**Nos. 15-8877 and 15A1033**

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**IN THE SUPREME COURT OF THE UNITED STATES**

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***In re* KENNETH EARL FULTS, *Petitioner***

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**PETITION FOR A WRIT OF HABEAS CORPUS**

**CAPITAL CASE**

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# BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT TO ORIGINAL WRIT AND MOTION FOR STAY

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## QUESTIONS PRESENTED

1. Whether this Court should deny this petition for a writ of habeas corpus when Petitioner has unquestionably failed to demonstrate the mandatory prerequisite that "adequate relief cannot be obtained in any other form or from any other court"?

2. Whether this Court should deny this petition for a writ of habeas corpus when Petitioner has failed to demonstrate the requisite "extraordinary circumstances" which would justify the granting of extraordinary relief?

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## BRIEF IN OPPOSITION

## ON BEHALF OF RESPONDENT

Respondent, Warden, respectfully prays that the Original Petition for Writ of habeas corpus filed in this case be denied as an abuse of the writ.

## JURISDICTION

Respondent contests that this Court has jurisdiction over the claim raised by Petitioner. Petitioner has failed to demonstrate that he could not obtain adequate relief from any other form in any other Court and has further failed to show the existence of "exceptional circumstances" necessary to authorize this Court's power of an original writ.

## GOVERNING STATUTES

United States Supreme Court Rule 20. Procedure on a Petition for an Extraordinary Writ

1. Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

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4 (a) A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U. S. C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes

within the provisions of 28 U. S. C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

28 U.C.S. § 2254 State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a

court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255 [28 USCS § 2255].

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was presented in a prior application shall be dismissed.

## SUMMARY OF ARGUMENT

Petitioner's failure to properly plead and prove cause to overcome the procedural default of his juror bias claim does not present an issue worthy of the grant of an extraordinary writ by this Court. Petitioner alleges this Court's recent grant of certiorari in Pena-Rodriguez v. Colorado, No. 15-606, is the exceptional circumstance warranting the grant of his original writ. But the juror bias claim in Pena-Rodriguez is not procedurally defaulted, as it comes to this Court following direct review. Even if this Court were to find Colorado's Rule of Evidence 606(b) in Pena-Rodriguez to be unconstitutional absent an exception for juror bias, this would not provide precedent overturning the state and federal courts' decisions in Petitioner's case that he failed to prove cause to overcome the procedural bar to his claim. Plainly, this Court does not grant an extraordinary writ to redetermine whether a Petitioner has shown cause to overcome the procedural default of a claim.

Petitioner raised his juror misconduct claim for the first time in state habeas court. His argument in support of cause and prejudice to overcome the procedural bar of this claim was captured in two sentences:

> The factual basis for this claim was not reasonably available to either Mr. Mostiler or Mr. Sturdivant; the claim is thus not procedurally defaulted. Even if that were not an appropriate basis to overcome procedural default, neither Mr. Mostiler nor Mr. Sturdivant investigated this claim and did not present this claim in either the motion for new trial or on direct appeal. The writ should issue.

(Respondent's Appendix 1 at 61). Petitioner did not present any further argument or evidence in support of cause. The state habeas court correctly found the claim was procedurally defaulted. (Petitioner's Appendix 4 at 12-13). Petitioner did not raise this claim on appeal to the Georgia Supreme Court or in its petition for certiorari review to this Court.

Subsequently, in Petitioner's federal habeas proceeding he was ordered by the district court to file his brief addressing his claims that Respondent had argued were procedurally defaulted, which included his juror misconduct claim. Petitioner failed to specifically address this claim in his brief and generally asserted that the ineffective assistance of trial and appellate counsel could serve as cause and prejudice to overcome the default of all of his procedurally defaulted claims. (Respondent's Appendix 2 at 16-27). As this argument was insufficient, the district court found the claim was procedurally defaulted. (Respondent's Appendix 3 at 12-20).

In an untimely motion for reconsideration, Petitioner asked the district court to revisit the procedural default of this claim. (Respondent's Appendix 4). Petitioner changed his argument in support of cause to overcome the default and presented an

argument he had neither presented to the state habeas court or to the district court in his procedural default brief. He alleged that because Mr. Buffington had concealed his racial bias during voir dire, trial and appellate counsel had no reason to investigate or raise a juror misconduct claim and, under state law, specifically the case of Turpin v. Todd, 268 Ga. 820 (1997), this established cause. (Respondent's Appendix 4 at 6). Neither the facts nor the legal argument had ever been presented to the state habeas court or to the district court. The district court found the motion for reconsideration was untimely and that, even if it were not untimely, Petitioner had failed to present argument showing that the court should reconsider its previous decision. (Respondent's Appendix 5 at 4-7).

On appeal to the Eleventh Circuit, Petitioner presented the court with his new argument in support of cause to overcome the default of his claim. The court found that the only argument in support of cause presented to the state habeas court was that the claim was not reasonably available and that the two sentences Petitioner presented to the state habeas court were insufficient under state law to establish cause. The court implicitly found Petitioner's new argument to show cause was unexhausted when it held that no other arguments in support of cause were presented to the state habeas court and claims not presented in support of cause are themselves procedurally defaulted. The court also found the district court's denial of Petitioner motion for reconsideration in which he presented his new argument for cause for the first time to

any court was not an abuse of discretion.

Petitioner's brief to this Court on the issue of cause all but ignores the double layer of default that exists to bar the consideration of the merits of this claim in federal habeas review. Instead, Petitioner argues that the case of Todd instructed the state habeas court to find he had overcome cause. However, in order for the state habeas court to apply this precedent, facts and legal arguments had to be presented to the state court. Petitioner attempts to circumvent this by implying that the state habeas court had duty to seek out law and facts and formulate Petitioner's argument for him. Obviously, Petitioner bears this burden not the court. Petitioner also implies that state habeas court was *required* to apply the holding Petitioner suggests Todd stands for with regard to cause without him making the argument. Todd sets out several reasons for cause, one being ineffective assistance of counsel, but the court never stated a court must find cause if there is anything in the record showing ineffectiveness where the petitioner has not asserted that as cause.

Looking to the requirements of this Court's Rule 20.1, Petitioner has failed demonstrate that "exceptional circumstance warrant[] the exercise of the Court's discretionary powers." Ultimately, Petitioner's argument to show cause is based entirely upon state law. And, Petitioner's reliance upon Pena-Rodriguez is not an "exceptional circumstance" as no matter this Court's decision in that case, it would not provide any guidance on whether cause exists to overcome the procedural default of

this claim. Most importantly, as this writ falls under 28 U.S.C. § 2254(b), Petitioner must show that his claims have been properly exhausted in state court. Petitioner's argument in support of cause were not presented to the state habeas court and thus, have not been properly exhausted, and should be precluded from review by this Court, even in an original writ.

In the end, this petition represents an abuse of the writ as the claims were litigated in a prior federal habeas proceeding, including being raised in a petition for certiorari recently denied by this Court, and there are no exceptional circumstances warranting the grant of an original writ. Thus, the provisions of 28 U.S.C. § 2244 prevent the granting of this petition for writ of habeas corpus.

## I. PROCEDURAL HISTORY

Petitioner has waited until 5:00 p.m. on Friday evening, four days before his scheduled execution, to petition this Court for an original writ. It could have been filed at any time in the last fourteen years. It is an abuse of the writ.

### A. Trial Court Proceedings

Petitioner, Kenneth Earl Fults, pled guilty to malice murder, felony murder, burglary, kidnapping with bodily injury, and possession of a firearm during the commission of a crime on May 19, 1997. On May 22, 1997, Petitioner was sentenced to death for malice murder by a jury.

Following a hearing, Petitioner's motion for new trial was denied on March 17,

2000. The Georgia Supreme Court affirmed Petitioner's convictions and sentence of death on June 11, 2001. Fults v. State, 274 Ga. 82, 548 S.E.2d 315 (2001). On March 4, 2002, this Court denied Petitioner's petition for writ of certiorari. Fults v. Georgia, 535 U.S. 908 (2002), *rehearing denied,* Fults v. Georgia, 535 U.S. 1043 (2002).

**B. State Habeas Proceedings**

Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia on November 26, 2002. Petitioner amended his state habeas petition almost three years later and, as correctly found by the Eleventh Circuit, asserted a juror misconduct claim:

> When [Petitioner] filed his amended state habeas corpus petition in April of 2005 — almost eight years after the jury sentenced him to death — Mr. Fults generally alleged, as part of Claim XVIII, that the "improper biases of jurors . . . infected their deliberations," causing them to "improperly prejudg[e]" his case. Record Excerpts, Vol. 1, Tab 7-46 at 67. Mr. Fults did not discuss or mention any specific juror in Claim XVIII.
>
> Mr. Fults did, however, incorporate, and attach to his amended state habeas petition, a number of affidavits. One of these belonged to Thomas Buffington, who served on Mr. Fults' sentencing jury. Handwritten, and signed and notarized just two days before Mr. Fults filed his amended state habeas petition, Mr. Buffington's affidavit provided the following sworn testimony:
>
> 2. I served as a juror in the capital sentencing trial of Kenneth Fults in May 1997.
>
> 3. I have been on a jury before, but this was my first capital trial.
>
> 4. I don't know if he ever killed anybody, but that nigger[1] got just what

[1] Respondent obviously does not dispute that this is a highly offensive racial slur.

should have happened.

5. Once he pled guilty, I knew I would vote for the death penalty because that's what that nigger deserved.

Fults v. GDCP Warden, 764 F.3d 1311, 1315 (11th Cir. 2014). In response to Petitioner's amended petition, Respondent asserted in his answer that the juror misconduct claim was procedurally defaulted.

Subsequently, during Petitioner's state habeas evidentiary hearing there was no evidence presented regarding this claim or to show cause and prejudice to overcome the default of this claim. In Petitioner's post-hearing brief to the state habeas court, his entire argument to prove cause and prejudice to overcome the default of this claim was captured in two sentences. (Respondent's Appendix 1 at 61). One sentence alleged the claim was not reasonably available and the other asserted that, if that argument was not sufficient, trial and appellate counsel did not present this claim at trial or on appeal, thus implying ineffectiveness. Petitioner provided no other argument in the portion of his brief addressing this claim to show cause and prejudice. Petitioner's reply post-hearing brief made no mention of this claim. Given Petitioner's total failure to support his argument of cause and prejudice, the state habeas court summarily found Petitioner had failed to show cause and prejudice to overcome the default of this claim in its order denying his petition for habeas corpus relief on December 28, 2007. (Petitioner's Appendix 4 at 12-13).

Petitioner filed his application for a certificate of probable cause to appeal from the denial of habeas corpus relief in the Georgia Supreme Court on February 27, 2008. Petitioner did not raise this claim in his CPC application to the Georgia Supreme Court. The Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal on April 28, 2009. Petitioner then filed a petition for writ of certiorari with this Court, which was denied October 5, 2009. Fults v. Upton, 558 U.S. 906 (2009). Petitioner did not raise this claim in his petition for writ of certiorari.

**C. Federal Habeas Proceedings**

Petitioner filed his federal petition for writ of habeas corpus on July 31, 2009. The district court entered a scheduling order instructing Respondent to file a motion addressing Petitioner's procedurally defaulted claims and for Petitioner to respond to that motion. Respondent filed his brief and asserted his procedural default as to Petitioner's juror misconduct claim. Petitioner failed to specifically address this claim in his brief in response and only generally asserted ineffective assistance of trial and appellate counsel as cause to overcome the default of his procedurally barred claims. (Respondent's Appendix 2 at 16-27). Subsequently, on August 2, 2010, the district court found the claim was procedurally defaulted and that Petitioner had failed to show cause and prejudice to overcome that default. (Respondent's Appendix 3 at 12-20).

Ninety-five days later, on November 5, 2010, Petitioner filed a motion for reconsideration of the district court's August 2, 2010 order. (Respondent's Appendix

4). Petitioner finally deemed this issue worthy of briefing and presented a new argument in support of cause that had neither been presented to the state habeas court nor to the district court. This new argument was that trial and appellate counsel had no reason to raise a claim of juror misconduct as Mr. Buffington had answered in the negative to questions during voir dire used to determine racial bias. (Respondent's Appendix 4 at 6). The district court rejected this argument as Petitioner did not raise this argument in his initial brief to the court and gave no explanation as to why he did not do so. (Respondent's Appendix 5 at 4-7). As this was a motion for reconsideration, this district court found Petitioner had not met the requirements of Fed R. Civ. P. 59(e) or 60(b). (Respondent's Appendix 5 at 7).

Petitioner argued his claim again in his final merits brief to the district court. On March14, 2012, the federal habeas court denied relief, and the court declined to reconsider its previous decision finding the claim to be procedurally defaulted as Petitioner had "not shown any newly discovered evidence, an intervening change in controlling law, or a clearly erroneous decision by this Court." The district court granted Petitioner a certificate of appealability on this issue.

The Eleventh Circuit Court of Appeals denied relief on August 26, 2014. Fults v. GDCP Warden, 764 F.3d 1311. The court found Petitioner had failed to show cause to overcome the default of his claim. Id. at 1317. The court pointed out that Petitioner's argument in support of cause to the state habeas court consisted only of his

allegation that the facts of the claim were not available to trial or appellate counsel. Id. The court implicitly found Petitioner's new argument for cause was unexhausted. Id. at 1317-1318. The court also found that the district court's denial of Petitioner's motion for reconsideration, filed after Petitioner had failed to brief his claim to the district court, was not an abuse of discretion. Id. at 1318.

On April 13, 2015, Petitioner filed a petition for writ of certiorari review with this Court. In this petition, he made nearly identical arguments as those in his petition for writ of habeas corpus to this Court. This Court denied his petition on October 5, 2015. Fults v. Chatman, 136 S. Ct. 56 (U.S. 2015). Petitioner did not request reconsideration.

On March 23, 2016, the state of Georgia issued an execution warrant for Petitioner setting his execution for April 12, 2016 at 7:00 p.m.

## II. STATEMENT OF THE FACTS OF THE CRIME

On direct appeal, the Georgia Supreme Court summarized the facts as follows:

> The evidence adduced at Fults' sentencing trial showed that he carried out a week-long crime spree which was centered, at least in part, upon his desire to murder a man who was engaged in a relationship with his former girlfriend. Fults first committed two burglaries, obtaining several handguns. After a failed attempt at murdering his former girlfriend's new boyfriend with one of the stolen handguns, Fults then burglarized the home of his next-door neighbors. After the male neighbor left for work, Fults forced his way through the front door wearing gloves and a hat pulled down over his face. Fults confronted the female occupant of the home, Cathy Bounds, brandishing a .22 caliber handgun he had stolen during one of the burglaries. Ms. Bounds begged for her life and offered

> Fults the rings on her fingers. Fults turned Ms. Bounds around toward the bedroom, either taped or forced her to tape her eyes closed by wrapping over six feet of electrical tape around her head, forced her into the bedroom, placed her face-down on her bed, placed a pillow over her head, and shot her five times in the back of the head.
>
> A search of Fults' trailer home revealed a boastful letter he had written in gang code in which he described the murder with some alterations of detail. Upon being confronted with this letter by a law enforcement officer, Fults confessed to killing Ms. Bounds but maintained that he had shot her by accident while in a dream-like state. The murder weapon was recovered from under Fults' trailer home, and .22 caliber shell casings shown to have been fired by the murder weapon as well as items from the earlier burglaries were found behind Fults' trailer home.
>
> Viewed in the light most favorable to the State, we find that the evidence adduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that statutory aggravating circumstances existed as to both the murder and kidnapping with bodily injury charges. Jackson v. Virginia, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979); O.C.G.A. § 17-10-30 (b) (2) and (7).

Fults, supra, at 83.

## III. REASONS FOR SUMMARILY DENYING THE WRIT

### A. Petitioner Has Failed To Justify The Grant Of Relief As He Has Failed To Demonstrate That "Adequate Relief Cannot Be Obtained In Any Other Form Or From Any Other Court."

As this Court stated in Felker v. Turpin, 518 U.S. 651, 665 (1996), "To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted." See also In re Blodgett, 502 U.S. 236, 240 (1992)

("To justify the granting of any writ under that provision, it must be shown ... that adequate relief cannot be obtained in any other form or from any other court."). Petitioner has alleged, but failed to demonstrate, that he has made the requisite showing under Rule 20.1.

The extensive procedural history of Petitioner's case establishes that Petitioner's juror bias claim has been reviewed by both state and federal courts. Significantly, the fact that Petitioner is seeking review from this Court of both lower federal court decisions and the lower state court decision shows that he has availed himself of repeated opportunities for review of his claims. The fact that Petitioner did not receive the relief requested in the state and federal courts is not equivalent to a showing that he did not have relief "available" to him in "other forms" or "from other courts." Original writs are not issued to correct errors in lower court's ruling and do not reach cases in which Petitioner simply disagrees with the lower court's determination. Parr v. United States, 351 U.S. 513, 520 (1956). Petitioner simply failed to establish that the relief which he sought should be granted.

Additionally, Georgia's Board of Pardons and Paroles has yet to determine Petitioner's request for clemency. Thus, he has not shown that he may not receive relief in another "form." Accordingly, this Court should summarily deny this extraordinary writ.

## B. Petitioner Has Failed To Justify The Grant Of Relief As He Has Failed To Demonstrate Extraordinary Circumstances.

Petitioner alleges this Court's grant of certiorari review in the case of Pena-Rodriguez is the extraordinary circumstance warranting this Court's original habeas jurisdiction. But, as conceded by Petitioner, the challenge to Colorado's evidentiary rule prohibiting the impeachment of a jury's verdict based upon evidence of juror racial bias is before this Court following direct review. There is no procedural bar to Pena-Rodriguez's claim. A procedurally defaulted claim is "barred" from federal habeas review absent a showing of cause. Coleman v. Thompson, 501 U.S. 722, 750 (1991). The federal courts have already found Petitioner failed to prove cause to overcome the default of his claim, and thus Petitioner's "exceptional circumstance" is in reality his allegation that this determination was made in error. Plainly, that is not an exceptional circumstance.

Specifically, Petitioner alleges "...the Eleventh Circuit's analysis of the alleged procedural default of his juror bias claims did not rise above the error-correction threshold governing certiorari review. That does not mean, however, that the Eleventh Circuit's ruling was not erroneous. Mr. Fults asserts that it was... ." (Petition, p. 24). But Petitioner fails to show that this Court's "extraordinary writ" jurisdiction should be used for "error-correction" either. Otherwise, every time a petition for certiorari was denied which contained a claim that the lower court committed error in determining a

claim, a petitioner could file an extraordinary writ. The fact that only one extraordinary writ has been granted in the past fifty years (see In re Davis, 557 U.S. 952, 954 (2009)) and the very language of Rule 20.4(a), "This writ is rarely granted," points to the fact that the standard for having an extraordinary writ granted is much higher and stringent than that for having a petition for certiorari review granted. Petitioner's argument is essentially the opposite and would turn this Court's long-standing precedent and rules that an extraordinary writ is only granted in rare circumstances on its head.

**1. This Court's Grant of Certiorari Review in Pena-Rodriquez Is Not an Exceptional Circumstance.**

As an initial matter, this Court's grant of certiorari in Pena-Rodriquez is not an "extraordinary circumstance" warranting the grant of this Court's extraordinary writ. As stated above, the juror bias claim in Pena-Rodriquez comes to this Court following direct review and is not procedurally barred. Petitioner attempts to circumvent this by calling to this Court's attention Respondent's arguments in state habeas, federal habeas and to this Court that Petitioner's juror affidavit in support of this claim is prohibited from consideration under Georgia's no-impeachment rule. These arguments were asserted in response to Petitioner's reliance upon this evidence. Respondent's arguments were in support of either Petitioner's failure to show prejudice or, in the alternative, merit to his claim. These arguments do not concern cause. The state

habeas court found Petitioner did not show cause. The Eleventh Circuit found Petitioner did not prove cause and *did not address prejudice or, in the alternative, the merits* of Petitioner's claim. Indeed, the Eleventh Circuit did not mention Georgia's no-impeachment rule. As cause and prejudice are separate issues, not supported by the same arguments or law, Petitioner has failed to show how Respondent's no-impeachment arguments had any influence, or now has any influence, on the cause determination.

No matter what decision this Court comes to in Pena-Rodriquez, it will not speak to the bar that precludes review of Petitioner's claim.

**2. Petitioner's Argument in Support of Cause is Unexhausted.**

Petitioner's argument in support of cause is unexhausted and should be precluded from this Court's review. This Court's Rule 20.4(a) states, "If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b)." In Felker, supra, at 662, this Court stated, "Our authority to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to the judgment of a State court.' § 2254(a)." This Court goes on to state that the new requirements under § 2254 "inform our authority to grant such relief" pursuant to an original writ. Id. Petitioner should not be allowed to use

the extraordinary writ to end run around his failure to properly plead and prove cause in state court. Thus, this Court could reasonably determine that Petitioner's argument in support of cause, which was clearly not pled and proven in state court is unexhausted under § 2254 and not properly before this Court for review.

As argued in Respondent's brief in opposition to Petitioner's writ for certiorari review, Petitioner's argument to the state habeas court as cause to overcome the procedural default was that the claim was not reasonably available for counsel to raise or counsel was ineffective for not raising the claim. In federal court, Petitioner abandoned these arguments and alleged there was no evidence suggesting a claim existed to trial and appellate counsel, based upon Mr. Buffington's voir dire testimony, and state law allegedly held this was cause to overcome the default. As stated above in the *Statement of the Case*, the following is the ***entirety*** of Petitioner's argument to the state habeas court to show cause and prejudice to overcome the procedural default of his juror misconduct claim:

> The factual basis for this claim was not reasonably available to either Mr. Mostiler or Mr. Sturdivant; the claim is thus not procedurally defaulted. Even if that were not an appropriate basis to overcome procedural default, neither Mr. Mostiler nor Mr. Sturdivant investigated this claim and did not present this claim in either the motion for new trial or on direct appeal. The writ should issue.

(Respondent's Appendix 1 at 61). In federal court, Petitioner failed to specifically brief this claim in his procedural default brief and, in his default brief, only generally

asserted ineffective assistance of trial and appellate counsel as cause to overcome the default of all of his procedurally defaulted claims. (Respondent's Appendix 2 at 16-27). Consequently, the district court found the claim was procedurally defaulted. (Respondent's Appendix 3 at 12-20).

Then, some three months later, Petitioner asked the district court to reconsider its ruling. (Respondent's Appendix 4). Petitioner raised a new argument in support of cause to overcome the default that he had not presented in state court or in his brief addressing procedurally defaulted claims to the district court. Petitioner stated that Mr. Buffington answered in the negative in voir dire that he did not have "racial prejudice resting on his mind" and the race of the defendant and the victim did not matter to him. (Respondent's Appendix 4 at 6). These facts were not presented to the state habeas court. See Fults, 764 F.3d at 1315, fn.1. Petitioner went on to argue that, due to Mr. Buffington's statements in voir dire, neither trial nor appellate counsel was alerted to a possible juror misconduct claim and, pursuant to Petitioner's interpretation of state law under Turpin v. Todd, this served as cause to overcome the procedural default. This legal argument also was not presented to the state habeas court or in Petitioner's procedural default brief to the district court. Respondent filed a motion in opposition and the district court denied Petitioner's motion for reconsideration.

Petitioner states in his *Statement of the Case*, that he cited to Todd in his state habeas post-hearing brief. Respondent does not dispute this. However, Petitioner did

not make the argument to the state court that he asserted for the first time in his federal habeas proceeding, and now for the second time to this Court, alleging his interpretation of Todd proved he had shown cause to overcome the procedural default of his claim.

On appeal, the Eleventh Circuit analyzed the procedural posture of Petitioner's cause arguments. The court pointed out that the argument made by Petitioner in his state habeas proceeding was "a general allegation that the basis for his claim was not reasonably available to his counsel." Id. at 1317. The court went on to find that because Petitioner did not provide any facts or argument in support of this allegation "it was insufficient to generally allege that the evidence was not reasonably available. See, e.g., Timberlake, 271 S.E.2d at 796; Johnson, 27 S.E.2d at 754; Mills, 17 S.E.2d at 723." Id.

The Eleventh Circuit then stated that Petitioner "did not assert [] any other basis for cause" in his state habeas proceedings and noted:

> We held in Henderson v. Campbell, 353 F.3d 880, 895-99 (11th Cir. 2003), that a cause and prejudice argument which is not presented in state court is itself procedurally defaulted and cannot be raised for the first time on federal habeas (unless, of course, there is cause and prejudice for that particular default as well).

Id. at 1317-1318. Thus, the court implicitly found Petitioner's new argument in support of cause presented in his motion for reconsideration to the district court was

unexhausted.[2] Petitioner fails to explain to this Court, as he failed to explain to the federal courts, how his argument in support of cause is not unexhausted.

This Court held in Edwards v. Carpenter, 529 U.S. 446, 450-454 (2000), that Carpenter's claim of ineffective assistance of counsel as cause to overcome the procedural default of a claim, could itself be procedurally defaulted if not fairly presented to the state courts. The case cited above by the Eleventh Circuit, Henderson v. Campbell, 353 F.3d 880 (11th Cir. 2003), *cert. denied,* Henderson v. Campbell, 543 U.S. 811 (2004), applied this Court's decisions in Edwards and Murray v. Carrier, and held that arguments for cause, not just ineffective claims, not presented to state courts were themselves subject to the rules of exhaustion. Reason for this was explained by this Court in Murray nearly thirty years ago:

> But if a petitioner could raise his [] claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available. The principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal district court "to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," Darr v. Burford, 339 U.S. 200, 204 (1950), and that holds true whether a[] [] claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief.

Murray, 477 U.S. at 489.

Furthermore, in Anderson v. Harless, 459 U.S. 4 (1982) (per curiam), this Court

[2] Respondent raised this argument in his brief to the Eleventh Circuit.

held:

> ...28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim. It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made.

459 U.S. at 6 (citing Picard v. Connor, 404 U.S. 270 (1971) (citations omitted)). Clearly, Petitioner did not give the state habeas court the opportunity to determine this argument in support of cause. This Court's extraordinary writ should not be used to determine cause based upon an argument that was available but not presented in state court. To do so would sharply undermine the doctrine of comity that lies between the state and federal courts.

### 3. The Procedural Default Rule of Law Is Not an Extraordinary Circumstance.

Petitioner argues that procedural default rule "must yield" to his claim of a Sixth Amendment violation. (Petition, p. 27).[3] In support of this argument, Petitioner does not cite to any precedent from this Court but instead relies upon an argument made by amici curie law professors that finality, one of the underlying purposes of procedural bars, is not an important enough factor to bar the review of a constitutional claim. And building upon that argument, Petitioner alleges Georgia's procedural default rule has a "mechanistic application." (Petition, p. 27). But there is nothing mechanistic in the

[3] Notably, this argument was presented for the first time in his latest petition for writ of certiorari review.

determination of whether a petitioner has made the necessary showing of cause and prejudice or a miscarriage of justice to overcome the default.

A properly pled cause argument is a fact specific inquiry. Petitioner bears the burden of showing when, where, why and who caused the failure to bring a claim during trial or the direct review proceedings. If a petitioner fails to argue, much less make, this showing, then a court is within its rights to summarily find cause. But this does not make the rule or the finding mechanistic, it merely makes it a ruling like every other ruling in which a moving party alleged a violation and failed to support it with evidence and argument. A court is not an advocate, it has no duty to hunt and find facts and evidence to support a party's claim.

Moreover, as argued by Respondent in his brief in opposition to Petitioner's request for certiorari review, Petitioner's argument that a claim of constitutional violation trumps the rule of procedural default is contrary to the long-standing precedent of this Court. As stated by this Court in Murray v. Carrier, "*Wainwright v. Sykes* held that a federal habeas petitioner who has failed to comply with a State's contemporaneous-objection rule at **trial must show cause for the procedural default and prejudice attributable thereto in order to obtain review** of his defaulted constitutional claim." 477 U.S. 478, 485 (1986) (emphasis added). This Court went on in Murray to soundly reject the notion that cause can be circumvented, and federal habeas review must be had, where there is an allegation of a violation of fundamental

constitutional rights. Id. at 492-97.

**4. Petitioner's Argument in Support of Cause Is Based Upon State Law and Does Not Present an Extraordinary Circumstance to Grant His Request for Federal Habeas Review by this Court.**

Petitioner alleges the state habeas court and the Eleventh Circuit failed to properly apply state law in finding he failed to show cause to overcome the procedural default of his claim. Assuming, *arguendo*, that this Court would grant an extraordinary writ to correct an alleged error by the state and federal courts, the error alleged is one of pure state law. Petitioner alleges the Georgia Supreme Court's decision in Todd required a finding by the state habeas court that cause was shown where a juror provides testimony in voir dire that race will not be a factor in his decision. Todd does not speak to these specific facts and, again, Petitioner did not make this argument to the state habeas court. Petitioner fails to provide any precedent that shows the state habeas court should have made a finding not advanced by Petitioner. Petitioner also alleges the federal habeas court's finding that Petitioner failed to prove cause was an erroneous application of state law. More importantly, Petitioner fails to explain how this argument based purely upon state law creates an "extraordinary circumstance" warranting the invocation of this court's federal habeas jurisdiction.

As previously argued in Respondent's brief in opposition to Petitioner's request for certiorari review, in Todd, there was evidence that "improper communications

between the bailiff and the jury on the subject of Todd's parole eligibility may have occurred." Todd, 268 Ga. at 821. The issue was procedurally defaulted and the court noted that it had not yet defined cause and prejudice for procedurally defaulted claims and this case "necessitate[d] that [they] do so." Id. at 824-825. The court looked to federal law, and this Court's precedent, and found cause could be shown where: (1) "objective factors external to the defense," such as government interference or unavailability of the factual basis existed, and; (2) ineffective assistance of counsel. Id. at 825-26. The court also held that State concealment could be "sufficient" cause but the court was not "willing to conclude, that the State's concealment of the factual basis of a claim [would] *always* constitute cause." Id. at 827. The court then examined Todd's claim and found the "bailiff improperly concealed the factual basis of the claim from Todd at trial and on appeal." Id. at 828.

The Georgia Supreme Court then rejected the State's argument that trial counsel should have interviewed the jurors after trial because there was no evidence alerting counsel to the misconduct. Petitioner alleges this paragraph stands for the premise that cause was automatically shown in his case where the juror did not answer questions in voir dire revealing him to be racist. But Petitioner's conclusion ignores several facts. In Todd, it was a State official that kept information from counsel, not a juror's subjective view of his own bias. Moreover, race was clearly an issue in this case as shown by the voir dire questions propounded to Mr. Buffington. Juror misconduct

claims are routinely raised and to say that Georgia law holds cause is essentially presumed when a juror does not answer questions in voir dire suggesting him to be a racist is a far stretch for Todd.

Petitioner alleges that that trial counsel had no "'freestanding' obligation" to interview the jurors after trial because the law assumes jurors follow the law and Mr. Buffington gave answers in voir dire that race would not influence his decision. (Petition, p. 31). But Petitioner's argument played out to its logical conclusion would mean that trial counsel could not or could choose not to interview jurors directly following a trial but it would be perfectly alright for state habeas counsel to do so some eight years later. More so, it misses one salient point: state habeas counsel had no indication that Mr. Buffington was biased but yet they chose to investigate him anyway. The reason why is perfectly clear, as stated above, juror misconduct claims are routinely raised. Moreover, Petitioner's argument is directly at odds with this Court's decision in Murray, discussing how cause is determined to overcome default:

> "Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as a cause for a procedural default."

Murray, 477 U.S. at 486 (quoting Engle v. Isaac, 456 U.S. 107, 133-134 (1982)). A juror misconduct claim is not difficult to perceive and law holding that cause can be shown in the manner argued by Petitioner is in clear contravention of Murray and

Engle.

Perhaps the most prominent flaw in Petitioner's argument is the lack of any Georgia precedent cited by Petitioner applying Todd in the manner suggested by Petitioner. Consequently, Petitioner has failed to show that there was a holding in state law so obvious, so consistently applied, that the state habeas court was bound to find Petitioner had established cause without Petitioner even having to make the argument.

Petitioner also alleges the state habeas court's finding that he failed to show cause was "not adequate" because it did not apply Todd in the manner he alleges it should be applied. (Petition, p. 35). As found by the Eleventh Circuit, "Because Mr. Fults does not deny that the state's procedural bar was adequate and independent, we do not address those matters. See generally Cone v. Bell, 556 U.S. 449, 465-66, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009)." Fults, supra, at 1317. Relying upon this Court's decision in Ford v. Georgia, 498 U.S. 411 (1991), he alleges he was deprived of an "opportunity" to bring his claim because he was not on notice that Mr. Buffington harbored racial bias. But Ford is entirely distinguishable. Ford was denied any opportunity to litigate his claim that the State had used its strikes in a discriminatory manner following this Court's decision in Batson and its remand of Ford's case to the Georgia Supreme Court to determine this claim. Petitioner was not denied the opportunity to litigate his claim either at the motion for new trial or during his state habeas proceedings.

Petitioner also alleges the Eleventh Circuit failed to properly apply state law in determining that he was not diligent in pursuing his juror misconduct claim prior to his state habeas proceeding. In doing so, Petitioner alleges the Eleventh Circuit failed to address his argument that cause was shown by Mr. Buffington's alleged concealment of his racial bias during voir dire and the application of Todd. However, in the portion of the Eleventh Circuit's order addressing Petitioner's diligence in pursuing this claim, see Fults, 764 F.3d at 1317, the court examined the argument Petitioner presented to the state habeas court, not the unexhausted argument presented in federal habeas court. Contrary to Petitioner's argument, the court was not creating a new standard under state law by which to judge cause but was instead looking at the applicable state law to determine the cause argument made by Petitioner in state habeas.

