

**Application to the
Georgia Board of Pardons & Paroles
on behalf of
Virgil Delano Presnell, Jr.**

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**BEFORE THE
BOARD OF PARDONS & PAROLES
OF THE STATE OF GEORGIA**

Application of Virgil Delano Presnell, Jr.
for a 90-day stay of execution
and for commutation of his sentence of death

Undersigned counsel applies to the Board of Pardons and Paroles, pursuant to Article IV, §II, ¶ II(a) and (d) of the Georgia Constitution of 1983; O.C.G.A. §§ 42-9-20, 42-9-42(a), 42-9-43, *et seq.*; and chapters 475.2.01 (1) and 475.3.10 (2)(b) of the rules of this Board for:

- (i) consideration of this application on behalf of Virgil Delano Presnell, Jr. for commutation of the sentence of death imposed by the Superior Court of Cobb County on March 16, 1999;
- (ii) a 90-day stay of his execution, presently scheduled for May 17, 2022 at 7:00 p.m., to permit full consideration of his application;
- (iii) a full and fair hearing before the full Board, allowing him to present witnesses and to be heard through counsel; and
- (iv) after that review, the commutation of his sentence of death.

Any discussion of this case must begin at the beginning, with the facts of Mr. Presnell's crime. There is no denying the gravity of what happened to Lori Ann Smith, Andrea Furlong, and their families on May 4, 1976.

Mr. Presnell does not know how to express how sorry he is for what he did, and he does not believe that anyone would even want to hear it. He is right that an apology can never be enough when a person has caused so much harm; but it is also true that "sorry" can and must be said, and that he is deeply and profoundly sorry to the Smith and Furlong families. As he told the Board during his clemency interview, he wishes he could "take it all back," "take everything back."

Counsel applies for executive clemency on Mr. Presnell's behalf not to minimize or distract from the pain Mr. Presnell caused, but to help the Board understand why it happened and the price that he has paid for what he did in 1976.

This application is based on the following grounds for executive clemency: (1) Mr. Presnell has served nearly five decades in prison, during which he has been routinely raped, beaten, and deprived; (2) in spite of the abuse Mr. Presnell has endured during his lengthy incarceration, he has a spotless disciplinary history and has been a model prisoner; (3) at the time of both the original 1976 trial and the 1999 resentencing trial, there was significant support for a sentence of life without parole, but it was not an option available to the jury during either proceeding; and (4) Mr. Presnell has significant cognitive impairments that may directly relate to the commission of this crime, and he is among the category of people in our society who deserve protection from execution by virtue of their disability.

To the extent possible, counsel will describe how her expert witness, [REDACTED] would have explained the relationship between Mr. Presnell's profound brain damage and the crimes at the heart of this case, had counsel received notice of Mr.

Presnell's impending execution,¹ and had [REDACTED] been available to evaluate Mr. Presnell prior to the hearing and present [REDACTED] conclusions to the Board.²

Counsel has marshaled as much evidence for the Board as possible under the significant time constraints she has faced since Mr. Presnell's execution order was signed. She respectfully requests a 90-day stay of execution to permit the Board to consider Mr. Presnell's full application, and thereafter, to commute his sentence of death.

1. Introduction

It was 1976. Riots exploded in Soweto, South Africa, marking the beginning of the end of apartheid. NASA unveiled its first space shuttle, the Enterprise. Gerald Ford was President of the United States – but would soon be defeated by Georgia Governor Jimmy Carter in an election that shocked the nation.

It was also the year that the death penalty was reinstated in the United States after a four-year hiatus. On July 2, 1976 – two months after Mr. Presnell's crime – the Supreme Court issued its decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), which permitted states to impose the death penalty as a punishment for certain crimes once again.

¹ As the Board is aware, the Attorney General provided counsel with only two days of notice regarding Mr. Presnell's execution warrant and did not meet the conditions required to resume executions following the COVID-19 pandemic. They violated a written agreement between the Federal Defender Program, the Georgia Resource Center, and the Office of the Attorney General that the parties entered into at the behest of the Judicial Council's COVID-19 Task Force.

² As the Board is also aware, Mr. Presnell's central clemency witness, [REDACTED] had a cardiac emergency the day after counsel learned about the AG's intention to procure Mr. Presnell's warrant. Through [REDACTED] counsel anticipated that [REDACTED] would present evidence that Mr. Presnell is severely brain damaged in precisely the ways that cause a person to commit crimes of this nature.

[REDACTED] expects to be available to evaluate Mr. Presnell in the late summer if the Board grants a 90-day stay of execution.

Mr. Presnell went to trial the following month. After a four-day trial, he became the second person sentenced to death in Georgia under the new sentencing regime.³

Since October 1976, Mr. Presnell has watched 76 men, many of them his friends, walk the path to death watch and never return.

He has been beaten countless times and raped even more – and prison guards, believing that “death row inmates were there to be killed,” “fostered the violence” against him.⁴

He has lived through many winters without heat or hot water, and he has gone several years at a time without ever stepping foot outdoors. He has spent the majority of his life in solitary confinement.

People can and will debate whether Mr. Presnell has served *enough* time, but nobody can dispute that he has served *hard* time. His crime was the worst of the worst – and so has his sentence been.

Life in prison has not been easy for Virgil Presnell. But in spite of significant abuse and severely deprived living conditions, Virgil does not complain. He has strived to live a quiet life – to see his son and speak to his sister whenever he can, to read, to crochet, and – most important – to never hurt anyone again. His life is simple and his pleasures few. Prior to receiving his execution warrant, the most momentous thing that had occurred in his life for the past several years was the introduction of a microwave into G-house. He has been incarcerated for so long that he had never used a microwave before, and he did not know what it was.

Virgil Presnell was once a helpless, “pathetic Peter Pan,”⁵ tortured and abused, and is now a quiet, easygoing, 68-year-old grandfather of three who has not received a DR in 32 years. He calls death row his “home,” without a trace of irony. And “home” is where he should remain.

2. 1976: Mr. Presnell’s arrest and initial detention

In the hours and days following his arrest, Virgil Presnell would come to understand that – in his words – there was something very wrong with him. The

³ The first was Jack Potts, who would later assume a significant role in Mr. Presnell’s life.

⁴ Letter of Billy Moore, at 2.

⁵ Mary Callen, “A Peter Pan past...,” *The Marietta Daily Journal* (September 19, 1976).

arresting officers, Sergeant Doug Williams and Lieutenant Lee Moss, realized it, too, and they immediately sought to capitalize on Virgil's childlike nature and gullibility.

Cobb County Senior Judge Adele P. Grubbs represented Virgil during his 1976 legal proceedings.⁶ She recalls:

Although Virgil was 22 years of age he seemed so much younger, he was clearly emotionally and intellectually in his early teens. He was slight of build and retiring of personality, [and] he did not seem to understand what was going on or understand the real world.

When he was arrested two senior detectives, Lt. Moss and Sgt. Williams, rode him around in a pickup truck[.] Virgil was in the back (there was not much space in those days) [and] each would lean over into his face and question him. In the course of that afternoon Virgil confessed to *every open crime against children in the county...*

Virgil explained that they would tell him something about a crime and, concerned for his safety, he would repeat it back to them as if he had committed the crime. The Trial Judge struck all the confessions to the other crimes, but left the one in this case to be submitted to the jury.⁷

After Virgil's arrest, he was placed in the Cobb County jail to await trial. The public reaction to his crime was predictably harsh and swift. Almost as soon as he arrived, the Cobb County jail began receiving bomb threats. Fearing for the safety of Virgil and the other inmates and staff, jail administrators moved him to the Fulton County jail.⁸

But his stay was short; Cobb County brought him back just a few days later. This time, the threats were coming from inside the facility. Upper-level jail personnel were forced to take steps to protect Virgil from violence perpetrated by the jail's guards. The lead security officer personally prepared and delivered Virgil's meals because the

⁶ Judge Grubbs worked on the case with her husband, Milton Grubbs, and another attorney, William Holley. They are both deceased.

⁷ Letter of Judge Adele Grubbs, at 1 (emphasis added).

⁸ Tom Crawford, Slay Suspect Questioned in Randall Case, *Atlanta Constitution* (May 9, 1976).

guards were so antagonistic toward Virgil that he believed they would assault or kill him if given the opportunity.

While he awaited trial, Virgil bunked with a 14-year-old boy who was incarcerated on a rape charge. Even though the boy had two broken wrists from running from the police and could not do Virgil much harm, he frightened Virgil so much that Virgil spent most of his time in a padded isolation cell at the end of the hall. The two men in the cell opposite him often lit things on fire and threw them inside Virgil's cell, though the fire usually died out quickly.

In the end, Virgil did not spend much time in the Cobb County jail. His case went to trial only a few months after his arrest. Even by 1970s standards, it was a remarkably fast trial process – and undoubtedly a politically-driven one. As Judge Grubbs explains:

[T]his death sentence case was tried to conclusion within four months of the crimes. This is one of the fastest such cases ever and without proper time on either side. This was an election year, a hotly contested one in which the District Attorney who tried the case⁹ had serious opposition. The pressure was on. In fact, three months later this District Attorney was defeated in the election and Thomas Charron became the next District Attorney.¹⁰

Virgil's trial lasted from August 23rd to August 26th, 1976. Voir dire – a process that, in modern death penalty cases, routinely lasts up to four weeks – started at 9:30 a.m. on August 23rd and was finished by dinnertime. The guilt phase began at about 6 p.m. on the 23rd, and continued until approximately noon on August 26th. The jury deliberated over lunch on the 26th. They returned with their guilty verdict, and the parties moved into the penalty phase right away.

The entire penalty phase was completed, and the sentence returned, on the afternoon of August 26th.¹¹ Virgil was sentenced to death.

⁹ George "Buddy" Darden was the Cobb County DA at the time of trial.

¹⁰ Letter of Judge Grubbs, at 2.

¹¹ As the Board is no doubt aware, a sentencing proceeding of this length is totally unheard-of today.

At trial, Virgil maintained – as he has for 46 years – that he did not intend to hurt the girls.¹² And while it may seem bizarre or even fantastical to think that someone could commit a sex offense against a child without understanding the harm it would cause, in this case, it was true. But the explanation for this terrible belief would not become clear until many years later, when medical and clinical advances established not just the existence of Fetal Alcohol Spectrum Disorders (FASD), but their relationship to sex offenses.

3. **“My baby ain’t going nowhere”: Mr. Presnell has endured 46 years of beatings, rapes, and torture.**
 - a. **“It destroys a man”: Georgia State Prison at Reidsville (1976 to 1977)**



Georgia State Prison at Reidsville, circa 1943. Courtesy of the Tracy O’Neal Photographic Collection at the Georgia State University Library.

