No. _____

IN THE
Supreme Court of the United States

BILLY DANIEL RAULERSON, JR.,
Petitioner,

v.

WARDEN,
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

DAVID W. DEBRUIN
Counsel of Record
ADRIENNE LEE BENSON*
FAARIS AKREMI*
BRADLEY D. POUGH*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6015
ddebruin@jenner.com

*Admitted only in New York, California, and Florida respectively. Not admitted in the District of Columbia. Practicing under the supervision of the partnership of Jenner & Block LLP.

CAPITAL CASE

QUESTIONS PRESENTED

Georgia is the *only* state in the Union that requires a capital defendant to prove intellectual disability (formerly called mental retardation) by a "beyond a reasonable doubt" standard. Discovery in the instant federal habeas proceeding established that in the thirty years during which Georgia has maintained this unique burden of proof, not a *single* capital defendant has been able to establish intellectual disability in a contested case. This case presents the following question:

Whether this Court's unanimous holding in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), clearly established that Georgia could not impose the burden of requiring proof of intellectual disability beyond a reasonable doubt, particularly when state supreme courts in Indiana, Tennessee, and other states recognized that *Cooper* would not allow their states to require a defendant to prove intellectual disability even by a lower standard of clear and convincing evidence.

STATEMENT OF RELATED CASES

Georgia Criminal Proceedings

State v. Raulerson, No. CR94-2599-C (Ga. Super. Ct.) (state trial court proceeding)

Raulerson v. State, Nos. S95P1166, S97P1207 (Ga. Oct. 6, 1997) (Georgia Supreme Court decision on direct appeal)

Raulerson v. Georgia, No. 97-8385 (U.S. May 18, 1998) (order denying a petition for a writ of certiorari)

Georgia Post-Conviction Proceedings

Raulerson v. Head, No. 98-V-706 (Ga. Super. Ct. Mar. 22, 2004) (order in state post-conviction proceeding))

Raulerson v. Head, No. S04E1707 (Ga. Jan. 11, 2005) (order denying appeal from state post-conviction proceeding)

Federal Habeas Proceedings

Raulerson v. Warden, No. 5:05-cv-00057-JRH (S.D. Ga. June 9, 2008) (order denying federal habeas relief)

Raulerson v. Warden, No. 14-14038 (June 28, 11th Cir. 2019) (order affirming denial of habeas relief)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PETITION FOR A WRIT OF CERTIORARI

Billy Daniel Raulerson, Jr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The June 28, 2019 split decision of the Eleventh Circuit (Pet. App. 1a) is reported at 928 F.3d 987. The decision of the Georgia Superior Court (Pet. App. 63a) is unreported. The decision of the Georgia Supreme Court denying review (Pet. App. 142a) is also unreported.

JURISDICTION

The Eleventh Circuit entered its judgment on June 28, 2019, and denied a timely petition for rehearing and rehearing en banc on August 27, 2019. On November 14, 2019, this Court granted an application to extend the time to file a petition for a writ of certiorari to January 24, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution, which states that "[n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

This case also involves the Eighth Amendment to the Constitution, which prohibits, in relevant part, the infliction of "cruel and unusual punishment[]."

Finally, this case also concerns Georgia's statutory requirement that capital defendants prove the affirmative defense of intellectual disability "beyond a

reasonable doubt." That requirement is set forth in Ga. Code Ann. § 17-7-131(c)(3), which provides: "The defendant may be found 'guilty but with intellectual disability' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded. If the court or jury should make such finding, it shall so specify in its verdict."

INTRODUCTION

In *Cooper v. Oklahoma*, 517 U.S. 348 (1996), this Court held unanimously that an Oklahoma statute requiring a defendant to prove incompetence to stand trial by *clear and convincing evidence* violated the Due Process Clause. The Court explained that "both traditional and modern practice and the importance of the constitutional interest at stake" required rejection of the State's heightened burden of clear and convincing evidence. *Id.* at 356. It emphasized that "there is no indication that the rule Oklahoma seeks to defend has any roots in prior practice," *id.*, and that "[c]ontemporary practice demonstrates that the vast majority of jurisdictions remain persuaded that the heightened standard of proof imposed on the accused in Oklahoma is not necessary to vindicate the State's interest in prompt and orderly disposition of criminal cases," *id.* at 360. The Court underscored that "[n]o one questions the existence of the fundamental right that petitioner invokes," *id.* at 354, and it expressly compared the consequence of an erroneous determination for the defendant and for the State, finding that an erroneous decision was far more harmful to the defendant. *Id.* at 364-65. Based on this analysis, the Court concluded that

"[b]ecause Oklahoma's procedural rule allows the State to put to trial a defendant who is more likely than not incompetent, the rule is incompatible with the dictates of due process." *Id.* at 369.

Several state supreme courts have recognized the rule that ineluctably follows from *Cooper*, holding that the Due Process Clause prohibits a state from requiring a defendant to prove intellectual disability,[1] which would preclude execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), by clear and convincing evidence. *See*, *e.g.*, *Pruitt v. State*, 834 N.E.2d 90, 103 (Ind. 2005) ("We do not deny that the state has an important interest in seeking justice, but we think the implication of *Atkins* and *Cooper* is that the defendant's right not to be executed if mentally retarded outweighs the state's interest as a matter of federal constitutional law. We therefore hold that the state may not require proof of mental retardation by clear and convincing evidence."); *Howell v. State*, 151 S.W.3d 450, 464-65 (Tenn. 2004) ("Just as the Supreme Court held in *Cooper* regarding incompetency, we conclude that it would violate due process to execute a defendant who is more likely than not mentally retarded.").

No state—except one—requires a capital defendant to prove intellectual disability *beyond a reasonable doubt*. But Georgia is the exception. In a split decision with Judge Jordan dissenting, the Eleventh Circuit ruled in this case that decisions of the Georgia Supreme Court upholding that standard under the Due Process

---

[1] At the time of trial, "intellectual disability" was referred to as "mental retardation," and the trial terminology is also used at times here.

Clause are not contrary to the clearly established law set forth in *Cooper* and expressly recognized in *Pruitt*, *Howell*, and other cases. As a result, defendants in Georgia—and only Georgia—must prove intellectual disability beyond a reasonable doubt. What the Due Process Clause requires in Georgia is simply different from what it requires in every other state that retains the death penalty.

This important issue warrants this Court's review.

The impact of Georgia's unique burden is real. Discovery from the State in Petitioner's *habeas* proceeding revealed that "in the last 30 years not a single capital defendant in Georgia has been able to establish intellectual disability when the matter has been disputed." Pet. App. 41a (Jordan, J., dissenting). Experience rates in every other state are radically different.

Intellectual disability is simply not susceptible to Georgia's requirement of proof beyond a reasonable doubt. Intelligence testing is complex, and an individual may suffer from certain deficits in adaptive functioning but not others. All of this is consistent with the accepted medical definition of the disability, but it provides ample fodder for a prosecutor to urge, and a jury to find, "reasons to doubt." The end result, just as in *Cooper*, is that use of this burden of proof means that persons who are more likely than not intellectually disabled—indeed who even may be clearly and convincingly intellectually disabled—will still be executed in Georgia. There is no historical precedent for Georgia's burden of proof; it is not contemporaneously employed by any other state; and the consequences of a mistaken determination are

immeasurably higher for the defendant than for the state. There is no reasonable way to distinguish this case from *Cooper*.

An expert explained in the proceedings below that there likely *are* persons who are intellectually disabled "beyond a reasonable doubt," but it is only those persons so profoundly disabled—with an IQ of 30 or 40—that the diagnosis could not be questioned. Other persons too are intellectually disabled, however, including the "mildly" retarded petitioner in *Atkins* himself. Georgia simply has redefined the *Atkins* right to include only the former category of persons—those profoundly disabled—and to exclude the rest. The Georgia Supreme Court in fact acknowledged that Georgia's "higher standard of proof serves to enforce the General Assembly's *chosen definition of what degree of impairment qualifies as mentally retarded* under Georgia law" and "*limits* the exemption to those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt." *Head v. Hill*, 587 S.E.2d 613, 622 (Ga. 2003) (emphasis added). But just last Term in *Moore v. Texas* (*Moore II*), 139 S. Ct. 666 (2019), this Court reiterated (for the fourth time) that a state is not free to redefine the substantive *Atkins* right. That is precisely what Georgia has done here.

The death penalty is a lawful punishment, and neither the legality nor the wisdom of that penalty is at issue here. But since *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court has upheld the use of capital punishment only in circumstances where it is not arbitrary, where mechanisms exist that reliably differentiate between those persons for whom execution

is appropriate and those for whom it is not. Georgia stands alone in allowing imposition of the death penalty on persons who could prove by a preponderance of the evidence, or even by clear and convincing evidence, that they are intellectually disabled. This creates an intolerable risk—even more significant than that presented in *Cooper*—that someone constitutionally ineligible for capital punishment will be executed.

Regardless of one's view of capital punishment, or even of this Court's decision in *Atkins*, it is fundamentally unfair that a constitutional defense guaranteed across the United States is entirely denied in Georgia because of a burden of proof that is, in reality, impossible to meet. The constitutional right of an intellectually disabled person not to be subject to a penalty of death cannot vary based on the geographic location of the defendant's crime.

This Court should grant the petition.

STATEMENT OF THE CASE

A. Trial Proceedings and Direct Appeal

Petitioner was convicted of shooting and killing three persons he did not know in 1996, when he was twenty-four years old. From the outset, the most critical issue in the case was whether Petitioner was intellectually disabled.

At the guilt phase of the trial, defense counsel contended Petitioner was "guilty but mentally retarded"—a defense that then under Georgia law, and now under federal constitutional law, bars imposition of a death sentence. A defense expert testified Petitioner had an IQ of 69 and was functioning at a 12-year old level.

Pet. App. 5a-6a. A state expert agreed Petitioner had an IQ of 69, and concluded that Petitioner "is an individual of very low intellectual capacity" and that "there are strong indications of organic CNS [central nervous system] impairment." 11th Cir. App. 491. Evidence showed Petitioner had been severely beaten by his alcoholic father as a child and had sustained several head injuries. He failed first, second, and seventh grade.

The State relied heavily on the significant defense burden of proving retardation beyond a reasonable doubt. The prosecutor argued in closing that "psychologists cannot be sure, cannot be certain of IQ" because "[t]hey're discussing the mind, and there is no way to be certain that certain things exist or do not exist." ECF 31-128 at 25.[2] After suggesting that experts' opinions were inherently too uncertain to satisfy the burden of proof, the prosecutor urged the jury to instead rely on lay stereotypes associated with intellectual disability. Among other factors, he argued that Petitioner's ability to have a child and hold a job raised reasonable doubt regarding his deficits in adaptive functioning. *Id.* at 29-31. In the prosecutor's view, even Petitioner's ability to keep his crime secret was enough to raise a reasonable doubt regarding his disability. *Id.* at 29. The prosecutor also asserted that the results of Petitioner's intelligence testing may have been affected by his depression and sleep problems, *id.* at 26, and that alcohol and drug use could have

[2] Citations to ECF are to filings in case No. 05-cv-0057 of the Southern District of Georgia.

diminished Petitioner's intellectual capacity after he turned eighteen, *id.* at 32.

The jury declined to find Petitioner mentally retarded beyond a reasonable doubt. The case proceeded to a sentencing hearing at which no mitigating evidence was offered, and the jury sentenced Petitioner to death.

On direct appeal, Petitioner contended that requiring him to prove mental retardation beyond a reasonable doubt violated the Due Process Clause, relying on this Court's decision in *Cooper*. ECF 31-155, at 32-35. But the Georgia Supreme Court had held that the State could require Petitioner to prove what was, at that time, solely a state-created defense of mental retardation, beyond a reasonable doubt. *Raulerson v. State*, 491 S.E.2d 791, 801 (Ga. 1997).

B. State Habeas Proceedings

In 2002, this Court decided *Atkins*. Therefore, in state habeas proceedings, Petitioner argued that the Due Process Clause prohibited a state from requiring a defendant to prove the *constitutional* defense of intellectual disability beyond a reasonable doubt. The state habeas court ruled that this claim was barred by res judicata, quoting the decision of the Georgia Supreme Court on direct appeal. Pet. App. 70a-71a. But the court also cited the Georgia Supreme Court's post-*Atkins* decision in *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003), where the court held, by a 4-3 vote, that Georgia's beyond-a-reasonable-doubt standard did not violate the Due Process Clause as established by this Court in *Cooper*. The state court denied *habeas* relief, and the

Georgia Supreme Court denied review. Pet. App. 140a, 142a.

C. Federal Habeas Proceedings

Petitioner then sought federal habeas relief. After the District Court denied relief, the Eleventh Circuit granted a certificate of appealability on three issues, including whether Georgia's reasonable doubt standard for intellectual disability violated procedural due process.

On the merits of that issue, the Eleventh Circuit ruled that the Georgia courts' rejection of Petitioner's due process claim was not an unreasonable application of clearly established federal law. The court held that *Cooper* did not clearly establish that Georgia's beyond-a-reasonable-doubt standard violated due process because "[u]nlike the *right* at issue in *Cooper*, which has deep roots in our common-law heritage, there is no historical right of an intellectually disabled person not to be executed." Pet. App. 25a-26a (emphasis added). In other words, whereas this Court in *Cooper* asked whether the State's burden of proof had roots in historical practice, the Eleventh Circuit looked to whether the constitutional right at issue had longstanding historical roots. In essence, the court ruled that the *Atkins* right is entitled to less protection under the Due Process Clause than the right not be tried if incompetent at issue in *Cooper*. In addition, the Eleventh Circuit did not even consider the other factors identified in *Cooper*: *contemporary* practice, and the relative harmfulness of an error to the defendant and the state. *See Cooper*, 517 U.S. at 362-67. The Eleventh Circuit also found that the Georgia courts reasonably

relied on *Leland v. Oregon*, 343 U.S. 790 (1952), which rejected a due process challenge to a state law that required a defendant to prove insanity beyond a reasonable doubt—even though *Leland* pre-dated *Cooper* and involved only a state defense not mandated by the Constitution to be provided at all. Pet. App. 27a.

Judge Jordan dissented. Pet. App. 41a-62a. He noted that where a criminal proceeding does *not* implicate an underlying constitutional right, the Due Process Clause generally allows a state to decide the appropriate allocation and burden of proof. Pet. App. 48a. This was true in *Leland*, where this Court emphasized that the defendant did not "s[eek] to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights." *Leland*, 343 U.S. at 798; Pet. App. 45a-46a. But Judge Jordan explained that "[w]here a fundamental constitutional right is involved—and the Eighth Amendment right of an intellectually-disabled defendant not to be executed is such a right—*Cooper* provides the governing precedent under the Due Process Clause." Pet. App. 46a. He emphasized that numerous states have followed *Cooper* to analyze their own state's procedures for determining intellectual disability, Pet. App. 46a-47a, and he concluded that "[b]ecause the Georgia Supreme Court in *Head* did not conduct the due process analysis required by *Cooper*, its decision in that case (followed by the superior court here) is not entitled to AEDPA deference." Pet. App. 47a.

Applying *Cooper*, Judge Jordan readily found that Georgia's unique burden of proof for *Atkins* claims

violates constitutional due process. He explained that "[h]ere the stakes are just as high [as in *Cooper*], and the burden Georgia places on capital defendants to prove intellectual disability is even higher than the clear-and-convincing standard found unconstitutional in *Cooper*." Pet. App. 50a. And he underscored that *Cooper* based its decision on "traditional *and* modern practice *and* the importance of the constitutional interest at stake." *Cooper*, 517 U.S. at 356 (emphasis added); Pet. App. 42a.

Finally, Judge Jordan reflected that "[s]ometimes 'a page of history is worth a volume of logic.'" Pet. App. 57a (quoting *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)). He explained, based on discovery produced by the State in this case:

> Should any proof be needed that Georgia's beyond-a-reasonable-doubt standard imposes an insurmountable and unconstitutional demand on capital defendants, we need look no further than how that burden has operated in practice. In the 30 years since § 17-7-131(c)(3) was enacted, not a single capital defendant has succeeded in proving to a factfinder that he or she is intellectually disabled beyond a reasonable doubt.

Pet. App. 57a; *see also* Pet. App. at 57a-61a. Judge Jordan also relied upon expert testimony in the record that, with regard to Georgia's standard, "it would be very rare for a clinician, especially in the so-called mild mental retardation range, to testify to that high level, to be able to testify to that high level." Pet. App. 60a-61a (quoting ECF 51 at 71-72).

Thus, Judge Jordan found that Georgia's standard "is one more manifestation" of the same problem this Court addressed in *Moore* and *Hall v. Florida*, 572 U.S. 701 (2014), which teach that "states violate their discretion under *Atkins* by establishing procedures that create an unacceptable risk that intellectually disabled prisoners will be executed." Pet. App. 57a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to review Georgia's unique outlier position requiring proof beyond a reasonable doubt for intellectual disability, which is contrary to this Court's decision in *Cooper*; to review the demonstrated factual reality that the *Atkins* right simply does not exist in Georgia, alone among the states; and to uphold the definition of intellectual impairment as it did in *Moore* and *Hall*.

I. GEORGIA'S OUTLIER POSITION IS CONTRARY TO *COOPER*'S CLEARLY ESTABLISHED LAW.

A. Georgia's Position Is Contrary to *Cooper* and That of Every Other State.

Georgia is a lone outlier in requiring the *Atkins* right to be established beyond a reasonable doubt and in refusing to apply the clear rule set down by this Court in *Cooper*. In *Cooper*, Oklahoma argued that its requirement that a defendant prove competence by clear and convincing evidence "provides a reasonable accommodation of the opposing interests of the State and the defendant." 517 U.S. at 355-56. This Court unanimously disagreed, concluding: "We are persuaded, by both traditional and modern practice and the

importance of the constitutional interest at stake, that the State's argument must be rejected." *Id.* at 356.

This Court unanimously concluded that Oklahoma's position plainly failed under these factors. It emphasized that "there is no indication *that the rule Oklahoma seeks to defend has any roots in prior practice*." *Id.* (emphasis added). Next, it underscored that "[c]ontemporary practice demonstrates that the vast majority of jurisdictions remain persuaded that the heightened standard of proof imposed on the accused in Oklahoma is not necessary to vindicate the State's interest in prompt and orderly disposition of criminal cases." *Id.* at 360. With regard to the importance of the interest at stake, the Court noted that "[n]o one questions the existence of the fundamental right that petitioner invokes. . . . Nor is the significance of this right open to dispute." *Id.* at 354. And the Court expressly compared the consequence of an erroneous determination for the defendant, with the injury to the State of the opposite error, finding that an erroneous decision was far more harmful to the defendant than to the State. *Id.* at 364-65.

There is only one way of applying *Cooper* to the question presented here. Georgia cannot contend that its beyond-a-reasonable-doubt standard for intellectual disability has "deep roots" in "prior practice" for the simple reason that various states, and then this Court in *Atkins*, only recently held that it is impermissible to execute an individual who is intellectually disabled. As a result, there simply is no history suggesting that the unique burden of proof Georgia seeks to impose in this context has long qualified as "a procedural rule [that] can

be characterized as fundamental." *Id.* at 356 (quoting *Medina v. California*, 505 U.S. 437, 446 (1992)). Contemporary practice is even clearer: not a *single* other state has deemed it appropriate to impose such a high burden on a capital defendant. *See* Pet. App. 50a-51a & n.2. Finally, although the constitutional right recognized in *Atkins* may be new, there is nothing to suggest it lacks importance: it is of constitutional dimension, and it literally determines whether an individual may live or die. An erroneous decision for the defendant means a person who is constitutionally entitled to be spared from execution because of an intellectual disability will die. In contrast, an erroneous decision for the state leaves it still able to impose a harsh punishment: imprisonment for life.

Following this same analysis, several courts of last resort in other states have applied *Cooper* to conclude that even a *lower* clear and convincing standard is unconstitutional for claims of intellectual disability under *Atkins*. And the reasoning of these courts makes clear that they have not viewed this question as a difficult application of *Cooper* to a novel factual situation; rather, their holdings followed inexorably from *Cooper*'s materially indistinguishable reasoning.

For example, in *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005), the Indiana Supreme Court struck down Indiana's clear and convincing evidence standard for proving intellectual disability in light of *Cooper* and *Atkins*. *Id.* at 103. It observed that, just like the right at issue in *Cooper*, the right recognized in *Atkins* is "fundamental" irrespective of its age. *Id.* at 101 ("In the course of recognizing the right in the Eighth Amendment of

mentally retarded defendants not to be executed, the Supreme Court has identified that right as grounded in a fundamental principle of justice." (citing *Atkins*, 536 U.S. at 306)). Guided by *Cooper*, the court further explained that "contemporaneous practice" supported its conclusion, as "only a relatively small number of jurisdictions" placed such a high burden of proof on defendants. *Id.* at 102. Then, critically, the Indiana Supreme Court engaged in the same "fundamental fairness" inquiry set forth in *Cooper*. *Id.* It concluded that while the state's interest in avoiding an erroneous determination was quite low—since intellectually disabled defendants "remain subject to punishment for their crimes"—the defendant's interest in avoiding a wrongful execution could not be higher. *Id.* at 103 (recognizing also that intellectually disabled defendants, like the incompetent defendants at issue in *Cooper*, already face a high risk of wrongful execution due to their condition (citing *Atkins*, 536 U.S. at 320-21)). The Indiana Supreme Court thus held that the state's clear and convincing standard was incompatible with this Court's decision in *Cooper*.

The Tennessee Supreme Court reached a similar conclusion in *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004). There, the petitioner challenged the state's law requiring defendants to prove intellectual disability by clear and convincing evidence in post-conviction proceedings. *Id.* at 463. The court began by acknowledging that *Cooper* controlled its burden of proof inquiry, and that *Cooper* required that the "burden of proof . . . reflect the degree of confidence our society thinks most appropriate in making [an *Atkins*] determination." *Id.* at 464. Just as in *Pruitt*, the court

emphasized that under both the United States and the Tennessee constitutions, intellectually disabled defendants are ineligible for execution. *Id.* It reasoned that the constitutional nature of the right, coupled with the "parallel concerns . . . regarding incompetency to stand trial and mental retardation," indicated that society had no interest in placing such a heavy burden on individuals raising *Atkins* defenses. *Id.* Following *Cooper*, the court ended its analysis by weighing the defendant's interest in avoiding an erroneous determination against that of the state. *Id.* at 465. It observed—as did the Indiana Supreme Court in *Pruitt*—that "the risk to the petitioner of an erroneous outcome is dire, as he would face the death penalty, while the risk to the State is comparatively modest." *Id.* The court concluded that "just as the Supreme Court held in *Cooper* regarding incompetency . . . it would violate due process to execute a defendant who is more likely than not mentally retarded." *Id.* at 464-65.

Even the Texas Court of Criminal Appeals' ruling that implemented *Atkins*—overruled by this Court in 2017 for insufficiently protecting intellectually disabled defendants' constitutional rights—applied a preponderance standard because "[t]he issue of mental retardation is similar to other affirmative defenses" including "incompetency to be executed." *See Ex parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004), *overruled on other grounds by Moore v. Texas* (*Moore I*), 137 S. Ct. 1039 (2017). Indeed, every other court that has addressed the issue—either reviewing a state statute or establishing a standard in the absence of legislative action—has only approved of standards less demanding than reasonable doubt. *See, e.g.*, *Commonwealth v.*

Sanchez, 36 A.3d 24, 69-70 (Pa. 2011) (adopting a preponderance standard for intellectual disability under *Atkins* and *Cooper*); *Chase v. State*, 873 So. 2d 1013, 1029 (Miss. 2004) (adopting a preponderance standard); *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002) (same), *overruled on other grounds by State v. Ford*, No. 2015-1309, __ N.E.3d __, 2019 WL 5792203 (Ohio Nov. 7, 2019); *State v. Williams*, 831 So. 2d 835, 860 (La. 2002) (concluding that a higher burden "would significantly increase the risk of an erroneous determination" that a defendant was not disabled, violating *Cooper* and *Atkins*); *Murphy v. State*, 54 P.3d 556, 568 & n.20 (Okla. Ct. Crim. App. 2002) (rejecting a statute mandating clear and convincing evidence in favor of a preponderance standard), *overruled on other grounds by Blonner v. State*, 127 P.3d 1135 (Okla. Crim. App. 2006).

In contrast, Georgia alone requires a defendant to prove intellectual disability beyond a reasonable doubt, and its Supreme Court has upheld that even *higher* burden notwithstanding *Cooper*. *See Head*, 587 S.E.2d at 620-22. Georgia has thus repeatedly defied clearly established federal law.

Undoubtedly, states possess discretion to develop procedural rules, and AEDPA ensures that procedural rules that reflect a reasonable application of clearly established precedent must be upheld on habeas review. But AEDPA's standard is not toothless. When, as here, a state defies clearly established federal law to effectively nullify a binding decision of this Court, "[i]t is this Court's responsibility to say what a federal" law means. *James v. City of Boise*, 136 S. Ct. 685, 686 (2016) (quoting *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S.

17, 20 (2012)) (alterations omitted). And "once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Id.* at 686. Thus, this Court's "solemn responsibility is not merely to determine whether a State Supreme Court has adequately protected a defendant's rights under the Federal Constitution. It is to ensure that when courts speak in the name of the Federal Constitution, they disregard none of its guarantees." *Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring) (internal quotation marks and alterations omitted).

As it has long recognized, this Court's role of providing uniform guidance is particularly important regarding the proper scope of constitutional due process for capital defendants. *Atkins*, 536 U.S. at 312 ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." (quoting *Coker v. Georgia*, 433 U.S. 584 (1977)). This case thus lies at the core of this Court's responsibility to interpret the line between a state's discretion and the requirements of the Eighth and Fourteenth Amendments. Today, the Constitution means one thing in Georgia and another thing just over the state line. Allowing such extreme constitutional discrepancies and arbitrariness to persist "would change the uniform 'law of the land' into a crazy quilt" in an area of fundamental rights. *Marsh*, 548 U.S. at 185 (Scalia, J., concurring).

B. By Ignoring This Court's Precedent in *Cooper*, Georgia Has Abrogated the Clearly Established Right Set Forth in *Atkins*.

This Court has stressed that "a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." *Bailey* v. *Alabama*, 219 U.S. 219, 239 (1911). But Georgia has done just that. By ignoring *Cooper*'s clearly established precedent, Georgia has effectively nullified the clearly established right recognized in *Atkins*, thus defying this Court's case law on the procedure *and* substance of rights due to intellectually disabled capital defendants.

Although *Atkins* left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction," *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416-17), it "did not give [them] unfettered discretion to define the full scope of the constitutional protection." *Hall v. Florida*, 572 U.S. 701, 719 (2014); *see also Cooper*, 517 U.S. at 367 (noting that "Oklahoma correctly reminds us that it is normally within the power of the State to establish the procedures through which its laws are given effect," but concluding that norm could not save its procedural rule that undermined a fundamental constitutional right). Indeed, this Court has observed, *Atkins* "provide[s] substantial guidance on the definition of intellectual disability." *Hall*, 572 U.S. at 721. On basis of this "substantial guidance," the Court has scrutinized—and repeatedly rejected—actions by states to redefine or limit the substantive right set forth in *Atkins*. *See, e.g.*,

Moore II, 139 S. Ct. at 672; *Moore v. Texas (Moore I)*, 137 S. Ct. 1039, 1052-53 (2017); *Hall*, 572 U.S. at 724.

