No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

BRIAN KEITH TERRELL,
Petitioner,

-v.-

BRUCE CHATMAN, Warden,
Georgia Diagnostic Prison,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

EXECUTION SCHEDULED
TUESDAY, DECEMBER 8, 2015, 7:00 P.M.

*Gerald King
(Georgia Bar No. 140981)
Federal Defender Program, Inc.
101 Marietta Street, NW, Suite 1500
Atlanta, Georgia 30303
404-688-7530
(fax) 404-688-0768
Gerald_King@FD.Org

Susan C. Casey
(Georgia Bar No. 115665)
965 Virginia Avenue, NE
Atlanta, Georgia 30306
404-879-1515
(fax) 404-879-0005
susancasey@outlook.com

*Counsel of Record for Petitioner

QUESTIONS PRESENTED

THIS IS A CAPITAL CASE

Is Petitioner's execution constitutionally tolerable where the only direct evidence of his guilt was the admittedly false and coerced testimony of his codefendant?

Does the Georgia courts' determination that Petitioner has failed to show cause and prejudice to overcome a state procedural bar constitute an adequate and independent state ground for denying the Petition, or was the adjudication of a federal question "integral to the state court's disposition of the matter," *Ake v. Oklahoma,* 470 U.S. 68, 75 (1985), and therefore jurisdiction properly lies with this Court?

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APPENDIX

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Petitioner prays for a writ of certiorari to review the December 8, 2015 decision of the Supreme Court of Georgia denying Mr. Terrell a Certificate of Probable Cause to Appeal, and thereby clearing the way for his execution. Tonight, the State of Georgia intends to execute Brian Terrell for the murder of John Watson—a crime that he did not commit. Mr. Terrell will be executed based on the State's presentation of false and misleading testimony by Jermaine Johnson, Mr. Terrell's cousin and codefendant, a witness without whom the State acknowledged it had no case against Mr. Terrell.

The case against Mr. Terrell has never been conclusive. The jury at his first trial could not agree that he was guilty, and hung. None of the physical evidence recovered from the crime scene implicated Mr. Terrell in Mr. Watson's murder. Mr. Terrell has always maintained his innocence. The State made two separate plea offers for sentences of life imprisonment, and life

imprisonment with a contract not to seek parole for eighteen years, but Mr. Terrell refused to confess to a crime that he did not commit.

In spite of the dearth of proof, the State tried Mr. Terrell three times for this crime over the course of nine years, building each prosecution upon the testimony of Jermaine Johnson, testimony that they knew was false. Mr. Johnson has now informed undersigned counsel that the testimony he gave against Mr. Terrell was not true, but was given out of fear that Mr. Johnson would be prosecuted as being the person who killed Mr. Watson. *See* Appendix C. The State also relied on the testimony of Marian Foschini to place Mr. Terrell at the scene. The State had Ms. Foschini describe the man she saw at the scene, which Ms. Foschini did, consistently. But we now know that the man she saw was not Brian Terrell. *See* Appendix D.

This Court is the only remaining forum that may vindicate Mr. Terrell's right to a fair trial and protect him from a fundamental miscarriage of justice.

CITATION OF OPINIONS BELOW

Petitioner was convicted of murder and sentenced to death in Georgia. The Georgia Supreme Court affirmed his direct appeal on November 12, 2002. *Terrell v. State,* 572 S.E.2d 595 (Ga. 2002). A timely petition for reconsideration was denied on December 13, 2002. Petitioner subsequently filed a petition for writ of certiorari with this Court, which was denied on October 6, 2003. *Terrell v. Georgia*, 540 U.S. 835 (2003).

Petitioner then filed a petition for writ of habeas corpus in Butts County Superior Court. Following an evidentiary hearing, the state habeas court granted relief on Petitioner's claims that his trial counsel provided ineffective assistance in failing to consult and present evidence from an independent forensic pathologist rebutting the State's evidence as to the manner of the victim's death. On appeal, the Georgia Supreme Court reversed the lower court, and reinstated Petitioner's sentence of death. *Hall v. Terrell,* 679 S.E.2d 17 (2009).

Petitioner then filed a petition for writ of habeas corpus with the United States District Court for the Northern District of Georgia, which denied the petition on May 9, 2011. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. That court denied his appeal on March 11, 2014, *Terrell v. GDCP Warden,* 744 F.3d 1255 (11th Cir. 2014), and this Court denied a timely filed Petition for Writ of Certiorari to the Eleventh Circuit, on December 1, 2014. *Terrell v. Chatman,* 135 S.Ct. 726 (2014).

