: Correct.
>
> *Johnson*: That's all I have, Judge.

Dkt. No. 16-20 at 73-74. This misstatement of the record becomes even more important because the prosecution expressly relied on it to strike McCall: "I did not make up my mind about Ms. McCall until after we voir-dired her husband, who was Richard McCall and in the next panel." Dkt. No. 16-28 at 24. This misstatement of the record can be evidence that the prosecutor was motivated by discriminatory intent. *See Flowers*, 139 S. Ct. at 2250 ("When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent.").

King argues that even more evidence of discriminatory intent exists because of inconsistent treatment of McCall as compared to "many white prospective jurors whom the prosecutor accepted." Dkt. No. 65 at 82. The first two race-neutral reasons the prosecutor set forth for striking McCall were that "[s]he indicated that the death penalty was not her first choice" and that "[s]he had a lot of hesitancy about her." Dkt.

No. 16-28 at 23-24. McCall indeed responded to the trial judge's question of "are you against the death penalty" as follows:

> "Your Honor, I have questions about that. Because of my religious beliefs, the Bible plainly states that I shall not kill. Okay. If the defendant has killed someone and you in turn, if that defendant is found guilty, then you kill him. I mean I have questions about that, but I really do believe in some cases that the death penalty should be given."

Dkt. No. 17-1 at 44. While McCall did agree that "in some instances" the death penalty "would be an appropriate punishment," she did show some hesitancy in her ability to recommend it: when asked whether, "after considering all of the evidence, that the most appropriate penalty was death, could you recommend to the Court that it impose that sentence," McCall responded "I think I could." *Id.* at 45-46. When it was the prosecution's turn to question McCall, she continued to show hesitancy toward the death penalty. While she did affirm that she could vote to recommend the death penalty, she also agreed that "because of [her] religion and [her] beliefs" she had problems with the death penalty and that if given other choices of punishment she would "lean toward those other choices before [she] would consider the death penalty." *Id.* at 50-51.

King's argument–that "McCall's views about the death penalty were no less favorable to the state's interest in a death sentence than those of many white prospective jurors whom the prosecutor accepted," dkt. no. 65 at 82–is not supported by the record. The

responses regarding the death penalty of each of the prospective white jurors that King identified cannot be characterized as hesitant. In stark contrast, the responses of McCall about the death penalty can only be characterized as hesitant and that hesitation was grounded in her religious beliefs. Thus, King has not shown that the white venire members were treated differently from McCall in a manner that suggests or evidences discriminatory intent.

The issue, then, is whether the overarching relevant circumstances, discussed *supra* Part IV.G.1., in combination with the prosecutor's incorrect reason for striking McCall and incorrect representation of the record are sufficiently clear and convincing to rebut the state court's finding that the prosecution was not motivated in substantial part by discriminatory intent in striking McCall. Although the question is closer than some, King has not met his burden with respect to McCall–especially when considering her strong hesitation in recommending the death penalty and her hesitation in her belief that she could even recommend that penalty.[19] *See* Dkt. No. 17-1 at 46 (replying that she "think[s]" she "could" recommend the death penalty if it

[19] Contrary to King's argument, the fact that McCall only "thought" she could impose the death penalty was argued by the prosecutor as a race-neutral reason for striking McCall and thus is properly considered by the Court. The prosecutor argued to the trial court that he struck McCall in part because "[s]he had a lot of hesitancy about her" regarding the death penalty. Dkt. No. 16-28 at 24. Saying she only "thought" she could recommend the death penalty (especially when compared to her answers regarding recommending the life imprisonment options) is aptly characterized as "hesitancy."

was the most appropriate penalty but replying that she "could" recommend life imprisonment and life imprisonment without the possibility of parole). Thus, the Court cannot say that the Georgia Supreme Court's finding–that the trial court did not abuse its discretion in finding that the strike of McCall was proper–was unreasonable.

3. Lillie Burkett

The prosecutor set forth two race-neutral reasons for this strike. The first reason was that she was a minister; the prosecutor explained he "do[es] not take people on juries who are ministers" because "[t]hey have a particular point of view about trying to forgive people and look to the best in them." Dkt. No. 16-28 at 27. Second, "she knew [King's] family in this case, and the fact that the family situation, the background situation, will be an issue in the psychological testimony that will come, made [him] feel that she would not be a fair juror in that respect." *Id.*

King has not shown that the Georgia Supreme Court's decision–that the trial court did not abuse its discretion in finding that the prosecution's strike of Burkett was not motivated in substantial part by discriminatory intent–was unreasonable. First, the prosecution's primary reason for striking Burkett was that she was a minister, and he does "not take people on juries who are ministers." *Id.* While the prosecution's questioning of Burkett on this topic may not have been particularly probing, he did learn from her that she had been a minister for eight years–a substantial period of time. Tellingly, the prosecution's questioning of others regarding their role in the church was equally as limited

to that person's title/role and did not probe into the specifics of the role. *See*, *e.g.*, Dkt. No. 16-13 at 94-95 (questioning Samantha Drew); Dkt. No. 16-14 at 5-6 (questioning Connie Arnold); Dkt. No. 16-15 at 137-38 (questioning Jacqueline Alderman); Dkt. No. 16-16 at 97-98 (questioning Alnorris Butler); *id.* at 140-41 (questioning James Orvin); Dkt. No. 16-17 at 16-18 (questioning Tamela Folsom); *id.* at 79-80 (questioning Rebecca Griffin); Dkt. No. 16-23 at 56-57 (questioning Eddie Vann); Dkt. No. 16-24 at 37 (questioning Brandy DeLoach); Dkt. No. 16-25 at 17-18 (questioning Carzell Rooks). Further, Johnson, the main prosecutor, showed that he was familiar with, at least, the Baptist Church. When he asked Rebecca Griffin about her position in the church, she replied that she taught "Training Union," dkt. no. 16-17 at 80. Johnson replied that "[h]earing the special words, you must be Baptist," and that he was "raised Baptist so I can understand." *Id.* King's argument that the prosecution treated Burkett differently than similarly situated whites with regard to their positions in the church is not supported by the record because he questioned all jurors similarly on the matter and no other jurors were ministers with the exception of Thomas Lightsey.[20]

Turning to King's second argument, the prosecution's lack of questioning regarding Burkett's

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[20] Although the prosecution did not strike Thomas Lightsey, who was also a minister, the prosecution was never given that opportunity. The prosecution indeed could have saved one of its strikes for Lightsey. But the prosecution's choice not to makes sense considering that Lightsey was the second to last prospective juror that could have been selected for the petit jury.

relationship to the King family does not move the needle either. The prosecution's reason that he does not take ministers is a valid race-neutral reason for striking Burkett. It is unsurprising, then, that the prosecutor did not probe further into the extent of Burkett and the King family's relationship because the prosecution already had reason enough to strike Burkett. Thus, the Georgia Supreme Court's finding that the trial court did not abuse its discretion with respect to the defense's challenge of Burkett was not unreasonable.

4. Gwen Gillis

The prosecutor's proffered reasons for striking Gillis were that she lived near King's aunt, that she was a neighbor of the family of King's co-defendant, and that she lived close to "one of the relatives, Gary Andrews," in whose house the murder weapon was found. Dkt. No. 16-28 at 27. King first argues that the prosecutor's reasons were pretextual because the prosecutor learned by his questioning only that Gillis lived down the road from King's aunt. It was not until the defense's individual voir dire of Gillis that Gillis stated she was a neighbor of King's co-defendant and of Gary Andrews. The prosecutor, however, learned from the fact that Gillis lived near King's aunt that, as he informed the trial court, "she would have lived in the neighborhood where both of the co-defendants' family lived." *Id.* at 27-28. For this reason, the prosecution "was not willing to accept her as a juror." *Id.* at 28. Thus , the prosecutor did not need to question her further because he had learned the information necessary in his mind to strike her. Second, King again points to white venire members Connie Arnold, Karen Milton, Rebecca Griffin, Martha

Vaugn, and James Edwards as having connections to witnesses that were just as strong. These jurors' connections, however, were far too attenuated to be compared to a neighbor of both co-defendants and Andrews.[21] Thus, King has not met his burden with respect to Gillis.

