

NO. _____

In the Supreme Court of the United States

JEFFERY GRIFFIN,

PETITIONER-APPELLANT,

v.

WARDEN, MARTY ALLEN,

RESPONDENTS-APPELLEES.

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question arising from this murder conviction is whether the Eleventh Circuit correctly applied the “reasonably debatable” standard when it declined to issue a certificate of appealability as to Brundidge’s claims (1) that inflammatory evidence of an unrelated gun incident resulted in a fundamentally unfair trial in violation of due process, (2) that he fairly presented the substance of this claim in state court when he argued that admitting the collateral evidence was “unconstitutional due to the degree of its prejudicial effects, unfairness, . . .” and cited “the Sixth Amendment guarantee of a fair trial,” and (3) that Georgia’s successive petition rule would not foreclose him from now raising his due process argument in a Georgia court.

PARTIES TO THE PROCEEDING

Petitioner Jeffery Griffin was the Petitioner-Appellant in the Court of Appeals and the Petitioner in the District Court.

Respondents, the Warden and Martin Allen, were the Respondents-Appellees in the Court of Appeals, and the Respondents in the District Court.

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Warden,
Marty Allen,
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*ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Jeffery Griffin, through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals denying a certificate of appealability is unreported. A copy of the opinion is attached as Appendix A. The ruling of the district court is unreported. A copy of that ruling is attached as Appendix B. The magistrate's report and recommendation is unreported. A copy is attached as Appendix C.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1254(1) and Part III of the Rules of the Supreme Court of the United States. The court of appeals entered its decision denying Petitioner's application for certificate of appealability on September 7, 2017. He timely files this petition based on Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

A party wishing to appeal the final order of a district court in a habeas corpus proceeding must comply with 28 U.S.C. section 2253, which provides:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

A party asking a federal court to vacate a state conviction must comply with 28 U.S.C. section 2254, which is attached as Appendix J.

The Fourteenth Amendment to the United States Constitution provides, in part: “nor shall any State deprive any person of life, liberty, or property, without due process of law;”

Georgia’s res judicata rule, O.C.G.A. § 9-14-51, reads:

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

STATEMENT OF THE CASE

A. *Introduction*

A jury found Jeffery Griffin guilty of felony-murder and unlawfully possessing a firearm, based in part on inflammatory evidence of an extraneous act that was only relevant to suggest that he had a propensity to escalate gun-fights. The Circuit Judge found that his argument that this evidence produced a constitutionally unfair trial was not only unmeritorious, but was not even a matter that reasonable jurists could debate. See *App. A*. The judge also found it was not reasonably debatable that Griffin did not “fairly present” this argument in state court (although he asserted in his *pro se* filings that the evidence violated his federal constitutional right to a fair trial), and it was reasonably debatable that a Georgia habeas court would now find the claim procedurally barred. The Circuit Judge’s narrow construction of the standard for issuing a certificate of appealability would foreclose countless litigants serving substantial state prison sentences from federal appellate review of federal constitutional claims that are far from marginal.

B. *Trial*

A grand jury indicted petitioner Jeffery Griffin and Dontavious Bunkley for murder, aggravated assault, and possessing a firearm while committing a crime. It alleged that Griffin handed a gun to Bunkley, who used it to shoot the victim, Tony Grey. Prior to trial, the state of Georgia filed a written notice, listing a number of witnesses from whom it intended to elicit testimony at trial that, on an unrelated occasion, Griffin handed a gun to someone else who used to shoot at a person. The

state argued at a hearing the evidence was relevant to intent, bent of mind, course of conduct, and modus operandi. Griffin responded that the evidence was only relevant to show bad character. The trial court ruled the evidence was admissible, noting the proximity and similarity of the collateral evidence to the charged conduct.

