No. 16-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2016

JOHN WAYNE CONNER,

Petitioner,

-v-

ERIC SELLERS, Warden
Georgia Diagnostic Prison,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

AND/OR

PETITION FOR WRIT OF HABEAS CORPUS IN A CAPITAL CASE

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QUESTIONS PRESENTED – CAPITAL CASE

(Execution Scheduled for TODAY, July 14, 2016, at 7:00 p.m.)

Petitioner was sentenced to death 34 years ago for killing a friend during an unplanned, drug- and alcohol-fueled beating provoked by the victim's lewd remark about Petitioner's girlfriend. The case languished in state court through court inaction and the State's successful efforts to prevent Petitioner from obtaining the expert evaluations required by state law to establish his right to a jury trial on the issue of his intellectual disability. During this period, critical witnesses disappeared through death or memory loss, and important records were lost or destroyed. After the State obtained a warrant for his execution, Petitioner unsuccessfully challenged the constitutionality of implementing his death sentence under the Eighth Amendment and Double Jeopardy Clause in state and federal court. The federal courts dismissed his petition as a second or successive petition barred by 28 U.S.C. § 2244, giving rise to the following important questions:

1. Do claims that a condemned inmate's extraordinarily long period of death row incarceration has rendered his execution excessive and unjustified punishment under the Eighth Amendment and/or prohibited multiple punishment in violation of the Double Jeopardy Clause become ripe only when a warrant for execution has finally been issued after lengthy delay?

2. If so, may a condemned inmate file suit in federal district court to raise such claims pursuant to 28 U.S.C. § 2254, under the theory that the claims did not accrue and thus could not have been brought before an execution date was set, or pursuant to 42 U.S.C. § 1983, as suggested by the decision in *Panetti v. Quarterman*, 551 U.S. 930, 943-47 (2007), and Justice Steven's observations in *Johnson v. Bredesen*, 558 U.S. 1067, 1070 (2009) (statement respecting denial of certiorari)? Or, must such claims instead be raised in an initial habeas petition, before their factual support has come to pass, else be barred from federal court review by the stringent limitations on second and successive habeas petitions set forth in 28 U.S.C. § 2244?

3. Will Petitioner's execution offend the Fifth, Eighth and Fourteenth Amendments to the United States Constitution given that Petitioner has served as a model inmate under the harsh conditions of Georgia's death row for 34 years already and no legitimate penological goals will be served by the gratuitous implementation of the death sentence at this point?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS AND/OR FOR ORIGINAL WRIT OF HABEAS CORPUS

Petitioner, John Wayne Conner, respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Eleventh Circuit Court of Appeals, entered in the above case on July 14, 2016. Alternatively, Mr. Conner seeks an original writ of habeas corpus in his capital case.

INTRODUCTION

The State of Georgia intends to execute Mr. Conner tonight, 34 years to the day that he received his death sentence. By virtue of this extraordinary delay between the imposition of sentence and its implementation, the State of Georgia has already exacted from Mr. Conner what amounts to a life sentence under the severe conditions of isolation and privation that characterize

incarceration on Georgia's death row. This delay, not attributable to Mr. Conner in any relevant way, renders implementation of the death sentence both excessive, cruel and unusual under the Eighth Amendment and a second punishment for the same offense prohibited by the Double Jeopardy Clause.

Mr. Conner has presented his claims to every available court and each has rejected his claims as procedurally barred or non-cognizable. The State's Board of Pardons and Paroles has rejected his plea for clemency. This Court, truly, is Mr. Conner's last resort to prevent his unconstitutional execution.

Mr. Conner has effectively suffered the punishment of life imprisonment over the course of the 34 years he has waited to be executed, living under the extraordinarily harsh conditions of death row while his appeals were considered by the courts. His case took this extraordinarily long period of time to wend its way through the courts due to no fault of Mr. Conner's. To the contrary, the fault falls entirely on the State of Georgia, through its judiciary and prosecutors.

Mr. Conner's initial state habeas action took over 15 years to complete. At the time, the State of Georgia provided Mr. Conner neither counsel nor funding to conduct complicated capital habeas corpus litigation. Instead, Mr. Conner was assisted in state post-conviction proceedings by a young and inexperienced volunteer attorney from out-of-state, Billy Nolas, who repeatedly asked the state habeas court for funding for investigative and expert assistance, and was each time denied any funds. After the close of evidence in the initial state habeas proceeding, the case sat in superior court for approximately 12 years, during which time it was transferred among various judges, who refused Mr. Nolas's several requests to reopen the evidence to present additional claims and proof. *See* Affidavit of Billy H. Nolas, at ¶¶15-17 (attached as App. 15 to Mr. Conner's Petition for Writ of Habeas Corpus, as amended, in *Conner v. Sellers*, Butts Co. Superior Court Case No. 2013-V-

162). It was not until January 1, 1997, that the state habeas court issued its final order. Three and a half years later, on September 11, 2000, the Supreme Court of Georgia denied review.

Following the completion of Mr. Conner's initial state habeas action, Respondent thereafter, aided by the state habeas court's rulings, delayed the development of Mr. Conner's intellectual disability claim for well over a decade. Until 2013, because of Respondent's intransigence and the state habeas court's refusal to accord Mr. Conner expert access in order to substantiate his claim, Mr. Conner had *never* been evaluated by an independent mental health expert. Throughout state and federal habeas proceedings, for over a decade, Respondent, with the state court's complicity, aggressively and effectively blocked Mr. Conner's diligent efforts to gain access to mental health experts who could substantiate his claim of intellectual disability or any other mental impairments. The Eleventh Circuit Court of Appeals recognized this injustice and remanded Mr. Conner's case for further evidentiary development. *Conner v. Hall*, 645 F. 3d 1277, 1292 (11th Cir. 2011). That evidentiary development upon remand, though it ultimately failed to persuade the federal district court of Mr. Conner's intellectual disability, was nonetheless sufficient to establish that intellectual disability was a "permissible view[] of the evidence," *Conner v. GDCP Warden*, 784 F.3d 752, 766 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1246 (2016), a finding that should have ensured Mr. Conner a jury trial on the issue of his intellectual disability under Georgia law.

Mr. Conner, on the other hand, has not delayed this case in any fashion. He has simply initiated and pursued legitimate legal proceedings in an effort to vindicate his constitutional rights and to comply with the strictures imposed by federal habeas law. Indeed, but for the delays occasioned by the superior court's lackadaisical approach and Respondent's obstructive tactics, there is a more than reasonable likelihood that Mr. Conner would years ago have obtained a jury

trial on the issue of his intellectual disability and that the case would have been resolve in a way that removed the death sentence. Instead, the state habeas court, at Respondent's behest, refused to allow Mr. Conner access to the very evidence needed to prove his claim and then, after denying relief for lack of proof, ruled he had defaulted the claim when he later returned to court with the necessary evidence he had finally obtained.

