No. 13-_____

IN THE SUPREME COURT OF THE UNITED STATES

DEMARCUS ALI SEARS,

Petitioner,

-v-

BRUCE CHATMAN, Warden,
Georgia Diagnostic and
Classification Prison,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Georgia Supreme Court, on return from remand following this Court's decision in *Sears v. Upton,* 561 U.S. ___, 130 S.Ct. 3259 (2010), violate both this Court's mandate and Petitioner's Sixth and Fourteenth Amendment rights, by (A) revisiting the first prong of *Strickland v. Washington,* 466 U.S. 688 (1984), deficient performance by counsel, and (B) finding that trial counsel's performance was constitutionally adequate?

2. Did the Georgia Supreme Court violate both this Court's mandate and Petitioner's Sixth and Fourteenth Amendment rights by failing to properly weigh the evidence that Petitioner was prejudiced by his trial counsel's performance in satisfaction of the second prong of *Strickland v. Washington,* 466 U.S. 688 (1984)?

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APPENDIX C	August 16, 2011	Unpublished opinion of the Superior Court of Butts County, Georgia (Judge Turner, sitting by designation), denying relief on remand, including as an attachment the unpublished opinion of the Superior Court of Butts County (Judge Girardeau, sitting by designation) dated January 7, 2008
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TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

CONSTITUTION

DISCLOSURE OF PARTIES

All parties to the proceedings in the Supreme Court of Georgia are reflected in the caption hereto.

No. 13-_____

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner, DEMARCUS A. SEARS, respectfully petitions this Court to review the November 18, 2013 decision of the Supreme Court of Georgia affirming the August 15, 2011 final judgment of the Superior Court of Butts County, Georgia (hereinafter "2011 Order") on return from remand from this Court. *See Sears v. Upton,* 561 U.S. ___, 130 S.Ct. 3259 (2010). This Court's 2010 decision in *Sears v. Upton* found that, in a 2008 final judgment (hereinafter "2008 Order"), the Superior Court of Butts County had misapplied the second prong of *Strickland v. Washington,* 466 U.S. 688 (1984) – prejudice to the outcome of the proceedings – to Mr. Sears' Sixth Amendment ineffective assistance of counsel claim. This Court held that though the 2008 Order had "unsurprisingly…concluded that Sears had demonstrated his

counsel's penalty phase investigation was constitutionally deficient," *id.* at 3264, the lower court "did not correctly conceptualize how [the *Strickland v. Washington* prejudice] standard applies to the circumstances of this case," and more fundamentally, "failed to apply the proper prejudice inquiry." *Id.* at 3265-66. Consequently, this Court vacated the lower court judgment and remanded the case "for further proceedings not inconsistent with" the opinion in *Sears v. Upton.*

The Georgia Supreme Court failed to abide by that directive, ultimately entering an opinion that was *inconsistent* with this Court's *Sears* opinion in every vital respect. *See Sears v. Humphrey,* 294 Ga. 117, 751 S.E.2d 365 (Nov. 18, 2013). First, the Georgia Supreme Court revisited the issue of counsel's performance under *Strickland*'s first prong and determined that it was constitutionally adequate, though the deficiency of counsel's investigation had been determined years prior, and in spite of this Court's observance that that legal question had been correctly resolved. *See, Sears,* at 3261, 3264, 3266 n.12 (referring to counsel's performance as "facially deficient," and as a "facially inadequate mitigation investigation"). The court then parlayed its determination that trial counsel acted reasonably into a basis for rejecting (and failing to weigh) much of the mitigating evidence adduced in the habeas proceedings.

As crucially, the Georgia courts failed to conduct the analysis of prejudice specifically directed by this Court's remanding opinion. Despite explicit guidance from this Court, the Supreme Court of Georgia failed to accord weight to the uncontroverted evidence that Petitioner suffers from frontal lobe brain impairment and psychiatric disturbances; and the court discounted the value of other mitigating evidence upon bases that were specifically rejected by a majority of this Court in its remanding decision. The Georgia court further failed to weigh the totality of the mitigating evidence – e.g., the substantial evidence adduced in the habeas court together with the compelling evidence of Petitioner's youth and non-violent history adduced at his trial – in order

to resolve the legal question of prejudice. The resultant opinion stands in direct contravention of this Court's decisions in *Sears v. Upton, ibid*, *Porter v. McCollum,* 558 U.S. 30 (2009); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); and *Gregg v. Georgia*, 428 U.S. 153 (1976).

In short, the Georgia courts exceeded the authority conferred by this Court's mandate, acted in contravention of this Court's mandate, and failed to conduct the requisite weighing of penalty phase evidence consistent with the governing decisions of this Court. The State of Georgia has continued to deny Petitioner his Sixth Amendment right to counsel, and thus has failed to ensure that his sentence of death is worthy of confidence. This Court's intercession is once again necessary.

I. JURISDICTION AND OPINIONS BELOW

Jurisdiction is invoked under 28 U.S.C. § 1257 (a). *See Yates v. Aiken*, 484 U.S. 211, 214 (1988). Petitioner asserted throughout the proceedings below and now again asserts that he has been deprived of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The Supreme Court of Georgia entered a final judgment denying Petitioner's appeal on November 18, 2013 (hereinafter, the "opinion"). *See* Appendix A. That decision followed an unpublished order of the Supreme Court of Georgia granting Petitioner a certificate of probable cause to appeal entered on January 7, 2013. *See* Appendix B.

The unpublished opinion of the Superior Court of Butts County, Georgia, Judge Turner sitting by designation, denying Petitioner relief on remand (the "2011 Order") was entered August 15, 2011. *See* Appendix C. The 2011 Order includes as an Appendix the unpublished opinion of the Superior Court of Butts County, Georgia, Judge Girardeau sitting by designation,

entered on January 9, 2008 (the "2008 Order"). The 2008 Order was that judgment originally before the Court in *Sears v. Upton.*

A true copy of this Court's opinion remanding the cause to the Justices of the Supreme Court of Georgia on June 29, 2010, is attached as Appendix D.

The October 4, 2010 Order of the Supreme Court of Georgia remanding the cause to the Superior Court of Butts County is attached as Appendix E. Appendix F reflects that Petitioner raised the Questions Presented in the state court proceedings below.

II. CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. Art III, Section 1:

> The judicial power of the United States shall be vested in one supreme Court and in such inferior courts as the Congress may from time to time establish.

The Sixth Amendment to the U.S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defense. U.S. CONST. Amendment VI;

The Eighth Amendment to the Constitution:

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. Amendment VIII;

The Fourteenth Amendment to the Constitution:

> [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. STATEMENT OF THE CASE

Petitioner seeks a Writ of Certiorari to review a final decision of the Georgia Supreme Court finding that Petitioner, Demarcus Sears, is not entitled to relief upon his claim that he was denied the effective assistance of counsel at his 1993 capital sentencing. The Georgia Supreme

Court's review and resultant decision were undertaken pursuant to the remanding authority of this Court, which, in 2010, directed the Georgia courts to conduct "proceedings not inconsistent with the opinion of this Court." *Sears v. Upton,* 130 S.Ct. 3259, 3267 (2010). Nevertheless, the Georgia Supreme Court deviated substantially from this Court's mandate, and Petitioner again must seek certiorari review from this Court. A brief review of the factual and procedural background informs the issues now before the Court.

A. Petitioner's Trial and Direct Appeal

Demarcus Sears and a codefendant, Phillip Williams, were arrested for the October 1990 abduction of Gloria Wilbur from a Cobb County, Georgia grocery store parking lot. Ms. Wilbur was subsequently murdered near the side of the highway in Kentucky after being driven north along Interstate 75 by Williams and Sears. Upon his arrest in Hamilton County, Ohio, Mr. Sears gave a statement admitting his role in the abduction, rape, and murder of Wilbur, but indicating that it was Williams who had initially approached, battered, and car-jacked Wilbur as she approached her vehicle in the parking lot.

The Cobb County District Attorney filed a Notice of Intent to Seek the Death Penalty and local attorneys Ray B. Gary, Jr. and J. Michael Treadaway were appointed to represent Mr. Sears. Williams entered a plea agreement and was the key witness at trial. He testified that Mr. Sears was responsible for the abduction and murder of Ms. Wilbur. TT 2116-26. In response, the defense attempted to demonstrate it was Williams, not Sears, who was responsible for the initial abduction. TT 1627, 2130-37, HT 4860-61. Mr. Sears was convicted of kidnapping with bodily injury and armed robbery.

During a penalty phase that lasted less than a day, trial counsel presented seven witnesses they had met at a gathering arranged by Mr. Sears' mother in Ohio two years earlier. His mother

was the only family member among the seven witnesses who testified. All the witnesses testified that Mr. Sears, who was eighteen years old at the time of the crime, was essentially a normal teenager, that they were shocked to learn the crimes he stood accused of, and that his execution would have a hurtful impact on the Sears family.

