No: 16-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2016

GREGORY PAUL LAWLER,

Petitioner,

v.

ERIC SELLERS, Warden,
Georgia Diagnostic Prison,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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-CAPITAL CASE-

QUESTIONS PRESENTED

1. The Eighth Amendment prohibits the execution of offenders whose capacity to make considered, informed judgments, to communicate, and to conform to societal expectations is lessened by their age or disability. *Roper v. Simmons* 543 U.S. 551, 570 (2005); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). Given the uncontroverted evidence that Petitioner suffers from Autism Spectrum Disorder, a pervasive developmental disorder with those same features, does the Eighth Amendment also prohibit his execution?

2. Does the death penalty continue to survive constitutional scrutiny?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioner Gregory Lawler respectfully petitions this Court for a writ of *certiorari* to review the October 19, 2016 decision of the Georgia Supreme Court denying him a Certificate of Probable Cause to Appeal. Tonight, the State of Georgia intends to execute Mr. Lawler even though he suffers from a pervasive developmental disorder that so lessens his culpability that it renders the death penalty both excessive and devoid of retributive or deterrent value in his case. Moreover, the death penalty itself no longer comports with our current societal standards of decency, as reflected by the rarity with which prosecutors and juries now utilize it, and is therefore constitutionally intolerable in all cases.

I. JURISDICTION AND LOWER COURT OPINION

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

The final judgment and decree rendered by the Supreme Court of Georgia on October 19, 2016, denying Petitioner's Application for a Certificate of Probable Cause to Appeal the decision of the Superior Court of Butts County, Georgia is filed as Attachment A, hereto. The unpublished order of the Superior Court of Butts County, Georgia dismissing the Petition for Writ of Habeas Corpus entered on October 19, 2016 is attached hereto as Attachment B.

II. CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that:

> [N]or [shall] cruel and unusual punishments [be] inflicted.

U.S. CONST. AMENDMENT VIII.

The Fourteenth Amendment to the United States Constitution provides that:

> [N]o State shall…deprive any person of life [or] liberty…without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMENDMENT XIV.

III. STATUTORY PROVISIONS INVOLVED

The Georgia capital sentencing scheme, O.C.G.A. § 17-10-30 *et. seq.* is attached hereto as Attachment C.

IV. STATEMENT OF THE CASE

A. Introduction

Gregory Paul Lawler suffers from a pervasive neurocognitive disorder. As a result, Mr. Lawler exhibits a dramatically impaired ability to process information–especially information about others' feelings and intentions–and to modulate his own emotional reactions accordingly. Societal standards of decency dictate that the death penalty is an excessive and disproportionate punishment for a person with these limitations.

This Court has previously noted that, where the death penalty is used at all, it must be reserved for offenders possessed of "extreme culpability," *Roper v. Simmons,* 543 U.S. 551, 578 (2005), and that it is therefore unconstitutional when applied to offenders "with diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," *Atkins v. Virginia,* 536 U.S. 304, 318 (2002). Mr. Lawler has many of these limitations.

Mr. Lawler suffers from Asperger's disorder, a subtype of Autism Spectrum Disorder, a cluster of pervasive developmental disorders that "impairs an individual's ability to communicate, interpret social cues and context, and to interact in a socially appropriate manner." Report of Dr. Robert Cohen ("Cohen Report"), attached hereto as Attachment D2, at 1. Asperger's disorder is characterized by deficits in communication and social development, two areas that

played a critical role in both the offense for which Mr. Lawler is about to be executed, and the trial that determined his fate. First, these deficits caused Mr. Lawler to misunderstand the intentions of the police officers outside his home, which led directly to Mr. Lawler tragically shooting the officers. Those same deficits later caused Mr. Lawler to appear remorseless and menacing to his jury and rendered their assessment of his culpability unreliable. As this Court has noted, offenders with these types of deficits bear an enhanced "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" and they make "poor witnesses" because "their demeanor may create an unwarranted impression of a lack of remorse for their crimes." *Atkins,* 536 U.S. at 320-21 (internal citations omitted). These risks came to bear at Mr. Lawler's capital sentencing trial. Mr. Lawler now asks this Court to grant him the writ and declare him ineligible for execution by virtue of his neurocognitive impairment.

In addition, Mr. Lawler asks that this Court examine the continued legality of the death penalty in all cases under the Eighth Amendment. Though this Court found the death penalty to be constitutional in 1976, *see Gregg v. Georgia*, 428 U.S. 153 (1976), that finding "is not fashioned in the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910); *see also Furman v. Georgia*, 408 U.S. 238, 242 (1972) (DOUGLAS, J., concurring). This Court has long held that the Eighth Amendment must draw its meaning from "the evolving standards of decency that mark the

progress of a maturing society." *Tropp v. Dulles*, 356 U.S. 86, 101 (1958); *Furman, supra*; *Gregg, supra.*

A reexamination of the death penalty under these standards, and with attention to those factors identified in both *Furman* and *Gregg,* will demonstrate that it is no longer constitutional. The citizens of the State of Georgia, through their chosen representatives (district attorneys and juries), have indicated they no longer believe that the death penalty is necessary. More important, when the use of the death penalty nationwide is subjected to any critical examination, the conclusion is inescapable that the nation as a whole no longer believes the death penalty is a warranted and acceptable punishment. Petitioner asks that this Court grant him the writ and, upon briefing and argument, determine that the death penalty no longer comports with the Eighth Amendment.

B. Brief Procedural History

On March 3, 2000, a Georgia jury sentenced Petitioner to death for the malice murder of Atlanta Police Officer John Sowa. The Georgia Supreme Court affirmed his sentence on direct appeal on January 27, 2003. *Lawler v. State*, 576 S.E.2d 841 (Ga. 2003), *reh. den*. February 24, 2003. Petitioner filed a timely petition for writ of *certiorari* in this Court, which was denied. *Lawler v. Georgia*, 540 U.S. 934 (2003).

Petitioner then filed a *pro se* petition for writ of habeas corpus in Butts County Superior Court in January 2004. The petition was later amended with the assistance of counsel and a hearing was held on the petition as amended. The Superior Court entered an order denying relief on all claims on December 5, 2008.

The Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal on June 7, 2010. This Court thereafter denied a timely-filed petition for writ of *certiorari* on November 8, 2010. *Lawler v. Hall,* 562 U.S. 1031 (2010).

