

***Application to the Georgia
Board of Pardons and Parole on Behalf of
KENNETH E. FULTS***

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BEFORE THE
BOARD OF PARDONS AND PAROLES
STATE OF GEORGIA

APPLICATION OF KENNETH FULTS FOR
A STAY OF EXECUTION
AND FOR A COMMUTATION OF HIS SENTENCE OF DEATH

Undersigned counsel applies to the Board of Pardons and Paroles, pursuant to Article IV, Section II, Par. II(a) and (d) of the Georgia Constitution of 1983, O.C.G.A. sections 42-9-20, 42-9-42(a), for consideration of this application on behalf of Kenneth Fults, for commutation of the sentence of death, imposed by the Superior Court of Spalding County on May 30, 1997. Undersigned counsel request the opportunity to have a full and fair hearing before the full Board, allowing them to present witnesses in support of commutation at the conclusion of which they will seek commutation of Mr. Fults's death sentence.

Pursuant to Chapter 475.3.10(2)(6), Mr. Fults bases his Application on the following compelling grounds: (1) Mr. Fults is deeply remorseful for his crime and took responsibility for his actions, as evidenced by his pleading guilty at trial; (2) Mr. Fults was abused, neglected and abandoned as a child; (3) Mr. Fults has suffered the life-long disadvantages of substantial intellectual impairments; (4) one of Mr. Fults's jurors, by his own admission, based his decision to sentence Mr. Fults to death on Mr. Fults's race (5) expressing a

variety of concerns, nearly half of Mr. Fults's seated jurors have come forward to speak out against the unfairness of Mr. Fults's trial.

INTRODUCTION

In Georgia, the "Board has the sole constitutional authority to commute, or reduce, a death sentence to life without parole."¹ As the following will show, the Board should exercise its authority and commute Mr. Fults's death sentence.

1. Mr. Fults Is Deeply Remorseful For His Crime

a. The Offense & The Trial

On January 30, 1996, Mr. Fults shot and killed Cathy Bounds. Earlier that night, Mr. Fults had gotten into a heated argument with his girlfriend, Tasha. The couple had been struggling for months and matters had only gotten worse with the premature birth of their son which resulted in a two month hospitalization. The couple was in big financial trouble and their relationship was crumbling. Mr. Fults needed money and he decided to rob the trailer next to his. In a burglary gone horribly wrong, Mr. Fults shot and killed the resident, Ms. Bounds. In an early demonstration of remorse, Mr. Fults pled guilty to all charges without the benefit of any plea bargain.

b. 20 Years Of Remorse

Not only did Mr. Fults take responsibility for his tragic mistake by pleading guilty, but he did so with his testimony at his sentencing trial Mr. Fults testified about many mistakes in his life and about how his life had been falling

¹ <http://www.pap.state.ga.us>.

apart in the months leading up to the crime. He also apologized to the victim's family as well as his own for what he had put everyone through. Mr. Fults specifically addressed Cathy Bounds's mother, telling her:

I want to say, Mrs. Bounds, I know sorry cannot bring your daughter back. And I'm truly sorry for what - - for what happened to your daughter. If there was any way that I could trade places with your daughter to bring her back I would do it in a minute. I'm sorry. I didn't mean to kill your daughter.

Exh. 1, Trial Testimony of Kenneth Fults at Vol 6:1504.

In a personal letter to this Board, Mr. Fults wrote:

There really are not words to tell you how truly sorry I am for taking the life of Ms. Bounds. I know there is nothing I will ever be able to do or say to change what I did or to comfort her family, but not a day has gone by when I haven't wished I could turn back the clock.

I'm also incredibly sorry for the pain I've caused my own family, especially my baby sister Tamiko and my own children.

Exh. 2, Letter of Kenneth Fults.

2. Kenneth Fults: The Kid Who Fell Through The Cracks

Throughout his life, Kenneth Fults was abandoned and rejected by those who were supposed to care for him, ridiculed and dismissed by those who could have helped him, and beaten up and down by family members and strangers alike. Clearly, not all children come into this world with the kind of loving, nurturing parents that all kids deserve. We hope that our social safety nets will serve to rescue the unfortunate few that are destined to suffer the kinds of deprivations inflicted on Mr. Fults. Tragically, Mr. Fults fell through even those cracks.

a. Rejected Even Before Birth

Mr. Fults's mother, Juanita, became pregnant with him while still a teenager herself. Juanita's mother was a violent alcoholic and Juanita not only tried to hide her pregnancy but even attempted to abort Mr. Fults by drinking turpentine. When Juanita's mother found out about the pregnancy, Juanita was beaten severely. Juanita drank throughout her pregnancy.

