No. _____

In The
Supreme Court of the United States

JAMES RANDALL ROGERS,

Petitioner,

v.

BRUCE CHATMAN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

During a 2005 trial to determine whether James Rogers is intellectually disabled and therefore ineligible for the death penalty, his jury was presented with two IQ scores obtained from intelligence testing that was administered during the developmental period but that had been normed decades earlier. When corrected to account for the Flynn effect – a well-established scientific principle demonstrating that aging norms cause scores to rise for each year since the test was normed – these scores were 73 and 76, within the range for intellectual disability. However, Rogers's counsel failed to explain or present evidence about the Flynn effect.

The question presented is this:

> Was Rogers denied effective assistance of counsel where (1) the only issue at trial was whether Rogers is intellectually disabled; (2) Rogers's IQ scores were within the range for intellectual disability with the Flynn effect, but outside the range without it; and (3) Rogers's counsel failed to explain the Flynn effect?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Petitioner James Rogers respectfully petitions this Court for a writ of certiorari to review the decision of the Supreme Court of Georgia.

OPINIONS BELOW

The unpublished order of the Superior Court of Butts County, Georgia, denying habeas corpus relief appears on pages 1-102 of the Appendix. The Supreme Court of Georgia's summary denial of a certificate of probable cause to appeal appears on page 103 of the Appendix.

JURISDICTION

The Superior Court of Butts County, Georgia, entered an order denying Rogers's petition for a writ of habeas corpus on April 11, 2014. App. 1. Rogers timely filed an application for a certificate of probable cause to appeal the Superior Court's ruling to the Supreme Court of Georgia, which entered an order denying a certificate of probable cause to appeal on October 19, 2015. App. 103. On January 4, 2016, Justice Thomas extended the time for filing this petition for writ of certiorari until March 17, 2016. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) (2001).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

INTRODUCTION

The sole issue at Petitioner James Rogers's 2005 trial was whether Rogers is intellectually disabled and therefore ineligible for the death penalty. Yet Rogers's counsel failed to explain to his jury that two IQ scores from his teenage years were obtained through outdated tests and, due to a well-established scientific principle known as the Flynn effect, required the deduction of points in order to accurately capture his intellectual functioning. Because these two scores fell within the range for intellectual disability

when corrected for the Flynn effect but outside that range when not, counsel's failure to explain the proper meaning of these scores was both unreasonable and prejudicial. Indeed, due to their ignorance of the Flynn effect, counsel attempted to exclude the most probative test for assessing Rogers's intellectual functioning.

STATEMENT OF THE CASE

A. Conviction and Sentence of Death

In 1982, Rogers was convicted and sentenced to death in Floyd County, Georgia, for the murder of his neighbor. He was 19 years old. After his conviction was overturned on direct appeal, the prosecution offered not to seek the death penalty if Rogers would plead guilty, H. 865-68,[1] but Rogers was unable "to adequately grasp his very serious plight," H. 867, so plea negotiations stalled. Rogers was again tried, convicted, and sentenced to death. *See Rogers v. State*, 344 S.E.2d 644 (Ga. 1986), *cert. denied*, 479 U.S. 995 (1986).

[1] "T. ___" refers to the designated page of the reporter's transcript from Rogers's intellectual disability trial. "R. ___" refers to the designated page of the clerk's record from Rogers's intellectual disability trial. "H. ___" refers to the designated page of the transcript and exhibits from state habeas corpus review of Rogers's intellectual disability trial.

B. Remand for Jury Trial on Issue of Intellectual Disability

After Rogers's conviction and sentence had become final, the Supreme Court of Georgia held that the state constitution bars the execution of the intellectually disabled.[2] *Fleming v. Zant*, 386 S.E.2d 339, 343 (Ga. 1989). Georgia's definition of intellectual disability mirrored the diagnostic criteria used by psychiatrists and psychologists, which required "significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." Ga. Code Ann. § 17-7-131(a)(3); *see Stripling v. State*, 401 S.E.2d 500, 504 (Ga. 1991). The Supreme Court of Georgia directed prisoners with claims of intellectual disability to submit a state habeas petition supported by at least one expert diagnosis of mental retardation. After making that showing, they would be remanded for a jury trial in which they would have to prove their intellectual disability by a preponderance of the evidence. *See Fleming*, 386 S.E.2d at 342-43.[3] After Rogers submitted a petition

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[2] "While this Court formerly employed the phrase 'mentally retarded,' [it] now us[es] the term 'intellectual disability' to describe the identical phenomenon." *Brumfield v. Cain*, 135 S. Ct. 2269, 2274 n.1 (2015) (quoting *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014)) (internal quotation marks omitted). Rogers does the same in this brief except when quoting sources that use the older phrase.

[3] Following this Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), the Supreme Court of Georgia adopted the procedure outlined above to determine whether a capital

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supported by the declarations of two psychologists who had examined him, administered intelligence testing, and diagnosed him as intellectually disabled, the habeas court remanded his case to the Superior Court of Floyd County. H. 2474.

C. Rogers's Attempted Waivers

Subsequent to the remand, Rogers – who suffers from several mental disorders and pronounced organic brain dysfunction[4] – became convinced that the proceedings concerning his intellectual disability were part of a conspiracy to prevent him from proving his innocence of murder. *See, e.g.*, H. 18250.[5] In an

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defendant is intellectually disabled for purposes of the Eighth Amendment. *See Rogers v. State*, 575 S.E.2d 879, 881-82 (Ga. 2003).

[4] An evaluation in 1977, when Rogers was 16 years old, found Rogers to have the "psychopathological features of [a] paranoid schizophrenic," noting that he was "almost obsessive about his various fears and concerns, and he is extremely impulsive." H. 975. The examiner recommended that Rogers "be moved as quickly as possible into long-term psychiatric care." *Id.* In 1984, a different examiner found "very strong evidence that Rogers suffers from a dysfunctioning brain" and predicted that Rogers "will tend to read malevolent meaning into neutral situations. He will tend to behave in a very impulsive manner and will demonstrate poor judgment and insight on an episodic basis." H. 982.

[5] Rogers wrote to numerous persons and entities seeking assistance in proving his innocence. In a letter to the Georgia Bureau of Investigation, for example, Rogers requested the agency's deployment of "microwave eaves[dropping] devices or laser dev[ices]" to investigate suspects. H. 1015. When his counsel

(Continued on following page)

attempt to persuade the superior court to abandon the intellectual disability trial and instead open an investigation into his innocence, Rogers sent letters to, *inter alia*, the presiding trial judge demanding termination of the proceedings because his lawyers "told [him] to cheat" on intelligence tests, T. 2015, and to a different state judge repeating the allegation against his counsel along with claims that prison correctional officers were stealing his outgoing mail and that the prison medical staff was trying to poison him, T. 2016. Rogers's counsel refuted those allegations, T. 1897-1914, which Rogers ultimately recanted, T. 1914-15.[6] While the superior court initially allowed his waiver, the Supreme Court of Georgia reversed and remanded for an intellectual disability trial,

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advised him to stop writing such letters, he promptly connected the intellectual disability proceeding to the conspiracy against him: "[S]o the way I see it these people (the judge, D.A. and lawyers) want's [sic] to protect the corruption in Floyd County. . . . I should have known better than to let the case get sent back to Floyd County. . . ." H. 1028. Rogers concluded that "[t]here's no way I'd get an investigation against them *so I'm sending a request to the court for a dismissal of the mental retardation trial. . . . [T]hen the case will go back to a high court and they will give me my investigation*." *Id.* Rogers's letter to the trial judge requesting the waiver of his trial came later that same month.

[6] The State Bar of Georgia also investigated the allegations and determined that they were unfounded. T. 1909-10.

holding that Rogers could not waive that proceeding. *Rogers v. State*, 575 S.E.2d 879, 882 (Ga. 2003).[7]

D. IQ Scores Presented at the Intellectual Disability Trial

Rogers was represented at his intellectual disability trial by Ralph Knowles – a civil litigator who had served pro bono as the principal lawyer in obtaining the reinstatement of the trial, but had such limited capital experience that he needed a waiver from the Supreme Court of Georgia to secure his appointment – and Jimmy Berry, who was appointed *sua sponte* by the trial judge to counter Knowles's inexperience. H. 102-03, 253-55. Berry had other cases at the time that kept him "run[ning] from courtroom to courtroom" and he "didn't do a lot of work on this case." H. 253. Knowles "essentially d[id] all the legal work and arguments and et cetera" himself, including consulting with experts. H. 254, 283-301.

"Rogers was hostile to anything being done for him." H. 261. However, Knowles believed that Rogers was intellectually disabled. H. 307. Knowles also believed that Rogers's IQ scores would be pivotal because "the way the evidence comes out is that if you're tested over [an IQ score of] 70 then you are not

[7] In two recent letters to the United States District Court for the Northern District of Georgia, Rogers again asserted that his intellectual disability proceedings are part of an effort by his current and former attorneys to undermine his innocence claim.

mentally retarded. [It] doesn't matter how many times I tell the jury to the contrary, I mean that's how it comes out because of the way the tests are set up, how they are done." H. 309. Knowles concluded that "it was extremely unlikely that we were going to win this case" if Rogers's IQ scores were taken at face value. H. 307-08.

When Rogers's trial was held in August 2005, Georgia law obliged him to prove by a preponderance of the evidence that he had significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior manifesting before he turned 18 years of age. *See Rogers*, 575 S.E.2d at 881-82. The only witnesses called by Rogers's counsel were the three psychologists who had evaluated him in the early 1990s, who concluded that he was intellectually disabled. T. 940-41 (Dr. Brad Fisher), 1125-26 (Dr. David Ryback), 1279-80 (Dr. Marc Zimmerman). The State called three experts in rebuttal. T. 1584 (Dr. Richard Hark), 1737 (Dr. Samuel Perri), 1819 (Dr. Robert Connell).

Every testifying psychologist acknowledged that a diagnosis of intellectual disability requires that a person's IQ score be two or more standard deviations below the mean, or approximately 70 points or less. T. 961-63 (Dr. Fisher), 1154, 1167-68 (Dr. Ryback), 1320-21 (Dr. Zimmerman), 1581 (Dr. Hark), 1732-33 (Dr. Perri), 1802-04 (Dr. Connell). The most contested issue at trial concerned the proper interpretation of Rogers's

scores on six intelligence tests administered by the testifying experts over a 23-year period.[8]

1977 WAIS (IQ 80). In 1977, when Rogers was 16 years old, psychologist and State's witness Richard Hark administered the Wechsler Adult Intelligence Scale (WAIS), which produced a full-scale IQ score of 80. T. 1300-04. This was the only reliable intelligence test given to Rogers before he reached adulthood.[9] Unaware that this score, if corrected for the Flynn effect, would place Rogers's IQ at 73, his counsel filed a motion to exclude it on the ground that the testing was privileged. T. 759-60. The trial court granted the

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[8] Regarding Rogers's adaptive deficits, jurors were aware that Rogers had serious difficulties in school. His school lacked a special education program, and Rogers was socially placed in the third and fifth grades before leaving in the seventh grade. T. 920-21. Rogers's first job was to "sort small spools" for a manufacturing company, but he "was not able to do that and they just moved him to a placement where [he] just move[d] these big spools. So there was no sophistication of any kind in the labor required there." T. 925. Rogers also worked as "the person that shoveled the asphalt" on a road construction crew. T. 925. Imprisoned since he was 19 years old, the bulk of Rogers's adult life was spent in an institutionalized setting. Four correctional officers testified that Rogers checked out library books and used a computer on occasion, but they also noted that they had limited interaction with Rogers and that life in prison is governed by simplified rules and practices. T. 1621-31, 1645-49, 1658-62, 1703-10. None of the correctional officers had actually seen Rogers read. T. 1630-31, 1646-47, 1659, 1709.

[9] There was also evidence that Rogers took the Peabody Picture Vocabulary Test at age seven and scored 78, but the test's 12-point standard error of measurement made it an unreliable guide to Rogers's general intelligence. T. 909-10.

motion, and counsel presented no evidence concerning this test. The State was subsequently permitted to question experts about the 1977 test, however, because Rogers's experts had relied upon it in formulating their opinions. T. 954-55, 1301-03, 1308-09.

1980 WAIS (IQ 84). In 1980, when Rogers was 19 years old, Dr. Hark again administered the WAIS, which produced a full-scale IQ score of 84. T. 1579. Even setting aside the Flynn effect, Dr. Hark acknowledged during his testimony for the State that Rogers's score might have been inflated by several points due to possible scoring errors. T. 1596-1600, 1603-05.

1984 WAIS-R (IQ 85). In 1984, psychologist and State's witness Robert Connell administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R), which produced a full-scale IQ score of 85. T. 1798-1802. On cross-examination, however, Dr. Connell appeared to concede that Rogers's IQ score was inflated by an impossibly high subtest score. T. 1851 (score was "unlikely").

1994 Stanford-Binet (IQ 68). In 1994, as a precursor to Rogers's petition for a remand for an intellectual disability trial, psychologist Marc[10] Zimmerman administered the Stanford-Binet Intelligence

[10] The trial transcript refers to Dr. Zimmerman as "Mark Zimmerman," App. 105, but his first name is Marc, H. 430.

