IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

ERIC A. PERKINSON,	:	
Petitioner,	:	CIVIL ACTION NO.
	:	4:15-CV-0101-AT
v.	:	
	:	DEATH PENALTY
BRUCE CHATMAN,	:	HABEAS CORPUS
Respondent.	:	

ORDER

I. Background and Factual Summary

A. Procedural History

This matter is before the Court for consideration of the merits of the petition. On August 27, 1999, a jury sitting in Bartow County Superior Court convicted Petitioner of one count of murder, three counts of felony murder, one count of aggravated battery, two counts of aggravated assault, two counts of false imprisonment, one count of theft by taking, one count of possession of a firearm during the commission of a crime, and one count of possession of a firearm by a convicted felon. On August 28, 1999, after a penalty phase hearing, that same jury found the presence of four statutory aggravating circumstances and recommended that Petitioner be sentenced to death for the murder of Louis G. Nava, which sentence the court imposed. The court further sentenced Petitioner to twenty years consecutive for the aggravated battery, ten years consecutive for false imprisonment, ten years consecutive

for the other false imprisonment conviction, and twenty years consecutive for theft by taking, five years consecutive for possession of a firearm during the commission of a crime, and five years consecutive for possession of a firearm by a convicted felon. The court vacated the remaining convictions as a matter of law.

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on March 14, 2005. Perkinson v. State, 610 S.E.2d 533 (Ga. 2005). The United States Supreme Court denied Petitioner's petition for writ of certiorari on October 3, 2005. Perkinson v. Georgia, 546 U.S. 896 (2005). Petitioner then filed a petition for a writ of habeas corpus in the Butts County Superior Court. After a hearing, that court denied relief on November 7, 2013. The Georgia Supreme Court summarily denied Petitioner's application for certificate of probable cause to appeal the denial of habeas corpus relief on September 22, 2014. The United States Supreme Court denied Petitioner's petition for a writ of certiorari on April 27, 2015. Perkinson v. Chatman, 135 S. Ct. 1897 (2015). This action followed.

B. Factual Summary

In affirming Petitioner's convictions and sentences, the Georgia Supreme Court held that based on the evidence presented at Petitioner's trial, the jury was authorized to find that:

On June 6, 1998, the victims, 17-year-old Dakarai Sloley and 16-year-old Louis Nava, drove Sloley's aunt's white BMW automobile to pick up Sloley's dog from a dog groomer in DeKalb County. The dog was not ready so they returned to the parked BMW to wait. Eric Perkinson and an accomplice, Rico Wilson, entered the back seat of the car. At gunpoint, Perkinson and Wilson forced Sloley and Nava to drive to a nearby church parking lot. Perkinson, holding the gun, demanded and received cash from both victims. In the church parking lot, they rendezvoused with a green Toyota driven by two more accomplices who were Perkinson's brothers. Sloley was made to sit in the front passenger seat of the BMW and Nava was forced into the BMW's trunk. Wilson then drove the BMW north on I-75 for about 45 minutes to Bartow County while Perkinson remained in the back seat with the gun. The two accomplices in the Toyota followed. Sloley asked Perkinson and Wilson not to kill them and Wilson said they would not kill them. During the drive north, the Toyota briefly passed the BMW and Sloley observed the Toyota's license plate. Wilson exited I-75 in Bartow County and Perkinson instructed him to drive the BMW to a wooded, secluded stretch of Paga Mine Road.

Wilson parked the BMW on the side of the dirt road and the Toyota stopped behind them. Wilson and Perkinson got out of the BMW and opened the trunk. Perkinson told Nava to get out and take off his shirt and shoes. Nava complied. Perkinson then marched Nava into the woods at gunpoint and shot him twice, killing him. Perkinson returned to the BMW, ordered Sloley to get out, and told him he was next. Sloley said, "I thought you weren't going to kill us." Perkinson replied, "[Y]ou already saw our faces and you got the license plate on the Corolla." While he was being marched into the woods by Perkinson, Sloley fled and Perkinson fired several shots, hitting Sloley in the left arm. Sloley fell down. Although the bone in his left arm had been severed by the bullet, he got to his feet after he heard the cars leaving and ran through the woods until he came to a road where he flagged down a pizza delivery driver. Police recovered the BMW and the Toyota within a short time and arrested Perkinson and his three accomplices. Sloley identified Perkinson both in a photo lineup and in court as the gunman. Police found Perkinson's fingerprint on the BMW and the murder weapon was found in the BMW. Perkinson told police after his arrest that he had gone

> to DeKalb County on June 6 in the green Toyota Corolla with his brothers and Rico Wilson, but Wilson left them in DeKalb County and he did not see the white BMW until that night in Rome when Rico Wilson was driving it. In a second statement, he said Rico Wilson told him he wanted to steal a BMW to pay off a debt. Perkinson said he did not see the carjacking, but he later saw Wilson in the BMW with three unidentified passengers. Perkinson said he and two others followed the BMW on I-75 in the Toyota, but stopped following it after it reached Bartow County. However, witnesses in Cartersville and Rome saw the BMW and the green Toyota Corolla driving around together on the night of June 6.

Perkinson, 610 S.E.2d at 536-37.

C. Proceedings in this Court

Petitioner timely filed his petition in this Court on June 10, 2015. On January 21, 2016, this Court denied Petitioner's motion for discovery or an evidentiary hearing. (Doc. 49). The parties have now filed their final briefs, and the matter is ripe for a merits review of Petitioner's claims.

II. Standard of Review Under 28 U.S.C. § 2254

Pursuant to 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus on behalf of a person held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). This power is limited, however, because a restriction applies to claims that have been

"adjudicated on the merits in State court proceedings." § 2254(d). Under § 2254(d), a habeas corpus application "shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim":

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This standard is "difficult to meet," Harrington v. Richter, 562 U.S. 86, 102 (2011), and "highly deferential," demanding "that state-court decisions be given the benefit of the doubt," Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (citation and internal quotation marks omitted), and requiring the petitioner to carry the burden of proof. Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citing Visciotti, 537 U.S. at 25). In Pinholster, the Supreme Court further held

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

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

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). To determine whether a particular state court decision is "contrary to" then-established law, this Court considers whether that decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. Id. at 405, 406. If the state court decision "identifies the correct governing legal principle" this Court determines whether the decision "unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. This reasonableness determination is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. Id. at 410. In other words, it matters not that the state court's application of clearly established federal law was incorrect so long as that misapplication was objectively reasonable. Id. ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). Habeas relief contrary to a state court holding is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." Richter, 562 U.S. at 102 (2011) (internal quotation marks omitted); see Landers v. Warden, Atty. Gen. of Ala.,

776 F.3d 1288, 1294 (11th Cir. 2015). In order to obtain habeas corpus relief in federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103.

III. Discussion of Petitioner's Claims for Relief

A. Ineffective Assistance of Counsel

1. Legal Standard

In his first claim for relief, Petitioner contends that his trial and appellate counsel were ineffective in a variety of ways. The standard for evaluating claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). The analysis is two-pronged, and the Court may "dispose of the ineffectiveness claim on either of its two grounds." Atkins v. Singletary, 965 F.2d 952, 959 (11th Cir. 1992); see Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffectiveness claim . . . to address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

Petitioner must first show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."

Strickland, 466 U.S. at 690. The court must be "highly deferential," and must "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "Given the strong presumption in favor of competence, the petitioner's burden of persuasion – though the presumption is not insurmountable – is a heavy one." Fugate v. Head, 261 F.3d 1206, 1217 (11th Cir. 2001) (citation omitted). As the Eleventh Circuit has stated, "[t]he test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done." Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc). Rather, the inquiry is whether counsel's actions were "so patently unreasonable that no competent attorney would have chosen them." Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir. 1987). Moreover, under Strickland reviewing courts must "allow lawyers broad discretion to represent their clients by pursuing their own strategy," White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992), and must give "great deference" to reasonable strategic decisions, Dingle v. Sec'y for Dep't of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007).

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

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," id., requiring "a substantial, not just conceivable, likelihood of a different result." Cullen v. Pinholster, 563 U.S. 170, 190 (2011) (quotation and citation omitted).

As will be discussed in more detail below, the state court rejected Petitioner's claims of ineffective assistance. As such, this Court's review of those claims are "doubly deferential" wherein this Court takes a "highly deferential look at counsel's performance [under] Strickland . . . through the deferential lens of § 2254(d)." Pinholster, 563 U.S. at 190 (quotation and citation omitted).

2. Background

At minimum, the history of Petitioner's legal representation leading up to and during his trial is troubling. Just after Petitioner and his codefendants were charged, the trial judge presiding over the case called a meeting in his chambers with Bartow County prosecutors and lawyers who performed contract defense work in the county. (Doc. 36-51 at 41, 43). The expectation was that the state would seek the death penalty against some or all of the defendants, and the purpose of the meeting was to assign lawyers to represent them. (Id.). Christopher Paul was assigned to represent Petitioner. (Id.). At the time, Mr. Paul had no experience with death penalty cases,

and his initial belief was that he would represent Petitioner with respect to a probation revocation, but the trial court would appoint a lawyer with death penalty experience to serve as Petitioner's lead counsel at the murder trial. (Id. at 44). Mr. Paul contacted Jimmy Berry, a lawyer with extensive death penalty experience, and Mr. Berry agreed to become involved. (Id. at 44). The trial judge also informally approved Mr. Berry's appointment. (Id.).

However, at the arraignment, another lawyer, Alan Medof, appeared and announced that he had been hired by Petitioner's mother to represent Petitioner as lead counsel. (Id. at 47). From a review of the record, it is clear that Mr. Medof was incompetent and a nonentity as far as Petitioner's legal representation is concerned. In fact, during the motion for a new trial hearing, the trial judge commented that "the Court would find as a matter of fact that, not only was Mr. Medof ineffective, but he was incompetent." (35-21 at 38). Mr. Medof was a Florida criminal lawyer who had practiced in Georgia briefly in the early 1980's. (Doc. 36-53). He had practically zero experience with death penalty litigation, and even his experience with criminal litigation was limited. Prior to representing Petitioner, he had tried approximately fourteen felony cases, none of which were murder cases. (Id. at 80-81). As a young prosecutor, he had participated in a very limited way in death penalty trials, (id. at 76-77), but he never examined any witnesses or argued in court, (id. at 123), and he was

in no way responsible for the prosecution of those cases, (id. at 124). Mr. Medof never took any courses on death penalty litigation, (id. at 125). Despite the fact that he had never tried a death penalty case – indeed, had never even tried a murder case – he felt that he was qualified to represent Petitioner. (Id. at 86).

During his testimony before the state habeas corpus court, Mr. Medof claimed that it was "explicitly agreed" that Chris Paul would serve as lead counsel, that he would assist Mr. Paul, and that this discussion took place prior to Medof's first appearance. (Id. at 93-94). It is clear from the record, however, that Medof fully intended to be Petitioner's lead counsel, (*see e.g.*, 35-2 at 32), and, in any event, it is preposterous that a retained lawyer would be hired to assist a state contract defense lawyer who had no death penalty experience.

To highlight some of Mr. Medof's more troubling testimony during the state habeas corpus proceedings: he admitted that he might have fallen asleep during Petitioner's trial. (Id. at 119). He did not know what a Jackson-Denno hearing or a Batson challenge is. (Id. at 146). Two years before Petitioner's trial, he was suspended by the Florida State Bar because of a crack cocaine addiction. (Id. at 82). He was reinstated after completing an inpatient rehabilitation program some eight or nine months later. (Id.). Nonetheless, when he filed his motion with the trial court to be admitted *pro hac vice*, he represented that he had never been reprimanded by a

court. (Id. at 136). During his representation of Petitioner, he was arrested in Florida for soliciting a prostitute. (Id. at 87-88).

With Mr. Medof's entry into the case, of course, Mr. Paul's plan to associate with Jimmy Berry came to an end, and Mr. Berry wound up representing one of Petitioner's codefendants. The arraignment occurred in December of 1998, and Mr. Paul was initially assigned to serve as Mr. Medof's local counsel, advising Mr. Medof on local procedure and Georgia law and attending hearings, but neither Mr. Paul nor the trial court intended that Mr. Paul was going to be "involved in any substantial way in the investigation or preparation of the case." (36-51 at 49).

For the first eight to ten months after the arraignment, before the cases of the various codefendants had been severed, a series of hearings were held to discuss the defendants' pretrial motions. During those hearings, Mr. Paul began to realize that Mr. Medof did not have sufficient experience defending criminal cases. (Id. at 52 ("[Medof] would ask odd questions [on] things that were routine, [and] the way that a criminal case proceeds seemed to be unfamiliar to him.")).

However, it was not until May, 1999, that Mr. Paul became somewhat more involved in the case. In February, 1999, Mr. Paul had requested Petitioner's school records. The initial batch of records Mr. Paul received was incomplete because the school system could not locate many of Petitioner's records. (Id. at 59). In May, the

school found additional records and sent them to Mr. Paul. (Id.). These new records contained test results indicating that Petitioner had repeatedly scored below 70 in a series of IQ tests, indicating to Mr. Paul that there was a viable mental retardation issue that would be important during both phases of Petitioner's death penalty trial. (Id. at 60-61). As a result, Mr. Paul began to develop the defense's case for establishing mental retardation by consulting with a psychologist, Dr. Dennis Herendeen. However, because of Mr. Paul's and Dr. Herendeen's schedules, they were not able to meet until the middle of June, 1999, a little less than two months before the trial. (Id. at 61-63).

On May 24, 1999, around the time of the discovery of the additional school records, the trial court scheduled Petitioner's trial for August 9, 1999. Although Mr. Medoff advised the court that his son's wedding was scheduled for August 7, 1999, he consented to beginning the trial two days after the wedding. (35-6 at 68-70).

Mr. Paul did not receive Dr. Herendeen's final report until after the Unified Appeal hearing – the final significant hearing before the trial – which was held on July 16, 1999. (35-7). At that hearing, Mr. Paul informed the trial judge and prosecutors about Petitioner's school records that he had recently received and the fact that he was working on developing a mental retardation defense with a psychologist. (Id. at 8-9).