As stated above, Petitioner only alleged as cause to overcome the default the unavailability of the evidence and/or trial and appellate counsel's ineffectiveness. Again, Petitioner did not make any arguments in support of these allegations in state habeas court. Therefore, the Eleventh Circuit relied upon state law that was applicable to the argument Petitioner made, i.e., the diligence of counsel raising this issue as it was not raised until eight years after the trial. As shown above, Petitioner's argument in support of cause presented to the Eleventh Circuit was untimely and unexhausted, therefore, the court was under no duty to examine it. Moreover, as the court found the arguments in support of cause made by Petitioner were themselves insufficient under

state law, see Fults, 764 F.3d at 1317, the court's recitation of state law on diligence was not determinative to the decision.

Petitioner has failed to show how the state habeas court's failure to apply his interpretation of Todd presents an issue involving federal law. Although the court in Todd stated that it was looking at federal law to define cause and prejudice, the ultimate finding of no cause, as advanced by Petitioner, has no roots in federal law. There is no precedent from this Court holding that where a juror does not admit to racial bias in voir dire, this establishes cause to overcome a procedural default.

As stated in the beginning, an extraordinary writ is not the proper vehicle to determine whether Petitioner has shown cause to overcome the procedural default of a juror bias claim. Especially in a case where Petitioner had the opportunity to do so in his state habeas proceeding and the only argument presented was two sentences which bear no resemblance to the argument he presents now to this Court. Petitioner's case comes nowhere near showing it is the type of "rare" case that warrants this Court's extraordinary writ jurisdiction.

## CONCLUSION

For the above and foregoing reasons the original petition for writ of habeas corpus filed in this case should be summarily denied as well as the motion for stay.

Respectfully submitted,

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## COMPLIANCE WITH WORD LIMITATIONS

Respondent/Appellee certifies that the instant brief is typed in 14 point Times New Roman, and contains 7,776 words as determined by the word-processing system used to prepare the brief.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Pleading, prior to filing the same, by emailing, properly addressed upon:

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This 11th day of April, 2016.

s/Sabrina D. Graham
SABRINA D. GRAHAM 305755
Senior Assistant Attorney General

# APPENDIX 1

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

DUPLICATE

KENNETH EARL FULTS,

Petitioner,

v.

HILTON HALL, Warden, Georgia Diagnostic and Classification Prison,

Respondent.

Habeas Corpus

No.: 2002-V-905

# PETITIONER'S POST-HEARING BRIEF AND MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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No.: 2002-V-905

PETITIONER'S POST-HEARING BRIEF IN SUPPORT OF PETITIONER'S FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Petitioner Kenneth Earl Fults, by and through counsel, and pursuant to O.C.G.A. § 9-14-41, *et seq.*, respectfully submits his Post-Hearing Brief in Support of Petitioner's First Amended Petition for Writ of Habeas Corpus. Mr. Fults is presently under sentence of death in the State of Georgia. He is in the custody of the Georgia Department of Corrections at the Georgia Diagnostic and Classification Center and Prison in Jackson, Butts County, Georgia, under the control of Respondent Hilton Hall. For the reasons demonstrated below as well as for the reasons set forth in Mr. Fults's First Amended Petition and arguments previously presented to the Court, Mr. Fults is entitled to the writ of habeas corpus.

## I. INTRODUCTION

During his trial, post-trial motions, and appeal, Mr. Fults has always been represented by attorneys who, although bound to follow the caseload limitations imposed by the Georgia Indigent Defense Council, never met a criminal or civil matter they refused to accept. During the year of his trial, Mr. Fults's lawyer, Johnny Mostiler, had more than twice the felony cases he was permitted in addition to his other death penalty matters and his civil cases. When

Mr. Mostiler died and Mr. Fults was provided with new counsel by Spalding County, his new lawyer, Harold A. Sturdivant, was as overextended as Mr. Mostiler since his firm agreed to take on all of Mr. Mostiler's felony and death penalty cases in addition to the misdemeanor and juvenile matters they were already handling for Spalding County. Under this scenario, it is impossible that any attorney could provide effective assistance of counsel at trial, after trial, or on appeal.

The failure of the State of Georgia to meet its constitutionally imposed obligations is clear from the performance of Mr. Mostiler and Mr. Sturdivant. Although Mr. Mostiler had been informed before trial that the state's competency expert had estimated that Mr. Fults's I.Q. was within the range of the mildly mentally retarded, Mr. Mostiler did nothing to prepare this absolute defense to capital murder: he did not retain an independent expert to evaluate Mr. Fults, he did not collect the requisite medical, educational, and institutional records, and he did not assemble the necessary anecdotal evidence from family members, friends, and teachers. In addition to not collecting this information for purposes of demonstrating mental retardation, Mr. Mostiler did not collect the type of information necessary to prepare a thorough mitigation presentation which would have demonstrated that Mr. Fults's life was riddled with alcoholic and crack-addicted caretakers, violence including routine beatings with extension cords, abandonment by his mother and other family members, incredibly poor performance in school and work, and socially awkward behavior including sucking his thumb and carrying a pillow well into his teens. Mr. Mostiler's abject failure to provide effective assistance did not end there: Mr. Mostiler slept through the sentencing phase of Mr. Fults's trial and spent virtually no time preparing any of the handful of witnesses he presented in mitigation. Mr. Sturdivant continued in Mr. Mostiler's footsteps. Not only did he have a caseload as inappropriate as Mr. Mostiler's, he did not raise Mr. Mostiler's failure to prepare a mental retardation defense or to present a proper mitigation case in either the motion for new trial or on direct appeal. Mr. Sturdivant had

never handled the appeal of a death sentence before, and during his representation of Mr. Fults on appeal, Mr. Sturdivant did not talk to any of Mr. Fults's family members about Mr. Fults's background or what happened at trial and did not even bother to ask Mr. Fults any personal questions. Finally, Mr. Fults was denied a fair trial because one of his jurors believed he should be executed because he was a "nigger." These claims entitle Mr. Fults to the writ of habeas corpus.

## II. FACTUAL BACKGROUND

### A. Mr. Fults was represented at trial by Johnny Mostiler who spent little time on his case due to an exceptionally large caseload.

The State of Georgia appointed Johnny Mostiler to serve as Mr. Fults's attorney. Mr. Mostiler was the contract public defender for Spalding County[1] and "normally . . . would handle half . . . or more" of the felonies covered by the contract with Spalding County. (Respondent's Ex. 2 at p. 31; Petitioner's Ex. 2 at ¶ 4, Ex. 60 [Order Establishing an Office of Public Defender dated August 8, 1996].) *See, e.g., Goodman v. State*, 237 Ga. App. 795, 516 S.E.2d 824 (1999); *Mangham v. State*, 234 Ga. App. 567, 507 S.E.2d 806 (1998); *Akins v. State*, 269 Ga. 838, 504 S.E.2d 196 (1998). His law firm received an annual budget to cover the costs of the representation from Spalding County and the Georgia Indigent Defense Council.[2] (Petitioner's Ex. 2 at ¶ 4.)

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1. Apparently, the judges of the Superior Court in Spalding County very much liked Mr. Mostiler as the public defender because he "work[ed] closely with the office of the District Attorney to resolve many of the criminal matters prior to actual trial." (Petitioner's Ex. 60 [Letter from Judge Paschal A. English, Jr. dated June 24, 1994].) The Judges were also impressed with the "sheer volume of matters which Mr. Mostiller [sic.] [was] able to conclude prior to trial. (Id.) The Sheriff's Department of Spalding County also liked Mr. Mostiler's approach of not investing time into defending the indigent. (Id. [Letter from Richard H. Cantrell dated June 18, 1992].) These statements were consistent with Mr. Mostiler's desire to plea out cases because "it was the wishes of the courts" and with his policy to let the district attorney review all of his file materials in his cases. (Respondent's Ex. 1 at pp. 7, 57.) It would appear that Mr. Mostiler preferred to function more as an agent of the state rather than as a zealous advocate for his clients.

2. As part of Spalding County's application for funds from the Indigent Defense Council, "[t]he County [agreed] to comply with the Georgia Indigent Defense Act and any amendments thereto (O.C.G.A. 17-12-30 et seq.) and the Guidelines of the Georgia Indigent Defense Council for the Operation of Local

The workload was immense; Mr. Mostiler reported to the Spalding County Commission on July 23, 1996 that he and his associate had handled 1,721 new felony matters in the preceding two-year period. (Petitioner's Ex. 60 [Proposal for the Provision of Indigent Defense for Spalding County dated July 23, 1996 at p. 4].) For the next two-year period, during which Mr. Fults's trial occurred, his office handled 1,861 new felony matters. (Id. [Proposal for Indigent Defense dated May 3, 2000 at p. 3; Proposal for the Provision of Indigent Defense for Spalding County dated July 14, 1998].) This did not include cases which had been initiated in prior periods which had yet to be closed.

Mr. Mostiler had only one other attorney to assist him with the felony matters, Rosamund Braunrot. (Id. [Proposal for the Provision of Indigent Defense for Spalding County dated July 23, 1996 at p. 6; Proposal for the Provision of Indigent Defense for Spalding County dated July 14, 1998].) Even assuming the cases were evenly divided,[3] Mr. Mostiler handled at least 415 felony cases during the year of Mr. Fults's trial.[4] In addition, Mr. Mostiler handled 11 appeals in 1996 and six appeals in 1997. (Id. [FY 1998 Application for Funds at p. 1; FY 1999 Application for Funds at p. 1].) Mr. Mostiler imposed no limitations on the numbers of cases he would handle. (Id. [FY 1998 Application for Funds at p. 3; FY 1999 Application for Funds at p. 3].)

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Indigent Defense Programs which [had] been or [would] be adopted and approved by the Supreme Court of Georgia." (Petitioner's Ex. 60 [FY 1996 Application for Funds: Spalding County; FY 1997 Application for Funds: Spalding County].)

3. Mr. Mostiler "normally . . . would handle half . . . or more" of the felonies covered by the contract with Spalding County. (Respondent's Ex. 2 at p. 31.)

4. Mr. Mostiler reported to the Georgia Indigent Defense Council that the average caseload for an attorney working under the contract for 1996 was 368 cases and 426 cases in 1997. (Petitioner's Ex. 60 [FY 1998 Application for Funds at p. 3; FY 1999 Application for Funds at p. 3].) These numbers are not completely reflective of Mr. Mostiler's personal caseload since they included the misdemeanors and juvenile matters which Mr. Mostiler contracted out to other attorneys and which consisted of a lower percentage of the total. (Id.) Accordingly, these numbers were depressed with respect to Mr. Mostiler.

In addition to his voluminous felony load, Mr. Mostiler handled most of the capital cases brought in Spalding County, none of which were covered by his contract with the county.[5] (Petitioner's Ex. 2 at ¶ 5, Ex. 60 [Transcript of First Appearance Hearing at p. 3].) *See, e.g., Whatley v. State*, 270 Ga. 296, 509 S.E.2d 45 (1998); *Pye v. State*, 269 Ga. 779, 505 S.E.2d 4 (1998). Several of these capital cases were tried during his representation of Mr. Fults. (Petitioner's Ex. 60 [Johnny B. Mostiler Capital Cases 1994 to 1997]; Respondent's Ex. 1 at pp. 21-22.) *See also Whatley*, 270 Ga. 296, 509 S.E.2d 45; *Pye*, 269 Ga. 779, 505 S.E.2d 4. According to Spalding County's application for funds to the Georgia Indigent Defense Council, Mr. Mostiler was appointed to one new death penalty case in 1996, tried two death penalty cases in 1996, and had three death penalty cases awaiting trial as of the end of 1996. (Petitioner's Ex. 60 [FY 1998 Application for Funds at p. 3].) For 1997, Mr. Mostiler was appointed counsel in two death penalty cases, tried two death penalty cases, and had two death penalty cases awaiting trial at the end of 1997. (Id. [FY 1999 Application for Funds at p. 3].)

Finally, as if his felony and capital practice were not enough, Mr. Mostiler maintained a private practice. He handled murder cases in other counties from time to time including the trial of Kevin Todd Hampton from November 11, 1996 through November 15, 1996 in the Superior Court of Carroll County. (Petitioner's Ex. 14 at ¶ 4.) He also had an active civil practice.[6] (Petitioner's Ex. 2 at ¶ 2, Ex. 14 at ¶ 3.) *See, e.g., Gardner v. Kinney*, 230 Ga. App. 771, 498 S.E.2d 312 (1998); *Williams v. Binion*, 227 Ga. App. 893, 490 S.E.2d 217 (1997).

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5. Mr. Mostiler handled death penalty cases by himself employing only the services of his investigator who worked on all of Mr. Mostiler's death penalty matters. (Respondent's Ex. 1 at pp. 8-9, 21, 26, 28, 58-60.) His investigator also had the obligation to investigate all felonies for Mr. Mostiler, and he occasionally investigated misdemeanors. (Id. at pp. 7-8.)

6. Mr. Mostiler filed 34 civil actions in the Superior Court of Spalding County in 1994, 41 civil cases in 1995, 29 civil cases in 1996, and 1 civil case on January 8, 1997. (Petitioner's Ex. 14 at ¶ 3.) This tally does not include civil cases that Mr. Mostiler filed in other courts in other counties.

Mr. Fults's trial began on May 12, 1997.[7] *See Fults v. State*, 274 Ga. 82, 82 n.1, 548 S.E.2d 315, 318 n.1 (2001). Mr. Mostiler and his associate had a felony trial calendar set to begin shortly after Mr. Fults's trial was scheduled to end and on which Mr. Mostiler had approximately 100 felony cases.[8] (Respondent's Ex. 2 at p. 28.) Prior to Mr. Fults's capital trial on May 12, 1997, Mr. Mostiler had completed a lengthy capital trial as counsel to Frederick Whatley which lasted from January 6 through 16, 1997. *See Whatley*, 270 Ga. at 296 n.1, 498 S.E.2d 48 n.1. Mr. Mostiler "spent an enormous amount of time before and during that trial on that case." (Petitioner's Ex. 2 at ¶ 12.) Mr. Mostiler, however, only spent 246.5 hours on Mr. Fults's case. (Petitioner's Ex. 44.) This total was consistent with the limited amount of time Mr. Mostiler spent on other capital cases. (Petitioner's Ex. 60 [Fee Application for *State v. Pye* dated September 4, 1996].)

**B. Although Mr. Mostiler had been specifically informed that Mr. Fults was potentially mentally retarded, Mr. Mostiler did not develop this defense.**

Rosamund Braunrot was Mr. Mostiler's associate from 1993 through 2000. (Petitioner's Ex. 2 at ¶ 4; Respondent's Ex. 1 at p. 25.) "[S]hortly before trial,"[9] Mr. Mostiler asked Ms. Braunrot to contact the Multi-County Public Defender to discuss whether there was any indication that Mr. Fults was mentally retarded and what needed to be done to prove that defense. (Petitioner's Ex. 2 at ¶ 6; Respondent's Ex. 2 at pp. 40.) It was clear to Ms. Braunrot "that this issue had not been investigated yet in the case, and that Mostiler was in search of basic information about what to do and how to go about looking into the issue." (Petitioner's Ex. 2

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7. On the advice of Mr. Mostiler, following jury selection, Mr. Fults entered a plea of guilty on May 19, 1997 to the capital crimes of malice murder and kidnapping with bodily injury along with the charges of burglary and possession of a firearm during the commission of a crime. (Trial Transcript at p. 917.)

8. At this time, Mr. Mostiler's only associate, Rosamund Braunrot, was pregnant. (Respondent's Ex. 2 at p. 40.)

9. It is clear from the documents contemporaneous with Ms. Braunrot's inquiry that Mr. Mostiler did not begin to look into mental retardation until three weeks before the start of Mr. Fults's trial. (Petitioner's Ex. 2 at ¶ 7; Petitioner's Ex. 13 at ¶ 8; Petitioner's Ex. 31.)

at ¶ 6, Ex. 13 at ¶ 9.) Ms. Braunrot was not surprised that "Mr. Mostiler had not focused on the mental retardation issue in the *Fults* case until that time," because "Mr. Mostiler and [his] office had recently been through *Whatley* capital murder trial." (Petitioner's Ex. 2 at ¶ 12.) *See Whatley*, 270 Ga. 296, 509 S.E.2d 45.

Ms. Braunrot immediately called the Multi-County Public Defender's office on May 1, 1997 and spoke with Pamela Leonard. (Petitioner's Ex. 2 at ¶ 7, Ex. 13 at ¶ 8.) Ms. Braunrot informed Ms. Leonard of the situation, and Ms. Leonard asked to review the competency report prepared by Dr. Karen Bailey-Smith at the request of the state. (Petitioner's Ex. 2 at ¶ 7, Ex. 13 at ¶ 9; Hearing Transcript at p. 36.) Ms. Braunrot immediately faxed Ms. Leonard a copy of the report. (Petitioner's Ex. 2 at ¶ 7, Ex. 13 at ¶ 9, Exs. 31, 33.)

Ms. Leonard reviewed the report carefully when the fax arrived. (Petitioner's Ex. 13 at ¶ 10.) According to the report, Dr. Bailey-Smith had administered a Kaufman Brief Intelligence Test ("K-BIT") to Mr. Fults as part of her competency evaluation. (Petitioner's Ex. 13 at ¶ 11, Exs. 30, 33.) Dr. Bailey-Smith determined that Mr. Fults had an estimated intelligence quotient ("I.Q.") of 74 with a range of plus or minus 6 points.[10] (Petitioner's Ex. 13 at ¶ 11, Exs. 30, 33.) Dr. Bailey-Smith's K-BIT score "clearly put Mr. Fults in the range of mild mental retardation." (Petitioner's Ex. 13 at ¶ 12, Ex. 30, Ex. 57 at pp. 41-42, 49; Hearing Transcript at pp. 40-41.) As Ms. Leonard read the report, she wrote her opinions and observations on it. (Petitioner's Ex. 13 at ¶ 12, Ex. 30; Hearing Transcript at p. 37-38.) Ms. Leonard "also drafted up a brief memo to Ms. Braunrot summarizing some of these issues, all with an eye toward educating Ms. Braunrot and the Fults defense team about the significance of this report and its contents for the issue of mental retardation in the case." (Petitioner's Ex. 13 at ¶ 12, Ex. 30.) Because the trial was so

10. The K-BIT "is not a valid diagnostic tool for assessing IQ or mental retardation, but merely a screening device." (Petitioner's Ex. 13 at ¶ 13; Hearing Transcript at pp. 54-55.)

soon, Ms. Leonard made sure that she reviewed the report that day. (Petitioner's Ex. 13 at ¶ 12.)

In her comments to the report and in her memo, Ms. Leonard made clear "that the K-BIT is not a valid diagnostic tool for assessing IQ or mental retardation but merely a screening device." (Petitioner's Ex. 13 at ¶ 13, Ex. 30.) Ms. Leonard also noted that "a full, comprehensive IQ examination was absolutely critical, especially given the K-BIT score already placing Mr. Fults in the range of mild mental retardation." (Petitioner's Ex. 13 at ¶ 13, Ex. 30.) Ms. Leonard also "pointed out that Mr. Fults's history of seizures, documented by Dr. Bailey-Smith in her report, needed further exploration and could be related to an eventual diagnosis of mental retardation." (Petitioner's Ex. 13 at ¶ 13, Ex. 30.) Ms. Leonard further emphasized that "school and medical records were necessary" including "any prior psychological . . . records" and that this would require "a comprehensive record gathering investigation." (Petitioner's Ex. 13 at ¶ 13, Ex. 30; Hearing Transcript at pp. 47-50.) Ms. Leonard "noted that such records were often critical to documenting the onset of the mental deficiency during the developmental stage, which is a necessary requirement for a mental retardation diagnosis." (Petitioner's Ex. 13 at ¶ 14, Ex. 30; Hearing Transcript at pp. 38-39.) Ms. Leonard also "pointed out how many of Dr. Bailey-Smith's observations about Kenneth were completely consistent with a diagnosis of mild mental retardation" including " 'below average' judgment" and "lack of insight into his own behavior." (Petitioner's Ex. 13 at ¶ 15, Ex. 30; Hearing Transcript at pp. 39-40.) Ms. Leonard also noted that "Mr. Fults was unable to complete the MMPI test, often found in persons with mental retardation who cannot read well enough to complete the test."[11] (Petitioner's Ex. 13 at ¶ 15, Ex. 30; Hearing Transcript at pp. 42-43, 60-61.)

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11. The Minnesota Multiphasic Personality Inventory requires that the taker be able to read at a sixth grade level. (Hearing Transcript at p. 512.) *See MMPI-A™ (Minnesota Multiphasic Personality Inventory-Adolescent™)*, http://www.pearsonassessments.com/tests/mmpia.htm (noting that the MMPI requires a sixth-grade reading level); *MMPI-A Overview*, http://www.upress.umn.edu/tests/mmpia.html (not-

After she completed her review of the report, Ms. Leonard called Ms. Braunrot to discuss her findings. (Petitioner's Ex. 2 at ¶ 8.) Ms. Leonard informed Ms. Braunrot that "there was a very real possibility that Mr. Fults was mildly mentally retarded . . . ." (Petitioner's Ex. 2 at ¶ 8, Ex. 30.) Ms. Leonard informed Ms. Braunrot that Mr. Mostiler "would need to do a complete psychological work-up on Mr. Fults, which would include obtaining records, hiring a defense mitigation specialist, hiring at least one or more psychological experts to conduct the necessary testing and do a proper evaluation, and conduct numerous interviews of persons who had known Mr. Fults during his childhood, including family, teachers, neighbors, friends, etc." (Petitioner's Ex. 2 at ¶ 8, Ex. 13 at ¶¶ 14, 16, Ex. 30; Hearing Transcript at pp. 47-50.) At the time of this conversation, none of this background investigation had yet to be undertaken, and Mr. Yarbrough, Mr. Mostiler's investigator, was returning from his only trip to Vicksburg, Mississippi, without obtaining any of this type of information.[12] (Petitioner's Ex. 2 at ¶ 9, Ex. 13 at ¶ 9, Ex. 20 at ¶ 26; Hearing Transcript at pp. 472-73; Respondent's Ex. 1 at pp. 6-7.) Because so much work needed to be done, Ms. Leonard stated that "it was absolutely critical that [Mr. Mostiler] seek a continuance to get the time needed to do the necessary work-up on the mental retardation issue." (Petitioner's Ex. 2 at ¶ 9, Ex. 13 at ¶ 16, Ex. 30; Hearing Transcript at p. 47.)

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ing that the MMPI requires a minimum sixth-grade reading level); ALAN F. FRIEDMAN, PSYCHOLOGICAL ASSESSMENT WITH THE MMPI-2 169 (same). In 1983 at the age of 14, Mr. Fults read at a fourth-grade level. (Petitioner's Ex. 45.) At the age of 17, Mr. Fults "was reading [only] at a fifth-grade level, and he was doing math at the second-grade level, and he failed to meet the qualifications to even take the high school equivalency diploma." (Hearing Transcript at pp. 230-31.) On the Wide Range Achievement Test administered by Dr. Toomer to Mr. Fults, Mr. Fults scored in the "fifth-grade level in reading," the "fifth-grade level in spelling, and third-grade level in arithmetic." (Hearing Transcript at p. 235.) Accordingly, Mr. Fults's inability to finish the test was consistent with his limited ability to read as documented throughout his life. Moreover, Mr. Fults's performance on the test, by skipping questions rather than simply ending after answering a few, was consistent with an inability to understand the questions. (Id. at pp. 510-12.)

12. Mr. Yarbrough claimed that he obtained Mr. Fults's education records sometime after his April 29, 1997 visit to Vicksburg. (Hearing Transcript at pp. 472-73.) Those records were never introduced at trial and were inexplicably absent from Mr. Mostiler's file. (Id. at pp. 488-89.)

Ms. Leonard also faxed a copy of the competency report with Ms. Leonard's handwritten notes to Ms. Braunrot. (Petitioner's Ex. 2 at ¶ 10, Ex. 13 at ¶ 17, Ex. 30; Hearing Transcript at p. 44.) Ms. Leonard "attached a cover memorandum to the report summarizing her thoughts about the issue, the need for further development, and the critical need for more time to do this investigation." (Petitioner's Ex. 2 at ¶ 10, Ex. 13 at ¶¶ 16-17, Ex. 30; Hearing Transcript at p. 44.) Ms. Braunrot provided a copy of Ms. Leonard's memorandum and the marked-up report to Mr. Mostiler. (Petitioner's Ex. 2 at ¶ 11; Respondent's Ex. 2 at p. 45.) Mr. Mostiler "was pleased" with the memorandum, because he "got the answer that we wanted, which is that it was worth doing [an investigation into mental retardation] and then somehow it didn't happen . . . ." (Respondent's Ex. 2 at p. 46; Hearing Transcript at p. 47.) No motion for continuance was filed, and no investigation into mental retardation occurred. Although Mr. Mostiler had moved the court for an order providing the funds necessary for a full psychological evaluation of Mr. Fults, he never took steps to ensure that the motion was even resolved, let alone granted, and no independent psychological evaluation was performed. (Petitioner's Ex. 36; Respondent's Ex. 1 at p. 18.)

### C. Mr. Mostiler did not adequately investigate the circumstances of Mr. Fults's life and presented little mitigation evidence.

The sentencing phase began immediately after the court accepted Mr. Fults's guilty plea. On May 22, 1997, the jury sentenced Mr. Fults to death. (Trial Transcript at p. 1790.) Prior to the sentencing phase, Mr. Mostiler had done little to investigate mitigation evidence and presented little mitigation evidence at trial.

#### *1. Although Mr. Mostiler had been appointed to represent Mr. Fults more than 16 months prior to trial, his investigator did little to investigate mitigation evidence until three weeks before trial.*

Mr. Fults's trial was set to begin on May 12, 1997. Mr. Yarbrough began his investigation into Mr. Fults's background with a telephone call to his aunt, Irene Squire, on March 31,

1997. (Hearing Transcript at p. 472.) Ms. Squire agreed to assist Mr. Yarbrough in investigating Mr. Fults's life by escorting him around Vicksburg, Mississippi, to meet his friends and family and to help collect various records. (Hearing Transcript at pp. 167, 472-73; Petitioner's Ex. 20 at ¶ 26) Mr. Yarbrough had also been provided with "leads" by Mr. Fults's mother. (Respondent's Ex. 1 at p. 34.) Mr. Yarbrough arrived in Vicksburg, Mississippi,[13] on April 29, 1997 and on April 30, 1997 spent "maybe eight to ten hours" there investigating Mr. Fults's background and education. (Hearing Transcript at pp. 473, 487-88.)

Ms. Squire and Mr. Yarbrough went to the local school and hospital to obtain Mr. Fults's records. (Id. at p. 168.) Mr. Yarbrough was unable to get any education records at that time because the schools were not in session and he had the wrong release forms.[14] (Id. at pp. 168, 487-88; Respondent's Ex. 1 at p. 40.) Mr. Yarbrough could not get any medical records because he did not have a medical release form executed by Mr. Fults. (Hearing Transcript at p. 168.) After they went to the school and hospital, they ended their day, and Mr. Yarbrough left the next morning without interviewing any other family or friends of Mr. Fults about him or his life.[15] (Hearing Transcript at pp. 169, 171; Petitioner's Ex. 1 at ¶ 18, Ex. 6 at ¶ 13, Ex. 7 at ¶ 29, Ex. 8 at ¶ 27, Ex. 9 at ¶ 6, Ex. 10 at ¶¶ 20-21, Ex. 11 at ¶ 4, Ex. 15 at ¶ 23, Ex. 16 at ¶ 14, Ex. 17 at ¶ 25, Ex. 18 at ¶¶ 3, 51-52, Ex. 19 at ¶ 14, Ex. 21 at ¶ 26, Ex. 25 at ¶¶ 27-28.)

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13. Even though Mr. Fults had lived for a period of time in Texas and had attended school there, Mr. Yarbrough did not make a trip to Texas as part of his investigation. (Respondent's Ex. 1 at p. 35.) This omission occurred despite of Mr. Yarbrough's belief that "most of his family was in Texas." (Id. at p. 37.)

14. Mr. Yarbrough had also tried to obtain police records from Mississippi but stopped after one phone call. (Respondent's Ex. 1 at p. 39.)

15. During Mr. Yarbrough's trip, he did not ask Ms. Squire about the period of time when Mr. Fults resided with her or about any other aspect of Mr. Fults's life except to inquire about individuals who might have negative things to say about Mr. Fults. (Hearing Transcript at pp. 171-72.)

### 2. *Mr. Mostiler presented little evidence of mitigation and did not prepare the few witnesses he called for trial.*

Prior to their taking the stand, Mr. Mostiler spent only 2.5 hours preparing the members of Mr. Fults's family who provided the limited mitigation evidence introduced at trial. (Petitioner's Ex. 45.) During this short period of time, Mr. Mostiler provided virtually no guidance to the mitigation witnesses, did not inquire about what they knew, and did not inform them of the types of information and testimony which would be helpful during the sentencing phase.[16] (Petitioner's Ex. 9 at ¶ 4, Ex. 20 at ¶¶ 28-29, Ex. 23 at ¶ 71.)

Mr. Fults's mother testified that her son had a history of medical problems during childhood. At six months of age, Mr. Fults contracted bacterial meningitis. (Trial Transcript at p. 1594.) The illness caused a fever of 106-108 degrees. (Id.) As a result of the illness, Mr. Fults began to have seizures and was prescribed phenobarbital and dilantin to control the seizures until he was approximately 10 years old. (Id.) Mr. Fults's doctor suggested that he might have suffered brain damage from the high fever, but Mr. Fults's mother chose not to investigate that possibility because she "still wouldn't face up that something was wrong." (Id. at p. 1604.) Mr. Fults's mother also stated that he had had problems in school, that he was often sick as a child, and that he had suffered from varying degrees of depression throughout his life. (Id. at pp. 1592, 1602, 1604.)

Dr. Karen Bailey-Smith, the psychologist appointed by the court to conduct a competency and fitness to stand trial evaluation, testified that Mr. Fults's I.Q. was 74, a level equal to or better than only 4% of his peers, based on the K-BIT screening test. (Id. at p. 1385.) Dr. Bailey-Smith also found that Mr. Fults was depressed at the time of the murder, and that he should be monitored by a mental health professional, whether convicted of the crimes charged or not. (Id.

16. Mr. Fults's family had extreme difficulties reaching Mr. Mostiler and Mr. Yarbrough before trial and rarely, if ever, spoke with them. (Petitioner's Ex. 9 at ¶¶ 3, 5.)

at pp. 1391, 1393.) In the course of her analysis, Dr. Bailey-Smith also determined that although he did know the difference between right and wrong when the crime was committed, Mr. Fults was not fully able to understand his own behavior. (Id. at pp. 1385-86, 1389, 1392, 1395.)

### 3. *A proper investigation and presentation would have provided the jury with significant evidence in support of mitigation.*

Limited information regarding Mr. Fults's life was provided to the jury during the sentencing phase of his trial. A proper and complete investigation would have revealed this complete life story which should have been presented:

- While pregnant with Mr. Fults, his mother was often drunk. (Petitioner's Ex. 9 at ¶ 14.)
- While pregnant with Mr. Fults, his mother tried to abort the pregnancy by drinking turpentine. (Petitioner's Ex. 9 ¶ 17.)
- Mr. Fults's mother was often intoxicated when Mr. Fults was a child and throughout his adult life. (Petitioner's Ex. 5 at ¶ 12, Ex. 9 at ¶¶ 40, 53, 63, 66, 69-71, 78, 79, Ex. 10 at ¶ 8, Ex. 16 at ¶ 7, Ex. 18 at ¶ 11, Ex. 23 at ¶¶ 17, 26.)
- Mr. Fults's mother was a perpetual drug user with a penchant for crack cocaine who associated with other addicts of illegal drugs which resulted in her taking no interest in her children and which required her to steal to afford her habit. (Petitioner's Ex. 1 at ¶¶ 12, 13, Ex. 5 at ¶¶ 24, 26, Ex. 9 at ¶¶ 53, 56, 69, 71, 72, 74, 77, 78, 79, Ex. 10 at ¶ 8, Ex. 11 at ¶ 39, Ex. 18 at ¶¶ 25, 27, 29, 32, 38, 40, 46, 49, Ex. 23 at ¶¶ 26, 33, 34-40, Ex. 25 at ¶ 6.)
- Mr. Fults's mother was often violent and belligerent with others around her including her children and referred to Mr. Fults as "stupid," "dumb," and "slow." (Petitioner's Ex. 1 at ¶¶ 12, 16, 17, Ex. 9 at ¶¶ 45, 46, Ex. 10 at ¶ 9, Ex. 11 at

¶ 37, Ex. 16 at ¶ 7, Ex. 17 at ¶¶ 21-22, Ex. 18 at ¶¶ 5, 34, Ex. 23 at ¶¶ 16-17, 19, 21, 29, 35, Ex. 25 at ¶¶ 7, 14.)