Georgia has done precisely what this Court has repeatedly rejected, but through a procedural side door. As the Georgia Supreme Court acknowledged, "Georgia's beyond a reasonable doubt standard . . . serve[s] to *define* the category of mental retardation within Georgia law." *Stripling v. State*, 711 S.E.2d 665, 668-69 (describing the holding of *Head*, 587 S.E.2d at 613) (emphasis in original). As its decision in *Head* made clear, Georgia's "higher standard of proof serves to enforce the General Assembly's chosen definition of what degree of impairment qualifies as mentally retarded under Georgia law," and it "*limits* the exemption to those whose mental deficiencies are *significant enough* to be provable beyond a reasonable doubt." *Head*, 587 S.E.2d at 622 (emphasis added). Under this controlling interpretation of the state's highest court, the standard of proof bridges the gap between procedure and substance. *Cf. Hall*, 572 U.S. at 718 (describing the importance of the Florida Supreme Court's construction of the statute at issue). As a result, defendants with mild-to-moderate disabilities are procedurally excluded from the definition of intellectual disability, redefining the *Atkins* right more narrowly to only those whose disabilities are deemed "significant enough," *Head*, 587 S.E.2d at 622, to be proven to "a subjective state of near certitude," *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

This Court's decisions in *Hall* and *Moore* emphatically reject such narrowing of the *Atkins* right. In *Hall*, the Court held that Florida's *Atkins* statute

violated the Eighth Amendment. 572 U.S. at 724. The statute had been construed to cut off the disability inquiry where a defendant had an IQ score above 70. Recognizing that clinical definitions were a "fundamental premise" of *Atkins*, *id.* at 720, this Court rejected the statute on the basis that it "disregard[ed] established medical practice in two interrelated ways." *Id.* at 712. First, the statute ignored the clinical consensus that intellectual disability diagnosis requires a "conjunctive assessment," *id.* at 722-23, that weighs not only intellectual deficits as measured by IQ testing but also adaptive functioning—i.e., "the inability to learn basic skills and adjust behavior to changing circumstances"—as well as the age these deficits manifested, *id.* at 710. Florida's failure to account for any other factor when a defendant presented with an IQ score above 70 impermissibly ignored that consensus, the Court explained, by relying solely on IQ testing instead of treating it as only one factor. *Id.* at 723 ("Florida's statute . . . bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability.").

Second, Florida's standard failed to account for the uncertainty intrinsic to measures of intellectual disability. This Court acknowledged that diagnostic tools are the products of "subjective judgments" by clinicians and are subject to other confounding factors, *id.* at 713, before holding that, in order to comply with *Atkins*, decisionmakers "must recognize, as does the medical community," that testing tools like IQ scoring are intrinsically imprecise, *id.* at 724. "The death penalty is the gravest sentence our society may impose," and defendants "facing that most severe sanction must

have a fair opportunity to show that the Constitution prohibits their execution." *Id.* at 724. In order to satisfy that command in light of diagnostic uncertainty, Florida was required to permit defendants with IQs slightly above seventy a chance to present evidence of deficits in adaptive functioning and age of onset. *Id.* at 720. It could not, based on an IQ score, deem a person not to be intellectually disabled as a matter of law. *Id.* Such a definition would too often exclude individuals who were mildly mentally retarded—a group clearly entitled to protection under *Atkins*—creating an "unacceptable risk that persons with intellectual disability will be executed." *See id.* at 704, 719-20.

Similarly, this Court's recent decisions in *Moore I*, 137 S. Ct. at 1039, and *Moore II*, 139 S. Ct. at 672, underscore that states cannot narrowly redefine the *Atkins* right. In *Moore I*, the Court reviewed a ruling by the Texas Court of Criminal Appeals that employed not only the trio of widely accepted diagnostic considerations for intellectual disability identified in *Atkins* and *Hall*, but also additional factors articulated by that court's earlier decision in *Ex parte Briseno*, 135 S.W.3d 1. One of the *Briseno* factors, for instance, asked whether people who knew the defendant during his development thought he was intellectually disabled. *See Moore I*, 137 S. Ct. at 1046 n.6. Another asked if the defendant could "hide facts or lie effectively in his own or others' interests." *Id.*

This Court unanimously rejected the *Briseno* factors on the basis that they introduced impermissible lay stereotypes into the intellectual disability analysis. *See id.* at 1050-53; *id.* at 1060 (Roberts, C.J. dissenting)

(agreeing with the majority that the *Briseno* factors violated the Eighth Amendment). And the majority identified several additional ways that the Texas court had violated the Eighth Amendment. For instance, the Texas court abridged the defendant's rights when it had "overemphasized [his] perceived adaptive strengths" rather than focusing on his deficits as required by the prevailing medical standard, and by treating the defendant's childhood abuse and academic failure as factors that detracted from a finding that his intellectual and adaptive deficits were related, when in fact such circumstances are considered risk factors for intellectual disability in the medical community. *Moore I*, 137 S. Ct. at 1050-51. The majority also condemned the Texas court's insistence that the defendant prove that his deficits were related to his intellectual disability rather than a personality disorder, acknowledging that such conditions are often co-diagnosed. *Id.*

And just last term in *Moore II*, this Court was forced to reiterate that it had meant what it said: a defendant's "adaptive strengths rather than his deficits" did not "pass muster under this Court's analysis" in *Moore I*. *See* 139 S. Ct. at 672 (Roberts, C.J., concurring).

By ignoring this Court's lessons in *Cooper*, Georgia has achieved procedurally what this Court has held on multiple occasions it cannot do substantively—narrow the *Atkins* right. Through its unachievably high burden of proof, Georgia's "reasonable doubt" standard invites the same inappropriate considerations this Court rejected in *Hall* and *Moore*. Thus, the prosecutor in the instant case urged the jury to find a reasonable doubt because "psychologists cannot be sure, cannot be certain

of IQ," and because "[t]hey're discussing the mind, and there is no way to be certain that certain things exist or do not exist." ECF 31-128 at 25. Indeed, the state's closing arguments present a litany of the very considerations this Court has found to be improper. The prosecutor asserted that the jury should consider one of the stereotype-laden factors unanimously rejected by this Court in *Moore I*: whether the defendant was capable of keeping secrets. *Id.* at 29 (emphasizing, as a basis for doubt about Petitioner's disability, that he was able to keep his crime secret for months). Further, demonstrating how the Georgia standard invites emphasis of adaptive *strengths* to the exclusion of weaknesses, the government argued that the Petitioner's ability to have a child and hold a job raised reasonable doubt regarding his deficits in adaptive functioning. *Id.* at 29-31. The prosecutor also appealed to misguided lay opinions that Petitioner's other health problems—namely depression and substance abuse—were alternative explanations for his intellectual deficits rather than, as this Court found in *Moore I*, co-existing diagnoses or even "risk factors" for intellectual disability. *See* ECF 31-128 at 26, 32; *Moore I*, 137 S. Ct. at 1051.

By requiring a defendant to prove his disability to a near certainty, the reasonable doubt standard invites a prosecutor to invoke exactly the sorts of considerations forbidden by this Court. By emphasizing a defendant's adaptive strengths—be it his ability to have a child or hold a job—and appealing to laypeople's stereotypes about intellectual disability, or even raising the possibility that his deficits *may have been* the result of a related but distinct condition, the government can

generate the meager doubt necessary to defeat a defendant's claim.

At bottom, Georgia's intellectual disability standard enables the state to execute a defendant who is almost certainly intellectually disabled, based on a procedural burden that elevates stereotypes and lay understandings above clinical realities. The standard thus facilitates precisely the sorts of error-prone reasoning repeatedly condemned by this Court, and creates an "unacceptable risk that persons with intellectual disability will be executed." *Hall*, 572 U.S. at 704. It is little wonder not a single defendant whose intellectual disability has been disputed before a factfinder has prevailed under this statute. If the Court meant what it said in *Atkins*, *Hall*, and *Moore I*, and was forced to repeat in *Moore II*, it should grant review.

Significantly, as developed in the record below, Petitioner's expert witness explained that "I think there are a few cases, a very few cases, where somebody could say beyond a reasonable doubt that the person has mental retardation. The bulk of those cases where you could do that would be down in the IQs of 30 or 40." ECF 51 at 54. Thus, just as the Georgia Supreme Court admitted the Legislature sought to do, the State through its procedure "*limits* the exemption to those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt." *Head*, 587 S.E.2d at 622 (emphasis added). This type of limitation, however, is precisely what this Court held in *Moore* and *Hall* a state *cannot* do. That the limitation is dressed in the language of procedure makes it no less a violation of this Court's

clearly established precedent. *See Cooper*, 517 U.S. at 363-65; *Bailey*, 219 U.S. at 239.

C. This Court Should Review the Important Issue in This Case, Particularly Given Record Evidence That No Capital Defendant Has Ever Prevailed Under Georgia's Burden of Proof for Intellectual Disability in a Contested Case.

Critically, the question presented here has severe practical consequences and is not one of mere intellectual consistency. As Judge Jordan emphasized in his dissent, and as this Court recognized in *Cooper*, burdens of proof are significant and often can be outcome-determinative. Pet. App. 57a; *Cooper*, 517 U.S. at 362-63. That is exactly what has occurred in Georgia.

In this habeas proceeding, the District Court allowed discovery and required Georgia to respond to interrogatories concerning whether, since 1988, any capital defendants had established intellectual disability beyond a reasonable doubt. Pet. App. 58a. As Judge Jordan observed based on the record evidence in this case, "Georgia, tellingly, did not provide *any* cases where a defendant met that standard." *Id.* Thus, "*in the last 30 years not a single capital defendant in Georgia has been able to establish intellectual disability when the matter has been disputed*." Pet. App. 41a (emphasis added). Recent scholarship confirms what the discovery in this case revealed. Based on an exhaustive study of records from 379 capital cases in Georgia, "[f]rom an empirical perspective, we can now say with confidence that not one defendant in Georgia has proven successfully to a jury post-*Atkins* that he is exempt from

the death penalty due to intellectual disability." Lauren S. Lucas, *An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 Ga. St. U. L. Rev. 553, 605 (2017).

By contrast, the nationwide rate at which intellectual disability is found on *Atkins* claims is far higher. *See* John H. Blume et al., *A Tale of Two (and Possibly Three)* Atkins, 23 Wm. & Mary Bill Rts. J. 393, 397-98 & n.23 (2014) (finding an overall success rate of 26% for *Atkins* claims addressed in all published merits opinions but noting that number likely underrepresents the true success rate). Georgia has never claimed that the incidence of intellectual disability within the state is drastically lower than the national average. Rather, the only reason why no Georgia defendant has ever been able to prove intellectual disability, but defendants in all other states have, is Georgia's extraordinary and unique standard of proof.

There is no reason to believe that Georgia will reverse or repeal its outlier status absent intervention from this Court. The Georgia Supreme Court has repeatedly reaffirmed its original, pre-*Atkins* holding that requiring capital defendants to prove intellectual disability beyond a reasonable doubt does not violate due process or this Court's decision in *Cooper*. *See, e.g.*, *Head*, 587 S.E.2d at 621-22 (reaffirming holding of *Mosher v. State*, 491 S.E.2d 348 (Ga. 1997)); *Stripling*, 711 S.E.2d at 668. Nor has the Georgia legislature shown any willingness to conform to the position of other States, which all employ a less stringent burden of proof. Although a legislative committee held a hearing on the

issue in 2013, the presiding chairman emphasized that it was merely for "educational purposes," and it predictably resulted in no significant legislation. *See* Veronica M. O'Grady, *Beyond a Reasonable Doubt*, 48 Ga. L. Rev. 1189, 1193 (2014) (quoting statement of Rep. Rich Golick, Chairman, Comm. On the Judiciary (Non-Civil)). When the Legislature recently revised the relevant section of the Georgia code, it provided only cosmetic changes—for instance, replacing the outdated "mentally retarded" terminology with the more modern usage of "intellectual disability." *See* 2017 Ga. Laws Act 189 §§ 2-3. Thus the burden of proof employed in Georgia remains unchanged since 1988. *See* Ga. Code Ann. § 17-7-131(c)(3).

Review by this Court is imperative. *Atkins* remains binding federal constitutional law. But experience has proved that the *Atkins* right simply does not exist in Georgia, because Georgia alone among the states has imposed and upheld an insurmountable burden of proof. As this Court has recognized, the complexity of psychiatric and psychological diagnoses often renders it impossible to achieve the same kind of certainty that may be possible for factual matters. In *Addington v. Texas*, 441 U.S. 418 (1979), the Court rejected a "beyond a reasonable doubt" standard for civil commitment proceedings, explaining:

> The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific,

> knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Within the medical discipline, the traditional standard for "factfinding" is a "reasonable medical certainty." If a trained psychiatrist has difficulty with the categorical "beyond a reasonable doubt" standard, the untrained lay juror—or indeed even a trained judge—who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care.

Id. at 430.

The District Court allowed Petitioner to present expert testimony on this issue below. An expert in intellectual disability diagnosis testified that Georgia's standard requires a level of certainty that experts simply cannot provide. The expert explained that "it would be very rare for a clinician" to be able to testify with a high enough level of confidence to satisfy the standard, "especially [for defendants] in the so-called mild mental retardation range." ECF 51 at 71-72; *see* Pet. App. 60a-61a.

This testimony illustrates how the reasonable double burden of proof effectively negates the substantive standard for intellectual disability defined by the Legislature. Any diagnosis of intellectual disability is readily susceptible to a "doubt" under the broad definition of reasonable doubt applied in Georgia courts, *see* Pet. App. 55a ("[A] reasonable doubt can arise from 'consideration of the evidence, a lack of evidence, or a conflict in the evidence.'" (quoting Georgia Suggested Pattern Jury Instruction—Criminal 1.20.10 (2019))). When a burden of proof nullifies a legislature's statute, that raises serious separation-of-powers concerns and further warrants this Court's review. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring in the judgment) ("Allowing the legislature to hand off the job of lawmaking risks substituting [the deliberative process] for one where legislation is made easy, with a mere handful of . . . prosecutors free to condemn all that they personally disapprove and for no better reason than they disapprove it." (internal quotation marks and alterations omitted)).

Unless this Court intervenes, Georgia will have successfully eviscerated a constitutional right established by this Court on procedural grounds. Intellectually disabled persons will be denied even a fair opportunity to prove that they should not be executed.

D. AEDPA Is Not an Impediment to Review.

AEDPA's demanding standard of review is not an impediment to granting certiorari in this case. This Court has repeatedly granted review even when a petitioner was required to overcome AEDPA standards. *See*, *e.g.*, *Williams v. Taylor*, 529 U.S. 362 (2000);

Wiggins v. Smith, 539 U.S. 510 (2003), *Brumfield v. Cain*, 135 S. Ct. 2269 (2015).

Where a state court correctly identifies and applies the governing Supreme Court precedents, AEDPA precludes habeas relief. Pet. App. 45a (citing *Bell* v. *Cone*, 535 U.S. 685, 694 (2002)). However, when the state court misidentifies the governing precedent, AEDPA instructs that the state court's decision be set aside and habeas relief granted. *See, e.g.*, *Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (concluding that AEDPA did not bar relief where the state court failed to apply the correct governing precedent to an ineffective assistance of counsel claim).

That is precisely what occurred here. Both the Georgia Supreme Court and the Eleventh Circuit grounded their opinions on the mistaken conclusion that this Court's 1952 decision in *Leland* controlled. Pet. App. 45a-46a. But there is no room for reasonable debate on whether that approach can be reconciled with clearly established precedent. *Leland* was a case in which the defendant did not "s[eek] to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights." *Leland*, 343 U.S. at 798. Rather, *Leland* involved only a statutory right that the state could have eliminated entirely, and the state thus also could encumber that right with whatever burden of proof it deemed appropriate.

But this case, like *Cooper*, involves a federal constitutional right. And for that, *Cooper* provides the relevant rule. *See Cooper*, 517 U.S. at 367 (rejecting Oklahoma's reliance on *Patterson v. New* York, 423 U.S.

197 (1977) because that case that concerned only "procedures for proving a statutory defense" rather than "a fundamental constitutional right"). Thus, as Judge Jordan explained, "[w]here a fundamental constitutional right is involved—and the Eighth Amendment right of an intellectually-disabled defendant not to be executed is such a right—*Cooper* provides the governing precedent under the Due Process Clause." Pet. App. 46a. And to answer that due process question, "*Cooper* requires a court to examine the relevant common-law traditions of England and the United States, contemporary practices, and the risks inherent in Georgia's practice of requiring capital defendants to prove intellectual disability beyond a reasonable doubt." *Id.* Here, however, the Georgia Supreme Court never conducted that analysis. Thus, "[b]ecause the Georgia Supreme Court in *Head* did not conduct the due process analysis required by *Cooper*, its decision in that case (followed by the superior court here) is not entitled to AEDPA deference." Pet. App. 47a.

That this Court has not specifically analyzed the issue of a beyond-a-reasonable-doubt burden of proof in the *Atkins* context is of no moment. As recognized in *Pannetti v. Quarterman*, "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" 551 U.S. 930, 953 (2007) (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in the judgment)); *cf. Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) (concluding that, in the AEDPA context, "[c]ertain principles are fundamental enough that when

new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.").

The fact that this case arises in a federal habeas context also presents advantages that make it an excellent vehicle for the questions presented. As explained above, Petitioner was able to obtain discovery regarding the experience rate on *Atkins* claims in Georgia; the State had the opportunity to address that experience rate (and could not demonstrate that any defendant had ever prevailed on an *Atkins* claim in a contested case); in addition, Petitioner was able to present expert testimony concerning the inappropriateness of the standard from a diagnostic perspective (which again, the State had the opportunity to rebut, but did not).

This Court should grant the petition to ensure that Georgia (alone among the states) cannot defy this court's clearly established teachings in *Cooper* as they apply to claims of intellectual disability, and to address the fundamental unfairness of the fact that, under Georgia's outlier standard requiring proof beyond a reasonable doubt, defendants do not have a meaningful opportunity to prove, and have never once proved, intellectual disability in a contested case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID W. DEBRUIN
Counsel of Record
ADRIENNE LEE BENSON*
FAARIS AKREMI*
BRADLEY D. POUGH*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6015
ddebruin@jenner.com

*Admitted only in New York, California, and Florida respectively. Not admitted in the District of Columbia. Practicing under the supervision of the partnership of Jenner & Block LLP.

APPENDIX

Appendix A

United States Court of Appeals, Eleventh Circuit.

Billy Daniel RAULERSON, Jr., Petitioner-Appellant,

v.

WARDEN, Respondent-Appellee.

No. 14-14038

(June 28, 2019)

Appeal from the United States District Court for the Southern District of Georgia, D.C. Docket No. 5:05-cv-00057-JRH

Before WILLIAM PRYOR, JORDAN, and HULL, Circuit Judges.

Opinion

WILLIAM PRYOR, Circuit Judge:

Billy Raulerson Jr., a Georgia prisoner under three death sentences for murdering two teenagers, one of whom he sodomized after killing her, and for murdering a woman he robbed the next day, appeals the denial of his petition for a writ of habeas corpus, 28 U.S.C. § 2254. At trial, Raulerson's counsel argued that he was "guilty but mentally retarded" beyond a reasonable doubt and so ineligible for the death penalty. The jury disagreed and sentenced Raulerson to death. After unsuccessfully

pursuing postconviction relief in Georgia courts, Raulerson filed a federal petition, which the district court denied. Raulerson contends that his counsel were ineffective by failing to investigate mitigating evidence and present it during the penalty phase; that the Georgia requirement that a criminal defendant prove his intellectual disability beyond a reasonable doubt violates the Due Process Clause of the Fourteenth Amendment; and that he is actually innocent of the death penalty because he is intellectually disabled. Because the Georgia superior court reasonably determined that the first two claims fail and because Raulerson fails to establish his intellectual disability, we affirm.

I. BACKGROUND

We divide the background of this appeal in three parts. First, we discuss the facts of Raulerson's crime. Next, we describe Raulerson's trial and sentencing. Then, we provide an overview of his state and federal habeas proceedings.

A. The Crime

In a two-day span, Billy Raulerson, Jr. killed three people in Ware County, Georgia. On May 30, 1993, Raulerson parked his car by a pickup truck occupied by two teenagers, Jason Hampton and Charlye Dixon, on a lakeside lovers' lane. *Raulerson v. State*, 268 Ga. 623, 491 S.E.2d 791, 795–96 (1997). Raulerson stood on the bed of the truck and shot Hampton several times. *Id.* at 796. As Dixon tried to flee, he shot her. *Id.* He then "dragged Hampton's body from the truck and shot him several more times." *Id.* Raulerson went on to take two fishing rods from the truck and put the rods and Dixon in his

car. *Id.* He drove to a wooded area several miles away where he shot Dixon again and sodomized her. *Id.*

When he tried to return to Dixon's body the next day, people were at the site, so he "drove to a rural section of the county looking for a house to burglarize." *Id.* He stopped at a home that had no vehicle in the carport. After no one responded to his knock at the door, Raulerson broke into a shed and stole meat from the freezer. *Id.* When he was loading the meat into his car, he heard someone in the house. *Id.* Raulerson went inside and encountered Gail Taylor, who was armed with a knife. *Id.* A struggle ensued, and Raulerson shot Taylor multiple times. *Id.* He then stole her purse and left. *Id.* Later that day, the bodies of Hampton, Dixon, and Taylor were discovered in separate locations. *Id.* at 795.

Several months later, the police arrested Raulerson on unrelated charges. He gave the police a blood sample, which matched the semen recovered from Dixon's body. *Id.* When the police questioned Raulerson about the murders, he confessed to killing all three people. *Id.* The police searched Raulerson's home and found the fishing rods taken from Hampton's truck and a gun that matched the shell casings recovered from the crime scenes. *Id.* A grand jury charged Raulerson with the murders of Dixon, Hampton, and Taylor; burglary; kidnapping; aggravated sodomy; necrophilia; two counts of possession of a firearm during the commission of a felony; and possession of a firearm by a convicted felon. *Id.* at 795 n.1.

B. The Trial and Sentencing

Leon Wilson and Mark Hatfield represented Raulerson. Wilson, who served as lead counsel, had tried several capital cases in his 46 years as an attorney, although he had not done so in 20 years when he represented Raulerson. Hatfield, a new attorney, assisted Wilson with the case.

Before trial, Raulerson's counsel conducted an investigation of Raulerson's background. They hired five experts, including a licensed clinical social worker, Audrey Sumner; a psychologist, Dr. Daniel Grant; a psychiatrist, Dr. John Savino; a neurologist, Dr. Michael Baker; and a neuropsychologist, Dr. Manual Chaknis. The experts interviewed Raulerson and his family and reviewed Raulerson's medical, school, and criminal records. Among other things, Raulerson's counsel learned that Raulerson had a tumultuous childhood, abusive parents, substance-abuse issues, and several emotional and intellectual problems.

During the guilt phase of trial, Raulerson's counsel presented the defense that Raulerson was "guilty but mentally retarded." In Georgia, a criminal defendant who proves beyond a reasonable doubt that he is intellectually disabled is ineligible for the death penalty. *See* O.C.G.A. § 17-7-131(c)(3). In July 2017, Georgia amended section 17-7-131 to substitute the term "mentally retarded" for "intellectual disability." *See id.* § 17-7-131; *see also* 2017 Ga. Laws 189 § 1. We will use the term "intellectual disability" unless we are quoting directly from the record. *See Brumfield v. Cain*, ––– U.S. ––––, 135 S. Ct. 2269, 2274 n.1, 192 L. Ed.2d 356 (2015) ("While this Court formerly employed the phrase

'mentally retarded,' we now use the term 'intellectual disability' to describe the identical phenomenon." (alteration adopted) (citation and internal quotation marks omitted)). To prove intellectual disability, Raulerson needed the jury to determine, beyond a reasonable doubt, that he had "significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." O.C.G.A. § 17-7-131.

To support his claim of intellectual disability, Raulerson's counsel presented the expert testimony of their psychologist, Dr. Grant. He testified that he had spent about 15 hours with Raulerson, administered about 25 different tests, interviewed his parents, and reviewed extensive records. Although Raulerson had received IQ scores of 78 and 83 as a child, which are above the range of intellectual disability, Grant testified that his tests determined Raulerson had an IQ around 69 and was "functioning at about a 12-year level." And he testified that Raulerson's deficits onset before age 18 because Raulerson had abused drugs and alcohol at a young age, suffered head injuries, and had memory and attention problems. Grant concluded that Raulerson was intellectually disabled.

Dr. Grant also testified about Raulerson's background. He testified that Raulerson always had trouble in school and never had any friends. He explained that Raulerson had suffered multiple head injuries, including being hit by a car at age three. And Grant described Raulerson's home life. He testified that Raulerson's father was abusive; by age ten, "he and his

father would actually get in the yard and fist-fight like two adults." Grant explained that Raulerson's environment made him "predisposed" for substance abuse. After Raulerson began using drugs and alcohol around age ten, Grant testified that Raulerson spent "his leisure time ... drinking or using drugs" and sitting outside his parents' house "just staring out." Grant also discussed Raulerson's failed marriage and his child. He explained that Raulerson had been married at age 18 and had a tumultuous relationship with his then-wife. When she was five months pregnant, Raulerson shot himself in the chest.

The state presented its own expert, Dr. Gerald Lower, who disagreed with some of Dr. Grant's conclusions that led to his diagnosis that Raulerson had an intellectual disability. Dr. Lower's test also determined that Raulerson had an IQ of 69, but he testified that he found signs of malingering. Lower testified that he did not have enough information to make a diagnosis about Raulerson's adaptive functioning. When asked whether there was "any convincing demonstration" that Raulerson had an intellectual disability onset before age 18, he testified, "Absolutely none whatever."

The jury rejected that Raulerson was "guilty but mentally retarded" beyond a reasonable doubt. It convicted him on three counts of capital murder, in addition to burglary, kidnapping, necrophilia, and two counts of possession of a firearm during the commission of a felony.

The penalty phase began the next morning. The state called six witnesses and presented several victim-impact

statements. Raulerson's counsel presented no additional witnesses in mitigation and instead relied on the testimony presented during the guilt phase. During Wilson's closing argument, he maintained that although the jury had found that Raulerson was "not ... legally retarded," Raulerson's actions were of a "sick mind" and "not entirely his fault." Wilson urged the jury to consider Raulerson's background and not to impose the death penalty. The court instructed the jury that it could rely on all testimony received in both stages of the proceedings. The jury returned a verdict of death for all three counts of capital murder for which Raulerson was convicted and found the existence of seven statutory aggravating circumstances beyond a reasonable doubt.

Raulerson appealed his convictions and sentences to the Supreme Court of Georgia. He argued, among other things, that section 17-7-131(c)(3), which requires the accused to prove his intellectual disability beyond a reasonable doubt, violated his *state* right not to be executed if intellectually disabled. In support, Raulerson cited *Cooper v. Oklahoma*, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996), which held that an Oklahoma requirement that the accused prove his incompetence to be tried by clear and convincing evidence violated the Due Process Clause. The Supreme Court of Georgia rejected his challenge to section 17-7-131(c)(3), and it affirmed Raulerson's convictions and sentences. *See Raulerson*, 491 S.E.2d at 801 (citing *Burgess v. State*, 264 Ga. 777, 450 S.E.2d 680 (1994)). The Supreme Court of the United States denied Raulerson's petition for a writ of certiorari. *See Raulerson v. Georgia*, 523 U.S. 1127, 118 S. Ct. 1815, 140 L. Ed. 2d 953 (1998).

C. The State and Federal Habeas Proceedings

After his direct appeal, Raulerson filed a petition for a writ of habeas corpus in a Georgia superior court. He alleged that his counsel rendered ineffective assistance at the penalty phase of his trial by failing to investigate and present mitigating evidence about his mental health. In the light of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), he also argued that Georgia's burden of proof to establish intellectual disability violated his *federal* right not to be executed if intellectually disabled. That is, he argued that section 17-7-131(c)(3) violates the Due Process Clause of the Fourteenth Amendment by failing to protect his right under the Eighth Amendment not to be executed if intellectually disabled. And Raulerson asserted that he is intellectually disabled and cannot be executed under the Eighth Amendment.

The superior court held an evidentiary hearing on these issues. Raulerson presented over 30 affidavits from family, friends, teachers, and mental-health professionals stating that they would have provided testimony on Raulerson's behalf if they had been asked. The affidavits provided details about Raulerson's substance abuse, physical abuse, troubled childhood, and his relationship with his daughter. Raulerson also presented an affidavit and testimony from Dr. Lower, the state's expert at his trial. Lower explained that, after reviewing additional records and testimony, he "would have testified that Mr. Raulerson's I.Q. ... and his deficits in adaptive functioning apparent prior to age 18 support[ ] a diagnosis of Mental Retardation." But Dr. Lower still questioned whether Raulerson's intellectual

disability onset before age 18. So even with the additional information, he could not diagnose Raulerson as intellectually disabled.