Scale, Fourth Edition, which produced a full-scale IQ score of 68. T. 1246, 2010.[11]

1995 WAIS-R (IQ 70). In 1995, psychologist Brad Fisher administered the WAIS-R, which produced a full-scale IQ score of 66. T. 912, 2020. Dr. Fisher noted during cross-examination that he had miscalculated Rogers's score, which should have been 70. T. 1047-49.

2000 WAIS-III (IQ 89). In 2000, counselor James Mills administered the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III), which produced a full-scale IQ score of 89. T. 1435-36, 2030. The psychologist who interpreted this test, Dr. Samuel Perri, acknowledged that Rogers's performance on several subtests was unusually high. T. 1764, 1778-80. Regarding Rogers's performance on the Information subtest, Dr. Connell, another expert called by the State, testified that it was "quite unlikely" that Rogers would answer the questions correctly, adding that there was "[a] good probability that he wouldn't have been able to answer *any of them* correctly. . . ." T. 1855 (emphasis added).

Given the agreement among the experts that a diagnosis of intellectual disability required an IQ score of 75 or below, *see* T. 1953-54 (prosecutor noting that an IQ of 70 or below is the guideline, but that an

[11] Dr. Zimmerman used the Stanford-Binet rather than a Wechsler-series test in order to avoid any practice effect, as Rogers had taken three Wechsler tests by then. T. 1236.

IQ "up to a 75" is consistent with intellectual disability due to the standard error of measurement), an accurate understanding of what Rogers's IQ scores revealed about his intellectual functioning was pivotal. His scores of 68 and 70 facially placed that functioning within the significantly-subaverage range required for a diagnosis of intellectual disability. His remaining scores, however, appeared at first blush to place him outside of that range.

Despite the acknowledged importance of these scores, Rogers's counsel elicited no testimony from their experts concerning the proper interpretation of these scores and how they would be adjusted in a clinical setting to correct for the limitations of the tests themselves. As a result, the first and only mention of the Flynn effect – which is essential to a correct understanding of Rogers's IQ scores – came during the State's cross-examination of Dr. Zimmerman, who, when asked by the State to reconcile his opinion with the other intelligence tests that Rogers had taken, volunteered that "research in what's now called the Flynn effect would say that for each year a test exists after it's published and it hasn't been renormed that you . . . subtract .3 from the score." App. 105. While the State led Dr. Zimmerman through an *ad hoc* and sarcastic adjustment of Rogers's scores, Dr. Zimmerman noted that the Flynn effect would reduce Rogers's score on the 1977 WAIS from 80 to 73, and his score on the 1980 WAIS from 84 to 76. App. 105-09. Dr. Zimmerman's testimony was cursory and disorganized, *id.*, and trial counsel made no effort

to explain or clarify the matter on redirect, T. 1339-54.

To discourage jurors from accepting Rogers's two lowest scores of 68 and 70, the prosecutor offered, and the trial court allowed the jury to read, Rogers's letters accusing his lawyers of instructing him to underperform on the 1994 and 1995 intelligence tests. T. 1696-97, 1876-1892, 2035, 2037. The prosecutor argued that, in light of those letters, jurors should disregard Rogers's lowest scores. T. 1951-52. The prosecutor also emphasized the significance of Rogers's higher IQ scores, which were not called into question by the letters:

> [S]ignificantly subaverage general intellectual functioning basically means someone who has an IQ of 70 or below. And there is a little bit of variance for error in the test, whether it could be up to a 75 or down to a 65. *The issue in this case is, the State submits to you, Jimmy Rogers hasn't ever scored that. At least not on a legitimate test.*

T. 1953-54 (emphasis added). Thus, the prosecutor's argument was that Rogers had taken four "legitimate" IQ tests, and all four were in the 80s.

During the defense's closing argument, Rogers's counsel instructed the jury to "just wipe your mind clear" of Rogers's 1977 WAIS test score despite Dr. Zimmerman's testimony that the score was properly understood as a 73 and the prosecutor's concession that anything below 75 was consistent with a verdict

for Rogers. Regarding the remaining IQ scores, counsel referred back to Dr. Zimmerman's testimony, but revealed their continuing misunderstanding of its importance by conflating the Flynn effect with the practice effect:

> Well, Dr. Hark's [1980] score rather than an 84 should have been a 76. Dr. Connell's [1984] test rather than an 85 should have been an 84. *It should not affect the Stanford-Binet test at a 68 because that was the first test he had given him.* The WAIS-R that Dr. Fisher gave, he indicated that would be difficult to do because there may be 4 other points added to that, which could have taken it to 71 [sic]. But, with the Flynn effect that may affect that score. On the WAIS-3, that was given in 2000 rather than 89, it would have been a – possibly 88.

T. 1975-76 (emphasis added).

The jury returned a verdict finding that Rogers was not intellectually disabled. T. 2057. The Supreme Court of Georgia affirmed. *Rogers v. State*, 653 S.E.2d 31, 40 (Ga. 2007).[12]

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[12] Dr. David Schwartz, a psychologist who served at the time as Senior National Measurement Consultant for the Psychological Corporation, publisher of the WAIS-III, H. 39, 3242, submitted an affidavit for the appeal in which he opined, among other things, that Rogers to the highest degree of psychological certainty could not have achieved the scores he did on four of the WAIS-III subtests – Information, Comprehension,

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E. State Habeas Corpus Proceedings

In state habeas corpus proceedings, Rogers claimed that his counsel were ineffective for failing to reasonably explain how the Flynn effect impacted Rogers's test scores. Dr. Zimmerman provided the habeas court with the full explanation of the Flynn effect and its implications for Rogers's case that reasonable counsel would have elicited. As Dr. Zimmerman testified, intelligence tests "are designed so that the perfectly average person has an IQ of 100." H. 43. Publishers of the tests use a process called "norming" by which "they will select a population that is representative of the United States by age, by geographic region, by gender, and in some cases by culture, then they will give [the new intelligence test] to these people" to determine the mean score of the population. H. 42. However, the mean IQ score of the population does not remain at 100 as intelligence tests age. Mean performance has historically increased by approximately one-third of a point for every year that passes after the test is normed. H. 43. This phenomenon is widely known as the "Flynn effect," after James R. Flynn, the professor who conducted a statistical analysis of it,[13] but "it was a well-known phenomenon" before Flynn published his work. H. 42. Critically, the Flynn effect will cause a person's IQ score to

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Arithmetic, and Vocabulary – without intervention or some other causal factor external to Rogers's knowledge base, H. 3240.

[13] *See* James R. Flynn, *The Mean IQ of Americans: Massive Gains 1932 to 1978*, 95 Psychol. Bull. 29, 29-51 (1984).

"appear to rise *even though [the person's] intelligence has not*." H. 43. Therefore, an accurate assessment of an IQ score must account for the Flynn effect and "adjust for that problem" to avoid a misleadingly-high measure of a person's intellectual functioning when older instruments are used. H. 52.

Unlike Rogers's trial counsel, who told the jury to "wipe [its] mind clear" of the 1977 WAIS score, T. 1966, Dr. Zimmerman deemed the score "confirmative of my diagnosis" that Rogers is intellectually disabled, H. 55. The WAIS was normed in 1954, making it 23 years old by the time it was administered to Rogers. H. 56. Thus, Rogers's full-scale score of 80 on that test was properly understood as a 73.

Similarly, the 1980 WAIS was inflated by approximately eight points, as 26 years had intervened between the norming of the test and its administration to Rogers. H. 56. Rogers's score of 84 on that test was thus properly understood as a 76. H. 56-57. In addition, Dr. Zimmerman testified that "one would have to assume there was a practice effect" because Rogers had taken the same test three years earlier. H. 57. Therefore, a score of 76 likely overstated Rogers's intellectual functioning and was consistent with intellectual disability.

The state habeas court denied relief on these claims because it found that evidence concerning the Flynn effect was presented to the jury during Dr. Zimmerman's cross-examination by the State. App. 70-72. Rogers applied for a certificate of probable

cause to appeal the state habeas court's denial of relief. Under Rule 36 of the Rules of the Supreme Court of Georgia, "[a] certificate of probable cause to appeal a final judgment in a habeas corpus case involving a criminal conviction will be issued where there is arguable merit. . . ." The Supreme Court of Georgia denied the application in an unexplained summary order. App. 103. This petition follows.

REASONS FOR GRANTING THE WRIT

I. TRIAL COUNSEL UNREASONABLY FAILED TO UNDERSTAND OR EXPLAIN THE SIGNIFICANCE OF ROGERS'S INTELLIGENCE TEST SCORES.

Particularly in a case where a capital defendant has made a prima facie showing that he is intellectually disabled and ineligible for a sentence of death, he must have "the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).[14] The right to counsel requires that an attorney meet "at least a minimum standard of competence" by making decisions that are "'reasonable considering all the circumstances.'" *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (per curiam)

[14] Under Georgia law, a trial on intellectual disability is formally part of the "guilt-innocence phase" of a capital case. *Stephens v. State*, 509 S.E.2d 605, 609 (Ga. 1998).

(quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

The performance of Rogers's counsel fell below that minimum. In a proceeding that hinged on explaining what their client's IQ scores revealed about his intellectual functioning, they failed to provide the jury with a meaningful explanation of how those scores must be interpreted to account for the limitations of the tests themselves. These deficiencies are manifest in trial counsel's admonishing the jury to disregard the 1977 WAIS score, which is the only test conducted during Rogers's developmental period and, when adjusted for the Flynn effect, places him squarely within the range of significantly subaverage intellectual functioning. As these errors cannot be attributed to reasonable strategic judgment and prejudiced Rogers, this Court should grant certiorari and reverse.

A. Counsel Unreasonably Failed to Explain the Importance of the Flynn Effect, Which Placed Four of Rogers's Six IQ Scores at or Near the Accepted Diagnostic Range.

Counsel's ineffectiveness deprived the jury and the state courts of the information necessary to decipher the meaning of Rogers's intelligence testing and to determine his eligibility for a death sentence. An intellectual disability trial in Georgia presents a situation where "'the only reasonable and available

defense strategy requires consultation with experts or introduction of expert evidence.'" *See Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 106 (2011)). Under the Eighth Amendment, the determination of whether a person "fall[s] within the range of [intellectually disabled] offenders about whom there is a national consensus [against the death penalty]" is linked to "clinical definitions" applied by psychologists. *Atkins v. Virginia*, 536 U.S. 304, 317 & n.22 (2002). Georgia similarly incorporates clinical definitions into its intellectual disability determinations. *See* Ga. Code Ann. § 17-7-131(a)(3); *Stripling v. State*, 401 S.E.2d 500, 504 (Ga. 1991). Indeed, Georgia requires "at least one expert diagnosis of mental retardation" before it will even afford a death-sentenced prisoner a trial on that issue. *See Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga. 1989). Thus, the range of choices that could "make the adversarial testing process work in th[is] particular case," *Strickland*, 466 U.S. at 690, cannot be understood apart from the clinical determination that lies at the center of the proceeding.

Under clinical definitions, "'[t]he essential feature of [intellectual disability] is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur

before age 18 years (Criterion C).'" *Atkins*, 536 U.S. at 308 n.3 (quoting *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000)).

While Georgia's definition of intellectual disability did not have a strict IQ-score cutoff, both the state and defense experts agreed that a diagnosis of intellectual disability requires an IQ score of two or more standard deviations from the mean, T. 961-63, 1167-68, 1320-21, 1581, 1732-33, which equates to a score of roughly 70 or below on Wechsler and Stanford-Binet series tests, where 100 is the mean IQ score and the standard deviation is approximately 15 or 16 points. The State conceded that the "variance for error in the test" meant that a score consistent with intellectual disability "could be up to a 75." T. 1954. While Rogers's scores on the tests administered by the defense experts – 68 and 70 – fell within this range, his other recorded scores – 80, 84, 85, and 89 – fell outside of it, at least when taken at face value.

As demonstrated in state habeas proceedings, however, those scores cannot be taken at face value. An explanation of the Flynn effect would have demonstrated that Rogers had indeed scored within the intellectually disabled range on a "legitimate test," T. 1953-54, and emphasized that the true outliers in measuring his intellectual functioning were his highest scores of 85 and 89, and not his lowest scores of 68 and 70.

Dr. Zimmerman provided the state habeas court with testimony concerning the proper interpretation

of intelligence testing that counsel neglected to elicit at trial. He explained that intelligence tests "are designed so that the perfectly average person has an IQ of 100." H. 43. As intelligence tests age, however, performance on those tests has historically increased by approximately one-third of a point for every year that passes after the test is normed. H. 42-43. Due to the extremely outdated WAIS test administered in 1977 and 1980, Rogers's scores were inflated by six to eight points. H. 42-43, 52.