Petitioner then filed a petition for writ of habeas in the United States District Court for the Northern District of Georgia, which denied the petition on April 2, 2014. The United States Court of Appeals for the Eleventh Circuit affirmed the district court's opinion on December 10, 2015. *Lawler v. Warden*, 631 Fed. Appx. 905 (11th Cir. 2015) (unpublished).

On July 7, 2016, Petitioner again sought a writ of *certiorari* from this Court. His petition was denied on October 3, 2016. *Lawler v. Chatman,* ___ S.Ct. ___, 2016 WL 4082979 (2016).

On October 5, 2016, the Superior Court of Fulton County entered an order directing the Department of Corrections to execute Gregory Lawler during a time period beginning at noon on October 19, 2016 and concluding at noon on October 26, 2016. The Department of Corrections scheduled Petitioner's execution for 7:00 p.m. on Wednesday, October 19, 2016.

On October 18, 2016, Petitioner filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia raising the claims that are the subject of the instant petition for writ of *certiorari* to the Supreme Court of Georgia. That Court denied the Petition on October 19, 2016. The Georgia Supreme Court denied

Petitioner's application for a certificate of probable cause to appeal that order later that day. This petition follows.

C. Summary of Facts Relevant to Petitioner's Culpability

Petitioner was convicted of murdering one police officer and wounding a second when he shot the officers outside his Atlanta apartment. As the Georgia Supreme Court described, the evidence presented at trial painted the picture of a senseless and unprovoked attack:

> Lawler and his girlfriend, Donna Rodgers, were drinking at a bar near their Atlanta apartment at approximately 9:00 p.m. on Sunday, October 12, 1997. Ms. Rodgers was very intoxicated. They left the bar and began walking home when they had some type of altercation in the parking lot of a pawn shop. A person at a nearby gas station believed that Lawler was striking an intoxicated Ms. Rodgers with a bag. He drove to a police station and reported what he had seen. Officer Cocciolone and Officer Sowa went to the parking lot and observed Ms. Rodgers sitting on a curb with Lawler trying to pull her to her feet. Lawler left the scene and walked to the apartment when the police arrived. The officers did not pursue Lawler; since Ms. Rodgers was intoxicated and lived only a short distance away, they decided to help her get home. …
>
> They parked on the street, escorted her up the walk (witnesses testified that she had difficulty standing), and knocked on the door. Lawler opened the door and began yelling "get the f---away from my door" at the officers. After Ms. Rodgers was inside, he tried to shut the door on them. Officer Sowa put a hand up to prevent the door from shutting and said they were just trying to confirm that Ms. Rodgers lived there and that she would be okay. Lawler grabbed an AR-15 rifle he had placed next to the door when he saw the officers arrive and opened fire on the officers as they fled for cover.

Lawler v. State, 576 S.E.2d 841, 844–45 (Ga. 2003).

What neither the officers, nor later the jury, nor even Mr. Lawler himself knew at the time was that Mr. Lawler suffered from a subtype of Autism Spectrum Disorder (ASD). His ASD made it impossible for him to discern the officers' good intentions and to calmly answer the officers' questions. A review of the same events described by the Georgia Supreme Court—this time with the knowledge of Mr. Lawler's ASD diagnoses—alters the evaluation of his culpability.

The events were set into motion by a misunderstanding. When Officers Sowa and Cocciolone first approached Mr. Lawler and his drunken girlfriend in the parking lot, they believed, based upon the citizen's report, that they were responding to a domestic assault. Mr. Lawler, however, had not assaulted Donna, but merely struggled to get her home, and he knew that he had not done anything wrong. Consequently, he was agitated and bewildered when the officers began questioning him. His inability to read the officers faces only increased his confusion. Interpreting the officers as inexplicably aggressive, and fearing that the situation might escalate, Greg made what seemed to the officers an odd choice: he left the scene.

While Greg arrived home and tried to compose himself, the officers decided to bring Donna to the apartment rather than arrest her for public drunkenness. As Mr. Lawler tried to discern what might happen next, the officers arrived. His senses were overloaded with blue lights, the revving of car engines, and the slamming of doors. He grabbed the rifle that he had purchased for Donna to use for home defense and went downstairs. He waited, agitated and flummoxed, until he

saw Donna through the blinds, waiting to be let inside. Again believing that the frightening encounter was over, Mr. Lawler put down the rifle and opened the door. As Donna came inside, Mr. Lawler tried to close the door. Officer Sowa stopped him. Mr. Lawler—not knowing that he had been reported to the police for an assault, and with his inability to decipher Officer Sowa's non-verbal communication—was disoriented and terrified. He remembers Officer Sowa as extraordinarily aggressive – a memory likely distorted by his fear and confusion. He was terrified that for reasons that he could not understand, he was about to be killed. And he grabbed the gun.

D. State Court Decisions Below

The court below failed to grapple with any of the salient facts surrounding Mr. Lawler's culpability or to address the constitutionality of the death penalty. Instead, the Georgia trial court resolved each of the constitutional claims with an inapposite and incorrect procedural bar, holdings that were affirmed by the Georgia Supreme Court on appeal.

Petitioner will demonstrate that he has not procedurally defaulted his claim that because of the effects of his Autism Spectrum Disorder on his culpability, the Eighth Amendment bars his execution. Further, his claim that the Eighth Amendment now categorically prohibits capital punishment is not *res judicata*, as that claim was not previously adjudicated by the Georgia or federal courts in Mr. Lawler's case. Even if it were, a renewed review of the claim in light of the current societal standards of decency is appropriate.

V. REASONS FOR GRANTING THE WRIT

A. The Eighth Amendment Does Not Tolerate Petitioner's Execution Given His Autism Spectrum Disorder.

Mr. Lawler's developmental disorder and cognitive deficits render him ineligible for the death penalty. His execution will violate the Eighth and Fourteenth Amendments to the United States Constitution. *Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (person "actually innocent of the death penalty" when he is ineligible but for violation because constitutional or state statutory prerequisite for its imposition could not have been satisfied).

"Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Roper*, 543 U.S. at 568 (citing *Thompson v. Oklahoma,* 487 U.S. 815, 856 (1988) (O'CONNOR, J., concurring in judgment)). Accordingly, this Court has held that "[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose *extreme culpability* makes them the most deserving of execution." *Roper*, 543 U.S. at 568 (internal quotation marks omitted) (citing *Atkins*, 536 U.S. at 319) (emphasis added). In recognition of that precept, this Court has held that "the death penalty may not be imposed on certain classes of offenders . . . no matter how heinous the crime" because they "cannot with reliability be classified among the worst offenders." *Roper*, 543 U.S. at 568–69.

In 2002, this Court held in *Atkins v. Virginia* that the Eighth Amendment prohibits the execution of the intellectually disabled because "by definition they

have *diminished capacities to understand and process information*, *to communicate*, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, *and to understand the reactions of others*." 536 U.S. at 318 (emphases added). These deficiencies "do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Id.*

Then, on March 1, 2005, the Court determined that standards of decency had evolved to exclude another category of defendant from the reach of the death penalty: juveniles. In *Roper*, 543 U.S. at 578, the Court explained its finding that the death penalty is excessive for offenders who were younger than 18 years old at the time of their crimes by quoting its decision in *Atkins*: "Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose *extreme culpability* makes them the most deserving of execution." *Id.* at 568 (emphasis added).

Under this Court's reasoning in *Atkins* and *Roper*[1], Mr. Lawler's developmental disorders and cognitive deficits place him on a level of moral culpability akin to that of juveniles and the intellectually disabled.

1. Mr. Lawler Suffers from Autism Spectrum Disorder.

On September 26, 2016, Robert Cohen, a clinical neuropsychologist who specializes in treating patients with Autism Spectrum Disorder, evaluated Mr.

[1]This Court has confirmed that *Atkins* and *Roper* are the operative precedent "to guide a court conducting Eighth Amendment analysis" as to whether a prisoner's mental illness renders him ineligible for a sentence of death. *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007).

Lawler at the Georgia Diagnostic and Classification Prison. In addition to conducting a clinical interview and administering a battery of testing instruments to Mr. Lawler, Dr. Cohen reviewed voluminous affidavits[2] and records and personally conducted interviews of Mr. Lawler's relatives. Dr. Cohen concluded "within a reasonable degree of scientific and psychological certainty that Mr. Lawler meets the diagnostic criteria for Autism Spectrum Disorder." *See* Attachment D-2, Report of Robert E. Cohen, Ph.D., at 1 (hereinafter "Cohen Report").

Autism Spectrum Disorder is a group of complex disorders of brain development. ASD is characterized by difficulties in social interaction, verbal and nonverbal communications and repetitive behaviors. As the Center for Disease Control has noted, "people with ASD . . . have different ways of learning, paying attention or reacting to things." As Dr. Cohen explained, ASD "impairs an individual's ability to communicate, interpret social cues and context, and to interact in a socially appropriate manner." Cohen Report at 1. In Mr. Lawler's case, his condition does not allow him to "accurately interpret facial expressions, contextual cues, or vocal inflection. Similarly, he is unable to understand and anticipate how his actions or words will be interpreted by others." *Id.* People like Mr. Lawler often "exhibit inappropriate affect for the social situation presented (*e.g.*, will laugh at the wrong time or appear emotionless when certain emotion

[2]*See* Attachment D-3, Affidavits submitted in support of Petition for Writ of Habeas Corpus, Butts County Superior Court.

would be expected)," and because of those characteristics, they are often perceived incorrectly as "cold, callous, unempathetic, or remorseless." *Id.*[3]

ASD manifests in, *inter alia*, the following ways: a qualitative impairment in social interaction, *id.* at 7; a failure to develop peer relationships at the developmental level, *ibidd.* at 7-8; problems with "social reciprocity," *ibid.* at 8, or "how the behavior of one person influences and is influenced by the behavior of another person, and vice versa"[4]; difficulties in understand social situations and other people's thoughts or feelings, *ibid.;* a restrictive and repetitive range of interests, *ibid.* at 9; inflexible adherence to specific routines or rituals, *ibid.*; life-long qualitative impairments in verbal and non-verbal communication, *ibid.* at 9-10; marked impairment in the ability to initiate or sustain a conversation with others, *ibid.* at 10; and a pedantic style of speech, *ibid.*

Dr. Cohen's testing revealed that Mr. Lawler manifested *all* of these symptoms. Mr. Lawler and his brother, Gerald, were engaged separately in a clinical interview and assessment instrument designed to discern symptoms of Autism Spectrum Disorder (Adult Asperger's Assessment - AAA). Scores as high as Mr. Lawler's on this assessment are strongly associated with a clinical diagnosis in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) of

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[3] As Dr. Cohen notes, in Mr. Lawler's case, these characteristics also "negatively influence[d] his ability to assist counsel, to testify, and to withstand cross-examination." *Id.*

[4] Autism Society of Baltimore-Chesapeake, *Social Reciprocity* (available at http://www.baltimoreautismsociety.org/glossary/term/social-reciprocity/ (last visited October 16, 2016).

an Autism Spectrum Disorder, and indicate that he suffers from moderate to severe deficiencies in social behavior. As Mr. Lawler does not have a speech production delay, his ASD most closely matches what is still popularly known as Asperger's disorder.

Dr. Cohen's report details several examples of how Mr. Lawler's ASD manifested during his testing and interviews. Dr. Cohen noted Mr. Lawler's "[q]ualitative impairment in social interaction" as evidenced by his "marked impairment in the use of multiple nonverbal behaviors," including: his pronounced flat affect and expression; his practice of "look[ing] at the examiner with his head down but his eyes up"; his "guffawing and exaggerated behavioral reaction" to mild humor; his vacillation between staring or quick fleeting glances; his repeated talking over Dr. Cohen; and the contrast between his responses about topics of little interest to him, "which were short in length and verbiage," and those "of specific or restricted interest such as science, triathlons, or his current charges," which "revealed overly detailed and tangential diatribes with little awareness of this examiner trying to get a word in to interject on the matter." *Id.* at 7. Dr. Cohen also detailed Mr. Lawler's chronic "[d]ifficulties in understanding social situations and other people's thoughts or feelings." *Id.* at 8. For example, Mr. Lawler "described an adult interaction that was confusing to him" in which he interjected his opinion into a conversation between a group of prisoners sitting across the room from him. *Id.* Mr. Lawler could not understand why the prisoners were annoyed by his interruption, protesting to Dr. Cohen, "I knew about what they were discussing,

so I gave them my opinion and they got pissed!" *Id.* When asked whether he had difficulties with social skills, Mr. Lawler demurred, stating that he had taken part in several Toast Masters groups and knew how to be assertive and how to speak in public. *Id.* at 8-9. When Dr. Cohen attempted to explain the difference between "learning about and then successfully implementing social skills" by giving the example of "trying to learn to play the violin by reading about it in a manual," Mr. Lawler was unable to follow the analogy, replying, "[b]ut I don't know how to play any musical instruments." *Id.* at 9.

