NO. 19-___

In the

Supreme Court of the United States

DONNIE CLEVELAND LANCE,
Petitioner,

v.

BENJAMIN FORD, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE
IMMINENT EXECUTION SCHEDULED
JANUARY 29, 2020 at 7:00 P.M.

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January 29, 2020

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QUESTIONS PRESENTED

A non-randomly selected grand jury, handpicked by state prosecutor Tim Madison, indicted petitioner Donnie Cleveland Lance for the murders of Joy Lance and Dwight ("Butch") Wood, Jr. After a petit jury convicted petitioner of the murders, a Georgia trial court sentenced him to death. Mr. Madison's improper grand jury selection was unknown for decades after petitioner was convicted, during which time petitioner pursued a direct appeal, a habeas petition in state court, and a federal habeas petition.

The question presented is:

Was petitioner denied his rights under the Sixth, Eighth, and Fourteenth Amendments when he was sentenced to death following his indictment by a non-randomly selected grand jury?

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The Supreme Court of Georgia denial of petitioner's habeas corpus petition on January 29, 2020 is attached as Appendix A.

The April 28, 2009 decision of the Superior Court of Butts County, Georgia, granting Petitioner's habeas corpus petition and ordering a new trial on sentencing is attached as Appendix B.

The Superior Court of Butts County, Georgia denial of petitioner's petition on procedural grounds on January 24, 2020 is attached as Appendix C.

The application for Certificate of Probable Cause to Appeal filed in the Georgia Supreme Court on January 27, 2020 is attached as Appendix D.

Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia on December 18, 2019 is attached as Appendix E.

Katrina Affidavit is attached as Appendix F.

Martin Affidavit is attached as Appendix G.

The relevant statute, O.C.G.A. § 5-5-41, is attached as Appendix H.

JURISDICTION

The decision of the Supreme Court of Georgia denying petitioner's application for certificate of probable cause to appeal from the habeas court's denial of his writ of habeas corpus was entered on January 29, 2020. *See* Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a), as

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petitioner asserts a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

U.S. Const. amend. VI.

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

U.S. Const. amend. VIII.

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

U.S. Const. amend. XIV.

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STATEMENT OF THE CASE

Petitioner's former wife, Sabrina "Joy" Lance, and her boyfriend, Dwight "Butch" Wood, Jr. were found dead in Mr. Wood's home on November 9, 1997. After a fairly short investigation, petitioner was arrested for these murders on December 2, 1997.

On March 3, 1998, petitioner was indicted on two counts of malice murder, two counts of felony murder, one count of burglary, one count of possession of a firearm during the commission of a crime, and two counts of possession of a firearm by a convicted felon by a grand jury in Jackson County, Georgia, initiated by state prosecutor Tim Madison. (As discussed below, Mr. Madison was later sentenced to six years in prison for his role in theft schemes while he was prosecutor.) Petitioner's grand jury was composed of twenty-three grand jurors who, as described below, were not randomly selected.

On June 23, 1999, the Superior Court of Jackson County, in Jefferson, Georgia, entered judgment against petitioner on two counts of malice murder, two counts of felony murder, one count of burglary and one count of possession of a firearm, for the murders of Ms. Lance and Mr. Wood. Petitioner was sentenced to death by electrocution for the murders, twenty years for burglary and five years for possession of a firearm during the commission of a crime.

The Georgia Supreme Court affirmed petitioner's convictions and sentences of death on February 25, 2002. *Lance v. State*, 560 S.E.2d 663 (Ga. 2002). A timely petition for writ of certiorari was denied by this

Court on December 2, 2002. *Lance v. Georgia*, 537 U.S. 1050 (2002).

On May 15, 2003, the Superior Court of Jackson County signed an order setting Petitioner's execution date for the week beginning at noon on June 2, 2003 and ending at noon on June 9, 2003. Petitioner filed a petition for writ of habeas corpus and a Motion for Stay of Execution in the Superior Court of Butts County on May 29, 2003, and an order staying the execution was entered on that date. Then, petitioner filed an Amended Petition on August 25, 2005. After a four-day evidentiary hearing, the Superior Court of Butts County concluded that trial counsel's failure to investigate and present readily accessible mental health evidence at the sentencing phase of trial constituted constitutionally deficient performance and vacated his death sentences. *Lance v. Hall*, No. 2003-V-490, slip op. at 58 (Super. Ct. Butts Cty. Apr. 28, 2009).

