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Fulfilling Porter's Promise

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FULFILLING *PORTER'S* PROMISE

DANIELLE ALLYN*

A NOTE ON LANGUAGE

Person-first language: Person-first language is used to describe communities affected by a type of disability or oppression.¹ For example, “incarcerated person” or “person” is used to describe someone rather than “offender” or “inmate.”²

Gender pronouns: Where the gender-specific pronoun “he” is used, it refers to a named person or is reflective of the fact that the six veterans profiled in this writing identify as male.

Veteran: As used in this report, “veteran” refers to any person with a history of service in the United States military, irrespective of length of service, combat exposure, or discharge designation.³

Race and capitalization: This Article capitalizes Black and White as proper nouns when referring to race. This choice reflects the reality that both terms represent historically created categories. Capitalizing Black in reference to individuals of African descent acknowledges a collective identity and a shared history and accords with publishing standards in institutions predominantly serving Black communities.⁴ Capitalizing White recognizes Whiteness as a socially constructed

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First, I would like to thank God for giving me life and breath. I would like to thank my family, and to extend a special thank-you to multiple generations of loved ones who served in the United States Military. I am eternally grateful to my partner, Kayembe, for his steadfast love and support. Finally, I offer sincere gratitude to the mentors and advisors who made this research possible: my faculty advisor, Professor Peggy Cooper-Davis, Lauren Sudeall and Darcy Meals at the Georgia State University Center for Access to Justice, and the community of capital defenders at the Georgia Resource Center, the Southern Center for Human Rights, and the Veterans Advocacy Project.

1. See *People-First Language*, EMP’R ASSISTANCE & RES. NETWORK ON DISABILITY INCLUSION, <https://askearn.org/topics/retention-advancement/disability-etiquette/people-first-language> [<https://perma.cc/X4BK-BCDS>].

2. Eddie Ellis, *An Open Letter to Our Friends on the Question of Language*, CREDIBLE MESSENGER JUST. CTR., <https://cmjcenter.org/wp-content/uploads/2017/07/CNUS-AppropriateLanguage.pdf> [<https://perma.cc/NJ2R-4LAJ>].

3. *Contra* 38 C.F.R. § 3.1(d) (2021). This is broader than the definition under federal law. *Id.* (“Veteran means a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.”).

4. Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, THE ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-black-and-white/613159> [<https://perma.cc/4HZZ-TAQ4>].

category and avoids portrayal of Whiteness as an objective fact, thus naturalizing racism.⁵ “When we ignore the dialectical relation between the labels ‘black’ and ‘white,’ we treat a bloodstained product of history as a neutral, objective fact about the world.”⁶

Mental disability: The term “mental disability,” where used, embraces individuals with experiences of mental illness, intellectual disability, and/or trauma.⁷

Intellectual disability: According to the American Association of Intellectual and Developmental Disabilities, intellectual disability refers to, “a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of eighteen.”⁸

Severe mental illness: While mental illness impacts 20% of Americans in a given year, only about 5% of people live with severe mental illness (SMI).⁹ SMI refers to a narrow category of conditions that often last longer than one year and that significantly impact a person’s ability to conduct daily life activities, such as spending time with family or going to work.¹⁰ Common diagnoses that fall into this category

5. *Id.*

6. *Id.* The National Association of Black Journalists (NABJ) and the American Psychological Association (APA) likewise capitalize both Black and White. *Id.*; *NABJ Statement on Capitalizing Black and Other Racial Identifiers*, NAT’L ASS’N OF BLACK JOURNALISTS (June 11, 2020), <https://www.nabj.org/news/512370/NABJ-Statement-on-Capitalizing-Black-and-Other-Racial-Identifiers.htm> [<https://perma.cc/TN7Z-RSE6>].

7. Convention on the Rights of Persons with Disabilities art. 1, Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008) (“[Any] long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”).

8. *Definition of Intellectual Disability*, AM. ASS’N OF INTELLECTUAL & DEVELOPMENTAL DISABILITIES, <https://www.aadd.org/intellectual-disability/definition#:~:text=Intellectual%20disability%20is%20a%20disability,everyday%20social%20and%20practical%20skills> [<https://perma.cc/U6A7-7SGB>]. In 2010, Congress enacted Rosa’s Law, changing all references to “mental retardation” to “intellectual disability” in federal law. Rosa’s Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010). In 2017, Georgia amended its criminal code in accordance with Rosa’s Law. *HB 343*, GA. GEN. ASSEMB., <https://www.legis.ga.gov/legislation/50486> [<https://perma.cc/3Y36-ZCC4>] (outlining how this code section substitutes the term “intellectual disability” for “mentally retarded” and “mental retardation”); *see, e.g.*, GA. CODE ANN. § 17-7-131 (2020).

9. RACHEL N. LIPARI & EUNICE PARK-LEE, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2018 NATIONAL SURVEY ON DRUG USE AND HEALTH 2 (2019), <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf> [<https://perma.cc/DX2V-QWTB>].

10. *Mental Health and Substance Use Disorders*, SUBSTANCE ABUSE & MENTAL HEALTH

include schizophrenia, bipolar disorder, major depression, and post-traumatic stress disorder (PTSD).¹¹ Individuals with SMI might hear voices, orient differently to time or place, remember things differently, hold fears or beliefs that others do not share, experience powerful emotions, or live with thoughts of suicide or self-harm.¹² No single factor causes SMI, but a person's family history, structural adversity, and past traumatic experiences all play a role.¹³ Factors such as structural racism and socioeconomic inequality both increase the risk of SMI and limit access to recovery-oriented care; research documents that Black people living with SMI experience forced treatment, involuntary hospitalization, physical restraint, and unwanted contact with the legal system at higher rates than their similarly situated White peers.¹⁴ In the past, psychiatrists believed that people with SMI could not recover, and thus "treatment" involved confinement to the

SERVS. ADMIN. (Apr. 30, 2020), <https://www.samhsa.gov/find-help/disorders> [<https://perma.cc/X6DE-MXNN>]; see also Marc Corbie`re, Patrizia Villotti, Tania Lecomte, Gary R. Bond, Alain Lesage & Elliot M. Goldner, *Work Accommodations and Natural Supports for Maintaining Employment*, 37 PSYCHIATRIC REHAB. J. 90, 90–91 (2014) (arguing that while people with SMI experience high unemployment rates and short job tenure, they can and do perform in the workplace given access to accommodations); LeRoy Spaniol & Ann Nelson, *Family Recovery*, 51 CMTY. MENTAL HEALTH J. 761, 761 (2015) ("The onset of a mental illness is a traumatic experience for all members of a family.").

11. TAMMEKA SWINSON EVANS, NANCY BERKMAN, CARRIE BROWN, BRADLEY GAYNES & RACHEL PALMIERI WEBER, AGENCY FOR HEALTHCARE RES. & QUALITY, DISPARITIES WITHIN SERIOUS MENTAL ILLNESS 1, 7–8, 17 (2016), https://www.ncbi.nlm.nih.gov/books/NBK368427/pdf/Bookshelf_NBK368427.pdf [<https://perma.cc/4E4W-Z66N>] (indicating that experiences with SMI vary from person to person, even within the same diagnosis, and factors such as race, poverty, and access to care influence a person's trajectory of recovery; plus, not everyone who receives a diagnosis of SMI identifies with that diagnosis).

12. See, e.g., HEALING VOICES (Digital Eyes Film 2016) (depicting three individuals living with SMI who share experiences commonly stigmatized as "psychosis" and furthermore examining America's broken mental health system).

13. See Cherise Rosen, Nev Jones, Eleanor Longden, Kayla A. Chase, Mona Shattell, Jennifer K. Melbourne, Sarah K. Keedy & Rajiv P. Sharma, *Exploring the Intersections of Trauma, Structural Adversity, and Psychosis Among a Primarily African-American Sample: A Mixed-Methods Analysis*, FRONTIERS PSYCHIATRY, Apr. 2017, at 1, 1–2.

14. See James Y. Nazroo, Kamaldeep S. Bhui & James Rhodes, *Where Next for Understanding Race/Ethnic Inequalities in Severe Mental Illness? Structural, Interpersonal, and Institutional Racism*, 42 SOCIO. HEALTH & ILLNESS 262, 262–63, 270 (2020) (explaining that factors such as structural racism, collective racial trauma, structural socioeconomic adversity, and childhood trauma all increase a person's risk of SMI and impact a person's subsequent trajectory of recovery; Black people with SMI face higher risk of negative contact with the prison system and coercive psychiatric treatment); Michael L. Perlin & Heather Ellis Cucolo, *"Tolling For the Aching Ones Whose Wounds Cannot Be Nursed": The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law Policing Rape Complaints*, 20 J. GENDER, RACE & JUST. 431, 439–40, 450 (2017) (explaining that irrespective of disability severity, Black people with mental disabilities experience involuntary commitment, involuntary administration of antipsychotics, misdiagnosis, substandard treatment, and clinician/court findings of "dangerousness" at higher rates than White people with the same disabilities).

state mental hospital.¹⁵ We now know that people with SMI can and do live full lives in their communities.¹⁶

Trauma: The Substance Abuse and Mental Health Services Administration defines trauma as “an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional, or spiritual well-being.”¹⁷ Trauma may be endemic in institutions, such as psychiatric hospitals or prisons, where these institutions repeatedly expose people confined within them to abuses such as involuntary treatment, restraint, excessive force, or solitary confinement.¹⁸ Trauma also includes experiences of chronic adversity, such as poverty or racism.¹⁹ Trauma alters the body’s biological response to stress; it profoundly impacts normal human processes, such as memory, concentration, emotional expression, the formation and maintenance of intimate relationships, and responses to real or perceived threats.²⁰

Historical trauma:

[H]istorical trauma is the “cumulative emotional and psychological wounding over a lifespan and across generations, emanating from massive group experiences” . . . “[A] person whose culture of origin has a history of oppression or genocide may be living with effects of trauma exposure that occurred not to the individual but [instead] to their forebearers.”²¹

15. See, e.g., MAB SEGRETT, *ADMINISTRATIONS OF LUNACY: RACISM AND THE HAUNTING OF AMERICAN PSYCHIATRY AT THE MILLEDGEVILLE ASYLUM* (2020) (explaining, through an in-depth case study of Georgia’s Milledgeville State Hospital, how the South’s history of slavery and racism influenced the development of the psychiatric asylum, the forced hospitalization of individuals reporting experiences labeled psychosis, and the over-institutionalization of Black people); Perlin & Cucolo, *supra* note 14, at 447 (acknowledging the legacy of racial segregation in southern psychiatric institutions).

16. See Mark Ragins & David A. Pollack, *Recovery and Community Mental Health*, in *MODERN COMMUNITY MENTAL HEALTH: AN INTERDISCIPLINARY APPROACH*, 385, 392 (Kenneth Yeager, David Cutler, Dale Svendsen & Grayce M. Sills eds., 2013) (outlining a recovery-based approach to care for SMI).

17. *Trauma and Violence*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Aug. 2, 2019), <https://www.samhsa.gov/trauma-violence> [<https://perma.cc/TS3S-U7P2>].

18. See *id.*

19. Kevin L. Nadal, Tanya Erazo & Rukiya King, *Challenging Definitions of Psychological Trauma: Connecting Racial Microaggressions and Traumatic Stress*, *J. SOC. ACTION COUNSELING & PSYCH.*, Winter 2019, at 2, 3, 11 (2019).

20. See BESSELA VANDER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 1–2, 21 (2014).

21. Kristin N. Williams-Washington & Chmaika P. Mills, *African American Historical*

Racial trauma: Current diagnostic criteria for post-traumatic stress disorder (PTSD) fail to capture the reality of racial trauma, which results from the cumulative impact of chronic exposure to racism (overt, covert, and systemic).²² Additionally, many clinicians and scholars conceptualize the negative mental health impact of racism through a historical trauma lens, defining African American historical trauma as, “the collective spiritual, psychological, emotional, and cognitive distress perpetuated intergenerationally deriving from multiple denigrating experiences originating with slavery and continuing with pattern forms of racism and discrimination to the present day.”²³

Trauma-informed: Trauma-informed capital defense lawyering requires: (i) understanding the prevalence of trauma as a public health issue, understanding the relevance of traumatic experiences in shaping an individual’s story, and conducting an investigation responsive to these realities; (ii) building relationships with clients in a manner that actively resists re-traumatization; and (iii) presenting a narrative that honors both the impact of trauma and the person’s resilience.²⁴ Specifically, defense teams must: (i) develop a comprehensive life and history through a variety of sources,²⁵ and (ii) prioritize

Trauma: Creating an Inclusive Measure, 46 J. MULTICULTURAL COUNSELING & DEV. 246, 247 (2018) (citations omitted).

22. Nadal et al., *supra* note 19, at 3–4; *see also* Della V. Mosley, Candice N. Hargons, Carolyn Meiller, Blanka Angyal, Paris Wheeler, Candice Davis & Danelle Stevens-Watkins, *Critical Consciousness of Anti-Black Racism: A Practical Model to Prevent and Resist Racial Trauma*, 68 J. COUNSELING PSYCH. 1, 1 (2021) (“Racial trauma, also referred to as race-based traumatic stress, is the psychological, emotional, and physical injury from experiencing real and perceived racism. Racial trauma accounts for experiences of racism inclusive of overt (e.g., use of racial slurs) and covert (e.g., exclusion based on assumptions of racial inferiority) interpersonal discrimination and harassment, as well as institutional and systemic racism (e.g., systemic excessive use of force by the police).” (citations omitted)).

23. Williams-Washington & Mills, *supra* note 21, at 247; *see also* Jocelyn R. Smith Lee & Michael A. Robinson, “*That’s My Number One Fear in Life. It’s the Police*”: Examining Young Black Men’s Exposures to Trauma and Loss Resulting from Police Violence and Police Killings, 45 J. BLACK PSYCH. 143, 144–45 (2019) (discussing the ways that the historical relationship between police brutality and racial terror lynching should inform clinical research on the mental health impact of police killings in Black communities).

24. Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 2, 5, 36, 38 (2018).

25. *2008 Guideline 10.11*, AM. BAR ASS’N (Apr. 18, 2018), https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2008-supplementary-guidelines/2008-guideline-10-11 [<https://perma.cc/ZKX9-J95N>] (“The investigation into a client’s life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history;

physical and emotional safety, trust and transparency, personal agency, and mutuality in relationships with clients and families.²⁶

INTRODUCTION

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- C. *William Hance*
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INTRODUCTION

In 2009, the Court decided a capital post-conviction case involving a Korean War veteran.²⁷ George Porter served his country on the front lines of a gruesome war.²⁸ He enlisted in the military to escape family violence and other challenges that he faced in childhood.²⁹ In Korea, he began to struggle with traumatic distress; these struggles

educational history; employment and training history; military experience; multigenerational family history, genetic disorders and vulnerabilities, as well as multigenerational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socioeconomic, historical, and political factors.”).

26. Megan Leschak, Soc. Work Supervisor, N.M. L. Offices of the Pub. Def., Presentation at the 2019 National Alliance of Sentencing Advocates and Mitigation Specialists (NASAMS) Conference: Trauma Informed Defense Teams and Restorative Practices (June 4, 2019) (explaining that trauma-informed mitigation work requires: ensuring maximum physical and emotional safety within institutional constraints, being transparent and trustworthy, maximizing personal choice, adopting a collaborative approach, and taking every opportunity to acknowledge the person’s growth and resilience).

27. *Porter v. McCollum (Porter II)*, 558 U.S. 30, 30–31 (2009).

28. *Id.* at 34–35.

29. *Id.* at 33–34.

escalated when he returned home.³⁰ The Court found that George Porter's trial counsel failed to present his full story to the Florida jury that sentenced him to death.³¹ The Supreme Court found especially unreasonable counsel's failure to present evidence of military service, given the unique potential of this evidence to engender empathy.³²

Despite the *Porter* court's reference to a "long tradition of according leniency to veterans," in the criminal legal system, veterans are overrepresented on death rows across America, including Georgia's.³³ Most of these veterans come to death row with experiences of marginalization due to other aspects of their identity, such as race or mental disability.³⁴

This Article examines the cases of six men executed in Georgia, each with a history of military service, and each with experiences of disenfranchisement based on race and/or mental disability. At trial, each confronted legal risks that disproportionately place Black people and people with mental disabilities in danger of execution. In no case did a trial attorney present meaningful evidence of military service to a jury. The State of Georgia executed all six men between 1994 and 2016.

The decision to join the military is different for each person. When choosing to serve, some people reflect on collective values of patriotism, duty, honor, and sacrifice. As Vietnam veteran Andrew Brannan explained, "I'm very proud, from a military family. We've always done our duty by our country"³⁵ For Americans with experiences of marginalization based on race and/or mental disability, the structured, merit-based environment of the military offers a new opportunity to succeed. Warren Lee Hill, a Georgia native, grew up amidst violence and poverty, and he experienced discrimination

30. *Id.* at 35–36.

31. *Id.* at 42–44.

32. *Id.* at 43–44.

33. *Porter II*, 558 U.S. at 43; see Mark Berman, *One in 10 Death Row Inmates Are Military Veterans, Report Says*, WASH. POST (Nov. 10, 2015, 9:29 AM), <https://www.washingtonpost.com/news/post-nation/wp/2015/11/10/one-in-10-death-row-inmates-are-military-veterans-report-says> [<https://perma.cc/CQ4U-7GDW>].

34. EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: TARGETING BLACK VETERANS 39 (2017), <https://eji.org/wp-content/uploads/2019/10/lynching-in-america-targeting-black-veterans-web.pdf> [<https://perma.cc/X9BE-GKV6>] (explaining that only 7% of Americans serve in the military, but an estimated 10% of persons on death row are veterans).

35. Special Neuropsychiatric Examination of Andrew H. Brannan at VA Med. Ctr., in Decatur, Ga. (Oct. 19, 1984) (on file with author). Mr. Brannan submitted hundreds of mental health records as mitigating evidence at his capital trial, which the Georgia Supreme Court reviewed on direct appeal. See VA Mental Health Progress Notes of Andrew H. Brannan (on file with author). These citations refer to Veterans Affairs psychiatric evaluations and mental health progress notes dating from 1984 to 1995. See *id.*; Neuropsychiatric Examination of Andrew H. Brannan at VA Med. Ctr., in Decatur, Ga. (on file with author).

due to his status as Black man with an intellectual disability.³⁶ In the words of his older sister, he joined the Navy to “escape.”³⁷ Escape he did, rising through the naval ranks to E5–Petty Officer Second Class.³⁸

However, for some Black service members and service members with mental disabilities, military life reproduces broader societal inequities.³⁹ In extreme cases, Black veterans and veterans with mental disabilities face an elevated risk of criminalization and extreme punishment after they return to civilian life.⁴⁰ A disproportionate number of Black veterans and veterans with mental disabilities populate death rows across America, including Georgia’s.⁴¹ Fifty percent of men on Georgia’s death row are Black.⁴² Five hundred thirty-one veterans currently live under a life, life without parole (LWOP), or death sentence in Georgia.⁴³ Over 50% of the people that Georgia executed between 2001 and 2015 lived with mental disabilities.⁴⁴

36. Hicks Aff. ¶¶ 2–3, 5–9, C.788–91, Head v. Hill (*Hill VI*), 587 S.E. 2d 613 (Ga. 2003) (on file with author); Porter Aff. ¶¶ 2–3, C.796–98, Head v. Hill (*Hill VI*), 587 S.E. 2d 613 (Ga. 2003) (on file with author).

37. Scott Aff. ¶¶ 2, 23, C.860–71, Head v. Hill (*Hill VI*), 587 S.E. 2d 613 (Ga. 2003) (on file with author).

38. O’Bryant Aff. ¶ 13, C.806–14, Head v. Hill (*Hill VI*), 587 S.E. 2d 613 (Ga. 2003) (on file with author). Mr. Hill submitted hundreds of pages of affidavits from family members, teachers, and fellow service members when he petitioned the State of Georgia for habeas relief. See, e.g., Hicks Aff., *supra* note 36, ¶¶ 2–3; O’Bryant Aff., *supra*, ¶ 2; Scott Aff., *supra* note 37, ¶ 2. In particular, Mr. Hill’s siblings Peggy, Robbie, and Chester, and his mother Joanne Hill, submitted testimony describing family life during Mr. Hill’s childhood. C. Hill Aff. ¶¶ 2–3, 6, C.853–59, Head v. Hill (*Hill VI*), 587 S.E. 2d 613 (Ga. 2003) (on file with author); J. Hill Aff. ¶¶ 3, 7–8, 10–12, C.832–46, Head v. Hill (*Hill VI*), 587 S.E. 2d 613 (Ga. 2003) (on file with author); Scott Aff., *supra* note 37, ¶¶ 7–10, 22–25; Williams Aff. ¶¶ 1–7, 11–18, C.818–31, Head v. Hill (*Hill VI*), 587 S.E. 2d 613 (Ga. 2003) (on file with author). The Supreme Court of Georgia retains a copy of these records.

