Nos. 15-7929, 15A801

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON ASTOR JONES

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 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 does not conflict with this Court's precedent. Certiorari review should be denied.

I. STATEMENT OF THE CASE

Petitioner's crime was not a spontaneous murder committed during the course of an armed robbery. It was the cold-blooded execution of an unarmed man over a few paltry dollars.[1]

On June 16, 1979, Roger Tackett, the night manager of the Tenneco gas station, arrived at the store around 11:20 p.m. to complete paperwork and close the store for the night. While Mr. Tackett was in the process of shutting down the store, Petitioner and his Co-Defendant, Van Solomon, entered the store with two loaded weapons for the express purpose of committing an armed robbery. The men forced Mr. Tackett into the storeroom of the station and cold-bloodedly executed him. There is no evidence that the victim fought back or had a weapon.

[1] Petitioner's attempt to create a new category by repeatedly referring to his crime as commission of a murder during an armed robbery of a "retail establishment" is offensive. The lives of the individuals who are murdered that work at a "retail establishment" are no different, certainly not less, as implied by Petitioner, than the lives of individuals murdered elsewhere.

A police officer on his normal beat noticed the store's lights were on past closing hours. Upon investigation, he found Petitioner and Van Solomon standing in the storeroom of the station with the Mr. Tackett lying dead on the floor.

Mr. Tackett had abrasions on his forehead, cheeks, knees and elbow. He had been shot five times from behind. Mr. Tackett had received a gunshot wound to his thumb that appeared to have been inflicted several minutes prior to the other four shots. He also received shots to the upper hip, the buttocks, and a shot above his left ear which fractured his facial bones and teeth. The killing shot was fired into the back of Mr. Tackett's ear as he laid on his stomach as if he was murdered in an "execution" method. Jones v. State, 273 Ga. 231, 231-233. Blood breathed into lungs established that he had lived for some period of time after the shot that shattered his facial bones. Each co-defendant claimed the other was the shooter; however, both men had gunshot residue on their hands.

Although Petitioner argues extensively about his culpability compared to his Van Solomon, this same evidence was introduced and argued at trial. Both men

were convicted of malice murder and sentenced to death.[2] Van Solomon was executed in 1984.

A. First Trial and Appeals (1979-1989)

Following his jury trial, Petitioner's conviction for murder and his death sentence were affirmed by the Georgia Supreme Court on June 30, 1982. Jones v. State, 249 Ga. 605, 293 S.E.2d 708 (1982).

Petitioner's first state habeas corpus petition was denied on June 20, 1983. On September 28, 1983, the Georgia Supreme Court affirmed the denial of state habeas corpus relief to Petitioner. Jones v. Francis, 252 Ga. 60, 312 S.E.2d 300 (1984). Petitioner then filed a petition for writ of certiorari in this Court, which was denied on October 1, 1984. Jones v. Francis, 469 U.S. 873 (1984), *rehearing denied*, 469 U.S. 1067 (1984).

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[2] These crimes were not an aberration on Petitioner's part. Petitioner was incarcerated as juvenile for robbing a milkman; he was a member of the Egyptian Cobras gang and incarcerated for being involved in a murder of a youth at a "gang party"; his children reported that he "was an absentee father, who beat their mother, and failed to financially support his family." He prostituted his second wife, ran a "whorehouse" and sold drugs. His second wife also stated he "had a violent nature and that if he had a 'bad day on the street' he would come home and beat her, once beating her with a 2x4 until she passed out and also beating her while she was pregnant." He also abused their children. Petitioner's known arrest record includes: larceny of an automobile (age 17); automobile theft (age 23); contributing the delinquency of a minor (age 27); prostitution (age 27); possession of stolen property (age 28); possession of a firearm without identification (age 30); burglary (age 31); unlawful use of a weapon (age 31); rape (age 31); kidnapping (age 34) contributing to the delinquency of a minor, accused of having sex with a 15-year-old (age 35) and strong armed robbery (age 35).