Reasonable counsel could also have used their experts to establish that consideration of the Flynn effect was a well-established professional norm among psychologists. An American Association on Mental Retardation treatise that was widely used at the time of Rogers's trial cites Professor Flynn's research in emphasizing that "it is critically important to use standardized tests with the most updated norms." *Mental Retardation: Definition, Classification, and Systems of Supports* 56 (10th ed. 2002).[15] The American Psychological Association had recognized the Flynn effect as well. *See* Ulric Neisser, *Introduction: Rising Test Scores and What They Mean*, *in* The Rising Curve: Long-term Gains in IQ and Related Measures 3, 4 (Ulric Neisser ed.) (Am. Psychol. Ass'n 1998)

[15] A companion guide to that treatise recognizes that "the clinician needs to . . . take into consideration the Flynn Effect as well as the standard error of measurement when estimating an individual's true IQ score." H. 13789-90.

("Psychometricians have long known that test performance tends to rise from one generation to the next."). Accordingly, in the wake of this Court's 2002 *Atkins* decision the Flynn effect was understood by lawyers and psychologists alike to play a significant role in determining whether a capital defendant seeking relief under *Atkins* had the requisite level of intellectual functioning.[16]

In a case such as this, where the jury's incorrect understanding of the meaning of an IQ score can result in an unconstitutional sentence of death remaining in place, counsel's basic duties include understanding and effectively presenting the information necessary for the jury to interpret those results, particularly when they obscure their client's low IQ.[17]

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[16] *See, e.g.*, Linda Knauss *et al.*, *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following* Atkins v. Virginia, 11 Widener L. Rev. 121, 127 (2004); LaJuana Davis, *Intelligence Testing and* Atkins*: Considerations for Appellate Courts and Appellate Lawyers*, 5 J. App. Prac. & Process 297, 309 (2003); Tomoe Kanaya *et al.*, *The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores Via Mental Retardation*, 58 Am. Psychol. 778, 789 (2003).

[17] *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.2.D (1989) (requiring counsel to present "favorable information consistent with the defense sentencing theory" in "the most effective possible way"); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11 cmt. (2003) (requiring counsel to "remain current on developments in fields such as neurology and psychology"); *cf. Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (recognizing ABA Standards as "valuable

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Lawyers for capital defendants in Georgia and across the nation have recognized this duty and addressed the Flynn effect when attempting to show that their death-sentenced clients were intellectually disabled. *See, e.g.*, *In re Hicks*, 375 F.3d 1237, 1242-43 (11th Cir. 2004) (Birch, J., dissenting from denial of motion to file second or successive habeas corpus petition) (quoting brief of Georgia lawyer claiming his client's IQ score of 94 was unreliable "because the Flynn Effect would cause any score obtained on the WAIS in 1985 to be artificially inflated").[18]

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measures of the prevailing professional norms of effective representation").

[18] *See also*, *e.g.*, *In re Salazar*, 443 F.3d 430, 433 n.1 (5th Cir. 2006) (addressing Flynn effect); *Walker v. True*, 399 F.3d 315, 323 (4th Cir. 2005) (same); *Berry v. Epps*, No. 2:04-CV-328-D-D, 2006 WL 2865064, at *35 (N.D. Miss. Oct. 5, 2006) (same); *Murphy v. Ohio*, No. 3:96-CV-7244, 2006 WL 3057964, at *3 (N.D. Ohio Sept. 29, 2006) (same); *Green v. Johnson*, 431 F. Supp. 2d 601, 615 (E.D. Va. 2006) (same); *Rivera v. Dretke*, No. 03-CV-139, 2006 WL 870927, at *14 (S.D. Tex. Mar. 31, 2006) (same), *vacated in part on other grounds*, 505 F.3d 349, 363 (5th Cir. 2007); *Cummings v. Polk*, No. 5:01-CV-910-BO, 2006 WL 4007531, at *30 (E.D.N.C. Jan. 31, 2006) (same); *Walton v. Johnson*, 269 F. Supp. 2d 692, 699 n.5 (W.D. Va. 2003) (same), *rev'd on other grounds*, 407 F.3d 285, 296 (4th Cir. 2005), *vacated* 440 F.3d 160, 178 (4th Cir. 2006) (en banc); *People v. Superior Court*, 28 Cal. Rptr. 3d 529, 559 (Cal. Ct. App. 2005) (same), *rev'd on other grounds*, 155 P.3d 259, 268 (Cal. 2007); *Bowling v. Commonwealth*, 163 S.W.3d 361, 375 (Ky. 2005) (same); *State v. Murphy*, No. 9-04-36, 2005 WL 280446, at *2 (Ohio Ct. App. Feb. 7, 2005) (same); *Myers v. State*, 130 P.3d 262, 268 n.11 (Okla. 2005) (same); *Black v. State*, No. M2004-01345-CCA-R3-PD,

(Continued on following page)

Rogers's trial was not held in "an era of card catalogues" where uncovering the phenomenon's existence would have taken special effort. *Cf. Maryland v. Kulbicki*, 136 S. Ct. 2, 4 (2015) (per curiam). The defense's own expert could have easily explained the concept if counsel had only asked him about the older testing. *Cf. Rompilla v. Beard*, 545 U.S. 374, 384 (2005) ("[T]he prior conviction file was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried."). And there was no downside to presenting this evidence. Unlike a test's standard error of measurement, which introduces the possibility that a score is lower *or higher* than measured, *see Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014), the Flynn effect would only apply when aging norms have inflated the score.

Instead, counsel threw up their hands, opting to argue that an IQ score "is just a number" that should not be determinative of the jury's decision. H. 309. Even at the time, however, counsel recognized that this strategy was unreasonable: "[T]he way the evidence comes out is that if you're tested over 70 then you are not mentally retarded. [It] doesn't matter how many times I tell the jury to the contrary, I mean that's how it comes out because of the way the tests are set up, how they are done." H. 309-10 ("[T]here's something magical about putting up a chart that has 70 and under."). The trial judge viewed the issue this

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2005 WL 2662577, at *14 (Tenn. Crim. App. Oct. 19, 2005) (same).

way as well, remarking to counsel, "I mean, you know, you've got to be like 70 to be mentally retarded." T. 279.

Even when the State inadvertently elicited the very information about the Flynn effect that counsel needed to make their case, they ignored it. Accordingly, Rogers's jury heard nothing beyond Dr. Zimmerman's accidental colloquy with the State to persuade them that this counterintuitive phenomenon was credible. When the defense mentioned the Flynn effect for the first time – during their closing argument – they conflated the Flynn effect with the very different concept of practice effect. T. 1975 (arguing that the Flynn effect "should not affect the Stanford-Binet test at a 68 because that was the first test he had given him"). This presentation was so unlikely to persuade anyone to reconsider Rogers's test scores that it was equivalent to no presentation at all.

The state habeas court nonetheless ruled that counsel's performance was not deficient. With respect to Rogers's 1977 WAIS score, the court found that "testimony regarding the Flynn Effect in relation to the 1977 WAIS was presented to the jury" during the State's cross-examination of Dr. Zimmerman. App. 70. Regarding the 1980 WAIS, the habeas court relied on the same finding. App. 72. The habeas court also found that counsel were not deficient for failing to explain how the Flynn effect lowered the 1980 WAIS score because the Flynn effect would only reduce Rogers's score on that test to 76, which "is still above

70 even when adjusted for the standard error of measurement." App. 73.

The habeas court's analysis of counsel's performance disregarded the standards set out in this Court's cases. The determination that counsel performed reasonably merely because the State elicited some testimony about the Flynn effect is flawed by its failure to examine counsel's actions at Rogers's trial. *See Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986). While Dr. Zimmerman's testimony may be "pertinent to the determination whether [Rogers] was prejudiced by his attorney's incompetence, it sheds no light on the reasonableness of counsel's decision" in this case to ignore the Flynn effect until closing argument. *Id.* at 387.

The habeas court also failed to consider counsel's own effort to rely on the phenomenon to explain Rogers's IQ scores. The fact that counsel ultimately tried to persuade jurors that the Flynn effect was important to Rogers's case, T. 1975-77, 1985, should have raised a concern that neglecting it until closing argument "was the result of inattention" to the potential force of Dr. Zimmerman's testimony, *see Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

Similarly, the habeas court erroneously held that counsel reasonably chose not to explain how the Flynn effect influenced the 1980 WAIS score because the "adjusted score of 76 is still above 70." App. 73. In fact, Rogers's counsel affirmatively argued to the jury that an IQ score of 76 *was* favorable to Rogers. T. 1985

("If it's 76, it fits right into the 70 to 75."). Moreover, the Flynn effect was not the only reason for a downward adjustment of that score. As the habeas court recognized, defense expert Dr. Ryback "effectively attacked Dr. Hark's 1980 test and pointed out several mistakes in scoring the test." App. 72. The habeas court's determination that those results had been "effectively attacked" without accounting for the Flynn effect "should have, at the very least, called into question the reasonableness of" counsel's failure to follow through with evidence that would have supported a further reduction in the score. *See Sears v. Upton*, 561 U.S. 945, 953 (2010) (per curiam).

In short, three psychologists testified that Rogers was intellectually disabled, and Rogers's counsel believed that he was. H. 307-08. Any reasonable approach to the range of IQ scores in this case – including a step as basic as asking their own experts how they reconcile these scores with their diagnoses – would have readily informed counsel of the Flynn effect, and any competent counsel would have recognized the impact it could have on jurors' assessment of Rogers's intelligence. With little additional effort, Rogers's counsel could have made a compelling case that most of Rogers's scores supported a finding of intellectual disability. The best explanation for counsel's failure to do so is "inattention, not reasoned strategic judgment," *Wiggins*, 539 U.S. at 526, and counsel therefore failed to provide effective assistance.

B. Counsel Unreasonably Instructed Jurors to Disregard Rogers's 1977 WAIS Score, Which Was the Best Evidence That They Had Concerning Rogers's Extremely Low Intellectual Functioning.

Even if this Court concludes that Rogers's jury was reasonably apprised of the Flynn effect by the State's unintentional elicitation of it, counsel unreasonably undercut whatever power it would have had upon the jurors by directing them to ignore entirely Rogers's score on the 1977 WAIS – a score that would have been the centerpiece of any reasonable counsel's case.

During voir dire, Rogers's counsel learned that the 1977 WAIS test administered by Dr. Hark had been initiated for the purpose of treating Rogers, who, at 16 years old, had attempted suicide by setting mattresses on fire in his jail cell after an arrest for public drunkenness. T. 759; H. 447. The trial court ultimately granted the defense's motion to exclude this evaluation as privileged. T. 1563. But as Rogers's own experts had based their opinions on the 1977 test, the trial court also allowed the State to cross-examine them about it. *See, e.g.*, T. 1303-04. Defense counsel objected that the jury would suspect that the defense was "trying to hoodoo them in some way" if the 1977 test were exposed to the jury without being accounted for in the defense's presentation, but the trial court overruled the objection and instead offered

the defense an opportunity to explain the 1977 score with evidence of their own. T. 1303-04.

Shortly after counsel learned that the 1977 score would not be kept fully out, however, the State's cross-examination of Dr. Zimmerman revealed information about that test that would have made reasonable counsel very happy to have it before the jury: specifically, that its score would be 73, not 80, when corrected for the Flynn effect. App. 105. But Rogers's counsel failed to grasp the import of this revelation. Indeed, during their redirect of Dr. Zimmerman, counsel's only reference to the 1977 score was that it was five points higher than 75. T. 1347. Defense counsel did not even acknowledge Dr. Zimmerman's crucial testimony that the 1977 score, when corrected, fell two points *below* 75. Counsel then played into their own concern that jurors would "think that we are trying to hoodoo them" by failing to account for the 1977 test after the State made an issue of it. Instead, they cryptically instructed the jury during closing argument, "There was a WAIS-R [sic] done by Dr. Hark in 1977. The Court has taken those. You will not be looking at those. They have taken those away from you to be able to look at. So, we are not going to – if you will, *just wipe your mind clear of those particular documents*." T. 1966 (emphasis added).

Ironically, trial counsel were directing the jurors to wipe their minds of the most powerful evidence they had of Rogers's significantly subaverage intellectual functioning. The 1977 WAIS score was well within the range for an intellectual-disability diagnosis and

established that Rogers's extremely low intelligence dated back to his childhood. T. 1308. Further, the 1977 WAIS would have provided powerful rebuttal evidence to the State's insinuation that Rogers's lowest two IQ scores were the product of malingering. By the time that Rogers's counsel advised jurors to ignore the score, the trial court had admitted into evidence the two letters suggesting possible underperformance on the 1994 and 1995 evaluations, which had produced the only scores that on their face supported Rogers. The 1977 WAIS, which predated any arguable incentive for Rogers to malinger, could have combated that suggestion. Counsel instead treated it as a liability.

And the damage went beyond merely negating the 1977 score. By asking the jurors to purge from their memory a test score that would have been highly favorable once corrected, counsel undermined both the Flynn effect and their own expert, as the only possible explanation for such a directive is that counsel thought the Flynn effect illegitimate and Dr. Zimmerman either inept or dishonest.