Despite the paucity of mitigation evidence, the jury deliberated over three days, and sent repeated notes to the trial court, including two notes expressing that they were hopelessly deadlocked. TT. 2561, 2673, 2587-89, 2604-2611. After repeatedly being instructed to continue deliberations, the jury returned a death sentence on September 25, 1993. The Georgia Supreme Court affirmed Mr. Sears' convictions, *Sears v. State*, S.E.2d (Ga. 1997), and later his sentence. *Sears v. State,* S.E.2d (Ga. 1999).

B. The State Habeas Corpus Proceedings

Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County alleging, *inter alia,* that his trial counsel provided constitutionally ineffective assistance in failing to perform a reasonably thorough investigation for mitigating evidence in preparation for the penalty phase of his trial. With the assistance of undersigned *pro bono publico* counsel, Petitioner conducted discovery and presented evidence in support of his claims at an evidentiary hearing held before the Superior Court, Judge Girardeau, on January 19, 2006. The evidence included testimony by deposition and by affidavit from trial counsel, as well as records and testimony concerning Mr. Sears' background and mental health.

1. <u>The Evidence of Mr. Sears' Frontal Lobe Brain Damage and Psychological Impairments</u>

The mental health evidence showed that Mr. Sears suffers from 1) a focal impairment of the frontal lobes of his brain, 2) major depression and an anxiety disorder, and 3) a psychiatric disturbance characterized by extreme impulsiveness, inappropriate affect, grandiose and magical

thinking, and a tenuous connection with reality. P. Ex. 3, HT 245, 273. Each of these disorders is exacerbated when Mr. Sears is under stress, and each compounds the effects of the others. P. Ex. 3, HT 273. The uncontroverted evidence adduced at the habeas evidentiary hearing is that these impairments existed at the time of his trial, and an evaluation by any appropriately qualified professional would have alerted trial counsel to their existence. HT 81-84, P. Ex. 1, HT 150; P. Ex. 3, HT 245, 275-277.

Both the psychiatrist, Dr. Richard Dudley, and the neuropsychologist, Dr. Tony Strickland, who examined Mr. Sears testified that his neurological impairment was obvious upon evaluation, and both were struck by the severity of his symptoms. Dr. Dudley observed that Petitioner "lacked forethought and judgment, was unable to identify relevant possibilities or options when presented with a problem, was unable to organize or weigh alternatives even when [presented with] varying choices/answers," that "his discourse was overly spontaneous and tangential," that "much of his behavior was oddly inappropriate," and that "his mood was labile and he was easily agitated." P. Ex. 3, HT 246.

Dr. Strickland conducted a neurological assessment of Mr. Sears over two days, observing and testing him for a period of between 12-16 hours. HT 32; P. Ex. 2, HT 219. Dr. Strickland also observed clear signs of neurological impairment during his examination, including concreteness of thought, compromised thought, and the inability to carry out simple sequenced tasks. P. Ex. 2, HT 220, 229. Dr. Strickland administered a standard battery of neuropsychological tests that revealed "results [that] are consistent with significant frontal lobe abnormalities." P. Ex. 1, HT 147. Dr. Strickland testified before the state habeas court that the pattern of behavior for persons with frontal lobe damage is incredibly predictable:

> Frontal lobes are extraordinarily important in the sense that they associate with one's capacity to comport their behavior to rules of

> society, to plan. Patients who have deficits in the frontal lobe don't plan well. Patients who have lesions or pathology in the frontal lobe don't sequence well...There is a lot of impulsivity in patients who have frontal lesions.

P. Ex. 2, HT 224-25.

Dr. Strickland's psychometric testing provides strong objective evidence of localized damage to Mr. Sears' brain. Mr. Sears' scores revealed drastic inabilities in nearly every area of executive functioning tested. P. Ex. 2, HT 228. As this Court previously noted, on one measure of Mr. Sears' ability to inhibit his reactions to inappropriate stimuli, his score placed him in the 0.04 percentile, a score not only in the severely-impaired range but which reflects that well over 99% of Mr. Sears' same-age peers have more ability to inhibit their impulses. HT 37; P. Ex. 1, HT 148. Mr. Sears' score similarly fell below the first percentile on a test which measures the ability to maintain concentration and shift his focus between competing stimuli.[1] HT 38. As a whole, the testing reveals that Mr. Sears' "biggest challenge is one of impulsivity, poor planning, poor judgment and a compromise in autonomy." HT 43. The pattern revealed on the standardized test battery demonstrated that Mr. Sears possesses "a marginal capacity for reflection and decision-making, particularly when faced with distracting stimuli. His ability to organize his choices, assign them relative weight and select among them in a deliberate way is grossly impaired. He instead reacts to problems impulsively and becomes disorganized and confused." *Id.* at 149.

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[1] Dr. Strickland testified that "Mr. Sears' frontal lobe deficits are most prominent on clinical observation and on measures sensitive to executive functioning: the Stroop Color and Word Test, the Trail Making Tests (both A&B) and the Symbol Modalities Test." HT 147-48. His scores on the Stroop test "fell below the first percentile, making him among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior to relevant stimuli." *Id.* Petitioner's performance on the Trail Making B test "was again dramatically weak, and placed him at the first percentile." On the Auditory Consonant Trigrams Test, "the patient's performance was in the range of severe impairment." *Id.* at 148-49.

With respect to the focal nature of the impairment, Dr. Strickland testified that on "many measures [his] brain function performance was in average (as with memory) or above average (as with tests of language) ranges. Furthermore, it was only with respect to measures of executive function where clinically significant impairments were noted, a profile Dr. Strickland testified was "difficult for the lay person to fake." HT 25.

Dr. Strickland found both clinically and in terms of test data that Mr. Sears has "significant problems in planning, sequencing, set-shifting, problem solving and impulse inhibition." HT 173-74. Dr. Strickland reported that such deficits are seen commonly in "significant traumatic brain injury as well as secondary to the extensive use of drugs of abuse." HT 175. He explained that "[f]ourteen years after the commission of the offense, Mr. Sears continues to demonstrate significant deficits in the frontal/executive area. A reasonable conclusion is that, given likely recovery curves, his deficits in 1990 were far more severe than demonstrated in this evaluation." HT 175. In other words, "[t]he level of impulsivity, the level of poor planning, the level of inability to exercise good judgment would have been much more pronounced." Pet Ex. 2, HT 227.

Several indicators also confirmed the brain damage revealed in the testing: Dr. Strickland testified that Mr. Sears' pattern of speech, his judgment as reflected in discussions of various situations and alternatives, as well as Mr. Sears' overall pace and approach to the various tests were wholly consistent with his expectations of a patient with organic frontal lobe damage. HT 81-84. Mr. Sears' school and psychological records also document a significant learning disability and his placement in behavioral handicap classes as early as grade three. HT 44. Substantial anxiety is documented throughout his school and institutional records, including a

diagnosis by professionals in Mr. Sears' current correctional setting of an anxiety disorder with significant obsessive compulsive traits. P. Ex.2, HT 218, P. Ex. 12.

Finally, the frontal lobe abnormality Mr. Sears exhibited can be tied to his history of injuries to those specific areas of the brain. Mr. Sears suffered direct traumatic insults to the front of his skull during childhood, resulting in a prominent scar on his temple and another on his left forehead. Pet. Ex. 3, HT 245; HT 33, P. Ex. 1, HT 150, P. Ex. 2, HT 67, P. Ex. 19, HT 1620, P. Ex. 22, HT 1651, P. Ex. 24, HT 1666, P. Ex. 25, HT 1671, HT 33. The consequences of these injuries were then exacerbated by chemical insults to his frontal lobes when Mr. Sears ingested cocaine as an adolescent. HT 73; P. Ex. 1, HT 150. The pathology of Mr. Sears' frontal lobes is so glaring because of the cross-convergence of these multiple sources of data. P. Ex. 2 at HT 228. Due to the consistency of so many and such varied sources, Dr. Strickland concluded that there is "little to no chance" that Mr. Sears is malingering. P. Ex. 2, HT 226. **All sources, independently and collectively**, provided "clear and compelling evidence for pronounced frontal lobe pathology." HT 68.

Mr. Sears' brain damage also was confirmed by Dr. Dudley, a psychiatrist who examined him over the course of three days, and separately interviewed both parents and a maternal aunt. Dr. Dudley testified that Petitioner exhibited the signs of substantial neurological impairment as well as a number of psychiatric problems. He concluded that the cumulative effect of Mr. Sears' organic brain damage and his psychiatric disturbances is "profoundly debilitating," and summarized his findings as follows:

> [Mr. Sears] exhibits extreme impulsivity, drastically impaired executive functioning, inappropriate affect, mood disturbance and grandiose thinking that is so severe that his contact with reality is at times tenuous.

Id. at 245.