5. Jane Ford

Jane Ford was a white female who was struck by the prosecution. King challenged her strike as being improperly motivated by discrimination based on Ford's gender. The trial court denied this challenge. The prosecution put forth two gender-neutral reasons to the trial court. First, "she was a single mother, had no family here, had children and no one to care for those children." Dkt. No. 16-28 at 25. Second, and the "primary reason" was because of her "relationship with [intellectually disabled] kids at school." *Id.* She was a special education teacher, and the only person that

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[21] Arnold ran a video store where King would rent videos. She worked there for about a year in 1990. Dkt. No. 16-14 at 1, 5-6. Milton, an x-ray technician, had only one connection in that she once gave King a CT scan. Dkt. No. 16-15 at 80-87. Griffin went to school with Juanita King (and her brother went to school with King, but she did not think she ever met King). Dkt. No. 16-17 at 80. Griffin did not state how well she knew Juanita, just that they were classmates at one point in time. Vaughn worked in a cafeteria, and her only contact with King was "[t]hrough the lunch period for just a brief period of time." Dkt. No. 17-1 at 20-21. Edwards was a middle school teacher, who may or may not have taught King as one of the seven hundred students he teaches a year for a class that meets for only six-weeks. Dkt. No. 16-20 at 7-8. Based on this record, these relationships are tenuous, at best.

indicated that she enjoyed the relationship with intellectually disabled persons. *Id.*

King argues that the Georgia Supreme Court's finding that the trial court did not abuse its discretion in finding that the strike was proper was unreasonable for three reasons: (1) the Georgia Supreme Court "unreasonably ignored both the inconsequential nature of [Ford's] testimony about her work with intellectually disabled students (a one-word affirmative response to defense counsel's question about whether she enjoyed her job)," dkt. no. 65 at 101, and (2) "the host of prospective jurors who were acceptable to the prosecution despite closer ties to individuals with intellectual disability," *id.*; and (3) the Court inaccurately characterized one of the prosecution's justifications when it stated that Ford was stricken "because she was a single mother who would be financially burdened by jury service," *id.* (quoting *King*, 539 S.E.2d at 796).

Even though the Georgia Supreme Court mischaracterized one of the prosecution's justifications, it was not unreasonable for the Georgia Supreme Court to find that the trial court did not abuse its discretion when it credited the prosecution's "primary reason" for striking Ford. It is axiomatic that "determinations of credibility and demeanor lie peculiarly within a trial judge's province." *Flowers*, 139 S. Ct. at 2244 (quoting *Snyder*, 552 U.S. at 477). Thus, it was not unreasonable for the Supreme Court of Georgia to find that the trial court did not abuse its discretion in determining that the prosecution's "primary reason" for striking Ford was gender-neutral and sincere–and thus that the strike was

not motivated in substantial part by discriminatory intent. Finally, with the exception of Dennis Reynolds, King's argument that Ford was treated differently than the other females because she was female is illogical.[22]

6. Barbara Dean

The final challenged strike properly before the Court was against Barbara Dean, who was also a white female. The prosecution's proffered gender-neutral justification was that "her stepson [who was a possible state witness] was shot by Darren Crosby, who is a potential witness in this case and who is the brother of Karen Crosby." Dkt. No. 16-28 at 20. King argues that the prosecutor's discriminatory intent was obvious because he did not ask Dean "a single question about her relationship to these two state witnesses or her knowledge of the alleged attack, even after defense counsel had questioned her about her familiarity with state witnesses." Dkt. No. 65 at 105. Further, when the defense argued that Dean was unconstitutionally struck because she was female, the prosecutor laughed, which shows he was acting with discriminatory intent. *See* Dkt. No. 16-28 at 29-30.

Again, King cannot meet his burden under AEDPA. Although the prosecutor did not ask Dean any questions, the prosecution already knew that her stepson, a possible state witness, was shot by Darren Crosby, another possible state witness and *brother of the victim*. *See* Dkt. No. 16-28 at 43 ("I happen to know that Barbara

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[22] King argues that because Ford was female she was treated differently than other females who also interacted with intellectually disabled people.

Dean's stepson was shot by Darren Crosby. I don't have to ask them and embarrass them about that information. I don't have to go into it . If I know it and can reasonably verify it's accurate, I've got a right to rely on that no matter what, just like defense counsel does."). Even though the prosecution did not ask Dean questions regarding this relationship, it was not unreasonable for the Georgia Supreme Court to find that the trial court did not abuse its discretion in finding that the prosecution's justification was both gender-neutral and credible.

V. Certificate of Appealability

Federal Rule of Appellate Procedure 22(b)(1) provides in relevant part: "In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court . . . the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a [COA] under 28 U.S.C. § 2253(c)." Under 28 U.S.C. § 2253(c)(2), a COA should be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." The United States Supreme Court has recently reemphasized that "[t]he COA inquiry . . . is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Rather, at this stage, "the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* (internal quotation marks and citation omitted).

Here, King has made a substantial showing of the denial of a constitutional right with respect to his *Batson* claims and the issues pertaining thereto. The Court finds that "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* (internal quotation marks and citation omitted). Accordingly, King is **GRANTED** a Certificate of Appealability as to (1) whether he is entitled to *de novo* review of these claims under 28 U.S.C. 2254(d)(1) because the Georgia Supreme Court unreasonably applied *Batson*; and (2) whether the Georgia Supreme Court's decisions that the trial court did not abuse its discretion in finding that *Batson* was not violated with respect to Burkett, Vann, McCall, Dean, Ford, and Gillis were unreasonable.

As to King's remaining claims, the Court **DENIES** a Certificate of Appealability finding that no jurist of reason could disagree with the Court's conclusions on the issues presented in these claims.

CONCLUSION

For the reasons provided above, King has failed to establish that he is entitled to relief under 28 U.S.C. § 2254. Accordingly, his petition for a writ of habeas corpus is **DENIED**.

King is, however, **GRANTED** a Certificate of Appealability on the issues of (1) whether he is entitled to *de novo* review of these claims under 28 U.S.C. § 2254(d)(1) because the Georgia Supreme Court unreasonably applied *Batson*; and (2) whether the Georgia Supreme Court's decisions that the trial court did not abuse its discretion in finding that *Batson* was

not violated with respect to Burkett, Vann, McCall, Dean, Ford, and Gillis were unreasonable.

SO ORDERED, this 24th day of January, 2020.

/s/ Lisa Godbey Wood
HON. LISA GODBEY WOOD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

Appendix D

273 Ga. 258

Supreme Court of Georgia.

KING

v.

The STATE.

No. S00P1146.

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Nov. 30, 2000.

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Reconsideration Denied Dec. 15, 2000.

Synopsis

Defendant was convicted in the Superior Court, Appling County, E.M. Wilkes, III, J., of malice murder, armed robbery, burglary, aggravated assault, false imprisonment, and possession of a firearm during a felony. Defendant appealed. The Supreme Court, Hines, J., held that: (1) investigators owed no duty to inform the defendant that he was suspected of murdering store employee; (2) defendant was not entitled to a change of venue; (3) defendant was not entitled to be present during a brief hearing concerning the state's request for an order compelling accomplice to testify; (4) denial of challenges for cause was proper; (5) state's exercise of peremptory exemptions was valid; and (6) defendant's closing argument that the jurors should ask "what Jesus would do" could be prohibited in penalty phase.

Affirmed.

Sears, J., concurred in part, dissented in part, and filed opinion joined by Benham, C.J.

Fletcher, P.J., dissented and filed opinion.

Attorneys and Law Firms

Jackson & Schiavone, George T. Jackson, Steven L. Sparger, George B. Hagood, Savannah, for appellant.

Stephen D. Kelley, District Attorney, John B. Johnson, III, Assistant District Attorney, Thurbert E. Baker, Attorney General, Susan V. Boleyn, Senior Assistant Attorney General, Allison B. Vrolijk, Assistant Attorney General, for appellee.

Opinion

HINES, Justice.

Warren King was convicted of malice murder, armed robbery, burglary, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony.[1] The jury fixed his sentence for

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[1] The crimes occurred shortly after midnight on September 14, 1994. King was indicted on October 4, 1994, by an Appling County grand jury for malice murder, armed robbery, burglary, two counts of felony murder, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony. The State filed written notice of its intent to seek the death penalty on January 6, 1995. King's trial began on September 14, 1998, and the jury found him guilty of malice murder, armed robbery, burglary, aggravated assault, false imprisonment, and possession of a firearm during the commission of the felony of false imprisonment on September 24, 1998. On September 25, 1998, the jury fixed the sentence for the murder at death. Also on September 25, 1998, the trial court ordered the death sentence for the murder and the

the murder at death after finding the following statutory aggravating circumstances to exist: the murder was committed during the commission of the capital felony of armed robbery and during the commission of a burglary; the murder was committed for the purpose of receiving money or other things of monetary value; and the murder was committed by King as the agent of another, Walter Smith. OCGA § 17–10–30(b)(2), (4), (6). For the reasons set forth below, this Court affirms.

1. A surveillance camera videotape and witness testimony identifying the persons recorded on the videotape, showed that on the night of September 13, 1994, King and his cousin, Walter Smith, visited a convenience store in Surrency, Georgia, at approximately 10:45 p.m. Smith testified that he found King later that night and that King suggested they rob the convenience store. Smith had previously obtained a .380 caliber handgun from a relative's home, and, according to Smith's testimony, King took the handgun from the seat of Smith's vehicle and carried it with him as the two parked and walked to the convenience store.