¹² It appears that Mr. Presnell has provided a version of events in which he intentionally killed Lori Smith once: during his interviews with Moss and Williams. Given that he also confessed to “*every* open crime against children” in Cobb County when questioned by Moss and Williams, this version of events contains clear indications of unreliability.

At the time that Mr. Presnell was sentenced to death, death row prisoners were housed at Georgia State Prison in Reidsville, Georgia (known as "Reidsville"). Mr. Presnell was transferred there in late October 1976. There were only around 40 death row prisoners at Reidsville then, but the facility was overcrowded, housing nearly 3,000 prisoners overall.¹³

i. Conditions at Reidsville

Reidsville was in total upheaval during the 1970s and early 1980s. When Virgil arrived, the United States District Court in Savannah was on the cusp of ordering the facility (for the second time) to desegregate.¹⁴ Riots had been breaking out for years. In 1973, for instance, 44 prisoners had taken four guards hostage for seven hours to protest the "dehumanizing and barbaric treatment" and "psychological war" against prisoners.¹⁵

Although people are sometimes tempted to say that the poor conditions were what the prisoners deserved, the conditions at Reidsville would have disgusted even the most strong-stomached and hard-hearted among us. They were more closely analogous to a POW camp than a state-funded corrections facility.

The prison was plagued by constant sewage leaks and floods, and prison staff served food by sliding trays under doors that had been contaminated by the raw sewage.¹⁶ Prisoners lacked beds, bedding, and even underwear.¹⁷ One of the disciplinary techniques was the "restricted diet regimen," in which prisoners were fed only bread and water twice a day.¹⁸ The prisoners' food was "heavily infested with weevils, roaches, and rat droppings."¹⁹ The "odor of human waste, urine, vomit...was

¹³ T.L. Wells & Barry King, "Reidsville guard, 2 inmates killed," *The Atlanta Constitution* (July 24, 1978).

¹⁴ Frederick Allen & Keeler McCartney, "Revenge sparks riot at prison," *The Atlanta Constitution* (November 13, 1976).

¹⁵ "Pressure leads to the Reidsville prison riot," *The Atlanta Voice* (January 20, 1973).

¹⁶ *Guthrie v. Evans*, 93 F.R.D. 390, 397 (1981).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Brenda Mooney & Barry King, "Reidsville: sentenced to neglect," *The Atlanta Constitution* (April 15, 1980).

overwhelming and disgusting.”²⁰ One person described the conditions as “just camouflaged slavery.”²¹ Another remarked: “The way Reidsville is designed it destroys a man.”²²

Reidsville also struggled with significant racial violence throughout the 1970s. In November 1976, a race-related riot broke out, resulting in three prisoner deaths and seven injuries.²³ On July 23, 1978, another riot occurred, and prisoners took four guards hostage.²⁴ One of the guards was killed, another was severely wounded, and two prisoners died.²⁵ This riot occurred in the wake of a series of smaller incidents that had resulted in thirty injuries and three prisoner deaths.²⁶ Over the course of summer 1978 alone, six people were killed and 34 prisoners were seriously injured.²⁷ Georgia Governor George Busbee was forced to step in and order the removal of 600 prisoners to other facilities in an effort to reduce the violence.²⁸

In 1972, a group of prisoners brought a class-action lawsuit, *Guthrie v. Evans*, against Reidsville, alleging unconstitutional racial segregation and deplorable conditions of confinement. The lawsuit resulted in “one of the most detailed and comprehensive remedial decrees **ever imposed on prison facilities.**”²⁹ It lasted for 13

²⁰ Carolyn Alexander, “Reidsville cells called ‘disgusting,’” *The Atlanta Constitution* (December 21, 1979).

²¹ Brenda Mooney & Barry King, “Reidsville: sentenced to neglect,” *The Atlanta Constitution* (April 15, 1980).

²² *Id.*

²³ Frederick Allen & Keeler McCartney, “Revenge sparks riot at prison,” *The Atlanta Constitution* (November 13, 1976).

²⁴ T.L. Wells & Barry King, “Reidsville guard, 2 inmates killed,” *The Atlanta Constitution* (July 24, 1978).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Bill Kraeger, “Reidsville: a hellhole, or a better prison?,” *The Atlanta Constitution* (August 3, 1979).

²⁸ T.L. Wells & Barry King, “Reidsville guard, 2 inmates killed,” *The Atlanta Constitution* (July 24, 1978).

²⁹ “Politics and Constitutional Interpretation in Prison Reform Litigation: The Case of *Guthrie v. Evans*,” Bradley S. Chilton and Susette M. Talarico, in *Courts, Corrections, and the Constitution: The Impact of Judicial Intervention on Prisons and Jails*, Edited by John J. DiIulio (ISBN: 0-190506141-1) (1990), at 117.

years and produced 61 consent decrees and orders.³⁰ The first action ordered the prison to desegregate in 1974; the final injunctive order in the case was not entered until June 26, 1985.



A still image from film footage taken at Reidsville on the day of one of the riots.
Source: the Walter Brown Media Archive at the University of Georgia Library.

Death row at Reidsville was a violent and lawless place. It was dominated by a few small cliques, which were largely formed along racial lines. Officer supervision at Reidsville was so minimal that all four members of one clique – Troy Leon Gregg, Timothy McCorquodale, Johnny L. Johnson, and David Jarrell – sawed through their cell bars one day, disguised themselves as guards using clothing they had sewn, and managed to escape. They were gone for two hours before anyone even noticed that they

³⁰ The conditions described above were documented several *years* after the prison had already been ordered to improve conditions. It is difficult to imagine what they were like before the lawsuit was initiated.

had left.³¹ The clique managed to call a journalist from the *Albany Herald* and report that they had escaped. Their reason? They were protesting the inhumane living conditions at Reidsville.³²

Reidsville Search Yields 13 Saw Blades In Cells

By Brenda Mooney
Constitution Staff Writer

COLUMBUS — Georgia State Prison officials found at least 13 hacksaw blades hidden in inmates' cells during a shakedown following the daring escape last Monday of four Death Row prisoners, the Reidsville institution's new warden said Wednesday.

Warden Charles Montgomery, who came to Reidsville from the federal Bureau of Prisons about a month ago, said eight of the blades "fit nicely in the handle of a radio."

He also told the state Board of Offender

Rehabilitation that investigators had found the escapees apparently had hours of unsupervised time to sew the makeshift guard uniforms they used in the breakout. Montgomery said tighter security measures have been implemented to prevent further escapes from the maximum-security facility in south Georgia.

In addition, board members were told by their chairman, the Rev. E.C. Tillman of Brunswick, that the DOR should be restructured to free Commissioner David Evans of some of his heavy responsibilities.

See PRISON, Page 40-A

ii. "What was happening to him was violent and nonconsensual":
Reidsville (1976-1977)

Virgil Presnell, Jr., a convicted pedophile standing only 5'5" tall, moved to Reidsville in October 1976. Virgil realized quickly that things were going to be much worse for him at Reidsville than they had been in the Cobb County jail.

The Rev. Billy Moore, who was on Georgia's death row for 14 years before being released in 1991,³³ described Virgil as a "target" for "the sexual predators" of death row:

³¹ Chester Coolrick & George Rodrigue, "The death-row escapees: violent clique of racists," *The Atlanta Constitution* (July 29, 1980); Brenda Mooney & Laura Lippman, "Escape unnoticed for two hours," *The Atlanta Constitution*, July 19, 1980).

³² *Id.*

³³ Shelia Poole, "Forgiven," *The Atlanta Journal-Constitution* (March 30, 2013).

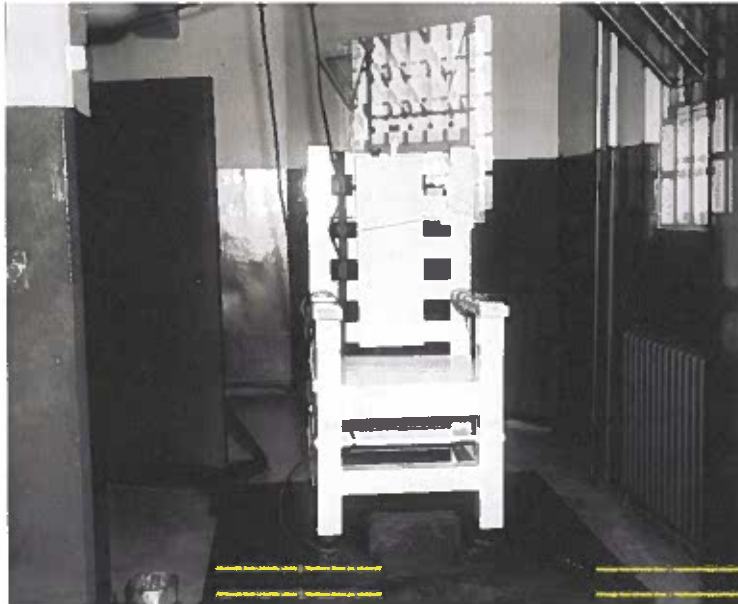
There were four sides to death row at Reidsville, and there were ten cells on each side. ...When I first arrived there, I was on the same side of the block as Presnell, which was D-Side. Security there was no good. Guards were supposed to come by and monitor the cells at least once every three hours, but this never happened, which meant that there was a lot of inmate to inmate sexual assault/rape happening, and Presnell was a victim of this kind of abuse.

There were some inmates who were consensually together or “married”, but this was not the case for Presnell. What was happening to him was violent and non-consensual, and the guards turned a blind eye to it. Their position was that it was easier for them to let it happen than it was for them to intervene. They fostered the violence. They would say that the death row inmates were there to be killed, so it didn’t matter what happened to them. That was the culture at Reidsville in those days.

I was on D-Side at Reidsville with Presnell for a little while, but then I was moved to another side. I know that during the time that we were housed on the same side, Presnell was being sexually assaulted by at least one death row inmate, and probably others. Presnell resisted these assaults initially, but over time his resistance lessened – I think he realized he was in a situation that he couldn’t get out of and there wasn’t anything he could do about it. And the prison certainly wasn’t going to help him.³⁴

The Reidsville guards also delighted in terrorizing Virgil. On the first day that he was permitted to visit with his mother, Lois, two guards removed him from his cell and brought him to the elevator. The visitation area was one floor down, but the elevator unexpectedly went up. The doors opened to reveal the electric chair.

³⁴ Letter of Billy Moore, at 1-2.



Georgia's electric chair, circa 1940s.

Source: the Tracy O'Neal Photographic Collection at the Georgia State University Library.

