No. _____

IN THE

Supreme Court of the United States

RODNEY RENIA YOUNG,

Petitioner,

—v.—

STATE OF GEORGIA,

Respondent.

CAPITAL CASE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Josh Moore
Thea Delage
OFFICE OF THE GEORGIA CAPITAL DEFENDER
270 Washington Street,
Suite 5-198
Atlanta, GA 30334

Brian W. Stull
Counsel of Record
Cassandra Stubbs
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
201 W. Main Street, Suite 402
Durham, NC 27701
(919) 682-9469
bstull@aclu.org

Jennesa Calvo-Friedman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Attorneys for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

Georgia requires persons with intellectual disability to prove their disability 'beyond a reasonable doubt' in order to vindicate their Eighth Amendment right to be free from execution. It is the only state to do so. Georgia's onerous burden is an extreme outlier not merely on the issue of intellectual disability; to petitioner's knowledge, no other state, in any other context, requires an individual to prove the factual predicate for *any* constitutional right beyond a reasonable doubt. Under this standard, Georgia will execute capital defendants who are more likely than not intellectually disabled. Indeed, it will even execute those who establish by clear and convincing evidence that they are intellectually disabled.

The questions presented are:

(1) Does requiring a capital defendant to prove his intellectual disability beyond a reasonable doubt violate the Due Process Clause by creating an unacceptable risk that a constitutional right will go unenforced?

(2) Does requiring a capital defendant to prove his intellectual disability beyond a reasonable doubt violate the Eighth Amendment by creating an unacceptable risk that an intellectually disabled person will be executed?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

REASONS TO GRANT THE PETITION 11

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF SEVERAL STATE SUPREME COURTS. 11

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT. 18

A. The Decision Conflicts with this Court's Due Process Decision in *Cooper v. Oklahoma* 18

B. The Decision Below Conflicts with this Court's Eighth Amendment Decisions in *Hall* and *Moore*. 22

III. EVEN OUTSIDE THE *ATKINS* SETTING, GEORGIA'S BEYOND-A-REASONABLE-DOUBT STANDARD IS A COMPLETE OUTLIER. 25

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR ANSWERING THE QUESTIONS PRESENTED. 30

CONCLUSION.....33

APPENDIX A, Opinion of the Georgia Supreme Court, June 24, 2021 .....1a

APPENDIX B, Order of the Georgia Supreme Court Upon Motion for Reconsideration, June 24, 2021 ..... 107a

APPENDIX C, Relevant Orders of the Trial Court, Jan. 17, 2012 and Apr. 9, 2019 .....109a

APPENDIX D, Trial Exhibit, Dec. 15, 1985 .....206a

APPENDIX E, Jury notes, Feb. 17 & 21, 2012 .....207a

APPENDIX F, Trial Transcript Excerpt,
Feb. 16, 2012 ..... 214a

TABLE OF AUTHORITIES

Cases

Abreu v. Lipka,
778 Fed. Appx. 28 (2d Cir. 2019) 28

Addington v. Texas,
441 US 418 (1979) 21, 26, 27, 30

Atkins v. Virginia,
536 U.S. 304 (2002) ..... passim

Berron v. Illinois Concealed Carry Licensing Review Board, 825 F.3d 843 (7th Cir. 2016).....28

Bowling v. Commonwealth,
563 S.W.3d 1 (Ky. 2018), *abrogated on other grounds by Woodall v. Commonwealth*,
563 S.W.3d 1 (Ky. 2018).....14

Brady v. Maryland,
373 U.S. 83 (1963) 29

Chase v. State,
873 So.2d 1013 (Miss. 2004) 16

Chevron USA, Inc. v. Cayetano,
224 F.3d 1030 (9th Cir. 2000).....28

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 28

Commonwealth v. Sanchez,
36 A.3d 24 (Pa. 2011) 16

Cooper v. Oklahoma,
517 U.S. 348 (1996) ..... passim

Crawford-El v. Britton,
523 U.S. 574 (1998) 28

Cruzan v. Director, Missouri Dept. of Health,
497 US 261 (1990) 19, 29

DeBurgo v. St. Amand,
587 F.3d 61 (1st Cir. 2009) 29

Drumgold v. Callahan,
707 F.3d 28 (1st Cir. 2013) 29

Ex parte Briseno,
135 S.W.3d 1 (Tex. Crim. App. 2004) 16, 23

Green v. Travis,
414 F.3d 288 (2d Cir. 2005) 29

Hall v. Florida,
572 U.S. 701 (2014) ..... passim

Head v. Hill,
587 S.E.2d 613 (Ga. 2003) 11, 22, 23, 31

Head v. Stripling,
590 S.E.2d 122 (Ga. 2003) 11, 31

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 26, 27

Hill v. Humphrey,
662 F.3d 1335 (11th Cir. 2011) 11, 20, 23, 31

Holsey v. Hall,
552 U.S. 1070 (2007) 31

Howell v. State,
151 S.W.3d 450 (Tenn. 2004) 13

In re Winship,
397 U.S. 358 (1970) 2, 27

Johnson v. Harmon,
5:03CV00468JLH/JTR, 2005 WL 1772752, at
*15 (E.D. Ark. July 1, 2005) 28

Jones v. Campbell,
436 F.3d 1285 (11th Cir. 2006).....29

King v. Georgia,
536 U.S. 957 (2002), *rehearing denied* 536 U.S.
982 (2002) 31

Leland v. Oregon,
343 U.S. 790 (1952) 9, 21, 22

Madison v. Comm'r, Ala. Dept. of Corr.,
761 F.3d 1240 (11th Cir. 2014).....29

McCormick v. Parker,
821 F.3d 1240 (10th Cir. 2016).....29

Medina v. California,
505 U.S. 437 (1992) 21, 29

Moore v. Texas,
137 S. Ct. 1039 (2017) 9, 22, 31

Moore v. Texas,
139 S. Ct. 666 (2019).....24

Morrow v. State,
928 So.2d 315 (Ala. Crim. App. 2004) 15

Mosher v. State,
491 S.E.2d 348 (Ga. 1997) 22

Munson v. Norris,
375 Fed. Appx. 638 (8th Cir. 2010) 28

Murphy v. State,
54 P.3d 556 (Okla. Crim. App. 2002), *overruled in part on other grounds by Blonner v. State*,
127 P.3d 1135 (Okla.Crim. App. 2006) 16

Ord. Adopting Amends. to Fla. Rules of Crim. Proc. and Fla. Rules of App. Proc.,
875 So.2d 563 (Fla. 2004).....16

Penna v. United States,
153 Fed.Cl. 6 (2021) 28

People v. Beauvais,
393 P.3d 509 (Colo. 2017) 29

People v. Vasquez,
84 P.3d 1019 (Colo. 2004) 17

Pruitt v. State,
834 N.E.2d 90 (Ind. 2005).....12

Raulerson v. Warden,
928 F.3d 987 (11th Cir. 2019),), *cert. denied*,
140 S. Ct. 2568 (2020).....11, 31

Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. City of New York,
914 F.2d 348 (2d Cir. 1990) 28

Rogers v. State,
698 N.E.2d 1172 (Ind. 1998).....12

Santosky v. Kramer,
455 U.S. 745 (1982).....27

Satanic Temple, Inc. v. City of Scottsdale,
856 F. App'x 724 (9th Cir. 2021) 28

Schneiderman v. United States,
320 U.S. 118 (1943) 27

Schofield v. Holsey,
642 S.E.2d 56 (Ga. 2007) 31

Speiser v. Randall,
357 U.S. 513 (1958) 26

State v. Blackwell,
801 S.E.2d 713 (S.C. 2017) 16

State v. Frank,
679 So.2d 1365 (La. 1996).....15

State v. Grell,
135 P.3d 696 (Ariz. 2006).....17

State v. Lott,
779 N.E.2d 1011 (Ohio 2002), *overruled on other grounds by State v. Ford*, 140 N.E.3d 616 (Ohio 2019) 16

State v. Robertson,
239 So. 3d 26 (La. 2018).....15

State v. Williams,
831 So.2d 835 (La. 2002).....15

Stripling v. Head,
541 U.S. 1070 (2004) 31

Stripling v. State,
711 S.E.2d 665 (2011) 11, 24

Tilton v. Marshall,
925 S.W.2d 672 (Tex. 1996) 28

United States v. Avalos,
984 F.3d 1306 (8th Cir. 2021).....29

United States v. Beaudion,
979 F.3d 1092 (5th Cir. 2020).....29

United States v. Castellanos,
716 F.3d 828 (4th Cir. 2013).....29

United States v. Feffer,
831 F.2d 734 (7th Cir. 1987).....29

United States v. Helms,
703 F.2d 759 (4th Cir. 1983).....29

United States v. Lord,
711 F.2d 887 (9th Cir. 1983).....29

United States v. Seeger,
380 U.S. 163 (1965) 28

Constitution & Statutes

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2254(d)(1).....31

Ga. Code Ann. § 17-7-131(a)(2) 5

Ga. Code Ann. § 17-7-131(c)(3).....1, 6

Ga. Code Ann. § 17-7-131(j)(1) 20

Tenn. Code Ann. § 39-13-203(c) 13

Tenn. Code Ann. § 40-30-110(f).....13

U.S. Const. amend. I.....25

U.S. Const. amend. IV.....29

U.S. Const. amend. VI.....29

U.S. Const. amend. XIV.....29

U.S. Const. amend. XIV, § 2.....passim

Other Authorities

4 William Blackstone, *Commentaries*.....2

American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* (12th ed. 2021).....5

John H. Blume et al., *A Tale of Two (and Possibly Three) Atkins*, 23 Wm. & Mary Bill Rts. J. 393 (2014).....18

Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases,* 33 Ga. St. U. L. Rev. 553 (2017).....7, 18, 19

PETITION FOR A WRIT OF CERTIORARI

Rodney Renia Young petitions for a writ of certiorari to review the judgment of the Georgia Supreme Court.

OPINIONS BELOW

The June 24, 2021, split decision of the Georgia Supreme Court is reported at 860 S.E.2d 746. *See* App. 1a-106a.

JURISDICTION

The Georgia Supreme Court initially entered a judgment on June 1, 2021, but denied a timely motion for reconsideration on June 24, 2021, and replaced the initial decision with a new version dated June 24, 2021. App. 107a-108a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

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

Ga. Code Ann. § 17-7-131(c)(3) provides: "The defendant may be found 'guilty but with intellectual disability' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is intellectually

disabled. If the court or jury should make such finding, it shall so specify in its verdict."

INTRODUCTION

Proof beyond a reasonable doubt is the most demanding burden known to the law. Historically, its application has been limited to the government's obligation to produce sufficient evidence to convict an individual for an alleged crime. In that setting, the standard reflects the judgment that it is better to see ten guilty persons go free than to wrongly convict one innocent person. *In re Winship*, 397 U.S. 358, 361-64 (1970); *id.* at 372 (Harlan, J., concurring); *see* 4 William Blackstone, *Commentaries* *352 ("[B]etter that ten guilty persons escape, than that one innocent suffer.").

The Eighth Amendment prohibits executing people with intellectual disability. *Atkins v. Virginia*, 536 U.S. 304 (2002). But Georgia, alone among the states, requires defendants invoking this right to prove *beyond a reasonable doubt* that they are intellectually disabled. Virtually every other state that imposes the death penalty requires only a preponderance of evidence. Georgia's unique burden has effectively nullified the right, as no jury has ever found this burden met in a case of intentional murder. Georgia, it seems, would rather unconstitutionally execute ten intellectually disabled people than spare the life of one non-disabled person.

The court below concluded that Georgia's burden does not violate the Due Process Clause or the Eighth Amendment. That decision directly conflicts with the decisions of other state supreme courts that have held that the Constitution requires states to apply a preponderance-of-the-evidence standard. The

decision also conflicts with holdings of this Court on both Due Process and the Eighth Amendment, because the beyond-a-reasonable-doubt standard creates an unacceptable risk of unconstitutional execution. It requires the juror or judge to eliminate all lingering doubt about an issue on which near-certainty is practically impossible.

Indeed, Georgia's standard is far out of step not only with the standards all other states use to adjudicate *Atkins* claims, but with the standards used to adjudicate constitutional rights claims generally. A religious adherent asserting a Free Exercise violation need not prove the sincerity of her belief beyond a reasonable doubt. A speaker asserting a violation of his speech rights need not prove a government forum has been open to other similar speakers beyond a reasonable doubt. And a criminal defendant seeking to vindicate his due process right during interrogation need not prove that his confession was involuntary beyond a reasonable doubt. Georgia is an extreme outlier, in other words, not only with respect to *Atkins* claims, but with respect to all of constitutional law.

The conflict is intolerable, because it is literally a life-or-death matter. In every other State in the Union, if a capital defendant shows by either a preponderance of the evidence or clear and convincing evidence that he has intellectual disability, he cannot be executed. Yet in Georgia, the same defendant will be executed. And there is nothing academic about this. In the states that apply a preponderance-of-the-evidence standard, approximately one-third of those asserting that they are intellectually disabled succeed in invoking the Eighth Amendment's protection. In Georgia, not a single person convicted of intentional

murder has prevailed at trial in establishing that he is intellectually disabled.

This case cleanly presents both the Due Process and Eighth Amendment questions on direct review, and provides an ideal vehicle to address them. The Georgia Supreme Court directly addressed and rejected both questions on the merits. And because Georgia stands alone in the nation in imposing such an onerous standard on defendants invoking *Atkins*, there is no likelihood of further percolation.

The beyond-a-reasonable-doubt standard has no place in assessing whether an individual can establish a factual predicate for a constitutional violation, particularly where the consequence of inevitable error is an unconstitutional execution. The Court should grant certiorari and reverse. And the error is so plain that the Court should also consider summarily granting, vacating, and remanding.

STATEMENT OF THE CASE

Intellectual disability marked Petitioner Rodney Young's childhood. New Jersey public schools consistently classified him as intellectually disabled, using a then-preferred term "educable mentally retarded," or EMR. App. 5a, 206a.

In 2012, Mr. Young was convicted in Georgia for killing the son of his estranged girlfriend. At trial, he relied on the only available Georgia procedure for invoking the protection of *Atkins*, arguing that he was guilty but intellectually disabled. Because the jury was not persuaded beyond a reasonable doubt of his intellectual disability, it found him guilty but *not* intellectually disabled, and ultimately sentenced him to death. App. 1a.

To establish intellectual disability under *Atkins*, Mr. Young had to prove that he has "significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior[,]" Ga. Code Ann. § 17-7-131(a)(2), and that his disability's "onset . . . [was] during the developmental period[.]" *Hall v. Florida*, 572 U.S. 703, 710 (2014); *see generally* American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* 1 (12th ed. 2021) (setting forth established medical definition of "intellectual disability"). Mr. Young put on extensive evidence that the New Jersey public schools consistently classified him as intellectually disabled when he was still a child, that is, during the "developmental period." App. 5a; 219a-221a.[1]

Mr. Young's evidence included testimony from teachers and educators who knew him as a child, knew of his placement in EMR classes, and attested that his placement in such classes required an IQ score of under 70 and deficits in adaptive functioning. App. 5a; 220a. For example, the head of the special education department, who personally taught Mr. Young, stated that

> Rodney was determined to be classified as educable mentally retarded and that was determined by the battery of tests

---

[1] Petitioner uses the term preferred in the medical community, "intellectual disability," except when quoting from sources that used the outdated terms, "mentally retarded" or "educable mentally retarded."

> that was given by that child study team. . . . For educable mentally retarded, they have to score within a range of 60 to 69 for the IQ test. . . . [A] student who is declared mentally retarded and educable does not have the capacity to perform within a level, within the normal learning limits.

App. 220a-221a. *See also* T10: 2896 (another teacher testifying that Mr. Young, and the other children in "educable mentally retarded" classes, had IQ's that "fell between the 60 and 69 range"); T10: 2985 (social worker on the child study team when Mr. Young was in high school testifying it "was common knowledge that Rodney was functioning as far as his academics [] probably, like, on the third grade level").

In rebuttal, the State called two witnesses who had worked with Mr. Young in a factory applying labels to canned goods. App. 66a. These witnesses claimed Mr. Young was skilled at applying labels. *Id.* Neither had any experience teaching or assessing people with intellectual disability.

Under Georgia law, a "defendant may be found 'guilty but with intellectual disability' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is with intellectual disability." Ga. Code Ann. § 17-7-131(c)(3). The judge instructed the jury that it would have to find Mr. Young intellectually disabled beyond a reasonable doubt in order to render a "guilty but mentally retarded" verdict. T57:3319-21.

Georgia is the only state in the nation that requires proof of intellectual disability beyond a reasonable doubt. *See* Lauren Sudeall Lucas, *An*

Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases (hereinafter *Empirical Assessment*), 33 Ga. St. U. L. Rev. 553, 560-61 nn.22-25 (2017) (collecting state laws). Virtually all other jurisdictions require a defendant to prove his intellectual disability by a preponderance of the evidence. *Id.* at 561 n.22 (cataloguing 33 jurisdictions). Only two other states that currently have the death penalty, Arizona and Florida, require proof by clear and convincing evidence. *Id.* Other than Georgia, none requires proof beyond a reasonable doubt.

In her closing argument, the prosecutor repeatedly relied on Georgia's demanding standard of proof. She argued repeatedly that, unlike the State, which had met its burden of proving Mr. Young's guilt beyond a reasonable doubt, T57:3251-52, the defense had not proven intellectual disability by that same standard. T57:3251; 3252; 3270; 3273; 3274, 3290, 3301. For example, she argued:

> The burden of proof, again, is on the defendant. He has to prove that he's mentally retarded. The standard, as I mentioned, *is beyond a reasonable doubt*. And the Judge is going to instruct you, just like the state has the burden to prove his guilt beyond a reasonable doubt, that a reasonable doubt is any doubt that leaves your *mind wavering, unsettled or unsatisfied*. That's a doubt of the law.
>
> So if you're in the back deliberating this case, and you say, you know, I just don't

> feel comfortable calling him mentally retarded, this just doesn't, we are taking a big leap here, you know, then that's a reasonable doubt. Because you, *if your mind is wavering or unsettled or unsatisfied about the fact that the defense has proven that he is mentally retarded, then you have the right to reject this defense and say, the defense has not proven he's mentally retarded beyond a reasonable doubt.*

T57:3274 (emphasis added); *see also* T57:3270 ("remember, the defense has to prove it beyond a reasonable doubt").

The jury deemed Mr. Young's proof of disability insufficient to surmount the "beyond a reasonable doubt" standard, rendering him eligible for the death penalty. App. 1a, 5a.

But even after rejecting Mr. Young's claim of intellectual disability in the guilt/innocence phase of the trial, individual jurors continued to ask questions about intellectual disability in the sentencing phase, where it remained relevant as potential mitigation even if not a categorical bar against execution. Two of the jury's five substantive notes during sentencing deliberations requested evidence concerning Mr. Young's adaptive deficits and IQ scores. App. 209a-213a.

Mr. Young objected to the constitutionality of the burden of proof for establishing intellectual disability before trial, R1481-83 (pretrial motion); App. 109a-110a (order denying motion); in post-trial motions, R1985-2004 (motion for new trial); R2059-94 (supplemental argument based on newly-decided *Hall*

v. Florida); R2538-43 (supplemental argument based on newly-decided *Moore v. Texas*); App. 130a-135a (order denying claims); and again on direct appeal.

The Georgia Supreme Court concluded that "*considering the conflicting testimony on the subject*, Young had failed to prove *beyond a reasonable doubt* that he was 'mentally retarded.'" App. 5a (emphasis added). The court rejected Mr. Young's arguments that Georgia's burden of proof violates the Due Process Clause and the Eighth Amendment. It acknowledged that this Court in *Cooper v. Oklahoma*, 517 U.S. 348, 366-67 (1996), held that requiring a criminal defendant to prove by clear and convincing evidence that he is not mentally competent to stand trial violates due process, because it means that persons who are more likely than not mentally incompetent will be forced to stand trial. App. 31a. But it declined to follow *Cooper*, and relied instead on *Leland v. Oregon,* 343 U.S. 790, 798-99 (1952), in which this Court rejected a due process challenge to a state law requiring a criminal defendant to prove beyond a reasonable doubt that he is not guilty by reason of insanity, a state law defense that this Court deemed not required by the Constitution. App. 37a-44a.

The court also rejected Mr. Young's argument that Georgia's uniquely demanding burden of proof violates *Atkins* and this Court's subsequent decisions in *Hall v. Florida*, 572 U.S. 701, 719 (2014) and *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017), by creating an unacceptable risk that persons with intellectual disability will be executed. App. 34a-36a. The majority below saw "no clear direction in the law to hold" Georgia's burden of proof unconstitutional. App. 28a.

Justice Bethel dissented. He explained that "[e]mploying the highest burden of proof in our system of justice . . . significantly increases the risk of an offender with an actual intellectual disability being executed because he or she is unable to meet the high standard of proof." App. 105a. He pointed out that, under this burden, "a meaningful portion of intellectually disabled offenders are effectively excluded from the constitutional protection recognized in *Atkins*." App. 105a. Even if the proof showed that a defendant was "probably or even clearly intellectually disabled[,]" any type of doubt or dispute that left a juror's mind "wavering, unsettled, or unsatisfied" could qualify such a defendant, under Georgia law, as eligible for execution. App. 106a.

Three justices concurred, expressing similar concerns. They stated that while the holdings of *Hall* and *Moore* did not squarely address the question of burden of proof, "some of the *reasoning* of the cases, particularly their disapproval of state measures that 'creat[e] an unacceptable risk that persons with intellectual disability will be executed,'. . . certainly casts doubt on this State's uniquely high standard of proof." App. 98a-99a (Nahmias, J., concurring) (quoting *Moore*, 137 S. Ct. at 1044 and *Hall*, 572 U.S. at 704) (emphasis in original)). While they believed that the *reasoning* of *Hall* and *Moore* precluded Georgia's beyond-a-reasonable-doubt standard, they did not understand the *holdings* to require a different result. App. 99a (Nahmias, J., concurring). Accordingly, they concluded that *Hall* and *Moore* did not offer a "compelling reason for the Court to overrule [its] well-established precedent[,]" but expressly noted that Mr. Young could seek this Court's intervention. App. 101a.

As it did below, the constitutionality of Georgia's standard of proof has divided every Georgia and federal appellate court that has addressed the issue. *See Head v. Hill*, 587 S.E.2d 613 (Ga. 2003) (4-3 decision); *Head v. Stripling*, 590 S.E.2d 122, 127 (Ga. 2003) (4-3 decision); *Stripling v. State*, 711 S.E.2d 665 (2011) (6-1 decision); *Hill v. Humphrey*, 662 F.3d 1335, 1348 (11th Cir. 2011) (en banc) (6-1-4, with the single concurrence critiquing the standard of proof as unconstitutional, but finding the claim not properly raised); *Raulerson v. Warden*, 928 F.3d 987, 1009 (11th Cir. 2019) (2-1 decision), *cert. denied*, 140 S. Ct. 2568 (2020).

REASONS TO GRANT THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF SEVERAL STATE SUPREME COURTS.

Virtually all other states require proof of intellectual disability by a preponderance of the evidence, and therefore their state high courts have not had reason to assess whether a higher standard would be constitutional. Nonetheless, the decision below is in direct conflict with decisions of several state supreme courts that have either invalidated statutes requiring clear and convincing evidence for *Atkins* claims under the Due Process Clause, or have held, in the absence of a state statute, that only the preponderance standard satisfies the Due Process Clause.

Indiana. The Indiana Supreme Court has held that capital defendants cannot be required to prove intellectual disability by clear and convincing

evidence. *Pruitt v. State*, 834 N.E.2d 90, 103 (Ind. 2005). Before *Atkins v. Virginia*, 536 U.S. 304 (2002), the court had upheld the state's imposition of a clear and convincing standard because the right of a person with intellectual disability not to be executed was *not* then constitutionally based. *Rogers v. State*, 698 N.E.2d 1172, 1175-76 (Ind. 1998). After this Court decided *Atkins*, however, the court overruled *Rogers*. *Pruitt*, 834 N.E.2d at 101. It concluded that because *Atkins* announced a constitutional right, Indiana's "clear and convincing evidence" standard was unconstitutional. *Id.* at 103.

The Indiana court followed this Court's decision in *Cooper v. Oklahoma*, 517 U.S. 348 (1996). In *Cooper*, this Court unanimously held that requiring a criminal defendant to prove mental incompetence to stand trial by clear and convincing evidence was fundamentally unfair and violated the Due Process Clause. *Id.* at 356, 369. The Court reasoned that there was no historical support for a clear-and-convincing standard; that Oklahoma was an outlier among the states, the vast majority of which required only a preponderance of the evidence; that "[w]hile important state interests [were] unquestionably at stake," the consequences of an error were higher for the defendant than for the state; and that the clear-and-convincing standard impermissibly forced someone who is more likely than not mentally incompetent to stand trial. *Id.* at 360-67.

The Indiana court concluded that "[t]he reasoning of *Cooper* in finding a clear and convincing standard unconstitutional as to incompetency is directly applicable to the issue of mental retardation." *Pruitt*, 834 N.E.2d at 101. It reasoned that the clear-and-convincing standard for *Atkins* claims, too, was

an outlier. *Id.* at 102. Further, the standard impermissibly shifted the risk of error to the defendant, and would lead to the execution of persons with intellectual disability:

> *Cooper* held a clear and convincing standard unconstitutional as to incompetency because it would result in some persons who are incompetent nonetheless going to trial. Similarly, requiring a defendant to establish mental retardation by clear and convincing evidence would result in execution of some persons who are mentally retarded. In the language of the Supreme Court: a heightened standard of proof "does not decrease the risk of error, but simply reallocates that risk between the parties."

Id. at 103 (quoting *Cooper*, 517 U.S. at 366).

Tennessee. The Tennessee Supreme Court has similarly held that this Court's decision in *Cooper* forbids any standard of proof for *Atkins* claims greater than a preponderance of the evidence. *Howell v. State*, 151 S.W.3d 450, 464-65 (Tenn. 2004). *Howell* involved a petition to reopen post-conviction relief proceedings in light of *Atkins*. *Id.* at 460. Although Tennessee law demanded only a preponderance showing at trial to demonstrate intellectual disability, it required clear and convincing evidence in post-conviction proceedings. *Id.* at 463; Tenn. Code Ann. § 39-13-203(c); Tenn. Code Ann. § 40-30-110(f). The court held that because of "the parallel concerns raised regarding incompetency to stand trial" and intellectual disability, the "proper burden of proof" for *Atkins*

claims is preponderance of the evidence. *Id.* at 464. The court explained that "were we to apply the statute's 'clear and convincing' standard . . . , the statute would be unconstitutional in its application." *Id.* at 465. And "[j]ust as the Supreme Court held in *Cooper* regarding incompetency," the court concluded "that it would violate due process to execute a defendant who is more likely than not" intellectually disabled. *Id.* at 464-65.

Thus, the state supreme courts of Indiana and Tennessee have held, in direct conflict with the court below, that the Constitution requires a preponderance of the evidence standard.

Three other state high courts, ruling in the absence of a state statute on the matter, have directed that *Atkins* claims must be resolved under the preponderance standard, expressly relying on this Court's decision in *Cooper*.

Kentucky. In *Bowling v. Commonwealth*, the Kentucky Supreme Court observed that this Court in *Cooper* "held unconstitutional a statute requiring a defendant to prove incompetency to stand trial by a standard higher than a preponderance of the evidence," and that "[a]ll courts that have considered the issue in the absence of a statute have held that the defendant is required to prove entitlement to the *Atkins* exemption by a preponderance of the evidence." 163 S.W.3d 361, 382 (Ky. 2005), *abrogated on other grounds by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018). It therefore held that the preponderance standard governed "the defendant's burden to prove at an evidentiary hearing that he or she is entitled to the mental retardation exemption" from the death penalty. *Id.*

Louisiana. The Louisiana Supreme Court has similarly interpreted *Cooper* to require a preponderance standard. In *State v. Williams*, 831 So.2d 835 (La. 2002), the court ruled that *Atkins* claims should be governed by state procedural rules for pre-trial competency hearings. *Id.* at 858. The court had previously applied *Cooper* to require a preponderance standard for claims of incompetence to stand trial. *Id.* at 859-60 (citing *State v. Frank*, 679 So.2d 1365, 1366 (La. 1996)). In *Williams*, the court held that this standard applies to *Atkins* claims as well. 831 So.2d at 860. Tracking the reasoning of *Cooper*, it explained that a clear-and-convincing-evidence standard "would significantly increase the risk of an erroneous determination that he is not mentally retarded," *id.* at 860; and that "[c]learly, . . . the State may bear the consequences of an erroneous determination that the defendant is mentally retarded . . . far more readily than the defendant of an erroneous determination that he is not mentally retarded." *Id.*[2]

Alabama. And the Alabama Court of Criminal Appeals likewise cited *Cooper* as constraining its ability to apply anything higher than a preponderance standard to *Atkins* claims. In *Morrow v. State*, 928 So.2d 315, 323 n.10 (Ala. Crim. App. 2004), the court cited both *Cooper* and the views of a Florida Supreme Court justice who questioned the constitutionality of Florida's statutory clear-and-convincing burden of proof in light of *Cooper*. *Id.* (citing *Ord. Adopting*

---

[2] Following *Williams,* Louisiana enacted the preponderance standard into state legislation. *State v. Robertson*, 239 So. 3d 268, 271 (La. 2018); 2003 La. Sess. Law Serv. Act 698 (codified at La. Code Crim. Proc. Ann. art. 905.5.1).

Amends. to Fla. Rules of Crim. Proc. and Fla. Rules of App. Proc., 875 So.2d 563 (Fla. 2004)); 875 So.2d at 566-67 (Pariente, J., concurring) ("Because of concerns about whether the burden of proof is a substantive or procedural requirement and further concerns over whether a 'preponderance of evidence' burden of proof may be constitutionally required under *Atkins* and *Cooper*, it is preferable to omit the burden of proof enunciated by the legislature from our rule of procedure regarding mental retardation."). The Alabama court, however, explained that because the state's procedural rules required application of only a preponderance standard, it "need not determine whether a higher standard would be constitutional." *Id.*[3]

---

[3] The Oklahoma Court of Criminal Appeals has also adopted a preponderance standard. *Murphy v. State*, 54 P.3d 556, 568 n.20 (Okla. Crim. App. 2002), *overruled in part on other grounds by Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006). While the majority did not cite *Cooper*, Justice Chapel, concurring, highlighted that the preponderance standard "is particularly appropriate given *Cooper*" because *Cooper* held a clear and convincing standard unconstitutional "in the competency context, which offers disturbing parallels" to the *Atkins* context. *Id.* at 573 n.7 (Chapel, J., concurring). *See also Commonwealth v. Sanchez*, 36 A.3d 24, 64-70 & nn. 22-23 (Pa. 2011) (citing *Cooper* in fashioning a procedural rule in the absence of legislation, and requiring a preponderance-of-the-evidence standard). Still other state high courts have adopted the preponderance standard without reference to *Cooper*. *See State v. Blackwell*, 801 S.E.2d 713, 719, 734 (S.C. 2017) (reaffirming the preponderance standard for *Atkins* claims); *Ex parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004) (appraising emergent consensus of sister states and adopting preponderance standard), *abrogated on other grounds by* 137 S. Ct. 1039 (2017); *Chase v. State*, 873 So.2d 1013, 1028 (Miss. 2004) (adopting a

Georgia's decision upholding the beyond-a-reasonable-doubt standard conflicts with all of the above decisions. And no other court in the country has so much as suggested that the standard Georgia imposes would be constitutional.[4]

The conflict is mature and deep. In its reasoning and result, Georgia stands entirely alone. Moreover, the split is intolerable because the consequences literally mean the difference between life and death. Under state high court rulings in Indiana, Tennessee, Kentucky, Louisiana, Alabama, Oklahoma, Pennsylvania, South Carolina, Texas, Mississippi and Ohio, and under statutory law in virtually every other state, a capital defendant who proves by a preponderance of the evidence that he is intellectually disabled cannot be executed. In Georgia, a defendant who makes the exact same showing can be executed.

---

preponderance standard); *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002) (holding that state's statutory requirement for successor state post-conviction claims of proving claims by clear and convincing evidence would not apply to then newly-available *Atkins* claims and holding that preponderance standard applied), *overruled on other grounds by State v. Ford*, 140 N.E.3d 616 (Ohio 2019).

[4] Two state courts have concluded that requiring proof of intellectual disability by clear and convincing evidence satisfies due process, but even these courts do not suggest that beyond a reasonable doubt would be permissible. *See State v. Grell*, 135 P.3d 696, 705 (Ariz. 2006) (en banc); *People v. Vasquez*, 84 P.3d 1019, 1022-23 (Colo. 2004). Colorado has now abolished the death penalty, leaving Arizona and Florida the only states employing a clear-and-convincing standard. Florida's high court has never squarely addressed the constitutionality of its standard.

In practice, the difference in the legal standards makes a demonstrable difference. A study examining all known *Atkins* claims through 2014 found, outside of Georgia, 99 successful claims out of 294 filed claims, a 33.6% success rate. John H. Blume et al., *A Tale of Two (and Possibly Three) Atkins*, 23 Wm. & Mary Bill Rts. J. 393, 412-13 (Table) (2014). In Georgia, by contrast, in 18 capital trials in which the *Atkins* claim was raised, only a single capital defendant has succeeded. *See Empirical Assessment*, 33 Ga. St. U. L. Rev. at 597-98. And that case involved a mother who was acquitted of intentional murder and convicted only of felony murder, not requiring proof of intent to kill, as a co-defendant with her boyfriend in the beating death of her ten-year-old son. *Id.* Among the 17 other capital trials, the study found *not a single successful Atkins claim*. *Id*. at 582-83.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

A. The Decision Conflicts with this Court's Due Process Decision in *Cooper v. Oklahoma*.

The decision below cannot be reconciled with this Court's unanimous decision in *Cooper*, 517 U.S. 348. As noted above, *Cooper* held that due process precludes a state from requiring a criminal defendant to prove by clear and convincing evidence that he is mentally incompetent to stand trial. As the state courts discussed above recognized, the reasoning in *Cooper* is fully applicable here.

The *Cooper* Court found that requiring proof of incompetence by clear and convincing evidence had no

basis in historical practice and was an outlier under contemporary standards. *Id.* at 360. The "near-uniform" existence of a preponderance standard for mental incompetence to stand trial claims in all but four states "support[ed] [a] conclusion that [a] heightened standard offends a principle of justice that is deeply rooted in the traditions and conscience of our people." *Id.* at 360-62 (internal quotation marks omitted). And it deemed the "clear and convincing evidence" standard fundamentally unfair in operation because the consequences of error for the defendant were "dire," *id.* at 364, and would mean that a person who was more likely than not incompetent would nonetheless be forced to stand trial. *Id.* at 366-67.

The same reasoning applies to Georgia's standard. It lacks any historical support, and is an extreme outlier among the states today. Indeed, as noted above, Georgia stands alone in requiring proof beyond a reasonable doubt of intellectual disability. *See Empirical Assessment*, 33 Ga. St. U. L. Rev. at 560 n.22 (collecting cases and statutes showing no other state employs this standard of proof); App. 30a (court below acknowledging Georgia stands alone).

Here, as in *Cooper*, the relative costs of error also weigh heavily against Georgia's standard. The "'more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.'" *Cooper*, 517 U.S. at 362 (quoting *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261, 283 (1990)); *id.* at 366 ("A heightened standard does not decrease the risk of error, but simply reallocates that risk between the parties."). In *Cooper*, "the consequences of an erroneous determination" against the defendant were "dire"; an error would require an incompetent person to stand trial. *Cooper*, 517 U.S. at

364. Here, the consequences are not just dire, but irreversible: an erroneous determination will cause an intellectually disabled person to be *executed*. The cost of error to Georgia pales in comparison. Where someone who is not intellectually disabled is erroneously found to be disabled, the state will not be able to execute him. But Georgia law requires that the defendant be sentenced to serve the remainder of his natural life in prison. Ga. Code Ann. § 17-7-131(j)(1).

Georgia imposes on the defendant an even greater likelihood of error than Oklahoma did in *Cooper*. The beyond-a-reasonable-doubt standard is substantially more demanding than clear and convincing evidence, and will therefore lead to many more erroneous conclusions that a defendant is not intellectually disabled.

As in *Cooper,* the beyond-a-reasonable-doubt standard frustrates "fundamental fairness in operation," *Cooper*, 517 U.S. at 362 (internal quotation marks omitted), because it means that a defendant will be executed "even though it is more likely than not that he is" intellectually disabled. *Id.* at 369. *See also* App. 106a (Bethel, J., dissenting) (finding that "requiring the highest burden of proof known to our judicial system [is] unreasonable because it fails to protect intellectually disabled persons who are unable to prove that fact beyond a reasonable doubt").

And because intellectual disability so often turns on conflicting expert assessments, it will be extraordinarily difficult to eliminate all reasonable doubt. *Hill v. Humphrey*, 662 F.3d 1335, 1342, 1364 (11th Cir. 2011) (Tjoflat, J., concurring) (finding the "swearing match between conflicting, and equally

qualified, experts . . . could easily—if not always—create reasonable doubt that the defendant is not mentally retarded"). Indeed, in *Addington v. Texas*, involving the due process requirements for civil commitment, the Court refused to require the *state* to prove mental illness beyond a reasonable doubt "because, given the uncertainties of psychiatric diagnosis, *it may impose a burden the state cannot meet*." 441 U.S. 418, 432 (1979) (emphasis added). Yet Georgia has imposed that burden on the individual.

The Georgia Supreme Court declined to follow *Cooper*, and instead relied on *Leland v. Oregon*, 343 U.S. 790 (1952), which upheld a state rule requiring defendants to prove an insanity defense beyond a reasonable doubt. App. 37a-44a. But critical to this Court's analysis in *Leland* was the fact that it viewed the insanity defense as solely a matter of state law, *not* constitutionally based. 343 U.S. at 798-99. The state has substantial leeway in how it defines and implements its own state law defense. *Cooper*, however, established that due process applies with substantially more bite when a constitutional right is at stake. *See Cooper*, 517 U.S. at 354; *see also Medina v. California*, 505 U.S. 437, 448-49 (1992) (distinguishing standard for proving incompetence to stand trial from standard for insanity defense at issue in *Leland* because "we have not said that the Constitution requires the States to recognize the insanity defense"). The right not to be executed if intellectually disabled is, like the right in *Cooper*, a constitutional right, not a matter of state law. *Atkins*,

536 U.S. at 321. Accordingly, *Cooper*, not *Leland*, controls.[5]

Because the decision below conflicts with *Cooper*, the Court should grant certiorari and reverse. Sup. Ct. R. 10(c) (stating certiorari may be appropriate when a state court "has decided an important federal question in a way that conflicts with relevant decisions of this Court"). Indeed, the conflict is so stark that the Court could summarily grant certiorari, vacate the decision below, and remand.

B. The Decision Below Conflicts with this Court's Eighth Amendment Decisions in *Hall* and *Moore*.

The decision below also conflicts with this Court's decisions in *Hall v. Florida,* 572 U.S. 701 (2014) and *Moore v. Texas,* 137 S. Ct. 1039 (2017), which together establish that states may not implement *Atkins*'s Eighth Amendment protection in a manner that creates an unacceptable risk of executing persons with intellectual disability. The beyond-a-reasonable-doubt standard does not merely

---

[5] The Georgia Supreme Court's contrary analysis is a holdover from a pre-*Atkins* decision, in which the court distinguished *Cooper* by explaining that claims for exemption from execution on the basis of intellectual disability were not constitutionally founded, but solely a matter of state law. *See Mosher v. State*, 491 S.E.2d 348, 353 (Ga. 1997) (distinguishing *Cooper* because it involved a constitutional right, while the State's sentencing rules regarding persons with "mental retardation" did not). After *Atkins* held that persons with intellectual disability had a constitutional right not to be executed, the Georgia Supreme Court has inexplicably adhered to its pre-*Atkins* view, even though the essential predicate for that view no longer obtains. *See*, *e.g.*, *Hill*, 587 S.E.2d at 621.

create such a risk; it virtually *guarantees* that Georgia will execute people with intellectual disability.

The Georgia Supreme Court initially justified its unique burden as "an acceptable state legislative choice to define as mentally retarded those defendants who are able to prove their mental retardation beyond a reasonable doubt." *Hill v. Humphrey*, 662 F.3d 1335, 1342 (11th Cir. 2011) (describing Georgia Supreme Court reasoning) (citing *Head v. Hill*, 587 S.E.2d 613, 622 (2003) (stating that the standard enforces Georgia's "chosen definition" of impairment deserving protection from execution)).

But in *Hall v. Florida*, this Court clarified that *Atkins* "did not give the States unfettered discretion to define the full scope of the constitutional protection." 572 U.S. at 719. The Court invalidated Florida's use of a bright-line IQ-score cutoff of 70 because it "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." *Id.* at 704.

The same reasoning led the Court in *Moore v. Texas* to strike down Texas's non-scientific reliance on factors said to reflect "the 'consensus of *Texas citizens*' on who 'should be exempted from the death penalty.'" *Moore*, 137 S. Ct. at 1051 (quoting *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004)) (emphasis in original). The Court reasoned that the Texas factors would permit execution of persons with "[m]ild levels of intellectual disability . . . and States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Id.* (emphasis and second alteration in original) (citation omitted). Here, again, the Court reiterated that state practices that create "an unacceptable risk that persons with intellectual

disability will be executed" violate the Eighth Amendment. *Id.* at 1044 (quoting *Hall*, 572 U.S. at 704); *see also Moore v. Texas*, 139 S. Ct. 666, 669 (2019) (*Moore II*) (same).

Confronted with *Hall* and *Moore*, the Georgia Supreme Court sought to distance itself from its earlier rationale for upholding the beyond-a-reasonable-doubt standard, stating that it now "disapprove[s] anything in [its] prior decisions suggesting . . . that 'Georgia's beyond a reasonable doubt standard further served to define the category of mental retardation.'" App. 32a (quoting *Stripling*, 711 S.E.2d at 668). But it nonetheless adhered to the beyond-a-reasonable-doubt standard, without even *addressing* whether the demanding burden of proof creates an unacceptable risk of executing a person with intellectual disability. App. 28a-50a.

As dissenting Justice Bethel correctly observed, however, the beyond-a-reasonable-doubt standard virtually guarantees that intellectually disabled persons will be executed. Under this standard, Justice Bethel noted, even if a defendant showed that he was "probably or even clearly intellectually disabled[,]" any doubt or dispute that left a juror's mind "wavering, unsettled, or unsatisfied" would deny that defendant the Eighth Amendment protection that *Atkins, Hall*, and *Moore* promise. App. 106a.

Justice Bethel is correct. Georgia's standard, no less than the practices struck down in *Hall* and *Moore*, creates an unacceptable risk that the State will erroneously execute a person with intellectual disability. The decision below plainly conflicts with *Hall* and *Moore*.

III. EVEN OUTSIDE THE *ATKINS* SETTING, GEORGIA'S BEYOND-A-REASONABLE-DOUBT STANDARD IS A COMPLETE OUTLIER.

Georgia's beyond-a-reasonable-doubt standard is a complete outlier not merely in the specific context of *Atkins* claims, but in the entire jurisprudence of constitutional law. As far as Petitioner can tell, there are *no other circumstances whatsoever* where an individual asserting a violation of his constitutional rights must establish the underlying facts beyond a reasonable doubt. In all of constitutional law, Georgia stands alone.