Dr. Dudley's findings were well-supported by collateral sources and his testimony before the state habeas court made clear that Mr. Sears' symptoms would have been apparent upon examination at the time of trial:

> Though Mr. Sears seemed considerably motivated to portray himself as high functioning, a number of profound psychiatric problems became apparent during our meeting. Most notably, much of Mr. Sears' discourse implicated serious neurological impairment: he lacked forethought and judgment, was unable to identify relevant possibilities or options when presented with a problem, was unable to organize or weigh alternatives even when I suggested varying choices/answers, and his discourse tended to be overly spontaneous and tangential. In addition, much of his behavior was oddly inappropriate.

Id. at 246.

> Second, it became obvious that Mr. Sears' thinking was distorted. He exhibited substantial grandiosity. He regards himself as uniquely savvy, even when questioned or confronted with clear evidence of his past failures in judgment or the reality of his present confinement on death row. He ascribes to a notion of himself as "special" and believes that he has needs and thoughts that no one else does and that others are incapable of understanding. Much of his grandiosity is centered on his importance to others, his sexual prowess or his unique status as a target or victim. In addition, during our interview, he told a number of stories that were wildly fantastic and implausible.

Id.; accord P. Ex.1, HT 149.

The depression, anxiety and vacillation in Mr. Sears' emotional state were also captured on standardized neuropsychological measures administered by Dr. Strickland. Mr. Sears' depression and anxiety scores were so elevated that Dr. Strickland concluded he is likely "plagued by extreme distress, emotional instability and low self-worth," and has "difficulty managing his emotional states and relating to others." P. Ex. 1, HT 149.

Dr. Dudley testified that, owing to this impairment, Petitioner never achieved the mental function substrates necessary for adult thinking that are expected to develop during adolescence,

HT 95-96, 114, and that Petitioner is "really like a much younger child who never gets those sorts of capacities." HT 351-53. Dr. Dudley testified that much of Petitioner's discourse has a tenuous connection with reality and that he engages in fantastic, grandiose, and narcissistic fantasies, a psychological device designed to cope with overwhelming feelings of inadequacy and a lack of self-worth. P. Ex. 3, HT 245, 273. Dr. Dudley interviewed Sears concerning the crime, HT 124-32, 357-59, and found an absence of deliberative decision-making on Mr. Sears' part at the time of the crime. HT 129-131; P. Ex. 3, HT 357-59. Like Dr. Strickland, Dr. Dudley concluded that Petitioner was suffering from the behavioral implications of his impairments at the time of the crime. HT 369. His review of Petitioner's audiotaped statement to law enforcement upon arrest confirmed that opinion. HT 115.

2. The Evidence of Petitioner's Troubled Background

The evidence adduced before the habeas court also shows that throughout Mr. Sears' early childhood, his parents had repeated physical fights in front of the children. Mr. Sears' father made cruel and embarrassing comments about his mother in front of the children – including once telling family members that he "never would have married a b**** like [Mr. Sears' mother] if he had not been in a wheel chair." P. Exs. 20 , HT 1633; 21, HT 1637. Mr. Sears' mother similarly minced no words to spare her husband's feelings, and she was inappropriately flirtatious and openly conducted extra-marital affairs throughout Mr. Sears' childhood. P. Exs. 20, HT 1633; 21, HT 1637-1638; 22, HT 1647; 27, HT 1689-90; 28, HT 1693. Mr. Sears' parents' frequent arguments would devolve into "screaming-knock-down-drag-out-fights," and they eventually separated following a fight which involved a knife. P. Ex. 21, HT 1639; 24, HT 1667; 26, HT 1676-77, 1679.

Mr. Sears and his brother were often left in the care of an adolescent male cousin who sexually abused them. P. Exs. 24, HT 1665, 1667; 26, HT 1681; 28, HT 1681-1682; 1696; 29,

HT 1700; 30, HT 1704. Furthermore, both of his parents physically disciplined Mr. Sears. His mother beat him with objects and his father disciplined him with severe and age-inappropriate military-style drills. HT 263-64, 1622, 1651, 1694, 1721; P. Exs. 27, HT 1690; 18, HT 1614; 25, HT 1669; 26, HT 1677; 33, HT 1721; 22, HT 1651; 28, HT 1694; 32, HT 1715).

The effects of Mr. Sears' cognitive impairment and unhealthy home environment were apparent at least as early as the third grade, when his teachers referred him for evaluation at the community health center. P. Ex. 7, HT 502-511; P. Ex. 9, HT 541-551. As documented in his school and health center records – records that the state habeas court found trial counsel did not gather – nine-year-old Mr. Sears lacked self-confidence and struggled to follow directions, with one examiner noting that Mr. Sears had an "overbearing" father with "unrealistic expectations" for his learning-disabled son. P. Ex. 7, HT 505, 508; P. Ex. 9, HT 546.

In 1983, Mr. Sears' mother Virginia divorced his father and moved to North Carolina with the children and her new boyfriend. Eleven-year old Demarcus saw that this relationship was also tumultuous and violent. P. Exs. 13, HT 1095; 19, HT 1624; 20, HT 1633; 21, HT 1640; 22, HT 1654-55; 25, HT 1672; 32, HT 1717; 33, HT 1722. His parents reunited after only a short time and Virginia and the children moved back to Cincinnati, but the violence between Mr. Sears' parents escalated to the degree that the children remember fighting as their only interaction. P. Ex. 19, HT 1624; P. Ex. 21, HT 1639; P. Ex. 32, HT 1713; P. Ex. 33, HT 1721.

When Mr. Sears reached high school, he was again evaluated, and this time placed in the Severe Behavioral Handicap Unit. Teachers testified before the state habeas court that this placement occurs only after "observation of long term problems by school personnel" and the consensus of a committee which includes teachers, a psychologist and the student's parents. P. Ex. 34B, HT 1736. Mr. Sears' teachers also testified that he came to the first class of each day

agitated and requiring substantial one on one attention to quell his anxiety. P. Ex. 34-A, HT 1728; P. Ex. 36, HT 1741, 1743. When school officials and teachers called his father to the school to brain-storm solutions to his academic problems, his father berated Mr. Sears for his ineptitude in front of the entire group. P. Ex. 37, HT 1746-47. His father pulled Mr. Sears out of the Severe Behavioral Handicap Program, and the result was described by one educator as a "disaster." *Id.* at 1747; P. Ex. 36, 1743; P. Ex. 34-A, HT 1729.

By the time of Mr. Sears' early adolescence, the Sears household was characterized by gross permissiveness. P. Ex. 26, HT 1683-84. Mr. Sears' older brother was firmly entrenched in the drug trade; he cooked and sold drugs in the family home. P. Ex. 26, HT 1684-85; P. Ex. 28, HT 1695; P. Ex. 38, HT 1752. Mr. Sears' father willfully ignored the brother's illegal behavior and his mother occasionally siphoned his drug profits for her own use. P. Ex. 26, HT P. Ex. 28, HT 1695-96; P. Ex. 30 at HT 1702; P. Ex. 38, HT 1752. Demarcus Sears would eventually give up on high school not once, but twice. P. Ex. 9, HT 526, 531. It was at this vulnerable time that he was befriended by codefendant Phillip Williams, an equally troubled young man with a history of delinquency. Jurors heard no evidence of this difficult history nor of Mr. Sears' severe cognitive and psychiatric impairments described above.

3. The State Court Judgment

On January 9, 2008, the Superior Court entered an Order denying relief on each of Mr. Sears' claims for relief (the 2008 Order). In the 2008 Order, which would subsequently become the subject of this Court's review in *Sears v. Upton,* the Superior Court outlined the circumstances of counsel's penalty phase investigation as reflected in the record before it.

Applying *Strickland*'s first prong,[2] the court determined that counsel's course of action was "on its face...not a thorough investigation and is constitutionally inadequate." *See* Appendix C, 2008 Order at 27. With respect to *Strickland*'s second prong – prejudice to the outcome of the proceedings – the court concluded that "it was just not possible to know what effect a different mitigation theory would have had...on...jurors." *Id.* at 30. The Court held that "because trial counsel put forth a reasonable theory with supporting evidence, Mr. Sears has failed to meet his burden of proving that there is a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced." *Id.*

The Supreme Court of Georgia was given an opportunity to review both holdings – that counsel performed deficiently and that Petitioner was not sufficiently prejudiced thereby – when Petitioner sought that Court's discretionary review in 2008. The Georgia Supreme Court declined review, finding that Petitioner's claims lacked "arguable merit." *See* Georgia Supreme Court Rule 36; *Sears v. Humphrey,* 751 S.E.2d 365, 367 (Ga. 2013).

