IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:00-HC-238-BO

LEVON JUNIOR JONES, Petitioner, v. MARVIN L. POLK, Warden, Central Prison, Raleigh, North Carolina, Respondent.	)	**ORDER**

This habeas corpus proceeding brought pursuant to 28 U.S.C. § 2254 is before the Court following evidentiary hearings held on February 13, 16, and 22, 2006, and on May 17, 2006. At the hearings, Petitioner and Respondent presented evidence and arguments to the Court concerning Petitioner's claims of mental retardation and ineffective assistance of trial counsel. Both parties have submitted post-hearing briefs, and the matter is now ripe for ruling.

STATEMENT OF THE CASE

A. Background Facts

More than three years after Leamon Grady was found shot to death in his home, Lovely Lorden contacted the Duplin County Sheriff's Department in August 1990 and reported that her former boyfriend, Levon Junior Jones, may have been involved in Grady's death. Jones was in prison at the time, serving a sentence for an unrelated assault. Lorden expected that Jones would soon be released and wanted to ensure that he remained in custody. Until Lorden contacted the authorities, no leads had been developed in the investigation of the February 1987 murder.

From the time of her initial contact with the authorities until the time of Jones' trial in November 1993, Lorden gave a number of inconsistent statements concerning Grady's death. She first told investigators that Jones had come home at "3:30 or 4:00 kind of high, [and] made the statement, 'I thought the man had more money on him than that,' and went to bed." A few months later, before any arrests were made, Lorden again visited the Sheriff's Department. This time, Lorden told the police that she was with Jones when he and two other men went to Grady's home the morning of his murder. She reported hearing one gunshot prior to the men returning to the car in which they had been riding.

Almost seven years after Grady was murdered, Jones was tried on indictments charging him with first-degree murder, armed robbery and conspiracy to commit armed robbery in connection with Grady's death. The prosecution's case was weak. There was no physical evidence linking Jones to the crimes, and no testimony from any eyewitnesses to the shooting.[1] The medical examiner testified that Grady could have been killed at anytime between midnight and four-thirty a.m. Even the prosecutor has described Jones' trial as "a close case for the jury" and "one of the more difficult cases I've prosecuted." Habeas Tr. Vol. IV, 87, 90.

The prosecution's case hinged on the testimony of Jones' former girlfriend, Lovely Lorden. Lorden testified that she had been living with Jones in February 1987 and that on the evening before Grady was killed she had been riding in an automobile with Jones and two other

[1]According to the State's evidence, Jones had two accomplices, Larry Lamb and Ernest Matthews. Lamb was tried non-capitally and convicted of first-degree murder prior to Jones' trial. After Lamb and Jones had both been convicted, Matthews pled guilty to second-degree murder. Neither Lamb nor Matthews assisted the State with its investigation or the prosecution of Jones.

men by the name of Ernest Matthews and Larry Lamb; that the men were drinking and that she went with them to a local pool hall called Herman's Place. Lorden stated that sometime after midnight, Jones drove them to Grady's home, and the three men went inside. She said that Jones had a handgun in his pants but that she did not see any other weapons. Lorden reported hearing two gunshots then seeing the men come out of the house, Jones carrying a case of beer under his left arm and the gun in his right hand. Lorden claimed that Jones drove to a bridge and threw the gun into the river. However, the authorities were never able to recover a weapon from the area Lorden identified.

The other principal witnesses for the State were Allen Bizzell and Deputy Sheriff Dalton Jones. Allen Bizzell testified that after getting off work at 3:00 a.m. he and George Overton drove separately to Leamon Grady's home. He stated that the door opened when Overton knocked on the door and that they saw Grady sitting on the floor. According to Bizzell's testimony, he and Overton drove back to work where Bizzell called Deputy Sheriff Dalton Jones and reported that they had been to Grady's home and that Grady looked like he needed help. Bizzell further testified that he and Overton then waited for Deputy Jones and followed him to Grady's house. Deputy Jones testified that he met Bizzell and Overton at Carolina Turkeys after having received Bizzell's call about Grady. He, Bizzell and Overton then drove to Grady's home, where they found Grady dead, lying on his side with his back against the wall. Deputy Jones further testified that Lovely Lorden first contacted him about the case in August 1990. He stated that he spoke with Lorden again concerning Grady's murder in November 1990. At that time, Lorden gave a statement indicating that she had been with Jones, Matthews and Lamb and heard a gunshot shortly after the three men went into Grady's home.

B. Procedural History

Jones was convicted and sentenced to death for Leamon Grady's death at the November 8, 1993, Criminal Session of Duplin County Superior Court. Following unsuccessful appeal and state post-conviction proceedings,[2] Jones filed a petition for writ of habeas corpus with this Court on May 23, 2000, alleging thirteen claims for relief. With leave of court, Jones amended his petition on January 25, 2005, to include two additional claims.

By order dated October 6, 2005, the Court dismissed without prejudice Claim XII, which alleged that Jones is not competent to be executed. The Court allowed Respondent's motion for summary judgment as to the other claims with the exception of Jones' claims of mental retardation and ineffective assistance of counsel at sentencing. *See* Summ. J. Order dated Oct. 6, 2005 [DE# 50]. Following an evidentiary hearing on Jones' claims of mental retardation and ineffective assistance at sentencing, the Court reconsidered its summary judgment ruling and, by

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[2]On direct appeal, the North Carolina Supreme Court found no error and affirmed Jones' convictions and sentences. *State v. Jones*, 342 N.C. 457, 466 S.E.2d 696 (1996). The United States Supreme Court denied certiorari on June 17, 1996. *Jones v. North Carolina*, 518 U.S. 1010 (1996).