On November 23, 2015, the Superior Court of Newton County entered an Order directing that Mr. Terrell's execution take place between December 8 and December 15, 2015. Pursuant to that Order, the Georgia Department of Corrections scheduled Mr. Terrell's execution for December 8 at 7:00 P.M. On December 4, 2015, Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia, which denied the Petition on December 8, 2015. *See* Unpublished Order, *Terrell v. Warden, GDCP,* Case

No. 2015-HC-23, December 8, 2015. Attached hereto as Appendix B. Later that same day, the Supreme Court of Georgia denied Petitioner's timely filed Application for a Certificate of Probable Cause to Appeal, ruling that the "application … lack[ed] arguable merit as a matter of Georgia procedural law." Unpublished Order of the Georgia Supreme Court, *Terrell v. Warden, GDCP,* December 8, 2015 (Attached hereto as Appendix A), citing Georgia Supreme Court Rule 36.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). *See Yates v. Aiken,* 484 U.S. 211, 214 (1988). Petitioner has asserted violations of his Eighth and Fourteenth Amendment rights in the proceedings below.

The Supreme Court of Georgia entered a final judgment denying Petitioner a Certificate of Probable Cause to Appeal on December 8, 2015. *See* Appendix A. That decision denied review of an unpublished order of the Superior Court of Butts County, Georgia denying Petitioner's Petition for Writ of Habeas Corpus entered on December 7, 2015. *See* Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISONS

This case involves the Eighth Amendment to the United States Constitution which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted [;]

And the Fourteenth Amendment to the United States Constitution which provides, in relevant part:

> Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

I. THE EVIDENCE AT TRIAL

On Monday morning, June 22, 1992, the body of John Watson was found outside his home on Highway 142 in Covington, Georgia. He was discovered by police officers and neighbors who had been summoned to his home by Brian Terrell's mother, Barbara Terrell, who had begun assisting Mr. Watson with meals and errands in 1989 and had recently become engaged to marry him.

A. Police Suspect Mr. Terrell

Police quickly focused their suspicion upon Brian Terrell because of his admitted involvement in forging checks against Mr. Watson's bank account. That previous Saturday, June 20, Mr. Watson had reported Mr. Terrell to the police after discovering ten checks forged for a total of $8,700. Three of the checks (totaling $2,100) had been made out to Mr. Terrell, while the other seven checks were made out to a Dexter Victor. Barbara Terrell identified her son's handwriting on the first three checks made out in his name. Mr. Watson had declined to press charges, however, telling the police and Barbara Terrell that he would not seek an arrest warrant on Mr. Terrell as long as he received a substantial repayment by the following Monday, June 22. Barbara Terrell

relayed Mr. Watson's message to Mr. Terrell, who took responsibility for all of the checks and promised to make repayment.[1]

Mr. Terrell knew that the police had been told he was responsible for the forgeries. The police nonetheless speculated that Mr. Terrell must have murdered Mr. Watson on June 22 in order to prevent him from pressing charges for the forgeries, which would result in the revocation of his parole.[2]

Outside of this theoretical motive, none of the considerable physical evidence recovered from the crime scene implicated Mr. Terrell. Shoe impressions taken from the disturbed dirt around Mr. Watson's body and car keys were left by feet smaller than those of Mr. Terrell. Thirteen latent prints collected and tested by the GBI did not match Mr. Terrell's fingerprints. The GBI did identify a palm print as matching Mr. Terrell's uncle, Tim Terrell, but he was never arrested or charged, despite the conclusion by the state's expert witness that the print had been made within 24 hours of the crime.

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[1] As Mr. Terrell detailed in his trial testimony, he forged the first three of the checks against Mr. Watson's account. He took responsibility for the others because it was his fault that the persons responsible for the remaining $6,500 had gained access to Mr. Watson's checkbook.

[2] This purported motive does not withstand scrutiny. Why would Mr. Terrell commit a murder to prevent his prosecution for a crime police already knew he was involved in? On the other hand, another person involved in the forgeries who was not suspected might have a motive to murder Mr. Watson, knowing that suspicion would settle on Mr. Terrell.

B. Eyewitnesses Describe a Suspect: Jermaine Johnson

Not a single eyewitness placed Mr. Terrell at or near Mr. Watson's house on the day of the murder.[3] However, two witnesses saw Mr. Terrell's cousin, Jermaine Johnson, driving along the stretch of Highway 142 where Mr. Watson lived at the approximate time of his murder. Virginia Kines, the co-owner of the Dixie Grocery convenience store on Highway 142, identified Mr. Johnson from a photographic and in person lineup as the man she encountered driving an "older model blue Cadillac … fairly slow" along Highway 142. Ex. 3 at 869; *see also* Ex. 4. Ms. Kines followed the car into the driveway of the Dixie Grocery, where it "pulled on through the parking lot and out the other exit and turned and went back toward Covington." Ex. 3 at 871. At least ten minutes later, Mr. Johnson drove "back in the parking lot from the east side, coming from Covington ... [and] pulled up and parked on the front side of the building." *Id.* at 873. Mr. Johnson sat in the car a few minutes before coming into the store, where Ms. Kines thought he "acted a little nervous." Ms. Kines described Mr. Johnson as wearing a "ball uniform, just beige color *maybe* with thin pin-stripe[s] ... short-sleeved, v-neck ... no color." *Id.* at 876.[4] She also

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[3] The prosecutor argued that Marian Foschini had seen Mr. Terrell. As Ms. Foschini's attached affidavit shows, and as discussed *infra,* she did not.