C. *Sears v. Upton*

In 2010, Mr. Sears petitioned this Court for a Writ of Certiorari to review the state court's judgment and review was granted. In *Sears v. Upton*, this Court identified two categories of mitigation evidence that, "[b]ecause [Petitioner's trial counsel] failed to conduct an adequate mitigation investigation," was not "known to Sears' trial counsel" and "emerged only during state postconviction relief." 130 S.Ct. at 3264. First, this Court found that the mitigation

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[2] *Strickland v. Washington*, 466 U.S. 668, 687 (1984), provides a two-pronged test for determining whether a criminal defendant has received the effective assistance of counsel: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

evidence that emerged during the state postconviction proceedings revealed that Mr. Sears was reared in a home plagued by his parents' discordant and physically abusive relationship, that Sears had been subjected to sexual abuse at the hands of a cousin/babysitter, and that Sears "struggled in school, demonstrating substantial behavioral problems from a young age." 130 S.Ct. at 3262 (record citations omitted).

Second, this Court found that "evidence produced during the state postconviction relief process also revealed that Sears suffered 'significant frontal lobe abnormalities,'" that expert testimony associated these abnormalities with "substantial deficits in mental cognition and reasoning, including planning, sequencing and impulse control," and that "[r]egardless of the cause of his brain damage, his scores on at least two standardized assessment tests placed him at or below the first percentile in several categories of adult functioning 'making him among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior to relevant stimuli.'" 130 S.Ct. at 3262-63 (record citations omitted).

This Court then identified two errors in the 2008 Order's analysis of the prejudice flowing from the violation of Mr. Sears' Sixth Amendment right to counsel. First, the 2008 Order placed undue reliance on the purported reasonableness of a mitigation theory adopted after a facially-inadequate penalty phase investigation. This Court found that the 2008 Order failed to apply the proper prejudice inquiry because it deemed the original mitigation case to have been "reasonable." *Sears,* 130 S.Ct. at 3264-65.

This Court reaffirmed that the approach taken in the 2008 Order was not a correct application of the *Strickland* principles. Once deficiency has been correctly found, a court must "consider the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – and reweig[h] it against the evidence in

aggravation." 130 S.Ct. at 3266 (citing *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 453-454 (2009)). Thus, a proper analysis of prejudice under *Strickland* "would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation." 130 S.Ct. at 3267. Accordingly, the "judgment below [was] vacated, and the case ... remanded for further proceedings not inconsistent with [the *Sears v. Upton*] opinion." 130 S.Ct. at 3266.

D. The Proceedings in the Superior Court of Butts County on Remand

Following this Court's decision, the Georgia Supreme Court vacated its September 28, 2009 order denying Petitioner an Application for a Certificate of Probable Cause to Appeal and vacated the 2008 Superior Court judgment denying Mr. Sears' Petition for Habeas Corpus. *See* Appendix E. The Court remanded the case to the lower court for proceedings not inconsistent with this Court's decision in *Sears v. Upton*.

Following the assignment of a new judge, the prior judge having taken senior status, the Superior Court of Butts County ordered briefing and argument on Petitioner's Sixth Amendment claim. The Court took no new evidence.

On August 15, 2011, the Superior Court issued its decision. *See* Appendix C. On the same record that was before this Court the prior year, the Superior Court held that "petitioner failed to prove that he was prejudiced in any way by trial counsel's performance." *See* Appendix C, 2011 Order, at 2. The 2011 Order began by declaring that the "United States Supreme Court only criticized the state habeas court's prejudice analysis with regard to his ineffective assistance of counsel claim; however, by vacating the entire judgment, this Court must now rule on all of

the claims presented in Petitioner's original and amended petitions." 2011 Order at 3. The 2011 Order then adopted "the original findings of the previous state habeas court with regard to all claims except Petitioner's claim that he received ineffective assistance of counsel." *Id.* at 3.

Thus, the 2011 Order effectively *excises* the portion of the 2008 Order wherein the court identified and applied the principles governing counsel's duty to conduct a diligent investigation into the client's background for "all reasonably available mitigating evidence" and inserted its own determination that trial counsel had fallen short of their constitutional obligations. 2008 Order at 25, quoting *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2002). On the same undisputed record as was before the same court in 2008, the 2011 Order stated that "while not specifically ruling on counsel's performance, this Court makes some findings of fact regarding trial counsel's performance that are evident based on a review of the record in order to adequately address and analyze the prejudice component of petitioner's ineffective assistance of counsel claim." Thereupon, the 2011 Order found "that trial counsel contemplated getting petitioner evaluated by a mental health expert, but felt constrained by the ruling in *Sabel*[3] that they would be forced to turn over the evaluation to the State even if they decided not to use the expert..." and that "without any indication that Petitioner was suffering from any significant, noticeable disorder, this Court finds that it was a reasonable, strategic

[3] *Sabel v. State*, 282 S.E.2d 61, 68-69 (Ga. 1981), required that, if an indigent defendant enlisted the assistance of an expert at government expense, the findings of that expert must be put in writing and made available to the prosecution, regardless of whether the witness testified on the defendant's behalf. *Sabel* further provided the prosecution could secure an instruction that the jury was permitted to draw an inference adverse to the defendant if the expert did not testify. *Rower v. State*, 443 S.E.2d 839 (Ga. 1994), overruled *Sabel*, finding that the *Sabel* doctrine violates an indigent defendant's right to due process of law and equal protection. Petitioner was unable to obtain relief under *Rower* because his trial counsel had withdrawn their motion for funds to retain a psychiatrist and the Georgia Supreme Court found on direct appeal that Petitioner "failed to show any chilling effect or other harm from the ruling that he must give the name of his experts to the state." *Sears v. State*, 761, 493 S.E.2d 180, 183 (Ga. 1997).

decision made by counsel and Petitioner not to have Petitioner evaluated." 2011 Order at 11. Accordingly, the 2011 Order does not give any further consideration to the results of the clinical evaluations of Mr. Sears by Dr. Dudley and Dr. Strickland or their probable mitigating effect.[4] Then, finding the evidence of developmental abuse did not rival the horrific abuse documented in *Porter v. McCollum*, 558 U.S. 30 (2009), *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), or *Williams v. Taylor*, 529 U.S. 362 (2000), the 2011 Order found no prejudice.

E. The November 2013 Decision of the Georgia Supreme Court

Petitioner filed a timely notice of appeal from the 2011 Order and, on January 7, 2013, the Georgia Supreme Court issued a certificate of probable cause to appeal, three justices dissenting. *See* Appendix B. The resulting decision on appeal affirmed the 2011 Order, resolving Petitioner's ineffectiveness claim on grounds wholly inconsistent with this Court's 2010 remanding decision. *See* Appendix A. The November 18, 2013 decision of the Supreme Court of Georgia illegitimately revisited the question of counsel's performance and yet failed to conduct the reweighing of prejudice in the manner proscribed by this Court.

The court first held, without referencing any order or precedent so providing, that "the 2008 Order was vacated, which means that it was nullified or cancelled," and that therefore no binding findings from that Order remain with respect to counsel's performance nor with respect to any other matter. *Id.* at 371.[5] The Georgia court further concluded that this Court, in deciding

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[4] The Order made the finding that the "the experts relied almost exclusively on affidavits…" 2011 Order at 19. This finding is wholly unsupported by the record. The Order then concludes that "without concrete evidence to support the psychological findings presented at the habeas hearing, there is no reasonable probability that the jury would recommend a different sentence." Order at 16.

[5] The *Sears v. Upton* opinion and mandate provides for vacating the *judgment* rendered on the

Sears v. Upton, had not "disposed of" the legal question of *Strickland*'s first prong, but only "assumed the correctness" of the 2008 ruling on performance. *Id.* at 370. Thus, according to the Georgia court, it was bound by no prior ruling with respect to *Strickland*'s first prong. Then, without any discussion of the legal standards governing counsel's duties in a capital case, the court turned to trial counsel's actions in preparation for trial and found that counsel's performance was reasonable and hence, constitutionally adequate.[6] *Id.* at 376-77.

The Georgia Supreme Court similarly acted without regard to this Court's mandate in resolving *Strickland*'s second prong. The 2013 opinion repeatedly ignored, and acted in contravention of, the appropriate application of *Strickland* principles outlined in *Sears v. Upton.* The court dismissed much of the evidence of Petitioner's childhood home as tainted with aggravating potential, while ignoring that those grounds were addressed and rejected in this Court's mandate. For example, the court made no mention of, much less weighed, this Court's finding that the notionally-adverse aspects of the mitigation case, such as the fact that Petitioner's brother was a drug dealer and convicted felon, were susceptible to being "turned into a positive," and that, on the whole, the mitigation evidence would help the jury "understand Sears, and his horrific acts." 130 S.Ct. at 3264. Then, after making the unsupported and

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habeas corpus claim, not the 2008 Order or its findings. The only *order* the *Sears v. Upton* mandate vacated was the order denying Petitioner's Application for a Certificate of Probable Cause to Appeal the 2008 Order.