Counsel's tactic is all the more jarring given their subsequent attempt to rely upon the Flynn effect in their closing argument with respect to other tests. T. 1975-76, 1985. Surely this begged the question for the jurors of why counsel would ask them to apply the Flynn effect to one test while simultaneously insisting that they disregard the test most dramatically affected by its application. These inconsistent courses of action bespeak deficient performance. *See Wiggins*

v. Smith, 539 U.S. 510, 534 (2003); *see also Porter v. McCollum*, 558 U.S. 30, 32 (2009) (per curiam).[19]

The state habeas court found that because "testimony regarding the Flynn Effect in relation to the 1977 WAIS was presented to the jury" when Dr. Zimmerman was cross-examined by the State, "counsel's strategic decision to exclude Dr. Hark's 1977 WAIS was reasonable and Petitioner has failed to show deficient performance or resulting prejudice." App. 70-71. But that analysis improperly conflates *Strickland*'s performance and prejudice inquiries, *see Kimmelman*, 477 U.S. at 387, and fails to engage with the "'all the circumstances'" of Rogers's trial, *see Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (per curiam) (quoting *Strickland*, 466 U.S. at 688). The habeas court disregarded counsel's inconsistent attempt to persuade jurors that the Flynn effect was credible, T. 1975-76, their belief that jurors would not return a verdict for Rogers absent a score of around 70, H. 309, and their concern that jurors would discount Rogers's only other scores within that range as a result of Rogers's letters, T. 1975-76.

Even granting considerable deference to counsel's strategic decisions, their attempts to minimize the 1977 WAIS score cannot be reasonable under these circumstances, where the decision excluded the best

[19] *See generally* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.10.1 (2003) (directing counsel "to minimize any inconsistencies").

evidence they had of Rogers's significantly subaverage general intellectual functioning. The unique circumstances of this case overcome any presumption of reasonableness and demonstrate that counsel's decision to exclude the 1977 WAIS violated the "minimum standard of competence." *Hinton*, 134 S. Ct. at 1088.

II. ROGERS WAS PREJUDICED BY THE JURY'S LACK OF INFORMATION ABOUT HIS INTELLIGENCE TEST SCORES.

In light of the narrow purpose of the trial and the profound difference that a minimally adequate explanation of Rogers's intelligence scores could have made to the jury's verdict, the failure of Rogers's counsel to address the significance of Rogers's intelligence test scores is an error "sufficient to undermine confidence" in the jury's finding that Rogers is not intellectually disabled. *See Porter v. McCollum*, 558 U.S. 30, 44 (2009) (per curiam).

Whether Rogers was found intellectually disabled depended on which of his six IQ scores were outliers and which represented his true intellectual functioning. While the State conceded that a qualifying IQ score of "up to a 75" would support an intellectual disability finding, it insisted that "Jimmy Rogers hasn't ever scored that. *At least not on a legitimate test*." T. 1954 (emphasis added). In support of that argument, the State asserted that Rogers's scores of 68 and 70 on the tests that led to his remand were unreliable,

given his attempt to waive the intellectual disability trial by claiming that his counsel had instructed him to "cheat." T. 2035, 2037.

A reasonable presentation of the Flynn effect would have allowed the jury to find that Rogers's 1977 and 1980 WAIS tests placed his intellectual functioning within the range of the intellectually disabled and, moreover, were consistent with the scores and diagnoses that the State sought to discredit.[20] The State offered no reason to doubt Rogers's effort on the 1977 and 1980 WAIS tests. Jurors accepting the Flynn effect thus could have found that four of Rogers's six IQ scores, including his two earliest, were properly understood as being at or below 75.

At the same time, the Flynn effect would have confirmed for the jurors that Rogers's highest recorded IQ scores of 85 and 89 were the outliers. *See Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014) (per curiam) ("Prosecution experts . . . sometimes make mistakes."). Dr. Ryback testified that it was "highly, highly unlikely" that Rogers achieved a full-scale IQ score of 85 on the 1984 WAIS-R. T. 1177. Similarly, State psychologist Dr. Connell testified that it was

[20] While the Flynn effect alone would not have adjusted the 1980 WAIS score below 75, the state habeas court found that psychologist Dr. Ryback "effectively attacked [the] 1980 test and pointed out several mistakes in the scoring of the test." App. 72. In addition, Dr. Zimmerman testified in habeas proceedings that a practice effect could have inflated Rogers's score on that test. H. 57.

"quite unlikely" that Rogers achieved the scores attributed to him on the 2000 WAIS-III. T. 1855.[21] The impact of this testimony was no doubt muted by the perception that Rogers had scored at or above 80 on two other tests, but it would have had tremendous effect upon a jury that had been properly educated on the Flynn effect, which placed Rogers's remaining four scores at 76 or below.

A complete understanding of Rogers's test scores would also have shifted the jurors' understanding of the letters purportedly written by Rogers that the State introduced to cast doubt on the 1994 Stanford-Binet and the 1995 WAIS-R. Jurors were already aware that "Rogers was highly shameful of being called mentally retarded," T. 1212, and the letters support that conclusion, T. 2037. If jurors had recognized that Rogers's corrected scores on the 1977 and 1980 WAIS tests – which were not called into doubt by the letters – actually placed him within the range of significantly subaverage intellectual functioning, they would have taken a more skeptical view of what those letters signified.[22]

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[21] After the trial, a psychologist employed by the WAIS-III's publisher reviewed Rogers's testing and concluded that his scores on four subtests were impossibly high. H. 3240-42.

[22] The content of the letters gave cause for doubt. For example, one letter alleged that correctional officers stole Rogers's mail and "tried to give me a stroke with the drug rush" when he complained. T. 2037.

A prejudice inquiry requires a "probing and fact-specific analysis that the state trial court failed to undertake" in its order denying relief. *See Sears v. Upton*, 561 U.S. 945, 955 (2010) (per curiam). The habeas court held that Rogers was not prejudiced by his counsel's exclusion of the 1977 WAIS score or failure to explain the Flynn effect to the jury because "testimony regarding the Flynn Effect" was "presented to the jury" during Dr. Zimmerman's cross-examination by the State. App. 70-71, 72-73. "It is true that [Dr. Zimmerman's] testimony would have done [Rogers] a lot of good *if the jury had believed it*." *See Hinton*, 134 S. Ct. at 1089. But the jury clearly did not accept his testimony, and the reason was that it was presented in an unpersuasive manner more likely to utterly confuse the jury, s*ee* App. 105-09, than convince them that the Flynn effect was worthy of consideration.

Under a proper *Strickland* analysis, Rogers was prejudiced by his counsel's failure to provide a credible account of the Flynn effect and their unreasonable decision to ignore the significance of Rogers's 1977 testing. Rogers should be granted an opportunity to have the question of his intellectual disability decided at a trial where he has the assistance of counsel who understand and explain to jurors the significance of his extremely low intelligence test scores.

III. THE COURT SHOULD GRANT REVIEW TO GIVE GUIDANCE ABOUT THE IMPORTANCE OF WELL-ESTABLISHED SCIENTIFIC PRINCIPLES TO DEATH-PENALTY ELIGIBILITY.

This Court has recognized that "in using [intelligence test] scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability."). The Flynn effect is "a well-known phenomenon" among clinicians. H. 43. Experts advise that "[i]n cases where a test with aging norms is used, a correction for the age of the norms is warranted." H. 13789-90. That advice has constitutional significance in the context of a capital case, where "[f]ailure to adjust IQ scores in the light of IQ gains over time turns eligibility for execution into a lottery – a matter of luck about what test a [particular] psychologist happened to administer." James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 Psychol. Pub. Pol'y & L. 170, 174-75 (2006); *see Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (noting the "special need for reliability in the determination that death is the appropriate punishment" (citation and internal quotation marks omitted)).

Executing an intellectually disabled person solely because his examiner's tests were out of date would

be "so arbitrary as to be 'freakish.'" *Kennedy v. Louisiana*, 554 U.S. 407, 439 (2008) (citation and brackets omitted); *Parker v. Dugger*, 498 U.S. 308, 321 (1991). The risk of that happening here is impermissibly high as a result of counsel's errors. The Court should grant certiorari and reverse the decision below.

CONCLUSION

Petitioner James Rogers respectfully requests that this Court grant a writ of certiorari to the Supreme Court of Georgia.

Respectfully submitted,

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March 17, 2016

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

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

FINAL ORDER

(Filed Apr. 11, 2014)

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

I. PROCEDURAL HISTORY

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

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

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

Court, which was denied on October 16, 1989. *Rogers v. Kemp*, 493 U.S. 923 (1989).

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

On November 29, 1994, Petitioner filed a second state habeas petition wherein he alleged that he is mentally retarded. On May 22, 1995, this Court remanded Petitioner's case to the Superior Court of Floyd County for a jury trial on the issue of Petitioner's alleged mental retardation under the procedure set forth by the Georgia Supreme Court in *Fleming v. Zant*, 259 Ga. 687 (1989).

Before the commencement of a jury trial on Petitioner's claim of mental retardation, Petitioner wrote a letter to the remand court asking for dismissal of the proceedings. The court held a hearing on Petitioner's request during which Petitioner denied being mentally retarded. The remand court found that Petitioner knowingly and voluntarily waived the

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

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

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

II. STATEMENT OF FACTS

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

> At approximately 11:45 p.m. on May 21, 1980, Edith Polston, the assault victim, returned from work to the home she shared with the murder victim, Grace Perry. She found a rake on the front steps with a liquid substance on the handle and Ms. Perry lying on a bedroom floor. Before she could summon the police, she was seized from behind, forced to remove her clothing and to lie down beside Ms. Perry. She then was taken outside and struck in the face. She managed to escape, and the police were called.
>
> The first investigating officer arrived on the scene at approximately eleven minutes after midnight on the morning of May 22, 1980, and found Rogers attempting to climb a fence at the rear of the victim's property. The officer employed moderate force to subdue Rogers, then handcuffed Rogers to the railing of the front porch while he began a search of the house. He found Ms. Perry lying naked on the floor of a bedroom with a large puddle of blood between her legs. He then gave Rogers *Miranda* warnings and placed him in a patrol car for transportation to police headquarters.
>
> Rogers' mother came to the crime scene. Ms. Polston overheard Rogers tell his mother, 'Ma – Mama, I'm gone this time; I'm gone.'

En route to the police station, Rogers volunteered that he had killed Ms. Perry but 'there's not anything you can do about it, I'm crazy and I've got papers to prove it.'

The autopsist testified that an external examination of the victim's body revealed a large amount of dry blood on the legs and traumatic infliction of wounds on the lower portion of the body. An internal examination disclosed a laceration to the back exterior portion of the vagina, which was approximately an inch and a half long. The autopsy further revealed a total perforation of the wall of the vagina. This perforation also extended through the liver, the diaphragm and into the right lung. The autopsist testified that the perforation caused a sudden and massive hemorrhaging into the right chest cavity which, in turn, caused the death of the victim.

Testimony indicated that the trauma to the victim's body was consistent with the use by the assailant of a blunt instrument in the shape of a pole which was at least two feet long and no more than two inches in diameter. Testimony indicated that the trauma would have required a considerable, purposeful force to be employed. The officer who recovered the rake from the front porch testified that two to four feet of the rake's handle was covered with what appeared to be blood and other fluid.

> A fingerprint taken from the handle of the rake subsequently was identified as Rogers'. Human blood found on the handle of the rake, and hairs found on Rogers' body, were consistent with Ms. Perry's. Bite marks on one of Rogers' arms were consistent with the dentures worn by the elderly victim.

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

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

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

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

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

Petitioner's Amended Petition enumerates thirteen (13) claims for relief. As stated in further detail below, this Court finds: (1) some claims asserted by Petitioner are procedurally barred due to the fact that

they were litigated on direct appeal; (2) some claims are procedurally defaulted, as Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; (3) some claims are successive, as Petitioner failed to timely raise the alleged errors in his prior habeas proceedings; (4) some claims are non-cognizable and, (5) some claims are neither barred nor defaulted and therefore, are properly before this Court for habeas review.

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CLAIMS THAT ARE *RES JUDICATA*

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

Claim IV, wherein Petitioner alleges that he is mentally retarded and as such, his sentence of death is unconstitutional, was addressed and decided adversely to Petitioner at his mental retardation trial. This holding was subsequently upheld by the Georgia Supreme Court. *Rogers v. State*, 282 Ga. 659(1).

That **portion of Claim V**, wherein Petitioner alleges juror misconduct during the original trial in that there were unspecified improper communications with the jury bailiffs. To the extent Petitioner alleges that the trial court erred in denying his motion for mistrial that was based upon a communication between a bailiff and a juror during dinner at a restaurant, this claim was addressed and decided adversely to Petitioner on direct appeal. *Rogers v. State*, 256 Ga. at 145(6).

That **portion of Claim VII**, wherein Petitioner alleges that the trial court excused unspecified potential jurors for allegedly improper reasons. To the extent Petitioner alleges that the original trial court erred in excusing for cause jurors Floyd and Barton, this claim was addressed and decided adversely to Petitioner on direct appeal. *Rogers v. State*, 256 Ga. at 142-143(3).