- Mr. Fults's mother often beat him with belts, switches, and electrical cords. (Petitioner's Ex. 9 at ¶¶ 45, 46, 52, Ex. 11 at ¶ 37, Ex. 16 at ¶¶ 9-10, Ex. 18 at ¶¶ 8, 22, Ex. 23 at ¶¶ 21-22, Ex. 25 at ¶¶ 8-9.)
- Mr. Fults's father Joseph Squire abandoned his son and did not acknowledge him as his son because he was light skinned, but Mr. Fults desired a relationship with him. (Petitioner's Ex. 5 at ¶ 13, Ex. 9 at ¶¶ 20, 21, Ex. 17 at ¶ 6, Ex. 20 at ¶¶ 4, 11, Ex. 21 at ¶¶ 14-17, Ex. 23 at ¶ 54.)
- Mr. Fults desperately desired to have a relationship with his father. (Petitioner's Ex. 7 at ¶ 26, Ex. 23 at ¶ 54.)
- Mr. Fults's mother constantly moved him and her other children around to live in various locations including Vicksburg, Mississippi, Houston, Texas, and Oklahoma while she lived with and slept with many different men, many of whom beat Mr. Fults. (Petitioner's Ex. 9 at ¶¶ 26, 49, 50, 61, 62, 67-68, 78-79, Ex. 11 at ¶¶ 5-6, 32, 34, 36, 38-41, Ex. 17 at ¶¶ 7, 20-21, 24, Ex. 18 at ¶¶ 4, 23-27, 36, Ex. 23 at ¶¶ 6-9, 13, 26, 33, 34, 38, 40, Ex. 25 at ¶ 4.)
- Mr. Fults's mother abandoned her children — leaving others to care for them on a regular basis or leaving them on their own entirely — and took no interest in being a parent to them, preferring to spend her time socializing and drinking; eventually she forced Mr. Fults out on his own at a very young age. (Petitioner's Ex. 1 at ¶¶ 14, 15, Ex. 5 at ¶¶ 16, 22, 24, 25, 32, Ex. 8 at ¶ 14, Ex. 9 at ¶¶ 48-51, 53, 57, 60, 66, 73, 75, 76, 78, Ex. 10 at ¶ 10, Ex. 11 at ¶¶ 6, 38, 42-43, Ex. 16 at ¶¶ 4-9, Ex. 17 at ¶¶ 4, 7, 16, 23-24, Ex. 18 at ¶ 11, 21, 27, 33, 39, 42, Ex. 23 at ¶¶ 15, 17-18, 20, 23-26, 34-35, 40, 43, 46-48, 51-52, Ex. 25 at ¶¶ 4, 11, 25.)

- Mr. Fults spent much time in the home of his maternal grandmother Doretha Calvin and maternal great-grandmother, both of whom drank alcohol constantly and were probably alcoholics. (Petitioner's Ex. 5 at ¶¶ 6-8, Ex. 6 at ¶ 12, Ex. 9 at ¶ 10, Ex. 11 at ¶¶ 6-8, Ex. 17 at ¶ 17, Ex. 18 at ¶¶ 4, 6, 12, Ex. 23 at ¶¶ 10, 12.)
- Mr. Fults's maternal grandmother was very violent, and she exposed Mr. Fults to much fighting and cruelty in her home and often beat him with belts, switches, and extension cords. (Petitioner's Ex. 5 at ¶¶ 8-10, Ex. 8 at ¶ 6, Ex. 9 at ¶¶ 9, 11, 15, 16, Ex. 10 at ¶ 4, Ex. 11 at ¶¶ 8, 20, Ex. 17 at ¶ 17, Ex. 18 at ¶ 6, Ex. 23 at ¶ 10, Ex. 25 at ¶ 10.)
- Mr. Fults's step-father often beat Mr. Fults's mother in front of Mr. Fults. (Petitioner's Ex. 5 at ¶ 14.)
- When Mr. Fults was still a young boy, Mr. Fults's mother abandoned Mr. Fults and her other children and left them in Texas with a man whom she had been dating for several weeks who beat Mr. Fults, stole the children's money, and deserted them without adult supervision to care for themselves without utilities until they were eventually able to contact relatives for help. (Petitioner's Ex. 9 at ¶ 62, Ex. 11 at ¶ 38, Ex. 23 at ¶¶ 23-25.)
- Mr. Fults eventually moved in with Irene Squire and her husband, Bobby Joe Squire, during which time Mr. Fults's mother made no attempt to contact him. (Petitioner's Ex. 9 at ¶ 68, Ex. 11 at ¶ 44, Ex. 20 at ¶¶ 4-5, 8, Ex. 23 at ¶ 47.)
- Mr. Fults's uncle Bobby Joe Squire, with whom he lived as a teenager, was an alcoholic. (Petitioner's Ex. 7 at ¶ 28.)
- Mr. Fults, who was diagnosed with bacterial meningitis at age six with a fever of 106°, often had seizures as a child which usually went untreated because the

family did not have health insurance. (Petitioner's Ex. 5 at ¶ 18, Ex. 8 at ¶ 5, Ex. 9 at ¶¶ 25, 26, Ex. 11 at ¶ 9.)

- As a child, Mr. Fults could not control his bowels and often went to the bathroom in his pants at school. (Petitioner's Ex. 9 at ¶¶ 26, 40.)
- As a child, Mr. Fults would often bang his head against the wall. (Petitioner's Ex. 9 ¶ 16.)
- Mr. Fults's family had a history of mental retardation and slow intellectual performance. (Petitioner's Ex. 8 at ¶ 3, Ex. 23 at ¶ 69.)
- Neither Mr. Fults's mother nor his grandmother took an active interest in his education. (Petitioner's Ex. 6 at ¶ 12, Ex. 9 at ¶¶ 40, 60, Ex. 11 at ¶ 21, Ex. 15 at ¶ 14, Ex. 17 at ¶ 10, Ex. 18 at ¶ 21; Respondent's Ex. 3 at pp. 10, 29-31, 35.)
- Mr. Fults scored very poorly on the Lee Clark Readiness Test and was put in the class for the slowest and least ready learners for first grade. (Respondent's Ex. 3 at pp. 25-26.)
- Mr. Fults had much difficulty learning his alphabet in first grade and often required special attention from his teacher and her assistant. (Petitioner's Ex. 6 at ¶¶ 5-9; Respondent's Ex. 3 at pp. 13-14, 27.)
- Mr. Fults's younger brother had to pick him up from his first grade classroom and take him home each day. (Respondent's Ex. 3 at p. 30.)
- Mr. Fults was unable to read aloud and had difficulty reading to himself, which led him to fake his ability to read and which caused him difficulty in completing job applications. (Petitioner's Ex. 1 at ¶ 6, Ex. 8 at ¶ 18, Ex. 9 at ¶¶ 31, 32, Ex. 11 at ¶ 22, Ex. 15 at ¶¶ 13, 17, Ex. 19 at ¶ 10, Ex. 20 at ¶ 12, Ex. 23 at ¶ 61.)
- Mr. Fults had difficulty in school and was perceived as intellectually slow by his classmates, his teachers, and his family and was mistreated by his teachers. (Pe-

titioner's Ex. 1 at ¶¶ 4, 6, Ex. 6 at ¶¶ 5-7, 9, Ex. 8 at ¶¶ 8, 23, Ex. 9 at ¶¶ 31-34, 36, Ex. 10 at ¶ 5, Ex. 15 at ¶¶ 3-13, 17-18, Ex. 17 at ¶¶ 9-10, Ex. 18 at ¶¶ 14, 48, Ex. 23 at ¶ 61, Ex. 25 at ¶ 12; Respondent's Ex. 3 at pp. 10, 13-14.)

- Mr. Fults received below-average scores on several of the Differential Aptitude Tests[17] given to him in October, 1983 including scoring in the third percentile[18] on Verbal Reasoning[19] and the tenth percentile on Abstract Reasoning.[20] (Petitioner's Ex. 45.)
- In March, 1983 at the age of 14, Mr. Fults took the Iowa Tests of Basic Skills[21] on which he performed very poorly and scored in the bottom fifth percentile on reading with a Grade Equivalent[22] score of 4.4 and a composite score in the bottom

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17. The Differential Aptitude Tests "are a series of assessments designed to measure an individual's ability to learn or to succeed in a number of different areas such as mechanical reasoning, verbal reasoning, numerical reasoning, and space relations." *Differential Aptitude Tests (DAT for PCA)*, http://www.shrm.org/testing/products/PsychCorp/DAT.asp.

18. "A percentile is the value of a variable below which a certain percent of observations fall. So the 20th percentile is the value (or score) below which 20 percent of the observations may be found." *Percentile*, http://en.wikipedia.org/wiki/Percentile. Accordingly, Mr. Fults's score in the third percentile meant that 97 percent of test takers performed better than he did.

19. "The DAT for PCA Verbal Reasoning Test is an assessment designed to measure the ability to understand concepts framed in words. It measures the ability to find commonalities among different concepts and to manipulate ideas on an abstract level. It assesses both an individual's knowledge and abstract thinking ability." *DAT for PCA Verbal Reasoning Test*, http://www.shrm.org/testing/products/PsychCorp/DAT_Verbal.asp.

20. "The DAT for PCA Abstract Reasoning Test is a non-verbal measure of reasoning ability. It involves the ability to think logically and to perceive relationships in abstract figure patterns." *DAT for PCA Abstract Reasoning Test*, http://www.shrm.org/testing/products/PsychCorp/DAT_Abstract.asp.

21. "The Iowa Test of Basic Skills (ITBS) are a set of standardized tests given annually to school students in the United States. These tests are given to students beginning in kindergarten and progressing until Grade 8 to assess educational development." *Iowa Test of Basic Skills*, http://en.wikipedia.org/wiki/Iowa_Test_of_Basic_Skills.

22. "The GE is a decimal number that describes performance in terms of grade level and months. For example, if a sixth-grade student obtains a GE of 8.4 on the Vocabulary test, his score is like the one a typical student finishing the fourth month of eighth grade would likely get on the Vocabulary test. The GE of a given raw score on any test indicates the grade level at which the typical student makes this raw score. The digits to the left of the decimal point represent the grade and those to the right represent the month within that grade." *Interpreting Test Scores*, http://www.education.uiowa.edu/itp/itbs/itbs_interp_score.htm.

first percentile with a Grade Equivalent score of 4.4 which demonstrated that Mr. Fults was performing at a fourth-grade level. (Id.)

- At the age of 14, Mr. Fults's school estimated that he had an I.Q. of 72. (Id.)
- When Mr. Fults was 20, he received a score of 68 on the Test for Nonverbal Intelligence administered by the Mississippi Department of Corrections. (Petitioner's Ex. 48; Hearing Transcript at pp. 216-18, 220, 222.)
- Mr. Fults had difficulty comprehending instructions which had to be repeated to him many times, and he could not follow geographic directions. (Petitioner's Ex. 9 at ¶¶ 36-37, 41, Ex. 15 at ¶ 18, Ex. 18 at ¶¶ 15, 17, Ex. 19 at ¶¶ 4, 12, Ex. 23 at ¶ 31, Ex. 25 at ¶ 15.)
- As a child, Mr. Fults had difficulty focusing his attention and would not look individuals in the eye. (Petitioner's Ex. 9 at ¶¶ 23, 27, 36, 41, Ex. 11 at ¶¶ 23-25, Ex. 17 at ¶¶ 11, 13, Ex. 23 at ¶ 67.)
- Mr. Fults had difficulty handling money and needed the assistance of others in dealing with transactions. (Petitioner's Ex. 7 at ¶ 6, Ex. 9 at ¶ 44, Ex. 10 at ¶ 5, Ex. 18 at ¶ 15; S. Smith at ¶ 10, Ex. 20 at ¶ 14.)
- Mr. Fults had difficulty learning to drive. (Petitioner's Ex. 7 at ¶ 7.)
- Mr. Fults was very slow at performing rudimentary tasks. (Petitioner's Ex. 8 at ¶ 11, Ex. 9 at ¶¶ 34, 43, Ex. 11 at ¶¶ 23-24, Ex. 18 at ¶ 15, Ex. 20 at ¶ 21.)
- Mr. Fults would often suck his thumb and hold a dirty pillow even into his teenage years. (Petitioner's Ex. 5 at ¶ 17, Ex. 6 at ¶ 11, Ex. 8 at ¶ 9, Ex. 9 at ¶¶ 29, 30, 39, 41, 58, Ex. 11 at ¶ 11, Ex. 18 at ¶¶ 15, 28, Ex. 23 at ¶ 64, Ex. 25 at ¶ 16.)
- Mr. Fults did not usually socialize with his classmates in elementary school or with other children his age, and he had difficulty understanding and communicating with others. (Petitioner's Ex. 1 at ¶¶ 2, 4, Ex. 5 at ¶¶ 17, 19, 30, Ex. 6 at

¶ 8, Ex. 7 at ¶¶ 9-11, 13-14, Ex. 8 at ¶¶ 7, 9, Ex. 9 at ¶¶ 30, 36, 39, 41, Ex. 10 at ¶ 6, Ex. 11 at ¶¶ 10, 26-27, Ex. 15 at ¶¶ 14, 21, Ex. 17 at ¶¶ 9, 11, Ex. 23 at ¶ 67.)

- When Mr. Fults would socialize with other children, he usually spent time with children much younger than he was and engaged in childlike activities.[23] (Petitioner's Ex. 5 at ¶ 31; Petitioner's Ex. 7 at ¶¶ 4, 13-14, 17-18, 27, Ex. 8 at ¶ 17, Ex. 9 at ¶ 39, Ex. 10 at ¶ 7, Ex. 15 at ¶ 14, Ex. 20 at ¶¶ 16-19, Ex. 23 at ¶¶ 63-66.)
- Mr. Fults was very gullible as a child and easily influenced by others; his classmates and his family members often took advantage of him because of this. (Petitioner's Ex. 1 at ¶¶ 3, 5, Ex. 5 at ¶¶ 20, 21, Ex. 8 at ¶ 24, Ex. 11 at ¶¶ 18, 28, Ex. 15 at ¶ 16, Ex. 18 at ¶ 46, Ex. 23 at ¶ 63, Ex. 25 at ¶ 23.)

This detailed story of a disastrous childhood coupled with very low achievement and capability test scores was not presented to the jury. Instead, the jury heard very limited testimony from unprepared witnesses who had never even had a chance to detail Mr. Fults's life to his attorney Mr. Mostiler.

**D. During Mr. Fults's trial, Mr. Mostiler was routinely asleep.**

"Mr. Mostiler was in poor health at the time of the *Whatley* trial" which preceded Mr. Fults's trial, and "every time he went through a big trial like the *Whatley* trial, he would get very tired." (Petitioner's Ex. 2 at ¶ 13.) After the *Whatley* trial, Mr. Mostiler was "very tired" and "the office was just very depleted, exhausted . . . ." (Id.; Respondent's Ex. 2 at p. 47.) In fact, Mr. Mostiler "was worn out coming away from the very recent capital murder trial in the *Whatley* case" that "had of course exhausted him" such that he "was not doing well afterwards." (Petitioner's Ex. 2 at ¶¶ 16, 20.) These problems were compounded by Mr. Mostiler's significant

23. On July 7, 1989, Mike Whelm at the Mississippi Department of Corrections wrote to the Honorable John E. Ellis to inform the court that Dr. Whelm concluded that Mr. Fults needed "[c]lose supervision primarily due to relative immaturity." (Petitioner's Ex. 48.) This is consistent with his family's testimony regarding his child-like behavior.

health disorders; he was "seriously overweight," "suffered from diabetes and congestive heart failure," was a "heavy smoker," and had previously suffered from a heart attack. (Id. at ¶ 14.) He "was often in denial about how significant his [health] problems were." (Id. at ¶ 22.) Mr. Mostiler "was [also] dealing with a sleeping disorder" which had required him to seek medical care from "a sleep disorder clinic at the Griffin Regional Hospital." (Id. at ¶ 15.) In fact, Mr. Mostiler "had a tendency to doze off unexpectedly" including during court proceedings and "would often sleep or doze in the middle of the day . . . because of his diabetic and heart conditions."[24] (Id. at ¶¶ 16, 18.) "The problem was exacerbated when he was not getting enough rest, as would always happen during a trial." (Id. at ¶ 16.)

The jurors witnessed Mr. Mostiler asleep at Mr. Fults's trial including during the examination of witnesses. (Petitioner's Ex. 3 at ¶ 4, Ex. 22 at ¶ 4, Ex. 24 at ¶ 4.) In addition, Mr. Fults's family members witnessed Mr. Mostiler asleep during the trial which often required Mr. Fults to wake Mr. Mostiler and which resulted in long pauses during the trial during which the court waited for Mr. Mostiler to awake in order to defend Mr. Fults and cross-examine witnesses. (Petitioner's Ex. 5 at ¶ 39, Ex. 8 at ¶ 26, Ex. 9 at ¶ 7, Ex. 10 at ¶¶ 11-19, Ex. 23 at ¶ 72.)

### E. One of Mr. Fults's jurors was motivated by racial bias to sentence Mr. Fults to death.

Thomas Buffington served as a juror at Mr. Fults's trial. (Petitioner's Ex. 4 at ¶ 2.) Mr. Buffington decided that "[o]nce [Mr. Fults] pled guilty, [he] knew [he] would vote for the death penalty because that [was] what that nigger deserved." (Id. at ¶ 5.) Accordingly, Mr. Buffington believed that "that nigger got just what should have happened." (Id. at ¶ 4.)

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24. As one example, Mr. Mostiler fell asleep once at his desk while smoking a cigarette. (Petitioner's Ex. 2 at ¶ 17.) "The cigarette burned a hole in his shirt before he woke up." (Id.) Because he had a court hearing that day, he covered the hole with Wite-Out and proceeded to court. (Id.)

### F. After Mr. Mostiler died, Harold A. Sturdivant became Mr. Fults's lawyer who took over all of Mr. Mostiler's duties as Indigent Defense Council in Spalding County.

Mr. Mostiler died on April 1, 2000. (Petitioner's Ex. 60 [Contract for the Provision of Indigent Defense for Spalding County dated April 10, 2000].) On April 10, 2000, Spalding County appointed the law firm of Sullivan & Sturdivant[25] to assume the remaining portion of Mr. Mostiler's contract with the county which was amended to expire on June 30, 2000.[26] (Id. [Proposal for Indigent Defense: Spalding County Georgia dated May 3, 2000 at p. 2].) Prior to assuming this role, Samuel H. Sullivan and Harold A. Sturdivant had handled all of the misdemeanor and juvenile matters under Mr. Mostiler's contracts with Spalding County. (Id. [Proposal for the Provision of Indigent Defense for Spalding County dated July 14, 1998].) For the period 1996 through 1998, this amounted to 1,145 misdemeanors and 838 juvenile cases handled by them. (Id.) From 1999 through April 30, 2000, this workload consisted of 1,555 misdemeanors and 925 juvenile matters.[27] (Id. [Proposal for Indigent Defense: Spalding County, Georgia dated May 3, 2000 at p. 3].) The only portion of the work which Sullivan & Sturdivant contracted out were guardian ad litem matters. (Id. [FY 2001 Application for GIDC Funds at p. 11].)

Mr. Sturdivant was also appointed to handle Mr. Fults's case after the death of Mr. Mostiler. In 2000 when Mr. Sturdivant was preparing Mr. Fults's motion for new trial and

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25. Sullivan & Sturdivant consisted of three attorneys: Samuel H. Sullivan, Harold A. Sturdivant, and Michele Ogletree. (Petitioner's Ex. 60 [Proposal for Indigent Defense: Spalding County, Georgia dated May 3, 2000 at p. 4].)

26. Apparently, the Sheriff's Department of Spalding County and judges of the State Court held the same view of Sullivan & Sturdivant as they did of Johnny Mostiler: they were equally effective at disposing of large numbers of cases quickly. (Petitioner's Ex. 60 [Letter from Richard H. Cantrell dated May 4, 2000; Letter from Griffin H. Howell, III dated April 25, 2000].)

27. All of the misdemeanors and juvenile matters handled by Sullivan & Sturdivant in 1999 under Mr. Mostiler's contract with Spalding County constituted only 40% of the firm's caseload; the remaining 60% was private practice work. (Petitioner's Ex. 60 [FY 2001 Application for GIDC Funds at p. 11].) This demonstrates that Sullivan & Sturdivant had a very large practice in addition to its indigent defense work.

his appeal, his firm handled 600 felonies, 700 misdemeanors, 35 probation revocations, 20 appeals, and 454 juvenile matters. (Id. [FY 2001 Application for GIDC Funds at p. 7].) The only portion of that work which was contracted out was cases involving guardians ad litem. (Id. [FY 2001 Application for GIDC Funds at p. 11].) Consistent with Mr. Mostiler's practice, Sullivan & Sturdivant imposed no limits on the number of cases which its attorneys could handle. (Id. [FY 2001 Application for GIDC Funds at p. 5].) In addition, in 2001 when Mr. Fults's second appeal was docketed and argued, Mr. Sturdivant handled four additional criminal and juvenile appeals. *See Harris v. State*, 252 Ga. App. 849, 557 S.E.2d 452 (2001); *In re C.A,,* 249 Ga. App. 280, 548 S.E.2d 37 (2001); *Bankston v. State*, 249 Ga. App. 118, 548 S.E.2d 25 (2001); *In re D.G.*, 248 Ga. App. 417, 546 S.E.2d 359 (2001).

**G. Mr. Fults's appellate counsel failed to investigate his potential claims with respect to his motion for new trial and his direct appeal.**

Mr. Sturdivant was appointed by Chief Judge Ben Miller to represent Mr. Fults following the death of Mr. Mostiler on April 1, 2000. Mr. Sturdivant was summoned by Judge Miller on the day of Mr. Mostiler's funeral and was told that Mr. Sturdivant would be appointed to represent Mr. Fults.

Mr. Sturdivant filed a notice of appeal to the Georgia Supreme Court on April 14, 2000. *See Fults v. State*, 274 Ga. 82, 82 n.1, 548 S.E.2d 315, 318 n.1 (2001). On June 30, 2000, the case was remanded to the trial court at Mr. Sturdivant's request to allow Mr. Sturdivant to file an amended motion for new trial. *See id.* On November 30, 2000, Mr. Sturdivant filed the amended motion for new trial. *See id.* On December 1, 2000, the amended motion for new trial was heard by Judge Caldwell. *See id.* Mr. Sturdivant raised three specific issues at the hearing: (1) that Mr. Mostiler provided ineffective assistance of counsel by telling Mr. Fults that he was guaranteed to be spared from the death penalty if he pleaded guilty; (2) that Mr. Mostiler provided ineffective assistance of counsel by failing to properly object to the introduction of a state-

ment by Mr. Fults to law enforcement; and (3) that Mr. Mostiler provided ineffective assistance of counsel by failing to object to the introduction of evidence related to gangs. No other issues were raised in connection with the amended motion for new trial.

After the amended motion for new trial was denied, Mr. Sturdivant filed a direct appeal to the Georgia Supreme Court. *See id.* On direct appeal, Mr. Sturdivant raised six specific issues related to ineffective assistance of trial counsel: (1) that Mr. Mostiler provided ineffective assistance of counsel by informing Mr. Fults that he would be spared the death penalty if he pled guilty; (2) that Mr. Mostiler failed to investigate more fully Mr. Fults's claim that other persons were involved in the crime; (3) that Mr. Mostiler failed to question five prospective jurors during voir dire; (4) that the trial court improperly restricted the questioning of some jurors and improperly qualified one juror; (5) that Mr. Mostiler failed to object to evidence of guilt introduced by the State at the sentencing trial; and (6) that the trial court erred by violating a rule purportedly established by the Georgia Supreme Court in *Gregg v. State*, 233 Ga. 117 (1974). *See Fults*, 274 Ga. 82, 548 S.E.2d 315. However, Mr. Sturdivant failed to identify and raise other meritorious issues related to ineffective assistance of trial counsel. For example, Mr. Sturdivant failed to identify and raise the claim that Mr. Fults was denied his Sixth Amendment right to counsel because of Mr. Mostiler's caseload. Mr. Sturdivant failed to identify and raise the issue of trial counsel's failure to investigate and assert mental retardation as either an affirmative defense or as evidence for mitigation. Mr. Sturdivant failed to identify and raise the issue of trial counsel's failure to investigate and present a complete mitigation case at the sentencing trial. Mr. Sturdivant failed to identify and raise a claim that Mr. Fults was denied counsel at trial in violation of the Sixth Amendment because his trial counsel slept through the trial. Mr. Sturdivant failed to identify and raise a claim that Mr. Fults was denied his Sixth Amendment right to a fair jury because of the racial bias of Mr. Buffington.

Mr. Sturdivant did very little to prepare Mr. Fults's amended motion for new trial and appeal. Mr. Fults's case was the only death penalty appeal that Mr. Sturdivant ever handled. (Sturdivant Dep. at p.18.) He did not want to handle such cases. (Id.) Mr. Sturdivant did not seek help from more experienced practitioners, because there was nobody in Griffin whom he knew who had worked on a death penalty case or murder case.[28] (Id. at p. 19.)

In preparing his appeal and amended motion for new trial, Mr. Sturdivant read the trial transcripts but not the transcripts from pre-trial proceedings. (Id. at p. 13-14) He did not recall reviewing the transcript from the hearing on the initial motion for new trial that had been handled by Mr. Mostiler prior to his death. (Id. at p. 14.) Although he knew Dewey Yarbrough and knew that Mr. Yarbrough had worked for Mr. Mostiler on Mr. Fults's case, Mr. Sturdivant did not discuss Mr. Fults's case with him except to ask him a question about who had written a note in the file. (Id. at pp. 10, 32.)

Mr. Sturdivant had not seen any notes in Mr. Mostiler's files regarding mitigation evidence or mitigating circumstances so he simply assumed that there were not any. (Id. at pp. 32-33.) Mr. Sturdivant did not review any of Mr. Fults's school records or medical records. (Id. at pp. 29-30.) Mr. Sturdivant did not try to obtain any other types of documents or records. (Id. at p. 29.) Mr. Sturdivant did not retain any doctors or mental health professionals to examine Mr. Fults. (Id. at Ex. 1.)

Mr. Sturdivant spoke with Mr. Fults on "very few" occasions. (Id. at p. 20.) He recalled visiting Mr. Fults one time. (Id.) Mr. Sturdivant did not ever ask Mr. Fults about his family or his background. (Id. at p. 31.) Mr. Sturdivant never asked Mr. Fults any "personal" questions. (Id.) Mr. Sturdivant did not contact any of Mr. Fults's family members to discuss the trial or the

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28. Mr. Sturdivant did not seek assistance from any of the numerous possible sources of assistance in the Atlanta area. *See Jefferson*, 2007 WL 1687263, at *48 (noting that counsel consulted with other attorneys with extensive experience in death penalty cases including attorneys with the ACLU, attorneys with the Southern Poverty Law Center, Bruce Harvey, and Jimmy Berry).

appeal. (Id. at p. 29.) The first time that he spoke to any family members was after he had submitted his brief when he received a telephone call from Mr. Fults's mother. (Id.) Mr. Sturdivant was not sure how she had obtained his phone number. (Id.)

Mr. Sturdivant's billing records show that he spent 47.75 hours preparing for the hearing on the amended motion for new trial. (Id. at Ex. 1) He spent 29.5 hours preparing the direct appeal. (Id. at Ex. 1) He spent 98.25 total hours working on this death penalty case. (Id. at Ex. 1) His time records corroborate his testimony that he did not research or investigate Mr. Fults's background, family or personal life. (Id. at Ex. 1) His work essentially consisted of one meeting with Mr. Fults and a review of some of the trial court transcripts. (Id. at Ex. 1)

## III. ARGUMENT AND CITATION OF AUTHORITY

### A. A petition for the writ of habeas corpus is the proper means to assert Mr. Fults's claims that his incarceration is illegal and unconstitutional.

A citizen's constitutional right to a writ of habeas corpus has been enshrined in Georgia's Constitution since 1777. Article I, Section I, Paragraph XV of the Georgia Constitution provides that "the writ of habeas corpus shall not be suspended unless, in case of rebellion, the public safety may require it." GA. CONST. art. I, § I, para. XV.

A petition for writ of habeas corpus provides the exclusive procedure for seeking relief "for those persons whose liberty is being restrained by virtue of a sentence imposed by a state court of record." O.C.G.A. § 9-14-41. "Any person imprisoned by virtue of a sentence imposed by a state court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of this state may institute" a habeas corpus proceeding under Title 9, Chapter 14, Article 2 of the Official Code of Georgia for review of the sentence. O.C.G.A. § 9-14-42. This statutory habeas corpus provision was adopted in 1967 to make habeas corpus more readily available to Georgia inmates. *See Giles v. Ford*, 258 Ga. 245, 245, 368 S.E.2d 318, 318 (1988) ("Under the expanded

view in this chapter, the assumption is that a prisoner should have wide latitude in filing a petition for habeas corpus.").

Post-conviction habeas corpus relief may be granted by a Georgia court if the conviction or sentence resulted from denial of a federal or state constitutional right. *See Valenzuela v. Newsome*, 253 Ga. 793, 795, 325 S.E.2d 370, 373 (1985) ("Now, under the 1982 amendment, habeas corpus is available to review constitutional deprivations only . . . ."). The Georgia Supreme Court has stated that habeas corpus relief is appropriate in numerous circumstances, including, but not limited to, violations of the right to counsel, *Jones v. Wharton*, 253 Ga. 82, 82, 316 S.E.2d 749, 750 (1984); ineffective assistance of counsel at trial, *Curry v. Zant*, 258 Ga. 527, 529, 371 S.E.2d 647, 649 (1988); ineffective assistance of counsel during sentencing, *Turpin v. Christensen*, 269 Ga. 226, 240, 497 S.E.2d 216, 228 (1998); ineffective assistance of counsel on direct appeal, *Nelson v. Hall*, 275 Ga. 792, 793, 573 S.E.2d 42, 43-44 (2002); admission of an involuntary guilty plea, *Johnson v. Smith*, 280 Ga. 235, 236, 626 S.E.2d 470, 471 (2006); suppression of exculpatory evidence by the state, *Nelson v. Zant*, 261 Ga. 358, 360-61, 405 S.E.2d 250, 252 (1991); knowing use of false evidence by the state, *Smith v. Zant*, 250 Ga. 645, 651, 301 S.E.2d 32, 37 (1983); improper charge at a sentencing hearing, *Jarrell v. Zant*, 248 Ga. 492, 493, 284 S.E.2d 17, 17-18 (1981); and imposition of a death sentence for a crime for which it is not authorized under the Georgia Code, *id.*, 284 S.E.2d at 18.

### *1. None of Mr. Fults's claims are procedurally defaulted.*

As a general rule, habeas corpus relief will not be granted for claims that have been procedurally defaulted — that is, claims that were not preserved by objection during the trial and by citation as error on direct appeal. *See* O.C.G.A. § 9-14-48(d); *Turpin v. Todd*, 268 Ga. 820, 824, 493 S.E.2d 900, 905 (1997). A procedurally defaulted claim will not be barred from consideration, however, "if the petitioner shows, first, an adequate cause for failing to raise the issue

earlier and, second, actual prejudice resulting from the alleged error or errors." *Turpin*, 268 Ga. at 824, 493 S.E.2d at 905.

A petitioner has shown adequate cause for overcoming a procedural default when "some objective factor external to the defense impeded counsel's efforts to raise the claim that has been procedurally defaulted." *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).[29] These factors "may include interference by government officials 'that makes compliance with the State's procedural rule impracticable,' " or " 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.' " *Id.* (quoting *McCleskey v. Zant*, 499 U.S. 467 (1991)). Newly discovered evidence can also establish cause. *See Dobbs v. Zant*, 506 U.S. 357, 359 (1993). Ineffective assistance of counsel that meets the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), also constitutes adequate cause for considering a procedurally defaulted claim. *See Turpin*, 268 Ga. at 825, 493 S.E.2d at 905.

After establishing cause for not preserving the defaulted claim, the petitioner must also demonstrate actual prejudice to his case from the error at issue. *See id.*, 268 Ga. at 828, 493 S.E.2d at 907. The petitioner must establish "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* (quoting *United States v. Frady*, 456 U.S. 170 (1982)). If the petitioner has demonstrated cause by proving ineffectiveness of counsel under *Strickland*, which has its own prejudice requirement, then the prejudice requirement under the procedural default rule for that claim has also been satisfied. *See id.*, 268 Ga. at 829, 493 S.E.2d at 908 ("We are persuaded that the *Strickland* and *Frady* prejudice tests address similar concerns, and we therefore conclude that if a convicted defendant meets the preju-

29. The Georgia procedural default provision was modeled on the federal provision, making federal precedent a source of guidance on the meaning of actual prejudice under the Georgia statute. *See Turpin*, 268 Ga. at 825, 493 S.E.2d. at 905.

dice prong of *Strickland*, he has satisfied the *Frady* prejudice test at least for the errors that support the ineffectiveness claims."). Therefore, if trial or appellate counsel's error in failing to raise a particular claim is deemed to constitute constitutionally cognizable ineffective assistance of counsel, the habeas court must consider the procedurally defaulted claim.

Each of Mr. Fults's claims are viable because any procedural hurdle is overcome by the failure of Mr. Mostiler and Mr. Sturdivant to raise the claims at trial or on direct appeal.

### 2. *Res judicata does not constitute a prohibition to any of Mr. Fults's claims.*

While the doctrine of res judicata applies to habeas corpus cases in Georgia, the res judicata doctrine does not bar relitigation of a habeas claim when a change in the law has occurred since the previous litigation of the claim or when there is newly discovered evidence bearing on the claim. *See Green v. Dunn*, 257 Ga. 66, 67, 355 S.E.2d 61, 62 (1987) ("This court having reviewed this issue and affirmed the judgment, neither this issue nor this court's legal conclusion that there was no harmful error, could be reviewed on habeas corpus, where neither facts nor law has changed."); *Zant v. Campbell*, 245 Ga. 368, 369, 265 S.E.2d 22, 24 (1980) ("Further, it is well settled that state habeas corpus trial courts will not adjudicate issues already decided by an appellate court on direct appeal unless either the facts or the law has changed."); *Gibson v. Ricketts*, 233 Ga. 809, 811, 213 S.E.2d 672, 674 (1975) ("One review on the merits, whether on habeas corpus or on appeal of conviction, is sufficient, where neither facts nor law has changed."). Res judicata also does not apply if appellate counsel failed to raise the specific claim for which a habeas petitioner seeks relief. *See Holt v. State*, 205 Ga. App. 40, 42, 421 S.E.2d 131, 133-34 (1992) (recognizing that an ineffective appellate lawyer cannot waive a claim for ineffective assistance of trial counsel); *Crawford v. Thompson*, 278 Ga. 517, 520, 603 S.E.2d 259, 262 (2004) (reversing the denial of habeas relief when the appellate attorney raised one instance of ineffective assistance of trial counsel on direct appeal but failed to raise another, stronger in-

stance of ineffective assistance of trial counsel based upon different facts). Accordingly, res judicata does not bar a claim in a habeas corpus petition if it is based upon facts not presented on direct appeal.