Jones filed a motion for appropriate relief ("MAR") in Duplin County on March 27, 1997, and an amended motion for appropriate relief on November 2, 1998 ("AMAR"). Following an appeal and remand, Jones' request for state post-conviction relief was ultimately denied by the Duplin County Superior Court on August 13, 1999. *See* Order, *State v. Jones*, No. 92-CRS-4389 (Duplin Co. Sup. Ct. Aug. 13, 1999), State Ct. Record, Vol. VII, Tab DD (hereinafter "MAR Order"). The North Carolina Supreme Court denied certiorari on March 2, 2000. *State v. Jones*, 351 N.C. 365, 543 S.E.2d 139 (2000). Jones also filed a state habeas petition, which was denied by the North Carolina Supreme Court on October 31, 2000. *See State v. Jones*, 545 S.E.2d 737 (2000). On January 31, 2002, Jones filed a motion for imposition of a life sentence alleging that he was mentally retarded at the time of the offense. The Duplin County Superior Court summarily denied that motion on December 12, 2002, and the North Carolina Supreme Court denied certiorari on November 10, 2003. *State v. Jones*, No. 497A93-5 (Nov. 10, 2003).

order dated April 3, 2006, vacated its summary judgment order as to Jones' claim of ineffective assistance at the guilt-innocence phase.[3] The Court further ordered an evidentiary hearing on the issue of counsel's performance at the guilt-innocence phase of Jones' trial.

The Court has conducted evidentiary hearings on all claims remaining before the Court and has carefully considered the evidence and arguments presented at the hearings, as well as the parties' pleadings and other submissions. For the reasons that follow, the Court determines that Jones has demonstrated that trial counsel performed inadequately at both the guilt-innocence and sentencing phases of his trial and that a writ of habeas corpus should issue.

DISCUSSION

A. AEDPA's Standard of Review

The Court's review of Jones' claims is governed by 28 U.S.C. § 2254(d), as modified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104, 132, 110 Stat. 1214 (1996). This section provides that habeas relief is not available for any claim adjudicated on the merits in state court unless "adjudication of the claim . . . (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . .; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The phrase "'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decisions." *Williams v. Taylor*, 529 U.S. 362,

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[3]The Court's order dated April 3, 2006, indicates that Claim V of Jones' habeas petition presents a claim of ineffective assistance of counsel due to a conflict of interest on behalf of Jones' lead counsel. That claim was actually set forth in Claim IV of Jones' petition.

412 (2000). A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Id.* at 413. A state court decision "involve[s] an unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. Only where a petitioner establishes that the state court's adjudication of his claims was "contrary to" or an "unreasonable application of" clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence may a federal court proceed to review a state court judgment independently to determine whether habeas relief is warranted. *Rose v. Lee*, 252 F.3d 676 (4th Cir. 2001). Factual findings of the state court are presumed correct. 28 U.S.C. § 2254 (e)(1). The petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Id.*

B. Jones' Ineffective Assistance of Counsel Claims

Jones claims that his trial counsel, Graham Phillips, Jr., and Charles C. Henderson, were ineffective throughout the guilt-innocence and sentencing phases of his trial. Jones contends that they failed to adequately investigate the facts and circumstances surrounding the crime, as well as Jones' background and mental state. Had they conducted a reasonable investigation, Jones contends, trial counsel would have developed substantial evidence to defend him at both the guilt-innocence and sentencing proceedings.

As noted in the Court's order dated April 3, 2006, Jones' claims of ineffective assistance are presented throughout his habeas petition. Although there are thirteen separately numbered and captioned claims, only two (Claims III and IV) are centered on trial counsel's performance. The remainder of Jones' ineffective-assistance claims are set forth in footnotes and various other portions of his habeas petition. *See, e.g.*, Pet. at 2-3 & n.2, 12 n.5, 18-19 & nn.8 & 10, 20 n.12, 29, 36-38 & n.18. Jones presented all of his ineffective-assistance claims to the state MAR court. That court purported to deny the claims as procedurally barred and on the merits.[4] However, it is not evident from the manner in which the state court ruled that it, in fact, addressed any ineffective-assistance claims other than those presented in Claims III and IV of Jones' habeas petition.[5]

As a consequence, there is some question as to the appropriate standard of review to be applied by the Court. AEDPA places strict limits on the federal courts' review of state court judgments. Where a state court has adjudicated a claim on the merits, federal habeas review is limited to determining whether the state court's decision was either contrary to, or involved an unreasonable application of, clearly established federal law or was based upon an unreasonable determination of the facts. 28 U.S.C. § 2254(d). This is true even where the state court "fails to articulate the rationale behind its ruling." *Bell v. Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000). In that event, the federal court must conduct an independent review to determine whether the result

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[4]This Court previously rejected the MAR court's procedural bar and ordered evidentiary hearings on the ineffective-assistance claims. *See* Summ. J. Order dated Oct. 6, 2005 [DE# 50], at 15; Order dated Apr. 3, 2006 [DE#64], at 10.

[5]These claims were denominated as Claims IV, V and VI in the AMAR filed with the state court.

of the state court decision is legally or factually unreasonable. *Id.* Where, however, a petitioner properly presents a claim to the state court and the state court fails to adjudicate the claim on the merits, the deferential standard set forth in AEDPA does not apply, and the court reviews the claim *de novo*. *Fisher*, 215 F.3d at 445.

Claims III and IV were adjudicated on the merits, albeit summarily. These claims are, therefore, subject to AEDPA's deferential standard of review. *Weeks v. Angelone*, 176 F.3d 249, 259-60 (4th Cir. 1999) (AEDPA applies to perfunctory decision on the merits). However, the balance of Jones' ineffective-assistance claims do not appear to have been addressed by the state court. While the state court decision concludes that "Claims II, III, IV, V, VI, and VII are . . . without merit," *see* MAR Order at 22, the state court does not appear to have construed Jones' MAR or AMAR as raising any ineffective assistance of counsel claims other than those presented in Claims III and IV of Jones' habeas petition. Claim II appears to have been construed simply as a *Brady* claim, whereas Claim III is addressed by the state court as a claim of prosecutorial misconduct, and Claim VII is decided as a juror misconduct claim. *See* MAR Order at 13. At no point does the state court decision acknowledge the various other allegations of inadequate performance of trial counsel, such as those raised in the alternative to Jones' *Brady* claim. *See, e.g.*, AMAR at 24 n.8 ("[T]o the extent some or all this information was disclosed, trial counsel was ineffective for not making use of this critical information at trial."); *see also* AMAR at 35, 41, 50, 53. Under these circumstances, the Court finds it implausible that the state court decision could be considered a merits adjudication of all of Jones' ineffective-assistance claims. *See Rompilla v. Beard*, 125 S. Ct. at 2467 (*de novo* review applied to portion of claim not reached by state court); *Chadwick v. Janecka*, 312 F.3d 597 (3d Cir. 2002) (deferential

AEDPA standard inapplicable where state court misunderstood nature of claim). The Court finds it unnecessary, however, to determine whether the proper standard is *de novo* review or the deferential standard of review set forth in AEDPA. Regardless of which standard applies, Jones is entitled to relief pursuant to 28 U.S.C. § 2254.