[4]In her initial statement to police, Ms. Kines said that Mr. Johnson should this say the person she observed near her and Watson's homes see my email "had on a [sic] outfit that looked like a ball uniform, but not a regular league uniform, it was -- it looked like a sport outfit, no collar, light in color, a faint pinstripe type outfit" with "short pants." Ex. 4 at 2. By contrast, Julius Hays, a customer in the store (*see infra* at 11), told police that Mr. Johnson

noted that Mr. Johnson had a "geometrical" haircut, *ibid* at 872, and "a dusty kind of dingy appearance," like he had been walking "on a dirt road." *Id.* at 880.[5] Ms. Kines was so unsettled by Mr. Johnson's appearance and conduct that she suspected he planned to rob her and asked another customer, Julius Hays, to remain in the store until Johnson left. *Id.* Mr. Hays would later identify Mr. Johnson as well.

On the day of the crime, moreover, the State obtained a statement from Marion Foschini, who lived in a duplex down and across the highway from Mr. Watson. Ex. 6. Ms. Foschini reported hearing a gunshot while "doing [her] hair in her bedroom." *Id.* at 1. A few minutes later, Ms. Foschini looked out of her front door and saw a "long, long car" that she thought was "blue and white" in color parked in her landlord's driveway, which was next to her house, with its "hood up." *Id.* A "very tall and lean" black man with a "white T-shirt on and ... jeans" was "looking in [at] the motor." Ms. Foschini was never shown a lineup with either Mr. Terrell or Mr. Johnson.

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was wearing "a V-neck white shirt that was short-sleeved and I believe blue jeans but I am not sure." Mr. Hays was not called to testify at Mr. Terrell's third trial.

[5] Mr. Watson's body was found in a patch of disturbed dust and dirt. In her first statement to police, Ms. Kines noted that Mr. Johnson looked "dirty all over."

C. Mr. Johnson Gets a Plea Deal in Exchange for Inculpating Mr. Terrell

At this point in the case, no evidence pointed to Mr. Terrell. Mr. Johnson, however, had been placed at the scene by two witnesses. When questioned by police, Mr. Johnson lied about his whereabouts and his appearance on the day of the crime. He was subsequently arrested on June 30, 1992, and held in jail for more than fourteen months. Finally, on September 3, 1993—after being informed by police that Mr. Terrell was the primary target of their investigation—he agreed to testify against Mr. Terrell in order to avoid the death penalty. Upon providing a taped statement to police and agreeing to testify, Johnson was allowed to plead guilty to robbery and was sentenced to five years imprisonment.

Mr. Johnson stated that on the morning of the crime he and Mr. Terrell left the motel room where they had stayed the night. After they "rode around" for a while, Mr. Terrell "pulled over to the side," asked him to drive, then directed him to Highway 142. Mr. Terrell then "got out of the car" and "[w]ent up to the house." Mr. Johnson claimed that he went back and forth to the motel at least twice, making stops at a Wal-Mart and "the store ... at the top of the road ... [for] something else to snack on." He then claimed that he returned to the motel yet again and, upon returning to Highway 142, heard Mr. Terrell call out to him from the other side of the road. Mr. Johnson stated that when he pulled over, Mr. Terrell told him to "pop the hood" and climbed in the passenger seat while Mr. Johnson got out to close the hood and trunk

(which he had opened by mistake). *Id.* Mr. Johnson said that they then returned to the motel before driving to Belk's, where they bought clothes. *Id.*

They then went to their grandmother's house, where Mr. Johnson dropped Mr. Terrell off and went to vacuum out the car.[6] When he returned, Mr. Terrell was taking a bath and left "a little while later and went to the zoo." *Id.* at 4.