Dr. Cohen also reported on Mr. Lawler's "qualitative impairments in verbal and non-verbal communication" and "obvious deficit[s] in his ability to engage in social reciprocity," as evidenced by his admissions that "[p]eople often tell me that I keep going on and on about the same thing," that "I tend to focus on my own thoughts rather than on what my listener might be thinking," and that "[w]hen I talk to people, I do not tend to talk about their experiences rather than my own." *Id.* at 9-10. Dr. Cohen observed this behavior in Mr. Lawler's repeated talking over him and inability to perceive that Dr. Cohen was attempting to change the subject, responding only to explicit instruction that they must move on. *Id.* at 10. Mr. Lawler seemed confused both by why this behavior was problematic and by its effect upon his intimate relationships. *Id.*

Dr. Cohen also noted Mr. Lawler's rigidity of thought and "tendency to think of issues as being black and white (e.g. in politics or morality), rather than considering multiple perspectives…" *Id.* at 9. Dr. Cohen noted that the intensity of

this trait, particularly as to "the manner in which he views his . . . charges," goes beyond "mere denial" and reveals "a severe inflexibility of thought." *Id.*

2. Mr. Lawler's ASD Was Evident Throughout His Life.

Dr. Cohen's report also details how the symptoms of Mr. Lawler's ASD were evident throughout his life, often isolating and derailing him both personally and professionally.[5] Born on December 29, 1952, in New Rochelle, NY, Gregory Lawler was slow to learn to roll over and was sluggish in his movements. *Id.* at 2. He

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[5]Dr. Cohen reported on the startling number of people in Greg's extended family who also suffered from ASD and other severe mental illnesses, including "bipolar disorder, severe depression with institutionalization, suicide, schizophrenia, developmental disorders, alcoholism, and other addictions." Appendix 2, Cohen Report at 5-6. *See also* Appendix 4, Affidavit of Susan Purtell. Greg's paternal grandfather, Thomas Lawler, was a tool and die maker who barely talked, was unable to interact with his ten children, and often shut himself in his room alone to do math puzzles. His wife, Grace, had a severe mood disorder with rage episodes. All ten of their children suffered from alcoholism.

> One daughter, Elizabeth, committed suicide. Another daughter Marie, had a nervous breakdown and was hospitalized with severe catatonic depression. Another daughter Carol died of alcohol related complications. Another daughter Joan was diagnosed with bipolar disorder and was hospitalized as well. Joan has a son, Brian Konick, who also has Autism Spectrum Disorder . . .
>
> Another son Paul suffered from alcoholism, and his brother Tony died of alcoholism. Another daughter, Rita, was diagnosed with bipolar disorder and alcoholism and was hospitalized. Rita ended up having five children (Gayle, Donna, Susan, John, and Renee). All of them . . . are alcoholics in recovery. . . . John has a son, Drew who suffers from schizophrenia and selective mutism and is currently residing in a supported family group home. His other son Daniel has symptoms of high functioning ASD.

Id. at 5-6.

struggled with fine motor skills. Unlike normal babies, he would not seek out people to interact with, so he did not talk until age three. *Id.* His parents and healthcare providers feared he was deaf because his ability to process auditory information was so delayed and inconsistent. *Id.* He underwent speech therapy for processing deficits. *Id.* Mr. Lawler's brother, Gerry, also reported Mr. Lawler's pronounced physical clumsiness, remembering that they learned to ride a bicycle at the same time even though Greg was two years older. *Id.* at 3.

Mr. Lawler was also "acutely sensitive to feelings of disappointment that would affect him intensely for days." *Id.* at 4. Gerry attested that Greg was hypersensitive to pain and reported that if Greg stubbed his toe, he would scream at the top of his lungs for several moments. *See* Attachment D-5, Affidavit of Gerry Lawler, at ¶ 10. Gerry also recalled his mother saying that when Greg developed measles at five years old, he cried and screamed for the duration of the illness. *Id.* Dr. Cohen observed that this behavior reflected Greg's "increased sensory input," another symptom of his ASD. *Id.* at 9.

Mr. Lawler's deficits in social interactions profoundly disrupted his childhood. "[Greg] had a hard time making friends and found that he could not interact well with others, not knowing when to start a conversation." Cohen Report at 3. His fifth-grade teacher recorded that Greg was having "a tremendous problem in adjusting . . . [is] socially inept . . . [has] few if any friends," and refused to participate in class discussions and projects because he "already knew the answers." *Id.* His seventh-grade teacher would write that Greg was "different" and "difficult",

"socially immature", "was frustrated", "gets very upset when he knows the test is timed . . . needs to work on self-control and self-discipline…. needs prodding and constant supervision … [and is] a volcano that could blow at any moment." *Id.* Despite Greg's documented frustration, he stayed out of trouble and earned good grades. *Id.* As his brother Gerry attested, however, Greg was "different": "He was never mean to anyone but just didn't have success hanging out with others because he was different. Other kids bullied him, chased him, and beat him up…. He never hit back and did not argue with them." *Id.* As a teenager, when Gerry would invite him to play card games with his friends, Greg was so slow to act during his turn that it would irritate the other players. *Id.* at 4. Once, while playing hearts, one of Gerry's friends became so frustrated with Greg that he asked, "What's the matter? Is your brain numb?" *Id.* From then on, Gerry's friends referred to Greg as "Numby." *Id.*

While Mr. Lawler would later have romantic relationships, his girlfriends noted his inability to provide emotional support. Mr. Lawler's affect caused some women to suspect that he was hitting on them, despite his protests that he was just talking to them, which confused and upset him. *Id.* One former girlfriend attested to a bizarre call she received from Mr. Lawler several months after they had broken up suggesting in earnest that they fix their relationship by getting married. *Id.*

