IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

FREDRICK HEAD, WARDEN, Georgia Diagnostic and Classification Prison, Appellant, vs. ALPHONSO STRIPLING Appellee.	)	Case No. S03A0525 HABEAS CORPUS

BRIEF OF APPELLEE

MITCHELL D. RAUP
DAVID M. GOSSETT
CARL J. SUMMERS
Mayer, Brown, Rowe and Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

DIANE GREEN-KELLY
Mayer, Brown, Rowe and Maw
190 South La Salle Street
Chicago, Illinois 60603
(312) 782-0600

Attorneys for Appellee

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

MISCELLANEOUS

INTRODUCTION

Years after Alphonso Stripling was sentenced to death, compelling evidence came to light that proved beyond a reasonable doubt that he is mentally retarded. That evidence — and the reasons why it was not discovered earlier — convinced the Superior Court of Butts County to grant Mr. Stripling relief from his death sentence. The Habeas Court's detailed 76-page Statement and Order demonstrates why the writ is necessary in this case: ***Georgia can not and will not execute a man who has proven beyond a reasonable doubt that he is mentally retarded***. *Turpin v. Hill*, 269 Ga. 302, 303 (1998) (execution of a mentally retarded person would be a miscarriage of justice); *Fleming v. Zant*, 259 Ga. 687, 689 (1989) (capital punishment of mentally retarded people is "categorically prohibit[ed]" by the Georgia Constitution); *Atkins v. Virginia*, 536 U.S. 304 (2002) (capital punishment of mentally retarded people violates the Eighth Amendment to the U.S. Constitution).

The Habeas Court made the following findings of fact (among many others):

- "In the proceedings before this Court Petitioner has presented voluminous new evidence that was not presented at trial to support his claim of mental retardation." Order, 9.

- "[T]he evidence in this case has established beyond a reasonable doubt that Alphonso Stripling is mentally retarded." Statement of the Court ("Statement"), 2; Order, 4.

- The State withheld from Mr. Stripling "[m]ental health records, * * * which revealed significant evidence of [his] mentally retarded condition," including an IQ score of 67 at age 16, and reports showing that the State diagnosed Mr. Stripling as mentally retarded at age 17. Statement, 2; Order, 6, 9-10, 35-36.

- The State also withheld from Mr. Stripling the notes and report of Dr. Cooper, an intern psychologist who examined and tested Mr. Stripling before trial at the request of the State's testifying expert. "Dr. Cooper's notes and report contain information that is favorable to Petitioner's mental retardation claim," and "the prosecution's failure to disclose the notes and report prejudiced the defense." Order, 40-41.

- Much more evidence of mental retardation was available to Mr. Stripling's trial counsel, including childhood IQ scores of 64 and 52 in elementary school records, but "trial

counsel * * * fail[ed] to acquire such evidence [as they could have done] by making an appropriate investigation." Statement, 2-3; Order, 45-50, 53.

- The evidence upon which the State relied at Mr. Stripling's trial was "completely discredit[ed]" at the habeas hearing. Order, 15. A test score that the prosecution represented to be from an "IQ test" in fact did not measure IQ, and was "of absolutely no worth [as an indicator of] intellectual functioning." Order, 16-18. Dr. Youngleson, the prosecution's psychologist, admitted to the Habeas Court that when he examined Mr. Stripling "he did not know mental retardation was an issue at trial and that if he had, he would have conducted testing [and] would not have used a 'guesstimated' IQ score." Order, 23. The Habeas Court found that Dr. Youngleson "had no basis for that ['guesstimated' IQ] testimony as he is not an expert in mental retardation, and he never examined Petitioner for mental retardation." Order, 32.

- Every credible expert "has reached the same conclusion – Petitioner is mentally retarded." Order, 24. "There is no credible evidence to the contrary." Order, 4.

Under settled Georgia law, the facts found by the Habeas Court amply justify the relief that it granted. The State devotes much of its brief to disagreeing with these findings of fact, but can not and does not assert that they are unsupported by "any evidence" — the applicable standard of review. The State's few legal arguments lack merit. Therefore, this Court should uphold the Habeas Court's factual findings and affirm the grant of habeas relief.

STANDARD OF REVIEW

"The question of determining credibility of testimony in a habeas corpus hearing is vested in the hearing judge." *Nelson v. Smith*, 228 Ga. 117, 119 (1971). "Factual determinations made by the habeas court are upheld on appeal unless clearly erroneous, *i.e.*, there is no evidence to support them.* * * [T]he 'clearly erroneous' test is the same as the 'any evidence rule.' Thus, an appellate court will not disturb fact findings of a trial court if there is any evidence to sustain them." *Turpin v. Todd*, 271 Ga. 386, 390 (1999) (internal quotation marks omitted). The law is applied *de novo* to those facts. *See, e.g.*, *Wetherington v. Carlisle*, 273 Ga. 854, 855 (2001).

ARGUMENT

I. THE FINDING OF MENTAL RETARDATION IS SUPPORTED BY THE EVIDENCE

After an extensive and detailed review of the evidence at Mr. Stripling's original trial and the new evidence presented at a four-day evidentiary hearing (Order, 4-26), the Habeas Court found that Mr. Stripling is mentally retarded and granted him relief on five independent grounds:

1. Because Mr. Stripling is in fact mentally retarded, he has an absolute constitutional right to be free from capital punishment, and it would be a miscarriage of justice to execute him. Therefore, the Habeas Court vacated his death sentence, and ordered the trial court to impose an appropriate non-capital sentence. Order, 27-34.

2. Mr. Stripling's trial was fundamentally unfair and unreliable because the State, in violation of *Brady v. Maryland*, withheld substantial evidence of Mr. Stripling's mental retardation, including Mr. Stripling's parole file and the report and notes of Dr. Cooper. Therefore, the Habeas Court ordered a new trial on the issue of Mr. Stripling's mental retardation. Order, 34-44.

3. The trial also was fundamentally unfair and unreliable because Mr. Stripling's trial counsel failed to present substantial, readily available evidence of his mental retardation, thus denying him his Sixth Amendment right to effective assistance of counsel. Therefore, the Habeas Court granted him a new trial on the issue of mental retardation. Order, 44-59.

4. In light of the United States Supreme Court's recent decision in *Atkins v. Virginia*, which held that capital punishment of mentally retarded people is cruel and unusual punishment under the Eighth Amendment, the statutory burden of proof requiring Mr. Stripling to prove his mental retardation beyond a reasonable doubt was unconstitutional. Therefore, the Habeas Court granted him a new trial on the issue of mental retardation under a constitutional burden of proof. Order, 61-71.

5. Throughout the trial, the prosecution violated *State v. Patillo* by repeatedly emphasizing the effect of a verdict of 'Guilty but Mentally Retarded' (*i.e.*, that capital punishment could not be imposed). Therefore, the Habeas Court ordered a new trial on the issue of Mr. Stripling's mental retardation. Order, 59-61.

Central to each of these holdings is the Habeas Court's factual finding that Mr. Stripling is mentally retarded. That finding was supported by overwhelming evidence. A consistent 30-year pattern of IQ test scores proved that Mr. Stripling's IQ is in the mentally retarded range.

Order, 4. More than twenty witnesses testified to Mr. Stripling's serious adaptive-behavior problems. Order, 12-15, 24-26. Mr. Stripling's mental retardation was readily apparent before age eighteen — so apparent that the State ***diagnosed*** Mr. Stripling as "mentally retarded" at age 17. Order, 9-10; Tr. 542, 543 (parole records). Every expert who considered this evidence agreed that Mr. Stripling meets the 3-part statutory definition of mental retardation.[1] Order, 24.