Because none of Mr. Fults's claims are premised on the facts presented to the Georgia Supreme Court on direct appeal, none of Mr. Fults's claims are barred by res judicata.

### 3. *The procedural default rule does not bar Mr. Fults's claim of mental retardation because the failure to address that claim would constitute a miscarriage of justice.*

The procedural default limitation on the jurisdiction of a habeas court does not apply when the failure to adjudicate the claim would result in a miscarriage of justice. *See, e.g., Chatman v. Mancill*, 278 Ga. 488, 489, 604 S.E.2d 154, 155 (2004) ("Under the 'procedural default' rule, the habeas court may consider Mancill's defaulted claim only if the 'cause and prejudice' test is satisfied or in order to avoid a miscarriage of justice where there has been a substantial denial of constitutional rights."); O.C.G.A. § 9-14-48(d) ("In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice."). The Georgia Supreme Court has held that the failure to present at trial a claim that a capital defendant is mentally retarded constitutes a miscarriage of justice such that a habeas petitioner may always present that claim anew to a habeas court. *See Schofield v. Holsey*, 281 Ga. 809, 816, 642 S.E.2d 56, 63 (2007) ("The habeas court was correct in considering this new claim, because this Court, under the 'miscarriage of justice' exception to the rule of procedural default, has authorized habeas courts to consider alleged mental retardation when the issue was not raised at trial.").

Accordingly, Mr. Fults's claim that he is mentally retarded and that executing him would violate Georgia law and the United States Constitution are cognizable in these proceedings.

### B. Mr. Fults is mentally retarded, and Mr. Mostiler's failure to raise the issue at trial constitutes a miscarriage of justice.

"Under both the Georgia and United States Constitutions, a criminal defendant may not be put to death if he is found to be mentally retarded." *Rogers v. State*, 276 Ga. 67, 68, 575 S.E.2d 879, 881 (2003). "Accordingly, where a defendant's mental capacity is challenged or otherwise appears to be in question, the Georgia and United States Constitutions require adjudication of the defendant's mental capacity in order to determine his or her eligibility for a death sentence." *Id.* A claim of mental retardation is cognizable in habeas corpus even if it was not raised with the trial court. *See Schofield*, 281 Ga. at 816, 642 S.E.2d at 63 ("The habeas court was correct in considering this new claim, because this Court, under the 'miscarriage of justice' exception to the rule of procedural default, has authorized habeas courts to consider alleged mental retardation when the issue was not raised at trial.")

Georgia law does not define mental retardation. Accordingly, when the legislature has not defined mental retardation, courts turn to the professional community and the Diagnostic and Statistical Manual of Mental Disorders IV ("DSM-IV") published by the American Psychiatric Association when addressing issues of mental retardation. *See, e.g., Commonwealth v. Crawley*, — A.2d —, —, 2007 WL 1583583, *3 (Pa. 2007) ("Accordingly, we reiterate that for purposes of the imposition of the death penalty in Pennsylvania, the definition of mental retardation is that set forth in the DSM-IV or the AAMR."); *Lynch v. State*, 951 So. 2d 549, 556-57 (Miss. 2007) (applying the definition of mental retardation contained in the DSM-IV). It is undisputed that the DSM-IV provides the diagnostic framework to determine whether Mr. Fults is mentally retarded.

A diagnosis of mild mental retardation requires a finding that the defendant met the following three criteria:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning);

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before age 18 years.

(Petitioners Ex. 57 at p. 49.)

Based upon these requirements, Jethro W. Toomer, Ph.D.,[30] diagnosed Mr. Fults as mildly mentally retarded. (Petitioner's Ex. 27 at p. 4; Respondent's Ex. 4 at p. 29.) The DSM-IV defines mild mental retardation as follows:

> Mild Mental Retardation is roughly equivalent to what used to be referred to as the educational category of "educable." This group constitutes the largest segment (about 85%) of those with the disorder. As a group, people with the level of Mild Mental Retardation typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in the sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic

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30. Dr. Toomer is routinely appointed by the courts in Dade County, Florida, and has described his court-appointed work as follows:

> [I]t depends on the Court. If it's a major felony, they are usually death penalty cases. [U]sually they are crimes where substance abuse is a critical issue, so I get appointed to evaluate those individuals by the Court and to render an opinion regarding a whole variety of issues. Mental retardation, whether that was an issue in terms of the crime, mental illness, competency, sanity at the time. It just depends on the particular case and the particular Court as to what the specific issues . . . the Court is interested in.
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> . . .
>
> They might want a competency evaluation or an evaluation to determine whether the person was sane or insane to meet the test for criminal responsibility. Sometimes they want an opinion whether the person is capable of representing himself pro se representation. There are all kinds [of] issues that the Court raises.
>
> Sometimes the issue is Miranda. Whether the person was capable of making a knowing, intelligent and voluntary waiver of his Miranda rights at the time. Sometimes a combination of all of that.

(Respondent's Ex. 4 at pp. 7-8.) Dr. Toomer began his career in forensic psychology working for the courts in Philadelphia during graduate school by providing psychological evaluations. (Id. at p. 14.) He has served as an expert witness for the State of Florida in death penalty cases. (Id. at p. 18.)

> skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

(Petitioner's Ex. 57 at p. 43.) As demonstrated below, Mr. Fults meets each of the three required elements to be diagnosed as mildly mentally retarded. Accordingly, the writ should issue.

### *1. Mr. Fults has an I.Q. within the prescribed range for mildly mentally retarded individuals.*

The first element for diagnosing mental retardation can be met with an IQ test as high as 75, because "there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument . . . ."[31] (Petitioner's Ex. 57 at p. 41.) *See Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002) (noting that an I.Q. score "between 70 and 75 or lower . . . is typically considered the cut-off" for a finding of mental retardation); *Commonwealth v. Miller*, 888 A.2d 624, 631 & n.9 (Pa. 2005) (noting "it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation" and refusing to "adopt a cutoff IQ score for determining mental retardation in Pennsylvania"); *State v. Harris*, 859 A.2d 364, 447 (N.J. 2004) (noting that DSM-IV has a measurement error of approximately five points in assessing I.Q.). The "upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment

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31. The importance of the standard of error in assessing mental retardation has been judicially recognized by many courts. *See, e.g., Garcia Briseno v. Dretke*, 2007 WL 998743 (S.D. Tex. 2007) (certifying issue of possible mental retardation to the Fifth Circuit Court of Appeals and noting that IQ scores of 72 and 74 placed the defendant within the range of mental retardation in light of the five point error of measurement); *Rivera v. Dretke*, 2006 WL 870927, *14 n.33 (S.D. Tex. 2006) (granting the writ of habeas corpus and noting that the WAIS-III test has margin of error of five points); *State v. Dunn*, 831 So. 2d 862, 886 n.9 (La. 2002) (holding that the standard error of measurement must be considered in evaluating IQ test scores for mental retardation); *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (remanding habeas petitioner's claim and ordering a hearing to determine whether the petitioner was mentally retarded with an I.Q. score as low as 72).

by a qualified psychological examiner." *Harris*, 859 A.2d at 446. "Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." (Petitioner's Ex. 57 at pp. 41-42.) *See State v. Jimenez*, 908 A.2d 181, 184 n.3 (N.J. 2006) ("Because the DSM-IV definition recognizes a measurement error of five points in assessing I.Q., persons with I.Q.s between 70 and 75 who exhibit significant deficits in adaptive behavior may be mentally retarded."); *Chase v. State*, 873 So.2d 1013, 1028 (Miss. 2004) (remanding to trial court to allow defendant to proceed in trial court on claim of mental retardation and noting that "it is possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75"); *State v. Canez*, 74 P.3d 932, 937 (Ariz. 2003) (recognizing that "[a]n IQ below 70-75 indicates sub-average intellectual functioning").

Dr. Toomer's testing concluded that Mr. Fults has an I.Q. of 72.[32] (Petitioner's Ex. 27 at p. 2; Hearing Transcript at p. 221; Respondent's Ex. 4 at pp. 30-31.) This I.Q. score was based upon Mr. Fults's performance on the Wechsler Adult Intelligence Scale ("WAIS") administered by Dr. Toomer which is approved by the DSM-IV. (Petitioner's Ex. 27 at pp. 1-2; Hearing Transcript at pp. 205, 215; Respondent's Ex. 4 at pp. 29-30.) Mr. Fults's score on the WAIS is consistent with his earlier I.Q. score of 72 when he was tested at age 14. (Petitioner's Ex. 45.) Mr. Fults's score is also consistent with his score of 68 on the Test for Nonverbal Intelligence administered by the Mississippi Department of Corrections when he was 20 years old. (Petitioner's Ex. 48; Hearing Transcript at pp. 216-18, 220, 222.) Finally, this score is further consistent with the K-BIT administered by Dr. Bailey-Smith. (Petitioner's Ex. 55; Hearing Transcript at pp. 219, 222.) In fact, this score is wholly consistent with every intelligence and achievement test contained in the record; there is not a single alternative test score at odds with the score obtained by Dr. Toomer.

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32. Dr. Toomer conducted his evaluation and testing prior to receiving any of the affidavits and institutional records for Mr. Fults. (Respondent's Ex. at pp. 25-26.)

Three I.Q. scores obtained pre-trial, "all suggest[ed] to [Dr. Toomer] that there is a very significant likelihood of underlying intellectual impairment that would require further assessment and further testing." (Hearing Transcript at p. 220.) Moreover, Dr. Toomer found "them all to be consistent, . . . in terms of suggesting the likelihood of mental retardation, based upon the assessment of . . . those protocols."[33] (Id. at p. 222.) When Dr. Toomer engaged in that testing, he determined that Mr. Fults had an I.Q. of 72 which falls within the range for mildly mentally retarded. (Petitioner's Ex. 27 at p. 2, Ex. 57 at pp. 41-42; Hearing Transcript at p. 221.) Essentially, Dr. Toomer observed "a consistent pattern of impaired intellectual function that goes through to the DOC records in Mississippi." (Respondent's Ex. 4 at p. 36.)

The DSM-IV recognizes that I.Q. scores fall within a range of error and states that an I.Q. score as high as 75 can support a diagnosis of mildly mentally retarded. (Petitioner's Ex. 57 at pp. 41-42; Hearing Transcript at pp. 214-15.) Accordingly, Dr. Toomer has appropriately diagnosed Mr. Fults as mildly mentally retarded in accordance with the standards contained in DSM-IV. (Petitioner's Ex. 27 at p. 4.)

The Respondent has provided no expert testimony, documentary evidence, lay testimony, or any other evidence to rebut or refute Dr. Toomer's conclusions regarding Mr. Fults's I.Q. Accordingly, this evidence is undisputed, and the writ should issue for this reason alone.

### *2. Mr. Fults has concurrent deficits and impairments in adaptive functioning.*

For the second element of mental retardation, the term "[a]*daptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." (Petitioner's Ex. 57 at p. 42 [emphasis in original].) In

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33. This conclusion is also consistent with the difficulty Mr. Fults had in school as reflected by his test scores, educational records, and observations by family and teachers. (Respondent's Ex. 4 at pp. 32-33.)

assessing adaptive functioning, "[i]t is useful to gather evidence for deficits in adaptive functioning from one or more reliable independent sources (e.g., teacher evaluation and education, developmental, and medical history)." (Id.)

In order to determine Mr. Fults's adaptive functioning, Dr. Toomer reviewed the affidavits from his friends, family, and educators presented to the Court. (Hearing Transcript at pp. 207-08; Petitioner's Exs. 1, 5-11, 13, 15-21, 23, 25, 27; Respondent's Ex. 4 at pp. 27-28, 32-33.) Dr. Toomer also reviewed various institutional records for Mr. Fults including his educational and employment records. (Hearing Transcript at pp. 209-10.) Finally, Dr. Toomer reviewed the testimony provided at Mr. Fults's trial. (Id. at pp. 210-11.) These materials are typically used by professionals to assess adaptive functioning. (Id. at p. 211; Respondent's Ex. 4 at p. 21.) These materials led Dr. Toomer to conclude that Mr. Fults has significant adaptive functioning deficits and that "his level [of adaptive functioning] was approximately the equivalent of a 12-year-old." (Respondents Ex. 4 at pp. 38-42, 45, 48, 60, 74.)

Based on these materials, Dr. Toomer concluded that Mr. Fults suffered from significant deficits in communication prior to the age of 18 years. (Hearing Transcript at p. 224.) Dr. Toomer based his diagnosis on the following observations:

> There was consistency among those reporters who describe, for example, Mr. Fults's deficits, problems, and difficulty in terms of the communication process. That was reflected in a number of instances such as an incidence [sic.] where Mr. Fults had difficulty understanding and that communication with him required repetition — over and, over again, in order to try to help him understand what was being said.
>
> [A]nother example was the fact that family members said that they never recall having a serious conversation with him. [W]henever an attempt was made to discuss something serious or of a serious nature, he would joke his way out of it. And they thought that at first it was kind of a male growing process. But then they realized that that was sort of the strategy that he used not to have to focus or to deal in any depth with a particular situation.
>
> And they found that that was a continuing kind of phenomenon.. His sister indicated that she does not recall having a serious conversation with him throughout his developmental . . . years by virtue of the fact that it was constantly the super-

> ficial nature of his responding in an attempt to not have to deal with anything . . . .

(Id. at pp. 224-25.) Dr. Toomer also based his opinion on the observations of Mr. Fults's first-grade teacher, Rosalie Conner, who stated that Mr. Fults would have been placed in special education classes if they existed at that time and that he was in the class of the worst-performing students. (Id. at p. 226.) The affidavits of his friends, family members, and educators consistently demonstrated that Mr. Fults had significant deficits in communication from an early age. (Id.)

Dr. Toomer also concluded that Mr. Fults had significant deficits in the area of self-care. (Id. at p. 228.) Self-care is "an individual's increasing ability to independently manage activities of daily living." (Id. at p. 227.) Dr. Toomer based his conclusion on the observations contained in the affidavits he reviewed:

> Part of what was reflected in the affidavits was the fact that he tended to be behind or slower than every one else. It took him a lot longer to do things that others his [age] could do very quickly.
>
> And that would be . . . all the way from getting up in the morning, to getting dressed, to take care of himself in the bathroom, to getting to school on time. All of these kinds of things were indicated as being areas where he was behind everyone else.

(Id. at pp. 228-29.) Dr. Toomer also concluded that Mr. Fults's thumb-sucking and pillow-carrying were consistent with his inability to engage in self-care:

> One of the affiants describe the fact that Mr. Fults always had this pillow that he carried with him everywhere. And he would be sucking his thumb, and would have his finger up his nose while he carried his pillow. And he carried the pillow and it could not be separated from him, and it was described as being dirty and gross.
>
> But he would continue to . . . carry the pillow. And it was only when he was about 15 years old or so that . . . someone threw it out so that he would not have access to it.

(Id. at p. 229.)

Dr. Toomer also determined that Mr. Fults had significant deficits in functional academics. (Id. at p. 236.) "Functional academics has to do with . . . whether, and to what degree the individual is able to apply what he or she has learned to the real world." (Id. at p. 230.) Mr. Fults's education records demonstrated "impaired intellectual functioning . . . that covered . . . various portion[s] of his . . . developmental history."[34] (Id. at p. 230.) At the age of 17, Mr. Fults "was reading at a fifth-grade level, and he was doing math at the second-grade level, and he failed to meet the qualifications to even take the high school equivalency diploma." (Id. at pp. 230-31.) Mr. Fults's education records indicated "that he needs teacher direction, and the fact that he has a low retention level, and that he is — he is basically under performing, and should be placed in a basic class" which demonstrated "that his impaired functioning has been in existence over time, and it is not just a one-time occurrence, but it has occurred over time." (Id. at p. 232; Petitioner's Ex. 45.) At age 20, Mr. Fults took the Wide Range Achievement Test[35] and "scored low in all areas" such that "he was reading at the fourth-grade level, and [performing] at the fourth-grade level in arithmetic at that particular point in time." (Hearing Transcript at p. 234.) On the Wide Range Achievement Test administered by Dr. Toomer, Mr. Fults again scored low in all areas: at the "fifth-grade level in reading," the "fifth-grade level in spelling, and [the] third-grade level in arithmetic." (Id. at p. 235.) Accordingly, "98 percent of individuals are performing at a higher level than he is . . . ." (Id. at p. 236.) These scores coupled with the observations of his friends, family, and educators demonstrate that Mr. Fults suffers from significant adaptive deficits in the area of functional academics. (Id.) Essentially,

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34. Dr. Toomer found the observations of Rosalie Conner, Mr. Fults's first-grade teacher, to be especially important since her observations were based on decades of teaching. (Respondent's Ex. 4 at pp. 34-35.)

35. "The Wide Range Achievement Test or WRAT is an achievement test which measures an individual's ability to read words, comprehend sentences, spell, and compute solutions to math problems." *Wide Range Achievement Test*, http://en.wikipedia.org/wiki/Wide_Range_Achievement_Test.

Dr. Toomer observed "a consistent pattern of impaired intellectual function that goes through to the DOC records in Mississippi." (Respondent's Ex. 4 at p. 36.)

Dr. Toomer also diagnosed Mr. Fults with significant deficits in social interpersonal skills. (Hearing Transcript at p. 237.) "Social interpersonal skills ha[ve] to do with whether or not, and to what degree the individual is able to develop, manifest, and maintain appropriate peer relationships." (Id. at p. 236.) Dr. Toomer concluded that Mr. Fults had this significant deficit because of his inability to develop friendships with individuals his own age:

> They describe, for example, the fact that Mr. Fults's peer relationships during this time . . . are always with individuals that are of a much younger chronological age.
>
> He appeared to have difficulty interacting with or developing relationships with those of his own peer group. And so where ever they saw him when he was with someone, when he wasn't alone, he was always with someone, with individuals of a much younger chronological age.
>
> . . .
>
> I think at a very basic level, it is significant. Because it tends to reflect a comfort level that is commensurate with one's level of intellectual functioning, and adaptive functioning. And so it would suggest that Mr. Fults was more comfortable with individuals of a much younger chronological age because of his own deficits, in terms of functioning, in terms of managing his environment.

(Id. at pp. 237-38.) This type of conduct is routinely seen in mentally retarded individuals. (Id. at p. 238.) Dr. Toomer also concluded that Mr. Fults suffered significant deficits in social interpersonal skills because he was easily manipulated by others:

> Because of some of the deficits that we have alluded to earlier, he could be easily influenced and manipulated by others who would do so sometimes, and would ridicule him regarding that and because he wanted to be accepted, and because of his deficits, he would often times be manipulated by others.
>
> They would indicate that they were going to give him money for doing a particular task. But that he would do whatever he was instructed to do, and that they would not give him money, and then the next week they would come back and do the same thing again, and he would fall for the same trick again.
>
> And they would continue to do that. And because . . . they saw that he could be manipulated, . . . they continue to do that, and he was victimized in that particular instance.

(Id. at p. 238.) Based upon the observations from his friends and family, Dr. Toomer concluded that Mr. Fults has significant deficits in social interpersonal skills. (Id. at p. 239.)

Dr. Toomer also concluded that Mr. Fults had significant deficits in the use of community resources. (Id. at p. 240.) This category "has to do with how the individual, and to what degree the individual is capable of managing the events, circumstances, et cetera, in his immediate environment." (Id. at p. 239.) As with other categories, Dr. Toomer based his diagnosis upon the observation of Mr. Fults's family and friends:

> Family members recount numerous incidences [sic.]. [H]is mother indicated, for example, that she would . . . not let him go anywhere beyond . . . a three to four-block radius from the house because he would tend to get lost when he would . . . venture that far.
>
> And on one occasion, I believe it was his cousin, they were in a particular area, and they were together and she was injured to the point that he had to carry her home because she had been injured in a fall from a swing or a tree or something like that. And she replied that he took her home by the most secure route because that was all that he had learned, and could not make the adjustment to take the shortest route, given the circumstances . . . at that particular point in time.
>
> . . .
>
> His mother also indicated that [Mr. Fults] could not give directions. And that even as he was older that someone asked him something about something nearby. He could not give appropriate directions going from one point to the other.

(Id. at pp. 240-41.) Accordingly, Dr. Toomer concluded that Mr. Fults had significant deficits in use of community resources. (Id. at p. 241.)

Dr. Toomer determined that Mr. Fults also had significant deficits with respect to self direction. (Id. at p. 242.) "Self direction has to do with the individual's move from what we refer to, often time, as concrete versus abstract reasoning." (Id. at p. 241.) It also relates to "the individual's ability to function appropriately in his environment . . . like completing tasks that they start, being able to master certain tasks, or to accomplish certain tasks." (Id. at p. 242.) Dr. Toomer provided several examples which supported his conclusion:

> For example, his being unable to go to the store [after] he was sent with a certain amount of money. He couldn't remember the list, or . . . he wouldn't come back with the appropriate change. He might have been cheated out of the amount of money that he was supposed to receive.
>
> Also there was another incidence [sic.] where he was home with a cousin [o]r two cousins or two other family members, and he had been instructed by his mother not to let anyone in the door. And one of the cousins left. And he would not let her in the door when she came back.
>
> And so the other individual in the house had to call his mother, who had to come home from work to get him to open the door to let his other family member in. And she said that he responded that you told me that I was not to let anybody in the door.

(Id. at p. 243.)

With respect to leisure, Dr. Toomer also concluded that Mr. Fults had significant deficits. Dr. Toomer described how this category has to do with the development of age-appropriate leisure activities. (Id. at pp. 243-44.) Dr. Toomer noted that individuals with deficits do not broaden or develop their leisure activities. (Id. at p. 244.) Dr. Toomer identified several instances that demonstrated Mr. Fults's deficits:

> Mr. Fults's leisure activity . . . always involved individuals of a much younger chronological age. Never peer group members. Never individuals of the same age during . . . this particular point in time.
>
> [O]ne . . . incidence that . . . I thought was interesting in this regard . . . occurred when Mr. Fults was 21 years of age. And they were at home, and there were younger kids there. And he was with the younger kid, and the idea was that they were going to sneak into the liquor cabinet and steal some liquor.
>
> And the kids report that — at least the person who was reporting said that they didn't quite understand it at the time why he would do it. Because he was 21 and he was able to drink. But yet, he was with the younger kids, and assisting them in . . . breaking into the liquor.

(Id. at p. 244.)

Dr. Toomer found significant deficits in health and safety. (Id. at p. 245.) This category involves an individual's ability "to engage in behavior that is not directly injurious." (Id. at p. 245.) In support of his conclusion, Dr. Toomer pointed to an incident in which Mr. Fults intentionally held a firework in his hand because "he was told to do so." (Id. at pp. 245-46.)

The final category in which Dr. Toomer concluded that Mr. Fults had significant deficits was work. This category relates changes in the types of work able to be performed over time: "their work will take on different flavor, different character, different types of work." (Id. at p. 246.) Ideally, levels of responsibility increase over time. (Id.) Dr. Toomer concluded that Mr. Fults had significant deficits in work because he had difficulty performing even repetitive tasks:

> Mr. Fults's work history was always basically in jobs that were repetitive, redundant, and basically required kind of one-stop activities. [These jobs] [d]id not require a great deal of abstract reasoning . . . .
>
> There were family members who talked about his working with other family members [at] a restaurant, and he couldn't seem to do things right as he was instructed [and was] not being able to follow instructions . . . .
>
> At one job, I believe at the rubber plant, he didn't show up . . . . [T]he jobs that he held were basically jobs that were redundant, repetitive. But he didn't seem to manage all of the activities that are required. [Y]ou have to get up, you have to get dressed, and you have to get there on time. You have to be consistent, you have to . . . be consistent over time.
>
> You have to get there not one day or two days, but everyday on time . . . . And he did not seem to be able to manage that. And that was reflected in his history.

(Id. at pp. 246-47.) The mildly mentally retarded can hold a job that requires "redundant, repetitive, rudimentary kind of tasks," but Mr. Fults's inability to maintain his jobs was consistent with mild mental retardation. (Respondent's Ex. 4 at p. 42.)

Based upon all of this information, Dr. Toomer concluded that Mr. Fults met the second requirement for a diagnosis of mental retardation. (Hearing Transcript at p. 250.) The Respondent has not provided any expert to testify that Dr. Toomer's conclusions regarding Mr. Fults's adaptive functioning are incorrect. Accordingly, there is no professional opinion in the record contrary to Dr. Toomer's, and the writ should issue.

### *3. Mr. Fults's mental retardation developed before the age of 18 years.*

Dr. Toomer concluded that Mr. Fults's mental retardation was present during his childhood. (Hearing Transcript at p. 249.) The early-onset requirement exists to ensure a "historical pattern, that progressive pattern of impaired functioning, having its origin — its origin prior to the onset of age 18." (Id. at p. 248.) Support for Dr. Toomer's diagnosis is found in Mr. Fults's I.Q. score of 72 at age 14 and in the testimony of numerous affiants who describe Mr. Fults's adaptive behavior deficits over the course of his childhood and teenage years. Accordingly, the writ should issue.

## C. Mr. Fults's lawyers provided ineffective assistance of counsel such that none of his claims are procedurally barred.

"A claim of ineffective assistance of counsel is grounded in the general right to counsel guaranteed to criminal defendants by the Sixth Amendment to the United States Constitution and Article I, Section I of the Georgia Constitution."[36] *Turpin v. Christenson*, 269 Ga. 226, 231, 497 S.E.2d 216, 222 (1998). *See also Strickland*, 466 U.S. at 686. The United States Supreme Court has described this right in the following terms:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

*Strickland*, 466 U.S. at 685. "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Id.* at 685. Instead, effective assistance of counsel requires active advocacy of the client's cause and active opposition to overreaching by the state. *See id.* at 688. *See also Halloway v. Arkansas*, 435 U.S.

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36. The Georgia Constitution guarantees that "[e]very person charged with an offense against the laws of this state shall have the privilege and benefit of counsel." GA. CONST. art. I, § 1, para. XIV. The Georgia Supreme Court analyzes ineffectiveness claims under either or both constitutions according to the federal standard. *See Smith v. Francis*, 253 Ga. 782, 784, 325 S.E.2d 362, 363 (1985).

475, 490 (1978) ("The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee . . . ."). When a lawyer represents a defendant in a criminal case, the lawyer has an "overarching" duty to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688.

Ineffective representation by counsel requires that a conviction or sentence be set aside in favor of a fair, properly adversarial trial where: (1) counsel's performance "fell below an objective standard of reasonableness;" and (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The writ will issue if the failings by counsel amount to virtually no assistance whatsoever, or if prejudice is shown such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[37] *See,*

37. Ineffective assistance of counsel has been found in a variety of situations. *See Hill v. Lockhart*, 474 U.S. 52, 58-60 (1985) (discussing the standard for ineffectiveness with respect to guilty pleas); *Williams v. Washington*, 59 F.3d 673 (7th Cir. 1995) (concluding that counsel was ineffective in investigating and presenting a defense); *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995) (holding that counsel was ineffective for failing to investigate and present available evidence of bipolar disorder); *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir. 1995) (concluding that counsel's failure to present evidence at the penalty phase of the defendant's long history of mental illness rendered counsel ineffective); *Bryant v. Scott*, 28 F.3d 1411, 1416-20 (5th Cir. 1994) (holding that counsel was ineffective for failing to investigate and interview alibi witnesses made known to counsel three days before trial, failing to interview eyewitnesses, and failing to interview the codefendant who maintained that the petitioner was not the second perpetrator of the alleged robberty); *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994) (determining that trial counsel was ineffective at the penalty phase for failing to prepare and present evidence of the defendant's mental state at the time of the offenses); *Loyd v. Whitley*, 977 F.2d 149, 156-60 (5th Cir. 1992) (holding that counsel was ineffective in sentencing phase for failing to obtain independent mental health evaluation when the funds were available); *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992) (concluding that trial counsel was ineffective in a murder case for failing to investigate and present powder residue evidence that was consistent with the defendant's claim that the shooting was accidental and at close range); *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1358-60 (4th Cir. 1992) (finding that counsel was ineffective for failing to contact alibi witnesses); *Moffett v. Kolb*, 930 F.2d 1156, 1160-63 (7th Cir. 1991) (holding that trial counsel was ineffective in a murder case for failing to introduce prior inconsistent statements of a state witness); *Cunningham v. Zant*, 928 F.2d 1006, 1017-19 (11th Cir. 1991) (determining that counsel was ineffective for sentencing purposes when they were aware of but failed to subpoena or present medical evidence which showed that the client was mildly mentally retarded); *Harris v. Reed*, 894 F.2d 871, 878-79 (7th Cir. 1990) (holding that counsel was ineffective for failing to call eyewitnesses who saw another man run from the scene of a shooting); *Evans v. Lewis*, 855 F.2d 631, 636-39 (9th Cir. 1988) (concluding that counsel's failure to investigate the defendant's mental condition for the purpose of presenting mitigation evidence at

*e.g., Curry v. Zant*, 258 Ga. 527, 529, 371 S.E.2d 647, 649 (1988) (concluding that notwithstanding an otherwise reasonable performance by counsel, the single error of failing to obtain an independent psychiatric evaluation of the defendant, which might have been the basis for a successful defense of not guilty by reason of insanity and would have provided crucial evidence in mitigation, deprived the defendant of the protection of counsel).

In assessing counsel's performance in a capital trial, a reviewing court must take the seriousness of the charges into account and must rigorously scrutinize counsel's performance in light of those charges. *See House v. Balkcom*, 725 F.2d 608, 615 (11th Cir. 1984) (holding that "the seriousness of the charges against the defendant is a factor that *must be considered* in assessing counsel's performance") (quoting *Proffit v. Wainwright*, 685 F.2d 1227, 1247 (11th Cir. 1982) (emphasis in original)); *Ross v. Kemp*, 260 Ga. 312, 312, 393 S.E.2d 244, 244 (1990) ("This is a case in which petitioner's life hangs in the balance, thereby causing this court to pay the utmost attention to rights guaranteed under the Constitutions of the United States and the State of Georgia.").

The ineffective assistance of counsel rendered by Mr. Mostiler and Mr. Sturdivant removes any procedural default to Mr. Fults's claims. There is cause and prejudice to reach the

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sentencing phase was prejudicial); *Middleton v, Dugger*, 849 F.2d 491, 493-95 (11th Cir. 1988) (determining that counsel was ineffective for failing to conduct an investigation into the petitioner's background to uncover mitigating psychiatric and childhood information); *Stephens v. Kemp*, 846 F.2d 642, 652-55 (11th Cir. 1988) (holding that the defendant was prejudiced when counsel was aware well in advance of trial that his client had spent at least a brief period of time in a mental hospital shortly before the shooting and that a psychiatric evaluation had been ordered but ignored the possible ramifications of those facts at sentencing); *Magill v. Dugger*, 824 F.2d 879, 889-90 (11th Cir. 1987) (holding that the defendant was prejudiced when counsel failed to discuss with the defendant the possibility that the state would seek to prove premeditation during his testimony on cross-examination, failed to object when the prosecutor asked the defendant to concede his guilt to capital murder, and did not develop or present to the jury the defense theory that the defendant committed the killing without premeditation); *Blake v. Kemp*, 758 F.2d 523, 531 (11th Cir. 1985) ("[T]he courts have 'long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel.' ") (citation omitted); *DeLuca v. Lord*, 858 F. Supp. 1330 (S.D.N.Y. 1994) (holding that trial counsel was ineffective for failing to pursue an extreme emotional disturbance defense to a murder charge when the defendant had been raped by the murder victim and had suffered from rape trauma syndrome).

merits of the claims in Mr. Fults's petition under O.C.G.A. § 9-14-48(d). *See Todd*, 268 Ga. at 826, 493 S.E.2d at 906. Constitutionally ineffective assistance of counsel constitutes cause under O.C.G.A. § 9-14-48(d). *See id*, 268 Ga. at 826, 493 S.E.2d at 906. The Georgia Supreme Court has made it clear that the definition of "cause" under the Georgia statute mirrors its federal counterpart. *See id.* at 268 Ga. at 825, 493 S.E.2d at 905.

Mr. Sturdivant's and Mr. Mostiler's performance was constitutionally deficient. They did not raise any of the issues outlined herein in the motion for new trial or direct appeal. Accordingly, their behavior is the cause of the failure of the claims to be raised. The prejudice arises from the fact that Mr. Fults's claims are meritorious. Moreover, as outlined below, prejudice should be presumed because neither Mr. Mostiler nor Mr. Sturdivant adhered to the requisite guidelines regarding the number of cases they could appropriately handle at any given time. Accordingly, no claim should be barred because of procedural default, and the writ should issue.

*1. Mr. Mostiler provided ineffective assistance of counsel.*

**a. Mr. Mostiler failed to investigate adequately mitigation evidence and to present Mr. Fults's complete life history to the jury.**

It is well settled that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (footnotes omitted). So broad is the concept of mitigation that it incorporates the "diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The Supreme Court has, therefore, held that trial counsel in a capital case has an "obligation to conduct a thorough investigation of defendant's background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000). The Supreme Court has held that a reasonable sentencing phase investigation should "comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that

may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 524 (emphasis omitted). The Supreme Court has relied on the ABA guidelines which state that "the lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor and to the court at sentencing" and that "[i]nvestigation is essential to fulfillment of these functions." *Id.* at 525 (quoting 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1, p.4-55).