On these facts, it would violate the Fifth, Eighth and Fourteenth Amendments to execute Mr. Conner after so lengthy a time on death row (particularly given his blamelessness and the State's culpability in causing the delay, and the degree to which Mr. Conner has been harmed by delay). His execution would inflict needless pain and suffering furthering no legitimate penological interest on Mr. Conner after he has already received 34 years of exceptionally harsh punishment on death row. Without this Court's intervention, Mr. Conner will suffer an execution our federal constitution forbids.

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals, entered July 14, 2016, denying Petitioner's appeal from the denial of habeas corpus relief, is attached as Appendix A. The federal district court decision affirmed by the Eleventh Circuit Court of Appeals in its denial of relief is on July 14, 2016, is attached hereto as Appendix B. The underlying state habeas court order denying relief on July 6, 2016, is unreported and attached hereto as Appendix C. The Georgia Supreme Court's July 14, 2016, order denying discretionary review of the state habeas court's decision, with two justices dissenting, is unreported and attached hereto as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1), 2241, 1651(a) and Article III of the United States Constitution. This Court's certiorari jurisdiction is invoked to

review the judgment of the Eleventh Circuit Court of Appeals denying Petitioner's appeal from the dismissal of his federal habeas action, which was entered on July 14, 2016, as Mr. Conner asserts a deprivation of rights secured by the Constitution of the United States. *See* Appendix A.

As required by Rule 20.4 and 28 U.S.C. §§ 2241 and 2242, Mr. Conner states that he the district court rejected his claims on the ground it lacked jurisdiction under 28 U.S.C. § 2244(3)(A) and the Eleventh Circuit affirmed that decision. Mr. Conner exhausted his state remedies on the questions raised herein when the state habeas court dismissed them as procedurally barred and meritless (Appendix C) and the Georgia Supreme Court denied his Application for Certificate of Appeailability (Appendix D). The Georgia Board of Pardons and Paroles denied Mr. Conner's application for clemency on July 13, 2016 (Appendix E).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV §1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244, in pertinent part, provides:

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

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2254, in pertinent part, provides:

(d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner, John Wayne Conner, is currently under sentence of death in Georgia for killing his friend, J.T. White, during an unplanned, drug- and alcohol-fueled beating provoked by Mr. White's statement that he wanted to have sex with Petitioner's girlfriend.

B. Procedural History

A Telfair County, Georgia jury found Mr. Conner guilty of one count of murder, one count of robbery and one count of vehicle theft on July 14, 1982. Later that same day, the jury sentenced Mr. Conner to death for the murder. On May 24, 1983, the Supreme Court of Georgia affirmed the murder and theft convictions, as well as the death sentence, but vacated the robbery conviction due to lack of evidence. *Conner v. State*, 251 Ga. 113, 115 (1983). A timely-filed motion for reconsideration was denied on June 28, 1983. This Court denied certiorari review on October 3, 1983. *Conner v. Georgia*, 464 U.S. 865, *rehearing denied*, 464 U.S. 1005 (1983).

Thereafter, Mr. Conner timely filed a petition for writ of habeas corpus in the Superior Court of Butts County on March 23, 1984. He was represented by Billy Nolas, a recent law school graduate who had volunteered to represent Mr. Conner *pro bono*, but who had few resources with which to investigate and litigate the petition.[1] Hearings were held in 1984. Although Mr. Nolas on several occasions moved the court for funds to hire mental health experts to investigate "the

[1] The Georgia Resource Center, which was created to provide resources and assistance to lawyers in capital post-conviction proceedings, in addition to providing direct representation, was not yet in existence, and there were no other entities providing such assistance.

mitigating significance of petitioner's mental incapacity,"[2] such funds for expert assistance were denied and the evidentiary record was closed.

The state habeas action was passed among several judges before it was finally adjudicated about 13 years after it had been filed. Originally, Judge English presided over the case, but it was transferred to different judges before being assigned to Judge Allen B. Keeble, who denied relief in an order entered on January 6, 1997. *See* Final Order of Jan. 6, 1997, in *Conner v. Zant*, Butts Co. Case No. 6335.

Mr. Conner filed a timely Application for Certificate of Probable Cause to Appeal ("CPC") in the Georgia Supreme Court (Case No. S97R1871). In CPC proceedings, Mr. Conner again raised claims regarding his intellectual impairment and specifically requested a remand in light of the Georgia Supreme Court's decision in *Fleming v. Zant*, 259 Ga. 687 (1989), which had issued about five years after the close of proceedings in state habeas court. *See* April 28, 2000 Reply to Response in Opposition to CPC (Case No. S97R1871) at 22.

On September 11, 2000, the Georgia Supreme Court denied Mr. Conner's Application for Certificate of Probable Cause to Appeal, over the dissent of Justice Sears. Mr. Conner filed a timely motion for reconsideration on September 21, 2000, which was denied on November 14, 2000. This Court denied the petition for writ of certiorari on June 25, 2001, *Conner v. Head*, 533 U.S. 932 (2001), and denied rehearing on August 27, 2001, *Conner v. Head*, 533 U.S. 970 (2001).

On October 3, 2001, Mr. Conner filed a second state habeas petition raising the claim that he is intellectually disabled and seeking a mental health evaluation in order to substantiate a *prima facie* allegation of intellectual disability in support of his request for a jury trial remand under

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[2] *See* September 13, 1984 Motion for Funds (Case No. 6335), at 4.

Fleming. He supported his claim with *inter alia* the affidavits of teachers and school records documenting early life cognitive impairment. *See* Butts Co. Superior Court Case No. 2001-V-692. Although *Fleming* expressly states that "sufficient credible evidence of [intellectual disability" . . . must include at least one expert diagnosis of mental retardation," Judge E. Byron Smith, at Respondent's behest, denied the request for expert access[3] and denied the petition without an evidentiary hearing on October 26, 2001. *See* Oct. 26, 2001 Final Order in *Conner v. Head*, Butts Co. Superior Court Case No. 2001-V-692 at 2. Mr. Conner was thereby precluded from satisfying *Fleming*'s requirement that he provide "at least one expert diagnosis of mental retardation"[4] in order to make out a *prima facie* case of intellectual disability. Mr. Conner is the only *Fleming* claimant to be denied expert access and a remand for jury trial on a colorable claim of intellectual disability in the Georgia courts.

On January 25, 2002, Mr. Conner filed a CPC application in the Supreme Court of Georgia, which denied CPC on March 25, 2002. Mr. Conner's timely filed motion for reconsideration was denied on April 12, 2002. He filed a Petition for Writ of Certiorari to the Georgia Supreme Court, which this Court denied on October 7, 2002. *Conner v. Head*, 537 U.S. 908 (2002).

In accordance with 28 U.S.C. § 2244(d), Mr. Conner filed for habeas corpus relief in federal district court within one year of the final denial of his first Application for CPC by the Georgia Supreme Court in order to meet the statute of limitations. The federal petition was filed on November 13, 2001.

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[3] The Georgia Diagnostic Prison does not allow experts access to prisoners for evaluation purposes without a court order.

[4] *Fleming*, 259 Ga. at 691.

On June 20, 2002, this Court held that the Eighth Amendment to the U.S. Constitution categorically prohibits the execution of intellectually disabled individuals. *Atkins v. Virginia*, 536 U.S. 304 (2002).