The evidence clearly established that Mr. Stripling's IQ is in the mentally retarded range.[2] The following test results were admitted into evidence:

Year	**Age**	**IQ score**	**Offered at trial?**	**Test**
1967	10 (3rd grade)	**IQ 64**	No	California Achievement Test in school recoreds
1969	12 (5th grade)	**IQ 52**	No	California Achievement Test in school records
1973	16	**IQ 67**	No	Prison IQ test in parole records
1974	17	**IQ 68**	Yes	Peabody IQ test in prison records
1989	32	**IQ 64**	Yes	WAIS-R IQ test administered by Dr. Kiehlbauch
1996	39	**IQ 72**	No	WAIS-R IQ test administered by Dr. Derning
1997	40	**IQ 61**	No	Stanford-Binet IQ test administered by Dr. Shaffer

[1] "The essential features of mental retardation are (i) significantly subaverage general intellectual functioning, (ii) resulting in or associated with impairments in adaptive behavior, and (iii) manifestation of this impairment during the developmental period." *Stripling v. State*, 261 Ga. 1, 4 (1991); *see also* O.C.G.A. § 17-7-131(a)(3); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text rev'n 2000) ("DSM IV-TR"); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d Ed. 1980) ("DSM III"). The statutory definition of mental retardation "is consistent with" the definition supplied by DSM III. *Stripling*, 261 Ga. at 4.

[2] "Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)." DSM-IV-TR at 41-42; *see also* DSM-III at 28.

Based on these test results, all of the experts who examined the issue concluded that Mr. Stripling's true IQ is below 70. (*See e.g.*, Tr. 75-80, 109, 112-13 (Professor Luckasson's testimony that Mr. Stripling's "true IQ is in the low 60's"); 242 (Dr. Shaffer's testimony that the scores "are remarkably consistent in the sense that they do not deviate very far from the range of 61 to 64"); 318 (Dr. Cooper's testimony that "the IQ tests were pretty consistently in the mild [mentally retarded] range," but "some of the affidavits on adaptive functioning make me wonder if the adaptive functioning was even lower than mildly mentally retarded")). There is no expert testimony or evidence to the contrary.[3]

The evidence also established that Mr. Stripling has significant limitations in adaptive functioning.[4] Mr. Stripling submitted affidavits from over 20 people — his teachers, friends, relatives, minister and acquaintances — who offered compelling testimony demonstrating that Mr. Stripling could not do even the simplest tasks expected of someone his age. The Habeas Court specifically found that testimony to be credible. Order, 26 n.30. These witnesses testified that Mr. Stripling could not make a sandwich at the age of 10 (Tr. 760-61), was not toilet trained

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[3] The experts agreed that the score of 72 on the 1996 WAIS-R was consistent with a diagnosis of mental retardation. As Dr. Shaffer testified: "It is above the 70. However, the DSM states very specifically that IQ scores in the range of 70 to 75 may result in a diagnosis of mental retardation when there is evidence of subaverage daily living skill behaviors." (Tr. 291-92). Professor Luckasson agreed: because "according to the DSM, the error range is about plus or minus 5," "a score of 72 on a WAIS [is] consistent with a diagnosis of mental retardation." (Tr. 112). *See generally* DSM-IV-TR at 41-42 ("it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.").

[4] "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." DSM-IV-TR at 42; *see also* DSM-III at 37. DSM-IV-TR explains that "significant limitations in adaptive functioning" means deficits "in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." DSM-IV-TR at 41.

until he was almost in his teens, consistently defecating in his pants until the age of twelve (*see, e.g.*, Tr. 775-76, 782-83), could not walk home alone, get on the right bus, or run simple errands at the age of 15 (*see, e.g.*, Tr. 827, 776), and even as an adult could not handle money, could not balance a checkbook and could not count change (*see, e.g.*, Tr. 837-40). Many more examples of Mr. Stripling's difficulties in adapting to life are summarized in the Habeas Court's Order at pages 12-15 and 24-26. Dr. Shaffer testified that "[i]n this case there is some of the most thorough documentation of subaverage adaptive behavior skills that I have seen in many, many cases of mental retardation." (Tr. 291-92; *see also* Tr. 117-124 (Professor Luckasson); Tr. 251-53, 279 (Dr. Shaffer); Tr. 312-18 (Dr. Cooper)).

Finally, the evidence established that Mr. Stripling's mental retardation was apparent before age eighteen.[5] The affidavits discussed above were replete with evidence that Mr. Stripling had serious developmental problems in childhood and adolescence. Moreover, beginning in grammar school, Mr. Stripling repeatedly scored below 70 on intelligence tests. Based on this evidence, Mr. Stripling could have been diagnosed as mentally retarded before age eighteen. And in fact, he ***was*** so diagnosed — in the Georgia state prison at Alto when he was 17. (Tr. 542, 543). Several documents from Mr. Stripling's parole file establish that, based on a prison Psychological Report and prison IQ testing, the State determined that Mr. Stripling was mentally retarded in 1974. (Tr. 543 (**"*He is mentally retarded*"**); Tr. 547 ("***The Psychological Report indicates functional mental deficiency***"; "The client seems to have ***very serious mental deficiencies with a Peabody score of 68***")).[6]

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[5] The third element of the definition of mental retardation requires that "the onset must occur before age eighteen." DSM-IV-TR at 41; *see also* DSM-III at 36.

[6] The State suggests that these reports are hearsay. Br. 25. However, because the State did not object to the admission of the reports into evidence at the habeas hearing (Tr. 11-14), it has

There is no evidence to the contrary. The State admitted in closing argument that it "did not present any evidence" on mental retardation at the habeas hearing (Tr. 466), and the State's evidence from the 1989 trial evaporated in light of the facts presented at the habeas hearing. For example, Mr. Stripling's purported IQ score of 111 on the modified "Culture Fair" test was debunked by the author of that test, Dr. Herbert Eber, who testified that this test is not "suitable for diagnosing mental retardation" (Tr. 58), "is not relevant to a DSM determination of mental retardation" (Tr. 71), and cannot properly be used as evidence on the issue of mental retardation (Tr. 58). The Habeas Court found this testimony credible, and concluded that "the 111 Culture Fair score is useless and should not be factored into any calculation on mental retardation." Order, 15-19. Similarly, in a dramatic reversal of his trial testimony, the State's expert at the original trial, Dr. Youngleson, testified that the reason he did no intelligence testing when he evaluated Mr. Stripling was that no one told him "that intelligence was an issue" in the case; had he known that intelligence was an issue, he "would have addressed [it] in a whole lot more detail as I do when I am told that that is the issue." (Tr. 422-24). Dr. Youngleson admitted that his trial testimony based on a "guesstimate" of Mr. Stripling's IQ was "improper." (Tr. 1357-58, 1396). The Habeas Court found that these admissions "significantly undermined" Dr. Youngleson's trial testimony (Order, 21-24), and held that his trial testimony "had no basis" (Order, 32).

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waived any objection to the Habeas Court's reliance on the reports as evidence of mental retardation. And, as the Habeas Court specifically found, these reports could have been used in many ways at trial, including "to rebut the State's charges of malingering, depression and recent fabrication," as the basis for defense expert opinions, and to impeach prosecution experts. Order, 58. Defense counsel also "could have subpoenaed the authors of the reports to testify at trial." *Id*. "[S]uch evidence could easily have led the jury to a different verdict." *Id*.