On March 4, 2008, approximately three years after the evidentiary hearing, Mr. Madison, the state prosecutor, pled guilty to two felony theft charges, one felony count of violation of oath of office, four felony counts of false statements and writings, and one felony count of conspiracy to defraud a political subdivision, which were unrelated to petitioner's case. Felony Plea Sheet, *State of Georgia v. Madison*, No. 07-cr-184 (Super. Ct. Banks Cty., Ga., Mar. 4, 2008). Mr. Madison was sentenced to six years in prison followed by six years on probation and $40,000 in restitution for his role in these theft schemes. *Id.*

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The State appealed the order granting habeas relief to the Georgia Supreme Court, and petitioner filed a cross appeal. The court did not purport to dispute any of the habeas court's factual findings but conducted a de novo review of the prejudice prong and reversed the grant of relief from the habeas court. *Hall v. Lance*, 687 S.E.2d 809, 812 (Ga. 2010). This Court denied certiorari on June 28, 2010 and denied a petition for rehearing on September 3, 2010. *Lance v. Hall*, 561 U.S. 1026 (2010).

Petitioner filed a federal petition for a writ of habeas corpus on July 29, 2010, which the United States District Court for the Northern District of Georgia denied in an unpublished opinion on December 22, 2015. *Lance v. Upton*, No. 2:10-CV000143-WBH (N.D. Ga. 2015). The Eleventh Circuit Court of Appeals affirmed the district court's ruling on August 31, 2017. *Lance v. Warden*, 706 F. App'x 565 (11th Cir. 2017). On January 7, 2019, this Court declined to hear petitioner's case over the dissent of three justices. *Lance v. Sellers*, 139 S. Ct. 511 (2019) (Sotomayor, Ginsburg & Kagan, JJ., dissenting).

In 2018, Katrina Conrad, an investigator for the Federal Defender Program, conducted witness interviews for purposes of petitioner's clemency proceedings. Conrad Aff. ¶ 2, attached hereto as Appendix F. These interviews revealed Mr. Madison's improper actions, which in turn, affected the grand jury composition in petitioner's case. *Id.* ¶¶ 3–5. As discussed below, Ms. Conrad followed up on the information she received in these interviews with an

Open Records Act Request ("ORA Request") in November 2018 to seek available data on grand jury composition in Jackson County. *Id.* ¶ 7. This grand jury information was not of the type that counsel litigating a habeas corpus proceeding would normally seek.

Several witnesses have now expressed concerns that "Mr. Madison used his influence to 'pack' the grand jury or to get people he knew to serve repeatedly on the grand jury and that he was picking jurors from the same church." *Id.* ¶ 3. Further, witnesses suggested that the same jurors sat repeatedly. *Id.* The evidence is fairly summarized as follows:

> Madison hand-picked his friends and business owners he knew to sit on the grand jury, people he knew would be on his side; the same clique of people sat for years and years; he picked jurors from one church in Jefferson and the preacher there would preach about the grand jury indicting people; he would not put anyone who did not go to church on a grand jury and he put people on there that he knew would do what he wanted; he always had the same people on his grand juries; and, Madison manipulated grand jury pools.

Id.

By mapping the home addresses of grand jurors who served in the March 1998 term, Ms. Conrad determined that the "jurors were concentrated in ways that were disproportionate to the population in the given area based on census data." Conrad Aff. ¶¶ 2-4.

Then, Ms. Conrad reviewed indictments from different grand jury terms which revealed that "several grand jurors had in fact sat on more than one grand jury." *Id.* ¶ 5. In November of 2018, Ms. Conrad and petitioner's counsel consulted with Jeffrey Martin,[1] who advised them to make an ORA Request of the Jackson County Clerk's Office. *Id.* ¶ 6. Ms. Conrad made the ORA Request on November 13, 2018 and gained access to some of the requested files in January and February of 2019. *Id.* ¶¶ 7–8. The County Clerk's Office has not been able to locate and provide many of the requested records. *Id.* ¶ 8. Mr. Martin used the records that were located to assess whether there were anomalies in the composition of petitioner's grand jury. *Id.* ¶ 9.

After examining the records obtained from the ORA Request, Mr. Martin determined that the March 1998 term grand jury that indicted petitioner was not randomly selected or derived from a jury list reflective of the Jackson County jury-eligible population. Martin Aff. ¶¶ 4–6, attached hereto as Appendix G. The Jury Commissioners in Jackson County used a systematic process which resulted in a jury list comprised of a small group of manually selected jurors who have served repeatedly on multiple grand juries for many years. *Id.* ¶ 7.