On March 31, 2004, Mr. Conner filed a motion for discovery on his intellectual disability claim in his federal habeas action, including a request for expert access for purposes of evaluation. The district court denied the motion in an order issued September 8, 2004, finding that Mr. Conner's claim that he is exempt from the death penalty because he is intellectually disabled was procedurally defaulted per Judge Smith's order in state court in 2001.

The district court thereafter denied the totality of Mr. Conner's petition for habeas corpus on November 6, 2009, but granted a certificate of appealability on the issues of whether or not Mr. Conner's claim of intellectual disability was procedurally defaulted and whether his trial counsel had rendered ineffective assistance during the mitigation stage of his trial.

Mr. Conner filed a timely appeal before the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit panel heard argument in Mr. Conner's case on October 14, 2010, and, on July 7, 2011, granted a remand of his case to the district court. Specifically, the Eleventh Circuit held that Georgia's procedural default rule was an inadequate bar to Mr. Conner's intellectual disability claim because virtually *every other* similarly situated petitioner (*i.e.*, every other *Fleming* claimant raising an intellectual disability claim in a successive petition) in Georgia had obtained permission for expert access and ultimately an intellectual disability remand under *Fleming*. *Conner v. Hall*, 645 F. 3d 1277, 1290 (11th Cir. 2011) (hereinafter *Conner I*). Specifically, the court noted that:

> [T]he Georgia Supreme Court held in *Turpin v. Hill*, [269 Ga. 302 (1998)], that a mental retardation claim raised by a capital habeas petitioner in a state habeas petition cannot be procedurally defaulted as a matter of state law.

Id. at 1289.

On remand, the district court issued orders permitting expert evaluation at the Georgia Diagnostic Prison regarding Mr. Conner's intellectual disability claim. As a result of the evidentiary development in federal district court, Mr. Conner was able to amass substantial evidence, previously unavailable due to the severe resource restrictions on *pro bono* counsel. The remand to the district court allowed Mr. Conner finally to obtain expert evaluations of Mr. Conner's cognitive abilities and, at an evidentiary hearing, Mr. Conner was able to adduce substantial, previously unavailable evidence of his significant intellectual impairment, intellectual disability, and the deleterious psychological impact (corroborated by the 1982 CSH records) of an upbringing marred by chronic violence and trauma. *See*, *e.g.*, Federal Petition Exhibits 2-7 (reports of Drs. Beck, Greenspan, Crown, Agharkar); Exhibits 8-9 (testimony of Drs. Beck, Greenspan, Crown, Agharkar). This and additional evidence, credited by both party's experts,[5] substantiates Mr. Conner's claims that he is cognitively impaired at least to the point of having borderline intellectual functioning and that his trial counsel rendered prejudicially deficient performance in failing to investigate and present mitigating evidence at the penalty phase of his capital trial. See the extensive discussion in Mr. Conner's state habeas petition, as amended (Federal Petition Exhibit 10), at § II (B-D).

Only after the district court provided Mr. Conner the opportunity to obtain the expert evaluations of Drs. Beck, Greenspan, Crown, and Agharkar was Mr. Conner able to satisfy

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[5] Even Respondent's experts found that Petitioner is intellectually impaired in that he has borderline intellectual functioning. *See* Federal Petition, Exhibit 9 at 541 (testimony of Dr. Matthew Norman). Respondent's expert Dr. Glen King explicitly credited affidavit and expert testimony describing Petitioner's horrific upbringing and acknowledged that the environment in which Petitioner was raised was disturbing, traumatic and not conducive to healthy development. *Id.* at 510.

Georgia's requirements for a *Fleming* remand for jury trial on intellectual disability by submitting "at least one expert diagnosis of mental retardation." *Fleming*, 259 Ga. at 691. Accordingly, Mr. Conner filed a third state habeas action in Butts County Superior Court on March 5, 2013, initially raising the single claim that Mr. Conner is intellectually disabled and entitled to a remand under *Fleming* for a jury trial on the issue of intellectual disability.

The Butts County Superior Court, at Respondent's request, ordered the state habeas case held in abeyance pending the completion of the federal habeas proceedings.

The federal district court conducted an evidentiary hearing on May 7-8, 2013. On May 10, the court heard oral arguments and issued a ruling from the bench denying Mr. Conner's intellectual disability claim, after refusing to allow the parties to submit briefing. The court adopted the rationale of the court's neurologist who testified that he "kn[ew] [intellectual disability] when [he] s[aw] it." *See Conner v. Humphrey*, Case No. 3:01-CV-73 (S.D.Ga.), Bench Ruling, at 48. Shortly thereafter, on June 11, 2013, the court entered a brief written order incorporating its bench ruling and denying all relief.

Mr. Conner appealed to the U.S. Court of Appeals for the Eleventh Circuit. After briefing and oral argument, that court affirmed the district court's ruling, stating:

> Because the District Court's finding that Petitioner is not intellectually disabled is plausible in light of the entire record, it is not clearly erroneous. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it *even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently*."). Finally, *where, as here*, "*there are two permissible views of the evidence*, the factfinder's choice between them cannot be clearly erroneous."

Conner v. GDCP Warden Conner, 784 F.3d 752, 766 (11th Cir. 2015) (hereinafter *Conner II*) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) (emphasis added)).

Mr. Conner's timely Petition for a Writ of Certiorari in this Court was denied on February 29, 2016. *Conner v. Humphrey*, 136 S. Ct. 1246 (2016). Rehearing was denied on April 4, 2016. *Conner v. Humphrey*, 2016 U.S. LEXIS 2289 (2016).

After the federal proceeding was completed, Mr. Conner returned to state court and, on June 23, 2016, filed an amended petition for writ of habeas corpus, augmenting his intellectual disability claim in light of the factual development that occurred in federal court and seeking to reopen his earlier ineffective assistance of trial counsel claim in light of intervening law and new, previously unavailable facts.

On Friday, June 24, 2016, the State of Georgia obtained a warrant setting an execution window to begin on July 14, 2016 and to end on July 21, 2016. Appendix F. On June 27, 2016, Mr. Conner amended his pending state habeas petition (*Conner v. Sellers*, Butts Co. Superior Court Case No. 2013-V-162) to add the claims now raised in this petition: that his execution, after serving 34 years under the harsh conditions of Georgia's death row, will constitute excessive and unjustified punishment in violation of the Eighth and Fourteenth Amendments (the *Lackey* claim[6]); and that his execution, after already serving what amounts to a life sentence on Georgia's death row, will violate double jeopardy.

On July 6, 2016, the Butts County Superior Court denied the state habeas action in its entirety, ruling in pertinent part that the *Lackey* and double jeopardy claims "could have [been] raised in [Mr. Conner's] prior petitions, and they are barred as successive under O.C.G.A. § 9-14-51. Insofar as [Mr. Conner] could not have raised these claims previously, they are without merit."

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[6] *See Lackey v. Texas*, 514 U.S. 1045, 1045-47 (1995) (Memorandum of Justice Stevens respecting the denial of certiorari).

