Nos. 15-7279 and 15-A605

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN KEITH TERRELL,

PETITIONER,

v.

BRUCE CHATMAN, WARDEN,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI AND RESPONSE IN OPPOSITION TO STAY

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QUESTION PRESENTED

Whether this court should deny certiorari review of the Georgia Supreme Court's order denying petitioner's application for a certificate of probable cause to appeal from the proper denial of his second state habeas corpus petition which was based on adequate and independent state law grounds?

BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

The state habeas court, applying state procedural law, properly dismissed Petitioner's second state habeas petition as procedurally barred. As the state habeas court properly dismissed Petitioner's second state habeas petition as barred under Georgia law, the decision rests on adequate and independent state law grounds, which do not conflict with this Court's precedent. Certiorari review should be denied.

I. STATEMENT OF THE CASE

Weeks after being paroled on armed robbery charges, Petitioner, Brian Terrell, stole checks from the victim, John Watson. On June 20, 1992, after the victim discovered the theft and that Petitioner had written checks totaling approximately $9000, Watson gave Petitioner an ultimatum. Watson gave Petitioner until the following Monday, June 22, 1992, to pay back a portion of the money. If Petitioner did not pay back a portion of the money by that date, Watson stated he would press charges, which would have resulted in Petitioner's parole being revoked as well as new criminal charges.

The following Monday, to avoid going back to prison, Petitioner murdered Watson by shooting the 70-year-old victim as he came out of his home to go to dialysis. After shooting Watson four times, Petitioner then brutally beat him, breaking Watson's "jaw, nose, cheek, forehead, and eye socket and knocking out

some of his teeth. The beating was so severe that bone penetrated into the victim's brain." Hall v. Terrell, 285 Ga. 448, 449 (2009).

A. First Trial – Hung Jury

Petitioner was originally indicted on July 13, 1992, for malice murder, felony murder, and armed robbery. On June 10, 1993, Petitioner was also indicted for ten counts of first degree forgery. In July of 1994, Petitioner went to trial. At that trial, Jermaine Johnson testified that he had driven Petitioner to and from the home of the victim, John Watson, and Petitioner had confessed to murdering Mr. Watson. This first trial ended in a mistrial as a result of a hung jury.

B. Second Trial – Guilty of Malice Murder, Forgery, and Sentenced to Death

Petitioner's second trial began on January 9, 1995. In this second trial, the State advanced charges against Petitioner only on malice murder and forgery. At that trial, Jermaine Johnson testified that he had driven Petitioner to and from Mr. Watson's home and Petitioner had confessed to murdering Mr. Watson. See Terrell v. State, 271 Ga. 783, 785 (1999). On January 20, 1995, Petitioner was convicted of malice murder and forgery and was sentenced to death. The jury found the following aggravating circumstances: that the offense of murder was committed while the defendant was engaged in the commission of an aggravated battery; and the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and an aggravated battery to the

victim before death. Terrell v. State, 271 Ga. 783 (1999). Subsequently, Petitioner's convictions and sentences were reversed by the Georgia Supreme Court due to an error in jury selection. Id.

C. Third Trial – Guilty Malice Murder, Forgery and Sentenced to Death

Petitioner's third trial was conducted on January 29 through February 6, 2001.

At that trial, Petitioner's mother testified that on the morning of the murder she saw Petitioner wearing a white golf shirt and blue jeans. She also saw Johnson, who was wearing a white "ball shirt" with black stripes. The manager at the hotel where the two men stayed on the night before the murder also described Johnson as wearing a light-colored baseball jersey, with stripes, trimmed in black or gray. Virginia Kines owned a small grocery store near Mr. Watson's home. On the day of the murder, around 9:10 a.m., she saw a black man, with an asymmetrical haircut, driving a Cadillac very slowly past Mr. Watson's house, which was on her route to work. She noticed the man and the car because she was in a hurry to get to work and was stuck behind the Cadillac driving slowly. The man pulled the Cadillac into her store parking lot and then turned around, driving back in the direction from which he had come. A few minutes later, he returned and entered the store. Ms. Kines testified the driver was wearing a ball shirt with a "pinstripe" in it. She identified the black male as Johnson. Marion Foschini

testified that she lived across the street from the victim. On the day of the murder, she heard a gunshot around 9:00 or 10:00 a.m. She looked out her window and saw a car with the hood up and a tall, black man wearing a white t-shirt and jeans. She did not see anyone with a shirt that looked like a baseball jersey or anyone with an asymmetrical haircut.