Due to the large eligible population of jurors in

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[1] Mr. Martin holds a bachelor's degree in Mathematics and Economics from Vanderbilt University, and has a Master's degree in Economics from the University of Chicago. He works as a consultant on, among other things, jury pool analysis.

Jackson County, there was no need for grand jurors to serve repeatedly. *Id.* ¶ 14. Despite this fact and the requirement under O.C.G.A. § 15-12-40 (eff. July 1, 2006 to June 30, 2011) for the grand jury list to be revised every two years, the majority of the grand jurors that indicted petitioner had served on previous grand juries. Martin Aff. ¶ 20. One of petitioner's grand jurors previously served on four grand juries, six served on three previous grand juries, three served on two previous grand juries, and six served on one previous grand jury. *Id.* ¶¶ 21–24. Several of those grand jurors had served together in previous grand jury terms. *Id.* ¶¶ 31–41. Additionally, 19 of petitioner's grand jurors appeared on the 1994 grand jury list and 12 appeared on the 1987 grand jury list. *Id.* ¶¶ 29–30. In the fourteen-year period spanning from March 1984 through March 1998, the number of serving grand jurors was limited to 410 different persons—despite the population of 30,518 persons who were jury eligible as of 2000. *Id.* ¶ 14.

On April 26, 2019, petitioner filed an extraordinary motion for new trial and for post-conviction testing in the Superior Court of Jackson County. An evidentiary hearing was held on July 31, 2019. The Superior Court denied the Motion on September 30, 2019, and an Application to Appeal the Denial of the motion was filed with the Georgia Supreme Court on October 30, 2019. The Georgia Supreme Court denied this Application on December 2, 2019 and denied a timely filed Motion for Reconsideration, on January 13, 2020. Petitioner filed a petition for writ of certiorari, based upon the

availability of new DNA testing methods, on January 23, 2020, which is presently pending before this Court.

Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County on December 18, 2019, raising a challenge to the composition of the grand jury that indicted him in his capital cases in Jackson County, Georgia in 1998 raising substantial newly discovered evidence supported by factual affidavit testimony and the expert affidavit of Jeffrey Martin. Without considering the merits of the petition, the habeas court denied petitioner's petition on procedural grounds on January 24, 2020. Petitioner filed an Application for Certificate of Probable Cause to Appeal in the Georgia Supreme Court on January 27, 2020, which the Georgia Supreme Court denied on January 29, 2020.

While the Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia was pending, the Superior Court of Jackson County issued a warrant for petitioner's execution during a time period beginning on January 29, 2020, and ending on February 4, 2020. The State has scheduled petitioner's execution for this evening, January 29, 2020, at 7:00 pm. Executing petitioner when he was denied his right to a fair and impartial grand jury is a gross miscarriage of justice.

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REASONS THE PETITION SHOULD BE GRANTED

I. The Non-Randomly Selected Grand Jury Violated Petitioner's Fundamental Rights to an Impartial Jury and Due Process.

The Sixth Amendment to the U.S. Constitution guarantees the right of an impartial jury to all criminal defendants. To this end, the Eleventh Circuit has found that "[f]undamental to our system of justice is the principle that the sixth amendment grants criminal defendants the right to an impartial jury. This guarantee also embraces a right that grand and petit juries be selected at random so as to represent a fair cross-section of the community." *Machetti v. Linahan*, 679 F.2d 236, 239 (11th Cir. 1982) (finding that state jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending written notice to the jury commissioners deprived habeas petitioner of her right to an impartial jury trial) (citing *Taylor v. Louisiana*, 419 U.S. 522, 527–30 (1975); *United States v. Perez-Hernan*dez, 672 F.2d 1380, 1384 (11th Cir. 1982)).

As this Court has repeatedly recognized, grand juries are an essential element of protection of defendants' rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Justices Thomas and Scalia said it plainly in *Apprendi v. New Jersey*:

> Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis

> on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed."

530 U.S. 466, 499 (2000) (Thomas and Scalia, JJ., concurring) (quoting U.S. Const. amends. V, VI). The grand jury plays a particularly critical role in this process, as the Court recognized in *Vasquez v. Hillery*:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts.