However sweeping mitigation may be for purposes of the Eighth Amendment, it is even more encompassing under Article I, Section I, Paragraph 17 of the Georgia Constitution and O.C.G.A § 17-10-30. Hence, "Georgia provides a defendant with more protection than that provided under *Lockett* and a trial court 'should exercise . . . broad discretion in allowing any evidence reasonably tending toward mitigation.'" *Barnes v. State*, 269 Ga. 345, 359, 496 S.E.2d 674, 688, (quoting *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981)). This is so because under the Georgia scheme, unlike its federal counterpart or the capital sentencing statutes in many jurisdictions, the sentencer is directed to consider mercy in addition to mitigation in distinguishing "the few cases in which [death] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). *See* O.C.G.A. § 17-10-2 (requiring that the court charge a capital jury on the legitimacy of mercy as a sentencing consideration); *Barnes*, 269 Ga. at 357-60, 496 S.E.2d at 687-89; *Romine v State*, 251 Ga. 208, 217, 305 S.E.2d 93, 101 (1983). *See also Moore v. Kemp*, 809 F.2d 702, 733 (11th Cir. 1987) (en banc) (holding that the failure to instruct a Georgia jury on its "life option" in accordance with Georgia's capital sentencing act rendered the penalty phase unconstitutional).

There is no doubt, therefore, that Mr. Fults had an absolute right to have a jury consider material concerning the particularities of his life, and that of his family's, in passing judgment on whether he should live or die.[38] *See Lockett*, 438 U.S. at 604; *Eddings v. Oklahoma*, 455 U.S.

38. Trial courts exercise broad discretion in permitting any evidence reasonably tending toward miti-

104, 113-16 (1982); *Barnes*, 269 Ga. at 357-60, 496 S.E.2d at 687-89; *Romine*, 251 Ga. at 217, 305 S.E.2d at 101. This right is so urgent and over-arching that State evidentiary rules, such as hearsay, cannot be used in a mechanistic way to exclude evidence that the defendant offers in his case in mitigation. *See Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam).

It is equally clear that, in assessing whether Mr. Mostiler performed in the manner required by the Sixth Amendment and Article I, Section I, Paragraphs 14 and 17, the Court must consider what potential evidence existed which might have formed a theory of mitigation or a basis for mercy. Only by reviewing the available life history evidence can the Court determine if Mr. Mostiler's failure to investigate, prepare, and present material concerning Mr. Fults's life history, the history of his family, and the circumstances of their lives, undermines the reliability of the instant death sentence. *See, e.g., Collier v. Turpin*, 155 F.3d 1277, 1184, 1201-02 (11th Cir. 1999) (concluding that counsel was ineffective during the penalty phase for failing to investigate, prepare, and present expert and lay evidence on the impact of diabetes on the defendant); *Baxter v. Thomas*, 45 F.3d 1501, 1513-14 (11th Cir. 1995) (holding that counsel was ineffective during the penalty phase for failing to investigate or present mitigating evidence based on prior mental health treatment); *Thomas v. Kemp*, 796 F.2d 1322, 1324-25 (11th Cir. 1986) (finding that counsel was ineffective during the penalty phase for failing to investigate or present evidence in mitigation based on petitioner's mental state, biography, and family history); *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir. 1985) (holding that counsel's performance fell below the requirements of the Sixth Amendment due to failure to investigate or present mitigation based on life history); *Johnson v. Kemp*, 615 F. Supp. 355, 364 (S.D. Ga. 1985) (same); *Christenson*, 269

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gation. *Cofield*, 247 Ga. at 112, 274 S.E.2d at 542. The Georgia Supreme Court has "consistently refused to place unnecessary restrictions on the evidence that can be offered in mitigation at the sentencing phase of a death penalty case." *Bright v. State*, 265 Ga. 265, 274, 455 S.E.2d 37, 49 (1995). Recently, it determined that "no unnecessary restrictions should be imposed on the mitigation evidence that a defendant can present in the sentencing phase regarding his individual background and character .... All doubt should be resolved in favor of admissibility." *Barnes*, 269 Ga. at 360, 496 S.E.2d at 689 (footnote omitted).

Ga. 226, 234-36, 497 S.E.2d 216, 224-26 (concluding that counsel's lack of investigation and advocacy concerning substance abuse and the defendant's mental health history violated the Sixth Amendment).

Mr. Mostiler's failure to investigate Mr. Fults's background and mental retardation was unreasonable. Reasonable investigation is a prerequisite for effective lawyering. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "Counsel has a duty to investigate and to provide informed legal advice to the client and 'first must evaluate potential avenues and advise the client of those offering possible merit.'" *Morrison v. State*, 258 Ga. 683, 686, 373 S.E.2d 506, 509 (1988) (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986)). The Eleventh Circuit has explained this duty:

> Of course, [the adversarial] testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies." *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 2588 (1986). Such an investigation includes at a minimum an independent examination of the relevant facts, circumstances, pleadings and laws. *Mulligan v. Kemp*, 771 F.2d 1436, 1442 (11th Cir. 1985) (quoting *Rummell v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979)); *see also Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985).

*Foster v. Dugger*, 823 F.2d 402, 405 n.9 (11th Cir. 1987).

A lawyer's duty to investigate is heightened when mental health is at issue. *See Morrison*, 258 Ga. at 686 n.3, 373 S.E.2d at 509 n.3; *Thompson* 787 F.2d at 1451. Moreover, in a death penalty case, a lawyer has an absolute duty to conduct a thorough investigation. *See Williams*, 529 U.S. at 396. This required investigation should begin early and should not wait until shortly before the sentencing phase. *See Christenson*, 269 Ga. at 234-36, 497 S.E.2d at 224-26; *Jermyn v. Horne*, 266 F.3d 257, 308 (3d Cir. 2001); *Blanco v. Singletary*, 943 F.2d 1477, 1501-02 (11th Cir. 1991) ("To save the difficult and time-consuming task of assembling mitigation wit-

nesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available.").

This case is very similar to *Wiggins v. Smith*, 539 U.S. 510 (2003), in which the United States Supreme Court granted relief in a capital case on an ineffectiveness of counsel claim. The Supreme Court found that by merely arranging for a psychological evaluation and obtaining a pre-sentence background investigation report and state foster care system records, Wiggins' counsel had "acquired only a rudimentary knowledge of [the defendant's] history from a narrow set of sources." *Id.* at 524.[39] Applying *Strickland*, the Supreme Court held that counsel's decision to terminate the mitigation inquiry was unreasonable because it was not informed by a thorough investigation into Wiggins's background. *See id.* at 527. In assessing the reasonableness of counsel's decision, the Supreme Court examined the adequacy of the underlying investigation under prevailing Maryland and national standards for capital defense representation. *See id.* at 523-24. Specifically, the Court found that counsel's failure to utilize a publicly funded forensic social worker to develop a comprehensive mitigation presentation fell below prevailing Maryland standards for capital representation at the time of trial as well as standards set forth in the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, which the Court described as "standards to which we long have referred as 'guides to determining what is reasonable.'" *Id.* at 524.[40] The Supreme Court in *Wiggins* endorsed ABA Guidelines as "well-defined norms" by which trial counsel's performance may be measured:

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39. The Court held that in assessing the reasonableness of trial counsel's investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527.

40. Mr. Wiggins's case hinged on the report of a social worker/mitigation expert who, in post-conviction proceedings, reviewed background records and interviewed Wiggins and his family members extensively about his life history. *See id.* at 523-25. A forensic social worker such as this was available to Wiggins' trial counsel, a public defender. The Supreme Court found trial counsel deficient because "[d]espite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report." *Id.* at 524.

> The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added).
>
> Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. *Cf. id.*, [Guideline] 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. Investigation is essential to fulfillment of these functions.")

*Id.* at 524-25 (emphasis in original).

This case is also remarkably similar to *Rompilla v. Beard*, 545 U.S. 374 (2005). In *Rompilla*, the United States Supreme Court presented a stark comparison between the mitigation case presented at trial and the mitigation case that should have and could have been presented to the jury. At the sentencing phase of Mr. Rompilla's trial, the defense presented the testimony of five family members. *See id.* at 378. They testified that Mr. Rompilla was a good man and innocent of the crime. *See id.* Mr. Rompilla's son testified that he loved his father and would visit him in prison. *See id.* at 378. However, had a proper background investigation been conducted, the jury could have been presented with the following testimony:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed severe drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

*Id.* at 391-92. The Court concluded that this "undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Rompilla's culpability." *Id.* at 393. The Supreme Court reversed the denial of the writ on the ground that Mr. Rompilla had received ineffective assistance of counsel under *Strickland*. *See id.*

Mr. Mostiler failed to examine Mr. Fults's troubled background and mental retardation and failed to present the complete facts to the jury in mitigation just like the attorney in *Wiggins* and *Rompilla*. The limited investigation began essentially three weeks before trial. The full extent of the investigation consisted of a few brief phone calls to some of Mr. Fults's family coupled with a one-day trip to Vicksburg, Mississippi, at a time when the school system was closed for spring break, during which his investigator spoke with virtually no one and obtained none of Mr. Fults's records in part because he had not even bothered to bring the proper releases. The few witnesses used at the sentencing phase met with Mr. Mostiler only briefly the night before they testified and received virtually no guidance. Because Mr. Mostiler made virtually no inquiries concerning this type of mitigating evidence, his decision to send his investigator to meet with only two members of Mr. Fults's family less than three weeks before trial was not reasonable. The evidence that has been collected and presented in support of Mr. Fults's petition was available to Mr. Mostiler if he had only taken the time to investigate Mr. Fults's life history. That life history, as detailed extensively herein, demonstrates that Mr. Fults was subjected to an ever changing home life devoid of serious adult supervision and filled with drugs, alcohol, and violence. His education background is riddled with poor performance in school, extreme difficulty with reading, very low scores on standardized tests, and an estimated I.Q. of 72. Clearly, this evidence is so compelling that it is conceivable that at least one juror, if not more, would

have refused to impose the death penalty on Mr. Fults.[41] Accordingly, Mr. Fults suffered prejudice as a result of Mr. Mostiler's ineffective performance.

Because Mr. Mostiler failed to investigate Mr. Fults's life history and mental retardation, the sentencing jury was deprived of compelling mitigating evidence. Therefore, the writ should issue. *See Wiggins*, 539 U.S. at 527; *Williams*, 529 U.S. at 395 (finding counsel ineffective for failing to investigate defendant's "childhood, filled with abuse and privation" and borderline mental retardation); *Christenson*, 269 Ga. at 226, 497 S.E.2d at 216 (1998); *Jermyn*, 266 F.3d at 305 (holding that counsel was deficient for failing to investigate the circumstances surrounding the defendant's childhood); *Dobbs v. Turpin*, 142 F.3d 1383, 1388 (11th Cir.1998) (finding that counsel's failure to investigate defendant's childhood and present evidence concerning abuse and neglect by his mother constituted deficient performance); *Glenn v. Tate*, 71 F.3d 1204, 1207-08 (6th Cir. 1995) (finding counsel's lack of investigation and preparation for the sentencing phase ineffective; counsel did not prepare for sentencing until after guilty verdict was rendered, failed to interview family members who would have testified in mitigation, and failed to obtain school and mental health records); *Antwine v. Delo*, 54 F.3d 1357, 1367-68 (8th Cir. 1995) (holding that trial counsel was ineffective for failing to investigate defendant's mental illness and present mitigation evidence establishing that he was bipolar where counsel knew that defendant was acting oddly and had denied using drugs on the night of the murder, even though brief mental examination attributed his behavior to P.C.P. use); *Jackson v. Herring*, 42 F.3d 1350, 1367-68 (11th Cir. 1995) (finding that counsel was ineffective for failing to investigate and present mitigating evidence of defendant's background where they had information that could have led them

41. The Georgia death penalty statute requires jury unanimity to impose a death sentence. *See Hill v. State*, 250 Ga. 821, 821, 301 S.E.2d 269, 270 (1983). Thus, when evaluating a claim that counsel failed to investigate and present mitigation evidence, "the proper frame of reference . . . is whether the mind of one juror could have been changed with respect to the imposition of the sentence of death." *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993). *See also Duest v. Singletary*, 997 F.2d 1336, 1339 (11th Cir. 1993).

to witnesses who could have testified on the defendant's behalf); *Brewer v. Aiken*, 935 F.2d 850, 858 (7th Cir. 1991) (stating that counsel's performance was deficient when he failed to investigate and present evidence of the petitioner's mental health history, low intelligence, and disadvantaged childhood).

**b. Mr. Mostiler provided ineffective assistance of counsel because he routinely slept during the proceedings.**

Under the Sixth Amendment, it has been stated that "sleeping counsel is tantamount to no counsel at all." *United States v. DiTommaso*, 817 F.2d 201, 216 (2d Cir. 1987). *See also United States v. Thomas*, 2006 WL 2567591 (11th Cir. 2006) (per curiam) ("We agree with the Second Circuit, that sleeping counsel is tantamount to no counsel at all."). "Unconscious counsel equates to no counsel at all. Unconscious counsel does not analyze, object, listen or in any way exercise judgment on behalf of a client." *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001). "When a defendant's attorney is asleep during a substantial portion of his trial, the defendant has not received the legal assistance necessary to defend his interests at trial" in violation of the Sixth Amendment. *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984) ("In Javor's case, his sixth amendment right to the effective assistance of counsel was violated in that he had *no* assistance during a substantial portion of his trial."). When counsel sleeps during trial, it is appropriate to presume that the criminal defendant has been prejudiced such that the prejudice requirement of *Strickland* is met. *See Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996) ("We therefore conclude that Tippins suffered prejudice, by presumption or otherwise, if his counsel was repeatedly unconscious at trial for periods of time in which defendant's interests were at stake.").

The undisputed evidence is that both jurors and family members witnessed Mr. Mostiler asleep at the trial on multiple occasions. This was often during the examination of witnesses during the limited sentencing phase. Clearly, this was a critical point in the trial, and Mr. Fults

was entitled to a lawyer who would pay attention and actively follow the testimony. Because Mr. Fults essentially received no assistance of counsel, his Sixth Amendment rights were violated. The factual basis for this claim was not reasonably available to Mr. Mostiler or Mr. Sturdivant; the claim is thus not procedurally defaulted. Even if that were not an appropriate basis to overcome procedural default, Mr. Sturdivant did not investigate this claim and did not present this claim in either the motion for new trial or on direct appeal. Accordingly, the writ should issue.

**c. Mr. Mostiler's constitutionally deficient performance was the result of his failure to meet the requisite guidelines for providing competent legal counsel which removes any prejudice requirement.**

As demonstrated at length, Mr. Mostiler had a voluminous caseload involving multiple other capital trials, hundreds of felonies, and many civil cases at the time he represented Mr. Fults. Because of this burden, prior to trial, during trial, at sentencing, and after trial, Mr. Mostiler failed to be a meaningful advocate as required by the Sixth Amendment and analogous provisions of the Georgia Constitution. Accordingly, even if the Court should find no actual prejudice, which has been detailed extensively, Mr. Fults is still entitled to the writ because the law requires that prejudice be presumed.

It has long been recognized that "lawyers in criminal courts are necessities not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The right to counsel is the right to the "*effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added). In *United States v. Cronic*, 466 U.S. 648, 656 (1984), the United States Supreme Court described this right as "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.*, 466 U.S. at 656. *Cronic* requires the grant of habeas relief without a showing of actual prejudice in circumstances in which "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one,

could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-60. Mr. Mostiler's overwhelming caseload at the time of Mr. Fults's trial created one of those circumstances in which prejudice is presumed.

There are three specific circumstances under which a presumption of prejudice is justified. *See Bell v. Cone*, 535 U.S. 685, 695-96 (2002). The first case is when there is a complete denial of counsel either actually or constructively. *See id.* Second, a presumption is warranted if counsel fails to subject the prosecution's case to meaningful adversarial testing and the failure is complete. *See id.* Finally, there is a presumption of prejudice when counsel is called on to render assistance in a situation in which even competent counsel very likely could not. *See id.* Mr. Fults's case easily falls into the first and third category of cases. The sheer magnitude of Mr. Mostiler's caseload created circumstances where it is so unlikely he — or any other lawyer in the same circumstances — could provide effective assistance that prejudice must be presumed because Spalding County constructively denied Mr. Fults counsel with the indigent defense system it had created. Accordingly, the circumstances under which Mr. Mostiler operated entitle Mr. Fults to the writ.

***(1) Mr. Mostiler's caseload grossly exceeded recognized ethical standards.***

Most published standards on indigent defense services state that a public defender should handle no more than 150 felony cases in a single year. *See* 1 UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE E49-E62 (2000). The standards in Georgia adopt this 150 felony case limit through the guidelines issued by the Georgia Indigent Defense Council and standards issued by the Georgia Public Defender Standards Council.[42] *See* GEORGIA INDIGENT DEFENSE COUNCIL

42. One purpose of the Georgia Indigent Defense Council is to recommend uniform guidelines under

GUIDELINE 6.1; STANDARD FOR LIMITING CASELOADS AND DETERMINING THE SIZE OF LEGAL STAFF IN CIRCUIT PUBLIC DEFENDER OFFICES. Under these standards announced by the Georgia Indigent Defense Council ("G.I.D.C."),[43] the number of felony cases handled by each attorney should be even lower if the attorney also handles civil cases or criminal appeals. *See* GEORGIA INDIGENT DEFENSE COUNCIL GUIDELINE 6.1.

According to the G.I.D.C. Guidelines, the 150 felony case limit "assumes that no cases where the state is seeking the ultimate penalty of death are included." *Id.* This limit exists because "[s]tudies indicate that attorney time in the defense of a case involving the death penalty averages between 1000 and 2000 hours." *Id.* The G.I.D.C. Guidelines further underscore the special status of capital cases by providing for a higher fee rate based on the "seriousness, complexity, and longevity of death penalty cases." GEORGIA INDIGENT DEFENSE COUNCIL GUIDELINE 2.6. Because of the labor-intensive nature of these cases, the G.I.D.C. Guidelines mandate that an attorney reduce his caseload of other matters when handling a death penalty case: "In situations where indigent defenders are actively involved in the defense of death penalty cases, the number of other cases that can be handled must be adjusted correspondingly." GEORGIA INDIGENT DEFENSE COUNCIL GUIDELINE 6.1.

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which local indigent defense programs "*shall* operate." O.C.G.A. § 17-12-8 (emphasis added). Because the Spalding County indigent defense program operated under the Georgia Indigent Defense Act, O.C.G.A. § 17-12-1, *et seq.*, at the time of Mr. Fults's trial, it was subject to the GUIDELINES OF THE SUPREME COURT OF GEORGIA FOR THE OPERATION OF LOCAL INDIGENT DEFENSE PROGRAMS approved in October 1989. *See McCorkle v. Bignault*, 260 Ga. 758, 760-61, 399 S.E.2d 916, 918 (1991). In *McCorkle*, the Supreme Court of Georgia recognized that if a county chooses to participate in the state-funded program, the county must follow the program's guidelines. *See id.* Thus, Mr. Mostiler should have handled no more than 150 clients per year, without death penalty or civil cases. *See* GEORGIA INDIGENT DEFENSE COUNCIL GUIDELINE 6.1.

43. The United States Supreme Court has made clear that courts are to look to ethical guidelines to determine whether an attorney has provided effective assistance of counsel as required by the Sixth Amendment. *See Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 2537 (2003) (applying the ABA guidelines to determine whether an attorney provided effective assistance of counsel in a death penalty case).

In representing Mr. Fults, Mr. Mostiler neither reduced his caseload nor even approached the recommended level of work for a death penalty case.[44] Mr. Mostiler's own proposals to be Indigent Defense Council for Spalding County demonstrate that he and his associate handled 1,861 new felony matters during the two years in which Mr. Mostiler represented Mr. Fults before and during trial. (Petitioner's Ex. 60 [Proposal for the Provision of Indigent Defense for Spalding County dated July 14, 1998].) This amounted to at least 465 felony cases per year for Mr. Mostiler during this period. According to Spalding County's application for funds to the Georgia Indigent Defense Council, Mr. Mostiler was appointed to one new death penalty case in 1996, tried two death penalty cases in 1996, and had three more death penalty cases awaiting trial as of the end of 1996. (Id. [FY 1998 Application for Funds at p. 3].) For 1997, Mr. Mostiler was appointed counsel in two death penalty cases, tried two death penalty cases, and had two more death penalty cases awaiting trial at the end of 1997. (Id. [FY 1999 Application for Funds at p. 3].) Clearly, Spalding County — which had a constitutional obligation to provide Mr. Fults with effective assistance of counsel — and Mr. Mostiler blatantly failed to abide by the applicable G.I.D.C. Guidelines. In the end, Mr. Mostiler handled at least twice the number of felonies per year which he was permitted to handle under Georgia's applicable guidelines without even taking into account unclosed cases from previous years and his large death-penalty practice which required that his felony caseload be greatly reduced. *See* GEORGIA INDIGENT DEFENSE COUNCIL GUIDELINE 6.1. Moreover, in representing Mr. Fults, Mr. Mostiler billed only 246.5 hours, 63 of which were for attendance at the trial. (Petitioner's Ex. 44.) The

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44. Mr. Mostiler's inability to comply with GEORGIA INDIGENT DEFENSE COUNCIL GUIDELINE 6.1 has been well documented. *See* Bill Rankin, *Defendant Refuses to Plead Guilty, Wins*, ATLANTA JOURNAL CONSTITUTION, Feb. 9, 2003, at A1 (noting that Mr. Mostiler was "[r]espondible for more than 600 criminal cases at a time" which exceeded "more than the maximum 150 felony cases the Georgia Supreme Court recommends"). His inability to provide effective assistance of counsel has been widely noted. *See, e.g.*, Bill Rankin, *Appeal Says Public Defender Missed Facts*, ATLANTA JOURNAL CONSTITUTION, Feb. 9, 2003, at A16; Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 128 n.248 (2003) (discussing Mr. Mostiler's failure to provide effective assistance of counsel).

staggeringly low number of hours spent by Mr. Mostiler preparing Mr. Fults's case for trial is woefully inadequate and constitutionally deficient. When the 183.5 hours of preparation time are compared with the 1000 to 2000 hours that a competent attorney should spend preparing to defend a capital case according to the G.I.D.C., the only proper conclusion is that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *Cronic*, 466 U.S. at 659-60.

***(2) Prejudice must be presumed because neither Mr. Mostiler nor any other attorney could provide effective assistance of counsel with such a large caseload.***

The Sixth Amendment requires that counsel act as an advocate at all critical stages of the case. *See Cronic*, 466 U.S. at 656. The Supreme Court has held that "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* In a criminal trial, while there is no expectation that advocates be equally matched, "neither is it a sacrifice of unarmed prisoners to gladiators." *Id.* at 657 (quoting *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)). Thus, when "counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected." *Bell*, 535 U.S. at 696. Thus, reasonably effective assistance of counsel means that "the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients." *State v. Peart*, 621 So. 2d 780, 789 (La. 1993) (presuming ineffective assistance of counsel because counsel was overworked). *See also In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1135 (Fla. 1990) (per curiam) (holding that when "excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created").

It is clear that Mr. Mostiler could not provide effective representation because of his caseload. Mr. Mostiler and his associate handled 1,861 new felony matters during the period in which Mr. Mostiler represented Mr. Fults in addition to voluminous death penalty cases and his civil practice.[45] (Petitioner's Ex. 60 [Proposal for the Provision of Indigent Defense for Spalding County dated July 14, 1998; FY 1998 Application for Funds at p. 3; FY 1999 Application for Funds at p. 3].) Regardless of Mr. Mostiler's experience "[n]ot even a lawyer with an S on his chest could effectively handle [such a] docket." *Peart*, 612 So.2d at 789. This caseload clearly affected Mr. Mostiler's performance: the record demonstrates that Mr. Mostiler's motions were form pleadings devoid of case specific facts with little citation to applicable case law, that Mr. Mostiler conducted virtually no mitigation investigation and presented no coherent theory of mitigation, that the mitigation defense was brief, and that sentencing witnesses were unprepared.[46] (Petitioner's Exs. 34-36, Ex. 9 at ¶ 4, Ex. 20 at ¶¶ 28-29, Ex. 23 at ¶ 71.) These facts are all the more staggering given that Mr. Mostiler advised and supported a guilty plea by Mr. Fults. This case, therefore, was focused completely on the sentencing phase; and Mr. Mostiler did little or no work to affect the outcome. The billing records demonstrate the lim-

45. In recognition of the shockingly deficient level of indigent defense in the State of Georgia, the legislature recently enacted sweeping reforms of the state indigent defense system. Systems like the one in place in Spalding County were the impetus for the legislature and the governor to create a new statewide public defender system. The new system will protect future defendants from the sham representation provided by overwhelmed contractors like Mr. Mostiler.

46. Mr. Mostiler functioned more as an agent of the state than an advocate for the defense. In his Proposal for the Provision of Indigent Defense for Spalding County, Mr. Mostiler emphasized that his representation of indigent defendants "resulted in a significant reduction in cost of service as shown in the cost comparison between the former system and the current system." (Petitioner's Ex. 60.) At the same time he championed the cost savings over the prior panel system of appointed attorneys, Mr. Mostiler described a "significant increase" in the overall number of cases. (Id.) Finally, he argued that another benefit of his contract defense of indigent defendants is that the "court personnel, the District Attorney and Solicitor deal with only one attorney regarding all indigent defense cases [resulting in] faster disposition of cases and more efficient operation of the courts." (Id.) While prompt and efficient administration of criminal law may be commendable, "[t]o satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court." *Cronic*, 466 U.S. at 657 n.17. When the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. *See Cronic*, 466 U.S. at 656-57. When defense counsel acts as a friend of the court, his representation is a "complete failure" for the accused such that prejudice should be presumed. *Bell*, 535 U.S. at 696.

ited amount of time which Mr. Mostiler spent preparing for Mr. Fults's trial. ( Petitioner's Ex. 44). Accordingly, prejudice should be presumed, and the writ should issue.

**d. The jury's verdict was unconstitutional because one of the jurors was racially biased.**

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate [a defendant's] right to a fair trial." *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998). "Accordingly, the presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). *See also Lockridge v. State*, 260 Ga. 528, 529, 397 S.E.2d 695, 695 (1990) ("There is a presumption of prejudice to the defendant when an irregularity in the conduct of a juror is shown and the burden is on the prosecution to prove beyond a reasonable doubt that no harm has occurred."). Although "[b]ias can be revealed by a juror's express admission of that fact, . . . more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). Individuals who use the term "nigger" are presumed to be racially biased. *See United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) ("We have considerable difficulty accepting the government's assumption that, at this time in our history, people who use the word 'nigger' are not racially biased."). *See also United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (reversing a criminal conviction and remanding for a new trial because of anti-Semitic statements made by jurors and holding that "anti-Semitic 'humor' is by its very nature an expression of prejudice on the part of the maker" and noting that "those harboring such thoughts often attempt to mask them by cloaking them in a 'teasing' garb").

Mr. Buffington has made clear that he is racially biased against African-Americans. Mr. Buffington has also made clear that he relied upon his racial bigotry in deciding to sentence

Mr. Fults to death. Accordingly, Mr. Fults was denied his Sixth Amendment right to an impartial jury. The factual basis for this claim was not reasonably available to either Mr. Mostiler or Mr. Sturdivant; the claim is thus not procedurally defaulted. Even if that were not an appropriate basis to overcome procedural default, neither Mr. Mostiler nor Mr. Sturdivant investigated this claim and did not present this claim in either the motion for new trial or on direct appeal. The writ should issue.

*2. Mr. Sturdivant provided ineffective assistance of counsel.*

A criminal defendant has a constitutional right to the effective assistance of appellate counsel on the first appeal as of right. *See Evitts v. Lucey*, 469 U.S. 387, 398 (1984). The United States Supreme Court has noted the importance of this right:

> The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to the appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that substantial legal and factual arguments are not inadvertently passed over.

*Penson v. Ohio*, 488 U.S. 75, 85 (1988). The traditional *Strickland* standard is applied to evaluate whether appellate counsel rendered effective assistance of counsel. *See Battles v. Chapman*, 269 Ga. 702, 705, 506 S.E.2d 838, 839 (1998) (finding that defendant was denied effective assistance of appellate counsel). As demonstrated below, Mr. Fults was denied effective assistance of appellate counsel. Accordingly, the writ should issue.

**a. Mr. Sturdivant did not properly investigate and present Mr. Mostiler's errors on appeal.**

Under the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines"), appellate counsel in death penalty cases has a duty to conduct "an aggressive investigation of all aspects of the case." ABA GUIDELINE 10.15.1.[47] The Commentary to Guideline 10.15.1 explains that appellate counsel

47. The United States Supreme Court has long referred to the ABA Standards and Guidelines as

must "reinvestigate" the case and conduct a "more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses." *Id.* cmt.

After conducting the required investigation, appellate counsel must make informed, deliberate, tactical decisions that are reasonable in light of the circumstances of the particular case with respect to the issues that are to be raised in the appeal. *See Battles,* 269 Ga. at 704, 506 S.E.2d at 840. Of course a proper investigation is a prerequisite to an effective attorney making informed, deliberate, tactical decisions about the case. *See Wiggins*, 539 U.S. at 534.

Additionally, appellate counsel who unreasonably ignores strong, meritorious issues in favor of weak issues renders ineffective assistance of counsel. *See Battles,* 269 Ga. at 704-05, 506 S.E.2d at 840-41. Further, appellate counsel who raises one specific instance of ineffective assistance of trial counsel but unreasonably omits a different, meritorious instance of ineffective assistance of trial counsel renders ineffective assistance of appellate counsel. *See Crawford v. Thompson*, 278 Ga. 517, 520, 603 S.E.2d 259, 262 (2004). Accordingly, under Georgia law, "the controlling principle is whether appellate counsel's decision was a reasonable tactical move which any competent attorney in the same situation would have made." *Shorter v. Waters*, 275 Ga. 581, 584, 571 S.E.2d 373, 376 (2002).

Mr. Sturdivant did not conduct a proper investigation; indeed, he conducted no investigation whatsoever. Mr. Sturdivant did not just fail to interview family members or jurors, review school and medical records, request additional documents and records and retain a mental

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guides to determining what is reasonable under *Strickland*. *See Rompilla v. Beard*, 545 U.S. 374, 387, n.6, 125 S. Ct. 2456, 2466 (2005). *See also Wiggins v. Smith*, 539 U.S. 510 (2003) (relying upon the ABA Guideline relating to the duty to investigate mitigating evidence to conclude that counsel provided ineffective assistance of counsel); *Amadeo v. State*, 259 Ga. 469, 384 S.E.2d 181 (1989) (relying upon the ABA Guidelines); *Jefferson v. Terry*, 2007 WL 1687263, at *49 (N.D. Ga. 2007) (holding that the reasonableness of counsel's investigation of possible mitigation evidence is evaluated by reference to the ABA Guidelines).

health expert. He failed to even ask Mr. Fults about his family or background. Given the importance of mitigation evidence in a death penalty case, as expressed by the United States Supreme Court, Mr. Sturdivant's failure to take any steps to evaluate the mitigation case presented by Mr. Mostiler is inexcusable. The mitigation case is recognized as one of the most critical parts of a death penalty case.

At the sentencing phase of Mr. Fults's trial, Mr. Mostiler presented the testimony of the a few family members with no preparation. However, the jury did not hear a complete picture of Mr. Fults's life. If Mr. Fults's attorneys had done their jobs properly, the jury would have heard the full story of Mr. Fults's life, as described above. The jury would have understood that his life had been "marked by poverty, physical abuse and violence, neglect, abandonment and addiction on the part of his caretakers." (Respondent's Ex. 5 at p. 4; id. at Ex. 2.) The jury would have also understood that Mr. Fults had "impaired intellectual functioning," suffered from "major mental illness," and that his mother had abused alcohol during her pregnancy with Mr. Fults. (Id. at p. 1-4; id. at Ex. 2.)[48] This evidence might well have influenced the jury's appraisal of Mr. Fults's culpability. *Rompilla*, 545 U.S. at 393. It might have made a difference. The key point is that Mr. Fults had a constitutional right for the jury to hear and consider this mitigating evidence. He was denied that right because of his attorneys' incompetence.

Mr. Mostiler failed to present a proper mitigation case at trial. Mr. Sturdivant failed to identify and prosecute this issue in the context of the amended motion for new trial and the direct appeal. Mr. Sturdivant treated this appeal like the appeal of a small money judgment in a civil case: he read some but not all of the transcripts and wrote a brief on which he spent only 11.5 hours. (Sturdivant Dep. at Ex. 1.) Mr. Sturdivant did not even ask Mr. Fults a single "per-

48. Similarly, the Supreme Court found it significant that the jury in *Rompilla* was not presented with evidence that Mr. Rompilla suffered from mental disturbances and cognitive problems traceable to his childhood experiences and his mother's use of alcohol during pregnancy. *See Rompilla*, 545 U.S. at 392-93.

sonal" question, much less request documents or interview family members, witnesses or jurors. (Sturdivant Dep. at p. 31). More is required in a death penalty case. Mr. Sturdivant raised weak arguments — "my dead lawyer promised me I wouldn't get the death penalty" — but failed to identify the two most important issues in the case: the lack of a proper mitigation case and the failure to present mental retardation to the jury. Both of these issues were apparent from the record and should have been investigated and raised by Mr. Sturdivant in the context of the amended motion for new trial and the direct appeal.