The trial was scheduled to begin on August 9, 1999, and the trial judge stated that he did not want the mental retardation issue to cause a delay in trying the case. (Id. at 14).

At the time of the July 16, 1999, hearing, Mr. Medof was still purportedly lead counsel, and Mr. Paul's role was supposed to be limited to assisting with any questions that Mr. Medof had about Georgia criminal law and to be local counsel in case a scheduling matter arose. (35-2 at 32). As a result, Mr. Paul had not done any meaningful work to prepare for the trial. (36-51 at 68). This was twenty-four days before the trial was to commence.

Just after the Unified Appeal hearing, Mr. Paul contacted a mitigation specialist. On July 28, 1999, Mr. Paul filed a motion for funds to pay for the mitigation specialist. (Id. at 71). The mitigation specialist indicated that she needed at least 200 hours to prepare a complete social history, (id. at 71), but she had time to work just over fifty hours, only fourteen and a half of which were spent interviewing potential mitigation witnesses, (id. at 72).

Approximately one and a half weeks before the trial commenced, Mr. Paul received Dr. Herendeen's report in which Dr. Herendeen diagnosed Petitioner as being mildly mentally retarded. (Id. at 75). Also around this time, Mr. Paul had begun to realize that Mr. Medof was not capable of trying the case on his own and that he – Mr. Paul – would have to have a more active role in the case than he had initially

anticipated, but he had not yet come to the realization that he would be trying the case by himself. (Id. at 75-76). Mr. Paul filed a motion for a continuance because, in his conversations with the mitigation specialist and Dr. Herendeen, he realized that he would need more time to develop his case in mitigation and his mental retardation defense. (Id. at 76). The trial judge denied that motion and later denied Mr. Paul's motion for reconsideration of that motion. (Id. at 78; 35-8 at 24).

This Court notes that the trial judge was well aware that Mr. Paul had no death penalty experience. Moreover, at the hearing on Petitioner's motion for a new trial, the trial judge noted that "it took [him] five minutes to figure out" that Mr. Medof was incompetent, and that is why he left Mr. Paul as appointed counsel on the case. (35-21 at 38). Nonetheless, the trial judge never bothered to let Mr. Paul know that he expected Mr. Paul to take on the lead role in the case until the Friday before the Monday trial. Indeed, the judge gave Mr. Paul the impression that his involvement in the case should be limited to an advisory role because "the judge was very sensitive about spending more than was absolutely necessary" in trying the case. (36-51 at 49).

Mr. Medof attended the Unified Appeal hearing. After that, he seemingly disappeared, missing a July 29, 1999, hearing. Thereafter, according to Mr. Paul,

> my understanding was, when Mr. Medof left we had a conversation after the Unified Appeal hearing that he would be coming back to Georgia sometime prior to trial, a week, two weeks prior to trial, and essentially

> setting up camp and would be here for the duration, until the case was concluded. Two weeks prior to trial I still hadn't heard from Mr. Medof.

(Id. at 80).

> When he didn't show up I started trying to get in touch with him and I had a great deal of difficulty getting in touch with him. I was finally told, and again, we probably spoke by phone, that he would be back the Monday morning preceding the start of jury selection, so that he would be there for the entire week preceding the start of the trial on August the 9th. So, I guess that would be, he was scheduled to be back in town on August the 2nd.

(Id. at 85).

Mr. Medof did not arrive, however, until August 4, 1999, the Wednesday before the Monday start of trial, and he was not prepared. (Id. at 86). It was clear that Mr. Medof "had not in any real way done anything to prepare this case, either in terms of the guilt/innocence phase or the penalty phase." (Id.). It was also clear to Mr. Paul that Mr. Medof was not capable of trying the case. (Id. at 86-87).

Thus it was that, *five* days before the trial was to commence, Mr. Paul came to the full realization that he was suddenly in charge of developing the defense for the entire death penalty case, including a mental retardation defense and the case in mitigation for the penalty phase, neither of which he had ever been involved with before. (Id. at 86, 79). On that Wednesday and Thursday, Mr. Medof provided some

nominal[1] assistance to Mr. Paul in preparing the case, but at the end of the day Thursday, Mr. Medof left town to attend his son's wedding for the weekend, having been in town only two days. (Id. at 87).

On Friday, Mr. Paul went to see the trial judge to once again beg for more time, explaining that Mr. Medof had shown up late, had done nothing to prepare for the case, had again disappeared to attend his son's wedding, and was clearly not competent. According to Mr. Paul:

> I explained to him what had developed and that Medof hadn't shown up for our meeting or hadn't shown up to prepare for this case until Wednesday, and I explained to him what happened when he got to the office and I explained to him what he had said to me, that I had, to illustrate to the judge just how desperate I thought the situation was, I had told the judge at that point, "Judge, this is what he said. He said, 'What's Batson?'" And the judge at that point looked at me and said, "I wish you hadn't told me that." Then he basically said, "Well, Mr. Paul, don't worry about it. Mr. Perkinson has an able attorney. You're doing a good job. And this case is going to trial on Monday." And that was basically the end of our conversation.

(Id. at 88).

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[1] According to Mr. Paul:

> [Medof] asked me at some point what could he do to help. I was in the middle of doing some research on Batson and reverse Batson challenges and I had suggested to him [that he] could help me do some research on this issue. And he [looked] at me at that point and he said, well, not to sound ignorant, or words to that effect, but what is Batson?

(36-51at 86-87).

The trial began that Monday, and Mr. Paul handled it entirely by himself with little help from Mr. Medof. In the meantime, after Mr. Paul filed his notice that he would be pursuing a mental retardation defense, the state had hired an expert to review Petitioner's mental health expert's (Dr. Herendeen's) diagnosis of mild mental retardation. The expert that the state hired, however, concurred with Dr. Herendeen's conclusion that Petitioner was mildly mentally retarded. On the second day of voir dire, the state approached the judge and requested a continuance so that the prosecution would have enough time to find another mental health expert to evaluate Petitioner. The trial judge granted the prosecution request, staying voir dire for eight days even though the trial had already started.

The trial recommenced on August 19, 1999, and on that same day, the state's new mental health expert, Dr. Alisa Smith, issued her report, opining that Petitioner was malingering and diagnosing Petitioner with antisocial personality disorder. (34-4 at 160). So it was that, while he was in the middle of trying a death penalty case – for which he was unprepared and essentially on his own – Mr. Paul had to figure out a way to rebut the state's expert witness opinions on an issue – mental retardation – that he had never before tried.

To make matters worse, the mitigation expert that Mr. Paul had hired quit working on the case. After the state's first expert agreed with Dr. Herendeen's mild

mental retardation diagnosis, the state offered to allow Petitioner to plead guilty but mentally retarded in exchange for a life sentence. As will be discussed below, Petitioner rejected that offer. When the mitigation expert heard about the offer, however, she stopped working and left town for the remainder of the trial, thinking that Petitioner had accepted the plea offer. (36-51 at 113). The mitigation expert's assistant had to step in to help Mr. Paul.

Once the trial began, Mr. Paul struggled to put his case together, and he was operating almost entirely on his own, including having to coordinate with witnesses to insure that they appeared when they were supposed to and meeting with Dr. Herendeen to discuss the state's expert's report on the mental retardation issue. (Id. at 117, 182). The prosecution expert, Dr. Smith, issued a revised report on August 24, 1999, merely two days before the mental retardation case was presented.

Even as the penalty phase of the trial began, Mr. Paul was still in the process of developing his case in mitigation. (Id.). He "had a handful of potential witnesses and [he] knew generally what they would say or what I wanted to try to develop with those witnesses in mitigation, but it was fairly insubstantial." (Id.). Mr. Paul described the presentation of his case in mitigation as follows:

> [The mitigation specialist]'s assistant came over to assist us in the mitigation phase when [the mitigation specialist] couldn't be there. And the mitigation phase went much quicker than I anticipated, and I think that I anticipated that we would have longer to develop, even at that point

> in time I felt like we would have longer to develop the mitigation, that I would have time to, you know, go back and meet and come up with a plan to present witnesses, and that's just not the way it turned out. What happened was a handful of witnesses were called and literally as we are putting up our, calling mitigation witnesses in our case-in-chief, [the mitigation specialist]'s assistant is in the hallway, interviewing potential mitigation witnesses and sending me in handwritten notes summarizing the potential witness's mitigating testimony, and I'm having to make a judgment call at that point, based on the notes, as to whether or not we were going to call that particular witness in a few minutes.

(Id. at 118).

Mr. Paul further described that he was putting up witnesses during the penalty phase that he had never spoken to before. (Id. at 120).

3. Discussion of Petitioner's Claims of Ineffective Assistance

In his final brief, Petitioner raises a variety of claims of ineffective assistance, but the bulk of his argument focuses on his claims that (1) trial counsel was ineffective in failing to properly present Petitioner's mental retardation defense, and (2) trial counsel was ineffective in investigating and presenting the case in mitigation during the penalty phase of the trial.

Based on the foregoing discussion, this Court acknowledges that Mr. Medof was clearly ineffective. By all accounts, however, Mr. Paul did a very good job of representing Petitioner considering the constraints that he was under. The question, then, is whether those constraints – mainly the fact that Mr. Paul had very little time

to prepare his defense – were unreasonable, and, if so, whether Petitioner suffered prejudice as a result.

At the outset, this Court finds that the trial court clearly should have permitted Mr. Paul more time to prepare for the trial.

> Implicit in [the] right to counsel is the notion of adequate time for counsel to prepare the defense:
>
> > Disposition of a request for continuance ... is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.
> >
> > But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

United States v. Verderame, 51 F.3d 249, 252 (11th Cir. 1995) (quoting Avery v. Alabama, 308 U.S. 444 (1940) (footnotes omitted)).

> The matter of continuance is traditionally within the discretion of the trial judge, . . . [but] a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Ungar v. Sarafite, 376 U.S. 575, 589 (1964). "To prevail on such a claim, a defendant must show that the denial of the motion for continuance was an abuse of discretion which resulted in specific substantial prejudice." Verderame, 51 F.3d at 251 (citing United States v. Bergouignan, 764 F.2d 1503, 1508 (11th Cir. 1985)).

Here the record clearly demonstrates that (1) the supposed lead counsel was incompetent and wholly unprepared to try the case, and the trial judge knew it at the time; (2) the co-counsel had no experience in trying a death penalty case or preparing a case in mitigation, and the trial judge knew it at the time; (3) the co-counsel had no experience in trying the issue of mental retardation, and the trial judge knew it at the time; (4) the co-counsel had approximately ten days before the beginning of the trial to prepare his mental retardation defense, and the trial judge knew it at the time; (5) the co-counsel had approximately five days before the beginning of the trial to prepare a case in mitigation in a death penalty case – starting with essentially nothing – and the trial judge knew it at the time; and (6) the co-counsel had zero time between receiving the prosecution's mental health expert's report and the recommencing of the trial after the stay, and, once again, the trial judge knew it at the time.

The trial judge's justification for denying Mr. Paul's motion for a continuance was that "it's been long enough," (35-7 at 14), which, when considering Mr. Paul's

circumstances, constitutes an arbitrariness and a "myopic insistence upon expeditiousness," Ungar, 376 U.S. at 589, that is self evident.

Admittedly, because the trial court granted the prosecution's request for a continuance, Mr. Paul had an additional eight days to prepare his case, and while that additional time should be considered in determining whether trial counsel had sufficient time to prepare his case, it certainly was of no benefit to Mr. Paul in his efforts to counter the prosecution mental health experts' diagnoses because Mr. Paul did not receive those diagnoses until after the trial had recommenced.

In rejecting Petitioner's claim on appeal that the trial court erred in failing to grant Petitioner's motion for a continuance, the Georgia Supreme Court stated:

> We find that the trial court did not abuse its discretion in denying [Petitioner]'s motion for a continuance made on the eve of trial. O.C.G.A. § 17-8-22.[2] Also, as discussed in the previous division, [Petitioner]'s trial was in fact continued for eight days when the trial court granted the State's motion for a continuance during voir dire.

Perkinson, 610 S.E.2d at 540.

It is important to stress, however, that Petitioner's claims of ineffective assistance of counsel were not before the Georgia Supreme Court, and, as a result, the state court did not have the factual record of Mr. Medof's and Mr. Paul's

[2] O.C.G.A. § 17-8-22 simply states that the trial court has discretion over whether to grant a continuance.

representation before it. This Court also notes that Petitioner did not raise a claim related to the trial court's refusal to grant a continuance in the instant petition. However, the Supreme Court has held that "judicial action before or during trial [can prevent] counsel from being fully effective." United States v. Morrison, 449 U.S. 361, 364 (1981) (citing Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975) and Powell v. Alabama, 287 U.S. 45 (1932)). Accordingly, this Court can consider the trial court's actions in evaluating Petitioner's claim of ineffective assistance of counsel.

a. Petitioner's *Cronic* Claim

Because Mr. Medof provided essentially no assistance and Mr. Paul did not have adequate time to prepare for Petitioner's trial, Petitioner contends that this Court should presume that he was prejudiced under United States v. Cronic, 466 U.S. 648 (1984).

> Cronic "recognized a narrow exception to Strickland's holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense." Florida v. Nixon, 543 U.S. 175, 190 (2004) (discussing Cronic). Cronic held that a Sixth Amendment violation may be found "without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial," Bell v. Cone, 535 U.S. 685, 695 (2002), when "circumstances [exist] that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," Cronic, supra, at 658.

> Cronic, not Strickland, applies "when . . . the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial," 466 U.S., at 659-60, and one circumstance warranting the presumption is the "complete denial of counsel," that is, when "counsel [is] either totally absent, or prevented from assisting the accused during a critical stage of the proceeding," id., at 659, and n. 25.

Wright v. Van Patten, 552 U.S. 120, 124-25 (2008).