The guards told Mr. Presnell that this was what he had coming for him because he was a pedophile. When the elevator doors closed, they instructed him not to move or say a word, and then kicked him as hard as they could in his genitals. During visitation, Mr. Presnell's mother could tell that something was wrong, but he wouldn't tell her what had happened.

iii. Reprieve: the transition from Reidsville to Jackson (1977-1980)

In March 1977, Virgil experienced an unexpected reprieve: he and a handful of other death-sentenced prisoners were moved to the Georgia Diagnostic and Classification Prison in Jackson, Georgia (known as "Jackson"). Cell block H-1 in H-house at Jackson had been turned into the unofficial death row for the weak, and it would now house the men who were victimized or otherwise not suitable for life at Reidsville. The rest of the death row prisoners would remain at Reidsville.

At first, counselors noted that Virgil was "withdrawn, initially seeming not to be coping very well."³⁵ By May, however, he had recovered somewhat from the Reidsville

³⁵ DOC Institutional File at 223.

experience. The counselor noted that Virgil was “emotionally immature,” but “consistently pleasant and eager to talk.”³⁶ Over the course of the next several months, counselors noted that Virgil “spen[t] most of his time reading” and had “no problems.”³⁷

The living conditions at Jackson were poor. For the first three years that Virgil lived there, the prison had no medical care; Jackson would not establish a medical unit until at least 1981.³⁸ Death row prisoners were not allowed outdoors for more than three consecutive years in the late 70s and early 80s.³⁹ But Virgil didn’t mind the lack of privileges because he was free from rapes and beatings.

In the ensuing years, a convergence of factors would change Virgil’s life for the worse. More and more men were being sentenced to death in Georgia, so there was an influx of prisoners to death row in Reidsville – at a time when Reidsville was already a tinderbox. Jackson renovated the four cell blocks of G-house, which created enough space to move all death row prisoners, including the ones incarcerated at Reidsville, into G-house.⁴⁰ And the death row prison escape by the McCorquodale crew had put Reidsville and the DOC in the spotlight and under pressure to tighten up security.⁴¹

By July 1980, there were 91 death-sentenced prisoners in Georgia, and 45 of them were housed at Jackson.⁴² Despite the deprivations and severity of the living conditions at Reidsville, many of the death row prisoners believed that conditions at Jackson were *worse* than those at Reidsville, so the remaining Reidsville residents vigorously protested the move. At around the same time, some of the new Jackson residents staged

³⁶ *Id.*

³⁷ *Id.*

³⁸ Before the medical unit was established, the prison’s medical care consisted of only a box containing basic medications, such as pain tablets and cold medicine.

³⁹ When they were finally allowed yard call after spending so many years indoors, they all became so severely sunburned that they required medical attention.

⁴⁰ Death row is still in G-house today.

⁴¹ Letter of Billy Moore.

⁴² Brenda Mooney, “Hunger strike is topic of meeting,” *Atlanta Constitution* (July 24, 1980). Thirty-six of them banded together and petitioned to remain at Reidsville, but they failed.

an 11-day hunger strike beginning on July 5, 1980, demanding, among other things, to be provided with shoes and *any* outdoor access.⁴³

By late August or early September 1980, the transfer of death row to Jackson was complete: 79⁴⁴ death row prisoners were spread between G-house and H-house.⁴⁵ The death row prisoners staged three additional hunger strikes that summer and fall. In September 1980, 70 of the 79 prisoners went on strike together to demand medical care, visitation rights, religious services, access to a law library, access to attorneys, and screens on their windows to prevent insect infestations.⁴⁶

iv. 1980-1983: No Escape

In late summer 1980, Virgil's troubles picked up right where they had left off in Reidsville in 1977. The death row cliques were now living in his cell block. As Billy Moore explained:

There was no rhyme or reason to the way inmates were put into cells when we got to Jackson – they just filled up the cells. Inmates who didn't get along were housed together, and fights and stabbings happened all the time. Sexual predators were housed with inmates who were known not to resist when assaulted, inmates like Virgil Presnell. The conditions in Jackson were just as bad as they were in Reidsville. The same kinds of things continued to happen – guards turned a blind eye to the sexual assaults that were occurring. The construction of the cells in Jackson made it so where the guards couldn't see inside of the cells, and it wasn't uncommon for inmates to be jumped by other inmates and the guards wouldn't have any idea that it was happening. The first year at Jackson was crazy. Rat infestations occurred often during my time there. Like Reidsville, summers were brutally hot and winters were brutally cold.⁴⁷

⁴³ *Id.* Contemporaneous reports describe the striking prisoners as “very emaciated,” noting that they had “lost perspective” and could not walk without bumping into things.

⁴⁴ The remaining 12 death-sentenced prisoners were at the women's prison in Hardwick, Georgia or in county jails awaiting transfer to Jackson.

⁴⁵ Mr. Presnell's institutional file indicates that the full transfer of death row prisoners from H-house to G-house did not occur until sometime in 1982.

⁴⁶ *70 Inmates on hunger strike*, Associated Press (September 3, 1980).

⁴⁷ Letter of Billy Moore, at 2-3.



Jack Potts alone in his cell at Reidsville right before the move to Jackson (circa June 1980).
Source: *Atlanta Journal-Constitution* Photographic Archive at Georgia State University.

Because supervision was nonexistent, death row cliques ran the cell blocks at Jackson in the same way that they had in Reidsville. In 1980, Virgil was living in cell block H-4 when a particularly violent prisoner who led one of the prison cliques, Jack Potts, and one of Pott's associates, Billy Mitchell, moved from Reidsville to H-4 at Jackson. They soon began raping Virgil.

Virgil's prison records consistently characterize these rapes not as assaults but as "peer problems relating to homosexual behavior."⁴⁸ (In the records from this era, sexual activities involving other prisoners, including obvious incidents of rape, are almost always referred to as "homosexual acts" or something similar.)

There is a marked deterioration in Mr. Presnell's behavior assessments beginning in summer/fall 1980. Prison personnel noted that Virgil had adopted a "negative attitude [because he is] apparently influenced by association with Jack Potts."⁴⁹

⁴⁸ DOC Institutional File at 225.

⁴⁹ *Id.*

On August 29, 1980, Virgil received the first of only **three DRs**⁵⁰ in his entire prison history after an officer discovered a knife inside of a drink package in his cell.⁵¹ As usual, Virgil immediately admitted to possessing and hiding the knife.⁵²

During an investigation into the matter, Virgil explained that Potts and Mitchell had induced him to hide the knife.⁵³ Believing that doing them this favor would prevent him from being raped, Virgil complied. But it was a setup: Virgil had been trying to get moved into H-3 so he could not be raped by Potts and Mitchell any longer,⁵⁴ and Potts thought that Virgil would be forced to remain in H-4 if he got into trouble.⁵⁵ Potts told Virgil to hide the knife, and then reported him to the guards for having it. After Virgil got caught, Potts told him, **"My baby ain't going nowhere."**

In October 1980, a counselor noted that Virgil was "experiencing some behavioral problems lately[.] It's understood that he is being [*illegible*] by Inmate Potts &

⁵⁰ Counsel notes that every additional DR in Mr. Presnell's file beyond the ones mentioned in this petition belong to another prisoner, Eric Perkinson. Some of Mr. Perkinson's records migrated into Mr. Presnell's institutional file, probably because their last names were sequential among the men of death row.

⁵¹ DOC Institutional File at 262.

⁵² *Id.*

⁵³ DOC Institutional File at 266. The DR document suggests that the officers believed that this knife may have been used in the stabbing of another prisoner, Ronald Spivey. But this suspicion was unfounded. Spivey had been stabbed at the prison on August 18, 1980. The incident generated quite a bit of media coverage, and prison officials were under pressure to locate the murder weapon. See Mary Burdette, "Prison officials can't find murder weapon," *The Macon News* (August 20, 1980). According to the DOC at the time, another prisoner, Roosevelt Green, was **"the only suspect in the assault."** *Id.* Spivey had testified against Green at Green's resentencing hearing in fall 1979. Mary Burdette, "Spivey's premonition," *The Macon News* (August 19, 1980).

Spivey was a notorious snitch who was despised by prisoners and staff alike because "he had on several occasions offered information to law enforcement officers about crimes that had been discussed in prison and because he felt he had information damaging to prison officials." Mary Burdette, *Spivey's Premonition*, *The Macon News* (August 19, 1980).

⁵⁴ DOC Institutional File at 266.

⁵⁵ 1983 affidavit of Erma Lois Cole (Virgil's mother, Lois).

Mitchell.”⁵⁶ The following month, the prison noted that Virgil was “experience[ing] peer problems relating to Homo-sexual [sic] behavior.”⁵⁷

Aaron Roquemore, a staff counselor, interviewed Virgil about the sexual violence on November 25, 1980. That fall, Virgil had written to Warden Walter Zant and Assistant Superintendent of Care & Treatment Steven Phillips to request that he be moved out of H-4 for his safety.⁵⁸

Roquemore was wholly unsympathetic. During the interview, Virgil explained that he was “having problems” with Billy Mitchell and other inmates in H-4 relating to “homosexual acts.” Roquemore wrote:

When questioned as to whether he was a homosexual, Presnell replied that he was a coward and would rather submit than fight.

He states that unless he is moved he is in fear of this practice of intimidation continuing. Presnell relates that if he remains in H-1 he will voluntarily place himself on lock down for he is in fear of his safety if he comes out of his cell.⁵⁹

But Roquemore refused to move him: “When questioned where he felt he could live, he mentioned H-3.” However, since Virgil had *previously* reported that James Spencer “had raped him [], and that is where Spencer is currently assigned,” the prison apparently decided not to grant Virgil’s request to move to H-3 – or anywhere else that may have afforded him some measure of relief from frequent rapes by multiple different prisoners.⁶⁰ Roquemore concluded his report as follows:

Thus what we have here is a homosexual claiming he is not a homosexual and no matter where we assign him, he is going to create problems for us due to his under-cover activities.⁶¹

⁵⁶ DOC Institutional File at 225.

⁵⁷ *Id.* at 224.