Speakers asserting a First Amendment retaliation claim, for example, do not have to prove their retaliation was motivated by protected speech beyond a reasonable doubt. People of faith challenging a government practice as a burden on their religious free exercise do not need to prove the sincerity of their beliefs beyond a reasonable doubt. Criminal defendants claiming that a confession was coerced need not prove that it was involuntary beyond a reasonable doubt; indeed, the burden lies on the *government* to prove the confession was voluntary, but only by a preponderance of the evidence. In these and virtually all other settings in which courts assess as an initial matter whether a constitutional right was violated, preponderance of the evidence is the standard the individual must meet. The Court should grant certiorari not only because Georgia's standard conflicts with decisions of other state high courts and this Court, but because Georgia's standard is wholly unprecedented and utterly at odds with constitutional rights jurisprudence generally. Due process forbids a

state from effectively nullifying a constitutional right by requiring individuals to prove a predicate fact beyond a reasonable doubt.

The beyond-a-reasonable-doubt standard is a "unique standard of proof" that has "historically been reserved" for the government in criminal prosecution. *Addington*, 441 U.S. at 428. It allocates "almost the entire risk of error" to the state. *Id.* at 424. We impose that burden in order to avoid wrongful convictions of the innocent. But imposing such a burden on an individual seeking to vindicate a constitutional right places "almost the entire risk of error" on the individual.

Absent a compelling reason to shift the risk of error to one party or the other, a preponderance standard serves as the default standard for all sorts of legal proceedings. *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (finding no reason to depart from "the preponderance-of-the-evidence standard generally applicable in civil actions").

Due process sometimes requires imposing a more demanding burden *on the government* where it seeks to deprive individuals of a particularly important interest. "Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt." *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). Thus, due process requires that the government must prove guilt beyond a reasonable

doubt in order to convict. *In re Winship*, 397 U.S. 358, 364 (1970).

Due process also sometimes requires the *government* to meet a "clear and convincing evidence" standard—substantially less demanding than beyond a reasonable doubt, but more demanding than preponderance—where "the possible injury to the individual is significantly greater than any possible harm to the state." *Addington*, 441 U.S. at 427. Due process thus requires the *government* to meet this standard where it seeks to involuntarily commit someone to a mental hospital, *id.* at 427, 431-32; to terminate parental rights, *Santosky v. Kramer*, 455 U.S. 745, 756, 758, 769 (1982); or to strip an individual of his citizenship through denaturalization, *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

But where legal proceedings pit interests of similar significance against each other, "[a] preponderance-of-the-evidence standard allows both parties to 'share the risk of error in roughly equal fashion.'" *Herman & MacLean*, 459 U.S. at 390 (quoting *Addington,* 421 U.S. at 423). Preponderance is thus the default standard for individuals asserting constitutional rights generally. This is true, for example, with respect to claims asserting violations of

free speech,[6] free exercise,[7] the Establishment Clause,[8] the right to bear arms,[9] the Takings Clause,[10]

---

[6] *See, e.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) (in the First Amendment retaliation context, finding that a plaintiff need not show improper motive by "clear and convincing evidence" because there is "no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation").

[7] *See, e.g.*, *Abreu v. Lipka*, 778 F. App'x. 28, 33 (2d Cir. 2019); *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 357 (2d Cir. 1990); *Johnson v. Harmon*, 5:03CV00468JLH/JTR, 2005 WL 1772752, at *15 (E.D. Ark. July 1, 2005); *Tilton v. Marshall*, 925 S.W.2d 672, 678 (Tex. 1996); *cf. United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[T]he threshold question of sincerity [of belief] which must be resolved in every case . . . . is, of course, a question of fact").

[8] *See, e.g.*, *Satanic Temple, Inc. v. City of Scottsdale,* 856 F. App'x 724, 726 (9th Cir. 2021); *Munson v. Norris*, 375 F. App'x. 638, 640 (8th Cir. 2010).

[9] *See, e.g.*, *Berron v. Illinois Concealed Carry Licensing Review Board*, 825 F.3d 843, 847-48 (7th Cir. 2016).

[10] *See, e.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 701 (1999); *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1037 (9th Cir. 2000); *Penna v. United States*, 153 Fed.Cl. 6, 18 (2021).

the Fourth Amendment,[11] the Due Process Clause,[12] Sixth Amendment counsel and jury rights,[13] and the Equal Protection Clause.[14]

The *sole* exception to the norm of preponderance imposed on individuals asserting a constitutional right only confirms the invalidity of Georgia's standard here. In *Cruzan*, 497 U.S. 261, this Court permitted Missouri to require a surrogate seeking to withdraw life support from an individual in a vegetative state to show by clear and convincing evidence that the individual would desire the withdrawal. 497 U.S. at 280. It did so because in this

---

[11] *See, e.g.*, *United States v. Avalos*, 984 F.3d 1306, 1308 (8th Cir. 2021); *United States v. Beaudion*, 979 F.3d 1092, 1102 (5th Cir. 2020); *United States v. Castellanos*, 716 F.3d 828, 833 (4th Cir. 2013); *United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987); *United States v. Helms*, 703 F.2d 759, 763-64 (4th Cir. 1983) ("[A]ny . . . fact at a suppression hearing[] need[s] [to] be established only by a preponderance of the evidence . . . ."); *United States v. Lord*, 711 F.2d 887, 891 & n. 3 (9th Cir. 1983) (collecting cases showing that preponderance is the standard for Fourth and Fifth Amendment violations and constitutional claims more generally).

[12] *See, e.g.*, *Medina*, 505 U.S. at 439 (incompetence to stand trial); *McCormick v. Parker*, 821 F.3d 1240, 1246 (10th Cir. 2016) (due process claim under *Brady v. Maryland*, 373 U.S. 83 (1963)); *Drumgold v. Callahan*, 707 F.3d 28, 48 (1st Cir. 2013) (same).

[13] *See, e.g.*, *DeBurgo v. St. Amand*, 587 F.3d 61, 71 (1st Cir. 2009) (claim of juror bias in violation of Sixth Amendment); *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006) (ineffective counsel).

[14] *See, e.g.*, *Madison v. Comm'r, Ala. Dept. of Corr.*, 761 F.3d 1240, 1250-51 (11th Cir. 2014) (discriminatory jury strikes); *Green v. Travis*, 414 F.3d 288, 291 (2d Cir. 2005) (same); *People v. Beauvais*, 393 P.3d 509, 525 (Colo. 2017) (same).

setting, it was the surrogate, not the individual, asserting the right, and the state had a substantial interest in assuring that the individual's wishes were in fact being asserted; the proceedings was not adversarial; and "[a]n erroneous decision to withdraw life-sustaining treatment . . . is not susceptible of correction." *Id.* at 280-83.

Here, there is an adversarial proceeding, both sides have important interests at stake, and an erroneous determination that an individual is not intellectually disabled will lead to execution. Any erroneous decision that an individual is intellectually disabled, by contrast, would still permit the state to impose the severe punishment of life imprisonment.

Georgia's requirement that an individual asserting a constitutional right violation for the first time in court must prove the predicate fact beyond a reasonable doubt is thus not only out of step with every other state that imposes the death penalty, but with all of constitutional jurisprudence. There is simply no justification for requiring an individual to establish a factual predicate for a constitutional right violation by the "unique standard" we impose on the state when it seeks to convict. *Addington*, 441 U.S. at 428. There is no legitimate interest in wrongly executing ten intellectually disabled persons in order to avoid erroneously sparing the life of one person who is not intellectually disabled.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR ANSWERING THE QUESTIONS PRESENTED.

This case presents an ideal vehicle to decide both questions presented. First, Mr. Young cleanly

presented and preserved the constitutional questions in the Georgia courts, and the state's high court decided both questions on the merits. App. 28a-50a.

Second, this case arises on direct review, affording the Court the opportunity to address the constitutional question without deference. The Court has previously denied review of two cases raising similar claims on federal habeas review, where the constitutional issue cannot be directly addressed, but must be analyzed through a highly deferential lens mandated by Congress in light of finality concerns. *Raulerson v. Warden*, 928 F.3d 987 (11th Cir. 2019) (rejecting attack on Georgia's burden of proof under deferential federal habeas review), *cert. denied* 140 S. Ct. 2568 (2020); *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (same), *cert. denied* 566 U.S. 1041 (2012). The Antiterrorism and Effective Death Penalty Act (AEDPA) requires that state court convictions must be upheld on habeas unless the state court decision was contrary to or an unreasonable application of this Court's precedent. 28 U.S.C. § 2254(d)(1).[15] Because this case arises on direct

---

[15] In both *Raulerson* and *Hill*, the State of Georgia opposed certiorari primarily by emphasizing the need for deference under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). *See Raulerson v. Warden,* No. 19-941, Resp. Br. Opp'n at 11-27; *Hill v. Humphrey*, No. 11-10109, Resp. Br. Opp'n at 16-21.

Since this Court decided *Atkins*, it has denied certiorari in three other known cases, but each had significant vehicle problems. In *King v. Georgia*, 536 U.S. 957 (2002), *rehearing denied* 536 U.S. 982 (2002), the prisoner filed his petition for certiorari in 2001, *before Atkins* had been decided. In *Stripling v. Head*, 541 U.S. 1070 (2004), the Georgia Supreme Court had

appeal, by contrast, the Court can address the issues here *de novo*.

Third, the burden of proof was almost certainly determinative in Mr. Young's case. The Georgia Supreme Court expressly acknowledged as much when it stated that "*considering the conflicting testimony on the subject*, Young had failed to prove *beyond a reasonable doubt* that he was 'mentally retarded.'" App. 5a (emphasis added). Long before Mr. Young was a capital defendant, as a child in New Jersey, educators placed him in special education classes and diagnosed him as "educable mentally retarded." App. 220a. Several educators from his school who knew him personally as a student testified to his disability, including his diagnosis as educable mentally retarded and his adaptive deficits. App. 220a-221a (Hendricks testimony); T56:2849-2928. The only contrary evidence the prosecution put on were two co-workers who said Mr. Young was a good factory worker, hardly a rebuttal of consistent diagnoses of intellectual disability. And in her closing argument to the jury, the prosecutor relied heavily and repeatedly on the beyond-a-reasonable-doubt standard. She invoked the onerous burden no fewer

---

actually *granted* the prisoner relief and remanded for a new trial on his claim of intellectual disability. *See Head v. Stripling*, 590 S.E.2d 122, 127 (2003). And the Court denied review in *Holsey v. Hall*, 552 U.S. 1070 (2007), years before *Hall*, *Moore I*, and *Moore II*, in the still early years of *Atkins*, where the decision below had addressed the issue only in passing in a single sentence. *Schofield v. Holsey*, 642 S.E.2d 56, 63 (Ga. 2007) ("The habeas court was also correct in applying the beyond a reasonable doubt standard to Holsey's claim." (internal quotation marks omitted)).

than ten times. T57:3251; 3252; 3270; 3273; 3274, 3290, 3301.

Finally, because Georgia is an outlier of one in imposing a beyond-a-reasonable-doubt standard, there is no possibility that the issue will be aided by percolation. It has been finally resolved in Georgia, erroneously and in conflict with this Court and several state supreme courts, and will not arise elsewhere. Only this Court can correct Georgia's egregious, life-and-death error.

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari or, in the alternative, grant the writ, vacate the decision and remand for further proceedings.

Respectfully submitted,

Brian W. Stull
Counsel of Record
Cassandra Stubbs
AMERICAN CIVIL LIBERTIES UNION FOUNDATION 201 W. Main Street,
Suite 402
Durham, NC 27707
bstull@aclu.org
(919) 682-5659

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Jennesa Calvo-Friedman
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

Josh Moore
Thea Delage
GEORGIA CAPITAL
DEFENDER'S OFFICE
270 Washington Street,
Suite 5-198
Atlanta, GA 30334

APPENDIX

APPENDIX A

In the Supreme Court of Georgia

Decided: June 24, 2021

S21P0078. YOUNG v. THE STATE.

MELTON, Chief Justice.

A jury found Rodney Renia Young guilty of the murder of Gary Jones and related crimes. The jury declined in its guilt/innocence phase verdict to find him "mentally retarded."[1] At the conclusion of the sentencing phase, the jury found multiple statutory aggravating circumstances and sentenced Young to death for the murder. For the reasons set forth below, we affirm Young's convictions and sentences.[2]

---

[1] The mental condition now referred to as "intellectual disability" in the mental health profession and in Georgia law was previously, including at the time of Young's trial, referred to as "mental retardation." See *Hall v. Florida*, 572 U. S. 701, 704 (I) (134 SCt 1986, 188 LE2d 1007) (2014) (noting the change in terminology); OCGA § 17-7-131 (as amended in 2017 by Ga. L. 2017, p. 471, § 3). We use both terms in this opinion, using "intellectual disability" in our discussions of the condition in general terms and using "mental retardation" in our discussions, particularly in quotations, of the specific proceedings below and the law that applied to them.

[2] The victim was killed on March 30, 2008. A Newton County grand jury indicted Young on June 6, 2008, on one count of malice murder, two counts of felony murder, one count of aggravated assault, and one count of burglary. On August 7, 2008, the State filed written notice of its intent to seek the death penalty. The trial began with jury selection on February 6, 2012.

1. Young had a seven-year relationship with Gary Jones's mother, Doris Jones, that was rife with arguments about money and Young's infidelity and included multiple breakups. After Young came to visit Doris in Georgia in November 2007 and the pair became engaged, Doris moved in with Young at his basement apartment in Bridgeton, New Jersey, in January 2008. The couple argued in New Jersey, and Doris moved back to Georgia to once again live with her son, Gary, in Covington. Young wrote Doris multiple letters between January and March 2008, asking her to return to him. On March 3, Young obtained approval from his employer for time off on March 26 to 28. He subsequently contacted his half-sister, whom he had never personally met and who lived in Atlanta, and he told her that he was coming

---

The jury found Young guilty on all charges on February 17, 2012. On February 21, 2012, the jury recommended a death sentence for the murder, and that same day the trial court filed an order imposing a death sentence on the malice murder count. On February 22, 2012, the trial court filed an order merging the felony murders with the malice murder (although they were actually vacated by operation of law, see *Willis v. State*, 304 Ga. 686, 686 n.1 (820 SE2d 640) (2018)), merging the aggravated assault with the malice murder, and deferring sentencing on the burglary. On March 9, 2012, the trial court filed an order imposing a 20-year sentence for the burglary, to be served concurrently with the death sentence. On March 5, 2012, Young filed a motion for new trial, and he amended the motion on April 1, 2014, and September 5, 2017. Following multiple hearings, the motion was denied on April 9, 2019. Young filed a notice of appeal on June 6, 2019. An appeal was initially docketed in this Court on December 11, 2019, as Case No. S20P0630; however, on December 19, 2019, this Court struck the case from the docket and remanded it, directing the trial court to ensure that the record was complete. Following this remand, the case was redocketed to the term of this Court beginning in December 2020, and the case was orally argued on March 23, 2021.

to see her while on vacation. Prior to his trip, Young borrowed a GPS device from his co-worker and obtained instructions on how to use it.

On March 28, Doris received yet another letter from Young, which she did not read immediately. When Doris awoke the next day, laundry that she had washed the night before had been folded, despite the fact that Gary had been staying with his girlfriend and no one else was home. That same weekend, Doris noticed that the laundry room window had a hole in it and that the screen on that window was missing. Testimony, cell phone records, and the memory of the GPS device that Young borrowed all showed that, from March 28 to 30, Young drove repeatedly from his half-sister's home in Atlanta to the area of Gary's home in Covington. A witness testified that he gave a man with a New Jersey license plate directions from Covington Square to Gary's neighborhood; this witness later identified Young from a photographic line-up as that man.

On March 30, Gary attended church with his girlfriend and then returned home with a plan to meet his girlfriend later for dinner. A little after 1:00 p.m. that day, Gary told his grandmother on the telephone that he was arriving at his home and would call her back in 15 minutes, which he never did. Doris discovered Gary's body in the home at approximately 11:20 p.m. that night and called 911. Gary was lying on his side on the floor in the dining room, and he was tied to an overturned chair with duct tape, a telephone cord, and fabric from some curtains. A bloody butcher knife and a bloody hammer were found next to his body. The victim's body had multiple fractures to the skull, the left eye protruded from its socket, there

were sharp force injuries to the neck, head, and face, and there were compression marks on the hands and legs indicating that the victim was alive while bound. Glass in a door leading into the dining room from an outside patio had been shattered, and the home showed signs of a struggle, with blood in the foyer, living room, and dining room. The home had multiple writings on the walls, including the following as recounted by an investigator: "ATL mob $25,000, dead in 20 days, 20 days to get out of state or dead, the hit be on you, were know what you drive, ATL m-o-b, I want my f***ing money, $25,000, you work at GRNCS." The writings were matched at trial to Young's handwriting, and investigators testified that they were unaware of a gang called the "ATL mob."

Upon learning that Young had called her brother-in-law, Doris called Young on the day after the murder. Young told Doris that he would come to get her things and move her back to New Jersey and that he had seen Gary in a dream asking him to take care of her. Investigators interviewed Young in New Jersey on April 3, 2008; he had two cuts on his right hand, and he denied traveling recently to Georgia. A search of Young's car yielded printed directions from New Jersey to Covington and Doris's ring that had been discovered missing from Gary's home, and a search of Young's basement apartment in New Jersey yielded Gary's cell phone and duct tape that was matched to the duct tape used to bind Gary.

Young presented evidence in the guilt/innocence phase in support of a possible finding of "mental retardation" by the jury, including testimony from staff members at his former high school stating that he had been in special education,

had been classified as "educable mentally retarded" and therefore must have been tested with an IQ of between 60 and 69, and had struggled intellectually in academics and in sports. However, Young did not present any expert testimony regarding his alleged intellectual disability or any actual IQ test results. The State countered Young's evidence with cross-examination and direct testimony showing Young's ability to function normally at work and in various other settings in life. The State also presented testimony from an expert who, although he had not evaluated Young and had not formed an opinion as to whether Young was intellectually disabled, was able to testify about the subject of intellectual disability in general terms.

After reviewing the record, we conclude that the evidence presented in the guilt/innocence phase was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that Young was guilty of all of the charges of which he was convicted and to find, considering the conflicting testimony on the subject, that Young had failed to prove beyond a reasonable doubt that he was "mentally retarded." See *Jackson v. Virginia*, 443 U. S. 307, 319 (III) (B) (99 SCt 2781, 61 LE2d 560) (1979) (providing the constitutional standard for the review of the sufficiency of the evidence of a crime); *King v. State*, 273 Ga. 258, 259 (1) (539 SE2d 783) (2000) (reviewing the sufficiency of the evidence regarding alleged intellectual disability); UAP IV (B) (2) (providing that, in all death penalty cases, this Court will determine whether the verdicts are supported by the evidence).

2. We reject Young's argument, including his arguments specific to the practices of the prosecutor in his case, that Georgia's death penalty laws are unconstitutional in that they allegedly permit unfettered discretion to prosecutors in choosing whether or not to seek the death penalty and thereby result in arbitrary and capricious results. See *Arrington v. State*, 286 Ga. 335, 336-337 (4) (687 SE2d 438) (2009); *Walker v. State*, 281 Ga. 157, 161 (6) (635 SE2d 740) (2006).

3. The trial court properly refused Young's attempt to plead guilty but mentally retarded to his murder charge in exchange for a life sentence, because the State objected to such a plea. See *Stripling v. State*, 289 Ga. 370, 376 (3) (711 SE2d 665) (2011).

4. We reject Young's arguments that he is entitled to a new trial based on several alleged discovery violations by the State.

(a) The record shows that the State disclosed the identity of Wanda Wilcher as a potential sentencing phase witness but listed her address as "private" because she had a restraining order against Young. The prosecutor represented to the trial court that she would have informed defense counsel of the witness's address if counsel had inquired. Under the circumstances, we conclude that the trial court did not abuse its discretion in not finding any prejudice to Young or bad faith on the part of the prosecutor and, accordingly, in allowing the witness to testify after first allowing defense counsel an opportunity to interview the witness. See *Wilkins v. State*, 291 Ga.

483, 486-487 (5) (731 SE2d 346) (2012) (applying OCGA § 17-16- 6).

(b) The record reveals that Young was aware well before trial of recordings of certain conversations between him and Doris Jones and, more importantly, that the State served him with the actual recordings by the statutory deadline.

(c) The trial court properly held that the State had no duty to disclose the criminal histories of witnesses, because Young had access to those records himself. See *Jackson v. State*, 306 Ga. 69, 89 (6) (d) (829 SE2d 142) (2019).

(d) After initially noting from the bench that the issue, at least at that time, was moot in light of the State's representation that it was aware of no such records, the trial court then also filed a written order denying Young's request for any psychiatric records of the State's witnesses based on its finding that "[n]o particularized showing of necessity for or even existence of these records ha[d] been made." We see no error. See *King*, 273 Ga. at 262-263 (11) (holding that the defendant was not entitled to the psychiatric histories of the State's witnesses where he failed to show that the hypothetical records were critical to his defense, that substantially similar evidence was otherwise unavailable, and that the records were not privileged); *McMichen v. State*, 265 Ga. 598, 611 (24) (458 SE2d 833) (1995) ("In requesting the psychiatric histories of the state's witnesses, McMichen failed even to allege that such histories existed.").

(e) The trial court properly declined to conduct an in camera review of the personnel records of the

law enforcement officers who would testify at trial, because Young made no "specific showing of need." *Cromartie v. State*, 270 Ga. 780, 785-786 (12) (514 SE2d 205) (1999).

5. Young argues that the State's use of funds from a victim assistance account, see OCGA § 15-21-130 et seq., to reimburse four witnesses for their lost wages without disclosing this fact to him at trial constituted unconstitutional evidence suppression because evidence of the use of the funds would have served as impeachment evidence. To succeed on an evidence suppression claim, a defendant must establish four elements: (1) the State possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not obtain it with reasonable diligence; (3) the State suppressed the evidence; and (4) the suppression created a reasonable probability of a different outcome of the trial. See *McCray v. State*, 301 Ga. 241, 246 (2) (c) (799 SE2d 206) (2017). The trial court found that the first three elements had been satisfied, but it correctly determined that Young's claim failed on the fourth element.

As to the two witnesses at issue who testified regarding Young's guilt, their testimony showing his presence in Georgia at the time of the murder was cumulative of multiple other independent pieces of evidence showing that same fact. As to the two witnesses at issue who testified regarding Young's alleged intellectual disability, the witnesses were his co-workers who stated merely that he had not been a problem employee, was a "good operator," and was punctual. Finally, as to the one witness at issue who testified in the sentencing phase, the witness stated

that Young had physically abused her while they were dating, and she showed the jury a scar on her face from that abuse; however, a certified copy of a restraining order regarding this witness was independently admitted into evidence, and similar testimony showing Young's abusive nature was presented through Doris Jones. We also note that evidence regarding the State's reimbursement of these witnesses' actual lost wages would not have been strong impeachment evidence. Pretermitting whether the other three elements of this evidence suppression claim have been satisfied, we hold that the trial court's conclusion regarding the fourth element, materiality, was not erroneous and that the overall claim was therefore properly denied. See *United States v. Payne*, 63 F3d 1200, 1210-1211 (II) (A) (2) (2d Cir. 1995) (noting that the suppression of impeachment evidence does not warrant a new trial where the testimony of the witness who might have been impeached was corroborated by other evidence and holding that the evidence presented at trial was "sufficiently strong" to support the appellate court's concluding that the suppression in the case "d[id] not undermine [the appellate court's] confidence in the outcome of the trial" and that the suppressed evidence therefore was "not material"). Cf. *Schofield v. Palmer*, 279 Ga. 848, 851 (1), 853 (3) (621 SE2d 726) (2005) (reaching a different conclusion where, unlike in Young's case where the witnesses enjoyed no actual gain but merely received reimbursement of their lost wages, "the GBI paid [a confidential informant] $500 for providing information implicating [the defendant]").

Issues Related to the Jury

6. Young challenged the composition of both his grand jury source list and his traverse jury source list. The trial court denied both challenges, and we see no error.

(a) (i) In his challenge to his grand jury source list, Young first claimed that an underrepresentation of African-American persons on the list violated both his statutory and constitutional rights. As in a previous case in which this Court denied relief, the undisputed evidence in Young's case

> showed that the jury commission in [Newton] County, pursuant to this Court's directive in the Unified Appeal Procedure, attempted to balance the percentages of various cognizable groups of persons on the [relevant] jury source list to match the percentages of those groups of persons reported in the most-recently available Decennial Census.

Williams v. State, 287 Ga. 735, 735 (699 SE2d 25) (2010), superseded by the Jury Composition Reform Act of 2011 as noted in *Ellington v. State*, 292 Ga. 109, 118 (4) n.2 (735 SE2d 736) (2012), disapproved on other grounds by *Willis v. State*, 304 Ga. 686, 706 (11) (a) n.3 (820 SE2d 640) (2018). See also *Ricks v. State*, 301 Ga. 171, 173 (1) (800 SE2d 307) (2017) (noting changes since *Williams* in the Code, in the Unified Appeal Procedure, and in relevant rules). In *Williams*, the then-established process for constructing the jury list had combined with shifting demographics in Clayton County to result in a

disparity of 17.49 percentage points between the percentage of African-American persons on the jury source list and the percentage of African-American persons as shown in the 2000 Census. See *Williams*, 287 Ga. at 737-738 (2). In Young's case, the disparity was 11.67 percentage points, or 11.37 percentage points if only the numbers of citizens involved were considered. See *Smith v. State*, 275 Ga. 715, 721 (4) (571 SE2d 740) (2002) (stating regarding cases where citizenship appears to be a significant factor: "When alleging underrepresentation of a distinctive group, a defendant 'must, to establish a prima facie case, present data showing that the percentage of persons in that group [on the jury list] is significantly lower than the percentage *eligible* to serve on juries.'" (quoting *United States v. Artero*, 121 F3d 1256, 1262 (III) (B) (9th Cir. 1997) (emphasis supplied)). The trial court did not err in following this Court's binding case law on this issue, particularly our prior holdings that the jury composition system then in place served "a 'sufficiently significant state interest' to rebut an otherwise-valid prima facie [claim]," and thus denying this portion of Young's challenge to his grand jury. *Williams*, 287 Ga. at 738 (2) (quoting *Ramirez v. State*, 276 Ga. 158, 162 (1) (c) (575 SE2d 462) (2003)).

(ii) Young's challenge to his grand jury source list also included an allegation of an underrepresentation of Hispanic persons. Young's expert testified that the Newton County jury commission had not separately accounted for Hispanic persons on the relevant jury certificate; however, the expert estimated the number of Hispanic persons included on the source list by performing a search for common Hispanic surnames. The expert testified that, as compared to census estimates of the population at

the time of Young's indictment, Hispanic citizens were underrepresented on the grand jury source list by an absolute disparity of 0.91 percentage points.[3] See *Smith*, 275 Ga. at 721 (4). We note further that the uncontested testimony of the expert also showed that, as compared to the 2000 Census, the absolute disparity was 0.42 percentage points. Based on our holdings in *Williams* and *Ramirez*, which are discussed above, the figure based on the 2000 Census was the correct one to consider; however, considering either figure, the trial court did not err in concluding that no impermissible underrepresentation had been shown. See id. at 723 (4); *Morrow v. State*, 272 Ga. 691, 695 (1) (532 SE2d 78) (2000). Furthermore, even if an underrepresentation *had* been shown, there would be no reversible error, because Young did not even attempt to show in the trial court that Hispanic persons were a cognizable group in Newton County, a necessary part to his claim. See *Smith*, 275 Ga. at 718 (2) (holding that whether a group is a cognizable group in a given county is a matter of fact to be found by the trial court).

(b) Regarding the traverse jury source list, the trial court found, after discounting an obvious error on the jury certificate and crediting the testimony of Young's expert, that there was an absolute disparity of 2.88 percentage points between the percentage of Hispanic persons on the 2011 jury list as compared to the percentage of Hispanic persons in the actual population in 2010. The uncontested testimony of

[3] Young's argument on appeal focuses on numbers of persons rather than on percentages; however, the numbers alleged by Young in his brief align with the percentages testified to by Young's expert.

Young's expert also showed that the absolute disparity was 1.38 percentage points when only Hispanic *citizens* were considered. Considering either figure, the trial court did not err in concluding that no impermissible underrepresentation had been shown. See *Smith*, 275 Ga. at 723 (4); *Morrow*, 272 Ga. at 695 (1).

7. The trial court did not err by refusing to compensate jurors beyond the amount authorized by OCGA § 15-12-7 (a) (2). See *Stinski v. State*, 286 Ga. 839, 846 (21) (691 SE2d 854) (2010).

8. After Young moved the trial court to order the State to disclose information about jurors concerning their possible connections to the State or possible driving and arrest records, the trial court accepted the representation from the State that it would reveal any false answers by jurors known to it on such subjects during voir dire. We see no error. See *Stinski*, 286 Ga. at 846 (23).

9. Young argues that his right to be present was violated during several bench conferences held during jury selection.[4]4 Although these bench conferences were not transcribed, despite the trial court's having granted Young's motion that all bench conferences should be, the trial court entered an order reconstructing the record of what transpired, see OCGA § 5-6-41 (f) (providing for supplementation of the record), and Young presented testimony at his

[4] In his brief in this Court, Young provides identical citations to the record for two different jurors among the several he discusses. We have reviewed the record as to both of these jurors.

motion for new trial hearing on the matter. As found by the trial court in its order denying the motion for new trial, Young sat during jury selection at the defense table with his three attorneys, he observed the voir dire, he remained at the defense table with one of his attorneys during the bench conferences, and yet he never objected to his absence from those bench conferences. The attorney who remained with Young refused to disclose the nature of their discussions, but Young testified that he and that lawyer did engage in conversations.

Jury selection is a critical stage at which a defendant generally is entitled to be present, including at bench conferences. See *Murphy v. State*, 299 Ga. 238, 240 (2) (787 SE2d 721) (2016); *Sammons v. State*, 279 Ga. 386, 387 (2) (612 SE2d 785) (2005). But see *Heywood v. State*, 292 Ga. 771, 774 (3) (743 SE2d 12) (2013) (holding that a defendant has no right to be present when only legal arguments and logistical or procedural matters are discussed). However, "the right to be present may be waived if the defendant later acquiesces in the proceedings occurring in his absence," *Jackson v. State*, 278 Ga. 235, 237 (3) (599 SE2d 129) (2004) (citation and punctuation omitted), and "[a]cquiescence may occur when counsel makes no objection and a defendant remains silent after he or she is made aware of the proceedings occurring in his or her absence," *Murphy*, 299 Ga. at 241 (2). And, in the absence of any controlling authority to the contrary, we reject Young's argument that his right to be present could not have been waived simply because this was a death penalty trial.

The record shows that Young was present throughout all of the voir dire, that he was present in

the courtroom during each of the bench conferences at issue here, that the purpose of each was obvious from its inception or announced afterward by the trial court, that the result of each was announced in open court, and that neither Young nor his counsel ever objected. Accordingly, we conclude that the trial court did not err in concluding in its order that Young acquiesced in the waiver of his presence that was made by his counsel. Cf. *Champ v. State*, 310 Ga. 832, 834-848 (2) (a, b, and c) (854 SE2d 706) (2021) (remanding where the trial court had not ruled on the defendant's acquiescence in counsel's waiver).

10. We reaffirm our prior case law rejecting claims like Young's regarding the process of qualifying jurors based on their death penalty views. See *Willis*, 304 Ga. at 694-695 (4).

11. Young argues that the trial court erred by excusing three prospective jurors based on their voir dire responses regarding their willingness to consider a death sentence. As we have explained:

> [T]he proper standard for determining the disqualification of a prospective juror based upon his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. This standard does not require that a juror's bias be proved with unmistakable clarity. Instead, the relevant inquiry on appeal is whether the trial court's finding that a prospective juror is disqualified is

> supported by the record as a whole. An appellate court . . . must pay deference to the trial court's determination. This deference encompasses the trial court's resolution of any equivocations and conflicts in the prospective jurors' responses on voir dire. Whether to strike a juror for cause is within the discretion of the trial court and the trial court's rulings are proper absent some manifest abuse of discretion.

Humphreys v. State, 287 Ga. 63, 71-72 (5) (694 SE2d 316) (2010) (citations and punctuation omitted), disapproved on other grounds by *Willis*, 304 Ga. at 706 (11) (a) n.3. See also W*illis*, 304 Ga. at 698 (9) ("[T]he erroneous exclusion from the list from which a defendant's jury is selected of a single prospective juror based on his or her purported unwillingness to consider a death sentence mandates the reversal of a death sentence."). After our careful review of the voir dire of the jurors at issue, we conclude that the trial court did not abuse its discretion by excusing them.

12. Young also argues that the trial court erred by refusing to excuse eight prospective jurors based on their voir dire responses regarding the death penalty. First, applying the same standards set forth in Division 11, and after our careful review of the voir dire of the jurors in question, we conclude that the trial court did not abuse its discretion. See *Humphreys*, 287 Ga. at 72 (5) ("The same standard applies to a court's decision to qualify a prospective juror over defendant's objection." (citation and punctuation omitted)). Furthermore, declining Young's invitation to overrule our recent holding to

the contrary, we conclude that any error regarding these jurors would have been harmless because none of them served on the 12-person jury that rendered the verdicts in Young's case. See *Willis*, 304 Ga. at 701-707 (11).

13. Young argues that the trial court improperly limited voir dire regarding prospective jurors' willingness to consider a sentence less than death upon a conviction for murder, as distinguished from cases where a complete defense has been proven or where only a lesser crime has been proven. First, we conclude that this issue was waived for the purposes of ordinary appellate review by Young's failure to object at the time of the announced limitations on his voir dire. See *Martin v. State*, 298 Ga. 259, 278-279 (6) (d) (779 SE2d 342) (2015), disapproved on other grounds by *Willis,* 304 Ga. at 706 (11) (a) n.3; *Braley v. State*, 276 Ga. 47, 52 (18) (572 SE2d 583) (2002).[5] Furthermore, our review of the voir

---

[5] In *Martin*, we explained that a special form of review applies to cases where a death sentence has been imposed. We stated:

> This form of review in death penalty cases arises not from any ordinary appellate review principle; instead, it arises from the statutory mandate for this Court to ensure that no death sentence is "imposed under the influence of passion, prejudice, or any other arbitrary factor." OCGA § 17-10-35 (c) (1).

Martin, 298 Ga. at 278 (6) (d). We also explained that this special review "include[s] a plenary review of the record" that "guards against any obvious impropriety at trial, whether objected to or not, that in reasonable probability led to the jury's

dire reveals that the trial court, rather than disallowing Young's questions, simply directed him to make his questions more focused, and we therefore conclude that the trial court did not abuse its discretion. See *Arrington*, 286 Ga. at 338 (7) ("The scope of voir dire is generally a matter for the trial court's discretion.").

14. Young argues that the trial court improperly limited his voir dire of one juror on the subject of the juror's views on intellectual disability. The trial court, after correctly noting that similar questioning of the juror had already been allowed, simply instructed Young to "rephrase [his] question" and specifically authorized Young to "go into something more deeply" on the issue. At that point, Young raised no objection to the trial court's instructions but instead stated: "[W]e'll move on from that. We got enough questions on that. . . ." Accordingly, we hold that this claim has been waived for the purposes of ordinary appellate review. See *Martin*, 298 Ga. at 278-279 (6) (d); *Braley*, 276 Ga. at 52 (18). Furthermore, we conclude that the trial court did not abuse its discretion. See *Arrington*, 286 Ga. at 338 (7) ("The scope of voir dire is generally a matter for the trial court's discretion.").

Issues Related to the Guilt/Innocence Phase

15. There is no merit to Young's argument that Georgia's murder statute, OCGA § 16-5-1, is

---

decision to impose a death sentence." Id. at 279 (6) (d). We conduct this special review below in Division 49.

unconstitutional. See *Lamar v. State*, 278 Ga. 150, 155 (10) (598 SE2d 488) (2004).

16. Young argues that his constitutional rights were violated by the placement of an electronic stun belt on him during his trial. Young filed a pretrial motion objecting to the use of such a stun belt for security purposes at his trial, and the trial court ruled, with Young present, that the issue was moot because no stun belt was being used at the time. However, the trial court stated that it would conduct a hearing on the issue if the use of a stun belt were requested in the future. About halfway through the guilt/innocence phase of the trial, while the trial court, again in Young's presence, was hearing arguments regarding a juror who was afraid of Young, the prosecutor stated: "[O]bviously [the juror] doesn't know that Mr. Young's wearing a shock belt. . . ." The prosecutor's statement was then reinforced in the State's brief filed in the trial court in response to Young's motion to remove this fearful juror. That brief stated: "The jurors do not have the knowledge that the Court, State, and Defendant have with respect to the 'shock belt' device that the Defendant is wearing underneath his non jail-garb clothing." Although the defendant himself obviously was aware that he was wearing the stun belt from the beginning and that defense counsel were aware of it *at least* from the time of the hearing and the State's brief, no concern regarding the stun belt was ever raised by Young or his counsel during the trial.

After Young raised the issue of the stun belt for the first time in his third amendment to his motion for new trial, the trial court conducted a hearing on the matter. In its order denying the claim, despite Young's

testimony at the hearing that the stun belt made him "uncomfortable" and "scared" and prevented him from speaking directly to the two of his three attorneys who were seated farther down the defense table, the trial court noted that Young also "testified that the stun belt did not prevent him from speaking to or conferring with his third attorney who sat next to him throughout the trial." The court also noted that this third attorney testified that she indeed spoke to Young during the trial, and the court further noted that the attorney "said nothing about any anxiety or reluctance [on Young's part] to speak with her." Based on this evidence, the trial court found that "there is no credible evidence that the stun belt had any effect, adverse or otherwise, on the defendant's Sixth Amendment and due process rights to be present at trial and to participate in his defense."

Furthermore, the trial court noted other testimony at the hearing showing that the deputies who fitted Young with the stun belt explained to Young "the operation of the stun belt and what would have to occur before it was used," explained to Young that he "would be warned or given instructions before the belt was ever activated," and explained to Young the circumstances that would warrant the use of the stun belt, which did not include anything about Young's speaking to his attorneys. The court further noted testimony showing that "care was taken to be sure the device did not fit too tightly" and that Young "never complained . . . about the belt being uncomfortable or preventing him from communicating with his attorneys." Based on these findings, the court finally concluded: "The constitutional rights of the defendant to counsel and to participate in his defense were not impacted by the use of the stun belt."

As to any portion of this claim regarding the stun belt that is related to the time period *following* the hearing regarding a fearful juror in which the State specifically noted that Young was wearing the belt, we conclude that the claim was waived for the purposes of ordinary appellate review by Young's failure to raise it. See *Martin*, 298 Ga. at 278-279 (6) (d); *Weldon v. State*, 297 Ga. 537, 541 (775 SE2d 522) (2015) ("Failure to raise the issue [regarding a stun belt] deprives the trial court of the opportunity to take appropriate remedial action and waives appellate review of any alleged impropriety."). Cf. *People v. Harris*, 904 NE2d 1200, 1206-1207 (III) (Ill. App. Ct. 2009) (holding that a similar issue was amenable to that court's plain error review, which is analogous to the review we conduct below in the Sentence Review section of this opinion). To the extent that this waiver might not apply to the time period *prior to* the hearing regarding the fearful juror because defense counsel were entitled to rely on the trial court's original ruling that any use of a stun belt would only follow a request for that security measure and a hearing on the matter, we conclude, based on the trial court's findings in its order denying Young's motion for new trial, that the lack of such a hearing was harmless beyond a reasonable doubt and therefore does not require a new trial. See *Chapman v. California*, 386 U. S. 18, 24 (III) (87 SCt 824, 17 LE2d 705) (1967) (holding that, in general, constitutional violations require reversal unless found to be harmless beyond a reasonable doubt). Cf. *United States v. Durham*, 287 F3d 1297, 1308-1309 (D) (11th Cir. 2002) (applying a harmless beyond a reasonable doubt standard of review to a claim regarding a stun belt); *State v. Bates*, 125 P3d 42, 47 (Or. Ct. App. 2005) (concluding "that there is little likelihood that the verdict was affected by any

inhibition defendant may have experienced as a result of being required to wear the stun belt" and "that any error was harmless beyond a reasonable doubt").[6]

17. The trial court did not abuse its discretion in denying Young's motion in limine regarding testimony from Doris Jones describing signs of a forced entry into the victim's laundry room prior to the day of the murder on grounds of relevance and the allegedly speculative nature of that testimony, particularly in light of the other evidence showing that Young had driven to the home prior to the day of the murder. See *Crozier v. State*, 263 Ga. 866, 867 (2) (440 SE2d 635) (1994) ("Any evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. . . . The trial court has great discretion to determine relevancy and materiality of evidence, and admission is favored in doubtful cases." (citation and punctuation omitted)). Insofar as Young's additional oral objection to the testimony also addressed a hearsay account of the victim's whereabouts on the night of the crime from his girlfriend, we see no reversible error, because the testimony was "cumulative of legally admissible evidence" from the girlfriend herself. *Wright v. State*, 291 Ga. 869, 872 (3) (a) (734 SE2d 876) (2012) (citation and punctuation omitted).

18. The trial court did not abuse its discretion in applying the former necessity exception to the

[6] We do not endorse, however, the State's failure to comply with the trial court's pretrial order regarding the use of a shock belt.

hearsay rule to allow testimony from Doris Jones regarding a statement that the victim had made to her about a warning he had given to Young regarding Young's possibly "putting his hands on" her. See *Jennings v. State*, 288 Ga. 120, 121-122 (3) (702 SE2d 151) (2010).[7]

19. Young's claim regarding the absence of a warrant to obtain location data for his cell phone was waived for the purposes of ordinary appellate review by his failure to raise the issue at trial. See *Martin*, 298 Ga. at 278-279 (6) (d). See also *Carpenter v. United States*, __ U. S. __, __ (IV) (138 SCt 2206, 2222, 201 LE2d 507) (2018) (addressing the privacy of cell phone location data).

20. Young's claim regarding the probative value versus the prejudicial effect of a recorded 911 call from Doris Jones has been waived for the purposes of ordinary appellate review by his failure to object at trial. See *Martin*, 298 Ga. at 278-279 (6) (d); *Bryant v. State*, 288 Ga. 876, 887 (8) (c) (708 SE2d 362) (2011).

21. Young argues that testimony from Doris Jones regarding a statement from her sister recounting a report from a third person about Young's whereabouts during the crimes, along with certain testimony from Annie Sampson, Sonny Goodson, Wesley Horne, Leo Rivers, and Latrice Rivers, constituted improper hearsay testimony. These claims were waived for the purposes of ordinary appellate

[7] We note that Young's trial was not governed by Georgia's current Evidence Code, which took effect on January 1, 2013. See *Parker v. State*, 296 Ga. 586, 588 (1) (769 SE2d 329) (2015) (citing Ga. L. 2011, p. 99, § 101).

review by Young's failure to object at trial.[8] See *Martin*, 298 Ga. at 278-279 (6) (d); *Bryant*, 288 Ga. at 887 (8) (c).

22. Young argues that an investigator gave speculative and improper opinion testimony by stating that it would have been "understandable" for Young to have been in Georgia and that it would have been "natural" for Young freely to admit as much, because, as Young had told the investigator, Young had been to Georgia in the past. First, this issue was waived for the purposes of ordinary appellate review by Young's failure to object at trial. See *Martin*, 298 Ga. at 278-279 (6) (d); *Bryant*, 288 Ga. at 887 (8) (c). And, in any event, the testimony was not improper. See *Harris v. State*, 279 Ga. 304, 305-306 (1) (612 SE2d 789) (2005) ("A lay witness may relate his or her opinion as to the existence of any fact so long as the opinion is based upon the person's own experiences and observations, and so long as the matter referred

[8] Young concedes that his hearsay argument regarding Annie Sampson was not preserved for ordinary appellate review. Our own review of the record reveals that the trial court's order reconstructing portions of the record concluded that a hearsay objection *was* raised in the bench conferences held during Ms. Sampson's testimony. See OCGA § 5-6-41 (f) (providing for amendments to the record). However, Young's "Proposed Record Reconstruction and Request for Hearing" stated that neither party could "recall the substance of the objection," and, in keeping with that representation, the trial court made no finding regarding what the substance of the hearsay objection might have concerned. Because there is no record of what specific hearsay objection was raised or why it was denied, we accept Young's concession on appeal that the issue was not preserved for ordinary appellate review.

to is within the scope of the average juror's knowledge.").