At trial, three witnesses testified about the collateral evidence. Trial transcript, available at *Griffin v. McLaughlin*, No. 4:14-cv-00029-CDL-MSH, ECF Nos. 7-9 at 579-83, 884-88; 7-10 at 896-98. Xavier Talton testified that during a barbecue, a man named Lockett got into an argument, left, and returned carrying a shotgun, along with Griffin. ECF No. 7-8 at 578-79. Lockett waived the gun, pointed it at a crowd, and then chased Nicholas Talton around the house. *Id.* at 580. He pulled the trigger but the shotgun jammed. *Id.* He met Griffin, who handed him a black gun and took the shotgun. *Id.* at 581. Then Lockett and Griffin ran behind a house, where the witness heard shots fired. *Id.*

Draper Woodard testified he saw Griffin and Lockett “walking up the road and Sport [Lockett] had a pump.” ECF No. 7-10 at 896. He said “Sport chased Nick with the pump with his little child running behind.” *Id.* at 897. Lockett walked back down the road, asked Woodard “did [he] want some,” and told Griffin to give him the .45. *Id.* at 897-98. They exchanged guns. *Id.* at 898.

Wylanda Harpe testified she saw Lockett chase Nicholas Talton with a pump gun at a cookout by Draper Woodard’s mother’s house. ECF No. 7-9 at 884-85. She stated Talton’s son was running behind him. *Id.* at 885. When Woodard gave Lockett “a look,” Lockett asked him “did he want some too?” *Id.* at 886. Lockett then told

Griffin to give him the .45. *Id.* at 887. She didn't see whether the gun was a pistol, a rifle, or a shotgun, but she saw Griffin put it in Lockett's hands. *Id.* at 887-88.

To prove the offenses charged, the government presented the testimony of six witnesses and the confession of Dontavious Bunkley. Bunkley told Agent Brunner that Grey accused him of stealing his Playstation. ECF No. 7-9 at 794. He denied it and began walking away, but Grey pushed him, and they fought. *Id.* Bystanders separated them and took them outside. *Id.* Grey approached him again and hit him with a stick, causing bruises and scratches on his face. *Id.* They were wrestling, when someone tossed or dropped a gun in the area. *Id.* at 795-96. He picked it up, and saw people with sticks in his peripheral vision. *Id.* at 797. He backed away, holding the gun out and pointing it in Grey's general direction, his hands shaking with his finger on the trigger. *Id.* When someone moved around on his side, he turned around and the gun went off. *Id.* at 797-98.

Xavier Talton, the only witness to both instances, saw Grey follow Bunkley into the house, verbally confront Bunkley about the break-in, and throw the first punch. *Id.* at 565-66. Bunkley threw Grey in a chair and hit him a few times. *Id.* at 566-67. Talton helped break them up, and Bunkley went outside. *Id.* at 567. Grey followed Bunkley outside and hit him again. *Id.* Bunkley grabbed him, threw him down on the porch, and "had him in some kind of hold." *Id.* at 567-68. Someone broke them up again. *Id.* at 568. Griffin walked to his car, got a pistol, came back and handed it to Bunkley. *Id.* at 568-69. He whispered something to Bunkley when he first approached him, and said "handle your business," when he gave him the gun.

Id. at 619. Bunkley waived the pistol and threatened to kill the victim. *Id.* at 569. Grey ran, and Bunkley pushed a bystander “off to the side,” stepped up, and pulled the trigger. *Id.* at 570, 598, 605-07.

Courtney Towns testified that Grey had a wooden stick about twelve to eighteen inches long and a quarter inch in diameter in the house. ECF No. 7-9 at 739-40. He hit Bunkley with it once, around his head. *Id.* at 740-41, 750. After they sparred on the porch, Bunkley ran to Griffin, who was leaning against his car. *Id.* at 743. Griffin said a few words to him, and then “reached on the right side and gave [Bunkley] the gun.” *Id.* at 743, 756. At the time, she was a little more than a foot away. *Id.* at 763.

Rodney Thomas was attempting to break up the fight when he felt a gun at his back. *Id.* at 474-76. He did not see how Bunkley got the gun. *Id.* at 494. To his knowledge, when Bunkley had the gun, Griffin was never closer to him than ten yards. *Id.* at 512.