⁵⁸ *Id.* at 266.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

At no point did any member of the prison staff investigate or even address Virgil's sexual assaults. Later that month, a counselor once again noted that Virgil's "behavior has not changed. Homosexual behavior creates peer problems for him."⁶²

Yet Virgil persisted in his requests that prison staff move him away from Jack Potts and Billy Mitchell. In April 1981, he again requested a transfer, and was denied on the ground that **he would be raped wherever he went**: "Continues to request to be moved from [H-4] but it is not recommended at this time because it is felt he will cause problems wherever you place him."⁶³

In March 1983, Virgil's mother, Lois, filed an affidavit in federal court regarding the extreme sexual abuse to which Virgil was being subjected in prison. She described a specific attack that had occurred on February 3, 1983:

[H]e was on a runaround shift and was watching TV from his cell, and two inmates rushed into his cell ([Roger] Collins and [David] Peek)[,] that Peek grabbed him around his throat and mouth, and told him not to make a noise or scream, or they would kill him. Collins grab[b]ed him around the waist, and he was put on his bunk, while he struggled with them, and that Collins snatched his pant and undershorts down to the ankles, and sexually assaulted him. When this was happening they heard an officer coming. They left his cell in a hurry and shut his door saying that if he snitches on them they would kill him.⁶⁴

Lois's sister, Sarah, graphically described the aftermath of the attack:

He was bleeding from his rectum and he wrote to a Lt. Johnston & Mr. Roquemore telling them what happen[ed] and that he needed to go to the medical section because of the bleeding. The Doctor & Nurse that checked him said there was evidence of recent damage to his rectum but they could not be sure of the cause of it. ...These inmates are using him over and over and if [they do] not stop it could cause some serious damage to his rectum.⁶⁵

⁶² *Id.* at 225.

⁶³ *Id.*

⁶⁴ 1983 Affidavit of Erma Lois Cole, at 4.

⁶⁵ 1983 Affidavit of Sarah Tweed, at 4.

Lois and Sarah repeatedly tried to discuss their concerns with prison officials, but the women were dismissed. The prison officials “said Virgil was assigned to H-1 cellblock and that he would stay there.”⁶⁶

v. The “War Daddy”

Eventually, Virgil found a solution to his problem: he obtained a “war daddy,” Carzell Moore. “War daddy” is a prison slang term for a prisoner who provides protection to another prisoner in exchange for sex. A prison counselor had noted during summer 1981 that Virgil was “viewed as being weak and easily influenced by others. Inmate currently is suspected of being under control of inmate [Carzell] Moore.”⁶⁷ This relationship apparently became one of protection in later years.

In February 1983, Virgil filed a grievance against Lieutenant Robert Hogan, who had referred to him as a “homosexual” after Virgil requested that his work or yard shift be changed to correspond with Moore’s shift.⁶⁸ Once again, the incident was investigated by Aaron Roquemore, the officer who had refused to move Virgil away from his current rapists because one of his past rapists was in a different cell block.⁶⁹

Virgil had apparently informed Hogan that he needed to be on the same shift as Moore “[b]ecause Carzell Moore has influence, and he will look after me.”⁷⁰ Hogan asked Virgil “if he was a homosexual,” and Virgil responded that he would “rather submit than fight.”⁷¹

The abuse against Virgil abated somewhat in the mid- to late 1980s, but did not end. It appears that the prison eventually began to take the assaults more seriously, however, because classification forms indicated that the prison kept Virgil separate

⁶⁶ 1983 Affidavit of Erma Lois Cole, at 2. Lois and Sarah’s affidavits reference 11 specific men who had either raped or were threatening to rape or kill Virgil. At the time, these men constituted around 15% of death row, which would have made it nearly impossible for Virgil to be free from sexual assault no matter where he was assigned, given the reported lack of officer supervision over the activities on death row. Contemporaneous records verify that at least five of these 11 men succeeded at raping Virgil.

⁶⁷ DOC Institutional File at 225.

⁶⁸ *Id.* at 270.

⁶⁹ *Id.* at 266.

⁷⁰ *Id.* at 271.

⁷¹ *Id.*

from Roger Collins and Jack Potts well into the 2000s.⁷² Prison records also document that he was attacked and beaten by Ward Brockman in December 1994,⁷³ and again by Brian Brookins in 2014.

Virgil never fought back. As his grandmother, Eula, put it in a statement she wrote in protest against Virgil's repeated rapes: "he does not fight and never has stood up for his self[.] he afraid to fight and I know for a fact that he want to keep everything peaceful and have no trouble there."⁷⁴

b. Virgil's disciplinary history: "Maintains a quiet attitude"⁷⁵

In 1980, Virgil received his **first DR** (described above) when Jack Potts set him up to prevent Virgil from moving to a cell block where Potts could not rape him easily. In 1982, Virgil received his **second DR**. His mother had given him a tube of glue during visitation in 1981, and he brought it with him back to his cell. When officers conducted a shakedown in his cell block on December 15, 1982, they discovered the glue and two extra sheets that Virgil had neglected to return when the prisoners had all turned in their extra sheets. Virgil immediately admitted guilt. He lost privileges for 30 days.

In 1990, Virgil received his **third and final DR** for tearing "approximately 60% of the front cover" of a library book. This time, Virgil denied guilt. For the offense of a torn paperback book cover, he lost all privileges (mail, store, visitation, recreation, library, and phone) for about a month, and his prison account was frozen until he could afford to repay the cost of the book, which was \$4.95.

That is the extent of Mr. Presnell's 46-year disciplinary history. He has not received a single DR in the past 32 years.

Counsel does not need to tell the Board that it is a remarkable feat to have only two true DRs in 46 years of incarceration – and for those DRs to be as insignificant as allegedly tearing the cover of a library book and possessing a tube of glue. Virgil's nearly spotless disciplinary history speaks not only to his cooperativeness and geniality, but also to the extent to which he has been victimized and unable (and unwilling) to fight back for so many years. As Billy Moore explained:

⁷² *Id.* at 161. Potts was stricken with cancer in 2004 and died at the Augusta State Medical Prison in 2005.

⁷³ *Id.* at 247.

⁷⁴ 1983 Affidavit of Eula Edwards, at 2.

⁷⁵ DOC Institutional File at 230.

I got along well with Presnell. I considered him a friend when I was in prison with him and I still do. He served his time quietly and never caused any trouble. I don't recall him ever raising his voice. He did his best to get along with everyone, but he was on the passive side, and this made him a target.⁷⁶

There are 46 years of institutional records describing him in terms like "maintains a quiet attitude" and "seems to keep a low profile."

That is Virgil Presnell. For nearly five decades, he has been known as a quiet, peaceful, cooperative person who keeps to himself. He is a model prisoner who sets an example to those around him and demonstrates how to do "good time." Virgil's disciplinary history supports a commutation to a sentence of life without parole.

4. **"I don't think Virgil Jr. had a chance growing up with the parents he had" (1953-1976)**
 - a. **"I was drinking during the entire time I was pregnant with Virgil" (1951-1954)**

In order to understand how Virgil became a prisoner's "baby" in need of a "war daddy," it is necessary to go all the way back to the beginning.

Virgil is an artifact of an Atlanta that most current residents don't know existed. He grew up among Lois's large family in housing projects located in the areas that are now downtown Atlanta and the Westside.

Virgil's parents, Lois Edwards and Delano Presnell, met in a retro "cute meet" when Lois's friend asked her if she wanted to talk to a military man on the phone. She did, and before long, they were an item. Six months later, in March 1953, they married.

Soon, Lois learned two important things: (1) she was pregnant, and (2) her new husband was a drunk and a cheater. Lois realized that she should have listened to Delano's stepmother: "she told me not to marry him but I went ahead and married him."⁷⁷

Lois, accustomed to being surrounded by her large family, was now stuck at home alone, pregnant, and waiting for her husband to come home at night. She knew he was out getting drunk with his friends and meeting other women, so she started

⁷⁶ Letter of Billy Moore, at 1.

⁷⁷ Affidavit of Lois Samples, at 2.

drinking, too. Nancy Smith, who spent a great deal of time with Lois after Virgil's 1999 trial, recalled discussing Lois's drinking habits with her:

[W]ithout realizing its significance, Lois told me how heavily she drank while pregnant with Virgil – sometimes in the company of Virgil's alcoholic father, Delano, and sometimes alone at home, waiting for him to return from a night of carousing. She described drinking almost two pints of whiskey while waiting for Delano one night, screaming and throwing a bottle into the road when he finally came home.

I do not think Lois realized how badly her drinking damaged her son. When she learned that she had given him fetal alcohol syndrome, I know she was devastated. I know she felt responsible and guilty for Virgil [and] all of its effects on his development and behavior.⁷⁸

When Lois was about six months pregnant, Delano deployed to Japan.⁷⁹ Lois's family decided to move into Lois and Delano's side of the small duplex that they lived in on Norcross Street.

Virgil was born on December 29, 1953, while Delano was still stationed in Japan.



Eula Edwards, Lois's mother, with baby Virgil, circa summer 1954

⁷⁸ Letter of Nancy Smith, at 2.

⁷⁹ Affidavit of Lois Samples, at 2.



Virgil with his mother, Lois, circa 1957

Virgil's family bounced between the Techwood Clark Howell Homes, which were in the area that is now occupied by the World of Coca-Cola⁸⁰; an industrial neighborhood called Belwood (or Bellwood), which is the modern-day Westside⁸¹; and the Bankhead area. When the family couldn't pay rent, which occurred rather often, they solved the problem by moving to a new apartment.

⁸⁰ All of the housing projects in this area were demolished in preparation for the 1996 Summer Olympic Games.

⁸¹ Belwood was the site of the Exposition Cotton Mills (demolished in 1952), Allied Factory, Standard Oil Company (now the Atlanta Contemporary Arts Center), and Atlanta Buggy Company (now the Carriage Works mixed-use complex).



The Techwood Clark Howell Homes housing project
Source: Atlanta History Center



Virgil and his cousins and friends in front of their Techwood Homes apartments, circa 1958-1959. (In the photo at right, Virgil is the small child in the center.)

Virgil had very little stability in his life. Lois loved him, but she struggled with parenting and with trying to make ends meet. She offloaded Virgil onto her mother or sisters, sometimes for months at a time. Lois and Delano were off and on (mostly off), and the times that Virgil and Lois lived with Delano were brutal.

Delano's violence is perfectly captured by Virgil's younger half-sister, Wanda Graves, in her letter to the Board. Wanda's mother, Nancy, married Delano during one of Lois and Delano's "off" periods while Virgil was a toddler.