[6] Although stating that its determination that there was no deficient performance of counsel is an entirely independent ground to deny relief, there is an interdependence between this errant determination that counsel performed reasonably and the subsequent determination that Petitioner was not prejudiced. After endorsing the lower court's finding that trial counsel made a reasonable, strategic decision not to have Mr. Sears evaluated by a mental health professional, which resulted in the lower court largely disregarding the expert testing and evaluation, the Georgia Supreme Court, in turning to the question of prejudice, defers to the lower court's findings that Petitioner's mental health evidence was "weak," a conclusion reached without consideration of the testing and evaluation of Petitioner. *Sears*, 751 S.E.2d at 391.

unspecified finding that some of the evidence would have been inadmissible, the Georgia court ultimately concluded that because the circumstances of Petitioner's upbringing were not so horrific as those present in *Porter*, *Rompilla*, *Wiggins*, or *Williams*, no prejudice could be shown.[7] The court wholly failed to address the probable impact of the life history evidence together with the evidence of Petitioner's age, non-violent personal history, compelling cognitive impairment and psychological problems.

The court similarly disposed of the mental health evidence on bases explicitly disavowed by this Court. The court *never* addressed the mitigating nature of Petitioner's evidence that he suffers "significant frontal lobe abnormalities," as directed by this Court. After noting only that the evidence revealed "some brain impairment and mental health problems," the court concluded, *inter alia*, that:

- the evidence of brain impairment and mental illness was "weak" in light of the purported unreliability of the sources upon which experts relied, such as the affidavit testimony of Petitioner's family members;
- the evidence of Petitioner's impairments and their impact on his behavior would have been viewed as aggravating by jurors, while making no mention of the fact that the aggravating aspects of Petitioner's behavior and affect were already known to jurors; and
- the evidence was unreliable because it was purportedly inconsistent with the "false portrait" of Petitioner painted at trial as a result of counsel's constitutionally-inadequate investigation; and that
- Petitioner's case is analogous to those cases denying habeas corpus relief where the new mental health evidence was unfounded and/or refuted by competent expert testimony on behalf of the government.

Though each of these critiques was squarely confronted and rejected by this Court in its remanding decision, the Georgia Supreme Court's 2013 opinion makes no mention of that

[7] The opinion adopts Respondent's earlier arguments concerning the credibility of Petitioner brother's testimony concerning sexual abuse, taking no account of the finding in *Sears v. Upton* that any effort to impeach Petitioner's brother based upon his criminal lifestyle would reinforce the evidence of Petitioner's unfortunate family background. 130 S.Ct. at 3263.

analysis. Petitioner must now seek a Writ of Certiorari to the United States Supreme Court once again. This timely Petition follows.

IV. REASONS FOR GRANTING THE WRIT

Petitioner appreciates that it was unusual for this Court to review a state habeas corpus action as it did in *Sears v. Upton*. Had this Court's mandate been carried out, a reasoned decision could have been reached and, if adverse to Petitioner, protected against collateral attack in the federal courts by the provisions enacted by 28 U.S.C. §§ 2254(d)-(e).[8] That has not occurred in this case.

The decision of the Georgia Supreme Court violates this Court's mandate with respect to nearly every point of law addressed therein. As a result, Petitioner's death sentence stands though no fact-finder has ever assessed "the character and record of the individual offender" in light of "the circumstances of the particular offense." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Given that this Court has held that such an assessment is a "constitutionally indispensable part of the process of inflicting the death penalty," *id.*, Petitioner's death sentence cannot stand. This Court must grant the Writ, both to protect its own lawful judgments and to insure the reliability of the Georgia capital sentencing scheme.

A. The Georgia Supreme Court Exceeded the Authority Conferred by this Court's Mandate by Reaching the Question of Trial Counsel's Performance

Without authority, the Georgia Supreme Court entered conclusions of law directly at odds with the remanding decision of this Court by examining trial counsel's penalty phase investigation and finding that it was constitutionally adequate. The rule of law requires an

[8] Facing the expiration of a jurisdictional limitations period, Petitioner timely filed an action for federal habeas corpus relief the day before *Sears v. Upton* was decided, which has been stayed pending resolution of the state habeas corpus action. Petitioner respectfully submits that this Court, instead of a district court, should address compliance with its mandate, especially in light of the directions taken by the proceedings below.

inferior court to adhere to the mandate issued by a higher court. *NAACP v. Alabama*, 360 U.S. 240, 244-45, (1959); *Security Life Insurance Co. of America v. Clark*, 273 Ga. 44, 46-47 (2000). The mandate rule is as old as the Republic. *NAACP v. Alabama follows Martin v. Hunter's Lessee*, 1 Wheat 304 (1816); *Sibbald v. United States*, 37 U.S. 488, 492 (1838). The courts below had no authority to reexamine the sufficiency of counsel's performance.

The Georgia Supreme Court claimed it was free to engage in this analysis because, in resolving Mr. Sears' prior Petition for Writ of Certiorari, this Court "only *assumed* for the purposes of its discussion the correctness of the 2008 Order's conclusion that trial counsel conducted a 'constitutionally inadequate' investigation." *Sears*, 751 S.E.2d at 370 (internal citation omitted). This is wrong. This Court does not render advisory opinions, but reaches a constitutional question only upon necessity. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568-572 (1947). This Court could not have reached the habeas court's 2008 misapplication of the prejudice standard without first being satisfied that the constitutionally deficient performance of counsel had resulted in a failure to adduce mitigation evidence to which the correct standard should be applied.

The Georgia Supreme Court's suggestion that this Court did not "did not explicitly engage with any evidence in the record regarding trial counsel's performance" is belied by the opinion. *Sears,* 751 S.E.2d at 370. This Court's decision reflects that it had before it the entirety of the state court record, including trial counsel's deposition and affidavit testimony. Furthermore, this Court specifically referred to its statements regarding counsel's performance as its own "findings," not simply assumptions, and noted that "the 22 volumes of evidentiary hearing transcripts and submissions in the record...**spell out the findings discussed above**." 130 S. Ct. at 3266, n.12 (emphasis supplied). While this Court's decision left room for the

Georgia Supreme Court to engage with the evidence of frontal lobe impairment and troubled background in making a proper assessment of prejudice, it left no room to conclude that counsel's performance was adequate after all, obviating any need for a prejudice inquiry.[9]

The lower court's assertion that this Court "never stated that it agreed with the habeas court that the assistance rendered by Sears' trial counsel was constitutionally deficient" is flatly contradicted by Part I of the *Sears v. Upton* opinion, where the Court expressly embraces the language of the 2008 Order, as well as the last sentence of that section of the opinion. This Court further found that the 2008 ruling that counsel was deficient was "unsurprising[]" in light of the record, and thereafter referred to counsel's penalty phase efforts as "facially deficient" and observed that "[b]ecause they failed to conduct an adequate mitigation investigation, none of this [mitigating] evidence was known to Sears' trial counsel." *Sears,* 130 S.Ct. at 3264, 3266.

Given that counsel's preparation for the penalty phase was "facially deficient," the decision of the Georgia Supreme Court simply sacrifices judicial economy. Not only were judicial resources expended on the litigation of legal questions that already were the law of the case, but all future litigation must now address the findings of the four separate tribunals to have ruled in the state post-conviction proceedings. When analyzing the reasonableness of the state courts application of *Strickland* in compliance with the strictures of 28 U.S.C. § 2254(d)(1), and whether the facts were found from the record in a reasonable manner under § 2254(d)(2), future federal courts will be required to resolve the conflicts between the judgments of: (1) the 2008

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[9] The Court's assertion that neither prong of the *Strickland* analysis was "finally decided" is similarly disingenuous, given that the performance prong was "finally decided" in 2009, when the Georgia Supreme Court itself declined to review the 2008 Order of the Superior Court of Butts County, in which the state habeas court determined, on the basis of the testimony before it, that trial counsel had performed deficiently. This Court only vacated the judgment below, e.g. the final determination of the rights and obligations of the parties to the case, not the 2008 Order and the fact-findings it contained.

Order entered by the state court judge who heard the witnesses and took the evidence, (2) the 2010 remanding decision entered by the Supreme Court of the United States, (3) the subsequent 2011 Order entered by the Superior Court, and finally, (4) the 2013 opinion of the Supreme Court of Georgia, all in light of the record and in light of the clearly established federal law as contained in the precedents of this Court, including *Sears v. Upton*. That cannot be the result contemplated by this Court.

The Georgia Supreme Court adopted these stratagems – e.g., adopting "independent alternative grounds" to deny relief on a remand from this Court and posturing key findings as simply deferential review of findings of fact by the court below (entered by a judge who heard none of the evidence and expressly did not consider the testing evidence relied upon by *Sears v. Upton*) – specifically for the purpose of impeding future review. The Writ must issue to clarify that scope of the state courts' authority on remand in this and future cases.

B. The Georgia Supreme Court Denied Petitioner His Sixth Amendment Right to Counsel by Concluding that Trial Counsel's Performance in Preparation for the Penalty Phase Was Not Constitutionally Deficient

The Georgia Supreme Court spends more than six full pages recounting the purported efforts and decision-making process engaged in by trial counsel. However, the record reflects – and the 2008 Court who took the evidence properly concluded – that those efforts were limited to **less than one day interviewing witnesses selected by Mr. Sears' mother and uninformed by any records collection.** The Georgia Supreme Court's finding that this constitutes an adequate investigation for mitigating evidence is outrageous, and cannot be reconciled with this Court's decisions in *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); and *Porter v. McCollum*, 558 U.S. 30 (2009).