Further, the omission of these issues was not the result of an informed, deliberate, tactical decision. *See Battles,* 269 Ga. at 704, 506 S.E.2d at 840. Mr. Sturdivant stated that he "just assumed" that there was not any possible mitigating evidence "from the facts of the transcript." (Sturdivant Dep. at pp. 32-33.) However, the lack of mitigating evidence shown by the transcript should have alerted Mr. Sturdivant to the issue of Mr. Mostiler's failure to present a proper mitigation case. The only other reason offered by Mr. Sturdivant for not doing more on behalf of Mr. Fults was that he did not have the time. (Sturdivant Dep. at pp. 19-20, 33-35). Mr. Sturdivant did not seek additional time because he assumed that any such request would be denied. (Id. at pp. 33-35.) Mr. Sturdivant's claim of not having sufficient time is curious in light of the fact that he was appointed to represent Mr. Fults in April, 2000 and did not file his brief in the direct appeal until almost a year later at the end of February, 2001. In any event, this is not a situation in which appellate counsel conducted a careful investigation and then selected the strongest arguments from a list of possible issues. There was nothing informed or tactical about Mr. Sturdivant's handling of this appeal. He simply failed to recognize and pursue the legitimate appellate issues in the case.

Mr. Sturdivant failed to provide Mr. Fults with effective assistance of appellate counsel. Accordingly, the writ should issue.

**b. Mr. Sturdivant's caseload affected his ability to provide effective assistance of counsel.**

Just like Mr. Mostiler, Mr. Sturdivant failed to abide by the caseload limitations imposed by the G.I.D.C. and to which his law firm agreed when it applied for funds from the G.I.D.C. (Petitioner's Ex. 60 [FY 2001 Application for GIDC Funds].) *See McCorkle*, 260 Ga. at 761, 390 S.E.2d at 918. Sullivan & Sturdivant's proposal to Spalding County and its 2001 application for fees to the G.I.D.C. demonstrate that Mr. Sturdivant could not have provided effective assistance of counsel due to his caseload. For example, in 1999, 454 cases represented only 40% of Sullivan & Sturdivant's caseload handled by three lawyers. (Petitioner's Ex. 60 [FY 2001 Application for GIDC Funds].) This would have meant that each lawyer handled approximately 378 cases in violation of Guideline 6.1. *See* GEORGIA INDIGENT DEFENSE COUNCIL GUIDELINE 6.1. In 2000 when Sullivan & Sturdivant took over all felonies and death penalty matters, this average naturally increased. Clearly, neither Mr. Sturdivant nor any other lawyer could have provided effective assistance of counsel under such circumstances. Mr. Fults was denied his rights under the Sixth Amendment and the corresponding provisions of the Georgia Constitution. *See Cronic*, 466 U.S. at 659-60. Prejudice must be presumed in such a situation. *See Bell*, 535 U.S. at 696. The writ should issue.

**D. The affidavits from Mr. Fults's jurors are admissible.**

It is well settled that the evidence provided by Mr. Fults's jurors is admissible, because "[t]he right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process." *Turner v. Murray*, 476 U.S. 28, 36 n.9 (1986) (quoting *Ristaine v. Ross*, 424 U.S. 589, 595 n.6 (1976)). The Georgia Supreme Court has held that whenever conduct violates the Due Process Clause, juror affidavits may be entered into evidence. *See, e.g., Turpin v. Todd*, 268 Ga. at 823, 493 S.E.2d at 903 (noting that the evidentiary rules "against impeaching verdicts must succumb to the defen-

dant's right to a fair trial") (footnote omitted); *Oliver v. State*, 265 Ga. 653, 654, 461 S.E.2d 222, 224 (1995) ("The rule [against jurors impeaching their own verdict] is deeply rooted in Georgia law and promotes important public policy considerations. But the rule does yield to a defendant's constitutional guarantees."); *Spencer v. State*, 260 Ga. 640, 643-44, 398 S.E.2d 179, 184 (1990) ("[I]t has been held that the rule of juror incompetency 'cannot be applied in such an unfair manner as to deny due process.' ") (citations omitted); *Watkins v. State*, 237 Ga. 678, 684, 229 S.E.2d 465, 470 (1976) ("[T]he question we face in this case is whether there are any limitations on a broad application of the rule in every case. We think there are constitutional limitations which must be recognized to preserve the fundamental concept of a fair trial."). This is also true when a violation of the Sixth Amendment has been alleged. *See Watkins*, 237 Ga. at 684, 229 S.E.2d at 470.

By their own terms, O.C.G.A. §§ 9-10-9[49] and 17-9-41[50] do not prohibit a juror from testifying regarding what he personally witnesses outside of deliberations or about his own racial bias. Moreover, their application must give way to a defendant's federal constitutional rights. The U.S. Supreme Court has explicitly recognized that "there might be instances in which [the] testimony of the juror could not be excluded without 'violating the plainest principles of justice.' " *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915). Because "evidentiary rules that insulate from discovery the violation of constitutional rights may themselves violate those rights," various courts around the country have concluded that the U.S. Constitution, in certain circumstances, prohibits the refusal of a court to receive a juror affidavit when the affidavit indicates or alleges

49. O.C.G.A. § 9-10-9 provides that "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdict."

50. O.C.G.A. § 17-9-41 provides that "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdicts."

that the constitutional rights of the accused have been abrogated.[51] *See* 27 FEDERAL PRACTICE AND PROCEDURE § 6074 (1990).

The Georgia Supreme Court has concluded that the United States Constitution requires that "the rule prohibiting jurors from impeaching their own verdict cannot be applied [when it] emasculate[s] the constitutional right to a fair trial." *Watkins*, 237 Ga. at 685, 229 S.E.2d at 470. *See also Todd*, 268 Ga. at 823, 493 S.E.2d at 903 ("This Court has held that the general rule against impeaching verdicts must succumb to the defendant's right to a fair trial.") (footnote omitted). Requiring the court to receive juror affidavits despite O.C.G.A §§ 9-10-9 and 17-9-41 is necessary because "there are constitutional limitations which must be recognized to preserve the fundamental concept of a fair trial." *Watkins*, 237 Ga. at 684, 229 S.E.2d at 470. Thus, the law in Georgia is clear: "[T]he rule of juror incompetency is waived where the alleged error violates the defendant's due process rights under the [C]onstitution." *Hamm v. State*, 214 Ga. App. 706, 706, 448 S.E.2d 773, 775 (1994). *See also Spencer*, 260 Ga. at 643-44, 398 S.E.2d at 184 ("[I]t has been held that the rule of juror incompetency 'cannot be applied in such an unfair manner as to

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51. There are plentiful examples. *See, e.g., Perkins v. LeCureux*, 58 F.3d 214, 222 (6th Cir. 1995) (Jones, J., concurring) (citing 27 FEDERAL PRACTICE AND PROCEDURE § 6074 (1990)); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987) ("The rule of juror incompetency cannot be applied in such an unfair manner as to deny due process. Thus, further review may be necessary in the occasional case in order to discover the extremely rare abuse that could exist even after the court has applied the rule and determined the evidence incompetent."); *Virgin Islands v. Nicholas*, 759 F.2d 1073, 1079 (3d Cir. 1985) ("The exceptions which permit a federal court to inquire as to the competence of a juror must be predicated on either the Federal Rules of Evidence or the due process clause of the Fifth Amendment or the impartial trial clause of the Sixth Amendment."); *United States v. Abcasis*, 811 F. Supp. 828, 834 (E.D.N.Y. 1992) (noting that a bar to juror affidavits to establish a constitutional violation cannot always be applied because "[i]n egregious cases the resulting misconduct might offend fundamental fairness") (quoting Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence*, 66 N.C. L. REV. 509, 524 (1988) (noting that the additional constitutional protections afforded criminal defendants "arguably tilt the balance in favor of the accused's right to receive a fair trial when weighed against the public policy of reducing jury harassment and increasing verdict stability and judicial integrity")); *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) (concluding that the exclusion of juror testimony must give way in the face of constitutional violations); *State v. Harley*, 656 A.2d 954, 958 (R.I. 1995); *State v. Duncan*, 563 So. 2d 1269, 1272 (La. Ct. App. 1990) (holding that the Louisiana rule of evidence at issue was "not absolute and must yield to a substantial showing that the defendant was deprived of his constitutional rights"); *People v. De Lucia*, 229 N.E.2d 211, 213-14 (N.Y. 1967) (concluding that the Sixth Amendment required the introduction of juror affidavits concerning the visit by two jurors to the crime scene).

deny due process'.") (citations omitted). This is also true when a violation of the Sixth Amendment has been alleged. *See Watkins*, 237 Ga. at 684, 229 S.E.2d at 470.

The federal courts have been unwilling to apply the federal evidentiary counterpart to O.C.G.A. §§ 9-10-9 and 17-9-41 to situations regarding racial bias by a juror against a criminal defendant because such evidence is essential to demonstrating the Sixth Amendment violation. *See United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001) ("It would seem, therefore, to be consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony."); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987) ("In short, although our scope of review is narrow at this stage, we must consider whether prejudice pervaded the jury room, whether there is a substantial probability that the alleged racial slur made a difference in the outcome of the trial."); *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) (concluding that "if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the sixth amendment's guarantee to a fair trial and an impartial jury"). This position is completely consistent with the Georgia Supreme Court's jurisprudence.

The reasons for admitting juror evidence here are all the greater because this is a death penalty case. It is well established that the "penalty of death is qualitatively different from a sentence of imprisonment," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), and that "[w]hen a defendant's life is at stake," courts should be "particularly sensitive to ensure that every safeguard [be] observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (citations omitted).

The juror affidavits are admissible. As demonstrated herein, most of the affidavits are being offered as evidence that Mr. Mostiler was asleep at the trial. They are not being offered to establish anything that occurred during deliberations. Mr. Buffington's affidavit is offered to demonstrate his racial bias and prejudice toward Mr. Fults. Since jurors are always competent

to testify regarding their own qualifications to be impaneled on a jury, Mr. Buffington's affidavit is equally appropriate. Accordingly, the juror affidavits are admissible as they are required to ensure that the trial comported with the obligations of the Sixth, Eighth, and Fourteenth Amendments.

### E. Viewed in their totality, the constitutional violations suffered by Mr. Fults entitle him to the writ of habeas corpus.

Mr. Fults has raised numerous, substantial claims of constitutional violations. He is entitled to relief on each of the claims individually. In addition, when taken as a whole, there is no doubt that Mr. Fults's death sentence is unreliable and violates the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the Georgia Constitution. As a result, the cumulative or combined error justifies the granting of relief, even if the Court does not find that any one individual error dictates relief. *See United States ex. rel Sullivan v. Cuyler*, 631 F.2d 14, 17 (3d Cir. 1980) (holding that "unified consideration of the claims in the petition well satisfies the interests of justice because the cumulative effect of the alleged errors may violate due process, requiring the grant of the writ, whereas any one alleged error considered alone may be deemed harmless"); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) ("Where, as here, there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant.") (citation omitted). *See also United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983) ("A piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution").

## IV. CONCLUSION

For the foregoing reasons, Mr. Fults is entitled to the writ of habeas corpus.

Respectfully submitted this 25th day of June.

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Attorneys for Petitioner Kenneth Earl Fults

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

KENNETH EARL FULTS,

Petitioner,

v.

HILTON HALL, Warden, Georgia Diagnostic and Classification Prison,

Respondent.

Habeas Corpus

No.: 2002-V-905

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing PETITIONER'S POST-HEARING BRIEF AND MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS upon all counsel of record via e-mail and U.S. mail, addressed as follows:

Kristen White
Assistant Attorney General
132 State Judicial Building
40 Capital Square S.W.
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Shannon Weathers
Council of Superior Court Judges of Georgia
18 Capitol Square, Suite 108
Atlanta, Georgia 30334

This 25th day of June, 2007.

T. Hunter Jefferson

# APPENDIX 2

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**NEWNAN DIVISION**

| | | |
|---|---|---|
| KENNETH EARL FULTS, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Case No. 3:09-CV-86-TWT |
| | ) | CAPITAL CASE |
| STEPHEN UPTON, Warden | ) | |
| Georgia Diagnostic and | ) | |
| Classification State Prison, | ) | |
| | ) | |
| Respondent. | ) | |

PETITIONER'S BRIEF ON PROCEDURAL DEFAULT
AND EXHAUSTION OF STATE REMEDIES

Petitioner, Kenneth Earl Fults, by and through undersigned counsel, respectfully submits this brief in response to the procedural issues raised by the state's brief. Petitioner hereby submits that he has exhausted state remedies for each of the claims raised in his Initial Petition for Writ of Habeas Corpus. In the alternative, should any of Petitioner's claims be subject to procedural default, Petitioner can show cause and prejudice to overcome any default. Each of his claims is, therefore, properly before this Court.

## I. INTRODUCTION

Petitioner has filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent filed an answer-response on August 25, 2009, followed a motion and brief in support of procedural defenses on December 14,

2009. In its brief, the Warden proposes this Court defer to the state courts' finding of procedural default on any claims raised in the federal petition, as now filed. The Warden further proposes that certain of Petitioner's claims not found procedurally defaulted by the state habeas court are, in fact, procedurally defaulted. Finally, Respondent asserts that several of Petitioner's claims are unexhausted.

Petitioner submits that individually, his claims were reviewed by the Georgia Supreme Court, whether on direct appeal or on Application for Certificate of Probable Cause to Appeal, and are therefore properly before this Court. In the alternative, he can show cause and prejudice to excuse any state court finding of default. Petitioner also submits that as to any claims this Court finds procedurally defaulted, the merits of a defaulted claim must still be heard when not to would present a fundamental miscarriage of justice.[1]

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[1] A fundamental miscarriage of justice exists with respect to a verdict of guilty if the defendant "claims he did not kill the victim" and "'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition." *Calderon v. Thompson*, 118 S. Ct 1489, 1503 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). *See also Bousley v. United States*, 118 S. Ct. 1604 (1998). A fundamental miscarriage of justice would also arise for even a guilty person if the person showed "'by clear and convincing evidence' that no reasonable juror would have found him eligible for the death penalty in light of the new evidence." *Thompson, supra*, 118 S. Ct. at 1503 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992). Petitioner has raised claims involving ineffective assistance of counsel, development of which would demonstrate his innocence of the death penalty.

## II. HABEAS CORPUS PROCEDURAL ISSUES

A person in state custody pursuant to a criminal court judgment obtained in violation of the United States Constitution may seek redress for the constitutional violation(s) by filing a petition for writ of habeas corpus. *See* 28 U.S.C. § 2254. This Court reviews such a petition to decide whether: to allow discovery;[2] to conduct an evidentiary hearing on the merits of the claims for relief (or with respect to any defense asserted by the Respondent);[3] and to adjudicate the merits of the claims.

### A. Procedural Default

This Court may decline to address the merits of a claim that was inexcusably "defaulted" by the Petitioner in state court proceedings. A "default" question generally involves an evaluation of whether and how a claim for relief was presented to and considered by a state court. If a claim in a habeas corpus petition (a.) was not presented, or not fully presented, to state court,[4] or (b.) was presented to state court, but not in the manner that the state court normally and regularly

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2 *See* Rule 6, Rules Governing Section 2254 Cases in the United States District Courts.

3 *See* Rule 8, Rules Governing Section 2254 Cases in the United States District Courts.

4 Presenting a claim to state court is called "exhausting" the claim. *See Keeney v. Tamayo-Reyes*, 112 S.Ct 1715, 1720 (1992) (exhaustion rule is grounded in "comity concerns"; "[t]he purpose of exhaustion is ... [to] afford the State a full and fair opportunity to address and resolve the [federal] claim on the merits").

requires that it be presented (i.e., an untimely presentation of the claim), and the state court invokes its state rule to bar consideration of the claim,[5] this court may be faced with a "default" issue.

Whether there is a default and, if so, whether it will be excused so that this Court can reach the federal constitutional merits of a claim, are issues which require considerable analysis and taking of evidence.[6] However, defaults must be

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[5] This is called a procedural default. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). In order for there to be this type of a default, the state court's ruling a.) must not be based upon the federal constitution (i.e., the state ruling must be "independent"), and b.) must be based upon an adequate state ground. Imposition by the state of a procedural bar, and federal court recognition of that bar, is

> subject to our standards for assessing the adequacy of independent state procedural grounds to bar all consideration of claims under the national Constitution. .... In any given case ... the sufficiency of a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

*Ford v. Georgia*, 498 U.S. 411, 423 (1991) (citation omitted). Only a "'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Id.*, 498 U.S. at 423 - 24 (citation omitted). *See also Hansbrough v. Latta*, 11 F.3d 143, 146 (11th Cir. 1994) (Procedural requirements "of whose existence the defendant could not reasonably be deemed to have been apprised [] cannot be permitted to thwart review of cases seeking vindication in state courts of federal constitutional rights."); *Cochrin v. Herring*, 43 F.3d 1404 (11th Cir. 1995)(to foreclose review in federal court, a state "bar" must be "firmly established and a regularly followed state practice.").

[6] Whether there exists an independent and adequate state court basis for barring a claim is decided by this Court, and "[w]hether a petitioner's actions have created a state law procedural bar is a mixed question of law and fact." *Hansbrough v. Latta*, 11 F.3d 143, 145 (11th Cir. 1994). *See also Macklin v. Singletary*, 24 F.3d 1307 (11th cir. 1994) (default is a de novo determination).

ignored by district courts when to enforce a default would result in a fundamental miscarriage of justice. If the evidence and claims reveal that constitutional errors "probably resulted in the conviction of one who is actually innocent," *Murray v. Carrier*, 477 U.S. 478, 496 (1986), or that the state court process "'has probably resulted'" in capital punishment for one who is "'actually innocent' of a death sentence," *Dugger v. Adams*, 489 U.S. 401, 411 n.6 (1989),[7] no procedural default can prevent relief for the Petitioner.[8]

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Even if there has been an enforceable default, a petitioner may receive merits review of a claim in this court if he or she can demonstrate "cause" for and "prejudice" from the default. Cause and prejudice are federal questions requiring de novo review by this court. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) ("cause and prejudice" is a mixed question of law and fact which this Court must decide).

Cause is established, *inter alia*, where trial and/or appellate counsel rendered ineffective assistance. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Greene v. United States*, 880 F.2d 1299, 1305 (11th Cir. 1989) (ineffective assistance provides cause, and it is determined de novo in federal district court); *Smith v. Murray*, 477 U.S. 527, 535 - 36 (1986); *Orazio v. Dugger*, 876 F.2d 1508, 1513 - 14 (11th Cir. 1989)(failure to raise claim on direct appeal, leading to state court invocation of procedural bar in post-conviction proceedings, constituted ineffective assistance of appellate counsel); *Hopkinson v. Shillinger*, 866 F.2d 1185, 1203 - 04 n.12 (10th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990).

If the state alleges and this court finds that a procedural default is applicable, Petitioner is entitled to an evidentiary hearing on the matter of cause and prejudice. *See Tamayo-Reyes, supra*, 112 S. Ct. at 1721 ("a remand to the District Court is appropriate in order to afford respondent the opportunity to bring forward evidence establishing cause and prejudice"); *Wainwright v. Sykes*, 433 U.S. 72, 80 (1977); *Murray v. Carrier*, 477 U.S. 478, 487 (1986); *Harich v. Dugger,* 813 F.2d 1082 (11th Cir. 1987); *Walker v. Davis*, 840 F.2d 834 (11th Cir. 1988) (evidentiary hearing in district court required to determine why counsel failed to act).

[7] *See also Sawyer v. Whitley*, 112 S. Ct. 2514, 2522 (1992) (the "innocence of the death penalty" inquiry "must focus on those elements which render a defendant eligible for the death penalty"); *Tamayo-Reyes, supra*, 112 S.Ct at 1721 ("[a] habeas petitioner's failure to develop a

Further, it falls to this Court and this Court alone to determine whether the state court's basis for barring a claim is independent and adequate. As the Eleventh Circuit has ruled, the question of "[w]hether a petitioner's actions have created a state law procedural bar is a mixed question of law and fact." *Hansbrough v. Latta,* 11 F.3d 143, 145 (11th Cir. 1994). While the respondent suggests that this Court must defer to the state courts findings regarding procedural default, the law affords this Court the opportunity to apply *de novo* review and make its own independent finding. *Macklin v. Singletary*, 24 F.3d 1307 (11th Cir. 1994)(default is a *de novo* determination).

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claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."); *Johnson v. Singletary*, 938 F.2d 1166, 1183 (11th Cir. 1991) (petitioner must show "that he is ineligible for the death penalty").

[8] In assessing the adequacy of petitioner's showing....the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the *Carrier* standard, we believe that Judge Friendly's description of the inquiry is appropriate: the habeas court must make its determination concerning the petitioner's innocence "in light of the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.

*Schlup v. Delo*, 130 L. Ed. 2d 808 (1995). It is not controlling that there is still sufficient evidence to convict after consideration of new evidence. *Id.* at 839. The controlling issue is, in light of Petitioner's allegations, and assuming "they are true," *id.*, can it "be said that a juror, conscientiously following the judge's instructions beyond a reasonable doubt, would vote to convict." *Id.* at 839.

B. Procedural Bar

Additionally, a state court finding of procedural bar (versus procedural default) does not divest this Court of authority to address the claims. The term "procedurally barred" is not the same as "procedurally defaulted" and is not an adequate and independent state court rule precluding this Court from reaching the merits of a federal issue. Under Georgia law, "procedural bar" means that the state habeas court was precluded from addressing the merits of the claim because the claim had previously been addressed by the Georgia Supreme Court on direct appeal and is therefore *res judicata*. 28 U.S.C. § 2254(d) requires this Court to determine whether any such claim is "contrary to or an unreasonable application of" clearly established Supreme Court precedent. *See, e.g., Ylst v. Nunnemaker*, 501 U.S.797 (1991) (once petitioner has properly exhausted his remedies during direct appeal, the claim is ripe for federal habeas review and procedural bar imposed when claim is improperly raised in state post-conviction proceedings does not preclude federal review); *see also Cone v. Bell*, 556 U.S. __, 129 S. Ct. 1769, 1780-82 (2009); *Owen v. Secretary for the department of Corrections*, 568 F.3d 894, 914-15 (11th Cir. 2009).

C. Exhaustion

For a claim to have been "fairly presented" to the state court, a petitioner must have given the appropriate state court the opportunity to grant relief on the claim and must have presented to the state court what is in "substance" the same claim in the federal petition. *Vasquez*, 474 U.S. at 257; *Henry v. Estelle*, 993 F.2d 1423, 1425 (9th Cir. 1993). "'A habeas petitioner need not spell out each syllable of his claim before the state courts in order to satisfy the exhaustion requirement of §2254(b).' It suffices that the substantial equivalent of a petitioner's federal claim has been argued in the state proceedings." *Spiegel v. Sandstrom*, 637 F.2d 405, 407 (5th Cir. 1981) quoting *Lamberti v. Wainwright*, 513 F.2d 277, 282 (5th Cir. 1975).

"A habeas petitioner may, however, reformulate somewhat the claims made in state court; exhaustion requires only that the substance of the federal claim be fairly presented." *Chacon v. Wood*, 36 F.3d 1459, 1467 (9th Cir. 1994)(emphasis in original); *accord*, *Carter v. Bell*, 218 F.3d 581, 606-607 (6th Cir. 2000)("We do not require word-for-word replication of the state claim in the habeas corpus petition in order to address the merits of the claim therein, only that the petitioner 'fairly present' the substance of each of his federal constitutional claims to the state courts."); *Odem v. Hopkins*, 192 F.2d 772, 775-776 (8th Cir. 1999)("an exact

duplicate of Odem's state court argument is not required for exhaustion."); *Williams v. Holbrook*, 691 F.2d 3, 6 (1st Cir. 1982).[9] Most of Respondent's complaints about lack of exhaustion in Petitioner's case involve quibbles over minor linguistic variations between the state and federal pleadings.

In addition, under Georgia law, "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." O.C.G.A. §9-11-15(b). Georgia courts have long interpreted this provision to mean that, when evidence is presented without objection in support of a claim not raised in the pleadings, the pleadings are automatically amended to include the claim. *See e.g. Conner et. al. v. Conner*, 269 Ga. 112, 499 S.E.2d 54, 55 (1998); *Fruin-Colnon Corp. v. Air Door, Inc.*, 157 Ga. App 804, 278 S.E.2d 708 (1981). Thus, if evidence was presented at the state hearing, without objection, in support of a claim not raised in the petition, the petition is automatically amended under operation of Georgia law and the claim exhausted.

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[9] Following the Supreme Court's direction in *Picard*, the Eleventh Circuit has adopted a broad and flexible view of when a claim is exhausted in state court. *Cummings v. Dugger*, 862 F.2d 1504, 1506 (11th Cir. 1989); *Osborne v. Wainwright*, 720 F.2d 1237, 1239 (11th Cir. 1983) (specific words not necessary so long as state court has "adequate opportunity to consider a party's objection").

Finally, as pointed out by the Court of Appeals for the Eleventh Circuit, "there is not better evidence of exhaustion that a state court's actual consideration of the relevant issue." *Sanstrom v. Butterworth*, 738 F.2d 1200, 1206 (11th Cir. 1984); *Walton v. Caspari*, 916 F.2d 1352, 1356-1357 (8th Cir. 1990). Thus, if the state court has actually ruled on an issue, "exhaustion . . . is undeniable" *Sandstrom*, 738 F.2d at 1206.

## III. CLAIMS THAT ARE ALLEGEDLY UNEXHAUSTED

Respondent argues that six of Petitioner's claims are unexhausted. However, Respondent's arguments are predicated upon linguistic variations between the state and federal pleadings that do not support findings of unexhausted claims. Contrary to Respondent's arguments, a habeas petitioner need not spell out each syllable of his claim before the state courts in order to satisfy the exhaustion requirement. *Spiegel v. Sandstrom*, 637 F.2d 405, 407 (5th Cir. 1981). *See also Carter v. Bell*, 218 F.3d 581, 606 (6th Cir. 2000) ("We do not require word-for-word replication of the state claim in the habeas corpus petition in order to address the merits therein…").

Rather, the exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to state court. *Soffar v. Dretke*, 368 F.3d 441, 465 (5th Cir. 2004). A claim is fairly presented to a state court where

there was 1) reliance on pertinent cases identifying the constitutional rights at issue; 2) an assertion of the claim in terms sufficiently particular to call to mind a specific right protected by the Constitution; or 3) allegations of a pattern of facts that is well within the mainstream of constitutional litigation. *Id.* With respect to specificity, even "bald or general" allegations asserted in state court may be sufficient to satisfy the exhaustion requirement. *Carter*, 218 F.3d at 606.

Further, under Georgia law, "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." O.C.G.A. § 9-11-15(b). Georgia courts have long interpreted this provision to mean that, when evidence is presented without objection in support of a claim not raised in the pleadings, the pleadings are automatically amended to include the claim. *Conner, et al. v. Conner*, 269 Ga. 112, 499 S.E.2d 54, 55 (1998). Thus, if evidence was presented at the state hearing, without objection, in support of a claim not raised in the petition, the petition is automatically amended under operation of Georgia law and the claim exhausted.

As shown below, each of Petitioner's claims identified by Respondent as purportedly un-exhausted was in fact fairly presented to the state court.

In Claim II of his First Amended Petition for Writ of Habeas Corpus filed in this case ("Federal Petition"), Petitioner alleges ineffective assistance of counsel in that trial counsel failed to object when one of Petitioner's jurors improperly began asking questions of a witness during that witness's testimony. In his First Amended Petition for Habeas Corpus filed in state court ("State Petition"), Petitioner asserted that he received ineffective assistance of counsel because his trial and appellate counsel failed to investigate juror misconduct. (R. Ex. 46 at 28). Petitioner also asserted that his trial and appellate counsel were rendered ineffective by virtue of juror misconduct during the sentencing trial. (R. Ex. 46 at 29). Petitioner also alleged that he received ineffective assistance of counsel in that his trial and appellate counsel failed to protect Petitioner's rights with respect to improper and unlawful contacts between jurors and witnesses. (R. Ex. 46 at 67). Accordingly, this claim was fairly presented to the state court and is exhausted.

In Claim II of his Federal Petition, Petitioner alleges ineffective assistance of counsel in that trial counsel failed to object to irrelevant and prejudicial evidence concerning Petitioner's ties to a racist, satanic gang. This issue was presented to the Georgia Supreme Court during Petitioner's direct appeal. (R. Ex. 20 pp. 11-12). There, appellate counsel alleged that trial counsel was ineffective "in that he failed to object to the introduction of an alleged gang letter wherein there was no

evidence whatsoever in [the] trial that this murder was . . .gang related." (Id. at 12). Accordingly, this claim was fairly presented to the state court and is exhausted.

In Claim IV of his Federal Petition, Petitioner alleges that trial counsel's overwhelming caseload under the Spalding County Indigent Defense contract created an actual conflict between Petitioner's rights and the rights of the multitude of other indigent criminal defendants represented by counsel. In his State Petition Petitioner argued that he received ineffective assistance of counsel because of his appointed trial counsel's enormous and overwhelming caseload. (R. Ex. 46 at 27). Petitioner cited further authority in support of this claim in his Post Hearing Brief and Memorandum of Law in Support of Petitioner's First Amended Petitioner for Writ of Habeas Corpus ("State Habeas Brief"), wherein he submitted that "when excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created." (R. Ex. 73 at 58). Because a claim is "fairly presented" to the state court when a petitioner has presented to the state court what is in "substance" the same claim in the federal petition, it is clear that the above claim was fairly presented and is clearly exhausted. *Vasquez*, 474 U.S. at 257; *Henry v. Estelle*, 993 F.2d 1423, 1425 (9th Cir. 1993). "'A habeas petitioner need not spell out each

syllable of his claim before the state courts in order to satisfy the exhaustion requirement of §2254(b).' It suffices that the substantial equivalent of a petitioner's federal claim has be argued in the state proceedings." *Spiegel v. Sandstrom*, 637 F.2d 405, 407 (5th Cir. 1981) quoting *Lamberti v. Wainwright*, 513 F.2d 277, 282 (5th Cir. 1975). Finally, the state habeas court addressed this claim in its final order. (R. Ex. 83 at 9). Accordingly, "exhaustion . . . is undeniable." *Sandstrom*, 738 F.2d at 1206.

In a portion of Claim VII of his Federal Petition, Petitioner alleges that appellate counsel was operating under an actual conflict during his representation of Petitioner. In his State Habeas Brief, Petitioner made the same caseload argument with respect to his appellate counsel as he had with his trial counsel. Rather than repeating the same argument in whole, Petitioner referred to the earlier argument with respect to his trial counsel. (R. Ex. 73 at 65). Accordingly, this claim was fairly presented to the state court and is exhausted.

In a portion of Claim XXIX of his federal petition, Petitioner alleges that the proportionality review performed by the Georgia Supreme Court is unconstitutional. In his State Petition, Petitioner engaged in a lengthy analysis of the proportionality issue, including a discussion of twelve Georgia cases that involved circumstances more aggravated or as aggravated as the circumstances in

Petitioner's case and in which a death sentence was not rendered. (R. Ex. 46 at pp. 114-118). Petitioner then cited a United States Supreme Court case for the proposition that states cannot impose the death penalty consistent with the Constitution without procedures to provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many other cases in which it is not imposed. (R. Ex. 46 at 127). Petitioner then argued that a proper "proportionality review of the facts in this case demonstrate that this is not a proper death penalty case." (R. Ex. 46 at 127). Petitioner further argued that "[a]n adequate comparison between the facts and circumstances in this case and those in similar cases demonstrates that death is a disproportionate punishment for Petitioner." (R. Ex. 46 at 128). Accordingly, this claim was fairly presented to the state court and is exhausted.

In a portion of Claim XXII of his Federal Petition, Petitioner alleges juror misconduct in that some of the jurors based their decision to impose a death sentence on a misunderstanding of the law and pressure placed upon them by other jurors. In his State Petition, Petitioner alleged that the jury committed misconduct during deliberations. (R. Ex. 46 at 64). Specifically, Petitioner alleged that the jury was tainted by "outside, extraneous, and/or unlawful influences, facts . . . throughout the jury selection process, and continuing through all phases of the pre-

trial, trial, [and] jury deliberations. . ." (R. Ex. 46 at 66). Further, Petitioner's juror misconduct claim was addressed by the state habeas court.[10] As the Eleventh Circuit has made clear, "there is not better evidence of exhaustion that a state court's actual consideration of the relevant issue." *Sanstrom v. Butterworth*, 738 F.2d 1200, 1206 (11th Cir. 1984); *Walton v. Caspari*, 916 F.2d 1352, 1356-1357 (8th Cir. 1990). Thus, if the state court has actually ruled on an issue, "exhaustion . . . is undeniable" *Sandstrom*, 738 F.2d at 1206. Accordingly, for all the reasons discussed above, this claim was fairly presented to the state court and is exhausted.

## IV. CLAIMS THAT ARE ALLEGEDLY PROCEDURALLY DEFAULTED

### A. Responses to Specific Claims

**XVI: Prosecutorial Misconduct Claim; XVII: Brady Claim; XVIII: Destruction of Potentially Exculpatory Evidence; and XIX: *Giglio* Claim:**

In claims XVI, XVII, XVIII, and XIX, Petitioner has raised claims asserting that the state has engaged in misconduct in violation of the rules in *Brady v. Maryland*, 373 U.S. 667 (1965); *Giglio v. United States*, 405 U.S. 150 (1972); *Arizona v. Youngblood*; *Napue v. Illinois*, 360 U.S. 264 (1959) and the Fourth,

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[10] In its Final Order, the state habeas court ruled that this claim was procedurally defaulted. (R. Ex. 83 at 12-13). However, even when a claim is rejected on a procedural ground, it will be held to have been exhausted. *See, e.g. Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Teague v. Lane*, 489 U.S. 288, 298 (1989); *Watson v. Alabama*, 841 F.2d. 1074, 1077 n.6 (11th Cir.), cert. denied, 488 U.S. 864 (1988).