The superior court denied Raulerson's petition. It denied Raulerson's claim of ineffective assistance of counsel on the merits. It ruled that his due-process claim was barred by res judicata. And relying on precedent from the Supreme Court of Georgia, it also explained that Raulerson's due-process claim failed because Georgia's burden of proof to establish intellectual disability was not unconstitutional under *Atkins*. The superior court also determined that Raulerson's claim that he is intellectually disabled and so ineligible for the death penalty was barred by res judicata because the jury had rejected that claim. And it determined that Raulerson "failed to present evidence to satisfy the extremely stringent miscarriage of justice standard" because the evidence presented at trial and in habeas proceedings did not "warrant eradication [of] the jury's verdict."

The Supreme Court of Georgia summarily denied Raulerson's application for a certificate of probable cause to appeal. Raulerson then filed a federal petition for a writ of habeas corpus in the district court. Following an evidentiary hearing, the district court denied Raulerson's petition.

II. STANDARDS OF REVIEW

We review de novo the denial of a petition for a writ of habeas corpus. Morrow v. Warden, 886 F.3d 1138, 1146 (11th Cir. 2018). The Antiterrorism and Effective Death Penalty Act, which governs Raulerson's petition,

provides "[a] general framework of substantial deference [for] our review of every issue that the state courts have decided." Diaz v. Sec'y for the Dep't of Corr., 402 F.3d 1136, 1141 (11th Cir. 2005). Under that Act, a federal court shall not grant habeas relief on any claim "adjudicated on the merits" in state court unless, as relevant here, the state court's decision denying relief was either "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The phrase "clearly established federal law" refers only "to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Yarborough v. Alvarado, 541 U.S. 652, 660–61, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) (quoting Terry Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). The decision of a state court is "contrary to" clearly established federal law when the state court "applied a rule in contradiction to governing Supreme Court case law" or "arrived at a result divergent from Supreme Court precedent despite materially indistinguishable facts." Dill v. Allen, 488 F.3d 1344, 1353 (11th Cir. 2007). And a state court's application of federal law is unreasonable "only if no 'fairminded jurist' could agree with the state court's determination or conclusion." Holsey v. Warden, Ga. Diagnostic Prison, 694 F.3d 1230, 1257 (11th Cir. 2012) (quoting Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)); see also Harrington, 562 U.S. at 101, 131 S. Ct. 770 ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). Section 2254(d)(1) sets "a difficult to meet and highly deferential

standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (citation and internal quotation marks omitted).

III. DISCUSSION

Raulerson raises three issues for our review. First, he argues that the superior court unreasonably determined that his attorneys were not deficient for failing to investigate mitigating evidence and to present it during the penalty phase and that he suffered no prejudice. Second, he argues that the superior court unreasonably applied clearly established law when it ruled that the Georgia requirement that he prove his intellectual disability beyond a reasonable doubt did not violate the Due Process Clause of the Fourteenth Amendment. Third, he argues that he is intellectually disabled and so actually innocent of the death penalty.

As an initial matter, our discussion focuses on the reasonableness of the superior court's decision even though it is not the last state-court "adjudicat[ion] on the merits," 28 U.S.C. § 2254(d). The Supreme Court of Georgia's summary denial of Raulerson's application for a certificate of probable cause to appeal was the last state-court adjudication on the merits. *Hittson v. GDCP Warden*, 759 F.3d 1210, 1231–32 (11th Cir. 2014). But we "presume" that the 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," which the state has not tried to do in this appeal. *Wilson v. Sellers*, —— U.S. ——, 138 S. Ct. 1188, 1192, 200 L. Ed.

2d 530 (2018). So we "'look through' the unexplained decision" of the Supreme Court of Georgia to review the superior court's decision as if it were the last state-court adjudication on the merits. *See id.*

A. The Superior Court Reasonably Determined that Trial Counsel Were Not Ineffective for Failing to Investigate Mitigating Evidence and to Present It During the Penalty Phase.

To obtain relief on his claim of ineffective assistance of counsel, Raulerson must establish two elements. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, he must prove that "his counsel's performance was deficient, which means that it 'fell below an objective standard of reasonableness' and was 'outside the wide range of professionally competent assistance.'" Johnson v. Sec'y, Dep't of Corr., 643 F.3d 907, 928 (11th Cir. 2011) (quoting Strickland, 466 U.S. at 688, 690, 104 S. Ct. 2052). When considering whether counsel's performance was deficient, we "review counsel's actions in a 'highly deferential' manner" and apply "a strong presumption ... of reasonable professional assistance." Id. (quoting Strickland, 466 U.S. at 689, 104 S. Ct. 2052). Second, Raulerson must establish prejudice, which means that "but for his counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. 2052). Because Strickland provides a "most deferential" standard for assessing the performance of counsel, "[w]hen [we] combine[ ] [it] with the extra layer of deference that § 2254 provides, the result is double deference." Id. at 910–11. So "the

question becomes whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. (citation and internal quotation marks omitted).

Raulerson first argues that his trial counsel were ineffective by failing to investigate mitigating evidence about his troubled childhood, his love for his child, and his mental illness. During the state habeas proceedings, Raulerson presented affidavits from over 30 family members, teachers, acquaintances, and mental-health professionals that he contends his counsel should have interviewed. Raulerson argues that these witnesses could have presented a more sympathetic portrait of him.

Counsel representing a capital defendant must conduct an adequate background investigation, but it need not be exhaustive. See Berryman v. Morton, 100 F.3d 1089, 1101 (3d Cir. 1996) ("The right to counsel does not require that a criminal defense attorney leave no stone unturned and no witness unpursued."). When our review is governed by section 2254, "the question is not just if counsel's investigative decisions were reasonable, but whether fairminded jurists could [reasonably] disagree." Johnson, 643 F.3d at 932.

To determine whether "trial counsel should have done something more" in their investigation, "we first look at what the lawyer[s] did in fact." Grayson v. Thompson, 257 F.3d 1194, 1219 (11th Cir. 2001) (citation and internal quotation marks omitted omitted). Raulerson's counsel hired five experts to assist in their investigation: a licensed clinical social worker, a psychologist, a psychiatrist, a neurologist, and a

neuropsychologist. The social worker, Audrey Sumner, interviewed Raulerson, his mother, his father, and two uncles. Her report crafted an extensive social history of Raulerson's life that described the physical and verbal abuse he suffered at the hands of both of his parents, his struggles with depression and substance abuse, his suicide attempt, and various incidents displaying his rage. The psychologist, Dr. Grant, also met with Raulerson, for at least fifteen hours, and interviewed his parents. And Dr. Grant examined extensive medical, school, and criminal records. Dr. Grant's report included background information about Raulerson and diagnoses of intellectual disability and several mental illnesses. The psychiatrist, Dr. Savino, met with Raulerson on at least eight separate occasions and reviewed Raulerson's records. Dr. Savino diagnosed Raulerson as mentally ill and intellectually disabled, and he suggested that Raulerson might have organic brain damage. To investigate potential brain damage, Raulerson's counsel hired Drs. Baker and Chaknis, a neurologist and neuropsychologist respectively. Several of the experts also reviewed Raulerson's case together. In addition to the work of these five experts, Raulerson's counsel performed their own interviews of Raulerson's mother, father, brother, and an uncle. Counsel also had Raulerson write out his life history.

The superior court reasonably concluded that trial counsel conducted an adequate investigation. Raulerson's counsel gleaned a portrait of his life from the expert reports, family interviews, and medical, school, and criminal records. Although Raulerson 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. Grayson, 257 F.3d at 1225 ("[C]ounsel is not required to investigate and present all mitigating evidence in order to be reasonable." (emphasis added)). From their investigation, counsel learned much of the information contained in the affidavits, including details on Raulerson's troubled childhood, abusive parents, difficulties in school, and intellectual deficiencies. And because Raulerson has pointed to no "known evidence [that] would lead a reasonable attorney to investigate further," Wiggins v. Smith, 539 U.S. 510, 527, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), he has provided no argument that his counsel acted unreasonably when they decided to end the investigation when they did. Because the superior court reasonably determined that Raulerson's counsel conducted an adequate investigation, we need not consider whether Raulerson suffered prejudice.

Raulerson next argues that his counsel were ineffective because they decided not to present additional mitigating evidence during his penalty phase, but again, the superior court reasonably rejected this claim. "No absolute duty exists to introduce mitigating or character evidence." Chandler v. United States, 218 F.3d 1305, 1319 (11th Cir. 2000) (en banc) (collecting cases). And we have held, in a capital case, that counsel's performance was not deficient when he chose to rely on the mitigating evidence presented in the guilt phase instead of presenting additional evidence during the penalty phase. Waters v. Thomas, 46 F.3d 1506, 1512

(11th Cir. 1995) (en banc). We explained that "[w]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." Id.

The superior court reasonably determined that Raulerson's counsel were not deficient when they presented no additional mitigating evidence during the penalty phase. As counsel in Waters had done, Raulerson's counsel chose to rely on the mitigating evidence presented in the guilt phase instead of presenting it again in the penalty phase. See id. at 1512–13. During the guilt phase, his counsel presented mitigating evidence that included descriptions of Raulerson's intellectual deficiencies and life history. Dr. Grant testified about Raulerson's trouble in school, his emotional and intellectual problems, his marriage, his relationship with his child, and his tumultuous home life, including his abusive father.

After the jury returned a guilty verdict, Raulerson's counsel chose to rely on this evidence for the penalty phase. Raulerson's counsel presented a closing argument urging the jury to consider Raulerson's background and spare him. Counsel reminded the jury to "[g]o back and look at the circumstances of Billy Raulerson's life, the way he was raised, this dysfunctional family, parents that fought like animals with each other; an alcoholic father who taught him to mind with blows of his fists to his head .... What chance did he have? Isn't he a victim, too?" And the court instructed the jury that it could rely on all testimony received in both stages of the proceedings. The superior court reasonably chose not to second guess counsel's

strategic decision to rely on the mitigating evidence presented in the guilt phase, so neither can we.

Raulerson presents a plethora of additional character evidence that he contends his counsel should have presented, but "[c]onsidering the realities of the courtroom, more is not always better." Chandler, 218 F.3d at 1319; see also Waters, 46 F.3d at 1512 ("There is much wisdom for trial lawyers in the adage about leaving well enough alone."). "The type of 'more-evidence-is-better' approach advocated by [Raulerson] 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.

As the superior court highlighted, a reasonable lawyer could fear that additional evidence of Raulerson's character during the penalty phase would be counterproductive, which is exactly what Raulerson's counsel explained had motivated their decision to not present additional mitigating evidence. Hatfield testified that they decided not to call Grant or Savino back to the stand for fear of "opening the flood gates" for "bad stuff." And they decided not to call Raulerson's

family members to testify out of concern that "they would be able to offer other negative information that might have hurt" Raulerson's case. Hatfield was concerned about testimony that Raulerson was an aggressor because "those sorts of things don't play well in front of a jury." Counsel knew from their investigation that Raulerson had frequently picked fights, bullied other children, and had abused his younger brother, mother, and ex-wife. And Raulerson, "who bears the burden in this case, never presented evidence that the fears of trial counsel about hurtful ... witnesses were imaginary and baseless." Chandler, 218 F.3d at 1323 n.36.

We also disagree with Raulerson that, because the jury had already heard harmful information about him, presenting mitigating evidence would not be counterproductive. We cannot overlook that Raulerson's counsel faced an uphill battle in the light of the brutality of the three murders Raulerson confessed he had committed. And his counsel reasonably feared that presenting additional mitigating evidence would have invited testimony about Raulerson's violent behavior and bad acts—aggravating evidence that far outweighed any mitigation value of the additional evidence Raulerson contends should have been presented. For example, had counsel called Raulerson's mother, she might have also testified about how her son beat her and how she had called the police on him. Because Raulerson has failed to prove that "no competent counsel would have taken the action that his counsel did take," id. at 1315, the superior court reasonably determined that counsel's performance was not deficient.

Even if counsel's performance in the penalty phase were deficient, the superior court also reasonably determined that Raulerson was not prejudiced by the failure to introduce the additional mitigating evidence. A petitioner cannot establish that the outcome of the proceeding would have been different when "[t]he 'new' evidence largely duplicated the mitigation evidence at trial." Cullen, 563 U.S. at 200, 131 S. Ct. 1388; see also Holsey, 694 F.3d at 1260–61. And "[t]o the extent the state habeas record includes new ... evidence," that evidence cannot prove prejudice when it is of "questionable mitigating value." Cullen, 563 U.S. at 201, 131 S. Ct. 1388.

The superior court reasonably determined that Raulerson's additional evidence would not have changed the jury's verdict. The superior court reasonably determined that much of the "new" evidence in the affidavits that Raulerson presented was cumulative. That is, the evidence Raulerson presented "tells a more detailed version of the same story told at trial," which covered Raulerson's limited intelligence and troubled childhood. Holsey, 694 F.3d at 1260. And the evidence was of questionable mitigating value because it could have led to a damaging rebuttal. See Cullen, 563 U.S. at 201, 131 S. Ct. 1388. If counsel had introduced additional testimony about Raulerson's relationship with his daughter to make him seem more sympathetic, such testimony could have opened the door to testimony about how Raulerson abused his ex-wife. And additional evidence about Raulerson's family and his own substance abuse might have led the jury to conclude that he "was simply beyond rehabilitation," so that evidence

is "by no means clearly mitigating." Id. The superior court reasonably discounted this evidence as cumulative and of questionable value.

B. The Superior Court's Determination that the Georgia Burden of Proof for Intellectual Disability Does Not Violate the Due Process Clause Was Not an Unreasonable Application of Clearly Established Federal Law.

We divide in two parts our discussion of Raulerson's argument that the Georgia requirement that he prove his intellectual disability beyond a reasonable doubt violates the Due Process Clause of the Fourteenth Amendment. First, we explain that the superior court adjudicated his due-process claim on the merits, so we apply the deferential framework imposed by section 2254(d)(1). Second, we explain that the superior court's rejection of his due-process claim was not an unreasonable application of clearly established federal law.

1. The Superior Court Rejected Raulerson's Due-Process Claim on the Merits, so We Apply the Deferential Framework of Section 2254(d)(1).

Raulerson argues that we should review *de novo* his due-process claim because the superior court never adjudicated it on the merits. According to Raulerson, the superior court concluded that the Supreme Court of Georgia had rejected the claim on direct appeal and so dismissed his due-process claim based only on res judicata. Raulerson argues that the court erred in applying res judicata because the due-process claim he now brings on collateral review is based on federal law

but his claim on direct appeal—which the Supreme Court of Georgia rejected—was based on Georgia law. Based on that asserted error, Raulerson argues that no state court adjudicated his federal due-process claim on the merits, which would, if correct, subject his claim to *de novo* review. *See Cone v. Bell*, 556 U.S. 449, 466, 472, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009).

When we consider the superior court's order denying Raulerson's petition in full, we have no trouble concluding that it rejected his federal due-process claim on the merits. "[A] decision that does not rest on procedural grounds alone is an adjudication on the merits regardless of the form in which it is expressed." *Wright v. Sec'y for Dep't of Corr.*, 278 F.3d 1245, 1255–56 (11th Cir. 2002). To be sure, the court addressed Raulerson's due-process claim within a section of its opinion titled "Claims that are Res Judicata." And it referenced the Supreme Court of Georgia's denial of that claim on direct appeal. So we agree with Raulerson that the superior court dismissed his claim in part because of res judicata. But it did not dismiss the claim *only* because of res judicata.

The court alternatively decided the merits of Raulerson's claim. It rejected Raulerson's argument that the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), established that Georgia's burden of proof for intellectual disability was unconstitutional. And it found *Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613, 621 (2003)—in which the Supreme Court of Georgia held that its burden of proof did not violate "federal constitutional law"—"controlling." Both of these decisions postdate the

rejection of Raulerson's due-process claim on direct appeal, so the superior court's reference to them establishes that it alternatively rejected Raulerson's federal due-process claim on the merits. Under Georgia law, this alternative holding is binding. *See World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, 586 F.3d 950, 958 (11th Cir. 2009) (explaining that Georgia courts consider alternative holdings binding); *QOS Networks Ltd. v. Warburg, Pincus & Co.*, 294 Ga. App. 528, 669 S.E.2d 536, 541 (2008) ("Where a case presents two or more points, any one of which is sufficient to determine the ultimate issue, but the court actually decides all such points, the case is an authoritative precedent as to every point decided, and none of such points can be regarded as having merely the status of a dictum." (citation omitted)).

We join our sister circuits in holding that a state court's alternative holding is an adjudication on the merits. *See Rolan v. Coleman*, 680 F.3d 311, 319–21 (3d Cir. 2012) ("[W]here a state court has considered the merits of the claim, and its consideration provides an alternative and sufficient basis for the decision, such consideration warrants deference."); *Sharpe v. Bell*, 593 F.3d 372, 382 (4th Cir. 2010) ("[A] state court's alternative holding on the merits of a constitutional claim qualifies for deference under Section 2254(d)."); *Brooks v. Bagley*, 513 F.3d 618, 624 (6th Cir. 2008) (same). Because the superior court adjudicated the merits of Raulerson's due-process claim, we must review the denial of that claim under the deferential framework set forth in section 2254(d)(1).

2. The Superior Court's Rejection of Raulerson's Due-Process Claim Was Not an Unreasonable Application of Clearly Established Federal Law.

Raulerson argues that, even under the deferential framework of section 2254(d)(1), the superior court's rejection of his due-process claim was an unreasonable application of clearly established federal law. According to Raulerson, 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.

Raulerson first relies on *Atkins*, but that decision 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. In *Atkins*, the Supreme Court held that the execution of the intellectually disabled violates the Eighth Amendment. *See* 536 U.S. at 321, 122 S. Ct. 2242. But as we have explained, "the Supreme Court in *Atkins* made no reference to, much less reached a holding on, the burden of proof." *See Hill v. Humphrey*, 662 F.3d 1335, 1347 (11th Cir. 2011) (en banc). To the contrary, the Supreme Court expressly "le[ft] to the States the task of developing appropriate ways" to identify intellectual disability. *Atkins*, 536 U.S. at 317, 122 S. Ct. 2242 (alterations adopted) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416–17, 106 S. Ct. 2595, 91 L. Ed. 2d 335

(1986)). So "*Atkins* established *only* a substantive Eighth Amendment right for the mentally retarded" and established no "minimum procedural due process requirements for bringing that Eighth Amendment claim." *Hill v. Humphrey*, 662 F.3d at 1360; *see also Bobby v. Bies*, 556 U.S. 825, 831, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009) (explaining that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person" is intellectually disabled). And we cannot "import a procedural burden of proof requirement" that the Supreme Court declined to adopt in our review of a habeas petition. *Hill v. Humphrey*, 662 F.3d at 1360.

Raulerson contends that the Court clearly established a procedural limitation on the burden of proof "by invoking *Ford*," *see Atkins*, 536 U.S. at 317, 122 S. Ct. 2242, but that argument reads too much into a lone citation to *Ford*. In *Ford*, the Supreme Court, in Justice Powell's controlling concurrence, held that prisoners who made a substantial threshold showing of incompetence to be executed were entitled to a hearing on that claim. 477 U.S. at 426, 106 S. Ct. 2595 (Powell, J., concurring in part and in the judgment). "The citation in *Atkins*, however, not only was not to that portion of *Ford*, it was not even to Justice Powell's *opinion* in *Ford*." *Brumfield*, 135 S. Ct. at 2294 (Thomas, J., dissenting). And neither the plurality opinion in *Ford* nor Justice Powell's concurring opinion even mentioned the burden of proof for claims of incompetence. So *Atkins*'s citation to *Ford* cannot clearly establish a procedural limitation on the burden of proof for intellectual disabilities.

Acknowledging that *Atkins* expressly left procedural rules to the states, Raulerson next argues that considering *Atkins* in conjunction with *Cooper* yields clearly established minimum procedural requirements to prove intellectual disability, but even the combination of these decisions does not suffice. In *Cooper*, the Supreme Court addressed whether an Oklahoma law that required a defendant to prove his incompetence to stand trial by clear and convincing evidence violated the Due Process Clause. To resolve that issue, the Court applied the general due-process standard first articulated in *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)—whether the criminal procedural rule "offends a principle of justice that is [so] deeply rooted in the traditions and conscience of our people" as to be considered fundamental. *Cooper*, 517 U.S. at 362, 116 S. Ct. 1373 (citation and internal quotation marks omitted). The Court had already held that requiring a defendant to prove his incompetence by a preponderance of the evidence did not violate this standard. *See Medina v. California*, 505 U.S. 437, 453, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). But contrasting the longstanding right not to be tried if incompetent with the lack of historical support for Oklahoma's clear-and-convincing standard, the Court concluded that the heightened standard offended a principle of justice deeply rooted in the traditions and conscience of our people. *Cooper*, 517 U.S. at 359–60, 362, 116 S. Ct. 1373.

Raulerson's comparison between the right not to be tried if incompetent and the right not to be executed if intellectually disabled is misplaced. Unlike the right at

issue in *Cooper*, which has deep roots in our common-law heritage, there is no historical right of an intellectually disabled person not to be executed. *See Hill v. Humphrey*, 662 F.3d at 1350. Indeed, as recently as 1989, the Supreme Court refused to bar the execution of the intellectually disabled. *See Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). Georgia's reasonable-doubt standard, enacted 30 years ago, was "the first state statute prohibiting such executions." *Atkins*, 536 U.S. at 313–14, 122 S. Ct. 2242; *see also Hill v. Humphrey*, 662 F.3d at 1350–51. "And since the constitutional right itself is new, there is no historical tradition regarding the burden of proof as to that right." *Hill v. Humphrey*, 662 F.3d at 1350.

In the light of these fundamental differences, *Cooper* did not clearly establish that the application of Georgia's beyond-a-reasonable-doubt standard to Raulerson's claim of intellectual disability violated his right to due process under the Fourteenth Amendment. To conclude otherwise would require us to extend the Court's rationale from incompetence to intellectual disability. That we cannot do. *See White v. Woodall*, 572 U.S. 415, 426, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014) ("'[I]f a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" (quoting *Yarborough*, 541 U.S. at 666, 124 S. Ct. 2140)).

In the "controlling" decision the superior court applied to reject Raulerson's due-process claim on the merits, the Supreme Court of Georgia reasoned that the burden of proof required to prove the defense of insanity

is "more closely analogous to the burden of proof standard in Georgia's mental retardation statute than is the mental incompetency" burden. *Hill v. Humphrey*, 662 F.3d at 1350 (glossing *Head v. Hill*, 587 S.E.2d at 621–22). And the Supreme Court has rejected a due-process challenge to a state law that required a defendant to prove his insanity beyond a reasonable doubt. *See Leland v. Oregon*, 343 U.S. 790, 798–99, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952). We held in *Hill v. Humphrey* that it was reasonable for the Supreme Court of Georgia to conclude that the burden of proof for intellectual disability is analogous to insanity, which permits a beyond-a-reasonable-doubt standard. *See* 662 F.3d at 1350. Nothing the Supreme Court has said since then changes that conclusion.

Our dissenting colleague's contrary conclusion disregards the nature of our inquiry. This Court cannot "answer the due process question presented here" based on how we would apply federal law. Dissenting Op. at 1011–12. We review only whether the superior court's decision was "contrary to, or involved an unreasonable application of, clearly established [f]ederal law," 28 U.S.C. § 2254(d)(1), which refers only to the holdings of the Supreme Court's decisions, *see Yarborough*, 541 U.S. at 660–61, 124 S. Ct. 2140. Our dissenting colleague infers that *Cooper* and *Leland* establish different procedural standards for constitutional and nonconstitutional rights respectively, *see* Dissenting Op. at 1011–12, but neither decision so holds. And the dissent's inference of an unstated rationale underlying their divergent outcomes does not amount to clearly established federal law. *See Yarborough*, 541 U.S. at

660–61, 124 S. Ct. 2140. Indeed, *Leland* did not even hold that the right to present an insanity defense was not constitutionally based, so this key premise of the dissent's argument that *Head v. Hill* transgressed clearly established federal law is itself not clearly established. In any event, although *Cooper* established a procedural standard for one constitutional right—the right not to be tried if incompetent—it does not follow that *Cooper* clearly established a procedural standard applicable to *all* constitutional rights. *See Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (explaining that "due process is flexible and calls for such procedural protections as the particular situation demands"). Our dissenting colleague's extension of *Cooper* from the context of incompetency to stand trial to the distinct context of ineligibility for the death penalty because of intellectual disability is just that—an extension—and section 2254(d)(1) neither "require[s] state courts to *extend* [Supreme Court] precedent [n]or license[s] federal courts to treat the failure to do so as error." *Woodall*, 572 U.S. at 426, 134 S. Ct. 1697.

No decision of the Supreme Court clearly establishes that Georgia's burden of proof for intellectual disability violates the Due Process Clause. "If the standard of proof Georgia has adopted for claims of [intellectual disability] is to be declared unconstitutional, it must be done by the Supreme Court in a direct appeal, in an appeal from the decision of a state habeas court, or in an original habeas proceeding filed in the Supreme Court." *Hill v. Humphrey*, 662 F.3d at 1361. Because the Court has not done so, the superior court's decision was not an

unreasonable application of clearly established federal law.

C. Raulerson Fails to Establish His Intellectual Disability by Clear and Convincing Evidence.

Raulerson argues that he is "actually innocent" of the death penalty because he is intellectually disabled, and under Atkins, the execution of an intellectually disabled person would violate the Eighth Amendment. This argument needlessly blends the distinct concepts of actual innocence and intellectual disability, but even when we sift through each, Raulerson's claim fails.

Considered as a freestanding claim of actual innocence of the death penalty, Raulerson's claim is a nonstarter. To begin with, our precedent forecloses habeas relief based on a prisoner's assertion that he is actually innocent of the crime of conviction "absent an independent constitutional violation occurring in the underlying state criminal proceeding." See Brownlee v. Haley, 306 F.3d 1043, 1065 (11th Cir. 2002) (citation and internal quotation marks omitted); see also Cunningham v. Dist. Att'y's Office, 592 F.3d 1237, 1273 (11th Cir. 2010) ("[An] assertion of actual innocence, by itself, is not enough."); Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351, 1356 (11th Cir. 2007). As we have explained, "[i]t is not our role to make an independent determination of a petitioner's guilt or innocence based on evidence that has emerged since the trial." Brownlee, 306 F.3d at 1065. And the Supreme Court has never held that a prisoner is "entitled to habeas relief based on a freestanding claim of actual innocence." McQuiggin v. Perkins, 569 U.S. 383, 392, 133 S. Ct. 1924, 185 L. Ed.2d 1019 (2013).

The prohibition on freestanding claims of actual innocence in a habeas petition respects the nature of our federal system: "Federal courts are not forums in which to relitigate state trials." Herrera v. Collins, 506 U.S. 390, 401, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (quoting Barefoot v. Estelle, 463 U.S. 880, 887, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)). When reviewing a habeas petition, we "sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." Id. at 400, 113 S. Ct. 853. And "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." Id. at 401, 113 S. Ct. 853.

To be sure, a prisoner may assert actual innocence to overcome a procedural bar that would otherwise prevent a federal court from hearing his claim on the merits. See Sawyer v. Whitley, 505 U.S. 333, 338–39, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992); see also Herrera, 506 U.S. at 404, 113 S. Ct. 853. But that way of escaping a procedural bar concerns "factual innocence, not mere legal insufficiency." McKay v. United States, 657 F.3d 1190, 1197 (11th Cir. 2011). And even when the Supreme Court has "assume[d] for the sake of argument"—but without deciding—that "a truly persuasive demonstration of 'actual innocence' [as a freestanding claim] ... would render the execution of a defendant unconstitutional," it meant actual innocence of the crime. Herrera, 506 U.S. at 417, 113 S. Ct. 853. Raulerson neither raises actual innocence to overcome a procedural bar nor argues that he is actually innocent of the murders for which he was convicted.

Although Raulerson frames his claim as one of actual innocence, it rests on the notion that he is "actually innocent" of the death penalty because he is intellectually disabled and so his execution would violate the Eighth Amendment—that is, in essence, an Atkins claim. See Atkins, 536 U.S. at 321, 122 S. Ct. 2242. A claim of a federal constitutional violation, in contrast with a freestanding claim of actual innocence, is a ground for federal habeas relief. See Herrera, 506 U.S. at 400, 113 S. Ct. 853 ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." (emphasis added)). So Raulerson may pursue his claim not because of actual innocence but because he argues that his execution would violate the Constitution. We put aside Raulerson's misplaced "actual innocence" rhetoric and consider his argument as an Atkins claim. But even when we give Raulerson's Atkins claim the benefit of every doubt, it fails.