It is well settled that the Sixth Amendment guarantees defendants the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). This right plays a crucial role in ensuring a fair trial, "since access to counsel's skill and knowledge is necessary to accord defendants . . . 'ample opportunity to meet the case of the prosecution.'" *Strickland*, 466 U.S. at 685 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)). An individual may be deprived of his right to counsel when counsel has "simply fail[ed] to render 'adequate legal assistance.'" *Id.* at 686 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. This same standard applies to capital sentencing proceedings since they are "sufficiently like a trial in [their] adversarial format and in the existence of standards for decision, that counsel's role in the proceedings is comparable to counsel's role at trial." *Id.* at 686-87 (citations omitted).

A petitioner claiming ineffective assistance of counsel must ordinarily make two showings. First, he must show that counsel's performance was deficient. *Id.* at 687. Counsel's performance is deficient when it falls below an "objective standard of reasonableness" under the circumstances. *Id.* at 688-90. A petitioner must also show that counsel's deficient performance prejudiced him. *Id.* at 687. Counsel's performance is prejudicial when "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'"[6] *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688) (second alteration in original). "Counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. Absent "investigation into the prosecution's case and into various defense strategies," the adversarial process breaks down. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). Thus, counsel have a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. A particular decision not to investigate must be assessed for reasonableness in view of all the circumstances, giving a "heavy measure of deference to counsel's judgments." *Id.* at 691.

The record in this case does not clearly establish when lead counsel, Graham Phillips, was appointed by the court to represent Jones. The order of appointment is undated, and Mr. Phillips testified before this Court that he did not recall the date of his appointment. Based on Mr. Phillips' testimony, however, it can be inferred that he was appointed at least several months prior to Jones' trial, presumably sometime between Jones' arrest in August 1992 and his arraignment in April 1993.

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[6]Standards promulgated by the American Bar Association ("ABA") are "guides to determining what is reasonable." *Strickland*, 466 U.S. at 688-89.

The record does clearly establish that from the time of appointment until the month before trial, Mr. Phillips worked very little on the case, however. During this period of time, Mr. Phillips utterly failed in his obligations to Jones. The only time he spent on the case involved trying to work out a plea to second-degree murder. He interviewed no witnesses, filed no motions, sought no evaluation of Jones, and conducted no mitigation investigation. Habeas Tr. Vol. I, 50-54. He did not request the assistance of a fact investigator or mitigation specialist or seek funds to retain any expert witnesses. *Id.* at 52-53. Despite Jones' state statutory right to two attorneys,[7] Phillips did not even request the appointment of associate counsel to assist him in representing Jones. *Id.* at 53. It was only at the request of the District Attorney that associate counsel Charles Henderson was appointed to the case. *Id.* at 22. Even then, Henderson was not appointed until October 11, 1993, less than a month before the capital trial commenced. *Id.* at 23; Pet.'s Habeas Hr'g Ex. 2.

1. Guilt-innocence phase

At the hearing before this Court, counsel testified that they focused their efforts on trying to convince Jones to accept the plea that had been offered and on preparing for the guilt-innocence phase of the trial. Habeas Tr. Vol. I, 30, 50. The record demonstrates that defense counsel did not begin to draft any motions or interview any witnesses prior to November 1, 2003, one week before Jones' capital trial began. *Id.* at 29; Pet.'s Habeas Hr'g Ex. 4. During that week, defense counsel investigated mainly the make and color of the car owned by Jones at

[7]Section 7A-450(b1) of the North Carolina General Statutes provides that "[a]n indigent person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed in a timely manner." Violation of this statute has been held to be prejudicial error *per se*. *See State v. Frye*, 341 N.C. 470, 493, 461 S.E.2d 664, 675 (1995).

the time of Grady's murder.[8] Habeas Tr. Vol. IV, 14. Counsel interviewed one of Jones' prior employers and an individual from the ABC store where Jones had allegedly purchased liquor the night before Grady's death. Habeas Tr. Vol. I, 32-33. In addition, counsel made one unsuccessful attempt to interview Lovely Lorden. Despite the fact that the State's case hinged on Lorden's testimony, counsel never spoke with Lorden prior to trial.[9] Habeas Tr. Vol. I, 57.

Counsel's main trial strategy was to attack Lovely Lorden's credibility. Habeas Tr. Vol. IV, 56. Assuming this was a sound trial strategy, counsel's investigation was inadequate to achieve their objective. For example, counsel failed to run a simple criminal background check on Lorden or otherwise discover that Lorden had a number of prior criminal convictions that would have been relevant and admissible for the purpose of impeaching her credibility, including one fraud conviction and a number of worthless check convictions. *See* Pet.'s Habeas Hr'g Ex. 51. Although counsel testified that they had a copy of "her statement," evidence before the Court establishes that they failed to obtain copies of all of Lorden's pretrial statements, a comparison of which reveals a number of inconsistencies. Moreover, counsel did not seek copies of Lorden's mental health records even after being made aware that she had been treated at the Duplin County Mental Health Center on a number of occasions and claimed to have first told an individual at mental health about Jones' possible involvement in Grady's death. *See* Habeas Tr. Vol. IV, 50-51; Trial Tr. 695, 757. Counsel's failure to investigate Lorden, a witness crucial to the prosecution's case, indicates inadequate performance on the part of counsel. *See*

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[8]Prior to Jones' trial, Lovely Lorden had testified at Lamb's trial that Jones was driving a red car. Jones contended that he owned a black and white sedan at the time of Grady's death.

[9]Counsel apparently thought interviewing Lorden was unimportant because they had "her statement" and a copy of her testimony at Lamb's trial. Habeas Tr. Vol. I, 57.

Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir.1998) ("Counsel must ordinarily 'investigate possible methods for impeaching prosecution witnesses,' and in some instances failure to do so may suffice to prove a claim under *Strickland*." (quoting *Hoots v. Allsbrook*, 785 F.2d 1214, 1221 (4th Cir. 1986))); *Tucker v. Ozmint*, 350 F.3d 433, 444 (4th Cir. 2003) (duty to investigate particularly important where witness is crucial to the prosecution's case).

Having failed to adequately investigate Lorden or the case, Jones' counsel lacked the evidence necessary to successfully discredit Lorden's testimony. Instead, counsel spent the majority of their cross-examination asking Lorden about what counsel considered to be promiscuous behavior on her part. *See* Trial Tr. 729-74. Counsel began by questioning Lorden about the fact that she had borne ten children by seven different men, only one of whom she married. *See* Trial Tr. 729-36. When the prosecutor objected to this line of questioning, defense counsel responded by arguing that "a woman that has 10 children by eight [sic] different men and married to none [sic] of them is, amounts to being a prostitute or whore, and that type woman is capable of telling a lie and that all goes to her character in this cross-examination." Trial Tr. 732. The trial judge quickly sustained the objection to defense counsel's inappropriate and irrelevant line of questioning. *See* Trial Tr. 732. Yet, counsel would not leave the matter alone, continuing to question Lorden about the parentage of her various children, *see* Trial Tr. 734-36, her male friends, *see* Trial Tr. 749-51, 759-60, 764-65, 772-73, and her finances, *see* Trial Tr. 739-48, 755-56, and suggesting that Lorden supplemented her $650 per month government assistance with prostitution and gambling. Trial counsel did not even question Lorden about what she had allegedly seen the morning Grady was killed or about any inconsistencies in her statements to the police.

Perhaps most troubling about counsel's failure to investigate, though, was their failure to review "readily available file[s] that the State ha[d] and [intended to] use against [Jones]." *Rompilla v. Beard*, 125 S. Ct. 2456, 2465 (2005). At all times relevant to this case, the prosecutor maintained an open-file discovery policy, which he describes as follows:

> [A]nything in my file, other than maybe a . . . I would not reveal the identity of a confidential informant or that information. Anything else at that time that was in my file, anyone could come in and make whatever copies they wanted of my file. . . . . I guess that started in the '80s. Because the law on *Brady* and other issues was just too doggone complicated for me to try to figure out what the strategy of defense attorneys were, and I just realized it was better to have an open file, because if a person is guilty, what did I have in my file that would hurt the State's case?

Habeas Tr. Vol. IV, 75-76. At the time of Jones' trial, Phillips was a seasoned criminal defense attorney with over thirty-five years' experience trying criminal cases in Duplin County. He had tried many cases against the prosecutor and was certainly aware of the prosecutor's open-file discovery policy. Habeas Tr. Vol. IV, 74. Yet, trial counsel failed to review the prosecutor's file.

Had counsel done so, they would have discovered substantial evidence with which to defend Jones. Throughout Jones' trial, defense counsel maintained that Jones was innocent and that someone else, perhaps George Overton, killed Leamon Grady. Habeas Tr. Vol. IV, 56-57; *see, e.g.*, Trial Tr. 980. This was not the main defense strategy, however, since the only evidence presented to support this theory was Allen Bizzell's testimony relating how George Overton went to Grady's home at 3:00 a.m. to pay Grady some money he owed him, returned a short while later, and the two men then went to Grady's home before calling for help. Trial counsel did not learn and, therefore, the jury did not hear that the State possessed information suggesting that Overton may have killed Grady and that Bizzell was covering for Overton.

Because trial counsel failed to review the prosecutor's file or interview Bizzell, they failed to discover that Bizzell had given several different versions of the morning's events. Initially, Bizzell told investigating officers that he went with Overton to Grady's home to buy beer for their boss sometime after 3:00 a.m. *See* Pet. Ex. 19. In subsequent interviews, however, Bizzell told the police that Overton alone left work for Grady's house (which was a quarter of a mile away) and that Overton was gone approximately ten minutes before he returned with a six-pack of beer he had stolen from Grady. *Id.* Bizzell further stated that Overton was acting suspicious and had asked him to lie and tell the police that he was with Overton when Overton went to Grady's house. *Id.* In his fourth interview, Bizzell told the investigators that Overton had gone to Grady's home to pay a debt and that he returned to work and spent time in other areas of the plant before telling Bizzell that "[Grady] has been robbed or beat up or shot or something." *See* Pet. Ex. 13. Bizzell stated that he and Overton then went to Grady's house and that Overton suggested they should "roll" Grady before calling for help. *Id.*

Moreover, counsel did not learn of other evidence in the prosecutor's file that tends to implicate Overton in Grady's death. For example, when questioned by the police, Overton initially failed to tell the officers that he went to Grady's house alone. *See* Pet. Ex. 15. Overton changed his account only after being questioned about the veracity of his story, then stated, "I guess you're going to say I killed him." *Id.* In this statement, Overton admitted shaking and yelling at Grady, stepping over him to steal some beer, and then returning to work to give his boss the beer before telling Bizzell about Grady. *Id.* Following Grady's death, Overton left town and did not return to work. *Id.* Within a week, he was arrested in Wilmington, North Carolina, on an outstanding warrant charging him with rape. *See* Pet. Ex. 16. At the time of his

arrest, Overton stated, "I bet it was Vanessa. Her old man is in prison, and I should have killed her too." *Id.*

Other statements in the prosecutor's file, and thus available to defense counsel, suggest that Overton has a propensity for violence. These statements indicate that Overton regularly carries a small handgun and has shot another man. *See* Pet. Exs. 17, 18. Overton is described as "crazy," having "no feelings," and "sure capable of killing someone." *See* Pet. Ex. 18. One person interviewed by the police stated that "he would watch Overton. . . . [I]f he thought someone would kill him, that the first person he believed would and could do it would be Overton." *Id.* He further stated that he knew a large reward had been offered for information about Grady's murder but that he was not sure he would tell the police if he knew Overton were involved because "knowing his luck, Overton would get out of prison and kill whoever told on him." *Id.*

The prosecutor's file also contained substantial evidence that could have been used to discredit Lovely Lorden's testimony. Her statements to the police are riddled with inconsistencies, some of which counsel were aware and some of which counsel were apparently unaware. Initially, Lorden identified Jones' alleged accomplices as Larry Lamb and "Tootie" Matthews. After it was discovered that Tootie had an "airtight alibi," Lorden identified Tootie's brother, Ernest Matthews, as the third individual. Habeas Tr. Vol. IV, 78-79. At trial, Lorden testified that she had always called Ernest Matthews "Tootie" and that he would answer to that name, although she had since learned that "Tootie" was actually the nickname of Ernest's brother, Nathaniel Matthews. Trial Tr. 699-700.