In this appeal, the State attempts to relitigate many of those factual determinations. However, at no point does the State show, or even claim, that any of the Habeas Court's factual findings lacks evidentiary support. Instead, the State simply reiterates the facts that it believes support its position and restates its preferred resolution of factual disputes. For example:

- The State cites portions of Dr. Youngleson's testimony that it contends are inconsistent with the Habeas Court's finding that when Dr. Youngleson evaluated Mr. Stripling before trial, he did not know that mental retardation was an issue in the case. (Appellant's Brief ("Br.") 24 n.9). However, the State does not deny that both Dr. Youngleson and Dr. Cooper testified that when they evaluated Mr. Stripling they did not know that mental retardation was an issue in the case. The Habeas Court found that testimony credible. Order, 21-24, citing testimony.

- The State attempts to rehabilitate the "Culture Fair" test by pointing to an alleged 1988 study (which the State referred to at the habeas hearing but never offered into evidence) suggesting that "Culture Fair" scores are within 10 points of IQ test scores for most Georgia inmates. Br. 14. Despite this alleged study, all of the experts testified that the "Culture Fair" test is not a reliable measure of IQ, and the Habeas Court found this testimony credible. Order, 15-19.

- The State asserts, with no authority, that Mr. Stripling achieved a high-school equivalency (General Educational Development or "GED") certificate in Prison. Br. 18, 24. The Habeas Court considered and rejected this claim, "based on the experts' testimony regarding [Mr. Stripling's] mental abilities" and the undisputed fact that "the Department of Education has no GED on file for [Mr. Stripling]." Order, 11. The Habeas Court therefore found as fact that "Petitioner did not obtain a GED."[7] *Id*.

- The State asserts that Mr. Stripling's one IQ score above 70 (a 72, on a test administered by Dr. Derning) contradicts the Habeas Court's finding of mental retardation. Br. 26. The State speculates here, as it did in the Habeas Court, that Dr. Derning "presumably" did not find Mr. Stripling to be mentally retarded. *Id*. But the Habeas Court found that the State's "position is wholly unfounded and unsupported by the record." Order, 24 n.26. The Habeas Court found that, "as all parties agree," a score of 72 is within the 5-point margin of error of an IQ test,

[7] To pass the GED "[y]ou have to be able to read, compute, interpret information, and express yourself in writing on a level comparable to that of 60 percent of graduating high school seniors." (American Council on Education website, http://www.acenet.edu/calec/ged/faq-TT.cfm, retrieved Sept. 11, 2002). The State's own testing showed that at age 23 Mr. Stripling functioned at a 3rd grade level in reading and math, and at a 2nd grade level in spelling. (Tr. 681).

> and "[t]he only evidence before this court establishes that Dr. Derning believed his test score * * * was consistent with * * * mental retardation." *Id*.

On each of these issues, the State simply repeats factual arguments that the Habeas Court rejected based on its considered analysis of the evidence and the credibility of witnesses. Such arguments cannot justify reversal. If "the evidence is conflicting upon the issue of fact [the Habeas Court's] decision will not be controlled where there is any competent evidence to support his findings." *Brown v. Smith*, 223 Ga. 433, 434 (1967); see also *Carlisle*, 273 Ga. at 855 ("While [the State's factual position] is a viable view of the evidence, it is not the one that the court found persuasive. As there was evidence to support the court's factual findings * * * the court's decision cannot be found to be clearly erroneous."). "[T]he burden is on him who asserts error to show it affirmatively by the record." *Smith v. State*, 203 Ga. 636, 637 (1948). On this record, the State cannot carry that heavy burden.

Therefore, this Court should affirm the Habeas Court's factual findings in their entirety. Mr. Stripling's mental retardation is now established "beyond a reasonable doubt," and that fact must be accepted for all purposes in this appeal.

II. THE HABEAS COURT'S HOLDING THAT IT WOULD BE A MISCARRIAGE OF JUSTICE TO EXECUTE MR. STRIPLING WAS CORRECT

Based on its findings of fact, and in light of the categorical prohibition against executing mentally retarded people under both the Georgia and Federal Constitutions, the Habeas Court held that it would be a miscarriage of justice to execute Mr. Stripling. Order, 31-34 (citing *Turpin v. Hill*, 269 Ga. 302, 303 (1998); *see also Fleming v. Zant*, 259 Ga. 687, 689 (1989); *Atkins v. Virginia*, 536 U.S. 304 (2002)). Because Georgia's habeas statute instructs that "[i]n all cases habeas corpus relief shall be granted to avoid a miscarriage of justice," *see, e.g.*, *Valenzuela v. Newsome*, 253 Ga. 793, 796 (1985) (quoting O.C.G.A. § 9-14-48(d)), the Habeas

Court vacated Mr. Stripling's death sentence and ordered that a non-capital punishment be imposed. Order, 31-34.

The Habeas Court's order was a straightforward application of this Court's controlling decisions. The State admits, as it must, that this Court has recognized a "miscarriage of justice exception to the res judicata procedural bar under which examination of this claim by the habeas court was permissible." Br. 22 (citing *Valenzuela*). The State does not deny that Mr. Stripling submitted "new reliable evidence that was not presented at trial," thus satisfying the prerequisite for a habeas petitioner seeking to relitigate an issue that was decided adversely at trial. *Walker v. Penn*, 271 Ga. 609, 612 (1999) (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). Therefore, the State admits that the Habeas Court could properly grant relief under the miscarriage of justice exception ***if*** Mr. Stripling proved that he is "actually innocent of the death penalty," (*i.e.*, that he is mentally retarded) under the proper standard. Br. 23.

The State's only legal argument on this issue is its contention that the Habeas Court applied the wrong standard to decide whether Mr. Stripling proved his mental retardation. Br. 22-23. The Habeas Court was guided by this Court's instruction in *Turpin v. Hill,* 269 Ga. at 303-04, that a habeas court deciding a claim of mental retardation under the miscarriage of justice exception should conduct a hearing, make a finding as to whether petitioner has proved mental retardation under the governing statutory standard of O.C.G.A. § 17-7-131, and then issue an order granting or denying relief pursuant to that finding. The State contends that the Habeas Court should instead have followed the different standard of *Sawyer v. Whitley*, 505 U.S. 333, 335-36 (1992), in which the U.S. Supreme Court instructed federal district courts that a petitioner who asserts ineligibility for the death penalty in a "successive, abusive, or defaulted

federal habeas claim," must "show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."

The State's proposed new standard is not grounds for reversal, for four reasons. ***First***, the State raised this legal issue for the first time on appeal. It never cited *Sawyer* in the Habeas Court, and never urged the Habeas Court to follow the standard that it now advocates. "Routinely, this Court refuses to review issues not raised in the trial court. * * * Fairness to the trial court and to the parties demands that legal issues be asserted in the trial court." *Pfeiffer v. Georgia Dep't of Transp.*, 275 Ga. 827, 829 (2002).

Second, there is no basis in Georgia law for applying the *Sawyer* standard in a Georgia state habeas case, and the State cites no authority for its proposed change in the law. The State relies only on language in *Hill* and *Head v. Ferrell*, to the effect that the *Hill* procedure applies in cases where the issue "was not raised at trial." Br. 22 (quoting *Ferrell*, 274 Ga. at 412). But neither *Hill* nor *Ferrell* holds that a different procedure applies in cases like this, where new evidence proving mental retardation is discovered after trial. The State acknowledges that the Habeas Court had to apply *some* standard, (Br. 22), and *Hill* holds that the applicable standard of proof is supplied by the governing statute, O.C.G.A. § 17-7-131. There is no reason to depart from that statutory standard here.