23. The trial court did not abuse its discretion in admitting photographs of the victim taken during his autopsy while medical instruments were used to retract tissue in order to reveal relevant injuries. See *Brown v. State*, 250 Ga. 862, 867 (5) (302 SE2d 347) (1983) ("A photograph which depicts the victim after autopsy incisions are made or after the state of the body is changed by authorities or the pathologist will not be admissible unless necessary to show some material fact which becomes apparent only because of the autopsy."), abrogated by the current Evidence Code as stated in *Venturino v. State*, 306 Ga. 391, 396 (2) (b) (830 SE2d 110) (2019). See also *Bunnell v. State*, 292 Ga. 253, 258 (5) (735 SE2d 281) (2013) (noting a trial court's discretion regarding autopsy photographs); *Simmons v. State*, 291 Ga. 705, 711 (8) (b) (733 SE2d 280) (2012) (addressing photographs taken during the use of medical instruments such as forceps). This holding is not changed by the fact that Young's trial strategy included an admission of his guilt, because the State was entitled to prove its case for guilt rather than to rely on Young's admissions. See *Morgan v. State*, 307 Ga. 889, 896 (3) (b) (838 SE2d 878) (2020) ("[A] criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the State chooses to present it." (citation and punctuation omitted)).

24. During the guilt/innocence phase, a witness testified that she had been Young's friend for over ten years and that their relationship had at some points been sexual. In addition to corroborating several of the details of the State's evidence regarding Young's

whereabouts and cell phone calls near the time of the murder, the witness also testified that Young came to her house on the day following the murder after he got off work and that she then saw him again later that night at his house. With no contemporaneous objection from Young, the State asked her if she and Young had sex that night, and she answered affirmatively.

After this testimony was concluded and after a lunch break, defense counsel argued that the testimony about the witness and Young having sex was improper because it was irrelevant to the question of Young's guilt. Defense counsel stated that Young was not seeking a curative instruction but instead was asking that the State be precluded from discussing the testimony about sex during its closing argument in the guilt/innocence phase on the ground that the testimony was irrelevant to the question of guilt but was highly prejudicial. The trial court ruled:

> Well, I can see that it would be corroborative in terms of Ms. [Doris] Jones' testimony about the defendant allegedly being unfaithful, that this would corroborate her perception of the nature of their relationship and why they would have arguments and to show that her testimony concerning his conduct, that would be evidence to support that her suspicions or her statements were well-founded. So I do find that it would have some corroborative value there. So in terms of just totally precluding them from arguing her testimony, I'm going to deny that request. I mean, anything can

> be argued in the wrong way. Anything can be – you can have incorrect argument, but I'm not going to preclude them from even mentioning it. They can't use it just to attack the character or whatever, but to, for the proper purpose that I just described.

We conclude that the trial court did not abuse its discretion in ruling on Young's argument concerning the relevance of the witness's testimony to the question of guilt. See *Spiller v. State*, 282 Ga. 351, 354 (3) (647 SE2d 64) (2007) (holding that the trial court had not abused its discretion in allowing a certain inference to be made in a closing argument, because the "inference was a permissible one from the evidence presented at trial"). See also *Moore v. State*, 295 Ga. 709, 714 (3) (763 SE2d 670) (2014) (addressing the propriety of evidence that might incidentally place the character of the defendant at issue but is otherwise relevant).

Pursuant to the trial court's ruling on relevance, the State argued in its guilt/innocence phase closing argument, while arguing how various behaviors that Young was capable of were relevant to the various "adaptive functioning areas" used in considering a possible finding of intellectual disability: "And the fact, again, that he's able to have this other relationship with another woman shows that he is multi-faceted, and there's a lot more to Rodney Young than what you've seen in this trial." To the extent that Young argues on appeal, in addition to the ground of relevance discussed above, that the State's argument regarding the issue of intellectual disability was unconstitutional, we conclude that the

issue was waived for the purposes of ordinary appellate review by Young's failure to make this specific objection at trial. See *Martin*, 298 Ga. at 278-279 (6) (d).

25. Young argues that requiring him to prove his intellectual disability beyond a reasonable doubt in order to be exempted from a death sentence was unconstitutional. Seeing no clear direction in the law to hold otherwise, we adhere to our prior decisions upholding Georgia's standard of proof.

(a) In 1988, Georgia was the first state in the nation to enact a statutory ban on the execution of intellectually disabled persons. See OCGA § 17-7-131 (c) (3), (j) (as amended by Ga. L. 1988, p. 1003, § 1). In 1989, shortly after Georgia enacted this groundbreaking statute, the United States Supreme Court held that there was no similar protection in the United States Constitution. See *Penry v. Lynaugh*, 492 U. S. 302 (109 SCt 2934, 106 LE2d 256) (1989). However, this Court held in 1989 that such a protection *did* exist under the Georgia Constitution and accordingly extended the new statutory protection to apply to persons tried in Georgia before the statute's effective date. See *Fleming v. Zant*, 259 Ga. 687, 690 (3) (386 SE2d 339) (1989) ("[*Penry*] was based in great part on the absence of any 'national consensus' against executing the mentally retarded. In contrast, the objective evidence indicates that a consensus against execution of the mentally retarded does exist among Georgians."). This Court then further extended Georgia's protection of intellectually disabled persons to those who could have but did not raise the issue at trial, concluding that allowing such defaulted claims in a prisoner's first state habeas

proceeding was necessary to prevent a possible miscarriage of justice. See *Turpin v. Hill*, 269 Ga. 302, 303 (3) (b) (498 SE2d 52) (1998) (citing OCGA § 9- 14-48 (d)). In 2002, the United States Supreme Court, concluding that a "national consensus" on the issue had developed in the 14 years since Georgia enacted its statutory protection for persons with intellectual disabilities, overruled *Penry* and announced that the execution of intellectually disabled persons violated the United States Constitution. *Atkins v. Virginia*, 536 U. S. 304, 316 (III) (122 SCt 2242, 153 LE2d 335) (2002). See id. at 321 (IV) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the [United States] Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (quoting *Ford v. Wainwright*, 477 U. S. 399, 405 (II) (106 SCt 2595, 91 LE2d 335) (1986)).

(b) While Georgia was the first state to ban the execution of intellectually disabled persons, it has from the initial adoption of that ban imposed a burden to prove intellectual disability on defendants under a beyond a reasonable doubt standard.[9] This standard

[9] The Georgia Code provides: "The defendant may be found 'guilty but with intellectual disability' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is intellectually disabled." OCGA § 17-7-131 (c) (3) (as amended in 2017 to use the term "intellectual disability"). This Court has held: "[T]he plain language of OCGA § 17-7-131 (c) (3) requires that the defendant prove his mental retardation beyond a reasonable doubt. . . ." *Burgess v. State*, 264 Ga. 777, 789-790 (36) (450 SE2d 680) (1994). Although we initially directed that a preponderance of the evidence standard should be applied to claims of intellectual disability raised by habeas petitioners who had been

of proof has been challenged several times in this Court on constitutional grounds, particularly in light of the fact that some other states impose only a clear and convincing evidence standard on defendants seeking to prove their intellectual disability and the majority of states that still have the death penalty impose only a preponderance of the evidence standard on defendants. See *Raulerson v. Warden*, 928 F3d 987, 1013-1014 (I) (B) (11th Cir. 2019) (Jordan, J., concurring in part and dissenting in part) (discussing the varying standards of proof applied). This Court's last published decision upholding Georgia's standard of proof was in *Stripling v. State* in 2011. See 289 Ga. at 371 (1) ("We have previously addressed this very issue, and we now reiterate our prior holding that Georgia's beyond a reasonable doubt standard is not unconstitutional." (citing *Head v. Hill*, 277 Ga. 255, 260-263 (II) (B) (587 SE2d 613) (2003)).

In *Stripling*, we explained:

> In addressing this issue previously, we first noted that, although the Supreme Court of the United States had recognized a constitutional right of mentally retarded defendants to be exempt from the death penalty, it had not directed the states to apply any particular burden of proof to claims of mental retardation. See *Atkins v.*

---

tried prior to the effective date of the statutory protection, our later case law has strongly suggested that even those cases should *also* have employed the beyond a reasonable doubt standard. See *Hill*, 269 Ga. at 303-304 (4).

> *Virginia*, 536 U.S. 304 (122 SCt 2242, 153 LE2d 335) (2002) (identifying a national consensus against executing mentally retarded persons and holding that executing such persons was therefore unconstitutional). Instead, we noted that the Supreme Court "specifically left '"to the States the task of developing appropriate ways to enforce the (federal) constitutional restriction"' on executing the mentally retarded." *Hill*, 277 Ga. at 260 (II) (B) (quoting *Atkins*, 536 U. S. at 317 (III) (citation omitted)). See also *Bobby v. Bies*, __ U. S. __, __ (I) (129 SC 2145, 2150 (I), 173 LEd2d 1173) (2009) ("Our opinion [in *Atkins*] did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall (within *Atkins*' compass).'" (quoting *Atkins*, 536 U. S. at 317 (III)). . . .

Stripling, 289 Ga. at 371-372 (1). We reaffirmed our prior holding that claims of intellectual disability are more closely analogous to claims of insanity, which the Supreme Court has held could be subjected to a beyond a reasonable doubt standard, than they were to claims of incompetence to stand trial, which the Supreme Court has held could not be subjected to a standard higher than a preponderance of the evidence. See id. at 372 (1) (discussing *Leland v. Oregon*, 343 U. S. 790 (72 SCt 1002, 96 LE 1302) (1952), and *Cooper v. Oklahoma*, 517 U. S. 348 (116 SCt 1373, 134 LE2d 498) (1996)). We concluded our

discussion regarding the purely procedural aspect of the standards that we were reaffirming by stating:

> Thus, in light of the specific statement by the Supreme Court that it had not established any particular procedural standards that must be applied to mental retardation, the similarity of mental retardation claims to claims of insanity at the time of the commission of crimes, and the persuasive effect of having sister states who have refused to declare the preponderance of the evidence standard to be constitutionally required, we held that Georgia's beyond a reasonable doubt standard was not unconstitutional from a procedural point of view.

Id. at 372-373 (1).

After concluding our analysis of Georgia's standard of proof on procedural grounds, we also reaffirmed our prior holding

> that Georgia's beyond a reasonable doubt standard further served to *define* the category of mental retardation within Georgia law and that, in [setting this standard], Georgia had not acted outside the bounds of the national consensus about the treatment of mentally retarded persons identified by the Supreme Court in *Atkins*.

Stripling, 289 Ga. at 373 (1). We further noted that "Georgia was not alone in defining mental retardation through the use of a heightened standard of proof at the time of *Atkins*" and that the several states at that time applying a clear and convincing evidence standard had been counted among the states forming a national consensus. *Stripling*, 289 Ga. at 373 (1). We observed:

> [T]he Supreme Court noted as follows:
>
> > To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.

Id. at 374 (1) (quoting *Atkins*, 536 U. S. at 317 (III)). We concluded this portion of our analysis by stating:

> Therefore, we reaffirm that Georgia's statutory definition of mental retardation, with its requirement that only mental deficiencies capable of proof beyond a reasonable doubt [qualify for protection], is not unconstitutional under *Atkins*.

Id.

(c) (i) First, Young assails our prior holdings affirming Georgia's beyond a reasonable doubt standard in reference to the second portion of the analysis set forth in *Stripling*, which addressed the matter from a more substantive perspective. The United States Supreme Court has recently stated: "In *Atkins v. Virginia*, we held that the Constitution 'restrict[s] . . . the State's power to take the life of' *any* intellectually disabled individual." *Moore v. Texas*, __ U. S. __, __ (II) (137 SCt 1039, 1048, 197 LE2d 416) (2017). Accordingly, we disapprove anything in our prior decisions suggesting otherwise, particularly those parts of our prior decisions suggesting that "Georgia's beyond a reasonable doubt standard further served to *define* the category of mental retardation." *Stripling*, 289 Ga. at 373 (1). See *Atkins*, 536 U. S. at 317 (III); *Hill*, 277 Ga. at 262 (II) (B). See also *Williams v. Cahill*, 303 P3d 532, 550 (Ariz. Ct. App. 2013) (Eckerstrom, P.J., dissenting) ("But this paragraph [from *Atkins*], by its terms, only invites states to develop 'ways to enforce' the constitutional restriction imposed in *Atkins*. No part of that language suggests the states are likewise entrusted with the power to redefine the substance of the constitutional restriction itself."). While we continue to take some guidance from the Supreme Court's observation that there is disagreement among the states "in determining which offenders are in fact retarded," we acknowledge that this observation is relevant only to the *procedures* for determining whether defendants are intellectually disabled and that every state is constitutionally required to recognize prevailing clinical definitions of intellectual disability in defining the category of persons who are constitutionally protected, including those who are "mildly mentally retarded." *Atkins*, 536 U. S. at 308

(I), 317 (III). See *Moore*, 137 SCt at 1049 (II) ("*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards."); *Hall v. Florida*, 572 U. S. 701, 720-721 (III) (C) (134 SCt 1986, 188 LE2d 1007) (2014) ("If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality. This Court thus reads *Atkins* to provide substantial guidance on the definition of intellectual disability."). On this point, we emphasize that Georgia, by statute and through case law, has always applied such prevailing clinical standards. See, e.g., *Stripling v. State*, 261 Ga. 1, 4 (3) (b) (401 SE2d 500) (1991). See also *Hill v. Humphrey*, 662 F3d 1335, 1352 (III) (D) (11th Cir. 2011) ("It is undisputed that Georgia's statutory definition of mental retardation is consistent with the clinical definitions cited in *Atkins*.").

(ii) We turn now to the *procedural* issue that Young raises regarding the constitutionality of Georgia's standard of proof. On this question, we begin and end with the Supreme Court's statement in *Atkins* that it "'l[eft] to the States the task of developing appropriate ways to enforce the [federal] constitutional restriction'" on executing intellectually disabled persons. *Atkins*, 536 U. S. at 317 (III) (quoting *Ford*, 477 U. S. at 416 (V) (A) (plurality portion of opinion)).[10] We acknowledge that the states'

[10] We again emphasize that the *substantive* question of intellectual disability is not at issue here. As the Supreme Court

freedom to develop appropriate procedures does not leave them unfettered from general constitutional principles, but we conclude, despite Young's arguments to the contrary discussed below,[11] that it does permit the procedure that the Georgia General Assembly has chosen.

First, Young argues that the Supreme Court's recent decisions in *Hall v. Florida* and *Moore v. Texas* require this Court's disapproval of Georgia's beyond a reasonable doubt standard. See *Moore*, 137 SCt 1039 (addressing the "wholly nonclinical" factors that Texas applied); *Hall*, 572 U. S. 701 (addressing a "strict IQ score cutoff" applied by Florida). We have considered these decisions carefully, especially as discussed in this opinion regarding the *procedural* question of Georgia's standard of proof. However, we note that they directly addressed only questions regarding the *substantive* definition of intellectual disability and the requirement that states must, as

---

has stated about its principle of leaving to the states the responsibility for creating appropriate procedures: "Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue." *Montgomery v. Louisiana*, 577 U. S. 190, 211 (III) (136 SCt 718, 193 LE2d 599) (2016). See *People v. Vasquez*, 84 P3d 1019, 1022 (III) (B) (1) (Colo. 2004) ("Atkins placed a '*substantive* restriction on the State's power to take the life of a mentally retarded offender.' *Atkins*, 536 U.S. at 321 (internal quotation marks omitted) (emphasis added). Far from announcing a procedural rule, *Atkins* merely declared that the Eighth Amendment now prohibits the execution of the mentally retarded. Id.").

[11] We also consider here the parallel arguments made by the amici curiae, The Arc of the United States, The Arc of Georgia, and the Georgia Advocacy Office.

Georgia indisputably does, adhere to prevailing clinical definitions of intellectual disability in fashioning such a definition. Thus, if this Court's precedents regarding the beyond a reasonable doubt standard are somehow incorrect, it would not be because of the core holding of *Hall* or *Moore*.

Next, Young argues that this Court has previously relied on inapposite case law from the United States Supreme Court in upholding the beyond a reasonable doubt standard. As we noted above, we have previously discussed the Supreme Court decisions of *Cooper v. Oklahoma* and *Leland v. Oregon* as being relevant to our evaluation of the constitutionality of Georgia's beyond a reasonable doubt standard. See *Cooper*, 517 U. S. 348; *Leland*, 343 U. S. 790. See also *Stripling*, 289 Ga. at 372 (1) (discussing *Cooper* and *Leland*); *Hill*, 277 Ga. at 261 (II) (B) (same). Despite Young's arguments that we should do otherwise, and although we acknowledge that neither case is a perfect fit to answer the question presented here, we continue to take more guidance from *Leland* than from *Cooper*.

In *Cooper*, the Supreme Court held as a matter of federal due process that a defendant could not be required to prove his or her incompetence to stand trial by clear and convincing evidence. See *Cooper*, 517 U. S. at 350, 369 (V). Cf. id. at 355 (II) ("Our recent decision in *Medina v. California*, 505 U.S. 437, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992), establishes that a State may presume that the defendant is competent and require him to shoulder the burden of proving his incompetence by a preponderance of the evidence. Id., at 449."). The Supreme Court noted that "[n]o one questions the existence of the fundamental right"

involved, id. at 354 (II), and we conclude that in this regard *Cooper* is relevant to the issue of intellectual disability, because the right of intellectually disabled persons not to be executed has also been made a clear constitutional right.[12] Likewise, the issue in *Cooper* and the issue here both involve consideration of the risks arising from a potentially erroneous finding of fact. See id. at 362-368 (IV and V).[13] However, the Supreme Court emphasized in *Cooper* the historical basis for the right to not be tried while incompetent and the historical basis in English and American

---

[12] We note here Young's argument that this Court first deemed *Leland* to be more persuasive than *Cooper* on the issue of a standard of proof for intellectual disability prior to the Supreme Court's announcement of the relevant *federal* constitutional right. However, we point out that this Court has already addressed this issue, and we remain mindful of it as we reach our conclusions here. See *Hill*, 277 Ga. at 260 (II) (B) ("Now that the Georgia exemption from death sentences for mentally retarded persons is paralleled by a new federal exemption, we must determine whether, under the authority of federal constitutional law, the beyond a reasonable doubt standard continues to be an acceptable standard of proof to apply to mental retardation claims." (emphasis omitted)).

[13] We note here Young's extensive argument regarding statistics concerning claims of intellectual disability in Georgia; however, we agree with the Eleventh Circuit in holding that statistics like Young's are neither complete nor constitutionally compelling. See *Hill*, 662 F3d at 1357 (F) ("[E]ven if one were to consider the dissent's skewed data, the fact remains that reported cases in Georgia actually show that judges and juries do find defendants guilty but mentally retarded under Georgia's proof beyond a reasonable doubt standard."). It is important to note in this regard that cases in which intellectually disabled persons are never charged with crimes, resolve charges without a trial, or obtain a not guilty verdict from a jury would rarely if ever result in reported judicial decisions and thus would not be included in the statistics that Young offers here.

common law for requiring defendants to prove their incompetence only by a preponderance of the evidence. See id. at 354-360 (II and III). And it was in reference to this historical basis for the right at issue that the Supreme Court noted the fact that "[o]nly 4 of the 50 States" imposed the higher burden of proof at issue. Id. at 360 (III). See also id. at 362 (III) ("The near- uniform application of a standard that is more protective of the defendant's rights than Oklahoma's clear and convincing evidence rule supports our conclusion that the heightened standard offends a principle of justice that is deeply 'rooted in the traditions and conscience of our people.' *Medina v. California*, 505 U.S. at 445 (internal quotation marks omitted)."). In contrast, such historical support is absent for claims of intellectual disability, as well summarized by the Eleventh Circuit:

> In contrast, there is no historical right (in the Eighth Amendment or elsewhere) of a mentally retarded person not to be executed. And since the constitutional right itself is new, there is no historical tradition regarding the burden of proof as to that right. As recently as 1989, *Penry* refused to bar the execution of the mentally retarded. *Atkins* was based not on historical tradition or the Due Process Clause, but on the contemporary national consensus that reflected "the evolving standards of decency" that informed the meaning of the Eighth Amendment. *Atkins*, 536 U.S. at 311-12, 122 S. Ct. at 2247. Indeed, Georgia's reasonable doubt standard for establishing a mental retardation

> exception to the death penalty, which was enacted twenty-three years ago, is the oldest such law in the nation. Although other states recently have employed either clear and convincing evidence or preponderance of evidence standards, no more lenient standard of proof predates Georgia's.

Hill, 662 F3d at 1350-1351 (III) (C). See also *Raulerson*, 928 F3d at 1002 (III) (B) (2) ("Unlike the right at issue in *Cooper*, which has its deep roots in our common-law heritage, there is no historical right of an intellectually disabled person not to be executed.").[14]

We turn next to an examination of our prior decisions insofar as they identified limited guidance on the constitutionality of Georgia's standard of proof in *Leland*. The United States Supreme Court began its analysis in *Leland* by noting that there was at least some historical precedent supporting Oregon's beyond a reasonable doubt standard for insanity claims, noting the origin of Oregon's statutory rule in 1864, the announcement in 1843 in England of a rule requiring such claims to be "clearly proved," and the requirement applied in "most of the nineteenth-

[14] We note that, if *Cooper*'s holding applied in this context with full force, the laws of the states where a clear and convincing standard applies would also be unconstitutional. See also *Hill*, 662 F3d at 1355 (III) (E) ("The effective result of Hill's argument, then, is that every state's death penalty statute or case law procedure is unconstitutional because none of them requires the state to prove the absence of mental retardation beyond a reasonable doubt. Or, to take Hill's argument to its logical conclusion, beyond all doubt.").

century American cases" that a defendant "'clearly' prove insanity." *Leland*, 343 U. S. at 796-797. The Court also noted that it had previously adopted a rule, through its supervisory authority over the federal courts, requiring an acquittal in federal prosecutions whenever "'there is reasonable doubt whether [the defendant] was capable in law of committing crime,'" id. at 797 (quoting *Davis v. United States*, 160 U. S. 469, 484 (16 SCt 353, 40 LE 499) (1895)); however, the Court emphasized that its holding in *Davis* "obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts," id.

The Supreme Court in *Leland* noted the central fact at issue, which was that "Oregon [wa]s the only state that require[d] the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt." *Leland*, 343 U. S. at 798. The Court noted that "[s]ome twenty states" required defendants "to establish [their] insanity by a preponderance of the evidence or some similar measure of persuasion." Id. Nevertheless, the Court, in comparing Oregon's beyond a reasonable doubt standard with these preponderance standards, held:

> While there is an evident distinction between these two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here.

Id. And yet, while not "significant" to the ultimate question, the Court stated, in words that warrant attention in Young's case given the number of American jurisdictions that employ standards of proof

for intellectual disability that are different from Georgia's:

> The fact that a practice is followed by a large number of states is *not conclusive* in a decision as to whether that practice accords with due process, but it is *plainly worth considering* in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Id. (emphasis supplied). See *Raulerson*, 928 F3d at 1013-1014 (I) (B) (Jordan, J., concurring in part and dissenting in part) (discussing the various standards of proof applied in different jurisdictions).

The Court, again noting its own contrary rule for the federal courts, held regarding Oregon's standard of proof:

> But "its procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." *Snyder v. Massachusetts*, supra, at 105.

Leland, 343 U. S. at 799. The Court concluded:

> We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the

> issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice.

Id.

We note, in deciding the degree of guidance to be gained in Young's case from *Leland*, that *Leland* was not a case involving an underlying right that the Supreme Court had specifically "held to be secured to defendants in federal courts by the Bill of Rights." *Leland*, 343 U. S. at 798. See also *Medina v. California*, 505 U. S. 437, 449 (112 SCt 2572, 120 LE2d 353) (1992) ("Moreover, while the Due Process Clause affords an incompetent defendant the right not to be tried, we have not said that the Constitution requires the States to recognize the insanity defense." (citations omitted)). But we also note that the Supreme Court has since clarified that *some* acceptable definition of insanity is constitutionally required. See *Kahler v. Kansas*, __ U. S. __, __ (II) (A) (140 SCt 1021, 1028-1029, 206 LE2d 312) (2020) ("A State's 'insanity rule[ ] is substantially open to state choice.'" (quoting *Clark v. Arizona*, 548 U. S. 735, 752 (II) (A) (126 SCt 2709, 165 LE2d 842) (2006))). See also id. at 1039 (II) (Breyer, J., dissenting) ("The Court contends that the historical formulations of the insanity defense were so diverse, so contested, as to make it impossible to discern a unified principle that Kansas' approach offends. I disagree."). In the end, while we see reason for some circumspection in applying *Leland*, we also note that some form of due process concerns regarding standards of proof were clearly at issue in the case. Thus, although both the United States Constitution and the Georgia Constitution now clearly protect persons with

intellectual disabilities from execution, we consider the due process analysis in *Leland* worthy of our consideration here, particularly given our conclusion that intellectual disability "is comparable to a claim of insanity at the time of the crime in that both relieve a guilty person of at least some of the statutory penalty to which he would otherwise be subject." *Hill*, 277 Ga. at 261 (II) (B).

While identifying some guidance in *Leland*, we focus most directly on the guidance given by the Supreme Court specifically on the question at hand. As noted above, the Supreme Court in *Atkins*, quoting *Ford v. Wainwright*, expressly "'l[eft] to the States the task of developing appropriate ways to enforce the [federal] constitutional restriction'" on executing intellectually disabled persons. *Atkins*, 536 U. S. at 317 (III) (quoting *Ford*, 477 U. S. at 416 (V) (A) (plurality portion of opinion)). See also *Jones v. Mississippi*, No. 18-1259, 2021 U.S. LEXIS 2110, at *26-27 (II) (B) (Apr. 22, 2021) ("[A]s the Court explained in *Montgomery*, when 'a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems.'" (quoting *Montgomery v. Louisiana*, 577 U. S. 190, 211 (III) (136 SCt 718, 193 LE2d 599) (2016) (citing *Ford*, 477 U. S. at 416-417 (V) (A) (plurality portion of opinion)))). The Supreme Court's choice of *Ford* as a lodestar makes sense, because *Ford*, like *Atkins*, addressed the possible execution of a person with severe mental deficiencies that significantly undermined the penological justifications for the person's execution. The protection announced in *Atkins* was centered on a

defendant's mental state at the time of his or her crime and the time of his or her trial, while *Ford* was centered on a condemned prisoner's mental state at the time of his or her actual execution. But the legal similarities between the two were clearly what commended *Ford* to the *Atkins* Court.[15]

Like the *Atkins* Court did regarding intellectual disability, the majority in *Ford* began with the conclusion that the execution of mentally incompetent persons violated the Eighth Amendment. See *Ford*, 477 U. S. at 401 (majority portion of opinion) ("For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does."). Thus, the Court's decision to "leave to the States the task of developing appropriate ways to enforce the [federal] constitutional

[15] We note that *Ford* directly addressed the question of whether Ford had a right to an evidentiary hearing on federal habeas review; however, both the plurality opinion and the concurring opinion in that case clearly indicate that the procedural due process necessary to enforce a clear Eighth Amendment right was at the core of the analysis. See *Ford*, 477 U. S. at 410 (III) (plurality portion of opinion) ("Once a substantive right or restriction is recognized in the Constitution, therefore, its enforcement is in no way confined to the rudimentary process deemed inadequate in ages past."); id. at 424 (II) (Powell, J., concurring in part and concurring in the judgment) ("At least in the context of competency determinations prior to execution, this standard is no different from the protection afforded by procedural due process. . . . Thus, the question in this case is whether Florida's procedures for determining petitioner's sanity comport with the requirements of due process.").

restriction" in *Ford* cannot be distinguished from Young's case based on the nature of the underlying right at issue. *Ford*, 477 U. S. at 416 (V) (A) (plurality portion of opinion).

Our task in applying *Ford* here is complicated somewhat by the fact that the portion of *Ford* directly quoted in *Atkins* was concurred in by only a plurality of the Supreme Court. See *Atkins*, 536 U. S. at 317 (III) (quoting *Ford*, 477 U. S. at 416 (V) (A) (plurality portion of opinion)). However, even assuming that the *Atkins* majority meant to embrace the details of the *Ford* plurality's reasoning to the exclusion of the somewhat more accommodating reasoning in *Ford*'s concurring opinion, we conclude that *Ford* supports our decision here.[16] In concluding that Florida's

---

[16] We note that the concurring opinion noted similar defects in Florida's procedures but differed with the plurality mainly by providing a prescription for procedures that was even less restrictive on the states than the plurality's prescription. To that end, the concurring opinion stated:

> We need not determine the precise limits that due process imposes in this area. In general, however, my view is that a constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have substantial leeway to determine what process best balances the various interests at stake. As long as basic fairness is observed, I would find due process satisfied. . . .

procedure was constitutionally inadequate, the *Ford* plurality identified the following faults: "no court played any role in the rejection of [Ford]'s claim of insanity"; the decision was made "wholly within the executive branch, *ex parte*"; the Governor had announced a policy of excluding all advocacy on prisoners' behalf; and the Governor refused to inform Ford's counsel whether he had considered the "written materials, including the reports of the two other psychiatrists who had examined Ford at greater length," that the attorneys had submitted on Ford's behalf. *Ford*, 477 U. S. at 410 (III) (A), 412-413 (III) (C) (plurality portions of opinion). The *Ford* plurality concluded: "That this most cursory form of procedural review fails to achieve even the minimal degree of reliability required for the protection of any constitutional interest . . . is self-evident." Id. at 413 (III) (plurality portion of opinion). But none of these deficiencies identified by the *Ford* plurality are even *remotely* at issue regarding Georgia's procedure for evaluating intellectual disability claims.

Yet even though such glaring deficiencies did exist in *Ford*, the *Ford* plurality nevertheless articulated this measured prescription:

> We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the

---

Ford, 477 U. S. at 427 (III) (Powell, J., concurring in part and concurring in the judgment).

> constitutional restriction upon its execution of sentences.

Ford, 477 U. S. at 416-417 (V) (A) (plurality portion of opinion). The plurality added this caution:

> [T]he lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. The stakes are high, and the "evidence" will always be imprecise.

Id. at 417 (V) (A) (plurality portion of opinion). But its focus in making this statement was on the availability of an "adversary presentation of relevant information," the "manner of selecting and using the experts," and the need for "neutral, sound, and professional judgments" by those experts. Id. ("Fidelity to these principles is the solemn obligation of a civilized society.").

The *Ford* plurality specifically disavowed requiring the *full* panoply of procedures typically associated with a trial. See *Ford*, 417 U. S. at 416 (V) (A) (plurality portion of opinion) ("We do not here suggest that only a full trial on the issue of sanity will suffice. . . ."). Nevertheless, Georgia law *does* provide a right to a full jury trial on the question of intellectual disability. Also critically absent from the *Ford* plurality's discussion is any mention whatsoever of a standard of proof to be applied to claims of

incompetence to be executed.[17] And this omission in *Ford* of any reference to a required standard of proof is all the more conspicuous in light of the fact that it seems certain, given the facts recited in *Ford,* that the Florida Governor had been completely unrestricted in selecting a standard of proof in Ford's case and that the plurality was indeed unaware of what that selected standard of proof might have been.[18]

---

[17] In noting here the omission of any discussion in *Ford* of Florida's standard of proof for claims of incompetence to be executed, we acknowledge Young's argument regarding the inherent difficulties in assessing intellectual disability. However, we note that the matter was addressed by the concurring Justices in *Ford* but was considered by them as an *additional* reason to largely leave choices regarding procedure to the states. See *Ford*, 477 U. S. at 426 (III) (Powell, J., concurring in part and concurring in the judgment) ("Unlike issues of historical fact, the question of petitioner's sanity calls for a basically subjective judgment." (citing *Addington v. Texas*, 441 U. S. 418, 429-430 (III) (B) (99 SCt 1804, 60 LE2d 323) (1979))); *Hill*, 662 F3d at 1354 (III) (D) (noting that "Georgia has exercised [the] leeway" provided by *Ford* "by determining that the risk of error due to malingering or other factors is substantial and that there is a need for a robust burden of proof"). See also *Heller v. Doe*, 509 U. S. 312, 322 (III) (A) (113 SCt 2637, 125 LE2d 257) (1993) (acknowledging *Addington* but crediting Kentucky's assessment that the "'risk of error'" regarding a standard of proof for claims of intellectual disability was less than it would be for claims of mental illness).

[18] We note here that *Ford*'s omission of any prescription for a particular standard of proof was presumably made with the awareness of the fact, highlighted by the dissent here in Young's case in arguing that Georgia law creates an "unacceptable risk," that some risk inheres under *any* standard of proof. See *Hill*, 662 F3d at 1354 (III) (E) ("A third critical flaw in Hill's argument is that a risk of error exists with any burden of proof."). See also id. at 1354 (III) (D) (noting that the Georgia General Assembly has "determin[ed] that the risk of error due to malingering and other

We are not called upon here to make a pronouncement on the wisdom of Georgia's burden of proof from a policy perspective, and to do so would be beyond this Court's constitutional power. Instead, we are called upon to apply the Georgia Constitution and the United States Constitution. In light of the general discussion of due process above, and especially in light of the clear delegation to the states by *Atkins*, by reference to *Ford*, of much of the responsibility for designing appropriate procedures, we hold that the standard of proof for intellectual disability claims presently chosen by Georgia's General Assembly is not unconstitutional.

26. Young argues that, as a matter of Georgia statutory law, he should have been permitted to enter a plea of "guilty but mentally retarded" over the objection of the State and that the trial court should then have held a hearing to determine if it would accept the plea and sentence him to imprisonment for life. The relevant statute provides:

> A plea of guilty but mentally ill at the time of the crime or a plea of guilty but mentally retarded shall not be accepted until the defendant has undergone examination by a licensed psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, held a hearing on the issue of the defendant's mental condition, and is satisfied that there is a factual basis that the defendant was

---

factors is substantial and that there is a need for a robust burden of proof").

> mentally ill at the time of the offense or mentally retarded to which the plea is entered.

OCGA § 17-7-131 (b) (2) (prior to an amendment in 2017 adopting the term "intellectual disability"). However, we reaffirm the soundness of our reasoning in *Stripling*, in which we held: "While the trial court may allow for the entry of a plea of guilty but mentally retarded by the defendant, the case would still go forward absent the agreement of the State to a judgment on that plea without a trial." *Stripling*, 289 Ga. at 376 (3). The provision in the statute at issue is analogous to the requirement in the Uniform Superior Court Rules that a trial court must find a factual basis for a plea of *guilty* before accepting it, although the factual basis addressed in the statute regarding intellectual disability appears designed to protect only the interests of justice rather than the interests of the defendant as well. See *State v. Evans*, 265 Ga. 332, 334 (2) (454 SE2d 468) (1995) ("The purpose of USCR 33.9 is to protect against someone pleading guilty when that person may know what he has done but may not know that those acts do not constitute the crime with which he is charged."). This provision does not undermine the State's entitlement "to have its full case adjudicated" where the defendant seeks a sentence pursuant to a plea but the State insists on seeking a greater sentence through a jury verdict. See *Stripling*, 289 Ga. at 376 (3).

27. Young also argues that trying the questions of guilt and intellectual disability together in the guilt/innocence phase violated his constitutional rights. He acknowledges that this Court has held otherwise. See *King*, 273 Ga. at 272 (27) (citing *Palmer*

v. State, 271 Ga. 234, 237 (3) (517 SE2d 502) (1999)). See also *Livingston v. State*, 264 Ga. 402, 406 (3) (444 SE2d 748) (1994) ("While there may be advantages to a criminal defendant in having a trial apart from the guilt-innocence phase on the issue of mental retardation, such a change must come from the General Assembly."). However, he argues that the creation by the United States Supreme Court of a federal constitutional right of intellectually disabled persons not to be executed, particularly considering recent decisions from that Court applying that right, dictates a different holding now by this Court.

(a) Much of Young's argument here focuses on his mischaracterization of a holding of the United States Supreme Court. That Court held that whether a defendant could formulate plans to commit his or her crimes or could conceal facts or lie relative to his or her crimes should not be *determinative* of the question of intellectual disability, but the Court did *not* hold that evidence of such things was *irrelevant* to the question of whether a defendant is intellectually disabled under professionally accepted standards. See *Moore v. Texas*, __ U. S. __, __ (III) (139 SCt 666, 671-672, 203 LE2d 1) (2019) (stating that clinicians might find this type of evidence relevant and citing American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports 44 (11th ed. 2010).

Young also cites a psychological manual for the proposition that there is insufficient "normative information" about crimes in general to extrapolate conclusions regarding a defendant's intellectual disability from the manner in which the defendant has

carried out his or her crime. However, as with his characterization of Supreme Court case law, Young concludes too much here. Instead, we conclude that evidence regarding a defendant's actions during and around the time of a crime, although generally not *conclusive* on the question, can be *probative* regarding whether a defendant has deficits in specific adaptive behavior areas, just as his or her previously observed actions in *non*-criminal settings might similarly be probative on the question. See id.; *Morrison v. State*, 276 Ga. 829, 831 (2) (583 SE2d 873) (2003). Furthermore, we reach this conclusion despite the fact that intellectual disability must have an onset prior to the age of 18, because, as Young himself argues, intellectual disability is regarded by mental health professionals as generally being a lifelong condition.

(b) We also are not persuaded by Young's argument that trying the questions of guilt and intellectual disability together prevented him from being able to "embrace" evidence of his crimes that arguably *supported* a finding of intellectual disability without thereby undermining his defense as to his guilt. This argument is somewhat surprising in light of Young's arguments regarding the alleged irrelevance of evidence regarding the crimes to a possible finding that he lacked deficits in adaptive behaviors. In any case, we conclude that defendants are not generally denied a fair opportunity to present a defense regarding their alleged guilt by having to address the evidence of that guilt alongside other evidence that might be relevant to a finding of intellectual disability, and we conclude as to Young specifically that he has failed to show that he suffered any actual disability in presenting such a defense.

(c) Young argues that trying the questions of guilt and intellectual disability together also wrongly suggested to the jury that a finding of intellectual disability would result in inadequate punishment for the murder. As we discuss below in Division 34, the trial court properly charged the jury in a manner that made clear that, upon a finding of intellectual disability, Young would nevertheless be placed in the custody of the Department of Corrections. Accordingly, we conclude that this argument is unpersuasive.

(d) Young also argues that trying the questions of guilt and intellectual disability together deprived him of his ability to admit his guilt, "contrary to his desire and explicit request to accept the allegations of guilt." However, as we make clear below in Division 29, it is untrue as a matter of fact that Young ever sought to plead guilty to his charges other than as part of a plea bargain as to sentencing, which, as we explained above in Division 26, the trial court was not empowered to accept over the State's objection.

(e) In light of the foregoing discussion, and taking note of our discussion above in Division 25 regarding what procedural requirements are constitutionally required for intellectual disability claims, we conclude that the General Assembly's chosen procedure of trying intellectual disability claims together with the issue of guilt is not unconstitutional. See *Atkins*, 536 U. S. at 317 (III) ("As was our approach in *Ford v. Wainwright*, with regard to insanity, 'we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.'" (quoting *Ford*, 477 U. S. at 416 (V) (A)

(plurality portion of opinion))). Accordingly, we reaffirm this Court's prior case law on this issue. See *King*, 273 Ga. at 272 (27).

28. Young argues that his constitutional rights were denied by his being forced to speak to an expert witness designated by the trial court as a precondition to presenting his own expert testimony in support of his claim of intellectual disability. As discussed in detail below, we conclude that the trial court had discretion in this matter, but we further conclude that, because this claim was waived, we need not determine whether that discretion was abused.

(a) The circumstances concerning this claim began on June 2, 2011, when Young filed a notice regarding his intent to raise a mental health defense at trial. The notice stated: "[T]he defense intends to raise the issue that the defendant or accused was insane, mentally ill or mentally retarded at the time of the act or acts charged against the accused."

On June 29, 2011, in response to this notice, the trial court ordered an evaluation of Young regarding his competence to stand trial and regarding his criminal responsibility as it related to the "mental capacity to distinguish right from wrong" and any possible "presence of a delusional compulsion." On January 17, 2012, the trial court conducted a hearing regarding the matter, and defense counsel explained that Young had refused to speak to the expert during the court-ordered evaluation, explaining that defense counsel intended to argue at trial only intellectual disability and not any other mental health claim and asserting that the facts of the crimes were irrelevant to the question of intellectual disability. The State

countered that "the methods and manners and questions and evaluations that are used" to evaluate possible intellectual disability should be determined by the expert, that such an evaluation might need to include the circumstances of the crimes, that the trial court had asked the expert to evaluate the general question of criminal responsibility, and that any diagnosis of intellectual disability would likely require the expert to consider and rule out other diagnoses. The trial court indicated that it would issue another order for an evaluation "for purposes of criminal responsibility and competency to stand trial, with retardation as being the primary focus of that evaluation." The trial court then indicated its initial opinion that any refusal of Young to answer questions put to him by the expert would prevent his use of his own expert at trial, but it left the matter somewhat in flux by stating: "So if we run up on that again, I'll be prepared to rule on it. We'll have to just hear what is and is not being answered by the defendant." Young then asserted that the statute governing intellectual disability claims was unconstitutional. The trial court instructed defense counsel to notify it if they had any concerns once the court issued its new written order for an evaluation, and the court indicated that, if there were concerns, it would conduct a hearing and "cross that bridge when we get there."

On January 17 and 23, 2012, Young filed motions claiming that OCGA § 17-7-131 and Uniform Superior Court Rule 31.5 were unconstitutional to the extent that they might require him to speak to a mental health expert regarding the facts of the crimes. On January 24, 2012, the trial court conducted another hearing on this matter. The trial court maintained at the hearing that intellectual disability

was a continuing mental condition despite the fact that its onset must be before the age of 18 for it to be given as a diagnosis, that evidence of that condition throughout all of one's life was relevant to the question of whether one is intellectually disabled, and that the facts of the crime therefore were also relevant to that question. The trial court then issued an order for Young to be evaluated by a mental health expert regarding his criminal responsibility and his competence to stand trial.[19] On January 26 and 30, 2012, the trial court filed written orders denying Young's motions challenging OCGA § 17-7-131 and Uniform Superior Court Rule 31.5. On January 30, 2012, Young filed a notice indicating that he was withdrawing his previous notice of an intent to present "testimony of an evaluating expert" at trial.

(b) As the trial court correctly noted, and as we noted above in Division 27 (a), this Court has held that

> evidence of a defendant's crimes in a mental retardation trial may be admissible as probative evidence of the defendant's intelligence if that evidence demonstrates his mental ability and adaptive skills,or is otherwise relevant to

[19] With regard to this second order, which was issued after Young had committed to the trial court that he would claim at trial only intellectual disability and not insanity or incompetence, we query whether the order should have omitted any reference to criminal responsibility and competence. While we need not address this concern at length here, we recommend a reexamination of Uniform Superior Court Rule 31.5 and the model order provided in it, upon which the trial court's order appears to have been based.

> the question of whether he is mentally retarded.

Morrison, 276 Ga. at 831 (2). Cf. *Moore*, 139 SCt at 671-672 (III) (stating that clinicians might find this type of evidence relevant). We note, however, that in *Morrison* we relied on *Zant v. Foster*, in which this Court held that, in determining the proper role of evidence of a crime in a jury's consideration of a claim of intellectual disability, a trial court must exercise its discretion in weighing the probative value of such evidence against "unfair prejudice." *Zant v. Foster*, 261 Ga. 450, 451-452 (4) (406 SE2d 74) (1991), overruled on other grounds by *State v. Patillo*, 262 Ga. 259, 261 n.1 (417 SE2d 139) (1992).