We begin by making two assumptions that favor Raulerson. First, although the parties dispute whether Raulerson exhausted this Atkins claim, we will assume that he did. Second, we will assume that Raulerson's Atkins claim has not been "adjudicated on the merits" by any Georgia court, so we will not apply the deferential standard of section 2254(d), which would require us to deny relief unless the rejection of Raulerson's Atkins claim was unreasonable "in the light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); see also Cullen, 563 U.S. at 181, 131 S. Ct. 1388 ("[R]eview under § 2254(d)(1) [also] is limited to the

record that was before the state court that adjudicated the claim on the merits.").

The superior court rejected Raulerson's Atkins claim on the ground of res judicata, which is not an adjudication on the merits for our purposes. See Cone, 556 U.S. at 466, 472, 129 S. Ct. 1769. And the Supreme Court of Georgia's denial of a certificate of probable cause presumably rested on the same ground. See Wilson, 138 S. Ct. at 1192. So, if Raulerson's Atkins claim was ever adjudicated on the merits, it must have been when the jury rejected his defense of intellectual disability or when the Supreme Court of Georgia affirmed the jury verdict. That Raulerson's Atkins claim was adjudicated by the jury and on direct appeal is a plausible interpretation but is in some tension with the longstanding principle that a "claim" in habeas consists of a "particular legal basis" wedded to a "specific factual foundation." McNair v. Campbell, 416 F.3d 1291, 1302 (11th Cir. 2005) (emphases added) (quoting Kelley v. Sec'y for Dep't of Corr., 377 F.3d 1317, 1344–45 (11th Cir. 2004)). In the context of exhaustion, "it is not at all clear that a petitioner can exhaust a federal claim by raising an analogous state claim," even if the federal and state rights are identical in content. Preston v. Sec'y, Fla. Dep't of Corr., 785 F.3d 449, 460 (11th Cir. 2015).

By the same token, it is not immediately obvious that Raulerson's jury or the Supreme Court of Georgia decided Raulerson's Atkins claim—which is based on his right not to be executed if intellectually disabled under the federal Constitution—when they rejected his state-law defense of intellectual disability. When Raulerson was tried, he had a right not to be executed if

intellectually disabled under Georgia law, but the Supreme Court had not yet decided Atkins, which acknowledged a corresponding federal right. So we will give Raulerson the benefit of this doubt and assume without deciding that his Atkins claim has never been adjudicated on the merits.

Even if Raulerson escapes the gauntlet of section 2254(d) because no state court adjudicated his claim based on Atkins, there was a determination of the factual issue of his intellectual disability, and we must presume correct "a determination of a factual issue made by a State court." 28 U.S.C. § 2254(e)(1). Whether a person is intellectually disabled is a factual issue. Fults v. GDCP Warden, 764 F.3d 1311, 1319 (11th Cir. 2014). The jury determined that issue against Raulerson when it rejected his defense of intellectual disability. See Restatement (Second) of Judgments § 27 cmt. d (Am. Law Inst. 1982) ("A determination may be based on a failure of ... proof as well as on the sustaining of the burden of proof."). And the Supreme Court of Georgia held that the jury verdict was rational. Raulerson, 491 S.E.2d at 796. Because the state courts determined that Raulerson is not intellectually disabled and that determination is entitled to be presumed correct, he bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The precise scope of the "determination of [the] factual issue" which Raulerson must rebut is not immediately obvious. The most generous interpretation of section 2254(e)(1) is that it provides the primary standard of proof whenever a state prisoner desires to

prove a factual issue that was determined against him in state court. If so, then a state prisoner may establish that a state court's factual determination was incorrect by proving the contrary proposition—in Raulerson's case, that he is intellectually disabled—by clear and convincing evidence as if in the first instance.

But section 2254(e)(1) could also be understood to establish, not a primary standard of proof, but a secondary standard of persuasion that operates in tandem with the original standard of proof applied by the state court. If so, then a state prisoner must prove by clear and convincing evidence that a state court's factual determination was incorrect in the light of the standard of proof that state law applies to that issue. See Maldonado v. Thaler, 625 F.3d 229, 236, 241 (5th Cir. 2010) (applying section 2254(e)(1) to a claim of intellectual disability, explaining that the petitioner "bears the burden of establishing by a preponderance of the evidence that he is mentally retarded"—the Texas burden of proof for intellectual disability—and finding that the petitioner "did not rebut the [section 2254(e)(1)] presumption of correctness that attaches to the state habeas court's conclusion that [he] did not meet his [state-law] burden"); cf. Tharpe v. Warden, 834 F.3d 1323, 1344–47 (11th Cir. 2016). In other words, it may be that the state's burden of proof is incorporated into the determination that the prisoner must rebut by clear and convincing evidence. On this interpretation, Raulerson must rebut—by clear and convincing evidence—the determination that it is not beyond a reasonable doubt that he is intellectually disabled.

Such compound standards are far from unusual in federal habeas review of state-court proceedings. See, e.g., 28 U.S.C. § 2254(e)(2)(B) (To obtain an evidentiary hearing in federal court, the petitioner must show that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."); Sawyer, 505 U.S. at 336, 112 S. Ct. 2514 ("[T]o show 'actual innocence' one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."); Tharpe, 834 F.3d at 1345 (When section 2254(d) applies to a Georgia court's rejection of an Atkins claim, "the heart of the matter" is "whether [the state court] unreasonably concluded that [the petitioner] had failed to prove beyond a reasonable doubt that" he is intellectually disabled. (emphases added)). By contrast, the more lenient interpretation would be unusual; even with a demanding standard of proof, permission for state prisoners to relitigate already-decided factual issues as if in the first instance would be a surprising departure from the structure and objectives of the Antiterrorism and Effective Death Penalty Act. But, because the outcome of this appeal does not depend on the answer, we assume without deciding that the more lenient interpretation is correct.

To recap, we have now made three important assumptions in Raulerson's favor. We have assumed his Atkins claim is exhausted. We have also assumed that it was not adjudicated on the merits, so the rigorous

standards of section 2254(d) do not apply. And we have assumed that section 2254(e)(1) permits him to prove that he is intellectually disabled—and ineligible for the death penalty—by providing clear and convincing evidence to a federal court in the first instance. In practice, this amounts to the assumption that a state prisoner may prove the factual predicate of an Atkins claim in federal court with clear and convincing evidence even when the state in which he was convicted and sentenced imposes a more demanding burden of proof for precisely the same factual issue—a particularly generous assumption in the light of the Atkins Court's express decision to "leave to the States the task of developing appropriate ways to enforce [Atkins's] constitutional restriction." Atkins, 536 U.S. at 317, 122 S. Ct. 2242 (alteration adopted) (quoting Ford, 477 U.S. at 416, 106 S. Ct. 2595).

Even with these assumptions in his favor, Raulerson is not entitled to relief based on his Atkins claim because the record does not clearly and convincingly prove that he is intellectually disabled. The clear-and-convincing-evidence standard, although not "insatiable," is still "demanding." Miller-El v. Dretke, 545 U.S. 231, 240, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). We have explained that it "calls for proof that a claim is 'highly probable.'" Fults, 764 F.3d at 1314 (alterations adopted) (quoting United States v. Owens, 854 F.2d 432, 436 (11th Cir. 1988)). To succeed on his claim, Raulerson must provide clear and convincing evidence of the three components of Georgia's definition of "intellectual disability": "significantly subaverage general intellectual functioning"; "resulting in or associated with

impairments in adaptive behavior"; "which manifested during the developmental period." O.C.G.A. § 17-7-131(a)(2); see also Moore v. Texas, —— U.S. ——, 137 S. Ct. 1039, 1045, 197 L. Ed. 2d 416 (2017) (explaining the "generally accepted, uncontroversial intellectual-disability diagnostic definition," which Georgia's definition matches). Considering the evidence presented at trial and in the habeas proceedings, Raulerson failed to prove that it is "highly probable" that he is intellectually disabled.

Raulerson's IQ scores that he received as a child undermine that he had "significantly subaverage general intellectual functioning," which is generally defined as an IQ between 70 and 75 or below. Ledford v. Warden, Ga. Diagnostic & Classification Prison, 818 F.3d 600, 633 (11th Cir. 2016). At trial, the evidence proved that Raulerson had received two IQ scores as a child that were above the range of intellectual disability. When Raulerson was eleven years old, he received an IQ score of 78. And when he was fourteen years old, he received an IQ score of 83. Both scores refute that Raulerson had subaverage intellectual functioning.

By applying two adjustments, the Flynn effect and the standard error of measurement, Dr. Grant testified that Raulerson's IQ scores could be as low as 70 and 74. But neither adjustment provides clear and convincing evidence of his subaverage intellectual functioning. No adjustment for the Flynn effect is required in this Circuit. Id. at 635–37. Because "IQ tests are scored on a scale that is relative to the population" when the test is developed, the Flynn effect adjusts for the empirical observation that IQ scores are rising over time.

McManus v. Neal, 779 F.3d 634, 652 (7th Cir. 2015). But as we have acknowledged, there is no consensus about the Flynn effect among experts or among the courts. Ledford, 818 F.3d at 635–37 (explaining the divergent approaches to the Flynn effect taken by our sister circuits); Thomas v. Allen, 607 F.3d 749, 758 (11th Cir. 2010) ("[T]here is no uniform consensus regarding the application of the Flynn effect in determining a capital offender's intellectual functioning ...."). Although Dr. Grant testified that the Flynn effect should be applied to lower Raulerson's IQ scores, the two psychologists who had administered Raulerson's IQ tests disagreed and testified that they would not apply the Flynn effect to the scores.

Adjusting Raulerson's scores for the standard error of measurement puts him closer to the range of intellectual disability, but that standard is a "bi-directional concept." *Ledford*, 818 F.3d at 641. "The standard error of measurement accounts for a margin of error both below *and* above the IQ test-taker's score." *Id.* at 640 (emphasis added). While Dr. Grant applied a standard error of measurement of five or six points to *lower* Raulerson's IQ scores, the standard also raises his range of scores. For example, while a six-point standard error of measurement might mean Raulerson's score of 83 could reflect an IQ as low as 77, it could also reflect one as high as 89. With Dr. Grant's standard error of measurement, Raulerson had IQ ranges of 77–89 and 73–83, which both fall above and dip into the threshold of intellectual disability. And the standard error of measurement "does not carry with it a presumption that an individual's IQ falls to the bottom of his IQ range." *Id.*

at 641. Even adjusting Raulerson's scores *both* for the Flynn effect and the standard error of measurement does not make it highly probable that he had subaverage intellectual functioning. As Dr. Lower testified in state habeas proceedings, although Raulerson's adjusted scores *could* put him in the intellectually disabled range, it "is a very small likelihood" because his scores are "pretty, pretty well above the range."

To be sure, Raulerson received an IQ score within the range of intellectual disability when he was tested after committing the murders. Both Dr. Grant and Dr. Lower tested him and scored him at an IQ of 69. But Dr. Lower also explained several reasons why he felt that Raulerson "was not probably motivated to do his best on [the tests]," including that "it was not to his advantage to do too well" because he stood charged of three capital offenses. In the light of two IQ scores comfortably above the range of intellectual disability that Raulerson received as a child, his later IQ score below the range does not clearly and convincingly prove he has "*significantly* subaverage general intellectual functioning."

Raulerson also has not established that it is highly probable he had an intellectual disability "which manifested during the developmental period." The "developmental period" refers to a disability that originated before the age of 18. *Ledford*, 818 F.3d at 635. Raulerson's claim of intellectual disability rests on Dr. Lower reevaluating his testimony about whether Raulerson was intellectually disabled, but Lower never changed his mind as to whether Raulerson had an intellectual disability that onset during the

developmental period. At trial, when asked whether there was any "convincing demonstration" that Raulerson was diagnosed with an intellectual disability before age 18, Lower answered, "Absolutely none whatever." At the hearing before the superior court on collateral review, Lower still questioned whether Raulerson had an intellectual disability onset before age 18, stating that the evidence of onset was "not real strong." And Lower explained that there was "no way to determine" when Raulerson "sunk" into the range for intellectual disability. Considering the IQ scores that Raulerson received as a child, Lower also testified that Raulerson's scores were "pretty well above the range" for intellectual disability. Ultimately, Lower still could not conclude that Raulerson was intellectually disabled. In the light of Lower's testimony, Raulerson has not established by clear and convincing evidence that he had an intellectual disability that onset during the developmental period.

The record does not prove that Raulerson's claim of intellectual disability is "highly probable." So he has not rebutted the presumption that the state courts' contrary determination was correct, and he is not entitled to federal habeas relief based on *Atkins*.

IV. CONCLUSION

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

JORDAN, Circuit Judge, concurring in part and dissenting in part:

"[B]urdens of proof can be outcome-determinative in the face of ignorance[.]"*

The Eighth Amendment prohibits a state from executing a defendant who is intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). In my view, the Georgia statute requiring capital defendants to prove intellectual disability beyond a reasonable doubt, *see* O.C.G.A. § 17-7-131(c)(3), violates the Due Process Clause of the Fourteenth Amendment. That burden of proof creates an intolerable risk that intellectually disabled defendants will be put to death. Indeed, in the last 30 years not a single capital defendant in Georgia has been able to establish intellectual disability when the matter has been disputed. With respect, I dissent from the majority's contrary holding.[1]

I

Where a criminal proceeding does not implicate an underlying constitutional right, the Due Process Clause generally allows a state to decide the appropriate allocation and burden of proof. Take, for example, the

---

* Ronald J. Allen, *How Presumptions Should Be Allocated—Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 Harv. J. L. & Pub. Pol'y 627, 639 (1994).

[1] I concur in Parts I, II, and III.A. of the majority opinion. Because I believe that Georgia's beyond-a-reasonable-doubt standard is unconstitutional, I would remand Mr. Raulerson's substantive intellectual disability claim to the district court for an evidentiary hearing under the preponderance-of-the-evidence standard.

affirmative defense of insanity. When a defendant invokes insanity as a defense to criminal liability, a state may require him to prove that he was insane beyond a reasonable doubt. *See Leland v. Oregon*, 343 U.S. 790, 799–800, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952). But that is because insanity is not a defense born of the Constitution. Indeed, the Supreme Court has never held that the Constitution requires states "to recognize the insanity defense." *Medina v. California*, 505 U.S. 437, 449, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). *See also* Alex Stein, *Constitutional Evidence Law*, 61 Vand. L. Rev. 65, 80 (2008) ("Because states and Congress may choose not to recognize [certain affirmative] defenses, they are allowed to condition the availability of any such defense on its proof by the defendant. Consequently, lawmakers can require defendants to establish any affirmative defense by preponderance of the evidence, by clear and convincing proof, or even beyond a reasonable doubt.").

Constitutionally-based rights stand on a different footing. Competency, for example, provides a good contrast to the affirmative defense of insanity. A state cannot constitutionally try and convict a defendant who is incompetent. *See, e.g.*, *Drope v. Missouri*, 420 U.S. 162, 171–72, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Accordingly, the Supreme Court has held that although a state can require a defendant to prove lack of competency by preponderance of the evidence, it cannot, based on "traditional and modern practice and the importance of the constitutional interest at stake," demand clear and convincing evidence. *Compare*

Medina, 505 U.S. at 453, 112 S. Ct. 2572 (allowing the use of the preponderance-of-the-evidence standard), *with Cooper v. Oklahoma*, 517 U.S. 348, 356, 369, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996) (prohibiting the use of the clear-and-convincing standard).

Intellectual disability, as noted, presents a constitutionally-based restriction on a state's ability to carry out the death penalty. *See Atkins*, 536 U.S. at 321, 122 S. Ct. 2242. Georgia's placing of a beyond-a-reasonable-doubt burden on capital defendants asserting intellectual disability therefore violates the Due Process Clause, and the decisions of the state superior court and the Georgia Supreme Court holding otherwise are contrary to *Cooper*, which constitutes clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1).

A

In Hill v. Humphrey, 662 F.3d 1335, 1338 (11th Cir. 2011) (en banc), a habeas corpus case decided under the deferential AEDPA framework, we held by a 7-4 vote that a Georgia Supreme Court decision upholding § 17-7-131(c)(3)'s beyond-a-reasonable-doubt standard against an Eighth Amendment challenge was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. Hill is not controlling here because Mr. Raulerson is challenging the beyond-a-reasonable-doubt standard under the Due Process Clause, and not the Eighth Amendment. See id. at 1363–64 (Tjoflat, J., concurring in the judgment) (explaining that the petitioner in Hill should have, but did not, assert a due process claim).

Prior to our decision in Hill, the Georgia Supreme Court held, by a 4-3 vote, in Head v. Hill, 277 Ga. 255, 587 S.E.2d 613, 620–22 (2003), that Georgia's beyond-a-reasonable-doubt standard did not violate the Due Process Clause. In this case, the state superior court relied on the opinion in Head to reject Mr. Raulerson's due process claim. See R31-423.

In Head, the Georgia Supreme Court identified Leland, 343 U.S. at 799–800, 72 S. Ct. 1002 (concerning the non-constitutional affirmative defense of insanity), as the governing Supreme Court precedent, and expressly declined to apply the standard set forth in Cooper, 517 U.S. at 356, 369, 116 S. Ct. 1373 (concerning the constitutional matter of competency). See Head, 587 S.E.2d at 621 ("[W]e again find the comparison between claims of insanity and of mental retardation to warrant a conclusion that the beyond-a-reasonable-doubt standard may be applied constitutionally to mental retardation claims."). This ruling, followed by the state superior court here, is "contrary to" established Supreme Court precedent—i.e., Cooper—under § 2254(d)(1) and is therefore not entitled to AEDPA deference.

A state court decision comes within the "contrary to" clause of § 2254(d)(1) if it applies a "rule that contradicts the governing law set forth in [Supreme Court] cases." Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). See also id. at 406, 120 S. Ct. 1495 (explaining that if a state court, in a case involving a claim of ineffective assistance of counsel, applies a standard different than the one set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the "contrary to" standard is satisfied); id. at

397–98, 120 S. Ct. 1495 (holding that a state court's decision was "contrary to" clearly established precedent because it did not correctly apply the prejudice standard of Strickland). If, on the other hand, a state court correctly identifies the governing Supreme Court cases in the relevant area of law and applies the standard from those cases, its decision will not be "contrary to" clearly established Supreme Court law. See Bell v. Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). The Supreme Court has consistently confirmed this interpretation of the "contrary to" clause, and so have we. See White v. Woodall, 572 U.S. 415, 420, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014); Lafler v. Cooper, 566 U.S. 156, 173, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); Trepal v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1088, 1109 (11th Cir. 2012). Accord Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 32.3 at 1908–10 (7th ed. 2018).

Contrary to what Head concluded, Leland is not the governing Supreme Court precedent for addressing the limits on determining and allocating the burden of proof when a constitutional right is at stake. Insanity, the affirmative defense at issue in Leland, is not and has never been constitutionally based. See Medina, 505 U.S. at 449, 112 S. Ct. 2572. So the deference given to the states in Leland to determine and allocate the burden of proof for an insanity defense to criminal liability is not appropriate in a case involving a constitutionally-protected right. Indeed, the Supreme Court noted in Leland that the defendant there did not "s[eek] to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of

Rights." Leland, 343 U.S. at 798, 72 S. Ct. 1002. See also Hill, 662 F.3d at 1383 (Martin, J., dissenting) ("There is a critical distinction between the Due Process required to protect substantive rights derived from the United States Constitution on the one hand [in Cooper] and state created rights on the other [in Leland.]") (citation omitted).

Where a fundamental constitutional right is involved—and the Eighth Amendment right of an intellectually-disabled defendant not to be executed is such a right—Cooper provides the governing precedent under the Due Process Clause. The Supreme Court in Cooper in fact distinguished cases, like Patterson v. New York, 432 U.S. 197, 201–02, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), involving the determination and allocation of the burden of proof for state-created defenses. See Cooper, 517 U.S. at 367–68, 116 S. Ct. 1373 ("[U]nlike Patterson, which concerned procedures for proving a statutory defense [i.e., extreme emotional disturbance], we consider here whether a State's procedures for guaranteeing a fundamental constitutional right are sufficiently protective of that right.").

To answer the due process question presented here, Cooper requires a court to examine the relevant common-law traditions of England and the United States, contemporary practices, and the risks inherent in Georgia's practice of requiring capital defendants to prove intellectual disability beyond a reasonable doubt. See id. at 356–69, 116 S. Ct. 1373. This is why several states have relied on Cooper to analyze their states' procedures for determining intellectual disability. See, e.g., Pennsylvania v. Sanchez, 614 Pa. 1, 36 A.3d 24, 70

(2011); Pruitt v. State, 834 N.E.2d 90, 103 (Ind. 2005); State v. Williams, 831 So. 2d 835, 859 (La. 2002); Murphy v. State, 54 P.3d 556, 573 (Okla. Crim. App. 2002); Morrow v. State, 928 So. 2d 315, 324 n.10 (Ala. Crim. App. 2004). The Indiana Supreme Court, for example, overturned its precedent requiring defendants to prove intellectual disability by clear and convincing evidence. See Pruitt, 834 N.E.2d at 103. That precedent had disregarded Cooper because "execution of the [intellectually disabled] had not yet been held to violate the Federal Constitution." Id. at 101. Once Atkins established the constitutional nature of the right, however, Cooper applied and barred the state from requiring the defendant to prove his disability by clear and convincing evidence. Id. at 101–03 ("The reasoning of Cooper in finding a clear and convincing standard unconstitutional as to incompetency is directly applicable to the issue of mental retardation .... [T]he implication of Atkins and Cooper is that the defendant's right not to be executed if mentally retarded outweighs the state's interest as a matter of federal constitutional law.").

Because the Georgia Supreme Court in Head did not conduct the due process analysis required by Cooper, its decision in that case (followed by the superior court here) is not entitled to AEDPA deference. See Williams, 529 U.S. at 406, 120 S. Ct. 1495 (explaining that if a state court applies an incorrect legal standard, "a federal court will be unconstrained by § 2254(d)(1) because the state court decision falls within that provision's 'contrary to' clause").

B

Atkins tasked the states with "developing appropriate ways to enforce the constitutional restriction" on executing the intellectually disabled. See Atkins, 536 U.S. at 317, 122 S. Ct. 2242. That task includes establishing a standard of proof and determining who bears the burden. But states do not have unfettered authority to establish such procedures. As in other areas of the law, "the state procedures must be adequate to protect" the Eighth Amendment prohibition against the execution of the intellectually disabled. See Pate, 383 U.S. at 378, 86 S. Ct. 836. See also Twining v. New Jersey, 211 U.S. 78, 102, 29 S. Ct. 14, 53 L. Ed. 97 (1908) ("The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights."); Bailey v. Alabama, 219 U.S. 219, 239, 31 S. Ct. 145, 55 L. Ed. 191 (1911) ("It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a [procedural rule] any more than it can be violated by direct enactment.").

The burden of proof plays a critical role in our adversarial system because it often drives the result. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome .... There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account." Speiser v. Randall, 357 U.S. 513, 525, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958). The burden of proof "allocate[s] the risk of error between the litigants" and, in so doing, "indicate[s] the relative importance attached

to the ultimate decision." Addington v. Texas, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). This is why we generally use the preponderance-of-the-evidence standard in civil disputes, but demand that the state prove the guilt of an accused defendant beyond a reasonable doubt. See Grogan v. Garner, 498 U.S. 279, 286, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991) ("Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'"). Our society recognizes the "magnitude" of the defendant's interests in a criminal case and places a high burden of proving guilt on the government "to exclude as nearly as possible the likelihood of an erroneous judgment." Id. at 423–24, 99 S. Ct. 1804. See also Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 283, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (noting that the "more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision").

In Cooper, 517 U.S. at 363, 116 S. Ct. 1373, the Supreme Court reiterated that where a constitutional right is at issue, a state may not place a heightened burden on the defendant if doing so "imposes a significant risk of an erroneous determination." See also Lockett v. Ohio, 438 U.S. 586, 604–05, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion) ("[The] qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed .... When the choice is between life

and death, [a heightened risk of wrongful execution created by a state statute] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."). The Court in Cooper reversed the conviction of a capital defendant because Oklahoma required him to prove his lack of competency to stand trial by clear and convincing evidence. See id. at 350, 116 S. Ct. 1373. This burden "allocat[ed] to the criminal defendant the large share of the risk which accompanies a clear and convincing evidence standard" and thus created an unconstitutional risk that the state would "put to trial a defendant who is more likely than not incompetent." Id. at 365, 369, 116 S. Ct. 1373. Oklahoma used this burden even though "the vast majority of jurisdictions" thought the heightened standard was "not necessary to vindicate the[ir] interest in prompt and orderly disposition of criminal cases." Id. at 362, 116 S. Ct. 1373. Because the "consequences of an erroneous determination of competence are dire," the Court held Oklahoma's procedural rule to be "incompatible with the dictates of due process." Id. at 364, 369, 116 S. Ct. 1373.

Here the stakes are just as high, and the burden Georgia places on capital defendants to prove intellectual disability is even higher than the clear-and-convincing standard found unconstitutional in Cooper. Georgia, I note, is also the only state to impose such a burden of proof. See Head, 587 S.E.2d at 630 (Sears, J., dissenting) ("[Georgia] is now the only state that requires condemned defendants to prove their retardation beyond a reasonable doubt."). Of the 25 states that retain and currently enforce the death

penalty, 19 apply a preponderance-of-the-evidence standard and only two apply a clear-and-convincing standard. See generally Lauren S. Lucas, An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases, 33 Ga. St. U. L. Rev. 553, 560–61 (2017).[2] "Not one state has followed Georgia's statutory scheme in implementing the Atkins decision." Id.

Moreover, several states have rejected a clear and convincing standard because no state interest justified the higher burden. See, e.g., Sanchez, 36 A.3d at 70 ("[W]e are persuaded that a different allocation or standard of proof [than preponderance] are not necessary to vindicate the constitutional right of mentally retarded capital defendants recognized in Atkins, or to secure Pennsylvania's 'interest in prompt and orderly disposition of criminal cases.'"); Pruitt, 834 N.E.2d at 103 ("We do not deny that the state has an important interest in seeking justice, but we think the implication of Atkins and Cooper is that the defendant's right not to be executed if mentally retarded outweighs the state's interest as a matter of federal constitutional

---

[2] Arizona and Florida currently apply a clear and convincing standard. *See* Ariz. Rev. Stat. § 13-753 (2011); Fla. Stat. § 921.137 (2013). Although Colorado, Delaware, and Indiana passed statutes requiring clear and convincing evidence for *Atkins* claims, Delaware's death penalty statute was struck down, Colorado no longer enforces the death penalty, and the Indiana Supreme Court has held that a clear-and-convincing standard was unconstitutional under *Atkins* and *Cooper*. *See Pruitt*, 834 N.E.2d at 103. The remaining states that retain and enforce the death penalty (Kansas, Montana, and Wyoming) have not adopted a specific standard of proof for *Atkins* claims.

law. We therefore hold that the state may not require proof of mental retardation by clear and convincing evidence."); Howell v. State, 151 S.W.3d 450, 465 (Tenn. 2004) ("[W]ere we to apply the statute's 'clear and convincing' standard in light of the newly declared constitutional right against the execution of the mentally retarded, the statute would be unconstitutional. ... [Because] the risk to the petitioner of an erroneous outcome is dire, as he would face the death penalty, while the risk to the State is comparatively modest. ... The balance, under these circumstances, weighs in favor of the petitioner and justifies applying a preponderance of evidence standard at the hearing."); Williams, 831 So. 2d at 859–60 ("Clearly, in the Atkins context, the State may bear the consequences of an erroneous determination that the defendant is mentally retarded (life imprisonment at hard labor) far more readily than the defendant of an erroneous determination that he is not mentally retarded."). Despite being the only state to apply the beyond-a-reasonable-doubt standard, Georgia has never explained how its uniquely high standard furthers a legitimate state interest.[3]

---

[3] In Head, the Georgia Supreme Court stated that the "higher standard of proof serves to enforce the General Assembly's chosen definition of what degree of impairment qualifies as mentally retarded under Georgia law for the purpose of fixing the appropriate criminal penalty that persons of varying mental impairment should bear for their capital crimes, in light of their individual diminished personal culpabilities and the varying degrees of deterrence possible." 587 S.E.2d at 622 (quotations omitted and alterations adopted). Georgia has not asserted such an interest in its briefs, but even if it had, the explanation amounts to no justification at all. The Georgia Supreme Court's reasoning—that the standard

C

Mr. Raulerson asserts that Georgia's beyond-a-reasonable-doubt standard effectively permits the state to do what the Eighth Amendment forbids—execute a prisoner who is intellectually disabled. Concurring in the judgment in *Hill*, Judge Tjoflat summarized the due process argument against imposing the beyond-a-reasonable-doubt standard. I think he was prescient, and got it exactly right:

> Claims of mental retardation are incredibly fact-intensive and could devolve into a swearing match between conflicting, and equally qualified, experts. This swearing match could easily—if not always—create reasonable doubt that the defendant is not mentally retarded. By erecting this higher burden, the State effectively put its thumb on the scale against a defendant's mental-retardation defense .... [T]he State's unfair thumb—the beyond-a-reasonable-doubt standard—deprive[s a defendant] of full and fair post-conviction hearing, and he would be entitled to an evidentiary hearing in federal court.