Order, dated July 6, 2016, at 3-4 (citing *Lackey*, 514 U.S. 1045; *Hulett v. State*, 296 Ga. 49, 73-74 (2014); *Jones v. State*, 273 Ga. 231, 233 (2000)).

Mr. Conner promptly filed a notice of appeal. On July 14, 2016, the Supreme Court of Georgia denied a Certificate of Probable Cause to Appeal as to the claims raised herein (Case No. S16W1789).[7] Exhibit 12. Justice Nahmias, joined by Justice Benham, dissented from the denial of CPC and the denial of a stay on ground that there is "arguable merit" to the claim that "under the specific facts and circumstances of this case, [Mr. Conner's] execution more than 34 years after being sentenced to death would qualify as cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution." *Id.*

Mr. Conner filed a petition for writ of habeas corpus in the District Court for the Southern District of Georgia raising the *Lackey* and double jeopardy claims that same day. Although this was a second-in-time petition, he urged that the court had jurisdiction to hear the case without circuit-court permission[8] under the authority of this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930, 943-47 (2007), and the Eleventh Circuit's decision in *Stewart v. United States*, 646 F.3d 856, 861 (11th 2011). *See also Johnson v. Bredesen*, 558 U.S. 1067, 1070 (2009) (Statement of Justice Stevens, with whom Justice Breyer joins, respecting the denial of certiorari) ("A *Lackey* claim, like a claim that one is mentally incompetent to be executed, should, at the very least, not accrue until an execution date is set.") (citations omitted). Those cases recognize "a small subset of unavailable claims that could not reasonably be categorized as "successive" under 28 U.S.C. § 2244 and accordingly may properly be brought in a district court without first authorization from

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[7] The day before, on July 13, 2016, the Georgia Board of Pardons and Parole denied Mr. Conner's clemency application.

[8] *See* 28 U.S.C. § 2244(b)(3)(A).

the circuit court. Mr. Conner alternatively posited that jurisdiction lay under 28 U.S.C. § 1343(a)(3) as the claims involved the violation of his constitutional rights under color of state law in violation of 42 U.S.C. § 1983. *See Johnson*, 558 U.S., at 1070 (Statement of Justice Stevens respecting the denial of certiorari) (noting that the lower court's decision to construe *Lackey* claim brought as a § 1983 action as a successive habeas petition "is a close question"). Mr. Conner requested that the district court, should it conclude it lacked jurisdiction under 28 U.S.C. § 2254, transfer the case to the District Court for the Middle District of Georgia (and that the Commissioner for the Georgia Department of Corrections, Homer Bryson, be added as a party defendant).

The district court, by order dated July 14, 2016 (Appendix B), dismissed the petition for lack of jurisdiction. The court acknowledged that a second-in-time habeas petition is not always governed by the strictures of 28 U.S.C. § 2244, and that *Panetti v. Quarterman*, 551 U.S. 930, 945-47 (2000) provided a model for such claims. Nonetheless, it concluded that because it "has not found a decision that extends *Panetti*'s holding to encompass claims challenging an execution under the Fifth or Eighth Amendments as claimed herein," it was "reluctant to do so without precedent, noting as it must that the Eleventh Circuit has cautioned that the *Panetti* exception is a narrow one." Order, dated July 14, 2016, in *Conner v. Sellers*, S.D.Ga. No. 3:16-cv-00057, at 3.

The Eleventh Circuit by Order dated July 14, 2016 (Appendix A) construed Mr. Conner's appeal as an application for a certificate of appealability (COA) and denied COA. In doing so, it failed to apply its own precedent recognizing that claims such as Mr. Conner's may be filed directly in the district court, *see Stewart v. United States*, 646 F.3d 856 (11th 2011), and that a district court's dismissal of a habeas corpus petition as successive is an appealable final order, *see Bolin v. Sec'y Fla. Dep't of Corr.*, 628 Fed. Appx. 728 730 (11th 2016) (citing *Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004)). The court denied COA on the ground that this

Court has never held that a condemned inmate's extraordinarily lengthy delay between imposition of his death sentence and execution of sentence has Eighth Amendment or Double Jeopardy implications.

REASONS WHY THE PETITION SHOULD BE GRANTED

Mr. Conner faces imminent execution after the State of Georgia has already exacted 34 years of imprisonment under the extremely harsh conditions of death row. In both state and federal court, he was told that he should have raised his claims that his execution, following such an excessively lengthy period of punitive confinement, will violate the Eighth Amendment and Double Jeopardy Clause long before those claims came to fruition, else waive the right to pursue them.

This case presents an appropriate vehicle for determining when and how a capital defendant may raise the claim that an execution under such circumstances will violate his Fifth, Eighth and Fourteenth Amendment rights. Given that the bulk of the lengthy delay in implementing sentence in this case is directly attributable to the actions and inactions of the State, through its judiciary and prosecutors, it is also an appropriate case in which to address the merits of the Eighth Amendment and double jeopardy claims Mr. Conner here raises.

ARGUMENT

I. This Court Should Grant Certiorari To Determine Whether Claims Alleging That A Condemned Inmate's Execution, Due To Extraordinary Delay, Will Violate The Eighth Amendment And/Or Double Jeopardy Become Ripe Only When A Likely Execution Date Is Set And If So, Whether Such Claims May Properly Be Filed In Federal District Court Under 28 U.S.C. § 2254 And/Or As Violations Of 42 U.S.C. § 1983.

Both the state and federal courts held that Mr. Conner waived the right to complain that his execution will violate the Eighth Amendment and the Double Jeopardy Clause because he should

have raised these claims many years ago, before the factual basis for the claims had come into existence, when he filed his original state and federal habeas corpus petitions. The federal courts, moreover ruled that the courthouse doors were closed to these claims. The lower courts' rulings make it virtually impossible to raise these claims in a fashion that will allow their meaningful consideration. Mr. Conner respectfully submits that this Court's guidance regarding the timing and the mechanism for bringing such claims in federal court is needed.

A. Mr. Conner's Claims Could Not Meaningfully Have Been Raised Before The State Of Georgia Set An Near-Certain Execution Date And Accordingly He Should Not Be Required To Have Raised Them Years Ago Before The Facts And Legal Theories Supporting Them Came Into Existence.

In *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007), this Court addressed the similar circumstance of litigating execution incompetence[9] and concluded that the identical position advanced by the lower courts and Respondent in this case would force "conscientious defense attorneys . . . to file unripe (and, in many instances, meritless) . . . claims in each and every § 2254 application . . . add[ing] to the burden imposed on courts, applicants, and the States, with no clear advantage to any." Such a requirement, this Court observed, would be at odds with the AEDPA's goals of "further[ing] the principles of comity, finality, and federalism." *Id.* at 945 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) (internal quotation marks omitted)). As the Court explained:

> An empty formality requiring prisoners to file unripe *Ford* claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies. . . . Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, "reduc[e] piecemeal litigation," or "streamlin[e] federal habeas

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[9] *See Ford v. Wainwright*, 477 U.S. 399 (1986).