This Court has also held that a death penalty defendant who wishes to support his or her claims at trial through expert mental health testimony must submit to an examination by a mental health expert selected by the State because of "'the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused.'" *Jenkins v. State*, 265 Ga. 539, 540-541 (3) (458 SE2d 477) (1995) (quoting *Lynd v. State*, 262 Ga. 58, 64 (11) (414 SE2d 5) (1992) (citation and punctuation omitted)). See also *Nance v. State*, 272 Ga. 217, 219- 220 (2) (526 SE2d 560) (2000) (citing *Buchanan v. Kentucky*, 483 U. S. 402, 422 (III) (A) (107 SCt 2906, 97 LEd2d 336) (1987), and *Estelle v. Smith*, 451 U. S. 454, 465 (II) (A) (2) (101 SCt 1866, 68 LE2d 359) (1981), and holding that, "when a defendant must submit to a court-ordered mental health examination because he wishes to present expert mental health testimony at his trial, the State expert may only testify in rebuttal to the testimony of

the defense expert or to rebut the testimony of the defendant himself"). However, this Court has also stated:

> In formulating the rule that a defendant in a case in which the State is seeking the death penalty must either cooperate in an evaluation by a mental health expert whose report will be given to the State or forfeit the right to present expert mental health testimony at trial, we have balanced the truth-seeking function of the courts, the defendant's constitutionally-protected privilege against self-incrimination, and the State's interest in having the ability to respond to the defendant's expert mental health testimony with [its own] expert testimony. ...
>
> We have taken pains to ensure that the extent to which a defendant must waive his constitutionally-protected right to remain silent is no greater than is necessary to serve the purpose mandating the waiver: "to permit the State to formulate a response or a rebuttal to the testimony of the defendant's mental health expert."

State v. Johnson, 276 Ga. 78, 79 (2) (576 SE2d 831) (2003) (quoting *Nance*, 272 Ga. at 219-220 (2)).

In view of these prior holdings, we caution that a trial court must exercise discretion in responding to a defense objection regarding the scope of questions to

be asked in a court-ordered mental health evaluation of alleged intellectual disability or in responding to an objection to the scope of expert testimony based on such an evaluation. We stress that an inquiry regarding the facts of a defendant's alleged crimes is not necessarily irrelevant in such an evaluation by the State's expert or the Court's expert simply because the defense and its own expert might think so. However, we also note that the facts of the crime that would be relevant to alleged intellectual disability often can be made known to a mental health expert through sources other than the defendant's own statements and that a defendant often can be asked questions by an expert regarding the defendant's personal abilities as they relate to the facts of the crimes without asking the defendant whether he or she admits committing those crimes.[20] Nevertheless, we need not consider whether the trial court properly exercised such discretion in Young's case, because, as we discuss below, we conclude that the issue was waived.

(c) On February 6, 2012, as jury selection was about to begin, the District Attorney stated:

> [T]he state will agree not to use any of the statements that the defendant makes pertaining to what happened at the time of the crime in terms of proving his guilt or innocence, despite the fact that that handcuffs the state in using

[20] For example, the State argues that Young's use of a GPS device to navigate to the crime scene is evidence undermining his claim of intellectual disability; however, we see no reason why Young could not have been asked by the State's expert generally about his ability to use a GPS device without being asked to make a direct admission of guilt.

> that evidence to prove whether or not he's mentally retarded, we will put the defendant in a position now where the state will agree not to introduce any of that testimony and then let them still make the strategic choice that they want to make in terms of an expert.

The District Attorney further agreed that the trial court could order its designated expert, who had already conducted an evaluation without the benefit of any statements from Young about the crimes and who had already submitted a report under seal, "not to ask any questions about what Mr. Young did at the time of the offense."[21] Young rejected the State's offer based solely on the fact that it would "prejudice[] the defense in [its] strategic decision making" to accept the offer at that stage of the case; however, we note that Young made no complaint regarding the availability of his own expert to testify and made no motion for a continuance. The State argued persuasively in response that Young's true motivation was the fact that his own expert had tested his IQ as being 77, a fact that would have been difficult to explain at trial. See *Hall*, 572 U. S. at 722 (III) (D) (stating that "an individual with an IQ test score 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning" (quoting *Atkins,* 536 U. S. at 309 n.5)); *Raulerson*, 928 F3d at 1008 (III)

[21] We note from our own review of the record that the expert's sealed report indicated that Young had refused to speak about the crimes at the direction of his counsel, but we note that the expert was nevertheless able to conduct psychological tests and to render an opinion, which was that Young was not intellectually disabled.

(C) (noting that "the Flynn effect adjusts for the empirical observation that IQ scores are rising over time" but that "there is no consensus about the Flynn effect among experts or among the courts"). In any case, the trial court implicitly accepted the State's offer and explicitly noted Young's rejection of that offer by stating: "All right. We will note, of course, the state's position as stated on the record. . . . [A]nd I will note the decision of the defense as to how the mental retardation defense is to be asserted." Accordingly, we conclude that Young's claim here has been waived for the purposes of ordinary appellate review. See *Martin*, 298 Ga. at 278- 279 (6) (d).

29. Young argues that he was forced to plead not guilty as a condition of seeking a verdict of guilty but mentally retarded and that such a requirement was unconstitutional and "prejudiced [him] by creating a false impression for the jury, judicially-sanctioned, that he did not accept responsibility and therefore felt no remorse." To the extent that Young is arguing that he was forced to plead not guilty as a precondition of seeking a decision by *a jury* of whether he was intellectually disabled, his claim is not supported factually by the record.

To support such a claim, Young relies on the transcript of a pretrial hearing held on whether he was required to speak to the State's expert about the facts of the crime as a precondition to presenting his own expert testimony on his alleged intellectual disability. However, a review of the full transcript reveals that Young was *not* willing to plead guilty as part of a jury trial. Defense counsel made comments indicating his hope that the jury would find Young guilty but mentally retarded, but those comments

never communicated a desire to enter a non-negotiated guilty plea. Instead, defense counsel stated: "I mean, essentially we would be happy to do so [plead guilty] in exchange for a sentence that we could agree upon." We also note that Young never moved the trial court to allow him to change the not guilty plea that he had entered and signed on the indictment. Indeed, even now on appeal, Young admits that his goal at this hearing was not to enter a guilty plea in advance of a jury trial, as he states: "In this case, defense counsel urged the court to allow Young to enter a plea of Guilty But Mentally Retarded in exchange for an agreed upon sentence." Accordingly, we conclude that Young never actually requested that he be allowed to enter a non-negotiated plea of guilty, with or without an associated claim of intellectual disability.

30. Young argues that the trial court erred by excluding testimony from three witnesses on the subject of his alleged intellectual disability. We see no error.

(a) During defense counsel's direct examination of a social worker from Young's high school who had known Young and his family since Young was a young child, defense counsel asked the witness whether and how he had "ever come into the[] lives" of Young's brothers and sisters. The State objected that the testimony sought was not relevant, and a bench conference was held and then explained later in detail on the record by the trial court and the parties. Defense counsel explained that he had been seeking testimony showing that Young's siblings had been in special education. Defense counsel conceded that it was "not universally accepted" in the mental health

profession that there was a genetic component to intellectual disability, and it was not disputed that the witness was not qualified to testify on the matter as an expert; however, defense counsel argued that, "in the general community, people are aware that certain diseases such as mental retardation, such as all different kinds of diseases, are genetic in nature." Nevertheless, defense counsel also stated immediately after the trial court announced its ruling: "I am certainly not making any assertion that anyone in Mr. Young's family is mentally retarded." Under these circumstances, we see no abuse of discretion in the trial court's sustaining the State's objection. See *Watson v. State*, 278 Ga. 763, 771 (10) (604 SE2d 804) (2004) (holding that the question of relevance is entrusted to a trial court's discretion and holding: "The proffered evidence in this case was too threadbare to be admissible."); cf. *Wilson v. State*, 233 Ga. 479, 481 (3) (211 SE2d 757) (1975) (holding that it was not improper for a non-expert to testify to a relevant factual matter within his personal knowledge).

(b) Pretermitting Young's likely waiver of the issue, we conclude that the trial court did not abuse its discretion by refusing to allow one of Young's former high school coaches to provide speculative testimony about what Young's team members thought of him or about whether the team members wished that they could be present at Young's trial. Instead, the trial court properly focused the witness's attention on his personal observations regarding Young's interactions with his teammates. Cf. *Mathis v. State*, 291 Ga. 268, 270 (2) (728 SE2d 661) (2010) (addressing improper testimony that "was based not on [the

witness's] personal knowledge but rather on hearsay").

(c) Another of Young's former high school coaches testified that Norfolk State College had regularly given "the opportunity to potential athletes to be admitted on a probationary status," that Young had "only lasted a short while" at the college, that "the idea wasn't so much for [Young] to be a four-year college graduate" but instead "was to hopefully improve his situation and to get him out of dodge," that "Norfolk State was giving him an opportunity to try to make it in school, to try to better himself," but that "[f]ootball was the whole idea." However, when the witness began to explain in more detail about what happened regarding the college when "they br[ought] you in," the State objected to "any sort of speculation about this" but conceded that the witness "c[ould] testify to personal knowledge about this situation." Defense counsel replied, "Sure." The trial court then stated that it was sustaining the objection and directed defense counsel to "focus in a little more." The witness then testified: "[Young] got in because we had a contact there who recognized his football ability." The State objected, stating that a foundation should be shown for any personal knowledge of the witness on the subject, and the trial court instructed defense counsel to "go a little more foundational with that" and to "[a]llow the witness to explain his knowledge and how he gained it and so forth." Defense counsel again replied, "Sure." Pretermitting the possible waiver of the issue by Young, we conclude that the trial court did not abuse its discretion in the manner in which it handled the State's objections regarding this witness. Cf. *Mathis*, 291 Ga. at 270 (2).

31. Young argues that the State presented testimony from three of his co-workers at a food-canning company that the State knew from Young's employment records to be false. See *Napue v. Illinois*, 360 U. S. 264, 269 (79 SCt 1173, 3 LE2d 1217) (1959). These co-workers testified at trial in the State's rebuttal case in the guilt/innocence phase, where Young's alleged intellectual disability was to be decided, that Young was "good at his job," was one of the "best operators" of the can-labeling equipment, was not "a problem employee," was "there every day, pretty much," "seemed to do fine," "was at work on time and everything," and was "always on time." From the 184 pages of Young's employment records spanning ten years, Young's brief points to "three suspensions, one lasting an entire week, twenty-nine unexcused absences, twenty-seven violations for lateness, and two warnings," to a notice of "poor job performance because of inattention, neglect or other non-deliberate actions," and to a notice regarding Young's third work suspension indicating that he would be terminated if he had an additional infraction.

In his response brief, the Attorney General notes that this "averages out to roughly a little less than three unexcused absences and three violations for lateness per year." Attempting to emphasize the gravity of the negative notations in his work records, Young cites the vague trial testimony of one of his co-workers that, "if you accumulate up to, like, eight points, you get your terminated [sic] from the job." But the jury was aware at trial that Young was never terminated, and even now Young cites part of his work records showing that eight points only warranted a suspension. We also note that one of the co-workers

testified that the point system "had nothing to do with the labeling part of it," which is borne out in the records and suggests that there is no reason to doubt the co-workers' testimony regarding Young's ability to perform his assigned work. Upon reviewing the co-workers' trial testimony and the ten years of work records submitted by Young on motion for new trial, the trial court found: "The defendant's personnel records do not establish as fact that the testimony of the defendant's coworkers and supervisors was knowingly and willfully false. . . ." We agree, and, therefore, Young's claim here fails.

32. Young argues that the State made improper arguments regarding his alleged intellectual disability. First, we hold that this claim has been waived for the purposes of ordinary appellate review, because Young did not raise any related objections at trial. See *Martin*, 298 Ga. at 278-279 (6) (d). Second, as we discuss below, the contested arguments were not improper.

(a) Young contends that the State's argument placed "undue emphasis on Young's perceived adaptive strengths, arguing that relative strengths could overcome adaptive deficits," and that the State's argument improperly relied on lay stereotypes. We disagree.

We note that it was the psychiatrist presented by the State[22] who set forth the areas of adaptive skills

[22] The State's psychiatrist, unlike the expert designated pretrial by the trial court whose report remained under seal, testified that he had never examined Young and had not reached a diagnosis regarding Young's alleged intellectual disability.

"listed in the DSM-IV-TR," an authoritative text in the field of mental health, and who, using a demonstrative exhibit without any objection from Young, explained the areas of adaptive skills "utilized by the American Academy of Mental Retardation."[23] On cross-examination by Young, the State's psychiatrist also explained the three areas of adaptive skills used by the American Association on Intellectual and Developmental Disabilities and the fact that a person would only need to have a deficit in *one* of those three areas to qualify for a diagnosis of mental retardation.

Notably, as the State did later in its closing argument, Young attempted in his cross-examination of the State's psychiatrist to emphasize specific things regarding Young's past behaviors and activities and how they might be relevant to the areas of adaptive skills. Even more notably, the State's psychiatrist answered affirmatively when Young asked whether "the DSM says that the focus is on the deficits," when Young asked whether, "if someone had particular strengths in any of these [areas of adaptive skills], they could still be classified as mentally retarded," when Young asked if it would be "irresponsible" to "ever say that[,] because [a person] can do X, one thing, that they are not mentally retarded," and when Young asked whether "what you're looking for is significant deficits in at least two" of the areas of adaptive skills when considering the list used by the

[23] Young assails the appropriateness of the diagnostic questions listed on this demonstrative exhibit. However, the State's psychiatrist explained that these questions were "some suggest[ed] questions that they have for looking at those particular skills area[s]."

AAMR. The State's psychiatrist also described how intellectually disabled persons often "try to act normal" and engage in "parroting behavior," that some of them are able to interact appropriately, that "they may not look mentally retarded on the surface," that they may appear "street smart," and that they may be able to do some tasks normally. See *Moore*, 139 SCt at 669 (I) (citing *Moore*, 137 SCt at 1051-1052 (IV) (C) (1)) (holding that the procedure for considering alleged intellectual disability must be based on the medical community's diagnostic standards).

Having itself presented an expert who carefully explained the proper analysis of areas of adaptive skills under prevailing professional standards, the State gave a closing argument that attempted to highlight various parts of the evidence showing Young's lack of deficits in those areas. Upon our review of the State's arguments at issue, we conclude that, although at times somewhat impassioned, they were not improper. See *Cullen v. Pinholster*, 563 U. S. 170, 200 (III) (D) (1) n.19 (131 SCt 1388, 179 LE2d 557) (2011) (noting that the prosecuting attorney cannot be expected to argue the evidence in the light most favorable to the defendant); *Ellington*, 292 Ga. at 143 (9) (c) (noting the latitude granted to the parties in making their closing arguments), disapproved on other grounds by *Willis*, 304 Ga. at 706 (11) (a) n.3.

(b) As we explained in Division 27 (a), evidence regarding a defendant's actions during and around the time of a crime can be probative on the question of whether a defendant lacks deficits in specific areas of adaptive behavior. See *Morrison*, 276 Ga. at 831 (2). See also *Moore*, 139 SCt at 671-672 (III) (stating that clinicians might find this type of evidence relevant).

Accordingly, we hold that the State did not act improperly by making arguments regarding Young's alleged intellectual disability based on the evidence of how he carried out his crimes.

(c) The State did not argue improperly by emphasizing the fact that there were no records showing any specific IQ score for Young, that the range of scores presumed by the school employees who testified on Young's behalf did not necessarily indicate intellectual disability, and that any additional IQ test that might be given to Young would "probably" show that, while not one of "the brightest bulbs on the tree," Young was not intellectually disabled. See *Ellington*, 292 Ga. at 143 (9) (c) (noting the latitude granted to the parties in making their closing arguments).

33. Young argues that a particular juror tainted the jury with extrajudicial evidence and that the jury engaged in premature deliberations. As explained below, we reject both arguments.

Young questioned the juror during voir dire about his stepdaughter, and the juror disclosed that his stepdaughter had "special needs," that she was 19 years old but at times was like a 7 or 8 year old, that he had been her caretaker for 18 years, that her need for special education became apparent at the age of 3 or 4 years old, that she had been slow to learn to speak, that her disability was not apparent from her physical appearance, and that she had been diagnosed as brain damaged. Young did not move to have the juror excused for cause.

In support of this claim, which Young also raised in his motion for new trial, he relies on the

testimony of an alternate juror. See *Collins v. State*, 308 Ga. 608, 610 (2) (842 SE2d 811) (2020) (noting that juror testimony is permitted regarding extraneous prejudicial information). But see *United States v. Siegelman*, 467 FSupp.2d 1253, 1279 (M.D. Ala. 2006) (expressing doubt that juror testimony regarding alleged premature deliberations is admissible). The alternate juror testified that the juror in question entered the jury room after some testimony about intellectual disability, that he appeared to be "agitated," and that he stated to several other jurors that "he knew what a disabled person was because his [step]daughter was disabled and she had to have a lot of care." The alternate juror testified that the juror in question "didn't actually come out and say" that Young was not disabled, but she testified that "it was basically like he could tell the difference between someone that had a disability and one that didn't," and she concluded, "I don't think he felt like [Young] had one." The alternate juror testified that the juror in question was in the same corner of the jury room and with the same few other jurors that he had been with during other breaks, but she added that the juror was not loud, that the other jurors did not gather around him, and that she never heard jurors, including those who were with the juror in question, deliberating or expressing an opinion about whether or not Young was intellectually disabled. In its order on Young's motion for new trial, the trial court found that the juror in question "was making statements concerning his life experience that apparently touched on the testimony he had just heard," that doing so was "understandable in light of his experience with his step daughter as revealed to counsel in voir dire," and that "[h]e expressed no opinion on any trial issues such as guilt or innocence

or the mental condition of the defendant." The trial court further found that "these issues were not discussed, talked about, or deliberated" and concluded that the matter did "not constitute premature deliberation." The trial court also concluded that the statements to several jurors by the juror in question "d[id] not constitute extra judicial evidence."

(a) In light of the foregoing, we accept the trial court's findings of fact and agree with the trial court's conclusion that no premature deliberations occurred. See *Sims v. State*, 266 Ga. 417, 419-420 (3) (467 SE2d 574) (1996).

(b) We also agree with the trial court's conclusion that the statements by the juror in question, which regarded matters that were discussed at length by him in his voir dire, did not warrant a new trial. See *Martin*, 298 Ga. at 292-294 (16) ("Having accepted Juror Lemmond as a juror, Martin cannot now complain that her knowledge drawn from her past employment assisted the other jurors in considering the evidence and arguments made by the parties at trial."), disapproved on other grounds by *Willis,* 304 Ga. at 706 (11) (a) n.3.

34. The trial court charged the jury, in accordance with OCGA § 17-7-131 (b) (3) (C), that a verdict of guilty but mentally retarded would result in Young's being "placed in the custody of the Department of Corrections," which would monitor his "mental health needs," and that, "at the discretion of the Department of Corrections," he could be "referr[ed] for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental Disabilities." The trial court correctly

refused to include Young's requested additional charge that, upon such a verdict, "the defendant w[ould] be sentenced to imprisonment for life." The charge as given was not misleading, because it clearly stated that the DOC would have custody of Young. Furthermore, this Court has held that charges prior to a guilty verdict generally should not give any instruction regarding possible sentences. See *Patillo*, 262 Ga. at 260. Although the charge prescribed by the Code and given in Young's case is a limited exception to this general rule that is designed to prevent jurors from speculating about a defendant's "immediate release" upon a finding of mental retardation, the additional charge requested by Young about a life sentence would have simply drawn undue attention to the issue of sentencing and would have raised questions such as whether or not a life sentence would carry the possibility of parole.

35. Young argues that the trial court erred by denying five requests to charge on the subject of intellectual disability, and he highlights in particular his requested charges that the jury could find Young intellectually disabled even if it found adequate functioning in some or many areas of adaptive functioning, that "[i]ndividuals may have capabilities and strengths that are independent of their mental retardation," and that such "abilities do not exclude a diagnosis of mental retardation." The trial court correctly instructed the jury on the statutory definition of "mental retardation," charging as follows: "The term mentally retarded means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior that became clear during the developmental period." See OCGA § 17-7-

131 (a) (3) (prior to an amendment in 2017 adopting the term "intellectual disability" and renumbering subdivisions); OCGA § 17-7-131 (a) (2) (after the amendment in 2017). We agree with the trial court that the additional, detailed charges requested by Young, which were drawn from two professional texts and a federal district court opinion, were not incorrect statements but nevertheless were more matters of evidence rather than legal principles suitable for jury charges.[24] Accordingly, we conclude that the trial court did not err in refusing to give them. See *Massey v. State*, 270 Ga. 76, 78 (4) (c) (508 SE2d 149) (1998) ("It is axiomatic that a trial court does not err in refusing to give a requested instruction in the exact language requested where the charges given in their totality substantially and adequately cover the principles contained in the requested charge.").

36. Young made no objection to the trial court's charging the jury, according to OCGA § 16-2-3, that "[e]very person is presumed to be of sound mind." Therefore, his claim on appeal that the charge should not have been given is subject to review only for whether there was plain error that affected substantial rights and under our Sentence Review below regarding Young's death sentence. See OCGA § 17-8-58 (b); *Martin*, 298 Ga. at 278-279 (6) (d). Nevertheless, we conclude that the trial court did not err under even the ordinary standard of review,

[24] We note that, through questioning both by the State on direct examination and by Young on cross-examination, the State's psychiatrist testified about the same diagnostic principles that Young asked the trial court to address in the jury charges.

because the charge was entirely consistent with the fact that, under Georgia law as we affirm it above, Young bore the burden of proving his alleged intellectual disability. See *Medina*, 505 U. S. at 452 (II) ("In light of our determination that the allocation of the burden of proof to the defendant does not offend due process, it is not difficult to dispose of petitioner's challenge to the presumption of competence imposed [under California law].").

37. Young argues that the pre-printed verdict form used in the guilt/innocence phase of his trial, coupled with the trial court's charges to the jury, would have misled the jury regarding its duties in considering his alleged intellectual disability. See *Rowland v. State*, 306 Ga. 59, 67-68 (6) (829 SE2d 81) (2019) (holding that a verdict form should be considered in conjunction with the jury charges); *Rucker v. State*, 270 Ga. 431, 435 (5) (510 SE2d 816) (1999) (holding that the use of a verdict form is error if it "would mislead jurors of reasonable understanding"). In Young's case, the verdict form and the jury charges made clear that the jury was to select, for each of the charges in the indictment, only one of the three verdict options: not guilty, guilty, or guilty but mentally retarded. The charges, read as a whole, also made clear that *no* verdict could be reached and entered on the verdict form unless it was unanimous. Furthermore, despite the trial court's somewhat confusing statement at one point that the jury should determine which of the three verdicts applied if it found that Young was "suffering mental retardation," the charges as a whole indicated that the jury should reach a unanimous conclusion regarding one option to the exclusion of the other two.

Finally, after first stating that the jury would have the "duty" to find Young guilty but mentally retarded if it so found beyond a reasonable doubt, the charges, in tracking the language of the pattern jury charge, later stated as to each charge that the jury would be "authorized" to enter such a verdict upon such a finding. See Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, § 3.80.50.[25] However, in light of the clear charges to the jury that any verdict must be unanimous and in light of a charge that individual jurors "should never surrender an honest opinion in order to be congenial or to reach a verdict," we conclude that the jury would not have been misled regarding its duties by the use of the word "authorized."[26] Cf. *Cheddersingh v. State*, 290 Ga. 680, 681-682 (2) (724 SE2d 366) (2012) (holding that a preprinted verdict form and jury charges should be considered as a whole and concluding that the verdict form might have led the jury to believe that it must conclude beyond a reasonable doubt that the defendant was not guilty in order to acquit).

Young raised no objection to either the charges at issue or to the verdict form. Therefore, the issues here are subject to review only for whether there was plain error that affected substantial rights and under

---

[25] In identifying no reversible error, we do not suggest that this pattern charge could not be improved.

[26] Young argues that the jury's notes to the trial court discussed in Division 45 show that it struggled with the issue of his alleged intellectual disability. Contrary to this argument, even assuming that such a fact is relevant at all to evaluating the charges and verdict form, we conclude that this fact shows that the jurors did indeed follow the trial court's charge on not surrendering individual opinions simply to reach a verdict.

our Sentence Review below regarding Young's death sentence. See OCGA § 17-8-58 (b); *Martin*, 298 Ga. at 278-279 (6) (d). To show plain error, an appellant must show: (1) there was no affirmative waiver; (2) the error was obvious; (3) the instruction likely affected the outcome of the proceedings; and (4) the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. See *Beasley v. State*, 305 Ga. 231, 236 (3) (824 SE2d 311) (2019). In light of the discussion above, and pretermitting the questions of whether any error here was affirmatively waived or should have been obvious to the trial court, we conclude that the outcome in Young's case was not likely affected and that any error did not seriously affect the fairness, integrity, or public reputation of his proceedings.

Issues Related to the Sentencing Phase

38. We see no merit to Young's arguments, including his arguments regarding the decline in the frequency of death sentences, that Georgia's death penalty statutes are unconstitutional in that they fail to sufficiently narrow the categories of murder eligible for the death penalty and thereby result in arbitrary and capricious death sentences. See *Ellington*, 292 Ga. at 116 (3) (b), disapproved on other grounds by *Willis,* 304 Ga. at 706 (11) (a) n.3.

39. Young argues that the trial court improperly closed the courthouse during the sentencing phase and thereby violated his constitutional rights. See *Waller v. Georgia*, 467 U. S. 39, 46 (II) (A) (104 SCt 2210, 81 LE2d 31) (1984) (discussing the right to a public trial). The day in question was a furlough day for county employees;

however, the trial court informed the parties that it would be having court on the furlough day and that the courthouse would be open to members of the public who wished to attend. On the furlough day, the trial court noted on the record that bailiffs had been "instructed at the front door that if anyone comes in looking for the, for a closed office, to tell them, but the building is open to the public." Young did not object to holding the trial on the furlough day. Testimony from officers confirmed that an entrance was open and that no one was turned away. We conclude that this issue was waived for the purposes of ordinary appellate review by Young's failure to object in the trial court. See *Martin*, 298 Ga. at 278-279 (6) (d). Furthermore, the record supports the trial court's finding that the courtroom remained open with access freely available to the public. Cf. *State v. Brown*, 293 Ga. 493, 493-496 (1) (748 SE2d 376) (2013) (addressing a courthouse that was accessible only to persons with a special relationship to court personnel).

40. Young argues that the trial court erred by overruling certain objections to the State's victim impact testimony. We have held previously that victim impact testimony should not include characterizations of the crime or the defendant and that it should not include any statements regarding the appropriate sentence. See *Bryant*, 288 Ga. at 895 (15) (a). We have held that testimony regarding the emotional impact on the victim's family and the community must be controlled within the trial court's discretion but is not categorically improper. See *Walker v. State,* 282 Ga. 774, 779- 780 (11) (653 SE2d 439) (2007), disapproved on other grounds by *Ledford v. State*, 289 Ga. 70, 85 (14) (709 SE2d 239) (2011), disapproved on other grounds by *Willis*, 304 Ga. at 706

(11) (a) n.3. We have held that victim impact testimony should not encourage the jury to base its sentencing decision on factors such as "class or wealth." *Livingston*, 264 Ga. at 404 (1) (b). We have held that "religious references" in victim impact testimony are not categorically prohibited but instead are entrusted to the trial court's discretion. *Pickren v. State*, 269 Ga. 453, 454-455 (1) (500 SE2d 566) (1998). We have also held that victim impact testimony may include evidence such as video recordings or photographs "of the victim alive." *Tollette v. State*, 280 Ga. 100, 105 (11) (621 SE2d 742) (2005). Finally, we have held that "even some legitimate victim impact evidence could inflame or unduly prejudice a jury if admitted in excess." *Livingston*, 264 Ga. at 404 (1) (b). Applying these various principles, and pretermitting the fact that Young waived much of this claim by failing to object or by failing to obtain rulings, we conclude that the specific portions of the victim impact testimony that Young complains about on appeal were not improper. See *Walker*, 282 Ga. at 779 (11).

41. Young argues that the trial court prevented him from asking certain witnesses in the sentencing phase about the impact that Young's execution would have on them. We conclude that, by agreeing first to a general set of questions to be asked of witnesses and then agreeing to additional questions to be asked of close family members, Young waived this claim for the purposes of ordinary appellate review. See *Martin*, 298 Ga. at 278-279 (6) (d). Furthermore, we conclude that the trial court's approach to this matter was not an abuse of discretion, because the court accepted the fact that a witness with especially intimate knowledge of a defendant can sometimes shed light on the defendant's character by asking for mercy and by

testifying about how the loss of the defendant would affect the witness personally and thus permitted some questions on the matter, while it also set reasonable limits on which witnesses were in a suitable position to give such testimony. See *Bryant*, 288 Ga. at 899 (16) (holding that "mitigating evidence that does not focus on the character, background, or offense of the particular defendant on trial is properly excluded"); *Barnes v. State*, 269 Ga. 345, 359 (27) (496 SE2d 674) (1998) ("In Georgia, mitigation evidence that relates to the individual defendant and not to the death penalty in general is admissible."); *Childs v. State*, 257 Ga. 243, 256 (19) (b) (357 SE2d 48) (1987) (holding that, "although a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, a defendant may not present witnesses to testify merely to their religious or philosophical attitudes about the death penalty"); *Romine v. State*, 251 Ga. 208, 217 (11) (305 SE2d 93) (1983) ("Ralph's testimony that he did not wish to see his grandson die would have been admissible in mitigation. . . .").

42. Young argues that it was unconstitutional for his jury to consider alleged non-statutory aggravating circumstances without being instructed that such circumstances must be found beyond a reasonable doubt. First, this specific issue was not raised in the trial court and therefore has been waived for the purposes of ordinary appellate review. See *Martin*, 298 Ga. at 278-279 (6) (d). Furthermore, contrary to Young's argument, "the finding of a non-statutory aggravating circumstance does not increase the defendant's maximum potential punishment" and therefore does not have to be found beyond a reasonable doubt. *Ellington*, 292 Ga. at 116-117 (3) (d)

(citing *Ring v. Arizona*, 536 U. S. 584, 609 (II) (122 SCt 2428, 153 LE2d 556) (2002)), disapproved on other grounds by *Willis*, 304 Ga. at 706 (11) (a) n.3.

43. We reject Young's invitation to overrule our precedent holding that this Court's proportionality review under OCGA § 17- 10-35 (c) (3) can never "'increase . . . the maximum punishment'" and therefore does not have to be performed by a jury under the beyond a reasonable doubt standard. *Willis*, 304 Ga. at 693 (3) (c) (citation omitted).

44. During sentencing phase deliberations, the jury sent the trial court a note asking if there is "an automatic appeal when the death penalty is given," and the trial court responded: "You are to decide this case based upon the evidence, the law and the instructions given to you. You are not to concern yourselves with matters of this nature." Young's complaint regarding this response was waived for the purposes of ordinary appellate review by Young's failure to object at trial. See *Martin*, 298 Ga. at 278-279 (6) (d). Furthermore, we conclude that the trial court's response was not unconstitutional as Young argues, because it did not suggest that "the responsibility for determining the appropriateness of the defendant's death rest[ed] elsewhere." *Caldwell v. Mississippi*, 472 U. S. 320, 329 (III) (105 SCt 2633, 86 LE2d 231) (1985) (reversing where the prosecutor argued that any death sentence would be reviewed by the appellate court for correctness).

45. Young argues that the trial court erred regarding two other notes from the jury during its sentencing phase deliberations. As explained below, we see no error.

(a) About an hour and 45 minutes into sentencing phase deliberations, a juror sent a note to the trial court stating: "I am asking to be dismiss [sic] as a juror. I have lots of questions and due to those I cann't [sic] say yes to death penalty." The trial court did not abuse its discretion by refusing Young's request to declare a jury deadlock and impose a sentence of life without parole, as it was not clear at this early stage that additional deliberations would be fruitless. The trial court also did not abuse its discretion by refusing Young's request "that the Court instruct the juror that each person's individual, moral assessment is to be respected." Instead, the trial court acted properly in simply letting the jury continue to deliberate under the court's original instructions, when there was no reason for the court to believe that the juror had misunderstood them, while announcing that it would take further action if the jury later notified the court of a deadlock. See *Porras v. State*, 295 Ga. 412, 419-420 (3) (761 SE2d 6) (2014) (holding that a trial court did not err by ordering the jury to continue deliberating). Cf. *Anderson v. State*, 262 Ga. 26, 27 (1) (c) (413 SE2d 732) (1992) ("The record in this case indicates that the jury was confused about the charge. No remedial instruction was given. . . .").

(b) Later, the jury sent a note informing the trial court that it was deadlocked eleven to one in favor of a death sentence and asking, "What is the next step?" At that point, which was after less than four hours of deliberations, the trial court properly charged the jury consistently with this Court's suggested modified *Allen* charge for such circumstances, instructing them (1) that each juror must agree in order for the jury to return a verdict, (2) that jurors have a duty to consult one another, (3) that

each juror must decide the case for himself or herself, (4) that a juror should not hesitate to reexamine his or her views and change an opinion if convinced that it is erroneous, and (5) that no juror should surrender his or her views solely based on other jurors' opinions or for the mere purpose of returning a verdict. See *Romine v. State*, 256 Ga. 521, 527 (1) (d) (350 SE2d 446) (1986). See also *Allen v. United States*, 164 U. S. 492 (17 SCt 154, 41 LE 528) (1896). We disagree with Young's contention that the charge given was coercive or improperly singled out the one juror who had not voted for death, even accounting for the fact that the jury had volunteered in its note the nature and breakdown of its deadlock. Cf. *Smith v. State*, 302 Ga. 717, 721 (2) (808 SE2d 661) (2017) (providing guidance on determining if an *Allen* charge was coercive).

46. We reject Young's argument that his right to be present was denied in the sentencing phase during bench conferences in which the juror notes regarding an alleged jury deadlock were discussed. We conclude that the trial court did not err in its order denying Young's motion for new trial in concluding that he was aware of the subject matter of the bench conferences, that the decisions made at them were announced in open court, that Young never personally voiced any concerns, and, accordingly, that Young personally acquiesced in the waiver of his presence that was made by his counsel. Cf. *Champ*, 310 Ga. at 834-848 (2) (a, b, and c) (remanding where the trial court had not ruled on the defendant's acquiescence in counsel's waiver).

47. Young argues that he is entitled to a new trial because a photograph of him as an infant or toddler was admitted at trial but is not included in the appellate record, despite the best efforts of his counsel on remand from this Court to complete the record, including a trip to New Jersey. First, Young has failed to show why he could not have obtained an adequate description of the photograph, with or without an intervening trip to New Jersey, in an order from the trial court pursuant to OCGA § 5-6-41 (f). Second, we conclude that a photograph of Young as a very young child would not assist our appellate review. See *West v. State*, 306 Ga. 783, 787 (2) (833 SE2d 501) (2019); *Brockman v. State*, 292 Ga. 707, 716 (5) (b) (739 SE2d 332) (2013) (denying relief where the defendant failed to show that he was harmed or prevented from raising any viable issue on appeal by the omission from the record of four exhibits, including three mitigation photographs).

48. Young argues that his convictions and sentences should be reversed based on a cumulative error analysis. Pretermitting the question of how suitable the various issues are for such a review and what rule this Court should adopt in that regard in the future, we hold that the cumulative effect of the several instances of constitutional violations and trial court error that we have assumed to exist above does not warrant relief under any rule that we might adopt. See *State v. Lane*, 308 Ga. 10, 14 (1), 17-18 (1), 21-22 (4) (838 SE2d 808) (2020) (holding that "Georgia courts . . . should consider collectively the prejudicial effect of trial court errors and any deficient performance by counsel — at least where those errors

by the court and counsel involve evidentiary issues" but declining to decide "exactly how multiple standards may interact under cumulative review of different types of errors").[27]

Sentence Review

49. Upon our review of the entire record, especially those portions relevant to the matters noted above that were waived for the purposes of ordinary appellate review, we conclude that the sentence of death in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See OCGA § 17- 10-35 (c) (1). See also *Martin*, 298 Ga. at 279 (6) (d) (stating regarding this Court's review under OCGA § 17-10-35 (c) (1): "That plenary review guards against any obvious impropriety at trial, whether objected to or not, that in reasonable probability led to the jury's decision to impose a death sentence.").

50. In its sentencing verdict, the jury found as statutory aggravating circumstances that the murder was committed while Young was engaged in the commission of burglary and aggravated battery and that the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture and aggravated battery to the victim before death and involved the defendant's depravity of mind. See OCGA § 17-10-30 (b) (2), (7). Upon our review of the record, we conclude that the evidence presented at trial was

[27] Our analysis here includes the issues addressed in Divisions 5, 16, and 37. However, we reiterate that we are not announcing here a rule regarding what types of error should be considered cumulatively.

sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of these statutory aggravating circumstances. See *Ring*, 536 U. S. 584, passim; *Jackson*, 443 U. S. at 319 (III) (B); OCGA § 17-10-35 (c) (2) (requiring a review of the statutory aggravating circumstances found by the jury); UAP IV (B) (2) (providing that, in all death penalty cases, this Court will determine whether the verdicts are supported by the evidence).

51. The Georgia Code requires this Court, in the direct appeal of a death sentence, to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." OCGA § 17- 10-35 (c) (3). As discussed below, we reject Young's arguments that our proportionality review is unconstitutional or otherwise improper, we reject his claim that he is categorically exempt from a death sentence based on his claim of intellectual disability, and we conclude that his death sentence is not disproportionate punishment.

(a) Contrary to Young's arguments, "[t]his Court's proportionality review is not inadequate under statutory or constitutional standards," *Ellington*, 292 Ga. at 117 (3) (e), disapproved on other grounds by *Willis*, 304 Ga. at 706 n.3, and there is no need for this Court to remand this case to the trial court for further proceedings regarding this issue. In support of this holding, we set forth our reasoning regarding Young's specific arguments in more detail below.

(i) As this Court has explained previously, our proportionality review

> concerns whether the death penalty 'is excessive per se' or if the death penalty is 'only rarely imposed . . . or substantially out of line' for the type of crime involved and not whether there *ever* have been sentences less than death imposed for similar crimes.

Gissendaner, 272 Ga. at 717 (19) (a) (citations omitted). Furthermore, as noted previously in a concurrence to the affirmance of the soundness of this Court's proportionality review:

> The Court does not determine whether the death sentence under review represents a large or small percentage of sentences in factually comparable cases. Rather, the Court examines the sentence on appeal to ensure that it is not an anomaly or aberration.

Terrell v. State, 276 Ga. 34, 46 (572 SE2d 595) (2002) (Fletcher, C.J., concurring). Thus, an argument like Young's highlighting the infrequency of death sentences in Georgia, particularly regarding cases involving crimes that are arguably somewhat similar to his and defendants that are arguably somewhat similar to him, "while not irrelevant, cannot alone compel a finding of unlawful disproportionality." *Gissendaner*, 272 Ga. at 717 (19) (a). Instead, "[t]his Court views a particular crime against the backdrop of all similar cases in Georgia in determining if a given sentence is *excessive per se or substantially out of line*." Id. (emphasis supplied). We reaffirm these aspects of our proportionality review.

(ii) We reaffirm this Court's previous holding that, "[b]ecause it is a jury's reaction to the evidence before it that concerns this Court in its proportionality review, it is irrelevant if the sentences in the cases used for comparison were already at the time, or later are, reversed for reasons unrelated to the juries' reactions to the evidence." *Davis v. Turpin*, 273 Ga. 244, 246 (2) (539 SE2d 129) (2000).[28]

(iii) We disagree with Young's assertion that this Court's partial reliance in its proportionality review on some cases that are not as recent as others in itself renders this Court's proportionality review inadequate.

(iv) The Georgia Code provides that this Court

> shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence reviewed in accordance with Code Section 17-10- 35.

---

[28] Young cites one particular case that he claims this Court cited in its proportionality reviews in several other defendants' direct appeals but was later vacated on habeas review on grounds that arguably affect the question of proportionality regardless of the correctness of our reasoning in *Davis*; Young's point is unpersuasive, however, because his proportionality review is being conducted here on its own merits. We are also unpersuaded by Young's arguments that are based on a 2007 newspaper article that takes a different view than we did in *Davis*.

OCGA § 17-10-37 (b) (as amended by Ga. L. 2010, p. 420, § 2). In a case where this Court affirms a death sentence, the role of the "compil[ation] of] such data," id., is reflected in this Court's published decision, including in an appendix providing "a reference to those similar cases which [this Court] took into consideration," OCGA § 17-10-35 (e). See also OCGA § 17-10-35 (e) (2) (directing this Court to provide the trial court, for resentencing purposes, with "[t]he records of those similar cases" cited by this Court in its opinion and with "the extracts prepared as provided for in subsection (a) of Code Section 17-10-37" in any case where this Court sets aside a death sentence on proportionality grounds). This Court's proportionality review complies with statutory requirements regarding its consideration of relevant data, and we hold that this Court's practices regarding those data are not unconstitutional. In light of this holding, we decline Young's invitation to remand this case for further evidentiary development regarding this issue, including his request to probe this Court's internal deliberative processes via an Open Records Act request directed at this Court and via subpoenas directed to this Court's staff. Cf. UAP IV (B) (1) (providing for this Court to direct the trial court to conduct whatever further proceedings this Court deems necessary to allow a full review on appeal).

(v) Finally, Young complains that it is "unfair" that he will not have access to this Court's reasoning regarding the proportionality of his death sentence prior to the issuance of this opinion, after which his only remaining remedy in this Court will be a motion for reconsideration. In rejecting this argument, we note that a similar difficulty presents itself to all

unsuccessful appellants in this Court, regardless of the issue decided on appeal.

(b) Young argues that he belongs to a class of persons, namely persons with intellectual disability, who are categorically exempt from the death penalty under the United States Constitution and the Georgia Constitution and that this Court should enforce that exemption through this Court's proportionality review in his case, see OCGA § 17-10-35 (c) (3), or through other unspecified authority. Although we have previously held that the execution of an intellectually disabled person would violate the Georgia Constitution, see *Fleming*, 259 Ga. at 690 (3), we see no constitutional infirmity in the General Assembly's determination that the issue of whether a defendant is categorically exempt from the death penalty based on intellectual disability should be decided by a jury, rather than by this Court, subject only to this Court's review of the sufficiency of the evidence to support the jury's verdict. But cf. *Hill*, 269 Ga. at 303-304 (3 and 4) (holding that, where alleged intellectual disability was not determined by a jury at trial despite the statutory provision allowing for such a claim at that stage, a *habeas* court may consider alleged intellectual disability under the miscarriage of justice exception to the procedural default rule). Nevertheless, we do consider Young's evidence of alleged intellectual disability falling short of the categorical exemption here in our proportionality review, because we are directed by law to consider "the crime *and the defendant*." OCGA § 17-10-35 (c) (3).

(c) The evidence in this case shows that, after weeks of careful planning, Young ruthlessly executed the prolonged attack on and brutal murder of his

former fiancée's son for the purpose of manipulating his former fiancée into resuming a relationship with him and returning to live with him. Considering both the crime and the defendant, including the evidence of his intellectual difficulties, we conclude that the death sentence imposed for the murder in this case is not disproportionate punishment within the meaning of Georgia law. See OCGA § 17-10-35 (c) (3); *Gissendaner*, 272 Ga. at 716-717 (19) (a) (holding that this Court's statutorily mandated proportionality review concerns whether a particular death sentence "is excessive per se" or is "substantially out of line"). The cases cited in the Appendix support our conclusion, because each shows a jury's willingness to impose a death sentence for the deliberate, unprovoked commission of a murder during the commission of a burglary, see OCGA § 17-10-30 (b) (2), or a murder that was "outrageously or wantonly vile, horrible, or inhuman," see OCGA § 17-10-30 (b) (7). See OCGA § 17-10-35 (e). See also *Barrett v. State*, 292 Ga. 160, 190 (4) (733 SE2d 304) (2012) (explaining that seldom, if ever, will the facts surrounding two death penalty cases be entirely alike and that this Court is not required to find identical cases for comparison in its proportionality review); *Ross v. State*, 233 Ga. 361, 366-367 (2) (211 SE2d 356) (1974) ("It is the reaction of the sentencer to the evidence before it which concerns this court and which defines the limits which sentencers in past cases have tolerated. . . .").