Petitioner contends that, because Mr. Medof was so incompetent, the effect was that Petitioner had the equivalent of no counsel until June, 1999, when Mr. Paul started working in earnest on the case. This Court agrees with the premise that Mr. Medof was essentially a nonentity as Petitioner's counsel, but the record indicates that Petitioner's interests were represented in the time between the arraignment and June, 1999.

During the pretrial motions hearings, the cases of the four codefendants, who were all still subject to a death notice, had not yet been severed. Jimmy Berry, the experienced death penalty attorney discussed above, was representing Petitioner's codefendant, Rico Wilson. Because of his experience, Mr. Berry played the role of lead attorney at the motion hearings. He filed numerous motions, and the attorneys for the other codefendants adopted Mr. Berry's pretrial motions. (36-51 at 51). Mr. Berry also took the lead in arguing those motions. (Id.). Mr. Paul also attended and participated in those hearings. (Id.).

Additionally, Mr. Paul represented Petitioner during the trial, and he was able to put up a significant case in Petitioner's defense. This Court agrees with the state habeas corpus court which found "that the facts of the instant case are nothing like those outlined in Cronic where trial counsel stood idly by and provided no assistance." (39-25 at 29). Accordingly, this Court concludes that the Cronic presumption of prejudice is not implicated in this case.

b. Presentation of the Mental Retardation Defense

i. Legal Standard

In 1988, Georgia enacted a statute prohibiting the execution of mentally retarded criminals. See O.C.G.A. § 17–7–131(j). The United States Supreme Court later held that execution of mentally retarded individuals constitutes cruel and unusual punishment in violation of the Eighth Amendment. Atkins v. Virginia, 536 U.S. 304 (2002). In banning the execution of the mentally retarded criminals, the Court expressly left the procedures for determining whether a particular individual is mentally retarded to the states. Hill v. Humphrey, 662 F.3d 1335, 1348 (11th Cir. 2011) (citing Atkins, 536 U.S. at 317). In Georgia, the essential features of mental retardation are: (1) significantly subaverage general intellectual functioning, (2) resulting in deficits in adaptive behavior, and (3) the manifestation of subaverage

functioning and adaptive deficits prior to age eighteen. O.C.G.A. § 17–7–131(a)(3). According to the Georgia Supreme Court:

> "Significantly subaverage intellectual functioning" is generally defined as an IQ of 70 or below. However, an IQ test score of 70 or below is not conclusive. At best, an IQ score is only accurate within a range of several points, and for a variety of reasons, a particular score may be less accurate. Moreover, persons "with IQs somewhat lower than 70" are not diagnosed as being mentally retarded if there "are no significant deficits or impairment in adaptive functioning."

Stripling v. State, 401 S.E.2d 500, 504 (Ga. 1991) (internal citations omitted). Likewise, an IQ score slightly above 70 does not preclude a mental retardation diagnosis. Hall v. Florida, 572 U.S. 701, 723 (2014) (requiring states to account for the standard error of measurement in an IQ test score which is typically plus/minus five points).

"Adaptive functioning" refers "to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 40 (4th ed. 1994). Examples of "adaptive activities" that may be considered in assessing an individual's functional limitations include "cleaning, shopping, cooking, taking public transportation, paying bills, maintaining

a residence, [and] caring appropriately for . . . grooming and hygiene." Id. § 12.00(C)(1).

O.C.G.A. § 17-7-131(c)(3) leaves the determination of mental retardation to the factfinder in the criminal trial, and requires the criminal defendant to prove mental retardation beyond a reasonable doubt. See Hill, 662 F.3d at 1360 (holding that Georgia's reasonable doubt standard for proving mental retardation is constitutional).

ii. Trial Counsel's Presentation of the Mental Retardation Defense

In attempting to establish Petitioner's mental retardation, Mr. Paul presented three witnesses and submitted historical documentation into evidence. The state habeas corpus summarized Mr. Paul's efforts, as well as the prosecution's case in rebuttal, as follows:

> Trial counsel first called Barbara Tustian, a psychometrist with the Cartersville City Schools, to testify. She testified that she had initially tested the Petitioner in April 1986 when Petitioner was seven years old following a referral from his first grade teacher. During this initial evaluation, she noted that Petitioner was cooperative and "put forth his best effort." Ms. Tustian told the jury that after the administration of all the tests, she concluded that the Petitioner functioned in the borderline range of intelligence. Ms. Tustian then performed a second evaluation of the Petitioner in 1987 after he was again referred by a teacher due to continued difficulty in school. Ms. Tustian again administered the WISC-Rand. Petitioner obtained a full scale IQ score of 73. Regarding the drop in Petitioner's IQ score, Ms. Tustian testified that it was not unusual to see a drop in score of five points.

In addition to the WISC-R, Ms. Tustian testified that she administered a number of other tests which established that Petitioner scored below his chronological age.

On the element of adaptive behavior for a diagnosis of mental retardation, Ms. Tustian testified that during the 1987 evaluation she additionally administered the AAMD Adaptive Behavior Scale. She informed the jury that the results of the adaptive functioning measure revealed that Petitioner had weakness in the areas of language development and responsibility. Ms. Tustian testified that Petitioner's overall results were consistent with the "range of mild mental handicapped." Ms. Tustian additionally testified that during the l987 evaluation, she noted that the Petitioner was cooperative and put forth a good effort. Following her 1987 evaluation, Ms. Tustian concluded that the Petitioner was functioning in the borderline range of intelligence at that time, Petitioner qualified for the special education program, and he was re-evaluated every three years.

Petitioner was again re-evaluated by Ms. Tustian in 1990 when she again administered the WISC-R. At that time, Petitioner obtained a full scale IQ score of 62. In addition to the WISC-R, Ms. Tustian also administered additional tests which showed that Petitioner was functioning below his chronological age. As evidence of adaptive behavior deficits, Ms. Tustian testified that in l 990 she administered the Adaptive Behavior Inventory, which was given to one of Petitioner's teachers. Ms. Tustian told the jury that the results from the Adaptive Behavior Inventory showed that Petitioner was functioning in the mildly mentally retarded range.

In support of his claim of mental retardation, the defense next called Dr. Jeri Breiner, a clinical psychologist. Dr. Breiner, who was initially retained by the prosecution and asked to review the evaluation done by Dr. Herendeen, outlined her experience in the area of mental retardation. Dr. Breiner defined the term mental retardation for the jury.

Dr. Breiner testified that as part of her assessment she reviewed the raw data from Dr. Herendeen's testing, Petitioner's school records, a vocational assessment and a request written in jail. She additionally

testified that she had spoken with Dr. Herendeen about the results of his testing. Dr. Breiner testified that the findings by Dr. Herendeen were consistent with the other information she was provided, including the 1993 evaluation of Petitioner (the Hatch report) which concerned the Petitioner's adaptive deficits. She testified that the corresponding data from the Hatch report and Dr. Herendeen's report indicated Petitioner had the requisite adaptive deficits.

Dr. Breiner testified that as to adaptive behavior deficits, the Vineland test was the acceptable and reliable testing instrument and that Dr. Herendeen's use of the Petitioner's mother for the test was in accordance with professional procedures. Using the reports provided by Dr. Herendeen and the 1993 Hatch report, Dr. Breiner testified about the Petitioner's adaptive deficits. Dr. Breiner opined, based upon her review of all the data, that Petitioner functioned at a mild mental retardation level.

Dr. Breiner also testified about how to measure malingering and what types of instruments might be used.

The last expert presented by the Petitioner on the issue of mental retardation was Dr. Dennis Herendeen. Dr. Herendeen testified that he was retained by Mr. Paul to perform an evaluation of the Petitioner. Dr. Herendeen testified that he met with the Petitioner on five different occasions for approximately ten hours. Dr. Herendeen identified the different tests he performed on the Petitioner and explained to the jury that he used what is called a Convergent Validity Model where he performs several different tests and looks for overall patterns of data, with the assumption being if both tests are saying the same thing, it's more believable. In that regard, Dr. Herendeen testified that he performed three separate intelligence tests, two separate measures of achievement and two tests for screening organic problems. In addition to testing, Dr. Herendeen also spoke with the Petitioner's mother on two separate occasions, reviewed school records which included four separate psychological evaluations, reports, notes, depositions and other documents detailing the investigation into the case and a report prepared by Dr. Allison Smith.

Regarding the scores obtained by Petitioner on the tests, Dr. Herendeen testified that Petitioner obtained an overall composite score of 62 on the Kaufman Adolescent and Adult Intelligence Test (KAIT), which indicated that the Petitioner was functioning in the mild mental retardation range of intelligence. On the Wechsler Intelligence Scale, III (WAIS-III) Petitioner obtained a full scale IQ of 66, which also indicated that Petitioner was mildly mentally retarded. With regard to the Wild Range Achievement Test (WRAT III) which is designed to look at types of academic functioning in the areas of reading, spelling and arithmetic, Petitioner had a first grade reading level, a first grade spelling level and a third grade arithmetic level. Dr. Herendeen testified that these scores were also consistent with someone who is mildly mentally retarded. Dr. Herendeen testified that the overall IQ scores from the testing performed by him and his finding of mild mental retardation were consistent with scores that were previously obtained on the school administered tests.

Mr. Paul elicited testimony from Dr. Herendeen regarding the drop in test scores from the time Petitioner was first tested in 1986 when he had a full scale IQ of 78 and the next year when he scored a 73. Dr. Herendeen testified that it was not unusual to see that type of drop in scores as there is going to be some change in scores because of "developmental issues." Although he was repeatedly asked about a possible conduct disorder being responsible for the drop in IQ scores, Dr. Herendeen testified that he did not see evidence of that diagnosis. He testified that he ruled out childhood conduct disorder based on all the information he had because of the "cumulative impact of all the data [he] saw." When questioned about Petitioner being "sneaky," Dr. Herendeen stated that often young children and normal children without mental retardation problems often do that. Further Dr. Herendeen explained that Petitioner's behavior problems in school were not the cause of his drop in IQ but rather the academics were too hard for him and he had behavioral problems because he gave up on school. Dr. Herendeen further testified that stress in the environment which comes from a child living in a dysfunctional home and their environment becoming more chaotic causing them to not be able to concentrate in school, results in them falling behind in school.

On the element of adaptive functioning, Dr. Herendeen testified that he administered the Vineland Adaptive Behavior Scales to the Petitioner's

mother. The Vineland is an assessment which requires information be obtained from somebody other than the person who is the target of the evaluation. Dr. Herendeen testified that you have to have an independent person who has observed the individual. He testified that you either have to rely on a member of the family or a teacher and since the Petitioner had been out of school for so long, he did not have access to his teachers. Therefore, in his opinion administering the test to his mother was appropriate. In addition to performing the Vineland, Dr. Herendeen also looked at the level of functioning from the earlier testing and these tests were also indicative of adaptive level of functioning in the mildly mentally handicapped area. Dr. Herendeen concluded that the current Vineland evaluation of adaptive functioning was consistent with the prior evaluations which identified the Petitioner as someone who has a mildly mentally handicapped level of functioning.

The State then called Dr. Pam Eilender, a clinical psychologist, employed with Georgia Regional Hospital in Atlanta to testify. Dr. Alissa Smith requested that Dr. Eilender administer some tests to the Petitioner. Dr. Eilender conducted the WAIS-III, the Hooper Visual Organizational Test, and the Bender-Gestalt. Dr. Eilender testified that she observed the Petitioner to be "a little defensive" and "responded with a lot of I don't knows." She additionally testified that he "shrugged his shoulders when he didn't want to respond." Dr. Eilender testified that a few "I don't knows can be expected but even somebody with a low IQ score between 60 and 70 is going to offer a guess" and the Petitioner didn't. Dr. Eilender testified that she was aware that prior to her testing, the Petitioner had recently taken the same test. Because of this recent testing, Dr. Eilender informed the Petitioner that "she was aware that he had taken the same test only a few weeks ago and so I was expecting him to do much better on mine because he had the practice of already taking the test." Dr. Eilender explained to the jury that there were studies that supported the theory that people will score at least two to three points higher if they are given the same test within about a month's time and this was why she was expecting him to score a few points higher than he had on the last administration of the test. Petitioner scored a 61 on her test, which was five points lower than he had scored on the previous administration of the WAIS-III. As for the results on the Bender- Gestalt, Petitioner's drawings were "representative of somebody with a low IQ,

anywhere from mild mental retardation to the borderline range." Dr. Eilender explained to the jury that the low scores on the tests she administered, the frequent "I don't knows" and the defensiveness, indicated to her that the Petitioner was "trying to get a lower score on testing overall."

On cross-examination, Mr. Paul attacked Dr. Eilender's findings with regard to the practice effect. He additionally had her concede that, regarding the Bender-Gestalt, she and Dr. Herendeen both administered the test and came up with similar results. Specifically, she testified that the results from the Bender-Gestalt showed no brain damage and the results were indicative of either borderline or mild mental retardation. As to adaptive functioning, Dr. Eilender testified that she did not administer any tests for adaptive functioning and therefore could not render a diagnosis.

The State then presented Dr. Alisa Smith, a psychiatrist from Georgia Regional Hospital. Dr. Smith was asked to evaluate the Petitioner for both competency and mental retardation on behalf of the State. Dr. Smith testified that her opinion was based on her interview with the Petitioner, old school records, some materials from juvenile court and some testing data from both Dr. Herendeen and Dr. Eilender. Dr. Smith testified that during the interview with the Petitioner, which took approximately an hour and forty-five minutes, he did not seem "very forthcoming" and was not very open with a lot of his answers. Dr. Smith testified based on her interview with the Petitioner, as well as his mental status exam and also the data received from Dr. Eilender as compared to that from Dr. Herendeen, she felt that "there was some effort on the part of Mr. Perkinson to try to under represent his cognitive functioning or his ability to be intellectual" so that he may have been actually trying to make himself look a bit slower than he actually was. Dr. Smith gave some examples that supported her opinion that the Petitioner was malingering, including giving approximate answers, which are answers which are off by just a little bit. There was also evidence of malingering in the tests that were administered to the Petitioner including the Rey Fifteen Item Test and the Clock Face Test. Dr. Smith also testified that malingering was indicated based on the testing data from Dr. Eilender and Dr. Herendeen and also general data like whether the fact that Petitioner was

making poor eye contact and gave vague answers like "I don't know" a good deal of the time. Dr. Smith testified that one of the things she found to be important was that when she asked the Petitioner what he thought would happen if the doctors came back with a finding that he was slow, Petitioner, after initially saying "I don't know," said he understood that they would drop the "death penalty thing." Dr. Smith testified that because he was making an effort to look slower than he was, she could not make a determination as to Petitioner's intelligence level.