Quavius Johnson testified that after the second altercation, he grabbed Bunkley and they walked by the house, as he told him to “let it go.” *Id.* at 646. He continued, “[t]hen Jeffery walked up. He asked him did he want to hold a gun. He was like, yea, give me the gun. I was telling Jeffery, I was like don’t give it to him, and he gave it to him anyway.” *Id.* at 647. Johnson did not see where Griffin got the gun from. *Id.* at 647, 662-63. Before giving him the pistol, Griffin “was like, man, you might as well go on and do him.” *Id.* at 666.

Joshua Towns observed the fight on the front porch. *Id.* at 856. He then saw Griffin go to his car, reach under the driver’s seat, and stick something in his pants. *Id.* at 857-58. Bunkley walked to Griffin, and Griffin gave something to him. *Id.* at 858. It was beginning to get dark outside at the time. *Id.* at 864. He did not actually see a gun come out of the car or change hands; he first saw the gun when Bunkley pulled it up. *Id.* at 877.

Finally, Andre Miller saw Griffin get a gun from under the driver’s seat of his Civic and put in his hoodie pocket or in his jeans. ECF No. 7-10 at 1007.

C. Direct Appeal

Griffin appealed to the Georgia Supreme Court. He argued that “[t]he trial court erred in admitting evidence of the alleged similar transaction evidence against [him].” App. D. The Georgia Supreme Court affirmed his conviction and sentence. *See* App. E.

D. Georgia Habeas Proceedings

In 2012, Griffin moved in Telfair County Superior Court for a writ of habeas corpus, raising seven grounds for relief, including that the trial court should not have admitted the “similar transaction” evidence. *See* App. F. The court conducted an evidentiary hearing on the petition. *See* App. G. After taking testimony from his former appellate counsel, Griffin sought to make legal argument, but the court told him he should only make legal arguments in a written brief. He did so, arguing in his post-hearing brief, among other claims, that the “similar transaction” evidence was so prejudicial that it violated his constitutional right to a fair trial, which he

misattributed to the Sixth Amendment. *See* App. H. The court denied relief on each ground. *See* App. I. In an order dated May 15, 2013, it explained that the “similar transaction” claim could not “be re-litigated in habeas corpus if there has been no change in the facts or the law.”

E. Change in Georgia Law Governing Evidence of Collateral Acts

Effective January 1, 2013, Georgia adopted the federal rules of evidence. 2011 Georgia Laws 52 § 2 (amending, *inter alia*, O.C.G.A. § 24-4-404(b)). Among other things, this eliminated “bent of mind” and “course of conduct,” as permissible exceptions to the bar on admitting evidence of collateral acts. *Id.*; *see also* Paul S. Milich, *Georgia’s New Evidence Code - an Overview*, 28 Ga. St. U. L. Rev. 379, 379 (2012).

F. Federal Habeas Proceedings

Griffin filed an initial petition *pro se*, but the District Court stayed proceedings so that he could apply to the Georgia Supreme Court for a Certificate of Probable Cause, which was necessary for him to exhaust his state remedies. After the Georgia Supreme Court denied this application, the District Court lifted the stay and allowed Griffin to file an amended petition, through counsel.

In his amended petition, Griffin narrowed his argument to the single claim that the collateral evidence violated due process, and argued the state habeas court misapplied Georgia’s rule of res judicata in dismissing this claim as successive. The state filed a “supplement answer-response” and a supporting brief, arguing this claim was not previously raised in the state courts would deem the claim successive if he

now tried to raise the issue. It further argued Griffin could not show prejudice to overcome any default.