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following consecutive prison terms for King's other crimes: life imprisonment for armed robbery; twenty years for burglary; twenty years for aggravated assault; ten years for false imprisonment; and five years for possession of a firearm during the commission of a felony. King filed a motion for a new trial on October 28, 1998, and, in an order filed on November 19, 1998, the trial court directed that the motion be deemed as timely filed. King amended his motion for new trial on November 24, 1999, and the trial court denied the amended motion in an order filed on February 7, 2000. King filed his notice of appeal on February 28, 2000. His appeal was docketed in this Court on March 29, 2000, and orally argued on July 17, 2000.

Shortly after midnight on September 14, 2000, Karen Crosby, an employee of the convenience store, set the store's alarm, locked the door, and walked toward her automobile. King and Smith confronted her in the store's parking lot, and King ordered her at gunpoint to "give it up." Crosby recognized King and spoke to him by name. Crosby then threw her keys to Smith, who entered the convenience store as King continued to hold Crosby at gunpoint. The store's surveillance camera recorded Smith entering the store, the sounding of the store's alarm, Smith running from the store, and, approximately twenty-four seconds later, the sound of two gunshots. King testified, during the sentencing phase, that Smith yelled at him repeatedly to shoot Crosby but that he, instead, handed the gun to Smith. However, Smith testified that, as he was running from the store, he heard the two shots, turned, and saw Crosby falling to the ground. Smith also testified that, as he and King were fleeing the scene, King exclaimed, "I hope I killed the bitch."

Viewed in the light most favorable to the verdicts, this Court finds that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that King was guilty of the crimes of which he was convicted and that the aforementioned statutory aggravating circumstances existed; also, the evidence was such that a rational trier of fact would be authorized to find that King had failed to show beyond a reasonable doubt that he was mentally retarded. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Pittman v. State*, 269 Ga. 419, 420,

499 S.E.2d 62 (1998); OCGA § 17–10–30(b)(2), (4), (6); OCGA § 17–7–131(c)(3).

Pretrial Proceedings

2. King moved the trial court to quash his indictment because all grand jury forepersons in Appling County over a number of years have been Caucasian males. The trial court denied the motion, finding that grand jury forepersons in the county were selected by the grand jury members themselves from among their own number, that neither the district attorney nor the court participated in the selection process, and that grand jury forepersons performed duties that were essentially ministerial. These circumstances distinguish King's situation from that addressed by the United States Supreme Court in *Rose v. Mitchell*, 443 U.S. 545, 551–552, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), and, accordingly, the trial court's refusal to quash King's indictment does not require the reversal of the verdicts reached by his traverse jury, which was properly selected. *Bishop v. State*, 268 Ga. 286, 288–289(4), 486 S.E.2d 887(1997); *Spivey v. State*, 253 Ga. 187, 199–200(7)(b), 319 S.E.2d 420 (1984); see *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984).

3. King argues that the trial court erred in denying his motion to suppress statements he made to authorities during the two days following the murder. Upon a review of the record, this Court finds no error.

Before King gave his first statement on September 14, 1994, he was told he was not under arrest, was told he could leave, was read his rights under *Miranda v.*

Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and signed a waiver of those rights. After giving a statement in which he denied knowledge of the crimes, he was returned to his residence. King was arrested later that day on an unrelated warrant for aggravated assault, and he was questioned for a second time on the evening of September 15, 1994, after hearing his *Miranda* rights read again and signing another waiver of those rights. King was interviewed a third time in the early morning hours of September 16, 1994, and admitted being present during the armed robbery. Before this third interview, King once again was read his *Miranda* rights and signed a waiver of those rights. A law enforcement officer testified at the suppression hearing that King did not appear to be suffering from any mental incapacity and did not appear to be " sleepy or confused or muddled." In light of the foregoing and upon a review of the record, this Court concludes that the trial court did not err in finding that King knowingly waived his *Miranda* rights and that his statements were voluntary. *Miranda*, 384 U.S. 436, 86 S.Ct. 1602; OCGA § 24–3–50.

This Court has held that *Riley v. State*, 237 Ga. 124, 226 S.E.2d 922 (1976), does not apply to adults. *McDade v. State*, 270 Ga. 654, 656(3), 513 S.E.2d 733 (1999). Alleged cognitive impairment is one factor to be considered by a trial court as part of the totality of the circumstances surrounding a statement; however, the trial court's finding that King was capable of understanding his rights was not clearly erroneous. *Lyons v. State*, 271 Ga. 639, 640–641(3), 522 S.E.2d 225

(1999); *Brown v. State*, 262 Ga. 833, 834–835(6), 426 S.E.2d 559 (1993).

Investigators, who presented waiver of rights forms referring only to the robbery of the convenience store, were under no duty to inform King specifically that he was suspected of murder before accepting his signed waivers and subsequent statements. *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987); *Christenson v. State*, 261 Ga. 80, 85–86(3), 402 S.E.2d 41 (1991).

Because there is no dispute that King was in custody at the time of his third statement and because King knowingly and voluntarily waived his rights, it is irrelevant that a warrant for his arrest on the charge of murder had been taken out but was not executed before he made his statement. See *United States v. Yunis*, 859 F.2d 953, 966–67(II)(B) (D.C.Cir.1988) (pretermitting question of whether rights had attached because those rights were affirmatively waived); see also *Hodges v. State*, 265 Ga. 870, 872(2), 463 S.E.2d 16 (1995) ("[T]he proper inquiry is whether the individual was formally arrested or restrained to the degree associated with a formal arrest, not whether the police had probable cause to arrest.").

4. King argues that the trial court erred by denying his motion for a change of venue. King concedes that media coverage of the murder was limited, but he contends that a "small town syndrome" created strong prejudice against him.

"A capital defendant seeking a change of venue must show that the trial setting was inherently prejudicial as

a result of pretrial publicity or show actual bias on the part of the individual jurors." *Gissendaner v. State*, 272 Ga. 704, 706(2), 532 S.E.2d 677 (2000). This Court finds that King failed to make either showing and, therefore, that the trial court did not abuse its discretion in denying King's motion. *Tolver v. State*, 269 Ga. 530, 532–533(4), 500 S.E.2d 563 (1998) (recognizing trial court's discretion in considering a motion for a change of venue).

The trial court denied King's motion in a detailed order following voir dire. The trial court noted its prior finding that media coverage of the murder had been "non-inflammatory" and, therefore, that it provided no basis for granting the motion. The trial court then found that, although most of the prospective jurors had heard about the murder in very general terms, "almost every juror ... had learned more about the case during the jury selection process than they had known before they entered the courthouse." A review of the record confirms this finding of fact, and this Court approves of the trial court's legal conclusion that jurors were not unfit to serve simply because they had heard that the crimes had occurred and that King had been arrested. In fact, a review of the record reveals that a large number of the jurors knew almost nothing about the crimes and did not remember King's name. Accordingly, this Court accepts the trial court's finding that King failed to show that the trial setting was inherently prejudicial. This Court also concludes that the trial court did not err by declining to change venue when only 8.4 percent of the prospective jurors were excused because of opinions formed from their exposure to pretrial publicity and rumors, particularly in light of the

soundness of the trial court's rulings on King's motions to have jurors excused for cause. See *Tharpe v. State*, 262 Ga. 110, 111(5), 416 S.E.2d 78 (1992).

5. The trial court did not err by denying King's motion to have execution by electrocution declared unconstitutional. *DeYoung v. State*, 268 Ga. 780, 786(6), 493 S.E.2d 157 (1997); *Wellons v. State*, 266 Ga. 77, 91(32), 463 S.E.2d 868 (1995).

The trial court did not err in finding that Georgia's death penalty statutes are not unconstitutional in general and that application of the death penalty in King's specific case would not be unconstitutional. See *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Zant v. Stephens*, 462 U.S. 862, 873–880(I), 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Gissendaner*, 272 Ga. at 716(16), 532 S.E.2d 677; *Crowe v. State*, 265 Ga. 582, 595(24), 458 S.E.2d 799 (1995).

6. King contends that this Court's review of the proportionality of death sentences is inadequate; however, as has been recently reiterated, "[t]his Court's review of death sentences is neither unconstitutional nor inadequate under Georgia statutory law." *Gissendaner*, 272 Ga. at 716(16), 532 S.E.2d 677.

7. King contends that the district attorney's office responsible for his prosecution selects cases in which it seeks the death penalty in an unconstitutional manner. This Court has previously rejected this same argument. *Jenkins v. State*, 269 Ga. 282, 284–285(2), 498 S.E.2d 502 (1998).