Third, the *Sawyer* standard makes no sense in the context of the Georgia habeas statute, O.C.G.A. § 9-14-48(d). Because of the limited scope of federal habeas jurisdiction, *Sawyer* requires a petitioner to prove that "***but for a constitutional error***" he would not have been found eligible for the death penalty. *Sawyer*, 505 U.S. at 352 (Blackmun, J., concurring) (federal jurisdiction to hear habeas petitions by state prisoners depends on an alleged "violation of the Constitution or laws or treaties of the United States") (quoting 28 U.S.C. § 2254(a))). The

Georgia habeas statute contains no such requirement; it provides "[i]n ***all cases*** habeas corpus relief shall be granted to avoid a miscarriage of justice." O.C.G.A § 9-14-48(d). A simple error of fact may lead to a miscarriage of justice that must be remedied in habeas: "A plain example is a case of mistaken identity." *Valenzuela*, 253 Ga. at 796. Therefore, the State is wrong in asserting that if this Court reverses Mr. Stripling's other claims of "constitutional error" (i.e., the *Brady*, *Strickland*, *Byrd*, *Cooper* and *Patillo* claims), the Habeas Court's miscarriage holding must also be reversed. Br. 24. The claims are independent, because the proper miscarriage standard asks whether Mr. Stripling has proved his mental retardation beyond a reasonable doubt, not whether he was prevented from doing so by a "constitutional error."

Fourth, the *Sawyer* standard would not lead to a different result in this case. The Habeas Court found that Mr Stripling proved his mental retardation "beyond a reasonable doubt." The finding that there is "no reasonable doubt" that Mr. Stripling is mentally retarded necessarily means that "no reasonable juror" who considered the evidence could find otherwise. *See Sawyer*, 505 U.S. at 336. While the Habeas Court did not expressly find that Mr. Stripling had proved his mental retardation by the lesser standard of "clear and convincing evidence," the Habeas Court did call Mr. Stripling's evidence "consistent," "voluminous," "compelling," "powerful," "credible," "impress[ive]," "reliable," and "highly probative," described it as "a wealth of information," and found that "there is no credible evidence to the contrary." (Order, 4, 9, 11, 15, 16, 17, 21, 25, 26, 31, 49, 54, 55). These findings easily satisfy the *Sawyer* requirement of proof by "clear and convincing" evidence. Finally, as the Habeas Court found, numerous "constitutional errors" contributed to Mr. Stripling's death sentence, which is itself unconstitutional. Therefore, even if the *Sawyer* standard were applicable, the Habeas Court's

order should be affirmed because its fact findings demonstrate that Mr. Stripling met that standard.

The Habeas Court correctly applied Georgia law to the facts of this case, and its conclusion that it would be a miscarriage of justice to execute Mr. Stripling was correct. Therefore, the order granting habeas relief to avoid a miscarriage of justice should be affirmed.

III. THE HABEAS COURT'S HOLDING THAT THE STATE VIOLATED BRADY WAS CORRECT

The State suppressed two sources of information that contained critical evidence of Mr. Stripling's mental retardation: his parole file and the notes and report of Dr. Cooper. Because the suppression of this information caused prejudice to the defense, the State has violated *Brady v. Maryland,* 373 U.S. 83 (1963) and a new trial on the issue of mental retardation is warranted.

A. Parole Records

At trial Mr. Stripling was denied access to his parole file at the request of the State, after the trial court conducted an *in camera* review. Order, 34. That file contained significant evidence of mental retardation such as, "documentation indicating Petitioner, at the age of 16, scored a 67 on an IQ test," "reports of Department of Corrections staff indicating Petitioner was mentally retarded," and "reports indicating that State officials called into question the validity of the 111 Culture Fair score." Order, 36. "[T]he defense could not have obtained these files by the exercise of due diligence * * * [and] could not have obtained [the information they contained] through any other source." Order, 35. "The suppression of the Parole files prejudiced the defense." Order, 35. On appeal, Mr. Stripling argued that the file should have been disclosed under *Pope v. State*, 256 Ga. 195 (1986), and *Walker v. State*, 254 Ga. 149 (1985),[8] but

[8] *Pope* was cited for the proposition that those portions of the parole file, if any, which are potentially ***mitigating*** should be disclosed to the defendant.

did not raise any claim under *Brady v. Maryland*. Order, 34-36. Indeed, Mr. Stripling "could not have raised the claim as a *Brady* violation because he did not know the contents of the file." Order, 36.

The State does not deny that at trial the State suppressed material, exculpatory evidence in its possession and that Mr. Stripling suffered prejudice as a result. The State's only contention is procedural, asserting that this Court already resolved a *Brady* claim related to the parole file during Mr. Stripling's direct appeal, and therefore the claim is *res judicata*. Br. 2. However, it is clear from the Habeas Court's factual findings that Mr. Stripling did not raise — and could not have raised — such a claim. Order, 34-36. It is likewise evident from the direct appeal opinion that this Court "evaluated the Parole file under *Walker* [and *Pope*] and not under *Brady*" Order, 37-38;[9] *see also Stripling v. State*, 261 Ga. 1, 6 (1991). Indeed, this Court's opinion never even cited *Brady v. Maryland*, and the Court's discussion was clearly limited to the claim ***actually raised*** by Mr. Stripling under *Pope* and *Walker*. *Id*. The State's observation that the opinion included a citation to a case that itself cited to *Brady* (Br. 2) does not change the fact that no *Brady* claim was raised, argued, or decided in this case and thus, "the principal of *res judicata* does not apply."[10] Order, 38.

The State's refusal to provide the parole files to Mr. Stripling was a clear violation of its duty under *Brady*, particularly since the death penalty was being sought. *See Gardner v.*

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[9] In support of this finding, the habeas court noted that this Court reviewed the *Pope* issue under an 'abuse of discretion' standard (the correct analysis for a *Pope* claim) rather than *de novo* review as mandated by a *Brady* analysis. Order, 38 (citing *Wright v. Hopper* 169 F.3d 695 (11th Cir. 1999).

[10] Even if this *Brady* claim were *res judicata*, it would be subject to review in order to avoid a miscarriage of justice — the execution of a man who is mentally retarded. *See, e.g.*, *Valenzuela*, 253 Ga. at 796 ("the writ must pass over procedural bars and the requirements of cause and prejudice, when that shall be necessary to avoid a miscarriage of justice").

Florida, 430 U.S. 349 (1977) (the State's duty to the defendant under *Brady* is magnified in capital cases). Because the Habeas Court's factual findings are amply supported by the record (and are not disputed by the State), this Court should affirm the Habeas Court's order granting relief under *Brady*.

B. Dr. Cooper's Notes and Report

The State also suppressed the notes and report of Dr. John Cooper, Dr. Youngleson's intern, who conducted the testing and most of the interviews with Mr. Stripling before trial. The Habeas Court found as a fact that Dr. Cooper's notes and report would have provided substantial impeachment material and "contain numerous notations that are indicative of deficits in adaptive behavior." Order, 41. It also found that "the defense could not have obtained Dr. Cooper's notes and report with the exercise of due diligence." Order, 40. "[T]he prosecution failed to disclose Dr. Cooper's notes and report * * * [which] prejudiced the defense." Order, 41. The suppression of notes and a report that included exculpatory and impeachment material, made by a member of the State's own expert's team, is a blatant violation of *Brady*. The Habeas Court's conclusion that this violation merits relief is clearly correct.