Thereafter, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia, which granted Petitioner federal habeas corpus relief as to sentence and ordered a retrial as to sentence. Jones v. Kemp, 706 F.Supp. 1534 (N.D. Ga. 1989).

B. Resentencing Trial (1997-2000)

Petitioner's resentencing trial was conducted on September 10-23, 1997. On September 23, 1997, the jury found the following statutory aggravating circumstances to impose the death penalty: 1) that Petitioner committed the offense of murder while engaged in the commission of armed robbery and burglary; and 2) that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture to the victim before death. Petitioner was then resentenced to death.

On October 10, 1997, Petitioner filed a motion for new trial, which was amended on June 9, 1999. Following a hearing, Petitioner's motion for new trial was denied on January 11, 2000.

C. Direct Appeal (2000-2001)

The Georgia Supreme Court again affirmed Petitioner's death sentence on November 20, 2000. Jones v. State, 273 Ga. 231, 539 S.E.2d 154 (2000). As part

of that review, the Georgia Supreme Court reviewed the proportionality of Petitioner's death sentence and found:

> Jones's death sentence was not imposed as the result of impermissible passion, prejudice or other arbitrary factor. The death sentence is also not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. We note that two juries have recommended that Jones receive the death penalty for Tackett's murder, and that his co-defendant was also sentenced to death for the same murder. The similar cases listed in the Appendix support the imposition of the death penalty in this case, in that all involve a murder during the commission of an armed robbery or burglary.

Jones v. State, 273 Ga. at 237.[3]

Petitioner also raised a claim on direct appeal that the length of time he had spent in prison awaiting execution amounted to cruel and unusual punishment. The Georgia Supreme Court rejected this claim holding:

> Jones claims that sentencing him to death after two decades on death row is an affront to human dignity. This "waiting for execution is intolerably cruel" argument is without merit. [] … **much of the delay is attributable to Jones's actions in that he frequently refused to cooperate with his appointed counsel and repeatedly sought to**

[3] In this opinion on direct appeal, which was issued on November 20, 2000, the Court provided an appendix listing nineteen (19) similar cases to those. Of that nineteen, eight have been executed, five are still on death row awaiting execution, and six have succeeded in challenging their convictions and sentences, but none of the six were granted relief due to the disproportionality of their sentence. Contrary to Petitioner's allegation that no one has received a death sentence for a similar crime in the past twenty years, as will be shown below, there have been five individuals sentenced to death for commission of a single murder during an armed robbery since 1998. Additionally, as will also be shown below, from 1984 until 2010, five condemned have been executed who murdered a single victim during the commission of an armed robbery.

> **have them replaced, and that he appealed the denial of a plea in bar and sought a separate interim review, each requiring considerable time to litigate**. [] In addition, one of the superior court judges assigned to the case was appointed to this Court, and two others recused themselves on defense motions, one because she had years earlier worked on Jones's case as an assistant district attorney and one because she had a sister in the district attorney's office. This resulted in a delay that cannot be fairly attributed to the prosecution.

Jones v. State, 273 Ga. at 233 (emphasis added).

Petitioner filed a petition for writ of certiorari in this Court, which was denied on October 1, 2001. Jones v. Georgia, 534 U.S. 839 (2001).

D. First State Habeas (2002-2008)

Petitioner filed a state habeas corpus petition on February 7, 2002, and an amended petition on October 31, 2003. In that petition, Petitioner alleged that his sentence was disproportionate. An evidentiary hearing was conducted in the matter on August 31 through September 1, 2004. The state habeas court denied Petitioner's petition for habeas corpus relief in its entirety on March 17, 2006. As part of that denial, the state habeas court found the claim was decided adversely to Petitioner on appeal, it was res judicata and "non-justiciable in this proceeding." Jones v. Terry, Butts Co. Sup. Ct., Case No. 2002-V-79, p. 108 (March 17, 2006). Additionally, the state habeas court held in the alternative "this claim is non-cognizable in this habeas action as this allegation failed to assert a constitutional violation." Id. (citing Pulley v. Harris, 465 U.S 37 (1984)).