> proceedings." . . . AEDPA's concern for finality, moreover, is not implicated, for under none of the possible approaches would federal courts be able to resolve a prisoner's *Ford* claim before execution is imminent. . . . And last-minute filings that are frivolous and designed to delay executions can be dismissed in the regular course. The requirement of a threshold preliminary showing, for instance, will, as a general matter, be imposed before a stay is granted or the action is allowed to proceed.

Id. at 946-47 (quoting *Burton v. Stewart*, 549 U.S. 147, 154 (2007) (*per curiam*) (internal quotation marks omitted) (additional citations omitted)). The Court refused to adopt a position "that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party." *Id.* at 947. Rather, a condemned inmate may raise the claim that he is incompetent to be executed at the time it becomes ripe – when an execution date has been set – without having first to obtain permission to file a "second or successive" petition from the circuit court. *Id.*

The same concerns expressed in *Panetti* apply here, where the *Lackey* and double jeopardy claims were neither ripe nor factually supported prior to the time the state had set an execution date that was all-but-certain to happen barring court intervention. The claims were not ripe because, like the claim of *Ford* incompetence, they do not seek to invalidate the death sentence on the basis of some flaw in its imposition, but, rather, are forward-looking claims that the act of implementing the death sentence will itself be a constitutional violation. Indeed, such claims remain purely theoretical until such time as execution is imminent. Moreover, of necessity, they are almost certainly factually unsupported until execution draws nigh because it is not until the passage of time has sufficiently eroded the penological justifications for the death sentence while increasing the punitive aspects of the long death row wait for the death chamber that these claims even have factual viability.

Accordingly, as Justice Stevens has explained, "a *Lackey* claim, like a claim that one is mentally incompetent to be executed, should, at the very least, not accrue until an execution date is set." *Johnson v. Bredesen*, 558 U.S. 1067, 1070 (2009) (Statement of Justice Stevens, joined by Justice Breyer, respecting the denial of certiorari). Several courts, however, like the courts below, have held that habeas petitions must raise factually unsupported, unripe claims in their initial petitions, else waive the right to raise such claims. *See, e.g.*, *Allen v. Ornoski*, 435 F.3d 946, 957 (9th Cir. 2006) ("Allen could have brought his *Lackey* claim in his first habeas petition in 1988, when he had already been on death row for six years, in his first amended habeas petition, when he had been on death row for nine years, or at some other point during the course of the proceedings on his first habeas petition in federal court from 1993 to 2005."); *Chambers v. Bowersox*, 157 F.3d 560, 568 (8th Cir. 1998) (agreeing that *Lackey* claim was procedurally barred as "[n]othing resembling the *Lackey* claim was made at trial, on direct appeal, or in postconviction proceedings following Chambers's third trial and conviction.").

B. May A Condemned Inmate Raise The Claim That His Execution Will Violate The Constitution Due To Excessive Delay In Its Implementation Through Filing A Second-In-Time Federal Habeas Corpus Petition In District Court And/Or By Filing A Civil Action Alleging The Violation Of 42 U.S.C. § 1983.

"A legal right without a remedy would be an anomaly in the law." *Peck v. Jenness*, 48 U.S. 612, 623 (1849). *See, e.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) ("[I]t is . . . well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.") (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). Surely these rights include a mechanism for obtaining relief.

Justice Stevens observed in *Johnson* that whether a condemned inmate may bring a § 1983 to raise a *Lackey* claim was a "close question" and that regardless the procedural vehicle of filing a second-in-time federal habeas petition in federal court should be available for the reasons set forth in *Panetti*. *See Johnson*, 558 U.S., at 1070.[10] Mr. Conner attempted to pursue his rights through these alternative mechanisms, but was told the courthouse door was closed. Mr. Conner respectfully submits that this Court should grant certiorari in order to provide guidance to the lower courts regarding the appropriate procedure for pursuing the *Lackey* and double jeopardy claims he has raised.

II. This Court Should Grant Certioari To Consider The Merits Of Mr. Conner's Claims That The Extraordinary Delay In Implementing His Death Sentence

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[10] As Justice Stevens explained:

> Although the Court of Appeals' treatment of Johnson's claim as a habeas challenge is a close question, its decision to apply § 2244(b)(2)'s successive habeas bar is not. The Sixth Circuit's decision has the curious effect of forcing Johnson to bring a *Lackey* claim prematurely, possibly at a time before it is ripe. Moreover, construing this claim as the functional equivalent of a habeas action also has the unfortunate effect of inviting further delay: A petitioner would be compelled to return to state court to exhaust his *Lackey* claim in the first instance under 28 U. S. C. § 2254(b)(1). For these reasons, I am persuaded that a *Lackey* claim, like a claim that one is mentally incompetent to be executed, should, at the very least, not accrue until an execution date is set. *See Ceja v. Stewart*, 134 F. 3d 1368, 1371-1372 (CA9 1998) (Fletcher, J., dissenting); *cf. Panetti v. Quarterman*, 551 U. S. 930, 945, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007).

Johnson, 558 U.S., at 1070 (statement respecting denial of certiorari).

Renders It Unconstitutional Under The Eighth Amendment And Double Jeopardy Clauses.

A. Executing Mr. Conner After He Has Spent 34 Years Under a Death Sentence Constitutes A Violation Of The Eighth Amendment's Prohibition Against Cruel And Unusual Punishment.

Due to state court indifference and prosecutorial obstruction, it took Mr. Conner's case close to 34 years to complete review from direct appeal through Mr. Conner's initial federal habeas proceedings, during which time he received less, rather than more, process. But for the delays occasioned by the Georgia habeas court's lackadaisical approach and Respondent's obstructive tactics, there is a more than reasonable likelihood that Mr. Conner would have obtained a jury trial on the issue of his intellectual disability and that the case would have been resolved in a way that removed the death sentence, as has happened to almost every similarly situated individual whose case has been resolved following a remand under *Fleming*. *See*, *e.g.*, *Conner I*, 645 F. 3d at 1290-91. Instead, the state courts, at Respondent's behest, refused to allow Mr. Conner access to the very evidence needed to prove his claim and then, after denying relief for lack of proof, ruled he had defaulted the claim when he later returned to court with the necessary evidence he had finally obtained, and the federal courts have now ruled that the courthouse is closed to further complaints.

On these facts, it would violate the Eighth and Fourteenth Amendments to execute Mr. Conner after so lengthy a time on death row (particularly given his blamelessness and the State's culpability in causing the delay, and the degree to which he has been harmed by delay). Such execution would inflict needless pain and suffering furthering no legitimate penological interest on Mr. Conner after he has already received 34 years of exceptionally harsh punishment on death row.

The Eighth Amendment declares that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "By

protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). The government's obligations under the Eighth Amendment continually develop, shaped by our nation's ever-evolving sense of morality. *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86, 99 (1958) ("[T]he words of the Amendment are not precise, and [] their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); *Weems v. United States*, 217 U.S. 349, 378 (1910) (stating that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice"). Accordingly, punishments not compatible with current standards of decency violate the Eighth Amendment prohibition on cruel and unusual punishments. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 406 (2008) (categorically prohibiting the execution of person who have not committed murder); *Roper*, 543 U.S. at 578 (categorically prohibiting the execution of individuals who committed murder as juveniles); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (categorically prohibiting the execution of person with intellectual disability); *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (limiting the use of solitary confinement).