Griffin filed a reply arguing, among other things, that (a) he had fairly presented his claim to the state habeas court, (b) if he had not done so, and now presented the claim in state habeas court, the court would not deem the claim successive, given the intervening change in the law governing collateral evidence, (c) his inability to discover the newly enacted law governing collateral evidence and otherwise limited research capability at Telfair State Prison excused any default in failing to present in greater detail his claim to state habeas court, and (d) he could show prejudice to overcome any procedural default based on the likely effect of the collateral evidence on the jury's verdict.

The District Court conducted an evidentiary hearing, at which Griffin testified about his research and preparation of his state habeas pleadings in Telfair State Prison. Counsel for both sides made oral arguments.

The Magistrate Court issued its report and recommendation. *See* App. C. It recommended the District Court find (i) Griffin's claim was unexhausted, (ii) the District Court should treat the claim as procedurally defaulted, (iii) Georgia had not waived reliance on res judicata as a procedural default, and, (iv) Griffin could not show cause and prejudice to overcome procedural default and in any event his claim was not meritorious. *Id.* It further recommended the District Court deny any application for certificate of appealability made in that forum. *Id.*

Griffin objected in detail to each of the Magistrate Court’s recommendations. The District Court summarily adopted the Magistrate Court’s report and recommendation, preemptively denied a certificate of appealability, and entered a judgment in favor of the respondent. *See App. B.*

G. Application for Certificate of Appealability

Griffin applied to the Eleventh Circuit for a certificate of appealability as to three issues: (1) whether the admission of the similar act evidence violated due process, (2) whether Griffin exhausted his due process claim in state court, and (3) whether, if he did not, Georgia law would now bar him from raising the claim.

The Circuit Judge declined to issue a certificate of appealability. *See App. A.* First, it found that Griffin had not raised his due process argument on direct appeal and had “indicated in his state habeas petition that he was raising the same claim previously presented to the Georgia Supreme Court.” *Id.* at 3. It next concluded that Georgia’s subsequent adoption of the federal rules of evidence did not excuse Griffin’s failure to raise the due process argument in state court. *Id.* Finally, it concluded his due process claim was not meritorious, considering that the trial court balanced the probative value against the prejudicial effect and gave the jury limiting instructions as to the evidence. *Id.*

REASONS FOR GRANTING THE WRIT

The Circuit Judge’s determination that Griffin’s claims were not even debatable contravened this Court’s precedents construing the standard for issuing a certificate of appealability. This Court has repeatedly emphasized that this threshold standard is not so demanding as to require a petitioner to show a likelihood of succeeding on the merits of his arguments. *See, e.g., Buck v. Davis*, __ U.S. __, 137 S. Ct. 759 (2017). Rather, “[t]he question is the debatability of the underlying . . . claim[s], not the resolution of that debate.” *Miller-El v. Cockrell*, 583 U.S. 322, 342 (2003).

Each of Griffin’s arguments – his due process fundamental fairness claim, his fair presentation argument, and his argument that Georgia would not bar him from raising the due process violation in a successive petition – rest squarely within the realm of debate. But the Circuit Judge dispensed with his petition in a summary opinion that barely touched on his arguments, let alone explain why their rejection was beyond reasonable debate.

The due process fundamental fairness test is broad, residual, and rarely employed. Its contours thus remain wide open for deliberation by reasonable jurists, and Griffin’s case presents a compelling example of evidence so inflammatory as to deny a fair trial.

The question of whether Griffin exhausted his claim in state court also leaves room for debate. Exhaustion requires at a minimum that the he “fairly present[]” the

substance of his claim in state court, *Picard v. Connor*, 404 U.S. 270, 275 (1971), and indicate to the state court that he claims a violation of his federal constitutional right. *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (no fair presentation when petitioner did not federalize claim in state court); *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (no fair presentation when petitioner did not constitutionalize claim in state court). This much he did. Whether he was required to say anything more to fairly present his claim in state court is debatable.

Assuming he did not fairly present his claim in state court, it is debatable that Georgia would not apply its rule barring raising new claims in a successive petition, given the intervening change in Georgia law governing the admission of collateral crimes evidence. This was a fundamental change in the relevant legal principles, which elucidated a due process claim that would have seemed frivolous (and thus not reasonably available to Griffin) under Georgia's former, more permissive rule.