39. See Alison J. Lynch, *Veterans on Death Row: Strategies for Mitigating Capital Sentences for Defendants with Military Service History*, AM. BAR ASS’N, SEC. CRIM. JUST., Winter 2018, at 4, 7 (explaining that service members with mental disabilities are differentially impacted by common stressors of military life, such as deployment, relocation, or the loss of close friends); Evan Seamone, Shoba Sreenivasan, James McGuire, Dan Smee, Sean Clark & Daniel Dow, *A Rehabilitative Justice Pathway for War-Traumatized Offenders Caught in the Military Misconduct Catch-22*, 44 ARMED FORCES & SOC’Y 139, 140–41 (2017) (describing the military’s punitive responses to mental disability); EQUAL JUST. INITIATIVE, *supra* note 34, at 7–8 (explaining that Black service members historically experienced racism while in the military, and upon return to civilian life).

40. EQUAL JUST. INITIATIVE, *supra* note 34, at 7, 39; Seamone et al., *supra* note 39, at 144–45.

41. See GA. DEP’T OF CORRECTIONS, INMATE STATISTICAL PROFILE: INMATE VALIDATED VETERANS 5, 19, 32, 39 (2020), http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/Profile_all_veterans_2020_03.pdf [<https://perma.cc/73HB-69KS>].

42. DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A.: WINTER 2020, 48–49 (2020), <https://www.naacpldf.org/wp-content/uploads/DRUSAWinter2020.pdf> [<https://perma.cc/U57B-FFJK>].

43. GA. DEP’T OF CORRECTIONS, *supra* note 41, at 32.

44. See Frank R. Baumgartner, Marty Davidson, Kaneesha R. Johnson, Arvind Krishnamurthy & Colin P. Wilson, *Data and Resources*, DEADLY JUST. (2017), available at <https://fbaum.unc.edu/books/DeadlyJustice/MentalIllness.xlsx>.

The Court clarified in *Porter* that military service carries mitigating weight even and perhaps especially when the veteran on trial falls outside the popular image of the “American hero.”⁴⁵ Through case studies of the six Georgia veterans sentenced to death, this Article demonstrates that: (i) many veterans share experiences of disenfranchisement based on race and/or mental disability, and (ii) when charged capitally, these veterans face heightened risk of execution, as the death penalty system targets people with these experiences. The Article concludes with a call to defense counsel to adopt mitigation strategies responsive to the heightened risk of execution that Black veterans and veterans with mental disabilities face. Only through such strategies may counsel effectuate *Porter's* promise to protect veterans from the death penalty.

The Article proceeds as follows. Part I introduces the case of Mr. George Porter, as well as the cases of six death-sentenced Georgia veterans: Andrew Brannan, William Hance, Warren Hill, Travis Hittson, Brandon Jones, and Marcus Wellons. This section highlights the ways that the veterans’ experiences with racism and/or mental disability placed them at elevated risk of execution at the sentencing phase of their capital trials. Part II highlights the unique risks that Black Georgians and Georgians with mental disabilities face in the death penalty system. Part III examines the *Porter* decision itself, arguing that the Court’s ruling applies with special force to veterans with histories of marginalization. Accordingly, this section urges capital defense counsel to rely on *Porter* in adopting strategies for mitigation responsive to both military service history and life-course experiences of racism and mental disability.

I. A PROFILE OF GEORGE PORTER AND SIX VETERANS EXECUTED BY THE STATE OF GEORGIA

After presenting a brief introduction to the case of George Porter, this section reviews the cases of six Black veterans and veterans with mental disabilities, executed by the State of Georgia between 1994 and 2016: Andrew Brannan, William Hance, Warren Hill, Jr., Travis Hittson, Brandon Jones, and Marcus Wellons. The case summaries focus on risks that each veteran faced at the capital sentencing stage, based on race and/or mental disability. Through life narratives, the summaries also depict the military and mental health mitigation evidence that defense counsel failed to present at trial.

Case descriptions reflect an analysis of decisions and filings available on Westlaw and PACER. In three cases—Andrew Brannan, Warren Hill, and Travis Hittson—case summaries also incorporate

45. *Porter v. McCollum (Porter II)*, 588 U.S. 30, 41–44 (2009).

portions of direct appeal and state post-conviction records on file with the Clerk of the Georgia Supreme Court. Appendix I provides record excerpts from these three cases, drawing on quotes that highlight each veteran's intersecting experiences with racism, mental disability, and military service.⁴⁶ These excerpts also offer a sampling of the wealth of mitigation information available in each case; information that capital jurors did not evaluate before sentencing each man to death.⁴⁷ Also, in the cases of Andrew Brannan, Warren Hill, Jr., and Travis Hittson, narrative sections include photos obtained with permission from the Georgia Resource Center, the 501(c)(3) law office that represented each of these three men in state and federal post-conviction litigation.⁴⁸

Finally, Appendix II provides a condensed procedural history for each veteran, beginning with the automatic review of the death sentence on direct appeal in the Georgia Supreme Court and concluding with execution at Georgia Diagnostic and Classification Prison (GDCP).⁴⁹

A. *George Porter*

A Brevard County, Florida, court sentenced Mr. George Porter to death in 1988, after a jury convicted him of killing his former lover and her new partner.⁵⁰ The trial court that sentenced Mr. Porter to death never learned about his history of childhood trauma, his experiences with mental disability, or the harsh conditions that he endured and the courage that he displayed while serving overseas.⁵¹

Multiple generations of Mr. Porter's family struggled with excessive drinking, and Mr. Porter's father beat his mother severely when he was drunk.⁵² George Porter witnessed these assaults and tried to intervene on his mother's behalf, but he soon became his father's "favorite target" due to his learning disability.⁵³ Evidence introduced

46. See *infra* App. I.

47. See *infra* App. I.

48. See GA. RES. CTR., <https://www.garesource.org> [<https://perma.cc/BZ5X-3T7J>] ("The Georgia Appellate Practice & Educational Resource Center ('Georgia Resource Center') is a 501(c)(3) non-profit law office established in 1988 to provide free, high quality representation to people on Georgia's death row, in state and federal habeas corpus proceedings challenging their capital convictions and death sentences . . .").

49. See *infra* App. II. Georgia has conducted executions at GDCP since 1983. GA. DEP'T OF CORRECTIONS, OFF. OF PLAN. & ANALYSIS, A HISTORY OF THE DEATH PENALTY IN GEORGIA: EXECUTIONS BY YEAR 1924–2014, at 2 (2015), http://www.dcor.state.ga.us/sites/all/files/pdf/Research/Standing/Death_penalty_in_Georgia.pdf [<https://perma.cc/6ETD-DP7Y>].

50. See *Porter v. State (Porter I)*, 564 So. 2d 1060, 1061–62 (Fla. 1990).

51. See *Porter v. McCollum (Porter II)*, 558 U.S. 30, 33 (2009).

52. See *id.*

53. See *id.* at 33–34.

years later, in Mr. Porter's post-conviction proceedings, linked his disability—he struggled with “reading, writing, and memory”—to differences in the structure of his brain.⁵⁴ The schools that Mr. Porter attended failed to accommodate his learning needs, and he dropped out by the age of thirteen.⁵⁵ At age seventeen, he enlisted in the military, bringing his childhood experiences with him.⁵⁶

In Korea, Mr. Porter fought on the front lines of two gruesome battles.⁵⁷ He sustained a gunshot wound, and 50% of his unit lost their lives on the battlefield.⁵⁸ The soldiers in Mr. Porter's unit endured extreme conditions: lack of food, lack of sleep, and extreme cold.⁵⁹ The army awarded Mr. Porter two Purple Hearts for his service.⁶⁰

Eventually, combat began to take its toll, and Mr. Porter started to exhibit signs of traumatic distress.⁶¹ He went absent without leave (AWOL) more than once during his time in Korea.⁶² After returning home, Mr. Porter's drinking escalated, as he struggled to find a way to soothe the war-related nightmares that kept him awake at night.⁶³ As Mr. Porter's mental health deteriorated, his family removed sharp objects from the home to keep him safe.⁶⁴ Soon, Mr. Porter's distress began to affect his relationships.⁶⁵ His partner left him, and Mr. Porter felt isolated and alone.⁶⁶ His crime of conviction occurred just three months after this tumultuous breakup.⁶⁷

The Florida trial court heard no evidence of Mr. Porter's childhood trauma, his learning disability, the grueling conditions he encountered on the battlefield, or the distress that overwhelmed him at the time of the crime.⁶⁸ In 2009, on federal habeas review, the Supreme Court found that George Porter's trial counsel failed to present sufficient mitigating evidence to the Brevard County court that sentenced him to death.⁶⁹ The Court found especially unreasonable counsel's failure to present evidence of military service, given the unique potential of this evidence to engender empathy.⁷⁰

54. *Id.* at 36, 41.

55. *See id.* at 33–34.

56. *Id.* at 34.

57. *Porter II*, 588 U.S. at 34–35.

58. *Id.*

59. *Id.* at 34.

60. *Id.* at 35.

61. *See id.* at 35.

62. *Id.* at 35.

63. *See Porter II*, 588 U.S. at 35–36.

64. *Id.*

65. *See id.* at 41, 43.

66. *See id.* at 31.

67. *Id.* at 31–32.

68. *Id.* at 33.

69. *Porter II*, 588 U.S. at 30–32, 44.

70. *See id.* at 43–44.

B. Andrew Brannan

71

A Laurens County jury sentenced Mr. Andrew Brannan to death in 2000 after convicting him of killing Laurens County Deputy Sheriff Kyle Dinkheller during a traffic stop.⁷² At the time of the killing, Veterans Affairs (VA) medical records classified Mr. Brannan as 100% disabled due to PTSD.⁷³ One week before the fatal traffic stop, he stopped taking the medications that he used, along with psychotherapy, to manage his PTSD.⁷⁴ The Laurens County traffic stop triggered a wartime flashback, and Mr. Brannan's mind and body sent him into survival mode.⁷⁵ In an outburst of violence, he took Deputy Dinkheller's life.⁷⁶

Trial counsel did not present testimony from Mr. Brannan's treating psychiatrist at the Decatur, Georgia VA PTSD unit.⁷⁷ Nor did trial counsel present testimony from veterans who served alongside Mr. Brannan in Vietnam.⁷⁸ The only real evidence that counsel presented in mitigation consisted of Mr. Brannan's mother, who spoke about his military and mental health records directly to the jury.⁷⁹

71. Image source: The Georgia Resource Center.

72. See *Brannan v. State (Brannan II)*, 561 S.E.2d 414, 418–19, 429 n.1 (Ga. 2002).

73. See Petition for Writ of Certiorari at 2, 6, *Brannan v. Humphrey*, 573 U.S. 906 (2014) (No. 13-1220), 2014 WL 1389015.

74. See *id.* at 27–28.

75. See *Brannan II*, 561 S.E.2d at 419.

76. See Petition for Writ of Certiorari, *supra* note 73, at 2; Brief for Ga. Mil. Officers Ass'n of America, Inc. et al. as Amici Curiae Supporting Petitioner at 5, 12, *Brannan v. Humphrey*, 573 U.S. 906 (2014) (No. 13-1220), 2014 WL 1912095 [hereinafter Brief for Ga. Mil. Officers Ass'n].

77. See Petition for Writ of Certiorari, *supra* note 73, at 6–7.

78. *Id.* at 9–10.

79. See *id.* at 9, 18.

Accordingly, the jury that sentenced Mr. Brannan to death lacked an understanding of the severity of the trauma that he endured in combat.⁸⁰ The jury also did not hear evidence documenting Mr. Brannan's history of successful treatment, evidence that would counteract narratives of future dangerousness and accurately contextualize his crime of conviction as an aberration.⁸¹

Mr. Brannan graduated from West Georgia College and became an officer and platoon leader in the United States Army.⁸² He came from a long line of veterans; every male member of his immediate family served.⁸³ In 1970, at the age of twenty-one, the army sent Mr. Brannan to Vietnam.⁸⁴ He led his platoon on reconnaissance missions amidst sniper fire, rarely slept, saw heavy combat, and earned a Bronze Star for his service.⁸⁵

After returning home to Georgia, Mr. Brannan struggled to reintegrate into the civilian world.⁸⁶ He found it difficult to secure and hold down a job.⁸⁷ Though grateful for family support, he felt that he never measured up to the expectations of his father, a retired lieutenant colonel who served in WWII.⁸⁸ After his brother, also a Vietnam veteran, died by suicide in 1984, Mr. Brannan sought help for his own traumatic distress.⁸⁹ In therapy sessions, he ruminated on how close he came to killing Vietnamese soldiers and civilians.⁹⁰ As an officer, he felt responsible for placing other soldiers in harm's way.⁹¹ He experienced survivor's guilt and reported recurrent flashbacks to witnessing the death of a superior officer in a land mine explosion.⁹² The burden of serving in a gruesome and unpopular war weighed heavily on him.⁹³ For sixteen years, he received ongoing treatment for PTSD from the VA Medical Center in

80. *See id.* at 18–19, 23–24.

81. *See id.* at 10, 28–29.

82. *See id.* at 2–3; Dr. Storms Trial Tr. at 575, *Brannan v. State (Brannan II)*, 561 S.E.2d 414 (Ga. 2002).

83. *Andrew Brannan: The Execution of a Decorated Veteran with Serious Mental Illness*, GA. RES. CTR., <https://www.garesource.org/cases/andrew-brannan> [<https://perma.cc/5LAE-UVUV>].

84. *See* Petition for Writ of Certiorari, *supra* note 73, at 3; Special Neuropsychiatric Examination of Andrew H. Brannan at VA Med. Ctr., in Decatur, Ga. (Oct. 19, 1984) (on file with author).

85. Petition for Writ of Certiorari, *supra* note 73, at 3–4.

86. *See id.* at 4–5.

87. *See* Special Neuropsychiatric Examination of Andrew H. Brannan at VA Med. Ctr., *supra* note 84.

88. *See id.*

89. *Id.*

90. *See id.*

91. *See* Petition for Writ of Certiorari, *supra* note 73, at 3–4, 6–7.

92. *Id.*

93. *See id.* at 3–4, 6, 22.

Decatur, Georgia, and spent several months hospitalized at the Center's inpatient PTSD unit.⁹⁴

At trial, District Attorney Ralph Walke excluded venire persons familiar with PTSD—a mental health nurse and a twenty-one-year Marine Corps veteran who served in Vietnam—from Mr. Brannan's jury.⁹⁵ He then (i) minimized the trauma that Mr. Brannan endured in Vietnam and its lasting impact by arguing that he feigned PTSD to receive disability compensation, and (ii) relied on “trained killer” stereotypes to link Mr. Brannan's combat PTSD to a proclivity to commit violence in prison:

Vietnam had not one thing in the world to do with this murder . . . That is a flimsy, sorry, no-good stinking excuse . . . He's a disgrace to our veterans when he walks in here and says, I did it because of Vietnam. I did it because I'm a veteran. Don't listen to that . . . He was drawing close to two thousand dollars a month as he walked around talking about I'm depressed, I don't feel good.⁹⁶

Does Andrew Brannan need to be sentenced to life in the penitentiary so he'll have a lifetime of laying in his bunk at night and breaking apart razors and figuring out some way when a deputy walks up or a jailer walks up that he can take him one of these razor blades and do some slashing? . . . Andrew Brannan is a dangerous man. He's murdered one deputy sheriff and it won't be hard for a combat-trained veteran to . . . do it again . . . you can put him in there and those guards and those prisoners, they are going to have to be living with him. And when he don't [sic] like the way something's going, he waits and he strikes . . .⁹⁷

Absent testimony from fellow veterans corroborating the trauma that Mr. Brannan sustained on the battlefield, the State's minimization of his combat trauma stood unrefuted.⁹⁸ Similarly, the absence

94. *See id.* at 5–7.

95. *See Brannan v. State (Brannan II)*, 561 S.E.2d 414, 418, 422 (Ga. 2002).

96. Trial Tr., *Brannan v. State (Brannan I)*, Laurens Super. Ct. Case No. 98-FE-438-T (Ga. Super. Ct. Jan. 2000) (on file with Georgia Research Center); *see also* Petition for Writ of Certiorari, *supra* note 73, at 10, 15.

97. *See* Brief of Cross-Appellant at 43–45, 48–49, *Brannan v. Hall (Brennan V)*, 670 S.E.2d 87 (Ga. 2008).

98. *See* Brief for Ga. Mil. Officers Ass'n, *supra* note 76, at 26 (“Had [Mr.] Brannan's counsel performed a sufficient investigation and called Brannan's comrades to testify, the jury would have heard first-hand accounts of [Mr.] Brannan's front-line combat experience. For example, the jury would have heard of how [Mr.] Brannan was a Lieutenant who led a five-man reconnaissance team, serving as an artillery forward observer, tracking the location of the enemy, and used a radio to call in grid coordinates. The jury would have also heard first-hand accounts of the traumatic events leading to [Mr.] Brannan's PTSD, such as the horror and haunting details of the patrol in which the company commander stepped on a land mine. A fellow veteran's graphic description of the land mine event

of mental health expert testimony on Mr. Brannan's sustained progress in treatment and available, evidence-based interventions for PTSD allowed the State to portray Mr. Brannan's trauma as "untreatable" and a predictor of future violence.⁹⁹ The jury voted for death.¹⁰⁰ After fifteen years of litigation, the State of Georgia executed Mr. Brannan on January 13, 2015.¹⁰¹

C. William Hance

A Muscogee County jury convicted William Hance of killing Gail Faison, a sex worker, and sentenced him to death.¹⁰² In 1978, while stationed at Fort Benning in Georgia, Mr. Hance met Gail Faison at a bar near the Army base.¹⁰³ As the two left the bar together, Ms. Faison propositioned Mr. Hance for sex and began to undress.¹⁰⁴ In response, Mr. Hance "flipped."¹⁰⁵ The interaction may have triggered memories of watching the rape of his younger sister and learning of the rape of his mother.¹⁰⁶ His past experiences with sexual trauma overwhelmed him, and he reacted violently, ultimately taking Ms. Faison's life.¹⁰⁷ The Eleventh Circuit overturned Mr. Hance's death sentence in 1983 after the court found that the prosecutor's closing argument impermissibly appealed to the race-based "fears and emotions" of the jury, thereby depriving Mr. Hance of a fair trial.¹⁰⁸ A resentencing jury again imposed a death sentence, and the Georgia Supreme Court affirmed.¹⁰⁹

During Mr. Hance's first capital trial, the State used almost all of its peremptory strikes to exclude Black venire persons from the jury.¹¹⁰ Defense counsel presented no mitigating evidence, and jurors never learned about Mr. Hance's honorable discharge from the

and his statement that 'I can still remember the smell of [the Captain's] burning flesh,' would have distinguished [Mr.] Brannan's trauma from the problems that the prosecutor argued we all have. It also would have served as a strong antidote to the prosecutor's argument that, despite a VA classification as 100 percent disabled, Andrew Brannan was a malingerer who 'had to work' to get his disability.").

99. See Brief of Cross-Appellant, *supra* note 97, at 7–8, 47–48.

100. See *Brannan II*, 561 S.E.2d at 418.

101. *Id.* at 418 n.1; *Andrew Brannan*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1395/andrew-brannan> [<https://perma.cc/XV9B-4ZCG>].

102. *Hance v. State (Hance I)*, 268 S.E.2d 339, 342 (Ga. 1980).

103. *Id.*

104. *Id.*

105. See *Hance v. Kemp (Hance VII)*, 373 S.E.2d 184, 188 (Ga. 1988).

106. See *id.* at 188–89.

107. See *id.* at 189.

108. *Hance v. Zant (Hance IV)*, 696 F.2d 940, 951–53 (11th Cir. 1983), *overruled by Brooks v. Kemp*, 762 F.2d 1383 (1985).

109. *Hance v. State (Hance V)*, 332 S.E.2d 287, 289, 292 (Ga. 1985).