That **portion of Claim VII**, wherein Petitioner alleges that the remand court erred in admitting the testimony of corrections officers that concerned Petitioner's adaptive functioning and the testimony of James Mills and Samuel Perri concerning the 2000

administration of psychological testing to Petitioner at Central State Hospital, was addressed and decided adversely to Petitioner on direct appeal. *Rogers v. State*, 282 Ga. at 664-665, 667-668(7) and (10);

That **portion of Claim VII**, wherein Petitioner alleges that the trial court erred in refusing to strike unspecified prospective jurors who were allegedly unqualified for reasons that included bias against Petitioner. To the extent Petitioner alleges that the original trial court erred in refusing to excuse juror Compton, this claim was addressed and decided adversely to Petitioner on direct appeal. *Rogers v. State*, 256 Ga. at 141-142(1).

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

That **portion of Claim VII**, wherein Petitioner alleges that the remand court erred in declining to submit special interrogatories enumerating diminished capacities and their related jury instructions and verdict form, was addressed and decided adversely to

Petitioner on direct appeal. *Rogers v. State*, 282 Ga. at 660-661(2);

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

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

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

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

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

That **portion of Claim VII**, wherein Petitioner alleges that the trial court erred in admitting unspecified privileged material into evidence. To the extent Petitioner alleges the remand court erred in admitting the testimony and materials of the Dr. Richard Hark, this claim was addressed and decided adversely to Petitioner on direct appeal. *Rogers v. State*, 282 Ga. at 662-664(6);

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

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

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

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

Mental Retardation Claim

In Claim IV of his Amended Petition[2], Petitioner alleges that he is mentally retarded and as such, his sentence of death is unconstitutional. This Court finds Petitioner's mental retardation claim is barred by the doctrine of *res judicata* as a jury already found Petitioner was not mentally retarded, and this finding was affirmed on direct appeal by the Georgia Supreme Court. *See Rogers v. State*, 282 Ga. 659 (2007). This Court can only review an issue that was

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

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

decided on direct appeal when there has been a change in the facts or law regarding the issue. *Bruce v. Smith*, 274 Ga. 432, 434 (2001). There has been no change in the law and Petitioner has not presented this Court with any new facts or evidence relating to his mental retardation claim. Accordingly, Petitioner's mental retardation claim is barred from this Court's review by the doctrine of *res judicata.* Furthermore, even if Petitioner's claim of mental retardation was properly before this Court for review, it would fail as Petitioner cannot meet the requirements to prove he is mentally retarded.

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

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

period, meaning prior to the age of 18. *Id*. *See also Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

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

Furthermore, Petitioner has failed to show that he has impairments in adaptive behavior which manifested during the developmental period. (*See* O.C.G.A. § 17-7-131; *see also* MR TT, Vol. 7:1493; Vol. 8:1621-1630, 1632-1649, 1650-1668, 1672-1683, 1735; Vol. 9:1818-1819, 1874). Adaptive functioning is "a person's ability to function independently in their community . . . [a]nd [ ] involves all the skills that we put together that one would have to have to survive well." (HT, Vol. 1:45-46). For a diagnosis of mental

retardation, there must be "significantly subaverage general intellectual functioning," as discussed above, accompanied by "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/ interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety." (PX 84, Vol. 53:13847; *see also* HT, Vol. 1:45-46). Dr. Zimmerman testified in these proceedings that he found Petitioner deficient in the academic and work categories. (HT, Vol. 1:62-63, 88). However, this Court finds that there is evidence in the record that contradicts Dr. Zimmerman's findings. (*See* MR TT, Vol. 7:1493; Vol. 8:1621-1630, 1632-1649, 1650-1668, 1672-1683, 1735; Vol. 9:1818-1819,1874). Therefore, based on the entirety of the record, this Court finds that Petitioner has failed to meet the requisite prongs required under Georgia law for a claim of mental retardation, and his claim fails.

B. CLAIMS THAT ARE PROCEDURALLY DEFAULTED

This Court finds that Petitioner failed to raise the following claims on direct appeal and has failed to establish cause and actual prejudice, or a miscarriage of justice, sufficient to excuse his procedural default of these claims. *Black v. Hardin*, 255 Ga. 239 (1985); *Valenzuela v. Newsome*, 253 Ga. 793 (1985); O.C.G.A.

§ 9-14-48(d); *Hance v. Kemp*, 258 Ga. 649(4)(1988); *White v. Kelso*, 261 Ga. 32 (1991).[4]

> That **portion of Claim II**, wherein Petitioner alleges that the prosecution presented arguments to the jury during the mental retardation remand trial that it knew or should have known were false or misleading;
>
> That **portion of Claim II**, wherein Petitioner alleges that the State allowed its witnesses to convey a false impression to the jury during the mental retardation remand trial;
>
> That **portion of Claim II**, wherein Petitioner alleges that the State knowingly or negligently presented false testimony in the pretrial and trial proceedings of the mental retardation remand trial;
>
> That **portion of Claim V**, wherein Petitioner alleges juror misconduct during the mental retardation remand trial. This alleged misconduct includes:
>
> a) improper consideration of matters extraneous to the proceeding;
>
> b) false or misleading responses of jurors on voir dire;

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

c) improper biases of jurors which infected their deliberations;

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

e) improper communications with third parties;

f) improper communications with jury bailiffs;

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

h) improperly prejudging the ultimate issues in the proceedings;

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

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

a) excused unspecified potential jurors for allegedly improper reasons;

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

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

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

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

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

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

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

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

j) excluded unspecified relevant and material evidence as hearsay;

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

l) interjected during the testimony of unspecified witnesses;

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

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

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

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

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

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

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

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

Claim VIII, wherein Petitioner alleges that the remand court erred by failing to provide him with the necessary assistance of competent

and independent experts in violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985); and

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

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

b) imposed allegedly improper burdens of proof upon Petitioner;

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

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

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

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

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

Juror Misconduct Claim

Petitioner alleges in Claim V of his Amended Petition that the jurors in his remand trial had

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

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

Furthermore, this Court finds that Petitioner has also failed to show prejudice. Petitioner claims that Juror Spivey's habeas testimony shows that he was aware of Petitioner's crimes during voir dire and provided false testimony by stating that he did not know of Petitioner. Additionally, Petitioner claims that Juror Spivey told Ms. Goodwill[5] that he had read about Petitioner's crimes in the newspaper several years before serving as a juror. However, Juror Spivey testified during the evidentiary hearing before this

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

Court that he "thought [he] read something in the paper but what [he] read in the paper was a different trial . . . it was two black people. This wasn't no white people." (HT, Vol. 2:189, 194). Further, Ms. Goodwill testified that, prior to the habeas proceedings in this case; Juror Spivey informed her that he was mistaken when he originally thought he had read about Petitioner's crime in the newspaper. (HT, Vol. 2:221).

In order for Petitioner to be entitled to habeas relief due to false information provided by a juror during voir dire, Petitioner must show "that the juror failed to answer the question truthfully and that a correct response would have been a valid basis for a challenge for cause." *Sears v. State*, 270 Ga. 834, 840 (1999), *citing Royal v. State*, 266 Ga. 165, 166 (1996); *Gardiner v. State*, 264 Ga. 329, 333 (1994); *Isaacs v. State*, 259 Ga. 717, 740 (1989). During the habeas proceedings before this Court, Juror Spivey testified repeatedly that he did not know about Petitioner's crime during the trial. (*See* HT, Vol. 2:189, 190, 191, 192, 194, 196). Therefore, Petitioner has failed to prove that Juror Spivey gave false testimony during voir dire. Moreover, even if Juror Spivey had known about Petitioner's crimes during voir dire, knowledge of the underlying crimes does not establish prejudice. *See Edmond v. State*, 267 Ga. 285, 290 (1996).

Additionally, Petitioner relies upon the testimony of Juror Frenya to support his juror misconduct claim. Juror Frenya stated that, during the remand trial, she overheard Juror Spivey discuss Petitioner's crimes with a female juror and another male juror,

who was later taken off the jury.[6] (HT, Vol. 2:186-187; PX 78). However, the record shows that when originally visited by a member of Petitioner's habeas team, Juror Frenya did not report hearing any jurors discussing Petitioner's crimes. (HT, Vol. 2:171-172).[7] Moreover, the numerous inconsistencies between the statements in Juror Frenya's affidavit and her testimony before this Court render her testimony unreliable. (*See* PX 78, Vol. 50:12957 *compare with* HT, Vol. 2:185; *see also* HT, Vol. 2:184 *compare with* HT, Vol. 2:186; PX 78, Vol. 50:12956-12957 *compare with* HT, Vol. 2:176-177).[8]

Furthermore, even if this Court were to consider Juror Frenya's testimony credible, Petitioner has still failed to show prejudice. Juror Frenya testified that she never overheard anyone say Petitioner was under a death sentence.[9] (HT, Vol. 2:173-174). Juror Frenya

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

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

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

[9] The Court notes that every juror, including Juror Frenya, testified that they did not know that Petitioner was under a death sentence when they served on his jury. (HT, Vol. 2:173-174,

(Continued on following page)

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

196, 200-201, 203, 205, 207, 210, 211, 214; RX 165, Vol. 81:21489; RX 166, Vol. 81:21491; RX 169, Vol. 81:21500).

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

Preliminary Instructions Claim

Petitioner alleges in Claim VII of his Amended Petition that the remand court gave erroneous preliminary instructions to a venire panel, rendering nine jury members biased in violation of Petitioner's due process rights. Petitioner failed to raise this claim in a motion for new trial or in his direct appeal to the Georgia Supreme Court; therefore, this claim is procedurally defaulted. *See Rogers v. State*, 282 Ga. 659 (2007); *see also Black v. Hardin, supra.* Furthermore, Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome his default of this claim. *See Perkins v. Hall*, 288 Ga. 810, 822 (2011).

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

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

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

Petitioner also claims that the remand court, by informing the prospective jurors that Petitioner's criminal trial may or may not go forward, essentially

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

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

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

Outside the presence of the other jurors, Juror Jennifer Braden told the court that she was not sure, but she believed she had seen Petitioner arrive in a police vehicle. (MR TT, Vol. 7:1367-1368). However, Juror Braden testified that the fact that she saw Petitioner in a police vehicle "absolutely" would not

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

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

prejudice or a miscarriage of justice to overcome his procedural default of these claims.

C. CLAIMS THAT ARE NON-COGNIZABLE

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

> **Claim I**, wherein Petitioner alleges that he is actually innocent of the murder of Grace Perry;
>
> **Claim VI**, wherein Petitioner alleges that execution by lethal injection is cruel and unusual punishment. Alternatively, this Court finds that this claim is without merit. *See Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008); and
>
> **Claim XIII**, wherein Petitioner alleges that the length of time he has spent on death row constitutes cruel and unusual punishment.[12]

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

Actual Innocence Claim

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

Insofar as Petitioner is attempting to couple his actual innocence claim with allegations of prosecutorial misconduct[13], this claim remains noncognizable as Petitioner has failed to establish constitutional error. Petitioner has not presented this Court with any credible evidence to support his allegations of misconduct. Furthermore, Petitioner has failed to present any "new reliable evidence" to prove he is "actually innocent" of the crimes for which he was convicted. *See Schlup v. Delo*, 513 U.S. at 324. As the United States Supreme Court has noted "experience

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

has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. [ ] To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence [ ] that was not presented at trial." *Id*. Accordingly, as Petitioner has failed to present a constitutional claim to accompany his "actual innocence" claim or any "new reliable evidence" that proves Petitioner is innocent of the crimes for which he was convicted, this Court finds this claim is non-cognizable and, in the alternative, **DENIED** as it is without merit.

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

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

O.C.G.A. §9-14-51.

The record shows that Petitioner was convicted of murder and sentenced to death in 1985. *See Rogers v. State*, 256 Ga. 139 (1986). Thereafter, his case was

remanded to the trial court solely on the issue of his mental retardation. (*See* MR TT, Vol. 5:857). Petitioner's guilt was not an issue and was not litigated in his mental retardation trial. (*See* MR TT, Vols. 5-10). Therefore, any alleged constitutional violation regarding Petitioner's actual innocence could only arise from Petitioner's second death penalty trial[14] during which his actual innocence was litigated. During his direct appeal of the conviction and death sentence received at his second trial, Petitioner failed to raise a claim of actual innocence or dispute the physical evidence linking him to the murder of Grace Perry. The Georgia Supreme Court found the following regarding the physical evidence proving Petitioner's guilt:

> A fingerprint taken from the handle of the rake subsequently was identified as Rogers'. Human blood found on the handle of the rake, and hairs found on Rogers' body, were consistent with Ms. Perry's. Bite marks on one of Rogers' arms were consistent with the dentures worn by the elderly victim.
>
> The sufficiency of the evidence was not raised on appeal. However, we have reviewed

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

> the evidence pursuant to Rule IV (B)(2) of the Unified Appeal Procedure, and find it sufficient to sustain the convictions.