After some prompting by the officers, Mr. Johnson added that he had "forgot to tell" that when Mr. Terrell first "got back in the car[] [h]e told me he had … fucked up." *Id.* at 5. After an officer assured him "that's fine," and Mr. Johnson added that "[h]e had shot somebody, like that." *Id.* Mr. Johnson then reiterated all of his and Mr. Terrell's purported movements. After yet more prompting, Mr. Johnson claimed that Mr. Terrell told him that he had shot at and missed a man; the man tried to run; that he had knocked him down, shot him, and then dragged him "over beside the water ... water house ... water pump. Water house or whatever." *Id.*[7]

When asked if he had seen Mr. Terrell "get a gun out" when dropping him off, Mr. Johnson said that he had taken a "black revolver with a brown handle" from under the seat that was "[a]ny where [sic] from a . . . thirty-eight

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[6] They had locked the keys in the car and had to break a window to get into it. Johnson said that he had vacuumed the car "to get the glass up that I broke."

[7] There was no water house on Mr. Watson's property.

or a three fifty-seven," and that he had vacuumed the car "to get the glass up that I broke." Mr. Johnson also claimed that Mr. Terrell had told him that he had disposed of the murder weapon at the zoo.

D. Mr. Johnson Gets Cold Feet

Mr. Johnson would ultimately testify against Mr. Terrell in all three of his trials. Mr. Terrell's first trial ended with a hung jury, with four jurors later citing Mr. Johnson's doubtful credibility as a major weakness in the State's case.[8] By the third trial, Mr. Johnson was resistant to again testify against Mr. Terrell. When the district attorney brought him copies of his previous testimony, he refused delivery.[9] He also informed Mr. Terrell's counsel, John Strauss, that he was not going to testify. 3T at 1091.

Taking the position that Mr. Johnson had "no right not to testify" because he had completed his sentence in the case, *id.* at 1091, the trial court evidently summoned an attorney to consult with Mr. Johnson prior to his testimony. *Id.*; *see also id.* at 1106 (attorney discussing his "almost overnight appearance as counsel for Witness Johnson"). The following day, Mr. Johnson's attorney informed the Court that he "was not going to testify," but suggested to the trial court that he could be ordered to testify. The trial court

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[8] The four jurors from Mr. Terrell's first trial who responded to the District Attorney's questionnaires *all* cited Jermaine Johnson's impaired credibility as a major weakness in the state's case.

[9]This application cites to Mr. Terrell's first trial as "1T at ___," his second trial as "2T at ___," and his third trial, which underlies his conviction and sentence of death, as "3T at ___." We include some portions of his third trial record as exhibits to this application and cite them accordingly.

accepted that advice and summoned Mr. Johnson to the stand, informing him that "whatever you say in this trial you cannot incriminate yourself" for Mr. Watson's murder, but quickly adding this admonition:

> I don't mean this to be coercive, but you need to understand this: There is a statute called perjury. Perjury means lying, lying under oath ... In a death penalty trial, if you have lied under oath and it has led to somebody receiving the death penalty, then you possibly could face a life sentence.

3T at 1110-11. Mr. Johnson chose to testify.

E. The Testimony of Marian Foschini Is Used to Corroborate Jermaine Johnson's Story

The prosecution relied upon the testimony of Marion Foschini to corroborate Mr. Johnson's account of the morning of June 22 and to place Mr. Terrell at the scene of the crime. Ms. Foschini testified that on June 22, 1992, she lived in a duplex "across the highway" and "[a] little ways down" from the home of John Watson.[10] At around "9:00 or 10:00" in the morning, Ms. Foschini was drying her hair when she heard a gunshot. A few minutes later, Ms. Foschini looked out of her front door and saw a car sitting in her landlord's driveway, which was just to the left of her house, no more than three car lengths away. A man stood at the front of the open hood of the car, looking down at the engine. Ms. Foschini described him at trial as "a young black man, very tall." When asked to describe his clothing, Ms. Foschini stated "I am not positive, but I think he had on a white type of a tee shirt, you know ... I ... just

[10]Ms. Foschini testified that if one were to look out the front door of her duplex, Mr. Watson's home would be down the road to the left.

saw sideways, so ... I am just assuming a white shirt of some kind, not a dress shirt or anything, looked like a tee shirt of some kind." Ms. Foschini also testified that the man was wearing "jeans or ... something like that." Ms. Foschini answered in the negative when asked if she had "see[n] anyone in the area that was wearing a ball jersey that was some color background with stripes and a geometric hairstyle," but later attested that she never saw the front of the man's shirt, and could not say if it had buttons. Nor could she rule out that it might have been "light gray" in color.