110. See Order on Defendant's Extraordinary Motion for New Trial at 9, *State v. Gates* (2019) (No. SU-75-CR-38335).

United States Marine Corps, his service in the Army, his exposure to sexual trauma in childhood, or the race-based trauma impacting the Black community in Columbus, Georgia, at the time of his prosecution.¹¹¹ Rather than present this narrative to the resentencing jury, defense counsel in Mr. Hance's second death penalty trial instead presented mental health experts who offered a series of diagnoses that tended to pathologize and dehumanize Mr. Hance.¹¹² Two jurors in this second trial admitted to using racial slurs during sentencing deliberations.¹¹³ Mr. Hance survived profound trauma in childhood.¹¹⁴ His mother, who lived with a disability, worked two jobs to provide for the family.¹¹⁵ His stepfather drank heavily and became angry when intoxicated.¹¹⁶ As a child, Mr. Hance witnessed his stepfather beat his mother.¹¹⁷ Mr. Hance's stepfather also physically and psychologically abused the children.¹¹⁸ At age six, his stepfather raped his nine-year-old sister, forcing Mr. Hance to watch.¹¹⁹ In 1972, Mr. Hance lost his mother—his primary source of support and protection in childhood—to a brutal rape and murder.¹²⁰ Law enforcement never identified the person responsible.¹²¹ The incident devastated Mr. Hance.¹²²

As a young adult, Mr. Hance enlisted in the Marines to help his mother provide for his family, serving for four years and earning an honorable discharge.¹²³ Less than a year later, he enlisted in the Army, taking on extra duty to provide for his own wife and children.¹²⁴

An atmosphere of racial terror gripped Fort Benning and the City of Columbus in the years surrounding Mr. Hance's arrest and trial.¹²⁵ Between 1977 and 1978, the city learned of the rape and

111. See *Hance VII*, 373 S.E.2d at 188, 190; James T. Wooten, *Racial Tensions in Columbus, Ga., Bring City to the Brink of Schizophrenia*, N.Y. TIMES (July 27, 1971), <https://www.nytimes.com/1971/07/27/archives/racial-tensions-in-columbus-ga-bring-city-to-the-brink-of.html> [https://perma.cc/2WQ6-GL7Y].

112. See *Hance VII*, 373 S.E.2d at 189.

113. See *Hance v. Zant (Hance X)*, 511 U.S. 1013, 1014 (1994) (Blackmun, J., dissenting) (noting that Mr. Hance's "trial and sentencing proceedings were infected with racial prejudice"); see also Stephen B. Bright, *Electric Chair and the Chain Gang: Choices and Challenges for American's Future*, 71 NOTRE DAME L. REV. 845, 855 (1996); Bob Herbert, *In America; Jury Room Injustice*, N.Y. TIMES, Mar. 30, 1994, at A15.

114. See *Hance VII*, 373 S.E.2d at 188–89.

115. See *id.*

116. See *id.* at 189.

117. See *id.* at 188–89.

118. *Id.*

119. *Id.* at 189.

120. *Hance VII*, 373 S.E.2d at 188.

121. *Id.*

122. See *id.*

123. See *id.*

124. *Id.*

125. See David Rose, *My Bid to Clear an Innocent Death Row Prisoner: How Reporter*

murder of seven White female residents.¹²⁶ The local chapter of the Ku Klux Klan began patrolling Columbus at night, seeking vengeance for these deaths.¹²⁷ The Columbus Police Department and the Fort Benning Military Police interrogated over 100 young Black men as pressure mounted to arrest and convict someone.¹²⁸ Over a decade after Mr. Hance's trial, a Muscogee County jury convicted Mr. Carlton Gary, a Black Columbus resident, of three of the killings.¹²⁹ In March 2018, the State of Georgia was set to execute Mr. Carlton Gary, despite compelling evidence of his actual innocence of these crimes.¹³⁰ Media coverage of this era in Columbus history likens the White community's response to the retributive urgency characteristic of racial terror lynchings.¹³¹ Gary Parker, the attorney who represented Mr. Hance in clemency proceedings before the Georgia Board of Pardons and Paroles, described the capital prosecution and execution of Mr. Hance as "cousin to a lynching."¹³²

During the late 1970s, Mr. Hance moved to Columbus and continued his military service at Fort Benning, conscious of the risks that he faced as a young Black man in a racially charged atmosphere.¹³³ The danger wore on him.¹³⁴ In early 1978, he wrote a series of letters to the Columbus Police, in which he identified himself as the leader of a White vigilante group, the "Forces of Evil," and threatened to take Black women hostage as retribution for the killings of local White women.¹³⁵ The content of these letters raised questions about Mr. Hance's deteriorating mental state at the time of Gail Faison's death.¹³⁶

As the White community in Columbus, with the aid of law enforcement, terrorized Black residents, the county's court system

Went to Court to Prove Convicted U.S. Murderer Could Not Have Killed Seven Women Because His Feet Are Bigger than the Real Culprit's, DAILY MAIL (Mar. 9, 2014, 6:45 AM), <https://www.dailymail.co.uk/news/article-2576524/My-bid-clear-innocent-Death-Row-prisoner-reporter-whos-dedicated-two-decades-justice-U-S-man-accused-killing-seven-women.html> [<https://perma.cc/X5NK-RHBH>].

126. *Id.*; Gary v. State, 389 S.E.2d 218, 219 (Ga. 1990).

127. See Rose, *supra* note 125.

128. See *id.*

129. Gary, 389 S.E.2d at 219; Hance v. State (*Hance I*), 268 S.E.2d 339, 339 (Ga. 1980); Rose, *supra* note 125.

130. See Tim Chitwood, *In Final Appeals, Stocking Strangler Attorneys Say Ga. Is About to Execute an Innocent Man*, LEDGER-ENQUIRER (Mar. 13, 2018, 7:13 PM), <https://www.ledger-enquirer.com/news/local/article204962304.html> [<https://perma.cc/C56V-EY6P>].

131. See Rose, *supra* note 125.

132. *Georgia Rejects Clemency for a Killer Who Says He Is [Intellectually Disabled]*, N.Y. TIMES (Mar. 31, 1994), <https://www.nytimes.com/1994/03/31/us/georgia-rejects-clemency-for-a-killer-who-says-he-is-retarded.html> [<https://perma.cc/3MEY-N869>].

133. See Hance v. Zant (*Hance IV*), 696 F.2d 940, 945 (11th Cir. 1983).

134. See Hance v. Kemp (*Hance VII*), 373 S.E.2d 184, 188 (Ga. 1988).

135. *Id.* at 187.

136. See *id.* at 187, 189.

simultaneously excluded Black people from participation in city life. Specifically, Muscogee county prosecutors prevented Black people from serving on capital juries in cases involving Black men.¹³⁷ Between 1973 and 1990, the Chattahoochee Judicial Circuit, in which Muscogee County is located, sentenced twenty people to death, more than any other judicial district in Georgia during this period.¹³⁸ Assistant District Attorney (ADA) William J. Smith prosecuted Mr. Hance's case.¹³⁹ ADA Smith prosecuted four Black men for capital murder during the 1975–1979 period.¹⁴⁰ Across the four cases, ADA Smith struck a total of twenty-five Black jurors.¹⁴¹ In three of these cases, he struck every prospective Black juror, securing an all-White jury.¹⁴² The State of Georgia set one of these formerly death-sentenced men free on May 15, 2020, after DNA testing undermined the all-White jury's 1977 conviction for the rape and murder of a White woman.¹⁴³ In Mr. Hance's case, though two Black Muscogee residents sat on the jury, DA Smith used ten of his preemptory strikes to remove Black venire members.¹⁴⁴ After trial, two of the ten White jurors admitted that they referred to Mr. Hance using racial slurs during deliberations.¹⁴⁵ No Georgia state or federal court ever held a hearing on this issue.¹⁴⁶

Muscogee County arrested, prosecuted, and tried Mr. Hance in an atmosphere of racial terror. In his first trial, the county prosecutor excluded Black people from Mr. Hance's jury.¹⁴⁷ In his second trial, jurors admitted to using racial slurs during sentencing deliberations.¹⁴⁸ Mr. Hance's first jury heard nothing to contextualize his

137. See Order on Defendant's Extraordinary Motion for New Trial, *supra* note 110, at 5, 8.

138. *Id.* at 1–2; *Chattahoochee Judicial District: BUCKLE OF THE DEATH BELT: The Death Penalty in Microcosm*, DEATH PENALTY INFO. CTR. (Jan. 1, 1991), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/chattahoochee-judicial-district-buckle-of-the-death-belt-the-death-penalty-in-microcosm> [<https://perma.cc/A72Y-YGED>].

139. *Hance v. State (Hance I)*, 268 S.E.2d 339, 342 (Ga. 1980).

140. See Order on Defendant's Extraordinary Motion for New Trial, *supra* note 110, at 5, 8–9.

141. *Id.* at 9.

142. *Id.*

143. *Id.* at 1, 12; Bill Rankin, *Georgia Man Freed After 43 Years for Crime He Denies Committing*, ATLANTA-J. CONST. (May 19, 2020), <https://www.ajc.com/news/local/georgia-inmate-freed-after-years-for-crime-denies-committing/HbDs7WRjonj4I4AekOorhL> [<https://perma.cc/BBK2-DV94>].

144. See Order on Defendant's Extraordinary Motion for New Trial, *supra* note 110, at 9.

145. See *Hance v. Zant (Hance X)*, 511 U.S. 1013, 1014 (1994) (Blackmun, J., dissenting); see also Bright, *supra* note 113, at 855; Herbert, *supra* note 113.

146. See *Chattahoochee Judicial District: BUCKLE OF THE DEATH BELT: The Death Penalty in Microcosm*, *supra* note 138.

147. *Id.*

148. See *Hance X*, 511 U.S. at 1014 (Blackmun, J., dissenting); see also Bright, *supra* note 113, at 855; Herbert, *supra* note 113.

mental state at the time of the crime, his experience with sexual trauma and relationship violence, or the legacy of racial terror in Muscogee County, because his trial counsel presented no mitigating evidence.¹⁴⁹ After a federal court granted habeas relief, new counsel represented Mr. Hance at a resentencing hearing.¹⁵⁰ Counsel, desperate for a diagnosis, presented a mental health expert who, testifying for the *defense*, offered a series of confusing and unflattering medical labels; he characterized Mr. Hance as “incapable of having empathy for others,” “ha[ving] a difficult time admitting he has done something wrong,” and exhibiting “poor judgement.”¹⁵¹ Although Mr. Hance’s post-conviction counsel did more to humanize their client by submitting a mental health expert report that, for the first time, drew connections between Mr. Hance’s trauma history and the violence that he committed against Ms. Faison, this same report characterized Mr. Hance as “impulsive . . . paranoid and argumentative . . . sullen, angry, demanding.”¹⁵² In short, the jury that sentenced Mr. Hance to death in 1978 learned nothing about Mr. Hance’s life.¹⁵³ The jury that resentenced him to death in 1985, and the state and federal post-conviction courts reviewing his case in the following years heard a lot about what was “wrong” with Mr. Hance, but they heard very little about what happened to him and the trauma that he experienced.¹⁵⁴ No court ever afforded Mr. Hance an opportunity to litigate his claim of racial bias in sentencing deliberations.¹⁵⁵ The State of Georgia executed Army and Marine Corps veteran William Hance on March 31, 1994.¹⁵⁶

149. See *Hance v. Zant* (*Hance IV*), 696 F.2d 940, 948, 954 (11th Cir. 1983); *Hance v. Kemp* (*Hance VII*), 373 S.E.2d 184, 188–89 (Ga. 1988).

150. See *Hance VII*, 373 S.E.2d at 185–86, 189.

151. *Id.* at 187.

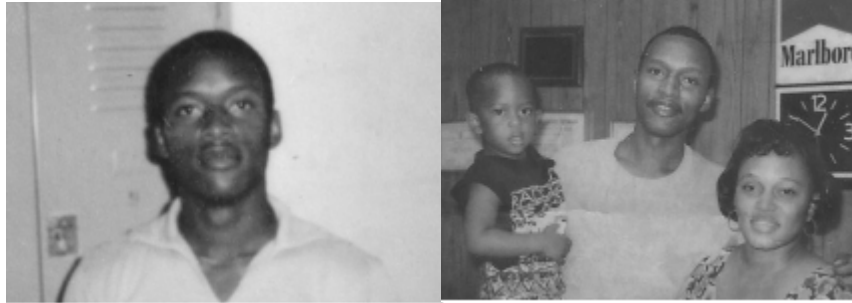
152. See *Hance v. Zant* (*Hance IX*), 981 F.2d 1180, 1185 n.6 (11th Cir. 1993).

153. See *Hance v. State* (*Hance I*), 268 S.E.2d 339, 342–43 (Ga. 1980).

154. See *Hance VII*, 373 S.E.2d at 186–89.

155. See *Hance v. Zant* (*Hance X*), 511 U.S. 1013, 1013–14 (1994).

156. See *William Hance*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/231/william-hance> [<https://perma.cc/B52B-G5EP>].

D. Warren Hill, Jr.

157

In 1991, a Lee County jury sentenced Mr. Warren Hill, Jr. to death for the killing of Joseph Handspike.¹⁵⁸ Both men were serving time at Lee State Prison and shared cells in close proximity to one another.¹⁵⁹ Immediately prior to the incident, Mr. Handspike made a series of threats and sexual advances toward Mr. Hill.¹⁶⁰ In close quarters and with no meaningful opportunity for redress, Mr. Hill reacted violently to the threat of impending rape.¹⁶¹ Understanding Mr. Hill's response to this threat requires understanding his history of intellectual disability, chronic physical abuse, sexual trauma, and the stressors that he experienced while serving in the United States Navy.¹⁶² The jury that sentenced Mr. Hill to death lacked access to this information.¹⁶³

Warren Hill, Jr. grew up between his grandparents' and parents' homes in Elberton and Hartwell, Georgia.¹⁶⁴ His father drank heavily and beat his mother when intoxicated.¹⁶⁵ Ms. Hill took the children to live with their grandparents when the violence became overwhelming.¹⁶⁶ While the abuse impacted all of the Hill children, Warren, who lived with an intellectual disability, exhibited a higher level of distress.¹⁶⁷ He often experienced seizures after witnessing one of his parents' violent arguments, sometimes requiring hospitalization.¹⁶⁸

157. Image source: Georgia Resource Center.

158. Petition for Writ of Habeas Corpus at 3, *Hill v. Terry (Hill VII)*, 2006 U.S. Dist. LEXIS 74723 (M.D. Ga. Oct. 13, 2006) (No. 1:04-cv-00151).

159. *Id.* at 5.

160. *Id.*

161. *See id.*

162. *See id.* at 5, 23–24, 56.

163. *Id.* at 6–8.

164. Williams Aff., *supra* note 38, ¶ 4.

165. *Id.* ¶ 3.

166. *Id.* ¶ 4.

167. *Id.* ¶¶ 9, 21.

168. *Id.* ¶¶ 24, 32; Scott Aff., *supra* note 37, ¶ 4.

Both Warren's mother and his grandfather targeted him for physical and psychological abuse based on his disability.¹⁶⁹ Warren's grandfather told him throughout his childhood that he would never amount to anything and would likely end up in prison.¹⁷⁰ When Warren experienced stress-related seizures due to the violence in his home, his grandfather beat him.¹⁷¹

Warren's grandfather molested his sisters, and his siblings believe that he molested Warren, too.¹⁷² At age twelve, a stranger abducted Warren and his younger brothers, Chester and Mitchell, and raped Chester in Warren's presence.¹⁷³

During the 1960s, Warren attended segregated schools in Franklin County and Elbert County, Georgia.¹⁷⁴ At the time, these counties allocated few resources to the education of Black students.¹⁷⁵ The schools that Mr. Hill attended lacked funds to provide individualized instruction for students with disabilities.¹⁷⁶

In spite of, or perhaps because of, the difficulties that he overcame in childhood, Mr. Hill personally excelled in the Navy.¹⁷⁷ He enlisted in 1979, immediately after graduating high school.¹⁷⁸ Mr. Hill rose quickly through the ranks, achieving the rank of E5, Petty Officer–Second Class.¹⁷⁹ At a naval air station in Massachusetts, he worked for an Aviation Ordinance (AO) squad tasked with loading nuclear bombs and nuclear-tipped missiles onto aircraft.¹⁸⁰ The Navy's rigid structure provided the stability and the social support system that Mr. Hill lacked in childhood, enabling him to perform his job well despite his disability.¹⁸¹ However, in the mid-1980s, when the Navy transferred him to Naval Air Station Atlanta, close to home and traumatic memories in Marietta, Georgia, Mr. Hill began to exhibit signs of distress.¹⁸² After living with his mother for a short time, he eventually moved in with a romantic partner, Myra Wright.¹⁸³ Ms. Wright's own struggles prevented her from being fully present

169. Williams Aff., *supra* note 38, ¶ 4.

170. *Id.* ¶ 14.

171. *Id.* ¶ 18.

172. *Id.* ¶ 19.

173. *Id.* ¶ 20.

174. Hicks Aff., *supra* note 36, ¶¶ 2–3; Porter Aff., *supra* note 36, ¶ 2.

175. Hicks Aff., *supra* note 36, ¶ 8; Porter Aff., *supra* note 36, ¶ 5.

176. Hicks Aff., *supra* note 36, ¶ 8; Porter Aff., *supra* note 36, ¶ 5.

177. Hartsough Aff. ¶ 5–7, C.815–17, *Head v. Hill (Hill VI)*, 587 S.E. 2d 613 (Ga. 2003) (on file with author).

178. Williams Aff., *supra* note 38, ¶ 27.

179. O'Bryant Aff., *supra* note 38, ¶ 13.

180. *Id.* ¶¶ 2, 8–9.

181. *See id.* ¶¶ 9–10.

182. *Id.* ¶¶ 16–17.

183. Williams Aff., *supra* note 38, ¶¶ 29, 31.

for Mr. Hill, and their relationship deteriorated.¹⁸⁴ His work began to suffer, and he received disciplinary citations for going AWOL from the Navy base.¹⁸⁵ For the first time since childhood, he experienced seizures so severe that he required inpatient hospitalization, once in 1984 and again in 1985.¹⁸⁶ During these years, he expressed feelings of severe depression, suicidality, and perceptions of reality that others did not share.¹⁸⁷ Kennestone Hospital in Marietta subjected Mr. Hill to involuntary restraints during his stay there, further exacerbating the traumatic impact of his mental health crisis.¹⁸⁸

Ms. Wright left Mr. Hill almost immediately following his discharge from Kennestone in 1984.¹⁸⁹ The breakup devastated him.¹⁹⁰ He grew increasingly depressed, and experienced a second, debilitating seizure in 1985.¹⁹¹ The Navy administered a battery of psychological tests to Mr. Hill in connection with this hospitalization, but it failed to identify the factors contributing to his distress or to propose a plan for his recovery.¹⁹² The broken relationship with Myra continued to dominate Mr. Hill's thoughts.¹⁹³ It was in this state of untreated distress that Mr. Hill took Myra's life, received a life sentence and entered Lee State Prison, where he encountered Mr. Joseph Handspike.¹⁹⁴

The jury that sentenced Mr. Hill to death heard very little about the trauma that he endured in childhood or the challenges that he faced due to his intellectual disability; they heard nothing about his experiences with sexual trauma—critical information for the jury to appreciate in understanding his response to the threat of prison rape.¹⁹⁵ The sentencing jury also heard very little about Mr. Hill's

184. *Id.* ¶¶ 30–31.

185. *See id.* ¶¶ 33–34.

186. *Id.* ¶¶ 32, 35.

187. *See* Duckworth Aff. ¶¶ 9–10, C.801–05, *Head v. Hill (Hill VT)*, 587 S.E. 2d 613 (Ga. 2003) (on file with author); O'Bryant Aff., *supra* note 38, ¶ 17; Williams Aff., *supra* note 38, ¶¶ 33, 35.

188. Williams Aff., *supra* note 38, ¶ 32.

189. *Id.* ¶¶ 32–33.

190. *Id.* ¶ 33.

191. *Id.* ¶¶ 33, 35.

192. *Id.* ¶ 38.

193. *See id.* ¶ 40.

194. *Hill v. State*, 351 S.E.2d 451, 452 (Ga. 1987); *Petition for Writ of Habeas Corpus*, *supra* note 158, at 5.