Delano was horrible when he drank beer, but [he was] hell, when he got some hard liquor in him. Growing up, I have witnessed him going into a drunken rage, beating my mother, punching holes in walls, and destroying the house. He didn't care that my mother was dying of cancer; he destroyed everything in his path.⁸²

Sexual abuse was endemic in both the Presnell and Edwards families. Virgil's paternal grandparents, Lawrence "Curly" Presnell and Iva Mae Hughes, had four children: Clarence Ray, Lonnie, Wanda Louise, and Delano (Virgil's father). After Iva Mae abandoned Curly and the children, Curly began raping [REDACTED] Virgil's father, Delano, had at least four children: Virgil, Wanda, William James (Jimmy), and Lawrence (Larry). Delano began molesting [REDACTED] when [REDACTED] was in 4th grade, and the abuse continued for three years.⁸⁴ [REDACTED] suspects that Delano may also have been molesting [REDACTED].⁸⁵ Jimmy later went to prison for child molestation.⁸⁶

The Edwards side was just as bad. Cleo and Eula Edwards had seven children: Lois, Mildred, Peggy, Brenda, Sarah, Lillian, and James. James molested at least two of his sisters, [REDACTED] and Lillian. The abuse began when Lillian was 10 or 11, and continued into her teenage years.⁸⁷ According to Lillian, "My mother never protected [REDACTED] or me from James. James even tried to mess with Lois. My Daddy had to have known what James was doing to us, but he turned a blind eye. ...What my mother knew about family secrets she kept to herself."⁸⁸ James was later incarcerated for incest,

⁸² Letter of Wanda Graves.

⁸³ Affidavit of Nancy Smith, at 29.

⁸⁴ Affidavit of [REDACTED] at 1.

⁸⁵ *Id.*

⁸⁶ Affidavit of Lillian Shepard, at 9.

⁸⁷ *Id.*

⁸⁸ *Id.*

including forcing his son to have sex with his mother.⁸⁹ Cleo molested one of his [REDACTED], starting when she was 5 or 6 years old.⁹⁰ He also molested his [REDACTED]



The Edwards family, circa 1957.
Back row, left to right: Eula, Cleo, and Lois
Front row, left to right: Sarah, Lillian, Brenda, and Virgil

In spite of his abusive and unstable environment, Virgil was universally described as a trusting, guileless, and sweet little boy. Virgil grew up near Dorothy Atkinson, whose daughter, Deborah, later became Virgil's wife. Dorothy remembers Virgil as "such a loving child. He was just as good as he could be. He was always respectful to me saying 'thank you momma.'"⁹¹ His aunt Lillian lovingly referred to him as "a little scamp."⁹²

⁸⁹ Affidavit of Nancy Smith, at 29.

⁹⁰ Affidavit of Lillian Shepard, at 9.

⁹¹ Affidavit of Dorothy Atkinson, at 1. Dorothy is still alive today, and although Virgil is 68 years old, he continues to refer to her as "momma Dorothy."

⁹² Affidavit of Lillian Shepard, at 9.

Even though Lois wasn't around and his dad was a violent alcoholic, Lois's family was large, and he had cousins and aunts to keep him company. His family knew he was "slow," but, to use the parlance of today, some of them were willing to meet him where he was. His younger half-sister, Wanda, recalls:

I always had a special place in my heart for Virgil because he wasn't like the other kids his age. He was very slow for his age and he had a hard time speaking his mind. It also seemed like Virgil had a hard time listening and understanding what people were saying to him. I was quite a bit younger than he was but I think mentally he was more on my level and I think that is why we got along so well. Marie [their cousin] and I were always the ones who made the decisions about what we were going to do when we played and Virgil would follow along with us. Virgil would follow us because he wanted every one else to be happy.⁹³

Virgil's cousin, Belinda, echoes Wanda's thoughts:

Virgil was always a gentle, kind person. He always acted like a kid. He seemed to have a child's mind, very simple. He hung out with the younger kids more often and got along with them better because he was on their level of intelligence and functioning.⁹⁴

While Wanda, Belinda, and some of their cousins were patient with Virgil, many others were not. "[P]eople made fun of him," Lillian recalled, and their uncle, Donny Tweed, "hated him. ...Donny would [] tell Virgil things like 'go play outside on the yellow line' or 'go play in the traffic.' Donny also called Virgil 'stupid' and a 'retard.' Virgil was about 5 or 6 when this was going on."⁹⁵ And whenever Delano was around, he berated Virgil, calling him "a stupid retard" and a "sissy."⁹⁶ "Delano put Virgil down left and right."⁹⁷

Lois recalled Delano's cruelty toward Virgil when they were living together in the mid-1960s:

Virgil had trouble with his schoolwork and Delano would yell at him and tell him that he was stupid. If Delano tried to explain the schoolwork to him, Virgil

⁹³ Affidavit of Wanda Graves, at 2.

⁹⁴ Affidavit of Belinda Saunier, at 1.

⁹⁵ Affidavit of Lillian Shepard, at 10.

⁹⁶ *Id.*

⁹⁷ *Id.*

would get real confused and Delano would get even angrier. Delano was always calling Virgil “stupid, retard, or an idiot.” Virgil also loved to draw when he was growing up and Delano would tear up Virgil’s drawings in front of him.⁹⁸



Virgil (center), circa 1961-1962

b. “We do not keep fifteen year olds in the elementary school” (1958-1969)

Virgil’s intellectual limitations started creating problems for him as soon as he entered kindergarten in 1958. He failed kindergarten, and then he failed first grade, too. When his school began assigning letter grades in second grade, his report card was filled with Ds and Fs, especially in language and arithmetic.

⁹⁸ Affidavit of Lois Samples.

PRESNELL, VIRGIL DELANO		DELANO, VIRGIL		MAY, VIRGIL		MAY, VIRGIL		MAY, VIRGIL		MAY, VIRGIL	
DATE OF BIRTH		PLACE OF BIRTH		CIVILIAN DEFENSE NUMBER		MAY, VIRGIL		MAY, VIRGIL		MAY, VIRGIL	
Dec 27, 1953		Atlanta, Georgia		Hoop Court, N. W. 11th St.		755-2447		755-2447		755-2447	
RESIDENT		NON-RESIDENT		DATE		CHILD'S ADDRESS		DATE		CHANGES OF ADDRESS	
✓				1-1-58		411 Lusk St. NW #21		1-1-60		2133 Peachtree	
				6-2-59		300 Lusk St. NW		9-3-63		523 Langhorn St. NW	
				9-27-60		27 Johnson Rd					
				1962-63		14 Johnson Rd					
NAME		MOTHER'S MAIDEN NAME		GUARDIAN		STEP PARENTS		NAME		DATE	
Virgil D. Presnell		Lois Edwards		Mrs. Lois Edwards							
ADDRESS OF CHILD		ADDRESS OF MOTHER		ADDRESS OF GUARDIAN		ADDRESS OF STEP PARENTS		NAME		DATE	
Morganton, N. C.		Morganton, N. C.		Morganton, N. C.		Morganton, N. C.					
OCCUPATION		OCCUPATION		OCCUPATION		OCCUPATION		NAME		DATE	
		Mead-Atlanta Paper Co.									
IF DECEASED, DATE		REASON		IF STUDENT LIVES WITH OTHER THAN PARENTS, EXPLAIN							
✓		✓		Mrs. Lois Edwards - Morganton, N. C.							
GRADE RECORD											
NAME	Virgil D. Presnell	Virgil D. Presnell	Virgil D. Presnell	Virgil D. Presnell	Virgil D. Presnell	Virgil D. Presnell	Virgil D. Presnell	Virgil D. Presnell	Virgil D. Presnell	Virgil D. Presnell	Virgil D. Presnell
YEAR	1958-59	1958-59	1959-60	1960-61	1960-61	1961-62	1962-63	1963-64	1964-65	1965-66	1966-67
GRADE	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
TEACHER	Edwards	Edwards	Edwards	Edwards	Edwards	Edwards	Edwards	Edwards	Edwards	Edwards	Edwards
ENTERED	9-2-58	11-10-58	8-31-59	Feb 4-60	3-29-60	4-1-60	8-11-60	8-29-62	9-3-63		
WITHDRAWN	11-10-58	6-2-59	1-29-60	8-25-60							
RE-ENTERED											
PROMOTED TO		2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
ATTENDANCE RECORD											
QUARTER	1	2	3	4	1	2	3	4	1	2	3
DAYS PRESENT	37	37	37	37	37	37	37	37	37	37	37
LAWFUL AB.	5	5	5	5	5	5	5	5	5	5	5
UNLAWFUL AB.											
TIMES LATE											
SCHOLASTIC RECORD											
READING											
LANGUAGE											
SPELLING											
WRITING											
ARTISTIC											
SOCIAL STUDIES											
SCIENCE											

School records of Virgil Delano Presnell, Jr., at 3

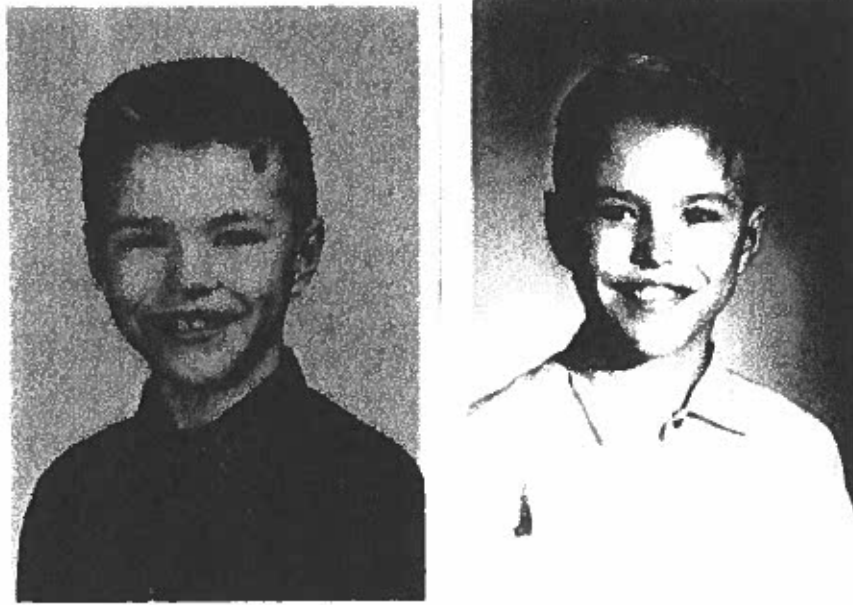
This pattern persisted into third grade. In fourth grade, his family was referred to the Child Guidance Clinic⁹⁹ for support, but Lois was apparently too afraid to go in.¹⁰⁰ One of Virgil's trial attorneys, Mitch Durham, clearly remembers:

A portion of his elementary school records contained a project asking the students to name three career goals. While it is likely that his classmates included

⁹⁹ The Child Guidance Clinic was a division of the Fulton County Department of Health. It was either today's equivalent of the Department of Family and Children's Services or a provider of mental health and therapeutic services - most likely the former.