3. Mr. Lawler's Prior Neurocognitive Testing Corroborates His ASD.

Dr. Cohen found corroboration of Mr. Lawler's ASD in the testimony and report of Dale G. Watson, a neuropsychologist who administered a full battery of

neurocognitive testing to Mr. Lawler in 2006, and identified a number of specific brain deficits that profoundly affect Mr. Lawler's functioning. Attachment D-6, Affidavit of Dale G. Watson, at ¶4. According to Dr. Watson, "[t]he most notable of these deficits were Mr. Lawler's markedly impaired visual memory, particularly as to his memory for faces and interpersonal interactions; deficits in recognizing emotion by means of facial expression; an impaired sense of smell; and a slowing of his decisional speed." *Id.* Dr. Watson noted that "Mr. Lawler had particular difficulties with an assessment tool called the Comprehensive Affect Testing System (CATS), which tests how accurately one can perceive emotions from faces and voices." *Id.* The CATS revealed that Mr. Lawler "had significant deficits in facial emotion recognition." *Id.* Because of this impairment, "Mr. Lawler's ability to discern emotions from facial expressions" was severely impeded. Dr. Watson also noted that while Greg "scored in the high average range on the intelligence testing that I administered, his scores on certain subtests demonstrated marked deficits in the speed with which he could process information. *This, too, is indicative of neurocognitive dysfunction.*" *Id.* (emphasis added). Dr. Watson "observed many of the same impairments in social interaction that Dr. Cohen noted in his report," *id.* at ¶5, including Greg's presentation as "irritable, guarded, and occasionally angry," his complaints about his "difficulty in controlling tremors in his hands," and his visible agitation "when challenged by the task at hand, particularly when it was mathematics," *ibid.*

4. Mr. Lawler's Diminished Capacities Render Him Ineligible for a Sentence of Death.

Mr. Lawler's deficits closely parallel those "diminished capacities" identified by this Court as relevant for determining whether a person is eligible for a sentence of death. *Atkins*, 536 U.S. at 318. Mr. Lawler's ASD has certainly left him with "diminished capacities to understand and process information," *id.*, as "he suffers auditory processing problems that slow both his speed and ability to understand what is said to him." Cohen Report at 11. Mr. Lawler's capacities "to communicate" are, as detailed *supra*, profoundly diminished. *Atkins*, 536 at 318. His ability "to abstract from mistakes and learn from experience [and] to engage in logical reasoning," *id.*, is limited by his "severe inflexibility of thought," Cohen Report at 9. As Dr. Cohen explained, people with ASD are "extremely rigid in their behaviors and manner of thought." *Id.* at 13. "'Laws are laws, rules are rules.' There are no exceptions," because "[e]xceptions would require flexible, abstract thinking." *Id.*

Most critically, Mr. Lawler's ASD profoundly impairs his capacity "*to understand the reactions of others*." *Atkins*, 536 U.S. at 318 (emphasis added). As Dr. Cohen noted, "individuals with ASD may not respond in a typical way to the facial expressions, gestures, tone of voice or physical proximity of others. They may not be able to 'feel' or sense what another is feeling (or may not even ask)." Cohen Report at 13. These deficits were corroborated by Dr. Watson's neuropsychological testing, which found that Mr. Lawler suffered from "slowed processing speed, poor facial recognition/discriminability, and poor visual versus verbal memory." *Id.* at 12. As Dr. Cohen observed, "since nearly two-thirds of all communication is non-

verbal, one can understand how a person without the ability to detect or modulate their emotional expression—especially under stress—would be hindered at best." *Id.*

5. The Execution of Persons with ASD Serves No Legitimate Penological Purpose.

Given these diminished capacities, none of the accepted penological purposes of the death penalty would be served by Mr. Lawler's execution. "With respect to retribution—the interest in seeing that the offender gets his 'just deserts'—the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 536 U.S. at 319. Since *Gregg*, this Court has sought to "consistently confine[] the imposition of the death penalty to a narrow category of the most serious crimes." *Id.* Accordingly, in *Godfrey v. Georgia,* the Court set aside a death sentence because the prisoner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." 446 U.S. 420, 433 (1980). Mr. Lawler's diminished capacities reduce his culpability. "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Atkins*, 536 U.S. at 319.

"With respect to deterrence—the interest in preventing capital crimes by prospective offenders —it seems likely that capital punishment can serve as a deterrent only when murder is the result of *premeditation and deliberation*." *Id.* (quoting *Enmund v. Florida,* 458 U.S. 782, 799 (1982)). Mr. Lawler's crime, the tragic culmination of misunderstandings driven by his ASD, does not rise to that

standard. Indeed, as recounted above, the tragic events of October 12, 1997, were first set into motion by a misunderstanding between Mr. Lawler and the officers.

Dr. Cohen summarized the aspect of Mr. Lawler's ASD that most complicated both of his encounters with the officers:

> [I]ndividuals with ASD may not respond in a typical way to the facial expressions, gestures, tone of voice or physical proximity of others. They may not be able to "feel" or sense what another is feeling (or may not even ask). Additionally, since nearly two-thirds of all communication is non-verbal, one can understand how a person without the ability to detect or modulate their emotional expression – especially under stress – would be hindered at best.

Dr. Cohen also noted how Mr. Lawler's ASD would prevent the officers from detecting his fear and instead perceiving him as menacing, as his "variable eye contact, flat facial expression, and style of speech might appear cold and detached." Cohen Report at 13.

As Dr. Cohen also noted, these traits would also hinder Mr. Lawler's efforts to communicate with his jury.

> Without understanding the impact of ASD, it would be difficult for someone observing Greg to discern between a lack of empathy related to a personality disorder . . . . versus a lack of awareness or connectedness due to a neurodevelopmental delay like ASD. This could lead law enforcement, legal officials, or even his own lawyers to interpret Mr. Lawler as rude, uncaring, detached, or lacking remorse.

Id.