The State does not contest that "the State possessed evidence favorable to the defendant," or that "the prosecution suppressed the favorable evidence." Br. 3-4. Instead, the State disputes the Habeas Court's fact findings that "the defense could not have obtained Dr. Cooper's notes and report with the exercise of due diligence," and that the suppression of the evidence "prejudiced the defense." *Id.*; *see* Order, 40-41. As to the first issue, the State contends that because Dr. Youngleson mentioned Dr. Cooper during his rebuttal testimony (first mentioning him by name during cross-examination (Trial Tr. 2327)), the State satisfied its burden of production under *Brady* and placed the onus on Mr. Stripling's counsel to make a specific request for any documents that Dr. Cooper may have prepared. This is wrong for at least three

reasons. First, in response to a general request for all *Brady* materials (Tr. 189-91), the State had already produced the files of Dr. Youngleson, but it withheld Dr. Cooper's notes and report to Dr. Youngleson.[11] Thus, even after discovering the existence of Dr. Cooper during cross-examination of the State's rebuttal expert, there was no reason for Mr. Stripling's lawyers to think that there was a written report or interview notes from Dr. Cooper — because they were under the mistaken impression that the State had already produced all such documents. Second, "the timing of the disclosure effective[ly] prohibited defense counsel from learning anything about what Dr. Cooper did or had to say" (Order, 42), coming as it did during cross-examination of the State's rebuttal expert (*i.e.*, after the defense rested). Third, when the State has a duty to produce information under *Brady*, it cannot satisfy that duty merely by mentioning the name of the author of a document and waiting for the defense to request the document; the State has an affirmative obligation to hand the document over. Order, 42-43 (citing *Julius v. Jones*, 875 F.2d 1520, 1525 (11th Cir. 1989) ("Defense counsel should be able to rely on a belief that prosecutors will comply with the Constitution and will produce *Brady* material."); *Smith v. Zant*, 250 Ga. 645, 652 (1983) ("The state urges that the defendant should have done more than he did to protect himself. We find that the state should have done more than it did to protect the defendant's rights.")). The Habeas Court's findings that the State failed to satisfy its duty of disclosure and that Mr. Stripling could not have obtained the information with any reasonable diligence should be upheld.

[11] Because the defense requested this information and the State did not produce it, this *Brady* claim is not procedurally defaulted. *Byrd v. Owen*, 272 Ga. 807, 810 n.14 (2000) ("The issue of whether the State's concealment of [evidence] requires reversal is not waived because the State's concealment of the issue prevented counsel from raising it on direct appeal").

As to the State's contention that the suppression of this evidence was not prejudicial, the State has not demonstrated that the Habeas Court's factual findings were clearly erroneous, nor that the Habeas Court applied the wrong law to those facts. The Habeas Court determined that "the prosecution's failure to disclose the notes and report prejudiced the defense" because they "contain information that is favorable to Petitioner's mental retardation claim * * * [including] numerous notations that are indicative of deficits in adaptive behavior." Order, 41. "Merely having a state employed mental health professional testify that he believed Petitioner may have been mentally retarded could have caused a different verdict," especially when his impression of Mr. Stripling's IQ was so different from Dr. Youngleson's "guesstimate." Order, 43. This Court should affirm the Habeas Court's finding that the State violated *Brady* by failing to disclose Dr. Cooper's notes and report, and its Order granting relief to remedy that violation.

C. The Cumulative Effect of the *Brady* violations

The United States Supreme Court has held that the cumulative effect of all individual *Brady* errors must be considered when determining the materiality of the State's suppression of evidence. *See Kyles v. Whitley,* 514 U.S. 419 (1995). Here, as the Habeas Court found:

> [A]ssuming *arguendo* that the Parole records and Dr. Cooper's notes and report are not material on their own, * * * the cumulative effect of their suppression undermines confidence in the outcome of Petitioner's trial. Had the Parole records and Dr. Cooper's notes and report been disclosed to the defense, the State's case would have been cast in a different light and there is more than a reasonable probability that the jury would have found Petitioner guilty but mentally retarded.

Order, 44. The Habeas Court's factual findings here are not clearly erroneous, and its legal conclusion is plainly correct. Thus, this Court should affirm the holding that the cumulative effect of the suppressed evidence warrants a new trial on the issue of mental retardation.

IV. THE HABEAS COURT'S HOLDING THAT MR. STRIPLING'S TRIAL COUNSEL WERE INEFFECTIVE UNDER *STRICKLAND* WAS CORRECT

Mr. Stripling's trial counsel failed to conduct a reasonable investigation into his mental retardation and thus were constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984).[12] The Habeas Court found, as a matter of fact, that mental retardation "was the critical issue in the case." Order, 45. Trial counsel testified that mental retardation was the "be all and end all * * * the thrust of the defense." (Tr. 229). The Habeas Court found that trial counsel made a series of prejudicial errors and omissions in developing the mental retardation defense. Order, 45-50. Those factual findings must be accepted by this Court because the State has failed to show clear error as to any of them. The only question is whether those errors amounted to ineffective assistance of counsel.

The most significant errors made by trial counsel were: (1) not requesting a complete set of Mr. Stripling's school records; (2) failing to investigate a supposed IQ test on which Mr. Stripling scored a 111 — a test that, it turns out, did not measure IQ at all; and (3) failing to present a wealth of readily available evidence of Mr. Stripling's deficits in adaptive behavior. Order, 51-53. The Habeas Court held that "each of the errors of trial counsel has prejudiced Petitioner, in that had trial counsel acted reasonably, counsel would have been able to refute every aspect of the State's case against the defense of retardation" and "there is a reasonable probability that [Mr. Stripling] would have been found Guilty But Mentally Retarded." Order, 53. The court determined that the cumulative effect of counsel's omissions completely

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[12] This Court should "accept the Habeas Court's factual findings unless clearly erroneous." *Head v. Taylor*, 273 Ga. 69, 71 (2000). Despite the State's contention, it is clear that the Habeas Court applied the correct legal standard under *Strickland*. Although at one point in its Order the Habeas Court used the phrase "all available means," its analysis turned on a finding that "trial counsel failed to conduct a reasonable investigation." Order, 51.

undermined its confidence in the outcome at Mr. Stripling's original trial. Order, 56. These holdings are clearly correct in light of the Habeas Court's factual findings and should be affirmed.

A. Counsel Were Ineffective For Failing To Request All School Records

The Habeas Court found, as a matter of fact, that trial counsel failed to request Mr. Stripling's grammar school records from the Atlanta Public school system.[13] Order, 46-47, n.44; *see also*, Order, 49. Because the grammar school records were obviously of central importance to proving all three elements of mental retardation, particularly deficits in adaptive behavior and onset before the age of eighteen, the Habeas Court held that counsel's failure to request these records was "unprofessional error." Order, 52. The error prejudiced Mr. Stripling because those grammar school records, "would have revealed both significantly subaverage general intellectual functioning and deficits in adaptive behavior that manifested prior to age eighteen." *Id*.