In all, Lorden provided five pretrial statements to the police. These statements reflect that Lorden is unable to fairly and reliably describe the circumstances of the offense. In one pretrial statement, for example, Lorden described the car driven by Jones as a "white over black Ford sedan." *See* Pet. Ex. 7. However, at both Larry Lamb's trial and Jones' trial, Lorden testified that Jones was driving "a little red car."[10] Trial Tr. 671. Lorden also stated that she heard one gunshot. *See* Pet. Exs. 6, 7. However, her subsequent statements and trial testimony were that two shots were fired. *See* Pet. Ex. 8; Trial Tr. 683. In one statement, Lorden told investigators that they met Larry Lamb at Herman's Place at 10:30 p.m., yet at trial and in other pretrial statements she stated that they picked Larry Lamb up from work shortly after midnight. *See* Pet. Exs. 7, 8; Trial Tr. 673. Lorden was also inconsistent about whether they visited Jones' sister the evening before Grady's death and about the sequence of events after leaving Grady's house. *See, e.g.*, Pet. Exs. 7, 8; Trial Tr. 671-72, 687. All of these inconsistencies were readily apparent from Lorden's pretrial statements, which were available to defense counsel had they simply perused the prosecutor's file.

In direct contravention of affidavits from Messrs. Phillips and Henderson,[11] the state MAR court unreasonably determined that counsel "obviously knew of Lovely Lorden's five

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[10]Counsel were aware of the description given by Lorden at Lamb's trial and thus spent much of their investigative efforts in an unsuccessful attempt to prove that Jones did not own a little red car in 1987. However, counsel were not aware of the pretrial statement in which Lorden described the vehicle as a white over black Ford sedan and, therefore, did not seek to cross-examine her regarding this or other inconsistencies in her statements.

[11]In affidavits presented to the state MAR court, both Mr. Phillips and Mr. Henderson stated that they did not recall receiving or seeing either of Lorden's two November 5, 1990, pretrial statements or her pretrial statements from November 7, 1990, August 31, 1990, and August 17, 1992. *See* Pet. Exs. 10, 49.

statements since the trial transcript indicates that [Mr. Phillips] referred to them in opening argument at [Jones'] trial." MAR Order at 14. A review of Mr. Phillips' opening statement does reveal that he forecast evidence of Lorden "chang[ing] her story several times." Trial Tr. 620. However, counsel never produced evidence supporting this statement. Instead, the evidence presented to the jury suggested that Lorden, out of fear of losing her children, initially withheld that she was with Jones, Matthews and Lamb but subsequently came forward and consistently told the truth about Grady's murder. Considering the fact that Lorden testified at Lamb's trial that she was initially reluctant to tell "the whole truth," the Court finds it more likely that Phillips' opening statement was based upon his knowledge of Lorden's prior testimony[12] than knowledge of Lorden's various pretrial statements to the police.

Had trial counsel reviewed the prosecutor's file, they would also have learned that the State possessed State Bureau of Investigation surveillance tapes of a conversation between Lorden and Larry Lamb on November 7, 1990. In this conversation, Lorden told Lamb that she was being hassled by the police about the Grady murder and that she had come to talk with Lamb so that they could save themselves. Lamb repeatedly denied any involvement in Grady's death. When asked by Lorden whether he was going to talk to the police and explain everything, Lamb replied, "There ain't nothing to explain. I don't know nothing about it." Pet. Ex. 21, at 8. Records of the surveillance further detail the following exchange:

> [LORDEN]: The night – the night that (Unclear) – that Leman [Grady] did get killed, I don't know whether you can remember or not. You, me, Tootie, and (Unclear) was together.

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[12]It is uncontroverted that defense counsel were aware of and had reviewed Lorden's testimony at the Lamb trial.

[LAMB]: No, we wasn't.

[LORDEN]: We were together.

[LAMB]: Uh-uh.

[LORDEN]: And they are giving me –

[LAMB]: Not me. You got me mixed up.

[LORDEN]: – a lot of – a lot of hassle.

[LAMB]: You got me mixed up with someone. It's not me.

[LORDEN]: You Larry Lamb?

[LAMB]: Yeah, I'm Larry Lamb. But that night (Unclear) I was at work. That's right, I was at work. . . .

. . . .

[LAMB]: I don't know nothing about it. I wasn't with you. You got me mixed up with somebody, but it [sic] me. I was working at night then.

Pet. Ex. 21, at 9-11. Evidence that Lamb denied being with Jones, Matthews and Lorden the evening before Grady's murder further discredits Lorden's trial testimony and would have been helpful to the defense.

In *Rompilla*, the Supreme Court held that defense counsel's failure to examine the court file on their client's prior conviction fell below the level of reasonable performance required by the Sixth Amendment. Because counsel knew the prosecution intended to rely on the prior conviction at Rompilla's capital sentencing hearing, the Court concluded that counsel were obligated to make reasonable efforts to review the file. The Court stated:

> With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their

> opportunity to respond to a case for aggravation. The prosecution was going to use the dramatic facts of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense. Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. . . .
>
> The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense.

Rompilla, 125 S. Ct. at 2465 (footnote omitted).