As to Petitioner's drop in IQ scores from a 78 to a 73, Dr. Smith testified that it was "not uncommon to see a small drop" but that a drop in scores from 73 to 62 in a span of about three years was "more perplexing and more difficult to explain." Dr. Smith explained that children from dysfunctional homes who are unhappy, depressed or anxious may have a significant drop in IQ scores but also children that are having problems in school, not attending school and not being attentive in school may also have a significant drop in IQ scores.

Dr. Smith testified that she found supporting information in Petitioner's school records which indicated his inattention at school and refusal to do his work. She testified that she considered the drop in IQ scores to be "profound" and she believed that there was "something else going on in Mr. Perkinson's life at that time that resulted in that drop in his IQ." As the school records indicated that Mr. Perkinson was getting into trouble, Dr. Smith opined that a conduct disorder was a "pretty good possibility" with Petitioner as a child. Additionally, Dr. Smith testified that there was evidence in the school records of Attention Deficit Disorder, which could also explain the significant decrease in his IQ scores. Dr. Smith diagnosed the Petitioner with malingering and antisocial personality disorder but she also gave the Petitioner a rule-out diagnoses (which means they are still in the process of ruling them in or ruling them out) of borderline intellectual functioning and mild mental retardation. Dr. Smith said she was hesitant to make a diagnosis of mild mental retardation because she felt she did not have good test data recently. On the prong of adaptive functioning based on the information she had, Dr. Smith testified that she felt that the information about adaptive functioning were "signs of antisocial personality or attention deficit disorder or some other problem."

On cross-examination, Mr. Paul made it clear to the jury that Dr. Smith could not rule out mental retardation. He also clearly pointed out that an assessment of malingering was subjective and depends in large part on the observations of the evaluator. When questioned about whether or not the observations of Ms. Tustian were reliable, Dr. Smith testified that the first two evaluations by Ms. Tustian did not say that Petitioner was mentally retarded and that the third evaluation "may have been subject to some outside influences." She further opined that Dr. Eilender's and Dr. Herendeen's testing data were both subject to some speculation that the Petitioner may have been faking because he would have an obvious reason to want to do that. Dr. Smith testified that she did not question the integrity of the reports prepared in the school setting – the three by Ms. Tustian and the one by Mary Hatch.

Dr. Smith testified that she administered the clock face test and the Rey's in an attempt to determine malingering in the Petitioner. Mr. Paul cross-examined Dr. Smith about the efficacy of using the clock face test which was normed with persons who had a mean education level of a junior in college to assess someone who is suspected of being mildly mentally retarded. He additionally had Dr. Smith testify that she was not aware of any studies that had been done regarding the reliability and validity of the clock face test as a screening tool on mentally retarded people or for the specific purpose of malingering. Finally, Mr. Paul concluded his cross-examination of Dr. Smith by showing her an evaluation of the Petitioner that was done in 1995 by Georgia Regional Hospital, Dr. Smith's employer, that indicated that there was a diagnoses of mild mental retardation.

The State then called three witnesses from the Douglas County Sheriffs Department to offer testimony regarding Petitioner's adaptive functioning. Mr. Paul cross-examined each of these witnesses and was able to utilize the records used by these witnesses to support his claim of mental retardation.

Following the testimony of the State's witnesses in rebuttal, Mr. Paul recalled Dr. Herendeen in surrebuttal. Dr. Herendeen testified that after his earlier testimony he had the opportunity to review additional documents that were provided to him by Mr. Paul, in particular

> documents from the Department of Human Resources (DHR) that supported the findings of mental retardation and specifically adaptive deficits. Dr. Herendeen testified that the records indicated that the Petitioner was involved in vocational rehabilitation to assist him in developing daily living and job skills. According to Dr. Herendeen, the DHR records provided "concrete examples of specific behaviors that corresponded to the test scores." For example, Dr. Herendeen testified about documents which showed an attempt to show the Petitioner how to use a ruler but he was unable to do that and he additionally could not "pull orders." He testified that according to the records, Petitioner was diagnosed as mildly mentally retarded.

(39-25 at 36-46 (citations to the internal record omitted)).

As indicated by the state court, the state's evidence regarding Petitioner's adaptive functioning consisted solely of the anecdotal testimony of a nurse and two sheriff's deputies at the Douglas County Jail. They testified, generally, that Petitioner seemed to be able to understand what was said to him and that he could follow instructions. One deputy noted that Petitioner had been assigned to clean his area of the jail and that he had done an able job. The state also presented examples of forms that Petitioner had filled out while at the jail.

iii. State Habeas Corpus Court's Conclusion that Petitioner Failed to Establish his Claim of Ineffective Assistance

At the hearing in the state habeas corpus court proceeding, Petitioner presented the testimony of three well-credentialed experts, Dr. Marc Tasse, Dr. Daniel A. Martell, and Dr. Stephen Greenspan. None of those experts met with Petitioner or

otherwise evaluated him. Rather, they reviewed the exhibits and testimony from Petitioner's trial as well as numerous affidavits secured by Petitioner's counsel that provided anecdotal testimony regarding Petitioner's adaptive deficits. All three experts testified that they concurred with Dr. Herendeen's diagnosis that Petitioner was mildly mentally retarded.

In concluding that Petitioner had failed to demonstrate that Mr. Paul had been ineffective in presenting the defense of mental retardation, the state habeas corpus court found that Mr. Paul's presentation was not deficient. (39-25 at 47). The state court first noted that the expert testimony presented at the state habeas corpus hearing was "very similar to that presented at trial" and that Petitioner's experts at the state habeas corpus hearing all relied on Dr. Herendeen's testing "in making their opinions." (Id. at 47-48). The state habeas corpus court further pointed out that

> [w]hile trial counsel did not present lay witnesses to testify about Petitioner's mental health or his adaptive deficits, trial counsel did present three experts to testify to all three prongs of mental retardation citing specific references and instances in the documentary evidence concerning Petitioner's alleged adaptive deficits. All three experts presented at trial by the Petitioner testified that they had concluded that Petitioner was mentally retarded. Additionally, the State's witnesses testified that they could not rule out mental retardation. Petitioner also submitted numerous documents including testing data and various reports which supported his theory of mental retardation.

(Id. at 48).

Based on these findings, the state habeas corpus court concluded that the "fact that the jury rejected Petitioner's claim of mental retardation in light of all the facts and evidence presented does not establish that trial counsel was deficient." (Id.). According to the state habeas corpus court, Petitioner's evidence at the hearing before that court was "that the testimony by the trial experts (Herendeen, Breiner and Tustian) was sufficient to establish a claim for mental retardation," and Petitioner's experts at the habeas corpus hearing did not disagree with Dr. Herendeen's testing methods or diagnosis. (Id.). Because the testimony of the experts "was consistent with that presented at trial," Petitioner could not establish prejudice. (Id. at 51).

Further on the topic of adaptive deficits, the state habeas corpus also noted that,

> Given the presentation of the evidence, the Court finds that trial counsel was not deficient in the presentation of Petitioner's adaptive deficits. Trial counsel presented the testimony of three experts on this issue. Petitioner's habeas expert Dr. Tasse testified that the use of Petitioner's mother as the informant for the Vineland by Dr. Herendeen was appropriate. He additionally testified that the testimony of Dr. Herendeen as well as the testimony of Barbara Tustian was sufficient to show significant adaptive deficits. The fact that trial counsel failed to call familial witnesses to testify to adaptive deficits when that evidence had already been presented by his experts was not deficient. The Court finds it was reasonable for trial counsel to rely on the testimony of the experts on the issue of adaptive deficits rather than members of Petitioner's family. Petitioner has failed to show that trial counsel's presentation of this evidence was deficient. The Court also notes that before the jury were records and evidence that Petitioner did not possess adaptive deficits. In that regard, the Court finds that Petitioner has failed to show that there was any resulting prejudice.

(Id. at 65-66).

As will be discussed below, however, the state habeas corpus court barely addressed the lay witness testimony that Petitioner presented in that proceeding.

iv. This Court's Analysis

At Petitioner's trial, the jury heard that over the course of his life, Petitioner took six IQ tests from 1986 to 1999. When Petitioner was ages 7 and 8, he scored 78 and 73, respectively. However, by age 11 his IQ had dropped to 62 and was again measured at 62 at age 14. In the two tests performed in preparation for Petitioner's trial, he scored 66 and 61. As noted by the state habeas corpus court, all of the state's expert witnesses "testified that they could not rule out mental retardation." (Id. at 48). Petitioner repeatedly tested in the mild mentally retarded range, and as also noted by the state habeas corpus court, the state's experts "did not question the integrity of the reports prepared in the school setting." (Id. at 45). In addition, records admitted into evidence from the Georgia Department of Human Resources Division of Rehabilitation Services, dating from 1995 when Petitioner was sixteen years old, noted that Petitioner had been diagnosed as mildly mentally retarded. (35-18 at 138).[3] Accordingly, in the

[3] This Court notes that Petitioner was just nineteen-years-old at the time that he committed his crimes and twenty when he was tried.

face of this strong evidence, the jury, in finding that Petitioner had not established that he was mentally retarded, must have been convinced by the testimony (1) that Petitioner was malingering, (2) that Petitioner's low, school-age test scores were the result of his inattention and possible conduct disorder, and/or (3) that Petitioner had failed to establish sufficient adaptive deficits in light of the evidence presented by the state. However, in addition to the three experts that testified at the state habeas corpus hearing, Petitioner also presented compelling, noncumulative evidence in the state habeas corpus proceeding that addressed each of those three issues and would have been available to Mr. Paul if he had been given sufficient time to prepare his defense.

In addition to the testimony of family and friends who testified that Petitioner was a slow learner who did not engage in age appropriate behavior, he also presented the testimony of several disinterested witnesses who had first hand experience interacting and working with Petitioner throughout his life. The jury heard none of this evidence.

Celesta Moore was Petitioner's special education teacher in first and second grades and later in ninth and tenth grades. (Doc. 36-52 at 3). She testified before the state habeas corpus court that, because of the severity of Petitioner's disability, she taught all of his academic courses. (Id. at 5). She repeatedly testified that Petitioner was much slower mentally than the other children in her special education class . (E.g.

id. at 44-45). She further testified that, when he first arrived in the special education class, Petitioner was significantly behind other students his age. (Id. at 12). In reading he did not have his readiness skills, which involves recognizing the alphabet and knowing the phonetic sounds of letters, (id. at 12-13), and this was after Petitioner had repeated kindergarten.

According to Ms. Moore, Petitioner had no behavioral problems in first grade, (id. at 18), and while he was less motivated and more distracted in high school, he did not act like a bully, and he was not violent, (id. at 32, 42). She also testified that, in high school, Petitioner was not independent. (Id. at 38). She thought that the testimony from the trial that Petitioner was lazy or careless could be interpreted to indicate that Petitioner was trying to hide the fact that his mental capacity was deficient. (Id. at 46).

Kimberly Fischer was a social worker for the juvenile court whose job was to evaluate whether juvenile offenders should be placed in detention or returned home to their parents. She testified that, when he was sixteen, Petitioner was arrested for obstruction, and because alcohol was supposedly involved,[4] he was taken to the hospital where Ms. Fischer met with him. (Id. at 106). As soon as she started talking

[4] It turned out that alcohol was not involved. Because of Petitioner's limited communications skills, the arresting officers thought he was drunk.

to him, she realized that he was mentally disabled. (Id. at 107). As a result of the charges against him, Petitioner was placed in Ms. Fischer's after school program, (id. at 111), and Petitioner was not able to participate in some of the classes given in the program because of his mental limitations, (id. at 112-113). Ms. Fischer testified that when Petitioner participated in a "daily skills" class that "focused on things such as taking care of laundry and taking care of grocery lists and preparing a budget of some sort, to make sure that we allowed for food and for any clothing items," (id. at 115), and "maintaining . . . skills needed for daily life," (id. at 116), Petitioner "wasn't able to keep up with that material," (id.). For example, Petitioner could not grasp how to make a budget, or how to make a grocery list that was limited to a certain budget. (Id. at 117). As a result, she had to remove Petitioner from the class. (Id.).

Ms. Fischer also testified that Petitioner was cooperative and not "oppositional." He was responsive and would do tasks when asked. (Id. at 120). If asked a question he did not understand, "he just wouldn't answer . . . . He wasn't defiant, he just wouldn't participate in the conversation." (Id.).

According to Ms. Fischer, Petitioner scored a 56 and a 58 on two IQ tests given to Petitioner as part of psychological examinations by the Department of Juvenile Justice. (Id. at 123). The record is not clear whether trial counsel was aware of these test results, but they were not presented at Petitioner's trial.

Petitioner also submitted the affidavit of Sue Brown, Petitioner's fourth grade teacher. (Doc. 38-2 at 130). Ms. Brown testified that Petitioner turned 13 during his fourth grade year. (Id.). At the age of 13, he struggled with second grade level math, and he could not comprehend fourth grade social studies and science classes; he would "stick with" his assignments, but it took him a long time to finish. (Id. at 133). Petitioner also struggled with reading. He did not know some vowel sounds and was able to sound out only three-letter words. Because of his inability to retain information and his lack of memory skills, Petitioner likewise had significant difficulty with vocabulary and spelling. (Id. at 134). After his fourth grade year, the school decided that he should spend the entire day in special education classes. (Id. at 133). In his end-of-year report card, Ms. Brown noted that Petitioner had a good attitude and that he put forth good effort. (Id. at 134).