By showing that Mr. Stripling scored 64 and 52 on IQ-test equivalents in third and fifth grades, they would have refuted several of the State's arguments: that Mr. Stripling was malingering, that his low IQ scores were the result of recent depression, and that his mental retardation was a recent fabrication. Order, 53-56. They also would have provided evidence of each prong of the definition of mental retardation: (i) subaverage intellectual functioning (two test scores consistent with an IQ in the mentally retarded range), (ii) deficits in adaptive behavior (poor performance at school), and (iii) onset before age eighteen. Counsel's failure to request

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[13] The State's argument that trial counsel did request the grammar school records is yet another example of its failure to satisfy its burden to show clear error. The State does not even argue that the Habeas Court had no competent evidence on which to base its finding — indeed, the Affidavit of Reba Treon, records custodian for the Atlanta City School system, provides more than the requisite "any evidence" (*see* Order, 46-47 & n.44) — but merely points out that there was evidence to the contrary. This is inadequate to demonstrate clear error.

these records significantly damaged Mr. Stripling's ability to prove his mental retardation and constituted ineffective assistance of counsel.

The facts of this case are remarkably similar to those in *Taylor*, where a habeas court determined that counsel's failure to obtain all of Taylor's past mental health records was deficient performance because the central question at trial was Taylor's mental illness. *Taylor*, 273 Ga. at 80. The records that counsel failed to obtain would have rebutted the State's argument that the petitioner was malingering and that the mental illenss defense was simply a trick. *Id*. In affirming that holding, this Court stated, "[although] an attorney is not ineffective for failing to follow every evidentiary lead * * * [t]he failure to conduct a reasonable investigation may constitute deficient performance." *Id*. at 81-82. As in *Taylor*, Mr. Stripling's counsel failed to request records that were an obvious source of critical evidence for proving the central issue at trial. As in *Taylor*, those records in fact contained significant evidence supporting Mr. Stripling's defense. Thus, as in *Taylor*, this Court should affirm the finding that trial counsel were constitutionally ineffective.

B. Counsel Were Ineffective For Failing To Investigate The Culture Fair Test

At trial, the following test scores were presented to the jury as evidence of IQ: (1) a score of 64 on a WAIS-R IQ test administered by defense expert John Kiehlbach, (2) a score of 68 on a Peabody IQ test, and (3) a score of 111 on a "Culture Fair" test. Thus, the only evidence that Mr. Stripling did ***not*** suffer from "significantly subaverage intellectual function (as determined by an IQ of about 70 or below on a standardized intelligence test)" was the score on the Culture Fair. This, of course, was exploited by the prosecutor, who argued that the score of 111 proved that Mr. Stripling was not mentally retarded beyond a reasonable doubt.

The extent of trial counsel's investigation into the Culture Fair test was to learn that the experts they had retained had never heard of it. Order, 52. Given the importance of this piece of evidence, "[r]easonable counsel would have asked the defense experts to conduct some research

to determine the validity and reliability of the Culture Fair." *Id*. The Habeas Court found that "minimal research" would have led counsel to information and testimony that completely undermines the validity of that test, and thus eliminates the "only objective evidence at trial suggesting that Mr. Stripling's IQ might be above 70." *Id*. The Habeas Court specifically found that reasonable counsel would have discovered and contacted Dr. Herbert Eber, who designed the modified Culture Fair test, and who would have testified that his modifications to the test rendered it completely useless for purposes of determining IQ. Order, 49-50.

If trial counsel had conducted a reasonable investigation into the Culture Fair test, there would have been ***no*** evidence to refute the valid IQ tests showing that Mr. Stripling has significant subaverage intellectual functioning. Order, 56. Thus, if counsel had rendered effective assistance, there is a reasonable probability that the outcome of the trial on the issue of mental retardation would have been different. *Id*. The Habeas Court's conclusion that this error constituted ineffective assistance of counsel should be upheld.

C. Counsel Were Ineffective For Failing To Develop Evidence of Deficits in Adaptive Behavior

At trial, the only witnesses that defense counsel called in order to establish Mr. Stripling's mental retardation were Dr. Keihlbach (a psychologist), Dr. Harris (a psychiatrist), and Mr. Stripling's mother. The Habeas Court found that these three witnesses provided virtually no testimonial support for the second essential prong of a mental retardation defense — deficits in adaptive functioning.[14] In light of the twenty-plus affidavits that were submitted

[14] The State argues, again failing to acknowledge the standard of review, that there was ample evidence presented at trial to indicate deficits in adaptive functioning. But the State relies upon evidence that is unrelated to deficits in adaptive behavior. For example, Dr. Kiehlbach's testimony that Mr. Stripling began hearing voices at the age of six and that he started fires in response to instructions from these voices (Br. 17) may be indicative of mental illness, but is not relevant to show deficits in adaptive behavior.

during this proceeding, the Habeas Court concluded that "there were many potential witnesses who had relevant and highly probative evidence of Mr. Stripling's mental retardation * * * [and] these people were readily available and willing to speak with counsel for Petitioner had they been asked."[15] Order, 49. The court concluded that a reasonable investigation would have "led to a wealth of information in support of a defense of Guilty But Mentally Retarded," rather than the few oblique references that trial counsel presented through Mr. Stripling's mother. *Id*. The Habeas Court concluded that "[b]ut for counsel's failure in this area there is a reasonable probability" that Mr. Stripling would have been found to be retarded. Order, 54. These findings and conclusions should be affirmed.

D. The Cumulative Effect Of These Errors Rendered Mr. Stripling's Trial Fundamentally Unfair And Unreliable

In addition to holding that each of these deficiencies in Mr. Stripling's representation was sufficient to have affected the verdict at trial, the Habeas Court concluded that the cumulative effect of these errors "rendered Petitioner's trial on the issue of mental retardation fundamentally unfair." Order, 57; *see also Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001) (holding that cumulative errors can amount to ineffective assistance under *Strickland*); *Strickland*, 466 U.S. at 695-96 ("the question is whether there is a reasonable probability that, absent the ***errors***, the sentencer * * * would have [reached a different conclusion]") (emphasis added)). If counsel had provided reasonable assistance, they would have: (i) successfully proven that Mr. Stripling had an IQ below 70, (ii) presented overwhelming evidence of deficits in adaptive behavior, and (iii)

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[15] The State's focus on whether trial counsel spoke with Mr. Stripling's sister in his investigation of the mental retardation claim is simply another attempt to reopen a factual dispute that was settled by the Habeas Court without proving clear error. The finding that trial counsel 'never contacted' Mr. Stripling's sister is supported by evidence in the record and must be accepted by this Court. *See* Order, 46, n.43.

definitively established onset before age eighteen. Thus, the cumulative effect of trial counsel's errors was a substantially weaker case for Mr. Stripling's mental retardation than could or should have been presented. This Court should affirm the Habeas Court's holding that each of the errors discussed above — or, alternatively, all of them together — constituted prejudicially ineffective assistance of counsel under *Strickland*.

V. THE HABEAS COURT'S HOLDING THAT STATE INTERFERENCE RENDERED TRIAL COUNSEL INEFFECTIVE UNDER *BYRD* WAS CORRECT

In addition to their own unprofessional errors, trial counsel were rendered ineffective by the State because they were denied access to two critical sources of evidence: Dr. Cooper's report and notes and Mr. Stripling's parole file. As this Court has held, under certain circumstances constitutionally ineffective assistance of counsel can be demonstrated even where the deficient performance is not directly attributable to the attorneys in question but instead was caused by state interference with the attorney's ability to present an adequate defense. *See Byrd v. Owen*, 272 Ga. 807 (2000); *see also Strickland*, 466 U.S. at 686 ("Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense"). "By withholding Mr. Stripling's parole file and Dr. Cooper's reports and notes * * * the State rendered Mr. Stripling's attorneys prejudicially ineffective." Order, 58.