¹⁰⁰ Virgil Presnell school records, at 42.

careers such as teacher, fireman, astronaut, athlete, or other, Virgil's list was comprised of delivering newspapers and collecting trash. The third option was left blank.¹⁰¹



Virgil's fourth-grade and fifth-grade photographs, circa 1955-56

The only subjects that Mr. Presnell could perform well in and enjoy were the creative arts. In his school report from the 5th grade, his only "S" (satisfactory) scores were in art and music.

That year, his teacher, Rebecca May, referred him to the Atlanta Public Schools Department of Psychological Services "for the purpose of finding some reasons for unusual behavior and lack of achievement."¹⁰² Virgil's teachers were concerned not just about his dismal academic performance, but also about his behavior. It was clear that something was wrong at home.

The counselor who interviewed Virgil for this evaluation, J.R. Kemp, noted that Virgil "displays much worldly wisdom for his age." Mr. Kemp elaborated, "He is not seemingly proud of his knowledge of the sex behavior of adults but gives the

¹⁰¹ Letter of Mitch Durham, at 1.

¹⁰² Virgil Presnell school records, at 17.

impression that it is just a part of his confused world.”¹⁰³ Mr. Kemp recommended that a social worker get involved with the family.¹⁰⁴ That never happened.

He failed fifth grade.

The following year, Virgil was moved directly from sixth grade to high school – not because he was academically capable, but because he was simply too old for his grade level. Principal Judith Lowry wrote in a letter to Virgil’s father:

Dear Mr. Presnell:

Since your son, Virgil, will be fifteen years old next December, we are sending him on to high school. We do not keep fifteen yearolds in the elementary school because they have difficulty in adjusting to younger children.

In other words, the school system moved him up even though he was functioning at the level of a child a few years *below* his grade level already.¹⁰⁵

Virgil’s naivete and limitations are on full display in the questionnaire that O’Keefe High School had him fill out before starting 8th grade that year:

5. List the places other than Atlanta where you have lived:

City	State	My age was
Panthers	Michigan	12-13-14

6. List places you have visited but not mentioned above:

Boston Massachusetts, Tennessee, Kentucky

7. What are some of the jobs you do around the house?

not right now

Are they regular? Occasional? Do you like them?

8. Are you given an allowance? yes For what purpose? cleaning house

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 18.

¹⁰⁵ During his 1976 trial, Virgil would remember that he skipped this grade, but not that he was repeatedly held back in school. TT Vol. 2 at 196.

7. Does your family have a television set? Yes I do
8. How much time per day do you watch television? none right now What programs do you watch regularly? lost in space, invaders, merugrifen, giligan islan, afta see the wizzard,

Virgil Presnell school records, at 31

Leaving aside the significant spelling issues, it is clear that he does not fully understand even the simple questions on the form. In response to the question, "What are some of the jobs you do around the house?," Virgil responds "not right now." In the next question, though, he reveals that he receives an allowance for "cleaning house."

The same thing occurred in another section of the questionnaire. When asked if he spends any time watching television, he answers "none," and then responds with multiple TV shows that he watches regularly - all riddled with spelling errors ("giligan islan").

Despite his limitations, though, nobody can say that Virgil did not *try*. The contrast between his *conduct* scores and his *academic* scores makes it very clear that the effort was there; the aptitude simply wasn't. Two of Virgil's eighth-grade report cards are reproduced below:

HIGH SCHOOL REPORT CARD

STUDENT'S NAME Virgil D. Presnell QUARTER 19 1968

GRADE AND SECTION B-225 High School D'Keefe

HOMEROOM TEACHER G. Craig Principal F.B. Jernigan

SUBJECTS	COURSE NO.	QTR. GRADE	STAND. CREDIT	CONDUCT	TEACHER'S SIGNATURE	SUBJECTS	COURSE NO.	QTR. GRADE	STAND. CREDIT	CONDUCT	TEACHER'S SIGNATURE
ENGLISH	RI 101	C	5	A		ART					
MATH	LM 201	F	0	A		MUSIC					
SCIENCE						PHY. ED.	101	D	5	A	
SOCIAL SCIENCE	GH 102	F	0	A		MILITARY					
FOREIGN LANGUAGE						CSL 111		D	5	A	
HOME ECON.											
IND. TECH.	DC 241	F	0	A		CONDUCT: Homeroom <u>A</u> Conduct Average <u>A</u>					
U.S. ED.						Absences <u>12</u> Tardies <u>2</u>					
OC. ED.						City Wide Spelling Test _____					
						Parent's Signature: _____					

Virgil Presnell school records, at 28

ATLANTA, GEORGIA
HIGH SCHOOL REPORT CARD

STUDENT'S NAME Presnell, Virgil QUARTER 3 1968 1969

GRADE AND SECTION B-225 High School D'Keefe

HOMEROOM TEACHER G. Craig Principal F.B. Jernigan

SUBJECTS	COURSE NO.	QTR. GRADE	STAND. CREDIT	CONDUCT	TEACHER'S SIGNATURE	SUBJECTS	COURSE NO.	QTR. GRADE	STAND. CREDIT	CONDUCT	TEACHER'S SIGNATURE
ENGLISH	RI 103	F	0	A		ART	Art 101	F	0	A	
MATH	LM 103	F	0	A		MUSIC					
SCIENCE						PHY. ED.	H 101	F	0	A	
SOCIAL SCIENCE	GH 103	F	0	A		MILITARY					
FOREIGN LANGUAGE											
HOME ECON.											
IND. TECH.	VC 104	F	0	A		CONDUCT: Homeroom <u>A</u> Conduct Average <u>A</u>					
U.S. ED.						Absences <u>25</u> Tardies <u>6</u>					
OC. ED.						City Wide Spelling Test <u>Absent</u>					
						Parent's Signature: _____					

Virgil Presnell school records, at 29.

After this point, it appears that Virgil finally gave up on school. He began skipping class and getting suspended. In February 1969, the school social worker, Judy Russell, referred him to the Child Guidance Clinic for yet another evaluation.

Psychologist Dorothy Swindell evaluated him in February 1969. She issued the following findings and recommendations:

- Virgil is at "the mentally defective level of intelligence and performing several years below grade level academically. He seems to be under excessive pressure to achieve beyond his ability, and may be derogated when he does not fulfill his parents' expectations."
- "He seemed to be at ease with the examiner except when called upon to perform tasks which he found difficult. At those times he would giggle self-consciously and become apologetic, e.g., 'I can't read out loud too well.'"
- "He [] seems to be under pressure from his parents to achieve academically and may be derogated and ridiculed when he does not perform to their satisfaction."¹⁰⁶

Dr. George Preston, M.D., the director of psychiatric services at the Child Guidance Clinic, evaluated Virgil in March or April 1969. He noted that Virgil's "own statement about himself was, 'My parents feel I am stupid.'" He sent a letter to Judy Russell, the school social worker who had initially referred Virgil for an evaluation:

¹⁰⁶ Virgil Presnell school records, at 48-51.

CONFIDENTIAL

April 10, 1969

Mrs. Judy Russell - Social Worker
O'Keefe High School
151 Sixth Street, N. W.
Atlanta, Georgia. 30313

Re: Virgil Presnell

Dear Mrs. Russell:

I am making a very strong recommendation for the placement of this boy in an educationally oriented class for mentally retarded. I am making this recommendation on the following basis. This boy's school record, going back to kindergarten, shows a continuous series of failures, which finished up by his being placed in the sixth grade, and then skipped the seventh grade entirely into the eighth grade in high school. At the age of twelve, he was given a psychological test

Virgil Presnell school records, at 42.

Dr. Preston also noted that Virgil was operating at the level of a third-grader to fifth-grader. He was 15 years old.

Virgil's academic situation never improved. By that point, it was simply too late. One of the final pages in his school record file contains the results and summary of a test battery performed by Jenny Kimbnel. Ms. Kimbnel was likely associated with the Child Guidance Clinic. She issued this poignant report:

Emotional problems can be blocks to learning. This seems to be the case, in part, with Virgil. His classmates consider him different. Then, his parents possibly tell him he is "no good", "not like other boys", or "not smart in school", or similar comments. Perhaps he is trying to live up to the expectations of others as a failure. This is all only a guess at the problem, but nevertheless, Virgil needs confident attitudes which his behavior, at the time of this testing, did not display.

Relating to placement, Virgil needs a place that can give him rewarding and positive experiences on a personal basis. He needs a true friend--one who understands him, accepts him for what he is, and is genuinely interested in him. This person should have the time to listen and relate to this child. They accent his strengths and help him with his weaknesses. Most of all he needs a situation he can learn that he is a worthy individual.

Virgil Presnell school records, at 61, 64.

Virgil dropped out of school entirely after that, having only made it to eighth grade.

In the ensuing years, Virgil hopped from job to job, unable to maintain employment for longer than a few weeks. He worked at a Burger King, flipping burgers and frying fries, but lasted only a week because he couldn't understand simple math well enough to work the cash register. He worked at Sealtest for a while, but had trouble maneuvering the trucks.¹⁰⁷ In all, he held at least eight or nine jobs over a period of five to six years.

He also began to get into trouble with the law, including stealing cars and molesting a teenage girl. And on May 4, 1976, he was arrested for his role in the crimes that lie at the heart of this case.

5. **"A pathetic Peter Pan": Mr. Presnell has the mental capacity of an 8-year-old child.**

*Persons with FASD, as a group, challenge the underlying premise that defendants understand the relationship between actions, outcomes, intentions, and punishment.*¹⁰⁸

Before society makes a man pay the ultimate price for a crime, it must determine if his culpability justifies the cost. In Virgil's case, it simply does not. Virgil Presnell is profoundly disabled. Even if his disability cannot be captured with sufficient numeric specificity to meet the standard for an *Atkins* claim that his intellectual disability

¹⁰⁷ Affidavit of Lillian Shepard, at 12.

¹⁰⁸ T.E. Moore & M. Green, "Fetal Alcohol Spectrum Disorder: A need for a closer examination by the criminal justice system," *Criminal Reports* 19.

prevents his execution,¹⁰⁹ that does not make him any less disabled or any more culpable.

Virgil's significant cognitive limitations have been on display since the moment of his arrest. Virgil was suggestible: after he was arrested, he confessed to **every** open crime against children in all of Cobb County,¹¹⁰ as well as a significant amount of other serious criminal conduct that was apparently not substantiated. And Virgil was confused: he had not understood that Andrea would be irreparably harmed by what he did.

As his 1976 trial counsel, Adele Grubbs, explained, "Virgil was always clear that he did not mean to harm either girl. The effect on them of being kidnapped was beyond his understanding. He thought they would have an enjoyable time."¹¹¹ That is why, when it became clear that he *was* harming Andrea during the assault, he stopped right away.