Hill, 662 F.3d at 1364 (Tjoflat, J., concurring in the judgment).

Intellectual disability is an inherently imprecise and partially subjective diagnosis. The generally accepted definition of intellectual disability, which Georgia

---

of proof is high because the General Assembly defined intellectual disability to require a high standard of proof—is tautological and fails to identify a state interest that the burden of proof actually serves.

follows, requires three core elements: (1) an intellectual-functioning deficit; (2) an impairment of adaptive behavior (the "inability to learn basic skills and adjust behavior to changing circumstances," *Hall v. Florida*, 572 U.S. 701, 710, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014)); and (3) the onset of these deficits at an early age. *See* O.C.G.A. § 17-7-131(a)(2). *See also Moore v. Texas*, –– U.S. ——, 137 S. Ct. 1039, 1045, 197 L. Ed. 2d 416 (2017). Experts must therefore sift through a lifetime's worth of data and draw impressions about whether certain facts or data points satisfy several subjective elements.

Each element presents its own challenges. Experts may measure intellectual functioning through IQ tests, but a person's score can only provide a possible range. As the Supreme Court explained in *Hall*, where it struck down Florida's use of a strict 70-or-below IQ requirement for *Atkins* claims, "[a]n individual's IQ test score on any given exam may fluctuate for a variety of reasons" including "a test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing." *Hall*, 572 U.S. at 713, 134 S. Ct. 1986. And "the test itself may be flawed, or administered in a consistently flawed manner," so that "even a consistent score is not conclusive evidence of intellectual functioning." *Id.* at 714, 134 S. Ct. 1986. And the age-of-onset element requires an expert to conduct a retrospective analysis to piece together the prisoner's intellectual capacity as a child—often without the benefit of childhood IQ tests, trained child psychologists,

or witnesses of the prisoner's childhood behavior. The difficulty of drawing a clear-cut conclusion is compounded by the always-existing phenomenon of dueling experts, who often differ only in terms of degrees.

The intellectual disability analysis, with its inherent difficulties, renders *Atkins* claims highly susceptible to uncertainty. That uncertainty is magnified by the way Georgia defines the concept of reasonable doubt. In Georgia, the "true question in criminal cases" is "whether there is sufficient evidence to satisfy the mind and conscience beyond a reasonable doubt." O.C.G.A. § 24-14-15. The Georgia pattern jury instructions state that a reasonable doubt can arise from "consideration of the evidence, a lack of evidence, or a *conflict in the evidence*." Georgia Suggested Pattern Jury Instruction—Criminal 1.20.10 (2019) (emphasis added). *See also Ward v. State*, 271 Ga. 62, 515 S.E.2d 392, 393 (1999) (approving this portion of the pattern jury instruction). Given that intellectual disability disputes will always involve conflicting expert testimony, there will always be a basis for rejecting an intellectual disability claim. Placing a beyond-a-reasonable-doubt burden on a defendant therefore creates an unacceptable risk of error that those with intellectual disabilities will be put to death. If *Cooper* held that a clear-and-convincing burden cannot be placed on defendants asserting incompetency, I do not see how Georgia can place a beyond-a-reasonable-doubt burden on capital defendants asserting intellectual disability.

The majority says that Georgia's burden of proof cannot transgress the Due Process Clause because

Atkins left to the states the ability to craft procedures for intellectual disability claims. But this reasoning disregards how the Supreme Court has interpreted its mandate for the states to create "*appropriate*" procedures to enforce the constitutional restriction. *See Atkins*, 536 U.S. at 317, 122 S. Ct. 2242 (emphasis added). *See also Moore*, 137 S. Ct. at 1053 ("'If the States were to have complete autonomy to define intellectual disability as they wished,' we have observed, '*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.'") (quoting *Hall*, 572 U.S. at 1999, 134 S. Ct. 1986). Would it be permissible for a state to require a capital defendant asserting an *Atkins* claim to prove intellectual disability "beyond all doubt whatsoever" or with "100% certainty" just because *Atkins* tasked the states with establishing procedures? The question answers itself—of course not.

In *Hall*, the Supreme Court recognized that "*Atkins* did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation falls within the protection of the Eighth Amendment," but it also reiterated that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." 572 U.S. at 718–19, 134 S. Ct. 1986 (quotations omitted). Florida exceeded its permissible discretion by using a strict IQ score because it "ignore[d] the inherent imprecision of these tests [and] risk[ed] executing a person who suffers from intellectual disability." *Id.* at 723, 134 S. Ct. 1986. So too in *Moore*, 137 S. Ct. at 1052–53. There, the Supreme Court repeated that "[s]tates have some

flexibility, but not unfettered discretion in enforcing *Atkins*' holding." *Id.* (quotations omitted). The Court then held that Texas had overstepped its *Atkins* authority by disregarding the consensus of the medical community and applying an outdated set of factors to determine intellectual disability—a practice that "create[d] an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 1044.

Georgia's beyond-a-reasonable-doubt standard is one more manifestation of the same problem. *Hall* and *Moore* teach that states violate their discretion under *Atkins* by establishing procedures that create an unacceptable risk that intellectually disabled prisoners will be executed. Not only has Georgia failed to recognize the practical impediments to proving an intellectual disability claim, but has imposed on capital defendants the heaviest burden in our legal system. Doing so effectively denies those defendants a "fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S. at 724, 134 S. Ct. 1986.

II

Sometimes "a page of history is worth a volume of logic." *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506, 65 L. Ed. 963 (1921) (Holmes, J.). Should any proof be needed that Georgia's beyond-a-reasonable-doubt standard imposes an insurmountable and unconstitutional demand on capital defendants, we need look no further than how that burden has operated in practice. In the 30 years since § 17-7-131(c)(3) was enacted, not a single capital defendant has succeeded in proving to a factfinder that he or she is intellectually disabled beyond a reasonable doubt.

In *Hill*, 662 F.3d at 1380—where we rejected, under AEDPA deference, an Eighth Amendment challenge to Georgia's beyond-a-reasonable-doubt standard—the majority asserted that there was no data "to support the proposition that the reasonable doubt standard triggers an unacceptably high error rate for mental retardation claims." *See also id.* at 1356 ("*There is no data on this question in this record.*") (emphasis in original). That is no longer the case.

Here, the district court held an evidentiary hearing to consider, among other things, whether any Georgia capital defendants had successfully proven their intellectual disability to a judge or jury beyond a reasonable doubt. Prior to that hearing, the district court allowed discovery and required Georgia to respond to interrogatories concerning whether, since 1988, any capital defendants had established intellectual disability beyond a reasonable doubt. Georgia, tellingly, did not provide *any* cases where a defendant met that standard. *See* D.E. 38; R1123–33.[4]

The record shows that since 1988 at least 27 Georgia defendants have asserted intellectually disability in

---

[4] Some of this evidence was not available in 2005, when the Georgia Supreme Court denied Mr. Raulerson's appeal. Under AEDPA, our review is normally constrained to the record as established before the state habeas court. *See Cullen v. Pinholster*, 563 U.S. 170, 181–82, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). But because the state habeas court's decision here was contrary to established Supreme Court precedent under § 2254(d)(1), *de novo* review is appropriate. *See Daniel v. Comm'r*, 822 F.3d 1248, 1280 (11th Cir. 2016). We therefore can, and should, consider the evidence developed in the district court. *See Landers v. Warden*, 776 F.3d 1288, 1295 (11th Cir. 2015); *Madison v. Comm'r*, 761 F.3d 1240, 1249–50 (11th Cir. 2014).

cases where the death penalty was sought. *See* D.E. 38 at 6–8; D.E. 52 at 29–32. In 13 of those cases, the intellectual disability issue went to a factfinder. And not a single one of those 13 defendants was able to satisfy the beyond-a-reasonable-doubt standard. In this context, 13 defendants is a reasonable sample size and a success rate of zero is constitutionally unacceptable.[5]

Other Georgia cases and recent scholarship on this issue confirm this reality. "From an empirical perspective, we can now say with confidence that not one defendant in Georgia has proven successfully to a jury post-*Atkins* that he is exempt from the death penalty due to intellectual disability." Lucas, *Empirical Assessment*, at 605. *See also id.* at 582 ("The final results of the study [reviewing records from 379 capital cases tried after § 17-7-131(c)(3) was enacted] confirmed what was thought anecdotally to be true about the impact of Georgia's beyond a reasonable doubt standard ...: not one capital defendant in Georgia has successfully obtained a jury verdict of [intellectual disability] in a case of intentional murder.").[6]

---

[5] The intellectual disability claims of 13 defendants are still pending, and one defendant passed away before the state court could determine his intellectual disability claim.

[6] In my own research, I have been able to find one Georgia non-capital defendant who proved to a jury that she was intellectually disabled beyond a reasonable doubt. In 2003—prior to the Supreme Court's decision in *Atkins*—a jury found Vanessa Marshall guilty but intellectually disabled of *felony murder* for the unintentional death of her son. *See Marshall v. State*, 276 Ga. 854, 583 S.E.2d 884, 886 (2003). In 2009, a state court found that Christopher Lewis—a capital defendant—was intellectually disabled beyond a reasonable doubt on habeas review. *See Hall v. Lewis*, 286 Ga. 767, 692 S.E.2d

By comparison, a national study found that, from 2002 to 2013, 55% of capital defendants succeeded in proving their *Atkins* intellectual disability claims. *See* John H. Blume, Sheri L. Johnson, Paul Marcus, & Emily C. Paavola, *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393, 397 (2014) (reviewing cases from 29 states). Not surprisingly, this disparity has raised the attention of experts in the areas of capital punishment and disability policy. *See id.*; Lucas, *Empirical Assessment*, at 553; Lauren A. Ricciardelli & Kristina Jaskyte, *A Value-Critical Policy Analysis of Georgia's Beyond a Reasonable Doubt Standard of Proof of Intellectual Disability*, 30 J. Disability Pol'y Stud. 56, 58–59 (2019).

Part of the problem is that Georgia's beyond-a-reasonable-doubt standard requires a level of certainty that mental health experts simply cannot provide. Mr. Raulerson's expert witness—a distinguished professor specializing in intellectual disabilities—analyzed cases where Georgia defendants attempted to prove intellectual disability and testified at the district court evidentiary hearing. When asked about the burden imposed by Georgia, she said the following:

> [W]hat I know is that the burden in the state of Georgia is beyond a reasonable doubt[,] and what I can say is that it would be very rare for a

---

580, 584, 592 (2010). In that case, however, Georgia did not credibly challenge Mr. Lewis' claim that he was intellectually disabled and did not appeal the habeas court's determination. So, there was no real dispute. *See Hill*, 662 F.3d at 1376 n.19 (Barkett, J., dissenting).

> clinician, especially in the so-called mild mental retardation range, to testify to that high level, to be able to testify to that high level.

D.E. 51 at 71–72. *See also* Lauren A. Ricciardelli & Kevin M. Ayres, *The Standard of Proof of Intellectual Disability in Georgia: The Execution of Warren Lee Hill*, 27 J. Disability Pol'y Stud. 158, 165 (2016) (criticizing Georgia's procedures because the "standard of proof for diagnosis requires something other than what a qualified expert in that field can provide").

We now have solid data confirming that Georgia's standard does not afford capital defendants a meaningful opportunity to prove intellectual disability. Must we continue to bury our heads in the sand?

III

"Rules about presumptions and burdens of proof reflect one's views about where the risk of loss ought to be placed .... It is not a novel proposition that judgments inflicting the penalty of death should be hedged about with greater safeguards." *Stanley v. Zant*, 697 F.2d 955, 974 (11th Cir. 1983) (Arnold, J., dissenting). In my view, § 17-7-131(c)(3) violates the Due Process Clause because a state cannot constitutionally place on a defendant the burden of proving intellectual disability beyond a reasonable doubt. That standard creates an intolerable risk that intellectually disabled defendants will be put to death, and the evidence from the last three decades in Georgia conclusively demonstrates that the standard is in fact insurmountable in litigated capital cases.

"[T]he procedures by which the facts of a case are determined assume an importance fully as great as the

validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding the rights." *Speiser*, 357 U.S. at 520–21, 78 S. Ct. 1332. Mr. Raulerson should be allowed to prove to the district court, by a preponderance of the evidence, that he is intellectually disabled.

Appendix B

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

BILLY DANIEL RAULERSON, Petitioner.	)	CIVIL ACTION NO. 98-V-706
v.	)	HABEAS CORPUS
FREDRICK J. HEAD, WARDEN Georgia Diagnostic and Classification Prison, Respondent.	)	

ORDER

STATEMENT OF THE CASE

Petitioner, Billy Daniel Raulerson, Jr., was indicted on February 2, 1994 by the Ware County grand jury for two counts of malice murder, burglary, felony murder, kidnapping, aggravated sodomy, necrophilia, two counts of possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. (R.18-22). Pursuant to a change of venue, Petitioner was tried before a jury in Chatham County from February 20 to March 7, 1996. The jury found Petitioner not guilty on the aggravated sodomy count, and found him guilty on the other remaining counts (R. 1683-1685). The State nol prossed the count of possession of a firearm by a

convicted felon (R. 1693). The jury recommended a sentence of death for each count of murder, (R. 1686-1691), and Petitioner was sentenced to death on March 15, 1996 (R. 1697-1699). Petitioner filed a motion for new trial on April 1, 1996 (R. 1697-1699). The motion, as amended, was denied, after hearing, on March 12, 1997. (R. 1710-1721, 1724). ·

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on direct appeal on October 10, 1997. *Raulerson v. State*, 268 Ga. 623 (1997). Petitioner's motion for reconsideration was denied. Petitioner then filed a Petition for Writ of Certiorari in the United States Supreme Court which was denied on May 18, 1998. *Raulerson v. Georgia*, 523 U.S. 1127, 118 S.Ct. 1815 (1998). Petitioner's Petition for rehearing was denied on July 28, 1998. *Raulerson v. Georgia*, 545 U.S. 969, 119 S.Ct. 9 (1998).

Petitioner filed his petition for writ of habeas corpus in this Court on November 30, 1998, and an amended petition on July 31, 2000. An evidentiary hearing was held in this case on February 20-21, 2001.

STATEMENT OF FACTS

On May 31, 1993, the bodies of Jason Hampton, Charlye Dixon and Gail Taylor were found in separate locations in Ware County. Each victim had been shot multiple times by a .22 caliber rifle, and Ms. Taylor suffered a potentially fatal knife wound to her wrist. Semen and spermatozoa were found in Ms. Dixon's rectum.

Seven months later, Petitioner was arrested on unrelated aggravated assault and weapons charges and

gave police a blood sample. Analysis of the DNA from the blood sample and from the semen recovered from Ms. Dixon led an expert to conclude that both samples of body fluid originated from the same person. After receiving the DNA test results, law enforcement officers questioned Petitioner about the three murders, and he admitted killing the three victims. When officers executed a search warrant at Petitioner's residence, they located a fishing rod and reel identified as having been taken from Hampton's pickup truck the night he was killed. Officers also located parts of a .22 caliber rifle. A ballistics expert testified that the shell casings found near Hampton's body and in Ms. Taylor's home were probably fired from the rifle found in the Petitioner's home.

In statements to investigating officers after the DNA test results were known, Petitioner admitted parking his car the evening of May 30, 1993 at a Ware County Lakeside "lover's lane" near the pickup truck occupied by Hampton and Dixon. Petitioner stated that he stood on the bed of the pickup truck and shot Hampton several times, and then shot Dixon as she attempted to flee. Appellant dragged Hampton's body from the truck and shot him several more times; he then placed Dixon and two fishing rods from Hampton's pickup truck in his vehicle and drove to a wooded area several miles away where he shot Dixon again and sodomized her. Petitioner chose this secluded location so that he would be able to return to the body at a later time in order to perform more sexual acts on the corpse. Petitioner's attempt to return to Dixon's body the next day was thwarted by the presence of people at the site,

so he drove to a rural section of Ware County looking for a house to burglarize. He stopped at a home with no vehicle in the carport and, when no one responded to his knock at the door, Petitioner broke into a utility shed and stole some meat from the freezer. As he was loading the meat into his car, he heard someone inside the house. He entered the home, struggled with Ms. Taylor who was armed with a kitchen knife and shot her multiple times. Petitioner then stole Taylor's purse. Petitioner informed officers that the he had stolen the .22 caliber rifle in a burglary of a home in Pierce County three weeks before the murders.

In response to expert testimony presented by Petitioner that tests administered after the crime established that Petitioner was mentally retarded with an IQ of 69, the State presented expert testimony that Petitioner's IQ at age 15 (9 years earlier) was 83. The State's psychologist opined that there was no indication that Petitioner was severely mentally ill. *Raulerson*, 268 Ga. 623-624.

FINDINGS OF FACT AND CONCLUSIONS OF LAW CLAIMS THAT ARE NON-COGNIZABLE

This Court finds that the following claims raised by Petitioner in this proceeding are not cognizable in this habeas action brought pursuant to O.C.G.A. § 9-14-41 et seq. By its very terms, as set forth in O.C.G.A. § 9-14-42 (a), this statute applies only to an action filed by "any person imprisoned by virtue of a sentence imposed by a state court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of this State." Habeas corpus is available to

review constitutional deprivations only. *Valenzuela v. Newsome*, 253 Ga. 793 (1985).

Claim I, ¶¶ 12-21 of the amended petition, wherein Petitioner alleged that he was deprived of a full and fair evidentiary hearing because this Court denied his request for funds.

Claim IV, ¶¶ 33-37 of the amended petition, wherein Petitioner alleged that he was denied access to competent mental health assistance in violation of *Ake v. Oklahoma* and the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the analogous provisions of the Georgia Constitution. Petitioner has no constitutional right to the effective assistance of a mental health expert. *Turpin v. Bennett*, 270 Ga. 584 (1999). *See also Clisby v. Jones*, 907 F. 2d. 1047 (11th Cir. 1990).

Claim V of the post-hearing brief, wherein Petitioner alleged for the first time that the execution of the severely mentally ill violates the Eighth Amendment and Georgia law. Contrary to Petitioner's argument, there is no constitutional prohibition against executing the mentally ill. *Colwell v. State*, 273 Ga. 634 (2001). To the extent that Petitioner alleged that trial counsel were ineffective for failing to raise this claim, the Court denies the relief as counsel were not deficient for declining to raise a claim that was without merit or justification based upon the case law as existed at the time of trial and as exists at present.

Claim XIII, ¶¶ 71-80 of the amended petition, wherein Petitioner alleges that his trial was fraught with procedural and substantive errors, which cannot be

harmless when viewed as a whole since the combination of errors deprived him of the fundamentally fair trial guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution. The Georgia Courts to not recognize the cumulative error rule. *Head v. Taylor*, 273 Ga. 69 (2000). Accordingly this claim, as well as Petitioner's allegations that counsel were ineffective for declining to assert the claim in the courts below is non-cognizable.

CLAIMS THAT ARE RES JUDICATA

This Court finds that the following claims are res judicata and not properly before this Court for review pursuant to the holdings of *Elrod v. Ault*, 231, Ga. 750 (1974), *Gunter v. Hickman*, 256 Ga. 315 (1986, *Hance v. Kemp*, 258 Ga. 649 (1988), and *Roulain v. Martin*, 266 Ga. 353 (1996).

Claim III, ¶¶ 29, 30, 32 of the amended petition, wherein Petitioner alleged that he is mentally retarded and therefore ineligible for the death penalty. The Court finds that the Petitioner failed to present evidence to satisfy the extremely stringent miscarriage of justice standard in view of the entire body of evidence on this issue presented at trial and in habeas to warrant the eradication of the jury's verdict on this exact issue. *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Valenzuela v. Newsome*, 253 Ga. 793 (1985). At the·trial of Petitioner, the jury rejected Petitioner's claim of mental retardation. This finding was affirmed by the Georgia Supreme Court. *Raulerson*, 268 Ga. at 623-624.

Claim III, ¶ 31 of the amended petition, wherein Petitioner alleged that the death penalty is an excessive and disproportionate penalty as he is mentally retarded. As stated above, this Court finds that Petitioner failed to satisfy by sufficient new and reliable evidence the stringent miscarriage of justice standard as to warrant the eradication of the jury's verdict on the issue of Petitioner's alleged mental retardation.

Claim V, ¶ 41 of the amended petition, wherein Petitioner alleges that the prosecution made improper and prejudicial remarks during its opening statement in violation of Petitioner's constitutional rights to due process and a fair trial and that the trial court improperly failed to correct these errors on its own motion. The Court finds that the Petitioner has procedurally defaulted this issue by his failure to raise the issue in the courts below. This Court finds that Petitioner failed to satisfy by sufficient new and reliable evidence the stringent miscarriage of justice standard.

Claim VI, ¶¶ 43-46 of the amended petition, wherein Petitioner alleged that the trial court conducted Petitioner's trial in a manner that violated Petitioner's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution and the analogous provisions of the Georgia Constitution by the following:

(a) the trial court admitted illegally obtained confessions and evidence despite proper motions to suppress. *Raulerson*, 268 Ga. at 625-631;

(b) the trial court erred in refusing to strike prospective jurors who demonstrated bias

against the defense. *Raulerson*, 268 Ga. at 629-630;

(c) the trial court unfairly restricted Petitioner's right to voir dire prospective jurors. *Raulerson*, 268 Ga. at 630;

(d) the trial court improperly denied Petitioner's motions for mistrial. Tr. T. Vol. 10, p.3 (denying Petitioner's motion for a mistrial based on a bomb threat that occurred during the course of the trial). *Raulerson*, 268 Ga. at 630-631(denying Petitioner's motions for mistrials for the "prosecutor's reference to inadmissible evidence in his opening statement and for Petitioner's character having been places in issue allegedly in violation of O.C.G.A. § 24-9-20(b));

(e) the trial court admitted improper evidence despite proper objections. *Raulerson*, 268 Ga. at 630-631;

(f) the trial court gave improper and unconstitutional jury instructions during the guilt-innocence phase of the case and refused to give proper instructions requested by Petitioner. *Raulerson*, 268 at 632.

Claim IX, ¶ 56 of the amended petition, wherein Petitioner alleged that he was denied due process of law by requiring him to bear the burden of proving his mental retardation beyond a reasonable doubt. *Raulerson*, 268 Ga. at 632 ("There is no merit to Raulerson's challenge to the constitutionality of O.C.G.A. § 17-7-131(3), which requires that the defense of mental retardation be proven beyond a reasonable

doubt in order for a jury to return a verdict of 'guilty but mentally retarded.'").

This Court denies Petitioner's claim that the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), declared this burden of proof of mental retardation unconstitutional. The Georgia Supreme Court's recent decision in *Head v. Hill*, S03A0559 (2003) held that a defendant's burden in proving mental retardation "beyond a reasonable doubt" is controlling.

Claim XI, ¶¶ 60-61 (a-g) of the petition, wherein Petitioner alleged that the death penalty in Georgia is imposed arbitrarily, capriciously and discriminatorily and was imposed in Petitioner's case, as well. *Raulerson*, 268 Ga. 633-634.

CLAIMS THAT ARE PROCEDURALLY DEFAULTED

This Court finds that the following claims were not raised at trial, the motion for new trial or on direct appeal, and are therefore procedurally defaulted as Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome the procedural bar to the litigation of these claims on their merits in this habeas corpus proceeding. O.C.G.A. § 9-14-48(d); *Black v. Hardin*, 255 Ga. 239 (1985); *Valenzuela v. Newsome*, 253 Ga. 793 (1985); *Hance v. Kemp*, 258 Ga. 649; *White v. Kelso*, 261 Ga. 32 (1991).

Claim V, ¶¶ 38 and 39 or the amended petition, wherein Petitioner alleged that the State suppressed information allegedly favorable to the defense at both phases of trial in violation of *Brady v. Maryland* and its

progeny, argued that which it knew or should have known to be false and/or misleading, and knowingly or negligently presented evidence that it knew or should have known to be false and/or misleading.

Claim V, ¶ 40 of the amended petition, wherein Petitioner alleged that the prosecution improperly used its peremptory strikes to systematically exclude jurors on the basis of race and/or gender.

Claim V, ¶ 42 of the amended petition, wherein Petitioner alleged that his rights to due process and a fair trial were violated by improper and prejudicial remarks by the prosecution in its closing statement at the guilt-innocence phase or trial and that the trial court improperly failed to correct these errors on its own motion.

Claim VI, ¶ 44 (f) of the amended petition, wherein Petitioner asserted that the trial court erred by allegedly refusing to allow an expert to testify as to facts he learned from other sources that were the bases for his opinions and by allegedly refusing to allow the defense to show that at the time Petitioner was questioned, he had a lawyer in connection with another charge, without allowing the prosecutor to elaborate on the nature of the charges for which the lawyer was involved.

Claim VII, ¶¶ 47-48 of the amended petition, wherein the Petitioner alleged that the jurors committed misconduct by discussing the case after being admonished not to do so. The Petitioner also claimed that the jury, improperly considered matters extraneous to the trial, held improper racial attitudes which infected the deliberations of the jury, made false or misleading

responses on voir dire, held improper biases which infected their deliberations, were exposed to the prejudicial opinions of third parties, made improper communications with third parties, made improper communication with jury bailiffs, made improper *ex parte* communications with the trial judge, and prejudged the guilt-innocence and penalty phases of Petitioner's trial and wherein Petitioner alleged improprieties on behalf of the trial court and the State in relation to these claims.

Claim VIII, ¶¶ 55-56 of the amended petition, wherein Petitioner alleged that he was denied due process of law when the same jury that convicted him was responsible for determining his sentence at the penalty phase in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution.

Claim IX, ¶¶ 55-56 of the amended petition, wherein Petitioner alleged that he was denied due process of law by the instructions given to the jury at the guilt innocence phase of trial, specifically on the burden of proof, the ability of the jury to convict Petitioner upon less that "utmost certainty" of guilt, on the impeachment of witnesses, by statutory terms, and by improperly charging the jury on the offenses charged in the indictment in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution.

Claim XII, ¶¶ 62-70 of the amended petition, wherein Petitioner alleged that the Unified Appeal

Procedure violated Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution.

Accordingly, these claims are denied.

PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

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

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

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

As to claims of ineffective assistance of counsel, the United States Supreme Court has directed that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. See also *Zant v.Moon*, 264 Ga. 93 (1994).

In considering the reasonableness or Petitioner's appellate attorney's performance, his representation of Petitioner must be considered in light of the "particular facts of the case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. As the Georgia Supreme Court recognized in *Zant v. Moon*, the parameters set forth by the United States Supreme Court for considering ineffective assistance claims are to "address not what is prudent or appropriate, but only what is constitutionally compelled." *Zant v. Moon*, 264 Ga. at 95-94.

Considering Petitioner's claims in light of this presumption and in light of the *Strickland* standard, this Court finds that Petitioner failed to meet his burden of proof with regard to any of his ineffective assistance of counsel claims.