Fifth, Sixth, Eighth, and Fourteenth Amendments. Respondent alleges that these claims are procedurally defaulted (Respondent's Procedural Default Brief at 23-25). Respondent states that these claims were found by the state habeas court to be defaulted because they were not presented at trial or on direct appeal. Respondent erroneously asserts that Mr. Fults has failed to show cause and prejudice to overcome the default.

In *Head v. Stripling*, 277 Ga. 403, 590 S.E.2d 122 (2003) the Georgia Supreme Court addressed the question of whether a *Brady* violation, first raised during Petitioner's state habeas proceedings was procedurally defaulted. In *Stripling*, where exculpatory evidence of the Petitioner's mental retardation was found in his parole file, which did not come to light until Mr. Stripling's post-conviction proceedings in state court, the Georgia Supreme Court stated the following:

> Moreover, procedural default did not operate to prevent the habeas court's consideration of Stripling's *Brady* claim because Stripling could not have raised such a claim before learning about the contents of the parole file. *See Williams*, *supra*, 251 Ga. At 789, 312 S.E.2d 40; *Turpin v. Todd*, 268 Ga. 820(2), 493 S.E.2d 900 (1997) (explaining cause and prejudice test for overcoming procedural default). Thus, we agree with the habeas court that this issue is not procedurally barred or defaulted.

*Stripling*, 277 Ga. at 407, 590 S.E.2d at 126.

In a subsequent case that included a *Brady* claim, the Georgia Supreme Court granted relief on that claim absent *any* mention of procedural default. *See Bronlow v. Schofield*, 277 Ga. 237, 587 S.E.2d 647 (2003). Had the court in *Bronlow* followed the procedural default rule upon which Respondent seeks to rely, it would have had to have found cause and prejudice prior to reaching the merits of Bronlow's *Brady* claim. Instead, the court simply addressed the merits of the claim, making clear that the default rule on which Respondent is attempting to rely is not regularly applied. *See also Zant v. Moon*, 264 Ga. 93, 440 S.E.2d 657 (1994) (*Brady* claim analyzed on the merits without discussion of procedural default or cause and prejudice); *Nelson v. Zant*, 261 Ga. 358, 405 S.E.2d 250 (1991) (analysis of *Brady* claim that came to light during state habeas proceedings on the merits without addressing procedural default or cause and prejudice).

A state procedural bar must be both "independent", in that cannot be bound up with federal law, and "adequate", meaning it is based on a procedural rule that is firmly established and routinely applied. Only a "'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (citation omitted). *See also Cochrin v. Herring*, 43 F.3d 1404 (11th Cir. 1995) (to foreclose review in federal court, a state

"bar" must be firmly established and a regularly followed practice."). As the above cases demonstrate, the procedural default rule is not regularly applied by the Georgia Supreme Court. Accordingly, the supposed violation of that rule cannot be used to bar this Court from deciding the issue(s) on the merits.

Thus, Respondent's argument that the state habeas court properly found the above claims to be procedurally defaulted falls flat. To the extent to the procedural default rule might apply (though Petitioner submits it does not for the reasons stated above) and to the extent that any valid default exists and to as to the above-mentioned claims, Petitioner can show cause and prejudice to excuse any default. Because effective counsel would have won this claim had it been raised on appeal, there is cause as well as prejudice to excuse any default based on counsel's ineffectiveness. Finally, to enforce a default would result in a fundamental miscarriage of justice. *See Dugger v. Adams*, 489 U.S. 401, 411 n.6 (1989) (procedural default cannot prevent relief for a petitioner when state court process "'Has probably resulted' in capital punishment for one who is "'actually innocent' of a death sentence").[11] Accordingly, these claims are properly before this Court.

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[11] *See also Sawyer v. Whitley*, 112 S. Ct. 2514, 2522 (1992)(the "innocence of the death penalty" inquiry "must focus on those elements which render a defendant eligible for the death penalty"); Tamayo-Reyes, supra, 112 S.Ct at 1721 ("[a] habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary

**XI: Trial Court's Restrictions on *Voir Dire* Deprived Petitioner of His Rights to a Fair and Impartial Jury, Effective Assistance of Counsel, Due Process, and Equal Protection in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.**

The state habeas court held that this claim was barred from review under the principles of *res judicata*. (R. Ex. 83 p. 4). Respondent states that this determination by the state habeas court was erroneous in that the claim was not raised in Petitioner's direct appeal proceedings. (R. Brief at 14-15). Respondent urges this Court to find the claim procedurally defaulted. Petitioner submits that it would be improper for this Court to rule that this claim is defaulted. The state habeas court made no such finding, as conceded by Respondent. Further, for this Court, a finding by the state habeas court that a claim is barred by *res judicata* means that there is no state procedural default. This finding means that the claim is properly exhausted and properly before this Court for review on its merits.

A. General Response

Many of the claims that Respondent alleges to be defaulted were found to be procedurally defaulted by the state habeas court for not being raised on direct

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hearing."); Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991) (petitioner must show "that he is ineligible for the death penalty").

appeal.[12] Respondent asks this court to find each of those claims to be procedurally defaulted for that reason.[13] As to each of those claims, Petitioner has the same response. While the claims are subject to a default, the ineffective assistance of counsel constitutes cause to excuse the procedural default.

In this case, trial counsel was ineffective in several instances during the course of his representation of Petitioner. As Mr. Fults was appointed separate counsel for his direct appeal (due to the death of his trial attorney while Petitioner was pending at the motion for new trial stage), those claims which could have been raised against his trial attorney for his deficient performance should have been raised by appellate counsel, Harold Sturdivant, during Petitioner's direct appeal proceedings. However, because Mr. Sturdivant's performance was itself woefully inadequate[14], Petitioner's underlying ineffectiveness claim, as well as other certain claims, were not fully or effectively presented to the Georgia Supreme Court on

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[12] Exceptions to this have been previously addressed in this Response.

[13] Specifically, Respondent argues that Claims II, III, IX, X, XI, XII, XIII, XIV, XV, XX, XXI, XXII, XXVI, XXVIII, XXXI, XXXII and portions of VIII and XXVII are procedurally defaulted because they were not raised on direct appeal.

[14] Notably, the state habeas court in this case found appellate counsel's performance deficient under Strickland. (R. Ex. 83 at 28-34). Specifically, that court found that attorney Sturdivant rendered deficient performance in that he failed to raise an ineffectiveness claim against trial counsel as it pertained to the investigation and presentation of evidence of mitigation at Petitioner's trial.

direct appeal. Accordingly, *appellate* counsel's ineffectiveness[15] constitutes further cause to excuse the procedural default.

It is widely recognized that cause is established where trial and/or appellate counsel rendered ineffective assistance. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Holladay v. Haley*, 209 F.3d 1243, 1254 (11th Cir. 2000)("Constitutionally ineffective assistance of counsel can constitute cause."); *Greene v. United States*, 880 F.2d 1299, 1305 (11th Cir. 1989) (ineffective assistance provides cause, and it is determined *de novo* in federal district court); *Smith v. Murray*, 477 U.S. 527, 535-36 (1986); *Orazio v. Dugger*, 876 F.2d 1508, 1513 14 (11th Cir. 1989)(failure to raise claim on direct appeal, leading to state court invocation of procedural bar in post-conviction proceedings, constituted ineffective assistance of appellate counsel); *Hopkinson v. Shillinger*, 866 F.2d 1185, 1203-4 n.12 (10th Cir. 1989).

A criminal defendant is entitled to the effective assistance of counsel under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Effective assistance of counsel such

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[15] It is beyond dispute that Petitioner's ineffectiveness claim as it pertains to his appellate counsel, is properly before this Court. Further, as the state habeas court recognized, in evaluating the ineffectiveness claim as against appellate counsel, it becomes necessary to examine the underlying performance of trial counsel. Indeed, reference to trial counsel's performance is woven throughout the state habeas court's ineffectiveness analysis as it applies to appellate counsel. (*See* R. Ex. 83 at 18-60).

as will withstand constitutional scrutiny is counsel "reasonably likely to render and rendering reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Counsel's conduct is violative of the Sixth Amendment if it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

In order to prevail on a claim of ineffective assistance of counsel so as to warrant a reversal of a conviction or death sentence, a habeas petitioner must make the following two-pronged showing: first, "that counsel's performance was deficient"; and second, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The constitutional framework established by the Supreme Court to prove ineffective assistance thus requires Mr. Fults to show that counsel's acts or omissions were inadequate and that Mr. Fults's defense was actually prejudiced thereby. The test for prejudice is whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also Williams v. Taylor*, 120 S.Ct. 1495, 1512 (2000). Accordingly, prejudice need not result from any single error alleged, but may, instead, flow from a combination of counsel's errors, which must be assessed on a cumulative basis and not item-by-item. *Williams*, 120 S.Ct. at 1515-16; *United States v. Cronic*, 466 U.S. 648, 657

n.20 (1984) (Ineffectiveness may be found where "counsel's performance as a whole" fell below professional standards).

To determine whether the Sixth Amendment standard of ineffective assistance has been met, the court must view the assistance rendered by counsel in the context of the totality of the circumstances. *Strickland v. Washington*, 466 U.S. at 690; *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982). In looking at the totality of the circumstances, a court must be mindful that, although a capital case is judged by the same standard of effectiveness as a non-capital case, "[t]he seriousness of the charges and the degree of punishment must be considered in assessing counsel's performance." *Proffitt v. Wainwright*, 685 F.2d 1227, 1247 (11th Cir. 1982).

Ineffectiveness may be found where "counsel's performance as a whole," *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984), or through individual errors, *Strickland*, 466 U.S. at 686, falls below an objective standard of reasonableness and counsel's errors prejudice the defendant. *Id.* 466 U.S. at 687.

A criminal defendant continues to have a Sixth Amendment right to effective assistance of counsel at the motion for new trial stage and during his first direct appeal. *Anders v. California*, 386 U.S. 738 (1967); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Williams v. Turpin*, 87 F.3d 1204 (11th Cir. 1996); *Adams v. State*, 199

Ga.App. 541 (1991). To obtain habeas corpus relief on a claim of ineffective assistance of appellate counsel, a petitioner must satisfy the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984) – that appellate counsel was deficient in failing adequately to raise an issue on appeal and that the deficiency prejudiced the defense. *Nelson v. Hall*, 275 Ga. 792, 793 (2002) (citing *Shorter v. Waters*, 275 Ga. 581 (2002); *Sloan v. Sanders*, 271 Ga. 299 (1999); *Battles v. Chapman*, 269 Ga. 702 (1998)).

The test for *Strickland* prejudice stemming from deficient performance on motion for new trial/appeal is whether, but for counsel's error, there is a reasonable probability that a more favorable outcome would have been obtained on motion for new trial/appeal. See Nelson, 275 Ga. at 794; Davis v. Crosby, 341 F.3d 1310, 1316 (11th Cir. 2003); Roe v. Flores-Ortega, 120 S.Ct. 1029 (2000). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 674.

Appellate counsel *must present evidence* in support of the claim that previous counsel was ineffective and thereby prejudiced the outcome of the trial or sentencing. *See Williams v. Turpin*, 87 F.3d 1204, 1210 (11th Cir. 1996) (capital defendants in Georgia have a right to effective assistance of counsel on motion for new trial; counsel who raised claim but failed to conduct investigation to support

claim would have been ineffective). In this case, appellate counsel failed to investigate or present several areas relating to trial counsel's ineffectiveness.

In order to determine if there is cause and prejudice to excuse the default, this Court must conduct an analysis under *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, was counsel's decision not to raise any of these issues a reasonable strategic decision made after appropriate research and investigation. If it was not, cause is established. Prejudice would exist if there is a reasonable probability that the motion for new trial or direct appeal would have been different. *Davis v. Secretary for the Dept. of Corrections*, 341 F.3d 1310 (11th Cir. 2003) (when trial counsel performs deficiently in failing to preserve a claim for appeal, the prejudice test is whether there is a reasonable likelihood of a more favorable result on appeal); *Heath v. Jones*, 941 F.2d 1126, 1132 (11th Cir. 1991) (prejudice prong of *Strickland* can be satisfied if, after review of the omitted claim, the appellate court finds "that the neglected claim would have a reasonable probability of success on appeal . . ."); *Chatom v. White*, 858 F.2d 1479, 1487 (11th Cir. 1988) (prejudice shown when result of appeal would have been different).

Since the prejudice analysis requires the Court to review the merits of the underlying claims that were not raised on appeal, Petitioner requests that the Court defer ruling on the procedural default until the issues are briefed on the merits.

(*See Henry v. Hall*, Northern District of Georgia Case No. 1:06-CV-2470-JEC, *Order and Opinion* August 25, 2008 [Docket No. 22] at 9-11) (Order on procedural default, wherein the District Court deferred ruling on the procedural default issue as to several claims consistent with Petitioner's position that a ruling should be deferred until the issues are briefed on the merits).

## IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court find that Mr. Fults's claims are not procedurally defaulted.

Respectfully submitted this, the 28th day of January, 2010.

Respectfully submitted,

/s/ Lindsay Bennett
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CERTIFICATE OF SERVICE AND COMPLIANCE WITH LR 5.1B

I hereby certify that on January 28, 2010, I electronically filed this pleading with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

Sabrina Graham
Assistant Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334

This the 28th day of January, 2010.

*Lindsay Bennett*

# APPENDIX 3

*2010 U.S. Dist. LEXIS 141551, **

KENNETH EARL FULTS, Petitioner, v. WARDEN STEPHEN UPTON, Respondent.

CIVIL ACTION FILE NO. 3:09-CV-86-TWT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, NEWNAN DIVISION

2010 U.S. Dist. LEXIS 141551

September 1, 2010, Decided
September 2, 2010, Filed

**SUBSEQUENT HISTORY:** Reconsideration denied by, Request denied by Fults v. Upton, 2011 U.S. Dist. LEXIS 11151 (N.D. Ga., Feb. 4, 2011)

**PRIOR HISTORY: Fults v. State, 274 Ga. 82, 548 S.E.2d 315, 2001 Ga. LEXIS 454 (2001)**

**CORE TERMS:** defaulted, procedurally, procedural default, habeas corpus, trial counsel, juror, ineffective assistance, unexhausted, direct appeal, exhaustion, murder, ineffective, assistance of counsel, burglary, procedural rule, habeas petition, new trial, exhausted, sentence, exhaust, default, caseload, death penalty, evidentiary hearing, proportionality review, judicata, res, financial interest, cases involving, claim of ineffective assistance

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For Warden Stephen Upton, Respondent: Beth Attaway Burton, Office of State Attorney General, Atlanta, GA; Sabrina G. Graham, Attorney General's Office-Atl, Atlanta, GA.

**JUDGES:** THOMAS W. THRASH, JR., United States District Judge.

**OPINION BY:** THOMAS W. THRASH, JR.

**OPINION**

ORDER

This is a petition for a writ of habeas corpus in a state death penalty case. It is before the Court on the Respondent's Motion to Dismiss Procedurally Defaulted and Unexhausted Claims [Doc. 25]. For the reasons set forth below, the Respondent's Motion is GRANTED IN PART and DENIED IN PART.

I. Background

This case arises from the murder of Cathy Bounds on January 30, 1996, in Spalding County, Georgia. The Petitioner plead guilty to malice murder. The Georgia Supreme Court summarized the facts as follows:

> The evidence adduced at Fults' sentencing trial showed that he carried out a week-long crime spree which was centered, at least in part, upon his desire to murder a man who was engaged in a relationship with his former **[*2]** girlfriend. Fults first committed two burglaries, obtaining several handguns. After a failed attempt at murdering his former girlfriend's new boyfriend with one of the stolen handguns, Fults then burglarized the home of his next-door neighbors. After the male neighbor left for work, Fults forced his way through the front door wearing gloves and a hat pulled down over his face. Fults confronted the female occupant of the home, Cathy Bounds, brandishing a .22 caliber handgun he had stolen during one of the burglaries. Ms. Bounds begged for her life and offered Fults the rings on her fingers. Fults turned Ms. Bounds around toward the bedroom, either taped or forced her to tape her eyes closed by wrapping over six feet of electrical tape around her head, forced her into the bedroom, placed her face-down on her bed, placed a pillow over her head, and shot her five times in the back of the head.
>
> A search of Fults' trailer home revealed a boastful letter he had written in gang code in which he described the murder with some alterations of detail. Upon being confronted with this letter by a law enforcement officer, Fults confessed to killing Ms. Bounds but maintained that he had shot her by **[*3]** accident while in a dream-like state. The murder weapon was recovered from under Fults' trailer home, and .22 caliber shell casings shown to have been fired by the murder weapon as well as items from the earlier burglaries were found behind Fults' trailer home.

**Fults v. State, 274 Ga. 82, 83, 548 S.E.2d 315 (2001)**.

Petitioner Kenneth Fults was formally arraigned on May 19, 1996, in the Superior Court of Paulding County. Pre-trial motions were heard on July 24, 1996, and trial began nearly a year later on May 12, 1997. But, just before opening statements were set to begin, the Petitioner pled guilty to the charges of malice murder, burglary, kidnapping with bodily injury, and possession of a firearm in the commission of a crime. The Petitioner's sentencing hearing began on May 19, 1997. After three days of evidence and argument, the jury found two aggravating circumstances to impose the death penalty: (1) the murder was committed during the commission of the capital felonies of kidnapping with bodily injury and during the commission of a burglary and (2) the murder was outrageously and wantonly vile, horrible, or inhuman in that it involved depravity of mind. See O.C.G.A. § 17-10-30(b). The Petitioner **[*4]** was then sentenced to death for malice murder. He also received consecutive sentences of life imprisonment without parole for kidnapping with bodily injury, twenty years for burglary, and five years for possession of a firearm during the commission of a crime.

The Petitioner filed a motion for new trial on June 19, 1997, and an amended motion for new trial on March 16, 2000. The trial court denied the motion. The Petitioner filed a notice of appeal to the Georgia Supreme Court on April 14, 2000. Because he had new counsel for his appeal, the Georgia Supreme Court remanded the Petitioner's case back to the trial court. The trial court conducted a hearing on the effectiveness of the Petitioner's trial counsel on December 1, 2000, and again denied the Petitioner's motion for a new trial. The Petitioner filed a notice of appeal to the Georgia Supreme Court on December 29, 2000. The Georgia Supreme Court affirmed the Petitioner's convictions and sentences on June 11, 2001. **Fults, 274 Ga. at 82**. The United States Supreme Court denied his petition for a writ of certiorari and petition for rehearing. Fults v. Georgia, 535 U.S. 1043, 122 S. Ct. 1812, 152 L. Ed. 2d 667 (2002).

The Petitioner next filed a petition for a writ of habeas **[*5]** corpus on November 26, 2002, in the Superior Court of Butts County, Georgia. The court held an evidentiary hearing that lasted from March 20, 2007 through March 22, 2007. It denied the petition on December 28, 2007, finding that most of the claims were procedurally defaulted and deciding some claims on the merits. The Georgia Supreme Court denied the Petitioner's application for certificate of probable cause to

appeal, and the United States Supreme Court denied his petition for writ of certiorari. Fults v. Upton, 130 S. Ct. 275, 175 L. Ed. 2d 184 (2009). The Petitioner now seeks a writ of habeas corpus from this Court. The Respondent moves to dismiss the Petitioner's unexhausted and procedurally defaulted claims. Pursuant to a scheduling order, the parties have not yet fully briefed the merits of the Petitioner's claims.

II. Discussion

A. Unexhausted Claims

A federal habeas petitioner must first exhaust available state court procedures. 28 U.S.C. § 2254(b). To exhaust a claim in state court, a petitioner must have "fairly presented" to the state court the same claim that he asserts in federal court. Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). The Eleventh Circuit has explained that "[w]hile we do not require **[*6]** a verbatim restatement of the claims brought in state court, we do require that a petitioner presented his claims to the state court such that a reasonable reader would understand each claim's particular legal basis and specific factual foundation." McNair v. Campbell, 416 F.3d 1291, 1302 (11th Cir. 2005) (quotation marks omitted). "[T]he exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record." Id. at 1303.

For any unexhausted claims, there is no reason for a habeas petitioner to return to state court. Under Georgia law, the failure to raise a claim in a first petition constitutes a waiver of the claim. O.C.G.A. § 9-14-51. "[R]equiring the petitioner to return to state court only to make a futile application for relief simply delays the federal courts' adjudication of his petition." Kelley v. Secretary for Dep't of Corr., 377 F.3d 1317, 1351 (11th Cir. 2004). Any unexhausted claim, therefore, is also procedurally defaulted. See Snowden v. Singletary, 135 F.3d 732, 736 (11th Cir. 1998). To overcome a procedural default, a petitioner must either show (1) "cause for the default and actual prejudice as a result" **[*7]** or (2) that "failure to consider the claim will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). The Respondent says that the Petitioner failed to exhaust parts or all of Claim II, Claim IV, Claim VII, Claim XXII, and Claim XXIX.

1. Claim II

In part of Claim II, the Petitioner alleges that trial counsel did not object when, during a witness's testimony, a juror started asking the witness questions. (Am. Petition for Writ of Habeas Corpus ¶ 67(g).) To establish exhaustion, the Petitioner points to allegations in his state habeas petition that "[t]rial and appellate counsel were rendered ineffective by virtue of the rampant jury misconduct that occurred throughout all phases of the . . . proceedings" and that "jurors made improper and unlawful attempts to contact . . . court officials, the parties, witnesses, and/or other outside sources and/or influences, throughout . . . all phases of the . . . proceedings." (Respondent's Ex. 46 ¶¶ 113, 256.) These allegations are way too general and ambiguous to support the Petitioner's now specific claim that trial counsel did not object when a juror started asking a witness questions. Therefore, this **[*8]** part of Claim II is unexhausted.

In another part of Claim II, the Petitioner alleges that trial counsel did not object to evidence that the Petitioner was involved in a racist, satanic gang. (Am. Petition for Writ of Habeas Corpus ¶¶ 60-65.) Although the Respondent had argued that this claim was not exhausted, he has since conceded that the "portion of Claim II, wherein [the] Petitioner alleges that trial counsel was ineffective for not challenging the introduction of gang evidence at trial, was raised and rejected on direct appeal and therefore is exhausted." (Respondent's Reply Br., at 2 n.1.) Therefore, this part of Claim II claim is exhausted.

2. Claim IV

In Claim IV, the Petitioner alleges that trial counsel's overwhelming caseload as a contract public defender for Spalding County created a conflict of interest between the rights of the Petitioner and the rights of other indigent defendants. (Am. Petition for Writ of Habeas Corpus ¶ 82.) To establish exhaustion, the Petitioner points to an argument from his state court brief that "[t]he sheer magnitude of [trial counsel's] caseload created circumstances where it is so unlikely he . . . could provide effective assistance that prejudice **[*9]** must be presumed." (Respondent's Ex. 73, at 55.) That argument is about ineffective assistance of trial counsel, not a conflict of interest. The two claims are distinct. Even the Petitioner treats the claims as distinct. Claim III alleges that trial counsel's "staggering caseload . . . created circumstances preventing counsel from providing competent representation," while Claim IV alleges that trial counsel "was forced to choose between defending the rights of Mr. Fults and the rights of the many other clients to which he was assigned." (Am. Petition for Writ of Habeas Corpus ¶¶ 71, 82.) Therefore, Claim IV is unexhausted.

3. Claim VII

In part of Claim VII, the Petitioner alleges that appellate counsel's financial interest in trial counsel's practice created a conflict of interest between the rights of the Petitioner and appellate counsel's financial interest:

> As the contract defender for Spalding County, Mr. Mostiler [trial counsel] sub-contracted a portion of the criminal cases which came through his office. Specifically, Mr. Mostiler contracted with appellate counsel, Harold Sturdivant to provide representation on juvenile matters. Under Mostiler's direction, Sturdivant and his law **[*10]** partner Sam Sullivan handled Spalding County cases involving juvenile delinquency and juvenile deprivation. Additionally, Sturdivant's firm, in which he was a partner, provided representation in state court misdemeanor cases. Finally, through the same budget, which was paid on a quarterly basis to Mr. Mostiler, appellate counsel Sturdivant was brought in to act as counsel in cases involving co-defendants. Through this arrangement, which was in effect from 1990-2000, appellate counsel was paid by trial counsel. Appellate counsel had a financial interest in Mr. Mostiler's practice. This interest existed for approximately a decade, and included the period during which Mr. Mostiler represented Petitioner. Appellate counsel's representation of Mr. Fults during his motion for new trial and direct appeal proceedings was completely inappropriate.

(Am. Petition for Writ of Habeas Corpus ¶ 114.) To establish exhaustion, the Petitioner points to an argument from his state court brief that "Mr. Sturdivant's caseload affected his ability to provide effective assistance of counsel." (Respondent's Ex. 73, at 65.) That argument is clearly about appellate counsel's caseload, not his financial interest. **[*11]** Therefore, this part of Claim VII is unexhausted.

4. Claim XXII

In part of Claim XXII, the Petitioner alleges that some jurors voted for the death penalty based on a misunderstanding of the law and pressure from other jurors. (Am. Petition for Writ of Habeas Corpus ¶ 216.) To establish exhaustion, the Petitioner points to allegations in his state habeas petition that "jurors were tainted and/or affected by and/or relied upon outside, extraneous and/or unlawful influences, facts, factors, sources of fact and/or law, persons, officials, etc., throughout [all the proceedings]." (Respondent's Ex. 46 ¶ 253.) These allegations are way too general and ambiguous to support the Petitioner's now specific claim that some jurors voted for the death penalty based on a misunderstanding of the law and pressure from other jurors.

The Petitioner also says that the state habeas court actually considered the Petitioner's claim that some jurors voted for the death penalty based on a misunderstanding of the law and pressure

from other jurors. But the final order from the state habeas court shows that it considered other types of juror misconduct claims, not the one now asserted by the Petitioner:

> Claim XVIII **[*12]** [of the Petitioner's state habeas petitioner], wherein Petitioner alleges jury misconduct in that jurors and/or venire persons and/or alternate jurors:
> a) violated their oaths;
> b) violated the court's instructions;
> c) relied upon outside, extraneous influences;
> e) testified falsely during jury selection, and/or failed to reveal relevant and material information;
> f) made improper and unlawful attempts to contact, and/or did contact court officials, the parties, witnesses, and/or other outside sources and/or influences;
> h) refused to deliberate;
> i) engaged in ex parte deliberations; and
> k) prejudged Petitioner's case.

(Respondent's Ex. 83, at 12-13.) [1] Therefore, this part of Claim XXII is unexhausted.

**FOOTNOTES**

1 The state habeas court held that these claims, among others, were procedurally defaulted. If this part of Claim XXII had been included in that list, it would have been an exhausted claim. "A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion." Coleman v. Thompson, 501 U.S. 722, 732, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

5. Claim XXIX

In part of Claim XXIX, the Petitioner alleges that the proportionality review performed by the Georgia Supreme Court was unconstitutional. **[*13]** (Am. Petition for Writ of Habeas Corpus ¶¶ 301-315.) To establish exhaustion, the Petitioner points to allegations in his state habeas petition that a "proportionality review of the facts in this case demonstrates that this is not a proper death penalty case" and that an "adequate comparison between the facts and circumstances in this case and those in similar cases demonstrates that death is a disproportionate punishment for Petitioner." (Respondent's Ex. 46 ¶¶ 427-28.) These allegations show that the Petitioner fairly presented to the state court the same claim that he asserts here. The Respondent says that the Petitioner "did not argue [in state court] that the statute by which the Georgia Supreme Court conducts a proportionality review is unconstitutional as he now alleges in his federal petition." (Respondent's Reply Br., at 6.) But the Petitioner does not make that allegation. Indeed, he says that the Georgia Supreme Court failed to comply with the statutory requirement of proportionality: "the Georgia Supreme Court must 'review each sentence of death and determine . . . whether the sentence is disproportionate compared to those sentences imposed in similar cases." (Am. Petition **[*14]** for Writ of Habeas Corpus ¶ 303) (quoting O.C.G.A. § 17-10-35). Therefore, this part of Claim XXIX is exhausted.

6. Summary

The Petitioner has failed to exhaust Claim IV and parts of Claim II, Claim VII, and Claim XXII. These unexhausted claims are procedurally defaulted. Because the Petitioner does not argue cause and prejudice or a fundamental miscarriage of justice to overcome the procedural default, these claims are dismissed.

B. Procedurally Defaulted Claims

A federal habeas court cannot review a claim that was presented to the state habeas court and rejected pursuant to an independent and adequate state procedural rule. See Caniff v. Moore, 269 F.3d 1245, 1247 (11th Cir. 2001). A state procedural rule is not independent and adequate if it is applied arbitrarily or in a manifestly unfair manner. See Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001); Upshaw v. Singletary, 70 F.3d 576, 579 (11th Cir. 1995). Moreover, "a procedural default does not bar consideration of a federal claim . . . unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." Harris v. Reed, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). To overcome **[*15]** a procedural default, a petitioner must either show (1) "cause for the default and actual prejudice as a result" or (2) "failure to consider the claim will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750 (1991).

The Respondent says that the Petitioner procedurally defaulted all or parts of Claim II, Claim III, Claim VIII, Claim IX, Claim X, Claim XI, Claim XII, Claim XIII, Claim XIV, Claim XV, Claim XVI, Claim XVII, Claim XVIII, Claim XIX, Claim XX, Claim XXI, Claim XXII, Claim XXVI, Claim XXVII, Claim XXVIII, Claim XXXI, and Claim XXXII. The Petitioner concedes procedural default as to all but Claim XI and Claim XVII. The Petitioner argues cause and prejudice to excuse any default.

1. Claim XI

In Claim XI, the Petitioner alleges that the trial court's restrictions on voir dire deprived the Petitioner of his constitutional rights. (Am. Petition for Writ of Habeas Corpus ¶¶ 128-132.) The state habeas court did not hold that this claim was procedurally defaulted. It held that it could not review the claim because it had already been decided on direct appeal. (Respondent's Ex. 83, at 3-4) ("Claims decided on appeal are precluded from review by this Court under the **[*16]** doctrine of res judicata."). Failure to review a claim because of res judicata is not the same as procedural default:

> When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is ripe for federal adjudication.

Cone v. Bell, 129 S. Ct. 1769, 1781, 173 L. Ed. 2d 701 (2009); see also Owen v. Secretary for Dep't. of Corr., 568 F.3d 894, 914-15 (11th Cir. 2009).

The Respondent says that "the state habeas court erred in ruling that this allegation was res judicata as it is clear that this claim was not raised on direct appeal." (Respondent's Mot. to Dismiss Procedurally Defaulted and Unexhausted Claims, at 14.) But it does not matter if the state habeas court was wrong. What matters is that the state habeas court did not "'clearly and expressly' state[] that its judgment rests on a state procedural bar." Harris, 489 U.S. at 263 ("The 'plain statement' requirement achieves the important objective of permitting the federal court rapidly to identify whether **[*17]** federal issues are properly presented before it."). Therefore, Claim XI is not procedurally defaulted.

2. Claim XVII

In Claim XVII, the Petitioner alleges that the prosecutor suppressed material, exculpatory evidence. The Petitioner says the prosecutor's conduct violated the rule from Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), which provides that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Id. at 87. The state habeas court held that this claim was procedurally defaulted because the Petitioner "failed to raise [the claim] on direct appeal." (Respondent's Ex. 83, at 5.)

The Petitioner says that Georgia courts do not normally apply procedural default rules to Brady claims. But the caselaw does not support the Petitioner's argument. Many courts have held that Brady claims were procedurally defaulted and then looked to see whether there was cause and prejudice to overcome the default. See Upton v. Parks, 284 Ga. 254, 255, 664 S.E.2d 196 (2008) ("Because [the petitioner] did not pursue his Brady claim until habeas proceedings, the initial question is whether [the petitioner] can establish **[*18]** sufficient cause and prejudice to overcome his procedural default."); Schofield v. Meders, 280 Ga. 865, 870, 632 S.E.2d 369 (2006) (same); Head v. Stripling, 277 Ga. 403, 407, 590 S.E.2d 122 (2003) (same). It is true that, in some cases involving Brady claims, courts did not explicitly discuss procedural default rules. But it may be that the respondents simply did not raise a procedural default issue; or that the procedural default analysis was implicit in the analysis of the merits of the Brady claim. See Upton, 284 Ga. at 255 ("In assessing prejudice for purposes of procedural default with respect to an alleged Brady violation, . . . the underlying claim and the prejudice analysis necessary to satisfy the cause-and-prejudice test are coextensive."). Nothing, however, in those cases suggests that Georgia courts do not normally apply procedural default rules to Brady claims. Therefore, Claim XVII is procedurally defaulted.

3. Cause and Prejudice

For all the claims that the Petitioner concedes were procedurally defaulted, and for Claim XVII, which the Court concludes was procedurally defaulted, the Petitioner says that there is cause and prejudice to overcome the default. He says that those claims were not raised at **[*19]** trial or on appeal because his trial and appellate counsel provided constitutionally ineffective assistance of counsel.

A habeas petitioner may establish cause by showing that "the procedural default is the result of ineffective assistance of counsel." Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). But an assertion of ineffective assistance as cause is itself subject to exhaustion requirements and state procedural rules. A petitioner may only assert ineffective assistance as cause if the petitioner properly presented that same assertion of ineffective assistance to the state courts as an independent claim. See id. at 489; Edwards v. Carpenter, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). The reason for this rule is that:

> To allow a federal court to review a defaulted claim of ineffective assistance under the guise of a cause analysis would ignore the fact that under the procedural rules of [many] states, the petitioner has forfeited his right to have that claim reviewed by a state court. This hardly amounts to respect for a state's right to enforce its procedural rules.

Hill v. Jones, 81 F.3d 1015, 1030 (11th Cir. 1996).