Trial counsel first requested funds to conduct a mitigation investigation during Mr. Sears' arraignment in May of 1991, roughly six months after his arrest. Mr. Sears' trial counsel traveled to Kentucky and Ohio for three days during the week of June 17, 1991, to interview witnesses. P. Ex. 44, HT 2164. After spending the first two days of their trip interviewing law enforcement officers and forensic examiners, P. Ex 44, HT 2166-72, trial counsel attempted to conduct the entirety of their mitigation investigation in a single day by asking Mr. Sears' mother to gather "character" witnesses whom they could interview. P. Ex. 45 at HT 2291; P. Ex. 44, HT 2151.

When trial counsel arrived, they found that Mr. Sears' father had left on a business trip but that his mother had collected some family members, friends, and community members for interviews. P. Ex. 22, HT 1657-1658. Trial counsel interviewed those witnesses in the Sears home and in the presence of Mr. Sears' mother; their contemporaneous notes reveal that their goal in these interviews was merely to locate "anybody to say something good about Demarcus." P. Ex. 44, HT 2151. The witnesses unsurprisingly did not volunteer either what they knew of the Sears' acrimonious marriage, chaotic household, personality defects, and unconventional parenting styles or how they had seen those aspects of his upbringing affect Mr. Sears. As one witness explained:

> The lawyers seemed focused on Demarcus's character as a teenager and how he related to adults before this crime, and so I focused on those issues as well. I did not want to embarrass my friend [Petitioner's mother] by talking about some very personal family issues in an unflattering way, particularly since I believed it had no bearing on my being a character witness for Demarcus, who was, just as I testified, always a personable and polite young man.

P. Ex. 27, HT 1690.

As the 2008 Order correctly found, these brief interviews constituted the whole of trial counsel's mitigation investigation. Order at 28. The 2008 Order, entered by the judge who heard the evidence, made explicit fact-findings regarding the contours of trial counsel's investigation:

> Petitioner's attorneys put many hours of work into his case: Mr. Gary 370 hours and Mr. Treadaway 443. (R. Ex. 124, HT 5067-5086). Less than 8 of each were spent interviewing potential mitigation witnesses. They traveled to Kentucky and Ohio for a week to interview potential trial and mitigation witnesses, but spent less than one day interviewing potential mitigation witnesses. They asked many questions to the family and family friends Petitioner's mother had assembled during the day they were there. They gathered useful information about the Petitioner that enabled them to develop a mitigation theory to present at trial. They asked Petitioner's mother for his school records, but obtained none and did not follow-up. (R. Ex. 124, HT 5066). Mr. Treadaway met with family members again before trial and spoke with them on the phone on occasion. (R. Ex. 124, HT 4909). He did not, however, expand his search for mitigation evidence beyond the narrow group of family and friends Petitioner's mother had assembled at her home. Trial counsel sought funds to obtain a psychological expert, but did not attempt to gather evidence from anyone other than the small group of family and friends that may have helped them evaluate the likelihood that the psychological evaluation may have produced valuable results. Counsel employed an investigator, but there is no evidence that the investigator expanded the search for mitigation evidence to be used on the Petitioner's behalf beyond that gathered by counsel on their Ohio visit.

Id. The Georgia Supreme Court opinion misleadingly details counsel's interviews with "more than a dozen people" who knew Mr. Sears as though they spanned a thorough and strategic pre-trial investigation into Mr. Sears' circumstances and mental health. The court never acknowledges that these interviews were completed in less than one day, that all witnesses were

selected by Mr. Sears' mother, and that the interviews were wholly uninformed by any background records.[10] *Sears,* 751 S.E.2d at 373-75

The record shows that trial counsel had no substantive contact with the Ohio witnesses for two years, until just one month prior to Mr. Sears' trial. P. Exs. 32, HT 1711; 34A, HT 1730; 45, HT 2296. By that time, trial counsel had withdrawn their motion for funds for the assistance of a defense mental health expert. The Georgia Supreme Court's considerable discussion of the purported reasonableness of this decision in light of what counsel knew, *Sears, ibid.* at 375-76, is flatly inconsistent with *Strickland. See Wiggins*, 539 U.S. at 521, *citing Strickland*, 466 at 690-691 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). Because trial counsel had not done the requisite investigation, they were in no position to make a strategic decision regarding whether to seek a mental health evaluation, no matter how reasonable that decision might seem in the abstract. In fact, the 2008 Order concluded precisely that. Order at 29 ("Sabel was certainly an obstacle here, but counsel, due to their limited investigation, were unable to properly evaluate the risk of going forward with the evaluation.")

Furthermore, the 2008 Order was "unable to find evidence of good professional judgment in terminating the investigation after less than one day." Order at 29. The court noted that counsel's decision to truncate their investigation "does not appear to be based on strategic

[10] Trial counsel "spoke with [the Ohio witnesses] on the phone on occasion," but contacted no additional penalty phase witnesses and sought not one set of records concerning Mr. Sears. The 2008 Order found that trial counsel "asked Petitioner's mother for his school records, but obtained none and did not follow-up," a fact acknowledged by the Georgia Supreme Court. Order at 28.

choice, but inattention," and went on to say that "*no reasonable lawyer* would terminate his investigation for mitigation evidence in a death penalty case after talking to a handful of witnesses selected and gathered by their client's mother." *Id.* (Emphasis added.)

> [I]t appears that counsel acquired only a limited knowledge of the defendant's history from a narrow set of sources. Wiggins considers such practice to be unreasonable where no good explanation has been given for terminating the investigation after less than a day. All potentially mitigating evidence must be investigated unless reasonable professional judgment supports the limitation. Here, it is impossible that all potentially mitigating evidence could have been investigated on less than a day and no reasonable professional judgment has been shown that would support the limitation.

Id. The Georgia Supreme Court never confronted the reasonableness of trial counsel's decision to halt the search for mitigation witnesses and records where they did.

In short, the Georgia Supreme Court's attempt to resuscitate trial counsel's efforts and decisions to the level of a reasonably thorough investigation fails. The court purported to find an adequate penalty phase investigation without even referencing this Court's seminal decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), and in a case where trial counsel abandoned all efforts after an initial afternoon of witness interviews unaided by any school, medical or legal records. This is a plain denial of the right to counsel. As this Court previously found, the 2008 Order correctly identified and applied governing legal principles to reach the conclusion that trial counsel provided constitutionally deficient performance in their representation at the sentencing phase of Mr. Sears' capital trial. The Georgia Supreme Court's finding to the contrary was unauthorized by this Court's mandate and contrary to governing law.

C. The Georgia Supreme Court Violated this Court's Mandate and Denied Petitioner His Sixth Amendment Right to Counsel in Failing to Conduct a Proper Assessment of Prejudice.

In addition to entering the unauthorized rulings described *supra,* the Georgia courts have once again failed to correctly weigh the prejudice that flowed to the outcome of Petitioner's capital sentencing as a result of his trial counsel's constitutionally deficient inquiry into mitigation evidence. In failing to address Mr. Sears' profound frontal lobe damage and in minimizing his troubled upbringing, the Supreme Court of Georgia engaged in the very analytical errors disavowed as an incorrect application of *Strickland* in *Sears v. Upton.* While the factual and legal errors in the Court's opinion are too numerous to itemize, the most grave of these errors include: failing to weigh the undisputed results of neuropsychological testing and psychiatric evaluation because of purported "concerns" over the sources of information upon which the mental health experts relied with respect to Petitioner's background; assessing the mitigating evidence as having "aggravating" potential when in fact, the value of the mitigation lay in part in its power to *explain* the aggravating evidence; and rejecting much of the evidence wholesale on the basis of minor quarrels with that evidence.

The Georgia Supreme Court compounded these legal errors with new errors that defy all logic. The court repeatedly rejected evidence because it would have been met with a counterargument by the District Attorney at trial, or because it was purportedly *inconsistent* with the theory upon which trial counsel chose to rely after insufficient investigation, a theory this Court has acknowledged was not an accurate picture of Mr. Sears' family life. Thus, no court has yet weighed the probable impact of complete and accurate information regarding Mr. Sears on his sentencing jury, and no court has yet to determine properly whether his death sentence is worthy of confidence.

1. The Georgia Supreme Court Failed to Confront and Weigh the Probable Mitigating Effect of Mr. Sears' Pronounced Frontal Lobe Impairment and Psychiatric Disturbance

The uncontroverted objective evidence reflects that Petitioner suffers from frontal lobe brain damage and a number of debilitating psychiatric symptoms. Despite the plain directives of this Court, the Georgia Supreme Court never acknowledges, much less weighs, the direct implications of this evidence for Petitioner's culpability. The court concedes the existence of "testimony that Sears suffers from **some brain impairment and mental health problems**" and ostensibly claims to acknowledge that this evidence "has mitigating value," yet the decision's many pages of discussion include not a single reference to that value. *Sears,* 751 S.E.2d at 388 (emphasis supplied). The court's decision did not acknowledge this Court's findings that the precise contours of Mr. Sears' pronounced cognitive impairment have been conclusively established,[11] as have its implications for Mr. Sears' functioning.