Mr. Fults's father, Joseph Squire, was out of his life before it even began. Joseph had joined the army the year before Mr. Fults was born and for the first couple years of Mr. Fults's life, his father was serving in Vietnam. When his father returned from the war, he was a broken man, incapable of being the father-figure that Mr. Fults desperately needed. Mr. Squire never played a role in his son's life. He went on to have other children, but forbade them from having any contact with their half-brother, Kenneth.

b. A Childhood Riddled With Chaos and Violence

For much of his childhood, Mr. Fults was surrounded by violence and drug and alcohol abuse. Most of Mr. Fults's family, including his mother and his maternal grandmother, were very heavy drinkers who became more and more volatile when they were drinking. During much of Kenneth Fults's early childhood, he lived with his maternal grandmother, Dorthea (aka "Big Momma") and her husband Freddie, along with some of Dorthea's other children. One of Dorthea's daughter's, Hope, who was only 2 years older than Kenneth Fults described life at Dorthea's house:

My stepdaddy, Freddie Walker, used to beat all of us. It would make me mad when he would hit my mama. She has scar on her head from where she had to get 19 stitches. When he was drinking he would fight her. One

time my brother Edmond (we call him "Lee Lee") jumped on him and I pulled a knife on him. There was lots of drinking going on in our house. When I would clean up my mom's bedroom I would find gallons of gin. They would have parties at the house all the time. When they got drunk they would fight and beat us. They would make us go and clean up their mess in the kitchen. They would have parties about every two weeks and would drink every weekend. On Fridays there would be a lot of drinking and partying because it was payday. When Dorthea would be drunk Kenny and I would ask her for money and she would be so drunk she would give some to us. When we came back she'd have sobered up we would get a beating.

[]

[Freddie] was a drinker too. He used to try and touch me and Tamiko. One time he chased me down the street with a gun because I told him that he was not going to touch Tamiko when I saw him go after her. I don't know how much he tried to touch Tamiko, but he was after me quite a lot. He would grab my chest or my legs. I never told my mother because he was the provider for the family, and I knew we needed him around. Kenny knew that Freddie was doing this to us, and one time when he was still quite young Kenny tried to beat him up. Dorthea got very mad at Kenny, but Kenny could not explain to her why he tried to hit Freddie. Doretha even made Kenny leave the house; he was only about 10 years old. I have no where little Kenny went when he was kicked out. Freddie used to say things like "you mother#\$o/o" & "punk #\$\$%" to Kenny and Michael.

Exh. 6, Affidavit of Hope Marianne Smith, at 697-699.

With his real father nowhere to be found, the men who were in Mr. Fults's life were no better. In addition to the drunk and violent step-grandfather, Freddie, young Mr. Fults was subjected to a steady stream of his mother's disreputable, abusive and irresponsible boyfriends. While many of the men Juanita Fults paired up with were, much as she was, violent drunks, one man -- Otis Wyatt -- stands out.

Juanita met Otis Wyatt midway through Mr. Fults's childhood and, eventually, she married him. In addition to being brutally abusive towards Juanita, as well as Mr. Fults, Otis introduced Juanita to crack cocaine, a drug that took over Juanita's life and extinguished the few remaining motherly instincts that she still had up to that point.

In recounting the years that their mother was with Otis, Kenneth's brother, Michael, stated:

Mom had begun dating this crack named Otis. He is the one that got mom hooked on crack. I'll never forgive Otis for what he did to my mother. . . [Otis] used to beat Kenny all the time. Otis and Mom would also get into fights. Sometimes Kenny would try and stop the fights, and that would just make matters worse for Kenny. Otis really had it in for Kenny, and he fought with him all the time. I remember times when Kenny would walk into the kitchen and grab a piece of food, and if Otis didn't want him to, he would beat the heck out of him. Otis would also have friends over who would beat on us too. When it got this bad, I would start taking the garbage out and then just walk on and not come back.

Exh. 3, Affidavit of Michael Jackson.

The only times when Mr. Fults wasn't subjected to his family's addictions and outbursts was when he was suffering the isolation and neglect stemming from the large flurry of irrational and unpredictable relocations his mother inflicted on him and his siblings. One of the most dramatic instances of Juanita's neglect involves her decision to move from Vicksburg to Houston when Mr. Fults was thirteen years old. Shortly after Juanita uprooted her children by moving them to Houston, Juanita told her children she had to leave "for a while" and the man who she was dating would look after them. As soon as Juanita left, so did the man, taking with him all of the money she'd left for their care. Kenny's brother Michael, now deceased, described this dark time:

While we were in Houston Mom left us with a convict who none of us knew. She went off with the army on training. The convict had some of his friends over, including a woman with whom he was having sex in the kitchen. They then beat Kenneth, took all our money, and left us there by ourselves. We went for several months on our own without money for food; for three or four months of those we were without utilities, because they had not been paid.

That's when Kenneth and I started stealing. We had to steal for food because we had nothing, and we had to look after Tamiko who was only in the first grade.

Exh. 3, Affidavit of Michael Jackson.

c. Raised By The Streets

Because Mr. Fults failed to find the sense of family and safety that he needed, indeed that all children need, he turned to the streets. Mr. Fults found a family that would both accept him and protect him when he joined the Black Gangster Disciples (“BGD”) gang at just nine years old.

Multiple sociological and psychological studies have identified the factors that put disadvantaged youth at risk for joining gangs. The presence of identifiable factors, such as poverty, violence, single parentage, and the like, greatly increase the likelihood that youngsters will seek refuge in gangs.