I. It is reasonably debatable that the extraneous evidence of Griffin's involvement in an unrelated shooting, offered to show his "bent of mind," intent, or "course of conduct," resulted in a fundamentally unfair trial.

Griffin's due process claim was reasonably debatable. The evidence of an unrelated shooting was a textbook example of propensity evidence. As such, it was legally irrelevant and its prejudicial effect was substantial. The evidence overshadowed Griffin's legitimate self-defense claim, encouraging the jury to resolve any doubts as to whether he was justified in handing a gun to his co-defendant by reference to evidence suggesting his bad character. Although Georgia law permitted the evidence, the trial court should have excluded it as a violation of due process. *See*

Lisenba v. California, 314 U.S. 219, 236-38 (1941); *Donnelly v. DeChristoforo*, 414 U.S. 637, 643 (1974); *Dowling v. United States*, 493 U.S. 342 (1990).

At the time of his trial, Georgia had arguably the most permissive rule in the country for admitting evidence of collateral acts. “Georgia [wa]s the only jurisdiction that admit[] evidence of the accused’s unrelated past crimes and other bad acts to prove his “bent of mind” or “course of conduct.” Paul S. Milich, *Georgia’s New Evidence Code - an Overview*, 28 Ga. St. U. L. Rev. 379, 407 (2012); *see also Wade v. State*, 295 Ga. App. 45 (Ct. App. 2008) (“Wade points out that Georgia is the only state to recognize the bent of mind exception, and we have found no authority to the contrary.”)

This law was roundly criticized. Neither statute nor case law defined “bent of mind” or “course of conduct.” Milich, *Georgia’s New Evidence Code, supra* (“Georgia cases do not explain where bent of mind came from or how it comports with the statutory rule against character evidence.”) Georgia Supreme Court Justice Sears lamented “‘bent of mind’ and ‘course of conduct’ have evolved into amorphous catch-phrases, difficult to define and slippery in application.” *Farley v. State*, 265 Ga. 622, 630 (Ga. 1995) (Sears, J., concurring). The problem, as Justice Sears saw it, was that “a person’s bent of mind is dangerously close to being his character, and a person’s course of conduct could easily show nothing more than a mere propensity to act in a certain manner.” *Id.*

Relying on this permissive rule governing collateral evidence, Georgia courts authorized a broad array of extrinsic evidence, often without much elaboration on its

relevance other than citing these statutory phrases. Such was the case here. Like the trial court, the Georgia Supreme Court found the evidence was admissible to show “course of conduct, bent of mind, or knowledge or intent of the defendant with respect to the acts allegedly committed by him” *Griffin v. State*, 288 Ga. 833, 834 (Ga. 2011) (App. E). But neither court elaborated on exactly how the evidence served these purposes, or explained how these purposes were material to the case.

A more careful consideration of the extraneous evidence reveals that it was only relevant to the homicide for its bearing on Griffin’s character. For example, Griffin’s collateral act was relevant to “intent,” but only to suggest that he was the type of person who *would* intend to help someone shoot a person. This is not the sense in which collateral evidence is admissible to show intent. “[E]ven though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime,” they “weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.” *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (italics added) (internal citation omitted). “The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.” *Id.*

In contrast to the evidence surrounding an unrelated shooting, the type of collateral evidence that might have been legitimately relevant to Griffin’s intent would have been something particular to the altercation with Grey. For example, a

prior physical altercation between Griffin and Grey would have suggested Griffin had a motive to hurt him.