Summary of trial counsel's experience and the defense team

Shortly after Petitioner's arrest for these crimes, Leon Wilson and Mark Hatfield were appointed to represent the Petitioner. The record showed that Mr. Wilson served as lead counsel throughout the trial of this case. The record showed that at the time he was appointed to represent Petitioner, Mr. Wilson had nearly fifty (50) years of experience as a criminal attorney and had tried hundreds of jury cases in south

Georgia, where Petitioner's case was ultimately tried. (T. Tr. Vol 13, p. 114). Mr. Wilson had tried several death penalty cases, and had never before had a client receive a sentence of death. H.T. 116. Although Petitioner alleged that Mr. Wilson had health problems at the time of his representation of Petitioner that prevented him from adequately preparing for and trying this case, the Court finds this suggestion to be without merit following a review of the evidence. H.T. 272.

Co counsel, Mark Hatfield graduated from the University of Georgia School of Law, cum laude, in May 1993. Id. at 238. After his graduation, Mr. Hatfield served as an assistant District Attorney at the Athens District Attorney's Office where he acquired "significant" felony trial experience. Id. at 238. He joined Mr. Wilson's firm in Waycross in April 1994, which handled an equal amount of criminal and civil cases. Id. at 105, 108. Prior to Petitioner's trial, Mr. Hatfield tried several cases on behalf of Mr. Wilson's firm. Id. at 238.

In terms of the division of labor in this case, the evidence showed that Mr. Wilson was generally responsible for most of the investigation, while Mr. Hatfield's responsibilities consisted of conducting research, preparing and filing motions, assisting at the pretrial hearings, interviewing witnesses, preparing Dr. Grant for his trial testimony, and generally assisting in the presentation of evidence and argument at trial. Gene Hatfield, co-counsel's father and Mr. Wilson's paralegal, also assisted in the investigation of this case. The evidence showed that Gene Hatfield completed law school and formerly served as a police officer prior to his

employment with Mr. Wilson. Co-counsel Mark Hatfield testified that, apart from his own investigations, Mr. Wilson and his father conducted substantial investigation in this case.

The record showed that counsel also obtained motion practice and research assistance from the Multi-County Public Defender's Office and consulted with them regarding certain aspects of the preparation of this case.

Summary of trial counsels' investigation in preparation for trial

This Court finds that trial counsels' investigation of the case was reasonable. The evidence showed that trial counsel retained "consulting criminalist and firearms identification technician" Rees Smith, to examine the State's physical evidence as well as DNA experts Dr. Jung Choi and Dr. Linda Adkinson to examine the State's findings regarding the DNA evidence. This Court finds that trial counsel reasonably declined to present the testimony of these experts at trial as the evidence showed that they would not have testified favorably for the defense.

Although the evidence showed that trial counsel continued to investigate the State's guilt phase case in hopes of establishing reasonable doubt at trial, given the strong evidence of Petitioner's guilt, including Petitioner's ultimate confession to these crimes and the lack of favorable DNA and ballistics testimony, this Court finds that counsel made a reasonable strategic decision to focus their limited time and resources in an attempt to save Petitioner's life through the

investigation and presentation of evidence designed to avoid a death sentence.

Investigation of Petitioner's Mental and Emotional Status

In furtherance of counsels' strategy, trial counsel arranged for Petitioner to be evaluated by licensed psychologist Dr. Daniel Grant to determine whether Petitioner had a mental disorder that affected his competency to stand trial, to determine whether he had the ability to discern right from wrong, to determine whether he was mentally retarded, and to examine his general mental status in hopes of gathering evidence in mitigation. The evidence showed that Dr. Grant worked with Mr. Wilson in previous cases. At the time of his retention in this case, Dr. Grant had board certifications in neuropsychology and forensic psychology and had extensive experience in conducting mental retardation evaluations.

Over the course of his evaluation, Dr. Grant met with Petitioner approximately seven times for a total of approximately fifteen (15) hours, interviewed him on several occasions, and administered to him approximately twenty-five (25) different psychological tests. This Court finds that in the course of his evaluation of Petitioner, trial counsel arranged for Dr. Grant to conduct clinical interviews with both of Petitioner's parents and to administer them a test designed to aid in the determination of the issue of mental retardation.

This Court finds that trial counsel also arranged for Petitioner to be evaluated by Dr. John Savino, a local

psychiatrist. Dr. Savino met with and evaluated Petitioner on eight separate occasions.

This Court finds that trial counsel arranged for licensed clinical social worker Audrey Sumner who was employed by Dr. Savino to compile a social history of Petitioner's life, through interviews with the Petitioner, Petitioner's mother, and Petitioner's uncles, Edgar and Donald Pittman. The Court finds that trial counsel provided Ms. Sumner's report to Dr. Grant and Dr. Savino along with Petitioner's criminal records, extensive records from the Ware County Hospital regarding Petitioner's stay there, the discharge summary from Petitioner's stat at Georgia Regional Hospital immediately following an attempted suicide, a letter summarizing Petitioner's treatment at the Satilla Community Mental Health Center, and extensive educational and school records on Petitioner from the Ware County School System and the Harrell Psychoeducational Center. There is no record of either Dr. Grant or Dr. Savino requesting additional materials from counsel.

The evidence showed that in the course of his evaluation of Petitioner, Dr. Savino suggested to trial counsel that he saw some indications that Petitioner might have organic brain damage. The evidence showed trial counsel responded to this suggestion by Dr. Savino by hiring a neurologist, Dr. Michael Baker, and a neuropsychologist, Dr. Manuel Chaknis, to evaluate Petitioner. The evidence showed that Mr. Wilson provided to Dr. Chaknis Petitioner's indictment, school records, newborn hospital records and later hospital records, and informed Dr. Chaknis that if he needed

further information to inform Wilson and he would attempt to provide that information. As with Dr. Grant and Dr. Savino, this Court finds that there is no record of Dr. Chaknis requesting additional materials from trial counsel. As neither Dr. Baker nor Dr. Chaknis found evidence to substantiate a claim of brain damage, this Court finds that trial counsel reasonably declined to call these witnesses to testify at trial.

At the conclusion of their evaluations, the evidence showed that trial counsel arranged for Dr. Grant and Dr. Savino to meet to discuss their impressions of Petitioner. Dr. Grant ultimately diagnosed Petitioner with chronic alcoholism, polysubstance dependence, cannabis abuse, major depressive disorder, close head injury by history, mild mental retardation, and mixed personality disorder with features of passive/aggressive, oppositional, borderline and antisocial. The evidence showed that Dr. Savino declined to make any formal psychological diagnosis of Petitioner. Accordingly, this Court finds that trial counsel reasonably declined to call Dr. Savino to testify at trial.

Additional Investigation of Petitioner's Background

The evidence showed that trial counsel interviewed Petitioner's mother and father to gather information regarding Petitioner's background as well as Petitioner's brother and uncle Donald Pittman. Trial Counsel also had Petitioner write out his "life history" for counsel to provide further insight into Petitioner's childhood and family life.

Presentation of Mitigating Evidence at Trial

Based on the information that counsel amassed, This Court finds that trial counsel presented the following evidence in mitigation at trial in addition to the evidence of Petitioner's alleged mental retardation:

1.) that Petitioner was physically abused by his parents;
2.) that Petitioner was verbally abused by his parents;
3.) that Petitioner grew up in an extremely dysfunctional environment;
4.) that Petitioner's family had a history of substance abuse;
5.) that Petitioner began abusing both alcohol and drugs at a very young age as a result of his environment and the history of abuse in the family;
6.) that Petitioner showed signs of brain damage;
7.) that Petitioner had a lifelong history of depression;
8.) that Petitioner had difficulty controlling his impulses;
9.) that Petitioner's alleged mental retardation resulted in increased aggressive behavior due to Petitioner's increased level of frustration;
10.) that Petitioner had previously attempted suicide and was hospitalized, thereafter;
11.) that Petitioner experienced marital difficulties that resulted in a divorce;
12.) that Petitioner often experienced blackouts following his use of alcohol and drugs;

13.) that Petitioner engaged in a binge of alcohol and drug consumption in the days preceding the commission of the crimes.

Although counsel did not offer additional mitigating evidence in the sentencing phase of trial, this Court finds that trial counsels' investigation and presentation of mitigating evidence at trial was reasonable.

SPECIFIC ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

This Court denies Petitioner's **Claim II, ¶ 23 (a)** of his amended petition wherein Petitioner alleged that counsel failed to conduct adequate negotiations for a plea agreement resulting in a sentence less than death as Petitioner failed to present any evidence to show that the District Attorney would have even considered a pleas offer or that Petitioner would have accepted one. Petitioner has failed to show deficient performance by counsel or prejudice flowing from such alleged deficient performance, thus, this ineffective assistance of counsel claim is denied.

The Court denies Petitioner's **Claim II, ¶ 23 (c)** of his amended petition wherein Petitioner alleged that counsel failed to conduct an adequate pretrial investigation into the voluntariness of Petitioner's statements to law enforcement personnel, and specifically failed to investigate the effect of Petitioner's mental capacity and his medical and psychological history on Petitioner's mental state at the time he provided his incriminating statements. The Court finds that Petitioner bas failed to show deficient performance

by counsel or prejudice flowing from such alleged deficient performance; accordingly this claim is denied.

The Court denies Petitioner' s **Claim II, ¶ 23 (d)** of his amended petition wherein Petitioner alleged that counsel failed to adequately present information and evidence in pretrial motions and at trial relating to Petitioner's alleged voluntary waiver of constitutional rights during interrogation by the police. The Court finds that Petitioner has failed to show deficient performance by counsel or prejudice flowing from such alleged deficient performance, accordingly this claim is denied.

The Court denies Petitioner's **Claim II, ¶ 23 (e)** of his amended petition wherein Petitioner alleged that counsel failed to file several pretrial motions to protect Petitioner's right to a fair trial including discovery motions which would have allegedly produced highly relevant and critical information regarding the circumstances surrounding the criminal charges against Petitioner and which would have allegedly assisted his lawyers to effectively represent their client. The Court finds that Petitioner has failed to show deficient performance by counsel or prejudice flowing from such alleged deficient performance, accordingly this claim is denied.

The Court denies Petitioner's **Claim II, ¶ 23 (h)** of his amended petition wherein Petitioner alleged that trial counsel were ineffective in the preparation and conducting of voir dire. The Court finds that Petitioner has failed to show deficient performance by counsel or prejudice flowing from such alleged deficient performance, accordingly this claim is denied.

The Court denies Petitioner's **Claim II, ¶ 23 (i)** of his amended petition wherein Petitioner alleged that counsel failed to adequately examine potential jurors during voir dire by failing to follow up on responses by potential jurors, by failing to discover the verdicts handed down by those jurors with prior jury service, Brenda Collins, David Lockett, Patricia Burke, Shirley Moussa and Joseph Hohnerlein, by failing to adequately question potential jurors Moselle Irvin, Carole Rich and Andrew Goldwire about their prior knowledge of the case, by failing to investigate the statements of prospective jurors April Reppert, Waltter Devereaux, Jr. and Sharon Rozier who admitted that the case was improperly discussed among venirepersons, by failing to properly question juror Moselle Irvin who stated that he was more prone to sentence Petitioner to death, by failing to further question prospective jurors Thomas Sanders and Jeanna Young who improperly placed the evidentiary burden of proof on the defense, by failing to question prospective jurors Mosell Irvin, Mary Fischer and Kathy Mabry who showed a complete lack of understanding regarding metal retardation, alcoholism and other conditions, by failing to question prospective jurors Elaine Ellison and Jeanna Young whose families and friends had been murdered, by falling to adequately question prospective jurors Cecil Mastison and Frank Chappell who had backgrounds in law enforcement, and by failing to examine prospective juror Susan DeFillipis who said that she would not willingly consider mitigating factors presented by the defense outside of the court's instructions. This Court finds that Petitioner failed to establish the deficient performance prong or the prejudice prong associated with this claim. Accordingly,

this ineffective assistance of counsel claim is denied in its entirety.

The Court denies Petitioner's **Claim II, ¶ 23 (j)** of his amended petition wherein Petitioner alleged that counsel failed to move to strike unqualified and biased jurors from the venire. This Court finds that Petitioner failed to establish the deficient performance prong or the prejudice prong associated with this claim, thus this claim is denied.

The Court denies Petitioner's **Claim II, ¶ 23 (k)** of his amended petition wherein Petitioner alleged that counsel were ineffective for declining to object to the trial court's alleged failure to admonish prospective jurors Carole Rich and Andrew Goldwire not to discuss the case or read, watch or listen to news accounts after individual sequestered voir dire. This Court finds that Petitioner failed to establish the deficient performance prong or the prejudice prong associated with this claim, thus this claim is denied.

The Court denies Petitioner's **Claim II, ¶ 23 (u)** of his amended petition wherein Petitioner alleged that counsel were ineffective for declining to object to the State's witnesses testimony about matters allegedly outside of their personal knowledge. This Court finds that Petitioner failed to establish the deficient performance prong or the prejudice prong associated with this claim, thus this claim is denied.

The Court denies Petitioner's **Claim II, ¶ 23 (x)** of his amended petition wherein Petitioner alleged that counsel were ineffective for declining to challenge the constitutionality of Petitioner's prior convictions. This

Court finds that Petitioner failed to establish the deficient performance prong or the prejudice prong associated with this claim, thus this claim is denied.

The Court denies Petitioner's **Claim II, ¶ 23 (v)** of his amended petition wherein Petitioner alleged that counsel were ineffective in the manner in which counsel conducted bench conferences at trial. This Court finds that Petitioner failed to establish the deficient performance prong or the prejudice prong associated with this claim, thus this claim is denied.

The Court denies Petitioner's **Claim II, ¶ 23 (z)** of his amended petition wherein Petitioner alleged that counsel were ineffective in assuring Petitioner's presence at critical phases of trial. This Court finds that Petitioner failed to establish the deficient performance prong or the prejudice prong associated with this claim, thus this claim is denied.

TRIAL COUNSEL WERE NOT INEFFECTIVE IN THE INVESTIGATION AND PRESENTATION OF POTENTIAL MITIGATING EVIDENCE AT TRIAL

(Claim II, ¶ 23 (b), (f), (g), (l), (o), (p), (q), (r), (s), (t), and (y) and Claim IV, ¶ 35-37 of amended petition)

Petitioner alleged that trial counsel were ineffective for allegedly failing to investigate and present sufficient potential mitigating evidence and defenses at trial, including evidence and defenses based upon Petitioner's mental state at the time of the alleged offenses. This Court finds that this claim is without merit.

Trial counsel were not ineffective in the investigation and presentation of evidence in support of Petitioner's mental retardation claim

This Court finds that the evidence showed that psychologist Dr. Grant was retained by trial counsel, in part, to evaluate Petitioner to determine whether he was mentally retarded. To aid in this determination, the evidence showed that trial counsel provided Dr. Grant with extensive materials regarding Petitioner's background including Petitioner's school records from the Ware County School System and some of Petitioner's Harrell Psychoeducation Center records, records of Petitioner's psychological evaluations conducted at the Harrell Center, Petitioner's Ware County Hospital records, Petitioner's discharge summary from his February 1998 admission into Georgia Regional Hospital following his suicide attempt, a letter summarizing Petitioner's diagnoses and treatment at the Satilla Community Mental Health Center, the psycho-social history of Petitioner compiled by social worker Audrey Sumner, Petitioner's prior criminal records, and reports of the Central State Hospital Forensic Evaluative Team members who evaluated Petitioner pursuant to the trial court's order, including the reports of Dr. Gibson and Dr. Tirath Gill and neurologist Dr. Bhagwant Rai Verma. See H.T. 5315-5323, 5511-5515, 5572-5589 and 7623-7624.

To determine whether Petitioner had subaverage intellectual functioning, the first prong of mental retardation, the evidence showed that Dr. Grant conducted several clinical interviews with Petitioner and administered several intelligence tests to him

including the Stanford-Binet Intelligence Scale, 4th edition, the Kaufman Adolescent and Adult Intelligence Test, the Slosson Intelligence Test, Revised, the Peabody Intelligence Test, Revised, the Test of Nonverbal Intelligence, and several achievement tests. The evidence also showed that Dr. Grant reviewed previous IQ tests administered to Petitioner during his school years that were included in the records that trial counsel provided to Dr. Grant, as listed above.

To determine whether Petitioner has adaptive deficits, the second prong of mental retardation, the evidence showed that Dr. Grant conducted several clinical interviews with Petitioner, administered "listening and expressive language tests," reviewed Petitioner's school and medical records, provided by counsel, conducted clinical interviews with both of Petitioner's parents, and administered the Vineland Adaptive Skills Behavior Test to both of Petitioner's parents.

Dr. Grant testified in this habeas corpus proceeding that he had "concerns" about the reliability on Petitioner's parents as sources for information regarding Petitioner's status and believed that they were limited mentally and not ideal reporters of Petitioner's childhood and upbringing, and claimed that he voiced these concerns to Mr. Wilson prior to Petitioner's trial. Dr. Grant also testified during these proceedings that Mr. Wilson ignored these concerns. This Court finds that Dr. Grant's present testimony is in conflict with his trial testimony, wherein he described Petitioner's parents as "helpful: and by his failure to mention this alleged concern after being asked by the

District Attorney on cross-examination whether he tested Petitioner's parents to determine whether they were mentally retarded prior to administering the Vineland test to them.

In order to determine whether Petitioner met the third prong of mental retardation, onset before age 18, the evidence showed that Dr. Grant referred to his evaluations of Petitioner, his interviews with Petitioner's parents, the results of the Vineland test he administered to Petitioner's parents and to the records provided to him by trial counsel.

At the completion of Dr, Grant's evaluation, he concluded that Petitioner clearly meets all three of these criteria and in fact meets the classification for mild mental retardation. H.T. 7630.

Contrary to Dr. Grant's testimony in this habeas proceeding, the evidence showed that Dr. Grant made no indication that he felt incapable of basing his conclusions on the information he obtained through his own testing and examination of Petitioner, his interviews of Petitioner's parents, the Vineland test he administered to Petitioner's parents, his discussions with Dr. Savino, and his review of Petitioner's records as provided by trial counsel. See. *Card v. Dugger*, 911 F2nd 1494, 1512 (11th Cir. 1990). Accordingly, this Court finds that trial counsel were not deficient in the investigation of Petitioner's mental retardation claim and denies this claim of ineffective assistance of counsel.

Trial counsel were not deficient in the preparation of Dr. Grant for his trial testimony or the presentation of Dr. Grant's trial testimony regarding this issue

This Court credits co-counsel Mark Hatfield's testimony that he spent a significant amount of time familiarizing himself with the aspects of the mental retardation defense as well as a significant amount of time talking with Dr. Grant about the defense and reviewing Dr. Grant's report and findings. H.T. 267. Under these circumstances, this Court finds that counsel were not deficient in preparing Dr. Grant for his trial testimony regarding this or any other issue. Accordingly, the Court denies this claim for ineffective assistance of counsel.

This Court also finds that counsel was not ineffective in the presentation of Dr. Grant's trial testimony regarding the issue of Petitioner' s mental retardation. Counsel elicited testimony from Dr. Grant regarding his ultimate finding of Petitioner's mental retardation as well as Dr. Grant's support for the satisfaction of each of the three prongs of the test for mental retardation.

Trial counsel were not ineffective in their provision of records to Dr. Grant regarding Petitioner's mental retardation claim

This Court rejects Petitioner's claim that trial counsel were ineffective for failing to provide Dr. Grant with all of Petitioner's educational, mental health, criminal and hospital records. As addressed above, this Court found as a matter of fact that Dr. Grant never informed trial counsel of his desire for additional records

of Petitioner. Notwithstanding this factual finding, this Court further finds that the information contained in the additional records presented in this habeas corpus proceeding are cumulative of the information trial counsel provided to Dr. Grant prior to Petitioner's trial. This Court finds that Petitioner failed to establish deficient performance and prejudice flowing from such deficient performance and hereby denies this ineffective assistance of counsel claim.

This Court's finding of the lack of actual prejudice to the Petitioner is underscored by the fact that the information contained in the additional documents present in this proceeding are not wholly beneficial to Petitioner as these additional records indicate that Petitioner could have passed some subjects in school, had he attended school and not refused to complete his work. H.T. 1121. This information is in contravention of Petitioner's mental retardation claim.

This Court also denies Petitioner's claim that trial counsel were ineffective for declining to provide Dr. Grant with Petitioner's parents' educational, mental health, criminal and hospital records or for allegedly refusing to allow Dr. Grant to conduct psychological and intelligence testing on Petitioner's parents as this Court finds that Dr. Grant never requested that trial counsel provide him with these materials or that counsel allow Dr. Grant to perform additional testing. *See Head v. Carr*, 273 Ga. 631 (2001). This Court notes that this finding is supported by Dr. Grant's letter to Mr. Wilson dated March 3, 1996 in which Dr. Grant stated that he enjoyed working with Mr. Wilson, indicating satisfaction with Dr, Grant's working relationship with counsel.

H.T. 5534. Accordingly, as Petitioner failed to establish deficient performance and prejudice flowing from such deficient performance and this Court hereby denies this ineffective assistance of counsel claim.

Trial counsel were not ineffective in declining to obtain a more detailed social history regarding Petitioner's life.

This Court also denies Petitioners' claim that trial counsel were ineffective for declining to provide Dr. Grant with a more detailed social history regarding Petitioner's life or for declining to arrange for Dr. Grant to interview other family members, friends and teachers of Petitioner, so that Dr. Grant could get "firsthand descriptions" of Petitioner's alleged adaptive functioning in furtherance of Petitioner's mental retardation claim. The Court finds that Dr. Grant never made a request of counsel to provide such information or to conduct additional interviews. *See Head v. Carr*, 273 Ga. at 631. Accordingly, this Court finds as a matter of law that Petitioner failed to establish deficient performance and denies this ineffective assistance of counsel claim.

This Court also finds that Petitioner failed to establish actual prejudice with regard to this claim. The additional information contained in the affidavits submitted in this proceeding is generally cumulative of the information that Dr. Grant possessed prior to trial. The Court notes that Petitioner's "friends" in this proceeding are not the same as the friends listed by Petitioner prior to trial, except for Shad Joyner, a convicted felon. This Court rejects Mr. Joyner's testimony as being unreliable. The Court also finds that

the affidavits provided in this proceeding by Petitioner's former teachers that would have been admissible at trial is either refuted by Petitioner's records or cumulative of the other information provided to Dr. Grant prior to trial. Accordingly, this claim is denied.

Trial counsel were not ineffective for declining to provide Central State Hospital psychologist Dr. Lower with additional materials to support Petitioner's mental retardation claim

This Court credits Dr. Lower's live testimony at the evidentiary hearings in this habeas corpus proceeding, rather than Dr. Lower's affidavit prepared in connection with these proceedings. In live testimony, Dr. Lower stated that he could not conclude that the Petitioner is mentally retarded, upon review of the additional materials provided to him by Petitioner's habeas counsel. Dr. Lower testified that a lack of persuasive evidence exists to show that the deficiencies in Petitioner's measured intelligence occurred before age 18, as to satisfy the third prong required in a finding of mental retardation. H.T. 365, 367. Instead, Dr. Lower testified that after a review of additional materials he could not rule out mental retardation or conclude that petitioner was mentally retarded which is consistent with his statement contained in his report following his 1995 evaluation of Petitioner as well as his trial testimony. Tr. T. Vol. 11, P. 52 and H.T. 7229. As this additional evidence did not change Dr. Lower's ultimate opinion on the issue of mental retardation, this Court denies this ineffective assistance claim as Petitioner failed to establish deficient performance or prejudice.

While the Court finds that Dr. Gibson testified that he found the Petitioner to be mentally retarded, his conclusion was based upon Dr. Gibson's mistaken belief that Dr. Lower's new conclusions were that Petitioner was mentally retarded. As a result of Dr. Lower's apparent abridgment of his diagnosis, Dr. Gibson was forced to abridge his diagnosis as well. See H.T. 522. In light of the fact that Dr. Lower did not change his diagnosis of the Petitioner, the Court disregards Dr. Gibson's adoption of the erroneous report of Dr. Lower's finding as sworn to in these proceedings.

Trial counsel were not ineffective for declining to call Petitioner's parents to testify in support of his mental retardation claim

As stated above, the evidence showed that Dr. Grant interviewed Petitioner's parents at length prior to trial in order to obtain more information regarding Petitioner's mental retardation claim. Accordingly, this Court finds that trial counsel was not deficient for declining to call Petitioner's parents as witnesses in support of this claim and therefore denies this ineffective assistance of counsel claim.

The Court also finds that Petitioner failed to establish the prejudice prong of this claim. The Court finds that the evidence contained in the affidavits offered in support of this claim is either cumulative of Dr. Grant's testimony or is refuted by other competent evidence. See H.T. 243, 1124, 4870-4882, 7757-7760 and Tr. T. Vol. 10, p. 66.

Trial counsel were not ineffective for declining to call Petitioner's sister to testify in support of his mental retardation claim

This Court denies Petitioner's suggestion that trial counsel were ineffective for declining to present the testimony of Petitioner's sister in support of his mental retardation claim as Petitioner repeatedly stated that he did not have a close relationship with his sister. See H.T. 4665 and 4407. Further, this Court finds that nothing trial counsel learned from speaking with Petitioner's parents indicated that Petitioner's sister knew more about his developmental history than the parents did. *See Williams v. Head*, 185 F3d 1223, 1237 (11th Cir. 1999). See also *Holladay v. Haley*, 209 F.3d 1243, 1252 (11th Cir. 2000). Accordingly, this Court finds that counsel were not deficient for declining to call Petitioner's sister to testify in support of his mental retardation claim or for any other matter and therefore denies this claim.

This Court also finds that Petitioner failed to establish prejudice with regard to this issue as the information contained in Petitioner' s sister's affidavit is cumulative of the evidence presented in support of this claim at trial.

Trial counsel were not ineffective for declining to call Petitioner's uncle, Donald Pittman, Sr. to testify in support of his mental retardation claim

This Court finds that trial counsel were not deficient for declining to call Petitioner's uncle, Donald Pittman, Sr. to testify in support of Petitioner's mental retardation claim. Although Mr. Pittman was willing to

testify on Petitioner's behalf, this Court finds that trial counsel strategically declined to call Mr. Pittman to the stand. Mr. Hatfield testified at the evidentiary hearing that Mr. Pittman "literally scared the daylights" out of him.

> "[H]e was way off the deep end. He came in telling...me...something about [how] somebody had given rat poison to his wife or something and had driven her out of her mind. And then he came back behind my desk and was looming over me and was telling me something about that if something wasn't done about that, there was going to be another killing or something like that. And this guy was, he was a complete, you know, he was out of it, he was out of it. I don't know, I don't know why, what triggered that incident, or why be came to see me about it or anything, but that wasn't the sort of guy you would want to put in the stand in front of a jury.

H.T. 173-174.

Under these circumstances, this Court finds that counsels' decision not to call Mr. Pittman to testify in support of this claim or for any other matter was reasonable, and this claim of ineffectiveness is denied. *See Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995).

Trial counsel were not ineffective for declining to call members of Petitioner's extended family to testify in support of his mental retardation claim

The other members of Petitioner's extended family that provided affidavits in this habeas corpus proceeding

included Thoetis Batten, Petitioner's surviving grandmother, James Raulerson and Edgar "Buddy" Pittman, Jr., Petitioner's uncles, Linda Shaw and Dorothy Waldron, Petitioner's aunts and Robert Pittman, Connie Richardson, Kenny Richardson and Sherry Richardson, some of Petitioner's cousins. As the Eleventh Circuit has held, the "correct approach toward investigation reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources. A lawyer is not required to pursue every path until it bears fruit or until all hope withers. A decision to limit investigation is accorded a strong presumption of reasonableness. *Williams v. Head*, 185 F.3rd at 1237. A decision to limit investigation made by counsel with considerable experience is criminal cases is entitled to even more deference. *Id.*

This Court finds that the evidence showed that Petitioner repeatedly represented to counsel that he did not have close relationships with these family members. H.T. 7204-7211, 7737-7738, 7661 and 7917. Further, the evidence showed that Petitioner generally had limited contact with these family members as well. Accordingly this Court finds that trial counsel reasonably declined to attempt to interview these witnesses and to call them to testify at trial in support of this or any other matter. *See Holladay v. Haley*, 209 F.3d 1243, 1252 (11th Cir. 2000). This Court denies this claim of ineffective assistance of counsel.