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

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

D. SUCCESSIVE CLAIMS

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

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

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

> That **portion of Claim II**, wherein Petitioner alleges that the State suppressed unspecified evidence favorable to his defense during the original trial in violation of *Brady v. Maryland*, 373 U.S. 667 (1965) and *Kyles v. Whitley*, 514 U.S. 419 (1995);[15]
>
> That **portion of Claim II**, wherein Petitioner alleges that the prosecution presented arguments to the jury during the original trial that it knew or should have known were false or misleading;
>
> That **portion of Claim II**, wherein Petitioner alleges that the State allowed its witnesses to convey a false impression to the jury during the original trial;

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

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

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

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

a) improper consideration of matters extraneous to the proceeding;

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

c) improper biases of jurors which infected their deliberations;

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

e) improper communications with third parties;

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

f) improper communications with jury bailiffs;

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

h) improperly prejudging the ultimate issues in the proceedings;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

attorneys would be permitted to present argument to the court;

m) declined to administer unspecified curative instructions;

n) excluded unspecified relevant and material evidence as hearsay;

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

p) impermissibly interjected during the testimony of unspecified witnesses;

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

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

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

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

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

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

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

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

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

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

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

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[17] To the extent Petitioner alleges that the trial court improperly charged the statutory aggravating circumstances and gave an improper instruction in response to the jury's question regarding the consequences of returning a life imprisonment

(Continued on following page)

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

b) imposed allegedly improper burdens of proof upon Petitioner;

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

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

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

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

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

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

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

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sentence, these claims were found to be procedurally defaulted by the state habeas court. *Rogers v. Kemp*, Civil Action No. 87-V-1007.

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

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

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

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

E. CLAIMS THAT ARE PROPERLY BEFORE THIS COURT FOR REVIEW

1. Alleged *Brady* Violation

Petitioner alleges in Claim II of his Amended Petition that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not providing remand counsel[19]

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

[19] This Court notes that James C. Wyatt and Lee Henley were originally appointed to represent Petitioner at his mental retardation trial in the Superior Court of Floyd County. (*See* PX 44B, Vol. 12:2606). However, shortly before the scheduled jury

(Continued on following page)

with documents that were subsequently located after Petitioner's trial. In 2003, prior to Petitioner's mental retardation trial, Assistant District Attorney Martha Jacobs was assigned to Petitioner's case. (RX 150A, Vol. 75:19903). Following her assignment to the case, Ms. Jacobs realized that there were trial preparation

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

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

The record shows that the missing file was not located and turned over by the State until February of 2008, after Petitioner's direct appeal to the Georgia Supreme Court was complete. (RX 150A, Vol. 75:19905, 19911). Petitioner could not have raised this Brady

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

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

claim on direct appeal because he did not know what was contained in the missing boxes and "thus could only have speculated about the withheld material." *Head v. Stripling*, 277 Ga. 403, 406 (2003). Therefore, this portion of Petitioner's *Brady* claim is not procedurally defaulted as he could not have raised this claim before learning about the contents of the file. Further, even if this Court were to find that this claim was procedurally defaulted, Petitioner has established cause for the default as he did not receive the contents of the missing file from the district attorney until the direct appeal of his mental retardation trial was complete.

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

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

Zant v. Moon, 264 Ga. 93, 100 (1994) (citing *United States v. Meros*, 866 F.2d 1304 (11th Cir. 1989), *cert. denied*, 493 U.S. 932 (1989)). It is undisputed that the State failed to turn over the missing file until after the conclusion of Petitioner's direct appeal. However, this Court finds that Petitioner's Brady claim fails as

he has failed to carry his burden of proving materiality. *See Upton v. Parks*, 284 Ga. 254, 256 (2008) (holding that the petitioner's "failure to carry his burden to prove materiality defeats both his *Brady* claim and his attempt to overcome procedural default").[22]

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

Upon locating the file in 2008, Ms. Jacobs immediately contacted trial counsel, Ralph Knowles. (RX 150A, Vol. 75:19905-19906). Mr. Knowles described Ms. Jacobs as "extremely forthcoming," and testified

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

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

Petitioner has failed to prove materiality, his *Brady* claim fails.[23]

Petitioner also claims that the missing box "contained documents that would have alerted trial counsel to the existence of evidence that they did not obtain until the eve of trial." (Petitioner's post-hearing brief, p. 135). Petitioner argues that trial counsel did not know about the testing administered by Mr. Mills in 2000 until two weeks before trial and learned of Dr. Hark's 1980 WAIS during voir dire. However, Petitioner has failed to demonstrate how any of the documents in the missing box would have alerted counsel to the existence of either Dr. Hark's 1980 WAIS or the testing administered by Mr. Mills in 2000.

Furthermore, to the extent Petitioner is alleging that the State violated *Brady* by failing to turn over these two records earlier, this claim also fails. There is no requirement that *Brady* materials be disclosed a specific number of days before trial or even before the start of the trial. *Castell v. State*, 250 Ga. 776, 781 (1983); *see also Jenkins v. State*, 269 Ga. 282, 293 (1998) ("A *Brady* violation does not exist where the information sought by the defendant becomes available at trial."). Further, the late disclosure of evidence

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

only amounts to a *Brady* violation when the "'disclosure came so late as to prevent the defendant from receiving a fair trial.'" *Parks v. State*, 254 Ga. 403, 407 (1985) (quoting *United States v. Sweeney*, 688 F.2d 1131, 1141 (7th Cir. 1982)); *see also Sears v. State*, 259 Ga. 671, 672 (1989).

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

2. Ineffective Assistance of Counsel

Petitioner alleges in Claim III of his Amended Petition and various footnotes to claims that he received ineffective assistance of counsel at trial and on appeal. Petitioner was represented at his mental retardation trial by Ralph Knowles and Jimmy Berry.

(HT, Vol. 1:102-103; RX 153, Vol. 78:20678-20679). Mr. Knowles represented Petitioner on direct appeal of his mental retardation trial as well. Petitioner's allegations of ineffective assistance of mental retardation trial counsel, which were neither raised nor litigated adversely to Petitioner on direct appeal, nor procedurally defaulted, are properly before this Court for review on their merits. Additionally, Petitioner's allegations of ineffective assistance of appellate counsel are properly before this Court for review on their merits.

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

A. Standard of Review

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

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

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

> 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).

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

B. Reasonable Investigation

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

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

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

Mr. Knowles had considerable experience dealing with mental retardation and mental health issues prior to representing Petitioner. (HT, Vol. 1:143). Remand counsel also performed extensive research on the issue of mental retardation and Petitioner's mental health. (*See* HT, Vol. 1:143-144; RX 79, Vol. 65:16982-17149; RX 80, Vol. 66:17152-17197; RX 81, Vol. 66:17198-17489; RX 82, Vol. 67:17492-17586; RX 83, Vol. 67:17587-17631; RX 87, Vol. 67:17673-18116; RX 153, Vol. 78:20682-20683). Additionally, the State provided remand counsel with a copy of its file, which contained a number of records relating to Petitioner. (HT, Vol. 1:145; RX 153, Vol. 78:20682, 20685).[25]

Furthermore, remand counsel investigated the facts of the crime as Petitioner maintained his innocence; however, they were unable to find evidence to

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

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

Communications with Petitioner

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

Eventually remand counsel were able to gain Petitioner's trust, but Petitioner remained uncooperative throughout remand counsel's representation. (*See* HT, Vol. 1:117; RX 45, Vol. 58:15358; RX 153, Vol. 78:20681). Furthermore, Petitioner was unable to provide remand counsel with the names of any potential

witnesses to contact other than inmates. (RX 153, Vol. 78:20684). Petitioner also refused to sign authorizations for the release of his records, except for his Department of Corrections and Central State Hospital records, and refused to submit to an evaluation, an MRI, or any type of mental health testing. (HT, Vol. 1:114-115; RX 25, Vol.57:14997; RX 29, Vol. 57:15198; RX 34, Vol. 58:15270; RX 66, Vol. 63: 16521; RX 67, Vol. 63:16522; RX 153, Vol. 78:20691). Therefore, this Court finds that Petitioner's refusal to cooperate limited remand counsel's investigation. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on . . . information supplied by the defendant.").

Adaptive Functioning

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

Mr. Knowles testified that gathering evidence regarding Petitioner's adaptive skills was "very difficult" as Petitioner had been incarcerated for an

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

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

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

several times to locate Petitioner's ex-wife Patricia Ramsey, but was unable to locate Ms. Ramsey. (RX 25, Vol. 57:15094, 15327).

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

Further, the record shows that remand counsel were in possession of numerous records concerning Petitioner's adaptive functioning. (*See* RX 19, Vol. 56:14878-14883; RX 20, Vol. 56:14887-14893; RX 25, Vol. 57:15009; RX 51, Vol. 59:15629-15858; RX 52, Vol. 59:15859-15863; RX 53, Vol. 59:15864-15865; RX 54, Vol. 59:15866-15868; RX 55, Vol. 59:15869-15863; RX 56, Vol. 59:15884-15903; RX 58, Vol. 60:15921-15968; RX 59, Vol. 60:15969-15975; RX 60, Vol.

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

60:15976-15981; RX 61, Vol. 60:15983-16032, 16045-16071, 16078; RX 62A, Vol. 61:16081-16086, 16097-16127, 16173-16177, 16179-16181, 16203-16223, 16239-16242, 16248, 16260-16273, 16276-16296; RX62B, Vol. 62:16299-16410, 16412-16460, 16461-16473, RX 64; RX 68; RX 69; RX 70; RX 71; RX 72; RX 73; RX 75; RX 76). Additionally, remand counsel were in possession of numerous affidavits filed in previous proceedings in Petitioner's case by Petitioner's family members. (*See* RX 62A, Vol. 61:16184-16187, 16189-16193, 16195-16201, 16224-16235, 16250-16258). Remand counsel also obtained what minimal school records were still available. (HT, Vol. 1:120; RX 74; RX 153, Vol.78:20685-20686).

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

letters were written by Petitioner. (RX 153, Vol. 78:20692).

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

Mental Health Experts

Remand counsel also consulted with and hired numerous mental health experts to assist in their mental health investigation. (HT, Vol. 1:117-118; RX 153, Vol. 78:20684, 20686-20690). Mr. Knowles testified that "it was clear that the only issue was going to be whether or not [Petitioner] under Georgia law was

mentally retarded and therefore could not be executed by the State." (RX 153, Vol. 78:20684). Mr. Knowles stated that since he knew many mental health experts prior to representing Petitioner, he "called upon those people to help sort of guide [him] through it." (HT, Vol. 1:117-118).

Initially, Mr. Knowles contacted Dr. Carl Clements, who was a forensic psychologist. (HT, Vol. 1:124; RX 153, Vol. 78:20686). Mr. Knowles sent materials to Dr. Clements and requested that he review the facts of Petitioner's case. (HT, Vol. 1:124; RX 37, Vol. 58:15283; RX 153, Vol. 78:20687). Mr. Knowles also sent Dr. Clements the testimony of the State's psychologist, Dr. Robert Connell, as Mr. Knowles was interested in "any interplay between 'mental retardation' and 'brain dysfunction or damage.'" (RX 37, Vol 58:15285).

Additionally, the record shows that Dr. Clements, in assessing Petitioner's case, conferred with a colleague, Dr. Karen Salekin, who had "real expertise on the MR/capacity/death penalty issues." (RX 37, Vol. 58:15293). Dr. Clements expressed concern over the conflicting IQ scores and noted that obtaining "adaptive behavior estimates retrospectively" would be a challenge. (HT, Vol. 1:125-126; RX 37, Vol. 58:15293). Dr. Clements also found that the "neuro battery certainly suggests impairment, perhaps in the judgment/executive functioning areas which is different from the MR question, per se, but in combo should raise a question of diminished capacity if nothing else." (RX 37, Vol. 58:15293). Further, Dr. Salekin concluded

that "the MR issue is going to be really hard to put forth. There are too many IQ scores that suggest Borderline MR rather than Mild." (RX 37, Vol. 58:15293). The record shows that Dr. Clements declined to serve as an expert witness in Petitioner's case, but provided remand counsel with the names of other potential mental health experts. (HT, Vol. 1:124; RX 37, Vol. 58:15283; RX 153, Vol. 78:20687).

Remand counsel also consulted with Dr. Brad Fisher, who was a psychologist that had testified for the defense in a number of death penalty cases.[28] (HT, Vol. 1:124, 137; RX 153, Vol. 78:20686, 20690). Mr. Knowles asked Dr. Fisher to review the file and provide an opinion, which Dr. Fisher ultimately did. (HT, Vol. 1:137-138; RX 153, Vol. 78:20690). Dr. Fisher also provided remand counsel with a critique of Drs. Hark and Perri's evaluations of Petitioner as well as a list of questions to ask them on cross-examination. (RX 33, Vol. 57:15249-15252). Further, Dr. Fisher provided remand counsel with a list of questions and answers for his testimony and the WAIS-R scoring manual. (RX 10, Vol. 55:14650-14668; RX 25, Vol. 57:15022; RX 33, Vol. 57:15255-15258).

Remand counsel also consulted with Dr. Mark Zimmerman, who had been involved in Petitioner's prior state habeas proceeding. (HT, Vol. 1:137, 139,

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

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

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

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

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

results. (RX 39, Vol. 58:15310). Dr. Stringer concluded the test was scored accurately and that based on this test score he could not testify that Petitioner was mentally retarded. (HT, Vol. 1:131; RX 39, Vol. 58:15310, 15322; RX 153, Vol. 78:20689). Although Dr. Stringer was unable to testify that Petitioner was mentally retarded, the record shows that he assisted remand counsel in preparing for the mental retardation trial. (*See* HT, Vol. 1:131-134; RX 25, Vol. 57:14986; RX 39, Vol. 58:15303, 15305-15317).