Instead, the Georgia Supreme Court simply concluded that the evidence was unlikely to be persuasive to a jury, citing four bases explicitly rejected in *Sears v. Upton*:

> (1) the weakness of much of the evidence upon which Sears' mental health experts relied to support their testimony and diagnoses; (2) the aggravating potential of this evidence; (3) the testimony's inconsistency with the evidence at trial; and (4) the strength of the aggravating circumstances in Sears' case.

Sears, 751 S.E.2d at 388. Each of these bases was previously rejected by this Court. Moreover, the Court's reasoning is inconsistent with both the factual record and this Court's precedent.

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[11] Even counsel for Respondent acknowledged Mr. Sears' proven deficits during the proceedings in the Court below. *See Transcript of Proceedings, Superior Court of Butts County, Georgia,* June 3, 2011, at 39. (Respondent's counsel stating that "one of the experts did conduct his own testing and it is the neuropsychological examination. And the results are what the results are. The state did not have anyone to rebut that.").

The first enumerated ground, the "weakness of much of the evidence upon which Sears' mental health experts relied," is simply a repetition of the etiology argument rejected in *Sears v. Upton*, where this Court noted:

> Whatever concern the dissent has about some of the sources relied upon by Sears' experts—informal personal accounts, see post, at 3269 - 3271 (opinion of SCALIA, J.)—it does not undermine the well-credentialed expert's assessment, based on between 12 and 16 hours of interviews, testing, and observations that Sears suffers from substantial cognitive impairment.

130 S.Ct. 326 (internal record citations omitted). The absence of any discussion of the experts' evaluations is telling; the court largely ignores their testing and personal professional observations of Mr. Sears. The court instead focuses its attack on the easier target: the accounts of Petitioner's head injuries and early drug use to which both experts pointed as the probable source of Mr. Sears' cognitive deficits,[12] and to some lesser extent, the evidence of Petitioner's early symptomology.[13] While these witness accounts are, as the experts testified, *consistent* with the deficits that the experts measured and observed, they are not a necessary factual underpinning of the experts' conclusions, as the Georgia court suggests. Rather than acknowledge that a specific impairment was proven in the court below, the court analogized Petitioner's case to one in which a federal court conducting review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") could find no prejudice when expert witnesses

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[12] The court also declined to find clearly erroneous a statement in the 2011 Order that Dr. Dudley did not discuss the crime with Petitioner, when the testimony referenced by the 2011 Order, HT 125-31, demonstrated the opposite, as does the court's own discussion of the testimony. *Sears,* 751 S.E.2d at 390. Furthermore, the entire argument is premised upon the erroneous assumption that Mr. Sears would have some insight into his behavior, a premise that the testimony of both expert witnesses makes clear is faulty. P. Ex. 1, HT 149, 165; P. Ex. 2, HT 224-25, 229.

[13] Again, the court assumes a number of faulty premises, implying that a major head wound requiring hospitalization would be the necessary precursor for a child to develop a frontal lobe impairment; and suggesting that this type of brain damage would be identified and diagnosed in a school setting as anything other than a behavioral disorder or learning disability.

found credible by the state courts had expressly *refuted* the existence of any brain damage and the petitioner had *also* failed to present hospital record evidence of brain injury. *Sears*, 751 S.E.2d at 389, *citing Windom v. Secretary, Dept. of Corr.*, 578 F.3d 1227 (11th Cir. 2009).

The court also relies upon the device of deferring to "factual findings" made by the 2011 Order that the psychological evidence was weak, even though that order excluded consideration of the experts' first-hand testing and evaluation after finding that trial counsel reasonably decided not to pursue a mental health evaluation. Consequently, the 2011 Order never fully addressed the diagnosis of focal frontal lobe impairment or the testimony addressing the consistencies of Petitioner's history with that diagnosis. HT 307, 354-56.

The second enumerated ground for rejecting the evidence – its aggravating potential – similarly was considered and rejected by this Court. The Georgia Supreme Court wholly ignored the injunction of *Sears v. Upton* that it weigh how that evidence helps make Petitioner more understandable and mitigates the trial evidence of his unflattering characteristics. *See Sears,* 130 S.Ct. at 3264 ("This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts-especially in light of his purportedly stable upbringing."). As it was, the jury already heard that Petitioner is impulsive or has an unattractive affect, along with the prosecutor's unanswered inference that he was heartless and "out of control." TT 2473. Jurors heard testimony from Petitioner's mother that he had behavioral problems, and a guidance counselor confirmed he was placed in special education for "Severe Behavioral Handicap" students. Jurors heard the prosecutor elicit from "character witnesses" the suggestion that Mr. Sears had a "hidden" or "split personality" (TT 2434), and evidence of grossly narcissistic conduct. TT 2487. Jurors heard that Mr. Sears was one of the most difficult to manage inmates housed at the Cobb County Detention Center, and

that he constantly had to be reassigned cells as a result of rules infractions. TT 2343-50. Entirely missing from the trial presentation was any explanation of how a "normal" adolescent could conduct himself as Petitioner had. As it stood, no rebuttal or mitigating facts apart from his youth were offered in response at trial.

The third enumerated ground for bluntly treating the mental health evidence as untrustworthy in the eyes of jurors was its purported inconsistency with the trial evidence. *Sears*, 751 S.E.2d at 393-94. As it turns out, this is its inconsistency with the *prosecution's arguments* at trial that Sears was the "man in charge." That the unpresented mental health evidence would have provided reasonable jurors with sound reasons to attribute to Petitioner a different mental state from that assigned by the prosecutor is precisely why the evidence is valuable. Petitioner's impairments are significantly mitigating precisely because they conflict with the inference that the prosecutor sought to have the jury draw: that Mr. Sears was perfectly capable of planning, and indeed planned, each step in the crime.[14] Merely because the prosecutor was *authorized* by the evidence to argue that Mr. Sears was responsible for planning the crime does not mean that the evidence of cognitive and emotional impairment would have had no value in rebuttal. This is particularly true considering that the *Strickland* prejudice standard, when applied under Georgia's capital sentencing scheme, is a one-juror standard. *Humphrey v. Morrow*, 717 S.E.2d 168, 173 (2001)("Under Georgia's death penalty laws, which provide for an automatic sentence less than death if the jury is unable to reach a unanimous

[14] Furthermore, the opinion treats as a foregone conclusion that it was Mr. Sears, rather than his codefendant Williams, who selected the victim, lay in wait for her outside the grocery store, battered her and placed her in her car. 751 S.E.2d at 394. However, this version of events was disputed by Mr. Sears even in his earliest statements to law enforcement and this fact was hotly contested at trial, where counsel sought to prove that it was Williams who initiated the kidnaping. Moreover, newly uncovered evidence presented in the habeas action showed that Williams had a history of assaultive behavior. P. Ex. 53, HT 2607, 2613, P. Ex. 55, HT 2634-35; P. Ex. 56, HT 2638, P. Ex. 57, HT 2642.

sentencing verdict, a reasonable probability of a different outcome exists where 'there is a reasonable probability that at least one juror would have struck a different balance' in his or her final vote regarding sentencing following extensive deliberation among the jurors."). There is, at a minimum, a reasonable probability that at least one juror would have found that the mental health evidence called into question the notion that Petitioner carefully planned the crime.

Finally, Petitioner's mental health evidence is deemed unavailing because of the seriousness of the four statutory aggravating circumstances found by the jury. However, this Court has long held that the omission of mitigating evidence of a capital defendant's cognitive and emotional problems, or disadvantaged youth, are prejudicial even in the face of considerable aggravation. *Williams,* 529 U.S. at 367-368 (Williams convicted of beating an elderly victim to death with a mattock for three dollars, which the victim refused to lend him; Williams had a history of armed robbery and burglary convictions and had recently committed two auto thefts and two other assaults on elderly victims, one of whom was in a vegetative state as a result of the attack); *Wiggins*, 539 U.S. at 553-554 (Wiggins drowned a 77-year-old woman in her bathtub, sprayed her with Ant and Roach Spray, ransacked her apartment, and took her car and credit cards); *Rompilla*, 545 U.S. at 574-576 (Rompilla attacked a bar owner after closing, stabbed him numerous times, including more than 16 times about the head and neck, beat him with a blunt object, gashed his face with portions of a broken liquor bottle and set his body on fire); *Porter,* 130 S.Ct. at 448 (Porter stalked his former girlfriend for months, threatening to kill her, before breaking into her home in the early morning hours to kill both her and a companion). Furthermore, while Petitioner's crime was certainly horrific, his actions on the day of the crime were proven aberrant and his criminal history was minimal. And, as referenced above, the

aggravating evidence that was presented is directly and easily explained by reference to the evidence of Mr. Sears' pronounced front lobe damage.