Petitioner filed an application for a certificate of probable cause to appeal from the denial of habeas corpus relief in the Georgia Supreme Court on June 19, 2006. Petitioner alleged this finding of res judicata was error. The Georgia Supreme Court summarily denied Petitioner's application to appeal on September 23, 2008.

E. Federal Habeas (2009-2015)

Petitioner filed a federal petition for writ of habeas corpus on May 8, 2009. In that petition, Petitioner raised his claim that his sentence was disproportionate. The district court also noted that the Georgia Supreme Court had reviewed and rejected this claim on direct appeal holding:

> The petitioner has no constitutional right to a proportionality review of his sentence. See Pulley v. Harris, 465 U.S. 37, 46-51 (1984). The petitioner asks the court to conduct a second proportionality review of his sentence but fails to cite to any precedent authorizing this court to do so. Even assuming such a review could be conducted by this court, the petitioner has failed to how that the death penalty is a disproportionate sentence for commission of murder during an armed robbery.

Jones v. Hall, N.D. Ga. 1:09-CV-1228, p. 28 (Aug. 10, 2011).

The federal habeas court denied relief on August 10, 2011. The Eleventh Circuit Court of Appeals denied relief on March 20, 214. Jones v. GDCP Warden, 746 F.3d 1170 (11th Cir. 2014). The Court amended its decision on April 24, 2014. Jones v. Ga. Diagnostic & Classification Prison Warden, 753 F.3d 1171 (11th Cir. 2014). Thereafter, Petitioner filed a petition for writ of certiorari in this

Court, which was denied on October 5, 2015. Jones v. Chatman, 136 S. Ct. 43 (2015), *rehearing denied,* __ U.S. __, __ S. Ct. __, 193 L. Ed. 2d 452 (2015).

F. Second State Habeas (January 27, 2016)

An order setting the execution of Petitioner was filed on January 13, 2016. On January 27, 2016, Petitioner filed his second state habeas petition. The state habeas court dismissed Petitioner's second habeas petition January 29, 2016, 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 THE PETITION ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

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 and present no federal question, the Court should deny certiorari review.

A. State Habeas Court Properly Found Proportionality Claim Barred Based on State Law

Under longstanding Georgia law, issues previously raised may not be relitigated in habeas corpus if there has been no change in the facts or the law. Bruce v. Smith, 274 Ga. 432, 434 (2001); Gaither v. Gibby, 267 Ga. 96, 97

(1996); Gunter v. Hickman, 256 Ga. 315 (1986); Elrod v. Ault, 231 Ga. 750 (1974). As Petitioner's proportionality claim has previously been raised and rejected by the state courts, the state habeas court properly applied state law in dismissing it in the successive petition.

Ignoring that he was sentenced to death for malice murder and that the jury found that he had tortured his victim, Petitioner alleged in his successive state habeas petition that evolving standards of decency prevent his execution as allegedly defendants no longer receive sentences of death for the armed robbery of retail establishments.[4] This claim was res judicata under Georgia law as the Georgia Supreme Court had previously ruled on this issue on direct appeal.

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[4] Contrary to Petitioner's evolving standards of decency and intertwined miscarriage of justice argument, no court has found O.C.G.A. § 17-10-30(b)(2), murder during the commission of an armed robbery, to be unconstitutional. Nor has any state in the country found murder during the commission of a serious felony, such as armed robbery, to be unconstitutional. There are currently at least six other individuals on death row in Georgia that have committed similar crimes: Meders v. State, 260 Ga. 49, 389 S.E.2d 320 (1990) (shot and killed a convenience store clerk during an armed robbery, no other victim); Whatley v. State, 270 Ga. 296, 509 S.E.2d 45 (1998) (shot and killed the owner of a bait shop during an armed robbery, no other victim); Cromartie v. State, 270 Ga. 780, 514 S.E.2d 205 (1999) (shot and killed a convenience store clerk during an armed robbery, although he shot another convenience store clerk in the days proceeding, this clerk survived); King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000) (shot and killed a convenience store clerk during an armed robbery, no other victim); Tollette v. State, 280 Ga. 100, 621 S.E.2d 742 (2005) (shot and killed an armored truck guard during an armed robbery, no other murder victim); Brockman v. State, 292 Ga. 707, 739-740, 739 S.E.2d 332 (2013) (shot and killed a gas station employee during the course of an armed robbery, no other victim). Additionally, in 2010, Melbert Ray Ford was executed in Georgia for shooting and killing two

The state habeas court properly dismissed this claim in this successive state habeas, just as it did in Petitioner's first state habeas proceeding, holding:

> 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); Gunter v. Hickman, 256 Ga. 315 (1986).

Jones v. Chatman, Case No. 2016-HC-2 (Jan. 29, 2016, pp. 1-2).[5]

B. Adequate An 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,

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convenience store clerks during the course of an armed robbery. In 2009, Mark McClain was executed in Georgia for murdering a Domino's Pizza employee during the course of an armed robbery. In 2005, Stephen Mobley was executed in Georgia for murdering a pizza store employee during the course of an armed robbery. Also Van Roosevelt Solomon, Petitioner's co-defendant, was executed for these same crimes in 1984.

[5] Also, Petitioner has no constitutional right to a proportionality review of his sentence. See Pulley v. Harris, 465 U.S. 37, 46-51 (1984) .

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.

C. The State Habeas Court Properly Found No Miscarriage of Justice To Overcome the State Procedural Bars

The state habeas court also properly concluded that Petitioner had failed to establish a miscarriage of justice to overcome the state 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. As the allegation does not turn on actual innocence, the state habeas court properly found Petitioner failed to meet this standard.

Petitioner attempts to circumvent this requirement by relying upon new cases that he alleges are similar to his in which the defendants have not received the death penalty. But there will always be cases similar to every case of an inmate

on death row in which a death sentence was not given. The statute setting out which crimes are eligible for death, O.C.G.A. § 17-10-30, was upheld in Gregg v. Georgia, 428 U.S. 153 (1976). As later held by this Court, "absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, [Petitioner] cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty." McCleskey v. Kemp, 481 U.S. 279, 306-307 (1987). Petitioner's crimes, including the execution of an unarmed man during the commission of an armed robbery, are squarely within the type of crimes for which the death penalty is sought and given. Petitioner has not presented new facts or new law which proves O.C.G.A. § 17-10-30, which includes his crimes as death eligible, to be unconstitutional.

The facts support Petitioner's convictions, as found by this Court. Petitioner and his co-defendant Van Solomon went into a Tenneco convenience store to commit armed robbery. Both were armed with loaded hand guns. Ultimately, their victim, Roger Tackett, was found "lying face-down" in a storeroom in the store and "had been shot five times from behind, once in the jaw, once behind the left ear, once in the thumb, and twice in the right hip." Jones, 273 Ga. at 232. Although it was determined that one of the two guns found in the storeroom probably fired all the shots, "[a]n atomic absorption test conducted on swabs of the defendants' hands indicated that both men had recently fired a gun or handled a

recently-fired gun." Jones, 273 Ga. at 233. Petitioner's attempt to place the murder weapon solely in Van Solomon's hands was presented at trial and thus is not new evidence.[6]

There is no miscarriage of justice to overcome the procedural bar and certiorari review should be denied.

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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[6] In Van Solomon's last words given in his cell, he states Petitioner was the murderer, not him. See http://joshsmith.xyz/audio-witness-to-an-electrocution-the-georgia-execution-tapes/

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 2nd day of February, 2016.

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