In closing argument, the State argued that the person Ms. Foschini saw was Petitioner as the person had a white t-shirt and blue jeans and she specifically did not see anyone dressed like Johnson. This argument was a proper inference from the evidence, not prosecutorial misconduct. See Jones v. State, 273 Ga. 231, 234 (2000).

Also, in the third trial, trial counsel chose to focus guilt on Johnson.[1] Johnson testified at Petitioner's third trial, just as he had in Petitioner's previous two trials, that Petitioner had murdered Mr. Watson and admitted that fact to Johnson, who drove him to and from the murder.

[1] Petitioner points to Petitioner's uncle, Tim Terrell, as a possible suspect. During the third trial, trial counsel informed the trial court, he made a strategic decision not to attempt to implicate Tim Terrell in the murder of Mr. Watson based on three factors: (1) this defense did not work in the first trial; (2) Tim Terrell had an alibi through Petitioner's mother; and (3) this theory would have been inconsistent with the defense's residual doubt theory that Jermaine Johnson murdered Mr. Watson. Also, in the second trial, Tim Terrell testified that he lived in the same home as Petitioner's mother, that she often brought Mr. Watson's truck to the house, and he did not recall if he ever touched the truck during those many occasions.

Following Johnson's incriminating testimony during the guilt phase of trial, Petitioner's trial counsel recalled Johnson. Mr. Johnson, upon examination by trial counsel, testified that he did not remember telling his aunt, Sarah Terrell, the day prior to Watson's murder, that he had a job to do the following day, from which he would get a lot of money and could therefore help her pay her bills. He also testified that he did not remember telling his uncle, Lester Terrell, that Petitioner would be fine at Petitioner's trial because he did not kill Mr. Watson. Trial counsel then presented the testimony of Sarah Terrell and Lester Terrell who testified that Johnson had made these statements to them.

On February 6, 2001, Petitioner was convicted of one count of malice murder and ten counts of forgery. Following the sentencing phase of trial, the jury found the following statutory aggravating circumstances: 1) that the murder was committed while Petitioner was engaged in an aggravated battery; 2) that the murder was committed while the Petitioner was engaged in an armed robbery; 3) that the murder was outrageously or wantonly vile, horrible, or inhuman because it involved torture; 4) that the murder was outrageously or wantonly vile, horrible, or inhuman because it involved depravity of mind; and 5) that the murder was outrageously or wantonly vile, horrible, or inhuman because it involved an

aggravated battery to the victim. On February 6, 2001, Petitioner was again sentenced to death for murder.[2]

D. Direct Appeal

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on November 12, 2002. Terrell v. State, 276 Ga. 34 (2002). In affirming, the Court held that the evidence was sufficient "to find beyond a reasonable doubt that Terrell was guilty of malice murder and ten counts of first-degree forgery. [] The evidence also was sufficient to authorize the jury to find beyond a reasonable doubt the statutory aggravating circumstances that supported Terrell's death sentence.'" Id. (citing Jackson v. Virginia, 443 U.S. 307 (1979) and O.C.G.A. § 17-10-35(c)(2)

[2] Petitioner also asserts that the jurors from Petitioner's **first** trial, not third trial, which is at issue, all cited Johnson's' impaired credibility as a major weakness in the State's case. (Petitioner's brief, p. 11 n.9). This is a mischaracterization. In responding to the State's questionnaire as to the "three biggest strengths of the State's case," Juror Causey stated, "Testimony by Jermaine Johnson and the MOTIVE!" Under biggest weaknesses in the State's case, Juror Causey stated, "Jermaine's reputation – 2 jurors said they did not believe his testimony – I told them that I did not give him enough credit to make up a 45 page confession without contradicting himself numerous times." Juror Causey later stated, "I was very upset with the 3 jurors who would not convict Brian – I would not have voted guilty until I heard Jermaine's testimony. His testimony made all the pieces fit like a puzzle and I could not find no major contradictions in his testimony." Likewise, Juror Harrison stated Johnson's testimony was one of the "three biggest strengths of the State's case." Notably, under three biggest weaknesses, Juror Harrison also stated, "Is co-defendant's testimony believable?" A third juror, Juror Wilson stated, "Under three biggest strengths of the State's case," "Testimony of Jermaine." Under "three biggest weaknesses," Juror Wilson stated, "Jermaine had lied before."