Of course, at issue here is not the admissibility of the collateral evidence as a matter of Georgia law. Rather, Griffin maintains that admitting the evidence resulted in a fundamentally unfair trial in violation of due process. The Eleventh Circuit, like this Court, has recognized that “where a trial court’s evidence ruling renders a state criminal proceeding fundamentally unfair the petitioner is entitled to relief.” *Boykins v. Wainwright*, 737 F. 2d 1539, 1544 (11th Cir. 1984). Such an error is of constitutional magnitude when it “fatally infect[s] the trial,” *Lisenba*, 314 U.S. at 236, “necessarily prevents a fair trial,” *id*, or the problematic evidence is “material in the sense of a crucial, critical, highly significant factor.” *Boykins*, 737 F. 2d at 1544-45 (11th Cir. 1984).

Here, the prior incident was superficially similar to the conduct for which the jury convicted Griffin of felony murder. This superficial similarity is precisely what made the collateral evidence so insidious. Taken together, the two incidents painted a picture of a man who had a bloodthirsty desire to escalate gunfights – a man who wanted to see his friends shoot at other people. But, unlike in the collateral incident, Griffin could plausibly argue that he handed the gun to Bunkley under circumstances that justified Bunkley’s at least brandishing the weapon in self-defense.

Under these facts, Griffin’s due process argument was neither frivolous nor marginal. Nor was it foreclosed by precedent. The case law governing the due process fundamental fairness claim is limited, but both this Court and the Eleventh Circuit

have recognized the viability of such a claim. *See, e.g., Boykins*, 737 F. 2d at 1544 (due process violation based on excluding testimony of psychologist who treated defendant at mental hospital, where defendant claimed insanity defense); *Panzavecchia v. Wainwright*, 658 F. 2d 337, 341 (5th Cir. 1981) (due process violation in admitting evidence of prior counterfeiting condition that was “totally irrelevant to the murder charge and . . . only . . . served . . . to show bad character and propensity to commit a crime.”); *Taylor v. Sec’y, Florida Dep’t of Corr.*, 760 F. 3d 1284, 1296 (11th Cir. 2014) (no due process violation by excluding defense testimony with “remote and attenuated” tie to defense); *cf. Dowling*, 493 U.S. 342 (in bank robbery trial, no due process violation by admitting testimony of woman identifying Dowling as intruder in separate robbery, where testimony was relevant to identity of bank robber and to connect him with co-defendant).

In concluding the claim was not even debatable, the Circuit judge relied on the trial judge’s balancing of probativeness against prejudice and the limiting instructions given to the jury. These considerations might have defeated Griffin’s claim on the merits (although Griffin would have argued that the balancing and instructions were inadequate in light of the inescapable propensity rationale that explained the actual relevance of the evidence). But they did not render his claim non-debatable. Griffin’s claim was “adequate to deserve encouragement to proceed further.’ ” *Slack v. McDaniel*, 529 U.S. 473, 483-484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983)).

II. It is reasonably debatable that Griffin fairly presented his due process claim to the Georgia habeas court by citing his federal constitutional right to a fair trial.

- A. The Circuit Judge ignored Griffin's post-hearing brief in deciding he had not fairly presented his claim, although this was the first time the state court had allowed him to cite any law supporting his argument.

The Circuit judge appeared to rely exclusively on the initial form motion Griffin filed in state court in construing his claim to be “the same claim previously presented to the Georgia Supreme Court.” App. A at 3. In a footnote, it quoted his “claim”:

Judicial Error. The trial court erred by allowing similar transaction evidence to be presented. The trial court erred by allowing the state to present similar transaction evidence of an alleged crime that occurred four months prior to this crime. The trial court abused its discretion in allowing the evidence to be presented to the jury that no reasonable jurist could believe he fairly presented his due process claim to state court.

Id. at 2, n. 1. The District Court adopted the opinion of the Magistrate Court, which considered the post-hearing brief, but concluded “it was reasonable for the state habeas court to assume that Griffin was raising the same claim he raised” on direct appeal, and his “post-hearing brief would not change the court’s perception of that claim.” App. C at 9.