In another affidavit submitted in the state habeas corpus proceeding, Louise Falkenberry testified that she was Petitioner's special education teacher from third grade through fifth grade. (Id. at 148). Petitioner was one of her weakest special education students. (Id.). He was not able to comprehend much of the material given to him and he struggled a great deal. (Id.).

Falkenberry stated that Petitioner was not a "behavior problem" in her class: "He was never violent, aggressive or disrespectful to me or my assistant teacher. The

only time [Petitioner] was a problem was when it came to doing work too difficult for him to understand." (Id. at 149). She also noted that she commented on Petitioner's school records that

> he tends to follow the inappropriate leads of the other boys, which is also common for children with [Petitioner]'s disability and background. I also noted that he was "sneaky," referring to [Petitioner]'s attempt to hide papers, but to be honest, this is a behavior I observe in a lot of children regardless of their intellectual functioning.[5] The comment that I wrote in [Petitioner]'s record could have been written about any one of my students. [Petitioner]'s lack of progress had nothing to do with his attitude or how he behaved, for there were certainly occasions that he tried in spite of how difficult or embarrassing things were for him, a point that I noted in the records. I observed [Petitioner] over the course of three years; he made very little progress primarily because he was mentally-challenged.

(Id. at 150-51).

In the state habeas corpus proceeding Petitioner also submitted a fourth grade special education report that stated that Petitioner "has tried hard this year. He has been cooperative and well-behaved. . . . However he is lazy and needs to be pushed in order to complete his work." (Id. at 155). His reading and spelling levels were measured to be at the first grade level. Again, Petitioner was thirteen at the time.

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[5] At Petitioner's trial, the prosecutor and the state's expert witnesses repeatedly referenced Falkenberry's statement that Petitioner' was "sneaky" in support of the contention that Petitioner had conduct disorder or antisocial personality disorder. (See Doc. 35-17 at 76, 77, 78, 141, 194, 196, 207).

Petitioner's health and physical education teacher noted that when Petitioner was in the seventh grade at age sixteen, Petitioner was a non-reader and could not keep up with the class work. (Id. at 192). Another health teacher, Woodrow James testified in his affidavit that he was

> completely aware that [Petitioner] had a disability. If you gave him something to read, you would know within the first five seconds that he had problems. When it came to health class, I remember having to adjust the tests that I gave [Petitioner]. The class consisted of students on different levels, but I knew that [Petitioner] would not be able to pass a test that was designed for his age group. I would give him tests with multiple choice questions or give him simple questions that he could understand. I also cut down on [Petitioner]'s homework assignments because I knew that he would not be able to handle the load. [Petitioner] tried hard in class and he tried to do what I asked of him mainly because I think that he liked me and didn't want me to think badly of him. When he didn't understand what I gave him in health class, he would at least try. If he still couldn't do it, then he would just sit there in his desk and not do anything.

(Id. at 195).

In yet another affidavit, Richard King, a vocational evaluator for the Georgia Department of Human Resources Division of Rehabilitation Services testified that he performed a vocational assessment of Petitioner in August of 1995. (Id. at 202).

> A teenager with [Petitioner]'s limitations would not have been able to work or live independently without assistance or intervention. In fact, because [Petitioner] had no skills upon which to build and had his intellectual limitations to contend with, I recommended that [Petitioner] have a job coach and/or on-the-job training. A job coach is someone that would have shadowed [Petitioner] to make sure that he not only understood how to do the work, but could handle the stressors that come

> with employment, such as dealing with bosses, co-workers or customers. Similarly, in order for [Petitioner] to live away from his family as an adult, a caseworker would have to have taken [Petitioner] out of his home environment and set him up somewhere with all the necessities.

(Id. at 203).

Petitioner's high school principal, J.S. Morgan, testified that he did not think that Petitioner had behavioral issues and remembered him as "generally cooperative and manerable." (Id. at 253).

Patricia Schellhardt, Petitioner's special education teacher in eighth grade when Petitioner was fifteen and sixteen, noted that Petitioner could not, at the time, read above a third grade level. (Id. at 285).

Sharon Vosburgh testified that she also taught Petitioner in first grade. She noted that when Petitioner was nine and completing his second year of first grade, he knew only ten "sight words" and could not get beyond that point when the typical, six-year-old first grader knows 175 sight words. She also commented that Petitioner "was a hard worker." (Id. at 295).

In his testimony before the state habeas corpus court, Mr. Paul stated that he felt strongly that he did not have enough time to properly develop his case with regard to the adaptive functioning prong of his mental retardation defense. (36-51 at 132). Because of the time constraints that he was operating under, Mr. Paul stated he was able to only "scratch the surface" in developing this aspect of his mental retardation

defense. (Id.). Mr. Paul had hoped that Dr. Herendeen would be able to work with the mitigation specialist to further develop the adaptive deficit evidence, but that happened, if at all, only to a limited degree "in the time frame that we had." (Id. at 132-33). Mr. Paul wanted to call some of Petitioner's teachers or school counselors to testify regarding Petitioner's abilities and limitations, but he did not have the time available to make that happen. (Id. at 168, 172).

As discussed above, the state habeas corpus court concluded that Mr. Paul was not deficient for failing to present lay witness testimony regarding Petitioner's adaptive deficits because the experts he did present testified to all three prongs of the mental retardation test. Specifically, the state court found that "it was reasonable for trial counsel to rely on the testimony of the experts on the issue of adaptive deficits." (Doc. 39-25 at 65). However, Mr. Paul would have presented lay testimony but could not under the circumstances because he simply did not have enough time to do so. It is thus clear that the failure to present the testimony was not a strategic decision, and contrary to the state court's finding, Mr. Paul did not "rely" on the expert testimony to make his case; rather, it was the most he could do given his situation and the limited time that he had to prepare. This Court again notes Mr. Paul did not receive the state's mental health expert's report until the trial had begun, and he thus had to somehow

find time to build his case in response to that report when he was not trying the case or dealing with the myriad other issues that demanded his attention.

Because there was no evidentiary basis for the state court to find that Mr. Paul made a strategic decision to forego lay witness testimony, the only reason that the state court could have for concluding that Petitioner had not established his claim of ineffective assistance for trial counsel's failure to present more extensive adaptive deficit evidence was that Petitioner failed to establish prejudice. The state court's prejudice analysis, however, was limited to the following two sentences: "The Court also notes that before the jury were records and evidence that Petitioner did not possess adaptive deficits. In that regard, the Court finds that Petitioner has failed to show that there was any resulting prejudice." (Id. at 65-66). This brief analysis incongruously suggests that, because evidence introduced at the trial supported the argument that Petitioner did not have adaptive deficits, he cannot demonstrate that he was prejudiced by trial counsel's failure to present evidence showing that he did have adaptive deficits.

Moreover, while the state habeas corpus court discussed, repeatedly and at great length, the adaptive deficit evidence presented at Petitioner's trial as well as the expert testimony that he presented at the state habeas corpus proceeding, the state court made no mention of the lay witness adaptive functioning evidence that Petitioner presented

at the habeas corpus hearing other than to imply that it was merely cumulative of the evidence that Mr. Paul presented through the experts that testified.

Having reviewed the lay witness evidence discussed above, this Court finds it to be compelling, especially in light of the fact that Petitioner did not claim to be mentally retarded for the first time during his murder trial. He had been repeatedly diagnosed as mentally retarded as a child, and three separate government agencies – Cartersville City Schools, the Georgia Department of Juvenile Justice, and the Georgia Department of Human Resources – had all recognized that Petitioner was mentally retarded well before his trial, and this background lends significant credibility to his claim that he is, in fact, mentally retarded as opposed to malingering, faking his mental deficits, or is simply antisocial.

The adaptive deficit evidence that Mr. Paul presented to the jury was dry and fairly abstract, limited to the results of the AAMD Adaptive Behavior Scale conducted by Barbara Tustian and the Vineland Adaptive Behavior Scales conducted by Dr. Herendeen. In contrast, anecdotal evidence summarized above, presented by disinterested witnesses, certainly would have given jurors more "real world" examples of the ways in which Petitioner struggled. Saying that a thirteen-year-old fourth grader reads at a first grade level simply has more impact than saying that the Vineland

Adaptive Behavior Scales revealed adaptive deficits.[6] Further, Dr. Herendeen compiled the Vineland data by interviewing Petitioner's mother, and the prosecution argued that she was obviously biased and questioned whether she was an appropriate source for the Vineland interview, (Doc. 35-17 at 101, 158), weakening the effectiveness of Mr. Paul's adaptive deficit evidence. Clearly, the testimony of disinterested teachers and social workers would have strengthened Mr. Paul's case.

This Court further finds that, contrary to the opinion of the state habeas corpus court, the lay witness testimonial evidence summarized above is not cumulative to the evidence presented by Mr. Paul during Petitioner's trial. In addition to providing strong support for the fact that Petitioner suffered adaptive deficits, the evidence Petitioner presented in the state habeas corpus proceeding also effectively countered the state's trial evidence that Petitioner was malingering and that Petitioner's low, school-age IQ test scores were the result of his inattention at school and/or his possible conduct disorder. The prosecution at Petitioner's trial portrayed Petitioner as an aggressive bully who may have suffered from conduct disorder and attention deficit disorder. One of the state's experts, Dr. Smith, testified that Petitioner's school

[6] For some reason, Mr. Paul never directly asked Dr. Herendeen about the results of the Vineland interview, and Dr. Herendeen's report was not admitted into evidence. As a result, the jury knew only that Dr. Herendeen had identified adaptive deficits, but they never learned what those adaptive deficits were.

records reflected the fact that Petitioner was "sneaky and lying and getting in trouble a lot in school" and that he had "poor attention to detail;" he did not "stay on task" and was "very careless and sloppy in [his] work." (Doc. 35-17 at 196). In Dr. Smith's opinion, these were the reasons that Petitioner's IQ test scores dropped – he was not learning in school because of his behavior, and Mr. Paul did not present any evidence to effectively counter that contention other than Dr. Herendeen's testimony that Petitioner's bad behavior was the result of his dysfunctional family and his being discouraged because academics were "just beyond him." Dr. Herendeen did, however, admit that Petitioner "became a behavior problem" at school. (Id. at 154). Yet, the numerous teachers and social workers who knew and worked with Petitioner testified in the state habeas corpus proceeding that Petitioner was not defiant, he did not have behavior problems, and he put forth good effort in school.

Additionally, as detailed by the state habeas corpus court, the state's experts testified at Petitioner's trial that his demeanor indicated that he was malingering. Dr. Eilender testified that Petitioner was "not forthcoming," that he answered questions with just one or two words, and that he frequently responded to questions by saying "I don't know." (Doc. 35-17 at 181). Petitioner's lay witnesses, however, explained that when Petitioner did not understand something, he would not respond. "He wasn't defiant, he just wouldn't participate in the conversation." (Doc. 36-52 at 120).

This Court now finds that there is a reasonable probability that, had the jury heard the evidence presented in the state habeas corpus hearing, the outcome of the jury's determination regarding Petitioner's mental retardation defense would have been different. Accordingly, this Court concludes that Petitioner has established that because Mr. Paul was not afforded adequate time to prepare his mental retardation defense, he was not able to put compelling evidence before the jury to demonstrate Petitioner's adaptive deficits and to counter the prosecution's evidence. Because the jury did not hear that evidence, this Court concludes that Petitioner has established prejudice under Strickland.

Moreover, the state habeas corpus court, in denying relief on this claim, erred in failing to adequately consider this evidence. The state court's finding that Mr. Paul relied on expert testimony to the exclusion of lay witness testimony regarding Petitioner's adaptive deficits was an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The state court's conclusion that Petitioner failed to demonstrate prejudice with respect to the evidence of adaptive functioning was contrary to, or involved an unreasonable application of, the law as set forth in Strickland.

Put simply, Petitioner is entitled to relief with respect to his claim that trial counsel was ineffective in presenting the mental retardation defense.

c. Presentation of the Case in Mitigation

Petitioner also contends that Mr. Paul was deficient in presenting the case in mitigation during the penalty phase of the trial. During the penalty phase, the state first presented the testimony of the victim's parents, his brother, and his wrestling coach, who testified generally that the victim was a good, well-liked person and that his murder had a devastating effect. (Doc. 35-20 at 84-100). The state then played a video for the jury that somewhat recreated what the victim went through on the evening that he was murdered. The video is the subject of a separate claim discussed below.

In his presentation during the penalty phase, Mr. Paul called several of Petitioner's family members to testify. Petitioner's sister, Linda Ham testified that it took Petitioner longer to learn things and that he did not do well in school. (Id. at 108). She also testified that Petitioner had a very close relationship with his father and that his father's death had a great effect on him and his family. (Id. at 109). According to Ms. Ham, most of Petitioner's siblings got into trouble with the law and went to prison. (Id. at 109-110). Finally, she lamented the fact that she was a bad role model for Petitioner because she often got into trouble. (Id. at 111-12).

Next to testify was Petitioner's mother. She said that Petitioner was not like other children because of his mental deficiency. (Id. at 113). She also said that she was sorry to the victim's family. (Id. at 114).

Alicia Greene, Petitioner's cousin, testified that she tutored Petitioner, and Petitioner had a difficult time learning. (Id. at 116). Another cousin, Terrell Linley, said that Petitioner was not able to play with the other children because of his limitations and that he had difficulty learning how to do things. (Id. at 118-19). Petitioner's aunt, Hazel Sullivan, testified that Petitioner was slow and that his father's death had a profound effect on Petitioner. (Id. at 121). Frances Brown, another aunt, testified that Petitioner was given a hard time by the other students because he was in special education classes and was upset by his father's death. (Id. at 123). She also stated that Petitioner's mother "did all she could for all of her children." (Id. at 124-25).