The effects of Mr. Lawler's deficits on his ability to communicate with his jury are evocative of the Court's decision in *Riggins v. Nevada*, in which the Court addressed whether the forced medication of a prisoner deprived him of his "right to

show jurors his true mental state" and "prejudicially affected his attitude, appearance, and demeanor at trial." 504 U.S. 127, 131 (1992) (internal citations omitted). While the Court did not reach the question of whether the forced medication violated the prisoner's Eighth Amendment rights, it noted that it "may well have impaired the constitutionally protected trial rights Riggins invokes," as its "side effects had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Id.* at 137. Mr. Lawler was no less affected, which argues further for his ineligibility for this sentence.

6. Petitioner's Eighth Amendment Claim Is Not—and Cannot Be—Procedurally Defaulted.

The court below erroneously found this claim to be procedurally defaulted because it was not raised on direct appeal. The court below was wrong. Petitioner raised the question of his eligibility for execution in light of his mental health during his 2006 state habeas corpus proceedings.

Moreover, even if it had not been raised previously, if a punishment is found to be unconstitutional, that punishment cannot be imposed even if the Petitioner had not raised the issue previously. *See Head v. Hill*, 277 Ga. 255, 621 (2003) ("*Atkins* announced a new federal constitutional prohibition against executing an entire class of persons. We deem this exemption to be comparable to placing certain conduct beyond the power of the State to punish and, accordingly, we must give the new federal right to death penalty exemption retroactive effect."). *Today's* societal

standards have evolved such that the execution of a person with Mr. Lawler's developmental disorder would violate the Eighth Amendment much like the execution of the intellectually disabled.

As this Court has noted:

> The Eighth Amendment categorically prohibits the infliction of cruel and unusual punishments. At a minimum, the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted. The prohibitions of the Eighth Amendment are not limited, however, to those practices condemned by the common law in 1789. The prohibition against cruel and unusual punishments also recognizes the "evolving standards of decency that mark the progress of a maturing society. In discerning those "evolving standards," we have **looked to objective evidence of how our society views a particular punishment *today***.

Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989) (citations omitted) (emphasis added). Thus, the court below erred in finding this question to be procedurally defaulted.

B. The Eighth Amendment No Longer Tolerates Capital Punishment.

This Court "ha[s] established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society'" in order to "determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 560-61 (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)). "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Id.* at 568 (citing *Thompson v. Oklahoma*, 487 U.S 815 (1988) (O'CONNOR, J., concurring in judgment)).

An overall consensus in sentencing outcomes across cases is a predominant measure of society's "evolving standards of decency." *Graham v. Florida,* 560 U.S. 48, 58 (2011) ("Actual sentencing practices are an important part of the Court's inquiry into consensus."). Prosecutors and jurors sentencing decisions now reflect a consensus: the death penalty has no role to play in modern society. That consensus is the Eighth Amendment's tipping point. *See, e.g., Kennedy v. Louisiana,* 554 U.S. 407 (2008); *Roper*, 543 U.S. at 560-61; *Atkins,* 536 U.S. at 304; *Miller v. Alabama,* ___ U.S. ____, 132 S. Ct. 2455 (2012).

Just last year, Justice Breyer gave a detailed account of why he believed the Court should examine the continued constitutionality of the death penalty. *See Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726 (2015) (BREYER, J. and GINSBURG, J., dissenting). The Justices outlined four of areas of inquiry in the analysis: first, whether the death penalty was cruel because of a lack of reliability, *id*. at 2756-59; second, whether it was cruel because of arbitrariness, *ibid*. at 2759-64; third, whether it was cruel because of excessive delays associated with its imposition, *ibid.* at 2764-72; and fourth, whether it was unusual because of the decline in use, *ibid.* at 2772-76. When examining national trends, it is clear that the death penalty can no longer withstand a constitutional challenge.

1. The Death Penalty Is Cruel Because It Is Arbitrary.

The death penalty is unconstitutional if it is imposed in an arbitrary or capricious manner. *See Gregg*, 428 U.S. at 188. The Court has long held that the death penalty is to be "limited to those offenders who commit a narrow category of

the most serious crimes and whose extreme culpability makes them most deserving of execution." *Roper*, 543 U.S. at 568. In other words, the death penalty must be reserved for the "worst of the worst." *See Kansas v. Marsh*, 548 U.S. 163, 205 (2006). Studies prove, however, that this is not the case. One such study examined death sentences imposed in Connecticut between 1973 and 2007. Using empirical criteria, the authors found that there were 205 death-eligible murders, and that courts imposed death in 12 cases, nine of which were affirmed on appeal. The authors then looked at the facts of the crime and the characteristics of the defendant, and found that only **one** of the nine defendants sentenced to death was actually "the worst of the worst." *See* Dohohue, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender and Georgahic Disparities?*, 11 J. EMPIRICAL LEGAL STUDIES 637 (2014); *see also Glossip*, 135 S. Ct. at 2760 (BREYER, J. and GINSBURG, J. dissenting).

Studies also indicate that death sentences were disproportionately imposed based on race, geography, the resources provided to defense counsel, racial make-up of juries, and political considerations – all "irrelevant and improper factors" not to be considered when imposing a death sentence. *Id*. at 2761-62 (BREYER, J. and GINSBURG, J., dissenting). Based on these studies, at least two Justices of this Court have concluded that this country's forty-year death penalty experiment has failed because "it [is] increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the reasonable consistency legally necessary to reconcile its

use with the Constitution's commands." *Id.* at 2760 (BREYER, J. and GINSBURG, J., dissenting) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).

At least one of these arbitrary factors is implicated in the instant case. Here, Mr. Lawler's crime occurred in 1997, and his trial took place in 2000, years before the Georgia Capital Defender, a state-funded office specializing in providing experienced counsel in death penalty cases, came into existence.[6] Mr. Lawler was represented by attorneys who were appointed by the trial court, were paid by the trial court at an hourly rate determined by the trial court, had to seek funding for investigation and experts from the trial court, and who served at the pleasure of the trial court.[7] Evidence that funding impacts death cases in Georgia is stark.[8]

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[6] The Georgia Capital Defender was created in 2005 and assumed responsibility for all capital cases in which the crime occurred from 2005 onwards. Prior to that time, indigent capital defendants were represented by attorneys appointed by the local judges, or in a few cases, by the Multi-County Public Defender's office. In those cases where defendants were represented by lawyers other than those from the Capital Defender or Multi-County Public Defender, indigent defendants had to rely on funding being approved by the local elected judge, who had to be cognizant of the county budget.