Virgil let Andrea go. He did no further injury to her and did not try to cover up his crimes. Clearly Andrea was emotionally harmed but Virgil did not understand that.¹¹²

"As twisted as it seems to the average person,"¹¹³ Virgil truly did not appreciate the harm he would cause.

That is the position he has maintained for 46 years. It was what he told this Board in his clemency interview on May 9, 2022. He did not know that there was something wrong with him, and he thought that if "they were willing," then "it was alright." What is truly striking is that during Virgil's clemency interview, he used almost exactly the same language that he used *46 years ago* to describe his mental state. As he said in August 1976, he had been reading erotic literature in which older men seduced girls, and "I felt that if **a girl was willing** to do such things [in the books] **it was alright**."¹¹⁴

¹⁰⁹ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹¹⁰ Letter of Adele Grubbs, at 1.

¹¹¹ *Id.* at 2.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Rick Beene, "Led to death row," *The Marietta Daily Journal* (September 19, 1976).

Virgil's thought process seemed just as unbelievable in 1976 as it does today. But unbelievable does not mean untruthful. If it seems so unbelievable, then we must ask ourselves why anyone *would* believe it. And the answer is simple: Virgil is profoundly brain damaged.

Labeling him a "pedophile" was not and is not sufficient to explain why this crime occurred.¹¹⁵ Instead, it is necessary to understand *why* he ended up that way, and why his additional impairments caused him to act on his urges in the manner that he did. Over the years, various explanations have been proposed, most of them focused on his upbringing in an environment rife with sexual abuse. While all or some of those explanations certainly *contributed*, they were not the primary cause.

Prenatal brain damage was the cause. Advances in research and clinical practice have made this abundantly clear over the past 20-25 years. This was the missing piece that has been hiding in plain sight for so many years, and it is what [REDACTED] would have explained to the Board if [REDACTED] had had the opportunity to fully evaluate Virgil and testify before the Board.

a. Fetal alcohol spectrum disorders overview

Even the reporters who interviewed Virgil in the aftermath of his 1976 trial seemed unable to reconcile the childish person in front of them with the gravity of his offense. Journalist Mary Callen called him "a pathetic Peter Pan, living in a fantasy world with his Wendy,"¹¹⁶ even though "the law says he is a monster."¹¹⁷ Her colleague, Rick Beene, agreed, noting that Virgil had "**basic misconceptions of reality.**"¹¹⁸

¹¹⁵ The descriptions of pedophilia at the 1976 trial indicate just how far we have come in our understanding of the human brain in the past five decades. The trial psychiatrist, Dr. Harry Porter, told the jury that pedophilia was so rare (and, by implication, so terrifying and deviant) that most psychiatrists would only encounter a pedophile "once or twice" in their *entire careers*. TT 655. Apparently Dr. Porter had not met anybody else in Virgil's family, or he would have quickly exceeded his lifetime quota.

¹¹⁶ "Wendy" refers to Virgil's ex-wife, Deborah Gilliland, who was the mother of his son. She is deceased.

¹¹⁷ Mary Callen, "Peter Pan past..." *The Marietta Daily Journal* (September 19, 1976).

¹¹⁸ Rick Beene, "Led to death row," *The Marietta Daily Journal* (September 19, 1976).

His “basic misconceptions of reality” had a name: Fetal Alcohol Spectrum Disorder (FASD).¹¹⁹ But it would be a long time before this diagnosis made it into the mainstream, longer before clinicians understood its connection to sex offenses, and longer still before anyone thought to apply the term to Virgil Presnell.

Fetal Alcohol Spectrum Disorder is the umbrella term for several diagnoses that comprise the spectrum of birth defects and brain damage produced by prenatal alcohol exposure.¹²⁰ The central, defining symptom of FASD is central nervous system (CNS) dysfunction. Neurodevelopmental disorder associated with prenatal alcohol exposure (ND-PAE) is the DSM-5-TR diagnosis – the technical term – for CNS dysfunction.

A diagnosis of FASD should be made by a multidisciplinary team of clinicians: (1) a medical doctor – to evaluate the individual’s physical manifestations of FASD, including specific facial features and/or growth impairments; (2) a neuropsychologist – to conduct neuropsychological testing that establishes the presence of specific cognitive impairments that are associated with FASD; and (3) a psychologist, who, among other things, conducts adaptive behavior assessments with multiple reporters to determine whether the individual has the functional (daily living) impairments that are associated with FASD.¹²¹

ND-PAE, the central symptom of FASD, produces a constellation of cognitive deficits, including deficits in executive functioning. A person’s executive functions are the “air traffic control system in the brain that synthesizes, organizes, and directs thoughts, emotional responses, and regulates behavior.” It is higher-level executive functioning, not IQ, that most determines how information is processed by the brain and ultimately manifests as *adaptive behavior*.

¹¹⁹ Virgil consistently refers to his disability in simple, basic terms like “there’s something wrong with me” or “there’s something wrong with my head.” He used this language at the time of trial, and as the Board saw in his clemency interview, he still uses it today. This type of static, arrested communication development is consistent with brain damage.

¹²⁰ Affidavit of [REDACTED], at 14.

¹²¹ See, e.g., Natalie Novick Brown, et al, *A proposed model standard for forensic assessment of fetal alcohol spectrum disorders*, Journal of Psychiatry & Law 38 (Winter 2010), at 388.

Adaptive behavior is, more or less, typical everyday behavior. It includes “conceptual/communication skills (including academic learning), daily living or practical skills, socialization, and motor skills.” “[E]xecutive skills are necessary for competent performance of daily life activities, socially appropriate behavior, and successful academic functioning.”

Impaired executive functioning predicts poor adaptive functioning. A person whose executive skills have been damaged – through, for instance, a traumatic brain injury or prenatal alcohol exposure – will experience more difficulty with the tasks of daily life, from large to small. In essence, ND-PAE is the adaptive functioning equivalent of intellectual disability.¹²²

Over the developmental years, children with FASD exhibit a pattern of gradually diminishing adaptive capacity in comparison to their peers. Thus, adults with FASD not only have the brain damage they were born with, their executive functioning remains very inefficient well past the point of typical brain maturity in the mid to late 20s. As a result, **adults with FASD tend to function like young children** or persons with intellectual disability.

A difficulty arises in the context of a legal case such as this one because adaptive functioning is not easily quantifiable, in stark comparison to IQ, which is quite literally a number (“quotient”). But ND-PAE can be just as, or more, impairing.

b. Secondary disabilities associated with FASD

There are eight secondary disabilities (negative developmental outcomes) associated with FASD: mental health problems, disrupted school experience, inappropriate sexual behavior, trouble with the law, confinement, alcohol and drug abuse, dependent living, and problems maintaining employment.

An individual’s risk of experiencing the secondary disabilities associated with FASD depends on the presence or absence of protective and risk factors. If a child with FASD experiences chronic adversity – that is, risk factors – without adequate protections, the risk for experiencing secondary disabilities dramatically increases.

¹²² Greenspan, S., Novick Brown, N., & Edwards, W. (2016). FASD and the concept of “intellectual disability equivalence.” In M. Nelson & M. Trussler (Eds.), *Law and ethics in fetal alcohol spectrum disorder*. Amsterdam: Springer.

The three protective factors are (1) FASD diagnosis in early childhood; (2) developmental disabilities services throughout the school years; and (3) stable, structured, and protective caregiving. The three risk factors are childhood exposure to (1) physical abuse, (2) sexual abuse, or (3) domestic violence.

c. The basis for an ND-PAE diagnosis

According to [REDACTED] three cognitive characteristics together rule *in* ND-PAE and rule *out* all other diagnostic possibilities:

- “patchy” (i.e., variable) results in comprehensive neuropsychological testing that display a mix of relative strengths and weaknesses, often with significant discrepancies within a single test or between scores on similar tests;
- context-dependent functioning; and
- adaptive functioning (but not IQ) in the intellectual disability range.

These patterns are clearly displayed in Virgil’s neuropsychological testing results. Dr. Paul Connor conducted a battery of neuropsychological testing on Virgil on April 6, 2022. His results underlay [REDACTED] ND-PAE diagnosis, and are included as attachments to [REDACTED] report.¹²³

d. Preliminary diagnosis of ND-PAE

[REDACTED] has issued a *preliminary* diagnosis of ND-PAE in Mr. Presnell’s case for the purposes of this petition. **But because [REDACTED] has not been able to meet with him in person, [REDACTED] can neither render the conclusive diagnosis nor explain *how* his impairments resulted in the crime.**

According to the CDC’s diagnostic guidelines, which are used to diagnose FASD, central nervous system damage is established by demonstrating impairments in three or more domains. Virgil has “8 domains of impairment in [] cognitive/adaptive

¹²³ The tests also served to screen Mr. Presnell for dementia and other conditions that may affect his competency to be executed, as those too were relevant issues in preparing for the Board’s clemency proceedings.

functioning,"¹²⁴ which is nearly three times the number (three) required for the diagnosis. It "well exceed[s] CDC as well as ND-PAE criteria, as shown below."¹²⁵

DSM-5 Criteria for ND-PAE

Criteria	Virgil Presnell
Prenatal alcohol exposure	Confirmed in a 2004 affidavit from birth mother Lois Samples
Neurocognitive impairments (at least 1)	Cognitive impairments in: <ul style="list-style-type: none"> • Intellectual Functioning (significant discrepancies) • Academics • Visuospatial Construction • Processing Speed • Executive Functioning
Self-Regulation impairments (at least 1)	Cognitive impairment in: <ul style="list-style-type: none"> • Attention
Adaptive impairments (at least 2)	Adaptive impairments in: <ul style="list-style-type: none"> • Communication • Daily Living Skills • Socialization • Motor Coordination (direct testing)
Childhood onset	Well-documented evidence of impairments in childhood (e.g., school records)
Disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.	Multiple secondary disabilities
The disorder is not better explained by the direct	Although genetic influences are possible given the family history of learning disability,

¹²⁴ Affidavit of [REDACTED] at 12.