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

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

Petitioner's case, Dr. Ryback opined that Petitioner was mentally retarded. *Id*.

Additionally, remand counsel spoke with Dr. Connell, who had been hired by the State. (RX 9, Vol. 55:14505; RX 25, Vol. 57:14985-14986; RX 153, Vol. 78:20686). Mr. Knowles testified in his deposition that Dr. Connell was "very helpful" to remand counsel even though he ultimately testified for the State that Petitioner was not mentally retarded. (RX 153, Vol. 78:20686-20687). Remand counsel also located Karen Stevenson, a psychologist who had seen Petitioner as a youth when he was at Central State Hospital; however, Ms. Stevenson recalled very little about Petitioner. (RX 32, Vol. 57:15238). Additionally, remand counsel spoke with Dr. Richard Hark, a psychologist that had previously evaluated Petitioner in 1977 and 1980. (RX 153, Vol. 78:20691). Dr. Hark was ultimately called by the State at trial and testified that Petitioner was not mentally retarded. *Id*.

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

MRI of his brain. (HT, Vol. 1:114-115; RX 25, Vol. 57:15103-1 5 104; RX 153, Vol. 78:20691).

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

Remand counsel also investigated and researched areas of neuropsychology, including Oppositional Defiant Disorder, Cockayne Syndrome, Goldenhar Syndrome, and Gorlin Syndrome. (RX 82, Vol. 67:17492-17586, 17614; RX 83, Vol. 67:17609-17614). Additionally, remand counsel researched the effects of brain injuries on moral judgment. (RX 83, Vol. 67:17615).

This Court finds that, based on the record, remand counsel made reasonable efforts to consult with and hire mental health experts to evaluate Petitioner's mental health. Accordingly, remand counsel's

mental health investigation was not deficient. Furthermore, Petitioner has failed to demonstrate prejudice resulting from remand counsel's investigation of his mental health.

Investigation of Remand Counsel's Expert Witnesses

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

Remand counsel were not aware of Dr. Ryback's prior disciplinary issues at the time of trial. However, even if this Court were to find remand counsel's investigation of Dr. Ryback deficient, Petitioner has

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

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

[31] The Court notes that remand counsel pointed out an abundance of scoring errors made by the State's expert witnesses.

(Continued on following page)

Court finds that even if remand counsel were deficient in failing to uncover Dr. Fisher's scoring error prior to trial, Petitioner has failed to establish resulting prejudice.

Independent Investigation

Petitioner alleges that remand counsel were ineffective for failing to conduct an independent investigation into Petitioner's intellectual and adaptive functioning, background, and history of mental health evaluations. This Court finds that although remand counsel considered the investigation conducted prior to their appointment to Petitioner's case, they elaborated upon the investigation that had already been completed. Mr. Knowles testified during these proceedings that he was already aware of Petitioner's background prior to beginning his investigation. (HT, Vol. 1:118). However, the record shows that remand counsel performed an independent investigation of Petitioner's adaptive functioning, which included locating members of Petitioner's family, Petitioner's former teachers, and other potential witnesses from Petitioner's formative years who might know of Petitioner's adaptive functioning. *See Supra*, pp. 36-38.

Furthermore, remand counsel consulted with and hired numerous mental health experts regarding

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(*See* MR TT, Vol. 6:1135-1137, 1143-1145, 1347-1349; Vol. 7:1450-1452, 1605-1606; Vol. 8:1763).

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

Investigation of the State's Case

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

Dr. Hark

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

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

down to about a 73." (MR TT, Vol. 6:1309). Therefore, this Court finds that remand counsel's strategic decision to exclude Dr. Hark's 1977 WAIS was reasonable and Petitioner has failed to show deficient performance or resulting prejudice.[32]

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

The record is void of any indication that Petitioner informed remand counsel he had been given the WAIS in 1980. Further, the record shows that Dr. Hark never wrote a formal report of his 1980 testing of Petitioner and did not, until the eve of trial, mention to the State or remand counsel that he had

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

performed an evaluation of Petitioner in 1980. (MR TT, Vol. 2:270-271, 273-274). Additionally, Jimmy Berry attempted to locate all prior testing that had been administered to Petitioner, but was not provided or told about Dr. Hark's 1980 testing. (MR TT, Vol. 2:275).

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

Petitioner also claims that remand counsel could have used the Flynn Effect to show that Petitioner's 1980 IQ score of 84 placed him in the mentally retarded range; however, the record shows that this evidence was presented to the jury. Dr. Zimmerman testified that "[o]n the 1980 test with the full-scale score of 84, [the Flynn Effect] would bring it to 76." (MR TT, Vol. 6:1309-1310). Dr. Zimmerman then explained to the jury that 8 points would be subtracted from the score since the test was 25 years old

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

when given to Petitioner. (MR TT, Vol. 6:1310). Additionally, this Court notes that Petitioner's adjusted score of 76 is still above 70, even when adjusted for the standard error of measurement.[34] Therefore, remand counsel is not deficient for failing to present evidence that does not prove Petitioner is mentally retarded. Furthermore, even if this Court were to find that remand counsel's investigation of Dr. Hark's 1980 test was deficient, Petitioner has failed to show resulting prejudice.

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

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

WAIS and remand counsel were not ineffective for declining to present such evidence.[35]

Additionally, Petitioner alleges that remand counsel were ineffective for failing to assert work product privilege to bar the discovery of Dr. Hark's 1980 evaluation of Petitioner. However, this Court finds that Petitioner waived any work product privilege regarding Dr. Hark's 1980 evaluation when he filed his habeas petition in 1987 alleging ineffective assistance of trial counsel. Furthermore, even if remand counsel were deficient, Petitioner has failed to show resulting prejudice. Dr. Hark's 1980 score of 84 was cumulative of other tests on which Petitioner scored in the 80s, including the testing administered by Dr. Connell in 1984 and Mr. Mills in 2000. (*See* RX 104, Vol. 68:18200). Additionally, during Petitioner's remand trial, Dr. Zimmerman argued that Dr. Hark's score of 84 would actually be a score of 76 when the Flynn Effect was taken into account. (*See* MR TT, Vol. 6:1310). Thus, as Petitioner has failed to show deficient performance or resulting prejudice, his ineffective assistance of counsel claim regarding Dr. Hark's 1980 evaluation is denied.[36]

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

[36] Additionally, this Court notes that the work product privilege only applies to civil cases under the Civil Practice Act; however, in Claim III, subsection hh of his Amended Petition, Petitioner alleges that remand counsel were ineffective in failing

(Continued on following page)

Mr. Mills

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

The record shows that Dr. Perri testified regarding the 2000 WAIS-Ill during a February 20, 2001 motions hearing. (PX 44B, Vol. 12:2625-2626). The Court notes that this hearing occurred prior to remand counsel's representation of Petitioner; however,

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to object to conducting Petitioner's mental retardation trial as a civil proceeding. (*See* O.C.G.A. §9-11-26).

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

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

The record shows that remand counsel had ample time to review Mr. Mills's 2000 test, including having the test rescored and critiqued by their retained experts. (*See* PX 1, Vol. 3:285-286; RX 39, Vol. 58:15310-15315; RX 104, Vol. 68:18199-18202, 18207-18208, 18212-18213). Further, at Petitioner's trial, remand counsel presented detailed testimony from their mental health experts challenging the test. (MR TT, Vol. 6:1141-1143, 1178-1182, 1273-1274).[39] Remand counsel also introduced a chart comparing Petitioner's subtest scores on Mr. Mills's 2000 test to

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

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

the subtest scores Petitioner achieved on other versions of the WAIS. (MR TT, Vol. 10:2011). Additionally, remand counsel thoroughly cross-examined Mr. Mills regarding his administration of the WAIS-III.[40] (MR TT, Vol. 7:1449-1471, 1473-1487). Thus, as Petitioner has failed to show resulting prejudice, this portion of his ineffective assistance of counsel claim fails.

C. *Pre-Trial*

The Remand Court's Preliminary Instructions

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

> The style of this case is – the style of the case, that just means its title. It is called the State of Georgia against James Randall Rogers. And Mr. Rogers is charged with a crime. He is not being tried for that crime. He is not being tried for it. This is a civil proceeding. I have given you a civil jury oath only. It is a separate civil proceeding in order to determine whether or not Mr. Rogers is or is not

[40] Although Petitioner alleges remand counsel should have presented the testimony Dr. Schwartz provided in his affidavit that was presented to the Georgia Supreme Court during Petitioner's direct appeal, Mr. Knowles testified that Dr. Schwartz was unwilling to testify at trial. (HT, Vol. 1:129-130).

> mentally retarded. That is all you have got to concentrate upon. This decision has to be made before any further proceedings may go forward in this case.

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

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

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

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

(MR TT, Vol. 1:65).

Even if this Court were to find that remand counsel performed deficiently in this regard, Petitioner has still failed to demonstrate resulting prejudice. The Georgia Supreme Court in *Foster v. State*, 272 Ga. 69, 70-71 (2000), held that it is not reversible error to inform jurors in a mental retardation remand trial that the individual had committed a crime. In both Petitioner's case and in *Foster*, the challenged

instructions informed the jury that the mental retardation issues arose out of a criminal proceeding. However, these instructions "did not in any manner impede the jury from 'focusing strictly on the mental condition of the defendant and deciding that issue without being concerned about the consequences of its finding.'" Foster, 272 Ga. 69, 70-71 (quoting *State v. Patillo*, 262 Ga. 259, 260 (1992)). Further, the remand court explained that the statement that Petitioner had committed a crime was necessary to ensure that any jurors who may have known about Petitioner's crime were identified. (MR TT, Vol. 1:64-66).

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

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

Petitioner alleges that remand counsel were ineffective for requesting, agreeing and failing to contest that his mental retardation trial was conducted as a civil proceeding, rather than a criminal

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

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

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

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

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

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

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

Furthermore, Petitioner's claim that he would have received twenty peremptory challenges, while the State would have had just ten, if the case had been tried as a criminal proceeding, also fails. (*See* Petitioner's post-hearing brief, p. 119). After reviewing both the trial transcript and O.C.G.A. §15-12-165, which Petitioner cites in support of his claim, this Court finds that the remand court did follow the criminal jury selection process in Petitioner's remand trial. O.C.G.A. §15-12-165 states that "in any case in which the state announces its intention to seek the

death penalty, the accused may peremptorily challenge 15 jurors and the state shall be allowed the same number of peremptory challenges." However, O.C.G.A. §15-12- 122(b), which governs jury selection in civil proceedings, states: "[i]n all civil actions in the superior courts, each party may demand a full panel of 24 competent and impartial jurors from which to select a jury . . . In all cases the parties or their attorneys may strike alternately, with the plaintiff exercising the first strike, until a jury of 12 persons is impaneled to try the case." Therefore, as the record reflects that both parties received fifteen peremptory strikes at Petitioner's remand trial, it is clear that the remand court followed the criminal jury selection process. (*See* MR TT, Vol. 3:713).

To the extent that Petitioner's claim could be construed as an allegation that remand counsel were ineffective in failing to object to the retroactive application of the amended version of O.C.G.A. §15-12-165, Petitioner's claim still fails.[43] "[T]he prohibition of ex post facto laws applies only to substantive, but not

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

procedural, rights." *Hamm v. Ray*, 272 Ga. 659 (1) (2000) (quoting *Cannon v. State*, 246 Ga. 754, 755 (1) (1980)). Further, "[s]tatutes that only govern the procedure of the courts are given retroactive effect absent an expressed intention to the contrary." *Barner v. State*, 263 Ga. 365, 367 (1993). Therefore, as peremptory strikes are procedural and not substantive in nature, Petitioner was not deprived of a protected right by the retroactive application of O.C.G.A. §15-12-165. *Madison v. State*, 281 Ga. 640, 642 (2007). Accordingly, this portion of Petitioner's ineffective assistance of counsel claims is denied.

D. Reasonable Presentation

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

Dr. Mark Zimmerman

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

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

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

seasoned expert witness who had testified in numerous death penalty cases, requested more time to review Mr. Mills's test. (HT, Vol. 1:36). As Petitioner has not shown what other testimony could have been elicited regarding Mr. Mills's 2000 test, Petitioner cannot establish the necessary deficiency and prejudice required to prove ineffective assistance of counsel as to this claim.

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

cannot show resulting prejudice as each of the experts at the trial testified to the specifics of their own testing and their own reports.

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

The Psychological Principles of Intellectual Testing

Petitioner alleges that remand counsel did not explain the structure and origin of intellectual testing to the jury as well as the practice effect, Flynn Effect, and standard error of measurement. However, this Court finds that remand counsel, through their expert witnesses, presented this exact testimony.

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

failed to demonstrate prejudice as this information was ultimately elicited at trial.