[7] And even though the trial court approved funding for an investigator, trial counsel did not hire a mitigation specialist. Moreover, trial counsel conducted virtually no penalty phase investigation. Instead, they hired a mental health professional solely to conduct a competency/criminal responsibility evaluation. That expert, Dr. Michael Hilton, offered potentially mitigating evidence on his own accord.

[8] Defender Services, a branch of the Administrative Office of the United States Courts, which oversees the United States Judiciary, commissioned a study on the effect of funding for the defense in federal death penalty cases. Among other things, the report concludes there is a direct correlation between cost and the outcome of a death penalty case:

> Specifically, as Table 12 (pg 40) shows, individuals whose defense received less than $320,000 in combined attorney and expert assistance - the lowest one third of federal capital trials -

Further evidence of the arbitrariness of Mr. Lawler's death sentence is evident in an examination of the sentences imposed on defendants who committed similar crimes. As Justice Stewart noted:

> Those death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [killing a police officer], many just as reprehensible [], th[is] petitioner[] [is] among a capriciously selected random handful upon which the sentence of death has in fact been imposed.

Furman, 408 U.S. at 309-10 (STEWART, J. concurring).

Mr. Lawler was convicted and sentenced to death for the killing of a police officer. In large part,[9] the State relied upon the statutory aggravating factor that authorized a death sentence for the killing of a police officer engaged in the performance of his lawful duties. *See* O.C.G.A. §17-10-30(b)(8). Since 1980, there have been approximately ninety police officers killed while in the line of duty in

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> had a 44 percent chance of being sentenced to death at trial. Individuals whose total representation costs were above that amount - the remaining two-thirds of defendants - had a 19 percent chance of being sentenced to death. Defendants in the low cost group thus were more than twice as likely to be sentenced to death.

See Gould and Greenman, *Update on the Cost, Quality and Availability of Defense Representation in Federal Death Penalty Cases*, at 39-40, attached hereto as Appendix 1.

[9] The jury was also charged on the (b)(2) statutory aggravating circumstance, *i.e.*, the murder occurred during the commission of an aggravated battery on Officer Cocciolone.

Georgia,[10] but there have only been seven death sentences imposed (approximately 8%).[11] Particularly given Mr. Lawler's limitations, *see* Claim II, *infra*, there is no rational reason to distinguish him from the 92% of the defendants who did not receive a death sentence for killing a law enforcement officer.

2. The Death Penalty is Unusual Because of the Decline in Its Use.

One of the core principles of the Eighth Amendment is that "a punishment must not be unacceptable to contemporary society." *Furman,* 408 U.S. at 277-78 (BRENNAN, J. concurring). Evidence that society rejects a punishment is a "strong indication that a severe punishment does not comport with human dignity." *Id*. at 277 (BRENNAN, J. concurring). Courts must use objective factors to make this determination, and the ultimate question to be answered is "whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable." *Id*. at 278 (BRENNAN, J. concurring). Thus, courts look to legislative activity as well as the number of death sentences imposed. It is important to recognize that "aggregate numbers are not the only consideration bearing on a determination of consensus. Consistency of change is

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[10] These statistics have been drawn from Officers Down Memorial Page. *See* https://www.odmp.org/search/browse/georgia. For purposed of this pleading, Mr. Lawler is only considering those officers who were killed by gunfire, assault and stabbing.

[11] Troy Davis, Warren McCleskey, Andrew Brannan, Nelson Earl Mitchell, Wayne Holsey, George Russell Henry, and Petitioner, Greg Lawler. In three other cases - Floyd Hill, Robert Collier, and Norris Speed - the death penalty was originally imposed but ultimately reversed. Floyd Hill pleaded guilty and has been paroled. Robert Collier went to trial and a life sentence was imposed by the judge. Norris Speed's case is pending in the trial court.

also relevant." *Hall v. Florida,* ___ U.S. ___, 134 S. Ct. 1986, 1997 (2014); *see also Roper*, 543 U.S. at 566 ("it is not so much the number of these states that is significant, but the consistency of the direction of change") (quoting *Atkins v. Virginia*, 536 U.S. at 315).

There is irrefutable evidence that the trend is away from the death penalty as an acceptable punishment. Since *Furman,* "the number of active death penalty states has fallen dramatically." *See Glossip*, 135 S. Ct. at 2773 (BREYER, J. and GINSBURG, J. dissenting). In 1972, there were 41 active death penalty states. Since that time, 19 states have abolished it (seven[12] in the last decade), and in 11 other states that have the death penalty, no executions have taken place in more than eight years[13]. *Id*. Effectively, thirty states have either formally abolished the death penalty or have done so *de facto*. *Id*. Moreover, within the last year, two other state supreme courts have invalidated the death penalty schemes in their states. *See Hurst v. Florida*, No. SWC12-1947 (October 16, 2016); *Rauf v. Delaware*, 2016 WL 4224252 (August 2, 2016). Tellingly, in the past twenty years, *no* state legislature has passed legislation enacting the death penalty. *See Atkins*, 536 U.S. at 315-16.

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[12] Connecticut (2012), Illinois (2011), Maryland (2013), Nebraska (2015), New Jersey 2007), New Mexico (2009), and New York (2007). *See* Death Penalty Information Center, *States With and Without the Death Penalty*, available at http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited October 17, 2016).

[13] Arkansas, California, Colorado, Kansas, Montana, Nevada, New Hampshire, North Carolina, Oregon, Pennsylvania and Wyoming.