195. *See* C. Hill Aff., *supra* note 38, ¶¶ 21–22; J. Hill Aff., *supra* note 38, ¶¶ 42–43; W. Hill, Sr. Aff. ¶ 20, C.847–52, *Head v. Hill (Hill VT)*, 587 S.E. 2d 613 (Ga. 2003) (on file with author); Scott Aff., *supra* note 37, ¶¶ 33–35; Williams Aff., *supra* note 38, ¶¶ 43–45. Mr. Hill's siblings explained on post-conviction review that they wish they had disclosed more information about their brother's childhood at trial; at the time, they failed to appreciate the power of such evidence to save their brother's life. *See* C. Hill Aff., *supra* note 38, ¶¶ 21–22; J. Hill Aff., *supra* note 38, ¶¶ 42–43; W. Hill, Sr. Aff., *supra*, ¶ 20; Scott Aff., *supra* note 37, ¶¶ 33–35; Williams Aff., *supra* note 38, ¶¶ 43–45.

successful Navy service, and on post-conviction review, the State attempted to use his military record to disprove his claim of intellectual disability.¹⁹⁶

One juror who voted for death disclosed on *voir dire* a past history of sexual harassment, identifying the person responsible as a young Black male with an intellectual disability.¹⁹⁷ Despite this admission, the court permitted her to serve as a juror in the capital trial of a young Black man in a case involving threatened sexual violence.¹⁹⁸ On state habeas review, a second juror came forward and renounced her death verdict; she claimed that she and other members of the jury cried when sentencing Mr. Hill to death, that they felt he “did not deserve to die,” and that, if she had access to more information about Mr. Hill’s trauma history, she would have chosen life.¹⁹⁹

In the quarter century that he spent on death row, Mr. Hill continued to litigate his Eighth Amendment right to protection from execution based on intellectual disability, until the State of Georgia executed him on January 15, 2015.²⁰⁰

196. See Duckworth Aff., *supra* note 187, ¶¶ 11, 13–14; Hartsough Aff., *supra* note 177, ¶¶ 5–8; O’Bryant Aff., *supra* note 38, ¶¶ 7–14, 18.

197. Trial Tr. at 302:11–303:25, Hill v. State, Lee County Superior Court Case No. 91R14 (August 2, 1991) (*Hill I*) (on file with author).

198. See *id.* at 303:7–303:25.

199. Mackey Aff. ¶¶ 4, 9–13, C. 939–44, Head v. Hill (*Hill VI*), 587 S.E.2d 613 (Ga. 2003) (on file with author).

200. Warren Hill, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1399/warren-hill> [<https://perma.cc/UF29-YLSA>]; see *Hill VI*, 587 S.E.2d at 617, 627.

E. Travis Hittson

201

A Houston County jury sentenced Mr. Travis Hittson and his co-defendant, Edward Vollmer, to death in 1993 for the murder of Conway Utterbeck.²⁰² All three men served in the United States Navy and were assigned to the U.S.S. Forrestal, a ship docked in Pensacola, Florida.²⁰³ In April 1992, the three took leave to enjoy a long weekend at Mr. Vollmer's family home in Warner Robins, Georgia.²⁰⁴ One evening, Mr. Vollmer and Mr. Hittson returned home after a day of drinking.²⁰⁵ Vollmer saw Mr. Utterbeck lying down and demanded that Mr. Hittson attack him with a baseball bat.²⁰⁶ Mr. Vollmer outranked Mr. Hittson on the Forrestal, serving as his direct supervisor.²⁰⁷ Vollmer used his superior position to manipulate Mr. Hittson by planning the murder and forcing Mr. Hittson to carry it out.²⁰⁸

201. Image source: Georgia Resource Center.

202. *Hittson v. State (Hittson I)*, 449 S.E.2d 586, 590 n.1 (Ga. 1994).

203. *Id.* at 590.

204. *Id.*

205. *Id.*

206. *Id.*

207. ART CODY & KIRSTEN ANDREA SALCHOW, APPLICATION TO GEORGIA BOARD OF PARDONS AND PAROLES ON BEHALF OF TRAVIS CLINTON HITTSON 15 (2016), <http://www.pap.georgia.gov/document/document/here-14/download> [<https://perma.cc/V8VS-3G76>].

208. *Id.* at 15, 20.

The jury that sentenced Mr. Hittson to death learned nothing of the ways that his family's struggles with alcoholism, his exposure to physical and emotional abuse, and his experiences of social marginalization impacted his development.²⁰⁹ The jury further lacked an understanding of the ways that Mr. Hittson's position in the hierarchical structure of the Navy informed his participation in an act of violence under the direction of a superior.²¹⁰

Mr. Hittson's experiences of abuse, neglect, and marginalization in childhood left him especially eager to earn the approval of others as an adult.²¹¹ Multiple generations of Mr. Hittson's family struggled with alcohol, and these struggles contributed to the chaotic environment in which Mr. Hittson grew up.²¹² His parents did not take care of their family home, and they expressed more affection for their dogs than they did for Mr. Hittson and his three siblings.²¹³ Mr. Hittson's father became violent when drunk, and he singled out Travis for abuse.²¹⁴ Mr. Hittson, born prematurely, lived with a learning disability, and found it challenging to interact with his peers.²¹⁵ As a result of these difficulties, he experienced social exclusion at school.²¹⁶ His parents failed to follow up on teachers' recommendations that they consider supportive learning services for their child.²¹⁷

At age seventeen, Mr. Hittson enlisted with the Navy.²¹⁸ The military's rigid structure and merit-based reward system presented opportunities to win the approval of his peers, approval that he never received during childhood.²¹⁹ Those who served with him on the Forrestal testified to his kind nature and the ways that he went above and beyond what the Navy asked of him: babysitting shipmates' children, bringing pizza to those assigned to stay on the ship for twenty-four-hour shifts, and putting in extra time to master required tasks.²²⁰ As his former superior Petty Officer Third Class Bill Kimberlin explained:

209. *See id.* at 5–6.

210. *See id.* at 13–15.

211. *See* Shults Aff. ¶¶ 14–16, 21, C.1340–49, *Hittson v. State (Hittson I)*, 449 S.E.2d 586 (Ga. 1994) (on file with author). The affidavit of Mary Shults, a social worker and defense mitigation investigator, remains on file with the Georgia Supreme Court Clerk's office.

212. CODY & SALCHOW, *supra* note 207, at 5–6.

213. Shults Aff., *supra* note 211, ¶¶ 17, 20.

214. *Id.* ¶ 14.

215. *Id.* ¶¶ 7, 15–16.

216. *See id.* ¶ 16.

217. *Id.* ¶ 15.

218. CODY & SALCHOW, *supra* note 207, at 8.

219. *See id.* at 8–10.

220. *Id.*

I felt it was important to Travis to please me both as a supervisor and as a friend. But Travis was the type of person so eager to please it put him in a vulnerable position, such that he could be swayed to do something he would not normally do on his own.²²¹

Shortly before the date of the incident, the Navy transferred Petty Officer Kimberlin to a new duty station and assigned Mr. Vollmer to supervise Mr. Hittson.²²² Mr. Hittson found the personnel change stressful.²²³ His drinking, which began in adolescence, escalated to dangerous levels, and he began to experience blackouts.²²⁴ Mr. Vollmer took advantage of Mr. Hittson's increasing vulnerability, forcing him to run errands for him and to buy him cigarettes and alcohol.²²⁵ Mr. Hittson, known to never disobey the Navy chain of command, obliged.²²⁶ It was in this vulnerable state that Mr. Hittson traveled to Warner Robbins with Vollmer and Mr. Utterbeck and in this state that Vollmer commanded Mr. Hittson to take Mr. Utterbeck's life.²²⁷

Mr. Hittson's trial counsel hired a social worker who specialized in family therapy to investigate the environment in which Mr. Hittson grew up, the difficulties that he experienced in childhood, and the ways that these struggles impacted his time in the Navy and his participation in the killing of Conway Utterbeck.²²⁸ At a pretrial hearing, defense counsel proffered the social worker's testimony.²²⁹ The court ruled that Mr. Hittson could not introduce her testimony as mitigation without triggering the State's right to present its own psychiatric expert in rebuttal.²³⁰ To protect Mr. Hittson, trial counsel withheld social worker Mary Shults's testimony.²³¹ Despite this decision, the court permitted the State to introduce the testimony of psychologist Dr. Robert J. Storms in rebuttal to lay witness testimony.²³² Dr. Storms characterized Mr. Hittson as completely devoid of remorse, and the Houston County prosecutor relied on this testimony during closing arguments.²³³ In fact, Mr. Hittson experienced profound regret over the death of Conway Utterbeck; shipmates

221. *Id.* at 5.

222. *Id.* at 11–12.

223. *See id.* at 12.

224. CODY & SALCHOW, *supra* note 207, at 6, 11.

225. *Id.* at 17.

226. *Id.* at 13, 15, 17.

227. *See id.* at 19–20.

228. Shults Aff., *supra* note 211, ¶¶ 1–4.

229. Trial Tr. at 42:1–4, *Hittson v. State*, Houston County Superior Court Case (Ga. Mar. 17, 1993) (on file with author).

230. *Id.* at 66:10–23.

231. *See id.* at 65:19–22.

232. *Id.* at 241:10–12, 20–21.

233. *See id.* at 242:5–6, 278:11–25.

observed signs of increased drinking, severe depression, and social withdrawal in the months following the incident.²³⁴ However, with no mental health expert testimony to contextualize Mr. Hittson's trauma history, his participation in the crime, or the profound emotional distress that he experienced following Mr. Utterbeck's death, Dr. Storms's characterization powerfully influenced the jury's vote for death.²³⁵

Four jurors later renounced their death verdicts, pleading with the Georgia Board of Pardons and Paroles to grant clemency to Mr. Hittson.²³⁶ The Board denied clemency, and the State of Georgia executed Mr. Hittson on February 17, 2016.²³⁷

F. Brandon Jones

In 1979, Brandon Jones and Van Roosevelt Solomon participated in the robbery of a gas station in suburban Atlanta.²³⁸ The station employee, Roger Tackett, lost his life during the course of the robbery.²³⁹ Evidence failed to establish which man fired the fatal shot.²⁴⁰ A Cobb County jury sentenced Mr. Jones to death for his participation in this crime.²⁴¹ Today, Georgia juries almost never impose death sentences in armed robbery cases.²⁴²

A federal court reversed Mr. Jones's death sentence in 1989, after finding a Sixth, Eighth, and Fourteenth amendment violation where the trial court permitted jurors to keep a Bible with them in the deliberation room.²⁴³ A second Cobb County jury resentenced Mr. Jones to death in 1997.²⁴⁴ Neither jury heard about the ways that physical and sexual abuse, racism, and inhumane prison conditions

234. CODY & SALCHOW, *supra* note 207, at 21–22.

235. *See* Hittson v. State (*Hittson I*), 449 S.E.2d 586, 590 (Ga. 1994); CODY & SALCHOW, *supra* note 207, at 5–6, 21–22.

236. CODY & SALCHOW, *supra* note 207, at 4.

237. Travis Hittson, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1429/travis-hittson> [<https://perma.cc/6FCB-9HVD>].

238. *Jones v. State (Jones I)*, 293 S.E.2d 708, 709–10 (Ga. 1982).

239. *Id.*

240. *See id.* at 714.

241. *Id.* at 709.

242. *See* GERALD W. KING, APPLICATION TO THE GEORGIA BOARD OF PARDONS AND PAROLE ON BEHALF OF BRANDON ASTOR JONES 19 (2016), <https://pap.georgia.gov/press-releases/2016-01-29/parole-board-has-declassified-clemency-application-brandon-astor-jones> [<https://perma.cc/8DNA-W8TG>]. Between 1995 and 2015, no jury imposed a death sentence on facts similar to Mr. Jones's case. *Id.*

243. *Jones v. Kemp (Jones IV)*, 706 F. Supp. 1534, 1558, 1560 (N.D. Ga. 1989).

244. *Jones v. State (Jones V)*, 539 S.E.2d 154, 157 (Ga. 2000) (affirming death sentence on direct appeal).

impacted Mr. Jones's development through young adulthood.²⁴⁵ Neither jury learned that, after leaving prison, Mr. Jones joined the Army to turn his life around.²⁴⁶ Jurors did not review reports from an Army psychiatrist, reports that explained how Mr. Jones's traumatic preservice experiences continued to affect him while in the Army, resulting in a PTSD diagnosis.²⁴⁷ The jury further did not learn that the military discharged him prematurely in response to his mental health crisis, rather than referring him to supportive services.²⁴⁸ Jurors never heard this information because Mr. Jones's trial and resentencing counsel lacked the trauma-informed mitigation approach necessary to uncover and present Mr. Jones's narrative.²⁴⁹ Faced with minimal mitigating evidence, Cobb County jurors sentenced Mr. Jones to death twice in an armed robbery case in which evidence failed to conclusively identify the shooter.²⁵⁰ The punishment that the jury imposed on Mr. Jones for this crime stood out as extreme given statewide sentencing patterns in similar cases.²⁵¹ The apparent disproportionality of sentencing in this case begs consideration of the potential power of available mitigating military and mental health evidence to produce a different outcome.²⁵²

Mr. Jones lived with his mother, Jessie Carter, in Chicago until the age of five.²⁵³ In an effort to provide a better life for her son, Ms. Carter sent him to live with his great aunt and uncle on a farm in rural Illinois.²⁵⁴ Unbeknownst to his mother, Mr. Jones's great uncle, a Reverend, forced him to perform arduous labor on the farm and mandated that he conform to strict religious rules.²⁵⁵ When Mr. Jones broke a rule or failed to complete his chores, his great uncle beat him.²⁵⁶ During the years that he lived with his great uncle, Mr.

245. Brief of Appellant at 24, *Jones v. Ga. Diagnostic & Classification Prison Warden*, 756 F.3d 1171 (11 Cir. 2014) (No. 11-14774) (on file with the author).

246. *Id.* at 33.

247. *Id.* at 33–39.

248. *Id.* at 34.

249. *Id.* at 2–3, 10–12.

250. See *Jones v. State (Jones V)*, 539 S.E.2d 154, 157, 161 (Ga. 2000); KING, *supra* note 242, at 12.

251. KING, *supra* note 242, at 16–17, 19 (noting that from 1975 to 2015, the Georgia Supreme Court affirmed only 11 death sentences in armed robbery cases and all of these sentencing decisions occurred prior to 1995). The death-sentencing rate in armed robbery cases stands out as negligible when considering that, over roughly the same period, between 1972 and 2018, Georgia juries imposed death sentences in nearly 300 cases. Excel Document of Death Sentences in Georgia, 1972–2018 (on file with author).

252. See KING, *supra* note 242, at 5–14.

253. *Id.* at 28–29.

254. *Id.* at 29–30.

255. Brief of Appellant, *supra* note 245, at 26–28.

256. KING, *supra* note 242, at 29–30.

Jones's cousin molested him repeatedly.²⁵⁷ Mr. Jones's great aunt and uncle enrolled him in a newly integrated school in their rural community.²⁵⁸ There, Mr. Jones, the school's only Black student, confronted racism daily at the hands of White peers and teachers, who resented his arrival.²⁵⁹

Mr. Jones's return to Chicago at the age of twelve provided no greater sense of safety.²⁶⁰ Ms. Carter continued to struggle with alcohol, and the violence that dominated her romantic relationships left her sons feeling unsafe.²⁶¹ Mr. Jones and his brother took to the streets to escape the chaos at home, leaving them vulnerable to arrest at an early age.²⁶² In 1958, fifteen-year-old Mr. Jones entered the State Industrial School for Boys, a prison for youth in Sheridan, Illinois.²⁶³ He spent over one year incarcerated at Sheridan.²⁶⁴ While at Sheridan, Mr. Jones survived brutal beatings at the hands of mostly White prison guards, who targeted Mr. Jones based on his identity as a young Black boy from Chicago.²⁶⁵ On multiple occasions, guards sent him to Sheridan's solitary confinement unit, where he spent anywhere from one up to twenty-nine days in the facility's "dungeon" with minimal lighting and a restricted diet.²⁶⁶ Sheridan guards hurled racial epithets at Mr. Jones and the other young Black boys in their custody, as they assaulted them or sent them to the dungeon.²⁶⁷ In 1960, one year after Mr. Jones's release, the Illinois legislature commissioned an investigation of the brutality and racism pervasive at Sheridan.²⁶⁸ The legislature's report corroborated Mr. Jones's own account of the inhumane conditions there.²⁶⁹ The State of Illinois stopped using it as a juvenile facility based on these findings.²⁷⁰

The abuse that Mr. Jones survived at Sheridan took its toll; he emerged feeling "broken down inside," unable to sleep, and disconnected from other people and sometimes from reality.²⁷¹ He never

257. *Id.* at 29.

258. *Id.* at 31.

259. *Id.*

260. *See id.*

261. *Id.*

262. *See* KING, *supra* note 242, at 32.

263. *Id.* at 32.

264. Brief of Petitioner at 32, *Jones v. Hall (Jones VII)*, 2011 U.S. Dist. LEXIS 158913 (N.D. Ga. Aug. 10, 2011) (No. 1:09-CV-1228-CAP).

265. *Id.* at 32–33.

266. *Id.*

267. KING, *supra* note 242, at 32.

268. *Id.* at 33.

269. *Id.* at 32–33.

270. *See Sheridan Correctional Center*, ILL. DEPT OF CORRECTIONS, <https://www2.illinois.gov/idoc/facilities/Pages/sheridancorrectionalcenter.aspx> [<https://perma.cc/9YJR-JUQM>].

271. Brief of Appellant, *supra* note 245, at 32.

received treatment for the psychological trauma that he endured while incarcerated.²⁷² Less than three years after his release from Sheridan, Mr. Jones enlisted in the United States Army, making a conscious decision to change the trajectory of his life.²⁷³

Mr. Jones spent less than one year in the army.²⁷⁴ The rigid pattern of army life recalled his great uncle's harsh authoritarianism and the cruel conditions at Sheridan.²⁷⁵ In this environment, Mr. Jones's mental health began to deteriorate, and his performance suffered.²⁷⁶ In 1963, Mr. Jones's commanding officer noticed his distress and referred him for a psychiatric evaluation.²⁷⁷ Dr. Levon Tashjian, a military psychiatrist, spoke with Mr. Jones about the traumas that he experienced in his youth, gave him a diagnosis consistent with PTSD, and he was administratively discharged from the army.²⁷⁸ Three mental health experts who met with Mr. Jones in 2003, in preparation for state habeas proceedings, and each independently concluded that he lived with chronic PTSD, corroborating the 1963 army evaluation.²⁷⁹

Mr. Jones spent over three decades on death row before the State of Georgia executed him in 2016.²⁸⁰ In prison, he became a prolific writer, penning memoirs entitled "Warning! Our Children Under Siege, and Why We Must Be There For Them!" and "An Obituary for Brandon Astor Jones: Soon To Be Deceased."²⁸¹ In these writings, Mr. Jones described what it was like to grow up in his mother's home; the physical, sexual, and psychological abuse he survived while living with his great uncle; and the brutality and racism that he encountered at Sheridan.²⁸² Mr. Jones struggled to discuss these difficult experiences with his trial and resentencing counsel when confronted directly.²⁸³ However, conscious of the power of his story, he mailed a copy of his writings to resentencing counsel.²⁸⁴ Counsel never followed up on these memoirs, and the Cobb County jury that sentenced Mr.

272. See Brief of Petitioner, *supra* note 264, at 34.

273. See *id.* at 34.

274. See *id.* at 34–35.

275. Brief of Appellant, *supra* note 245, at 24–35.

276. See Brief of Petitioner, *supra* note 264, at 35.

277. *Id.* at 34–35.

278. *Id.* at 34–36; *cf.* 10 U.S.C. § 1177(a)(1)–(2) (outlining the modern statute for administrative separation due to PTSD).

279. Brief of Appellant, *supra* note 245, at 35–39.

280. *Jones v. State (Jones I)*, 293 S.E.2d 708, 709 (Ga. 1982); *Brandon Jones*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1427/brandon-jones> [<https://perma.cc/3QNP-BRW4>].

281. Brief of Petitioner, *supra* note 264, at 17–18, 79 n.15.

282. *Id.* at 17–18, 20, 33.