8. King was permitted to question jurors thoroughly after the statutory question prescribed by OCGA § 15–12–164(a)(4) was asked, and no potential jurors were excused based solely upon their responses to that statutory question as King asserts is improperly authorized by OCGA § 15–12–164(c). Consequently, King has no standing to challenge the constitutionality of these statutory subsections, and he can show no harm in the trial court's ruling which allowed the challenged statutory question prescribed by OCGA § 15–12–164(a)(4) to be asked. *Jenkins*, 269 Ga. at 287(7), 498 S.E.2d 502.

9. The trial court did not err by denying King's pretrial motion seeking authorization to make an unsworn statement or, alternatively, to testify subject to specially-limited cross-examination at trial. *Jenkins*, 269 Ga. at 294(22), 498 S.E.2d 502; OCGA § 24–9–20(b).

10. King sought an order from the trial court requiring the State to comply with the discovery requirements of OCGA § 17–16–1 et seq. The act of the General Assembly which is codified, in part, as OCGA § 17–16–1 et seq. states, "This Act shall become effective on January 1, 1995, and shall apply to all cases docketed on or after that date." 1994 Ga. Laws 1252, § 13. Rule 39.3 of the Uniform Superior Court Rules, which were promulgated by this Court, states that "[t]he criminal docket shall contain a record of all criminal indictments in which true bills are rendered...." This Court concludes that King's case was "docketed" in the superior court when his true bill of indictment was recorded by that court. Because this docketing occurred before January 1, 1995, and because the State refused to consent to the

application of OCGA § 17–16–1 et seq. as it could have under OCGA § 17–16–2(d), the trial court did not err in finding that OCGA § 17–16–1 et seq. was inapplicable to King's case.

11. The trial court did not err by denying King's blanket motion for the disclosure of any psychiatric histories of the State's witnesses that might exist. King failed to show that the hypothetical records were "critical to his defense and that substantially similar evidence [was] otherwise unavailable to him" so as to penetrate the psychiatrist-patient privilege. *Bobo v. State*, 256 Ga. 357, 360(4), 349 S.E.2d 690 (1986); OCGA § 24–9–21(5). There is also no evidence in the record that any exculpatory psychiatric evidence was withheld that was not privileged. See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

12. (a) King contends that the trial court erred by denying his motion for discovery of "informal notes of law enforcement officers," of search and seizure procedures, of evidence "arguably subject to suppression," and of "any and all documents which substantiate any public statements made by the prosecutor or police official regarding [King's] case and any and all press releases made by the District Attorney during his campaign for office in the past." The trial court properly directed the State to disclose any evidence subject to disclosure under *Brady v. Maryland*, id., and performed an in camera review of the district attorney's file in King's case. King has failed to show that he was legally entitled to discovery of any other materials or to show that the State failed to follow the trial court's directive.

(b) The trial court did not err by denying King's motion for discovery of certain materials believed to be in the public record but allowing him to renew his motion if he were to "encounter difficulty in obtaining" those materials. See *Conklin v. State*, 254 Ga. 558, 566(3)(a), 331 S.E.2d 532 (1985).

(c) The trial court did not err by denying King's motion to compel the State to disclose information it might have about prospective jurors. *Wansley v. State*, 256 Ga. 624, 625–626(2), 352 S.E.2d 368(1987) (holding such information is not subject to compelled discovery unless it is exculpatory and, thus, subject to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215).

(d) King contends that the trial court erred by ordering him, after he had agreed to do so, to disclose to the State the materials relied upon by one of his experts in preparing a report that was, in turn, relied upon by another of his experts in rendering a professional opinion about his alleged mental retardation. This Court finds no error.

Although this Court has noted that the discovery provisions of OCGA § 17–7–211 have been repealed, their repeal is effective only with respect to cases docketed on or after January 1, 1995. 1994 Ga. Laws 1252, § 13 ("This Act shall become effective on January 1, 1995, and shall apply to all cases docketed on or after that date."); see *State v. Lucious*, 271 Ga. 361, 518 S.E.2d 677 (1999). Because King's case was docketed before that date, the discovery rules in place prior to the act apply.

This Court held in *Rower v. State*, 264 Ga. 323, 443 S.E.2d 839 (1994), that the State is entitled to discovery of expert reports only to the extent that the State's discovery would be reciprocal to the discovery to which defendants are entitled under OCGA § 17–7–211. *Rower*, 264 Ga. at 324–325(5), 443 S.E.2d 839. Because this Court has held that a defendant is entitled to discover expert reports and other forms of data relied upon by the State's experts in forming the opinions they will testify about, the State's reciprocal right of discovery would also include such materials. See *Eason v. State*, 260 Ga. 445, 396 S.E.2d 492 (1990); *Lucious*, 271 Ga. at 365(4)(b), 518 S.E.2d 677 (holding that *Eason*'s requirements were "derived from former OCGA § 17–7–211"). Pretermitting the State's contention that King acquiesced in the trial court's ruling, this Court holds that the State was entitled to discover the contested materials.

13. A review of both the sealed and unsealed portions of the record reveals no support for King's suggestion that the trial court's in camera review and disclosure of exculpatory documents was inadequate. The transcript suggests in a number of places that King had possession of the arguably-exculpatory portions of the sealed record. See *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Brady*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

14. (a) The trial court did not err by denying King's pre-trial motion regarding voir dire and ordering, instead, that it would "bring in small panels for general voir dire, restrict possible responses which might bias the panel to a showing of hands, and permit individual

follow up voir dire." *Lynd v. State*, 262 Ga. 58, 59(2), 414 S.E.2d 5 (1992); *State v. Hutter*, 251 Ga. 615, 307 S.E.2d 910 (1983).

(b) The trial court did not abuse its discretion in denying King's motion seeking to have a questionnaire sent to prospective jurors in advance of their in-court voir dire. *Jones v. State*, 263 Ga. 904, 907(9)(b), 440 S.E.2d 161 (1994).

(c) The trial court did not abuse its discretion in denying King's motion for additional peremptory strikes. *Frazier v. State*, 257 Ga. 690, 695(10), 362 S.E.2d 351 (1987).

15. King contends that the trial court acted improperly by conducting a brief hearing outside his presence concerning the State's request for an order compelling Walter Smith to testify in King's trial and confirming the use and derivative use immunity that would apply to that compelled testimony. See OCGA § 24–9–28. A criminal defendant has the right to be present during all portions of his or her trial, and a defendant's absence during a critical stage of those trial proceedings, absent a waiver of the defendant's right to be present, is not subject to harmless error analysis. *Holsey v. State*, 271 Ga. 856, 860–861(5), 524 S.E.2d 473 (1999). The hearing in question, however, appears not to have been a part of the proceedings against King. While King might have preferred that a key witness not be ordered to testify truthfully in his trial, there is nothing in Georgia law that would have permitted him to object to the State's request for the order or that would suggest that King's rights were the subject matter under consideration. See *Williams v. State*, 234 Ga.App. 191,

193–194(2) (b), 506 S.E.2d 237 (1998). On the contrary, the trial court was obliged to consider whether the testimony was "necessary to the public interest," a matter which King had no standing to address. OCGA § 24–9–28(a). King was placed on sufficient notice that Smith had been ordered to testify and that his testimony could not later be used against him. Any alleged bias on the witness's part was the proper subject of cross-examination, not grounds for denying the State's request for the order. See *State v. Mosher*, 265 Ga. 666, 667, 461 S.E.2d 219 (1995) (holding that the credibility of a witness ordered to testify under OCGA § 17–9–28 is a jury question).

16. King has failed to show a violation of any of his legal rights by the State's decision to prosecute him before Walter Smith. See OCGA § 17–8–4 ("When separate trials are ordered in any case, the defendants shall be tried in the order requested by the state.").

17. The trial court did not err by denying King's pre-trial motions seeking authorization to present evidence about the alleged lack of deterrent effect of the death penalty, about the effects of electrocution, about alleged lingering doubt surrounding other persons' convictions, and about life imprisonment in general. *Barnes v. State*, 269 Ga. 345, 359–360(27), 496 S.E.2d 674 (1998). The trial court did authorize King to introduce evidence relevant to his own "background and character" as this Court has required. Id. at 360, 496 S.E.2d 674.

Guilt–Innocence Phase

18. King contends that the trial court erred by failing to excuse certain jurors based on their alleged

unwillingness to consider mitigating evidence and a sentence other than death. The core question where a juror's views about the death penalty are the subject of a motion to have the juror stricken for cause is whether the juror's views would "'prevent or substantially impair ... his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" *Greene v. State*, 268 Ga. 47, 48–50, 485 S.E.2d 741 (1997) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424(II), 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)); see also *Waldrip v. State*, 267 Ga. 739, 743–744(8)(a), 482 S.E.2d 299 (1997). Upon a review of the record, this Court finds that the trial court did not abuse its discretion by finding the challenged jurors qualified to serve.