474 U.S. 254, 263 (1986).

Indeed, a constitutionally flawed indictment requires reversal of any subsequent conviction. In *Vasquez*, the Court unequivocally rejected the notion that a defect in composition of a grand jury "has no effect on the fairness of the criminal trials that result from that grand jury's actions." *Id.* The Court similarly rejected the contention that defects in grand jury composition can be adequately addressed by a later finding of guilt at trial. *Id.* ("Thus, even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that

confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come."). There is only one sufficient remedy for a constitutional flaw in the grand jury process: mandatory reversal of a conviction that follows the grand jury's indictment. *Id.* at 264 ("The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.").

While the constitutional right to an indictment by a grand jury is not directly applicable to the States, *see Hurtado v. California*, 110 U.S. 516 (1884), Georgia has implemented the indictment requirement on its own. In Georgia, "the return of an indictment by the grand jury [is] a necessary prerequisite to the jurisdiction of the courts of this State to try a person charged with a felony. A conviction is void where there is no jurisdiction and we cannot breathe new life into a void conviction by remanding the case for a new indictment." *Cochran v. State*, 344 S.E.2d 402, 406 (Ga. 1986) (Smith, J., concurring) (internal citations omitted).

As such, an indictment returned by a grand jury in Georgia must be constitutionally sufficient. *Colson v. Smith*, 315 F. Supp. 179, 182 n.3 (N.D. Ga. 1970) ("Where states use grand juries under their state constitutions, an individual is denied the equal protection of the laws when he is indicted by a grand jury [that fails to meet the constitutional

requirements] . . . .") (citation omitted) (applying Georgia law), *aff'd*, 438 F.2d 1075 (5th Cir. 1971); *United States v. Choate*, 276 F.2d 724, 728 (5th Cir. 1960) ("[W]here an indictment is required [for the institution of criminal proceedings], lack of an indictment goes to the court's jurisdiction.") (applying federal law). This means that the grand jury process must not be discriminatory and must be fair and impartial. *See generally Colson*, 315 F. Supp. at 182 ("If the indictment is returned by a grand jury which was selected in a racially discriminatory manner the indictment itself is void, and if the indictment is void there is no charge to which the accused can legally be held to answer."), *aff'd*, 438 F.2d 1075 (5th Cir. 1971).

The United States District Court for the Northern District of Georgia long ago recognized this result:

> The constitutional right involved in the case of a state defendant is not a constitutional right to be indicted by a grand jury—for there is no such right, *Hurtado v. California*, 110 U.S. 516 (1884)—but, rather, the right to be indicted only by a fair and impartial grand jury when the state has provided for indictment by a grand jury at all.

Colson, 315 F. Supp. at 182 n.3. A constitutionally invalid indictment is void and removes jurisdiction from the trial court. In *Colson*, the indictment was constitutionally defective because the grand jury was selected in a racially discriminatory manner. Thus, the Northern District of Georgia held that the

petitioner was "entitled to release, subject to the State's right to reindict him." *Id.* at 183.

The law is clear: Petitioner was entitled to a fair and impartial grand jury. The facts are also now clear: the grand jury that indicted petitioner was nothing of the sort. The grand jury that indicted petitioner was compiled from a small group of prosecutor-selected jurors who repeatedly served on multiple grand juries dating as far back as 14 years. Martin Aff. ¶¶ 6–7. The majority of petitioner's grand jurors had been on the grand jury list for 11 years. *Id.* ¶ 10. Two-thirds of petitioner's grand jurors had previously served with one of the other jurors. *Id.* ¶ 8. Two of the grand jurors had previously served on two grand juries together. *Id.* In 2000, two years after petitioner was indicted, the population of Jackson County was 30,518. *Id.* ¶ 11. Yet, in the 29 Jackson County grand jury terms in the 14-year span between March 1984 and March 1998, only 410 different people served as jurors. *Id.* ¶ 15. These statistical anomalies show that the Jury Commissioner for Jackson County was not following O.C.G.A. § 15-12-40, as established in 1998, which required the Commissioner to revise the grand jury list at least once every two years.[2] The grand jury

[2] O.C.G.A. § 15-12-40 has since been revised in an effort to make the grand jury selection process representative of the community. The current statute requires that the clerk select "a random list of persons from the county master jury list" every year. O.C.G.A. § 15-12-40.1(h). O.C.G.A. § 15-12-4(a) attempts to limit repeat grand jurors by providing that a grand juror who has served "at any session of the superior or state courts shall be ineligible for duty as a juror until the next succeeding county master jury list

that indicted petitioner was hand-picked, by a now-convicted prosecutor, in ways that clearly suggest a desire to achieve that prosecutor's preferred outcome. As petitioner's expert concluded, "[t]he theoretical chance of repeat grand jurors on a grand jury list randomly chosen every two years during the 14 year time period ending March 1998 is less than 0.001%." Martin Aff. ¶ 13. But yet there are numerous such instances of repeat grand juror service in the data Mr. Martin reviewed. This is not a fair and impartial grand jury. It falls far short of the petitioner's right, as recognized by the State of Georgia and afforded to him under the United States Constitution, to a fair and impartial indictment.