283. See *id.* at 17.

284. See *id.*

Jones to death for a second time in 1997 never learned the history of the person that they condemned to die.²⁸⁵ The State of Georgia executed Mr. Jones on February 3, 2016.²⁸⁶

G. Marcus Wellons

On August 31, 1989, military police located the body of fifteen-year-old India Roberts in the woods near an apartment complex in Cobb County, Georgia.²⁸⁷ In 1993, a Cobb County jury convicted army veteran Marcus Wellons of raping and killing Ms. Roberts, a close friend to his former partner's fourteen-year-old son, Tony Saunders.²⁸⁸ Mr. Wellons and Ms. Roberts lived in the same apartment complex, and the tragedy occurred less than twenty-four hours after Gail Saunders, Tony's mother, declined Mr. Wellons' marriage proposal and ended their relationship.²⁸⁹ At the time of the arrest, police found Mr. Wellons in a state of severe emotional distress.²⁹⁰

A pretrial ruling chilled Mr. Wellons's ability to present evidence of his trauma history, and the State used its peremptory strikes to exclude Black people from the jury and to handpick White jurors who endorsed discriminatory views about mental illness.²⁹¹ This unrepresentative group of jurors heard very little about Mr. Wellons's experiences with family trauma and the ways that these experiences contributed to a state of emotional crisis following the painful end to a romantic relationship.²⁹² They heard little of Mr. Wellons's honorable army service, his career as a counselor, or his desire to give back to his family and community—all factors tending to frame the crime that he committed as a tragic response to a crisis that recalled prior family trauma.²⁹³ Predictably, this jury voted for death.²⁹⁴

Marcus Wellons grew up in Miami, Florida, in extreme poverty.²⁹⁵ His family sometimes went without electricity and running water.²⁹⁶ His father beat his wife and children.²⁹⁷ Mr. Wellons's

285. *Id.* at 1–2, 18.

286. *Brandon Jones*, *supra* note 280.

287. *Wellons v. State (Wellons II)*, 463 S.E.2d 868, 873–75 (Ga. 1995).

288. *Id.* at 873.

289. *Id.* at 873–75.

290. *See id.* at 875.

291. Brief of Appellant at 8, 39–40, *Wellons v. Warden, Ga. Diagnostic & Classification Prison (Wellons X)*, 695 F.3d 1202 (11th Cir. 2012) (No. 11-14935).

292. *See id.* at 4–6, 8.

293. *See id.* 5–6.

294. *Wellons II*, 463 S.E.2d at 873.

295. Brief of Appellant, *supra* note 291, at 4–5.

296. *Id.* at 4.

297. *Id.* at 4–5.

exposure to the violence between his parents profoundly impacted him.²⁹⁸ When he intervened to protect his mother, Mr. Wellons's father directed his anger toward his son, threatening him with a gun and disclaiming him as a part of the family.²⁹⁹

Despite the challenges that Mr. Wellons experienced in childhood, he excelled as a young adult.³⁰⁰ He served in the United States Army and earned an honorable discharge.³⁰¹ Later, he became the first in his family to graduate college and pursued a career as a counselor.³⁰² His own life experiences motivated him to make a positive impact in the lives of others dealing with similar challenges.³⁰³ When he and his partner Gail began to experience relationship difficulties, he sought counseling on his own initiative.³⁰⁴ Aware of the traumatic impact of violence on families, he exerted great effort to preserve his own.³⁰⁵

Police arrested Mr. Wellons in the midst of a mental health crisis.³⁰⁶ When Gail rejected his proposal, he began drinking heavily and acting out-of-character.³⁰⁷ He wrote a letter to Gail describing his psychological state as "the worst [he had ever experienced] . . . in his life."³⁰⁸

ADA Jack Mallard, the Cobb County prosecutor assigned to Mr. Wellons's case, purposely excluded Black people from his jury.³⁰⁹ Aware that the defense intended to present mental health evidence to contextualize Mr. Wellons's state of mind at the time of the crime, ADA Mallard seated White jurors who held discriminatory views about mental illness.³¹⁰ Two of these jurors expressed an inability to consider mental health evidence.³¹¹

In a pretrial ruling at the State's request, the Cobb County Superior court erroneously ordered Mr. Wellons to turn over the reports of any mental health experts consulted in preparation for

298. *See id.* at 5.

299. *Id.* at 4–5.

300. *Id.* at 5.

301. Brief of Appellant, *supra* note 291, at 5.

302. *Id.* at 5.

303. *See id.*

304. *See id.* at 5–6.

305. *See id.*

306. *See id.* at 4, 6–8.

307. *Wellons v. State (Wellons II)*, 463 S.E.2d 868, 874 (Ga. 1995); Brief of Appellant, *supra* note 291, at 6.

308. Brief of Appellant, *supra* note 291, at 6.

309. *Wellons II*, 463 S.E.2d at 873, 877.

310. *See id.* at 877.

311. Petition for Writ of Habeas Corpus at 67, *Wellons v. Head (Wellons V)*, 2007 U.S. Dist. LEXIS 116796 (N.D. Ga. Mar. 19, 2004) (No. 1:01-cv-01296).

trial, whether or not he ultimately introduced their testimony.³¹² This ruling prevented trial counsel from fully investigating his trauma history and presenting this information to the jury.³¹³ In summary, the State of Georgia tried Marcus Wellons, a man charged with murder committed in the midst of a mental health crisis, before a panel of jurors who held discriminatory views about people with mental illness and without affording him a meaningful opportunity to present mental health mitigation.³¹⁴

Mr. Wellons did present one expert psychologist at trial.³¹⁵ In his testimony, the psychologist characterized Mr. Wellons's emotional state at the time of the crime as a post-traumatic stress response.³¹⁶ In state habeas proceedings, two mental health experts testified in further detail about the trauma that Mr. Wellons experienced in childhood; they explained that he lived with PTSD and contextualized the way that his experience with trauma related to his actions on the night of August 30, 1989.³¹⁷ Georgia courts denied relief based on the new mental health evidence, and the Supreme Court denied certiorari.³¹⁸ Mr. Wellons litigated claims of discriminatory jury selection for over two decades, but state and federal courts ultimately denied relief.³¹⁹ The State of Georgia executed army veteran Marcus A. Wellons on June 17, 2014.³²⁰

II. BLACK GEORGIANS AND GEORGIANS WITH MENTAL DISABILITIES FACE A HEIGHTENED RISK OF EXECUTION

Black Georgians face an elevated risk of execution due to the death penalty's historical relationship to chattel slavery and racial terror. For Georgians with mental disabilities, heightened risk arises due to the institution's failure to accommodate for the unique needs of these individuals. Due to the intersection of these two identities, Black Georgians who live with mental disabilities face an especially

312. *Id.* at 11.

313. *See id.* at 5–6, 11.

314. *See id.* at 11, 67.

315. *Wellons II*, 463 S.E.2d at 876.

316. *Id.*

317. *See Wellons v. Hall (Wellons VI)*, 554 F.3d 923, 927–28, 941–42 (11th Cir. 2009).

318. *Wellons v. Turpin (Wellons IV)*, 534 U.S. 1001, 1001 (2001) (denying certiorari review of rejection of state habeas claims related to mental health mitigation); *see Wellons VI*, 554 F.3d at 932–33.

319. *See Wellons v. Humphrey (Wellons XI)*, 571 U.S. 869, 869 (2013); *Wellons IV*, 534 U.S. at 1001; *Wellons II*, 463 S.E.2d at 877, 882.

320. *Marcus Wellons*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1380/marcus-wellons> [<https://perma.cc/3M6U-4MJD>].

heightened risk of execution.³²¹ As the cases of the six Georgia veterans from Part I illustrate, veteran status alone fails to insulate Black Georgians and Georgians with mental disabilities from these risks.

A. Black Georgians Face a Heightened Risk of Execution

Georgia's death penalty, as an institution, historically functioned within a dual system of punishment designed to oppress both free and enslaved Black people. The state's modern death penalty evolved as a *de jure* replacement for racial terror lynching.³²² Today, features of death penalty law, such as unchecked prosecutorial discretion in charging decisions, weak enforcement of the right to a jury of one's peers, and an unwillingness to root out the role of racism in capital jury deliberations, preserve the death penalty's historic function as a racially biased institution.³²³

As amended in 1755, Georgia's slave code classified all felonies committed by enslaved Black people as crimes punishable by death.³²⁴ This scheme differed markedly from the hierarchy of punishments applied to White Georgians.³²⁵ Black Georgians charged with murder or the rape of a White woman faced automatic execution.³²⁶ White people received a sentence of two to twenty years for the rape of a White woman, and "[a] fine [and/or a term of] imprisonment, at the discretion of the court" for identical sexual violence committed against a Black woman.³²⁷

321. See GA. DEP'T OF CORRECTIONS, *supra* note 41, at 5, 39. Black people living with mental disabilities also face legal marginalization in areas outside death penalty law. See, e.g., Perlin & Cucolo, *supra* note 14, at 432–33, 435, 437–39, 441 (discussing how Black people with mental disabilities confront racism in the mental health system through experiencing misdiagnosis, substandard treatment, involuntary commitment, involuntary administration of psychotropic medications, seclusion and restraint, and clinician/court findings of dangerousness at higher rates than White people with identical disabilities).

322. See EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 5 (2017). During the era of racial terror lynching, White state and non-state actors in states like Georgia murdered Black people for violating the social codes of segregation, developing relationships with White people, achieving economic success, asserting their political rights, or demanding that White people treat them with respect. See *id.* at 27, 29–31, 38–39. Black citizens accused of crimes also faced the threat of lynching, as White communities viewed the court system, with its constitutional protections, as too good for Black people. See *id.* at 32. Finally, in some cases, White people lynched entire families or friend groups to create a public spectacle intended to terrorize Black communities. See *id.* at 38.

323. See *id.* at 63–64.

324. GLENN MCNAIR, *CRIMINAL INJUSTICE: SLAVES AND FREE BLACKS IN GEORGIA'S CRIMINAL JUSTICE SYSTEM* 38–39 (2009).

325. See *id.* at 39–40.

326. Ga. Penal Code § 4704 (1861).

327. *Id.* § 4249.

Between 1877 and 1950, Georgia ranked second in the nation in number of racial terror lynchings.³²⁸ White Georgians executed 589 Black people during these years.³²⁹ By the time the Court decided *McCleskey v. Kemp* in 1987, Georgia sentenced people to death at a rate four times higher for killing White victims than for killing Black victims.³³⁰ In 2019, researchers demonstrated that the State of Georgia executes people at a rate seventeen times higher for killing White victims than for killing Black victims.³³¹

The data speaks for itself, documenting remarkable continuity in Georgia's use of extreme punishment as a tool to enforce racial subordination.³³² The *McCleskey* decision underscores the ways that prosecutorial charging decisions and jury penalty-phase verdicts sustain this system of racial targeting.³³³ In *McCleskey*, the Court refused to intervene to prevent prosecutors from exercising their discretion to seek death in a way that targeted Black Georgians.³³⁴ More recent Georgia cases highlight the law's failure to protect Black people from unrepresentative and racially biased juries.³³⁵

In the 2016 case of *Foster v. Chatman*, the prosecutor excluded Black people from the jury that sentenced Mr. Timothy Tyrone Foster to death in Floyd County, Georgia, citing membership in a historically Black church as a "race neutral" reason for the strikes.³³⁶ The Supreme Court ultimately reversed, finding this explanation pretextual.³³⁷ In 2019, a Georgia trial court found that Muscogee County prosecutors unconstitutionally excluded Black jurors in every death penalty case involving a Black male between 1975 and 1979, securing all-White juries in six of seven cases during these years.³³⁸ The same two Muscogee County prosecutors handled all seven of these cases, excluding a total of forty-one prospective Black jurors over the

328. EQUAL JUST. INITIATIVE, *supra* note 322, at 39–40.

329. *Id.* at 40.

330. *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987); *see also* DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* vii, 316 (1990) (providing data that analyzes the death sentences for murder in Georgia between 1973 and 1979).

331. Scott Phillips & Jason Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 587 (2020) (discussing how researchers updated the Baldus study by examining the same dataset of death-sentenced cases and finding that race-of-victim effects predicted not only the likelihood of receiving a death sentence but also the likelihood of execution, indicating that appellate review exacerbated, rather than remedied, racial disparities at the trial phase).

332. *See* EQUAL JUST. INITIATIVE, *supra* note 322, at 65; Phillips & Marceau, *supra* note 331, at 586.

333. *See McCleskey*, 481 U.S. at 287–91.

334. *Id.* at 333–35 (Brennan, J., dissenting).

335. *See, e.g., Foster v. Chatman*, 136 S. Ct. 1737, 1742, 1744 (2016).

336. *Id.* at 1742, 1751, 1753.

337. *Id.* at 1742–43, 1753.

338. Order on Defendant's Extraordinary Motion for New Trial, *supra* note 110, at 5, 8.

four-year period.³³⁹ In one case, the State excluded all four prospective Black jurors, and an all-White jury sentenced Mr. Johnny Lee Gates, a Black man, to death.³⁴⁰ The Georgia Supreme Court granted Mr. Gates a new trial in March 2020 based on exculpatory DNA evidence.³⁴¹ In May 2020, the State of Georgia consented to Mr. Gates's release from prison based on this evidence of innocence.³⁴² He walked free on May 15, 2020.³⁴³

Black Georgians face heightened risk that prosecutors will exclude Black peers from their capital juries. They also face a risk that White jurors will sentence them to death based on racist beliefs. A Jones County, Georgia jury sentenced Mr. Keith Leroy Tharpe to death for the 1990 killing of his former wife.³⁴⁴ Years later, a member of that jury, Mr. Barney Gattie, disclosed to Mr. Tharpe's defense team the racism underlying his death vote.³⁴⁵ Mr. Gattie stated in an affidavit, "[T]here are two types of Black people: 1. Black folks and 2. N[*****]' . . . Tharpe, . . . 'wasn't in the "good" [B]lack folks category in [my] book, [and] should get the electric chair for what he did.'" ³⁴⁶ No federal or Georgia state court ever examined Mr. Tharpe's claim of juror bias on its merits, instead denying relief on procedural grounds.³⁴⁷ Mr. Tharpe died on Georgia's death row on January 24, 2020, less than a year after the Supreme Court declined to review his case.³⁴⁸

The juror exclusion and juror bias cases cited above demonstrate the ways that racial discrimination continues to pervade Georgia's death penalty system. Each of the Black Georgia veterans introduced here likewise faced an elevated risk of execution due to discriminatory jury selection and juror bias. For example, ADA William Smith, the Muscogee county prosecutor handling Mr. Hance's case, used ten of his eleven peremptory strikes to remove Black people from his jury.³⁴⁹ Cobb County prosecutor Jack Mallard similarly exercised peremptory strikes to remove Black people from Marcus Wellons's

339. *Id.* at 8–9.

340. *Id.* at 9–10, 12.

341. *State v. Gates*, 840 S.E.2d 437, 456 (Ga. 2020) (upholding Muscogee County Superior Court's order granting extraordinary motion for new trial).

342. Rankin, *supra* note 143.

343. *Id.*

344. *Tharpe v. State*, 416 S.E. 2d 78, 79, 82 (Ga. 1992).

345. *Tharpe v. Ford*, 19 S. Ct. 911, 912 (2019).

346. *Id.* at 911.

347. *Id.* at 912.

348. *Id.* at 911; *Man Sentenced to Death by Juror Who Questioned if 'Black People Even Have Souls' Dies on Georgia's Death Row*, DEATH PENALTY INFO. CTR. (Jan. 27, 2020), <https://deathpenaltyinfo.org/news/man-sentenced-to-death-by-juror-who-questioned-if-black-people-even-have-souls-dies-on-georgias-death-row> [<https://perma.cc/F53F-DCAN>].

349. *See Order on Defendant's Extraordinary Motion for New Trial*, *supra* note 110, at 9.

jury, strategically seating White jurors who expressed discriminatory views about mental illness.³⁵⁰ A juror who disclosed on *voir dire* that she “[had a] problem with young [B]lack men” sat on the panel that sentenced Mr. Warren Hill to death.³⁵¹ Two jurors who voted to condemn Mr. William Hance later admitted that they referred to Mr. Hance using racial slurs during deliberations.³⁵²

As these cases illustrate, capitally charged Black Georgians face enhanced risks in a legal system historically designed and procedurally maintained to enforce racial subordination. Veteran status alone does not nullify these risks, especially in cases—like those of the four Black veterans examined in this Article—where counsel fails to present evidence of military service at trial. Protecting Black veterans from execution therefore requires defense counsel to adopt strategies responsive to the heightened risk that these veterans face: investigating with cultural humility; exploring the impact of racism and racial trauma on a person’s life story, including their experience in the military; and remaining vigilant against the State’s attempts to deprive Black veterans of the right to a jury comprised of their peers.

B. Georgians with Mental Disabilities Face a Heightened Risk of Execution

Georgia’s death penalty places Black Georgians at risk due to the institution’s historical function as a tool of racial subordination. Georgia’s death penalty also places individuals with mental disabilities at risk, due to the system’s failure to accommodate the unique needs and experiences of these individuals.

Over 70% of people support exempting individuals with SMI from the death penalty.³⁵³ Despite widespread opposition to executing these individuals, they remain overrepresented on death rows across America, including Georgia’s.³⁵⁴ Of the 824 individuals executed nationwide between 2000 and 2015, over 42% exhibited signs of mental illness.³⁵⁵ Around 13.4% showed signs of major depression,

350. *Wellons v. State (Wellons II)*, 463 S.E.2d 868, 873, 877 (Ga. 1995).

351. Trial Tr. 302:19–20, *Hill v. State (Hill I)*, Lee Cnty. Superior Ct. Case No. 91R14 (August 2, 1991) (on file with author).

352. See Bright, *supra* note 113, at 855; Herbert, *supra* note 113.

353. AM. BAR ASS’N DEATH PENALTY DUE PROCESS REV. PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 6 (2016), http://www.amnestyhouston.org/uploads/1/1/5/9/15993000/american_bar_associaton_-_severe_mental_illness___deathpenalty_2016_.pdf [https://perma.cc/Y8XN-HGWJ].

354. See Baumgartner et al., *supra* note 44.

355. *Id.*

14.4% experienced suicidality and 10.07% previously attempted suicide, 4.5% lived with schizophrenia, 3.9% experienced Bipolar disorder, and 5.8% exhibited signs of PTSD.³⁵⁶ Over 10% spent time in a psychiatric hospital before receiving a death sentence.³⁵⁷ Many reported histories of severe childhood trauma—with over 26.2% reporting physical abuse, 12.5% reporting sexual abuse, 16% reporting neglect, and 7.8% reporting general abuse.³⁵⁸ Approximately 7.5% gave up their legal appeals and volunteered for execution.³⁵⁹

The State of Georgia executed 36 people between October 2001 and December 2015.³⁶⁰ Twenty of these individuals, or 56%, demonstrated signs of mental illness.³⁶¹ Specifically, six lived with depression, two with schizophrenia, one with bipolar disorder, and five with PTSD.³⁶² Seven experienced suicidality.³⁶³ Six survived psychiatric hospitalization prior to receiving a death sentence.³⁶⁴ Many came to death row with histories of severe trauma: fifteen experienced physical abuse, six survived sexual abuse, and four reported childhood neglect.³⁶⁵ During the 2001 to 2015 period, Georgia executed three veterans who shared these experiences: Warren Hill (childhood physical and sexual trauma and an intellectual disability), Andrew Brannan (bipolar disorder and PTSD), and Marcus Wellons (PTSD and physical abuse in childhood).³⁶⁶

Why do individuals with mental illness face enhanced risk of execution if most people support exempting them from the death penalty? One reason is that the structure of capital trials makes it difficult for people with mental disabilities to present their stories in a way that humanizes them. Specifically, four discrete challenges impact the ability of individuals to present mental health mitigation at the sentencing phase of a capital trial: (i) capital charged people with mental disabilities experience difficulty exposing painful, traumatic memories; (ii) prosecutors frequently exclude individuals with experience of mental illness from capital juries; (iii) adversarial

356. Frank R. Baumgartner, Marty Davidson, Kaneesha R. Johnson, Arvind Krishnamurthy & Colin P. Wilson with Betsy Neill, *Mental Health, in DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY* 244, 256 (2017).

357. Baumgartner et al., *supra* note 44.

358. *Id.*

359. Baumgartner et al., *supra* note 356, at 64–65.

360. *Executions Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database?filters%5BstartDate%5D=10%2F01%2F2001&filters%5BendDate%5D=12%2F01%2F2015&filters%5Bstate%5D=Georgia> [https://perma.cc/525P-DNKH].

361. Baumgartner et al., *supra* note 44.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. Williams Aff., *supra* note 38, ¶¶ 3, 19; Baumgartner et al., *supra* note 44.

capital prosecutions activate stereotypes about mental illness and violence; and (iv) forensic mental health experts often pathologize, rather than humanize, defendants with mental illness.³⁶⁷ Responsive mental health mitigation requires that defense counsel recognize these risks and structure mitigation strategy accordingly.