This Court acknowledges that the defense's penalty phase testimony was sparse, reflecting the fact that Mr. Paul was not afforded adequate time to prepare. However, the evidence that Petitioner now claims that Mr. Paul should have presented is not sufficiently compelling to undermine this Court's confidence in the outcome of the penalty phase of his trial. In the state habeas corpus proceeding, Petitioner presented evidence of his background and the struggles of his life that he contends Mr. Paul was

deficient for failing to present. In his brief, Petitioner provides an extensive narrative description based on that evidence. (Doc. 82 at 204-27).[7] Summarizing that narrative, Petitioner was born prematurely and his mother consumed alcohol while she was pregnant with him. Petitioner was slow to learn, and his younger brother learned to do things before Petitioner did. Petitioner needed help dressing himself, and he did not begin to speak until a late age. Petitioner's family knew that something was wrong with him.

Petitioner's family life was dysfunctional. His parents regularly threw parties for the neighbors that lasted all night, and his parents drank heavily. As a young boy, Petitioner was left at home alone with his brother frequently. Petitioner's parents sometimes argued. One time his mother hit his father with a frying pan.

Petitioner was devoted to his father, but his father worked long hours and was not around much. Petitioner contends that his father was his only protector. When his father died when Petitioner was sixteen-years-old, he lost that protection, and his mother treated him poorly, calling him names and neglecting his needs at school. Petitioner felt that, when his father died, he did not have anybody left that loved him. After Petitioner's father died, the family fell apart. Petitioner's siblings were arrested

[7] Before discussing his own life, Petitioner provides a fairly lengthy family history that describes events that occurred prior to Petitioner's birth. (Doc. 82 at 197-204). This Court finds this information to be irrelevant.

and sent to prison frequently, and their trouble with the law increased markedly after Petitioner's father died.

Petitioner had difficulty learning at school. The neighborhood where Petitioner grew up was "awash in drugs." All the young men in the area sold drugs, and most of Petitioner's family members, including possibly, his mother, sold drugs. Petitioner saw his oldest sister abuse drugs heavily. Petitioner began drug use at age thirteen and later began selling drugs. After Petitioner's father died, his home became a site of significant drug use.

Petitioner himself was arrested several times, the first time for shoplifting a video game. Petitioner's mother did not react properly to Petitioner and his siblings getting into trouble. She would claim that authorities were targeting her children rather than believing that her children had violated rules. Petitioner dated older women.

Reviewing Petitioner's background, an expert in social work testified that Petitioner had no opportunity to learn limits and boundaries, regulate his emotional states, respect others' needs, maintain healthy relationships, and be resilient in the face of adverse circumstances. Instead, he developed destructive and unhealthy responses to the world. Because of his mental deficiency, his ability to make proper choices and take responsibility was flawed.

For the purposes of this discussion, this Court will acknowledge that Mr. Paul was not afforded adequate time to investigate Petitioner's background and prepare his case in mitigation. However, after a careful review of the evidence in mitigation that Petitioner presented in the state habeas corpus proceeding and that he contends that Mr. Paul should have presented during the penalty phase of Petitioner's trial, this Court concludes that Petitioner cannot demonstrate that he was prejudiced by Mr. Paul's failure to present that evidence.[8]

The state habeas corpus court's conclusion that Petitioner failed to demonstrate prejudice with respect to his claim that trial counsel was deficient during the penalty phase was based on that court's findings that (1) the evidence presented in that proceeding was cumulative to the evidence presented by Mr. Paul, and (2) the additional evidence was contradicted by testimony presented at trial. This Court somewhat breaks with the state court and concludes instead that the "new" evidence was not sufficiently compelling to undermine confidence in the outcome of Petitioner's penalty trial.

The evidence that Petitioner presented at his state habeas corpus proceeding, "even taken together and credited as true, is weak and a far cry from the horrific

[8] To be clear, this Court notes that it refers to the evidence in mitigation excluding the evidence of Petitioner's mental retardation.

childhood circumstances that have been held sufficient to satisfy the prejudice prong in a capital case." DeYoung v. Schofield, 609 F.3d 1260, 1291 (11th Cir. 2010). For example in both Williams v. Taylor, 529 U.S. 362 (2000), and Wiggins v. Smith, 539 U.S. 510 (2003), the Supreme Court concluded, *inter alia*, that trial counsel had been ineffective in failing to present evidence of the death penalty defendants' extremely troubled childhood during the penalty phase of the trial. The facts presented in those cases depict an almost unfathomable level of deprivation. In Wiggins, there was evidence that

> [Wiggins'] mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner – an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, and, as petitioner explained to [a licensed social worker], the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor.

Wiggins, 539 U.S. at 516-17.

In Williams v. Taylor, Terry Williams' childhood was equally distressing. Williams' parents were severe alcoholics who were often so drunk that they were

incapable of caring for the children. When social workers arrived at the Williams home on one occasion, conditions were not habitable, including human feces in several places on the floor. The social workers had to remove the children because, among other reasons, the children were drunk from consuming moonshine. Williams' parents were each charged with five counts of criminal neglect. Acquaintances of the family testified (1) that Williams' father would strip Williams naked, tie him to a bed post and whip him about the back and face with a belt, and (2) that Williams' parents engaged in repeated fist fights that terrorized the children. Williams' trial attorneys also ignored or failed to discover evidence of Williams' borderline retardation, organic brain damage caused by head injury, and Fetal Alcohol Syndrome. See generally, Williams v. Taylor, 1999 WL 459574 (Brief for Petitioner); see also Rompilla v. Beard, 545 U.S. 374, 391-92 (2005) (stating that overlooked mitigation evidence included evidence that Rompilla's parents were alcoholics, his father frequently beat his mother and bragged about his infidelity, his father beat Rompilla and locked him and his brother in an excrement-filled dog pen, Rompilla slept in an unheated attic, and he was given no clothes and went to school in rags).

The evidence presented by Petitioner in this action pales in comparison to the horrific facts of Williams and Wiggins. Petitioner has presented no evidence of physical or sexual abuse. There is further no evidence that Petitioner was deprived of

food or minimally habitable living conditions. Neither Petitioner nor his siblings were removed from their home by the state because of neglect. Moreover, the jury was well aware of Petitioner's cognitive limitations, and evidence of Petitioner's drug use and his dealing in drugs is not particularly mitigating, and the jury well could have considered it aggravating. This Court thus concludes that Petitioner has failed to establish that his trial counsel was ineffective in presenting mitigating evidence during the penalty phase of his trial.

d. Ineffective Assistance Regarding the Offer to Plea

As was briefly mentioned above, after the first expert that the state consulted concluded that Petitioner was mentally retarded, the prosecution offered Petitioner the opportunity to plead guilty in exchange for a life sentence in addition to a term of years for certain other counts. Petitioner rejected that offer, and he now claims that Mr. Paul was ineffective for failing to assist Petitioner in understanding the consequences of rejecting the plea offer. In concluding that Petitioner had failed to establish a claim under Strickland, the state habeas corpus court discussed the claim as follows:

> Mr. Paul testified that the offer of a plea of a life sentence plus a life sentence was made by the District Attorney during an in chambers conference when [Petitioner] was not present. Mr. Paul first met with [Petitioner]'s mother and sister and explained to them about the offer and why he thought it was a good offer. He tried to enlist their help in impressing upon [Petitioner] that it was a good offer and he ought to

> consider it. When he met with [Petitioner] to convey the offer, he made arrangements for a contact visit so that his mother and sister could also be present. [Petitioner]'s sister was supportive of the offer but his mother was noncommital, in Mr. Paul's opinion because she did not believe her son was the shooter. [Petitioner] was noncommital about the offer as well. Shortly before jury selection started back, [Petitioner] confirmed to Mr. Paul that he did not want to accept the offer.
>
> The Court finds that Mr. Paul's actions were not deficient. Mr. Paul explained to [Petitioner] the terms of the plea offer from the State and additionally enlisted the help of both the Petitioner's mother and sister. The Court further finds that Mr. Paul was not deficient in failing to seek the appointment of a guardian to assist Petitioner in reaching a decision about whether to accept the plea offer. Even assuming that the actions of Mr. Paul were deficient, the Court finds that Petitioner can show no prejudice. Petitioner has failed to meet his burden under Strickland.

(Doc. 39-25 at 66-67 (citations to the internal record omitted)).

Petitioner argues that the state court "failed to evaluate whether Mr. Paul made a reasonably informed decision to involve Mrs. Perkinson." (Doc. 82 at 252). Petitioner further argues that Mr. Paul should have recruited an advocate or guardian. This Court disagrees that it was deficient performance for Mr. Paul to include Petitioner's mother in the discussions. From his testimony, it is clear that Mr. Paul felt strongly that Petitioner should take the plea deal, and he brought Petitioner's mother into the discussion because he thought that she would help convince Petitioner to take the deal. This was clearly a strategic decision that a reasonable lawyer would make.

As to Petitioner's contention that Mr. Paul should have enlisted the services of a guardian, this Court cannot determine how a guardian or other advocate would have

mattered. Mr. Paul was Petitioner's advocate, and Petitioner did not follow his advice, and Petitioner has failed to establish that having someone else in the room that he did not know was likely to lead to a different outcome.

Having reviewed the record, this Court concludes that the state habeas corpus court was not unreasonable in concluding that Petitioner failed to establish that Mr. Paul was deficient on this basis.

e. Petitioner's Remaining Claims of Ineffective Assistance of Counsel

Petitioner asserts that his motion for a new trial and appellate counsel was ineffective and that trial counsel failed to raise "numerous objections." Both of these claims are conclusory and are not supported by adequate argument or factual development.

In his appellate counsel claim, Petitioner contends that

> Petitioner was denied effective assistance in that counsel at the Motion for New Trial and on direct appeal unreasonably failed to investigate, present or argue effectively the multitude of legal errors that occurred in this case. These errors include, but are not limited to, all of the numerous deficiencies regarding trial counsel's performance, as well as all claims that Respondent has alleged to be procedurally defaulted.

(Doc. 82 at 257).

Other than a vague or cursory reference to appellate counsel's failure to argue "all appropriate precedent on mental retardation and the death penalty, and the trial

court's failure to provide adequate funding for experts, investigators and mitigation specialists that denied Petitioner a fair trial," (id. at 258), Petitioner has not sufficiently specified the claims that appellate counsel should have raised, pointed to facts in the record to support his argument, or argue that the claims appellate counsel failed to raise have merit. This Court may not "mine the record" in an effort to make Petitioner's claims for him; to do so would "shift the burden of sifting from petitioners to the courts." Chavez v. Sec'y Fla. Dep't of Corr., 647 F.3d 1057, 1061 (11th Cir. 2011). As such, this Court concludes that Petitioner has failed to establish that his appellate counsel/motion for new trial counsel was ineffective.

Under the heading "Other Instances of Deficient Performance," Petitioner contends that

> counsel failed to raise and adequately support numerous objections throughout [Petitioner]'s trial. This includes failing to object to highly inflammatory and improper victim impact evidence and to an improper "victim-perspective" video crafted by the State to inflame the passions and prejudices of the juror. Trial counsel also failed to make adequate or timely objections to the prosecutor's improper and prejudicial comments during opening and closing arguments at both phases of Petitioner's trial, including the prosecutor improperly imploring the jury that they could only consider a life sentence if they found an absence of aggravating factors, and his argument that Petitioner should not be permitted to "hide behind" his intellectual disability.
>
> Counsel failed to make and adequately argue for the continuance that was necessary in order to prepare for trial, and failed to object to the last-minute production of evidence purportedly refuting the intellectual disability defense and other events that resulted in the eleventh hour

> development of key pieces of evidence regarding Petitioner's intellectual disability.

(Id. at 258-59).

Again, Petitioner has failed to properly develop these claims by explaining, for example, how the "victim perspective" video he mentioned was inflammatory or pointing to case law that supports his argument. In any event, this Court notes that Mr. Paul vigorously objected to the video shown during the penalty phase of trial, (Doc. 35-16 at 35), and this Court concludes below that Petitioner has not established that his rights were violated by the presentation of the video during the penalty phase of the trial. Also, with respect to Petitioner's reference to "the last-minute production of evidence purportedly refuting the intellectual disability defense . . .," it is clear that Mr. Paul vigorously sought more time to prepare his mental retardation case, and the trial judge denied those requests. In any event, this Court has determined that Mr. Paul had inadequate time to prepare and that Petitioner was prejudiced thereby. Accordingly, these claims fail.

B. Trial Counsel's Conflict of Interest

Petitioner next contends that Mr. Medof had a conflict of interest representing Petitioner because he "agreed to represent Petitioner for a fee of just $7,000, a fee so low that he could not possibly have devoted the hours necessary to properly prepare

a capital case." (Doc. 82 at 264). As a result, Petitioner contends that Mr. Medof's interests were in conflict with Petitioner's. Respondent contends that this claim is unexhausted and procedurally defaulted before this Court, and this Court agrees. Even if the claim were not procedurally barred, this Court agrees with the state habeas corpus court that Petitioner's conflict claim is merely another way of arguing that Mr. Medof was ineffective, which claim this Court has adequately addressed above.

D. Petitioner's Claim of Intellectual Disability

Petitioner asserts that he is mentally retarded and he cannot be executed under Atkins v. Virginia, 536 U.S. 304 (2002). This Court has already determined that trial counsel was ineffective in presenting Petitioner's mental retardation defense and, below, will direct that the issue of Petitioner's mental retardation be retried. Should that conclusion be reversed, however, Petitioner is not otherwise entitled to relief.

As was noted by the state habeas corpus court, the trial court has adjudicated Petitioner's intellectual disability claim, (Doc. 39-25 at 5), and the Georgia Supreme Court concluded that Petitioner was not entitled to a directed verdict on the mental retardation defense because "the evidence regarding [Petitioner's] mental ability was disputed and conflicting," Perkinson, 610 S.E.2d at 537, a finding that was not unreasonable in light of the testimony presented at Petitioner's trial.