In *Vasquez*, this Court noted that fundamental flaws in the composition of a grand jury are "not amenable to harmless-error review." 474 U.S. at 263–64. In so holding, the Court pointed to *Tumey v. Ohio* for the notion that the appearance of bias, whether or not bias actually existed, requires the presumption that the judicial process was impaired. *Id.* at 263. The Court continued, "when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained." *Id.*

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has been received by the clerk." O.C.G.A. § 15-12-4(a). The effect of these changes is clear from the fact that the grand jury list used to indict petitioner included 341 persons, while the current grand jury list for Jackson County includes 52,437 people. Martin Aff. ¶ 15.

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There is much more than just an appearance of impropriety here. The statistical analysis provided by petitioner's jury expert and the illegal actions of Mr. Madison demonstrate actual impropriety in the composition of the grand jury that indicted petitioner. Mr. Madison personally exercised influence over the selection of grand jurors; he hand-picked them in violation of Georgia law and petitioner's constitutional rights. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322, 346-47 (2003) ("[W]e accord some weight to petitioner's historical evidence of racial discrimination by the District Attorney's Office. . . . This evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case.").

II. The Georgia Courts Wrongly Found Petitioner's Habeas Petition Was Barred by Procedural Default and Res Judicata.

The Superior Court of Butts County, Georgia incorrectly dismissed petitioner's habeas petition as procedurally defaulted as a successive petition and barred by res judicata. This claim cannot be procedurally defaulted as it is based on entirely new evidence. For the same reason that the evidence of the improperly selected grand jury is entirely new—this claim cannot be barred by res judicata. This claim was never before raised or litigated.

Res judicata does not bar a claim based on facts that were not reasonably available at the time of the first habeas proceeding, even if the claim was raised in the first habeas proceeding. *See Gibson v. Head*, 646

S.E.2d 257, 260 (Ga. 2007) ("The claim would not be barred by res judicata, however, if it were based on facts that were not reasonably available at the time of the first habeas proceeding.").

Of course, claims that are raised for the first time in habeas proceedings are procedurally defaulted, unless the petitioner meets the "cause and prejudice" test. *Turpin v. Todd*, 493 S.E.2d 900, 905 (Ga. 1997); *see Davila v. Davis*, 137 S. Ct. 2058, 2064–65 (2017) ("A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show 'cause' to excuse his failure to comply with the state procedural rule and 'actual prejudice resulting from the alleged constitutional violation.'" (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). "Cause" requires the petitioner to demonstrate "'some objective factor external to the defense impeded counsel's efforts' to raise the claim that has been procedurally-defaulted," such as by newly discovered evidence not reasonably available previously. *Todd*, 493 S.E.2d at 905 (quoting and citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991)). Because res judicata and procedural default both allow exceptions for facts not reasonably available previously, the analysis of the two is intertwined.

Petitioner's Amended Petition for Writ of Habeas Corpus, filed on August 25, 2005 as part of his first state habeas petition, raised the argument that the pools from which his grand and traverse jury were drawn were unconstitutionally composed and discriminatorily selected. As even the State argued in

the recent petition, however, the argument lacked support at the time. *See* Response to Petitioner's Second Habeas Petition at 8 ("He then challenged the composition and selection of the grand jury during his first state habeas proceeding, but failed to present any evidence or argument to support the claim.").

But now, the available facts are entirely different. Petitioner sought relief because the now-convicted prosecutor packed the grand jury with individuals hand-picked by him to secure indictments. At the time of filing of the 2005 Amended Petition, there was no reason for petitioner to suspect that this conduct had occurred or to seek the specific evidence necessary to show the impact of this "packing" on the grand jury's composition. Thus, petitioner's original petition focused only on the generic contention that demographic data would show flaws in the grand jury. But now, the evidence of ***actual*** impropriety is overwhelming. It consists of witness interviews, the documents obtained from the ORA Request, and the state prosecutor Mr. Madison's conviction.