The Constitution entitles individuals with mental disabilities to present evidence of their experiences with mental disabilities when pleading with a jury to vote for life, and jurors find such evidence compelling.³⁶⁸ The cases of the six Georgia men presented here bear witness to the power of mental health mitigation. In the case of Mr. Warren Hill, for example, jurors did not hear evidence of the chronic physical and sexual abuse that he experienced at home.³⁶⁹ In an affidavit submitted in support of state post-conviction relief, one member of the Lee County jury that sentenced Mr. Hill to death explained that she and several other jurors cried during deliberations because they did not feel that Mr. Hill was “one of those type[s] [of] criminals that deserved to be put to death[:]” and that, if presented evidence of Mr. Hill’s trauma history, she would have chosen life.³⁷⁰ As a first step, defense counsel must acknowledge the mitigating potential of mental health evidence and its presentation as part of a person’s narrative.

Second, defense counsel must possess an understanding of trauma and the risk of re-traumatization, and they must adopt a trauma-informed mitigation strategy. Although jurors in capital cases find mental health evidence powerful, uncovering and presenting this evidence requires a person to reveal and make public painful, triggering, and stigmatizing memories and experiences. Many people with SMI and other mental disabilities do not identify with their diagnoses, and may not inform counsel of their mental health history.³⁷¹ Others, witnessing the mental health stigma prevalent in the world around them, learn to survive by concealing their disabilities.³⁷²

367. See Baumgartner et al., *supra* note 356, at 235, 240, 260.

368. See, e.g., *Ferrell v. Hall*, 640 F.3d 1199, 1203, 1227–28 (11th Cir. 2011) (discussing how Georgia petitioner Eric Lynn Ferrell entitled to present evidence of, *inter alia*, childhood trauma, family history of mental illness, intellectual disability, organic frontal lobe brain damage, epilepsy, bipolar disorder, and suicidality to the jury who sentenced him to death).

369. See *Williams Aff.*, *supra* note 38, ¶¶ 3, 19, 43–45.

370. *Mackey Aff.*, *supra* note 199, ¶¶ 1, 4, 9–10, 12–13.

371. See *Ragins & Pollack*, *supra* note 16, at 386.

372. See THE ICARUS PROJECT, *MADNESS AND OPPRESSION: PATHS TO PERSONAL TRANSFORMATION AND COLLECTIVE LIBERATION* 1–3 (2015), <http://nycicarus.org/images/MadnessAndOppressionGuide-compressed.pdf> [<https://perma.cc/4789-XM2H>] (providing a guide for psychiatric survivors to name and respond to their experiences of societal stigma); Brian Watermeyer & Tristan Görgens, *Disability and Internalized Oppression*, in *INTERNALIZED OPPRESSION: THE PSYCHOLOGY OF MARGINALIZATION* 253, 263–65 (E.J.R. David ed., 2014) (explaining the general theory of internalized oppression); see also

Additionally, traumatic experiences profoundly impact memory, making it challenging to share painful past experiences with defense counsel.³⁷³ Further, trauma that occurs in the home impacts all members of the family, making it difficult for a person's loved ones to discuss these painful memories with defense counsel.³⁷⁴ When a loved one faces a death sentence, family members likewise experience trauma and face stigma in their communities.³⁷⁵ Family members may find it easier to share positive memories about their relative in an effort to protect the person and the family from shame and to avoid re-traumatization.³⁷⁶ Put simply, capital trials place individuals with mental disabilities, and their loved ones, in a position in which their lives depend on their ability to share things about themselves that may be difficult or impossible to reveal publicly. The six cases profiled here include illustrations of the ways that trauma complicates collaboration with individuals and their families around mental health mitigation. For example, Georgia army veteran Brandon Jones found it difficult to discuss with trial counsel the pervasive physical and sexual abuse he endured in childhood and the way that past experiences of solitary confinement impacted his mental health, but he wrote prolifically about these events in his memoirs.³⁷⁷ The jury that sentenced him to death never heard about these experiences.³⁷⁸ Similarly, on post-conviction review, Mr. Warren Hill's siblings submitted affidavits expressing their regret that they did not introduce jurors to their brother's experiences with childhood abuse, and the marginalization that he endured as a result of his intellectual disability.³⁷⁹

Katherine C. Cunningham & Alicia Lucksted, *Social Cognition, Internalized Stigma, and Recovery Orientation Among Adults with Serious Mental Illness*, 40 PSYCHIATRIC REHAB. J. 409, 409–11 (2017) (finding that internalized societal stigma serves as a barrier for some people with SMI who pursue recovery).

373. STEPHEN BRIGHT, S. CTR. FOR HUM. RTS., DEFENDING A CAPITAL CASE IN GEORGIA 4 (1993) ("Victims of trauma, particularly in childhood, experience a phenomenon known as memory blocking. Blocking is a coping mechanism that allows continued functioning in the face of psychologically and physically threatening abuse and trauma. It is for this reason that the client may be a poor historian: memories are simply blocked out."); BESSEL VAN DER KOLK, *Uncovering Secrets: The Problem of Traumatic Memory*, in THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (2015); BESSEL VAN DER KOLK, *The Unbearable Heaviness of Remembering*, in THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (2015).

374. See BRIGHT, *supra* note 373, at 5.

375. See TEX. AFTER VIOLENCE PROJECT, NOBODY TO TALK TO: BARRIERS TO MENTAL HEALTH TREATMENT FOR FAMILY MEMBERS OF INDIVIDUALS SENTENCED TO DEATH OR EXECUTED 22–23 (2019), https://texasafterviolence.org/wp-content/uploads/2019/10/TAVP_Report.pdf [<https://perma.cc/47NG-KQ3N>].

376. See BRIGHT, *supra* note 373, at 5.

377. See *Jones v. Ga. Diagnostic & Classification Prison Warden (Jones IX)*, 753 F.3d 1171, 1180–81 (2014).

378. See *id.* at 1174, 1180.

379. See, e.g., *C. Hill Aff.*, *supra* note 38, ¶¶ 5–6, 11, 21–22.

Third, defense counsel must seek to seat jurors with a personal familiarity with mental disability, while also structuring advocacy to reach an audience that lacks exposure to these issues. This is because prosecutors routinely exclude individuals with experiences of mental disability from capital juries.³⁸⁰ Although the Constitution prohibits prosecutors from excluding jurors based on race or gender, these protections do not apply to people with disabilities.³⁸¹ Accordingly, no legal protections exist to prevent prosecutors from striking people based on a personal history of mental disability or a close relationship to someone with a mental disability.³⁸² The six cases cited here bear out this pattern. In Andrew Brannan's case, the prosecutor struck a mental health nurse who worked with patients experiencing PTSD as well as a twenty-one-year veteran of the United States Marine Corps, who served in Vietnam alongside other service members who later developed combat PTSD.³⁸³ ADA Jack Mallard, who prosecuted Mr. Marcus Wellons's case, knew that the defense intended to introduce mitigating evidence of his trauma history and deteriorating mental state at the time of the crime.³⁸⁴ The ADA excluded Black people from the jury, strategically seating White jurors who expressed discriminatory views about mental illness.³⁸⁵

Finally, defense counsel must anticipate the State's attempt to use mental health evidence in aggravation, so they must think critically when selecting a mental health expert and orienting that person to the case. The adversarial nature of capital trials makes it difficult to present mental health evidence in a way that engenders empathy rather than fear. Capital sentencing trials pit defense counsel, arguing for life, against the State, arguing for death. Both sides present mental health expert testimony; the defense expert explains that the person's experience with SMI mitigates responsibility for the charged crime, while the State's expert characterizes an individual's SMI as untreatable and likely to lead to future violence. Each side offers a conflicting, difficult-to-understand diagnosis, which often leads to juror confusion. The Georgia prosecutor and the State psychiatrist claim that the defendant "faked" SMI to avoid a death sentence, that

380. See GA. CODE ANN. § 15-12-163(b)(3) (2020).

381. See *Epps v. United States*, No. 2:12-CV-13-RWS-JCF, No. 2:06-CR-28-RWS-JCF-1, 2013 WL 1490979, at *8–9 (N.D. Ga. Feb. 12, 2013) (rejecting Mr. Azim Waleed Epps's argument that the court should extend *Batson* to disability and upholding prosecutor's strike of the sole Black juror in the venire based on disability); *Jones v. State*, 548 S.E.2d 75, 77 (Ga. Ct. App. 2001) (holding that constitutional protection against discrimination in jury selection does not extend to disability and permitting prosecutor to strike hearing-impaired Black juror because disability was a "race-neutral" reason for exclusion).

382. See, e.g., GA. CODE ANN. § 15-12-163(b)(3) (2020).

383. *Brannan v. State (Brannan II)*, 561 S.E.2d 414, 422 (Ga. 2002).

384. See *Wellons v. State (Wellons II)*, 463 S.E.2d 868, 873, 875–76 (Ga. 1995).

385. *Id.* at 877.

he is “untreatable,” and that he will commit more violence if allowed to live. The jury may never learn how SMI impacts the person on a daily basis.³⁸⁶ Capital jurors in trials presenting issues of SMI encounter evidence of a horrible crime alongside evidence of mental illness. Prosecutors encourage jurors to make sense of this evidence by relying on stereotypes linking SMI to violence.³⁸⁷ These arguments place Black people with SMI at elevated risk given the societal myths associating both Black men and individuals with mental illness with violence.³⁸⁸ Additionally, popular imagery of veterans living with combat PTSD as “trained killers” places former service members at grave risk when attempting to present mitigating mental health evidence at trial.³⁸⁹ The cases of army veterans Andrew H.

386. See Marla Sandys, Heather Pruss & Sara M. Walsh, *Capital Jurors, Mental Illness, and the Unreliability Principle: Can Capital Jurors Comprehend and Account for Evidence of Mental Illness?*, 36 BEHAV. SCIS. & L. 470, 479, 483–84 (2018) (interviewing 205 jurors who served in 63 capital cases in which mental illness emerged as a key issue and the researchers found that the “battle of the experts” led jurors to mistrust and dismiss defense mental health expert testimony).

387. See *id.* at 480–81 (revealing that prosecutors focus, in capital trials, on the aggravated nature of a crime to “eclipse serious consideration” of a defendant’s mental health and attempt to activate stereotypes linking mental illness to violence).

388. See, e.g., JONATHAN M. METZL, *PROTEST PSYCHOSIS: HOW SCHIZOPHRENIA BECAME A BLACK DISEASE* 207 (2009) (analyzing the ways in which negative beliefs about schizophrenic violence came from racial discrimination and psychiatry pathologizing Black men); see also Perlin & Cucolo, *supra* note 14, at 432–33, 437–41 (explaining that Black people with mental disabilities are overdiagnosed with schizophrenia; more frequently subject to involuntary commitment, involuntary administration of antipsychotics, seclusion and restraint; and clinicians are more likely to perceive Black people with mental disabilities as “dangerous” than White people with identical disabilities).

389. See Brief for Ga. Mil. Officers Ass’n, *supra* note 76, at 13, 15 (“Military training includes psychological conditioning to enable a soldier to fire a weapon at another human under certain circumstances. While such training is essential to success in combat, where the ability to accurately evaluate circumstances and judge a perceived threat are later derailed by a psychological condition, such as severe PTSD, this conditioning may contribute to violent or aggressive behavior . . . For the vast majority of soldiers, the training to react and fire quickly and accurately does not lead to unlawful behavior, probably because this training to kill comes with an equally strict training to follow orders, including conditioning for the discipline to fire only when ordered to do so. However, for the portion of front-line combat veterans suffering from PTSD who exhibit aggression and violent behavior, an understanding of military training is integral to understanding the veteran’s behavior.”); W. Chris Jordan, *Conditioned to Kill: Volition, Combat Related PTSD, and the Insanity Defense—Providing a Uniform Test for Uniformed Trauma*, 16 RUTGERS J.L. & PUB. POL’Y 1, 27–28 (2019) (“Through the application of highly effective military training, combat veterans have been conditioned to kill and respond to threats with violence . . . The perception of threats to their lives and the lives of their friends, accompanied by the application of violence during exposure to war, causes PTSD in many veterans. Veterans who develop PTSD on deployment return home with altered brain chemistry, predisposing some to respond to threats with violence, and this altered brain chemistry is sensitive to many stimuli. When a veteran with PTSD encounters these stimuli, or stressors, the veteran may recall the original trauma—combat—causing the brain to release chemicals which can lead the veteran to revert to skills and functions conditioned during training . . . [T]he threats of civilian life, while much

Brannan, William Hance, and Travis Hittson illustrate the shortcomings of mental health mitigation in adversarial capital prosecutions.³⁹⁰ In each man's case, the State and/or a mental health expert presented a representation of mental disability that alienated the jury.³⁹¹ In Mr. Brannan's case, the Laurens County prosecutor argued both that Mr. Brannan faked his combat PTSD and that his military experience made him a threat to others at GDCP:

Does Andrew Brannan need to be sentenced to life in the penitentiary so he'll have a lifetime of laying in his bunk at night and breaking apart razors and figuring out some way when a deputy walks up or a jailer walks up that he can take him one of these razor blades and do some slashing? . . . Andrew Brannan is a dangerous man. He's murdered one deputy sheriff and it won't be hard for a combat-trained veteran to . . . do it again . . . you can put him in there and those guards and those prisoners, they are going to have to be living with him. And when he doesn't like the way something's going, he waits and he strikes.³⁹²

Mr. Brannan's trial counsel failed to meaningfully rebut the prosecutor's inflammatory statements, leaving the image of Andrew Brannan as a trained killer to stand uncontested in the eyes of the jury.³⁹³ Similarly, Mr. William Hance's counsel, desperate for a

different, are nonetheless capable of triggering the physiological effects that lead to the dissociative states and flashbacks inherent in PTSD.”).

390. See *Brannan v. State (Brannan II)*, 561 S.E.2d 414, 428 (Ga. 2002); *Hance v. Zant (Hance IX)*, 981 F.2d 1180, 1184–85 (11th Cir. 1993); *Hittson v. GDCP Warden*, 759 F.3d 1210, 1237–41 (11th Cir. 2014).

391. See *Brannan II*, 561 S.E.2d at 428; *Hance IX*, 981 F.2d at 1184–85; *Hittson*, 759 F.3d at 1237–41.

392. Brief of Cross-Appellant, *supra* note 97, at 45, 48–49.

393. Brief of Ga. Mil. Officers Ass'n, *supra* note 76, at 19, 26 (“At his habeas hearing in the Superior Court, Brannan established that others who served with him in Vietnam were available and willing to testify on his behalf, but his trial counsel never asked them to do so. Instead, at the sentencing phase, defense counsel relied upon the defendant's mother to introduce, but not explain, some records of defendant's military history. Counsel also referenced expert witness testimony from the guilt/innocence phase of the trial concerning Brannan's PTSD in which psychologists described some of Brannan's combat experiences. Significantly, each of these witnesses ultimately relied upon the defendant's account of what happened in Vietnam, making their testimony susceptible to an attack on the defendant's credibility . . . Had Brannan's counsel performed a sufficient investigation and called Brannan's comrades to testify, the jury would have heard first-hand accounts of Brannan's front-line combat experience. For example, the jury would have heard of how Brannan was a Lieutenant who led a five-man reconnaissance team, serving as an artillery forward observer, tracking the location of the enemy, and used a radio to call in grid coordinates. The jury would have also heard first-hand accounts of the traumatic events leading to Brannan's PTSD, such as the horror and haunting details of the patrol in which the company commander stepped on a land mine. A fellow veteran's graphic description of the land mine event and his statement that ‘I can still remember the smell of [the Captain's] burning flesh,’ would have distinguished

diagnosis, hired experts who presented a series of unflattering psychiatric diagnoses that portrayed him as subhuman.³⁹⁴ In Mr. Hittson's case, a trial judge issued a ruling that effectively prevented him from introducing the testimony of a licensed social worker and family therapist that was supposed to contextualize the ways that the chaotic, abusive environment in which he grew up informed his participation in the crime charged.³⁹⁵ The trial court permitted the State psychiatrist to testify that Mr. Hittson lacked remorse, without ever affording Mr. Hittson an opportunity to rebut this testimony.³⁹⁶

The dangers that people with mental disabilities face during a capital trial in Georgia—the pressure to disclose painful memories and experiences, the exclusion of peers with mental disabilities from capital juries, the adversarial proceedings that promote the use of stereotypes, and the expert testimony that confuses and alienates rather than humanizes—place these people at a higher risk of execution. As the six cases summarized above illustrate, veteran status alone fails to protect people with mental disabilities from the death penalty. This is especially true where trial counsel fails to present mitigation that integrates a veteran's experience with mental disability into a full narrative of his or her service history.

III. PORTER PROMISES PROTECTION FOR BLACK VETERANS AND VETERANS WITH MENTAL DISABILITIES

Granting Mr. George Porter relief merely required the Court to apply well-established ineffective assistance of counsel precedent. *Strickland v. Washington* and its progeny ask very little of capital defense counsel, setting the bar for performance quite low.³⁹⁷ George Porter's trial counsel presented no evidence of his life history or military service to the Florida court.³⁹⁸ In such an egregious case, the Court overturned Mr. Porter's death sentence without creating a new rule of constitutional law.³⁹⁹

Brannan's trauma from the problems that the prosecutor argued we all have. It also would have served as a strong antidote to the prosecutor's argument that, despite a VA classification as 100 percent disabled, Andrew Brannan was a malingerer who 'had to work' to get his disability." (alteration in original) (footnotes omitted)).

394. See *Hance IX*, 981 F.2d at 1184, 1185 n.6.

395. *Hittson*, 759 F.3d at 1241–42, 1245–46.

396. *Id.* at 1124.

397. See *Strickland v. Washington*, 466 U.S. 668, 689, 693–95 (1984). At the turn of the twenty-first century, applying *Strickland*, the Court decided a series of cases clarifying requirements for competent mitigation representation. See *Williams v. Taylor*, 529 U.S. 362, 395–98 (2000); *Wiggins v. Smith*, 539 U.S. 510, 522–25 (2003); *Rompilla v. Beard*, 545 U.S. 374, 380–86 (2005). The *Porter* decision followed these developments. See *Porter v. McCollum (Porter II)*, 558 U.S. 30, 43–44 (2009).

398. *Porter II*, 558 U.S. at 33.

399. *Id.* at 44.

That *Porter* did not create new law does not nullify its power as a tool for counsel representing veterans at risk of execution. The power of *Porter* arises more from the Court's reasoning, than from its ruling:

It is unreasonable to discount to irrelevance the evidence of [Mr.] Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with Williams. It is also unreasonable to conclude that [Mr.] Porter's military service would be reduced to "inconsequential proportions," simply because the jury would also have learned that Porter went AWOL on more than one occasion. Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as [Mr.] Porter did. Moreover, the relevance of [Mr.] Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on [Mr.] Porter. The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service. To conclude otherwise reflects a failure to engage with what [Mr.] Porter actually went through in Korea.⁴⁰⁰

The *Porter* Court engaged fully with Mr. Porter's childhood trauma and his experiences with mental disability as well as the bravery that he demonstrated on the battlefield.⁴⁰¹ The Court acknowledged his less-than-perfect service record and the fact that his mental health deteriorated after he returned home.⁴⁰² After reviewing his entire life history, the Court concluded that the country owed Mr. Porter respect and, more impactfully in a legal sense, protection against execution.⁴⁰³

An analysis of state and federal case law fails to establish *Porter's* power to protect veterans from execution at the post-conviction stage. Only two Georgia Supreme Court cases between November 30, 2009, the date of the *Porter* decision, and October 2020, the time of this writing, cite to *Porter*.⁴⁰⁴ Both raised state habeas claims for relief based on ineffective assistance of counsel, and the court denied relief to both men.⁴⁰⁵ Neither case involved a veteran petitioner.⁴⁰⁶ Georgia

400. *Id.* at 43–44 (internal citation omitted).

401. *See id.* at 33–37.

402. *See id.* at 35–36.

403. *See id.* at 42–44.

404. *See* *Sears v. Humphrey*, 751 S.E.2d 365, 381 (Ga. 2013); *Hall v. Lance*, 687 S.E.2d 809, 812, 816, 818 (Ga. 2010).

405. *Sears*, 751 S.E.2d at 368; *Hall*, 687 S.E.2d at 813–16.