At its core, the Eighth Amendment is animated by a respect for the inherent dignity of all human beings: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop*, 256 U.S. at 100. *See also Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) ("The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be."); *Brown v. Plata*, 563 U.S. 493 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."). As a result, the Eighth Amendment prohibits punishments which "involve the unnecessary and wanton infliction of pain."

Gregg v. Georgia, 428 U.S. 153, 173 (1976). This broad proscribed category includes, *inter alia*, punishments which are "totally without penological justification." *Id.* at 183. Punishment, moreover, must be proportionate, based on both the crime and offender. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment.").

1. A Delay of 34 Years Between The Imposition of A Death Sentence and Execution Renders Nonexistent Any Arguable Deterrent or Retributive Effect And, To Top The Punishment of Lengthy Incarceration With Execution Would Inflict Wholly Disproportionate Punishment Under the Eighth Amendment.

Under the Eighth Amendment, "[p]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). "Rehabilitation, it is evident, is not an applicable rationale for the death penalty." *Hall v. Florida*, 134 S. Ct. 1986, 1992-93 (2014). Rather, the "two principal social purposes" of the death penalty are "retribution and deterrence of capital crimes by prospective offenders," *Gregg*, 428 U.S. at 184 (plurality opinion). In this case, those goals will not be meaningfully furthered by Mr. Conner's execution given the 34-year gap between imposition of Mr. Conner's death sentence and his scheduled execution. To the contrary, implementation of Mr. Conner's death sentence under these circumstances, "'would . . . be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'" *Lackey*, 514 U.S. 1045, 1046 (1995) (memorandum of Stevens, J., respecting denial of certiorari) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring in judgment)).

Mr. Conner's execution after this extraordinary passage of time will serve no retributive or deterrent purpose. Indeed, carrying out a sentence issued 34 years ago would serve only to illustrate what Justices Stevens and Breyer have called "the two underlying evils of intolerable delay":

> First, the delay itself subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement . . . . Second, delaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner's death . . . . In other words, the penological justifications for the death penalty diminish as the delay lengthens.

Johnson v. Bredesen, 558 U.S. 1067, 1069 (2009) (Stevens and Breyer, JJ., statement respecting denial of certiorari) (internal citations omitted).[11] Acknowledgement of the role these "evils" play in Mr. Conner's case does not mean that one must "accept the proposition "'that the imposition of the death penalty [always] represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'" *Id.* at 1070 (quoting *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in judgment)). Rather, one need only recognize that in Mr. Conner's case, "the imposition of the death penalty on these extreme facts is without constitutional justification." *Id.*[12]

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[11] *See also Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer and Ginsburg, JJ., dissenting) (the "excessively long periods of time that individuals typically spend on death row, alive but under sentence of death" pose grave constitutional concerns).

[12] Ironically, although rehabilitation is decidedly not a penological goal of the death penalty, Mr. Conner's lengthy incarceration has led his rehabilitation. During his time on death row, Mr. Conner has transformed himself from a depressed and angry substance-abusing young man into a compliant and well-behaved inmate who is remorseful for his crimes and helpful to the guards. Mr. Conner's transformation is yet another reason why execution after so lengthy a period of punitive incarceration violates the Eighth Amendment.

If Mr. Conner is executed, he will have been facing a death sentence on death row for longer than any other death row inmate executed in Georgia in the modern era.[13] On death row, Mr. Conner has endured the harshness of life under solitary confinement for periods well beyond the delay members of the Supreme Court have already identified as constitutionally troubling. Mr. Conner has spent nearly three-and-a-half decades under a sentence of death.[14] The time Mr. Conner has spent under the constant specter of execution outstrips the "astonishingly long" 24-year period in *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting); the 27 years Justice Breyer called "unusual by any standard" in *Foster v. Florida*, 537 U.S. 990, 992 (2002); and the "extraordinary" 32-year period in *Thompson v. McNeil*, 556 U.S. 1114, 1115 (2009) (Stevens, J., statement respecting the denial of certiorari). Indeed, if Mr. Conner ultimately is

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[13] Brandon Jones, executed on February 3, 2016, was convicted and sentenced to death in September 1979. *See Jones v. State*, 249 Ga. 605, 605 (1982). Although executed some 35 years after he was first sentenced to death, his death sentence was vacated in federal habeas proceedings in February 1989, *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989), and he was not resentenced to death until September 1997, *Jones v. Ga. Diagnostic & Classification Prison Warden*, 653 F.3d 1171, 1174 (11th Cir. 2014). He was accordingly not under a sentence of death for eight and a half of those 35 years. Mr. Conner, by contrast, will have been under a sentence of death for 34 continuous years if his execution proceeds on July 14, 2016.

[14] Three people currently under sentence of death first arrived on death row earlier than Mr. Conner. Virgil Presnell was initially sentenced to death in August 1975. He received sentencing relief in federal habeas proceedings in April 1992, *Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992), and was resentenced to death close to seven years later, in March 1999, *Presnell v. State*, 274 Ga. 246, 247 n. 1 (2001). James Rogers' 1982 conviction and death sentence were vacated in 1983, and he was resentenced to death two years later, in June 1985. *Rogers v. State*, 256 Ga. 139, 139 n.1 (1986). In 2003, he was granted a jury trial on the issue of intellectual disability. *See Rogers v. State*, 276 Ga. 67 (2003). The jury found that he had not proven his intellectual disability, *Rogers v. State*, 282 Ga. 659 (2007). The case of Willie Wilson, sentenced to death in February 1982, *Wilson v. State*, 250 Ga. 630 (1983), was remanded in 1990 for a jury determination of intellectual disability, and the case has been pending there since.

executed, he "will have been punished both by death and also by more than a generation spent in death row's twilight." *See Foster*, 537 U.S. at 993 (Breyer, J., dissenting).[15]

The State of Georgia has already exacted a far greater retributive toll upon Mr. Conner than it exacts from most convicted murderers.[16] Any slight retributive effects gleaned from executing an intellectually impaired man more than 34 years after he was sentenced to death are insufficient in this case to prevent the execution from violating the Eighth Amendment's prohibition on excessive punishments. If Mr. Conner's execution proceeds, it will amount to a constitutionally proscribed "pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose." *Furman,* 408 U.S. at 312 (White, J., concurring).[17]

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[15] *See* Claim II for additional discussion of the Fifth Amendment implications of this impermissible double punishment.