The prosecution never asked Ms. Foschini if she could identify Mr. Terrell as the man in her landlord's driveway. The prosecution nonetheless asserted precisely that in its closing arguments, claiming that Ms. Foschini's testimony both placed Mr. Terrell near the scene of the crime and corroborated Mr. Johnson's statement:

> And here is where we come with another element of corroboration. According to Jermaine, after he circled the area several times, he finally hears his cousin, Chico holler at him, but he has already gone passed the house. It is too late for him to stop right there. He goes up again, turns around, pulls off near Ms. Foschini's house, in all likelihood this driveway that Ms. Foschini has described, and Chico Terrell has crossed the street and yelled pop the hood, pop the hood, so nobody will get wise and think it is car trouble and not somebody working and loitering in the area.
>
> And Ms. Foschini, who had already heard the ... gunshot fired out maybe five or ten minutes previously, maybe longer, goes to her front door and looks out and what does she see? She sees a clean-cut, young black male with a white shirt and no geometric haircut, no stripes, no ballshirt insignia.
>
> In short, she saw the Defendant. **She saw Brian Chico Terrell. More corroboration.**

T3 at 1500-01 (emphasis added).[11]

F. The State's Concession that Its Case Rested Upon Jermaine Johnson

In the end, the State's case against Brian Terrell—by its own admission—rested upon the testimony of Jermaine Johnson and the corroboration provided by Marian Foschini. In an acknowledgment of the centrality of Mr. Johnson's testimony to his flimsy case, the District Attorney made a remarkable concession during his closing argument:

> If you never heard anything about Jermaine Johnson in this case, if he had never testified, would you have enough information to make a decision in this case? **You wouldn't**. Jermaine Johnson fills in so many *gaps* that you needed to hear, it was **necessary** for you to hear it and you wouldn't have heard it without a plea agreement.

Id. at 1502-03 (emphases added). But undersigned counsel's investigations have established that Mr. Johnson's testimony was falsified and Ms. Foschini's testimony was used to mislead the jury.

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[11]The prosecution first argued that "this murder took place sometime between probably 9:00 and 9:30 ... because Ms. Foschini heard the gunshot during approximately that time," despite the fact that Ms. Foschini attested to a broader range of time. The prosecution also resolved the ambiguities in Ms. Foschini's description of the man in an attempt to implicate Mr. Terrell, describing him as "the person in the blue jeans and the white shirt that Ms. Foschini described to you." That is the clothing that Mr. Terrell had stated he was wearing on the morning of June 22.

II. RECENT REVELATIONS THAT THE EVIDENCE IS FALSE AND MISLEADING

A. Mr. Johnson's Statement Was Coerced and His Testimony Was False

Mr. Johnson has admitted to undersigned counsel and Melanie Goodwill, an investigator with the Federal Defender Program, Inc., that his statement and testimony in Mr. Terrell's trials were false. *See* Affidavit of Melanie Goodwill, Appendix C. Mr. Johnson now admits that "Brian never told him that he had shot Mr. Watson." *Id*. at 2. Mr. Johnson explained his falsified testimony by stating that he was "being pressured" by the investigators in the case, Dell Reed and Troy Pierce, and the district attorney, Alan Cook, to implicate Mr. Terrell. *Id.* at 1.

Over the course of more than a year, Mr. Johnson was told repeatedly that "he would be prosecuted and sentenced to death for Mr. Watson's murder unless he testified against Brian Terrell." *Id.* at 2. Mr. Johnson, who "felt he was alone and had no choice but to do what the prosecutor and police asked," said that he "held out for as long as he could but didn't have an adult to advise him." *Id.* When he finally agreed to testify against Mr. Terrell, "the police told him what to say if he wanted to avoid a death sentence." *Id.*

When Mr. Johnson met with undersigned counsel and Ms. Goodwill to review his statement to law enforcement, he confirmed that parts of it are untrue, and he gave as an example its most inculpatory portion: that portion in which he claimed that Mr. Terrell had taken him around the side of their

grandmother's house and offered a detailed confession to lying in wait, ambushing, and murdering Mr. Watson. *Id.* at 2-3. Mr. Johnson informed counsel and Ms. Goodwill that this conversation never occurred, but that Mr. Reed and Mr. Pierce "told him that was how they thought the crime went down and that was what he had to say in order to get his five-year plea deal." *Id.* at 3.

After vacillating, Mr. Johnson declined to provide an affidavit to undersigned counsel to this effect. Mr. Johnson has offered a number of explanations for that decision. While expressing anger that the police were able to pressure him into making a statement—which he attributes to his being only eighteen years old at the time—he is afraid that he will face retaliatory arrest and prosecution if he were to come forward. Mr. Johnson reports that "every time something happens in Brian's case, he gets picked up by the police," and that "he is often arrested and held in custody any time there is a hearing or if someone comes to talk to him about Brian's case." *Id.* at 3.

On the other hand, Mr. Johnson said that he "has not had any peace since all of this happened," and has only "gone along with his statement in Brian's trials because he doesn't want to get locked up again if he said why it was wrong." *Id.* Mr. Johnson also expressed concern about his ability to provide for his young daughter if he were again incarcerated. *Id.* at 3-4. As he stated to Ms. Goodwill, he "wants people to know the truth but is afraid to come forth." *Id.* at 4.