406. *See* *Sears*, 751 S.E.2d at 367–69; *Hall*, 687 S.E.2d at 811.

federal district courts cite *Porter* in seventeen unreported decisions and one published decision between November 2009 and October 2020.⁴⁰⁷ In 2017, the Northern District of Georgia granted habeas relief to veteran petitioner Lawrence Jefferson, based on ineffective assistance of counsel.⁴⁰⁸ However, the decision focused on trial counsel's failure to present evidence of organic brain damage, and nowhere referenced Mr. Jefferson's service in the United States Navy.⁴⁰⁹ In a second case, the Southern District denied relief to Jimmy Meders.⁴¹⁰ Five years later, in January 2020, the Georgia Board of Pardons and Paroles granted clemency to Mr. Meders, relying in part on his seven years of service in the U.S. National Guard.⁴¹¹

407. See *Butts v. Warden, Ga. Diagnostic & Classification Prison*, No. 5:13-CV-194, 2015 U.S. Dist. LEXIS 140874, at *102, *111–12 (M.D. Ga. Oct. 16, 2015); *Cook v. Upton*, No. 5:09-CV-25, 2010 U.S. Dist. LEXIS 25290, at *39–40 (M.D. Ga. Mar. 18, 2010); *Esposito v. Humphrey*, No. 5:12-CV-163, 2014 U.S. Dist. LEXIS 170476, at *15 (M.D. Ga. Dec. 10, 2014); *Fults v. Upton*, No. 3:09-CV-86-TWT, 2012 U.S. Dist. LEXIS 34150, at *25 n.8 (N.D. Ga. Mar. 14, 2012); *Gissendaner v. Seabolt*, No. 1:09-CV-69-TWT, 2012 U.S. Dist. LEXIS 39248, at *11 (N.D. Ga. Mar. 21, 2012); *Hittson v. Humphrey*, No. 5:01-CV-384, 2012 U.S. Dist. LEXIS 161727, at *136 (M.D. Ga. Nov. 13, 2012) (granting habeas corpus petition in part), *aff'd in part and rev'd in part by Hittson v. GDCP Warden*, 759 F.3d 1210 (2014); *Jones v. Chatman*, No. CV502-116, 2019 U.S. Dist. LEXIS 169525, at *56–59 (S.D. Ga. Sept. 30, 2019); *King v. Warden*, No. CV-2:12-119, 2020 U.S. Dist. LEXIS 12317, at *46–49 (S.D. Ga. Jan. 24, 2020); *Lee v. Upton*, No. 5:10-CV-17, 2017 U.S. Dist. LEXIS 152145, at *14–15 (S.D. Ga. Sept. 19, 2017); *Lucas v. Upton*, No. 5:09-CV-289, 2013 U.S. Dist. LEXIS 41049, at *12 (M.D. Ga. Mar. 25, 2013); *McKinney v. Jarriel*, No. CV409-091, 2010 U.S. Dist. LEXIS 113916, at *35–36 (S.D. Ga. Oct. 8, 2010); *Meders v. Chatman*, No. CV 207-90, 2014 U.S. Dist. LEXIS 113816, at *43 (S.D. Ga. Aug. 14, 2014), *aff'd*, *Meders v. Warden, Ga. Diagnostic Prison*, 900 F.3d 1330 (11th Cir. 2018); *Meders v. Chatman*, No. 207-90, 2015 U.S. Dist. LEXIS 126847, at *14 (S.D. Ga. Sept. 22, 2015), *aff'd*, *Meders v. Warden, Ga. Diagnostic Prison*, 900 F.3d 1330 (11th Cir. 2018); *Pye v. Chatman*, No. 3:13-CV-0119-TCB, 2018 U.S. Dist. LEXIS 240421, at *71–72 (N.D. Ga. Jan. 22, 2018); *Sears v. Sellers*, No. 1:10-CV-1983-WSD, 2018 U.S. Dist. LEXIS 86901, at *60, *66–67 (N.D. Ga. May 23, 2018); *Tharpe v. Humphrey*, No. 5:10-CV-433, 2014 U.S. Dist. LEXIS 28438, at *9–10, *50, *52–53 (M.D. Ga. Mar. 6, 2014); *Wilson v. Humphrey*, No. 5:10-CV-489, 2013 U.S. Dist. LEXIS 178241, at *43–44, *48, *126–27, *160 (M.D. Ga. Dec. 19, 2013); *Jefferson v. Sellers*, 250 F. Supp. 3d 1340, 1371 (N.D. Ga. 2017), *aff'd*, *Jefferson v. GDCP Warden*, 941 F.3d 452 (11th Cir. 2019).

408. *Jefferson v. Sellers*, 250 F. Supp. 3d 1340, 1386–87 (N.D. Ga. 2017), *aff'd*, *Jefferson v. GDCP Warden*, 941 F.3d 452 (11th Cir. 2019).

409. *Id.* at 1372–74; see also Psychological Report: Lawrence Jefferson, C. 367, *Jefferson v. State*, 353 S.E.2d 468 (Ga. 1987) (explaining during an interview with a forensic psychologist that he [Mr. Jefferson] enlisted in the Navy to send money home to his mother and to help send his younger sisters to school).

410. *Meders v. Chatman*, No. CV 207-90, 2015 U.S. Dist. LEXIS 126847, at *16 (S.D. Ga. Sept. 22, 2015), *aff'd*, *Meders v. Warden, Ga. Diagnostic Prison*, 900 F.3d 1330 (11th Cir. 2018).

411. MICHAEL ADMIRAND, APPLICATION TO THE GEORGIA BOARD OF PARDONS AND PAROLES ON BEHALF OF JIMMY MEDERS at 11–14 (2020), <https://files.deathpenaltyinfo.org/documents/Jimmy-Meders-Georgia-Pardons-and-Paroles-Clemency-Application.pdf> [<https://perma.cc/Q4C4-R4RK>]; *Parole Board Grants Clemency To Jimmy Fletcher Meders*, GA. STATE BD. OF PARDONS & PAROLES (Jan. 16, 2020), <https://pap.georgia.gov/press-releases/2020-01-16/parole-board-grants-clemency-jimmy-fletcher-meders> [<https://perma.cc/N4J7-5CVX>].

In the remaining fifteen cases, federal courts denied habeas relief.⁴¹² The Eleventh Circuit cited *Porter* in twenty-six appellate decisions in cases originating from Georgia between November 2009 and October 2020.⁴¹³ The appellate court granted habeas relief on an ineffective assistance claim in only two of these cases and affirmed the lower court's decision to grant relief in one other case.⁴¹⁴ Neither case granting new relief involved a veteran petitioner.⁴¹⁵ None of the

412. *Butts v. Warden, Ga. Diagnostic & Classification Prison*, No. 5:13-CV-194, 2015 U.S. Dist. LEXIS 140874, at *176 (M.D. Ga. Oct. 16, 2015); *Cook v. Upton*, No. 5:09-CV-25, 2010 U.S. Dist. LEXIS 25290, at *79–80 (M.D. Ga. Mar. 18, 2010); *Esposito v. Humphrey*, No. 5:12-CV-163, 2014 U.S. Dist. LEXIS 170476, at *123 (M.D. Ga. Dec. 10, 2014); *Fults v. Upton*, No. 3:09-CV-86-TWT, 2012 U.S. Dist. LEXIS 34150, at *60 (N.D. Ga. Mar. 14, 2012); *Gissendan v. Seabolt*, No. 1:09-CV-69-TWT, 2012 U.S. Dist. LEXIS 39248, at *72 (N.D. Ga. Mar. 21, 2012); *Hittson v. Humphrey*, No. 5:01-CV-384, 2012 U.S. Dist. LEXIS 161727, at *183–84 (M.D. Ga. Nov. 13, 2012) (granting habeas corpus petition in part and denying petition in part), *aff'd in part and rev'd in part by Hittson v. GDCP Warden*, 759 F.3d 1210 (2014); *Jones v. Chatman*, No. CV502-116, 2019 U.S. Dist. LEXIS 169525, at *151 (S.D. Ga. Sept. 30, 2019); *King v. Warden*, No. CV-2:12-119, 2020 U.S. Dist. LEXIS 12317, at *120 (S.D. Ga. Jan. 24, 2020); *Lee v. Upton*, No. 5:10-CV-17, 2017 U.S. Dist. LEXIS 152145, at *50–51 (S.D. Ga. Sept. 19, 2017); *Lucas v. Upton*, No. 5:09-CV-289, 2013 U.S. Dist. LEXIS 41049, at *121 (M.D. Ga. Mar. 25, 2013); *McKinney v. Jarriel*, No. CV409-091, 2010 U.S. Dist. LEXIS 113916, at *57 (S.D. Ga. Oct. 8, 2010); *Pye v. Chatman*, No. 3:13-CV-0119-TCB, 2018 U.S. Dist. LEXIS 240421, at *120 (N.D. Ga. Jan. 22, 2018); *Sears v. Sellers*, No. 1:10-CV-19830WSD, 2018 U.S. Dist. LEXIS 86901, at *142 (N.D. Ga. May 23, 2018); *Tharpe v. Humphrey*, No. 5:10-CV-433, 2014 U.S. Dist. LEXIS 28438, at *78 (M.D. Ga. Mar. 6, 2014); *Wilson v. Humphrey*, No. 5:10-CV-489, 2013 U.S. Dist. LEXIS 178241, at *192 (M.D. Ga. Dec. 19, 2013).

413. *See Brown v. United States*, 720 F.3d 1316, 1327–28 (11th Cir. 2013); *Conner v. Hall*, 645 F.3d 1277, 1292 (11th Cir. 2011); *Ferrell v. Hall*, 640 F.3d 1199, 1229 (11th Cir. 2011); *Tharpe v. Warden*, 834 F.3d 1323, 1343–44 (11th Cir. 2016); *Lance v. Warden, Ga. Diagnostic Prison*, 706 F. App'x 565, 574 (11th Cir. 2017); *Cromartie v. GDCP Warden*, No. 17-12627-P, 2018 U.S. App. LEXIS 37224, at *25, *27–29, *33 (11th Cir. Mar. 26, 2018); *Tollete v. Warden, Ga. Diagnostic Prison*, 816 F. App'x 361, 367 (11th Cir. 2020); *Aldridge v. Crickmar*, 680 F. App'x 809, 812 (11th Cir. 2017); *Brannan v. GDCP Warden*, 541 F. App'x 901, 906–07 (11th Cir. 2013); *Lawler v. Warden*, 631 F. App'x 905, 908 (11th Cir. 2015); *Hall v. Warden, Lee Arrendale State Prison*, 686 F. App'x 671, 678 (11th Cir. 2017); *Cook v. Warden, Ga. Diagnostic Prison*, 677 F.3d 1133, 1141 n.1 (11th Cir. 2012); *Wilson v. Warden, Ga. Diagnostic Prison*, 898 F.3d 1314, 1322 (11th Cir. 2018); *Morrow v. Warden, Ga. Diagnostic Prison*, 886 F.3d 1138, 1150 (11th Cir. 2018); *Franks v. GDCP Warden*, 975 F.3d 1165, 1185 (11th Cir. 2020); *Jones v. Ga. Diagnostic & Classification Prison Warden*, 753 F.3d 1171, 1194 n.5 (11th Cir. 2014); *Conner v. GDCP Warden*, 784 F.3d 752, 761 (11th Cir. 2015); *Nejad v. Att'y Gen., Ga.*, 830 F.3d 1280, 1290 (11th Cir. 2016); *Gissendan v. Seaboldt*, 735 F.3d 1311, 1330 (11th Cir. 2013); *Wilson v. Warden, Ga. Diagnostic Prison*, 774 F.3d 671, 679 (11th Cir. 2014); *Johnson v. Upton*, 615 F.3d 1318, 1331, 1343–44 (11th Cir. 2010); *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1272, 1280, 1290 (11th Cir. 2012); *Jefferson v. GDCP Warden*, 941 F.3d 452, 485 (11th Cir. 2019); *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1235 (11th Cir. 2016); *Butts v. GDCP Warden*, 850 F.3d 1201, 1243, 1246–47 (11th Cir. 2017); *Sealey v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338, 1357 (11th Cir. 2020).

414. *Ferrell v. Hall*, 640 F.3d 1199, 1245 (11th Cir. 2011); *Hall v. Warden, Lee Arrendale State Prison*, 686 F. App'x 671, 685 (11th Cir. 2017); *Jefferson v. GDCP Warden*, 941 F.3d 452, 487 (11th Cir. 2019).

415. *See Hall v. Warden, Lee Arrendale State Prison*, 686 F. App'x 671, 673–74 (11th

six veterans profiled in this Article obtained post-conviction relief based on *Porter*. Considering the foregoing, *Porter*'s power as a post-conviction tool appears untested at best. This says more about the petitioner-hostile nature of capital habeas law than it does about the limitations of the *Porter* decision.⁴¹⁶

Many death-sentenced veterans share stories similar to George Porter's. This Article introduces readers to six such stories of men sentenced to death and executed in the state of Georgia. As the Court's language establishes, the *Porter* decision exists *primarily for* men such as these—men whose military service intersects with life-course experiences of marginalization based on race and/or mental disability.⁴¹⁷ These veterans face elevated risk at the capital trial stage⁴¹⁸ and difficulty in obtaining post-conviction relief, as the Georgia and Eleventh Circuit case law applying *Porter* demonstrates.⁴¹⁹ To protect these veterans from execution, *Porter* calls on trial counsel to adopt mitigation strategies responsive to the heightened risk of execution facing Black veterans and veterans with mental disabilities. Doing so requires cultural humility, an empathetic and person-centered approach to investigating mental disability, and a comprehensive investigation of military service that incorporates review of active duty and VA records as well as interviews with fellow service members and former commanding officers.⁴²⁰ Only with such an integrated approach would the capital jury learn the full story of an Andrew Brannan, a William Hance, a Warren Hill, a Travis Hittson, a Brandon Jones, or a Marcus Wellons.

Cir. 2017); *Ferrell v. Hall*, 640 F.3d 1199, 1203–06 (11th Cir. 2011). In a third case, the court reversed a state court denial of relief based on *Atkins*, but it declined to review the petitioner's ineffective assistance claim. *See Conner v. Hall*, 645 F.3d 1277, 1292–94 (11th Cir. 2011). This case also did not involve a veteran petitioner. *See id.* at 1280.

416. *See* 28 U.S.C. § 2254(d)–(e). As amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, the federal habeas statute makes it virtually impossible for a habeas petitioner to obtain relief in federal court after a state court issues a denial. *Id.*

417. *See Porter v. McCollum (Porter II)*, 558 U.S. 30, 42–44 (2009).

418. *See supra* Part II.

419. *See, e.g., Sears v. Humphrey*, 751 S.E.2d 365, 381 (Ga. 2013).

420. *See, e.g.,* Alexis Hoag, Senior Counsel, NAACP Legal Defense Fund, Presentation at the Post-Conviction Capital Defense Training Program of the New York City Bar Association Committee on Capital Punishment: Developing Race-Based Mitigation Evidence and Cultural Competency in Post-Conviction Proceedings (June 25 2018); Sean Bolser, Presentation to the Federal Defenders of New York: Signs and Symptoms: Identifying and Investigating Mental Illness (Spring 2018); Art Cody, Presentation to the Legal Aid Society of New York: Developing Your Veteran Client's Narrative (Apr. 24, 2018).

APPENDIX I: RECORD EXCERPTS

Andrew Brannan

Quote	Citation
For the first time since Vietnam I can imagine myself living beyond the next month.	C. 001746, <i>Brannan II</i>
I would like to spend all of my time out in the woods by myself. I feel peaceful when I'm not around people . . . Now, I don't go anywhere. I come out here, take care of my folks and go out in the woods. I was in Vietnam from June 1970 to June 1971 with the America Division I was a forward observer with the Infantry. I was a first lieutenant. Do I dwell on it now?	C. 001773–74, <i>Brannan II</i>
I feel survival guilt because I was an officer. I isolate to prevent myself from feeling the need to take charge of others.	C. 002134, <i>Brannan II</i>
I had a hard time over the weekend. When I got back I was so anxious I felt out of breath. I couldn't catch my breath. All the way back I was thinking about how the country had abused me. It's like being an abused child. I still love it but I'm so hurt because I was betrayed. I feel I've lost everything except my life.	C. 002164, <i>Brannan II</i>
Constant thoughts of Vietnam cause a decrease in concentration, making a job situation extremely stressful. Unable to interact interpersonally with others. Feels he will never have a relationship due to low self-esteem and severe anxiety. Feels he needs to isolate to protect himself from this anxiety and feels different and detached from others. Recalls several incidents where he numbed himself during critical events in Vietnam—e.g. fire fights, deaths of friends, killing of enemy . . .	C. 002202, <i>Brannan II</i>

Quote	Citation
I am the son of a career officer. In fact, our family provided four males for military service. Three served in Vietnam, all officers, of which my father and I are the only survivors and I suffer with PTSD . . . I now realize I was suffering with PTSD then but thought <i>it a burden soldiers carried for their country</i> . I have struggled with my PTSD for a long time and my concern now is my parents who are in their old age [and] do not deserve to suffer due to my struggle.	C. 002594, <i>Brannan II</i>
I have suffered with PTSD since my return from Vietnam, believing it to be a burden soldiers bare for their country . . . I was only able to exist by the kindness of my family and friends . . . I am doing the best I can under the nature of my disorder.	C. 002605, <i>Brannan II</i>
Upon my request for treatment at the VAMC it was six weeks until my appointment at the Mental Health Clinic on 06-06-89. Unable to retreat to my isolation for protection, knowing my family had carried the burden of my care for too long and unable to maintain nor find more stable employment, I slipped into a deep state of depression.	C. 002605, <i>Brannan II</i>
My parents took me in. My father is a 30-year career officer, a lieutenant colonel, and he couldn't understand. [But] He listened to my story.	C. 002615–16, <i>Brannan II</i>
I was given a 10% disability [in 1985]. But I'm mad about the whole situation. I don't think the American people have accepted their responsibility to the Vietnam veteran. Why have more veterans committed suicide than were killed in Vietnam? We've never received the recognition we deserve.	C. 002615–16, <i>Brannan II</i>

Quote	Citation
<p>You may be interested to know I had one brother who killed himself [in 1984]. He was a Vietnam veteran. I had another brother who was in the military who was killed in a plane accident. I'm the only living son. And I guess my father has learned to accept me, learned to appreciate the difference between being a World War II veteran and a Vietnam veteran. You see, the World War II veteran fought a clean, noble war, and they sent their sons to fight the kind of war we did in Vietnam.</p>	<p>C. 002615–16, <i>Brannan II</i></p>
<p>I do have one persistent flashback, one persistent dream . . . we were on a mission . . . and the captain stepped on a land mine. I had to go help him. I can still see him. He had a leg blown off. He was practically blown to pieces. Of course, he didn't live. That's something that's with me always</p>	<p>C. 002615–16, <i>Brannan II</i></p>
<p>I guess I didn't want to face up to the fact that I had a problem. I'm very proud, from a military family. We've always done duty by our country, and perhaps I feel that I have failed. I know this, I felt regrets about leaving combat.</p>	<p>C. 002626–28, <i>Brannan II</i></p>
<p>My father is a retired LTC. He was in WWII, Vietnam, had a younger brother in Vietnam. They did their duty. My father has always looked down on us from Vietnam. His attitude has always been we were soldiers, this was our job, and it's all in the past. But I can't say that's true for me He never tried to know me, to understand my feelings. He called me a boy; I'm a man. When I was 21 I commanded 200 soldiers. So I just went into a deep depression</p>	<p>C. 002626–28, <i>Brannan II</i></p>

Quote	Citation
About two months ago my other brother killed himself . . . I guess this started all of us thinking, that maybe there was something wrong with me. I've never wanted to admit it. I finally faced up to it and applied for help from the Veterans Administration . . . I don't want to be classified as a mental problem volunteer; I'm proud, I simply haven't been able to cope with a job . . . I don't want to be a burden, I want to be self-supporting, but 12 or 13 years later, I'm not.	C. 002626–28, <i>Brannan II</i>
I feel guilty about this whole Vietnam situation. I feel like I could have done something, should have done something more . . . I feel guilty at leaving combat because I know other fellows were killed in my place . . . I remember one instance where I almost killed a wounded Vietnamese. I'm so glad I didn't. If I did, I would be carrying that guilt with me now.	C. 002626–28, <i>Brannan II</i>
Even when I'm walking in the woods I'm looking for the Viet Cong, long over my shoulder, apprehensive about any sudden noise.	C. 002626–28, <i>Brannan II</i>
I was an officer. I was in charge of men, sending them to death, and the country betrayed them, that's what hurts.	C. 002626–28, <i>Brannan II</i>

Warren Hill

Quote	Citation
<p>He's very limited, but he's got a lot of heart. He was willing to follow rules in the Navy, and probably in school too. He pretty much behaved and did what the teachers told him to and didn't create problems. And so he did adequately. He maximized his intellectual potential. In the Navy, apparently, same kind of thing. He had fairly low scores to get into the Navy, but yet, when you look at his military records, there were some pretty good commendations. He was promoted and there are some written commendations in there about he was a good example to the other seamen. He was never a behavior problem. He behaved himself, much like he apparently did in school. so he's got limited abilities, but he's able to maximize them by basically not being a problem.</p>	<p>Tr. 1497–98, <i>Hill I</i> (testimony of Dr. William Dickinson, neuropsychologist)</p>
<p>I wish that I had been asked about Junior's [disability], and about the abuse he suffered. I wish that I had been told what was important for the jury to know about Junior.</p>	<p>C. 818–31, <i>Hill VI</i> (affidavit of Peggy Williams, sister)</p>
<p>Junior grew up around a lot of fighting. I feel like he saw a lot of bad things from me and Joan when he was coming up and it affected him some way. He saw a lot of meanness and violence. I wish I could go back and do things over so that he didn't have to live through that. But I guess you can never go back.</p>	<p>C. 847–52, <i>Hill VI</i> (affidavit of Warren Lee Hill, Sr., father)</p>
<p>As we were growing up, I always felt protective of Warren, and I looked out for him . . . Warren looked to me to be a mom for him in a lot of ways, because our mother had a lot on her hands with 10 children and a violent, alcoholic husband.</p>	<p>C. 860–71, <i>Hill VI</i> (affidavit of Robbie Scott, half-sister)</p>

Quote	Citation
My little brother Warren was beaten almost every other day all through childhood and teenage years, until he left to join the Navy in 1979. He told me once that he thought of the Navy as a way to escape.	C. 860–71, <i>Hill VII</i> (affidavit of Robbie Scott, half-sister)
I did not feel that Mr. Hill was one of those type of criminals that deserved to be put to death . . . I, along with many other jurors, cried when we voted to put Mr. Hill to death.	C. 939–44, <i>Hill VI</i> (affidavit of Jean Mackey, juror)
The lay person sees [intellectual disability] perhaps as the Downs child, or someone who is pretty severely [disabled], has a severe deficit. And many mildly [intellectually disabled] people are able to, again, find an environment in which they can be reasonably successful. And the image of the military is, for most people, the recruitment posters and movies. And as we know, as those who have served know, that isn't always the way it is, and it is possible for somebody to get on a uniform and show up on time and stay neat and make it, grow up, up to a certain level.	Tr. 222, <i>Hill VI</i> (testimony of Dr. Stonefeld, M.D.)