(a) Juror Hardee repeatedly answered affirmatively in response to the trial court's extensive questioning about whether he would consider mitigating circumstances with "a genuine openness to being convinced that they might make life imprisonment a more appropriate punishment." The juror also answered that he would not "start out with a predisposition" toward the death penalty. Only when defense counsel improperly questioned the juror about what sentence the juror might choose under the specific, hypothetical circumstance where "somebody intentionally killed somebody for money and it wasn't self-defense, it wasn't [an] accident, and it wasn't justifiable" did the juror state that he would consider life imprisonment only as a harsher alternative to the death penalty. *Gissendaner*, 272 Ga. at 707–708(3)(b), 532 S.E.2d 677; *Blankenship v. State*, 258 Ga. 43, 45(6), 365 S.E.2d 265 (1988). The trial judge, who was present and

able to observe the demeanor and voice inflection of counsel and the juror, noted that defense counsel's questioning "implied that there were no mitigating circumstances." Viewing the juror's responses as a whole, this Court finds that the trial court did not abuse its discretion in denying King's motion to have the juror stricken for cause. *Greene*, 268 Ga. at 50, 485 S.E.2d 741.

(b) Juror Norris gave some responses during questioning by defense counsel which suggested he would likely give little or no weight to certain hypothetical mitigation evidence. However, the juror also answered repeatedly that he would listen to all of the evidence presented to him and allow it the opportunity to sway him. Although the juror's responses suggested that he would be more influenced by evidence pertaining to the actual crimes and "the reason given why it happened" than by other evidence, his responses showed a willingness to listen to the defendant's mitigation evidence in general and to meaningfully consider a sentence other than death. This Court finds no abuse of discretion in the trial court's determination that the juror was qualified to serve. Id.

(c) A review of the record suggests that a number of juror Drew's responses concerning mitigating evidence were affected by her apparent confusion about the meaning of the word "sentence." Her confusion is made most plain by her attempt to question defense counsel whether he was referring to "an actual sentence guilty or innocent...." A number of the juror's other responses, however, clearly indicated her willingness to consider mitigating evidence and a sentence less than death. This Court finds that her responses, viewed as a whole, amply

supported the trial court's exercise of discretion in finding her qualified to serve. Id.

(d) Juror Hipps's responses clearly showed that she would consider mitigation evidence and a sentence less than death. In fact, when defense counsel improperly questioned the juror about what weight she would give to specific, hypothetical evidence, she answered that she might give significant weight to a number of those evidentiary items. Although the juror stated that a person convicted of murder should "pay for it if it's done intentionally," she explained that she "would still have to hear the evidence" before she could state what an appropriate sentence would be. This Court finds no abuse of discretion in the trial court's finding her qualified to serve. Id.

(e) Under improper questioning seeking to find what weight she would give to specific, hypothetical mitigating circumstances, juror Vaughn stated that she would give weight to some but probably not to others. The juror later stated that she would attempt to consider all of the evidence that might be presented "with a genuine openness" and would meaningfully consider a sentence less than death. This Court finds that the trial court did not abuse its discretion in finding her qualified to serve. Id.

19. King contends that the trial court erred by excusing certain jurors for cause based on their personal views in opposition to the death penalty and their inability to meaningfully consider it as a sentencing option. This Court finds that the trial court did not abuse its discretion in its rulings. Id.

(a) Juror Wilkerson stated that his opposition to the death penalty was so strong that it might affect his ability to render a correct verdict even during the guilt-innocence phase of King's trial. He also stated quite clearly that he could never cast a vote in favor of the death penalty during jury deliberations. This Court finds no abuse of discretion in the trial court's excusing the juror for cause. Id.

(b) Juror Fuller indicated that he believed he would automatically vote against the death penalty during jury deliberations. He indicated that he might tend to favor the death penalty if one of his own close family members were murdered, particularly in the heat of the moment, but he stated repeatedly that he was "firmly" opposed to the death penalty in all other situations. This Court finds that the trial court did not abuse its discretion in excusing the juror for cause. Id.

(c) The trial court did not abuse its discretion in excusing jurors Richard McCall, Ernestine James, and Eddie Vann, who all made clear that they were unable or unwilling to consider the death penalty as a sentencing option. Id.

20. There is no violation of the constitutional right to freedom of religion and conscience where a juror is stricken for cause based upon death penalty views that are derived from religion. *Cromartie v. State*, 270 Ga. 780, 785(11), 514 S.E.2d 205 (1999) ("The standard for excusing a prospective juror based upon the prospective juror's views on the death penalty draws no religious or secular distinction.").

21. Upon a review of the record, this Court concludes that there is no merit to King's contention that the trial court conducted voir dire in an unfair or biased manner. See *Ledford v. State*, 264 Ga. 60, 64(6)(c), 439 S.E.2d 917 (1994).

22. King moved the trial court to consider whether the State had engaged in race and gender discrimination in the exercise of its peremptory jury strikes. See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). The trial court found that King had made a prima facie showing of discrimination and required the State to explain the reasons for the challenged strikes. The trial court found the State's reason for striking juror Alderman to be insufficient to rebut the prima facie showing of discrimination and ordered her reinstated in a manner agreed upon by the parties. This Court finds that the trial court did not abuse its discretion in finding that King failed to carry his burden of persuasion as to the jurors challenged in this appeal. See *Barnes*, 269 Ga. at 349–351(6), 496 S.E.2d 674; *Turner v. State*, 267 Ga. 149, 150–153(2), 476 S.E.2d 252 (1996) (setting out proper procedure for evaluating claims of discrimination in use of peremptory strikes and holding that trial court's findings are "entitled to great deference and will be affirmed unless clearly erroneous.").

(a) The State explained that it had stricken juror Burkett because she knew King's family and because she was the minister of a church. The State explained its preference that ministers not serve as jurors by stating that ministers "have a particular point of view about

trying to forgive people and look to the best in them." A review of the record reveals that the State consistently questioned male and female jurors of all races during voir dire about the roles they served in their places of worship and that none of the other prospective jurors were ministers, factors that support the State's contention that its explanation was not pretextual. A review of the record also confirms that juror Burkett stated that she knew King's family, a factor that was not unique to the juror but which the State was permitted to consider as part of its final decision to strike the juror. This Court finds that the trial court did not abuse its discretion in finding no discrimination. Id.

(b) The State explained that it had stricken juror Maurice Vann because his responses regarding the death penalty had been "50–50" and because he had stated that he knew King's family. During voir dire, the juror requested on his own initiative that he be dismissed from the jury because of his connection to King's family, explaining that considering the death penalty for King would be difficult for him. King's contention that the juror was mistaken about which, if any, of King's family members the juror knew is of little import, because a juror's belief of a fact need not be correct to influence his or her deliberations. This Court finds that the trial court did not abuse its discretion in finding no discrimination. Id.

(c) The State explained that it had stricken juror Sarah McCall because she had stated that the death penalty was not her "first choice" and because her husband, who was also a prospective juror, had stated during his voir dire that she was opposed to the death

penalty. The assistant district attorney was mistaken in his recollection of Richard McCall's voir dire, but this mistake does not show that the explanation was a mere pretext. *Smith v. State*, 264 Ga. 449, 453(4), 448 S.E.2d 179 (1994) (holding that a reason for a strike may be mistaken so long as it is race-neutral). This Court finds that the trial court did not abuse its discretion in finding no discrimination. *Barnes*, 269 Ga. at 349–351(6), 496 S.E.2d 674; *Turner*, 267 Ga. at 150–153(2), 476 S.E.2d 252.

(d) The State explained that it had stricken juror Dean because the victim's brother, a potential witness, had previously shot the juror's stepson. The trial court did not err by allowing the State to rely on information not derived from voir dire questioning which was gender neutral. *Barnes*, 269 Ga. at 350–351(6), 496 S.E.2d 674. The juror's responses during voir dire did not significantly undermine the State's factual assertion about the shooting, and nothing in the record suggests that the assistant district attorney was being untruthful. This Court finds that the trial court did not abuse its discretion in finding no discrimination. *Barnes*, 269 Ga. at 349–351(6), 496 S.E.2d 674; *Turner*, 267 Ga. at 150–153(2), 476 S.E.2d 252.

(e) The State explained that it had stricken juror Ford because she was a single mother who would be financially burdened by jury service and because of "her relationship with [mentally retarded] kids at school." Although seven other jurors, four of them women and one an African–American male, described some exposure to mentally retarded persons, the State explained that juror Ford "was the only person who

indicated that she enjoyed that relationship." This Court finds that the trial court did not abuse its discretion in finding no discrimination. Id.