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

Petitioner's IQ Scores

Furthermore, this Court finds no merit in Petitioner's allegation that remand counsel presented Petitioner's test scores to the jury "in a manner that suggested that [Petitioner]'s scores were not within the range of mental retardation." (Petitioner's post-hearing brief, p. 68). The record shows that remand counsel argued that each IQ test Petitioner had been given demonstrated that Petitioner was mentally retarded. Extensive testimony was elicited through all of the expert witnesses including the State's expert witnesses, Dr. Connell and Mr. Mills, that there were problems in the administration and scoring of each of the IQ tests on which Petitioner had scored above 70. (*See* MR TT, Vol. 5:909-911; Vol. 6:1127-1141, 1143-1146, 1175-1177, 1179-1182, 1242-1243, 1273-1275, 1308-1312, 1328-1329; Vol. 7:1450-1452; Vol. 9:1852-1855). Further, in addition to

addressing the validity of Petitioner's IQ scores above 70, remand counsel also informed the jury that they must consider Petitioner's adaptive functioning deficits as well. (MR TT, Vol. 5:858-859; Vol. 9:1950). Remand counsel also presented testimony, through Dr. Fisher and Dr. Zimmerman, that under Georgia law the determination of whether Petitioner suffered from mental retardation was within the sole discretion of the jury, and that the jury was not "bound by the opinion testimony of expert witnesses, or by test results," and that they could "weigh and consider all evidence bearing on the issue of mental retardation." (MR TT, Vol. 5:905-906; Vol. 6:1229, 1245-1246).

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

Comprehensive Assessment of Petitioner's Mental Health Issues

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

brain dysfunction and cognitive dysfunction, adaptive functioning[44], onset of symptoms prior to age 18, and delusional beliefs. This Court finds that Petitioner has failed to show deficient performance or resulting prejudice as the majority of Dr. Price's testimony is cumulative. As the Georgia Supreme Court has held, trial counsel is not ineffective for failing to present cumulative evidence. *DeYoung v. State*, 268 Ga. 780, 786 (1997).

The record shows that remand counsel investigated and presented evidence of Petitioner's brain dysfunction and cognitive dysfunction to the jury. (*See* RX 12, Vol. 56:14702; RX 14, Vol. 56:14731; RX 17, Vol. 56:14777; RX 37, Vol. 58:15285; RX 82, Vol. 67:17492-17586; *see also* MR TT, Vol. 5:862-863, 936-940; Vol. 6:1239-1240, 1249-1255; Vol. 9:1821, 1823, 1830-1841, 1847). Dr. Fisher and Dr. Zimmerman explained the relevancy of brain dysfunction when determining whether someone is mentally retarded. (MR TT, Vol. 5:936-937; Vol. 6:1250-1251).[45] Drs. Fisher and Zimmerman also explained the two standard tests given to measure brain dysfunction, the Halstead-Reitan and the Luria-Nebraska Neuropsychological Battery, and how those tests are

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

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

scored.[46] (MR TT, Vol. 5:938-940; Vol. 6:1251-1252, 1254). Additionally, Dr. Zimmerman testified that Petitioner has "significant dysfunction" that is "diffuse" and "goes to both sides of the brain." (MR TT, Vol. 6:1252). Dr. Zimmerman explained that "it involves those areas in which he takes in and processes information. Where the information comes in and we try to make sense of it." *Id*. Therefore, Dr. Price's testimony pertaining to Petitioner's brain and cognitive dysfunction is cumulative, and Petitioner cannot show deficient performance or resulting prejudice as to this claim.

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

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

Petitioner also claims that Dr. Price could have testified that the "'best reflection' of [Petitioner's] abilities came from the Stanford-Binet administered by Dr. Zimmerman" because the Flynn Effect and the Practice Effect would not alter Petitioner's score of 68 on the Stanford-Binet. (Petitioner's post-hearing brief, p. 100). The record shows that, at Petitioner's trial, Dr. Zimmerman testified that he administered the Stanford-Binet instead of the WAIS because Petitioner had been given one or two WAIS IQ tests prior to his examination, but had never taken the Stanford-Binet, thereby limiting the practice effect. (MR TT, Vol. 6:1236).[47] Dr. Price's testimony regarding the Flynn Effect is not cumulative; however, Petitioner has failed to show resulting prejudice. As Dr. Price testified in his deposition, the Flynn Effect would not have applied to the Stanford-Binet administered by Dr. Zimmerman, on which Petitioner scored a 68. (PX 3, Vol. 3:376). Therefore, as Petitioner's score already placed him within the IQ range for mental retardation, Dr. Price's testimony stating that the Flynn Effect would not raise or lower this score; would not have, in reasonable probability, changed the outcome of Petitioner's trial. *See Smith v. Francis*, 253 Ga. 782, 783 (1985).

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

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

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

Remand Counsel's Presentation of Adaptive Functioning Evidence

Petitioner alleges that remand counsel failed to adequately investigate, develop and present evidence

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

Additionally, this Court notes that Dr. Price did not apply the correct standard in addressing Petitioner's deficits in adaptive functioning. (*See* RX 152, Vol. 78:20572-20573, 20575-20577). The record shows that Dr. Price relied upon the Social Security Guidelines

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

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

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

Petitioner also alleges that remand counsel were ineffective for failing to request a hearing or an opportunity to brief the admissibility of affidavit testimony remand counsel sought to introduce through their expert witnesses at trial. This Court finds that the affidavit testimony from Petitioner's family and teachers, which Petitioner alleges remand counsel were ineffective for being unable to admit, were affidavits taken by Petitioner's previous attorneys during Petitioner's second state habeas proceedings. *See Rogers v. State*, 282 Ga. at 666. The record shows that by the time remand counsel became involved in Petitioner's case the affiants were either

deceased, unavailable, or were no longer willing to testify on Petitioner's behalf.[50] (*See* HT, Vol. 1:118; RX 42, Vol. 58:15331; RX 153, Vol. 78:20681, 20683-20685).

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

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

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

Rogers v. State, 282 Ga. at 666. Therefore, Petitioner has failed to show prejudice resulting from the exclusion of these affidavits.

The State's Adaptive Functioning Evidence

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

this Court finds that remand counsel did attempt to exclude the State's adaptive functioning evidence.

Furthermore, even if this Court were to find that remand counsel failed to adequately litigate this motion, this claim still fails as Petitioner has failed to show resulting prejudice. On Petitioner's direct appeal from his remand trial, the Georgia Supreme Court upheld the State's introduction of Department of Corrections' employees who testified to Petitioner's adaptive functioning in prison. *Rogers v. State*, 282 Ga. at 667-668. Regarding this issue, the Georgia Supreme Court held that "[t]he officer's testimony was relevant to the issue of [Petitioner's] adaptive skills, however, and was not unduly prejudicial because the officer clarified that he was not diagnosing anyone." *Id*. Therefore, this Court finds that Petitioner has failed to prove deficient performance or prejudice as to this issue.

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

The record shows remand counsel presented testimony through Dr. Fisher that most of the standards for judging adaptive functioning were developed based upon reviewing how a person interacts in society, not prison. (MR TT, Vol. 5:916). Anticipating that the State would introduce evidence that Petitioner had checked out library books in prison, remand counsel also presented testimony through Dr. Fisher and Dr. Zimmerman that mentally retarded individuals can read and write. (MR TT, Vol. 5:942; Vol. 6:1237). Dr. Zimmerman also testified that Petitioner "read at the sixth grade level, which is the eighth percentile" and clarified that this score is based on reading recognition, not reading comprehension. (MR TT, Vol. 6:1237-1238). Dr. Zimmerman explained that "comprehension means you read something and you understand it. Reading recognition means you can sound out the word, you know how to pronounce it. Two different things." (MR TT, Vol. 6:1238). Further, on cross-examination of the State's witnesses, remand counsel elicited that there was no evidence to show that Petitioner had checked out the reading material from the prison library for himself or read the material. (*See* MR TT, Vol. 8: 1630-1631, 1659, 1666-1668, 1710).

Additionally, during cross-examination of the State's adaptive functioning witnesses, remand counsel elicited testimony that the rules in prison are simple and made so that anyone can understand the rules. (MR TT, Vol. 8:1645, 1647-1648, 1660). Remand counsel also had the State's witness, Jackie Bedsole,

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

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

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

Cumulative Error Claim

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

V. CONCLUSION

After considering all of Petitioner's allegations made in the habeas corpus petition and at the habeas corpus hearing and all of the evidence and argument presented to this Court, this Court concludes that Petitioner has failed to carry his burden of proof in demonstrating any denial of his constitutional rights as set forth above.

WHEREFORE, it is hereby ORDERED that the petition for a writ of habeas corpus is DENIED and

that Petitioner be remanded to the custody of Respondent for the service and execution of his lawful sentence.

The Clerk is directed to mail a copy of this Order to counsel for the parties.

SO ORDERED, this 7th day of April, 2014.

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

[SEAL] SUPREME COURT OF GEORGIA
Case No. S15E0034

Atlanta, October 19, 2015

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

JAMES RANDALL ROGERS v.
CARL HUMPHREY, WARDEN

From the Superior Court of Butts County.

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

Trial Court Case No. 09V407

IN THE SUPERIOR COURT OF FLOYD COUNTY

STATE OF GEORGIA

THE STATE	*	FILE NO.
	*	83-CR-21295
vs.		
JAMES RANDALL ROGERS	*	MENTAL
	*	RETARDATION

APPEARANCES

FOR THE PETITIONER:	JIMMY BERRY Attorney at Law
	RALPH KNOWLES Attorney at Law
FOR THE RESPONDENT:	MARTHA JACOBS Chief Asst. District Attorney
	LEIGH PATTERSON District Attorney

Rome, Georgia, August 1, 2005

BE IT REMEMBERED, the above-stated case came on for hearing on this date before the HONORABLE TOM POPE, Judge of said Court, and a Jury, when all parties announced ready to proceed.

TRANSCRIPT OF PROCEEDINGS

VOLUME 5 OF 10

* * *

[1217] THE COURT: Have a seat, ladies and gentlemen. Call your next witness.

MR. KNOWLES: Your Honor, we call Dr. Mark Zimmermann.

* * *

[1309] A Okay. Now, the next test was in 1977, and he had a full-scale IQ of 80. But the problem is that test was approximately twenty-two years old. And research in what's now called the Flynn effect would say that for each year a test exists after it's published and it hasn't been renormed that you add .3 or you subtract .3 from the score. So you'd actually subtract –

Q For each year?

A Yes. Yes, ma'am, .3

Q .3 for each – so for every three years that's one point?

A Yes, ma'am.

Q Okay.

A So if my math is correct, we take about 7 points off of this, it would come down to about a 73.

Q Okay.

A Then – let's see – the next one –

Q So, you want that one to be a 73?

A Uh-huh. Okay. The next one in 1980 would be, again, a 72 or 73, because of the Flynn effect.

Q So it would be 6 points off that one?

[1310] A Well, it would be –

Q Three years one point – three years –

A Yes. So, roughly, one more point off of it.

Q So that would be a 78. No, no – one more. It would be an 80 – it would be 25 years out of date, so it would be 8 points – subtract 8 points from the score.

Q On which one?

A On the 1980 test with the full-scale of 84, would bring it to 76.

Q Well, I thought we took 7 points off the one above that?

A Correct.

Q Did I not count right?

A Correct.

Q But it was further in time away.

A Let's see, it was published in '55 – so it was – the '77 was closer in time.

Q I got you. I'm sorry. You're counting from 1955.

A Yes ma'am. So –

Q You want 8 points off that 84.

A Uh-huh. It would be 76, I think.

Q Thank you. My math skills have deteriorated. All right.

A And I'm trying to remember when the WAIS-R was published. I want to say it was '81.

[1311] Q The WAIS-R?

A Yes, ma'am.

Q Do we need to knock a point off there?

A Well, let's see. Yes, ma'am.

Q Okay. So that should really be an –

A 84.

Q 84.

A So, you know, if we're going to have to compare scores, that's how we would have to compare them.

Q Okay. Well, can you go on through and compare the rest of them.

A Then the – again the WAIS-R that Dr. Fisher did in '95 would be – if that was published in '81 – would be 14-years-old. Am I subtracting that right.

Q You said it was published in '81?

A I believe it was published in '81.

Q That's 14 years.

A Okay. So .3 x 14 is –

Q 4.6.

A 4.6, yes. So whatever score he came up with, when the edition is changed, we need to take 4 points off.

Q So, we know it's not correct at 66. But whatever we get here you want us to take 4 points off.

A Correct.

Q So 4 points off.

[1312] A And –

Q The last test?

A The WAIS-3. I'm not sure when that was published. I want to say '93, but I'm not certain. No, that wouldn't be right because he would have given it if it was – certainly he would have given the WAIS-3 if it was '93. I'm not sure when it was –

Q If the WAIS-3 was published – I don't know when it was – we'll find out.

A Okay.

Q If it had been published in '93 then Dr. Fisher shouldn't have given that test anyway, should he?

A That's correct. That's correct.

Q Okay. So that's another question about that. But the WAIS-3 was pretty close in time to when the test was issued, right?

A I would think so, yes.

Q So, we'll take a point off of that for fairness. How about that?

A Okay.

* * *