The investigation was not designed to relitigate the arguments from petitioner's habeas petition. Instead, these interviews were conducted to prepare for petitioner's clemency proceedings—an entirely separate process. Conrad Aff. ¶ 2. Because Mr. Madison had been convicted of charges in 2008 relating to his theft of money from his office—a "rare occurrence" in Ms. Conrad's experience—she asked questions to the witnesses about Mr. Madison's conviction and his position as the former district attorney. *Id.*

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Petitioner was entitled to presume that the statutory and constitutional safeguards were followed. Indeed, obligations that courts have recognized under the United States Constitution and the Georgia Constitution were in place to ensure that petitioner received an impartial grand jury. *See Machetti*, 679 F.2d at 239 (finding an impartial grand jury "[f]undamental to our system of justice" under the Sixth Amendment); see also Ga. Const. art. I, § 1, ¶ XI ("The right to trial by jury shall remain inviolate . . . . [T]he defendant shall have a public and speedy trial by an impartial jury . . . ."). Standard 3-4.5(a) of the ABA Standards of Criminal Justice Relating to the Prosecution Function provided the standard for Mr. Madison: "[T]he prosecutor should respect the independence of the grand jury and should not preempt a function of the grand jury, mislead the grand jury, or abuse the processes of the grand jury." Mr. Madison also was obligated to uphold the Oath of Georgia Prosecuting Attorneys by swearing to "faithfully and impartially and without fear, favor, or affection discharge [his] duties." O.C.G.A. § 15-18-2.

Petitioner had no reason to question that the grand jury selection process adhered to the United States Constitution and the Georgia Constitution and that Mr. Madison abided by the prosecutorial code of ethics. Petitioner cannot be barred from presenting evidence, newly discovered in preparation for clemency, proving otherwise. This evidence was not reasonably available during his first state habeas proceeding.

Likewise, while the records acquired through the

ORA Request have been theoretically available, petitioner had no reason to request these historical records for the same reason that he did not question the witnesses regarding Mr. Madison's attempts to "pack" the grand jury—no reason to look for the pattern existed. As noted by Petitioner's expert Jeffrey Martin, the type of historical data obtained to demonstrate the pattern of the non-random selection of these grand juries over several years is "unlike a typical [grand jury] challenge." Martin Aff. ¶ 5. Reasonable due diligence would not have included such an ORA Request.

Because petitioner presented new evidence that was not reasonably available previously to support his claim regarding his unconstitutionally constructed grand jury, petitioner's claim is not barred by principles of res judicata and satisfies the "cause" prong of procedural default.

The prejudice needed to overcome a procedurally defaulted habeas claim is actual prejudice that worked to the petitioner's actual and substantial disadvantage. *See Murray v. Carrier*, 477 U.S. 478, 494 (1986); *Schofield v. Meders*, 632 S.E.2d 369, 372–73 (Ga. 2006). Petitioner must demonstrate "not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. *Murray*, at 494 (quoting *United States v. Frady*, 456

U.S. 152, 170 (1982)).[3] The improper selection of the grand jury prejudices petitioner by depriving him of his constitutionally mandated right to trial by a fair and impartial jury. *See* U.S. Const. amends. VI, VIII, XIV—a right to fundamentally important to the criminal process that the appearance of impropriety of the jury "require[s] reversal of the conviction because the effect of the violation cannot be ascertained." *Vasquez*, 474 U.S. at 623. As petitioner can prevail on the merits of the claim, prejudice has been established.

Therefore, because petitioner's grand jury claim was neither procedurally defaulted nor barred by res judicata, the Georgia courts wrongly dismissed petitioner's constitutional claim without reviewing the merits. As described above, petitioner's constitutional claim has merit and thus should be heard.

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[3] Georgia courts have also required that such prejudice infect the trial with a constitutional error. *See Schofield*, 632 S.E.2d at 372–73. Because the prejudice that must be shown to overcome procedural default is a prejudice of constitutional proportions and because a habeas petitioner is entitled to relief only for constitutional violations, the prejudice prong of the cause and prejudice test is coextensive with the merits of a claim of a constitutional violation. *Turpin v. Christenson*, 497 S.E.2d 216, 229–30 (Ga. 1998).

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CONCLUSION

Petitioner respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted this 29th day of January, 2020.

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