The State's only challenge to this holding is to assert that if Mr. Stripling's *Brady* claim fails, so too must his *Byrd* claim. Br. 5 n.1. Even assuming *arguendo* that there was any reason for this Court to overturn the Habeas Court's *Brady* holding, the State's argument would be incorrect. The claim of compelled ineffectiveness under *Byrd* does not require a legal holding that there was a *Brady* violation, it merely requires that the State interfere with the defense — in this case by withholding material evidence — such that counsel could not provide adequate

representation to their client. Thus, the *Byrd* claim and the *Brady* claim are legally independent: one is based on the State's violation of its duty to disclose evidence; the other is based on the compelled ineffectiveness of the defendant's counsel. The State has simply misinterpreted the nature of a claim under *Byrd*, and this Court should affirm the Habeas Court's holding that Mr. Stripling's counsel were rendered ineffective by the State under *Byrd*.

VI. THE HABEAS COURT'S HOLDING THAT THE STATE VIOLATED *PATILLO* WAS CORRECT

During closing arguments at Mr. Stripling's trial, the prosecutors equated his claim to be mentally retarded to a "lawyer's trick," stating: "That man is looking straight down the barrel of the electric chair. You don't think he's going to pull some wrong answers on an IQ test if he thinks it will save his life?" (Trial Tr. (6/30/89) 2458-59; *see also, e.g.,* Trial Tr. (6/30/89) 2472-74). Such statements — and the trial record is replete with them — interjected the effect of a finding of Guilty but Mentally Retarded (*i.e.*, that the defendant will not be sentenced to death), into the jury's deliberations and thus violated *State v. Patillo*, 262 Ga. 259 (1992). The Habeas Court found that because these statements violated *Patillo* and infected the guilt-innocence phase of Mr. Stripling's trial with extreme prejudice, Mr. Stripling must be granted a new trial on the issue of mental retardation. Order, 61.

The State argues that Mr. Stripling is not entitled to the protections of *Patillo* because of the "pipeline" rule of retroactivity for new procedural rulings. Br. 29-30 (citing *Taylor v. State*, 262 Ga. 584, 586 (1992)). However, "*Taylor v. State* is inapposite because the rule of *Patillo* is one of substantive rather than procedural law. The pipeline rule announced in *Taylor* applies only to new ***procedural*** rules." Order, 60-61 (citing *Taylor*, emphasis added). Because the rule of *Patillo* provided new rights to defendants who assert mental retardation and imposed new obligations on prosecutors and courts, it is a substantive rule of law, one that "creates rights,

duties, and obligations." *Polito v. Holland*, 258 Ga. 54, 55 (1988). Therefore, it "must be applied retroactively to cases on collateral review." *Luke v. Battle*, 275 Ga. 370, 373 (2002).

The State also asserts that the *Patillo* violation in this case was harmless. Br. 30 (citing *Heidler v. State*, 273 Ga. 54, 63 (2000)). Once again, the State has disregarded the Habeas Court's factual findings. Based upon its review of the trial transcript, the Habeas Court found that the prosecution's statements "encourage[d] a verdict based not on the facts, * * * but on the basis of passion." Order, 61. As a result of "this serious constitutional violation," the Habeas Court concluded that it "can have no confidence in the verdict at trial." *Id*. The State has given this Court no reason to overturn the Habeas Court's informed conclusion that prejudice ensued from the prosecutors' improper comments. Indeed, the contrast between this case and *Heidler*, the case cited by the State, is telling. In *Heidler*, the *Patillo* violation was harmless because the defendant had put on ***no*** affirmative evidence of mental retardation and defense counsel conceded that Heidler was "not mentally retarded." *Heidler*, 273 Ga. at 63. In this case, the evidence of mental retardation was hotly contested and there can be no doubt that the prosecutor's outrageous comments, equating mental retardation to a "lawyer's trick" invented only because Mr. Stripling was "looking down the barrel of the electric chair," had the potential to alter the jury's view of the evidence. The Habeas Court's holding was clearly correct and should be upheld by this Court.

VII. THE HABEAS COURT'S HOLDING THAT THE BURDEN OF PROOF FOR MENTAL RETARDATION UNDER O.C.G.A. § 17-7-131 IS UNCONSTITUTIONAL WAS CORRECT

Mr. Stripling has now proven his mental retardation beyond any reasonable doubt. However, due to withheld evidence, a false test score, misleading expert testimony, and ineffective assistance of counsel, he was unable to prove this truth at trial 'beyond a reasonable doubt,' as he was required to do under O.C.G.A. § 17-7-131. Thus, Mr. Stripling's trial is a

case-in-point for the Habeas Court's conclusion that the 'beyond a reasonable doubt' burden of proof is no longer constitutionally permissible under the Fourteenth Amendment and recent United States Supreme Court precedent. Order, 61-70.

On June 20, 2002 the United States Supreme Court reversed its prior holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and held that the Eighth Amendment prohibits execution of mentally retarded people. *Atkins v. Virginia*, 536 U.S. 304 (2002). Thus, as of June 20, 2002, defendants in every State — including Georgia — have a new federal constitutional right to be free from execution if they are mentally retarded. With this right, obviously, comes due process protection under the Fourteenth Amendment. The Supreme Court left the development of procedural rules related to claims of mental retardation up to the states in the first instance, "as [it did] in *Ford v. Wainwright*." *Atkins*, 536 U.S. at ___, 122 S. Ct. 2242, 2250 (citing *Ford v. Wainwright*, 477 U.S. 399 (1982)). However, the procedures established by the states must comply with the guarantees of the Fourteenth Amendment. *See Cooper v. Oklahoma*, 517 U.S. 348 (1996) (striking down Oklahoma's burden of proof under *Ford v. Wainwright*, and holding that the states cannot require defendants to prove insanity by any standard higher than a preponderance of the evidence).

Cooper established a tripartite test for reviewing state burdens of proof that protect federal constitutional rights. *Id*. at 355-62. A court analyzing such a burden of proof must consider: (i) historical practice, (ii) contemporary practice, and (iii) fundamental fairness. *Id*. The Habeas Court performed this analysis and made the following factual findings: (i) historical practice is not informative either way (Order, 67), (ii) contemporary practice militates overwhelmingly against a beyond-a-reasonable-doubt burden of proof, because Georgia is the only state to impose such a high burden (Order 64-65; *see also id*. at 67) and, (iii) in light of the

interests at stake, fundamental fairness compels a finding that this burden is unreasonably high and therefore unconstitutional (Order, 62-63; *see also id* at 67-70). The Habeas Court's factual findings and legal reasoning are compelling and this Court should hold that the burden of proof under O.C.G.A. § 17-7-131 is unconstitutional under the Fourteenth Amendment and *Atkins*.

The State argues that Mr. Stripling is procedurally barred from raising this claim because it was not raised on his direct appeal. As the Habeas Court correctly held, however, this claim is based on a radical change in federal constitutional law that post-dates Mr. Stripling's direct appeal. Order, 65. At the time of his direct appeal, the United States Supreme Court had recently ruled that Mr. Stripling did ***not*** have a right to be free from execution under the Eighth Amendment (*see Penry*, 492 U.S. 302). Therefore, he could not have argued that Georgia's burden of proof violated that right. Furthermore, the Habeas Court found as a matter of fact that the evidence Mr. Stripling presented at his trial probably would have met a lower, constitutionally permissible burden of proof. Order, 63. Thus, there is cause and prejudice for Mr. Stripling's failure to raise this claim, and any procedural bar is overcome.[16] Order, 65.