Even though this Court need not conduct a further inquiry into this claim as Petitioner failed to establish counsels' deficient performance, this Court finds that Petitioner also failed to establish prejudice with regard

to his mental retardation claim as the affidavits are largely cumulative of Dr. Grant's trial testimony on the issue of mental retardation.

The only evidence contained within these affidavits that is not cumulative of the evidence presented in support of this claim at trial is the testimony regarding Petitioner's father's alleged mental retardation. However, there is no evidence to show that Petitioner's father was ever diagnosed as being mentally retarded and the Court finds that there exists no reasonable probability that this additional testimony would have changed the outcome of the trial on this issue. Accordingly, this claim is denied.

Trial counsel were not ineffective for declining to call Petitioner's alleged friends to testify in support of his mental retardation claim

Petitioner claimed that trial counsel were ineffective for declining to present the testimony of Lisa Habicht, Shad Joyner and Angela Taylor in support of Petitioner's mental retardation claim. However, when asked at the time of trial to identify his friends to assist in the investigation of this case, Petitioner did not include Ms. Habicht and Ms. Taylor. Instead, Petitioner listed Wayne Sweat, Sandy Sweat, Corey Strickland, Fred Williams, Shad Joyner and Joe and Millie Wainwright. H.T. 7737-7738. Only Shad Joyner was named on Petitioner's list of friends for these proceedings and for the trial of this case.

Trial counsel are not required to find and interview all potentially favorable witnesses. This duty particularly does not attach when Petitioner has not

notified counsel of the names of such favorable witnesses. Accordingly, the Court denies this claim of ineffective assistance of counsel.

As noted above, Petitioner did identify Shad Joyner as one of his friends. This Court finds that Mr. Joyner's testimony is unreliable. Accordingly, this Court finds that trial counsel reasonably declined to present Mr. Joyner's testimony. Therefore, this claim for ineffective assistance of counsel is denied.

Even addressing these affidavits on their face, this Court finds that Petitioner failed to establish actual prejudice in counsels' failure to call these witnesses to testify as the testimony of these witnesses would have undermine Petitioner's claim of mental retardation. Dr. Grant relied in part on the evidence that Petitioner had no friends in finding that the second prong of mental retardation had been satisfied. Further, this Court finds that the testimony contained within these affidavits is generally cumulative of Dr. Grant's trial testimony.

Trial counsel were not ineffective for declining to call former teachers, social workers and administrators of Petitioner to testify in support of his mental retardation claim

Petitioner claimed trial counsel were ineffective for declining to present the testimony of Virginia Anderson, Hattie Cunningham, Susan Engram, Deborah Lance Logan and Frank Sumner in support of his mental retardation claim. This Court finds that this claim also lacks merit. As the Eleventh Circuit has held, the mere fact that other witnesses might have been available is not a sufficient ground to prove ineffectiveness of

counsel." *Williams v. Head*, 185 F.3d at 1236 (1999). This Court finds that Petitioner failed to establish that trial counsel was deficient in declining to present this testimony in support of this claim at trial and hereby denies this ineffective assistance of counsel claim.

The Court also finds that the Petitioner has failed to establish actual prejudice resulting from the alleged deficiency of counsel. The Court finds that the information contained in the affidavits of these witnesses is either refuted by Petitioner's school records or cumulative of other evidence presented at trial in support of this claim.

Trial Counsel were not ineffective for declining to call employees of Hickox Cabinets and Millwork to testify in support of Petitioner's mental retardation claim

Petitioner alleges that counsel were ineffective for declining to present the testimony of Ron Lynn and Ray Dryden regarding Petitioner's employment at Hickox Cabinets and Millwork in support of his mental retardation claim. (*see* Tr. T. Vol. 10, pgs. 10-189). The Court finds that counsel were not deficient for declining to present this testimony of these two additional witnesses in support of this claim at trial and hereby denies this ineffective assistance of counsel claim.

This Court also finds that Petitioner failed to establish actual prejudice with regard to the presentation of this evidence as the testimony of these witnesses did not cast doubt on State's witness Freddy Hickox's trial testimony, refuting Petitioner's claim.

Trial counsel were not ineffective in the investigation and presentation of evidence regarding the issue of mental illness

The record in this case clearly established that trial counsels' investigation and presentation of evidence regarding the issue of mental illness was not deficient. Trial counsel retained an experienced forensic psychologist, Dr. Grant, and a psychiatrist, Dr. Savino to evaluate Petitioner's mental and emotional status. Additionally, trial counsel provided Dr, Grant and Dr. Savino with extensive materials regarding Petitioner's background as set forth above as well as the reports of the Central State Hospital Evaluative Team members who evaluated the Petitioner pursuant to the trial court's order including the reports of Dr. Gibson and Dr. Lower, as well as the reports of psychiatrists Dr. Anita Rae-Smith and Dr. Tirath Gill and neurologist Dr. Bhagwant Rai Verma. The record also showed that trial counsel had Petitioner evaluated by a neurologist, Dr. Michael Baker, and a neuropsychologist, Dr. Manual Chaknis, at Dr. Savino's suggestion, although their evaluations did not provide information helpful to Petitioner's case. The record further showed that trial counsel arranged for Dr. Grant to interview Petitioner's parents and for Dr. Grant and Dr. Savino to meet to discuss their findings following the conclusion of their assessments of Petitioner. H.T. 7790-7792.

The evidence showed that in addition to the evidence regarding Petitioner's mental retardation claim, trial counsel presented potential mitigation evidence of Petitioner's mental health. This evidence, which was largely uncontested by the State at trial, is as following:

1. Petitioner began to abuse alcohol at a very early age
2. Petitioner began to abuse drugs at a very early age
3. Petitioner's drug and alcohol abuse stemmed from a family history of such abuse and the dysfunctional environment in which Petitioner was raised.
4. Petitioner's teachers described him as experiencing frequent and intense mood swings, being unable to control his temper, and having difficulty controlling his impulses.
5. Petitioner's lack of an understanding of reality as highlighted by a test which was administered to Petitioner in the second grade.
6. Petitioner suffered several serious head injuries in childhood and adolescence.
7. Petitioner's aggressiveness was consisted with a history of head injuries and was likely exacerbated by his family and emotional problems.
8. Petitioner had a history of chronic depression
9. Petitioner's mother sought psychiatric counseling and treatment for Petitioner, but Petitioner's father forbade it.
10. Petitioner was evaluated at the Satilla Mental Health Center in December 1987, where Petitioner was diagnosed with explosive disorder with a history of borderline intellectual functioning and marital problems.
11. Petitioner was late evaluated at the Satilla Mental Health Center one year later after

complaining of depression after which Petitioner was diagnosed with attention deficit disorder, hyperactive disorder, residual, borderline intellectual functioning, marital problems, cannabis abuse and amended explosive disorder.

12. Petitioner attempted suicide when his wife left him.

13. Petitioner was admitted to Georgia Regional Hospital immediately following his suicide attempt, and the admitting physician noted that Petitioner had a history of mental health problems.

The record showed that trial counsel also placed Dr. Grant's report into evidence which recorded Dr. Grant's findings that Petitioner suffered from chronic alcoholism, polysubstance abuse, cannabis abuse, major depressive disorder and mixed personality disorder with features of passive/aggressive, oppositional, borderline and antisocial in addition to mild mental retardation.

The Court finds as a matter of law that trial counsel's performance in investigating and presenting evidence regarding the issue of mental illness was reasonable. Accordingly, Petitioner's claim that counsel were ineffective in the investigation and presentation of evidence regarding the issue of mental illness is denied.

Trial counsel was not ineffective for declining to provide Dr. Grant with additional records regarding the issue of mental illness

This Court rejects this claim for ineffective assistance of counsel as there is no record of Dr. Grant

requesting that trial counsel provide him with additional materials regarding this issue despite Dr. Grant's present testimony to the contrary. This Court notes that Dr. Grant's present assertions regarding his alleged pretrial request for additional materials is further contradicted co-counsel's testimony at the evidentiary hearing in these habeas corpus proceedings. At the evidentiary hearing co-counsel did not recall Dr. Grant mentioning a need for additional materials regarding this or any other issue. H.T. 247-50. Accordingly, this Court finds that trial counsel were not deficient for declining to provide Dr. Grant with additional records regarding this issue, as alleged by Petitioner. This claim of ineffective assistance of counsel is denied.

The Court finds that Petitioner failed to establish prejudice with regard to this claim. The Court finds that Petitioner's mother had no mental records at the time of Petitioner's trial. Further, the Court finds that while Petitioner's mother was diagnosed with dysthymia or chronic depression when she was evaluated in 1998 following the conclusion of Petitioner's trial, this depression was deemed to stem, in large part, by Petitioner's commission of the crimes at issue. H.T. 1725-1729.

Although Petitioner's father bad been evaluated twice in the years leading up to these crimes and following one evaluation had received a diagnosis "differentiated between psychoneurotic depressive reaction and psychotic depressive reaction," this Court finds that Petitioner failed to show that his alleged mental health problems stemmed from his father's alleged disorder. Even if Petitioner had made this

showing, as the jury was aware of Petitioner's history of depression at the time the jurors rendered their sentencing decision in this case, this Court finds that these records would not have, in reasonable probability, caused the jury to reach a different result. Accordingly, this claim of ineffective assistance of counsel is denied.

Petitioner also claimed that counsel were ineffective for failing to provide Dr. Grant with all of Petitioner's Satilla Community Health Center records, including a letter written in May 1978, following psychiatrist Dr. Speriosu's evaluation of Petitioner. Dr. Speriosu's letter represented that Petitioner's difficulty was more complex than hyperactivity. H.T. 1170. Even if counsel did not provide all of Petitioner's Satilla Center records to Dr. Grant, which is unclear from the record, this Court finds that counsel's alleged failure to provide the sum total of these records to Dr. Grant did not establish deficient performance. *See Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990). Accordingly this claim of ineffective assistance of counsel is denied.

The Court also finds that Petitioner failed to satisfy the prejudice prong of this claim as the Court finds that the alleged new records are generally cumulative of the evidence that Dr. Grant had in his possession prior to trial. Although the letter representing Dr. Speriosu's feelings with respect to Petitioner's mental health was not presented to the jury, given that Dr. Speriosu never made a diagnosis of Petitioner and declined to recommend treatment after an evaluation, this Court finds that there is no reasonable probability that the jury would have reached a different verdict if they had been

made aware of the contents of this letter. This claim of ineffective assistance of counsel is denied.

Trial counsel did not limit Dr. Grant's evaluation to the issue of mental retardation.

Petitioner also claimed that counsel rendered deficient performance by insisting that Dr. Grant limit his evaluation to the issue of mental retardation. This claim is contradicted by Mr. Hatfield's testimony, as well as by Dr. Grant's report wherein he stated that he was requested to evaluate Petitioner in part to determine if he is mentally retarded. H.T. 7630. In that same report, Dr. Grant diagnosed Petitioner with other mental disorders including chronic alcoholism, polysubstance abuse, cannabis abuse, major depressive disorder and mixed personality disorder with features of passive/aggressive, oppositional, borderline and associational in addition to mild mental retardation. *Id.* The Court denies this claim of ineffective assistance of counsel.

Trial counsel were not ineffective for declining to provide Central State Hospital psychiatrist Dr. Gibson and psychologist Dr. Lower with additional materials regarding the issue of mental illness

Petitioner also claimed that counsel were ineffective for declining to provide Dr. Lower and Dr. Gibson with additional materials. Petitioner argues that such documents might have persuaded the doctors to reach a different opinion on the issue of Petitioner's mental illness. This claim is without merit. The four psychological experts that evaluated Petitioner at

Central State Hospital prior to trial concluded that Petitioner did not have a mental illness such that his criminal responsibility for the commission of these crimes would be negated. This Court finds that trial counsel reasonably refraned from voluntarily providing Dr. Gibson and Dr. Lower with additional materials in the hopes that the doctors would reevaluate their findings and conclude that Petitioner was mentally ill. This claim for ineffective assistance of counsel is denied.

This conclusion is supported by the holding of *Head v. Carr*, 273 Ga. 613 (2001). The Georgia Supreme Court held that it "is simply not reasonable to put the onus on trial counsel to know what additional information would have triggered" the psychiatrist to take a different course of action; "a reasonable lawyer is not expected to have a background in psychiatry or neurology." *Id.* at 631. No record exists of either Dr. Gibson or Dr. Lower requesting any materials from trial counsel on the issue of Petitioner's alleged mental illness. This Court finds that a reasonable lawyer would not have known what additional information might have triggered Dr. Gibson and Dr. Lower to reach different opinions regarding Petitioner's mental illness. Following the *Carr* holding, this Court denies Petitioner's claim on this issue.

Trial counsel were not ineffective for declining to present the testimony contained in Dr. Atkerson's affidavit regarding the issue of mental illness

Petitioner claimed that trial counsel were ineffective for failing to present the testimony contained in the affidavit of psychologist Dr. Akerson, who was hired by Petitioner's habeas counsel to evaluate Petitioner for these proceedings. Dr. Ackerson's evaluation took place

on August 8, 2000, several years after Petitioner was tried and sentenced for these crimes. This Court finds that Petitioner failed to show that trial counsel rendered deficient performance by declining to obtain a mental health expert to testify to these findings, as contained in Dr. Ackerson's affidavit, offered for these proceedings. As the Eleventh Circuit has held, counsel are "not required to 'shop'" for a mental health expert "who will testify in a particular way." *Card v. Dugger*, 911 F2d. 1494 (1990). This claim of ineffective assistance of counsel is denied.

This Court also finds that Petitioner failed to establish prejudice with regard to this ineffectiveness claim as Dr. Ackerson's psychological diagnoses are generally cumulative of the evidence presented at trial. The Court finds, based upon the evidence, that the jury would not have found, by a reasonably probability, that Dr. Ackerson's assertion that Petitioner showed signs of reactive attachment disorder of infancy or early childhood as compelling given the fact that Petitioner was approximately twenty-four years of age at the time of the commission of these crimes. The Court also finds that the jury likely would have disregarded Dr. Ackerson's claim that Petitioner experienced a dissociative episode at the time he began shooting at Mr. Hampton and Ms. Dixon. The suggestion that Petitioner was not fully cognizant of his actions is refuted by Petitioner's own ability to recall the events of the crimes to investigators. The Court also finds that the Petitioner was cognizant of his actions in his attempt to hide the body of Ms. Dixon for Petitioner's intended sexual gratification at a later time. Additionally, this Court

finds that no evidentiary support exists for Dr. Ackerson's assertion that Petitioner had no intention of harming others on the day of these crimes, as statements Petitioner made to the GBI in which Petitioner intimated that if he had known the location of his ex-wife he probably would've killed her, too. H.T. 4486-4488. The Court also finds that Dr. Ackerson's findings that he did not mean to harm Gail Taylor and was unaware of her presence prior to entering her house is in direct contradiction with Petitioner's own statement to the GBI that he heard someone in the house prior to kicking open Ms. Taylor's door. Tr. T. Vol. 9, p. 16. The Court, finding no actual prejudice to Petitioner, denies this claim of ineffective assistance of counsel.

Trial Counsel were not ineffective for declining to attempt to elicit the "new" testimony of Dr. Gibson and Dr. Lower regarding the issue of mental illness

This Court finds that counsel were not deficient for declining to attempt to elicit the new findings of Dr. Gibson and Dr. Lower adopting Dr. Ackerson's present findings of a serious mental disorder, which impaired Petitioner's actions and Petitioner's ability to appreciate the wrongfulness of his actions. The Court finds that Dr. Gibson's and Dr. Lower's reports based upon their evaluations of Petitioner in 1995 at the time of trial reflect Dr. Gibson's and Dr. Lower's unambiguous findings at the time of trial. Accordingly, this claim of ineffective assistance of counsel is denied.

The Court also finds that there is no reasonable probability that Dr. Gibson's or Dr. Lower's present affidavit testimony adopting Dr. Ackerson's findings

would have changed the outcome of this case. The record reflects that Dr. Gibson and Dr. Lower were generally aware of the information on which they now base their "new" findings at the time they evaluated Petitioner in 1995 and yet did not conclude at that time that Petitioner had a serious mental disorder of any kind. H.T. 7213-7388. This Court finds that counsel was not ineffective for declining to attempt to elicit this "new" testimony at trial.

The lack of prejudice and the denial of this claim is further supported by psychologist Dr. Schroeder's report following her evaluation of Petitioner in the Georgia Diagnostic and Classification Prison shortly after the completion of Petitioner's trial where in she noted that Petitioner showed signs of a major disorder of thought and no signs of a major disorder of mood. See H.T. 5158. Accordingly this claim of ineffective assistance of counsel is denied.

Trial counsel were not ineffective for declining to present the testimony of Dr. Savino regarding the issue of mental illness

The Court finds that counsel were not ineffective for declining to call Dr. Savino to testify regarding the issue of mental illness as there is no evidence to show that Dr. Savino diagnosed the Petitioner with any specific mental illness. See H.T. 7790-7792. Therefore, this Court finds that trial counsel were not deficient in declining to present Dr. Sovino's testimony as potential mitigating evidence.

This Court also finds that Petitioner failed to establish prejudice regarding this claim as there is no

reasonable probability that Dr. Savino's testimony would have changed the outcome of this case absent a specific diagnosis.

Trial counsel were not ineffective for declining to present evidence regarding Petitioner's alleged sexual abuse

This Court finds that counsel were not ineffective for declining to present evidence regarding the allegation of Petitioner's alleged childhood sexual abuse addressed in Dr. Ackerson's and Angela Taylor's affidavits. The Court finds that the evidence showed that counsel obtained some information about that allegation prior to trial, Id. at 246, but declined to present it at trial because it was a subject that Petitioner did not want to be brought out in the case. *Id.* at 245. The Court finds that Petitioner's desire to keep this allegation of childhood sexual abuse from being aired publicly was further demonstrated by Petitioner's actions at the evidentiary hearing. As co-counsel Mark Hatfield explained at the evidentiary hearings in these proceedings, "when we got into that evidence,...from what I've seen [today], I think he told his lawyers he didn't want them to go into that any further. I think I heard as much." *Id.* at 245-246.

As Petitioner is ultimately in charge of his own defense, this Court finds that counsel were not deficient for declining to present evidence of this allegation at trial. *See Gilreath v. Head*, 234 F.3d 547, 551 (11th Cir. 2000). Accordingly, this claim of ineffective assistance of counsel is denied.

The Court finds that Petitioner failed to establish prejudice with regard to this claim. Even assuming,

arguendo, that Petitioner would have permitted the introduction of this evidence at trial, as Petitioner failed to even name the alleged perpetrator of this act and specifically denied that he had been sexually abused as a child during the course of his evaluation at Central State Hospital, while awaiting trial for these crimes, H.T. 7274, there is no reasonable probability that this testimony would have changed the outcome of this case. Accordingly, this claim for ineffective assistance of counsel is denied.

Trial counsel were not ineffective in the investigation and presentation of mitigating evidence regarding the circumstances under which these crimes were committed

Following a review of the record, that trial counsel presented evidence to attempt to mitigate against a finding that Petitioner premeditated these crimes. This evidence presented by counsel to the jury at the trial of this case included the following:

1. That Petitioner was brain damaged;
2. That Petitioner was mentally retarded at the time of commission of these crimes;
3. That Petitioner had very poor judgment which predisposed him to acting in a impulsive and aggressive manner as a result of his alleged mental retardation;
4. That Petitioner had a history of poor impulse control;
5. That Petitioner suffered from chronic depression;
6. That Petitioner had attempted suicide;

7. That Petitioner abused drugs from an early age;
8. That Petitioner abused alcohol from an early age;
9. That Petitioner's abuse of drugs and alcohol stemmed from a history of such abuse in his family;
10. That Petitioner's abuse of drugs and alcohol stemmed from the dysfunctional and abusive household in which he was raised;
11. That Petitioner had a history of blackouts caused by heavy use of alcohol and drugs that would prevent him from recalling what he did the night before;
12. That Petitioner consumed at least a case and a half of beer, a half bag of marijuana and various pills including Vistaril, Vicodin, Percodan and Valium contemporaneously to the commission of these crimes;
13. That Petitioner shouted out his wife's name prior to the shootings of Mr. Hampton and Ms. Dixon, evidencing his alleged emotional distress.

At the close of the sentencing phase, trial counsel urged the jury to further consider Petitioner's mental condition at the time of these crimes as a reason to vote for a sentence less than death, arguing that "you can't expect the same thing of him that you'd expect of someone with a healthy," "adult mind," *Id.* at 121, and that "[t]hese murders," which were "entirely without motive or reason," "can only be understood as the product of a mind" that, if not "legally retarded," was

nevertheless "sick," and not entirely through Petitioner's own doing. *Id.* at 118.

The Court finds trial counsels investigation and presentation of evidence and argument to attempt to show that these crimes were impulsive and not premeditated was reasonable. Accordingly, this claim of ineffective assistance of counsel is denied.

The Court also denies Petitioner's claim that counsel were ineffective for failing to present the testimony of a crime scene reconstructionist in support of this allegation. Petitioner cites to the affidavit of R. Robert Tressel that Petioner secured and submitted in this habeas corpus proceeding. Mr. Tressel's opinions, as set out in the affidavit, describe the manner in which these crimes were carried out, Petitioner's mental, physical and emotional state at the time of these crimes and the manner in which the victims died. As the Eleventh Circuit has held, the "mere fact that other witnesses might have been available or that other testimony might have been elicited...is not sufficient ground to prove ineffectiveness of counsel." *Waters v. Thomas*, 46 F.3d at 1514. As this Court finds that counsel's investigation, presentation of evidence and argument to attempt to show the lack of the premeditation of these crimes was reasonable, this claim of ineffective assistance is denied.

The Court also finds that Petitioner failed to establish prejudice with regard to Mr. Tressel's testimony given Mr. Tressel's reliance on inaccurate and unreliable information in reaching many of his conclusions as well as his clear bias in Petitioner's favor. Therefore, this claim of ineffective assistance of counsel is denied.

Trial counsel were not ineffective for declining to present the testimony of a toxicologist

This Court finds that counsel were not ineffective for declining to present a toxicologist to testify that Petitioner's alleged drug and alcohol use around the time of the murders of Mr. Hampton and Ms. Dixon caused him to "experience a drug-induced dissociative episode which significantly impaired his judgment, behavior, capacity to recognize reality, and his ability to conform his conduct to the requirements of law" and that "the toxic amount of alcohol and drugs ...would have had a continuing profound affect on Mr. Raulerson's physical, cognitive, and emotional abilities the following day" at the time of Ms. Taylor's murder.

As Mr. Hatfield testified, he did not believe that a Chatham County jury would have "thought "very much" of the claim that Petitioner was too "drunk or drugged" to know what he was doing as he had learned from experiences trying cases in south Georgia that people are" very unforgiving" when it comes to "that sort of drug and alcohol use." H.T.. at 264-266 *See also Id.* at 298-300. Accordingly, this Court finds that counsel reasonably refrained from securing and presenting the testimony of a toxicologist.

The reasonableness of counsels' strategic decision to decline to present such testimony is additionally demonstrated by the lack of credible evidence to support Petitioner's self-serving statements regarding the amount of alcohol and the types of drugs Petitioner allegedly consumed on the night and day in question and the lack of evidence regarding the quantity of drugs consumed. As a result, the possibility that a toxicologist

could have reached a credible, trustworthy opinion regarding the effects of drugs and alcohol on Petitioner at the time of the crimes is eliminated.

As the Eleventh Circuit held in *Tompkins v. Moore*, 193 F.3d 1327, 1337 (11th Cir. 1999), the opinion of an expert "that a defendant was intoxicated with alcohol or drugs at the time of the capital offense is unreliable and of little use as mitigating circumstances evidence when it is predicated solely upon the defendant's own self-serving statements." As a result of this holding, the Court finds that counsel were not deficient for declining to secure and present the testimony of a toxicologist and this claim of ineffective assistance is denied.

This Court also finds that Petitioner failed to establish prejudice with regard to this claim. As the Eleventh Circuit as held, "[e]vidence of drug and alcohol abuse is a two-edged sword." *Housel v. Head* 238 F.3d 1289, 1296 (2001). *See also Waldrop v. Jones*, 77 F.3d 1308, 1313 (11th Cir. 1996). Accordingly, this Court finds that there exists no reasonable probability that this evidence would have persuaded the jury to vote for a sentence less than death.

The Court finds that presentation of toxicology testimony would not have changed the outcome at trial in reasonable probability. Dr. Holbrook, the expert whom Petitioner retained in this habeas proceeding had no contact with Petitioner prior to rendering his conclusions. Dr. Holbrook based his opinions entirely on information provided by Petitioner's habeas counsel. H.T. 341-350. Additionally, the Court finds that the testimony of Dr. Holbrook is generally cumulative of the

evidence presented at trial. Accordingly, this Court denies the Petitioner's claim on this issue.

Trial counsel were not ineffective for declining to object to the State's guilt phase argument (Claim V, ¶ 39, footnote 4 of amended petition)

Petitioner also claimed that trial counsel were ineffective for declining to object to the State's guilt phase arguments that Petitioner saw Gail Taylor in the house prior to kicking down the door, that Petitioner "started out mean and grew up even meaner," that Dr. Grant was biased in favor of the defense given the amount of money that he was paid by the defense to work on this case and the prosecutor's characterizations of the victims as "good kids" who were neither under the influence of drugs or alcohol so as to refute any suggestion that they in some way provoked Petitioner's attack. This claim is without merit.

The Georgia Supreme Court has long held that "the permissible range of argument during summation is very wide." *Simmons v. State*, 266 Ga. 223 (1996). "Each party has the right to argue all reasonable inferences drawn from the evidence presented at trial." *Id.* "[I]ncidental characterizations of a victim are not improper in the guilt/innocence phase when they are necessary to show something sufficiently relevant." *Lucas v. State*, 274 Ga. 640 (2001). As the prosecutor's aforementioned arguments fell within the wide range of permissible argument as they were reasonable inferences based on the evidence presented and these arguments did not unfairly prejudice Petitioner, this Court finds that counsel were not deficient for declining to object to these arguments at trial or on direct appeal.

See (Testimony of Weyland Yeomans, Tr. T. Vol. 9, p. 16)(Petitioner acknowledged that "he heard someone in the house" and then "went to the door" and "kicked it open and "fell in the door.") and (Tr. R. 1524-1541)(photographs of the crime scene at Gail Taylor's home). *See also* (Tr. T. Vol. 10, p. 106).

Trial counsel were not ineffective for declining to object to the trial court's failure to charge the jury to consider verdicts of not guilty by reason of insanity and guilty but mentally ill in addition to the verdict of guilty but mentally retarded (Claim II, ¶ 23 (m) of amended petition as alleged as Petitioner's Brief)

According to O.C.G.A. § 17-7-131(b)(1), a trial court is only required to instruct the jury that it shall consider verdicts of not guilty by reason of insanity at the time of the crimes and guilty but mentally ill at the time of the crimes in addition to a verdict of guilty but mentally retarded where "the defense of insanity is interposed." O.C.G.A. § 17-7-131(b)(1). According to O.C.G.A. § 17-7-131(a)(1), insanity "means meeting the criteria of Code Section 16-3-2 or 16-3-3." O.C.G.A. § 16-3-2 defines insanity as the lack of mental capacity to distinguish between right and wrong" in relation to the crimes with which the defendant is charged. O.C.G.A. § 16-3-3 provides that mental capacity is lacking where the person "acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime[s]" with which he is charged. Following a review of the trial record in this case, this Court finds that counsel did not interpose a defense of insanity or mental incompetency. *See* Tr. T.

Vol. 10, p. 85 (wherein defense expert testified that Petitioner knows the difference between right and wrong). Accordingly, this Court finds that trial counsel were not deficient for declining to assert an objection to the absence of charges on these additional verdicts. Therefore, this claim is denied.