Viewing the performance of Jones' counsel in light of the circumstances as they existed at the time and applying a "heavy measure of deference" to counsel's judgment, the Court finds counsel's investigative efforts to be contrary to prevailing professional norms. The Court rejects any suggestion that counsel's actions were the product of sound trial strategy. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. There can be no reasoned strategic decision where, as here, counsel's inadequate investigation fails to unearth the information upon which such tactical decisions must be based. Moreover, it is hard to imagine how defense counsel could have made a reasoned decision not to utilize the evidence involved here. Defense counsel's main strategy was to attack the credibility of Lovely Lorden. They also sought to imply that another person, perhaps George Overton, was responsible for Grady's death. Information that a reasonable investigation would have garnered about Lorden and Overton would have strongly supported Jones' defense. Counsel's failure to obtain the readily available information in the prosecutor's file or to otherwise reasonably investigate the State's case and possible defenses prevented them from making any reasoned

strategic decisions and rendered their performance at the guilt-innocence phase constitutionally deficient.

Given the weakness of the prosecution's case and its heavy reliance on the testimony of Lovely Lorden, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Reasonable counsel would have reviewed the prosecutor's file and interviewed and run a simple criminal background check on Lorden. Doing so would have enabled defense counsel to impeach Lorden's testimony much more successfully than they did by questioning her about her sexual proclivities. A reasonable investigation would have also revealed evidence of George Overton's actions the morning of Grady's murder, as well as his disappearance and statements following the murder. This evidence would surely have weighed heavily upon the jurors' minds and may well have caused one or more of the jurors to have a reasonable doubt as to Jones' guilt.[13]

Both the evidence presented to the MAR court and the evidence presented to this Court demonstrate that Jones' counsel deprived him of his Sixth Amendment right to effective assistance of counsel during the guilt-innocence phase of Jones' trial. In fact, counsel's performance was so deficient and the consequences so prejudicial that it would be unreasonable

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[13]The state MAR court rejected evidence as to Overton's possible involvement on the ground that it failed to meet state evidentiary rules requiring that evidence of third-party guilt "point directly to the guilt of [an]other party" and "tend both to implicate that other person and be inconsistent with the defendant's guilt." MAR Order at 11. The MAR court stated, "common sense dictates that murderers do not generally telephone the police and await their arrival after the murder has been committed." MAR Order at 11. To the extent the rule applied by the MAR court required Jones to show that his evidence did more than raise a reasonable doubt as to his guilt, it violates clearly established federal law guaranteeing criminal defendants the right to have a meaningful opportunity to present a complete defense. *See Holmes v. South Carolina*, 126 S. Ct. 1727, 1733-35 (2006) ("'Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt . . . .") (quoting 41 C.J.S., Homicide § 216, pp. 56-58 (1991)).

to conclude otherwise. The MAR court's decision denying Jones' claim of ineffective assistance of counsel at the guilt-innocence phase is not only erroneous, but an unreasonable application of *Strickland.*

2. Sentencing phase

Counsel's failings in this case were not isolated to the guilt-innocence phase of Jones' trial. They performed deficiently throughout the proceedings, depriving Jones of his right to counsel at the penalty phase as well as the guilt-innocence phase. Defense counsel "did not believe Mr. Jones would be convicted of first degree murder." Pet. Exs. 10, 49. They conducted virtually no mitigation investigation. They did not talk with their client about his childhood, his family background or ask him whether he had any history of mental health problems or substance abuse. Habeas Tr. Vol. I, 36-37. Counsel never attempted to obtain copies of Jones' school, hospital, prison or mental health records. *Id.* at 38-39. They saw no reason to talk to his teachers. *Id.* at 39. Counsel made no request for an investigator or mitigation specialist to assist them in preparing for the sentencing proceeding. *Id.* at 39-40. They explored no defenses based on mental illness or intoxication. They hired no experts and sought no psychiatric or psychological evaluation of their client. *Id.* at 40. At the habeas hearing before this Court, Mr. Henderson testified that he never pursued any mental health issues because Jones "seemed to be aware of what was gong [sic] on" and "nothing never [sic] really seemed to indicate that, you know, I should be checking out his mental competence and that kind of thing." Habeas Tr. Vol. I, 36-37.

Jones' entire capital sentencing hearing lasted a mere fifty-five minutes and makes up less than thirty-two pages of transcript. Jones' evidence was thirty minutes long and comprised

the testimony of three witnesses, two of whom had met Jones only after he was arrested for Grady's murder. The third was one of Jones' maternal aunts, Margaret Urso. Counsel first approached Ms. Urso in the hallway of the courthouse after the sentencing hearing had begun and asked whether she would be a character witness for Jones. She testified that same day, without preparation by defense counsel. Her testimony provides the only mental health evidence, the entirety of which is as follows:

> Several times [Jones' mother] would tell me that she had taken him to the mental health trying to get help for him, and they would turn her down and said there wasn't anything they could do.
>
> . . . .
>
> He was in school, he was small, maybe about 10 or 12, I'm just guessing, you know, he was small in school.
>
> [Defense counsel]: Well, now, do you know how many times she carried him to mental health?
>
> No, I don't, I know she's taken him there.
>
> [Defense counsel]: Was she concerned about his mental health even up until her death?
>
> Yes.

Trial Tr. 1108-09. The remainder of Ms. Urso's testimony dealt with Jones' relationship with her and Jones' relationship with his daughter and two of Lorden's children. She stated that Jones "act[ed] like a father" to the three children when he brought them to her house but that she had never seen Lorden's other children. Trial Tr. 1106-07.

The only other defense witnesses were Jesse Scott and Felton Baker. Mr. Scott was a supervisor at the jail where Jones was incarcerated. He testified that he had seen Jones "on occasion" since his incarceration and that Jones had been a good prisoner while incarcerated at

the jail. Trial Tr. 1101-03. Mr. Baker testified that he is a Gideon and had met Jones while ministering individuals incarcerated at the county jail. He testified that Jones had accepted Jesus Christ as his savior and regularly attended services and read his Bible. Trial Tr. 1115, 1117. He described Jones as having a great influence on cellmates:

> Everyone seemed to like him, in fact, that amazes me how much they did like him and they seemed to respect him and a lot of times when I would have to leave, after witnessing to one of the fellows, it would be time for me to go, I'd say, now, Levon, I says now, you take care of this and finish it on out and witness this young man. I said that's the fruit of the Christian is another Christian. I said now this is what you're supposed to do, and several times when we got ready to dismiss, I would ask him to close in prayer, well, he was, it was hard, naturally, for any young Christian to do it, but he would, several times he would, he would dismiss us in prayer.