(f) The State explained that it had stricken juror Gillis in order to reach the next juror in the panel of prospective alternate jurors, an African–American male, and because juror Gillis had stated that she was a neighbor of both King's aunt and of King's co-indictee's uncle, the owner of the murder weapon. Pretermitting the State's argument that any error was harmless because no alternate jurors participated in deliberations, this Court finds that the trial court did not abuse its discretion in accepting the State's explanations. Although "'[m]ere place of residence or any other factor closely related to race'" cannot by itself serve as the basis for explaining a challenged peremptory strike, juror Gillis was shown to have specific personal acquaintances that might have tended to make her sympathetic to the defense. *Congdon v. State*, 262 Ga. 683, 424 S.E.2d 630 (1993) (quoting *Lynn v. Alabama*, 493 U.S. 945, 947, 110 S.Ct. 351, 107 L.Ed.2d 338 (1989)) (Marshall, J., dissenting). This Court has carefully noted King's argument that other jurors who knew him or members of his family were not stricken by the State, but, as with juror Burkett, the State's argument that other factors, which did not apply to those other jurors, contributed to its final decision to strike juror Gillis was credible. Accordingly, this Court finds that the trial court did not abuse its discretion in finding no discrimination. *Barnes*, 269 Ga. at 349–351(6), 496 S.E.2d 674; *Turner*, 267 Ga. at 150–153(2), 476 S.E.2d 252.

23. King contends that the trial court erred by declining to strike jurors Folsom and Strickland based upon their familiarity with the victim's young child and juror Reddy (formerly Smith) based upon the fact that she had attended school with the victim. Jurors need only be excused for cause based on their relationship to a victim when it appears that they cannot or will not "put aside [the] relationship with the victim ... and render impartial verdicts based solely on the evidence." *Mosley v. State*, 269 Ga. 17, 19–20(2), 495 S.E.2d 9 (1998). This is a mixed question of law and fact, and a trial court's findings regarding a juror's ability to put aside his or her relationship with the victim will be reversed only if they appear to be an abuse of discretion. Id.; see also *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

(a) Juror Folsom had counseled the victim's child while the child was in kindergarten, but the juror, whom the trial court found to be "very honest," stated that she did not believe her past relationship to the child would affect her decisions as a juror. This Court finds that the trial court did not abuse its discretion by denying King's motion to have the juror stricken for cause. Id.

(b) Juror Strickland had worked at the school attended by the victim's daughter. Her responses, read together, suggest that she knew who the daughter was but was not well-acquainted with her. The juror stated that she had formed no opinions regarding King's guilt or regarding what a proper sentence might be for the murder. Although she later volunteered that the victim's daughter "might enter into [her] mind," she immediately added that she understood that her proper focus would be the defendant and the evidence. This

Court finds no abuse of discretion in the trial court's denying King's motion to have her stricken for cause. Id.

(c) Juror Reddy stated that she had attended school with the victim, but she also stated the following: "[W]e had a class together, but that's the extent of it." This Court finds no abuse of discretion in the trial court's refusal to strike this juror for cause. Id.

24. Juror Arnold revealed during her voir dire that her husband had served as the foreman of the grand jury that indicted King. The juror made clear that she had learned nothing from her husband at the time of his service other than King's name. The juror also revealed that she had told her husband the name of the case she had been called for as a prospective juror, and that her husband had told her that she should inform the trial judge that he had "signed that paper," referring to the indictment. The juror stated plainly that she and her husband had no other discussions about King's case and that she had not formed any opinions.

Although the trial court had instructed the prospective jurors not to discuss the case with anyone while awaiting voir dire, this Court does not agree with King's contention that juror Arnold's simply informing her husband of the name of the case in which she had been called was juror misconduct requiring a presumption of harm. Compare *Lamons v. State*, 255 Ga. 511, 340 S.E.2d 183 (1986). The juror was entirely forthright about her brief conversation with her husband, had learned nothing from him that would seem likely to affect her, and stated specifically that she had formed no opinions. Compare *Logue v. State*, 155 Ga.App. 476, 271 S.E.2d 42 (1980) (reversing where juror

was related to a grand jury member and stated consistently that "she would be inclined toward the prosecution"). In light of the circumstances, this Court finds no abuse of discretion in the trial court's denying the motion to have her stricken for cause.

25. Juror Reddy (formerly Smith) responded affirmatively when asked if she had ever observed racial discrimination. The juror then responded affirmatively when asked if the discrimination had "bother[ed]" her. When King then attempted to ask an additional question about whether the juror had attempted to "intercede for" the person discriminated against, the trial court sustained an objection by the State.

Although a criminal defendant in an interracial murder case certainly has the right to inquire into the possible racial biases of jurors, a trial court "retains discretion as to the form and number of questions on the subject...." *Turner v. Murray*, 476 U.S. 28, 37(III), 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); see also *Legare v. State*, 256 Ga. 302, 303–304(1), 348 S.E.2d 881 (1986). Because King was allowed to ask questions regarding possible bias to juror Reddy and all other jurors and because King's initial questions to juror Reddy had revealed no compelling reason for continued questioning of her on the subject, this Court finds no abuse of the trial court's discretion in sustaining the State's objection.

26. The trial court did not err by sustaining the State's objections to King's apparent effort to have jurors Drew and Hipps enumerate the mitigating circumstances they would give weight to. *Carr v. State*, 267 Ga. 547, 554(6)(a), 480 S.E.2d 583 (1997) ("[I]t is improper to require [a] juror to enumerate hypothetical

circumstances in which she [or he] might or might not vote to impose the death penalty."). This Court finds no error in the trial court's limitation of King's questioning of juror Kimberly and further notes that, because the juror was excused for cause upon King's motion, any alleged error would have been rendered harmless.

27. The trial court did not err by charging the jury that they were authorized to find King "guilty but mentally retarded" if they "believe[d] beyond a reasonable doubt that [he was] guilty and was mentally retarded at the time of the commission of the offense...." See OCGA § 17–7–131(c)(3). The trial court also did not err by conducting the proceedings on King's alleged mental retardation during the guilt-innocence phase of his trial. Neither the procedure nor the burden of proof established by OCGA § 17–7–131(c)(3) is unconstitutional. *Palmer v. State*, 271 Ga. 234, 237(3), 517 S.E.2d 502 (1999); *Burgess v. State*, 264 Ga. 777, 789–791(36), 450 S.E.2d 680 (1994)

> ("[I]t is clear that the intent of [*Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989), and its progeny] was to give the defendants therein 'essentially the same opportunity to litigate the issue of [their] mental retardation as [they] would have had if the case[s] were tried today, with the benefit of the OCGA § 17–7–131(j) death-penalty preclusion.'")

(quoting *Zant v. Foster*, 261 Ga. 450, 451(4), 406 S.E.2d 74 (1991)).

28. King contends that the trial court committed reversible error by not preventing the State from

arguing that King's claim of mental retardation was an attempt at "putting responsibility somewhere else" and avoiding the death penalty. The record reveals that King made one successful objection to the State's argument, contending that the State had improperly suggested that a finding of mental retardation would require the jury to find him not guilty. The State later continued to argue without objection that King's allegation of mental retardation was an attempt to avoid a finding of guilt. In the same vein, the State recounted the testimony of Dr. Dickinson where he, first on direct examination and later on cross-examination, stated that King might have been motivated to malinger during his mental evaluation in order to avoid the death penalty.

This Court held in *State v. Patillo*, 262 Ga. 259, 417 S.E.2d 139 (1992), that a jury should not be informed that a finding of mental retardation bars the imposition of the death penalty. However, the State's arguments about King's attempt to place responsibility somewhere else and to avoid the death penalty were directed not at the question of whether a finding of mental retardation would bar the imposition of the death penalty but, rather, toward King's argument to the jury that his alleged mental retardation suggested he was not capable of committing the crimes of which he was accused. In this particular circumstance, we find that the argument was not improper.

29. The trial court did not err by denying King's motion for a directed verdict on the issue of mental retardation, because the evidence was in conflict as to the questions of King's "intellectual functioning," his alleged "impairments in adaptive behavior," and his

alleged malingering during his examinations by experts. *Jenkins*, 269 Ga. at 291(15), 498 S.E.2d 502; OCGA §§ 17–7–131(a)(3); 17–9–1(a).

30. During its cross-examination, the State questioned one of King's expert witnesses about whether the witness had a "complaint for having sex with one of [his] patients ... presently pending against [him.]" The State then attempted to question the witness about scheduled hearings concerning the complaint that the witness had delayed for health reasons. King objected to the line of questioning and the jury was removed from the courtroom. The State argued that it was entitled to question the witness about the complaint in order to show that the witness's professional credentials were in jeopardy and in order to show alleged bias in his willingness to appear at King's trial for a fee when he had previously claimed he was physically incapable of attending hearings concerning the complaint against him. The trial court ruled the questioning improper and gave a strongly-worded curative instruction. King argues that the curative instruction was insufficient and, therefore, that his renewed motion for a mistrial was erroneously denied.