If, contrary to this Court's conclusions above, Mr. Paul was not ineffective in presenting Petitioner's mental retardation defense, Petitioner has no basis to challenge the jury's verdict. As mentioned above, the Eleventh Circuit has held that Georgia's reasonable doubt standard for proving mental retardation is constitutional. Hill v. Humphrey, 662 F.3d 1335, 1360 (11th Cir. 2011). To the degree that Petitioner contends that the evidence that he presented in the state habeas corpus proceeding establishes that he is mentally retarded, he cannot retry his innocence to obtain relief under § 2254. Herrera v. Collins, 506 U.S. 390, 400 (1993).

E. Application of Georgia's Beyond a Reasonable Doubt Standard for Determining Intellectual Disability

In response to Petitioner's contention that Georgia's requirement that death penalty defendants prove the fact that they are mentally retarded beyond a reasonable doubt violates Petitioner's Eighth and Fourteenth Amendment rights, this Court notes that it is bound by the Eleventh Circuit's conclusion to the contrary. Hill, 662 F.3d at 1360.

F. The Trial Court's Instructions on Mental Retardation

Petitioner claims that the trial judge erred in its instructions to the jury regarding the consequences of finding Petitioner guilty but mentally retarded when he said:

"Should you find the defendant guilty but mentally retarded, the defendant will be given over to the custody of the Department of Corrections or the Department of Human Resources as the mental condition of the defendant may warrant." At the time of Petitioner's trial, his instruction was required by the Georgia Code. See O.C.G.A. § 17-7-131 (1999).

Petitioner contends that this instruction was legally and factually inaccurate, and it gave the jury the false impression that he may serve his sentence somewhere other than a prison, violating the rule announced in Simmons v. South Carolina, 512 U.S. 154 (1994).

Because the Georgia Code required that the instruction be given, this Court disagrees that the instruction was legally inaccurate. As to the question of whether the instruction was factually inaccurate, Petitioner points to the testimony of Dr. Karen Bailey-Smith, the Director of Forensic Services at the Georgia Department of Human Resources (DHR).[9] According to Dr. Bailey-Smith, if a criminal defendant is adjudged guilty but mentally retarded, it is unlikely that the defendant would be remanded straight to the DHR. (Doc. 38-15 at 277). Rather, after the conviction, an evaluator would go to the jail and determine whether the defendant needs immediate

[9] Dr. Bailey-Smith's testimony was given during the state habeas corpus proceeding of another petitioner, Jerry Scott Heidler.

hospitalization, which is rare. (Id. at 278). In addition, if the Department of Corrections determines that it is not capable of caring for the defendant, it can send the defendant to the DHR, which is also rare. (Id.). In either event, the transfer is temporary, and the defendant is sent back to the prison as soon as he is stable. (Id. at 279). To summarize, it is highly unlikely that a defendant found guilty but mentally retarded will end up with the DHR, and if he does, it would be for only a short time.

This Court finds that, based on this evidence, the instruction that Petitioner would be "given over to the custody of the Department of Corrections or the Department of Human Resources" was not inaccurate, because it is possible that, had Petitioner been found guilty but mentally retarded, he would have spent some time with the DHR.

This Court further concludes that Simmons is distinguisable. In Simmons, the Supreme Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." Simmons, 512 U.S. at 156. The Court's rationale was that it was unfair for the State to "mislead the jury [about the defendant's future dangerousness] by concealing accurate information about the defendant's parole ineligibility" under state law. Id. at 165 n.5. In this case, the instruction did not imply that Petitioner would be set free. In fact, the instruction

stated that Petitioner would be held in "custody." This Court thus concludes that the instruction as given did not violate Petitioner's due process rights.

G. Petitioner's Exclusion from Trial Proceedings

As discussed above, just after the start of voir dire in Petitioner's trial, the expert that the state had hired to evaluate Petitioner's claim of mental retardation informed prosecutors that she concurred with Dr. Herendeen's diagnosis that Petitioner is retarded. Prosecutors then sought a continuance so that they could have another expert evaluate Petitioner, and the prosecutors and Mr. Paul met in chambers to discuss the motion. During that meeting, prosecutors offered to allow Petitioner to plead guilty in exchange for a life sentence.

Petitioner did not attend the meeting, and he argues that his exclusion violated his rights as discussed in Kentucky v. Stincer, 482 U.S. 730 (1987). Petitioner raised this claim in his direct appeal and the Georgia Supreme Court concluded that "he acquiesced to the conference occurring outside his presence." Perkinson, 610 S.E.2d at 540 (citing Holsey v. State, 524 S.E.2d 473 (Ga. 1999) (superseded by statute on other grounds), for the proposition that a defendant may later acquiesce in proceedings occurring in his absence (quotation marks omitted)). In Holsey, the Georgia Supreme

Court held that the defendant had acquiesced to his absence from a part of his criminal trial when he did not object or otherwise complain about it later.

In addition to acknowledging a criminal defendant's Confrontation Clause right to be present at all stages of his trial, the United States Supreme Court has recognized a broader due process right to be present "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." Stincer, 482 U.S. at 745. No witnesses testified during the meeting, and thus only Petitioner's due process rights are implicated. Petitioner has made no argument that his presence would have contributed to the fairness of the meeting. Given what was discussed – a continuance motion and a plea deal – this Court finds that Petitioner's presence "would have been 'useless, or the benefit [of] but a shadow,' . . . and thus his exclusion did not violate his due process rights." United States v. Boyd, 131 F.3d 951, 954 (11th Cir. 1997) (quoting Snyder v. Massachusetts, 291 U.S. 97, 108 (1934), *overruled on other grounds*, Malloy v. Hogan, 378 U.S. 1, 17 (1964)).

H. Claim that Petitioner was not Competent to Reject State's Life Sentence Plea Offer

Petitioner claims that, because of his mental retardation, he was not competent to reject the state's offer, discussed above, of a guilty plea in exchange for a life sentence. Respondent contends that, because Petitioner did not raise this claim in his

direct appeal, the claim is procedurally defaulted. Pretermitting the issue of procedural default, see Adams v. Wainwright, 764 F.2d 1356, 1359 (11th Cir. 1985) (indicating that procedural default rules do not apply to claims of incompetence to stand trial), this Court concludes that Petitioner has not demonstrated that he is incompetent under the standard described in Drope v. Missouri, 420 U.S. 162, 171 (1975) (to be competent, a criminal defendant must be able "to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense").

Moreover, Petitioner's contention that "the State permitted him to make the decision whether to waive important constitutional rights or to risk his death without assistance," (Doc. 82 at 326), is simply wrong. As discussed above, Petitioner had an advocate in Mr. Paul who explained to Petitioner the terms of the plea offer, encouraged Petitioner to accept the offer, and enlisted the help of Petitioner's mother and sister. Ultimately, the decision of whether to waive his rights and plead guilty rested solely with Petitioner.

This Court thus concludes that Petitioner is not entitled to relief with respect to this claim.

I. The Trial Court's Instructions to the Jury

Petitioner claims that the trial court's jury instructions at both phases of the trial, "both individually and collectively, were ambiguous, misleading, insufficient, vague, confusing and contrary to law and fact." (Doc. 82 at 328). However, this claim is entirely conclusory as Petitioner has made no specific citations to the record or specific legal argument in support of his argument. Accordingly, this Court concludes that Petitioner has not demonstrated that he is entitled to relief with respect to his claims regarding jury instructions.

J. Video Admitted During Penalty phase

During the penalty phase of the trial, the trial court, over Mr. Paul's objection, permitted the state to present a video to the jury that depicted somewhat of a reenactment of what the victim experienced during the kidnapping but without any dialogue or individuals posing as the victim's assailants. This Court has reviewed the video. It lasts six minutes and forty-one seconds and depicts the following:

- The video opens with scenes around the church in Dunwoody, Georgia, where Petitioner and his codefendants first took their victims after the carjacking at the pet grooming establishment. The video camera operator then points the camera at the BMW that the victims had been driving on the day of the crimes. The car's trunk is ajar.

- At 00:58, the operator places the camera into the trunk of the car. The trunk lid closes, and the screen goes black.
- At 1:13 a picture of murder victim Louis Nava appears on the screen as sounds of the car driving down the street are heard. For the next five minutes, the picture of Nava remains on the screen while the sounds of the car are heard.
- At 6:13 the car engine shuts off and the picture of Nava disappears.
- At 6:20 the trunk lid opens to reveal the scene at Paga Mill Road where the murder took place. The video camera operator lifts the camera out of the trunk and pans around to reveal what appears to be a two-lane road in a remote location. The operator then walks toward brush at the side of the road where Mr. Nava was killed, and at 6:41, the screen goes black.

Petitioner contends that the video was testimonial in nature and thus violated his Sixth Amendment right to confront witnesses. In affirming Petitioner's convictions, the Georgia Supreme Court addressed this claim as follows:

> The trial court allowed the State to introduce into evidence during the penalty phase a videotape made months after the crime depicting the church parking lot, the inside of the BMW's trunk, and the place on Paga Mine Road where the murder occurred, the stated intent of which was to depict the crime from the perspective of the victim, Louis Nava. [Petitioner] alleges the admission of this videotape was error.

> In considering the use of videotape evidence in Pickren v. State, 500 S.E.2d 566 (Ga. 1998), we cautioned that the extreme vividness and verisimilitude of pictorial evidence is truly a two-edged sword. For not only is the danger that the jury may confuse art with reality particularly great, but the impressions generated by the evidence may prove particularly difficult to limit or, if the film is subsequently deemed inadmissible, to expunge by judicial instruction.
>
> We further acknowledged that use of a videotape is unauthorized "where the situation or event sought to be depicted is simple, the testimony adequate, and the picture adds nothing except the visual image to the mental image already produced." Pickren, 500 S.E.2d at 570.
>
> In this case, the introduction of the video portrayal was unauthorized in that it depicted a simple event already adequately represented by testimony and for which the portrayal added nothing to the existing mental image already created. Although we hold the admission was error, due to the brevity of the tape and the fact that it in essence was little more than the fair and accurate depiction of the crime scene and not a reenactment of the crime itself, we find the error was harmless in this case.

Perkinson, 610 S.E.2d at 540.

Respondent argues that Petitioner did not raise a Confrontation Clause claim before the Georgia Supreme Court and his claim is thus procedurally defaulted. Petitioner contends that he did raise the constitutional claim, but the state court ruled solely on state law grounds and ignored his Sixth Amendment claim. Without deciding the procedural default issue, this Court acknowledges Petitioner's argument and reviews the claim on its merits.

According to Petitioner, introduction of the video violated the rule announced by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 59

(2004), that testimonial statements of a witness absent from trial are not admissible if the declarant is unavailable unless the defendant has had a prior opportunity to cross-examine the witness, abrogating the prior rule that allowed such statements to be admitted if indicia of reliability were present. Crawford was a criminal assault case where the defendant's wife was not available to testify under the state's spousal privilege rule, but the trial court permitted the state to admit the wife's statement to police under a hearsay exception. The Court concluded that the wife's statement, which was made during a police interrogation (she was also initially implicated in the assault) was inherently testimonial in nature, id. at 52, and that the Constitution demanded that the testimony be excluded unless the defendant had an opportunity to confront the witness.

At the outset, this Court notes that it is not entirely clear that the rule announced in Crawford extends to the penalty phase of a capital trial. See United States v. Brown, 441 F.3d 1330, 1361 (11th Cir. 2006) (indicating that the Eleventh Circuit had not yet decided the issue); United States v. Fields, 483 F.3d 313, 325 (5th Cir. 2007) (Crawford does not apply to testimonial evidence admitted during penalty phase to establish nonstatutory aggravating factors). To the degree it does, and despite Petitioner's arguments to the contrary, this Court concludes that the video was not testimonial. The video was not introduced in an effort to establish for the jury what

Petitioner had done or for the truth of the events depicted. At the penalty phase of the trial, of course, Petitioner's guilt was not at issue because the jury had already determined what Petitioner had done. Rather, the video was merely a visual aid to allow the jury to appreciate what the victim experienced during the kidnaping and leading up to his eventual murder.

Even if this Court were to consider the video to be testimonial evidence, purported constitutional error resulting from the admission of testimonial hearsay evidence is subject to harmless error analysis, see United States v. Travis, 311 F. App'x 305, 311 (11th Cir. 2009); United States v. Dupree, 240 F. App'x 382, 390 (11th Cir. 2007), and this Court agrees with the Georgia Supreme Court that any error arising from the admission of the video was harmless. "[C]onstitutional error is harmless unless there is 'actual prejudice,' meaning that the error had a 'substantial and injurious effect or influence' on the jury's verdict." Mansfield v. Sec'y, Dep't of Corr., 679 F.3d 1301, 1307 (11th Cir. 2012) (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). While this Court believes that the video was something more than a mere depiction of the crime scene as the Georgia Supreme Court held, it was not highly inflammatory, particularly likely to improperly arouse the passions of the jury, or otherwise encourage them to base their decision on matters other than the evidence. In summary, while agreeing with the Georgia Supreme Court that introduction of the

video was unfortunate and unnecessary, this Court concludes that Petitioner is not entitled to relief with respect to his Confrontation Clause claim.

K. Prosecutorial Misconduct

Petitioner claims that his prosecutors engaged in misconduct, mostly concerning their efforts to convince the jury that he had not established his mental retardation defense. According to Petitioner, prosecutors created a false impression that Petitioner was not mentally retarded, the testimony of the state's experts was false, and prosecutors improperly "capitalized" on the false testimony in closing argument. Petitioner also claims that prosecutors presented evidence designed to inflame the jurors such as evidence indicating that Petitioner was malingering, evidence regarding the worth of the victim, and the video discussed above.

Petitioner further provides the following laundry list of supposed instances of misconduct:

> The prosecutor made misleading, improper, and unconstitutional closing arguments at both guilt/innocence and sentencing phases of Petitioner's trial, including but not limited to improper speculations grounded in neither the evidence nor science, vouching for the prosecution witnesses, "testifying" to what he believed to be true and untrue from the sworn testimony, suggesting that Petitioner's mental retardation was an improper defense that Petitioner was "hiding behind," mischaracterizing the evidence and the law regarding Petitioner's mental retardation, encouraging jury nullification on an issue of constitutional magnitude, informing jurors that they could not impose a life sentence if they found

> the existence of one or more statutory aggravating circumstances, suggesting that trial counsel's objections were evidence of Petitioner's guilt, commenting upon Petitioner's right to remain silent, and stating facts not in evidence.