Quote	Citation
<p>You try to find where the strengths and weaknesses are, and you try to build an environment that will not let those weaknesses let that person fail . . . so you try to give them an environment where they can use their strengths successfully and where their weaknesses won't handicap them . . . In some respects [the military] is ideal, in that it is highly structured, highly repetitive for a person who is trained to do a very narrow segment of whatever his job description is, like refueling, or armament loading or something. It is very repetitive. In the military we say, when you teach you say, tell them what you are going to say, say it, tell them what you said, and then do it again if you have to. And so it is an over and over and over and over again, and then walk through, and then hands on, and then more supervision, and then another walk through, and just over and over until it is second nature, so to speak. Very little is dependent on reading a book or figuring anything out. There are checklists, there are places to sign off, supervisors sign off. It is really kind of-enlisted ranks, lower levels are really kind of an ideal situation for a person who has marginal IQ.</p>	<p>Tr. 228–30, <i>Hill VI</i> (testimony of Dr. Stonefeld, M.D.).</p>

Travis Hittson

Quote	Citation
The Hittsons raised dogs and Travis was very jealous of the fact that his father was more interested in the dogs than him.	C. 1340–49, <i>Hittson I</i>
There was no evidence of any family activities, no cohesion or centralization in the family. There was a lack of nurturing and love and an emotional void in the family. It appears as if most of the family members were numb or numbed themselves with alcohol or drugs. The only vivid expressions of emotion occurred when Mr. Hittson was drunk and emotionally abused Travis.	C. 1340–49, <i>Hittson I</i>
On one occasion, when family counseling was an option, Mr. Hittson stated that he knew his son better than anybody and that he would not participate in counseling. Even now, when their son was facing a death sentence, they were unengaged, showed no emotion, and failed to acknowledge any understanding of their failures and the difficulties Travis encountered as a result.	C. 1340–49, <i>Hittson I</i>
Neither of the parents showed a great deal of interest or engagement in Travis' fate . . . they both showed very flat affect, no warmth, and never cried or acknowledged any strong emotions in spite of the fact that their son had been charged with a gruesome murder and was facing capital punishment.	C. 1340–49, <i>Hittson I</i>

Quote	Citation
There are a couple of systems that let this boy down, and I think he fell through the cracks, and I think he was at risk . . . At risk of harm, to himself, to his health, to his development, by the use of alcohol, and it was untreated; it's unchecked. There were agencies that knew about it, as well as family, and nobody would do anything. I think he was at risk a long time ago. He had accidents. He wanted so much, Judge, to please his friends and to be accepted. There are reports of him eating worms and, you know, doing things that were not healthy for him, that, you know, was real strange. He just—needed to belong.	C. 1340–49, <i>Hittson I</i>

APPENDIX II: CASE PROCEDURAL HISTORIES

Andrew Brannan

- **Laurens County jury sentences Mr. Brannan to death.** *Brannan v. State (Brannan I)*, Laurens Super. Ct. Case No. 98-FE-438-T (Ga. Super. Ct. Jan. 2000).
- **The Georgia Supreme Court affirms the death sentence.** *Brannan v. State (Brannan II)*, 561 S.E.2d 414 (Ga. 2002).
- **The Supreme Court denies certiorari.** *Brannan v. Georgia (Brannan III)*, 537 U.S. 1021 (2002).
- **The Butts Superior Court grants state habeas relief.** *Brannan v. Hall (Brannan IV)*, Butts Cnty. Super. Ct. Case No. 2003-V-408 (Ga. Super. Ct. Mar. 13, 2008).
- **The Georgia Supreme Court reverses, reinstating Mr. Brannan's death sentence.** *Hall v. Brannan (Brannan V)*, 670 S.E.2d 87 (Ga. 2008).
- **The Southern District of Georgia denies federal habeas relief.** *Brannan v. Humphrey (Brannan VI)*, No. 3:09-cv-00041-DHB (S.D. Ga. Mar. 9, 2012).
- **The Eleventh Circuit affirms.** *Brannan v. GDCP Warden (Brannan VII)*, 541 F. App'x 901 (11th Cir. 2013).
- **The Supreme Court denies certiorari.** *Brannan v. Humphrey (Brannan VIII)*, 134 S. Ct. 2732 (2014).
- January 2, 2015: Laurens County Superior Court sets execution date for January 13–20, 2015.
- January 12, 2015: Georgia Board of Pardons and Paroles denies clemency.
- **Butts Superior Court denies state habeas relief.** *Brannan v. Chatman (Brannan IX)*, No. 2015-HC-1, 2015 Ga. Super. LEXIS 5710 (Ga. Super. Ct. Jan. 13, 2015).
- **Georgia Supreme Court denies motion for stay of execution.** *Brannan v. Chatman (Brannan X)*, No. S15W0734 (Ga. Jan. 13, 2015).
- **Supreme Court denies stay of execution.** *Brannan v. Chatman (Brannan XI)*, 135 S. Ct. 1038 (2015).
- January 13, 2015: State of Georgia executes Andrew Brannan. *Andrew Brannan*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1395/andrew-brannan> [<https://perma.cc/XV9B-4ZCG>].

William Hance

- **The Georgia Supreme Court affirms Mr. Hance's death sentence on direct appeal.** *Hance v. State (Hance I)*, 268 S.E.2d 339 (Ga. 1980).
- **The United States Supreme Court denies certiorari.** *Hance v. Georgia (Hance II)*, 449 U.S. 1067 (1980).
- **The Butts County Superior Court denies habeas relief, and the Supreme Court denies certiorari.** *Hance v. Zant (Hance III)*, 456 U.S. 965 (1982).
- **The Eleventh Circuit grants federal habeas relief.** *Hance v. Zant (Hance IV)*, 696 F.2d 940 (11th Cir. 1983).
- **A Muscogee County jury resentences Mr. Hance to death, and the Georgia Supreme Court affirms the second death sentence.** *Hance v. State (Hance V)*, 332 S.E.2d 287 (Ga. 1985).
- **The Supreme Court denies certiorari.** *Hance v. Georgia (Hance VI)*, 474 U.S. 1038 (1985).
- **The Butts County Superior Court denies state habeas relief, and the Supreme Court of Georgia affirms.** *Hance v. Kemp (Hance VII)*, 373 S.E.2d 184 (Ga. 1988).
- **The Middle District of Georgia denies federal habeas relief.** *Hance v. Zant (Hance VIII)*, No. 4:89-cv-00085-HL (M.D. Ga. Feb. 26, 1991).
- **The Eleventh Circuit affirms.** *Hance v. Zant (Hance IX)*, 981 F.2d 1180 (1993).
- **The United States Supreme Court denies certiorari.** *Hance v. Zant (Hance X)*, 511 U.S. 1013 (1994).
- March 31, 1994: The State of Georgia executes William Hance. See *William Hance*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/231/william-hance> [<https://perma.cc/B52B-G5EP>].

Warren Hill, Jr.

- **A Lee County jury sentences Mr. Hill to death.** *Hill v. State (Hill I)*, Lee Cnty. Super. Ct. Case No. 91R14 (Aug. 2, 1991).
- **The Georgia Supreme Court affirms.** *Hill v. State (Hill II)*, 427 S.E.2d 770 (Ga. 1993).
- **The United States Supreme Court denies certiorari.** *Hill v. Georgia (Hill III)*, 510 U.S. 950 (1993).
- **The Butts Superior Court denies state habeas relief.** *Hill v. Head (Hill IV)*, Butts Cnty. Super. Ct. Case No. 1994-V-216 (Ga. Super. Ct. May 13, 2002).

- **The Butts Superior Court reverses denial of habeas relief for a jury determination of intellectual disability in consideration of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Ring v. Arizona*, 536 U.S. 584 (2002).** *Hill v. Head* (Hill V), Butts Cnty. Super. Ct. Case No. 1994-V-216 (Ga. Super. Ct. Nov. 19, 2002).
- **The Georgia Supreme Court reverses, denying Mr. Hill a jury trial on the issue of intellectual disability.** *Head v. Hill* (Hill VI), 587 S.E. 2d 613 (Ga. 2003).
- **The Middle District of Georgia denies federal habeas relief.** *Hill v. Schofield* (Hill VII), No. 1:04-cv-00151-WLS (M.D. Ga. Nov. 7, 2007).
- **The Eleventh Circuit reverses.** *Hill v. Schofield* (Hill VIII), 608 F.3d 1272 (11th Cir. 2010).
- **On rehearing, an *en banc* panel of the Eleventh Circuit reverses its decision in Hill VIII, reinstating the district court's denial of relief.** *Hill v. Humphrey* (Hill IX), 662 F.3d 1335 (11th Cir. 2011).
- **The United States Supreme Court denies certiorari.** *Hill v. Humphrey* (Hill X), 566 U.S. 1041 (2012).
- **The Butts Superior Court again denies state habeas relief.** *Hill XI*, Butts Cnty. Super. Ct. Case No. 2012-V-658 (Ga. Super. Ct. July 19, 2012).
- **The Georgia Supreme Court grants a stay of execution based on issues with Georgia's lethal injection protocol.** *Hill v. Owen* (Hill XII), Case No. S12W1812 (Ga. July 23, 2012). **The Georgia Supreme Court vacates the stay.** *Hill v. Owen* (Hill XIII), 738 S.E.2d 56 (Ga. 2013).
- **The Georgia Supreme Court declines to review Georgia trial court's denial of second state habeas petition, based on new intellectual disability evidence.** *Hill v. Humphrey* (Hill XIV), Case No. S13W0825 (Ga. Feb. 19, 2013).
- **The Middle District of Georgia denies leave to file a second federal habeas petition, and the Eleventh Circuit affirms.** *In re Hill* (Hill XV), 715 F.3d 284 (11th Cir. 2013).
- **The United States Supreme Court denies certiorari.** *Hill v. Humphrey* (Hill XVI), 134 S. Ct. 115 (2013).
- **The Lee County Superior Court denies state habeas petition filed based on *Hall v Florida*, 572 U.S. 701 (2014).** *Hill v. Chatman* (Hill XVII), Lee Cnty. Super. Ct, Case No. 2014-SU-HC-6-TW (Ga. Super. Ct. Oct. 1, 2014).
- **The Eleventh Circuit denies federal habeas relief based on *Hall*.** *In re Hill* (Hill XVIII), 777 F.3d 1214 (11th Cir. 2015).

- January 27, 2015: The State of Georgia executes Warren Hill. *Warren Hill*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1399/warren-hill> [<https://perma.cc/UF29-YLSA>].

Travis Hittson

- **The Georgia Supreme Court affirms Mr. Hittson's death sentence on direct appeal.** *Hittson v. State (Hittson I)*, 449 S.E.2d 586 (Ga. 1994).
- **The Supreme Court denies certiorari.** *Hittson v. Georgia (Hittson II)*, 514 U.S. 1129 (1995).
- **The Butts County Superior Court denies state habeas relief, and the Supreme Court denies certiorari.** *Hittson v. Turpin (Hittson III)*, 532 U.S. 1052 (2001).
- **The Butts County Superior Court denies state habeas relief.** *Hittson v. Terry (Hittson IV)*, Civil Action No. 2005-V-615 (Ga. Super. Ct. Oct. 5, 2005).
- **On remand from the Georgia Supreme Court, the Butts County Superior Court again denies state habeas relief.** *Hittson v. Hall (Hittson V)*, Butts Cnty. Super. Ct. Case No. 2005-V-615 (Ga. Super. Ct. Jan. 1, 2009).
- **The Georgia Supreme Court declines to review denial of relief.** *Hittson v. Hall (Hittson VI)*, Case No. S09E1294 (Ga. Oct. 18, 2010).
- **The Supreme Court denies certiorari.** *Hittson v. Humphrey (Hittson VII)*, 564 U.S. 1026 (2011).
- **The Middle District of Georgia grants federal habeas relief.** *Hittson v. Humphrey (Hittson VIII)*, No. 5:01-CV-384, 2012 WL 5497808 (M.D. Ga. Nov. 13, 2012).
- **The Eleventh Circuit reverses.** *Hittson v. GDCP Warden (Hittson IX)*, 759 F.3d 1210 (11th Cir. 2014).
- **The Supreme Court denies certiorari.** *Hittson v. Chatman (Hittson X)*, 135 S. Ct. 2126 (2015).
- **The Cobb County Superior Court issues an execution warrant.** *State v. Hittson (Hittson XI)*, No. 92-C-18076-M, 2016 Ga. Super. LEXIS 2028 (Ga. Super. Ct. Feb. 1, 2016).
- February 16, 2016: The Georgia Board of Pardons and Paroles denies clemency.
- **The Georgia Supreme Court denies a stay of execution.** *Hittson v. Chatman (Hittson XII)*, Case No. S16W0863 (Ga. Feb. 17, 2016).

- **The Supreme Court denies a stay of execution.** *Hittson v. Chatman* (*Hittson XIII*), 136 S. Ct. 1000 (2016).
- February 17, 2016: The State of Georgia executes Travis Hittson. *Travis Hittson*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1429/travis-hittson> [<https://perma.cc/6FCB-9HVD>].

Brandon Jones

- **The Butts County Superior Court denies state habeas relief, and the Georgia Supreme Court affirms.** *Jones v. Francis* (*Jones II*), 312 S.E.2d 300 (Ga. 1984).
- **The United States Supreme Court denies certiorari.** *Jones v. Francis* (*Jones III*), 469 U.S. 873 (1984).
- **The Northern District of Georgia grants federal habeas relief.** *Jones v. Kemp* (*Jones IV*), 706 F. Supp. 1534 (N.D. Ga. 1989).
- **A second Cobb County jury resentences Mr. Jones to death, and the Georgia Supreme Court affirms.** *Jones v. State* (*Jones V*), 539 S.E.2d 154 (Ga. 2000).
- **The Supreme Court denies certiorari.** *Jones v. Georgia* (*Jones VI*), 534 U.S. 839 (2001).
- **The Butts County Superior Court denies state habeas relief.** *Jones v. Terry* (*Jones VII*), Butts Cnty. Super. Ct. Case No. 2002-V-79 (Ga. Super. Ct. Mar. 17, 2006).
- **The Northern District of Georgia denies federal habeas relief.** *Jones v. Hall* (*Jones VII*), No. 1:09-CV-1228-CAP, 2011 U.S. Dist. LEXIS 158913 (N.D. Ga. Aug. 10, 2011).
- **The Eleventh Circuit affirms.** *Jones v. GDCP Warden* (*Jones IX*), 753 F.3d 1171 (11th Cir. 2014).
- **The Supreme Court denies certiorari.** *Jones v. Chatman* (*Jones X*), 136 S. Ct. 43 (2015).
- **The Northern District of Georgia denies challenge to state's lethal injection protocol.** *Jones v. Bryson* (*Jones XI*), No. 1:15-CV-4445-CAP, 2016 WL 7486189 (N.D. Ga. Jan. 21, 2016).
- **The Eleventh Circuit affirms.** *Jones v. GDCP Comm'r* (*Jones XII*), 811 F.3d 1288 (11th Cir. 2016).
- **The Supreme Court denies certiorari.** *Jones v. Bryson*, 136 S. Ct. 998 (2016).
- February 3, 2016: State of Georgia executes Brandon Jones. *Brandon Jones*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1427/brandon-jones> [<https://perma.cc/3QNP-BRW4>].

Marcus Wellons

- **A Cobb County jury sentences Mr. Wellons to death.** *Wellons v. State (Wellons I)*, Cobb Cnty. Super. Ct. Case No. 914048 (Ga. Super. Ct. June 8, 1993).
- **The Georgia Supreme Court affirms on direct appeal.** *Wellons v. State (Wellons II)*, 463 S.E.2d 868 (Ga. 1995).
- **The United States Supreme Court denies certiorari.** *Wellons v. Georgia (Wellons III)*, 519 U.S. 830 (1996).
- **Butts County Superior Court denies petition for state habeas relief, the Georgia Supreme Court declines review, and the Court denies certiorari.** *Wellons v. Turpin (Wellons IV)*, 534 U.S. 1001 (2001).
- **The Northern District of Georgia denies federal habeas relief.** *Wellons v. Head (Wellons V)*, No. 1:01-cv-01296-WBH (N.D. Ga. Feb. 20, 2007).
- **The Eleventh Circuit affirms.** *Wellons v. Hall (Wellons VI)*, 554 F.3d 923 (11th Cir. 2009).
- **The Supreme Court vacates *Wellons VI*, remanding to the Eleventh Circuit with instructions to remand to the Northern District.** *Wellons v. Hall (Wellons VII)*, 558 U.S. 220 (2010).
- **The Eleventh Circuit remands to the district court.** *Wellons v. Hall (Wellons VIII)*, 603 F.3d 1326 (11th Cir. 2010).
- **The Northern District denies habeas relief.** *Wellons v. Head (Wellons IX)*, No. 1:01-cv-01296-WBH (N.D. Ga. Feb. 20, 2007).
- **The Eleventh Circuit affirms.** *Wellons v. Warden (Wellons X)*, 695 F.3d 1202 (11th Cir. 2012).
- **The Supreme Court denies certiorari.** *Wellons v. Humphrey (Wellons XI)*, 571 U.S. 869 (2013).
- **The Georgia Board of Pardons and Paroles denies clemency.** PAROLE BOARD DENIES CLEMENCY FOR MARCUS WELLONS (June 16, 2014).
- **Federal courts deny Mr. Wellons' challenge to Georgia's execution protocol.** *Wellons v. Owens (Wellons XII)*, No. 1:14-CV-1827-WBH, 2014 WL 12524653 (N.D. Ga. June 16, 2014).
- **The Eleventh Circuit denies a stay of execution.** *Wellons v. Comm'r, Ga. Dep't of Corr. (Wellons XIII)*, 754 F.3d 1260 (11th Cir. 2014).
- **The Supreme Court denies certiorari.** *Wellons v. Owens*, 573 U.S. 928 (2014).
- June 17, 2014: The State of Georgia executes Marcus Wellons. *Marcus Wellons*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database/1380/marcus-wellons> [<https://perma.cc/3M6U-4MJD>].