Trial Tr. 1116.

With the exception of Jones' mother, all of Jones' immediate family members were alive at the time of his trial. Jones' sisters and several other family members were present at Jones' trial and sentencing hearing. While counsel met with members of Jones' family, they never asked them about Jones' background. Habeas Tr. Vol. I, 80, 97. And, other than Margaret Urso, who they caught in the courthouse hallway shortly before she testified, they never asked any family members to testify at sentencing.

Information since obtained from family members and post-conviction experts paints a far different picture of Jones than that presented at the penalty phase. This evidence depicts Jones as mentally ill, with a history of cognitive impairments and substance abuse who grew up in an impoverished family. Jones was one of five children who lived with their parents in a five-room house with a wood heater, no plumbing, and holes in the floor so that "you could stand in the living room and look under the house." Habeas Tr. Vol. I, 98. According to Jones' evidence, it

was an "unstable, chaotic" household. Habeas Tr. Vol. II, 43. Jones' father was controlling and demoralizing, yet disengaged from the children. He was "particularly rejecting of [Jones], almost as if [he] didn't like [Jones]." *Id.* His mother was an insulin-dependent diabetic and suffered from mental illness, including depression and auditory hallucinations. Habeas Tr. Vol. I, 101-07; Habeas Tr. Vol. II, 43, 45. Jones' father refused to give her money for her insulin and would often kick her out of the house. Habeas Tr. Vol. II, 43-44.

During his adolescent years, Jones began acting out a lot. His mother was unable to control him, so she took him to the local mental health center. Habeas Tr. Vol. II, 44-45. Mental health records describe an inappropriate presentation, including staring and "a somewhat mystical smile." *Id.* at 49-50. These records further indicate a concern "that a psychotic process could be possible in Mr. Jones' future." *Id.* at 49. At that time, Jones was diagnosed with borderline mental retardation and situational disorder of adolescents. Habeas Tr. Vol. II, 57. A treatment plan was prescribed, but Jones' parents did not ensure that he completed his treatment. Habeas Tr. Vol. II, 58.

As part of these habeas proceedings, Jones has been evaluated by Respondent's psychologist and psychiatrist, as well as experts of his own. Although the experts are not in agreement as to their specific diagnoses, they do agree that Jones suffers from mental health disorders. Likewise, all but one agree that evidence of cognitive impairment exists.[14] Jones' experts diagnosed him with delusional disorder, mental retardation, and alcohol and cocaine

[14]In connection with these proceedings, Jones was evaluated by Dr. Ginger Calloway, a forensic psychologist, and Dr. Moira Artigues, a forensic psychiatrist, both of whom were retained by Jones; and by Dr. Mark Hazelrigg, a forensic psychologist, and Dr. Robert Brown, Jr., a forensic psychiatrist, who were retained by Respondent. Only Dr. Brown found no evidence of cognitive deficits. *See* Habeas Tr. Vol. III, 21.

dependence. Habeas Tr. Vol. I, 166-67; Habeas Tr. Vol. II, 46. While Respondent's experts disagree with the mental retardation diagnosis, Respondent's psychologist testified that Jones does meet the criteria for borderline intellectual functioning. He placed Jones in the lowest four percent of the population in terms of intellectual functioning and stated that Jones has significant deficits in attention and concentration. Habeas Tr. Vol. II, 145-46. He further diagnosed Jones with antisocial personality disorder, alcohol dependence and cocaine abuse. *Id.* at 113. Respondent's psychiatrist diagnosed Jones with antisocial personality disorder and narcissistic personality disorder. Habeas Tr. Vol. III, 12-13. According to him, Jones suffered from these disorders both at the time of the offense and at the time of trial. *Id.* at 14.

Evidence presented in this habeas proceeding further suggests that had trial counsel interviewed Lorden they would have learned that she, too, could offer evidence that Jones was mentally ill and intoxicated at the time of Grady's murder. At the habeas hearing, Lorden testified that she believed Jones had a mental illness – that he had trouble telling the difference between reality and his thoughts or fantasies and that he would do things for no reason at all. Habeas Tr. Vol. II, 90-91; *see also* Pet. Ex. 3. She further testified that the morning they went to Grady's house, Jones had been drinking continuously for eight hours and had smoked some crack cocaine. Habeas Tr. Vol. II, 87-89; *see also* Pet. Ex. 3. She described Jones as "extremely intoxicated." Habeas Tr. Vol. II, 87; Pet. Ex. 3. He was slurring his words, walking clumsily and using bad language, which he ordinarily did when he was drunk. *Id.* She stated that Jones was extremely intoxicated when he entered Grady's house and that she did not think he knew what he was doing or thinking at the time. Habeas Tr. Vol. II, 87-90. When he left Grady's "he still had slurred speech" and he was "speeding and weaving back and forth when he was driving." Pet. Ex. 3; *see also* Habeas Tr. Vol. II, 88.

Lorden's trial testimony left a much different impression. Instead of Jones being portrayed as intoxicated, Lorden's testimony suggested that Jones had been drinking some but was not intoxicated. She testified that Jones was quiet that evening, which was not his normal behavior when drinking. Trial Tr. 676-78. At no point did she indicate that Jones' speech was slurred or that he was stumbling or driving erratically.

Based on an affidavit submitted by Jones' lead counsel, the MAR court rejected Jones' claim of ineffective assistance at sentencing, finding unassailable counsel's strategy to "present [Jones] in the best possible light" by showing that Jones "had been a hard worker who supported not only Lovely Lorden and his own child but also the many other children who lived with them, and who was a loving family member." *See* Phillips Aff. dated Apr. 23, 1997, State Ct. Record, Vol. V, Tab U(2), *cited in* MAR Order at 20. The MAR court's adjudication of this claim is both an unreasonable application of *Strickland* and an unreasonable determination of the facts.