The Respondent says that the Petitioner failed to exhaust his ineffective assistance claims **[*20]** in state court. But the record does not support the Respondent's argument. The Petitioner's state habeas petition includes a lengthy claim that the Petitioner was denied the right to effective assistance at all phases of his proceedings. (Respondent's Ex. 46 ¶¶ 62-127.) Among other things, the Petitioner alleged that:

> 118. Trial and/or appellate counsel failed adequately to investigate facts and issues about which they were or should have been on notice — including trial and/or appellate counsel's ineffectiveness for failing to present information related to all aspects of Petitioner's ineffective assistance of counsel claims — at the motion for new trial, the failure of which may have waived or did waive Petitioner's right to present and litigate those issues on appeal or in habeas corpus proceedings.
> 119. Appellate counsel failed to enumerate, assert, and argue numerous state and federal constitutional and/or legal issues that were readily apparent on the face of the record in the appellate proceedings.

> 120. Trial and/or appellate counsel failed properly to preserve any facts, claims or issues asserted here by Petitioner (or to be asserted later) which this Court or some future court **[*21]** may deem to have been waived by virtue of trial or appellate counsel's failure to have properly preserved such facts, claims or issues.

(Id. ¶¶ 118-120.) The Petitioner also included a footnote to nearly all of his other claims that said, "[t]o the extent that trial or appellate counsel failed to object at trial or preserve this issue on appeal, they rendered ineffective assistance of counsel." (Id., at 3 n.1.) Indeed, most of the final order from the state habeas court is devoted to addressing these allegations. It held that "although Petitioner established that appellate counsel's performance was deficient, Petitioner failed to establish that Petitioner was prejudiced by appellate counsel's representation." (Respondent's Ex. 83, at 17.) The Petitioner's allegations in his state habeas petition and the court's consideration of those allegations are sufficient to show exhaustion.

The state habeas court, however, held that the new claims of ineffective assistance of trial counsel were procedurally defaulted. The ineffective assistance of trial counsel claims made on direct appeal were res judicata, but were not procedurally defaulted. The Petitioner has not attempted to show that any **[*22]** of the ineffective assistance claims made on direct appeal provide cause and prejudice to excuse the procedural default rulings of the state habeas court.

The Petitioner has not actually briefed the issue of ineffective assistance as cause and prejudice. Instead, the Petitioner makes two arguments regarding the schedule of this case. First, the Petitioner says that he is entitled to an evidentiary hearing on cause and prejudice. (Petitioner's Br. on Procedural Default and Exhaustion of State Remedies, at 5 n.6.) But the Petitioner does not make any attempt to explain why he is entitled to an evidentiary hearing on cause and prejudice. He does not identify any problems with the factual record created by the state habeas court (other than to object to its legal conclusions). And he does not point to any allegations that require new evidence. Without any reason to do so, the Court will not duplicate what the state habeas court has already done. Cf. Keeney v. Tamayo-Reyes, 504 U.S. 1, 9, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992) ("The state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only **[*23]** degrade the accuracy and efficiency of judicial proceedings."). Therefore, the Court denies the Petitioner's request for an evidentiary hearing on cause and prejudice.

Second, the Petitioner says that, because deciding cause and prejudice would require looking at the merits of his ineffective assistance claims and the merits of the potentially defaulted claims, the Court should defer ruling on cause and prejudice until the merits have been briefed. Cf. Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir. 1991) ("In the context of an ineffective assistance on appeal claim, this Court . . . [has] held that in order to determine prejudice the court must first perform a review of the merits of the omitted or poorly presented claim.") (quotation marks omitted). The Court declines to do this. It is well settled that generalized claims of ineffective assistance of counsel do not provide cause and prejudice to excuse procedural defaults. The only ineffective assistance of counsel claims that will be considered on the merits are those that were addressed by the Georgia Supreme Court and the state habeas court. All other ineffective assistance of counsel claims are procedurally defaulted.

4. Summary

The **[*24]** Respondent says that the Petitioner procedurally defaulted all or parts of Claim II, Claim III, Claim VIII, Claim IX, Claim X, Claim XI, Claim XII, Claim XIII, Claim XIV, Claim XV, Claim XVI, Claim XVII, Claim XVIII, Claim XIX, Claim XX, Claim XXI, Claim XXII, Claim XXVI, Claim XXVII, Claim XXVIII, Claim XXXI, and Claim XXXII. The Court concludes that Claims XI, XXI, and XXIII were not procedurally defaulted. As for the rest of the claims, the Court concludes that they were procedurally defaulted and are dismissed.

III. Conclusion

For the reasons set forth above, the Respondent's Motion to Dismiss Procedurally Defaulted and Unexhausted Claims [Doc. 25] is GRANTED IN PART and DENIED IN PART. Therefore, in general, the claims remaining to be addressed on the merits are Claim I (mental retardation), Claim II (ineffective assistance of trial counsel as raised on direct appeal), Claim VI (ineffective assistance of appellate counsel as raised in the state habeas corpus proceeding), Claim VII (ineffective assistance of appellate counsel as raised in the state habeas corpus proceeding), Claim XI (trial court restrictions on voir dire as raised on direct appeal), Claim XXI (introduction of inflammatory **[*25]** and prejudicial evidence as raised on direct appeal), Claim XXIII (improper jury instructions), and Claim XXIX (proportionality review).

SO ORDERED, this 1 day of September, 2010.

/s/ Thomas W. Thrash

THOMAS W. THRASH, JR.

United States District Judge

# APPENDIX 4

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**NEWNAN DIVISION**

| | | |
|---|---|---|
| KENNETH EARL FULTS, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Case No. 3:09-CV-86-TWT |
| | ) | CAPITAL CASE |
| STEPHEN UPTON, Warden | ) | |
| Georgia Diagnostic and | ) | |
| Classification State Prison, | ) | |
| | ) | |
| Respondent. | ) | |

**MOTION FOR RECONSIDERATION OF THE ORDER ON RESPONDENT'S MOTION TO DISMISS PROCEDURUALLY DEFAULTED AND UNEXHAUSTED CLAIMS**

Petitioner Kenneth Earl Fults asks the Court to reconsider a portion of its Order [Doc. 30] on Respondent's Motion to Dismiss Procedurally Defaulted and Unexhausted Claims [Doc. 25].

In its Order, this Court ruled that Mr. Fults's claim that he was denied a fair trial as a result of the racial animus of one of his jurors (Claim XXII in the Amended Habeas Corpus Petition) was procedurally defaulted and, therefore, dismissed the claim. Mr. Fults respectfully submits that the Court's ruling on this issue was incorrect.[1] Accordingly, Mr. Fults asks the Court to reconsider this

[1] As this Court is aware, there are various sub-parts to Petitioner's Amended Petition Claim XXII. This Motion specifically concerns the portion of Claim XXII

portion of its Order and issue a ruling that the claim is not dismissed on the ground of procedural default.

## I. ARGUMENT AND CITATION OF AUTHORITY

### A. In His State Habeas Case, Mr. Fults Showed That His Constitutional Rights Were Violated Because Racial Bias Infected The Jury's Decision To Sentence Mr. Fults To Death.

Mr. Fults may establish a violation of his rights under the Eighth Amendment by showing that there is an unacceptable risk that racial prejudice influenced the jury's decision to sentence him to death. *McCleskey v. Kemp*, 481 U.S. 279, 308-9 (1987). An unacceptable risk that racial prejudice infected a death sentence likewise violates a defendant's right to an impartial jury under the Sixth and Fourteenth Amendments. *Turner v. Murray*, 476 U.S. 28, 36 (1986). Further, a showing that a jury acted with a discriminatory purpose establishes a violation of the Equal Protection Clause. *McCleskey*, 481 U.S. at 292-93.[2]

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that relates to the racial bias of a decision-maker in his case, as evidenced by misconduct of Juror Buffington and the Constitutional implications of the same upon Mr. Fults's capital trial. Thus, the portion of Claim XXII which is the subject of this Motion is detailed within paragraphs 205, 213, 215, 217, and 218.

[2] Thus, while an Equal Protection Claim requires proof that the jury was in fact motivated by racial prejudice, claims under the Sixth, Eighth, and Fourteenth Amendments require only a showing of an unacceptable risk that racial prejudice infected or influenced the sentencing decision.

**B. Uncontroverted Evidence In The State Habeas Case Establishes That Mr. Fults's Death Sentence Was Infected By Racial Bias.**

Uncontroverted evidence admitted in the state habeas case establishes that the decision to sentence Mr. Fults to death was infected by racial bias in violation of Mr. Fults's constitutional rights

Juror Thomas Buffington provided the following sworn testimony in connection with Mr. Fults's state habeas proceedings:

> I served as a juror in the capital sentencing trial of Kenneth Fults in May, 1997. I have been on a jury before, but this was my first capital trial. ***I don't know if he ever killed anybody, but that nigger got just what should have happened. Once he pled guilty, I knew I would vote for the death penalty because that's what that nigger deserved.***

Affidavit of Thomas Buffington (emphasis added) (R. Ex. 57a at 571).

The uncontroverted evidence thus shows that Juror Buffington not only harbored racial prejudice towards African Americans, he also harbored racial animus towards Mr. Fults in particular. *United States v. Henley*, 238 F.3d 1111, 1112 (9th Cir. 2001) ("We have considerable difficulty accepting the government's assumption that, at this time in our history, people who use the word 'nigger' are not racially biased"). Juror Buffington's testimony also shows that his racial

animus was intertwined with his decision to sentence Mr. Fults to death.[3] This evidence at a minimum demonstrates an unacceptable risk that his death sentence was influenced and infected by racial prejudice. *McCleskey*, 481 U.S. at 308-9.

The state habeas court admitted the evidence of Juror Buffington's racial animus. However, the state habeas court ruled that the claim was procedurally defaulted because it had not been raised at trial and/or on direct appeal. (R. Ex. 83 at 5, 12-13). As demonstrated below, that decision was incorrect and does not preclude this Court from considering Mr. Fults's claim.

**C. Cause And Prejudice Overcome Procedural Default With Respect To Mr. Fults's Claim That There Is An Unacceptable Risk That His Death Sentence Was Infected By Racial Prejudice.**

**1. Mr. Fults Has Shown Cause.**

The state habeas court found Mr. Fults's claim that his jury was tainted by racial bias was procedurally defaulted because it was not raised on direct appeal and instead was raised for the first time in the state habeas corpus case. This finding was incorrect.[4] Georgia law specifically provides that a habeas petitioner

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[3] Indeed, Juror Buffington's testimony shows that his decision to sentence Mr. Fults to death was based upon two considerations—that Mr. Fults pled guilty, and that Mr. Fults was a "nigger."

[4] This Court reviews the state court's finding of procedural default *de novo*. Unless and until this Court determines that the default rests upon adequate and

may overcome procedural default and properly raise a claim for the first time in a habeas proceeding where the factual basis for the claim was not reasonably available to counsel in prior proceedings. *Todd v. Turpin*, 268 Ga. 820, 825, 493 S.E.2d 900, 905 (1997). In *Todd*, the Georgia Supreme Court held that while there is a procedural default for not raising a juror misconduct claim on appeal, such a claim only need be raised on appeal if there exists "evidence that would have alerted trial or appellate counsel to the fact that jury misconduct or improper jury deliberations occurred at trial." *Id.* at 827, 493 S.E.2d at 907. Thus, cause that overcomes procedural default exists where counsel was not aware of evidence that would indicate the jury misconduct occurred or had no reason to suspect misconduct. *Id.*

In this case, the factual basis of Mr. Fults's claim was not known and was not reasonably apparent to trial counsel or counsel for the direct appeal. First, there is a presumption that a jury is impartial and unbiased. *United States v.*

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independent state grounds it need not honor the state court's procedural default finding. The question of whether a federal district court is precluded from reviewing the merits of a claim because of a state imposed procedural rule is uniquely a federal question that must be answered in the first instance by the Federal District Court. *Oberry v. Wainwright*, 548 F.2d 1204, 1216 (5th Cir. 1977).

*Robbins*, 500 F.2d 650, 653 (5th Cir. 1974); *see also Ward v. Hall*, 592 F.3d 1144, 1175 (11th Cir.2010) (citing *United States v. Siegelman*, 561 F.3d 1215, 1237 (11th Cir. 2009) (jury assumed to act impartially). Further, in this case, Juror Buffington concealed his racial bias at the time he was questioned by the trial judge and by counsel during *voir dire*. When asked by defense counsel "Do you have any racial prejudice resting on your mind?", Juror Buffington replied "No, sir" and when further pressed by defense counsel as to whether it made any difference that the defendant in the case was black and the victim was white, Juror Buffington again responded "No, sir." (R. Ex. 8 at 291). Based on Juror Buffington's responses during *voir dire*, there was no evidence that Buffington harbored racial bias that put Mr. Fults's constitutional rights to a fair trial at risk. Finally, there was nothing apparent from the record on review that would have alerted appellate counsel as to Juror Buffington's racial bias.[5] Thus, under the rule of *Todd*, counsel was not required to raise the claim on direct appeal or on motion for new trial.

[5] In the alternative, should this Court find that trial or appellate counsel knew or had reason to know of the juror misconduct, those attorneys had an obligation to investigate and present the claim at motion for new trial or on direct appeal. Failure to do so would constitute ineffective assistance of counsel.

Accordingly, there is cause to overcome procedural default with respect to this claim. *Strickler v. Greene,* 527 U.S. 263, 283, n.24 (1999) (a showing that the factual or legal basis for a claim was not reasonably available to counsel satisfies the cause standard). [6]

**2. Mr. Fults Has Established Prejudice To Excuse The Default.**

Because this juror misconduct issue is a meritorious ground for relief, Mr. Fults can demonstrate actual prejudice. In other words, if Mr. Fults prevails on the merits of the underlying claim, he demonstrates prejudice to excuse the procedural default. Moreover, as will be explained below, the racial bias of the decision maker in this case presents a structural error, which if proven, is presumed to be prejudicial without any showing of harm by Mr. Fults. As the prejudice flowing from the error is presumed, actual prejudice to excuse a procedural default exists. *See United States v. Withers*, 618 F.3d 1008, 1018 (9th Cir. 2010)(establishing a structural error satisfies the prejudice showing required to excuse a procedural

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[6] Mr. Fults also submits that a fundamental miscarriage of justice would result from a failure by this Court to consider the merits of Mr. Fults's claim that the decision to sentence him to death was infected by racial prejudice. *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (even if cause not shown, the failure to raise the claim in an earlier proceeding may be excused if a fundamental miscarriage of justice would result from a failure to entertain the claim). In this case, a failure to review the claim could result in Mr. Fults's execution under a death sentence infected by racial prejudice.

default); *Owens v. United States*, 483 F.3d 48, 64 (1st Cir. 2007)(a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice).

**a. Mr. Fults Suffered Actual Prejudice.**

Actual prejudice is established where the errors or violations worked to the defendant's actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. *Murray v. Carrier*, 477 U.S. 478, 494 (1986). Prejudice results when a defendant is denied fundamental fairness at trial. *Id.*

The evidence in this case establishes actual prejudice. This not a situation where there is just a possibility that Mr. Fults's death sentence was infected by racial prejudice. The evidence conclusively establishes that the death sentence was infected by racial prejudice.[7] Juror Buffington's testimony shows that he was racially prejudiced, and that that his prejudice was intertwined with his decision to sentence Mr. Fults to death.[8] As shown above, the presence of racist jurors prevents impartial decision-making and implicates fundamental fairness.

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[7] This is the type of claim where the same evidence that establishes the substantive claim also establishes prejudice. *Strickler*, 527 U.S. at 282 (observing that the materiality prong of a *Brady* claim is co-extensive with the prejudice inquiry).

[8] The fact that a single juror's decision was infected by racism is sufficient to establish prejudice. In the context of mitigation evidence, the Supreme Court has

*Heller*, 785 F.2d at 1527. And "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Turner*, 476 U.S. at 35. As Mr. Fults is entitled to relief on this claim, he has shown actual prejudice.

**b. Prejudice Is Presumed Because A Death Sentence Infected By Racial Bias Constitutes A Structural Error.**

Courts have held that where a structural error is established, actual prejudice exists to excuse a default. The error alleged is structural. As has been consistently held by the Supreme Court, "structural" errors are fundamentally different than "trial" errors. *See Arizona v. Fulminante*, 499 U.S. 309 (1991). "Trial" errors are those which occur during the course of trial "and which may therefore be quantitatively assessed in the context of other evidence" to determine if the error was harmless. *Id.* at 307. By contrast, "structural" errors are "defects in the constitution of the trial mechanism . . . [that effects] the entire conduct of the trial from beginning to end." As such, structural errors are not subject to a harmless error analysis. *Id.* at 309. In *Fulminante,* the Supreme Court observed a number

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held that prejudice is shown whenever there is a reasonable probability that the omitted evidence would have caused a single juror to vote against the death sentence. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). *See also Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (the bias or prejudice of even a single juror violates a defendant's right to a fair trial).

of instances where errors were to be considered structural, including the complete deprivation of counsel,[9] a biased decision-maker,[10] and racial discrimination in grand jury selection.[11] Such errors required reversal *per se* because "[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 310 (citing *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)).

The presence of a biased juror is unquestionably a structural error. As with the denial of counsel or a grand jury selected in a racially discriminatory manner, the presence of a racially biased juror in a death penalty sentencing hearing is an error that cannot be quantitatively assessed in the context of other evidence to determine if the error was harmless. Likewise the presence of a racially biased juror in a death penalty sentencing proceeding impairs the reliability and fundamental fairness of the result of the trial. *See Dyer v. Calderone*, 151 F.3d 970, 973 n.2 (9th Cir. 1998) ("Like a judge who is biased, the presence of a biased juror introduces a structural defect not subject to harmless error analysis"). *See*

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[9] *Gideon v. Wainwright*, 372 U.S. 335 (1963).
[10] *Tumey v. Ohio*, 273 U.S. 510 (1927).
[11] *Vasquez v. Hillery*, 474 U.S. 254 (1986).

*also generally United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (observing that racist jurors prevent the impartial decision making required by the Constitution and fundamental fairness).

In sum, under either scenario, Mr. Fults has demonstrated prejudice.

**D. If The Court Does Not Conclude That Mr. Fults's Claim Is Reviewable Based Upon This Motion, Mr. Fults Would Request An Evidentiary Hearing.**

In the event that the Court concludes that either cause or prejudice is not established by the current record, Mr. Fults respectfully requests the opportunity to conduct discovery and have an evidentiary hearing on these issues. The Supreme Court has suggested that a habeas petitioner may be entitled to an evidentiary hearing to establish cause and prejudice unless the district court can conclude that it would be impossible for the petitioner to satisfy the standard as a matter of law. *McCleskey*, 499 U.S. at 494. Likewise, the issue of whether a petitioner can meet the miscarriage of justice standard is fact intensive and may be best resolved by an evidentiary hearing. *Schlup v. Delo*, 513 U.S. 298, 332 (1995). And with respect to claims involving juror partiality, the Supreme Court has long held that such claims are best resolved through an evidentiary hearing. *Smith v. Phillips*, 455 U.S. 209, 215 (1982). Accordingly, if this Court determines that it cannot

conclude that Mr. Fults's claim is reviewable based upon this motion, Mr. Fults requests the opportunity for discovery and an evidentiary hearing to address the issues of cause and prejudice, and whether a failure to review this claim would result in a fundamental miscarriage of justice.

## II. CONCLUSION

Mr. Fults asserted a claim of violations of constitutional rights at his state habeas trial based on the fact that the jury's decision to sentence him to death was infected and influenced by racism. The state habeas court erroneously rejected the claim on the ground of procedural default. The state court's finding does not preclude review of Mr. Fults's claim by this Court. Mr. Fults can establish cause and prejudice to excuse the procedural default. Accordingly, Mr. Fults respectfully asks the Court to reconsider its prior ruling with respect to this claim and allow Petitioner the opportunity to establish the merits of the claim.

Respectfully submitted this, the 5th day of November, 2010.

Respectfully submitted,

/s/ Lindsay Bennett
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CERTIFICATE OF SERVICE AND COMPLIANCE WITH LR 5.1B

I hereby certify that on this date I electronically filed this pleading with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

Sabrina Graham
Assistant Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334

This the 5th day of November, 2010.

*Lindsay Bennett*

# APPENDIX 5

*2011 U.S. Dist. LEXIS 11151, **

KENNETH EARL FULTS, Petitioner, v. WARDEN STEPHEN UPTON, Respondent.

CIVIL ACTION FILE NO. 3:09-CV-86-TWT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, NEWNAN DIVISION

2011 U.S. Dist. LEXIS 11151

February 4, 2011, Decided
February 4, 2011, Filed

**SUBSEQUENT HISTORY:** Writ of habeas corpus denied Fults v. Upton, 2012 U.S. Dist. LEXIS 34150 (N.D. Ga., Mar. 14, 2012)

**PRIOR HISTORY:** Fults v. Upton, 2010 U.S. Dist. LEXIS 141551 (N.D. Ga., Sept. 1, 2010)

**CASE SUMMARY:**

**OVERVIEW:** An order granting in part and denying in part a warden's motion to dismiss a petitioner's petition for habeas corpus was not a final order. Therefore, the order could not be vacated under Fed. R. Civ. P. 60(b). Further, Rule 60(b) provided a limited number of grounds warranting relief, but petitioner failed to cite any of these grounds.

**OUTCOME:** The petitioner's motion for reconsideration was denied.

**CORE TERMS:** reconsideration, evidentiary hearing, procedural default, new trial, new evidence, clear error, amend, writ of habeas corpus, procedurally, reconsider, defaulted, authorize, repackage, reiterate, animus, juror, notice of appeal, racial bias, manifest injustice, legal theories, improper use, through-rightly, intervening, introduce, sentence, opposing, rethink, wrongly, vacated, murder

**LEXISNEXIS(R) HEADNOTES**

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

*HN1* Rule 59(e) of the Federal Rules of Civil Procedure authorizes district courts upon motion to alter or amend a judgment. Fed. R. Civ. P. 59(e). The decision to alter or amend judgment is committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion. The Federal Rules of Civil Procedure do not specifically authorize motions for reconsideration. Nevertheless, such motions are common in practice.

Civil Procedure > Judgments > Relief From Judgment > Newly Discovered Evidence

*HN2* N.D. Ga. R. 7.2 provides that motions for reconsideration are not to be filed as a matter of routine practice, but only when absolutely necessary. N.D. Ga. R. 7.2.E. A party may move for reconsideration only when one of the following has occurred: an

intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice. Further, a party may not employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the court will change its mind.

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

HN3 A motion for reconsideration under Rule 59(e) must be filed no later than 28 days after the entry of the judgment. Fed. R. Civ. P. 59(e).

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview

HN4 See Fed. R. Civ. P. 60(b).

Civil Procedure > Judgments > Relief From Judgment > Newly Discovered Evidence
Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview

HN5 Courts will reconsider a judgment only when one of the following has occurred: an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice. The petitioner may not, however, employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the court will change its mind.

Criminal Law & Procedure > Habeas Corpus > Procedural Default > General Overview

HN6 To overcome procedural default, a petitioner for habeas corpus must show (1) cause for the default and actual prejudice as a result or (2) failure to consider the claim will result in a fundamental miscarriage of justice.

Civil Procedure > Judgments > Relief From Judgment > General Overview

HN7 A motion for reconsideration should not be used to reiterate arguments that have previously been made.

**COUNSEL: [*1]** For Kenneth Earl Fults, Petitioner: Brian Mendelsohn, Lindsay Nicole Bennett, LEAD ATTORNEYS, Federal Defender Program Inc.-Atl, Atlanta, GA; William Vann Hearnburg, Jr., LEAD ATTORNEY, Smith Gambrell & Russell, LLP, Atlanta, GA.

For Warden Stephen Upton, Respondent: Beth Attaway Burton, Office of State Attorney General, Atlanta, GA; Sabrina G. Graham, Attorney General's Office-Atl, Atlanta, GA.

**JUDGES:** THOMAS W. THRASH, JR., United States District Judge.

**OPINION BY:** THOMAS W. THRASH, JR.

**OPINION**

ORDER

This is a petition for a writ of habeas corpus in a state death penalty case. It is before the Court on the Petitioner's Motion for Reconsideration [Doc. 32]. For the reasons set forth below, the Petitioner's Motion is DENIED.

I. Background

This case arises from the murder of Cathy Bounds on January 30, 1996. The Petitioner, Kenneth Fults, pled guilty to malice murder. At sentencing, the jury imposed the death penalty. The Petitioner then filed a motion for new trial on June 19, 1997, and an amended motion for new trial on March 16, 2000. The trial court denied the motion. Fults filed a notice of appeal to the Georgia Supreme Court on April 14, 2000. Because he had new counsel for his appeal, the Georgia Supreme Court **[*2]** remanded the Petitioner's case back to the trial court. The trial court conducted a hearing on the effectiveness of the Petitioner's trial counsel on December 1, 2000, and again denied the Petitioner's motion for a new trial. Fults filed a notice of appeal to the Georgia Supreme Court on December 29, 2000. The Georgia Supreme Court affirmed the Petitioner's convictions and sentences on June 11, 2001. **Fults v. State, 274 Ga. 82, 548 S.E.2d 315 (2001)**. The United States Supreme Court denied his petition for a writ of certiorari and petition for rehearing. Fults v. Georgia, 535 U.S. 1043, 122 S. Ct. 1812, 152 L. Ed. 2d 667 (2002).

Fults next filed a petition for a writ of habeas corpus on November 26, 2002, in the Superior Court of Butts County, Georgia. The court held an evidentiary hearing that lasted from March 20, 2007 through March 22, 2007. It denied the petition on December 28, 2007, finding that most of the claims were procedurally defaulted and deciding some claims on the merits. The Georgia Supreme Court denied the Petitioner's application for certificate of probable cause to appeal, and the United States Supreme Court denied his petition for writ of certiorari. Fults v. Upton, 130 S. Ct. 275, 175 L. Ed. 2d 184 (2009).

Finally, the Petitioner sought **[*3]** a writ of habeas corpus from this Court. The Respondent moved to dismiss the Petitioner's unexhausted and procedurally defaulted claims [Doc 25]. On September 1, 2010, the Court granted in part and denied in part the Respondent's motion [Doc. 30]. In its Order, the Court dismissed several of the Petitioner's claims, including Claim XXII alleging racial animus by one of the jurors. Specifically, the Court found that Claim XXII was procedurally defaulted. The Petitioner has now filed a Motion for Reconsideration [Doc. 32]. The Petitioner asserts that the Court's ruling with respect to Claim XXII was incorrect and requests an evidentiary hearing.

II. Motion for Reconsideration Standard

*HN1* Rule 59(e) of the Federal Rules of Civil Procedure authorizes district courts upon motion to alter or amend a judgment. See FED. R. CIV. P. 59(e). "The decision to alter or amend judgment is committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion." American Home Assurance Co. v. Glenn Estess & Assocs., 763 F.2d 1237, 1238-39 (11th Cir. 1985) (citing Commodity Futures Trading Comm'n v. American Commodity Group Corp., 753 F.2d 862, 866 (11th Cir. 1984)). **[*4]** The Federal Rules of Civil Procedure do not specifically authorize motions for reconsideration. Nevertheless, such motions are common in practice.

*HN2* Local Rule 7.2 provides that motions for reconsideration are not to be filed "as a matter of routine practice," but only when "absolutely necessary." L.R. 7.2.E. A party may move for reconsideration only when one of the following has occurred: "an intervening change in controlling law, the availability of new evidence, [or] the need to correct clear error or prevent manifest injustice." Godby v. Electrolux Corp., No. 1:93-CV-0353-ODE, 1994 U.S. Dist. LEXIS 10760, 1994 WL 470220, at *1 (N.D. Ga. May 25, 1994). Further, a party "may not employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind." Brogdon v. National Healthcare Corp., 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000); see also Godby, 1994 U.S. Dist. LEXIS 10760, 1994 WL 470220, at *1 ("A motion for reconsideration should not be used to reiterate arguments that have previously been made ... '[It

is an improper use of] the motion to reconsider to ask the Court to rethink **[*5]** what the Court [has] already thought through-rightly or wrongly.'") (quoting Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va.1983)) (alterations in original); In re Hollowell, 242 B.R. 541, 542-43 (Bankr. N.D. Ga. 1999) ("Motions for reconsideration should not be used to relitigate issues already decided or as a substitute for appeal ... Such motions also should not be used to raise arguments which were or could have been raised before judgment was issued.").

III. Discussion

The Petitioner did not specify whether his Motion for Reconsideration was filed pursuant to Rule 59(e) or Rule 60(b). Thus, the Court will address both rules. HN3 A motion for reconsideration under Rule 59(e) "must be filed no later than 28 days after the entry of the judgment." Fed R. Civ. P. 59(e). Here, the Court entered its Order on September 1, 2010. The Petitioner filed this motion on November 5, 2010, 64 days after the entry of judgment. Thus, the Petitioner's motion is untimely under Rule 59(e). See Marous Bros. Const., Inc. v. Alabama State Univ., No. 02:07-CV-384, 2010 U.S. Dist. LEXIS 70641, 2010 WL 2773422, at *2 (M.D. Ala. July 14, 2010).

HN4 Federal Rule of Civil Procedure 60(b) authorizes relief from a final **[*6]** judgment, order, or proceeding for these reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

FED. R.CIV. P. 60(b). Here, the Court's Order granting in part and denying in part the Respondent's motion to dismiss was not a final order. Thus, the Court's Order cannot be vacated under Rule 60(b). See Bon Air Hotel v. Time, Inc., 426 F.2d 858, 862 (5th Cir. 1970) (finding Rule 60(b) is inapplicable to interlocutory orders). Further, Rule 60(b) provides a limited number of grounds warranting relief. See FED. R. CIV. P. 60(b)(1-5). The Petitioner has not cited any of these grounds. For these reasons, the Petitioner's motion is also improper under Rule 60(b).

A. Claim XXII

Even **[*7]** if the Motion for Reconsideration were proper under Rule 59(e) or 60(b), the Petitioner would not be entitled to relief. HN5 Courts will reconsider a judgment only when one of the following has occurred: "an intervening change in controlling law, the availability of new evidence, [or] the need to correct clear error or prevent manifest injustice." Godby, 1994 U.S. Dist. LEXIS 10760, 1994 WL 470220, at *1. The Petitioner may not, however, "employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind." Brogdon, 103 F. Supp. 2d at 1338.

Here, Fults does not present a change in controlling law, the availability of new evidence, or argue clear error. Rather, the Petitioner raises a new argument seeking to show that cause and prejudice overcome procedural default with respect to Claim XXII. (Pet'r's Mot. for Recons., at 4.) See Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) HN6 (to overcome procedural default, petitioner must show (1) "cause for the default and actual prejudice as a result" or (2) "failure to consider the claim will result in a fundamental **[*8]** miscarriage of justice."). Specifically, Fults asserts that the factual basis for his claim of racial animus was not reasonably available during his direct appeal. This, the Petitioner argues, constitutes cause to overcome procedural default. Fults also claims that prejudice may be assumed because racial bias is a structural defect. Finally, the Petitioner contends that he suffered actual prejudice because a juror's racial animus influenced Fults' sentence. The Petitioner, however, did not raise these arguments in response to the motion to dismiss [1] and has not explained why he failed to do so. Thus, Fults cannot raise these arguments for the first time now. See O'Neal v. Kennamer, 958 F.2d 1044, 1047 (11th Cir. 1992) (quoting Lussier v. Dugger, 904 F.2d 661, 667 (11th Cir. 1990)) (denying rule 59(e) motion and noting "[m]otions to amend should not be used to raise arguments which could, and should, have been made before the judgment was issued . . . Denial of a motion to amend is 'especially soundly exercised when the party has failed to articulate any reason for the failure to raise the issue at an earlier stage in the litigation.'"). In any event, the evidence of racial bias is **[*9]** based entirely upon inadmissible juror impeaching evidence. For these reasons, the Petitioner's Motion for Reconsideration should be denied.

**FOOTNOTES**

1 In opposition to the Respondent's motion to dismiss, Fults argued that ineffective assistance of counsel excused the procedural default (Pet'r's Br. on Procedural Default and Exhaustion of State Remedies, at 21.)

B. Request for Evidentiary Hearing

In the alternative, the Petitioner requests an evidentiary hearing on the issues of cause and prejudice. Fults first requested an evidentiary hearing in his brief opposing the motion to dismiss. (Pet'r's Br. on Procedural Default and Exhaustion of State Remedies, at 5 n.6.) The Court denied this request, noting that the state habeas court already conducted an evidentiary hearing [Doc. 30, p. 18]. Fults simply reiterates his request, this time with respect to new arguments. HN7 "A motion for reconsideration should not be used to reiterate arguments that have previously been made." Godby, 1994 U.S. Dist. LEXIS 10760, 1994 WL 470220, at *1. Here, the Court has already considered and denied Fults' request for an evidentiary hearing. See id. ("[It is an improper use of] the motion to reconsider to ask the Court to rethink what the Court [has] **[*10]** already thought through-rightly or wrongly.") (quoting Above the Belt, 99 F.R.D. at 101); Brogdon, 103 F. Supp. 2d at 1338 (a party "may not employ a motion for reconsideration as a vehicle to . . . repackage familiar arguments to test whether the Court will change its mind."). Further, the Petitioner does not present any change in case law, new evidence, or argue that the Court committed clear error in declining to hold such a hearing. For these reasons, Fults' request for an evidentiary hearing is denied.

IV. Conclusion

For the reasons set forth above, the Petitioner's Motion for Reconsideration [Doc. 32] is DENIED.

SO ORDERED, this 4 day of February, 2011.

/s/ Thomas W. Thrash

THOMAS W. THRASH, JR.

United States District Judge

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