This Court first addresses whether the State's questioning was improper. "[I]mpeaching a witness with specific acts of bad character is not permissible," *Pruitt v. State*, 270 Ga. 745, 754(21), 514 S.E.2d 639 (1999), and the State acknowledged that it had no evidence of criminal convictions that might serve as the proper basis for impeachment. See OCGA § 24–9–84; *Vincent v. State*, 264 Ga. 234, 234–235, 442 S.E.2d 748 (1994) (quoting *McCarty v. State*, 139 Ga.App. 101, 102,

227 S.E.2d 898 (1976)) (setting forth permissible methods of impeaching a witness). The State urged that it was entitled to question the witness about the complaint in order to show the weakness of his professional credentials, but the witness's professional license was valid and the complaint against the witness bore no relation to the scientific issues about which he testified at trial. The State's other purported purpose in the questioning, that of showing bias from the witness's willingness to appear at trial for a fee when he had failed to appear at other hearings concerning the professional complaint against him, was only marginally relevant and failed to justify the introduction of the irrelevant and potentially prejudicial matter of alleged sexual misconduct. This Court notes that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." (Punctuation omitted.) *Hicks v. State*, 256 Ga. 715, 720(13), 352 S.E.2d 762 (1987). The prejudicial aspects of the questioning should have been plain to the State, and parallel lines of questioning were available that would have served the same purpose. This Court finds, therefore, that the trial court correctly found the questioning to be improper.

OCGA § 17–8–75 requires a trial court's action where counsel "make statements of prejudicial matters which are not in evidence" and an objection is raised, and this Court has held that the statute forbids the State's introduction of prejudicial matters by its questioning of witnesses. *Castell v. State*, 250 Ga. 776, 789(8), 301 S.E.2d 234 (1983). But this Court has further held the following:

> Where, as here, counsel has made statements regarding prejudicial matters not in evidence before the jury, OCGA § 17–8–75 provides the trial court with discretion to order a mistrial. His [or her] refusal to do so, coupled with appropriate curative instructions and admonishment of state's counsel, absent manifest abuse, will not be reversed.

Schirato v. State, 260 Ga. 170, 171–172(4), 391 S.E.2d 116 (1990) (citing *Welch v. State*, 251 Ga. 197, 200(6), 304 S.E.2d 391 (1983)); see also *Wilson v. State*, 271 Ga. 811, 819(13), 525 S.E.2d 339 (1999). In this case, the trial court's curative instructions included a statement that the questioning was improper, a statement that the jury must disregard the question, and a statement concerning the unreliability of an unsubstantiated ethical complaint filed by a person under psychiatric treatment. In light of the strong curative instruction given, this Court finds that the trial court's refusal to grant a mistrial was not a manifest abuse of discretion.

31. The trial court did not err by sustaining the State's objection when King attempted to ask Walter Smith, King's co-indictee, why he had left high school in the tenth grade. A defendant's right to a "thorough and sifting cross examination" is not violated by a trial court's confining questioning to relevant, material matters, and "the trial court, in determining the scope of relevant cross-examination, has a broad discretion." *Kolokouris v. State*, 271 Ga. 597, 600(4), 523 S.E.2d 311 (1999) (applying both constitutional and statutory requirements); OCGA § 24–9–64. This Court finds that the question's bearing upon the ultimate question in the

guilt-innocence phase of whether King, who had been holding the murder weapon seconds before the victim's death, was legally culpable for her death was too remote to now justify interference with the trial court's broad discretion.

32. The trial court did not err by restricting argumentative questioning by defense counsel. *Beadles v. State*, 259 Ga. 519, 524(3), 385 S.E.2d 76 (1989).

33. The pattern charge on reasonable doubt given by the trial court was not improper and would not have mislead the jury as to their duty to apply the correct standard of proof. Compare *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

Sentencing Phase

34. King contends that the trial court erred by sustaining an objection to a question his counsel asked which sought more detail about "problems" King's foster mother had had with her other foster children prior to King's second stay with her. Because the witness had already testified that King had not caused problems during his first stay with her when the other children were not there, because she had already testified in general terms that the other children had caused problems prior to King's second stay with her, and because King was later permitted to question the witness more directly about whether King had been a follower or a leader when he and the other children fell into trouble together, this Court concludes that the trial court did not abuse its discretion in sustaining the State's objection. *Kolokouris*, 271 Ga. at 600(4), 523 S.E.2d 311.

35. At the conclusion of King's sentencing phase closing argument, defense counsel urged the members of the jury to consider a sentence less than death by stating, "[A]sk yourself what Jesus would do." The trial court sustained the State's objection to the argument and instructed the jury to disregard the comment after concluding that it called upon the jury "to put themselves in a [position] to be judged by God." The trial court's ruling did not forbid counsel's arguing in favor of mercy in other ways. This Court finds no reversible error.

This Court has held that "it would be improper ... to urge that the teachings of a particular religion command the imposition of a death penalty in the case at hand." *Hill v. State*, 263 Ga. 37, 45(19), 427 S.E.2d 770 (1993). Accordingly, this Court reversed a death sentence where the State argued that biblical law required the death penalty for murder, holding, "Language of command and obligation from a source other than Georgia law should not be presented to a jury." *Carruthers v. State*, 272 Ga. 306, 310(2), 528 S.E.2d 217 (2000). The same general standard should apply to defendants as applies to the State, and, accordingly, defense counsel should not argue that a particular religion requires the imposition of a sentence other than death.

This Court has acknowledged that "[i]t is difficult to draw a precise line between religious arguments that are acceptable and those that are objectionable...." Id. In light of this difficulty, some discretion must be afforded to trial courts in determining whether a particular argument, whether made by the State or by a

defendant, tends to urge jurors' compliance with some religious mandate in potential exclusion of their duty to consider all applicable sentencing alternatives. This Court finds that the trial court did not exceed this limited discretion in evaluating King's argument about what Jesus might do.

36. This Court finds that the trial court's charge to the jury at the conclusion of the sentencing phase which instructed the jury to "consider the facts and circumstances, if any, in extenuation, mitigation, and/or aggravation" was not rendered confusing or misleading by the trial court's earlier charge at the conclusion of the guilt-innocence phase describing the requisite mens rea for malice murder as "the unlawful intention to kill without justification, excuse, or mitigation." In context, the two uses of the word "mitigation" would have been understood and applied appropriately in each of the two phases of King's trial. This is particularly true because the trial court charged the jury on the definition of the word "mitigation" to be applied during the sentencing phase.

37. King has failed to show that the trial court committed reversible error in presenting statutory aggravating circumstances to the jury for its consideration.

(a) This Court does not agree with King's contention that OCGA § 17–10–30(b)(2) fails to narrow the class of persons eligible for the death penalty because it authorizes that sentence whenever a murder was committed during a burglary. See *Ford v. State*, 257 Ga. 461, 462–464(1), 360 S.E.2d 258 (1987).

(b) The trial court did not err by submitting to the jury both the statutory aggravating circumstance referring to armed robbery and the statutory aggravating circumstance referring to murder "for the purpose of receiving money or any other thing of monetary value...." *Simpkins v. State*, 268 Ga. 219, 220–223(2), 486 S.E.2d 833 (1997); see OCGA § 17–10–30(b)(2), (4).

(c) This Court finds that there was evidence to support a finding that King "committed murder as an agent ... of another" and, therefore, that the trial court did not err in presenting that statutory aggravating circumstance to the jury for its consideration. OCGA § 17–10–30(b)(6).

(d) This Court agrees with King's contention that OCGA § 17–10–30(b)(2) sets forth only one statutory aggravating circumstance which exists if the offender committed a murder while "engaged in the commission of" either one or more of certain enumerated crimes. OCGA § 17–10–30(b)(2); see *Carruthers*, 272 Ga. at 311(3)(b), 528 S.E.2d 217. However, this Court concludes that any error in presenting the jury with two separate findings to consider, one that the murder was committed during a burglary and the other that the murder was committed during an armed robbery, was harmless because the death penalty would still have been authorized if the two overlapping findings had been merged and because the jury was not instructed to weigh the number of statutory aggravating circumstances but, instead, was properly charged that it could impose a sentence less than death for any or no reason. See *Pace v. State*, 271 Ga. 829, 845(33), 524

S.E.2d 490 (1999); *Moore v. State*, 240 Ga. 807, 822(III)(2), 243 S.E.2d 1 (1978).