As Griffin argued to both the District Court and to the Circuit Judge, he did not have an opportunity to meaningfully present his claim until he filed the post-hearing brief. His initial state habeas pleading was a pre-printed form. *See* App. F. That form provided three lines to state each claim, and about four lines to provide supporting facts. *Id.* at 5. A parenthetical instructed him “[t]ell your *story briefly*

without citing cases or law.” Id. (italics added.) The form stated Griffin could “attach pages stating additional grounds and facts supporting the same.” *Id.* He did so, adding grounds five through seven, and following the same abbreviated format. *Id.* at 7.

At the evidentiary hearing, Griffin indicated he wanted to “testify,” but when he began reciting his arguments, the state interjected “Your Honor, this sounds more like legal argument than evidence to me.” See App. G at 13. The court instructed Griffin “what you are reading there is not testimony, it is argument. I’m going to let you give that to me in writing. That works to your benefit because I will have it in my hand when I decide your case.” *Id.* at 14.

Griffin’s only opportunity to elaborate on his claim was therefore his post-hearing brief. See App. H. Where the instructions on the initial pleading form provided to Griffin foreclosed legal argument and the state habeas judge barred oral argument at the hearing and ordered a post-hearing briefing, it would not have been reasonable for that court to ignore that brief in deciding the claim. Neither the state habeas court nor the federal courts could reasonably determine the substance of Griffin’s claim, without consulting his only legal argument allowed on the issue. Not only was this unreasonable, but it was unfair, particularly to a *pro se* litigant.

B. It is reasonably debatable that the District Court misconstrued the fair presentation requirement.

The Circuit Judge relied on *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) in support of its finding, quoting “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed

by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.” App. A at 3. But *Duncan* did not alter the central inquiry under *Picard*, 404 U.S. at 278: whether “the substance of a federal habeas corpus claim” was “first . . . presented to the state courts.”

The problem in *Duncan*, 513 U.S. 364, was that the prisoner did not federalize his claim in state court. Duncan argued to the state court that collateral evidence admitted in his trial violated the California Constitution, but he never cited the United States Constitution. *Id.* at 364-65. This Court held “[i]f state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” *Id.* at 365-66. It suggested that Duncan should have cited “due process,” but this statement was dicta, since Duncan had not referred to any federal constitutional right. In contrast, here Griffin told the state court that he was relying on the federal constitutional right to a fair trial, but misattributed that right to the Sixth Amendment.

Thus, Justice Stevens understood the holding in *Duncan* to rest on the prisoner’s failure to federalize his claim before the state court, stating “[t]oday the Court tightens the pleading screws by adding the requirement that the state courts ‘must surely be alerted to the fact that prisoners are asserting claims under the United States Constitution.’” *Id.* at 368 (Stevens, J., dissenting). If there were any doubt, the Court’s opinion in *Baldwin v. Reese*, 541 U.S. 27 (2004) confirmed that

Duncan did not add to the rule of *Picard* an “exact labeling requirement.” *Duncan*, 513 U.S. at 368 (Stevens, J., dissenting).

In *Baldwin*, 541 U.S. at 32, this Court held that a prisoner does not fairly present a federal claim to a state court “if that court must read beyond a petition or a brief (or a similar document)” to discover the federal nature of his claim. Significant to this case, the Court stated “[a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies *or* a case deciding such a claim on federal grounds, *or by simply labeling the claim federal.*” *Id.* (italics added).

Griffin presented a federal, constitutional claim to the state habeas court that the collateral evidence violated his right to a fair trial. Although he did not incant “due process” or cite the Fourteenth or Fifth Amendments, this Court still does not require a prisoner to “cit[e] ‘book and verse on the federal constitution.’” *Picard*, 404 U.S. at 278. But the District Court did, by finding that his failure to cite the Fifth or Fourteenth Amendments was fatal, even though he argued the evidence violated his federal constitutional right to a fair trial. Because this Court’s precedents are not so exacting, the Circuit Judge was wrong to find the District Court’s conclusion was beyond reasonable debate.