Judgment affirmed. All the Justices concur, except Nahmias, P. J., and Boggs and Peterson, JJ., who concur specially, Warren, J., who concurs in judgment only, and Bethel, J., who dissents.

Spears v. State, 296 Ga. 598 (769 SE2d 337) (2015), disapproved on other grounds by *Willis v. State*, 304 Ga. 686, 706 (11) (a) n.3 (820 SE2d 640) (2018); *Barrett v. State*, 292 Ga. 160 (733 SE2d 304) (2012); *Ledford v. State*, 289 Ga. 70 (709 SE2d 239) (2011), disapproved on other grounds by *Willis,* 304 Ga. at 706 (11) (a) n.3; *Arrington v. State*, 286 Ga. 335 (687 SE2d 438) (2009); *Walker v. State,* 282 Ga. 774 (653 SE2d 439) (2007) (relevant to Young's case despite the fact that the convictions and sentences were later vacated for reasons unrelated to the jury's reaction to the evidence before it, see *Humphrey v. Walker*, 294 Ga. 855 (757 SE2d 68) (2014), disapproved on other grounds by *Ledford,* 289 Ga. at 85 (14), disapproved on other grounds by *Willis,* 304 Ga. at 706 (11) (a) n.3)); *Lewis v. State,* 277 Ga. 534 (592 SE2d 405) (2004) (relevant to Young's case despite the fact that the death sentence was later vacated for reasons unrelated to the jury's reaction to the evidence before it, see *Hall v. Lewis*, 286 Ga. 767, 767-768, 781 (II) (692 SE2d 580) (2010)); *Sallie v. State*, 276 Ga. 506 (578 SE2d 444) (2003); *Braley v. State*, 276 Ga. 47 (572 SE2d 583) (2002); *Terrell v. State*, 276 Ga. 34 (572 SE2d 595) (2002); *Fults v. State*, 274 Ga. 82 (548 SE2d 315) (2001); *McPherson v. State*, 274 Ga. 444 (553 SE2d 569) (2001) (relevant to Young's case despite the fact that the death sentence was later vacated for reasons unrelated to the jury's reaction to the evidence before it, see *Hall v. McPherson,* 284 Ga. 219, 220 (663 SE2d 659) (2008)); *King v. State*, 273 Ga. 258 (539 SE2d 783) (2000); *Jones v. State*, 273 Ga. 231 (539 SE2d 154) (2000), overruled on other grounds by *State v. Lane*, 308 Ga. 10, 23 (838 SE2d 808) (2020); *Drane v. State*, 271 Ga. 849 (523 SE2d 301) (1999), 265

Ga. 255 (455 SE2d 27) (1995); *Jones v. State*, 267 Ga. 592 (481 SE2d 821) (1997).

S21P0078. YOUNG v. THE STATE.

NAHMIAS, Presiding Justice, concurring specially.

With the one exception that I discuss below, I am fairly confident that the Court reaches the right result on all of the issues presented in this case, so I concur in the judgment upholding Young's convictions and sentences, including his death sentence. I am less sure about everything the plurality opinion says, or fails to say, about each of the issues presented. I do not fault the author of the plurality opinion for that, because the opinion has to try to explain its reasoning regarding the 50 enumerations of error (many with subparts) raised in Young's 466-page principal brief (which was supplemented by another 76 pages of argument in a reply brief), and the Court must decide this case (along with our many other second- term cases) by July 2 to comply with our state Constitution's unique "two-term rule." See Ga. Const. of 1983, Art. VI, Sec. IX, Par. II ("The Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court's docket for hearing or at the next term.").

This Court has not (yet) imposed a page limit on briefs in death penalty cases. See Supreme Court Rule 20 (3). Compare id. (1) and (2) (imposing a 50-page limit for principal briefs in other criminal cases and a 30-page limit in civil cases). Young presents several substantial issues, but it is difficult to identify the wheat among all the chaff, and even the chaff must be addressed. Indeed, the plurality opinion might be 250 pages long if it dealt with every issue in

detail (and if this Court had time to do so). Because Young has chosen to present his appeal in this way, I join only the result of the plurality opinion, without necessarily agreeing with every bit of its analysis.

The issue that is closest, as evidenced by Justice Bethel's dissent, and as to which I have the least confidence in the result, is the continued viability, under the Eighth Amendment of the United States Constitution, of Georgia's unique statute placing on the defendant the burden of proving his intellectual disability beyond a reasonable doubt. See OCGA § 17-7-131 (c) (3). As the plurality opinion recounts, in 1988, the people of this State, acting through their elected representatives, were the first in the nation to take the humane step of prohibiting the execution of intellectually disabled criminal defendants. See id. (j) (prohibiting the imposition of the death penalty after a finding of intellectual disability). Not long thereafter, this Court, and then the United States Supreme Court, constitutionalized that prohibition using the doctrine that applies the "cruel and unusual punishments" constitutional text based on "evolving standards of decency that mark the progress of a maturing society." See *Fleming v. Zant*, 259 Ga. 687, 689-690 (386 SE2d 339) (1989); *Atkins v. Virginia*, 536 U.S. 304, 312, 321 (122 SCt 2242, 153 LE2d 335) (2002).

That doctrine, which does not purport to be founded on the original public meaning of the constitutional text, allows judges to outlaw punishments based on their judicial conceptions of what contemporary "decency" requires. See *Atkins*, 536 U.S. at 337 (Scalia, J., dissenting) (explaining that the rule adopted by the majority opinion "find[s] no

support in the text or history of the Eighth Amendment"); *Conley v. Pate*, 305 Ga. 333, 339-341 (825 SE2d 135) (2019) (Peterson, J., concurring) (explaining that the majority opinion in *Fleming* departed without explanation from "the history and context of the Georgia Constitution, as well as over 100 years of Georgia precedent," to adopt the "evolving standards of decency" doctrine from the United States Supreme Court case law). I say "judicial conceptions," because although judges applying this doctrine often purport to be reflecting the views of contemporary American (or Georgian) society, the cases often disregard the best evidence of those views, which is contemporary *legislation* enacted by the people's elected representatives.[29]

---

[29] Perhaps the most telling example of this is the United States Supreme Court's 5-4 decision in *Kennedy v. Louisiana*, 554 U.S. 407 (128 SCt 2641, 171 LE2d 525) (2008), which prohibited under all circumstances the death penalty for rape of a child not resulting in the child's death. See id. at 421. The majority then stuck to that position even when the Court was advised in a motion for rehearing that only two years before, Congress had enacted (by vote of 374-41 in the House and 95-0 in the Senate) and the President had signed a law authorizing the death penalty for members of the military who rape a child. See *Kennedy v. Louisiana*, 554 U.S. 945, 946-948 (129 SCt 1, 171 LE2d 932) (2008) (statement of Kennedy, J., respecting the denial of rehearing); id. at 948- 950 (statement of Scalia, J., respecting the denial of rehearing). Justice Scalia, who had dissented, explained why he was not voting to grant rehearing as follows:

> I am voting against the petition for rehearing because the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case. The majority opinion, after

Consequently, when we enter the realm of Eighth Amendment "evolving standards of decency," if there is not a holding from a United States Supreme Court case directly on point, a lower court trying to understand what validly enacted state laws that Court will decide the United States Constitution has morphed to nullify requires guessing about what the majority of Justices currently serving on that Court will decide when a particular new issue is presented to them. The *Atkins* majority explained that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national

---

> an unpersuasive attempt to show that a consensus against the penalty existed, in the end came down to this: "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 554 U.S. [at 434]. Of course the Constitution contemplates no such thing; the proposed Eighth Amendment would have been laughed to scorn if it had read "no criminal penalty shall be imposed which the Supreme Court deems unacceptable." But that is what the majority opinion said, and there is no reason to believe that absence of a national consensus would provoke second thoughts.

Id. at 948-949. The dissent in *Fleming* similarly explained that in holding that the death penalty for the intellectually disabled was prohibited by the Georgia Constitution based primarily on the enactment of OCGA § 17-7-131, the majority disregarded the limitations and prospective-only application of that statute enacted by the people's representatives. See *Fleming*, 259 Ga. at 691-701 (Smith, J., dissenting).

consensus," and asserted that the Court would therefore "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317 (citation and punctuation omitted). Taking heed of those statements, this Court held in *Head v. Hill*, 277 Ga. 255, 260-263 (587 SE2d 613) (2003), and reiterated in *Stripling v. State*, 289 Ga. 370, 371-374 (711 SE2d 665) (2011), that Georgia's beyond-a-reasonable-doubt standard of proof for claims of intellectual disability (in conjunction with other procedures protecting the intellectually disabled from death sentences) does not violate the Eighth Amendment. And the en banc United States Court of Appeals for the Eleventh Circuit held that our decisions on this issue were not contrary to clearly established federal law. See *Hill v. Humphrey*, 662 F3d 1335, 1337-1338 (11th Cir. 2011) (en banc), cert. denied, 566 U.S. 1041 (132 SCt 2727, 183 LE2d 80) (2012).

Thereafter, however, in *Hall v. Florida*, 572 U.S. 701 (134 SCt 1986, 188 LE2d 1007) (2014), and *Moore v. Texas*, 581 U.S. ___ (137 SCt 1039, 197 LE2d 416) (2017), the majority on the United States Supreme Court began to constrain the leeway that the states appeared to have been given regarding how intellectual disability may be determined. The *holdings* of those two cases do not address what standard of proof may be used to evaluate an intellectual disability claim, and thus they plainly do not affect Georgia's law. But as Justice Bethel explains in his dissent, some of the *reasoning* of the cases, particularly their disapproval of state measures that "'creat[e] an unacceptable risk that persons with intellectual disability will be executed,'" *Moore*, 137

SCt at 1044 (quoting *Hall*, 572 U.S. at 704), certainly casts doubt on this State's uniquely high standard of proof.

The reasoning of the United States Supreme Court's decisions does not bind lower courts, however; only the holdings govern. Cf. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (109 SCt 1917, 104 LE2d 526) (1989) (explaining that even when the holding of a Supreme Court case appears to be contradicted by the reasoning of another line of decisions, the holding rather than the subsequent reasoning is binding on lower courts). And particularly in this area of "evolving standards of decency," in which it all comes down to whether five Justices decide to "evolve" the Eighth Amendment a little more, it is risky to rely on reasoning alone. Indeed, this Court just experienced that pitfall in another area of "evolving" Eighth Amendment jurisprudence – the imposition of life without parole sentences on defendants convicted of murders committed when they were juveniles.

Since the death penalty for juveniles was outlawed by the 5-4 decision in *Roper v. Simmons*, 543 U.S. 551, 578 (125 SCt 1183, 161 LE2d 1) (2005), the clear trend line of the United States Supreme Court's cases in this area (all decided by narrow margins) was to restrict the states' authority to punish juveniles. In particular, the reasoning of the Court's 6-3 majority opinion in *Montgomery v. Louisiana*, 577 U.S. 190 (136 SCt 718, 193 LE2d 599) (2016), seemed to make it clear that before a juvenile murderer could be sentenced to life without parole, the sentencer must consider more than just the defendant's youth and its attendant characteristics; there must be a specific

determination that the defendant is one of those "rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility." Id. at 208-212. This Court and other lower courts relied on that reasoning to require such a determination. See *Veal v. State*, 298 Ga. 691, 702-703 (784 SE2d 403) (2016). See also, e.g., *Malvo v. Mathena*, 893 F3d 265, 275 (4th Cir. 2018); *Commonwealth v. Batts*, 163 A3d 410, 459 (Pa. 2017). But then the composition of the United States Supreme Court changed, and just a few weeks ago that Court held, by a 6-3 margin, that notwithstanding most of what the *Montgomery* majority opinion said, that decision does *not* require a specific finding of permanent incorrigibility. See *Jones v. Mississippi*, 593 U.S. ___ (141 SCt 1307, 1311, 209 LE2d 390) (2021). See also *Holmes v. State*, Case No. S21A0377, slip. op. at 11-17 (decided June 1, 2021). Both the three dissenters and Justice Thomas (who concurred in the judgment based on his view that *Montgomery* was wrongly decided) criticized the majority opinion for disregarding *Montgomery*'s logic and reasoning. See *Jones*, 141 SCt at 1323, 1326-1328 (Thomas, J., concurring in the judgment); id. at 1330-1337 (Sotomayor, J., dissenting).

Jones demonstrates that courts like mine should be cautious in deciding Eighth Amendment cases based on aspects of the reasoning, rather than the square holdings, of the United States Supreme Court's "evolving standards of decency" decisions, and should be wary of trying to predict which way those holdings are trending. If I had to guess today, I would say that it is likely that if the United States Supreme Court, as currently comprised, is called on to decide whether Georgia's beyond-a-reasonable-doubt-standard for proof of intellectual disability violates

the Eighth Amendment, a majority of the Justices would not extend the holdings of *Hall* and *Moore* to strike down our State's statute, notwithstanding the reasoning of the majority opinions in those two cases.

Of course I (and the majority of this Court) could be wrong. Young is welcome to seek certiorari from the United States Supreme Court to have that Court tell us that we are wrong; I would obediently accept and forthrightly apply such a decision. Young and his advocates are also welcome to try to persuade the people of Georgia, through their elected representatives, to revisit OCGA § 17-7-131 (c) (3) in light of the extensive developments in the science of intellectual disability and the law in this area since that statute was enacted more than three decades ago; if the General Assembly takes a further humane step with regard to criminal defendants who are potentially intellectually disabled, I would embrace that change. In the meantime, however, I see no compelling reason for this Court to overrule our well-established precedent on this issue.

I am authorized to state that Justice Boggs and Justice Peterson join this special concurrence.

S21P0078. YOUNG v. THE STATE.

BETHEL, Justice., dissenting

"[T]he Eighth and Fourteenth Amendments to the [United States] Constitution forbid the execution of persons with intellectual disability." *Hall v. Florida*, 572 U. S. 701, 704 (I) (134 SCt 1986, 188 LE2d 1007) (2014) (citing *Atkins v. Virginia*, 536 U. S. 304, 321 (IV) (122 SCt 2242, 153 LE2d 335) (2002)). However, before a person can access this constitutional protection, Georgia requires that the person first prove that he or she is intellectually disabled beyond a reasonable doubt. See OCGA § 17-7-131 (c) (3), (j). As others have before him, Young argues that Georgia's law is unconstitutional. See, e.g., *Stripling v. State*, 289 Ga. 370, 371-374 (1) (711 SE2d 665) (2011); *Head v. Hill*, 277 Ga. 255, 260 (II) (B) (587 SE2d 613) (2003) (rejecting habeas court decision that beyond-a-reasonable-doubt standard is unconstitutional under *Atkins* because "nothing in *Atkins* instructs the states to apply any particular standard of proof to [intellectual disability] claims"). But Young suggests that subsequent decisions of the Supreme Court of the United States cast doubt on *Stripling* and *Head* and compel a different conclusion. I agree.

In *Atkins*, the Supreme Court of the United States determined that the United States Constitution prohibits the execution of intellectually disabled persons. See 536 U. S. at 321 (IV). When this constitutional protection was identified, its contours were not particularly well-defined, and it appeared that the individual states were to be responsible for

defining and safeguarding this right. See id. at 317 (III) ("[W]e leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." (citation and punctuation omitted)); see also *Bobby v. Bies*, 556 U. S. 825, 831 (I) (129 SCt 2145, 173 LE2d 1173) (2009) ("Our opinion [in *Atkins*] did not provide definitive procedural or substantive guides for determining when a person who claims [intellectual disability] will be so impaired as to fall within *Atkins*' compass. We left to the States the task of developing appropriate ways to enforce the constitutional restriction." (citation and punctuation omitted)). Since then, however, we have learned that States are not authorized to enforce legislative rules or judicial tests that by design or operation create "an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 572 U. S. at 704 (I); see also *Moore v. Texas*, __ U. S. __ (137 SCt 1039, 1051 (IV) (C) (1), 197 LE2d 416) (2017).

In *Hall*, Florida's rule precluding a finding of intellectual disability for any person scoring over 70 on an IQ test failed constitutional review because it created "an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 572 U. S. at 704 (I). The "rigid" statutory rule in *Hall* was deemed unacceptable by the Supreme Court, in part because the strict rule failed to consider the margin of error and variability inherent in IQ testing, and thus disregarded established medical practice. See id. at 713-714 (III) (A).

Likewise, in *Moore*, the seven-factor test established by Texas courts to evaluate intellectual disability was found to be deficient because "by design

and in operation," the Texas test created "'an unacceptable risk that persons with intellectual disability will be executed.'" *Moore*, 137 SCt at 1051 (IV) (C) (1) (citing *Hall*, 572 U. S. at 701). More specifically, the Supreme Court determined that the Texas test failed to protect those with mild levels of intellectual disability from execution. See id. This was impermissible because "the entire category of intellectually disabled offenders" is constitutionally protected from execution. (Citation, punctuation, and emphasis omitted.) Id.

The question before us, then, is whether Georgia's requirement that a defendant prove his or her own intellectual disability beyond a reasonable doubt creates "an unacceptable risk that an intellectually disabled person will be executed." *Hall*, 572 U. S. at 704 (I). Here, the existence of such a risk seems plain.

Obviously, some portion of persons who are actually intellectually disabled would, nevertheless, find it difficult to prove that fact in a judicial proceeding under any standard of proof. See *Raulerson v. Warden*, 928 F3d 987, 1015, 1016 (I) (C) (11th Cir. 2019) ("Intellectual disability is an inherently imprecise and partially subjective diagnosis. . . . Given that intellectual disability disputes will always involve conflicting expert testimony, there will always be a basis for rejecting an intellectual disability claim.") (Jordan, J., concurring in part and dissenting in part); see also *Hill v. Humphrey*, 662 F3d 1335, 1367 (I) (11th Cir. 2011) (Barkett, J., dissenting) ("[M]ental retardation spans a spectrum of intellectual impairment[.]"). There is a risk of failure in every effort to divine truth through a

judicial proceeding. Employing the highest burden of proof in our system of justice, however, significantly increases the risk of an offender with an actual intellectual disability being executed because he or she is unable to meet the high standard of proof.[30] Under Georgia's standard, a meaningful portion of intellectually disabled offenders are effectively excluded from the constitutional protection recognized in *Atkins*. See *Humphrey*, 662 F3d at 1365-1366 (Barkett, J., dissenting) (noting that the State does not "have unfettered discretion to establish procedures that through their natural operation will deprive the vast majority of [intellectually disabled] offenders of their Eighth Amendment right not to be executed"). The United States Constitution protects *all* intellectually disabled offenders from execution under *Atkins*, and Georgia's standard "effectively limits the constitutional right protected in *Atkins* to only those who [suffer from severe or profound intellectual disability]" such that their disability is not subject to any real dispute or doubt. Id. at 1365-1377. But as the Supreme Court has determined, the Eighth and Fourteenth Amendments must afford protection to an offender whose disability is less obvious or profound. See *Moore*, 137 SCt at 1051 (IV) (C) (1).

---

[30] Indeed, the beyond-a-reasonable-doubt standard employed in criminal proceedings has been described in the legal community as a societal preference for acquitting guilty people rather than risking incarceration of the innocent. See, e.g., *In re Winship*, 397 U. S. 358, 372 (90 SCt 1068, 25 LE2d 368) (1970) (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

Further, when the standard of proof is beyond a reasonable doubt, an individual juror who merely believes the defendant to be probably or even clearly intellectually disabled would still be authorized to join a sentence of death if any part of their mind was wavering, unsettled, or unsatisfied that the defendant had proven intellectual disability. We know that a rigid cutoff for IQ that does not account for variability and margin of error in the test is unreasonable. See *Hall*, 572 U. S. at 713-714 (III) (A). Likewise, we know that employing a test that exposes those with mild intellectual disabilities to a greater risk of execution is unreasonable. See *Moore*, 137 SCt at 1051 (IV) (C) (1). With these truths in mind, then, it seems plain to me that requiring the highest burden of proof known to our judicial system is also unreasonable because it fails to protect intellectually disabled persons who are unable to prove that fact beyond a reasonable doubt. Accordingly, while I concur in the balance of the Chief Justice's opinion, I respectfully dissent with respect to Division 25. Thus, I would vacate the trial court's judgment and remand the case for a new jury trial on the sole question of intellectual disability and for resentencing consistent with the result of that trial, or for other constitutionally agreeable proceedings.

APPENDIX B

[Seal: SUPREME COURT OF GEORGIA – WISDOM – JUSTICE – MODERATION – 1845]

SUPREME COURT OF GEORGIA
Case No. S21P0078

June 24, 2021

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

RODNEY RENIA YOUNG v. THE STATE.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that the motion be hereby denied. The opinion issued by this Court on June 1, 2021 is vacated, and the attached opinion is substituted therefor. No additional time for motions for reconsideration shall be allowed.

All the Justices concur, except Bethel, J., who dissents.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Therese S. Barnes, Clerk

APPENDIX C

12 JAN SCANNED [ILLEGIBLE]

IN THE SUPERIOR COURT OF NEWTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

V. RODNEY YOUNG

Defendant.

INDICTMENT NUMBER

2008-CR-1473-3

Order on Motion #86

ORDER DENYING DEFENDANT'S MOTION TO DECLARE O.C.G.A. § 17-7-131 UNCONSTITUTIONAL

The above-captioned motion came on for a hearing on January 17, 2012, with the defendant present and represented by counsel. The defendant filed an unnumbered motion, which will hereinafter be referred to as Motion #86, in which the defendant argued that O.C.G.A. § 17-7-131, which requires the

defendant to prove mental retardation beyond a reasonable doubt is unconstitutional. The issue has already been presented to the Supreme Court of Georgia, and based upon the holding in Stripling v. State, 289 Ga 370, 711 S.E.2d 665 (2011), the defendant's motion is hereby denied.

So ordered, this 17 day of January, 2012.

/s/ Samuel D. Ozburn

Samuel D. Ozburn
Judge, Superior Court
Alcovy Judicial District

CERTIFICATE OF SERVICE

I, Kristi M. Bradford, secretary to Judge Samuel D. Ozburn, do hereby certify that I have this day served the within Order(s) upon the individuals listed below by facsimile transmittal, electronic mail and/or by mailing a copy of same to them by U.S. Mail in envelopes having sufficient postage thereon to insure delivery:

Layla H. Zon, Esq.
District Attorney, Alcovy Judicial Circuit
Newton County District Attorney's Office
1132 Usher Street, Room 313
Covington, Georgia 30014
Fax: (770} 784-2069

Joseph Andrew Romond, Esq.
Office of the Georgia Capital Defender
225 Peachtree Street, NE. Suite 900
Atlanta, Georgia 30303
Fax: (404) 739-5155

Teri L. Thompson, Esq.
Office of the Georgia Capital Defender
225 Peachtree Street, NE, Suite 900
Atlanta, Georgia 30303
Fax: (404) 739-5155

Thea A. Delage, Esq.
Office of the Georgia Capital Defender
225 Peachtree Street, NE, Suite 900
Atlanta, Georgia 30303
Fax: (404) 739-6155

This 17 day of January, 2012.

/s/ Kristi M. Bradford
Kristi M. Bradford

Newton County Judicial Canter
Room 204, 1132 Usher Street
Covington, Georgia 30014
Telephone: (770) 784-2030
Fax: (770) 788-3770

IN THE SUPERIOR COURT OF NEWTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,

vs.

RODNEY RENIA YOUNG,

Defendant.

INDICTMENT NO.

2008-CR-1473-3

MOTION FOR NEW TRIAL

ORDER

The above captioned indictment was filed in open court on August 21, 2008. On February 17, 2012, a jury verdict was returned on this indictment in which the defendant was found guilty of one count of malice murder, two counts of felony murder, one count of aggravated assault and one count of burglary.

Because the death penalty was sought by the State, the issue of sentencing was presented to the same jury. On February 21, 2012, a verdict was returned which, inter alia, found the existence of aggravating factors and recommended that a sentence of death be imposed. On February 21, 2012, and March 9, 2012, the defendant was sentenced accordingly.

The defendant filed a motion for a new trial on March 5, 2012, which has been amended. Several hearings have been held concerning this motion. The defendant has been present for every hearing.

Based upon the record, the law and the arguments of counsel the Court finds and concludes as follows.

STATEMENT OF THE FACTS

The evidence at trial showed that Doris Jones was in an on-and-off again relationship with

defendant for seven years. (T. 9:2380).[31] They would often break up after arguments and when this would occur, the defendant would often try to persuade Ms. Jones to return to him by persistently calling her and buying her things. (T. 9:2381-2382). The defendant resided in Bridgeton, New Jersey. (T. 8:2308, 9:2392, 2640, 2647-2649). Ms. Jones had a son named Gary who was living at 65 Benedict Drive, Covington, Georgia. (T. 9:2377, 2382-2383). In January of 2007, Ms. Jones moved in with her son at the Benedict Drive residence after breaking up with the defendant once again. (T.9:2383). Eventually Ms. Jones got back together with the defendant after the January 2007 breakup and for a period of time the two would fly back and forth visiting each other. On one occasion, in August of 2007, the defendant drove with her to Georgia from New Jersey. (T. 9:2384-2385). Even then, the two argued with each other prompting her son Gary to speak with her and the defendant. Gary told the defendant on another occasion when the two were alone that it was okay if he argued with his mom, but if he put his hands on her, then he would have to deal with him. (T. 9:2386- 2387).

Sometime between November and December of 2007, the defendant came to Georgia from New Jersey and proposed marriage to Ms. Jones. (T. 8:2348-2349, 9:2389-2390). In early 2008, she left her job in Georgia and went to go live with the defendant. (T. 9:2391-2392). The defendant lived at a Giles Street address in New Jersey with his aunt, the aunt's boyfriend, and the defendant's daughter in the basement of a three

[31] Citations to the trial transcript are denoted as "T" for the trial transcript, followed by the volume number, i.e. "9:" followed by the page number.

story home. (T. 9:2392). However, when Ms. Jones moved back to New Jersey in 2008, the relationship did not improve and the two argued about money. (T. 9:2394-2395). Eventually, Ms. Jones left New Jersey again and returned to Georgia to live with her son, Gary Jones. (T. 9:2396). When she did, her mother gave Ms. Jones a diamond ring after leaving Mr. Young. (T. 9:2349).

The defendant, displeased with Ms. Jones leaving him, wrote Ms. Jones several letters between January and March of 2008, trying to persuade her to return to him.[32] (T. 9:2397). On Friday, March 28, she received a letter from the defendant but did not read it immediately. Instead, she washed laundry and went to bed. (T. 9:2397-2398). The next day when she awoke, the laundry was dried and folded and on the arm of her couch. (T. 9:2399), Over this same weekend, Ms. Jones noticed the laundry room window was cracked and that the screen was missing to the same window. She spoke with her son, Gary, about this. (T. 9:2400) On the morning of the March 30, she observed that the screen was in the woods and it appeared as if somebody "was chipping away, like with a knife" on the windowsill. "And the hole was big." (T. 9:2402). Ms. Jones woke up her son and discussed with him how she was going to get the alarm system activated the next day due to this discovery. (T. 9:2402).

[32] Letters from the defendant to Ms. Jones dated September 6, 2007, February 5, 2008, February 10, 2008, February 21, 2008, and March 25, 2008, were admitted into evidence. (Exhibits 354-358) (T. 9:2418-2433).

Ms. Jones got off work at 11:00 p.m. that evening and arrived home at about 11:20 p.m. (T. 9:2403). Previously, she had tried to call Gary but there was no answer and this was unusual for him not to answer. (T. 9:2403). As she approached the house, she heard the television playing loudly and saw through the front door that the back glass door was shattered. (T. 9:2405). She opened the door and saw Gary lying there in their dining room with a chair in front of him and a hammer and knife beside his body. It appeared that her son had been involved in a struggle and she became immediately frightened, dropping the items in her hand and fleeing the residence to call 911. (T. 9:2406-2407). During a later walk through of her residence, she determined that her son's cell phone was missing. (T. 9:2413).

In March of 2008, Shanika Cole was involved in a romantic relationship with the victim, Gary Jones. The two met at church and had been dating for about a month or two. (T. 8:2089). On March 30, 2008, Ms. Cole saw Gary Jones at Springfield Baptist Church for the 10:45 a.m. service. Jones was wearing black pants and a pink dress shirt. (T. 8:2090). The victim and Ms. Cole had plans for him to come over to her residence after church for dinner. (T. 8:2091). Church ended between 1:00 p.m. and 1:30 p.m. and the victim said he was going to change and meet Ms. Cole at her house in about 30 minutes (T. 8:2092). She talked on the phone with the victim afterwards while leaving church before he ended the call to speak with his grandmother. (T. 8:2093). This was the last time Ms. Cole spoke with the victim. Prior to his death, Jones had told Ms. Cole that he had noticed a screen from his residence had been removed. (T. 8:2056).

Annie Sampson was Gary Jones' grandmother. (T. 8:2344). Her grandson called her when he was leaving church on March 30th shortly after 1:00 pm. He indicated to her that he was outside his residence and was going to go inside the residence and would call her back (T. 8:2350-2352). The victim had mentioned to his grandmother during his conversation that he had seen that the screen was away from the window and back in the woods and he was going to go get it. (T. 8:2352).

Mike Roberts was employed at the Newton County Sheriff's Office in March of 2008 as an investigator. (T. 8:2098-2099). Investigator Roberts responded to 65 Benedict Drive in Newton County in reference to a call about a person seriously injured. (T. 8:2099). He arrived at approximately 11:28 p.m. (T. 8:2099). Upon his arrival, Gary Jones' mother was outside the residence in a state of panic and he asked her to stay outside while the residence was cleared. (T. 8:2100, 2102). Upon entering the residence, Investigator Roberts located the victim and cleared the residence after observing the victim to be deceased. (T. 8:2100-2101). The front door to the residence was open when he arrived. (T. 8:2102).

Roberts observed that the victim had obvious injuries. (T. 8:2102). The victim was tied to a chair with a cord, lying on his side. Next to his body were a butcher knife and a hammer, both of which were covered in blood. In general, there was blood everywhere. (T. 8:2103). A crime scene log was kept in accordance with procedure. (T. 8:2104).

Sergeant Sonny Goodson was the sergeant over investigation in March of 2008. (T. 8:2105). He was

contacted on March 30, 2008, by Investigator James Fountain and, while en route to the crime scene, Goodson advised investigators to set up a crime scene perimeter. (T. 8:2105-2107). The Georgia Bureau of Investigation was requested to conduct the crime scene investigation. (T. 8:2107). A neighborhood canvass was conducted which yielded no information. (T. 8:2113). An initial interview of Ms. Jones revealed the victim had no enemies and he was involved in no obvious criminal lifestyle. (T. 8:2114).

Cecil Hutchins was the crime scene investigator for the scene. Special Agent Hutchins had been employed at the GBI since 1987. (T. 8:2121). Hutchins testified as an expert in crime scene investigations. (T. 8:2123). In the late evening hours of March 30, he was requested to handle the investigation. In the early morning hours of March 31 he responded to Benedict Drive. (T. 8:2124-2125). He prepared a crime scene diagram. (T. 8:2127). Special Agent Hutchins testified that upon entering the residence through the front door, he observed keys and a notebook that were at the front of the residence. (T. 8:2129, 2143). The victim's body was located in the dining room. A glass door separating the dining room from an outside patio was shattered. (T. 8:2129). There were overturned items in the living room that led from the front entrance foyer to the dining room. The living room also had bloodstains on the carpet. (T. 8:2144-2145). In addition to the stains, which were in the form of ninety degree blood drops and smears, there were pieces of duct tape found in the living room. (T. 8:2246-2247).

The dining room, where the victim was found, contained curtains on the floor, a broken picture

frame, a knife, and a hammer. (T. 8:2150). The hammer and knife each had blood stains. (T. 8:2216-2217). The victim was found with a towel partially covering his face. (T. 8:2218). Duct tape, a phone cord, and fabric from the cloth curtains were used to tie the victim to a chair. (T. 8:2222, 2225-2226, 2235). There were numerous wounds surrounding his neck and head area. (T.8:2229).

Hutchins was tendered as an expert in bloodstains. (T. 8:2147). He identified different blood patterns on the dining room wall and marked them. (T. 8:2152-2153). The bloodstains on the wall contained smearing, arterial spurting, impact, and cast off patterns. (T. 8:2153-2165). Hutchins' conclusion was that the blood source was close to the wall. He concluded that there was enough force to the victim to make the stains on the wall and that there were swinging motions with these objects demonstrated by the cast off pattern evidence. (T. 8:2165-2166). In the kitchen near the dining room, Hutchins found some kitchen drawers open with a knife on the counter, and a broken lamp. (T. 8:2221, 2230-2231).

There was writing on the walls in the stairway leading upstairs as well as in an upstairs bedroom. (T. 8:2221). The writings on the wall of the stairwell stated, "ATL mob $25,000, dead in 20 days, 20 days to get out of state or dead, the hit be on you, were know what you drive, ATL mob, I want my fucking money, $25,000, you work at GRNCS." (T. 8:2257-2258). There were more handwritings on the walls of an upstairs bedroom of a similar nature and a handwriting expert was called to the scene. (T. 8:2258-2259).

Art Anthony testified as an expert in forensic document examination. (T. 9:2444). On March 31st, he observed the handwritings on the walls of the victim's home. (T. 9:2444). He compared these writings to letters handwritten by the defendant. (T. 9:2447). Anthony's conclusion was that the defendant wrote the writing on the walls at the crime scene. (T. 9:2448). Investigator James Fountain, an expert in criminal gang investigations, testified at trial that he had never heard of an Atlanta gang called the ATL Mob. (T. 9:2526-2529).

The laundry room, which was in the rear of the residence, contained a broken window. (T. 8:2233-2234). Shoe impressions were found in the yard leading towards the woods behind the residence where there was a shed. (T. 8:2130, 2267-2268). Bloodstains were found on the broken glass on the back door of the residence. (T. 8:2235). GBI crime lab testing concluded that the blood on the broken glass and rear door matched the DNA profile of Gary Jones. (T. 8:2239).

Dr. Jonathan Eisenstat, the medical examiner for the GBI, testified as an expert in forensic pathology. (T. 8:2305). He testified that Jones had multiple fractures to his skull. (T. 8:2311). Furthermore, there was a mixture of blunt force and sharp force injuries to the neck, head, face, chin, ear, and body of Gary Jones. Compression marks to the hands and legs of the victim led to the conclusion that the victim was alive when he was bound. (T. 8:2317-2326). Dr. Eisenstat concluded that Gary Jones died as a result of blunt force injury to the head and sharp force injury to the neck. (T. 8:2336).

The defendant called Annie Sampson the day following the murder and said that he heard Doris had "lost it." (T. 8:2353). Ms. Jones called the defendant on this same day after she learned he had been calling her brother in law as well. (T. 9:2414). The defendant told Ms. Jones that her mom had called him and that is how he learned of the victim's death. (T. 9:2414). The defendant told her he would come get all her things and move her to New Jersey. He also conveyed to Ms. Jones that Gary had come to him in a dream and asked him to take care of her and get her out of Georgia. (T. 9:2415). On Tuesday, two days after the murder, Ms. Jones learned that the defendant had been in Georgia. (T. 9:2415-2416).

Leo Edward Rivers lived in Fairburn, Georgia. He was married to Latrice Rivers. (T. 9:2471-2472). The defendant is his wife's half brother. (T.9:2472). They had never met the defendant until he came to Georgia in March of 2008 for the supposed purpose of visiting with them for three days. (T. 9:2474). The defendant drove his Nissan Altima to Atlanta from New Jersey. (T. 9:2475). The defendant conveyed to Mr. Rivers that nobody knew he was coming down to Georgia. (T. 9:2475-2476). According to Mr. Rivers' best recollection, the defendant came down on a Wednesday but said he was going by Covington first before traveling to the Rivers' residence. (T. 9:2477-2478).

The defendant left the Rivers' residence on Sunday, March 30, 2008. (T. 9:2484). Before leaving, the defendant stated to Mr. Rivers that he was going to go to Covington and "holler at Doris" before heading back to New Jersey. (T. 9:2486) Mr. Rivers knew that

the defendant had a GPS device with him during this trip. (T. 9:2491).

On March 25, 2008, Rodrick Baker was in Covington, Georgia, on the town square. He had made previous arrangements to meet his mother-in-law to pick up his daughters. (T. 9:2510). Around 7:00 p.m., while he was waiting outside a restaurant on the square, an individual drove up from beside him and asked for directions. The individual asked for directions to Salem Road, and later, more specifically, mentioned Benedict Drive. Baker gave the man directions to get to Salem Road. (T. 9:2512-2513). Baker noticed as the man was driving off that he had a New Jersey license plate. (T. 9:2516). From a photographic lineup, he identified the defendant as the individual that approached him asking for directions to Benedict Road. (T. 9:2518-2519, 2533-2536).

The defendant's cell phone records for the dates between March 25, 2008, and March 31, 2008, established that his cell phone was communicating with cell phone towers in several locations on the eastern seaboard as it tracked south from New Jersey to Atlanta, and specifically to cell phone towers very near the victim's residence, and then back from Atlanta to New Jersey. (T. 9:2539-2585).

Benito Lopez worked with the defendant at Aunt Kitty's Foods, a food-canning factory in Vineland, New Jersey. (T. 9:2595). At the end of March of 2008, the defendant told Lopez he was going to make a trip and wanted to buy a GPS but wasn't sure what kind to get, so Lopez offered the use of his "Tom Tom" (a particular name brand of a GPS device).

(T. 9:2596). Lopez loaned the device to the defendant for his trip to Georgia. The defendant said he was going to meet a sister he had never met. (T. 9:2597). Lopez showed the defendant how to use the GPS device. (T. 9:2598). When he returned from his trip, the defendant returned the GPS device to Lopez. Stored in the recent device locations, or searches, was the location of Salem Road. Salem Road is the major cross street for Benedict Drive where the Benedict Place subdivision is located. This is where the victim's homicide occurred. (T. 9:2610). Lopez never traveled to this area with this device. The device was given over by Lopez to investigators. (T. 9:2598, 2600-2601, 2609).

In March of 2008, Investigator Jason Griffin was assigned to criminal investigations at the Newton County Sheriff's Office. (T. 9: 2607). He made plans to travel to New Jersey with Special Agent Horne of the GBI to speak with co-workers of the defendant. (T. 9:2608). Inv. Griffin participated in the interview of the defendant at the New Jersey State Barracks that was conducted after the defendant was advised of his Miranda rights. (T. 9:2612).

Elise Thomas was a friend of the defendant with whom he had a sexual relationship for over ten years. (T. 9:2615). She testified at trial that she was aware of a trip he was taking to Georgia at the end of March of 2008. (T.9: 2615). She spoke with the defendant while he was in Georgia visiting his sister. (T. 9:2615-2616). He never mentioned he was going to see Doris Jones. (T. 9:2616-2617). Ms. Thomas spoke with the defendant on Sunday when he was driving back to New Jersey. (T. 9:2617). She saw him on Monday after he got off work and came to her house

for a visit. (T. 9:2618). During this visit, the defendant told her that somebody had killed Ms. Jones' son. (T. 9:2618).

Glen Garrels, a detective with the New Jersey State Police, assisted the GBI and Newton County investigators. (T. 9: 2634). On April 3, 2008, he went to the defendant's place of employment, Aunt Kitty's Foods, in Vineland, New Jersey. (T. 9:2635). The manager of the facility brought the defendant into a waiting room area. The defendant stated then that he never left the state of New Jersey in the days just prior to the interview. (T. 9:2636). He was transported to the New Jersey State Police Barracks for questioning. Special Agent Wesley Horne from the GBI interviewed the defendant and photographed his hands. The defendant had two cuts on his right hand. (T. 10: 2822, 2824-2826).

Garrels prepared a search warrant for the defendant's residence at 71 South Giles Street and was present when it was executed. (T. 9:2640). The defendant's car was searched as well. (T. 9:2642-2643). During the search of the defendant's residence, Daniel Wright, the crime scene investigator for the Bridgeton Police Department, took several items from the defendant's residence including deposit slips from the bank, several roles of duct tape, a silver Motorola cell phone, and a letter to Doris Jones. (T. 9:2646-2648, 2665-2674). The IMEI number on the Motorola Razor phone located in a dresser drawer at the defendant's residence was registered to Gary Jones, the victim. (T. 9:2680). Tammy Jergovich, a GBI expert in analysis of fractured materials, testified to a fracture match from a roll of duct tape retrieved from the top dresser drawer in the defendant's residence to

one of the three strips of duct tape recovered from the crime scene in Georgia. (T.10: 2791-2795).

Matthew Peeke, a detective with the New Jersey State Police, obtained records of the defendant's time clock hours and earnings from Aunt Kitty's Foods. (T. 10: 2697). He also obtained the defendant's employment application, an absentee calendar showing vacation days for March 26-28 of 2008, and an Aunt Kitty's time off request form submitted by the defendant on March 3, 2008, requesting vacation for March 26-28, 2008. (T. 10: 2698, 2701-2703). Special Agent Wesley Horne from the GBI learned that the defendant reported to work late at 10:40 a.m. on the Monday following the murder. (T. 10: 2820).

Peeke also assisted in processing the search warrant on the defendant's car at the New Jersey State Police Barracks in Atlantic County, New Jersey, on April 3, 2008. (T. 10: 2703). Inside the defendant's vehicle were Google map directions that were printed out with directions from the defendant's residence on South Giles Street in New Jersey to Covington, Georgia. (T. 10: 2706-2707, 2716-2717). A ring was also found in the defendant's vehicle, later identified to be the ring that Ms. Jones' mother had given her. (T. 9:2440, 10: 2708).

LEGAL ANALYSIS OF GROUNDS ASSERTED BY DEFENDANT IN SUPPORT OF MOTION FOR NEW TRIAL

The defendant has asserted grounds for a new trial. Each ground is addressed by the Court in consideration of this motion.

1. The verdict was contrary to the evidence.

"When a defendant challenges the sufficiency of the evidence supporting his criminal conviction, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (citation omitted, emphasis in original). It is the function of the jury, not the reviewing court, to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the evidence. Id. "As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the [s]tate's case, the jury's verdict will be upheld." Miller v. State, 273 Ga. 831, 832, 546 S.E.2d 524, 525 (2001) (citations and punctuation omitted). See also Gordon v. State, 329 Ga. App. 2, 3, 763 S.E.2d 357, 358 (2014).

The Court has viewed the evidence in the light most favorable to the prosecution. See statement of facts on pages 2-15 of this order. The evidence

authorized the jury to find that the defendant committed the acts alleged in the counts of the indictment.

Therefore the motion for new trial on this ground is denied.

2. The verdict was against the weight of the evidence and contrary to law.

The defendant has asserted that the verdict is against the weight of the evidence and contrary to law. These grounds for a new trial "require the trial judge to exercise a broad discretion to sit as a thirteenth juror." White v. State, 293 Ga. 523, 524, 753 S.E.2d 115, 116 (2013). "In so doing, the trial court has an 'affirmative duty' not only to assess witness credibility, but also to consider conflicts in the evidence and to weigh the evidence as a whole in order to determine whether the verdict is so decidedly against the weight of the evidence and/or the principles of justice and equity so as to warrant the Court setting it aside." State v. Reid, 331 Ga. App. 275, 277, 770 S.E.2d 665, 677 (2015), citing Brockman v. State, 292 Ga. 707, 713, 739 S.E.2d 332 (2013).