38. OCGA § 17–10–2(c) states that the jury in a death penalty trial "shall retire to determine whether any mitigating or aggravating circumstances exist ... and whether to recommend mercy for the defendant." We find that this language does not prescribe any specific jury charge. Rather, as the statute specifically states, the trial "judge shall give the jury *appropriate* instructions...." (Emphasis supplied.) OCGA § 17–10–2(c). This Court finds that the trial court's charge to the jury, which stressed that they should consider any mitigating evidence and that they could impose a sentence less than death for any or no reason, was an appropriate instruction that sufficiently informed the jury of its relevant duties in deciding King's sentence.

39. The trial court did not err by declining to charge the jury on the specific mitigating circumstance of residual doubt but, instead, charging the jury on mitigating circumstances in general. *Carruthers*, 272 Ga. at 317(18), 528 S.E.2d 217; *Johnson v. State*, 271 Ga. 375, 385(17), 519 S.E.2d 221 (1999); *Jenkins*, 269 Ga. at 296(25), 498 S.E.2d 502.

40. The trial court's instructions on mitigating and aggravating circumstances and on the jury's duties in deciding King's sentence were adequate, and it was not error for the trial court to refuse to charge the jury in the exact language requested. *Massey v. State*, 270 Ga. 76, 78(4)(c), 508 S.E.2d 149 (1998) ("It is axiomatic that a trial court does not err in refusing to give a requested instruction in the exact language requested where the charges given in their totality substantially and

adequately cover the principles contained in the requested charge."); *Kelly v. State*, 241 Ga. 190, 191–192(4), 243 S.E.2d 857 (1978).

41. A trial court is not required to charge a jury on the consequences of the jury's failure to reach a unanimous verdict. *Burgess*, 264 Ga. at 789(35), 450 S.E.2d 680.

Sentence Review

42. This Court finds that the sentence of death in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. OCGA § 17–10–35(c)(1).

43. King contends that the death penalty in his case is disproportionate to the sentences imposed in other, unspecified cases in Georgia where murder was committed under similar circumstances, because his co-indictee has not yet been tried and sentenced for the murder, and because he is allegedly mentally retarded.

Although King suggests that this murder during the commission of an armed robbery and a burglary is similar to cases in Georgia where the death penalty has not been imposed,

> our 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.

(Citations omitted; emphasis in original.) *Gissendaner*, 272 Ga. at 717(19)(a), 532 S.E.2d 677.

This Court also is not persuaded that King's death sentence should be overturned because his co-indictee has not yet been sentenced and, according to King's argument, is not likely to be sentenced to death. Although King argues he was less culpable than Smith, we note that the jury had before it sufficient evidence to authorize it to conclude that King was involved in planning the armed robbery and burglary, that King had carried the handgun to the crime scene, that King had actually fired the shots from the handgun, and that King had shown a complete lack of remorse by his statement that he hoped he killed the victim. See also *Waldrip*, 267 Ga. at 752–753(25), 482 S.E.2d 299 (finding that death sentence was not disproportionate where jury was authorized by the evidence to conclude that the defendant was more culpable than his co-indictees who received life sentences). This Court also notes that the jury was authorized to credit the State's argument at trial that King's allowing himself to be identified by the victim, who knew him and addressed him by name, suggested that he intended to murder her from the beginning. *Ross v. State*, 233 Ga. 361, 366–367(2), 211 S.E.2d 356 (1974) ("It is the reaction of the sentencer to the evidence before it which concerns this court and which defines the limits which sentencers in past cases have tolerated....").

Although this Court's sentence review includes consideration of the particular characteristics of the defendant, see *Corn v. State*, 240 Ga. 130, 141(III)(2)(c), 240 S.E.2d 694 (1977) (discussing "low mental level and social maladjustment"), this Court looks to the evidence presented at trial and the reasonableness of the jury's

reaction to that evidence for its guidance, not bare allegations. As stated above, this Court finds that the evidence concerning King's alleged mental retardation was such that the jury was authorized to find that King had failed to prove beyond a reasonable doubt during the guilt-innocence phase that he was mentally retarded. The jury was also asked by defense counsel to consider King's mental capabilities during the sentencing phase in deciding his sentence, and, in fact, the jury was able to hear his testimony and observe his demeanor prior to fixing his sentence. This Court finds that the evidence of King's alleged mental deficiencies was not sufficient to compel a finding by this Court that the jury's sentence of death was "excessive."

For the reasons detailed above, this Court concludes, considering both the crime and the defendant, that the death penalty in King's case was neither excessive nor disproportionate to the penalties imposed in similar cases in this State. OCGA § 17–10–35(c)(3). The cases appearing in the Appendix support this conclusion in that each involved an intentional killing during the commission of an armed robbery or a burglary.

Judgment affirmed.

All the Justices concur except FLETCHER, P.J., who dissents, and BENHAM, C.J. and SEARS, J., who concur in part and dissent in part.

APPENDIX

Lee v. State, 270 Ga. 798, 514 S.E.2d 1 (1999); *Whatley v. State*, 270 Ga. 296, 509 S.E.2d 45 (1998); *Carr v. State*, 267 Ga. 547, 480 S.E.2d 583 (1997); *Thomason v. State*, 268

Ga. 298, 486 S.E.2d 861 (1997); *Bishop v. State*, 268 Ga. 286, 486 S.E.2d 887 (1997); *McClain v. State*, 267 Ga. 378, 477 S.E.2d 814 (1996); *Greene v. State*, 266 Ga. 439, 469 S.E.2d 129 (1996); *Mobley v. State*, 265 Ga. 292, 455 S.E.2d 61 (1995); *Christenson v. State*, 262 Ga. 638, 423 S.E.2d 252 (1992); *Meders v. State*, 261 Ga. 806, 411 S.E.2d 491 (1992); *Stripling v. State*, 261 Ga. 1, 401 S.E.2d 500 (1991); *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986); *Davis v. State*, 255 Ga. 588, 340 S.E.2d 862 (1986); *Ingram v. State*, 253 Ga. 622, 323 S.E.2d 801 (1984); *Horton v. State*, 249 Ga. 871, 295 S.E.2d 281 (1982).

SEARS, Justice, concurring in part and dissenting in part.

I concur in the majority's affirmance of appellant's adjudication of guilt. However, due to the concerns I expressed in my partial dissent to *Wilson v. The State*,[2] I dissent to Division 5 of the majority opinion and to the affirmance of appellant's death sentence only to the extent it requires execution by means of electrocution.

I am authorized to state that Chief Justice BENHAM joins me in this partial concurrence and partial dissent.

FLETCHER, Presiding Justice, dissenting.

For the reasons stated in my dissent in *Jenkins v. State*[3] I believe that it is unconstitutional to require a

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[2] 271 Ga. 811, 525 S.E.2d 339 (1999).

[3] 269 Ga. 282, 298, 498 S.E.2d 502 (1998).

capital defendant to establish mental retardation beyond a reasonable doubt during the guilt/innocence phase. The difficulties inherent in the procedure are apparent in this case. The state's argument that King was using mental retardation as a way to escape responsibility and avoid the death penalty was subject to two interpretations, both improper. The state's suggestion that a finding of mental retardation required a not guilty verdict was wrong legally and the trial court properly sustained the argument. The other interpretation is also impermissible – that a finding of mental retardation would bar the imposition of the death penalty.[4] Therefore, I conclude that the state's argument was improper.

I also conclude that the trial court erred in charging the jury on both the statutory aggravating circumstances of armed robbery and murder for the purpose of receiving money because the two circumstances refer to identical aspects of the crime.[5]

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[4] *See State v. Patillo*, 262 Ga. 259, 417 S.E.2d 139 (1992).

[5] *Simpkins v. State*, 268 Ga. 219, 223, 486 S.E.2d 833 (1997) (Fletcher, P.J., concurring specially).

Appendix E

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-12804

WARREN KING,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 2:12-cv-00119-LGW

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

Before WILLIAM PRYOR, Chief Judge, and WILSON and GRANT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

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

August 18, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-12804-P
Case Style: Warren King v. Warden GDP
District Court Docket No: 2:12-cv-00119-LGW

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.

Clerk's Office Phone Numbers

General Information:	404-335-6100
Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135
Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125
Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

Appendix F

AO 450 (GAS REV 10/03) Judgment in a Civil Case

In the United States District Court for the Southern District of Georgia Brunswick Division

FILED 2020 JAN 27

WARREN KING,

JUDGMENT IN A CIVIL CASE

V.

CASE NUMBER: 2:12-cv-119

WARDEN,
GEORGIA DIAGNOSTIC
PRISON,

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☑ **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that in accordance with the Order dated January 24, 2020, Petitioner's Amended Petition for Writ of Habeas Corpus is DENIED. The Court GRANTS a Certificate of Appealability on two claims. This case stands closed.

Approved by: /s/ Lisa Godbey Wood

HON. LISA GODBEY WOOD, JUDGE

January 27, 2020
Date

Scott L. Po
Clerk

/s/
(By) Deputy Clerk

GAS Rev 10/01/03