Mr. Johnson has expressed similar indecision about whether to tell the truth on other occasions, as well. Over the years, Mr. Johnson has indicated to numerous people that Mr. Terrell is innocent of Mr. Watson's murder and—perhaps anticipating that he would find the courage to step forward when the time came—reassured them that Brian would not be executed. At Mr. Terrell's trial in 2001, Lester Terrell, uncle to both Brian Terrell and Mr. Johnson, testified that he had a conversation with Mr. Johnson after Johnson had completed his five year sentence for his involvement in Mr. Watson's murder.[12] In that conversation, Mr. Johnson told Lester Terrell "not to worry about [Brian, that] he would be [released from prison] in 2000, that [Brian] didn't do it, [Brian] didn't kill that man."

In his state habeas proceedings, Mr. Terrell presented affidavits from two other individuals as to similar statements made by Mr. Johnson: Sonya Benton, Mr. Terrell's cousin, who worked as an officer at the Newton County Jail at the time of trial, and defense investigator, Dan Goldman. Prior to and during Mr. Terrell's third trial in 2001, Jermaine Johnson was incarcerated in a holding cell at the Newton County Jail, where Ms. Benton was employed. Ms. Benton attested that shortly before the start of the 2001 trial, a district

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[12] The Georgia Department of Corrections website indicates that Mr. Johnson was released from prison related to this offense on February 26, 1996. *See* http://www.dcor.state.ga.us/GDC/OffenderQuery/jsp/OffQryRedirector.jsp re: Jermaine Johnson, GDC identification number 617061 (last visited December 3, 2015).

attorney's investigator came to the jail to visit Johnson. The investigator brought transcripts and left them with Mr. Johnson. After the investigator left, however, Mr. Johnson told Ms. Benton that he did not want the transcripts because "he was going to tell the truth this time, and that he was doing it for Big Mama [his and Mr. Terrell's grandmother]." Then, just after the third trial commenced, Mr. Johnson again told Ms. Benton that he was ready to tell the truth and that he wanted to speak with Mr. Terrell's trial counsel, John Strauss.

When Mr. Strauss's investigator, Dan Goldman, came to the jail, Ms. Benton informed him that Johnson wanted to talk to Mr. Strauss. Mr. Goldman later confirmed this in his testimony. Mr. Goldman further testified that he spoke with Mr. Johnson after Ms. Benton told him what Mr. Johnson had been saying, and that although Mr. Johnson ultimately did not change his story, he did tell Goldman that "one of these days he was going to tell ... the truth."

B. Marian Foschini Never Saw Brian Terrell, As the State Led Jurors to Believe

The remainder of the State's case is equally unsound, as Ms. Foschini's testimony cannot be relied upon either to place Mr. Terrell at the scene of the murder or to corroborate Mr. Johnson's now admittedly-false statement. While the prosecution argued that Ms. Foschini "saw the defendant," he never asked Ms. Foschini the question invited by her testimony: whether the man she saw in her landlord's driveway was Brian Terrell. It was not, as her sworn

affidavit now shows. "When I saw Brian in the courtroom" at the beginning of his first trial, Ms. Foschini attests, "I knew he wasn't the man I had seen in [my landlord's] driveway." Appendix D.

> Brian looked very different from the young black man I saw in the driveway. The man I saw was much skinnier than Brian and seemed taller than him, too ... If I had been asked to identify him in court, I am sure I would have told them Brian wasn't the man I saw parked in the driveway that day.

Appendix D at 1-2. The State never asked Ms. Foschini to identify Mr. Terrell, despite the State's dependence upon her testimony.

> Nor did Ms. Foschini know to raise the issue herself.
> I had moved to Jasper, Alabama shortly after Mr. Watson was killed and was no longer living in Covington, Georgia. I didn't know the details of the crime and thought I was just testifying about what I saw that day. I didn't know why the prosecutor thought my testimony was important. I knew they had arrested Brian and were saying that he had murdered Mr. Watson, but I didn't have any details about how they thought it had all happened ... *I never heard that the prosecutor thought Brian was the person who was parked in* [*my landlord's*] *driveway.*

Id. at 1-2.

The State's improper and misleading use of Ms. Foschini's testimony to corroborate Mr. Johnson's false testimony violated Mr. Terrell's rights to a fair trial and reliable sentencing.