The Georgia Supreme Court's refusal to weigh the mitigating impact of Petitioner's well-documented frontal lobe brain damage and psychiatric symptoms stands in direct violation of this Court's precedent, including the mandate of *Sears v. Upton.* Once again, an accurate assessment of Petitioner's moral culpability has been thwarted, and this Court's intervention is necessary.

2. The Georgia Supreme Court Ignored the Mandate of this Court in Its Evaluation of the Evidence of Petitioner's Troubled Family Background

The Georgia Supreme Court likewise discounted the evidence that Mr. Sears' childhood was "far from 'privileged in every way'" on grounds explicitly rejected by this Court. *Sears,* 130 S.Ct. at 3262. In many instances, the court did so on the basis of arguments that are internally inconsistent or facially illogical. For example, the court finds that the evidence of Mr. Sears' parents' acrimonious marriage and poor parenting would have been unpersuasive in light of the trial evidence that his parents were loving, involved and well-respected. *Sears,* 751 S.E.2d at 383-84. As this Court noted however, the trial presentation was made on the basis of an incomplete investigation into Mr. Sears' background. *Sears,* 130 S.Ct. at 3264-65. Consequently, that presentation misled jurors regarding the circumstances in which Mr. Sears was reared. *Id.* at 3262. Trial counsel's deficient investigation was prejudicial precisely because it left jurors with a false impression, and permitted the prosecutor to argue that Petitioner had spurned a life of full privilege. The court's rejection of mitigating evidence as inconsistent with the notion of Petitioner's parents as loving and supportive simply cannot be reconciled with the prejudice analysis which this Court directed the state court to undertake.

The court likewise trivializes the evidence that Mr. Sears was sexually abused on an evidentiary basis specifically addressed and rejected in *Sears v. Upton.* The court concluded that the direct witness to the abuse – Mr. Sears' brother Demetrius – would not have been credible given his felony record and incentive to assist his brother's cause. The court again ignores the this Court's finding that any effort to impeach Demetrius on the basis of his criminal background would reinforce the evidence that Mr. Sears' troubled home life contributed to his poor choices. 130 S. Ct. at 3263. Remarkably, the court complained of the hearsay nature of witness testimony that Demetrius and Mr. Sears had disclosed to the sexual abuse during conversations prior to Petitioner's arrest. However, this evidence obviously would have been admissible precisely to refute the argument raised by the court: that Demetrius' account of the sexual abuse was a recent fabrication designed to help his brother's mitigation case. The court further relied on Petitioner's purported failure to "report" his sexual abuse, while ignoring the evidence that he informed trial counsel that he had engaged in sexual activity as a prepubescent child, albeit without terming it "abuse."

Such faulty logic and blatant contravention of this Court's remanding opinion pervades the lower court's treatment of Petitioner's evidence. Certiorari review is necessary.

3. The Georgia Supreme Court Failed to Weigh the Habeas Evidence Together With the Trial Evidence of Petitioner's Youth and Non-violent History

Perhaps its most crucial error is the Georgia Supreme Court complete failure to undertake the task at the crux of this Court's mandate: a reweighing of the mitigating evidence adduced at trial **together with** that evidence presented at Mr. Sears' trial. This Court could not have been more explicit in its mandate:

> A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' "significant" mental and psychological impairments, **along with the mitigation**

> **evidence introduced during Sears' penalty phase trial**, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation. See *Porter, supra,* at __, 130 S.Ct. at 453-54; *Williams, supra,* at 397-398, 120 S.Ct. 1495; *Strickland, supra,* at 694, 104 S.Ct. 2052. It is for the state court...to undertake this reweighing in the first instance.

Sears, 130 S.Ct. 3267 (emphasis supplied). At the outset of its decision, the Georgia Supreme Court describes the mitigating factors that trial counsel successfully presented to the jury:

> despite some problems at school, Sears was also well-liked, had never been in any serious trouble, had no history of violence, and was considered polite and well-mannered by teachers, friends, and neighbors; that Williams' influence, Sears' own youth and immaturity, and the fact that he was stranded over 400 miles away from home all contributed to his commission of uncharacteristically violent crimes; that he cooperated with police; and that sentencing him to death would devastate his parents, his family, and their friends...

Sears, 751 S.E.2d at 377. However, at no point does the court add those factors back in to the prejudice calculus to determine the probable impact on reasonable jurors. These mitigating factors were sufficiently persuasive that at least one juror struggled with the decision to impose death. Had the evidence of Mr. Sears' "'significant' mental and psychological impairments" been added to the mitigating side of the ballast as instructed by this Court, there is certainly a reasonable probability that the scales would have tipped in favor of a life sentence.

Not only is this type of background and mental health evidence traditionally found to establish prejudice, but Mr. Sears' youth and his severe brain damage are among the most compelling mitigation available to *any* capital defendant. He was just eighteen years old at the time of his crime and – as found by this Court and unrefuted by any scientific evidence – he was biologically possessed of a lesser ability to make well-reasoned decisions. Because the Eighth Amendment limits application of the death penalty to those possessed of "extreme culpability," a

death sentence is categorically prohibited for those under eighteen at the time of their offense. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005).

Mr. Sears' pronounced frontal lobe impairment undermines the precise capacities that differentiate adults from children, the latter being prone to heedless risk-taking, impulsivity, recklessness, vulnerability to peer influence, limited control over their own environment and lack of capacity to extricate "themselves from horrific, crime-producing settings." *Id.* at 569. Trial counsel knew this, and strenuously argued the mitigating impact of Mr. Sears' age at the time of the crime. The evidence of Mr. Sears' cognitive impairment would have added measurably to that argument. The organic impairment underlying Petitioner's infirmities is precisely that identified in *Graham v. Florida,* 130 S.Ct. 2011 (2010), as rendering children possessed of a lessened "moral culpability" and an "enhanced prospect that, as the years go by and neurological development occurs, the 'deficiencies will be reformed.'" *Miller v. Alabama,* 132 S.Ct. 2455, 2464-65, *quoting Graham,* 130 S.Ct. at 2026.

The evidence of Mr. Sears' frontal lobe brain damage and difficult home life similarly would have amplified the mitigating impact of his personable nature and lack of prior violence. Reasonable jurors would have been persuaded by evidence that a young defendant was personable and well-liked *in spite of* the obstacles he faced. Ironically, while the Georgia Supreme Court decision suggested that Mr. Sears' early life was a "far cry" from that found to establish prejudice in cases such as *Williams v. Taylor*, 529 U.S. 362 (2000), and *Rompilla v. Beard,* 545 U.S. 374 (2005), the Court wholly failed to consider the aggravated personal histories of the capital petitioners that weighed *against* prejudice in such cases. *See, e.g., Williams*, at 367-368 (describing Williams' history of armed robbery and burglary convictions, two recent auto thefts and his two prior vicious assaults on elderly victims, one of whom was left in a permanent

vegetative state as a result); *Rompilla,* at 383 (records showed that Rompilla "had a significant history of felony convictions indicating the use or threat of violence," including a "prior conviction for rape and assault").

The Georgia Supreme Court acted in direct contravention of this Court's mandate by failing to accord mitigating weight to the evidence of Petitioner's "'significant' mental and psychological impairments," and the evidence that "established that he was far from privileged in every way" and further failing to consider that mitigation in conjunction with the mitigating factors adduced at trial. Had the Georgia Supreme Court carried out its charge, there can be little doubt that "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Petitioner's culpability." *Rompilla*, 545 U.S. at 393.

V. CONCLUSION

For the foregoing reasons, Petitioner requests that the Writ be granted and that Petitioner be afforded such further relief from his unconstitutional sentence of death as the Court may find appropriate.

Respectfully submitted, this the 14th day of February, 2014.

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No. 13-_____

IN THE SUPREME COURT OF THE UNITED STATES

DEMARCUS ALI SEARS,

Petitioner,

-v-

BRUCE CHATMAN, Warden,
Georgia Diagnostic and
Classification Prison,

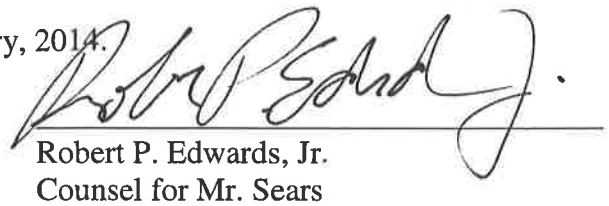
Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the Petitioner's MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI upon counsel for Respondent by mail, first class postage prepaid, at the following address:

Sabrina Graham
Mitchell Watkins
132 State Judicial Bldg
40 Capitol Square SW
Atlanta GA 30334

Dated, this the 14th day of February, 2014.



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