One landmark study, published by United States Department of Justice's Juvenile Justice Bulletin (“JJB”), was conducted by The Seattle Social Development Project (“SSDP”).² The SSDP found that the more risk factors a youth experienced, the more likely he was to join a gang. Exh. 4, p. 3. No-risk youth experienced no risk factors or only one; low-risk youth experienced two to three risk factors; medium-risk youth experienced four to six risk factors; and high-risk youth experienced seven or more risk factors. *Id.* As compared with no-risk youth, high-risk youth were thirteen times more likely to join a gang. *Id.*

² Exh. 4: Karl G. Hill, James C. Howell, J. David Hawkins & Sara R. Battin-Pearson, Childhood Risk Factors for Adolescent Gang Membership: Results From The Seattle Social Development Project, *Journal of Research in Crime and Delinquency*, Vol. 36, No. 3 (Aug. 1999); Karl G. Hill, Christina Lui & David Hawkins, Early Precursors of Gang Membership: A Study of Seattle Youth, *Juvenile Justice Bulletin* (Dec. 2001).

Mr. Fults experienced at least thirteen risk factors during his childhood, placing him well into the high-risk category. These include: 1) neighborhood youth in trouble; 2) low neighborhood attachment; 3) family unit consisting of one parent plus other adults; 4) parental attitudes favoring violence; 5) low bonding with parents; 6) low household income; 7) poor family management; 8) learning disabled; 9) low academic achievement; 10); low school attachment; 11); low school commitment; 12) low academic aspirations; and 13) poor refusal skills. *Id.* at 4.

Not only did Mr. Fults experience an extraordinary number of youth/gang risk factors, he experienced many of them in the extreme. Dr. Patrice Harris, a psychiatrist who has evaluated Mr. Fults and examined his life history, concluded that Mr. Fults's childhood and pre-adult life were marked by family dysfunction, alcoholism, violence, and severe abuse. Exh. 5, Patrice Harris, MD, MA, Summary of Findings: Evaluation of Kenneth Fults.

Dr. Harris noted that these negative childhood experiences were not counterbalanced by any sources of positive experiences or emotions, which are often described in the literature as "resilience factors" which can serve to counterbalance risk factors and reduce the likelihood of gang membership. Often these resilience factors are unique to specific individuals and often explain why one sibling may have a markedly better outcome than another.

Take Mr. Fults and his two siblings, for example. All three children were subjected to some of the same risk factors (though to different degrees), including poverty and neglectful caregivers, but only Kenneth Fults had the additional risk

factor of low IQ, which placed him at greater risk for a poor outcome - - such as joining a gang or going to prison.

One risk factor that is particularly significant is the absence of loving, supportive caregivers. It is beyond question that Mr. Fults was deprived of loving parents for virtually his entire childhood, and, further, that this deprivation had a tremendous impact on him and the trajectory of his life, a fact attested to by myriad family members and underscored in the following examples. As Mr. Fults's younger brother, Michael, explained:

My mother used to beat me and Kenny a lot when we were growing up. She hit us with sticks, switches, or even electric extension cords. When Kenny stopped crying from these beatings Mom started turning the cords around using the plug end so it would hurt more. . . While we were in Houston Mom left us with a convict who none of us knew. . . The convict had some of his friends over including a woman with whom he was having sex in the kitchen. They then beat Kenneth up, took all our money, and left us by ourselves. We went for several months on our own without food; for three or four of those months we were without utilities because they hadn't been paid.

Exh. 3, Affidavit of Michael Jackson.

In another example, Mr. Fults's Aunt Hope (herself only two years older than Kenneth Fults) described life at her mother's house (Dorthea's), where Mr. Fults lived off and on throughout his early childhood:

A lot of time when we were growing up we had to cook for ourselves and take care of ourselves because the adults in the house were drunk. . . Juanita [Kenneth's mother] would be out partying and never had much to do with her kids when they were living in Vicksburg.

Juanita had a lot of hatred in her. She used to tell Kenny and Michael "You aren't going to amount to nothing."

Exh. 6, Affidavit of Hope Marianne Smith.

Another example lies in the admissions of Mr. Fults's mother, Juanita:

Once I got pregnant with Kenny, I tried to induce an abortion . . . but it didn't work.

□

Joseph Squire, Kenny's father, was gone to Vietnam when I had Kenny. . . Joseph didn't want anything to do with Kenny because he was light skinned. . . It was hard for Kenny not having a father and all. His brother Michael's grandparents would send for him, but Kenny never got that kind of attention. His father never came for him. Kenny always had a sad face when he was young.

□

In Vicksburg when the kids were young . . . I lived in a house with Melvin Selma . . . my daughter Tamiko's father. . . I was wild and young. The kids stayed with us on and off. They mostly stayed with my mother. I wasn't ready to raise a family and I wanted to be in the streets.