The State is silent on the merits of this issue, which is understandable given that the arguments for unconstitutionality are so compelling.[17] Order, 65-70. Under federal law, "not only does the standard of proof reflect the importance of a particular adjudication, it also serves as a societal judgment about how the risk of error should be distributed between the litigants."

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[16] The Habeas Court also held that because it would be a miscarriage of justice to execute Mr. Stripling, any procedural bar would be overcome even absent cause and prejudice. Order, 65-66. As the State has not shown that it was clear error to find Mr. Stripling mentally retarded, that holding still stands and independently justifies review of this issue.

[17] The State's citation to this Court's precedent is inapposite here as each of those cases predated *Atkins* and thus could not have considered or decided whether the beyond-a-reasonable-doubt burden of proof is constitutionally permissible under *Atkins* and *Cooper* — that question is a matter of first impression for the Habeas Court and this Court.

Order, 66 (citing *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 283 (1990) (quotation marks and citation omitted)). Furthermore, "[t]he finality of the death penalty requires a greater degree of reliability when it is imposed." Order, 68 (citing *Murray v. Giarratano*, 492 U.S. 1, 8-9 (1989) (quotation marks and citation omitted)). Applying the tripartite *Cooper* test, and keeping in mind these principles of federal law, it is clear that the 'beyond a reasonable doubt' burden of proof is a violation of federal due process guarantees.

Contemporary practice universally militates against the 'beyond a reasonable doubt' burden of proof.[18] *See* Order, 64-65, 67. Before *Atkins*, Georgia was the only state to impose such a high burden of proof. *See id*. Furthermore, since *Atkins*, no court or legislature has adopted, or even recommended, such an unreasonably high burden of proof. Indeed, several courts have held that under *Atkins* and *Cooper*, a defendant may not be required to prove mental retardation by any standard higher than a preponderance of the evidence.[19] Although Georgia was the first state to ban execution of the mentally retarded, its procedures have fallen behind the curve and now stand outdated — and impermissible — by federal due process standards.

Finally, as the Habeas Court found, "it is fundamentally unfair to require people who are mentally retarded to bear such a high burden and to carry such a high risk of wrongful determination when the cost of error is their life." Order, 69. "Under the United States Constitution, a determination that affects a life or death decision must be accompanied by a high degree of certainty." Order, 67 (citing, among other cases, *Ford v. Wainwright*, 477 U.S. at 411 ("[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire

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[18] Historical analysis is unhelpful because the right in question was only recognized in June of 2002. Order, 67.

[19] *See, e.g.*, *State v. Williams*, 831 So. 2d 835, 859-60 (La. 2002); *Murphy v. State*, 54 P.3d 556, 568 & n.20 (Okla. 2002); *State v. Lott*, 779 N.E.2d 1011, 1015-16 (Ohio 2002).

to a heightened standard of reliability * * * [because] execution is the most irremediable and unfathomable of penalties")). However, as the Habeas Court found as a matter of fact, "[b]y requiring defendants to prove their mental retardation beyond a reasonable doubt, O.C.G.A. § 17-7-131 creates a significant risk that people who are actually mentally retarded will not be able to, or for various reasons will fail to, satisfy the burden necessary to prove mental retardation and thus will be executed." Order, 62. It would be particularly inappropriate to place such a high burden on mentally retarded defendants when "one of the Supreme Court's reasons for its ruling in *Atkins* is that mentally retarded people are not often able to participate fully in the adversarial process and thus receive less than a fully adequate defense." Order, 69; *see also* Order, 63 (finding as a matter of fact that mentally retarded people "are often unable to assist their lawyers fully in preparing their defense" and "often attempt to conceal their condition in order to avoid stigmatization"). In sum, "[t]he analysis under *Cooper* is clear; it is fundamentally unfair and therefore violates the Fourteenth Amendment to require a defendant to meet the beyond a reasonable doubt burden of proof in order to assert his rights under *Atkins v. Virginia* and the Eighth Amendment." *Id*.

The Habeas Court's conclusion is clearly correct. If mentally retarded defendants are required to labor under this burden of proof, then many of them will be executed in spite of the fact that they are not eligible for the death penalty. As the Habeas Court noted, Mr. Stripling's trial was a case in point:

> While the Court is now faced with an overwhelming body of evidence demonstrating that Petitioner is mentally retarded by any standard, at trial the evidence of mental retardation was substantially less convincing * * * [I]f the burden of proof at trial had been lower there is a reasonable probability that Petitioner would have been found to be mentally retarded.

Order, 69. The statutory burden of proof is simply not permissible under the Fourteenth Amendment or United States Supreme Court precedent. This procedural rule effectively eviscerates the protection that was guaranteed by *Atkins*. In order to create a procedure that provides more than lip service to the holding of *Atkins*, and thus passes muster under the Fourteenth Amendment and *Cooper*, "[t]he risk of error in the determination of mental retardation must, at the very least, be shared more evenly by the State." Order, 69.

Given that the burden of proof under O.C.G.A. § 17-7-131 is unconstitutional, the question arises, what burden is permissible and appropriate? The Habeas Court determined that defendants could not be required to prove mental retardation by any standard higher than a preponderance of the evidence. Order, 70-71. This is the standard that has been adopted by a majority of states, and in *Cooper* it was found to be the highest permissible standard for proving insanity. Appellee submits that any burden higher than a preponderance of the evidence would violate the Fourteenth Amendment. This Court should strike down the burden of proof under O.C.G.A. § 17-7-131, and mandate that defendants are required to prove mental retardation by a preponderance of the evidence.

CONCLUSION

For all of these reasons as well as those set forth in the Habeas Court's Order, this Court should affirm that Order.[20]

[20] If, however, this Court overturns all of the Habeas Court's grounds for relief, it should remand to the Habeas Court for resolution of the issues on which that Court deferred ruling. *See* Order, 72.

DATED: March 3, 2003

Respectfully submitted,

MITCHELL D. RAUP
DAVID M. GOSSETT
CARL J. SUMMERS
Mayer, Brown, Rowe and Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

DIANE GREEN-KELLY
Mayer, Brown, Rowe and Maw
190 South La Salle Street
Chicago, Illinois 60603
(312) 782-0600

Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a copy of the foregoing Appellee's Brief upon counsel for Appellant by hand at the following address:

Karen Anderson Johnson, Esq.
Georgia Department of Law
40 Capital Square, S.W.
Atlanta, GA 30334-1300

this 3d day of March, 2003.

Mitchell D. Raup

IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

FREDRICK HEAD, WARDEN, Georgia Diagnostic and Classification Prison, Appellant, vs. ALPHONSO STRIPLING Appellee.	)	Case No. S03A0525 HABEAS CORPUS

NOTICE OF FILING

PLEASE BE ADVISED that on March 3, 2003, we caused to be filed with the Clerk of the Supreme Court of Georgia, State of Georgia, a true and correct copy of Appellee's Brief, a copy of which is hereby served upon you.

MITCHELL D. RAUP
Mayer, Brown, Rowe and Maw
1909 K Street, N.W.
Washington, D.C. 20006

Attorney for Appellee