The Court has read and considered the entire trial transcript and the evidence admitted at trial. As a "thirteenth juror" the Court finds the evidence and testimony presented by the State to be credible. In weighing the evidence as a whole the Court finds that the verdict is not decidedly against the weight of the evidence nor the principles of justice and equity so as to warrant the verdict being set aside.

Therefore, the motion for new trial based on these grounds is denied.

3. The evidence presented at trial was not sufficient to support the defendant's convictions.

The defendant challenges the sufficiency of the evidence in this ground. "The standard of review for denial of a motion for directed verdict is the same as that for determining the sufficiency of the evidence to support a conviction." Terry v. State, 293 Ga.App. 455, 667 S.E.2d 109 (2008). To determine whether the evidence presented at trial was sufficient to support a conviction, the question is "whether any rational jury could find, in the evidence proffered below, proof beyond a reasonable doubt, viewing that evidence in the light most favorable to the verdict." Dennis v. State, 294 Ga.App. 171, 669 S.E.2d 187 (2008). "It is the function of the jury, not the Court, to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the evidence." Cooper v. State, 229 Ga.App. 199, 682 S.E.2d 154 (2009). The conviction must be upheld "if the record contains some competent evidence to prove each element of the crime of which the defendant was convicted, even though that evidence may be contradicted." Id.

Based upon the record and evidence presented at trial taken in the light most supportive to the verdict, the Court finds that there was sufficient evidence for any rational trier of fact to convict the defendant of the charges for which he was convicted.

Therefore, the evidence was sufficient to support the guilty verdict.

4. Georgia's scheme for identifying mentally retarded defendants in capital cases violates Atkins v. Virginia, 536 USS. 304, 122 S.Ct. 2242 (2002).

The defendant argues that the Georgia statutory scheme for identifying the mental retardation of a criminal defendant in a capital case is unconstitutional and violates the holdings of Atkins. The defendant bases this argument on (a) the burden imposed upon him to prove his mental retardation beyond a reasonable doubt, (b) the requirement of a guilty but mentally retarded verdict in the guilt-innocence phase to demonstrate his ineligibility for the death penalty, and (c) the existence of "constitutionally viable alternative procedures" to determine whether he is mentally retarded. Arguments (b) and (c) will be addressed as one argument.

a. Burden of proving mental retardation beyond a reasonable doubt.

In Atkins the Supreme Court of the United States held that the death penalty punishment of a mentally retarded individual is excessive under the Eighth Amendment of the United States Constitution. Id. In doing so, the Court made it clear that it was entrusting the states with the power to develop the procedures necessary to enforce this newly recognized federal constitutional ban on the execution of the

mentally retarded. Id., 526 U.S. at 317, 122 S.Ct. at 2250.

In criminal trials in Georgia, if an accused contends that he was mentally incompetent under the law at the time the acts charged against him were committed, the trial judge shall, inter alia, instruct the jury that they may consider, in addition to verdicts of "guilty" and "not guilty", the verdict of "guilty but mentally retarded." O.C.G.A. § 17-7-131(c). The statute, which was enacted before this trial and before the holding in Atkins, authorized a verdict of "guilty but mentally retarded" if the jury finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded, which shall be specified in the verdict. See. O.C.G.A § 17-7-131(a)(3). The burden of proving mental retardation as a defense and as a disqualification from a death sentence is upon the defendant. See Mosher v. State, 368 Ga. 555, 558-560, 491 S.E.2d 348 (1997).

The defendant argues that requiring capital defendants to prove their mental retardation beyond a reasonable doubt violates the Fifth and Eighth Amendments, citing Hill v. Schofield, 608 F.3d 1272, 1283 (11th Cir. 2010), reversed by Hill v. Humphrey, 662 F.3d 1335 (11th Cir. 2011), and Cooper v. Oklahoma, 517 U.S. 348, 366-369, 116 S.Ct. 1373 (1996) (declaring unconstitutional defendant's burden to prove incompetence to stand trial by clear and convincing evidence), because, in essence, mentally

retarded defendants will not be correctly identified and will receive a death penalty sentence.[33]

This argument is unpersuasive for five reasons. First, in Atkins the United States Supreme Court recognized that even though a national consensus has developed against the execution of the mentally retarded, "(n)ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." Atkins, 536 U.S. at 317, 122 S.Ct. at 2250. After comparing this issue to that of determining who is insane in the criminal context,[34] the Court declared that " 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" Id. Clearly as a result, the State was authorized to define a burden to be imposed upon a defendant claiming to be mentally retarded in order to assert such a defense.

Second, the issue of the constitutionality of this requirement was addressed directly by the Supreme Court of Georgia in Head v. Hill, 277 Ga. 255, 262, 587 S.E.2d 613 (2003), holding that the Georgia General Assembly "was originally and now remains within

---

[33] This summary does not purport to be all inclusive of the defendant's arguments in support of this ground. The arguments are stated in pp. 10-14 of his brief filed on April 11, 2014.

[34] See Ford v. Wainwright, 477 U.S. 399, 405, 416-417, 106 S.Ct. 2595, (1986), which was cited and quoted by the Court at this point in Atkins.

constitutional bounds" in its enactment of this burden of proof.

Third, as asserted by the State in its responsive brief,[35] this identical argument was presented to the United States Supreme Court in at least three applications for writ of certiorari in post-Atkins death penalty cases from Georgia, all of which were denied by the Court. See King v. Georgia, 536 U.S. 982, 123 S.Ct. 17 (2002); Stripling v. Head, 541 U.S. 1070, 124 S.Ct. 2400 (2004); and Holsey v. Hall, 552 U.S. 1070, 128 S.Ct. 728 (2007).

Fourth, examination of this burden of proof in the context of Georgia's procedural framework for determining whether a defendant qualifies for exemption from the death penalty, shows that there is no violation of the United States Constitution or any holding in Atkins.

As authorized and directed by the Court in Atkins, the statutory procedure developed by Georgia provides safeguards for a defendant claiming mental retardation to ensure that he has ample notice, a hearing before a neutral body of his choice (jury or the court), assistance of counsel, and access to governmental power to compel witnesses to appear and produce evidence sought by him, due process rights that are commensurate with his interest in protecting his life and liberty. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541-542, 105 S.Ct. 1487 (1985); and Morrisey v. Brewer, 408 U.S. 471, 482-483, 92 S.Ct. 2593 (1972).

---

[35] See brief of State filed on October 1, 2014, at p. 24.

Under Georgia law, the defendant can choose whether to have his mental retardation claim tried before a judge or a jury. O.C.G.A. § 17-7-131(j). Unlike other states, Georgia allows the defendant to present unlimited testimony of experts of his own choosing and lay testimony in support of his claim, as was done by the defendant in this case. Even if the judge or jury finds that the defendant failed to prove mental retardation, he may still present his claim of mental retardation as mitigation evidence in the sentencing phase. See O'Kelley v. State, 284 Ga. 758, 767, 670 S.E.2d 388 (2008); and O.C.G.A. § 17-10-30. Significantly, at the sentencing phase a mitigating factor, such as evidence of mental retardation, does not have to be unanimously accepted by the jury for the jury to decline the death penalty. The finding by one juror, based on this mitigating evidence, that the death penalty is undeserved prevents the imposition of a death sentence. Hill v. State, 250 Ga, 821, 301 S.E.2d 269 (1983); and O.C.G.A. § 17-10-31(c).[36] For a more complete list of the several procedural protections of a Georgia defendant claiming mental retardation, see Hill v. Humphrey, 662 F.3d 1335, 1353 (11th. Cir. 2011).

Finally, as found by the Supreme Court of the United States in Heller v. Doe, 509 U.S. 312, 321, 113 S.Ct. 2637 (1993), "mental retardation is easier to

[36] The importance of the context of the beyond a reasonable doubt burden of proof within the general procedural framework of determining mental retardation is further highlighted by understanding that the defendant is not found to be deserving of the death penalty if he fails to meet his burden in the first phase. As acknowledged by the defendant on p. 9 of his previously cited brief filed on April 1, 2014, he has then merely failed to show that he is ineligible for the death penalty.

diagnose than is mental illness." The Court further observed that "mental retardation is a developmental disability that becomes apparent before adulthood . . . By the time the person reaches 18 years of age the documentation and other evidence of the condition have been accumulated for years," Id. Therefore, it is rational for the General Assembly to assign a higher burden of proof upon a defendant claiming this condition to render him ineligible to receive the death penalty so as to avoid the risk of error that an undeserving person who is not mentally retarded would mistakenly be allowed to realize this benefit. In Heller the Court relied upon clinical definitions of mental retardation as a "permanent, relatively static condition" which a defendant should be able to more easily prove. Id. See also Williams v. Mitchell, 729 F.3d 606, 619-620 (6th Cir. 2015).

As a result, the statutory requirement that the defendant prove mental retardation beyond a reasonable doubt is not unconstitutional or violative of any holdings in Atkins.

> b. and c. Guilty but mentally retarded verdict, and availability of a constitutionally viable alternative procedure.

The defendant correctly notes that the "single avenue for capital defendants in Georgia to demonstrate ineligibility for the death penalty under Atkins in the context of a capital trial is through a guilty but mentally retarded verdict." (Emphasis added.) See p. 14 of the brief of the defendant filed on April 1, 2014. Specifically the defendant argues that addressing the issue of the defendant's mental retardation in the guilt-innocence phase of a death

penalty trial diminishes its mitigation in the sentencing phase.

In support of this argument and his assertion that a "viable alternative exists," the defendant makes policy related assertions more properly presented to the legislative branch and cites social science publications and studies questioning the ability of jurors to process and properly consider evidence, pointing to "(p)ersisting societal discrimination" and "(f)ear of future dangerousness." See, e.g., p. 18 of brief of the defendant filed on April 1, 2014. This Court certainly does not endorse discrimination or prejudice as a basis for any verdict but these dangers are properly addressed in the jury selection process under Georgia law, a process which was exhaustive over a period of several days in this case.

"[I]t is the legislature's function and authority to decide public policy and to implement that policy by enacting laws, and the courts are bound to follow such laws, if constitutional, despite any contrary personal policy preferences." Doe v. State, 347 Ga. App. 246, 256, 819 S.E.2d 58 (2018). That is, despite any contrary personal policy preference of the attorneys, it is the legislative branch that declares and enacts that policy. If it is not unconstitutional or violative of case law, this Court will not declare the enactment invalid.

5. The execution of the defendant, "a mentally retarded man," violates the Georgia and United States Constitutions.

In support of this ground the defendant apparently acknowledges that the Court complied with Georgia law in following the statutory procedures for the defendant to demonstrate that he is mentally retarded and thereby disqualified from receiving the death penalty. See p. 27 of brief of the defendant filed on April 1, 2014. He argues, however, that the evidence clearly established that the defendant was mentally retarded despite the jury verdict and that, pursuant to O.C.G.A. §§ 5-5-20 and 5-5-25, the Court should grant a new trial.

O.C.G.A. § 5-5-20 provides that the presiding judge may grant a new trial when the verdict of a jury is found contrary to evidence and the principles of justice and equity. O.C.G.A. § 5-5-25 requires the presiding judge to exercise "a sound legal discretion in granting or refusing (a motion for new trial) according to the provisions of the common law and practice of the courts."

The defendant points to testimony and exhibits admitted during the trial which arguably support a finding of mental retardation according to the various definitions in the record. See O.C.G.A. § 17-7-131(a), Diagnostic and Statistical Manual of Mental Disorders, 4th and Sth editions, and American Association of Intellectual and Developmental Disabilities Manual.

Addressing a motion for new trial based upon the grounds asserted by the defendant pursuant to O.C.G.A. § 5-5-20 require the trial judge to exercise a broad discretion to sit as a "thirteenth juror." Taylor v. State, 341 Ga. App. 767, 801 S.E.2d 629 (2017).

The court has reviewed the testimony, both expert and non expert, the exhibits and all items of evidence admitted during the jury trial. The Court finds the testimony of the State's expert to be credible. (T. 11:3084-3085, 3089, 3093-3096, 3144-3146) Although some evidence presented by the defendant arguably supported a finding of mental retardation, the testimony was tainted by personal bias (T. 10:2865-2867, 2965-2966, 3032-3033), speculation (T. 10:2950, 2953, 2969, 2981-2982, 3027, 3038), lack of corroboration such as testing results (T. 10: 2868-2869, 2873, 2876, 2925-2930, 2976, 2979, 3028), lack of personal knowledge (T. 10:2855, 2894, 2950, 2953, 2969, 2981-2982, 3027, 3038), and being substantially anecdotal (T. 10:2865-2867, 2883, 2932-2935, 2964-2966, 3032-3033). This evidence was contradicted, as previously noted, by the State's expert and evidence that the defendant graduated from high school (T. 10:2866, 2890, 2899), attended college on a football scholarship (T. 10:2865, 2881), received an A in psychology (T. 10:2879), lived independently (T. 9:2646-2665; T. 11:3182-3187), used the internet to apply for credit cards and make airline reservations (T.11:3182), held a full time job as a machine operator for ten years (T: 11:3188, 3190, 3192), and utilized a GPS satellite device to travel back and forth between New Jersey and Georgia (T. 9:2491, 2596-2598; T. 10:2883, 2964).

The Court has carefully considered and independently weighed the evidence and arguments presented in this case. The Court exercises its discretion to deny the defendant's motion for new trial pursuant to O.C.G.A. § 5-5-20. See Massey v. State, 346 Ga. App. 233, 235-236, 816 S.E.2d 100 (2018).

With regard to O.C.G.A. § 5-5-25 which provides broader discretion to grant a new trial, the Court has found no "provisions of the common law and practice of the courts" that would justify the granting of a new trial. See State v. Tunkara, 298 Ga. 488, 782 S.E.2d 278 (2016).

In support of this ground the defendant also argues that even though the Court followed the requirements of Georgia law which established the procedure for determining whether the defendant is mentally retarded, the statutory procedures violate the holdings in Hall v. Florida, 572 U.S. 701, 134 S.Ct. 1986 (2014) and Moore v. Texas, 581 U.S. at___, 137 S.Ct. 1039 (2017).

In Hall, the Court held that Florida's use of an IQ test score alone to determine mental retardation in death penalty cases was unconstitutional as a deprivation of the defendant's Eighth Amendment right to a fair trial. See Hall supra, 572 U.S. at 724, 134 S.Ct. at 2001. This was based, in part, on the "standard error of measurement" associated with the IQ test score which results in the score being approximate and "imprecise." Id. Further, this treatment of the IQ test score by Florida was held to have barred inquiry into the defendant's adaptive functioning, an element of the definition of mental retardation contained in the Diagnostic and Statistical Manual of Mental Disorders (4th Ed. 2000)." [37]

[37] The third element of the definition of mental retardation is onset of mental retardation prior to the age of 18 years. See Diagnostic and Statistical Manual of Mental

Unlike Florida's procedure to determine mental retardation, the Georgia procedure allows consideration of an IQ test but does not allow this single factor to be determinative of the mental retardation issue. See Stripling v. State, 261 Ga. 1, 4, 401 S.E.2d 500, 504 (1991). In fact, there were no IQ test results of the defendant in this case except vague recollections of the school officials and a teacher who knew the defendant in high school.

In Moore, the Court considered a series of nonclinical factors adopted by the Texas Court of Criminal Appeals[38] to determine whether a person is mentally retarded. Moore, 581 U.S. at___, 137 S.Ct. at 1041. In applying these factors, the Texas Court of Criminal Appeals was found to have erroneously rejected the lower court's "application of current medical diagnostic standards" including the Sth edition of the Diagnostic and Statistical Manual of Mental Disorders. Id., 581 U.S. at, 137 S.Ct. at 1041-1042. Just as in Hall, the United States Supreme Court found that Texas had "disregarded established medical practice" as shown in the most recent (and at that time still current) versions of the leading diagnostic manuals. Id., 581 U.S. at___, 137 S.Ct. at 1042. As a result the Eighth Amendment right of the defendant was violated.

Disorders (4"" Ed. 2000). To satisfy the Diagnostic and Statistical Manual of Mental Disorders definition of mental retardation, all of these elements must be satisfied. See Diagnostic and Statistical Manual of Mental Disorders (4" Ed. 2000).

[38] See Ex Parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004).

Unlike Florida and Texas, Georgia has enacted a procedure, which the defendant acknowledges was followed by this Court, which defines mental retardation[39] as "having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." This statutory description tracks the definition of mental retardation as stated in the Diagnostic and Statistical Manual of Mental Disorders (4th Ed. 2000) in effect at the time of trial.

As a result the Georgia statute is in alignment with the current medical community diagnostic framework, standards and practice and creates no "unacceptable risk that persons with intellectual disability will be executed." See Moore, 581 U.S. at___, 137 S.Ct. at 1042, 1043.

Likewise, these holdings provide no basis for finding that the burden of proving mental retardation beyond a reasonable doubt is unconstitutional. In Head, 277 Ga. at 260, 587 S.E.2d at 621, the Supreme Court of Georgia upheld this burden as constitutional in light of the Atkins decision which specifically left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." Atkins, 536 U.S. at 317, 122 S. Ct. 2250. Merely because Florida and Texas clearly exceeded constitutional restrictions in the manners previously noted does not render the Georgia burden

[39] The current statute, which has been amended since the date of trial, now refers to "mental retardation" as "intellectual disability." See O.C.G.A. § 17-7-131(a)(2).

of proof unconstitutional under Atkins and there is no precedent for such a holding.[40]

The defendant also argues that he was deprived of a "fair opportunity to show that the Constitution prohibits (his) execution" because the jury instructions and verdict form created a "distinct possibility" that some of the jurors may not have been convinced beyond a reasonable doubt that he was mentally retarded. See Supplemental Briefing in Light of the United States Supreme Court's Decision in Hall v. Florida, filed on August 5, 2014, p. 26. See Hall, 572 U.S. at 713-724, 134 S.Ct. at 1995.

In support of this argument the defendant cites Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988), which involved an examination of the Maryland statutory sentencing scheme. The jurors had marked "no" alongside each of an enumerated list of potential mitigating circumstances. This resulted in ambiguity concerning the meaning of the verdict as marked in this manner. That is, under the Maryland procedure, the verdict form could be reasonably interpreted as a failure by the jury to unanimously agree on the existence of the mitigating factors under consideration. In that case, the jury could not consider the mitigating circumstance in sentencing even if some of the jurors believed that it existed, which would preclude all jurors from considering this

[40] The Court also notes that the defendant's burden of proving insanity beyond a reasonable doubt as a defense was found to be constitutional in 1952, in Leland v. Oregon, 343 U.S. 790, 797-799, 72 S.Ct. 1002 (1952), even though the United States Supreme Court has found "that mental retardation is easier to diagnose than is mental illness." Heller, 509 U.S, at 321-323, 113 S.Ct. at 2643-2644.

mitigation evidence due to a lack of unanimity.[41] The death penalty would then be required. However, the Maryland statute and verdict form could also be interpreted as requiring unanimity of all critical issues including the rejection of mitigating circumstances, and that the "no" indicated a unanimous rejection of the mitigating circumstance. The Maryland appellate court noted that "the statute did not fully provide what was to transpire when unanimity was lacking at various stages of the sentencing deliberations." Id., 486 U.S. at 372, 108 S.Ct. at 1864. As noted in Mills, the issue is whether the former interpretation, which would unconstitutionally preclude the jurors from considering mitigation evidence, "is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case." Id., 486 U.S. at 375-376, 108 S.Ct. at 1866.

The Maryland procedure clearly created an unacceptable risk of imposition of the death penalty without consideration of factors that may call for a less severe penalty. See Lockett, 438 U.S. at 605, 98 S.Ct. at 2965. This is based upon the possibility that a reasonable jury could have drawn such a conclusion from the jury charge given and verdict form employed in the jury trial.

However, an examination of the instructions given in this case with the verdict form utilized in the sentencing phase does not lead to a similar conclusion.

---

[41] Failure of the sentencing jury to consider all of the mitigating evidence risks erroneous imposition of the death sentence in violation of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978) (Plurality opinion).

The defendant asks this Court to speculate concerning the deliberation process in order to show uncertainty over "the true meaning and intent of the jury's verdict."

The jury was properly instructed concerning the verdicts it was authorized to return, relying upon the pattern jury instructions which were based upon the permissive language of O.C.G.A. § 17-7-131(c)(3).

> The defendant may be found "guilty but mentally retarded" if the jury . . . finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded. (Emphasis added.)[42]

The jury was earlier charged that it had the duty to find the defendant guilty but mentally retarded if it found beyond a reasonable doubt that he was guilty and that he was mentally retarded. Although this again is the language of the version of the pattern jury instructions in effect at trial, this apparent contradiction would, if anything, benefit the defendant. However, the argument of the defendant is based upon speculation that somehow the jury "sidestepped" the issue of mental retardation in reaching its verdict of guilty because "it is reasonable to assume that some degree of disagreement on this key point may have existed in the jury room." Supplemental Briefing in Light of the United States

---

[42] O.C.G.A. § 17-7-31 was amended effective July 1, 2017, to replace the term "mentally retarded" with the term "with intellectual disability." Ga. Laws 2017, Act 189, §3.

Supreme Court's Decision in Hall v. Florida, p. 28. (Emphasis added.)

In an effort to invalidate the verdict the defendant presents a new objection to the jury charges which was not made at trial. He argues that the jury "was never specifically instructed on what to do in the event there was a disagreement on the question of whether or not Mr. Young met the legal criteria for mental retardation." Id., p. 28. The jury was instructed that the defendant had the burden to prove mental retardation beyond a reasonable doubt. (T. 11:3320). The verdict form showing the three potential verdicts was displayed and explained to the jury. (T. 11:3327-3328). Unlike the verdict form in Mills the jury placed a single checkmark in a single blank for each count to indicate its verdict. No objection to the charge or to the form was stated at trial.

Applying the statutory procedure for identifying mitigating circumstances to the verdict form in Mills revealed that a reasonable jury could have interpreted the court's instructions and the verdict form in a manner that was unconstitutional. As requested by the defendant in this case, and unlike the circumstances in Mills, the Court in this case would have to resort to pure speculation to find that the jury just "sidestepped" even addressing the issue of mental retardation.

"[I]t is not generally within the court's power to make inquiries into the jury's deliberations, or to speculate about the reasons" for a verdict. Carter v. State, 298 Ga. 867-868, 785 S.E.2d 274 (2016). See also United States v. Powell, 469 U.S. 57, 66, 105 S.Ct. 471 (1984).

The jury considered the evidence, applied it to the Court's instructions concerning the definition of mental retardation and the defendant's burden of proof, and by finding him guilty, obviously determined that he had not met his burden. This is clearly reflected by the evidence and the record (which includes the jury charge and verdict form) and requires no speculation.

Therefore, the defendant was not unconstitutionally deprived of his right to present this defense.

The defendant is not entitled to a new trial on the ground that his execution would be in violation of the Constitutions of the United States and Georgia.

6. The "jurors engaged in substantial premature deliberations" on the issue of mental retardation, thereby denying the defendant of his due process rights and his right to be free from cruel and unusual punishment.

Prior to and during the trial the jurors were instructed by the Court not to discuss the case with each other and that they were to begin their deliberations only after all the evidence had been presented. See, e.g., T. 8:2039 and 8:2167. Months after the trial the defendant presented testimony of an alternate juror that was in the jury room during a break in the trial that a juror, who was not summoned to testify, had discussed his daughter, who was actually his step-daughter. (Vol. 1 of transcript of

motion for new trial hearing held on February 29, 2016, at p. 48, hereinafter 2/29/16 MNT. 1:48). The alternate juror, who never participated in the deliberations, testified that she overheard the juror, whose daughter purportedly had an "intellectual disability," say that "he knew what a disabled person was because his daughter [sic] was disabled and she had to have a lot of care and just, you know, just in that area." (2/29/16 MNT. 1:46, 49). According to the testimony, the juror did not say that the defendant was not disabled or that he did not believe the defendant was disabled. (2/29/16 MNT. 1:50, 51). The alternate juror had the impression that the juror felt that the defendant did not have a "disability." (2/29/16 MNT. 1:50, 51). This occurred after a witness, apparently an expert, had testified about "the different levels of disability." (2/29/16 MNT. 1:53, 54).

The statements by the juror were made to a few other jurors in the corner of the jury room, not to all the jurors. (2/29/16 MNT. 1:57, 58, 60). The alternate juror recalled the Court's instructions not to discuss the issues during repeated breaks, including "whether Mr. Young was mentally disabled or mentally retarded or suffered from an intellectual disability." (2/29/16 MNT. 1:58-59). The alternate juror testified that the jury did not "deliberate," "discuss" or "talk about" these issues. (2/29/16 MNT. 1:58-60).

The defendant claims that these reported comments by the juror constitute premature deliberations which is "juror misconduct," thereby creating a presumption of prejudice to the defendant. Mullins v. State, 241 Ga. App. 553, 556, 525 S.E.2d 770 (1999). However, to create such a presumption this "misconduct" must be "so prejudicial that the

verdict is deemed inherently lacking in due process." Holcomb v. State, 268 Ga. 100, 103, 485 S.E.2d 192 (1997).

The defendant and the State learned during voir dire that the juror had a nineteen year old step daughter with "special needs" whom the juror had cared for since she was one year old. (T. 2:617-618). The juror described her as having "brain damage" with the mind of a seven or eight year old. (T. 2:618). Obviously, the defendant and the State knew that the mental condition, specifically mental retardation, of the defendant would be a trial issue when they agreed to allow this individual to serve as juror.

The statements and conduct attributed to the juror by the alternate juror do not constitute misconduct. He was making statements concerning his life experience that apparently touched on the testimony he had just heard.[43] This is understandable in light of his experience with his step daughter as revealed to counsel in voir dire. He expressed no opinion on any trial issues such as guilt or innocence or the mental condition of the defendant. As stated by the alternate juror, these issues were not discussed, talked about, or deliberated, and the statements by the juror, as viewed years after the verdict, made to three or four jurors in the corner of the jury room do not constitute premature deliberation. As a result there is no presumption of prejudice, there is no

[43] No showing has been made concerning the identity of the "expert" witness or the exact subject matter of his or her testimony.

evidence of prejudice, and the verdict does not "inherently lack due process" due to this discussion.

7. The jury "relied on extra-judicial evidence — the 'expert' experience of a fellow juror, the parent (sic) of a mentally retarded child."

To place a juror in the box knowing that the juror has a life experience related to a trial issue and to expect that juror to ignore that experience in functioning as a juror is unrealistic. In fact, jurors are authorized to rely upon their "everyday experience" in their consideration of cases. See, e.g., Worthen v. State, 304 Ga. 862, 823 S.E.2d 291, (2019), footnote 3 of the opinion, citing Willeson v. Ernest Communications, Inc., 323 Ga. App. 457, 466 n. 4, 746 S.E.2d 755 (2013).

O.C.G.A. § 24-6-606(b) allows post-trial testimony from a juror presented to set aside a verdict which involves, inter alia, extraneous prejudicial information improperly brought to the jurors' attention, and any outside influence improperly brought to bear upon any juror. Any statement by a juror made in the jury room is not "extraneous" nor is it an "outside influence." See Muthu v. State, 337 Ga. App. 97, 102, 786 S.E.2d 696 (2016). "(I)nformation is deemed 'extraneous' if it derives from a source 'external' to the jury." Warger v. Shauers, 574 U.S.__, 135 S.Ct. 521, 529 (2014). " 'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury

room." Id. Juror conduct during deliberations and statements made during deliberations, including statements calling into question a juror's objectivity, have been deemed internal matters. U.S. v. Foster, 878 F.3d 1297, 1310 (11th Cir. 2018).

Clearly, extrajudicial evidence brought before a jury by a juror violates the Sixth Amendment. See Edge v. State, 345 Ga. App. 794, 796-797, 815 S.E.2d 146 (2018). However, the previously described statements by the juror during a court break do not constitute extrajudicial evidence as contemplated by the case law of Georgia and the federal courts. The jury was instructed by the Court in this case, without objection, that the evidence includes the testimony of witnesses, exhibits admitted during the trial, and stipulations of counsel, and that they were to decide the case based on the evidence and the law. (T. 11:3307-3308)

Therefore the defendant is not entitled to a new trial on this ground.

8. The trial court's decision to hold court on an unpaid county holiday violated the defendant's federal and state constitutional right to a public trial.

The Court recognizes that "(i)t is a fundamental part of our judicial system that the general public be permitted to witness court proceedings sufficiently to guarantee that there may never be practiced in this State secret or star-chamber court proceedings, the deliberations of the juries alone excepted." Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210 (1984). It is

for this reason the Newton County Judicial Center was not closed on February 20, 2012. There was no closure, partial, complete or otherwise.

The photographs taken by the defendant depicting "closed" signs in the windows of county buildings, including the Newton County Judicial Center where all trials are held, were not taken on February 20, 2012. (2/29/16 MNT 1:77-78, MNT 2:496). All courtrooms and the building were open all day that day according to the uncontroverted testimony of the captain responsible for security for the building. (2/29/16 MNT 2:491). Deputies were stationed at the only entrance to the building all day to provide directions to the courtroom and for security. (2/29/16 MNT 2:496). No one was turned away. (2/29/16 MNT 2:493).

The decision to hold court on this date, a Monday, was first discussed with the State and defense counsel on more than one occasion to be sure there were no objections. (T. 10:2774-2775 and T. 12:3386). This was designed to provide a two day (Saturday and Sunday) break for counsel between the guilt-innocence phase and commencement of the sentencing phase. There were no objections.

O.C.G.A. § 15-1-3 provides that "(e)very court has power: (1) To preserve and enforce order in its immediate presence and, as near thereto as is necessary, to prevent interruption, disturbance, or hindrance to its proceedings, . . . and (4) To control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." O.C.G.A. §§ 15-1-3(1)and (4). Therefore, the Court was

authorized to control and conduct the jury trial proceedings in its discretion. See, e.g., Davis v. State, 221 Ga. App. 131, 470 S.E.2d 520 (1996) (Trial court's insistence upon "promptness and firm control of the progress of the trial" does not equate to a "rush to judgment."); and Moore v. State, 176 Ga. App. 251, 252, 335 S.E.2d 716 (1985) (Trial court has broad discretion in regulating business of the court.)

O.C.G.A. § 36-1-12 cited by the defendant merely obligates the board of commissioners to "keep the county courthouse and the county offices maintained therein open during working hours." Defendant seems to argue that this somehow makes operation of the courts subject to hours set by the county governing authority. No authority was given for such a proposition. The county clerk testified that the county courts are not bound by nor do they follow the hours of operation followed by other county offices. (2/29/16 MNT 1:81-83). In addition, the courts of this county are not located in the "county courthouse."

Every case cited by the defendant involved courtroom closures for a specific purpose, e.g., voir dire, minor victim's testimony, verdict announcement, or conducting court even though the courthouse was closed. The sole example cited by the defendant for a partial closing, requiring the public to present photo identification to enter the courthouse, is clearly inapplicable. See pp. 62-63 of brief of defendant filed on April 1, 2014.

There was no closure of any type or in any degree. No attendance was "chilled" and there was no requirement for a pre-closure analysis. The defendant agreed to the court schedule and his rights were not

affected by having court on February 20, 2012. See Reid v. State, 286 Ga. 484, 488, 690 S.E.2d 484 (2010).

The defendant was therefore not deprived of his right to a public trial.

9. The verdict of death was the product of unconstitutionally coercive circumstances rather than the free, careful and deliberate choice of a unanimous jury.

During the sentencing phase, after approximately one hour and forty minutes of jury deliberations, a note was sent from the jury room to the Court stating "I am asking to be dismiss (sic) as a juror. I have lots of questions and due to those I cannot say yes to death penalty." (T. 13:3719-3723). The note was filed with the Clerk and a copy was given to the State and the defendant. It does not identify the juror who wrote the note.[44]

In discussing an appropriate response, various alternatives were considered. (T. 13:3720). The juror did not state that he or she could not or would not continue to deliberate. Defense counsel asked the Court to cease jury deliberations and sentence the defendant to life with or without parole, presumably pursuant to O.C.G.A. § 17-10-31 (c) (T. 13:3721-3722).

[44] It is important to note that the note gave no indication of coercion or "bullying" by other jurors. In fact, it was unknown whether other jurors were aware of the note or the contents thereof.

However, the Court is required to dismiss the jury and impose one of the life sentences only "(i)f the jury is unable to reach a unanimous verdict as to sentence" according to the statute.

The Court considered the volume of evidence the jury had before it and the relative brief period of deliberation which preceded the note. It would clearly have been coercive to single out the unknown author of the note to be addressed by the Court. Because there was no indication that the jury was deadlocked, the charge approved by the Georgia Supreme Court in Romine v. State, 256 Ga. 521, 526, 350 S.E.2d 446 (1986), would have been premature at that point in the deliberations. The Court and counsel, by their admission (T. 13:3719-3728, 3728), were engaging in speculation as to the meaning of the note based on the totality of the circumstances, that is, reading more into the note than may be appropriate.

The jury had the written instructions with them in the jury room, the same which had been delivered to them verbally by the Court prior to deliberations.

In light of the volume of evidence, the myriad of issues to be addressed, the risks associated with addressing the note with the jury and the need to avoid any indirect coercion, the Court elected at that early stage to delay responding to the note from the unknown juror.

Shortly thereafter a series of notes were sent from the jury room, all of which were shared with counsel and the defendant and filed with the clerk. Apart from a single legal question which was

answered by the Court with no objection by counsel, each note clearly evinced robust deliberations, a thorough consideration of evidence, and collaboration among the jurors. (T. 13:3729-3733).

After approximately three and one half hours of deliberations (T. 13:3737), the jury indicated by note that "we are stuck at this point" and the modified Allen charge as approved in Romine, supra, was then given. (T. 13:3738-3739). This charge included the statement that "(e)ach juror must decide the case for himself or herself, but only after an impartial consideration of the evidence with the other jurors." (T. 13:3738-3739). Thereafter a verdict was reached. (T. 13:3743). The jury was polled immediately after it was published. (T. 13:3746-3751). Every juror affirmed the verdict in open court.

Examining the record as a whole, and the noncoercive instructions of the modified Allen charge, Drayton v. State, 297 Ga. 743, 749, 778 S.E.2d 179 (2015), the Court finds that the verdict was not coerced. The defendant names a juror in its brief as the purported author of the first note but she was not called to testify. In fact, there is no evidence that she was the "holdout" juror in the final note that led to the modified Allen charge.

The defendant is not entitled to a new trial on this ground.

10. The State (a) withheld crucial evidence from the defendant concerning payments made to witnesses by the State, (b) used

funds illegally in making the payments, and even if the funds were not used illegally, the State (c) deprived the defendant of a fair trial because of the unavailability of the funds to him.

a. State withholding evidence from the defendant.

The defendant argues that the State made payments to four witnesses for lost wages, airline tickets and other expenses incurred by the witnesses as a result of their appearing and testifying on behalf of the State. (2/29/16 MNT 1:9-10). The defendant claims that he had no knowledge of these payments until over three years after the trial. (2/29/16 MNT 1:221). These payments were in excess of the statutory per diem payments due pursuant to O.C.G.A. § 24-13-94, codified at § 24-10-94, at the time of trial.

Two of the witnesses, Lopez and Harris, worked with the defendant in New Jersey and testified at the sentencing phase concerning the defendant's ability to perform his job as a machine operator and his work and attendance record. Wilcher was the defendant's former girlfriend in New Jersey. She testified at the sentencing phase concerning being physically abused by the defendant. These witnesses flew from New Jersey to Georgia to testify and stayed in a local hotel during the trial until their testimony.

Witness Rivers is the half sister of the defendant. She lived in the Atlanta area and was visited by the defendant who stayed with her and her family for four days in March of 2008 around the date

and time of the homicide. She testified at the guilt-innocence phase about the defendant leaving her home at various times during his visit with her. She was paid for lost wages and mileage for her coming to court to testify.

The payments made to these witnesses were based upon receipts, pay stubs and other documentation provided to the district attorney to verify the amount of payment needed to compensate them. See Defense Exhibit 15 admitted into evidence at the February 29, 2016, hearing (2/29/16 MNT 1:165). This exhibit contains checks written to the previously identified witnesses who testified on behalf of the State at trial. According to this documentation the witnesses were compensated for expenses incurred and losses sustained associated with appearing and testifying in this case.

The defendant claims that the State was obligated to provide this information to him because it was favorable to him for cross examination of these witnesses whose testimonies were material to the issue of the defendant's mental retardation defense. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

"Because the reliability of a particular witness may be determinative of guilt or innocence, impeachment evidence, including evidence about any deals or agreements between the State and the witness, falls within the Brady rule." Schofield v. Palmer, 279 Ga. 848, 852, 621 S.E2d 726 (2005). This obligation of the State was further defined by the order of this Court entered on August 20, 2010, granting the defendant's motion for disclosure of deals

with witnesses which sought "impeachment information" including "any agreement with a witness, even an informal one." See motions of defendant filed on January 16, 2009, designated as motion no. 4.

However, in order to prevail on this Brady claim, the defendant must show (1) the State possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome would have been different. Id.

The first two parts of this Brady claim are obviously met. With regard to the third part, suppression of the favorable evidence by the State, "[t]here is a distinction between suppression of exculpatory evidence and a failure to disclose such evidence." Adams v. State, 271 Ga. 485, 487, 521 S.E.2d 575 (1999). There is no evidence that the State purposely concealed or resisted any efforts by the defense to gain access to this information; however, "[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Schofield, supra at 851, quoting Brady, 373 U.S. at 87, 83 S.Ct. at 1196.[45] The

[45] In the order granting the defendant's motion for disclosure of deals with witnesses this Court noted that "(a)lthough the State has proffered it has no agreements or relationships with any witnesses ..., it will provide such

Court finds that the third part of the Brady claim has been satisfied.

However, to prevail the defendant must also show that had this evidence been disclosed, a reasonable probability exists that the outcome of the trial would have been different. The evidence that the defendant killed the victim is overwhelming, but, as acknowledged by the defense, the key issue was his mental retardation because the defense theory was to seek a verdict of guilty but mentally ill in the guilt-innocence phase which would have precluded a sentence of death.

The testimony of each of the four witnesses was material to this issue, but was evidence of these compensatory payments material? That is, if the State had provided this information to the defendant before trial, would there be a "reasonable probability of a different result?" Schofield, supra at 852, quoting Banks v. Dretke, 540 U.S. 668, 699, 124 S.Ct. 1256 (2004). It is unnecessary that the defendant show that he would have been acquitted if he had been able to impeach these witnesses with a financial motive for their testimony; "he simply must show that the State's 'evidentiary suppression' undermines confidence in the outcome of the trial." Id., quoting Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555 (1995).

The payments to these witnesses were tied to actual costs incurred and actual losses sustained as a

---

information if it develops." See Order on Defendant's Pleading No. 4 — Motion for Disclosure of Deals With Witnesses, filed August 20, 2010.

result of their appearance. There was no "gain" for their testimony, only the prevention of loss. Unlike a cash payment in some arbitrary or compensatory amount to a witness for testimony or information, these payments were set according to documentation provided by each witness, e.g., pay stubs for lost wages, and distance traveled for mileage reimbursement, or according to the documentation obtained by the State, e.g., written bills from hotels and airlines.

Revealing to a jury the actual cost of transporting a witness from New Jersey, putting them in a hotel, and paying the documented wages they lost while in Georgia, could not reasonably be expected to affect the juror's consideration of their testimony. Had the State paid a random fee for their testimony unrelated to a documented expense, such as a fee typically paid to an expert witness, the receipt of an economic "gain" would certainly be expected to be weighed by the jury since it is tied directly to the content of the testimony of the witness which is not the case here.[46]

In reviewing the affidavits of two of the witnesses obtained by the defendant, the witnesses verified the nature of the payments they received and provided no material change in the testimony they gave at trial. See Defense Exhibits 2 and 3 attached to defendant's supplement to motion for new trial

[46] In Schofield, a new trial was granted because an undercover informant, whose identity the GBI sought to protect, had been paid $500.00 for information he had provided concerning the defendant.

filed on June 29, 2015. Their testimony was amply supported by other evidence in the record to which the defendant had not objected. The inability of the defendant to cross examine these witnesses with information about these reimbursement payments does not undermine confidence in the outcome of the trial. There was no Brady violation.

> b. State illegally used public funds dedicated to crime victim compensation in order to compensate and reimburse witnesses who testified against the defendant.

Even if the failure to provide the defendant with information about compensatory payments to witnesses did not constitute a violation of Brady, the defendant argues that the payments were an unlawful use of funds which violated the defendant's right to a fair trial.

The defendant argues that the payment by the State of witness transportation fees and other previously described expenses was illegal because (1) the District Attorney failed to utilize the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings as codified at O.C.G.A. §§ 24-13-90, et seq., and (2) the State improperly used funds designated for compensation of victims of crimes. See O.C.G.A. §§ 15-21-130, et seq.

First, no party to any case, civil or criminal, is required to utilize the statutory method of securing the attendance of out of state witnesses to testify in Georgia. The terms of O.C.G.A. § 24-13-94 are permissive, that is, the procedure is merely available

to litigants who are free to make other arrangement for the appearance of these witnesses as was done by the State and as the defendant was free to do.

Therefore, the use of an alternative arrangement by the State does not affect the validity of the trial. The Court notes that the defendant acknowledges that the State in this case could very well have followed the statutory procedure. See footnote 7 on p. 26 of the defendant's supplement to his motion for new trial filed on June 29, 2015.

The defendant also contends that funds earmarked for serving crime victims were illegally used by the State to make these payments to the subject witnesses.

Pursuant to O.C.G.A. §§ 15-12-130, et seq., the Georgia Criminal Justice Coordinating Council promulgated rules and regulations for the certification of crime victim assistance programs. See Ga. Comp. R. & Regs. 144-4-.05. The rules and regulations provide, in pertinent part, that no program will be certified that does not show proof that it provides or will provide services to victims of crimes. Ga. Comp. R. & Regs. 144-4-.05(2)(d)(4). Thirteen categories of these allowed services are listed, the final one being "(o)ther." See Ga. Comp. R. & Regs. 144-4-.05(2)(d)(4)(xiii). By including this category it is clear that the listed categories are not intended to be exhaustive and that services provided to victims are allowed that do not fall into the categories listed.

The Court also notes that one category of approved victim services is "criminal justice

support/advocacy." See Ga. Comp. R. & Regs. 144-4 .05(2)(d)(4)(vii). Criminal justice support is a very broad category that could include assisting with the prosecution of cases in which there were victims. Whether this support is limited to advocacy is subject to interpretation.

The defendant called two witnesses from the Georgia Criminal Justice Coordinating Council. The first was the director of the Statistical Analysis Center which collects data from local victim assistance programs. (2/29/16 MNT 1:23). She testified concerning expenditures by the Newton County District Attorney's Office in 2012. (2/29/16 MNT 1:29-36).

The second witness was a grant specialist from the Georgia Criminal Justice Coordinating Council. (2/29/16 MNT 1:40). She testified that she was familiar with the funds collected for victim services and that, in her personal opinion, it would be a mis-use of the funds to pay lost wages for an out of state criminal trial witness. (2/29/16 MNT 1:42). On cross examination she gave general examples of expenditures (2/29/16 MNT 1:43) and confirmed that there were no efforts to "de- certify" the Newton County District Attorney's Office as a certified victim assistance program. (2/29/16 MNT 1:44).

Therefore, to the extent that the legality of the use of these funds by the district attorney in this case is a material issue, based upon the record the Court cannot find that this was an improper use.

c. Effect of unavailability of victim assistance funds to the defendant.

The defendant claims that his defense limits itself to the statutory scheme codified at §§ 24-13-90, et seq., to arrange the attendance of and to compensate out of state witnesses. Because the State paid the actual losses sustained by its out of state and in state witnesses the defendant claims he is deprived of his rights to a fair trial, to avoid cruel and unusual punishment, and due process.