As noted in this Court's October 6, 2005, Order, defense counsel's tactical decisions must be given great deference but are not unassailable. Where a petitioner challenges counsel's decision not to present mitigating evidence, it must be determined "whether the investigation supporting counsel's decision not to introduce [that evidence] . . . was itself reasonable." *Wiggins*, 539 U.S. at 521-23. ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989), *quoted in Wiggins*, 539 U.S. at 524. "[A]mong the topics counsel should consider presenting are medical history, educational history, employment and training history, family and

social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Wiggins*, 539 U.S. at 524 (citing ABA Guidelines 11.8.6, p. 133).

In this case, counsel failed to conduct even a rudimentary investigation into mitigating evidence. Had they done so, they would have discovered significant evidence to present at sentencing. Their failure in this regard is especially troubling since the testimony of Margaret Urso and Lovely Lorden put them on notice that Jones had a mental health history and had been drinking the night before Grady's death. Notwithstanding this testimony, defense counsel never sought a continuance of the trial in order to obtain copies of Jones' mental health records and never even asked any of Jones' siblings or other family members about his family background and mental health and substance abuse history. Counsel's failure to investigate and present such mitigating evidence can not be justified as a tactical decision because they had not "fulfill[ed] their obligations to conduct a thorough investigation of [Jones'] background." *Williams*, 529 U.S. at 396.

The MAR court failed to consider whether trial counsel's failure to present evidence of Jones' background was a reasoned decision made after a thorough investigation or whether counsel acted reasonably in deciding to limit their investigation. As such, the MAR court's deference to counsel's strategy was an unreasonable application of *Strickland.*

The MAR court's decision is also based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d). The state court found that counsel sought "to present [Jones] in the best possible light in the hope that the jury would recommend a life sentence." MAR Order at 20. This finding is based on lead counsel's statement that they sought to present Jones as "a hard worker who supported not only

Lovely Lorden and his own child but also the many other children who lived with them, and who was a loving family member." Phillips Aff. dated Apr. 23, 1997, State Ct. Record, Vol. V, Tab U(2). The problem with the state court's finding is that the record fails to support counsel's claim. Instead, the record demonstrates that counsel allowed the prosecution to portray Jones as someone who worked off and on but could not maintain a steady job and who stole Lorden's welfare money and food stamps, terrorized the children and physically and emotionally abused both Lorden and the children. Lorden described Jones as a violent person who would "pull guns on [her]," "jump on [her] for no reason at all," and beat her and the children. Trial Tr. 691-92. She testified that the kids were "so scared of him [that] when he walked in the house, you could hear a pin drop." Trial Tr. 692. Based on the evidence before it, the MAR court could not have reasonably found that counsel's failure to present evidence of Jones' background and history was the result of a trial strategy to present Jones "in the best possible light." The Court, therefore, reviews this portion of Jones' claim independently to determine whether Jones was deprived of his right to effective assistance of counsel at sentencing. *See Williams*, 529 U.S. 362 (applying *de novo* review where state court decision unreasonable).

"'[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell and Stevens, JJ.)). "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the

ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings . . . ." *Woodson*, 428 U.S. at 304. "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

Evidence of Jones' childhood, social background, character, and mental health is highly relevant to the sentencing decision and may have served the basis for a sentence less than death. There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990) (internal quotation marks and emphasis omitted). Evidence of impaired intellectual functioning is inherently mitigating because it reduces an individual's personal culpability. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004).

Trial counsel's deficient performance in this case left behind a wealth of evidence that the jury may have considered mitigating. Among this evidence is expert testimony establishing that Jones has either mild mental retardation or borderline intellectual functioning.[15] Recent IQ testing suggests that Jones has an IQ of 74 or below, which means that Jones functions intellectually at or below the fourth lowest percent of the population. Other evidence suggests that Jones was dependent upon alcohol and cocaine, suffered from two personality disorders and was highly intoxicated at the time of the offense. Respondent argues that his experts' diagnoses

[15]Because Jones is entitled to relief based on his claim of ineffective assistance of counsel, the Court finds it unnecessary to address Jones' claim of mental retardation, which is also pending before the Court.

of narcissistic personality disorder and antisocial personality disorder should not be considered because these disorders translate, in lay terms, simply as meanness. However, other courts have found such evidence to have mitigating value. *See, e.g.*, *Steckel v. Carroll*, 2004 WL 825302 (D. Del. 2004) (not unreasonable to present evidence of defendant's antisocial personality disorder); *Kindler v. Horn*, 291 F. Supp. 2d 323 (E.D. Pa. 2003) (mood and narcissistic personality disorders sufficient to establish extreme mental or emotional disturbance mitigator); *United States ex rel. Cloutier v. Mote*, 2003 WL 76867 (N.D. Ill. 2003) (defense presentation of evidence of polysubstance abuse and antisocial and narcissistic personality disorders not unreasonable); *Hunter v. State*, 817 So. 2d 786 (Fla. 2002) (narcissistic personality disorder found as non-statutory mitigating circumstance); *cf. Burger v. Kemp*, 483 U.S. 776, 793-94 (1987) (mitigation is in eye of beholder). Jones had a constitutional right to provide the jury with the mitigating evidence that his trial counsel failed to discover. It is reasonably probable that given evidence of Jones' low IQ, deprived background and psychological problems, together with evidence of Jones' intoxication, at least one of the jurors may have decided that life imprisonment was a more appropriate sentence.

CONCLUSION

Jones was entitled to counsel who would "require the prosecution's case to survive the crucible of meaningful adversarial testing" by investigating and presenting to the jury such evidence as a reasonable investigation would have uncovered. *United States v. Cronic*, 466 U.S. 648, 656 (1984). Instead, Jones received two appointed attorneys that spent virtually no time or effort investigating the offense or his background. Counsel's deficient conduct undermines any confidence in the jury's verdicts and renders fundamentally unfair both the guilt-innocence and

penalty phases of Jones' trial. The MAR court's decision to the contrary effectively ignores *Strickland's* reasonable investigation requirement and is an objectively unreasonable application of *Strickland.*

A writ of habeas corpus vacating Jones' convictions and sentence shall issue pursuant to 28 U.S.C. § 2254. Jones shall be unconditionally released from custody on the state court's judgment entered at the November 8, 1993, criminal session of Duplin County Superior Court unless, within 180 days, the State of North Carolina initiates new trial and sentencing proceedings against Jones.

SO ORDERED.

This 26 TH day of September 2006.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE