IN THE SUPREME COURT OF GEORGIA

BRANDON ASTOR JONES Petitioner	Application No. S16W0778
v.	Superior Court of Butts County Case No. 2016-HC-2
BRUCE CHATMAN, Warden Georgia Diagnostic Prison Respondent.	**EXECUTION SCHEDULED TUESDAY, FEBURARY 2, 2016**

Application for Certificate of Probable Cause to Appeal

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Petitioner	)	Application No. S16W0778
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v.	)	Superior Court of Butts County
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Petitioner Brandon Astor Jones ("Petitioner") respectfully submits this Application for Certificate of Probable Cause to Appeal the judgment of the Superior Court of Butts County ("the habeas court") entered on January 29, 2016 denying him a Writ of Habeas Corpus. *See* Attachment A, hereto. Petitioner makes this Application pursuant to O.C.G.A. § 9-14-52(b) and Georgia Supreme Court Rule 36. Petitioner timely filed a Notice of Appeal in the Superior Court of Butts County on February 1, 2016. Petitioner's execution is currently scheduled for tomorrow, February 2, 2016. A Motion for a Stay of Execution is filed together herewith.

I. SUMMARY OF THE ISSUES TO BE APPEALED

Brandon Jones's death sentence is demonstrably excessive and disproportionate in violation of both the Georgia and federal Constitutions. Article 1, Section 1 of the Georgia Constitution, like the Eighth Amendment of the federal Constitution, prohibits "cruel and unusual" punishments. GA. CONST Art. 1 § 1 ¶

XVII. Both provisions prohibit a criminal sentence that is excessive, or that is arbitrarily or rarely imposed. *Jarrells v. State*, 234 Ga. 410, 216 S.E.2d 258, 270 (1975); *Furman v. Georgia*, 408 U.S. 238, 258 (1972) (BRENNAN, J., concurring). And both provisions acknowledge that "whether a punishment is cruel and unusual is not a static concept, but instead changes in recognition of the 'evolving standards of decency that mark the progress of a maturing society.'" *Humphrey v. Wilson*, 282 Ga. 520, 652 S.E.2d 501 (2007) (internal citations omitted); *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

The two provisions, however, are not precise correlates. Not only is the Georgia protection broader than that contained in the Eighth Amendment, *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951), but this Court has "explicitly held that in interpreting the prohibition against cruel and unusual punishment found in the Georgia Constitution, the applicable standard is '**the standard of the people of Georgia**, not the national standard.'" *Dawson v. State*, 274 Ga. 327, 328, 554 S.E.2d 137, 139 (2001) (citing *Fleming v. Zant*, 259 Ga. 687, 690(3), 386 S.E.2d 339 (1989) (emphasis supplied)). The people of Georgia no longer consider Petitioner's crime to be among the "worst of the worst," or one reflecting "extreme culpability" for which the death penalty must be reserved. *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

This is illustrated by the extreme rarity with which the death penalty has

ever been imposed in Georgia for Mr. Jones's crime, a murder that occurs during the attempted armed robbery of a retail establishment. Even at the time of Mr. Jones's original sentence in 1979, a death sentence for a murder that occurred in those circumstances was an anomaly in Georgia. In fact, a large portion of those offenders who contemporaneously committed a murder during a similar or more aggravated armed robbery have now been paroled. More importantly, today a death sentence is *never* imposed in Georgia for a crime like Mr. Jones's. Since the time of Mr. Jones's crime, a death sentence for a murder that occurs in the context of a place-of-business armed robbery has fallen into complete extinction. A death sentence has not been imposed in Georgia for a murder committed during an armed robbery in the last 20 years. Petitioner's sentence of death is without question, today **in Georgia**, a disproportionate response to his crime.

The review that Petitioner now seeks is not precluded by the Georgia prohibition on second or successive habeas corpus petitions. This Court has indicated that there may be circumstances in which a second proportionality review would be appropriate. *See Fleming v. Zant*, 259 Ga. 687, 688, 396 S.E.2d 339, 340 (1989). This Court has also indicated that, in performing the required review, it must examine not isolated similar cases, but must "view[] a particular crime against the backdrop of all similar cases in Georgia in determining if a given sentence is excessive per se or substantially out of line." *Gissendaner v. State*, 272

Ga. 704, 717, 532 S.E.2d 677, 690 (2000). That "backdrop of all similar cases in Georgia" has not been hereto *available,* let alone examined in the instant case. Petitioner has now amassed and analyzed the information that was not previously available to this Court, and he is entitled to a proper review. The potential that the death penalty will be capriciously applied and result in Mr. Jones's execution where it would not in any similar case, warrants a second proportionality review at this juncture. Finally, the addition of these new facts places Petitioner's current claim outside the Georgia procedural obstacles imposed by O.C.G.A. § 9-14-51, and differentiates his claim from that previously adjudicated, making Georgia principles of *res judicata* inapplicable in the current case.

II. STATEMENT OF JURIDICTION

Pursuant to Article IV, Section IV, Paragraph III of the Georgia Constitution, this Court has jurisdiction over Applications for Certificates of Probable Cause to appeal the final judgment in a capital habeas corpus proceeding.

III. PROCEDURAL HISTORY

On June 17, 1979, Petitioner and co-defendant Van Roosevelt Solomon were arrested in connection with a murder that occurred during an attempted robbery of a gas station. Petitioner and Solomon were both indicted on one count of malice murder in violation of O.C.G.A. § 16-5-1. Both men entered pleas of not guilty,

were convicted at trial, and sentenced to death. Petitioner's death sentence was imposed on October 11, 1979.

Appellate and habeas proceedings relating to Petitioner's conviction and sentence continued for almost ten years. On February 16, 1989, the United States District Court for the Northern District of Georgia granted Petitioner's habeas petition as to his sentence, but not as to his conviction. The District Court vacated Petitioner's death sentence and remanded the case for a new sentencing trial. *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989).

Petitioner's re-sentencing trial commenced in the Superior Court of Cobb County on September 8, 1997—more than 8 1/2 years after the District Court's order granting Petitioner's writ and more than 3 1/2 years after the Georgia Supreme Court's interim appellate review order. On September 23, 1997, the jury returned a verdict of death, after initially stating that they were "at an impasse."

Petitioner filed a timely appeal of the death sentence, and on November 20, 2000, with three dissents, this Court affirmed Petitioner's sentence. *Jones v. State*, 539 S.E.2d 154 (Ga. 2000), *reh. den*. December 14, 2000. The three dissenting justices found that the State's closing argument violated Petitioner's right against self-incrimination and was so fundamentally unfair as to deny due process. *Id.* at

237-39. A timely petition for writ of certiorari in the United States Supreme Court was denied. *Jones v. Georgia*, 534 U.S. 839, *reh. den*. 534 U.S. 1157 (2001).

Petitioner filed an initial petition for writ of habeas corpus relating to the 1997 re-sentencing proceedings, *pro se*, in Butts County Superior Court on February 7, 2002. On October 31, 2003, the petition was amended with *pro bono* counsel. Following a hearing, the court signed the 115-page proposed order drafted by counsel for Respondent and denied relief on each of Mr. Jones's claims.

A timely filed application for a certificate of probable cause to appeal to this Court was denied without opinion on September 3, 2008.

On May 8, 2009, Jones filed a federal petition for writ of habeas corpus attacking his 1997 sentence of death for the first time in the United States District Court for the Northern District of Georgia. On August 10, 2011, the district court denied the petition but granted a certificate of appealability on two claims.

A Motion to Expand the Certificate of Appealability with the United States Court of Appeals for the Eleventh Circuit was denied. Following briefing and oral argument, the court affirmed the district court's order denying relief on March 20, 2014. After Petitioner petitioned the court for rehearing and rehearing *en banc*, the court amended its original opinion to alter its legal analysis of the state court order under 28 U.S.C. §2254, and again affirmed the district court's dismissal. *Jones v.*

GDCP Warden, 753 F.3d 1171 (11th Cir. 2014). An amended petition for rehearing was denied on December 1, 2014.

A timely filed writ of *certiorari* in the United States Supreme Court was denied on October 5, 2015. *Jones v. Chatman*, 136 S. Ct. 43 (2015), *reh. den.*, 136 S. Ct. 570 (Nov. 30 2015).

On January 13, 2016, the Superior Court of Cobb County entered an order directing the Department of Corrections to execute Brandon Jones during a time period beginning at noon on February 2, 2016 and concluding at noon on February 9, 2016. The Department of Corrections has scheduled Petitioner's execution for 7:00 p.m. on February 2, 2016.

This petition follows. A motion for stay of execution is filed herewith. Each of the grounds stated below is predicated on the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution (article I, section I, paragraphs I, II, and XVII).

IV. PETITIONER'S EXECUTION WOULD BE UNCONSITUTIONALLY CRUEL AND UNUSUAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE ANALOGOUS PROVISIONS OF THE GEORGIA CONSTITUTION BECAUSE EXECUTION IS AN ARBITRARY AND DISPROPORTIONATELY SEVERE SENTENCE AS PROVEN BY AN EXAMINATION OF THE SENTENCES IMPOSED UPON SIMILARLY SITUATED DEFENDANTS IN GEORGIA.

No-one, as in nobody, has been sentenced to death in Georgia for committing Petitioner's crime (a common offense) in the last twenty years.

Murder alone is not constitutionally sufficient to warrant the use of the death penalty; "this most irrevocable of sanctions should be reserved for a small number of extreme cases." *Gregg v. Georgia*, 428 U.S. 153, 182 (1976). Crimes for which the offender is executed must fall within that narrow class of murders "more horrid than others." *Thomason v. State*, 268 Ga. 298, 315, 486 S.E.2d 861 (1997) (BENHAM, C.J. concurring in part and dissenting in part); *see also Roper v. Simmons*, 543 U.S. 551 (2005). When the crime falls outside this core class of the most abhorrent murders, a death sentence cannot be carried out. O.C.G.A. § 17-10-35(c)(3); *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

Moreover, the concept of which crimes fall into that "small number of extreme cases" is not static. Rather, it is fluid and dynamic; it changes and progresses as society evolves. As the Supreme Court noted in *Roper v. Simmons*, "we have established the propriety and affirmed the necessity of referring to 'the

evolving standards of decency that mark the progress of a maturing society'" in order to "determine which punishments are so disproportionate as to be cruel and unusual." *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)). "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Id.* at 568 (citing *Thompson v. Oklahoma*, 487 U.S 815 (1988) (O'CONNOR, J., concurring in judgment)).

As the United States Supreme Court has explained, "the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Roper*, 543 U.S. at 560 (internal citations omitted). A punishment is cruel and unusual in Georgia if it "'(1) makes no measurable contribution to accepted goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.'" *Wyatt v. State*, 259 Ga. 208, 209, 378 S.E.2d 690 (1989) (quoting *Coker v. Georgia*, 433 U.S. 584 (1977)).

As will be shown below, the citizens of the State of Georgia – as represented by their elected prosecutors and their juries – have in the last two decades determined that crimes like Petitioner's – a murder committed during an attempted armed robbery of a gas station/convenience store – do not fall in the class of

offenses so "extreme" that society has deemed them the "most deserving of execution." *Id.* A death sentence was once rarely imposed for a spontaneous murder committed during the course of effectuating an armed robbery – Petitioner's is one of those rare instances. But today, a death sentence is never imposed for that crime. The proof before this Court demonstrates that Brandon Jones's sentence is a lone outlier in Georgia, a "freakish and wanton" punishment, an artifact of another era. The Eighth Amendment does not tolerate his execution.

A. Facts Relevant to the Claim

1. Petitioner's Crime.

The State's evidence at Petitioner's trials demonstrated that in the early morning hours of June 17, 1979, Roy Kindel, a patrol officer with the Cobb County Police Department, had occasion to stop at a Tenneco service station/convenience. (RT 1390-91, 1399).[1] There he noticed a green car parked near the front of the store with the door open. (RT 1400). Through the store's glass front, he saw Brandon Jones poke his head out a storeroom door at the back of the store, glance around, and close the door again. (*Id*.) As Kindel entered the store with his gun drawn, he heard three loud pops, followed by a pause, then a

[1] Citations to prior proceedings are as follows:
Transcript of Petitioner's 1979 capital murder trial = TT
Transcript of Petitioner's 1997 resentencing trial = RT
Transcript of Petitioner's 2004 habeas corpus evidentiary hearing = HT

fourth and final pop. (RT 1401). He announced that he was the police, and ordered the occupant(s) out of the storeroom. (*Id*.) No one immediately complied. (RT 1402).

When Kindel opened the storeroom door, Mr. Jones was closest to him near the door, with Solomon some distance behind him. (RT 1402, 1542). Solomon was standing between Mr. Jones and the victim, Roger Tackett, who had been shot and fallen to the storeroom floor in the area immediately behind where Solomon was standing. The victim's body went unnoticed by Kindel as he ordered the two men out of the storeroom. Kindel ordered Jones and Solomon onto the floor face down and searched both men. (RT 1402–03). Neither had a weapon. (*Id*.) Kindel handcuffed Petitioner using his only set of handcuffs, then escorted Solomon to his police car and locked him inside. (RT 1403).

Alex Woolard, a private security consultant who happened to be in the area, heard and responded to Kindel's request for assistance on the police scanner. (RT 1442–43). Woolard and Kindel discovered a van parked near the store. (RT 1445). Woolard questioned Jones, who was handcuffed to a pole in the parking area. (RT 1444–1447). Jones related that they were burglarizing the store and that the green car was not theirs; they had arrived in the van. (RT 1446). Throughout the conversation with Woolard, Jones looked anxiously through the window of the

police cruiser at Solomon. (*Id*.; RT 1454). Eventually, Petitioner stated that there was another man in the back storeroom, "bad hurt." (RT 1447).

Inside, Woolard and Kindel discovered the body of the store manager, Roger Tackett. The store's cash register drawer had been moved from its normal after-hours hiding place and placed inside the storage area wrapped in a plastic garbage bag. (RT 1367, 1381, 1558). After discovering the victim's body, the police recovered two guns from a shallow box inside the storeroom.

Mr. Jones maintains that, though he was present and in possession of a gun when Mr. Tackett was robbed and killed, he did not fire at the victim. Van Solomon alone shot Roger Tackett.

a. **The evidence of a single shooter –Van Solomon**

The primary point of contention at trial was the number of shots fired at Mr. Tackett and consequently, whether there were two separate guns fired, or just one. The victim suffered five gunshot wounds. (RT 1691–94). There is strong evidence to show that those five wounds were made by only four bullets, with a single bullet passing through the victim's thumb before entering his head. This indicates that Mr. Tackett was killed by a single shooter using the smaller of the

two guns (a Colt .38 revolver containing the casings of four spent rounds), and that the second, a Smith and Wesson .38 Special, was not fired during the robbery.[2]

Only the Colt was fired in the storeroom. Four bullets were recovered at the scene, all from the Colt: two were recovered from the victim's body, and two were found on the storeroom floor. (RT 1692–93). All four bullets were a type of ammunition that could not be fired from the Smith & Wesson. (RT 1793-95). Officer Kindel heard a total of four shots that were consistent with the spent ammunition in the Colt: three shots in quick succession, followed by a short pause and a fourth shot (the Colt contained three spent shell casings, followed by a live round, followed by a spent casing). (RT 1401). No fired bullets from the larger Smith & Wesson gun were ever recovered. (RT 1613, 1622-23). Despite conducting additional, thorough searches of the entire interior of the service station and its exterior surrounds, police could not locate any further spent bullets. (RT 1583-84, 1615-17).

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[2] At Solomon's trial, the state conceded that both guns belonged to Solomon, arguing that Solomon was "the man who knew what was going on and was in control. His van, his burglary tools, his gun." *State v. Solomon*, Cobb Co. Superior Court Indictment No. 79-1125, Trial transcript, September 25, 1979 at p. 540.

Mr. Solomon was mentally unstable, (HT 2083-2105), and had several prior convictions for which he had served time in Oklahoma, including one for armed robbery, and another for assault with a deadly weapon after he shot a man in the leg. (TT 2421-2438).

Also, when Officer Kindel entered the storeroom and discovered Solomon and Petitioner, it was Solomon who was standing closest to the body of Roger Tackett, suggesting that Solomon delivered all four shots to the victim. Jones was standing nearest the door; Solomon was behind him and to his right. Were Jones the shooter, he would have had to fire four rounds without hitting Solomon, who was standing in between him and the victim in a space described by the State's crime scene expert as a "little cramped area." (RT 1715). Mr. Jones would have had to accomplish this all while heavily intoxicated. (HT 3072). (In response to the detectives' inquiry about how much he had been drinking on the night of the crime, Jones indicated that "a vodka bottle is just about empty.").

The van parked near the store was owned by Solomon, and it contained burglary tools, as well as holsters for both guns. (RT 1491-93, 1561). A small holster fitting the murder weapon (the Colt or "little gun") sat on the engine cover between the two front seats with its opening pointed in the direction of the driver; a holster fitted to the larger Smith & Wesson was found behind the driver's seat. (RT 1494, 1503 -05).

Though the evidence accounted for only four bullets being fired, the State's pathologist at Petitioner's 1997 resentencing trial posited that the five wounds were in fact made by five separate bullets. (RT 1709-10, 1772-73). He agreed that it was possible that one bullet produced both the wound to the thumb and the wound

to the head. Nevertheless, he suggested that had a bullet first traveled through the thumb, the bullet would then be traveling in an unsteady tumbling motion as it left the thumb and struck the head. (RT 1709-10). According to the State, the reentry wound made by such an unstable bullet would have been irregular in shape. (RT 1770). Neither of the entry wounds to Mr. Tackett's head revealed this expected irregular shape. (*Id*.)

The State's contention, however, ignores three key factors: the nature of the body part struck first by the bullet, the probable distance between the thumb and head wounds at the time they were made, and the other forensic and eyewitness evidence at the scene.

First, a well-credentialed crime scene reconstructionist, Peter DeForest, testified that the thumb is "a fairly negligible" obstacle for a bullet. (HT 204). While a bullet would almost certainly be destabilized by passing through a substantial intermediate object such as a limb or piece of furniture, this would not necessarily be true of a bullet that passed through something with so little mass as the thumb. It is entirely possible that a bullet could continue its path with a tight "spin" undisturbed as it left a thumb, and that the re-entry wound that it would thereafter create would not be irregular in shape.

Second, the State's hypothesis of five separate shots fails to consider that the thumb was likely in close proximity to the victim's head when both wounds were made. As Dr. DeForest testified in the prior proceedings:

> [I]f the thumb was only a short distance from the body when struck by the same bullet, there is likely to be little in the way of evidence of the bullet's "tumbling" to be observed in the shape of the reentry wound. If the bullet passed directly from the thumb to another part of the body as the two were in contact with one another, one would expect no such evidence of irregularity in the reentry wound.

(HT 2044).

Third, the State's five-bullet theory requires ignoring the undisputed physical evidence at the scene – no fifth bullet from the Smith & Wesson was recovered despite an exhaustive search – as well as the eyewitness testimony from the responding officer who heard only four shots. A theory which fails to account for all the evidence violates the cardinal principles of crime scene investigation and reconstruction. (*Id*.)

Finally, the atomic absorption test for gunshot residue performed on each man's hands does little to inform the inquiry. The test alerted to the presence of antimony, barium or lead on Jones's and Solomon's hands. As an initial matter, the science behind that test is now regarded as unreliable.[3] And in any event, it

[3] *See* Schwoeble & Exline, Current Methods in Forensic Gunshot Residue Analysis (2000).

does not answer the key question in this case. The state's examiners did not identify, quantify or report the levels of each substance found, making it impossible to rule out that one or more of these metals came from another source – such as lead paint.[4] And even *if* the elements on Jones's hands were gunpowder, it does not indicate that he fired a gun during the crime. The elements could have been deposited there when Jones handled the Smith & Wesson revolver which contained two spent rounds fired at some point prior to the robbery, and/or when Mr. Jones stood in close proximity to Solomon as he fired his revolver in the tiny storeroom.[5] Solomon was also wearing brown cotton gloves when Kindel discovered him in the storeroom, and he later attempted to conceal them between the seats of Kindel's patrol car. (RT 1402, 1408, 1431-33). The gloves were never subjected to chemical analysis for gunshot residue, though the GBI chemist testified that it would have been possible to do so. (RT 1673).

As previously stated, Mr. Jones has consistently maintained that he did not fire at the victim. There is considerable circumstantial evidence to suggest this is true. The evidence establishes that there was just a single shooter during Mr. Tackett's armed robbery. That same evidence strongly suggests just what Mr.

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[4] Jones and Solomon spent the day prior to the crime working in Solomon's contracting business; they were painting. (TT 398-399).

[5] *See, e.g.*, https://leb.fbi.gov/2011/may/the-current-status-of-gsr-examinations (FBI Bulletin indicating that any person or surface within three feet of the person firing a weapon may test positive for particulate of gunshot residue).

Jones has always contended: that shooter was Van Solomon. However, even if this Court is not persuaded that Mr. Jones did not fire his weapon, his death sentence remains arbitrary and disproportionately severe in light of the hundreds of other armed-robbery murder cases in Georgia from 1975 to 2015.

2. The Sentence for This Crime Is Now Always Less Than Death.

Offenses like that committed by Mr. Jones and Mr. Solomon happen with unfortunate frequency. The proof gathered through counsel's investigation reveals that in Georgia, a murder committed while attempting to effectuate the armed robbery of a retail establishment such as a convenience store has occurred more than 430 times in the modern death penalty era.[6] The investigation directed by undersigned counsel continues to identify additional instances of this crime each day, so the number of such similar offenses in Georgia is actually higher. *See, e.g., State v. John Willie Williams,* Superior Ct of Richmond Co., Case No. 42 (January 1981 Term), guilty plea entered February 23, 1981 (sentenced to life plus twenty five years) (case information obtained *after* the compilation of counsel's study).

The majority of the 430 armed robbery offenses identified by counsel's investigation were similar to or more aggravated than the crime committed by Mr.

[6] Petitioner's counsel has examined cases from 1975, when the Georgia capital sentencing scheme was revised to pass constitutional muster in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), through 2015.

Jones. Nevertheless, those defendants almost always received a sentence of life imprisonment, and indeed, some of them received a sentence shorter than life. In fact, dozens – *dozens* – of offenders who committed murders during an armed robbery *after* Mr. Jones's 1979 crime have completed their sentences and have been paroled.

A small handful of these 430 cases received the death penalty. But of those, several were reversed early in the post-*Furman* era, and a sentence of life imprisonment subsequently imposed.[7] The fact is, of 430 persons whose cases can be located today and examined, only 11 defendants other than Mr. Jones received a death sentence that was ultimately affirmed for a homicide committed during the course of an armed robbery.[8] This number includes Mr. Jones's codefendant, Van

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[7] *See e.g., Smith v. State*, 249 Ga. 228, 290 S.E.2d 43 (1982), habeas corpus relief granted by *Smith v. Kemp*, 664 F. Supp. 500 (M.D. Ga. 1988); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977), habeas relief directed by *Corn v. Kemp*, 837 F.2d 1474 (11th Cir. 1988); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977); *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976), habeas relief granted by Tattnall Cnty. Super. Ct. No. 77-358, Order of June 20, 1979; *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

[8] *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1981); *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983) ; *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984)**;** *Kinsman v. State*, 259 Ga. 89, 376 S.E.2d 845 (1989); *Meders v. State*, 261 Ga. 806, 411 S.E.2d 491 (1992); *Brockman v. State*, 292 Ga. 707, 739 S.E.2d 332 (2013); *Mobley v. State*, 265 Ga. 292, 455 S.E.2d 61 (1995); *Cromartie v. State*, 270 Ga. 780, 514 S.E.2d 205 (1999); *King v. State*, 273 Ga. 258, 539 S.E.2d 783 (2000); *McClain v. State*, 267 Ga 378, 477 S.E.2d 814 (1996).

Roosevelt Solomon, who actually shot the victim. In other words, by Georgia's own community standards, more than 418 people who committed murder while attempting to rob a business over the past 40 years have received sentences of life or shorter.

More important, no Georgia defendant, other than Petitioner, has received a sentence of death for such an offense committed in the past twenty years. In sum, Mr. Jones is "among a capriciously selected random handful upon which the sentence of death has in fact been imposed," *Furman*, 408 U.S. at 309-310, 92 S. Ct. at 2726 (concurring opinion), and his death sentence is, today, a complete anomaly. "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence." *Montgomery v. Louisiana*, 577 U.S.__, 2016 WL 280758 (Jan. 27, 2016). This Court must enforce that protection, stay Mr. Jones's execution and vacate his disproportionate sentence of death.

a. 1975-1994: A Death Sentence for an Armed Robbery-Murder Is Exceedingly Rare in Georgia.

The 11 cases that resulted in death sentences share two key characteristics. First, the offenses for which death was imposed were committed early in the post-*Furman* era. Most of the eleven retail-armed robbery crimes resulting in a death

sentence occurred in the late 1970s or 1980s.[9] A few happened in the early 1990s.[10] It bears repeating: None have occurred in the last twenty years.

Second, those crimes for which the death penalty was imposed typically were more aggravated than Mr. Jones's in some substantial way. *See, e.g.*, *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977) (armed robbery of a barbershop in which the victim was found comatose in a pool of his own blood after being stabbed in the chest and beaten over the head with a claw-hammer); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984) (two men interrupted the robbery of a cocktail lounge; Spivey shot both multiple times and returned to fire again when he heard one of them moan, killing one; shot bar employee in the hip and took a woman hostage and fled to Alabama); *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983) (Mincey chose to rob gas station after finding only a female

[9] *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977) (crime occurred December 1975); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984) (crime occurred on December 1976); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1981) (crime occurred June 1979); *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983) (crime occurred April 1982); *Kinsman v. State*, 259 Ga. 89, 376 S.E.2d 845 (1989) (crime occurred September 1986); *Meders v. State*, 261 Ga. 806, 411 S.E.2d 491 (1992) (crime occurred June 1987).

[10] *Brockman v. State*, 292 Ga. 707, 739 S.E.2d 332 (2013) (crime occurred June 1990); *Mobley v. State*, 265 Ga. 292, 455 S.E.2d 61 (1995) (crime occurred February 1991); *Cromartie v. State*, 270 Ga. 780, 514 S.E.2d 205 (1999) (crime occurred April 1994); *King v. State*, 273 Ga. 258, 539 S.E.2d 783 (2000) (crime occurred September 1994); *McClain v. State*, 267 Ga. 378, 477 S.E.2d 814 (1996) (crime occurred November 1994).

cashier and two teenage customers inside. After voicing intent not to leave witnesses, Mincey shot approaching customer in the chest and the face while holding cashier at gunpoint, blinding him, then shot and killed cashier when she ran away); *Cromartie v. State*, 270 Ga. 780, 514 S.E.2d 205 (1999) (after shooting the store clerk in the face during a 1994 armed robbery of a convenience store, Cromartie robbed another store the next day and again shot the clerk twice in the face, killing him). The fact is, even the few offenses similar to Petitioner's that resulted in death sentences were often characterized by factors that made those defendants markedly more culpable than Mr. Jones – such as multiple shooting victims who survived or a defendant who was the known trigger-person.

b. 1995-2015: A Death Sentence Is *Never* Imposed for This Crime in Georgia.

No constitutionally-sound death sentence has been imposed for any similar offense that has occurred after 1994, in spite of the offense continuing to happen regularly during this era. Mr. Jones's 1997 resentencing verdict –imposed by a jury that was initially hung and with lawyers who failed miserably to introduce significant mitigating evidence— is the *only* exception. The prevailing conscience of the citizens of the State of Georgia is thus shown in the most demonstrative manner imaginable: by the charging decisions of their elected representatives and through their own jury verdicts. That community conscience is now, and has been for at least twenty years, that a spontaneous murder committed while carrying out

the armed robbery of a retail establishment – while extremely serious and deserving of serious punishment – is not among the "worst of the worst" offenses for which the death penalty is constitutionally reserved.

c. Many Armed Robbery-Murders That Resulted in a Life Sentence Were Far More Aggravated Than Mr. Jones's Crime.

As noted, of 430 similar offenses since 1975, well over 400 of them resulted in non-death sentences. And an examination of those 400-plus life sentences that were imposed for the same crime further highlights just how anomalous his sentence of *death* is by comparison. None of the characteristics of Mr. Jones's offense set it apart in terms of culpability. In fact, an expert statistical study of the sentencing patterns in all 430 cases of murder during the armed robbery of a retail establishment, concludes that the factors in Mr. Jones's crime would result in a predicted sentence of life or slightly less. (App. 3 at 4).

The stark – unconstitutional –severity of Mr. Jones's sentence is highlighted by comparing it to the legion of cases that resulted in a life sentence. Even for offense conduct that is uniquely vile or aggravated, a death sentence has not been imposed for murder committed during a place-of-business armed robbery. Some examples:

James T. Jackson was convicted of murder while robbing a bridal shop in Albany, Georgia in 1982. He absconded with all the cash from the store and the

victim's car. When the bridal shop's proprietor did not return home for dinner, her daughter went to the store to check on her and found the following:

> At the time [the owner of the store] Mrs. Raybun was discovered, her face was lacerated and she showed no signs of life. Blood spattered the floor, the wall, Mrs. Raybun, and a telephone and desk. Her pants were off and her body was bare from the waist down. There were between sixteen and twenty-two individual stab wounds to her body, with several thin stab wounds on both sides of her neck. Deep circular puncture wounds in her chest and abdomen showed surface handle impressions indicating that a weapon had been inserted to the hilt. Her heart and lungs were punctured by sharp instruments and her scalp was lacerated, bruised, and torn. Her head and body were bruised. The victim died as a result of stab wounds to her chest and abdomen. Vaginal swabs were taken from the body and under analysis showed the presence of semen. Dried matter on the victim's abdomen was collected and analyzed as saliva from a person with type O blood. Jackson has type O blood and the victim had type A blood.

Jackson v. State, 249 Ga. 751, 752, 295 S.E.2d 53, 55 (1982). Jackson was not sentenced to death; the jury's verdict imposed life in prison. (App. 3 (case data) at row 69).

In 1979, **Joseph Chafin, with the help of Jackie Beaver**, robbed the Oak Park Inn in Brunswick. *Chafin v. State*, 246 Ga. 709, 273 S.E.2d 147 (1980). He fatally shot the night manager and stole the cash box. *Id.* at 709. Over the course of the night, Chafin threatened Beaver that if he did not also rob and kill someone, Chafin would kill him and a member of his family. *Id.* They then drove to another motel, where Beaver robbed and murdered the night manager. *Id.* Chafin was

sentenced to life imprisonment plus twenty years, (*Id.* at 710), and was paroled in 2010. (App. 3 at row 36). Beaver was sentenced to 25 years. (*Id.* at row 35).

Similarly, **Anthony Cobb and Harold Sneed** went on a multi-county, multi-state armed robbery spree in 1976, robbing and killing the desk clerks at several hotels, including three robbery-murders during their time in Georgia. *Cobb v. State,* 250 Ga. 1, 295 S.E.2d 319 (1982); *Cobb v. State,* 244 Ga. 344, 260 S.E.2d 60 (1979). Cobb received a life sentence for murder in two of the Georgia counties and a death sentence in the third. That death sentence was subsequently overturned, *Cobb v. State,* 244 Ga. 344, 260 S.E.2d 60 (1979), and Cobb was resentenced to life imprisonment on remand. Sneed received a life sentence and was paroled in 2010. (App. 3 at row 22).

In 1993, **Donnie and Monaleta Allen** robbed Spell's Place Package store in Lowndes County. Mr. Allen told everyone in the store to get down, and then began shooting. He shot at six to eight people, wounding the owner and killing a customer. Mr. Allen was sentenced to life imprisonment. (App. 3 at row 187, 188).

The *Allen* case is exemplary of any number of cases, unlike Petitioner's, in which multiple persons were shot during the course of the robbery, and yet resulted in the imposition of a life sentence. In April 1991, **Willie Parish and Allen Grace** robbed the Bee Line grocery store while Allen's uncle, James Grace, stood guard

outside. *Grace v. State*, 763 S.E.2d 461, 461 (2014). One of the store employees, Anthony Justiss, was shot once in the head; he died. *Id.* A second employee, Warren Jackson, was shot twice in the head; his injuries rendered him blind in one eye. *Id.* at 461-62. Grace and his accomplices took the cash register and a cash box, and they fled to another county, where Grace opened fire on two police officers. *Id.* He shot one in the face point-blank. *Id.* Grace was indicted for malice murder, aggravated battery, and aggravated assault. *Id.* He was sentenced to consecutive terms of life for the murder and armed robbery, and consecutive terms of years for the aggravated battery and aggravated assault. *Id.* Grace's uncle James Grace was also convicted of the same offenses and was sentenced to life imprisonment for the murder, and consecutive terms of years for the remaining crimes. *Grace v. State*, 262 Ga. 746, 747, 425 S.E. 2d 865 (1993). (App. 3 at rows 152, 153); *accord*, *Chapman v. State*, 273 Ga. 348, 541 S.E.2d 634 (2001) (both proprietors of a neighborhood grocery shot during Chapman's attempt to rob the store to feed his crack cocaine addiction. Chapman did not receive a death sentence). (App. 3 at row 147).

d. Many of the Men Who Committed This Crime Contemporaneously With Mr. Jones's Crime Received a Term of Years or Have Been Paroled from a Life Sentence.

The full force of the unconstitutional sentencing disparity that this case represents is perhaps best evidenced by the fact that the majority of persons who

committed this same crime during the late 1970s and early 1980s are now on parole, or have completed their sentences entirely. *Id.* This is true even for offenders who were confirmed to be, or admitted to being, the actual shooter/assailant. Of the offenders who committed their murders in the years 1978 to 1980, a full 75% are currently living outside of prison on parole. Again, some examples:

Jeffrey Rex Dillard, Jr. and three co-defendants robbed the In and Out grocery store in August 1977. (App. 3 at row 30). They entered the grocery store, selected a few items, put the items on the counter, and drew their guns on the man behind the counter, Johnny Conyers. *Id.* Conyers was not an employee; he was a customer who had simply been using the phone to make a personal call. *Id.* Believing that Conyers was calling the police, Dillard ordered him to put the phone up. *Id.* When Conyers moved, Dillard shot him in the chest and Conyers died on the scene. *Id.* Dillard was sentenced to life imprisonment for the murder. *Id.* at 27. He was paroled in August 2006 after serving 29 years in prison.

Gregory Thompson robbed the C.B.C. Convenience Store in Chatham County in June 1984, during the course of which he murdered Richard Robinson. Thompson was charged with armed robbery and murder. He pled to voluntary manslaughter and armed robbery. (App. 3 at row 85). He was released in 2004 after serving a twenty-year sentence.

During the year of Mr. Jones's crime, 1979, a total of 14 offenders who committed a place-of-business armed robbery were documented in the study. Two of those men are currently serving a life sentence. Two of them, Brandon Jones and Van Solomon, were sentenced to death. The other ten men are currently on parole – some of them living successfully in the community for many years now – in spite of offenses that were similar to or more aggravated than that committed by Mr. Jones.

3. This Court Failed to Cull Petitioner's Anomalous Death Sentence.

This Court's initial proportionality review was insufficient to capably identify and vacate Petitioner's sentence as disproportionate. Petitioner was sentenced to death for a crime which overwhelmingly – indeed, now **uniformly** – results in a life sentence or a sentence of a term of years, and yet his death sentence was affirmed. In its prior review in this case for proportionality, the Court was unable to actually consider the sentences "imposed in similar cases," O.C.G.A. §17-10-35(c)(1), (3). Consideration of these sentences would have shown "that the factors that most clearly ought to affect application of the death penalty – namely, comparative egregiousness of the crime" did not. *Glossip v. Gross*, __U.S.__, 135 S. Ct. 2726, 2760 (2015) (BREYER, J., dissenting).

After *Furman v. Georgia*, 408 U.S. 238, 310, 313 (STEWART, J., concurring) (WHITE, J. concurring) (1972), the Supreme Court of the United States required

those states that permit capital punishment to institute procedures that protect against the "wanton" and "freakish" imposition of the death penalty and provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.*; *see Parker v. Dugger*, 498 U.S. 308 (1991). In striking down Georgia's capital sentencing scheme in particular in *Furman*, the United States Supreme Court observed that it placed unfettered discretion in the hands of juries, resulting in the arbitrary, and often discriminatory, issuance of capital sentences. *See generally id.* at 254-56 (DOUGLAS, J., concurring). Consequently, death sentences in Georgia were "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* (quoting *Furman*, 408 U.S. at 309 (STEWART, J., concurring opinion)).

In response, Georgia amended its statutory scheme to, *inter alia*, charge this Court with the task of reviewing every death sentence imposed in the superior courts of the state. O.C.G.A. § 17-10-35. The statute explicitly directs this Court to determine "whether the sentence of death is excessive or disproportionate to the penalty **imposed in similar cases**…." O.C.G.A. §17-10-35(c)(1), (3) (emphasis supplied). Specifically, the Court must focus on "how prior sentencers have responded to acts similar to those committed by the defendant whose case is being reviewed" and to set aside death sentences that are out of line with sentences imposed for similar crimes. *Terrell v. State*, 276 Ga. 34, 40, 572 S.E.2d 595, 601

(2002) (internal citation omitted). As this Court summarized its task in an early opinion, this new proportionality review required that "if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive." *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 616 (1974). By this standard, Petitioner's death sentence must now be set aside.

Indeed, when the Supreme Court upheld Georgia's amended capital sentencing scheme in *Gregg v. Georgia*, 428 U.S. 153 (1976), it did so because it believed the statute's new procedures would protect against the influence of impermissible factors in the imposition of death sentences. The *Gregg* Court explained how the Georgia statute had addressed the concerns of *Furman*:

> [T]he Georgia statute has an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and "(w)hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

428 U.S. at 204-05.

This Court has held that, in performing [the] sentence-review function, "if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set

aside as excessive." *Coley v. State*, 231 Ga. at 834, 204 S.E.2d at 616. As the Court indicated in *Moore v. State*, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975):

> As we view the court's duty in light of the *Furman* and *Jackson* cases and the statutory provisions designed by the Georgia legislature to meet the objections of those cases, this court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics. On the contrary, **we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly and freakishly imposed,**' as stated by Justice Stewart in his concurring opinion in the *Furman* and *Jackson* cases.

Id. (internal citations omitted) (emphasis added).[11]

[11] The Supreme Court of the United States subsequently held that this Court's proportionality review passed constitutional muster because its scope included similar cases in which a sentence of *life*, and not just death, was imposed. *Id*. As Justice Stevens, then a member of the Court, later wrote, "[w]e assumed that the court would consider whether there were 'similarly situated defendants' who had not been put to death because that inquiry is an essential part of any meaningful proportionality review." *Walker v. Georgia*, ___ U.S. ___, 129. S. Ct. 453 (2008) (Stevens, J., statement respecting denial of certiorari). This Court confirmed that assumption when it responded to a certified question posed in *Zant v. Stephens*, 462 U.S. 862 (1983), stating expressly that its proportionality review "uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed." *Stephens*, 462 U.S. at 880 n. 19 (internal citation omitted). "That approach seemed judicious," Justice Stevens wrote, "because**, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court**." *Walker*, 129 S. Ct. at 454-55 (emphasis supplied).

Well over four hundred cases similar to or more aggravated than Petitioner's have been documented that resulted in a life sentence or less. Only 11 times, in forty years, has an arguably similar crime resulted in a death sentence – and none in a similar crime committed in the last twenty years.[12] "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey v. Georgia*, 446 U.S. 420, 443, 100 S. Ct. 1759 (1980) (plurality opinion).

e. The Eighth Amendment No Longer Tolerates Petitioner's Execution.

"[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Godfrey*, 446 U.S. at 428. Because this Court was without the information necessary to fulfill its constitutional duty to guard against disproportionate sentences, the Georgia capital sentencing statutory scheme is plainly in question. Petitioner would assert that the system as a whole

[12] Given the time constraints of his impending execution date, Petitioner has surely not captured *all* of the available retail armed robbery-murder cases in the last forty years *that resulted in no death sentences*. However, he *has* captured *all* of the similar cases that have yielded death sentences. While there are likely dozens more similar life-sentence cases over the last forty years than the 418 Petitioner has identified, the number of similar *death* sentences is known and fixed: no more than 11 total since 1975, and *zero* in the last twenty years.

may no longer be constitutional. *Furman*, 408 U.S. at 248 (striking down the then-current system because "[j]uries [or judges, as the case may be] have practically untrammeled discretion to let an accused live or insist that he die"); *see also Glossp v. Gross*, __U.S.__, 2775, 2776 (BREYER, J., GINSBURG, J., dissenting) (Because "[t]he circumstances and the evidence of the death penalty's application have changed radically" in the forty years since the Court upheld the death penalty statutes believing they "contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily," Justice Breyer finds it "highly likely" the death penalty violates the Eighth Amendment.) But whether or not this is true in general, with regard to Petitioner's death sentence in particular, there is no question that it is so disproportionate to the sentence almost always typically imposed for his offense that it cannot stand.

The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). This is not a static concept. *See, e.g., Roper*, 543 U.S. at 560; *Atkins v. Virginia*, 536 U.S. 304, 311-312 (2002); *Coker v. Georgia*, 433 U.S. 584, 593 (1993); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). The Eighth Amendment demands that this Court vacate a defendant's death sentence "[i]f a time comes when juries generally do not impose

the death sentence in a certain kind of murder case, [because] the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death." *Gregg*, 428 U.S. at 206. An overall consensus in sentencing outcomes across cases is a predominant measure of society's "evolving standards of decency." *Graham v. Florida*, 560 U.S. 48, 62 (2011) ("Actual sentencing practices are an important part of the Court's inquiry into consensus."). Over time, a consistent direction of change in prosecutorial charging decisions and jury verdicts toward life sentences for a particular class of crimes can make the death penalty inappropriate and unconstitutional in an entire class of cases. *Coker*, 433 U.S. at 603; *Gregg*, 428 U.S. at 181; *Enmund*, 458 U.S. at 794.

Prosecutors and jurors have reached a consensus in Georgia. A death sentence is no longer imposed or appropriate for Mr. Jones's crime, a single-victim killing during a store robbery. Petitioner maintains that his death sentence was disproportionate even when first imposed in 1979. But by 1997, a consensus had clearly been reached that the shooting death of a single victim during the course of an armed robbery of a retail business, while horrifying, does not fall into that class of cases so appalling that no other punishment is sufficient. And today the consensus is beyond doubt. This consensus is far clearer than that which compelled a number of the Supreme Court's seminal Eighth Amendment decisions, and it has been in place for a far longer period of time. *See, e.g.*,

Kennedy v. Louisiana, 554 U.S.407 (2008) (no death sentence even for aggravated rape); *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012).

Finally, because cases more aggravated than Petitioner's routinely result in a sentence of life (even parole) and not death, Petitioner's death sentence is also unconstitutionally excessive. The Eighth Amendment requires that punishment serve a legitimate end. If a lesser punishment is able to satisfy society's legitimate interests, execution becomes nothing more than the "pointless and needless extinction of life" which is "patently excessive," violating both the Eighth Amendment and Georgia law. *Furman*, 408 U.S. at 312 (WHITE, J., concurring); *see also Wyatt*, 259 Ga. at 209 (punishment is cruel and unusual in Georgia if it does not measurably contribute to accepted goals of punishment and hence is nothing more than purposeless and needless imposition of pain and suffering, or if it is grossly out of proportion to the severity of the crime) (quoting *Coker v. Georgia*, 433 U.S. 584 (1977)). Given the consistency with which lesser sentences are utilized to punish conduct far more vile than Mr. Jones's, a sentence less than death would suffice to serve society's interest in punishing Petitioner for his 36-year-old crime, particularly when he has already served over 36 years in prison facing the death penalty.

"The arbitrary imposition of punishment is the antithesis of the rule of law." *Glossip v. Gross*, __U.S.__, 135 S. Ct. 2726, 2759 (2015) (BREYER, J., dissenting). The Georgia courts have until now failed to offer Petitioner a process sufficient to protect against a "death sentence[] [that is] cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309 (STEWART, J., concurring). Petitioner's sentence is grossly disproportionate and excessive when the court considers both the crime and the defendant as required by Georgia law and the federal Constitution. This Court should enter an immediate Order staying Mr. Jones's execution and vacate his unconstitutional sentence of death.

f. This Claim Is Properly Before The Court For Review.

As noted above, this Court has acknowledged that there may be instances in which a change in the facts or the law warrants a second proportionality review of a death sentence. *Fleming*, 259 Ga. at 688. Petitioner would submit that, given the proof now before this Court, and given this Court's statutory and constitutional role as a stop-gap against wanton and freakishly imposed death sentences, a second proportionality review is warranted and just in this instance.

1. Petitioner's Claim Is Not *Res Judicata*.

The doctrine of *res judicata* prohibits a court from addressing an issue that has previously been resolved; in Georgia, the doctrine applies only to the

adjudication of the "same issues." *Head v. Carr*, 273 Ga. 613, 544 S.E.2d 409 (2001). The issue of whether the Eighth Amendment permits Mr. Jones's execution could not have been addressed in the earlier proceedings because neither the factual nor the legal bases for this claim were previously available. Petitioner's claim is thus reviewable on the merits. *Tucker v. Kemp*, 256 Ga. 571, 573, 351 S.E.2d 196 (1987).

2. Petitioner's Execution Would Be a Miscarriage of Justice; This Court Therefore Has Authority to Reach the Claim.

However, should this court find the doctrine applicable here, this Court has made clear that *res judicata* is not an absolute bar to the consideration of this claim. In *Walker v. Penn*, 271 Ga. 609, 523 S.E.2d 325 (1999), the Court wrote:

> While an issue actually litigated and decided on direct appeal is precluded from being relitigated on habeas corpus, a narrow exception has been carved where petitioner can show that the writ is necessary to avoid a miscarriage of justice.

Walker, 523 S.E.2d at 326.

Pursuant to *Walker*, the miscarriage of justice exception allows this Court to consider the merits of a claim that was decided on direct appeal. While the standard for the miscarriage of justice exception is extremely high and narrowly applied, Petitioner's case fits within the exception. Because his death sentence is grossly disproportionate to the lesser sentence now uniformly imposed on other

offenders who commit his offense, Mr. Jones is actually innocent of the death penalty. As such, his execution would be a miscarriage of justice.

Both this Court and United States Supreme Court have held that the imposition of the death penalty is unconstitutional and disproportionate if it is imposed in a case that is in a class of cases that so rarely get the death penalty that the capital sentence is freakish or wanton. *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584 (1977*); Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974). Here, Petitioner has shown that the death penalty is simply not warranted for his particular crime because it is now *never* imposed in Georgia for such a crime. If a sentence is disproportionate, then the offender is actually innocent of the death penalty and cannot be punished capitally. *See Sawyer v. Whitley*, 505 U.S. 333, 345, 112 S. Ct. 2514, 2522 (1992). By proving his proportionality claim, Petitioner demonstrates that he is actually innocent of the death penalty. And because executing someone who is actually innocent of the death penalty would be a miscarriage of justice, Petitioner's proportionality claim is not barred by the doctrine of *res judicata*.

3. The Claim Is Not Procedurally Defaulted.

Pursuant to O.C.C.A. § 9-14-51, all grounds not raised in Petitioner's prior challenge to his conviction and sentence are deemed waived unless this Court determines that the "grounds for relief asserted [here]in…could not reasonably have been raised in the original or amended petition." Petitioner easily clears that

bar. The underlying legal basis of Petitioner's Eighth Amendment claim was previously unavailable. As stated *supra*, the "evolving standards of decency" to which courts must look in order to "determine which punishments are so disproportionate as to be cruel and unusual" are not static. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (citing *Trop*, 356 U.S. at 100-101 (1958)). Rather, punishments once considered proportionate can reach a point where they are imposed with such rarity that they may be held to be unconstitutional. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

Petitioner's Eighth Amendment claim has accrued over many years, as death sentences for murder committed in the course of robbing a business fell into extinction in Georgia. This intervening evolution in the law since the time of Petitioner's prior challenges places his case outside the restrictions on successive habeas petitions found in O.C.G.A. § 9-14-51. *See State v. Cusack*, 296 Ga. 534, 535, 769 S.E.2d 370, 372 (2015) ("a claim that could not reasonably be raised in an earlier petition would likely include the circumstance in which a change in the law after the first petition might render a later challenge successful").

Societal standards of decency make clear that execution is now a disproportionate response given Mr. Jones's crime. Execution would be disproportionate and unusual. Relief should follow.

V. CONCLUSION

For the reasons set forth herein and those set forth in all pleadings and exhibits submitted by Petitioner to the habeas court in support of his Petition for Writ of Habeas Corpus, Petitioner's Application for Certificate of Probable Cause satisfies this Court's "arguable merit" standard. Petitioner respectfully requests that this Court grant his Application, stay his execution, and order briefing and argument on his appeal.

Respectfully submitted this 1st day of February, 2016.

_____

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been served on counsel for Respondent via this Court's electronic filing system. In addition, counsel for Respondent has been served via United States mail, postage prepaid, at:

Sabrina Graham
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This 1st day of February, 2016.

/s/ Gerald W. King, Jr.
Gerald W. King, Jr.
Ga. Bar No.140981

EXHIBIT A

THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

BRANDON ASTOR JONES,	*	
Petitioner,	*	**CIVIL ACTION NO.**
	*	**2016-HC-** 2
v.	*	
	*	
BRUCE CHATMAN, Warden,	*	
Georgia Diagnostic and	*	
Classification Center,	*	
Respondent.	*	

ORDER

This is Petitioner's second state habeas petition. As all of Petitioner's claims are barred from this Court's review in this proceeding, the petition is DISMISSED and the stay DENIED.

1. Petitioner alleges his sentence of death is disproportionate in violation of the Eighth Amendment. Petitioner raised this claim on direct appeal following his resentencing trial and it was denied by the Georgia Supreme Court. See Jones v. State, 273 Ga. 231, 233 (2000). This Court found it was barred under the res judicata doctrine in Petitioner's first state habeas proceeding following his resentencing trial. 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);

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Rhonda Smith
[redacted] Clerk, Butts Superior Court

Gunter v. Hickman, 256 Ga. 315 (1986). Alternatively, this Court finds this claim is non-cognizable.

2. Petitioner alleges that his lengthy incarceration is in violation of the double jeopardy clause of the Fifth Amendment. 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.

3. Petitioner alleges that his lengthy incarceration constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendment. Petitioner raised this claim on direct appeal following his resentencing trial and it was denied by the Georgia Supreme Court. See Jones v. State, 273 Ga. 231, 233 (2000). This Court found it was barred under the res judicata doctrine in Petitioner's first state habeas proceeding following his resentencing trial. 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 before, it is barred as successive. O.C.G.A. § 9-14-51.

As this Court is able to determine from the face of the pleadings that the claims in the petition are barred from this Court's review, the petition is dismissed without the necessity of a hearing. See Collier v. State, 290 Ga. 456 (2012). Additionally, Petitioner's request for a stay of execution is denied.

SO ORDERED, this 29 day of January, 2016.

THOMAS H. WILSON
Chief Judge of the Superior Courts
Towaliga Judicial Circuit

Prepared by:
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Pleading and Proposed Order, prior to filing the same, by emailing, properly addressed upon:

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This 29 day of January, 2016.

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