REASONS FOR GRANTING THE WRIT

I. The State of Georgia is Poised to Execute Brian Terrell Though His Conviction—By the State's Own Admission—Would Not Have Been Possible Without The Testimony Of His Codefendant, Testimony That The State Knew to Be False

The State of Georgia's entire case against Mr. Terrell was built upon the false testimony of Jermaine Johnson, buttressed by the misleading argument that an eyewitness corroborated Mr. Johnson's account. Mr. Johnson has now admitted that Mr. Terrell never confessed his role in the crime to him, and that his testimony at trial was the product of State coercion and threats of prosecution. Mr. Johnson was the only direct evidence that Mr. Terrell committed the murder. The State argued that the testimony of Marian Foschini placed Mr. Terrell near the crime scene at a time when Mr. Johnson claims to have picked him up there. But she never identified Mr. Terrell as the man she saw in the victim's neighborhood.

This Court has long recognized that deception of the court and jurors by the presentation of false evidence is incompatible with the "rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Since *Mooney*, this Court has routinely found constitutional violations in a number of situations where false testimony was presented: *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (false testimony not solicited by state but the state failed to correct it once it appeared); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (favorable evidence withheld that is material to either guilt or punishment);

Giglio v. United States, 405 U.S. 150, 154 (1972) (failing to disclose evidence affecting credibility when the reliability of a given witness may well be determinative of guilt or innocence).

In each instance, some form of materiality must be established in order for relief to be granted. In the *Brady* context, the petitioner must establish there is a reasonable probability the outcome of the proceeding would have been different. *See, e.g., Kyles v. Whitley*, 514 U.S. 419 (1995). Materiality for a *Giglio* claim is a lesser standard than that of a *Brady* claim. To establish a *Giglio* claim, a habeas petitioner must prove: "(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material, *i.e.* that there is any reasonable likelihood that the false testimony could … have affected the judgment." *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011). "The 'could have' standard requires a new trial unless the prosecution persuades the court that the false testimony was 'harmless beyond a reasonable doubt.'" *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009)*(*internal case citations omitted*).* This standard "favors granting relief." *Id.*

In the instant case, there is no doubt that a constitutional violation occurred—the state presented the false testimony of Jermaine Johnson and painted the testimony of Marian Foschini in a false light. This is constitutionally prohibited conduct. *Giglio*, 405 U.S. at 154; *Kyles*, 514 U.S. at

432. The question becomes whether the false testimony was material. Again, the answer is a resounding yes.

In determining materiality, this Court has instructed reviewing courts that the prosecutor's closing argument is fertile ground for determining what evidence was crucial to the State's case. In *Kyles v. Whitley*, 514 U.S. 419 (1995), this Court, in conducting the materiality analysis, noted the "likely damage" caused by the false testimony could be "best understood by taking the word of the prosecutor" uttered during closing argument. *Id.* at 444. Indeed, if the prosecutor places particular importance on the testimony, the likelihood that the jury relied upon it is heightened. Here, the prosecutor not only relied upon the testimony of Mr. Johnson, he candidly admitted that without the perjured testimony, there was no case against Mr. Terrell. There can be no doubt Mr. Johnson's false testimony was material.

Recognizing the weakness of its case and the credibility issues surrounding Mr. Johnson, the state took the ambiguous testimony of Ms. Foschini and painted it in a false light to place Mr. Terrell at the scene and to bolster the credibility of Mr. Johnson. The state argued that the person Ms. Foschini saw was in fact Mr. Terrell when in actuality it was not.

The cumulative effect of presenting the perjured testimony of Mr. Johnson and painting Ms. Foschini's testimony in a false light operated to deny Mr. Terrell a fair trial and reliable capital sentencing proceeding in violation of the Sixth, Eighth and Fourteenth amendments to the United States

Constitution. *See Kyles,* 514 U.S. at 436 ("The ... final ... aspect of materiality to be stressed ... is its definition in terms of suppressed evidence considered collectively, not item by item."). The discovery that Mr. Johnson's testimony was false and that Ms. Foschini never identified Mr. Terrell would have put the State's evidence in an entirely different light. Indeed, the case would have been "a significantly weaker case than the one heard by the first jury, which could not even reach a verdict." *Id.* at 454 (finding materiality established because "confidence that the verdict would have been unaffected cannot survive" given the centrality of the suppressed evidence to the State's case). Materiality is established, and Mr. Terrell's execution cannot be tolerated given the State's misconduct and the dearth of reliable evidence of Mr. Terrell's guilt.