(Doc. 82 at 337-38).

This Court concludes that Petitioner has failed to demonstrate that he is entitled to relief based on these contentions. In discussing these claims, Petitioner provides not one citation to the record and no legal argument other than general boilerplate, and as established above, it is not this Court's role to search the record in order to make Petitioner's claims for him. Moreover, this Court carefully reviewed the transcript of Petitioner's trial, especially that portion of the transcript relating to Petitioner's defense of mental retardation, and saw nothing that even hinted at prosecutorial misconduct.

L. The Trial Court's Failure to Grant a Change of Venue

In a brief argument, Petitioner contends that, because of extensive media coverage, the trial court should have granted his motion for a change of venue. Petitioner raised this claim in his direct appeal, and, in affirming his convictions, the Georgia Supreme Court discussed the claim as follows:

> [Petitioner] claims that the trial court erred by refusing to change venue. "A trial court must order a change of venue in a death penalty case when a defendant can make a 'substantive showing of the likelihood of prejudice by reason of extensive publicity.'" Barnes v. State, 496 S.E.2d 674 (Ga. 1998). In order to prevail on this claim, [Petitioner] must show

> that his trial setting was inherently prejudicial as a result of pretrial publicity or that there was actual bias on the part of individual jurors. See Gissendaner v. State, 532 S.E.2d 677 (Ga. 2000). When determining whether the trial setting was inherently prejudicial, courts consider the size of the community, the extent of the media coverage, and the nature of the media coverage. Barnes, *supra*. The trial court found that Bartow County was no longer a small community and that the media coverage, while extensive at times, was not inflammatory or prejudicial. Most of the news reports simply related the allegations in the indictment and other undisputed aspects of the case, such as that [Petitioner] had been arrested and charged with the murder of Louis Nava and other offenses, that the district attorney was seeking the death penalty, and that [Petitioner] was alleging that he was mentally retarded; this is information that prospective jurors were apprised of during voir dire. See King, *supra*, 539 S.E.2d 783. The trial court was particularly concerned with a lengthy article that appeared in the Atlanta Journal–Constitution at the beginning of voir dire that included some information that would not be admissible during the guilt-innocence phase, such as [Petitioner]'s juvenile court record, but it determined that relatively few prospective jurors had read this article. See Gissendaner, *supra*. We conclude, upon review of the record, that the pretrial media coverage was "neither so extensive and inflammatory nor so reflective of 'an atmosphere of hostility' as to require a change of venue." Id. at 683. . . . .
>
> With regard to whether there was actual bias on the part of individual jurors, the State and [Petitioner] differ slightly on the number of prospective jurors who were excused for cause due to bias resulting from pretrial publicity. [Petitioner] claims that [15 out of 100] prospective jurors were excused for such bias; the State claims only 13 were excused for this reason. Even assuming the higher number asserted by [Petitioner], we conclude that the number of excusals for cause due to exposure to pretrial publicity does not indicate an inherently prejudicial environment for [Petitioner]'s trial. . . . [T]he trial court did not err by denying [Petitioner]'s motion for change of venue.

Perkinson, 610 S.E.2d at 538 (footnote omitted).

As the Eleventh Circuit has explained,

> A defendant is entitled to a change of venue if he can demonstrate either actual prejudice or presumed prejudice. To find the existence of actual prejudice, two basic prerequisites must be satisfied. First, it must be shown that one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty. Second, these jurors, it must be determined, could not have laid aside these preformed opinions and rendered a verdict based on the evidence presented in court. If a defendant cannot show actual prejudice, then he must meet the demanding presumed prejudice standard.
>
> Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held. The presumed prejudice principle is rarely applicable, and is reserved for an extreme situation. Where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from the community, jury prejudice is presumed and there is no further duty to establish bias.

Meeks v. Moore, 216 F.3d 951, 960-61 (11th Cir. 2000) (quotations, citations and alterations omitted); see also Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985).

Moreover, as described by the Supreme Court, trial judges' decisions regarding whether and how to change venue for a trial are accorded great deference by reviewing courts:

> When pretrial publicity is at issue, primary reliance on the judgment of the trial court makes especially good sense because the judge sits in the locale where the publicity is said to have had its effect and may base her evaluation on her own perception of the depth and extent of news stories that might influence a juror. Appellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges.

> Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record – among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty. In contrast to the cold transcript received by the appellate court, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service. We consider the adequacy of jury selection in [Defendant]'s case, therefore, attentive to the respect due to district-court determinations of juror impartiality and of the measures necessary to ensure that impartiality.

Skilling v. United States, 561 U.S. 358, 386-87 (2010) (citation and footnote omitted).

Based on the foregoing, it is clear that the Georgia Supreme Court applied the proper standard in analyzing Petitioner's claim. This Court further finds that, while Petitioner points out that "[w]ell over three hundred news stories concerning the case were printed, broadcast and aired by local media outlets," [Doc. 82 at 340], Petitioner has altogether failed to demonstrate that the news coverage was inflammatory or that it saturated the community. Petitioner has further failed to demonstrate that the Georgia Supreme Court's conclusion was unreasonable under § 2254(d). Accordingly, this Court concludes that Petitioner is not entitled to relief regarding this claim.

M. The Trial Court's Improper Bias and Consideration of Matters External to the Case

Petitioner next contends that the trial judge was biased and too concerned with his own public image, and because of this bias, the judge made several pretrial rulings

against Petitioner. However, Petitioner's evidence of the purported bias is limited to the fact that, "[a]fter the conclusion of Petitioner's trial, numerous materials concerning Petitioner's case were discovered in the court's chambers, including numerous news articles reporting the outcome of the case and the court's pronouncements." [Doc. 82 at 342]. This Court finds that the fact that the judge read and kept newspaper articles about a case over which he presided simply does not establish bias.

N. *Batson* and *Witherspoon* Violations

Petitioner contends that his rights as discussed in Batson v. Kentucky, 476 U.S. 79 (1986), were violated because prosecutors used their peremptory challenges against a disproportionate number of African-Americans. He further contends that the trial court excused jurors who expressed views on the death penalty that did not warrant exclusion under Witherspoon v. Illinois, 391 U.S. 510 (1968). Again, however, Petitioner has not developed these claims. With regard to his Batson claim, he has failed to name a single juror who was struck, failed to mention whether trial counsel raised a Batson challenge to the strike, and failed to demonstrate that the prosecution's race neutral explanation for the strike was pretextual. In his Witherspoon discussion, Petitioner has likewise failed to name a single juror who he claims was improperly

excused, failed to recite what the juror said that prompted his or her removal, and failed to offer any explanation as to why the removal was improper.

As Respondent points out, the voir dire transcript is well over one thousand pages long, and as noted above, this Court may not dig through that transcript and make up legal arguments in order to demonstrate Petitioner's entitlement to relief. Accordingly, this Court concludes that Petitioner has failed to demonstrate that he is entitled to relief with respect to his Batson and Witherspoon claims.

O. Trial Court Failure to Remove Jurors for Cause or Bias

In his appeal, Petitioner raised a claim that the trial court erred in failing to remove certain jurors for cause. The Georgia Supreme Court held that "[t]he prospective jurors that [Petitioner] complains about were properly qualified with regard to capital punishment." Perkinson, 610 S.E.2d at 541.

In the instant petition, Petitioner has raised a much more wide ranging claim, contending that the trial court erred in not removing jurors who would automatically impose the death penalty, would have difficulty considering evidence of mental retardation, would have difficulty considering a life sentence, and would have difficulty applying the presumption of innocence. As with his other juror claims, Petitioner has failed to identify the jurors who he claims were improperly qualified.

To the degree that Petitioner intends to raise the same claim that he raised in his appeal, he has failed to establish (or even argue) that the state court's conclusion was unreasonable under § 2254(d). To the degree that Petitioner purports to raise claims regarding jurors beyond that raised in his appeal, Respondent correctly points out that the claims are procedurally barred, and Petitioner has made no argument that cause and prejudice should excuse the default. Accordingly, Petitioner is not entitled to relief for this claim.

P. Petitioner's Sentence Is Disproportionate and Excessive

Petitioner raises three arguments that his death sentence is excessive. His first argument is fairly general and somewhat unclear. Petitioner seems to imply – without actually saying – that he was not the shooter, and that, because he did not pull the trigger, he is not eligible for a death sentence under current jurisprudence and evolving societal standards. However, while the question of whether Petitioner was the person who shot and killed the victim may be subject to some doubt, as the Georgia Supreme Court found, the evidence presented at Petitioner's trial was certainly sufficient to authorize the jury to conclude that Petitioner shot and killed the victim.

Petitioner's next argument is that a death sentence is excessive because of his cognitive deficiencies. This Court has already determined that Petitioner's trial

counsel was ineffective in presenting his mental retardation defense, and to the degree that this Court erred in that determination, Petitioner is not otherwise entitled to relief based on his claim that he is mentally retarded. In Atkins, the Supreme Court recognized that the mentally retarded cannot be held fully accountable for their actions, and that as a result, subjecting them to the death penalty is excessive. However, Atkins created a bright-line rule that requires Petitioner to establish that he is mentally retarded in order to avoid execution. He did not so convince the jury, and this Court thus has no basis to conclude that Petitioner's execution would be excessive. In response to Petitioner's argument that he is functionally mentally retarded, the Eleventh Circuit in Carroll v. Sec'y, Dept. Corr., 574 F.3d 1354 (11th Cir. 2009), rejected that argument on the basis that "Atkins protects only those individuals who *are* mentally retarded. . . .Thus, a constitutional rule exempting the 'functionally mentally retarded' from execution would go beyond the holding of Atkins, something this Court may not do when reviewing § 2254 petitions." Id. at 1369 (emphasis in original). The same rationale holds for Petitioner's contention that he is functionally under the age of eighteen. Sears v. Chatman, 2016 WL 1417818 at *11 (N.D. Ga. Apr. 8, 2016).

In his third argument, Petitioner contends that the Georgia Supreme Court failed to properly carry out its statutory mandate to evaluate the proportionality of his death

sentence under O.C.G.A. § 17–10–35(c)(3). In affirming Petitioner's conviction, the Georgia Supreme Court held that Petitioner's "death sentence . . . is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. Perkinson, 610 S.E.2d at 541. Petitioner contends that the state court's proportionality review failed to take his intellectual deficits into account and failed to consider cases in which the defendant did not receive a death sentence.

This Court stresses, however, that proportionality review is not required by the Constitution "where the statutory procedures adequately channel the sentencer's discretion," McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (citing Pulley v. Harris, 465 U.S. 37, 50-51 (1984)), and Georgia's statutory procedures are adequate. Collins v. Francis, 728 F.2d 1322, 1343 (11th Cir. 1984) ("[I]t appears clear that the Georgia [death penalty] system contains adequate checks on arbitrariness to pass muster without proportionality review.") (internal quotations and citations omitted). As the proportionality review is not required by the Constitution, Petitioner cannot claim relief under § 2254 for the Georgia Supreme Court's failure to properly carry out its statutory mandate. Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987) ("[W]e refuse to mandate as a matter of federal constitutional law that where, as here, state law requires [proportionality] review, courts must make an explicit, detailed account of their comparisons."); see also Bush v. Singletary, 99 F.3d 373, 375 (11th Cir. 1996)

("Proportionality review of the kind at issue is not required by the federal constitution.").

Q. The Introduction of Prejudicial Evidence

Petitioner next claims that the prosecution presented improper victim-impact testimony. However, aside from a brief mention of the video discussed above, Petitioner has failed to cite to or describe the evidence that he contends violated his rights. Moreover, as Respondent points out, the state habeas corpus court concluded that this claim was procedurally defaulted because Petitioner had failed to raise it in his appeal. Accordingly, the claim is procedurally barred before this Court, and Petitioner has failed to present any argument that cause and prejudice exist to lift the procedural bar.

R. Georgia's Use of Lethal Injection as a Means of Executing Petitioner Would Violate His Rights under the Eighth and Fourteenth Amendments

In the Order of January 21, 2016, (Doc. 49), this Court concluded that Petitioner's claim that Georgia's current lethal injection protocol poses too much of a risk of violating his Eighth Amendment rights is not cognizable under § 2254. Accordingly, the claim is denied without prejudice to Petitioner's raising it in a 42 U.S.C. § 1983 action.

S. Cumulative Error

As extensively discussed above, this Court has already determined that Petitioner is entitled to relief based on his claim that his trial counsel was ineffective in presenting his mental retardation defense. This Court has not otherwise identified any cumulative error that would entitle Petitioner to § 2254 relief.

Conclusion

For the reasons discussed, Petitioner's petition for a writ of habeas corpus is hereby **GRANTED IN PART**, with respect to Petitioner's claim that his trial counsel was ineffective in preparing for and presenting his defense of mental retardation, and **DENIED IN PART** as to the remainder of Petitioner's claims. The denial of Petitioner's claim that application of Georgia's lethal injection protocol would violate his Eighth Amendment rights is denied without prejudice to his raising the claim in a 42 U.S.C. § 1983 action. Petitioner's death sentence is hereby **VACATED**. The state trial court is **ORDERED** to either hold new trial within 120 days limited to the question of whether Petitioner is mentally retarded or resentence Petitioner to life in prison.

A Certificate of Appealability is **GRANTED** to Petitioner pursuant to 28 U.S.C. § 2253(c)(2), but only with respect to Petitioner's claims (1) that his trial counsel was

ineffective in presenting his case in mitigation during the penalty phase of the trial and (2) that his rights were violated in connection with the video that the trial court allowed the prosecution to present during the penalty phase of the trial.

Petitioner's motion for leave to file excess pages, (Doc. 87), is **GRANTED** nunc pro tunc.

IT IS SO ORDERED, this 31st day of January, 2019.

AMY TOTENBERG
UNITED STATES DISTRICT JUDGE