[16] Life-sentenced prisoners convicted of serious felonies before 1995, as Mr. Conner was, were typically eligible for parole consideration after serving seven years. *See* State Board of Pardons and Paroles, Life Sentences, available at http://pap.georgia.gov/life-sentences. Life-sentenced prisoners convicted of serious felonies between 1995 and June 30, 2006, are initially considered for parole after serving 14 years. *Id.* Life-sentenced prisoners convicted of serious felonies on or after July 1, 2006, are considered for parole after 30 years. *Id.* The State Board of Pardons and Paroles grants parole each year to numerous life-sentenced individuals. *See, e.g.* Fiscal Year 2015 Annual Report, at 22 (151 grants out of 1381 total life decisions) (available at https://www.joomag.com/magazine/ga-parole-fy2015-annual-report/0499652001427221953?short); Annual Report, FYI 2014, at 19 (Board granted parole in 133 out of 710 total life decisions) (available at https://pap.georgia.gov/sites/pap.georgia.gov/files/Annual_Reports/FY14%20AR.pdf); Annual Report FY 2013, at 19 (144 grants out of 1289 total life decisions) (available at http://pap.georgia.gov/sites/pap.georgia.gov/files/Annual_Reports/2013%20Annual%20 Report_0.pdf); FY 2012 Annual Report, at 19 (Board granted parole to 235 of 1105 life decisions) (available at https://pap.georgia.gov/sites/pap.georgia.gov/files/Annual%20Report%202012.pdf).

[17] The delay in Mr. Conner's case also cannot be viewed as harmless with respect to his ability to press constitutional claims for relief in the courts. By the time Mr. Conner finally had an opportunity to present the mitigation evidence that was available and should have been presented to a jury in 1982, or in his initial habeas proceedings, many of the witnesses had become impossible to locate, had died, or had lost relevant memories, and critical evidence and documentation had been lost or destroyed. For example, since Mr. Conner filed his first state

2. Mr. Conner Has Been Subjected to More Than Three "Decades of Especially Severe, Dehumanizing Conditions of Confinement."[18]

As Justice Kennedy has explained, the "usual pattern," followed in Georgia, is for a death row inmate to be held "in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone," for years or decades. *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015). This Court has long recognized that solitary confinement aggravates the already serious problems of extended confinement under a death penalty. These conditions have been described as tantamount to torture by a large and growing number of human rights organizations, psychological experts, and international tribunals. *See, e.g.*, *Knight*, 528 U.S. at 995 (citing international sources discussing the tortuous role of delay in death penalty and other cases, including, *inter alia*, *Pratt v. Attorney General of Jamaica*, [1994] 2 A.C. 1, 18 (P.C. 1993) (en banc) (acknowledging the lawfulness of the death penalty but calling a delay of 14 years "shocking" and "inhuman or degrading punishment" forbidden by Jamaica's Constitution)).

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habeas petition in 1984, both of his parents, two siblings, and numerous aunts, uncles, and cousins have died. Similarly, various records which initial state habeas counsel was unable to obtain due to the lack of investigative resources and funding, have since been destroyed. *See, e.g.*, *Murphy v. State*, 290 Ga. 459 (2012) (reversing conviction on direct appeal and noting that "[a]s a result of the delay, the parties are now faced with the difficult task of reconstructing evidence more than 13 years after the crimes were committed. Not only is it difficult to locate witnesses many years after the fact and for those witnesses to remember important details, but in some cases, substantive law may even change during the period of delay."). Had Mr. Conner been provided adequate defense resources, including competent, resourced counsel at trial or in initial state habeas proceedings, this evidence could have been adduced in a timely manner and would likely have resulted in a life sentence or relief in subsequent legal actions.

[18] *Johnson*, 558 U.S. at 1069 (Stevens and Breyer, JJ., statement respecting denial of certiorari).

Indeed, both the American Bar Association and the United Nations Special Rapporteur on Torture have sought to limit or ban solitary confinement. *See Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer and Ginsburg, JJ., dissenting).

As long ago as 1890, this Court described solitary confinement as an "additional punishment of the most important and painful character," *In re Medley*, 134 U.S. 160, 171 (1890), and one which is often incompatible with humane confinement:

> [E]xperience demonstrated that there were serious objections to [solitary confinement]. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident that some changes must be made in the system . . . solitary confinement was found to be too severe."

Id. at 168.

Justice Kennedy recently reaffirmed this understanding, stating that "research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price." *Ayala*, 135 S. Ct. at 2209 (Kennedy, J., concurring). "The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators." *Id.* at 2209. Yet, death row prisoners are routinely subjected to this practice – a practice that can lead to a litany of psychological issues, including anxiety, panic, hallucinations, self-harm, and suicide. *See id.* at 2210.

In addition to the harmful effects of physical isolation, the long period of waiting to be given an actual execution date – measured in decades in Mr. Conner's case – is also a source of

significant psychological trauma.[19] "The dehumanizing effect of solitary confinement is aggravated by uncertainty as to whether a death sentence will in fact be carried out." *Glossip*, 135 S. Ct. at 2765 (Breyer and Ginsburg, JJ., dissenting). The *Medley* Court similarly recognized long ago that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place." *Medley*, 134 U.S. at 172. If, as the Court acknowledged, a wait of four weeks produces "one of the most horrible feelings," the decades Mr. Conner has waited are surely exponentially more horrible. *See Lackey v. Texas*, 514 U.S. 1045, 1046 (1995) (memorandum of Stevens, J., respecting denial of certiorari) ("If the Court accurately described the effect of uncertainty in *Medley,* which involved a period of four weeks . . . that description should apply with even greater force in the case of delays that last for many years."); *Furman*, 408 U.S. at 288-89 (Brennan, J., concurring) ("[W]e know that mental pain is

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[19] The psychological suffering thrust onto death row prisoners is demonstrated by the number of individuals who commit suicide or drop their appeals and "volunteer" for execution:

> [G]iven the negative effects of confinement and uncertainty, it is not surprising that many inmates volunteer to be executed, abandoning further appeals. *See, e.g.*, ACLU Report 8; Rountree, Volunteers for Execution: Directions for Further Research into Grief, Culpability, and Legal Structures, 82 UMKC L. Rev. 295 (2014) (11% of those executed have dropped appeals and volunteered); ACLU Report 3 (account of "'guys who dropped their appeals because of the intolerable conditions'"). Indeed, one death row inmate, who was later exonerated, still said he would have preferred to die rather than to spend years on death row pursuing his exoneration. Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & C. 860, 869 (1983). Nor is it surprising that many inmates consider, or commit, suicide. *Id.*, at 872, n. 44 (35% of those confined on death row in Florida attempted suicide).

Glossip, 135 S. Ct. at 2766 (Breyer and Ginsburg, JJ., dissenting).

an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.").

Due to the extraordinary delay in this case, Mr. Conner has already been subjected, in effect, to a life sentence under exceptionally severe penal conditions. To top this punishment with the permanently harmful indignity of execution would be excessive and disproportionate punishment, prohibited by the Eighth Amendment.