□

When I was drinking I just didn't care what was going on with the kids. When one of the boys got in trouble I would yell at them and whoop them. If I came home from work I would sit and drink a bottle of Hennessy. I did not ask the children about their school work or how they were doing. On some nights I would go to the bars after work and when I would get home I would pass out. . . the children were left at home and I know I wasn't watching over them the way I should have.

□

Some time not too long after we moved to Houston I met a man named Otis Wyatt. . . Otis was real bad news for me and the kids. Otis was a drug user and he turned me on to drugs too. He was selling things out of the house for drugs . . . Once this period of my life began I just lost sight of raising my kids. At this point the boys were left pretty much to fend for themselves.

Exh. 7, Affidavit of Juanita Fults.

These negative factors, suffered by all the Fults siblings, were buffered for some. Without question, life with their mother, Juanita, was nothing short of horrible for all her children, though both Michael and Tamiko have attested the Kenny took the “worst” of Juanita’s wrath. Additionally, whereas Kenny’s only alternative to life with his mother for many years was the streets, his brother and sister found life preservers. Michael sometimes got a reprieve through his paternal grandparents, who brought him to stay with them at various points during his childhood. Mr. Fults’s younger sister, Tamiko, had the good fortune to gain a reprieve that lasted several consecutive years. Ironically, Tamiko’s reprieve occurred because her mother left her with a family she had only just met - - and never came back. By the grace of God, they were kind people, who felt sorry for Tamiko, took her in and raised her as one of their own for nearly four years. Tamiko has noted that the best thing her mother ever did for her was to abandon her to that family.³

The experiences of Mr. Fults’s childhood and early adolescence, including but not limited to the abuse and abandonment by his parents, made him a prime candidate for a whole host of poor outcomes. Gang membership. Violence. Incarceration.

³ Tamiko Jackson Wright, Kenneth Fults’s younger sister, lived with the Pollard family for approximately four years, beginning at the age of 10. During those four years, Tamiko had her first exposure to what a normal, healthy family was like. The love and care she received from the Pollards changed the trajectory of her life. She has an exemplary career in the military, is married with two children, and is currently working on her Ph.D. Tamiko credits her big brother Kenny, who protected and cared for her when she was a young girl, for helping her get through the early years, before she was in the safety of the Pollard’s home.

As his aunt, Irene Squire, who Mr. Fults lived with in his early twenties explained: “he joined the gang because they were the only ones who treated him like family. He had no one else and the gang accepted him . . . he was only 9 years old.” Exh. 8, letter of Irene Squire. Even though at one point in his life joining a gang was the closest Mr. Fults could come to having a real family, he wasn’t blind to the dangers and pitfalls that accompanied gang life. Over time he tried to extricate himself from gang life as well as discouraging those he loved from taking that path. Mr. Fults’s cousin, Ebonie Davis stated:

I can [] remember when [Kenny] and his brother Mike got into an altercation about Mike joining a gang here in Vicksburg. He also discouraged me from getting involved in gang activity. He stuck close to me and my friends and made sure we were protected from getting involved. He told us that it is not a life style we wanted to live. As time went on I realized that he loved the family environment and the support of a whole family.

During my eighth grade year of school, I can remember two guys from Houston showing up and for the first time I saw that Kenny was afraid. At that point he pulled away from me and started staying out as though he was keeping them away from us. I don’t know all the details of the Houston connection but I do remember that he said he would have to leave soon to save his life and to keep the family safe. He never explained it but then it all changed and he stayed to go to court and served about two years in jail. After his release he found out that one of the guys was then living in Vicksburg and he decided to leave town and left while we were out of town. He later said that he could not handle saying good bye to us and he wanted us to know that he loved us. We learned from his mom’s side of the family that he was in Georgia because he never told us where he was going. I felt like he was running from something that was connected to Houston.

Kenny had only known the life of gangs and we gave him love and a sense of belonging to a real family. I felt that he chose family life over the gang life. We gave him something that he had never experienced before. I know now that he never had a real chance of survival and when he was shown that he had options, he chose to

do the right thing. It may have been too late but, he did make the choice to attempt an escape from his old life.

Exh. 9, Letter of Ebonie Davis.

The path from gangs to incarceration is often a predictable one. And so too is the path ahead for a child who suffers a steady stream of disadvantage and abuse. Mr. Fults, the man, committed a terrible, tragic act when he killed Cathy Bounds. But before the man existed, there was an innocent, vulnerable child in his place. And *that* child, Kenny, fell through the cracks.

The jury charged with deciding Mr. Fults's fate heard almost nothing about the myriad assaults on Kenneth Fults's childhood. But they did hear that before he killed Cathy Bounds, he was a gang member even though his crime had nothing to do with a gang. Nevertheless, the State presented detailed evidence about the Black Gangster Disciples gang ("BGD") in an effort to demonize Mr. Fults. Indeed, the State's testifying witness even described the BGD's supposed allegiance to Satan himself. While the jury was subjected to lengthy testimony about Mr. Fults's gang history, they were never provided with any explanation as to why Mr. Fults – at the tender age of nine – would have joined up with a gang.

3. Mr. Fults Is Intellectually Disabled And Should Not Be Executed

In addition to the assaults and disadvantages described above Kenneth Fults struggled throughout his childhood with significant intellectual deficiencies and impairments. Some of the earliest and best indicators of Mr. Fults's intellectual disabilities are reflected in his educational history. Low test scores, poor grades, and

belittlement both at home and at school eventually led Kenneth Fults to give up on ever measuring up to his peers.

As Kenny's former teacher, Rosalie Conner, explained:

I taught the lowest level of students; students in my first grade class scored the poorest on the test. At the end of the school year the students were tested again.

Kenneth Fults was the poorest performing student in my class. He scored the lowest on the Test, as I recall, and he was a very poor student academically. He was very slow in all subject areas. . . Nowadays Kenny would certainly have been placed in special education classes. Back then, however, this is what we did with students like Kenneth Fults.

Exh. 10, Affidavit of Rosalie Conner, at 586.

Unfortunately, not all of Kenneth Fults's teachers were as thoughtful as Ms. Conner. As one former classmate noted about their elementary English teacher, Mr. Wilson:

Mr. Wilson would yell at us, call us names, and say very mean things to us. He picked on Kenny the most. He would tell Kenny that he was going to "amount to nothing," and that he would end up in jail. He would call Kenny a "stupid nigger."

Exh. 12 Affidavit of Linda Miles, at 682.

a. People Who Are Intellectually Disabled Are Less Culpable

In the late eighties, the citizens of The State of Georgia, through their legislators, decided that it was wrong to execute someone who was intellectually disabled. In 1988, Georgia was the first jurisdiction in the country to recognize that people who are intellectually disabled are less culpable than the normal person and

for that reason cannot be executed.⁴ Kenneth Fults is intellectually disabled.⁵ This Board is presented with compelling evidence of his intellectual disability and this Board is the only body that can give effect to the will of the people of the State of Georgia and keep Mr. Fults from being executed.

Over a decade ago the United States Supreme Court followed the lead of Georgia and ruled that the Eighth Amendment to the Constitution prohibited the execution of the intellectually disabled.⁶ The Court surveyed the states and, noting that Georgia was the trendsetter, recounted how eighteen jurisdictions followed Georgia's lead.⁷ This change in attitude reflects the recognition that today society views intellectually disabled offenders as less culpable than the average criminal, and therefore should not be subject to our harshest punishment - - the death penalty.

Those with intellectual disabilities have diminished capacities to understand and process information. They often lack adequate communication skills and are not able to learn from experience as a "normal" person would. Their ability to engage in logical reasoning is impaired and because of their disability, they have difficulty

⁴ After Jerome Bowden, a death sentenced prisoner who, like Mr. Fults was unquestionably intellectually disabled, was executed, the Georgia Legislature enacted O.C.G.A. §17-7-131(j) which provides in any case "in which the death penalty is sought . . . [and] the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed. . ."

⁵ In 2013, the American Psychiatric Association eliminated the diagnostic term "mental retardation" and replaced it with "intellectual disability".

⁶ *Atkins v. Virginia*, 636 U.S. 304 (2002).

⁷ *Id.* at 314-315. The jurisdictions were: the United States, Maryland, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri and North Carolina.

controlling their impulses and often fail to comprehend the reactions of others around them. Their disability has a profound impact on those who are caught up in the criminal justice system. They are more prone to giving false confessions, are impaired in their ability to assist their attorneys, and they are typically poor witnesses. Their demeanor may give a false appearance of lack of remorse.⁸ Further they may appear to be deviously avoiding answering certain questions or appear obstinate when in reality deficits in attention prevent the individual from responding appropriately.⁹ Further, those who are intellectually disabled will often overrate their skills in order to mask their disability. This is especially so when intellectually disabled persons report their academic achievement, physical skills and intellectual level.¹⁰

The American Psychiatric Association recognizes varying degrees of intellectual disability, profound, severe, and mild. It is important to note that labeling an intellectual disability as “mild” may be misleading because even people who are mildly disabled face significant challenges.¹¹ Those with mild intellectual disability “are physically indistinguishable from the general population, they have no identifiable behavioral features and their personalities vary widely, as is true in all

⁸ *Id.*, 536 U.S. at 320-21.

⁹ *See, Mentally Retarded Criminal Defendants*, Ellis & Luckasson, 53 *Geo. Wash. L. Rev.* 414, 429-30, 1985.

¹⁰ *Id.*

¹¹ *See, Intellectual Disability, Definition, Classification and System of Supports*, Eleventh Edition of the AAIDD Definitional Manual, 2010 at 152-53

people . . . [s]ome may be able to live independently.”¹² Indeed, there are abundant of success stories about people with mild intellectual disability that “contrast sharply with incorrect stereotypes that these individuals never have friends, jobs, spouses, or children, or are good citizens.”¹³ Those who suffer from mild intellectual disability can often prosper when given the needed supports and educational opportunities. With these specific supports, the individual can learn useful skills that allow choice and control in life. Indeed, many people with significantly limited intellectual functioning and adaptive behavior may be competent learners. With the correct supports in place, an individual who is mildly intellectually disabled can learn functional academic skills.¹⁴ Therefore, it is “crucial not to stereotype” all those who are classified as mildly intellectually disabled¹⁵ because “[a]ctual or relative strengths often coexist in an individual” who is mildly intellectually disabled.¹⁶

b. Mr. Fults Is Intellectually Disabled

The hallmark diagnostic criteria of intellectual disability are: (A) deficits in intellectual functions; (B) deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards; and (C) the onset of intellectual and adaptive deficits during the developmental period.

¹² *Id.*

¹³ *Id.* at 161

¹⁴ *Id.* at 162

¹⁵ *Id.* at 161

¹⁶ *Id.* at 162

One way of determining deficits in intellectual functions is through the administration of standardized IQ tests. It is widely accepted that a score which is two standard deviations from the norm is indicative of deficits in intellectual functions.¹⁷ Most IQ tests have a standard measure of error of ± 5 which leads to a range of scores from 65 to 75 that would be indicative of deficits in intellectual functioning. In addition to IQ tests, there are standardized objective tests that can be administered to determine if a person exhibits deficits in adaptive behavior. Moreover, a trained psychologist, using clinical judgment, can interpret anecdotal information to aid in the determination of whether someone exhibits significant deficits in adaptive behavior. Finally, there must be sufficient evidence that the deficits in intellectual functioning and adaptive behavior manifested in the developmental period.

On three occasions, Mr. Fults was given IQ tests and each time the results were indicative of deficits in intellectual function.¹⁸ All scores, ranging from 68 to 74, fall within the range indicative of deficits in intellectual functioning. Recently, standardized tests were administered to determine if Mr. Fults exhibited deficits in adaptive behavior. Based on a review of voluminous records, personal interviews and previously administered IQ testing, Dr. Adriana Flores, a Forensic and Clinical Psychologist has concluded:

¹⁷ IQ tests are normed so that the average score is 100. One standard deviation is fifteen (15) points. In addition, IQ tests have a standard error of measurement of five points. Thus, DSM-V indicates a score of 65-75 is indicative of deficits in intellectual functions. See, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, pg. 37

¹⁸ The tests were: (1) Test of Nonverbal Intelligence on which Mr. Fults scored a 68; (2) the Kaufman Brief Intelligence Test - - he scored a 74; and (3) the Weschler Adult Intelligence Scale, Third Edition - - scored a 72.

[i]n my opinion, within a reasonable degree of scientific, psychological certainty [] Mr. Fults meets [the] diagnostic criteria for Intellectual Disability, Mild. Mr. Fults has significant subaverage intellectual functioning and adaptive abilities, with onset prior to the age of 18.

Exh. 11, Report of Dr. Adriana L. Flores, Ph. D. at 1.

By definition, Mr. Fults is less culpable because of his intellectual disability and is therefore worthy of this Board's intervention. Because of the traits associated with his disability, Mr. Fults lacks sufficient reasoning abilities, lacks impulse control, fails to learn from experience and is subject to decompensation when involved in stressful situations. All of these traits factored into the crime for which Mr. Fults stands to be executed. All of these traits made him less able to conform his behavior to what is socially acceptable. And all of these traits are not his fault. Whether caused by his mother's drinking during pregnancy, by his chronic seizures, or by the serious head trauma he suffered, the fact remains Mr. Fults's brain is altered to the point that he functions in the lowest one percent of the population.

This finding is significant as it sheds considerable light on factors this Board will be evaluating in this process including his record in prison, the crime, his remorse, and his response to this proceeding. Mr. Fults's behavior while in prison has been marked with infractions. While at first blush one might think Mr. Fults is willingly violating the rules that have been established, that is not the case. As noted above, those with Intellectual Disability (ID) are often impulsive, fail to learn from experience and have difficulty engaging in logical reasoning. Many of Mr. Fults's infractions can be fairly described as impulsive. Further, the fact that he has

repeatedly violated the rules is indicative of his inability to learn from experiences or engage in logical reasoning (i.e., if I do this, punishment will result).

Finally, the Board is likely to comb the record to determine whether Mr. Fults has accepted responsibility for his actions and shown remorse. As detailed in section 1 of this Application, Mr. Fults did accept responsibility by pleading guilty and he clearly and convincingly expressed remorse during his testimony. At the same time, we recognize that his testimony overall contains elements suggestive of something short of complete acceptance of responsibility. However, his testimony needs to be understood in the context of his intellectual disabilities.

Almost three decades ago Jerome Bowden, who was undeniably intellectually disabled, was executed. The citizens of Georgia were so outraged they staged protests¹⁹ that led to the legislature enacting a provision that prohibits the execution of the intellectually disabled.²⁰ Mr. Fults's trial attorney did not raise Mr. Fults's intellectual disability in connection with his trial, despite having been advised by multiple people that his client might in fact be intellectually disabled.

The issue of Mr. Fults's intellectual disability was first raised in connection with his state habeas proceedings. The state habeas court, after being presented with evidence of intellectual disability failed to make a determination, instead finding only that the evidence Mr. Fults presented was not credible. The court never opined - - either way - - whether Mr. Fults was intellectually disabled. Likewise, the reviewing

¹⁹ See, *Montgomery, Bowden's Execution Stirs Protest*, Atlanta Journal, Oct. 13, 1986, at A-1.

²⁰ See, *Atkins v. Virginia*, 536 U.S. at 313-14.

courts have never analyzed whether Mr. Fults is, or is not, intellectually disabled. Indeed, the Eleventh Circuit Court of Appeals, even under the exceedingly reviewing deferential standards of the Anti-Terrorism and Effective Death Penalty Act, still expressed the following reservations about the state habeas court's determination:

We close by acknowledging that some of the arguments advanced by Mr. Fults—e.g., that Dr. Bailey-Smith's opinions were not based on thorough or proper testing for mental retardation, that his own evidence was stronger than the state habeas court thought—are not without some force. But we are not sitting as the initial triers of fact determining whether Mr. Fults is in fact mentally retarded. We are not even assessing factual findings made by a district court for clear error. We are reviewing the factual findings of the state habeas court through the prism of AEDPA, which calls for a presumption of correctness that can only be overcome by clear and convincing evidence.²¹

In light of Dr. Flores' recent evaluation, the reservations expressed by the Eleventh Circuit, and this State's long-standing aversion to executing the intellectually disabled, this Board should commute Mr. Fults's death sentence to a sentence of life in prison without the possibility of parole.

4. Mr. Fults Was Sentenced To Death By A Racist Juror

This case involved a 19 year-old white female victim and a black male defendant. Mr. Fults's attorney, Johnny Mostiler, knew that the issue of race might be a factor, which is why he questioned potential jurors about their views on race. For example, when he asked one woman whether she "had any racial prejudice," she replied that she was opposed to interracial marriage. Exh. 13, Trial Transcript, *voir dire* of Vera Stephens. Mr. Mostiler used a strike to keep her off the jury.

²¹ *Fults v. G.D.C.P Warden*, 764 F.3d 1311, 1321 (11th Cir. 2015)

When Thomas Buffington was asked whether he had “any racial prejudice resting on [his] mind?”, Buffington replied “No, sir” and when further pressed about whether it made any difference that the defendant in the case was black and the victim was white, Buffington again responded “No, sir.” Exh. 14 Trial Transcript, *Voir Dire* of Thomas Buffington. No one in the courtroom, other than Buffington himself, knew of Buffington’s bigotry because he concealed it when questioned by the trial judge and counsel.

Eight years after trial, Buffington agreed to meet with Mr. Fults’s post-conviction counsel. During the interview, Buffington made a startling admission, which was memorialized in a sworn affidavit. Buffington stated:

I served as a juror in the capital sentencing trial of Kenneth Fults in May, 1997. I have been on a jury before, but this was my first capital trial. I don’t know if he ever killed anybody, but that nigger got just what should have happened. Once he pled guilty, I knew I would vote for the death penalty because that’s what that nigger deserved.

Exh. 15, Affidavit of Thomas Buffington.

Even though Buffington hid his racial animus before and during Mr. Fults’s trial, and only revealed it eight years later, the courts concluded that the evidence came too late and have refused to correct this grave injustice. It now falls to this Board to act as a failsafe. Unencumbered by the procedural hurdles of the court system, this Board is uniquely positioned to right this wrong.

5. Several Jurors Have Spoken Out

Six jurors – that’s half the jury – have provided sworn statements. Five of the six have come forward because they are deeply concerned about the fairness of Mr.

Fults's trial. And the sixth juror, Thomas Buffington, admitted that he decided on a death sentence before hearing any evidence at all and because Mr. Fults is, in Buffington's words, a "nigger."

a. A Verdict Tainted By Racial Prejudice

Because one of his fellow jurors -- Thomas Buffington -- was motivated to vote for death by racial prejudice, jury foreman Ryan Archer supports clemency. Just as this Board should have grave concerns about allowing a man to be put to death when it is beyond question that he didn't get a fair trial, so too Foreman Archer is haunted by this knowledge. As Mr. Archer states:

Mr. Buffington hid his feelings about Mr. Fults' race during our deliberations. As the foreperson, I would have alerted the judge if I had known about Mr. Buffington's true feelings.

There are two very troubling things in his statement to me as a juror and the foreperson of the jury. One is Mr. Buffington indicated he could not be a fair and impartial juror and actually listen to the evidence for Mr. Fults. The second is the racial slur used by Mr. Buffington in such a casual manner. It is my personal opinion, a person with this mentality cannot sit in judgment of others. Their biases outweigh their ability to be fair and impartial.

I am a white man and I am a mandated peace officer with the Georgia POST. I have also worked in law enforcement since 2010. I am also pro death penalty. I know our system is not perfect. However, it can work if we are provided a fair and impartial trial. That did not happen in Mr. Fults's case. This is especially troubling since we are giving Mr. Fults the ultimate penalty, death. I support clemency for Mr. Fults and I also support Mr. Fults getting a new sentencing trial.