("Whether [] the evidence supports the jury's or judge's finding of a statutory aggravating circumstance…."). On direct appeal, Petitioner did not allege the State knowingly presented false testimony through Johnson, and he did not allege that the prosecutor had presented a misleading argument to the jury.

Thereafter, Petitioner filed a petition for writ of certiorari in this Court, which was denied on October 6, 2003. Terrell v. Georgia, 540 U.S. 835 (2003).

E. State Habeas Petition

Petitioner filed a state habeas corpus petition on August 20, 2004, and an amended petition on December 18, 2006. A three-day state habeas evidentiary hearing was held on May 21, 24 and 25, 2007.

In his first state habeas petition, Petitioner alleged that the State had presented the false testimony of Johnson. Petitioner also alleged that trial counsel were ineffective in not presenting the testimony of Petitioner's cousin, Sonya Benton, or the defense's trial investigator, Dan Goldman, that Johnson had previously stated that he would tell the truth at Petitioner's third trial. Notably, Petitioner failed to establish what Johnson meant by this statement and failed to introduce any testimony from Johnson in that state habeas proceeding.

On July 17, 2008, the state habeas court denied relief as to Petitioner's convictions, but granted relief as to Petitioner's death sentence. Specifically, the court found that Petitioner's claim of prosecutorial misconduct as to Johnson was

defaulted. The court also found the ineffectiveness claim as to counsel not calling Ms. Benton and Mr. Goldman was without merit. Respondent appealed, Petitioner cross-appealed to the Georgia Supreme Court.

In that cross-appeal, Petitioner alleged that the state habeas court had erred in not finding that trial counsel were ineffective in failing to present the testimony of Ms. Benton and Mr. Goldman. The Court, in addition to noting the testimony Petitioner claimed should have been introduced at trial, also noted that that "Dan Goldman testified further in the habeas court that he felt like Johnson was 'toy[ing] with' him." Hall v. Terrell, 285 Ga. at 456 (2009). The Court concluded that Petitioner had failed to carry his burden of showing "a reasonable probability of a different outcome" if this testimony had been introduced. Id. The Georgia Supreme Court unanimously reinstated Petitioner's death sentence.

F. Federal Habeas Petition

Petitioner filed his federal habeas petition on July 14, 2009. Petitioner filed an amended petition on April 6, 2010.

Petitioner again raised his claim of prosecutorial misconduct with regard to the presentation of the testimony of Johnson. The district court found that claim was procedurally defaulted. Terrell v. Upton, 1:09-CV-1897, p. 12, n.2 (N.D. Ga, Sept. 1, 2010); Terrell, 1:09-CV-1897, p. 13 (N.D. Ga., May 9, 2011).

Petitioner also raised his claims that trial counsel should have called Ms. Benton and Mr. Goldman at trial to show Johnson had allegedly stated that Petitioner was going to tell the truth at Petitioner's third trial. Petitioner alleged this meant Johnson would testify that Petitioner did not murder Mr. Watson. The district court rejected this ineffectiveness claim holding: "By Terrell's own concession, Johnson's remarks to these three individuals are cryptic, which suggests that they have had more than one meaning, not just the interpretation proffered by Terrell. Noting Petitioner had not presented any testimony from Johnson, the court found Terrell has not even offered evidence to support his interpretation of Johnson's remarks or sought to shed light on what exactly Johnson meant by his statements." Id. at 93.

Viewing this evidence, much like this Court, the federal habeas court held:

> In fact, another interpretation of Johnson's statements is that Johnson was not trying to exonerate Terrell but rather toying with defense counsel and Terrell, as Goldman testified at the habeas hearing. Terrell has not denied this interpretation or Goldman's impression. Thus, the impact of introducing such testimony from Benton and Goldman is minimal, and in the totality of the trial, it does not make the likelihood of a different result substantial. *See Harrington*, 131 S. Ct. at 792 ("The likelihood of a different result must be substantial, not just conceivable.").

Id. at 94.

On May 9, 2011, the federal habeas court denied relief. On that same date, the federal habeas court denied Petitioner's application for a certificate of

appealability. The Eleventh Circuit affirmed the denial of federal habeas relief on March 11, 2014. Terrell v. GDCP Warden, 744 F.3d 1255 (11th Cir. 2014).

This Court denied certiorari review on December 1, 2014. Terrell v. Chatman, 135 S. Ct. 726 (2014).

G. Extraordinary Motion for New Trial

Petitioner filed an extraordinary motion for new trial on July 6, 2015. Petitioner claimed "the prosecution argued false - fraudulent statements, before the jury, when it presented, Ms. Foschini saw a black male, with white shirt, and in short, she saw the Defendant." (EMNT, pp. 9-10). Petitioner argues that the trial court noted Petitioner was preceding pro se and dismissed the motion. (Reply, p. 34, citing "Order Denying Defendant's Extraordinary Motion for New Trial"). The trial court **denied** Petitioner's extraordinary motion for new trial. (EMNT Order, pp. 2-3) (emphasis added). Petitioner did not apply to appeal.

H. Second State Habeas Petition

An order setting the execution of Petitioner was filed on November 23, 2015. On December 4, 2015, Petitioner filed his second state habeas petition. The state habeas court dismissed Petitioner's second habeas petition today, December 8, 2015, finding all of Petitioner's claims were procedurally barred based on Georgia law. The Georgia Supreme Court denied Petitioner's application to appeal.

II. REASONS FOR NOT GRANTING THE WRIT

THIS COURT SHOULD DENY CERTIORARI REVIEW AS THE STATE HABEAS COURT DISMISSED PETITIONER'S PETITION ON INDEPENDENT AND ADEQUATE STATE LAW GROUND.

The state habeas court properly concluded that all of Petitioner's claims filed in his successive state petition were barred from review based on state law. As the state court's dismissal of the successive petition was on adequate and independent state law grounds, which are routinely applied in Georgia, the Court should deny certiorari review.

A. Knowingly Presenting False Testimony Claim Properly Found Barred By State Law.

Petitioner alleged that the State knowingly presented the false testimony of Petitioner's cousin, Jermaine Johnson. The state habeas court dismissed this claim holding:

> Petitioner previously raised this claim in his first state habeas petition, and this Court found the claim was procedurally defaulted. (2008 Habeas Order, p. 11). There has been no change in the facts or the law to overcome this procedural bar, nor has Petitioner established a miscarriage of justice. Therefore, this Court finds that this claim is barred from this Court's review. See Bruce v. Smith, 274 Ga. 432, 434 (2001); Gaither v. Gibby, 267 Ga. 96, 97 (1996); Gunter v. Hickman, 256 Ga. 315 (1986). Insofar as this claim was not raised in his prior petition, it is barred under as successive. O.C.G.A. § 9-14-51.

Terrell v. Chatman, Case No. 2015-HC-23 (Dec. 7, 2015, p. 1).

B. Misleading Argument Claim Properly Found Barred By State Law.

Petitioner alleged that the State misled the jury in closing argument by arguing that Marion Foschini had seen Petitioner across the state from the victim's home near the time of the murder. The state habeas court dismissed this claim holding:

> Petitioner also alleges that the State falsely argued that Marion Foschini testified that she saw Petitioner on the day of the murder across the street from the victim's home. As this claim is based on trial testimony, Petitioner could have raised the claim on direct appeal or in his first state habeas proceedings. It is therefore barred as successive. O.C.G.A. § 9-14-51.
>
> Further, as this same claim has previously been raised and rejected in Petitioner's extraordinary motion for new trial, and as there has been no change in the facts or law and as Petitioner has failed to show a miscarriage of justice, it is also barred by the doctrine of *res judicata*. See Walker v. Penn, 271 Ga. 609, 523 S.E.2d 325 (1999); Bruce v. Smith, supra; Gaither v. Gibby, supra; Gunter v. Hickman, supra.

Terrell v. Chatman, Case No. 2015-HC-23 (Dec. 7, 2015, p. 2).

C. Adequate And Independent State Law Grounds Provide No Federal Question

This Court has held on numerous occasions that a state court judgment which rests on an independent and adequate state law ground presents no federal question for adjudication by this Court in a petition for a writ of certiorari. See, e.g., Fox Film Corp. v. Miller, 296 U.S. 207, 210 (1935); Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Michigan v. Long, 463 U.S. 1032 (1983).

Therefore, as the decision of the state habeas court, which Petitioner is requesting that this Court review, clearly rests upon adequate and independent state law grounds, this Court should deny Petitioner's petition for writ of certiorari.

D. There Is No Miscarriage of Justice Exception

The state habeas court also properly concluded that Petitioner had failed to establish a miscarriage of justice to overcome the procedural bars. In Valenzuela v. Newsome, 253 Ga. 793. 796 (1985), the Georgia Supreme Court stated that the term miscarriage of justice is to be reviewed on a case-by-case basis and the Court specifically set "no definitive limits." Id. The Court concluded:

> However, the term is by no means to be deemed synonymous with procedural irregularity, or even with reversible error. To the contrary, it demands a much greater substance, approaching perhaps the imprisonment of one who, not only is not guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry.

Id. The state habeas court properly found Petitioner clearly failed to meet this standard.

The evidence at trial established that Petitioner was the only person with a motive to murder Mr. Watson. Petitioner was released from prison, based on an armed robbery conviction seven weeks prior to the murder. Petitioner admittedly stole Mr. Watson's checks, forged them, and received almost $9000 from Mr. Watson's account. Mr. Watson had given Petitioner until Monday, June 22, the day Mr. Watson was murdered, to pay back the

money. Thus, Petitioner was faced with having his parole revoked and returning to prison, in addition to new forgery charges.

On Sunday, June 21, Petitioner told his mother that he did not have the money. The next morning, June 22, Mr. Watson was murdered in his own driveway; and thereafter, Petitioner had money to go to the Atlanta Zoo and go on a shopping spree for new clothing.

Further, although Petitioner asserts that Johnson's testimony should not be believed, it is corroborated by witnesses throughout the trial. Johnson testified that, on the night before the murder, he and Petitioner slept at a local motel, the Jameson Inn. This testimony was corroborated by staff of the motel.

Johnson testified that on the morning of the murder, he had broken the window of the car around 6:30 a.m., because they had locked the keys in the car, and the two left the motel immediately thereafter. The manager corroborated this as she testified that there was broken glass in the parking lot of the motel around 8:00 a.m.

Johnson testified that he and Petitioner left the motel at approximately 6:30 a.m. and rode around Covington in Petitioner's car. Around 7:30 a.m., Petitioner stopped the car on the side of the road and asked Johnson to drive to Mr. Watson's residence where Petitioner, who was armed with either a .38 or .357 caliber revolver, got out of the car and instructed Johnson to pick him up at 9:00 a.m.

Johnson testified he returned to the Jameson Inn to wait sleeping for awhile before returning to pick up Petitioner. This testimony was also corroborated by the manager of the hotel who saw the Cadillac in the parking lot shortly after 8:00 a.m. in a parking space away from the broken glass. The manager also saw Johnson come down to the car around 8:00 or 8:30 a.m.; she spoke to him and he left.

Correspondingly, Johnson testified that, at approximately 9:00 a.m., he left the motel and went back by Mr. Watson's home to pick up Petitioner as instructed. Johnson stated he did not initially see Petitioner and drove back and forth down the road by Mr. Watson's home, stopping one time and going in a "country store." This testimony is corroborated by the store owner, Ms. Kines, who saw Johnson driving back and forth on the road and waited on him in the store.

Shortly after 9:00 a.m., Johnson eventually heard Petitioner call out for him to stop. After getting into the car, Petitioner removed the .357 revolver from the waistband of his pants and revealed to Mr. Johnson that he had "fucked up" and shot someone.

The pair then drove back to the Jameson Inn Motel to check out before travelling to a Belk's Department store, where Petitioner purchased new clothing. The record corroborates Johnson's statements, thus lending credibility to his account.

Additionally, physical evidence from the crime scene implicated Petitioner. Mr. Watson was shot at relatively close distance; however, a number of shots missed Mr. Watson and went into the ground. Evidence was presented at trial that Petitioner had a "stiff wrist" that caused his wrist to be fixed in downward position, thus accounting for the shots being fired into the ground. See also Terrell v. State, 276 Ga. at 36 (2002).

This testimony and Petitioner's guilt remains unchanged. There is no miscarriage of justice to overcome the procedural bars.

CONCLUSION

Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari seeking review and deny Petitioner's motion for stay of his execution.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing response, prior to filing the same, by email addressed upon:

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This 8th day of December, 2015.

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