III. It is reasonably debatable that a Georgia habeas court would not now find the claim in a new petition for habeas corpus to be procedurally barred.

The Circuit Judge found no reasonable jurist could disagree that Georgia's rule against successive petitions, O.C.G.A. section 9-14-51, would foreclose Griffin from now raising his claim in Georgia court. Although "[f]ederal courts may apply state rules about procedural bars to conclude that further attempts at exhaustion would be futile[, t]his step should not be taken if there is a reasonable possibility that an exception to the procedural bar may still be available to the petitioner." *Snowden v. Singletary*, 135 F. 3d 732, 737 (11th Cir. 1998). "[T]he rule of res judicata in [Georgia] habeas corpus proceedings is rendered inapplicable where the grounds for relief are based on a change in the law occurring subsequent to the prior habeas proceeding." *Stevens v. Kemp*, 254 Ga. 228, 230 (Ga. 1985). "[T]he determination of whether the change is sufficient to excuse the omission of the claim is an objective inquiry, which seeks to ascertain whether petitioner or his counsel reasonably should have known about the claim at the time the earlier habeas petition was filed." *Moore v. Zant*, 885 F. 2d 1497, 1506 (11th Cir. 1989).

Georgia adopted the federal rules of evidence after Griffin had filed his initial state habeas petition and post-hearing brief. Although this was not a development that was binding on the due process issue, this does not mean there is no "reasonable possibility" that the Georgia habeas court would conclude this intervening change in the law excepted his due process claim from section 9-14-51. *Id.* The adoption of the federal rules of evidence was a seismic change in Georgia law, especially upending

the landscape of collateral crimes evidence. The previous rule allowing such evidence to show “bent of mind” or “course of conduct” begged jurists and practitioners to consider such evidence for its bearing on character, in violation of the longstanding and widespread American tradition of judging the crime and not the defendant. It could only have encouraged sloppy thinking and rote admission of propensity evidence. In this permissive environment, a due process challenge to such evidence would have seemed not just farfetched, but patently frivolous.

Thankfully, the adoption of the federal rules of evidence was a return to first principles, or as Professor Milich called it, a “reboot.” *Georgia’s New Evidence Code – an Overview*, 28 Ga. St. U. L. Rev. at 379. In light of first principles, Rule 404(b) is an application of the general rule of relevance, with certain policy-based limitations. Chief among these limitations is that propensity evidence is categorically inadmissible. Although such evidence is technically relevant, its relevance is categorically outweighed by undue prejudice.

Before Georgia’s return to first principles, “bent of mind” and “course of conduct” had created a black hole which consumed the policy concerns excluding propensity evidence, and eclipsed the careful consideration of evidence offered for other reasons, such as “intent,” which can often mask an actual propensity justification. With the adoption of the federal rules of evidence, Georgia again closed the door to propensity evidence in some forms, and cast new light on propensity evidence in all of its forms. Adopting Rule 404(b) opened the minds of Georgia jurists, lawyers, and *pro se* litigants to a due process claim which would have been difficult

to conceive in the bad old days of customarily presenting to Georgia juries evidence and argument about a defendant's "bent of mind" or "course of conduct."

Petitioner would not reasonably have been aware of the rare due process fundamental fairness claim, with his limited access to a prison law library. But the subsequent change in the Georgia rules of evidence shined sunlight on the old evidence code in a way that would have alerted him to the fundamental unfairness of the court's admission of the collateral evidence in his trial. Georgia's "reboot" thus informs not only the evidentiary issue, but the parallel constitutional question. The adoption of the new evidence code was such a significant change in the relevant legal principles that there is a "reasonable possibility that an exception to the procedural bar may still be available to the petitioner." *Snowden*, 135 F. 3d at 737. Hence, the Circuit Judge was wrong to conclude that jurists could not reasonably debate whether Georgia courts would now bar Griffin's claim.

CONCLUSION

For the reasons above, Petitioner Griffin respectfully requests this Court grant his petition for writ of certiorari.

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