Exh. 16, Affidavit of Ryan K. Archer.

Fellow juror Mary Bunn also supports clemency for Mr. Fults. After learning of Mr. Buffington's admission of racial prejudice, Ms. Bunn professed:

Mr. Buffington called Mr. Fults a “nigger.” I am deeply troubled that Mr. Buffington was allowed to sit in judgment of Mr. Fults since he considered Mr. Fults to be less of a human being. His use of the word “nigger” in describing Mr. Fults is extremely offensive and it seems very unfair to me that Mr. Buffington was allowed to be a juror at Mr. Fults’s trial.

Exh. 20, Affidavit of Mary Bunn

b. The Sleeping Lawyer Problem

Three other jurors: Tommy Willis, Ricky Brittain, and L.M. Wyatt, have expressed concern about the fairness of Mr. Fults’s trial because, among other things, they saw Mr. Fults’s lawyer, Mr. Mostiler, sleeping during the trial proceedings. Willis, Brittain, and Wyatt have all provided sworn affidavits attesting to their observations of Mostiler sleeping during Mr. Fults’s capital sentencing trial. Juror Wyatt states: “Mr. Mostiler did not provide any real representation of [Mr. Fults]. He just didn’t really do anything at all, and several times I saw him sleeping during the trial.” (Exh. 17 Affidavit of L.M. Wyatt). Similarly, Juror Willis noted: “Mr. Fults’s lawyer, Mr. Mostiler, did not tell us much or put on lots of witnesses. He would slump over with his head bent down. I saw him doing this frequently.” (Exh. 18, Affidavit of Tommy L. Willis, Jr.). Finally, as Juror Brittain explained:

Mr. Fults’s lawyer, Mr. Mostiler, did not seem to care about Mr. Fults or his case. Mostiler seemed unorganized and unprepared. McBroom [the District Attorney], however, had everything well organized and presented his case in a very understandable and persuasive way. Mostiler would just sit there with pieces of crumpled up paper in front of him. He was uninterested in what was happening, and it seemed like something was wrong with him. I saw him fall asleep repeatedly during the trial and he would wake up, startled, when it was his turn to examine witnesses. I saw him sleeping off and on throughout the whole trial. It really bothered me because here, there was a man on trial for his life and

his lawyer didn't even care enough to stay awake, much less properly examine the witnesses.

Exh. 19, Affidavit of Ricky Brittain.

c. Qualms About Executing The Intellectually Disabled

Juror Mary Bunn has also expressed her support for a commutation of Mr.

Fults's death sentence based on his intellectual disabilities. Ms. Bunn stated:

I have just learned about Mr. Fults's low intellectual abilities. I would have liked to have known more about this. You need to have as much information as possible . . . [t]his kind of information would have changed my decision to life without parole for Mr. Fults.

Exh. 20, Affidavit of Mary Bunn.

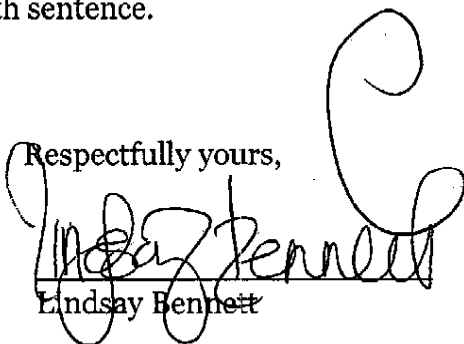
There is no greater civic duty than when citizens are asked to perform that to sit on a jury charge with deciding whether the legal mechanisms of the State should be invoked to extinguish the life of a fellow citizen. Their solemn verdicts are entitled to great deference and respect. But when, as here, those jurors come forward and admit their verdicts represent a break down in our system of justice, *those* words are entitled to similar deference and respect. When faced with circumstances like this: one juror is an admitted racist whose decision to vote for a death sentence was inextricably linked with his animus against African-Americans and five other jurors have spoken out about what they view as an unfair trial, then the jury's verdict has been eroded. All twelve jurors must be unanimous in order for a death sentence to be imposed. When half of the jury has told us that the system has failed, the death sentence should not stand.

CONCLUSION

This Board is empowered to intervene under exceptional circumstances, to act as a failsafe in cases where the Courts have failed. This is such a case. The citizens of Georgia have empowered this Board to make decisions not as judges under the law, but as human beings, to serve as the conscience of our community.

Kenneth Fults and his family recognize that the relief they request is extraordinary. In his letter to the Board, Mr. Fults stated: "I don't have the right to ask you for clemency for myself, but I ask you for clemency so that my crimes will not cause more suffering to other people, especially my family." Exh. 2, Letter of Kenneth Fults.

For all of the reasons provided, as well as those presented at the hearing on this application, Mr. Fults and his loved ones respectfully request that the Board (1) grant a stay of his execution date for 90 days to permit the Board to review and deliberate the evidence on his behalf, and (2) exercise its power to grant mercy and commute his death sentence.

Respectfully yours,

Lindsay Bennett

/s/
William Hearnburg, Jr.