This Court also finds that counsel were not ineffective for declining to specifically raise the defense of guilty but mentally ill and request that the jury be charged to consider the additional verdict of guilty but mentally ill. According to O.C.G.A. § 17-7-131, defendants found guilty but mentally retarded or guilty but mentally ill are entitled to psychological evaluation and treatment, if necessary; however the explicit terms of the 1988 amendment to this statute provide that the death penalty is only prohibited for those persons found guilty but mentally retarded. Although the record showed that counsel presented evidence at the guilt phase of trial that Petitioner had mental health issues in addition to evidence of Petitioner's alleged mental retardation, this Court finds that counsel reasonably refrained from requesting that the jury be instructed to consider a guilty but mentally ill verdict in addition to the guilty but retarded verdict due to counsels' fear that the jury might choose the guilty but mentally ill verdict which would not have prohibited the imposition of the death sentence in lieu of the guilty but mentally retarded verdict. Therefore, this Court finds that counsel were not deficient in declining to request that this verdict be considered and denies the ineffectiveness claim.

SENTENCING PHASE ISSUES

This Court denies **Petitioner's Claim II, ¶ 23 (n) of the amended petition** wherein he alleged that trial counsel were ineffective for declining to object properly to unspecified items of improper evidence offered by the State in aggravation as Petitioner failed to establish deficient performance or actual prejudice to warrant a grant of relief on this claim.

Trial counsel were not ineffective for declining to question Mr. Reeves regarding his prior criminal record which consisted of burglaries and thefts given that the State presented evidence of Petitioner's commission of burglaries and thefts as non-statutory aggravating evidence. Tr. T. Vol. 13, pgs. 50-58. Accordingly, this claim of ineffective assistance of counsel is denied.

This Court also finds that trial counsel reasonably declined to cross-examine Mr. Reeves about his prior statements to law enforcement regarding an incident with Petitioner given the possibility that questioning Mr. Reeves about such statements could have caused the trial court to change his ruling and permit these statements to be admitted in their entirety, including Petitioner's racist remarks. *See* Tr. T. Vol. 13, p. 87. Given the fact that this Court finds that trial counsel reasonably believed that the admission of these remarks "in any...fashion" would have "sunk" their chances of obtaining a sentence less than death, particularly with "African-Americans on the jury," H.T. 230-232, this Court finds that counsel were not deficient for declining to cross-examine Mr. Reeves regarding alleged inconsistencies in his prior statements to police regarding this incident. Accordingly, this claim of

ineffectiveness is denied. The denial of this claim is further supported by this Court's finding that another witness, Virginia Roberson, Petitioner's first cousin, was available to corroborate Mr. Reeves' account. *See* Tr. R. 263-265, 905-907, and 1418-1419 and H.T. 4497-4499.

The Court also finds that Petitioner failed to establish prejudice regarding this claim as Ms. Roberson, if called by the State to confirm Mr. Reeves' account, could have testified to other damaging facts that were not otherwise presented to the jury, including that Petitioner had asked her to lie for him regarding his whereabouts on the weekend of these crimes, that he bragged to her that he could kill someone and get away with it, and that he told her that the person who committed these murders would never be caught. See H.T. 4440, 4497-4499 and Tr. R., pgs. 1418-1419.

Trial counsel were not ineffective for declining to further cross-examine Petitioner's brother, Christopher Raulerson (Claim II, ¶ 23 (w) of amended Petition

This Court also denies Petitioner's claim that counsel were deficient in the cross-examination of Christopher Raulerson. This Court finds that counsel conducted a reasonable factual investigation into the Petitioner's November 27, 1993, aggravated assault on his brother and violent conduct toward his mother and sister on that same occasion. The evidence showed that counsel spoke with Petitioner, his brother and his mother regarding this incident prior to trial. The evidence showed that counsel also reviews the police documentation and Petitioner's statements to the police regarding this

incident. *See* H.T. 174, 206-209, and 5994-6039. The Court finds that counsels' investigation showed Christopher Raulerson's account of the incident with Petitioner to be generally accurate. This Court finds that counsel were not deficient in declining to cross-examine Christopher Raulerson regarding the veracity of his testimony as further cross-examination of Christopher Raulerson could have resulted in the disclosure of additional damaging testimony that was not otherwise before the jury including evidence that Petitioner previously attacked him, that Petitioner frequently hit his ex-wife Stacy and that Christopher Raulerson walked in on Petitioner choking her on one occasion, and that Petitioner also "often physically and verbally" abused his mother and father. H.T. 4429-4430. *See Chandler v. U.S.*, 218 F.3d 1305, 1321 (11th Cir. 2000). For these reasons, this Court also denies the Petitioner's claim of prejudice. Accordingly, this claim of ineffectiveness is denied.

The Court also denies Petitioner's claim that counsel were deficient for declining to call other witnesses who were allegedly present during this incident in order to impeach the testimony of Christopher Raulerson's account. This Court finds that Petitioner failed to show that he did not threaten his brother with a gun, push his mother to the ground and punch his sister on the occasion to which Christopher Raulerson testified in the sentencing phase of trial. Tr. T. Vol. 13, pgs. 61-65. Additionally, this Court finds that counsel reasonably declined to call Petitioner's mother to testify regarding this incident as her cross-examination would likely have also revealed additional harmful testimony to Petitioner

that would not have played out well "in front of a jury." H.T. 204, including testimony as reflected in Audrey Sumner's social history that by age 10, Petitioner was "constantly picking fights" "with his younger brother," that he began beating her when he was 15 years old and that he beat his wife when she was pregnant with their child, Mandy. *See* H.T. 7204-7211.

This Court also rejects Petitioner's suggestion that counsel were deficient for declining to attempt to interview and call Petitioner's cousin, Tommy Richardson, to testify regarding this incident to attempt to impeach Christopher Raulerson's account. This Court finds that Petitioner did not indicate to counsel that Mr. Richardson was present during this incident and as Mr. Richardson's name is not reflected in the police records documenting this incident.. H.T. 5994-6018. See *Mulligan v Kemp*, 771 F.2d 1436.

This Court also finds that Petitioner failed to establish prejudice as to counsel's failure to call Mr. Richardson to testify as Mr. Richardson did not dispute that during this incident, Petitioner pulled a gun on his brother, pushed his mother to the ground and punched his sister in the face. The Court further finds that Petitioner admitted in a post-Miranda statement that his brother did not pull a knife on him until after Petitioner punched him and that he did threaten his brother with a gun. See H.T. 4406-4407. Therefore, this claim for ineffective assistance of counsel is denied.

Trial counsel were not ineffective for declining to present mitigating evidence in the penalty phase

The United States Supreme Court has held that "[t]he failure to present mitigating evidence during the penalty phase of a capital trial is not ineffectiveness per se." *Burger v. Kemp*, 483 U.S. 776 (1987). Accordingly, this Court denies Petitioner's claim that counsel were per se ineffective because they presented no evidence in mitigation at the sentencing phase of Petitioner's trial.

The Court also rejects Petitioner's allegation that counsel presented no mitigating evidence at trial. To the contrary, as previously listed in this order, this Court's review of the trial transcript showed that trial counsel presented substantial evidence in mitigation including the following:

1.) that Petitioner was physically abused by his parents;
2.) that Petitioner was verbally abused by his parents;
3.) that Petitioner grew up in an extremely dysfunctional environment;
4.) that Petitioner's family had a history of substance abuse;
5.) that Petitioner began abusing both alcohol and drugs at a very young age as a result of his environment and the history of abuse in the family;
6.) that Petitioner showed signs of brain damage;
7.) that Petitioner had a lifelong history of depression;
8.) that Petitioner was diagnosed by Dr. Grant as having major depressive disorder;

9.) that Petitioner had been diagnosed with attention deficit disorder and explosive disorder;
10.) that Petitioner had difficulty controlling his impulses;
11.) that Petitioner's alleged mental retardation resulted in increased aggressive behavior due to Petitioner's increased level of frustration;
12.) that Petitioner had previously attempted suicide and was hospitalized, thereafter;
13.) that Petitioner experienced marital difficulties that resulted in a divorce;
14.) that Petitioner often experienced blackouts following his use of alcohol and drugs;
15.) that Petitioner Petitioner engaged in a binge of alcohol and drug consumption in the days preceding the commission of the crimes

see generally, Tr. T. Vol. 10, pgs. 1-189).

At the conclusion of the sentencing phase, the trial court instructed the jury in accordance with Georgia law, that in arriving at the sentencing determination, they were "authorized to consider all of the evidence received" in court "in both stages of this proceeding, presented by the State and the defendant throughout the trial." *See* Tr. T. Vol. 13, p. 125.

This Court finds that under these circumstances, the presentation of evidence in mitigation in this case was reasonable. Although trial counsel did not present all arguably available evidence, this Court finds, in accordance with the directives of the United States Supreme Court, the Eleventh Circuit, and the Georgia Supreme Court, that Counsel were not constitutionally

deficient for declining to present additional mitigating evidence in the sentencing phase. *See Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995). Accordingly, this claim of ineffective assistance of counsel is denied.

Trial counsel were not ineffective for declining to present the testimony of Petitioner's immediate family members as mitigating evidence

Although trial counsel did not present the testimony of Petitioner's immediate family members as evidence in mitigation given that trial counsel reasonably believed, base on their investigation, that the testimony of these family members could have adduced additional harmful evidence that was not otherwise before the jury. H.T. 200, 261. The evidence in this case further showed that Petitioner's parents and other members of Petitioner's family were present in the courtroom throughout the course of Petitioner's trial to demonstrate their support for him. H.T. 200. *See Chandler v. U.S.*, 218 F.3d 1305, 1321 (11th Cir. 2000). Under these circumstances the Court denies Petitioner's claim that counsel were deficient for declining to call his immediate family members to testify as potential mitigating witnesses and denies this claim of ineffective assistance of counsel.

The Court also finds that there is no reasonable probability that the testimony of Petitioner's immediate family members would have influenced the jury more than their presence in court during the course of the trial. This fact is highlighted by the fact that most of the information contained in their affidavits for these proceedings are generally cumulative of the evidence presented at Petitioner's trial.

Trial counsel did not elicit testimony contained in the family member's affidavits regarding Petitioner's daughter, Mandy, because the prosecution could have responded to the presentation of such evidence by calling Petitioner's ex-wife, Stacy Cox. Ms. Cox made statements to GBI agents at the time of these crimes regarding the beatings she suffered from Petitioner during the course of their marriage. These beatings occurred even after the birth of Mandy. Ms. Cox's statement also included a recounting of Petitioner's threats to take her life as well as the lives of her family members. H.T. 4554-4556 and R. 927. This Court finds that there is no reasonable probability that this evidence would have changed the outcome of this case. Absent a showing of prejudice, this Court denies Petitioner's ineffective assistance of counsel claim.

Trial counsel were not ineffective for declining to present the testimony of Petitioner's extended family members as mitigating evidence

This Court also finds that counsel were not deficient for declining to interview all of Petitioner's extended family members and to call members of Petitioner's extended family and "friends" as potential mitigation witnesses. *See Holladay v. Haley*, 209 F.3d 1243, 1252 (11th Cir. 2000) and *Stanley v. Zant*, 697 F.2d 955 (11th Cir. 1983). Accordingly this claim of ineffective assistance of counsel is denied.

This Court also finds that Petitioner failed to establish prejudice with regard to the affidavits of these extended family members and friends. The testimony contained in the affidavits was generally cumulative of the evidence presented at trial including the abuse that

Petitioner was subjected to as a child, his dysfunctional family life, his family history of substance abuse, his own long-standing problems with drugs and alcohol and his alleged mental retardation.

This Court finds that the only evidence contained in these affidavits which is not cumulative of the evidence presented at trial is the testimony regarding Petitioner's attempt to perform CPR on his aunt in 1990, the testimony of that Petitioner picked up a young boy on the side of the road to take him to the police station to find his parents and the alleged mental problems that Petitioner's father, great-grandfather and grandmother experienced. This Court finds that there is no reasonable probability that the presentation of this evidence regarding Petitioner's isolated good deeds would have changed the outcome of this case in light of his extensive, prior criminal history and the horrific circumstances of these crimes.

Even assuming, arguendo, that the evidence regarding the alleged mental problems of Petitioner's father, great-grandfather and grandmother would have been admitted by the trial court despite its being highly speculative lay testimony on a subject-matter restricted to experts, see O.C.G.A. § 24-9-67, this Court finds that there is no reasonable probability that this evidence would have resulted in a sentence less than death as the Petitioner has failed to establish a link between the alleged undiagnosed mental problems of his ancestors bears upon his own claims of mental retardation and/or mental illness.

Trial counsel were not ineffective for declining to object to the prosecutor's sentencing phase argument. (Claim II, ¶ 23 (aa) of amended petition)

Petitioner also claimed that counsel were ineffective for declining to object to the prosecutor's argument on the issue of mercy. The prosecutor's argument is as follows:

He may say that the defendant is worth saving, that this jury should give him a chance at life, but he gave no chance to life for three people on May 30th and May 31st, 1993. He may argue this jury should show mercy to this defendant, although he showed no compassion or mercy to Jason and to Charlye and to Gail.

> The Bible tells us that we should have mercy and compassion for people. It does. However, the Bible also tells us that God gave man authority to make laws so that man could live amongst man until we all go to the point that we lived as Jesus lived. God gave us the authority to set up laws and to punish those people who violate our laws. In order to be a free society, in order to be safe, we must have laws that hold people accountable for their actions, and sometimes those laws must be applied in a way that give the ultimate punishment in a case such as this. The defendant showed no mercy or compassion to three people in May, 1993.

Tr. T. Vol. 13, p. 108.

Contrary to Petitioner's assertion, it is not improper for the State to vigorously urge that mercy is not

appropriate in the case at hand. *Johnson v. State*, 271 Ga. 375 (1999), *see also Hicks v. State*, 256 Ga. 715 (1987). In fact, the State is entitled to ask the jury not to be sympathetic to the defendant. *Hicks*, 256 Ga. 715, 730 (1987), and to urge vigorously that a death sentence is appropriate punishment in the case at hand. *Ford v. State*, 255 Ga. 81, 93 (1985).

The Court finds that the prosecutor in this case did not argue that the jury must exclude any consideration of mercy in violation of *Presnell v. Zant*, 959 F.2d 1524, 1530 (11th Cir. 1992), but rather argued that mercy was no appropriate in this case as Petitioner showed no mercy to his victims. As the argument was proper, this Court finds that counsel were not deficient for declining to object to it and accordingly denies this ineffectiveness claim.

Petitioner also claimed that counsel were ineffective for declining to object to the aforementioned reference to the Bible. This reference did not constitute an inflammatory appeal to the jurors' private religious beliefs to convince the jury to sentence Petitioner to death. *Hammond v. State*, 264 Ga. 879, 886 (1995). The Petitioner argues that *Carruthers v. State*, 272 Ga. 306, 310 (2000) is controlling in that its holding prevents language of command and obligation from a source other than Georgia law from being presented to a jury. The Court finds that the Petitioner's convictions and sentences were final at the time that *Carruthers* was decided, but the Court also notes that nothing in the prosecutor's arguments at Petitioner's sentencing phase cited the Bible in a way as to suggest language of command or obligation. As the Biblical reference

neither changed the result of the sentencing trial nor rendered it fundamentally unfair, this claim of ineffectiveness is denied.

Petitioner also claimed that counsel were ineffective for declining to object to the prosecutor's argument that death is the proper punishment in this case. However, this Court finds that the argument was proper. *Ford v. State*, 255 Ga. at 93. As a result, this Court denies Petitioner's claim that counsel were deficient for not objecting to this argument, and denies this claim for ineffective assistance of counsel.

Petitioner further claimed that counsel were ineffective for failing to object to the prosecutor's statement that "I submit to you that this is one of the worst cases that one can imagine." Tr. T. Vol. 13. p. 109. This Court finds that this statement did not suggest to the jury that the prosecutor had canvassed all murder cases and selected this one as particularly deserving of the death penalty, thus infringing on the jury's decision-making discretion and improperly invoking the prosecutorial mantle of authority. *Conklin v. State*, 254 Ga. 558 (1985), *see also Brooks v. Kemp*, 762 F.2d 1383, 1413 (11th Cir. 1985). Rather, this Court finds that this statement was a reasonable inference by the prosecutor based on the nature of these crimes and the evidence presented. *Simmons*, 266 Ga. at 228. Accordingly, this Court finds that counsel were not deficient for declining to object to this statement and denies this ineffectiveness claim. Additionally, this Court finds that there is no reasonable probability that prosecutorial experience or expertise played a discernible role in the jury's evaluation of the vileness and brutality of

Petitioner's crimes in view of the evidence. *Conklin*, 254 Ga. at 573.

Petitioner additionally alleged that counsel were ineffective for declining to object to the prosecutor's insertion of alleged improper victim-impact evidence into his closing argument. However, as the prosecutor's brief arguments regarding the emotional impact of the crime on the victim, the victim's family and the community, O.C.G.A. § 17-10-1.2(a)(1), were based on evidence presented in this case and reasonable inferences from the evidence presented and did not serve to inflame or unduly prejudice the jury, *Pickren v. State*, 269 Ga. 453, 454 (1998), this Court finds that counsel were not deficient for declining to object to these statements by the prosecutor. This Court denies the Petitioner's ineffective assistance of counsel claim on this issue.

Petitioner also claimed that counsel were ineffective for declining to object to the prosecutor's characterizations of Petitioner as being "mean from an early age,' " a cold-blooded killer" and an "enemy," as well as the prosecutor's statement that these crimes "exhibit what kind of creature we're dealing with." This Court finds that this claim is also without merit as the Georgia Supreme Court has held that a prosecutor is allowed considerable latitude in illustration and imagery in closing argument, *Philmore v. State*, 263 Ga. 67, 69 (1993), and that his "illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; if he will, give play to his wit, or wing to his imagination." *Conner v. State*, 251 Ga. 113, 122 (1983). In *Miller v. State*, 226 Ga.

730, the Georgia Supreme Court held that it was not error for the prosecutor to characterize the defendant as a "brute, beast, an animal and a mad dog who did not deserve to live" in light of all of the evidence presented. Given the wide latitude extended to the prosecutor in his closing arguments and considering all of the evidence presented at trial, the aforementioned characterizations were clearly permissible. Accordingly, this Court finds that counsel were not deficient for declining to object to these characterizations at trial or on direct appeal. This Court denies the Petitioner's claim of ineffective assistance of counsel on this issue.

Trial counsel were not ineffective in the presentation of their sentencing phase argument (Claim II, ¶ 23 (bb) of amended petition)

This Court finds that trial counsel were not deficient in their presentation of the sentencing phase argument. Additionally, this Court finds that the Petitioner did not suffer legally cognizable prejudice as a result of counsel's argument at the Petitioner's sentencing phase. Accordingly, this Court denies this claim.

Trial counsel were not ineffective for declining to present these issues during the Motion for New Trial or on Direct Appeal (Claim II, ¶23 (dd) and ¶¶ 25-27(a-c) of amended petition)

As Petitioner failed to establish deficient performance or prejudice with regard to any of the claims he raised, this claim is denied.

Trial counsel were not ineffective for declining to assert Brady Violations (Claim V, ¶ 39, footnote 4 of amended petition)

Petitioner alleged that counsel were ineffective for declining to assert a *Brady* violation for the State's alleged suppression of material information favorable to the defense at both phases of trial and for declining to assert a *Brady* violation regarding the State's alleged presentation of evidence that it allegedly knew or should have known to be false and/or misleading. The Court finds that Petitioner failed to show that counsel were deficient in declining to raise such a claim at trial or on direct appeal. Additionally, this Court finds that Petitioner failed to establish that there is a reasonable probability that the assertion of such a claim would have changed the outcome of this case. Therefore, this claim of ineffective assistance of counsel is denied.

Trial counsel were not ineffective for declining to object to the manner in which the prosecutor excised his peremptory strikes (Claim V, ¶ 40, footnote 5 of amended petition)

Petitioner also alleged that counsel were ineffective for declining to object to the prosecutor's alleged use of peremptory strikes in a manner to systematically exclude jurors on the basis of race and gender. Petitioner bears the burden of proof of establishing this claim. However, Petitioner has failed to provide support for this claim. Accordingly, this Court denies this claim of ineffective assistance of counsel as Petitioner failed to establish deficient performance or prejudice with regard to this claim.

Trial counsel were no ineffective for failing to object further to the State's opening statement at the guilt phase of trial (Claim V, ¶ 41, footnote 6 of amended petition)

Petitioner also alleged that counsel were ineffective for declining to raise additional objections to the State's opening statement at the guilt phase. However, this Court finds that Petitioner failed to show that counsel were deficient in declining to object to the portion of the prosecutor's opening statement that he asserts is improper. Further this Court finds that Petitioner failed to show that there is a reasonable probability that the outcome of this case would have been different had counsel objected to this portion of the State's opening statement. Instead, the Petitioner simply argued in his brief that "Petitioner's rights to due process and fair trial were violate by improper and prejudicial remarks in its opening to the jury," without specifying the alleged improper remarks, and that "[t]o the extent that Petitioner's counsel failed to object to these comments and seek a mistrial or other appropriate relief or to otherwise preserve objections," "counsel is ineffective and Petitioner was prejudiced thereby." Petitioner's Brief at 292-293. As Petitioner bears the burden of establishing this claim and has failed to do so, this claim is denied.

Trial counsel were not ineffective for declining to raise juror misconduct claims (Claim VII, ¶ 48, footnotes 8 and 9 of amended petition)

Petitioner alleged that counsel were ineffective for declining to allege that Petitioner's trial jurors: discussed the case after being admonish not to do so,

improperly considered extrajudicial matters, held improper racial attitudes which infected their deliberations, made false and misleading responses on voir dire, had improper biases which infected their deliberations, were improperly exposed to the prejudicial opinions of third parties, had improper communications with third parties including bailiffs and the trial judge and improperly prejudged the guilt and penalty phases of Petitioner's trial. Although Petitioner sought to admit the affidavits of several jurors in support of these claims, this Court excluded this evidence in its entirety upon reviewing these affidavits upon determining that the testimony contained therein violated the rule against the impeachment of a verdict. *Turpin v. Todd*, 268 Ga. 820 (1997). Petitioner presented no other evidence in support of these broad claims. This Court finds that Petitioner failed to carry his burden to prove that counsel were deficient for declining to raise these allegations or that Petitioner was suffered prejudice as a result of such deficiency. This Court denies this claim of ineffective assistance of counsel.

Trial counsel were not ineffective for declining to request that the issue of Petitioner's sentence be decided by a new jury (Claim VIII, ¶¶ 49-54, footnote 9 of amended petition)

Petitioner alleged that counsel were ineffective for declining to raise these claims. However, as the Georgia Supreme Court has repeatedly rejected the claim that a defendant is entitled to a different sentencing jury, *Ward v. State*, 262 Ga. 293, 200 (1992)(citing *Miller v. State*, 237 Ga. 557, 559 (1976)), this claim of ineffective assistance of counsel is denied.

SENTENCING PHASE JURY CHARGES

"Claims regarding sentencing phase jury charges in a death penalty case are never barred by procedural default." *Head v. Ferrell*, 274 Ga. at 403. Accordingly, this Court will address this claim regarding Petitioner's sentencing phase jury charge on its merits.

In Claim VI, ¶ 44 (g) and in Claim X, ¶¶ 57-59 or Petitioner's amended petition. Petitioner generally alleged that the instructions given to the jury at the sentencing phase of his trial violated the fifth, sixth, eighth and fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution. Petitioner specifically alleged that the jury was mislead by the instructions of the trial court to believe that the beyond a reasonable doubt standard applicable to a finding of mental retardation in the guilt-innocence phase applied to the sentencing phase and thereby was precluded from considering the evidence of mental retardation as a mitigating factor in the sentencing phase and that the trial court failed to adequately define mitigating circumstances. This Court finds that this claim is without merit.

A review of the record showed that the trial judge charged the jury on their consideration of circumstances in mitigation of punishment as follows:

> In arriving at this determination, you are authorized to consider all of the evidence received here in court in both stages of this proceeding, presented by the State and the defendant throughout the trial before you.

* * *

[Y]ou shall also consider the facts and circumstances, if any, in extenuation, mitigation, and aggravation of punishment. Mitigating or extenuating facts or circumstances are those which you the jury find do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame.

* * *

Members of the jury, under the laws of this state, a person found guilty of murder shall be punished by death, or life imprisonment without parole or life imprisonment. Under our law, a sentence of death or life imprisonment without parole shall not be imposed unless the jury finds, in writing, at least one or more statutory aggravating circumstances, and next sixes the sentence of death or life without parole in its verdict.

* * *

It s not required and it is not necessary that you find any extenuating or mitigating facts or circumstances in order for you to return a verdict setting the penalty to be imposed at life imprisonment...Whether or not you find any extenuating or mitigating facts or circumstances, you are authorized to fix the penalty at life imprisonment.

If you find from the evidence, beyond a reasonable doubt, the existence in this case of one or more aggravation circumstances as given to

> you in charge by the Court, then you would be authorized to recommend the imposition of a sentence of death, but you would not be required to do so. If you should find from the evidence in this case, beyond a reasonable doubt, the existence of one or more aggravating circumstances as given to you in charge by the Court, you would also be authorized to sentence the defendant to life in prison. You may fix the penalty at life imprisonment, if you see fit to do so, for any reason satisfactory to you, or without any reason.

Tr. T. Vol. 13, pgs. 125-132.

In viewing this charge as a whole, this Court finds that the trial court properly "charged the jury that it was not necessary to find any mitigating circumstances to impose a life sentence" in accordance with the requirements of law. *Palmer v. State*, 271 Ga. 234, 238 (1999). This Court finds that the jury was not misled into believing that the beyond a reasonable doubt standard applicable to a finding of mental retardation in the guilt phase applied to its consideration of alleged mental retardation as evidence in mitigating circumstances was sufficient. Accordingly, the claim is denied. Additionally the Court denies **Claim II, ¶ 23 (cc)** wherein the Petitioner alleged that trial counsel were ineffective for failing to object to this charge. The Petitioner has neither proved deficient performance by counsel or prejudice flowing from such deficiency. As a result the Court will deny this claim, as well.

The Court also denies Petitioner's suggestion that he was entitled to a charge that his allegation of mental

retardation was subject to a lower standard of proof in the sentencing phase. *Burgess v. State*, 264 Ga. 277, 291-292 (1994). In *Burgess*, the Georgia Supreme Court rejected the defendant's argument that he was entitled to have the jury charged that it could not impose a death sentence if it found by a preponderance of the evidence that he was mentally retarded, holding that "the giving of such a charge is entirely inconsistent with the General Assembly's establishment of a specific procedure for determining whether a defendant who claims to be mentally retarded should be sentenced automatically to life imprisonment, rather that be subject to the possibility that the jury would impose the death penalty at the sentencing phase." Accordingly, this claim is denied.

CHALLENGE TO SENTENCE OF DEATH BY ELECTROCUTION

In light of the holding of *Dawson v. State*, 274 Ga. 327 (2001), this Court finds that this claim is moot as the Georgia Supreme Court has held that a sentence of death by electrocution is unconstitutional.

CONCLUSION

After a review of the evidence, the parties' filings and the arguments presented in these proceedings, this Court hereby respectfully **DENIES** Petitioner's petition for habeas corpus relief, as amended.

SO ORDERED.

This 22nd day of March, 2004.

/s/ Robert W. Adamson
ROBERT W. ADAMSON, JUDGE
SUPERIOR COURT
BUTTS COUNTY
BY DESIGNATION

Appendix C

SUPREME COURT OF GEORGIA

Case No. S04E1707 Atlanta, January 11, 2005

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

BILLY DANIEL RAULERSON v. FREDRICK HEAD, WARDEN

From the Superior Court of Butts County.

Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied.

All the Justices concur, except Fletcher, C.J., who dissents.

1998V706

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

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

Chief Deputy Clerk.

Appendix D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14038-P

August 27, 2019

BILLY DANIEL RAULERSON, JR.,

Petitioner - Appellant,

versus

WARDEN,

Respondent - Appellee.

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

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

BEFORE: WILLIAM PRYOR, JORDAN, and HULL, 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 is also denied. (FRAP 40)

ENTERED FOR THE COURT:

/s/ William H. Pryor
UNITED STATES CIRCUIT JUDGE

ORD-46