Moreover, when examining the rate at which the death penalty is imposed by sentencing decision-makers, a similar trend is evidenced. In 1999, 279 people were sentenced to death nationwide, but by 2014, that number had dropped to 73. In Georgia, the number of death sentences imposed has declined dramatically. From 1980 to 1999, there were 179 death sentences imposed in Georgia, an average of almost nine per year. From 2000 to 2016, there were 24 death sentences imposed, for an average of 1.5 per year. Perhaps even more telling, from the time that "death noticing" cases became mandatory in Georgia, the number of cases in which the death penalty has been *sought* has declined dramatically. In 2005, the year that the Georgia Capital Defender was created and began tracking this type of statistical data, there were forty cases noticed for death. The following year, there were 34, followed by 26 in 2007, 21 in 2008, 18 in 2009, 16 in 2010, 26 in 2011, 24 in 2012, 15 in 2013, 15 in 2014, and only 13 in 2015. This year, there has only been one case in which a district attorney has filed a notice of intent to seek the death penalty.[14]

The precipitous decline in use of the death penalty, along with the number of states abolishing or finding the death penalty unconstitutional, establishes an unmistakable trend indicating that the people of both the United States and the State of Georgia no longer believe the death penalty is an effective or necessary

[14] Of note is the fact that in Georgia at least two police officers have been killed in the line of duty this year, *see* Jason Hanna and Steve Visser, *Fallen Officers: 38 Shot Dead in the Line of Duty in 2016*, August 26, 2016 (available at http://www.cnn.com/2016/08/14/us/police-officers-fatal-shooting-line-duty-nationwide/), but neither case has been noticed for death.

punishment. For the first time in 45 years, national polls indicate that the majority of Americans no longer support capital punishment. *See* Death Penalty Information Center, *Pew Poll: Public Support for the Death Penalty Drops Below 50% for First Time in 45 Years*.[15] Given these unmistakable and incontrovertible trends, there is no question that "evolving standards of decency that mark the progress of a maturing society," *Tropp*, 356 U.S. at 101, indicate that the death penalty is no longer a constitutionally acceptable punishment. This Court should declare the death penalty unconstitutional and vacate Mr. Lawler's death sentence.

3. The Death Penalty is Cruel Because It Lacks Reliability.

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of this qualitative difference, there is a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976); *see also Godfrey v. Georgia*, 446 U.S. 420, 443 (1980) ("[I]n capital cases we must see to it that the jury has rendered its decision with meticulous care.") (BURGER, C.J., concurring); *Eddings*, 455 U.S. at 117-18 (1982) (O'CONNOR, J., concurring); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

The reliability of the death penalty has been called into question by a number of factors, not the least of which is advancement in DNA research. In the modern era of the death penalty, 156 death-sentenced people have subsequently been

[15] Available at http://www.deathpenaltyinfo.org/category/categories/resources/public-opinion (last visited October 16, 2016).

exonerated.[16] Over a decade ago, when there were only sixty exonerations, this Court found that trend "disturbing." *Atkins,* 536 U.S. at 320 n. 25. If the Court was "disturbed" when there were sixty people wrongfully convicted and sentenced to death, it must be appalled that the number has now reached nearly three times that amount. Clearly, the fact that 156 death-sentenced people have later been proven innocent demonstrates beyond any doubt the death penalty process is not even remotely reliable enough to meet the heightened reliability requirement announced in *Woodson*, *supra.*[17]

Further proof of the death penalty's unreliability is found in an examination of death cases litigated post-*Gregg*. A study examining the rate of reversal in capital cases between 1973 and 1995 revealed there was "prejudicial error" in 68% of cases, requiring reversal of either the conviction or death sentence. *See* Leibman, Fagan and West, *A Broken System: Error Rates in Capital Cases 1973-1995* (June 2000).[18]

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[16] *See* Death Penalty Information Center, *The Innocent List*, available at http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row

[17] Justice Breyer has noted that the rate of exonerations in capital cases outpaces that of regular criminal cases, and he postulates the reason is that in capital cases, there is "a greater likelihood of an initial wrongful conviction." *Glossip*, 135 S. Ct. at 2757. He further believes the cause of this phenomenon lies in the fact that death penalty cases involve "horrendous murders" that generate "intense community pressure" to secure a conviction, which creates a likelihood of convicting the wrong person. *Id*. at 2757-58.

[18] Available at http://www2.law.columbia.edu/instructionalservices/liebman/ liebman_final.pdf (last visited October 16, 2016).

Further, the death penalty is unreliable in this case is the fact that Mr. Lawler's attorney, trial judge and capital jury were unaware that he suffered from ASD. *See* Claim II, *infra.* ASD is a developmental disorder characterized by deficits in communication and social development, two areas that played a critical role in both the offense for Mr. Lawler is about to be executed, and the trial that determined his fate. As discussed *infra* at 34, these deficits caused Mr. Lawler to appear remorseless and menacing to his jury, which inflamed them and rendered their assessment of his culpability unreliable. *See Atkins*, 536 U.S. at 320-21 (noting that, in cases involving an intellectually disabled prisoner, the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty is enhanced…by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors" and that they are "poor witnesses" because "their demeanor may create an unwarranted impression of a lack of remorse for their crimes") (internal citations omitted).

4. The Lower Court Erred In Finding That This Eighth Amendment Claim is *Res Judicata*.

The Georgia Supreme Court's finding with respect to this claim is erroneous for at least two reasons. The Court first claims that because the challenge was procedurally defaulted at the time that Mr. Lawler first raised it in conjunction with his state habeas corpus proceedings in 2006, it therefore remains procedurally barred today. That is incorrect. An Eighth Amendment challenge like the instant one is not static—what may have been constitutional in 2000 (the time of Mr.

Lawler's original trial) or in 2006 (the time of his state habeas proceedings) might very well be unconstitutional *today*. Indeed, this Court has aptly demonstrated just that. In 1989, the Court found that executing someone who was intellectually disabled[19] did not violate the Eighth Amendment. *Penry v. Lynaugh*, *supra*. Thirteen years later, the Court found that community standards had evolved such that the Constitution would no longer tolerate the execution of the intellectually disabled. *Atkins v. Virginia*, *supra*.[20] Thus, the claim was not barred by default at the time it was first raised in 2006 and it is not so today. The claim rests upon *present-day* standards of decency.

V. CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court stay his execution, issue a writ of *certiorari* to the Supreme Court of Georgia, reverse the decision of that court and vacate his sentence of death. In the alternative, Petitioner asks that this Court stay his execution, issue a writ of *certiorari* and remand his case to the Georgia Supreme Court for further development of the facts in support of his claims.

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[19] In 1989, the term used was "mentally retarded." Since that time the psychological/psychiatric community has replaced that term with "intellectually disabled."

[20] *Compare Booth v. Maryland*, 482 U.S. 496 (1987) (victim impact evidence is unconstitutional) and *Payne v. Tennessee*, 501 U.S. 808 (1991) (victim impact evidence is constitutional).

Respectfully submitted this, the 19th day of October, 2016.

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