¹²⁵ *Id.*

<p>physiological effects of postnatal use of a substance, a general medical condition other than FASD, a genetic condition, or environmental neglect.</p>	<p>pattern analysis in this preliminary evaluation rules out all known genetic conditions except FASD.</p> <p>Given the number of adversities Mr. Presnell was exposed to in childhood, there is some likelihood environmental influences had an additive and cumulative effect on the brain damage shown in his neuropsychological testing and neuroimaging. However, environmental influences do not explain the results of pattern analysis in this case.</p> <p>While Mr. Presnell may have experienced traumatic brain injury during the incidents depicted in affidavits (e.g., falling off a changing table at six weeks of age), such incidents are not known to cause the profiles seen in his pattern analysis.</p>
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In conclusion, [REDACTED] writes, [REDACTED] preliminary assessment finds that *only* ND-PAE can account for *all* information currently known about Mr. Presnell's functioning."¹²⁶

e. Additional time is needed for counsel's experts to conduct a full ND-PAE and FASD evaluation

Because of [REDACTED] health condition and the lack of notice of Mr. Presnell's execution warrant, [REDACTED] cannot complete [REDACTED] evaluation of Mr. Presnell, but [REDACTED] could do so if given more time. [REDACTED] writes:

In 2021, I was retained by counsel because of my unique dual expertise in FASD and the aggravated nature of the sexual offending in this case. In the context of my preliminary analysis of available records, Virgil Presnell's lifelong functioning is consistent with the DSM-5-TR disorder, Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure (ND-PAE). However, in

¹²⁶ *Id.* at 13.

order to complete my evaluation with procedures that constitute the standard of practice in psychology, the following procedures will need to be conducted:

- (1) a face-to-face interview with Mr. Presnell and
- (2) collateral interviews, including administration of standardized adaptive assessments with individuals who interacted with him at various points in his life

"If given the opportunity," [REDACTED] explains, "a thorough evaluation will determine whether ND-PAE explains Mr. Presnell's offense conduct and allow for me to draw conclusions about the *causal* nature between his FASD and his actions in both the homicide and the sexual offense."¹²⁷

[REDACTED]
[REDACTED]
believes [REDACTED] can make [REDACTED] available toward the end of the summer to evaluate Mr. Presnell.¹²⁸

Further, the full FASD diagnosis cannot yet be rendered because counsel's medical doctor could not make it to the prison to evaluate Mr. Presnell on such short notice. Counsel hired a medical doctor in February 2022 to conduct the facial feature and growth assessment. He is a nationally-renowned FASD expert, but he does not live in Georgia. Medical doctors must obtain permission from the Georgia Medical Board to assess a person who is living in the state, and counsel's doctor has been in the process of obtaining such permission for months. The process remains ongoing.¹²⁹

¹²⁷ Affidavit of [REDACTED] at 14.

¹²⁸ *Id.* at 2.

¹²⁹ It is true that, during state habeas proceedings, a neuropsychologist, Dr. Ricardo Weinstein, performed a neuropsychological test battery on Virgil. But Dr. Weinstein did not diagnose Virgil with FASD – because he could not. He is not a medical doctor. Dr. Weinstein merely tested Virgil for the FASD-associated cognitive impairments, and confirmed the existence of those impairments. Virgil has *never* received a full FASD diagnosis because he has not had two of the three necessary components of a diagnosis: (1) an analysis of facial features and growth deformities by a medical doctor, and (2) a sufficient number of adaptive functioning reports to render a diagnosis.

f. **There is no rational justification for executing someone as disabled as Virgil Presnell.**

Virgil is profoundly impaired, far below the level that even his low IQ scores indicate. This has always been clear to people who know him. As Dr. Brown explains in her report, IQ scores do not capture the significant functional (daily living) impairments associated with ND-PAE and FASD – but adaptive behavior scales do.

Adaptive functioning is the missing puzzle piece that can explain why Mr. Presnell seems so much more impaired than his IQ scores would indicate – but only if Dr. Brown is permitted to complete the adaptive functioning evaluation she intended to complete. The full adaptive functioning assessment could link Mr. Presnell’s specific deficits to the terrible events of May 4, 1976.¹³⁰

It was not enough to label Mr. Presnell a “pedophile” and sentence him to death without probing deeper into what made him that way, and why it led him to do what he did. It was not enough for a single expert witness to say that one set of scores “were consistent with” an FASD diagnosis, and then for Mr. Presnell’s counsel to drop the

As his state habeas counsel, Robert McGlasson, recalled:

This was one of the early cases where I worked with fetal alcohol syndrome evidence. We did not have the understanding of what was needed to support a diagnosis of fetal alcohol syndrome that we have now. We hired Dr. Ricardo Weinstein, a neuropsychologist, to evaluate Virgil but we did not hire a medical doctor who could diagnose fetal alcohol syndrome. At the time, we did not appreciate the necessity of investigating adaptive deficits to support a diagnosis of fetal alcohol syndrome. Nor did we know back then that his fetal alcohol syndrome might have played a role in predisposing him to sexual offending. We simply knew that his mother’s prenatal alcohol use was a significant factor in Virgil’s background.

Letter of Robert McGlasson, at 2.

¹³⁰ A single adaptive behavior scale was administered to Mr. Presnell’s mother during his 1999 resentencing proceedings. Virgil’s scores on this scale ranged from **below the .1 percentile to .3 percentile**, indicating very significant adaptive behavior deficits. However, one adaptive behavior scale is not sufficient to make the diagnosis.

matter. We know that FASD is a “cause-and-effect” diagnosis – in other words, it directly contributes to the commission of certain types of offenses, including sex offenses.

We did not know better in 1976. But we know better today. A just society does not execute the developmentally disabled. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (it is the same cognitive and behavioral impairments that make these defendants less morally culpable - for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses - that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information...Thus, executing the mentally retarded will not measurably further the goal of deterrence.); *ibid.* at 318 (“Because of their impairments, however, by definition [such offenders] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”).

6. Previous support for a sentence of life without parole

Perhaps because they recognized Mr. Presnell’s significant cognitive limitations, many people have supported a life-without-parole sentence over the years, including six of the jurors from his 1999 resentencing proceeding. Daniel Hyland, one of the jurors from the 1999 trial, wrote:

The deliberations were very difficult. ...Many of us discussed whether or not to give Mr. Presnell a sentence of life without parole. Although this was not an option before us, we sent a note to the judge asking if life without parole was an option for his sentence. The judge said it was not. ...

I would have voted for life without parole if that sentencing option had been available.

To the best of my knowledge, at least 6 jurors would have voted for life without parole had that been an option.¹³¹

While counsel cannot and would not speak for [REDACTED] current feelings on the appropriateness of Virgil's sentence, it is clear that [REDACTED] supported a life-without-parole sentence at both stages of the proceedings. Their wishes were ignored. As Judge Grubbs explained, in 1976,

[REDACTED] did not want Virgil to receive the Death Penalty but for Virgil to remain in jail. He expressed this to the Defense lawyers. The feeling in what was then a small community, and with all the publicity, [was that] the State was adamant about the Death Penalty.¹³²

[REDACTED] approached Lois during the 1976 trial and "told her that they didn't hold what happened against her or Virgil, and that they had not wanted the death penalty, but the district attorney pushed for it."¹³³

[REDACTED] also approached District Attorney Pat Head prior to the 1999 resentencing proceeding, and again requested a sentence of life without parole. DA Head told [REDACTED] that it was impossible – which, of course, was false; the District Attorney certainly had the authority to plead Virgil's case to a lesser sentence.

The Board can and should take into consideration the wishes of the people involved at the time of the original proceedings when deciding on the appropriateness of Mr. Presnell's sentence today. If so many people believed that a life-without-parole sentence was the correct one so many years ago, surely they would believe it is more than appropriate today, after Mr. Presnell has endured sexual torture and violence for 46 years.

7. "He is one of the few people who understands and listens to me": Virgil's family will be irreparably harmed if his execution proceeds as scheduled

Last, but not least, counsel would like to address the severe limitations she faced in preparing this petition by the lack of notice the Attorney General provided for seeking Mr. Presnell's execution warrant. The premature warrant has prevented

¹³¹ State habeas affidavit of Daniel Hyland.

¹³² Letter of Judge Adele Grubbs.

¹³³ Letter of Nancy Smith, at 2; see also Mary Callen, *A Peter Pan Past*, Marietta Daily Journal (September 18, 1976) (corroborating that this conversation occurred at the time of trial).

counsel from providing the Board with “all pertinent information on” Virgil Presnell, as required by Georgia law. *See* O.C.G.A. § 42-9-43. Counsel hired multiple experts who have not had time to evaluate Virgil, and are thus unable to testify. There are potential clemency witnesses across the country to whom counsel has not yet spoken.

Mr. Presnell has not received the process to which the Georgia Constitution and Georgia law entitle him. And in this case, “process” is not a theoretical consideration or point of law. It has very real consequences for real people.

Because of the lack of notice, Mr. Presnell’s son and sister will most likely not be able to appear before the Board on his behalf at all. Such a harm cannot be repaired. Whether one has any empathy for Virgil himself, it is undeniable that his family is innocent, and they deserve the opportunity to ask the Board to spare his life. In his sister Wanda’s words:

If given more notice, I would come to Georgia to tell the board in person about my brother Virgil. But I live in Michigan and care for my great-nephew, which makes traveling on short notice impossible. ...

Virgil and I keep in touch through phone calls and letters. He is one of the few people who understands and listens to me. I get a sense of relief after talking to him, which makes me feel better. There is no one else in my life like that anymore. Most of my family is dead, and my brother Jimmy and I don’t get along. So all that’s left are my children, their kids, and Virgil. This past year has been rough for me, dealing with my husband’s colon and kidney cancer. As my husband’s primary caregiver, I had little time to write or talk to Virgil. I thought the cancers were in remission, but he died suddenly within two weeks of being released from the hospital in January. I’m heartbroken my partner of 48 years is no longer here. Now I may also lose my brother Virgil.¹³⁴

A 90-day stay is necessary and warranted to correct this injustice. If the state wishes to execute Virgil Presnell, it should and must do so with clean hands.

8. Conclusion

Virgil Presnell entered prison in 1976, a defenseless, “pathetic Peter Pan” destined for year after year of sexual violence, beatings, and degradation. Today, he is a quiet, simple old man with a developmental disability who adores his son and his sister. Executing him after all this time would serve no purpose, and would bring more

¹³⁴ Letter of Wanda Graves.

pain to more innocent people. It would also be wholly contrary to the ideals of a civilized society to execute someone so profoundly disabled.

As Nancy Smith, who worked on Mr. Presnell's case in 2004, says:

When I think of Virgil, I remember how kind he was, and how hard he tried to help me, despite his profound impairments. I remember his grief at what he had done. And I remember Lois's grief at the harm that she had done to her son. I know that Virgil and Lois would have done anything to undo the pain and damage they caused. I hope this Board will show them both mercy and spare Virgil's life.¹³⁵

Counsel respectfully requests that the Board grant a 90-day stay of execution in order to review his full application, and thereafter commute his sentence to life without the possibility of parole.

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¹³⁵ Letter of Nancy Smith, at 2.