B. Mr. Conner's Execution Would Be Unconstitutionally Duplicative Of And Additional To The Punishment Already Inflicted On Him In Violation Of The Fifth Amendment Prohibition Against Double Jeopardy.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution guarantees that no person shall be "subject for the same offence or be twice put in jeopardy of life or limb." U.S. Const. amend. V. *See* also Ga. Const. Art. I, §I ("No person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in case of mistrial."). The federal guarantee against double jeopardy applies to the States through the Fourteenth Amendment, s*ee Benton v. Maryland*, 395 U.S. 784, 794 (1969), and protects against, *inter alia*, "multiple punishments for the same offense," *North Carolina* v. *Pearce,* 395 U.S. 711, 717 (1969), *overruled on other grounds*. *See also Dept. of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 769-70 (1994); *Alabama* v. *Smith,* 490 U.S. 794 (1989); *Brown v. Ohio*, 432 U.S. 161, 165-66 (1977); *In re Bradley*, 318 U.S. 50, 51-53 (1943); *Ex parte Lange*, 85 U.S. 163, 172 (1873); *U.S. v. Bonilla*, 579 F.3d 1233, 1239-40 (11th Cir. 2009); *U.S. v. Jones*, 722 F.2d 632, 637 (11th Cir. 1983); *Williams v. State*, 288 Ga. 7 (2010). Stated differently, one of the

"distinct abuses" the Double Jeopardy Clause prohibits is being punished a second time for the same act. *United States v. Halper*, 490 U.S. 435, 440 (1989).

Mr. Conner has been incarcerated for nearly 34 years under a single murder conviction.[20] Though sentenced to death, Mr. Conner has instead served a *de facto* life sentence. To permit the State to exact any additional or second punishment against Mr. Conner, namely, to execute him pursuant to a death sentence, violates the Fifth Amendment guarantee that no man shall be subject to multiple punishments for the same offense. *See, e.g.*, *Lange*, 85 U.S. at 176 ("When a prisoner by reason of a valid judgment has fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further is gone.").

Mr. Conner arrived on Georgia's death row in the summer of 1982. He has served his sentence in the Georgia Diagnostic and Classification Prison, where death row is currently housed; the prior Georgia State Prison in Reidsville; and the Telfair County Jail. Not only has Mr. Conner arguably served a longer term of incarceration than that served by the typical "lifer" in Georgia prisons,[21] but the uniquely harsh conditions of death row make the sentence that he has already served more severe than life imprisonment under normal prison conditions. Life on death row has been described as "the relentless regime of lockdown, loneliness, isolation, and hopelessness while one awaits death, exacting a terrible psychic, spiritual, psychological, and familial toll." Daniel P. Blank, *Mumia Abu-Jamal and the Death Row Phenomenon,* 48 Stan. L. Rev. 1625, 1642 (1996).

Protracted incarceration under a sentence of death causes extensive mental suffering and anguish. Mr. Conner is housed alone in a 7-foot by 10-foot windowless cell where the lights

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[20] Mr. Conner's armed robbery conviction was vacated on appeal. *Conner*, 251 Ga. at 115. On the theft conviction, Mr. Conner was sentenced to seven years to serve concurrently.

[21] *See supra* note 16 discussing parole eligibility for life sentences.

remain illuminated 24 hours a day, seven days a week. For most of Mr. Conner's incarceration period, outdoor exercise has been restricted to, at most, two three-hour periods per week. Indoor exercise, known as "runaround time," is restricted to one hour or less per day. During that time, Mr. Conner must attend to his personal hygiene needs and complete any permitted personal or legal phone calls. Any other time Mr. Conner is outside his cell is spent performing janitorial and maintenance services in his capacity as a "houseman."

Visitation privileges for death-sentenced prisoners are extremely restricted, and limited to a small number of people who may visit only on Saturdays and Sundays, and who must be pre-approved by prison authorities. Contact visits with approved family members are earned only with a perfect disciplinary record and happen only once every two months. All other visits are conducted via telephone though a thick plexiglass window, which makes seeing and hearing loved ones and paralegals difficult. Before and after each visit, including legal visits, inmates are subject to a thorough strip-search. They are also strip-searched before and after making legal phone calls.

By virtue of his age, Mr. Conner has been and remains more at risk for victimization by other inmates. In short, the conditions on Georgia's death row are far more invasive, restrictive, and anxiety-inducing than the conditions of confinement for prisoners not sentenced to death.

In Mr. Conner's case, his long-term confinement in these conditions has accelerated the aging process and exacerbated the effects of his intellectual impairments. Adding to the impact of the more restrictive physical conditions of incarceration is the mental anguish of living under the shadow of death. The psychological impact of anticipating one's own execution, and witnessing friends' executions, is devastating. *See Solesbee,* 339 U.S. at 14 (Frankfurter, J., dissenting), *abrogated by Ford v. Wainwright,* 477 U.S. 399 (1986). Mr. Conner suffers from cognitive limitations that impair his ability to cope with psychological stress, making him yet more

susceptible to the emotional toll of living under a sentence of death. Justice Brennan wrote in his concurrence in *Furman* that "mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death." 408 U.S. at 288-289 (1972) (Brennan, J., concurring). Mr. Conner has been burdened not only by the threat of his own potential execution, but the ever-present threat to the lives of his friends and the other men on his cell block. Indeed, Mr. Conner has served as a grim witness of sorts to the execution of approximately 65 fellow inmates throughout his incarceration.

Mr. Conner's 34-year incarceration outstrips the length of time served by the great majority of similarly situated defendants, including the many who served life sentences as well as the few who were sentenced to death.[22] By keeping Mr. Conner confined to death row for nearly 34 years, the State has inflicted on him a second criminal sanction, unauthorized by law. Any further punishment impermissibly subjects Mr. Conner to two punishments: life in prison AND the death penalty, a combination of punishments that violates the prohibition against double punishment. *See, e.g.*, *Pearce*, 395 U.S., at 718 ("[I]t is clear that this basic constitutional guarantee [against being punished twice for the same offense] is violated when punishment already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction for the same offense."); 85 U.S., at 176 ("[W]hen the prisoner, s in this case, by reason of a valid judgment, had fully

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[22] *See also* Claim I (discussing how an execution that fails to meaningfully further any penological purpose violates the Eighth Amendment). Executing Mr. Conner after he has already served and will continue to serve the equivalent of a life-without-parole sentence in prison fails to serve either of government's fundamental goals or "traditional aims" of punishment, namely, deterrence and retribution. *See, e.g.*, *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 168 (1963). Should it go forward, Mr. Conner's execution will constitute little more than the "wanton and needless infliction of pain." *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone."). The Fifth and Fourteenth Amendments, accordingly, do not permit Mr. Conner's execution.

CONCLUSION

Over the past 34 years, the State of Georgia has exacted from Mr. Conner the equivalent of a life sentence under severe conditions of isolation and privation that characterize Georgia's death row. To now implement his death sentence would doubly punish him with excessive and disproportionate penalty, in violation of the Fifth, Eighth and Fourteenth Amendments. This Court must grant the Petition for Writ of Certiorari or, alternatively, issue a writ of habeas corpus in order to prevent the State of Georgia from committing an act so inimical to our morality and fundamental laws.

Respectfully submitted,

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COUNSEL FOR PETITIONER

No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 20__

[PETITIONER NAME],

Petitioner,

-v-

[WARDEN NAME], Warden
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by U.S. Mail, first-class postage prepaid, on counsel for Respondent at the following address:

Paula K. Smith
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This 14th day of July, 2016

_____
Marcia A. Widder