II. The State Courts' Application of a Procedural Bar is Wholly Intertwined With, and Dependent Upon, the Adjudication of a Federal Constitutional Question; This Court Has Jurisdiction

Throughout the state habeas corpus proceedings below, Petitioner argued that his Petition should not be subject to Georgia's ban on second or successive habeas claims because, *inter alia*, he is able to show both cause and prejudice to overcome that bar as a matter of Georgia law. The Georgia habeas court below nevertheless held that Petitioner's claim of prosecutorial misconduct could not be brought because it was prohibited by the state's successive petition bar, thereby implicitly rejecting, as a matter of Georgia law,

Petitioner's assertions of cause and prejudice.[13] *See* Order, Butts County Superior Court, *Terrell v. GDCP Warden,* Case No. 15-HC-23, December 8, 2015 (Attached as Appendix B), citing O.C.G.A. § 9-14-51.

Under Georgia law, the analysis of cause and prejudice to overcome the default of a claim of prosecutorial misconduct at trial is co-extensive with the analysis of the underlying merits of the federal claim. *Whatley v. Terry,* 668 S.E.2d 651, 656 (Ga. 2008). The "cause portion of the cause and prejudice test is satisfied where evidence was 'concealed from [the defendant] by the State'…." *Id.* at 655, *citing Schofield v. Palmer,* 621 S.E.2d 726 (Ga. 2005). Similarly, in Georgia, "the prejudice necessary to satisfy the cause and prejudice test is a prejudice of constitutional proportions," *id.* at 656, and therefore the prejudice analysis is "coextensive" with an analysis of materiality of the suppressed evidence. *Waldrip v. Head,* 620 S.E.2d 829, 836 (Ga. 2005). In short, in order to determine the existence of cause and prejudice, the state court below necessarily resolved the underlying federal constitutional question presented here.

In *Ake v. Oklahoma,* 470 U.S. 68, 74 (1985), this Court held that jurisdiction properly lay with this Court, even though the Oklahoma appellate

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[13] The Georgia Supreme Court denied Petitioner's Application for a Certificate of Probable Cause to Appeal, finding that it "lack[ed] arguable merit **as a matter of Georgia procedural law**," thereby declining to review the Petition and leaving the procedural finding intact. See Order of the Georgia Supreme Court, December 8, 2015 (Attached hereto as Appendix A) (emphasis supplied).

court had denied Ake's claim on the basis of a state procedural rule. The Oklahoma court found that Ake had waived his claim by failing to comply with a state rule requiring that claims first be raised in the defendant's motion for new trial. However, application of the state's waiver rule was dependent upon a determination of whether the error was "fundamental trial error," e.g., federal constitutional error. "Thus, the state ha[d] made application of the procedural bar depend on an antecedent ruling on federal law…" and this Court's jurisdiction "is properly exercised." *Id.* at 75, 74.

Here, just as in *Ake,* "before applying the [state procedural rule] to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question." *Id.* at 75. Jurisdiction is proper, and this Court may grant the writ.

III. A Writ of Certiorari Must Issue to Avoid an Unconstitutional Miscarriage of Justice

The evidence before this Court raises the prospect that Brian Terrell will be executed on December 8 even though he is actually innocent of the murder of John Watson. The State's ability to prove their case at trial depended, by their own admission, entirely upon the testimony of a single witness: Jermaine Johnson. The State pressured and incentivized Mr. Johnson to provide false testimony. Even after the State's cajoling, Johnson's credibility was so questionable that the jury at Mr. Terrell's first trial hung as to his guilt. All of the jurors who then responded to the District Attorney's post-verdict inquiries cited Johnson's lack of credibility as a central problem

with the case. Mr. Johnson has now confirmed that his testimony against Mr. Terrell was not true, but invented at the urging of investigators and the prosecutor.

But for the State's presentation of this false evidence and misleading argument, it would not have had enough evidence with which to convict Mr. Terrell. None of the ample physical evidence found at the scene linked Mr. Terrell to Mr. Watson's death. Simply put, there is no reliable evidence that Mr. Terrell committed the murder.

To execute Brian Keith Terrell in light of his probable innocence would be a fundamental miscarriage of justice and "an atrocious violation of our Constitution and the principles on which it is based." *In re Davis*, 557 U.S. 952, 953 (2009) (Stevens, J., concurring). Thus, habeas corpus relief is required by the Eighth and Fourteenth Amendments even if this court finds that there would otherwise exist a procedural bar to the instant claim.

CONCLUSION

WHEREUPON, for the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for a Writ of Certiorari.

Respectfully submitted this 8th day of December, 2015.

/s/ Gerald W. King, Jr.
Gerald W. King, Jr. (GA Bar No. 140981)
Federal Defender Program, Inc.
101 Marietta Street, Suite 1500
Atlanta, Georgia 30303
404-688-7530/ (fax) 404-688-0768
gerald_king@fd.org

Susan C. Casey (GA Bar No. 115665)
965 Virginia Avenue, NE
Atlanta, Georgia 30306
404-879-1515/ (fax) 404-879-0005
susancasey@outlook.com

ATTORNEYS FOR BRIAN TERRELL