However, it is not clear that the defense limits itself to a per diem and mileage when seeking the attendance of out of state witnesses as asserted. When information concerning payments to defense witnesses was sought by the State, defense claimed that "the information requested was privileged and confidential." (2/29/16 MNT 2:263). See also State's Exhibits 1 and 2 admitted into evidence at the hearing. (2/29/16 MNT 2:268). Subsequently the defense acknowledged that although they had no checks to show actual payments, they paid every witness expense that could be proven with a receipt, except lost wages. (2/29/16 MNT 2:269-271). Therefore, the defense did not limit itself in reimbursing their witnesses to the extent originally claimed. In addition, any limitation is clearly self imposed.

Therefore, any discrepancy in witness reimbursement between the parties did not cause any unconstitutional harm or disadvantage to the defendant.

11. Defendant was deprived of his right to due process, assistance of counsel, against cruel and unusual punishment and a fair trial by being required to wear an electronic stun belt.

The defendant was required to wear a concealed electronic stun belt during his trial. Although the Court had previously ordered that a hearing would be held if the sheriff requested such a device, no hearing was held. (Volume 1 of transcript of motions hearing held on April 26, 2010, p. 144, hereinafter 4/26/10 T. 1:144). However, before the commencement of the jury trial at a motion hearing held on January 17, 2012, the Court reviewed the unified appeal checklist with counsel and the defendant. (January 17, 2012, transcript, p. 89, hereinafter 1/17/12 T. 89). Included in this review was the issue of physical control of the defendant. (1/17/12 T. 130-131). The Court stated the following on the record in addressing this issue with counsel and the defendant.

> Now, as far as the physical control of the defendant, he, of course, will not be required to wear any chains or shackles or visible restraining devices during trial unless the need for that arises.

The Court addressed only chains, shackles and any visible restraining devices in this statement, not a stun belt. The defendant was already aware that he

would be wearing a stun belt during the trial[47] since he had worn such a belt without objection during pretrial hearings. (11/27/17 MNT. 137). Early during the jury trial a juror expressed concern to a deputy bailiff about the defendant being "anxious," not out of concern for the defendant's well being but, as stated by the juror, out of concern for safety, and the bailiffs needing to be sure they keep an eye on the defendant. (T. 10:2781). In a colloquy with counsel outside the presence of the jury the district attorney commented on the defendant wearing a stun belt. (T. 10:2779). This occurred in the presence of the defendant and his counsel and they did not respond because they were already aware of this and they voiced no objection to the stun belt at anytime during the trial, despite knowing it was being worn by their client.

This issue should have been addressed on the record before the defendant was fitted with the belt. In defense motion no. 41 filed on January 16, 2009, the defendant objected to the use of a stun belt as a violation of the defendant's due process rights and his Sixth Amendment rights to a fair trial and a hearing

[47] On January 13, 2012, Deputy Polite, who later testified at the motion for new trial hearing on November 27, 2017, reviewed with the defendant the operation of the stun belt, and explained the conditions and/or conduct on the defendant's part that would lead to the activation of the belt. (Transcript of motion for new trial hearing held on November 27, 2017, at pp. 129-133, hereinafter 11/27/17 MNT. 129-133). A form was also read to the defendant containing this information. See Exhibit 2 admitted into evidence at the hearing held on November 27, 2017. (11/27/17 MNT. 131).

was ordered to be held if the need for a stun belt arose. (4/26/10 T. 1:143-144).

However, the issue then becomes whether the defendant's rights were unjustly burdened. See Weldon v. State, 297 Ga. 537, 775 S.E.2d 522 (2015); and U.S. v. Durham, 287 F.3d 1297 (11th Cir. 2002).[48] The defendant argues that the use of the concealed[49] stun belt impacted his Sixth Amendment right to counsel and his due process rights to be present at trial and to participate in his defense. See defendant's post-hearing brief filed on January 12, 2018, at p.6

At no point during the trial did the defendant or his counsel assert that the presence of the stun belt under his clothing had an adverse effect on his ability to confer with counsel or his ability to focus on his trial. See Weldon, 297 Ga. at 540 (fn. 17). Apart from the motion filed by the defendant on January 16, 2008, four years before his trial, the defendant and his attorneys never objected to the use of the stun belt. (11/27/17 MNT. 121). The defendant testified that the stun belt did not prevent him from speaking to or

---

[48] If the defendant's rights were unjustly burdened the inquiry then becomes "whether these burdens on (the defendant's rights) were harmless ... beyond a reasonable doubt." Durham, 287 F.3d at 1308. See also Weldon, 297 Ga. at 541 (Utilization of a remedial electronic security measure shielded from jury's view is permissible where the defendant fails to show he was harmed by its use.)

[49] It is uncontroverted that the stun belt was concealed at all times and was never visible to the jury. As a result, the defendant's presumption of innocence was never jeopardized. See Deck v. Missouri, 544 U.S. 622, 125 S.Ct. 2007(2005).

conferring with his attorney who sat next to him throughout the trial.[50] (11/27/17 MNT. 115-116). This attorney testified that she spoke with him during the trial (11/27/17 MNT. 71). She said nothing about any anxiety or reluctance to speak with her ever begin exhibited by the defendant. Therefore, there is no credible evidence that the stun belt had any effect, adverse or otherwise, on the defendant's Sixth Amendment and due process rights to be present at trial and to participate in his defense. See Durham, 287 F.3d at 1306 (fn.

This conclusion is further supported by the great lengths the deputy went to in explaining to the defendant the operation of the stun belt and what would have to occur before it is used. (11/27/17 MNT. 128-129). When the belt was put on the defendant a checklist was utilized to make sure he had no heart, health or motor skill problems. (11/27/17 MNT. 130). In fact, in the standard questionnaire the defendant revealed that he had previously worn a stun belt. See State's Exhibit 2 admitted into evidence at the November 27, 2017, hearing, p. 1. (11/27/17 MNT. 131, 134-135, 137).

The deputy read and explained to the defendant that he would be warned or given instructions before the belt was ever activated. Even though the defendant was never given such a warning during the trial, the deputy explained the events or

[50] The third chair attorney, a member of the defendant's defense, sat next to the defendant at the counsel table throughout the trial while his first and second chair attorneys participated in the trial proceedings. (11/27/17 MNT. 64, 68).

acts by the defendant that could cause the belt to be activated. See State's Exhibit 2 admitted into evidence at the November 27, 2017, hearing, p. 3. (11/27/17 MNT. 132-133)[51] None of these events or acts included speaking to his attorney.

The vest was adjustable and care was taken to be sure the device did not fit too tightly (11/27/17 MNT. 126-128). The defendant never complained to the deputy about the belt being uncomfortable or preventing him from communicating with his attorneys. (11/27/17 MNT. 129-130).

The constitutional rights of the defendant to counsel and to participate in his defense were not impacted by the use of the stun belt. The use of the belt does not entitle him to a new trial based upon the record.

12. The death sentence of the defendant was arbitrary and disproportionate in violation of his constitutional rights.

The Eighth Amendment to the United States Constitution mandates that a death sentence be proportionate to the crime the defendant committed. Coker v. Georgia, 433 U.S. 584 592, 97 S.Ct. 2861 (1977). (A death sentence is unconstitutional if it "is

[51] State's Exhibit 3 also contained documentation of the daily testing of the device each day during the trial to confirm that it was functioning properly before it was fitted on the defendant. (11/27/17 MNT. 135).

grossly out of proportion to the severity of the crime.") In reviewing sentences the United States Supreme Court has focused on "the gravity of the offense and the severity of the penalty" in evaluating the appropriateness of a death sentence for a particular offense. Pulley v. Harris, 465 U.S. 37, 42-43, 104 S.Ct. 871, 875 (1984).

However, the defendant seeks a new trial based upon his claim that the death penalty in this case is disproportional based on comparison with similar death penalty cases in Georgia, not based upon inherent disproportionality, that is, comparing the gravity of the specific offense in the case to the severity of the death penalty. See Defendant's Supplemental Brief Under Protest Relating to Proportionality Claim and Response to State's Supplemental Brief filed on May 27, 2016, in which murder cases from throughout Georgia were cited for comparison with the case before this court and other death penalty cases in Newton County.[52] The defendant also argues that the death penalty in his case was sought by the district attorney because she "has pursued the death penalty with a fervor and zeal unmatched by any other elected prosecutor in the State." See Defendant's Supplemental Brief Under Protest Relating to Proportionality Claim and

[52] In his supplemental brief the defendant cited Georgia Department of Corrections statistics concerning the number of murder convictions statewide for the period of 2011-2016, reported decisions of the Supreme Court of Georgia over various periods of time to quantify "presumptively death eligible offenses," and other data as a basis for a comparative disproportionality review.

Response to State's Supplemental Brief filed on May 27, 2016, at p. 3.

The comparative proportionality review sought by the defendant as a basis for the granting of a new trial is not mandated by the Eighth Amendment, rather it is a requirement imposed solely by statute. Pulley, 465 U.S. at 43-44, 104 S.Ct. at 871. See also Bowling v. Parker, 344 F.3d 487, 521 (6th Cir. 2003), and Commonwealth v. Guernsey, 501 S.W.3d 884 (Ky. 2016).

The sole statutory authority for conducting a comparative proportionality review is vested in the Supreme Court of Georgia. O.C.G.A. § 17-10-35. Wilson v. State, 250 Ga. 630, 300 S.E.2d 640 (1983) ("It is for (the Supreme Court of Georgia), and not the jury, to determine whether a sentence of death is excessive or disproportionate to the penalty imposed in similar cases.) See also Willis v. State, 304 Ga. 686, 820 S.E.2d 640, 650 (2018). Therefore, this Court declines to conduct such a review.

Finally, the prosecutorial discretion of the district attorney in this case in seeking the death penalty was not abused due to the evidence adduced at trial which formed the basis of the jury finding statutory aggravating circumstances and ultimately deciding that a death sentence was appropriate.

"[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct.

663 (1978). "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." Wayte v. U.S., 470 U.S. 598, 607, 105 S.Ct. 1524 (1985). However, the "prosecutorial discretion given to district attorneys has also been upheld as constitutional based on the fact that [a] prosecutor's decision to seek the death penalty is limited by the jury's ultimate decision to impose it.'" Arrington v. State, 286 Ga. 335, 337, 687 S.E.2d 438 (2009), quoting Jenkins v. State, 269 Ga. 282, 285, 498 S.E.2d 502 (1998).

Therefore, the defendant is not entitled to a new trial based upon the comparative disproportionality of the death penalty as argued.

13. The defendant was deprived of his right to be present during bench conferences held during the jury trial.

Thirty eight bench conferences were held during the jury trial. See Supplement to Motion for New trial on the Basis of the Denial of Rodney Young's Right to be Present, filed on November 22, 2016, at p. 1. The issue of recording bench conferences was addressed by the Court at a pretrial hearing held on April 26, 2010.

Bench conferences typically become necessary during a trial without warning. They are conducted

primarily with the jury still in the courtroom.[53] Technology was not available at trial to simultaneously record every word spoken in such a conference with each participant gathered at the bench. As a result the Court instructed the parties, without objection, that the Court and counsel would make sure that the contents of each such bench conference were subsequently placed on the record outside the presence of the jury. (4/26/10 T. 1:185-186)

Almost five years after completion of the jury trial the defendant amended his motion for a new trial to allege that his right to be present at his trial was violated because he was not present during these pretrial conferences. See Supplement to Motion for New Trial on the Basis of the Denial of Rodney Young's Right to be Present, filed on November 22, 2016. Nine months earlier on February 18, 2016, the defendant had filed a Motion to Conform the Record Transcripts to the Proceedings, alleging that transcriptions of the thirty eight bench conferences were missing from the trial transcript and requesting the Court to order that the filed transcripts "accurately report the entirety of the trial proceedings, including all bench conferences." See p. 4 of the motion.

A hearing was held on February 29, 2016, where the Court instructed counsel to review the trial record to identify the bench conferences which were

[53] When the objected to bench conferences were held during voir dire, no other jurors were present in the courtroom.

subsequently placed on the record pursuant to the procedure agreed upon by counsel. (2/29/16 T. 1:4-7)

On March 18, 2016, the defendant filed a Motion to Reconstruct the Record in which he acknowledged that twelve of the bench conferences had been subsequently described on the record. See pp. 4-5 of the motion. The contents of the remaining bench trials have been stipulated by the parties or reconstructed for the record by the Court pursuant to O.C.G.A. §§ 5-6-41(f).[54]

The defendant argues that he was unconstitutionally denied his right to be present at nine bench conferences held during voir dire and at two bench conferences which occurred during jury sentencing deliberations. See Supplement to Motion for New Trial: Right to Presence filed on August 14, 2018, at pp. 2-10.

The defendant was represented at trial by three attorneys. (11/27/17 MNT:60- 61). One attorney was assigned to sit next to the defendant throughout the trial while the other attorneys tried the case. (11/27/17

---

[54] See Defendant's Proposed Record Reconstruction and Request for Hearing filed on November 22, 2016; Transcript of November 27, 2017, hearing on Motion for New Trial, pp. 27-30; and Order Correcting Omissions in Record to Make Record Conform to the Truth pursuant to O.C.G.A. § 5-6-41(f) filed on June 22, 2018. The defendant filed an "objection" to the reconstruction of four bench conferences by the Court but has not asserted the Court's ruling as a ground for new trial. See Defendant's Objection to Certain Portions of the Court's Reconstruction and Motion for Reconsideration filed on August 14, 2018.

MNT:61, 63, 68). The defendant was present in the courtroom throughout the trial, including voir dire. (11/27/17 MNT:64, 72). He never asserted his right to attend bench conferences. (11/27/17 MNT:71). His attorney never asked the Court to allow him to join him at bench conferences (11/27/17 MNT:63), nor did the Court ever forbid the defendant from attending. (11/27/17 MNT:63). The attorney who sat next to the defendant throughout the trial acknowledged having "conversations" with him but she refused to testify concerning what they discussed or whether she was "informing or advising him as counsel sitting next to him about what was taking place during his trial." (11/27/17 MNT:72). The defendant acknowledged that he could freely talk to this attorney during his trial by simply leaning over and speaking to her. (11/27/17 MNT:115).

Finally, his defense attorney could not say for certain that he didn't discuss "the substance of the bench conferences" with the defendant. (11/27/17 MNT:62). Although the defendant was present for all proceedings, when called as a witness in support of his motion for new trial he did not testify that he was unaware of the subject matter of the bench conferences, his ignorance (if any) of his right to be present, or that he objected to the bench conferences being attended solely by his attorneys. (11/27/17 MNT:101-121).

The defendant's attorney also acknowledged that the defendant was present in court and observed each juror appearing individually to be questioned by the court, then by the attorneys. (11/27/17 MNT:64, 72-73). The defendant was also present when notes were received from the jury during their sentencing

deliberations, shared with counsel and discussed at length on the record. (T. 13:3719, 3736).

VOIR DIRE BENCH CONFERENCES

"It is well established that proceedings involving the selection of a jury are considered 'critical stage[s]' at which the defendant is entitled to be present," Sammons v. State, 279 Ga. 386, 387, 612 S.E.2d 785 (2005), and that a defendant who is present in the courtroom but who does not participate in a bench conference at which a juror is discussed and dismissed is not "present" to the extent required under the federal and state Constitutions. Murphy v. State, 299 Ga. 238, 240, 787 S.E.2d 721 (2016).

However, this right belongs to the defendant, and the defendant is free to relinquish that right if he or she so chooses. Ward v. State, 288 Ga. 641, 646, 706 S.E.2d 430 (2011). "The right is waived if ... counsel waives it and the defendant subsequently acquiesces in the waiver." Id. Acquiescence is a tacit consent to acts or conditions which "may occur when counsel makes no objection and a defendant remains silent after he or she is made aware of the proceedings occurring in his or her absence," Burner v. State, 299 Ga. 813, 820, 792 S.E.2d 354 (2016), that is, "after the subject was brought to their attention." Zamora v. State, 291 Ga. 512, 519, 731 S.E.2d 658 (2012)

Based upon these principles the Court will address the bench conferences held during voir dire identified by the defendant.[55]

1. G. Miller — After extensive voir dire (T. 5:1631-1637). defense counsel asked to approach the bench. (T. 5:1637) A bench conference was held and the juror was then dismissed without objection. See Order Correcting Omissions in Record to Make Record Conform to the Truth Pursuant to O.C.G.A. § 5-6-41(f) (hereinafter referred to as Correcting Order at p. 7). The defendant was present and did not object.

2. P. Howland — After extensive voir dire (T. 6:1714-1719) defense counsel asked to approach the bench. (T. 6:1719). A bench conference was held and the juror was then dismissed without objection. See Correcting Order at p. 8. The defendant was present and did not object.

ANALYSIS
Jurors 1 (G. Miller) and 2 (P. Howland)

The defendant waived his right to participate in these bench conferences which occurred in his presence. His attorney not only failed to object to the conferences but actually requested the conferences, also in the defendant's presence. The defendant was aware of the individual voir dire process which had been repeated in his presence over several days and

[55] See Supplement to Motion for New Trial: Right to Presence, filed on August 14, 2018.

was clearly aware of the subject matter of the bench conferences.

Each juror was called into the courtroom individually, questioned individually, and remained present as counsel went to the bench, after which the juror was excused. (11/27/17 MNT 64, 72-73). Therefore, the defendant knew that the bench conference involved whether the juror should or should not be dismissed. Despite this knowledge the defendant did not object regarding his absence. See Zamora, 291 Ga. at 519-520, 731 S.E.2d 658. Instead, the first time the defendant contended that his right to be present was violated was in a supplement to his motion for new trial, filed on November 22, 2016, almost five years after his jury trial, further evidence of his acquiescence. Id. See also Jackson v. State, 278 Ga. 235, 237, 599 S.E. 2d 129 (2004).

Finally, during the guilt-innocence phase of the trial after the close of evidence but prior to the return of a verdict, on February 17, 2012, the Court reviewed the Unified Appeal[56] checklist with the defendant, defense counsel and the State. (T. 11:3347). The defendant was asked by the Court whether he was satisfied with the manner in which his defense had been conducted and was being conducted. (T. 11:3347, lines 21-25) and whether there was anything he wanted to say. (T. 11:3348, line 1). See Rule III B3c of the Unified Appeal which requires the Court to give the defendant the opportunity to state any such

[56] See the Unified Appeal Procedure as promulgated by the Supreme Court of Georgia pursuant to O.C.G.A. §& 17-10-36(a) and (b).

objections he may have.[57] In response, defense counsel advised the Court that they had "instructed Mr. Young to exercise his 5th Amendment rights to not respond." (T. 11:3347- 3348). This was repeated when the Court asked the defendant if that was his understanding. (T. 11:3348).

The defendant testified one time in this case. This testimony was in support of his motion for new trial on November 27, 2017. In this testimony he expressed no objection to his absence from any of the bench conferences held in this case. (11/27/17 T. 11:101-121). This was a year after he first asserted this claim in support of his motion and was, therefore, aware of this right when he testified. A defendant who has heard testimony from a prospective juror concerning the fitness and qualifications to serve as a juror and is aware that (1) a bench conference will be held, that (2) he will not be present during the conference, that (3) the conference will involve whether to excuse the juror known to the defendant, and if the defendant and his attorney do not object, the defendant has acquiesced in the waiver by his attorney to be present. See Scudder v. State, 298 Ga. 438, 440, 782 S.E.2d 638 (2016); Zamora, 291 Ga. at 520, 731 S.E.2d 658 (holding that the defendant acquiesced in the dismissal of a trial juror at a bench conference that occurred in his absence where the defendant did not voice any objection until his appeal

[57] The defendant had been given these opportunities previously and he had responded that he had nothing to say or "no comment." (08/07/08 T. 11-12) (08/21/08 T. 12) (04/26/10 T. 2:407-408) (04/28/11 T. 173) (12/1/11 T. 30-31) (01/03/12 T. 106-107) (01/17/12 T. 134).

brief); Jackson, 278 Ga. at 237, 599 S.E. 2d 129 (holding that the "appellants acquiesced in the proccedings [occurring] in their absence when their counsel made no objection and appellants thereafter remained silent after the subject was brought to their attention"); Hanifa v. State, 269 Ga. 797, 807, 505 S.E.2d 731 (1998)(finding acquiescence where the defendant failed to object after learning prior to the return of the jury's verdicts that the court had spoken with the jury outside of his presence). Compare Gillespie v. State, 333 Ga. App. 565, 567, 774 S.E.2d 255 (2015) (Because juror was not immediately excused by court following bench conference not attended by defendant, defendant had no knowledge juror was being excused and could not have acquiesced as a result.)

This acquiescence is further confirmed by the defendant witnessing bench conferences conducted in this manner over a period of two weeks in the trial with no objection, his failure to object when asked directly by the Court if he had any complaints about the manner in which his counsel were conducting his defense in his trial, and his failure to express any disapproval when called to the stand by his attorney who claimed that he (the defendant) disapproved, that is, when he had the opportunity to be heard on this issue.

3. N. Brown – During voir dire of this juror the State asked to approach the bench. (T. 2:576). A bench conference was held in which no decision was made concerning whether to excuse the juror for hardship as requested by the district attorney. See Correcting Order at pp. 5-6. Voir dire then resumed. (T. 2:576).

Upon completion of voir dire the juror was asked to exit the courtroom. (T. 2:585). The Court recounted the juror hardship discussed in the bench conference. (T. 2: 585-586). By agreement of counsel the juror was called back into the courtroom and was given instruction to consult her employer and her college about potential undue hardship if she is selected to serve and to let the clerk know the results of her inquiry. (T. 2:586-588). The defendant was present and did not object.

ANALYSIS
Juror 3 (N. Brown)

Juror Brown testified that she was a full time student and had a full time job, and expressed concern for her classroom and employment responsibilities if she were selected to be a juror, i.e., a hardship. (T. 2:571-573, 573-579). A bench conference was then held (T. 2:576), the defense questioned the juror and she was asked to exit the courtroom. (T. 2:585). The Court addressed what had been discussed in the bench conference, counsel stated that they had no objection to the juror, and the Court then explained how the potential hardship issue would be addressed. (T. 2:585-586). This was done in the presence of the defendant. He was also present when the Court called the juror back into the courtroom and conveyed instructions to the juror about checking with her college and employer about hardship and how to convey follow up information to the Court. (T. 2:586-588). Therefore, the defendant, knowing the subject matter of the bench conference, that the juror would be accepted by his attorney, and after hearing the juror's hardship testimony himself, did not object,

thereby acquiescing to her approval. See Williams v. State, 300 Ga. 161, 165, 794 S.E.2d 127 (2016).

4. M. Johnson – After extensive voir dire (T. 4:1183-1187) defense counsel asked to approach the bench. (T. 4:1187). In the bench conference defense counsel asked that the juror be excused due to obvious hardship. See Correcting Order at p. 6. The State did not object. After the bench conference the Court stated to the juror that "in light of the situation you're faced with dealing with concerning your child, we don't want you to have to worry about being in this case while that's going on, so we're going to excuse you and wish you the best with your child." (T. 4:1188). The defendant was present and did not object.

ANALYSIS
Juror 4 (M. Johnson)

Juror Johnson testified about her three year old son experiencing ongoing seizures, that tests were scheduled during the trial, that additional tests could be ordered, and that she and her mother cared for the child, i.e., a hardship. (T. 4:1185- 1187). In the bench conference requested by defense counsel it was acknowledged by counsel that she should be excused for hardship. See Correcting Order at p. 6. Immediately after the bench conference, in excusing the juror the Court stated the reason on the record, her hardship associated with the condition of her son. (T. 4: 1188).

Therefore, knowing that the hardship of the defendant had been discussed in the bench conference, that his attorney had agreed to the excusal of the juror

based on the hardship, and after hearing the juror's hardship testimony himself, did not object, thereby acquiescing to her excusal. See Williams, ibid.

5. M. Anderson –During extensive voir dire (T. 5:1515-1521) the juror explained the financial hardship he would experience if chosen to serve on the jury. (T. 5:1520-1521). Defense counsel then asked to approach the bench. (T. 5:1521- 1522). Defense counsel then requested dismissal of the juror based on the hardship he described in open court. See Proposed Record Reconstruction and Request for Hearing (hereinafter referred to as Record Reconstruction) filed on November 22, 2016, at p. 2, accepted by the Court as agreed upon by counsel. (11/27/17 MNT. 28-30). The Court ordered further questioning. d. The juror was then asked more questions about his claim of financial hardship. (T. 5:1521-1523). The Court then stated that based upon his financial hardship, that is, what the juror had told the Court and counsel on the record (T. 5:1523, line 12) he was excused. (T. 5:1523). The defendant was present and did not object.

ANALYSIS
Juror 5 (M. Anderson)

Just prior to the bench conference requested by defense counsel the juror testified extensively about the financial hardship he and his family would experience if required to serve as a juror. (T. 5:1520-1521). After the bench conference the Court continued to question the juror concerning the financial impact of jury service if he were chosen. (T. 5:1521-1523).

After counsel declined the opportunity to ask more questions, the Court excused the juror, stating "(w)e don't want to make things more difficult for you by serving on the jury in light of what you have told us." (T. 5:1523). Therefore the Court explained the reason for excusing the juror in the presence of the defendant. The basis for the hardship finding had been testified to in the presence of the defendant as well.

As previously noted, the defendant was clearly aware that the jury was being selected. He was aware of the jury selection procedures that had been repeated in his presence over a period of several days. He knew that the single juror in the courtroom was the subject of the voir dire process and, as a result, any bench conferences had to involve whether the single juror in the courtroom would be selected. Even though the Court "cannot say that (the defendant) would have been unable to offer his counsel a meaningful opinion as to whether (this juror) should be excused," Gillespie v. State, 333 Ga. App. 565, 569, 774 S.E.2d 255 (2015), the juror was not excused in the bench conference. The questioning continued and the juror was ultimately excused by the court, again in the defendant's presence. Neither the defendant nor his attorney objected.

Despite his knowledge that the juror was excused and his knowledge of the reason the juror was excused as announced by the Court the defendant remained silent and voiced no objection until years later. Under these circumstances the defendant acquiesced in the waiver of his presence in the conferences that was held in his absence. See Zamora, 291 Ga. at 519, 731 S.E.2d 658. See also Williams, 300

Ga. at 166, 794 S.E.2d 127 (Defendant while present in the courtroom during bench conference held in her absence after juror had explained hardship on record, with Court announcing excusal of juror based on hardship, held to have acquiesced in her trial court's waiver of her presence at bench conference by her silence in the face of this knowledge.)

6. J. Kinnebrew – During voir dire of this juror, a seminary professor, the juror expressed concern about his ability to meet his teaching responsibilities if selected as a juror. (T. 6:1924-1925). Before asking any questions defense counsel asked to approach the bench. (T. 6:1926). Defense counsel requested that the juror be excused due to hardship. Record Reconstruction at p. 4. The Court ordered that additional questions be asked and did not rule on the request. Id. Follow up questions were then asked exclusively about the concerns expressed earlier by the juror concerning his teaching responsibilities and the hardship if he were selected. (T. 6:1926-1927). After these questions, the Court excused the juror based upon undue hardship related to his employment. (T. 6:1928). The defendant was present and did not object.

ANALYSIS
Juror 6 (J. Kinnebrew)

This juror testified extensively concerning his teaching obligations as a seminary professor, including teaching on line courses, on-campus courses taught at night, and requiring three hours of preparation per class for graduate level classes being

taught by him. (T. 6:1923-1926). After the bench conference requested by defense counsel to seek dismissal of the juror due to hardship which the Court declined, the Court continued to question the juror about the concerns the juror had expressed. The juror explained that sleepness nights would result from his selection as well as an impact on the structure of his classes. (T. 6:1927).

Based upon the juror's testimony in open court, the juror was excused and the Court clearly explained that the excusal was due to the hardship based on the nature of his employment. (T. 6:1928). This explanation was stated in the presence of the defendant. He and his attorney did not object.

Based upon the reasoning stated in the previously stated analysis of juror M. Anderson, the Court finds that the defendant acquiesced in the waiver of his presence in the bench conference that was held in his absence. See Zamora and Williams, id.

7. J. Nave — During voir dire of this juror, an hourly paid carpenter (T. 5:1544, 1549, 1552), the juror expressed concern about being "without a paycheck" during the trial. (T. 5:1549). Defense counsel then immediately asked to approach the bench. (T. 5:1549). At the bench conference defense counsel asked that the juror be excused due to hardship but the Court declined and instructed defense counsel to continue questioning. Record Reconstruction at p. 3. Defense counsel and the Court then asked questions concerning financial hardship. (T. 5: 1550-1551). After additional questioning by defense counsel about the juror's openness to various sentences, and his

willingness to consider mental retardation, as well as questioning by the State, the juror was asked to exit the courtroom while his fitness to serve was discussed in open court. (T. 5:1560). The Court then explained on the record that the purported financial hardship claim of the witness had been discussed in the bench conference, and that care needed to be taken that the rejection of hourly wage earners as jurors would not be automatically sought by the defense. (T. 5:1560-1561). However, defense counsel did object to the juror in open court based on financial hardship. (T. 5:1561-1562). The Court allowed the juror to remain on the panel and explained its reasoning. (T. 5:1562-1563). The defendant was present and did not object.

ANALYSIS
Juror 7 (J. Nave)

During voir dire this juror expressed concerns associated with his loss of income during the trial. Despite defense counsel approaching the bench to request the excusal of the juror due to financial hardship, the Court declined the request and ordered that questioning continue. After more testimony concerning financial hardship the juror was excused from the courtroom and, during the juror's absence and in the presence of the defendant, the defendant's attorney and the Court explained what had been discussed at the bench conference, that is, how financial hardship excusal requests need to be carefully considered to be sure that young hourly wage earners would not be excluded from the jury panel. (T. 5:1560-1561). After hearing this the defendant voiced no objections to his absence from the bench conference.

Defense counsel, again in the presence of the defendant without objection, proceeded to request excusal of the juror based on financial hardship. (T. 5:1561- 1562). The juror was not excused.

Therefore the defendant acquiesced to his absence from the bench trial. See Zamora and Williams, Id.

8. K. Hairston — During voir dire the juror testified that she was conscientiously opposed to the death penalty, that she would vote against imposing the death penalty regardless of the circumstances, and that there were no circumstances under which she would seriously consider voting for a death sentence. (T. 5:1565-1566). Defense counsel immediately asked to approach the bench. (T. 5:1566). Counsel agreed the juror was obviously not qualified as a result of her responses to the Court's questions. Record Reconstruction at p. 9. The bench conference ended and the juror was excused. (T. 5:1566). The defendant was present and did not object.

ANALYSIS
Juror 8 (K. Hairston)

If a juror is "conscientiously opposed to capital punishment" the juror "shall be set aside for cause." O.C.G.A. §§ 15-12-164(a)(4) and (c). (Emphasis added.) See Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978) ("Georgia law provides that, in a capital case, a prospective juror who is opposed to the imposition of the death penalty under any circumstance is automatically removed by the trial

judge "for cause," citing earlier codification of O.C.G.A. § 15-12-164.) In fact, if a juror is clearly disqualified on this basis, the defendant has no right to ask additional questions to the juror. Roberts v. State, 252 Ga. 227, 233, 314 S.E.2d 83 (1984).

As clearly stated by the United States Supreme Court,

> [T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (cits.) Under this standard it is clear . that a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause.

Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222 (1992). See also Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968).

Therefore if the defendant is not present at a bench conference where a legal matter is addressed to which the defendant cannot make a meaningful contribution and the Court has no discretion in deciding the issue addressed, his constitutional right to be present is not violated. Parks v. State, 275 Ga. 320, 323-324, 565 S.E.2d 447 (2002). The previously described legal effect of the juror's refusal to impose

the death penalty on his or her qualification to serve is clearly such a legal matter with which the defendant would have been "unfamiliar" and "incapable of rendering meaningful assistance." Id.

9. M. Wood — During voir dire this juror testified that he was "against the death penalty" and would "probably" vote against the death penalty "regardless of the circumstances." (T. 2:422). Before asking any questions the district attorney asked to approach the bench. (T. 2:423). The district attorney stated that the juror was clearly disqualified but the Court advised counsel that they would be allowed to ask further questions if they desired. Correcting Order at p. 4. The State and defense counsel then asked several more questions, primarily concerning his unwillingness to consider death as a sentence. (T. 2:423-434). The juror was then excused from the courtroom. (T. 2:435). In open court, both attorneys acknowledged that the juror was disqualified because he would not impose the death penalty and because he ignored the Court's previous instructions by investigating the case at home on the internet. (T. 2:435). The juror was called back into the courtroom and was excused. (T. 2:436). The defendant was present and did not object.

ANALYSIS
Juror 9 (M. Wood)

Just as juror Hairston, this juror testified that he was opposed to the death penalty. At the ensuing bench conference the Court declined to rule on the juror's qualification and instead ordered further questioning. In response to these questions the

defendant confirmed his opposition to the death penalty, that evidence of aggravating circumstances would not change his opinion, that he would not be open to considering all three sentencing options, and that he had researched the case on the internet.

When the juror was excused from the jury room, the Court heard from both counsel in open court in the defendant's presence. Both acknowledged that the juror was disqualified due to his opposition to the death penalty and because he disobeyed the Court's instructions not to investigate the facts of the case as shown by his testimony in the defendant's presence. (T. 2:435). The Court agreed, the juror was recalled and dismissed. (T. 2:435-436). The defendant was present during every contact with the juror and never objected.

As with juror Hairston, the bench conference issue was his disqualification due to his unwavering opposition to the death penalty, a legal issue as previously noted. See Correcting Order at p. 4. In addition the juror, as he testified in the defendant's presence, had researched the case on the internet and gained information about the case outside the courtroom which was stated as an additional ground for his disqualification. Again, the defendant did not object. Only then was the juror called in and excused.

Therefore, the defendant's absence from the bench conference did not violate his constitutional rights since a legal matter was addressed with which he would not have been familiar and no decision was made in the bench conference concerning the juror's qualifications or excusal.

BENCH CONFERENCES HELD DURING JURY SENTENCING DELIBERATIONS

The defendant identified two bench conferences held during the jury's sentencing deliberations, both of which involved a note received from the jury. (T. 13:3719, 3736). In both instances, the Court took the bench, called the attorneys to the bench, gave a copy of the note to the attorneys, allowed them a few moments to review the notes, and briefly discussed how the notes would be addressed, then the Court and counsel put those discussions on the record.[58] (T. 13:3719-3729, 3735- 3738).

Both bench conferences occurred in the defendant's presence. The conferences involved notes from the jury, copies of which were given to the attorneys.[59] The subject matter of the bench conferences were then recited on the record by the Court and the parties, again in the presence of the defendant. Although possible responses to the notes were discussed in the bench conferences, no final decision concerning a response was made during either bench conference.[60] On the record the Court not

---

[58] The State and defense counsel agree concerning what was discussed in both bench conferences. See Proposed Reconstruction at p. 7.

[59] The Court observed defense counsel take the notes to the table where the defendant was seated.

[60] After the second bench conference identified by the defendant the Court announced that it would give a modified Allen charge but no such final decision had been reached during the bench conference. (T. 13:3736).

only stated its ruling, it explained its reasoning, and allowed counsel to present arguments and objections, all in the presence of the defendant before the jury was called in. He did not object.

The first note presented a legal issue as to whether to declare a mistrial. The positions of the attorneys were argued and legal authority was cited concerning the alternatives available to the Court, specifically O.C.G.A. § 17-10-131 (T. 13:3725) and Morgan v. Illinois, supra. (T. 13:3726).

The second note involved a deadlock in jury deliberations. The Court proposed to charge the jury pursuant to Romine, supra. (T. 13:3726). Defense counsel presented argument in opposition to the Allen charge. The Court denied their requests to instruct the jury concerning collateral matters.

The absence of the defendant from these two conferences was not unconstitutional for two reasons. First, "acquiescence, which is a tacit consent to acts or conditions, may occur when ... a defendant remains silent after he or she is made aware of proceedings occurring in his or her absence." Goodrum v. State, 303 Ga. 414, 416, 813 S.E.2d 220 (2018), quoting Burney v. State, 299 Ga. 813, 820, 792 S.E.2d 354 (2016). With regard to both notes, the subject matter of both conferences was recited on the record by the Court or the attorneys following the conferences. The defendant remained silent. The defendant's attorney then stated their position concerning the issue. The defendant remained silent. The decision of the Court concerning how the subject matter of the notes would be addressed was then announced outside the presence of the jury. The defendant remained silent.

The objections, if any, of his attorneys were stated on the record. Therefore, the defendant acquiesced in how each bench conference was handled outside his presence.

Secondly, both bench conferences involved matters to which the defendant could not make a meaningful contribution, that is, matters with which he is unfamiliar and incapable of rendering meaningful assistance. Parks, supra. It is unreasonable to expect the defendant to be familiar with matters related to a mistrial, hung juries, an Allen charge and related matters.

For both of these reasons the defendant is not entitled to a new trial based on his absence from these bench conferences.

By refusing to acknowledge that they said anything at any time to the defendant about the content of the bench conferences, the vast majority of which were held at their request, defense counsel almost seem to accept the clear appearance of ineffectiveness. The Court cannot be asked or expected to ignore conduct which occurs in its presence throughout a trial over which it presides. The attorneys representing the defendant repeatedly, and quite properly, conferred directly with their client in the presence of the Court throughout voir dire and the trial, including prior to and after bench conferences. It is with great reluctance that the Court makes this observation for the record but it is compelled to do so by virtue of the arguments and testimony presented by the defendant in support of

this motion for a new trial.[61] Since defense counsel never brought their client with them to the bench nor requested approval to do so, nor did they ever object to the bench conference procedure followed throughout the trial, the Court observed and surmised that his presence was deemed by them to be unnecessary since he was told by them what was being discussed.

14. The voir dire process was "tainted" and unduly restrictive, resulting in the qualification of "several jurors" who were not qualified.

This ground for a new trial was presented in a pleading delineated as First Amended Motion for New Trial and Brief in Support presented to the Court by a previous defense counsel on December 4, 2012. See paragraphs 4A, 5A, 6A, and 7A of the pleading. When the Court discovered that the pleading was never filed, it promptly notified present defense counsel by letter dated and filed on February 15, 2019 (with the pleading attached), asking if the various grounds asserted in this pleading would be relied upon. In response, defense counsel stated "while we are not waiving any of the issues flagged by (prior counsel) for purposes of appeal, neither are we asserting them at this point as specific grounds for the new trial." See

[61] See Supplement to Motion for New Trial on the Basis of the Denial of Rodney Young's Right to be Present, pp. 4-6, filed on November 22, 2016; and Supplement to Motion for New Trial: Right to Presence, pp. 10-24, filed on August 14, 2018.

correspondence dated February 22, 2019, and filed on February 27, 2019. (Emphasis added.) Since these grounds are not waived the Court will address each ground presented in this pleading and assume that the decision not to assert them as grounds for the motion is a strategic one. The grounds asserted in paragraphs 1A, 3A, 8A and 10A of the pleading are addressed by this order in its consideration of grounds 2, 3, 4, 5 and 9 herein. Paragraph 2A of the pleading (The Court committed errors of law warranting the grant of a new trial.) will not be addressed because it fails to identify any "errors of law," cites no authority and presents no argument in support of this ground. See 66 C.J.S. New Trial §263 (February, 2019) (Party seeking new trial has the burden of proving, inter alia, irregularities at the trial); and Allstate Ins. Co. v. Brannon, 214 Ga. App. 300, 304, 447 S.E.2d 666 (1994).

The defendant properly argues that the Court should allow "a full and fair voir dire by counsel" and that the Court should not "browbeat" jurors in an effort to rehabilitate them but he does not specify how this purportedly occurred.

The defendant also objected to the ruling by the Court concerning State's Motion #4. See Motion in Limine to Prohibit the Defense from Introducing Improper Issues to the Jury During Voir Dire, filed on January 24, 2012. (01/24/12 T:220, 227). In addressing the motion, the State limited its request to hypothetical questions described on the third page of its motion. (01/24/12 T:221-220). Specifically, the State expressed concern with regard to hypothetical questions by defense counsel about sentencing which ask the juror to prejudge the case and, arguably,

inflame the juror with a "one-sided picture of what the evidence is going to be." (01/24/12 T:222).

After hearing from defense counsel, although the Court granted the motion, it acknowledged the difficulty of declaring general prohibitions prior to voir dire without knowing the context of the question (01/24/12 T:227), declaring "we may have to just cross that bridge when we get there." (01/24/12 T:227, lines 10-11).

The defendant acknowledges in his brief that the Court subsequently allowed questions which defense counsel had assumed were disallowed by the ruling and then points to no rulings by the Court during voir dire to which the defendant objects. See pp. 5-6 of the First Amended Motion for New Trial and Brief in Support.

Finally, the defendant asserts that the Court improperly qualified mitigation- impaired jurors, apparently as a result of improper voir dire rulings. See paragraph 7A of the First Amended Motion for New Trial and Brief in Support. Although case citations were given concerning the ability of jurors to consider mitigating circumstances, no ruling by the Court is identified as a basis for the granting of a new trial.

Therefore, these arguments do not provide a basis for granting a new trial.

15. The State relied upon false and misleading testimony which denied the defendant due process and fair trial.

In the sentencing phase of the trial, the defendant presented testimony of four witnesses, each of whom had taught or had contact with the defendant in high school in the mid-1980's. (T. 10:2969). Each witness testified based solely on their memories of the defendant and no testing results or documentary evidence was presented.

The two witnesses who taught the defendant testified that they recalled that he was determined to be mentally retarded and educable (T. 10:2852-2853, 2909), with an IQ between 60 and 69. (T. 10:2853). He could read on a third or fourth grade level (T. 10:2855) and needed assistance. (T. 0:2932).[62]

The other witnesses did not teach the defendant. One expressed surprise that he attended college, received an A in Psychology, and had successfully used a GPS device. (T. 10:2955, 2963-2964). The other had worked with the defendant and other students in a summer program in which they did landscaping and painting. (T. 10:2969).

In rebuttal the State presented testimony of three witnesses who worked with the defendant and testified concerning his job performance as a machine operator. (T. 11:3188-3224). The defendant argues that this testimony was false and misleading. See Supplemental Motion for New Trial filed on June 29, 2015, p. 36. In support of this the defendant filed personnel records from the defendant's employer consisting of 184 pages covering the ten years that he

[62] This teacher, when reviewing State's Exhibits 354, 355, 356, 357 and 358 (letters written by the defendant) testified that the defendant must have had help preparing them. (T. 10:2932).

worked at Aunt Kitty's Foods, a factory which processed and canned various food products in New Jersey where the defendant lived. (02/29/16 T. 2:280). See Defendant's Exhibit 19. These records were obtained by the defendant after the trial.

The defendant points to six entries in the 184 page personnel record in support of his claim that these witnesses perjured themselves in their descriptions of the work performance of the defendant. (02/29/16 T. 2:283-284).

1. The defendant had an unscheduled absence on August 26, 2007, causing him to have four disciplinary points.[63] (02/29/16 T. 2:284).

2. The defendant was verbally warned about a poor job performance due to non-deliberate actions on October 24, 2004. (02/29/16 T. 2:285).

3. The defendant left work early on April 19, 2004, due to illness but apparently did not ask to be excused, although he "doesn't make a habit of leaving early." (02/29/16 T. 2:285-286).

4. The defendant arrived late for work on February 27, 2001, causing the assessment of a point, and an accumulation of eight points "which warrants a five- day suspension." (02/29/16 T. 2:286-287).

---

[63] The defendant and his fellow employees worked under an accountability system involving points which were assessed based upon missing work for any reason, job performance issues, and related matters. (T. 11:3205-3206).

5. The defendant was late for work on December 21, 1999, again resulting in the assessment of one point "which warrants a one-day suspension. (02/29/16 T. 2:287).

6. The defendant had an unscheduled absence from work on February 8, 1998, resulting in two points being assessed for a total of four points being accumulated. (02/29/16 T. 2:287).

The defendant's counsel acknowledged that the defendant, according to the records, was employed at the job for approximately ten years with the last entry date in the records being February 3, 2008. (02/29/16 T. 2:287-288).

The witnesses called by the State were Benito Lopez, the union shop steward, who had known the defendant since 1997 or 1998 (T. 11:3188-3200); Edward Harris, a label machine operator (the same job held by the defendant) who had worked at this same job for 27 years (T. 11:3200-3213); and Cedric Blackney, the defendant's job supervisor in the labeling department (T. 11: 3213-3223).

Benito Lopez testified that the defendant, whom he had known since the defendant's employment started (T. 11:3188), was a "good" employee (T. 11:3190), that the defendant was able to operate and clean each of the five to six labeling machines (T. 11:3191-3192, 3197-3199), that he "was good at his job" and "was one of our best operators" (T. 11:3192), and that the defendant "was there every day, pretty much ... " (T. 11:3153).

Edward Harris, also a label machine operator with the defendant (T. 11:3201), described the operation of the labeling machines (T. 11:3202-3203) and described the defendant as not being "a problem employee in terms of being able to fi11 his job orders properly" (T. 11:3204), that the defendant "seemed to do fine" operating the various machines (T. 11:3204), had no problems communicating with Mr. Harris (T. 11:3204), and was "at work on time and everything." (sic) (T. 11:3204). The witness specifically refuted the idea that the defendant was incapable of doing his job without repeated help. (T. 11:3209). On cross examination he described the defendant's ability to read the written list of orders each day, test run and adjust the machines and insert the appropriate labels as directed in the "production sheet." (T. 11:3210-3213).

Cedric Blackney, the defendant's supervisor (T. 11:3214) in the labeling department (T. 11:3215), described the defendant as a "good machine operator" who was "consistent" (T. 11:3215), meaning that "(w)hatever machine he ran out of the five machines, he always ran them the same way." (T. 11:3215-3216). He also described the defendant as "always on time ... He showed up for work on time." (T. 11:3217).

It is true that "[c]onviction of a crime following a trial in which perjured testimony on a material point is knowingly used by the prosecution is an infringement of the accused's Fifth and Fourteenth Amendment rights to due process of law." Wimes v. State, 293 Ga. 361, 362, 744 S.E.2d 787 (2013) (citations omitted). However, "a line exists between cases of impeachment (which can be any diminution of the credibility of a witness) and cases of knowing

and willful false swearing (which, when material, is perjury)." Fugitt v. State, 251 Ga. 451, 452, 307 S.E.2d 471 (1983)

The defendant, post trial, has presented evidence concerning his job performance and evaluations covering ten years and points to six entries which arguably contradict the testimony of the witnesses.[64] This exhibit falls far short of showing that the trial testimony was "in every material part purest fabrication." Fugitt, supra, 251 Ga. at 453, 307 S.E.2d 471. See also Lewis v. State, 301 Ga. 754, 762-763, 804 S.E.2d 82 (2017) (Setting aside a verdict based on challenge to testimony "where there can be no doubt of any kind that the State's witness' testimony in every material part is purest fabrication" which can be shown "when the witness' testimony is shown to be an impossibility.")

Any contradictions between the testimony of the defense witnesses and the State's witnesses were properly presented to and resolved by the jury. The defendant's personnel records do not establish as fact that the testimony of the defendant's coworkers and supervisors was knowingly and willfully false, much less "purest fabrication." See Norwood v. State, 273 Ga. 352, 541 S.E.2d 273 (2001).

[64] These same records also reveal that the defendant received numerous pay raises and positive job evaluations during the ten years he was so employed. See Defense Exhibit 19.

Based on the foregoing, the defendant's motion for new trial is hereby **DENIED**.

SO ORDERED this 9 day of April, 2019.

/s/ Samuel D. Ozburn

SAMUEL D. OZBURN
JUDGE, SUPERIOR COURTS
ALCOVY JUDICIAL CIRCUIT

CERTIFICATE OF SERVICE

I, Kristi M. Bradford, Judicial Assistant to Judge Samuel D. Ozburn, do hereby certify that I have this day served the attached Order on Defendant's Motion for New Trial on the parties listed below by facsimile transmittal, electronic mail and/or by mailing a copy of same to them by U.S. Mail in envelopes having sufficient postage there on to insure delivery, unless otherwise noted:

Layla H. Zon, Esq. District Attorney, Alcovy Judicial Circuit Newton County District Attorney's Office 1132 Usher Street, Room 313 Covington, Georgia 30014 Fax: (770) 784-2069 Email: lzon@pacga.org
Josh D. Moore, Esq. Georgia Capital Defender's Office 104 Marietta Street NW Suite 600 Atlanta, GA 30303 Email: jmoore@gacapdef.org Fax: (404) 739-5155
Anna Arceneaux, Esq. Brian Stull, Esq. 201 W. Main Street, Ste. 402 Durham, NC 27701 Email: bstull@aclu.org Email: aarceneaux@aclu.org

This 9th day of April, 2019.

/s/ Kristi M. Bradford
Kristi M. Bradford

1132 Usher Street, Room 214
Covington, Georgia 30014
Telephone: (770) 784-2180
Fax: (770) 788-3770

APPENDIX D

856 435 1291 Bridgeton BOE Communi 10:55:11 a.m.
05-04-2010 1/1

Defendant's Exhibit 1

YOUNG, Rodney 12/6/67 19 Male 5-5792

23 Grove Street Bridgeton Bridgeton

Sarah Brihm

Senior High EMR 12

W. Schenck (12/81) 12/15/82

Poor academic achievement.

Educable

Place in EMR class commensurate with his age.

12/15/85

APPENDIX E

(Jury note)

Case No
2008CR1473-3

Need to hear the
recording where Mr
Young read his rights

FILED IN OPEN COURT

This 17th day of Feb. 2012
Linda D. Hays CLERK
Newton County Superior Court,
Alcovy Circuit

(Jury note)

Case No
2008CR1473-3

Can we get a copy
the legal definition
of mental
retardation?

(Jury note)

FILED IN OPEN COURT

This 21st day of Feb. 2012
Linda D. Hays CLERK
Newton County Superior Court,
Alcovy Circuit

We are stuck
at this
point

1 Life w/o parole
11 Death

___
12

?

What is the next step?

(Jury note)

Can we get
Prosecution
evidence
490-492

FILED IN OPEN COURT

This 21st day of Feb. 2012
Linda D. Hays CLERK
Newton County Superior Court,
Alcovy Circuit

(Jury note)

Case No
2008CR1473-3

Mental retardation [crossed out]

Charts [crossed out]

Can we get Prosecution
overhead
on how Rodney
met adaptive
skills area

FILED IN OPEN COURT

This 21st day of Feb. 2012
Linda D. Hays CLERK
Newton County Superior Court,
Alcovy Circuit

(Jury note)

Case No
2008CR1473-3

I am asking to be
dismiss as a juror. I
have lots of questions
and due to those I
cann't say yes to
death penalty

FILED IN OPEN COURT

This 21st day of Feb. 2012
Linda D. Hays CLERK
Newton County Superior Court,
Alcovy Circuit

(Jury note)

Case No
2008CR1473-3

Is there an automatic
appeal when the
death penalty is given?

You are to decide this case based upon the evidence, the law and the instructions given to you. You are not to concern yourselves with matters of this nature.

Judge Ozburn

FILED IN OPEN COURT

This 21st day of Feb. 2012
Linda D. Hays CLERK
Newton County Superior Court,
Alcovy Circuit

state rests subject to rebuttal.

THE COURT: All right. Mr. Romond.

MS. THOMPSON: Your Honor at this time, we call Wayne Hendricks to the stand. (Witness entered the courtroom)

Whereupon,

WAYNE MARVIN HENDRICKS

was called as a witness herein, and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. THOMPSON:

Q. And state your full name for the court reporter

A. My name is Wayne Marvin Hendricks.

Q. And can you spell your last name.

A. H-e-n-d-r-i-c-k-s.

Q. Thank you. Mr. Hendricks, what is your current occupation?

A. Currently I'm retired.

Q. And what are you retired from?

A. I retired from teaching in the Bridgeton School system in New Jersey.

Q. Where do you currently live?

A. Millville, New Jersey.

Q. Okay. And you said you were retired from teaching in Bridgeton, New Jersey?

A. Yes.

Q. And what exactly did you teach there?

A. Special Education.

Q. How long did you teach special education?

A. 38 years.

Q. And did you at some point have another position as, in special education?

A. Yes. I served as the department head of the special education of the high school.

Q. And can give us some years, from what years to what?

A. I began teaching in September of 1972, and in September of 1975 I was appointed the department

head of the special education department at the high school in Bridgeton.

Q. Okay. And what exactly does that job entail?

A. As department head, I oversaw a department of about 23 teachers, seven teachers aides. I was responsible for setting up schedules for the teachers and the students, overseeing the curriculum, coordinating the reviews and evaluations of the students.

Q. So have you always worked in special education?

A. Yes.

Q. What is your background that prepared you for that type of position?

A. I attended college in New Jersey, graduated from Trenton State College in 1970 with a bachelors in special education. I later went back to Rowan University and received a masters degree in administration.

Q. Do you know Rodney Young?

A. Yes, I do.

Q. How do you know Rodney Young?

A. Rodney Young was a student for me in the special education department in Bridgeton.

Q. And I'm going to ask you this, can you identify Rodney Young.

A. Yes.

Q. Okay. Can you point him out to the Court.

A. Yes. He's seated right there.

Q. Okay. And just describe the color of his...

A. He's wearing glasses. He's wearing a gray shirt with white collar.

Q. Okay. When's the last time you saw Rodney Young.

A. The last time I remember seeing Rodney was at a back-to-school function at the Bridgeton Middle School where he had brought his daughter in for a parent conference.

Q. Okay. Can you tell us what year that was.

A. I don't recall exactly, but I think it was within the last three or four years.

Q. Now, how old was Rodney when you first met him?

A. 14 years old.

Q. He was 14 years old. And at that time, what grade would that have been, and would that have been high school?

A. That would have been ninth grade in high school.

Q. Now, at that time, were you also a teacher of special education, or had you already ascended to your position as department chair?

A. At that time, I was a department head.

Q. Okay. And as department head, how did you happen to come into contact with the student Rodney Young at the age of 14?

A. As department head, I knew every student in the department. I met them. I would be required to go to the middle school when they were beginning the procedure of graduation from 8th grade. I met all the students there. Once they came into the high school as ninth graders, I got to know him on that basis, and on a regular basis I was called to substitute for teachers who weren't able to get a substitute, so I would go into the classroom and cover those classes, and that's how I would meet someone like Rodney.

Q. Okay. Now, when you were a substitute teacher, when you served as that, even though you were a department chair, were you ever at a time teaching or substituting a class where Rodney was in?

A. Yes.

Q. Okay. Now, let me go back a little bit. You talked about being chair of special education. And I think you indicated that was the year 1975?

A. '75, yes.

Q. Okay. And when did you stop becoming chair of that department?

A. I stopped in 1998.

Q. Okay. Now, can you tell us how a student at that time, when you were a department chair, becomes eligible for special education?

A. Okay. All the students that we received at the high school had to be evaluated by a child study team.

Q. I'm sorry. Can you explain.

A. We have, all students have to be evaluated by a child study team and declared eligible for special education services.

Q. Can you talk a little bit about what a child study team means.

A. Okay. Child study team consists of the least three members: There's a psychologist, a learning disabilities teacher consultant and a social worker. Their responsibilities include testing students who have been referred and determining, after those tests have been completed, whether that student is eligible for special education classes.

Q. Okay. Now, to your knowledge, was Rodney Young eligible for special education classes?

A. Yes, he was.

Q. Okay. And in order to be eligible for special education classes, what type of tests did he have to take?

A. There were given a, they were given an IQ test that was performed by the psychologist, and the learning teachers disability consultant would also give testing.

Q. Okay. And as a result of the testing, what was the result as it related to Rodney Young?

A. Rodney was determined to be classified as educable mentally retarded and that was determined by the battery of tests that was given by that child study team.

Q. Okay. Now, is there a range of scores as a result of the tests that you just described, in order to be educable mentally retarded?

A. Yes.

Q. And what is that range?

A. For educable mentally retarded, they have to score within a range of 60 to 69 for the IQ test.

Q. Okay. And do you know for a fact that Rodney Young tested between 60 and 69?

A. Yes, I do.

Q. Okay. Now, you used the world educable mentally retarded. Can you just tell us what that means.

A. It means that a student who is declared mentally retarded and educable does not have the capacity to perform within a level, within the normal learning limits.

Q. And it's, and a, and I think you've already stated that if they are in that range, 60 to 69.

A. Yes.

Q. And when we say that range, we're talking about the IQ tests results. Now, as special education department chair, what kind of services did you offer at that time for students?

A. Students that were placed in the EMR classes of educable classes were given mathematics, English, science, and social studies. But they, they were given on an level that was commensurate with their academic abilities.

Q. Okay. Now, you talked a little bit about being a substitute teacher, even though you were the department chair.

A. Mm-hmm.

Q. And just for clarification, when you did do substitution-type teaching, was it in special education classes, or were you throughout the school?

A. No. It was in special education classes.

Q. Okay. And I think you've already testified that during the time that you were subbing, you actually taught Rodney.

A. Yes.

Q. Okay. Can you tell us what classes you would have actually taught Rodney.

A. The classes that I would have seen him in would have been the, the academic areas, math and language arts.

Q. Okay. Can we talk about the math class for a moment.

A. Mm-hmm.

Q. Can you just describe for us, first of all, what grade that would have been. Do you recall?

A. Actually that would have been probably ninth, ninth through eleventh.

Q. Ninth through eleventh.

A. Yes.

Q. And again, as it relates to math, can you tell me about what that looks like, special education math course for a ninth grader.

A. The math classes were similar to the language arts classes. They were basically third- to fourth- grade level. We tried to tailor the instruction to meet those learning levels, but we also tried to make it interesting enough that they could apply it to everyday encounters, if they needed to.

Q. Okay. Let me just ask you a pretty basic question, then. Could Rodney read?

A. He could read, but not very well.

Q. Okay. And when you say not very well, can you describe that.

A. My recollection would be probably third or fourth grade.

Q. And what grade was he actually in?

A. At that time ninth, ninth grade.

Q. Okay. So you indicated that you taught math as a substitute teacher.

A. Yes.

Q. And you taught Rodney math as a substitute teacher?

A. Yes.

Q. Okay. And I think you also indicated there was a second course. What was that course?

A. Language arts.

Q. Language arts. And can you just describe what that looks like for a ninth grader in a special education class.

A. It was little different than the math except we taught things such as grammar, spelling, writing

mechanics, things of that nature. But it's also about living your own.

Q. Okay. In terms of the testing in terms of eligibility to get into the EMR class, how often was Rodney tested?

A. All the students in special education were required to go through a three-year reevaluation process. So every three years the study team would do a reevaluation. He was given another IQ test, another battery of tests and also a social history was done to update any changes.

Q. Okay. And when you say reevaluating for...

A. They are always reevaluating to find out or to determine whether they are still eligible for special education.

Q. Okay. And you mentioned a social history.

A. Yes.

Q. Can you tell me what that means.

A. It involves the social worker going to the home and interviewing the parents or the custodial parent to find out whether they's been any changes in the living conditions or things that happened around the house, around the home.

Q. And I think you testified that we're talking about three tests that would make up, that would make a student eligible for educable mentally retarded; is that correct?

A. Yes. Well, actually two tests and the learning history, the social history.

Q. I see. And Rodney was given that test every three years?

A. Every three years.

Q. Okay. And at the end of, or based on each three-year period testing, was Rodney, what was his eligibility standing?

A. He was still determined to be eligible. And if I might add, we also give an annual review. Each year every student goes through an annual review process where the teachers meet with the child study team to give any input or feedback to a, essentially whether they feel the student is still worthy or eligible for special ed.

Q. Did you ever have any concerns about that, about the annual review or whether Rodney should or should not have been in the educable mentally retarded classification?

A. No. Do you mean did I object to his placement?

Q. Yes.

A. No, I didn't. If, if I could add.

Q. Yes, sir.

A. I became department head in my third year. It was before I got tenure –

Q. You have to raise your voice a little bit.

A. I was appointed department head in my third year. That was before I got tenure in New Jersey. The department head before me, Mr. Addison, had recommended me. And we, as professionals, were very concerned about the number of students in special ed. Particularly, particularly the African-American students. I mean, I had a special, I had a special interest in those people who were in special ed -- and I'm, I'm fine. At that time, I would not have, I would not have allowed any student to remain in a place where he didn't belong. So I, I, I was certain that his placement was correct.

Q. You went through to make sure his placement was correct.

A. Yes.

Q. And did you actually review records yourself with your own eyeball to see whether or not that placement was correct?

A. Yes. As department head, I was -- as the department head, I was required to that. But I also did that out of personal, out of personal interest.

Q. Out of personal interest. And was Rodney placed in the EMR, educable mentally retarded class for certain?

A. Yes.

Q. Now, do you ever remember seeing his IQ scores?

A. I recall -- as a department head, I always reviewed records. I do recall seeing the score. I cannot not recollect exactly what the score was, but I'm confident that the score fell within the fell within the range.

Q. And to your knowledge, what happened to Rodney's IQ score?

A. Records were kept at the administration building in the basement of the building, and that at that time they were kept for a period of five years. After five years had passed -- after students had graduated, after five years, they were destroyed. I didn't agree with that, but that was the policy of the district.

Q. Okay. Now going back -- and of course I'm speaking specifically about Rodney. We've heard you say that, that you did serve as his actual substitute teacher. Can you tell us from what year to what year you actually -- well, let me rephrase that. How many times do you think you served as a substitute teacher for Rodney, in a class where Rodney actually was sitting in?

A. I can't recall exactly the number of times. Over the course of a year, I would estimate that I would substitute or cover classes thirty or forty times a year. And many of those times would be for maybe three or four periods a day. If I had to give you a number as to the times that I actually saw Rodney in class, over that three-year period that I would have seen him, I'd probably say an average, about maybe a eleven times a year, at least. But I saw Rodney on a daily basis outside, outside of the class.

Q. Okay. Now, can you tell me again, I'm speaking just about Rodney. How did Rodney do? You said you taught him in math, and it was at a third-grade level. You taught in language arts. It was at third-, fourth-grade level. How did Rodney do?

A. Rodney performed as best he could given his limitations. He, he struggled with -- he always tried to put forth an effort, but again, he was limited you in those areas.

Q. Okay. And that would be both in language arts and...

A. Both subjects.

Q. In both subjects. Now, was there a time where you had a, or you held a summer program?

A. Yes.

Q. Can you tell me about that.

A. Each year we received federal funding for a summer job program. The program consisted of a half day of academics and a half day of on-the-job training skills, which students would go out and maybe do landscaping or janitorial work or something of that nature. And Rodney was in that program with us, if I recall, probably three years while I was there.

Q. And how many -- so the courses, was it, like, school work, or was it actual hands on...

A. They were, they were required to get remedial school work for half a day and then go out in

the afternoon or the morning. We would flip flop. Sometimes we had academics in the morning, vocational training or on-the-job training in the afternoon, or they would get on-the-job training in the morning and then academics in the afternoon.

Q. And then when we say academics, what are we talking about?

A. They would get math and language arts, just those two subjects.

Q. And would that be on what level? Do you recall?

A. Well, that was on, for those students, there was no grade level required because the program consisted of regular education students and special education students.

Q. And how did Rodney perform?

A. Well, we didn't keep Rodney in the academic classes. Rodney performed vocational, on-the-job vocational training both morning and afternoon, and that was because we felt that he would be too challenged in the classroom, become to frustrated because of his ability level and instruction. The academics was on grade level, and at that point, we didn't feel that that was in his best interest.

Q. Okay. So as I understand it, even though the summer program had an academic component, it also has a hands on, you, you described that hands on...

A. On-the-job training.

Q. On-the-job training. So in that setting, Rodney did not even take the academic classes?

A. No, he did not.

Q. He only did the hands on?

A. Yes.

Q. Now, you mentioned something about frustration. Can you talk to us a little bit about what Rodney was like when he came to emotions. How did he do?

A. First indication that I had that he was struggling might have been in ninth grade when I was covering his class.

Q. Can you tell us about that.

A. The teacher that I would often work for, the teacher was required to leave lesson plans and work for those students. And the particular instance that I remember was, I did notice that, I did notice Rodney, in particular, was having some difficulty. And I remember going over to him, talking to him and asking what the problem was. And I know that he wasn't able to do the assignment, so I tried to help him with it. But as a distraction, I think we got into a conversation about football or something like that. We talked about that for a while, and then I kind of got him back to the activity and walked away. But I did notice that he still was having trouble, and I don't think he wanted me to know. But I could see that he was struggling, and I could see, I could see him begin

to cry. And it was at that point that I realized just how much difficulty he had.

Q. There's been some discussion that Rodney Young attended college. Do you know anything about that?

A. Yes, I do.

Q. How did Rodney go to college?

A. Well, honestly, it bothered me that he was enrolled in college, but I did find out later on –

MS. ZON: Your Honor, I object to either hearsay or speculation on this witnesses. Unless he has instant knowledge of why he was accepted into college from somebody from Norfolk, it would be hearsay if this person testified.

MS. THOMPSON: I can ask him, Your Honor.

THE COURT: Okay.

MS. THOMPSON: And if he knows –

THE COURT: He can testify as to his personal knowledge but not speculate.

All right.

JUROR: (Indicating)

MS. THOMPSON: Your Honor, there's a juror...

JUROR: Could I have somebody remove that tissue box. I can't see the witness.

THE COURT: I'm sorry.

JUROR: Thank you, Your Honor.

BY MS. THOMPSON:

Q. Do you know anything first hand about Rodney Young going to college?

A. Yes, I do.

Q. And can you tell me what you know about him attending college.

A. Initially I was surprised that he had been enrolled in college. I did find out later on from Rodney himself how he got there. One of the deans at Norfolk State was a Bridgeton resident, had grown up in Bridgeton. Dr., I don't know if I should say his name but. That dean has interceded to a, to a get him enrolled in college. And at that time, there was a program for special needs students, and Rodney attended that way.

Q. One second, Mr. Hendricks. Of course, Rodney graduated when he was in the 12th grade?

A. Yes, he did.

Q. And at the time that he graduated, was he still educable mentally retarded?

A. Yes, he was.

MS. THOMPSON: Nothing further.

THE COURT: Ms. Zon.

MS. ZON: Thank you, Judge.

CROSS-EXAMINATION

BY MS. ZON:

Q. Mr. Hendricks, good afternoon. My name is Layla Zon. I'm the district attorney. And I want to ask you just a couple of questions following up on your testimony about Mr. Young. I can't help but notice that you're emotional today in your testimony. Could you explain why that is.

A. I got into special education because I had a concern about students in that area. And at the time I was in college, I was recruited, recruited to go into special ed because there were a number of students going into special ed or being classified as special education. A large majority of these were African- American, and we thought at that time that we could use -- got into education, there were things that we could do to help those students.

Q. Okay. And you're not a psychologist; is that correct?

A. No, I'm not.

Q. And You're not a doctor. You're not a psychiatrist; is that correct?

A. No, I'm not.

Q. So you don't clinically diagnose people as mentally retarded in your profession or in your former profession as a teacher; is that correct?

A. No. I do not diagnose them personally, no.

Q. And when you just made the comment that you were concerned that there were larger number or a large percentage of African-Americans in the special education classes, I'm curious about that because an IQ test determines what someone's abilities are on an intellectual level; is that correct?

A. That's correct.

Q. Do you have an opinion as to why there would be a larger number of African-Americans in those types of classes if, if the test is objectively testing intelligence as opposed to perhaps environmental, lack of parental involvement that might make a child go into special education class?

A. Could you repeat that question.

Q. Well, I'm just, I guess I'm curious. Let's talk a little bit about IQ tests.

A. Yes.

Q. IQ tests, there are several different kinds; correct?

A. Mm-hmm.

Q. Are you familiar with the different types of

IQ tests?

A. Yes, I am.

Q. And can you list those for us.

A. There's a Stanford-Binet, the Wechsler. Those are the two most common. Those are the two that were used in the Bridgeton School Systems.

Q. And which, which two were used?

A. Stanford-Binet and Wechsler.

Q. Okay. And do you know which versions of those tests were used?

A. No, I don't.

Q. Do you know if it was the Wechsler Intelligence scale for children, which is the WISC- III.

A. No. I don't recall exactly, but I know that the WISC-III was one that we used. And I'm not certain whether that was used when Rodney was a student.

Q. Okay. There's also the Stanford-Binet you mentioned. Do you know whether that was the fourth edition, or is that a newer edition?

A. I'm sure it might have been the older edition.

Q. Okay. And you yourself did not administer that test; is that correct?

A. No, I did not.

Q. And those tests essentially ask questions of an individual and are supposed to give a number, a range of score and then that score is compared against a norm; is that correct?

A. That's correct.

Q. Are you familiar with what norms were being used at that time that the test was being administered?

A. No. I don't recall what norms we used.

Q. You would agree, though, if a norm included a group of students who came from, let's just say, a different area of the country, perhaps a different background, there may be some problems with the, the comparison of the test.

MS. THOMPSON: Objection, Your Honor, to this line of questioning. Mr. Hendricks has already said he's not a psychologist.

MS. ZON: Judge, he also said he's familiar with the testing and he's looked at the testing, so I'm cross-examining him.

THE COURT: These questions deal with IQ tests, and he said he was familiar can those

the different types and so forth. So I'll overrule the objection.

BY MS. ZON:

Q. Getting back, then, to, I guess your testimony on direct examination, you said you were concerned about the number of African-Americans who were in those classes. Is it your opinion that all of those African- Americans were in those classes because all of them were mentally retarded, therefore a cognitive disability existed in that child, or were there over factors such as learning disabilities that prompted those students to be deemed special needs children? Or I think you used the term mentally, educable mentally retarded.

A. Educable mentally retarded.

Q. Yes, sir.

A. And in answer to your question. No, I was not convinced that they all belonged there. That was probably my, one of my primary reasons for going into special education, to make certain that those that were there belonged there and those that did not, we need to get them out and back to the work area.

Q. And in fact, there's been a lot of -- what year did you retire?

A. I retired in 2007.

Q. Okay. So you taught fairly recently, or you've been in education fairly recently?

A. Yes. In fact, I'm still, I'm still teaching GED classes at the high school.

Q. Okay. And there's been a, sort of a big pendulum change in the thought process in this area of education with respect to whether or not the best thing to do back then, back in the 70's and early 80's, was to keep the students separated out from other students; is that correct?

A. That's correct.

Q. And now they try to integrate students in the regular classrooms and just adjust, make adjustments to their curriculum so that they are not all kept in one particular area with other children with learning disabilities. Is that fair to say?

A. Right. It's called the inclusion program.

Q. Okay. So with respect to Mr. Young, back in the 70's, I suppose, when he was in high school; is that correct?

A. That's correct. No, no. He was in high school in the early 80's.

Q. In the early 80's.

A. In high school, yes.

Q. Okay. With respect to Mr. Young, do you know who specifically administered the IQ test to him?

A. Yes, I do.

Q. Who was that?

A. The IQ test was administered by Dr. Marge Stubee. She was the school psychologist.

Q. What is her name.

A. Marge Stubee.

Q. S-t...

A. S-t-u-b-e-e.

Q. Ms. Lauren Stubee, or Dr. Lauren Stubee.

A. No. Margie Stubee. M-a-r-g-i-e.

Q. How long did Ms. Stubee carry the position of the psychologist at the school?

A. I can't tell you exactly, but she was there for quite some time. She probably retired sometime around the early part of 2000.

Q. And is she from the Bridgeton area?

A. She used to reside in Bridgeton. She no longer lives there. She's living with her daughter now.

Q. Okay. And do you know where she's living?

A. No.

Q. But the fact that she retired in 2000 and not it's 2012 and you know that she is living with her

daughter, I guess I can infer that you've had contact with her.

A. I haven't had any contact with her, but I know that she is living with her daughter because she is suffering from early dementia, and her daughter had to take her in because her husband passed away last year.

Q. Do you have any idea of what that conditions were, the testing conditions were, for when she administered the test to Mr. Young?

A. The testing was usually done in the school, and it was done -- we had a testing area, so the school psychologist did administer the test one on one in a separate area apart from classes, from the classrooms.

Q. But aside from knowing that it was done in the school and in a separate area, do you know specifically about the instructions that were given, the oversight that was included and any of the procedures that the manual prescribes must be done in order for the test to be accurate?

A. I will say this, Margie Stubee and all the members of child study team at this time were all on one accord. To me, I think they were a very closely-knit team. We all shared the statement, view point about students in special education, and I had a lot of confidence in Dr. Stubee, and we worked very closely together.

Q. So the answer, then, to my question is, no, you're not familiar if the manual, the manual was followed by the doctor, if the testing procedures were

properly followed according to each of these tests. Each of these tests has a manual that specifically instructs how the test is to be administered and has sort of a protocol to ensure the integrity of the score on that test.

A. My answer would have to be that I'm confident that the protocol was followed because I have, I had nothing but the absolute, the absolute confidence in Dr. Stubee.

Q. Okay.

A. And the reliability of those tests.

Q. All right. So you, if you didn't administer the test, you weren't there when the test was administered, you don't know which test it was and you don't know what score he got on the test, let's talk about the other part of mental retardation. You do understand that the American Psychiatrist Association -- you're familiar with the DSM, the Diagnostic Statistical Manual?

A. No, I'm not.

Q. You're not familiar with that?

A. Not the manual, no.

Q. That's the, that's the book, the, sort of the Bible for psychiatrists and psychologists, and that's the standard that they follow to determine a diagnose somebody as mentally retarded.

A. Yes. But I'm not familiar with the manual.

Q. Are you familiar with what the criteria are for a person to be diagnosed by a psychiatrist or psychologist for mental retardation?

A. No, I'm not.

Q. So you're not aware, then, that, that in addition to a IQ score below 70, one also has to have adaptive functioning disorders in one of several different areas?

A. I'm, I'm, I'm familiar with that. But I'm not familiar as to the criteria that you're referring to.

Q. And are you familiar with whether or not any testing was done on Mr. Young to determine if he had any adaptive functioning disabilities?

A. Those were always mentioned, always mentioned in the results that were given at the child study team meetings. But I'm not, I can't give you specifics, no.

Q. And you don't have any of those reports or records here?

A. No, I don't.

Q. And you indicated that he was tested on either Stanford-Binet or...

A. Wechsler.

Q. Wechsler. Okay. And do you acknowledge that those test results can vary based upon the effort, the level of achievement or the level of motivation that

the student has when they are in school or when they are taking the test?

A. Yes. I am -- and that's why there was also a re-evaluation done at the end of the three-year period. That's also why we had to handle reviews because we got input from teachers to determine what they thought concerning child development.

Q. Can you tell us specifically what Mr. Young's learning disabilities, what areas? Was it verbal, nonverbal, mathematical?

A. I think Rodney's disabilities covered a wide range of issues. They were both verbal and nonverbal.

Q. So it was verbal and nonverbal. And I'm assuming you're also going to say that it was mathematical as well.

A. Yes. I know that to be.

Q. Okay. Let's start, for example, with the reading. You indicated that he could read; is that correct?

A. Yes.

Q. But that he could not real well.

A. He could not read well or comprehend well.

Q. How many times did you sit down and read with Mr. Young or hear him read?

A. I can't give you an exact number, but I know that as a course, when I was called to substitute, there were various reading assignments that were given. Students were called on to read. And I can recall sometimes when Rodney was called on to read, he would balk when he would read. His reading was hesitant. He skipped over words, and as a result I tried to avoid calling on him and other students to read because they had problems.

Q. Okay. And I think you used the word, he would balk at reading; is that correct?

A. Uh...

Q. Is that what you just testified to?

A. I might, might have said balk.

Q. What you mean is, he wouldn't want to read in front of the class.

A. He would be balking to read it out loud because it was embarrassing.

Q. Okay. And you're assuming that the reason he didn't want to read out loud is because it was embarrassing because you don't know what Mr. Young was thinking.

A. It's only an assumption on my part, yes.

Q. Okay. And you would agree that if you're diagnosed, if you're clinically diagnosed as mentally retarded, it requires not just a low IQ test below 70, adaptive functioning disorder in at least two different

areas out of the ten that are isolated in the Diagnostic Statistical Manual, but it also has third requirement, which is that the mental retardation has to be onset before the age of 18; is that correct?

A. That's correct.

Q. And at the end, then, if that is true, the person is mentally retarded and that is onset below the age of 18, then presumably when that person is 30 or 40 years old, they are also mentally retarded; is that correct?

A. That would be the assumption, yes.

Q. Okay. So if Mr. Young was unable to read in the classroom, can you explain to the members of the jury why we just heard Mr. Young read a few moments ago from a recorded interview that occurred in 2008, and he read perfectly fine, big words? Any idea why that would be the case?

A. I have no idea.

Q. Would it surprise you that Mr. Young -- I know said you were surprised that he went to college?

A. Mm-hmm.

Q. Would it surprise that you when he went to college, he got an A in psychology?

A. That is a surprise.

Q. Would it surprise you that he stayed in college for over two years?

A. Yes, it would.

Q. Does it surprise you that he was able to maintain a stable job for a number of years in Bridgeton, New Jersey?

A. That would not surprise me, no.

Q. Have you had an opportunity to review his school records from Norfolk State University?

A. No.

Q. Would it surprise that you that the majority of his grades are, beside the one A he got in psychology, were C's and B's. Does that surprise you?

A. Well, in a sense it would. But for a student who was probably recruited to play football, it wouldn't surprise me that much because I know that in some cases, there are students who do not do the actual work themselves. So I mean, it's surprises me. But on the other hand, it could very well be that he didn't do the work himself.

Q. Well, sure. I mean, there's, there's students that -- I mean, we all, we all know -- we're down here in the South, so we have the SEC football program. Everybody knows, or I guess it's pretty widespread knowledge that there are athletes who go to universities and play football who maybe aren't the brightest bulbs on the tree, so to speak. But they get through the classes. And I'm sure a lot of that is by encouragement from their coaches. Is that what you're essentially stating?

A. I was just stating that some their classes are overlooked.

Q. Okay. But just because someone does poor in an academic setting in and of itself does not make them mentally retarded, does it?

A. No, no.

Q. I mean, there are people who drop out of school in the eight grade, ninth grade, tenth grade who go on to be very successful productive members of society because you can't measure a person's intelligence just by how they perform sitting in a classroom and taking a test; correct?

A. If we are talking in general.

Q. Yes.

A. That's correct.

Q. And you would agree that there are certain people who are smart and gifted in a particular area that just stink at taking standardized testing.

A. If we're talking about standardized testing apart from IQ testing, yes.

Q. Correct. And I'm going to show you State's Exhibit No. 488. This is the Norfolk State University records.

MS. ZON: The parties have stipulated that these are admissible.

Your Honor, I would enter State's 488 into evidence.

(State's Exhibit No. 488, Norfolk State University records, was tendered as evidence)

THE COURT: Any objection?

MS. THOMPSON: No objection.

THE COURT: It's admitted without objection.

(State's Exhibit No. 488 was admitted as evidence)

BY MS. ZON:

Q. Are you also aware, sir, that he also attended vocational school? Mr. Young attended vocational school?

A. Yes.

Q. Does that surprise you?

A. No, not at all.

Q. Why is that?

A. Well, in vocational school, the emphasis is on hands-on learning, not so much academics.

Q. I'm sorry. Could you repeat that.

A. In vocational school the emphasis on hands-on learning and not so much the academic part of it.

Q. Okay. So hands-on learning, though, is another, that's another form of intelligence; right? It's not just all about being book smart, so to speak; correct?

A. That's true.

Q. There is a term, have you every heard the term, street smart?

A. Yes.

Q. So you don't know why he would be able to read now. What about using a GPS device? Do you have any idea how he would be able to program a GPS device and travel 900-plus miles from New Jersey to Georgia using that device?

A. That would astound me somewhat.

Q. It would astound you?

A. Yes.

Q. But if it's a fact that that happened, that would astound you?

A. If it's a fact, I'd have to accept it. But it still astounds me.

Q. Okay. What about the fact that Mr. Young was capable of surfing the Internet and printing out

directions from Google so that he could make plans for a trip.

> MS. THOMPSON: Your Honor, I'm going to object. That particular fact that the district attorney is alluding to is not into evidence that he, Rodney Young, searched the Internet.
>
> MS. ZON: Judge, it's cross- examination. She can always point that out if she wants to.
>
> THE COURT: Well, on cross-examination, I think in this case there's, I think it's appropriate under the facts of this case. I won't go into everything or comment on the facts. But I think it is admissible as cross-examination based on the record.

BY MS. ZON:

Q. Would that surprise you, sir?

A. Would it surprise me that he could access the Internet?

Q. Correct.

A. Not particularly, no.

Q. Would it surprise that you he could program ring tones on his cell phone?

A. No.

Q. Would it surprise you that Mr. Young was able to understand, in a very lengthy interview with law enforcement officers, things like hypothetical?

A. No. That wouldn't surprise me.

Q. Would it surprise that you, in a lengthy interview with law enforcement officers, he used big words or, or let me give you an example. The word infatuation. Is that a typical type of vocabulary that Mr. Young would use?

A. Well, on the face of it, no. But I have a four-year-old grandson who uses those words because he hears them at our household. So it's not entirely out of the realm of possibility that some of the acquaintances that Rodney has had over the years, that those words might have come up and he's attached himself to them.

Q. Okay.

A. I don't think it bothers me, no.

Q. But if he's using those words in the proper context and not just mimicking them like a parrot, then that would, that would imply that there's a level of intelligence behind his thought process when they choose to use that word?

A. Not necessarily. I'm not, I'm not suggesting that he's mimicking them either, but my grandson does use those words in context.

Q. So your testimony just a few moments ago is you wouldn't be surprised that Rodney could continue

to word over the years, which seems to sort of rub against the whole mental retardation thing; right? Because mental retardation is set and it cannot be changed; right?

A. That's not entirely what I'm saying. I'm saying that the fact that he uses certain words does not imply he's learning. It justifies that he's repeating words merely through rote. He does have an understanding of those, but that doesn't imply that his intelligence has increased.

Q. Okay. So in preparation for your testimony today, you haven't sat down and spoken with Mr. Young prior to coming in here and testifying?

A. No, I have not.

Q. Spoken to him recently?

A. No.

Q. So, and you haven't listened to the interviews that I'm referring to or listened to the facts of this case and some of the circumstances that might suggest he's smarter than what he's being given credit for?

A. No. In fact, this is the first time that I've seen Rodney in, like, the last three or four years.

MS. ZON: Just one moment, Judge. Nothing further, Judge.

THE COURT: Any redirect?

MS. THOMPSON: Yes, Your Honor. Just a few things to clear up.

REDIRECT EXAMINATION

BY MS. THOMPSON:

Q. Mr. Hendricks, Ms. Zon was asking you about a number of issues, of course. And one of those I just want to touch on and see what you can tell us. She asked you if you were surprised that she, excuse me, that he, Rodney Young, held a stable job. What are your thoughts about his ability to hold a stable job?

A. Rodney could perform any kind of manual labor. And as far as something that was rote or routine, I'm not surprised that had, he could hold a job. We worked with Rodney, Rodney in landscaping during the summer. I mean, and I know that he also had held a job maybe at a packing firm after high school, so I know that he could perform a job, and I'm not having any problems with that.

Q. And is it that same vocational type of environment that you saw Rodney perform in during the summer program that you were, that you were a part of, a part of with Rodney?

A. Yes.

Q. And I think you testified that at that summer program, you had to remove the academic portion.

A. Yes.

Q. Is that correct? And when you removed the academic portion of that summer program, what was he left to do?

A. The manual work. The hands-on vocational training.

Q. Now, you also were asked about poor academic performance and particularly about some records at Norfolk State University. So with respect to that, and I think the question is or was, were you surprised about, you know, an academic performance. So my question is, with poor academic performance, does that necessarily mean you're mentally retarded? I'm not sure if my question is clear.

A. Could you restate that.

Q. I didn't think that was clear. I think the question was, a person who performs poorly in academics is not necessarily mentally retarded. Do you recall that question?

A. I recall that question.

Q. Okay. Can you talk about the difference between poor academic performance and mental retardation.

A. As it relates to how he did at Norfolk State in just something general?

Q. Well, in general from your experience as being director of special education.

A. Okay. I would except that a student who is classified as mentally retarded would perform poorly in a classroom, but with proper support, which is what we provided, that he would be able to do adequate work.

Q. And in the case of Rodney Young, was he just poor in academic performance or was he designated to be educable mentally retarded?

A. He was designated as mentally retarded. And I'm not sure if I'm answering your question, but we did provide enough support in the classroom to, either individual or one on one instruction, to get him through his scheduled classes.

Q. Okay. And I think that does answer it because my question, I know it was quite disjointed, was he just performing poorly at school as I'm sure students do, or was he mental, or was he designated EMR, educable mentally retarded?

A. Yes.

Q. Okay. And he was which one?

A. He was educable mentally retarded.

MS. THOMPSON: Okay. Let me check to see if there's anything.

That's all I have. Thank you.

THE COURT: Anymore questions Ms. Zon?

MS. ZON: Just one more.

RECROSS-EXAMINATION

BY MS. ZON:

Q. When you tried to distinguish him between poor academic achievement or a person just being a poor academic achiever and a person being mentally retarded that you just did, and you said that Mr. Young fell in the latter category.

A. Yes.

Q. How do you factor in the statistical criteria of the adaptive functioning since you're unaware of what those areas are, you've just testified?

A. I can only give you an answer based on what I observed when he was a student at the high school. But I know that as hard as he tried, I think he always gave his best in the classroom, and I know he was severely limited in the classroom. With support, the support that he we gave him, he did perform adequately enough to get a high school diploma. Granted, he didn't graduate on level with the other students, but based on our observation and evaluation, we thought that he was able to get a diploma and that he would be productive citizen or employee when he was employed.

Q. But again, if the definition of mental retardation is not just poor academic performance or a low IQ score, but it also must be two adaptive functioning disorders of communication, self-care, home living, self direction, social interpersonal, use of

community resources, functional academic, work, leisure and health and safety. Out of those ten categories, you haven't assessed any adaptive functioning disorders nor did you know what those criteria were when you testified.

A. I didn't know. No. I couldn't give you all 12 of those, but I do know that those were always mentioned at the re-evaluations. And I do know that he was also, he was also assessed to be deficient this at least two of those areas.

Q. And is Rodney Young significant to you in, out of all the hundreds of students that I'm sure you've been involved with or probably thousand, is he significant to you because of the personal connection that you had with Mr. Young, or is he significant to you because he is sitting here charged with murder and facing capital punishment?

A. He is not significant to me, anymore significant to me than any of those students that I came into contact with.

Q. And so the reason that –

A. They're not always –

Q I'm sorry.

A. I don't esteem him any higher or lower than any student that I had in all my years.

Q. No, no personal connections with Mr. Young?

A. Personal connection?

Q. Yes, sir.

A. No, no more than any other student.

Q. So this reason why you were emotional and reaching for Kleenex earlier was simply your concern for special education in general?

A. Yes.

MS. ZON: Thank you.

THE COURT: Anymore questions?

MS. THOMPSON: No, Your Honor.

THE COURT: All right. You may step down.

Any reason the witness cannot be excused?

MS. THOMPSON: No.

THE COURT: Ms. Zon.

MS. ZON: Nothing further for this witness, Judge. We don't mind him being excused.

THE COURT: Thank you. You're excused from further attendance wit the Court.

(Witness exited the courtroom)

THE COURT: You can call your next witness.

MS. THOMPSON: Yes. That is Karen Owens-Jones.

(Witness entered the courtroom)

Whereupon,

KAREN DENISE OWENS-JONES

was called as a witness herein, and having first been