Nos. 16-6485, 16A390

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY PAUL LAWLER,

PETITIONER,

v.

GDCP, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

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

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

SAMUEL S. OLENS
Attorney General

BETH A. BURTON
Senior Assistant Attorney General

SABRINA D. GRAHAM
Senior Assistant Attorney General

KATHERINE L. IANNUZZI
ASSISTANT ATTORNEY GENERAL
(*Counsel for Respondent*)
40 Capitol Square
Atlanta, Georgia 30334-1300
(404) 656-7659
Facsimile (404) 651-6459

QUESTION PRESENTED

Should this Court grant certiorari to review a decision on claims that were decided solely on independent and adequate state law grounds?

BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

Following a jury trial, Petitioner Gregory Lawler was convicted of, inter alia, malice murder and sentenced to death on March 3, 2000. On direct appeal, Petitioner did not raise any claims regarding his alleged mental illness. Petitioner did not challenge the constitutionality of the death penalty on direct appeal. However, affirming the convictions and sentences, the Georgia Supreme Court reviewed Petitioner's death sentence and found:

> The death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. O.C.G.A. § 17-10-35 (c) (1). Lawler's sentence is also not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. O.C.G.A. § 17-10-35 (c) (3). Lawler, armed with a rifle loaded with penetrator bullets, shot and killed a police officer and seriously wounded another police officer when the officers were trying to help his intoxicated girlfriend get home safely. The cases listed in the Appendix support the imposition of the death penalty in this case as they all involve the murder of a police officer during the discharge of the officer's official duties.

Lawler v. State, 276 Ga. 229, 236 (2003), cert denied Lawler v. Georgia, 540 U.S. 934 (2003).

Petitioner filed his first state habeas corpus petition on January 9, 2004 alleging two claims that he was ineligible for the death penalty due to his severe mental illness:

Claim VI

> Petitioner is severely mentally ill, and the execution of the severely mentally ill violates the Eighth Amendment to the United States Constitution and corresponding provisions of the Georgia Constitution.

Claim VII

> Petitioner is severely mentally ill and is thus ineligible for the death penalty under the Georgia evolved standards of decency that prohibit the execution of those who are guilty but mentally ill.

In the final order denying Petitioner habeas relief, the state habeas court found these claims were barred from its review as they were procedurally defaulted and that Petitioner failed to establish either cause or prejudice or a miscarriage of justice to excuse the default.

Petitioner also alleged in his original amended state habeas petition in Claims IX and X respectively that his death sentence was unconstitutional under the Eighth Amendment because it was "imposed arbitrarily and capriciously" and was "disproportionate." The state habeas court found Petitioner's claims were barred under the doctrine of res judicata as they had been denied by the Georgia Supreme Court on direct appeal.

Petitioner filed an application for a certificate of probable cause to appeal on February 3, 2009. In his application, Petitioner did not challenge the state court's ruling on his allegation that he is severely mentally ill and ineligible for the death penalty or the constitutionality of the death penalty. Petitioner's application for a

certificate of probable cause to appeal was denied by the Georgia Supreme Court on June 7, 2010.

Petitioner filed a petition for writ of certiorari with this Court on September 3, 2010, which was denied on November 8, 2010. Lawler v. Hall, 562 U.S. 1031 (2010). In his petition for writ of certiorari, Petitioner did not challenge the state court's ruling on his allegation that he is severely mentally ill and ineligible for the death penalty or the constitutionality of the death penalty.

On February 25, 2011, Petitioner filed his federal habeas petition in the Northern District of Georgia. The district court denied Petitioner relief on April 2, 2014. Subsequently, the Eleventh Circuit affirmed Petitioner's convictions and sentences in an unpublished opinion. Lawler v. Warden, 631 Fed. Appx. 905 (11th Cir. 2015). This Court denied certiorari review on October 3, 2016. Lawler v. Chatman, 2016 U.S. LEXIS 5701(2016).

On October 18, 2016, the day before his scheduled execution, Petitioner filed his second state habeas petition, once again alleging that he is too mentally ill to be executed and that his death sentence violates the Eighth Amendment because it was imposed in an arbitrary and capricious manner and it is disproportionate. The state habeas court dismissed Petitioner's claims as procedurally barred on October 19, 2016. Petitioner filed his application for certificate of probable cause with the Georgia Supreme Court and it was denied on October 19, 2016.

STATEMENT OF THE FACTS

This Court summarized the facts of the crime as follows:

Lawler and his girlfriend, Donna Rodgers, were drinking at a bar near their Atlanta apartment at approximately 9:00 p.m. on Sunday, October 12, 1997. Ms. Rodgers was very intoxicated. They left the bar and began walking home when they had some type of altercation in the parking lot of a pawn shop. A person at a nearby gas station believed that Lawler was striking an intoxicated Ms. Rodgers with a bag. He drove to a police station and reported what he had seen. Officer Cocciolone and Officer Sowa went to the parking lot and observed Ms. Rodgers sitting on a curb with Lawler trying to pull her to her feet. Lawler left the scene and walked to the apartment when the police arrived. The officers did not pursue Lawler; since Ms. Rodgers was intoxicated and lived only a short distance away, they decided to help her get home. They placed her in a patrol car and drove to her and Lawler's apartment, which was a two-story townhouse-style apartment with a ground floor door.

They parked on the street, escorted her up the walk (witnesses testified that she had difficulty standing), and knocked on the door. Lawler opened the door and began yelling "get the f--- away from my door" at the officers. After Ms. Rodgers was inside, he tried to shut the door on them. Officer Sowa put a hand up to prevent the door from shutting and said they were just trying to confirm that Ms. Rodgers lived there and that she would be okay. Lawler grabbed an AR-15 rifle he had placed next to the door when he saw the officers arrive and opened fire on the officers as they fled for cover. A neighbor testified that she heard a young man's voice shout, "Please don't shoot me"; another neighbor testified that she saw Lawler emerge from the apartment firing a gun; and a third neighbor testified that she saw the officers running with their backs to the apartment during the shooting. Lawler fired fifteen times; the police found three shell casings inside the apartment and the remainder outside the apartment. A fourth neighbor testified that seconds after the shooting he saw Lawler standing over the crumpled form of Officer Cocciolone holding what appeared to be a rifle; Lawler then ran back into the apartment. Lawler had fired penetrator bullets, which can pierce police body armor.

> Officer Cocciolone managed to send a radio distress call and other police officers arrived at the scene. They found the victims in front of Lawler's apartment, with Officer Sowa lying next to a parked car near the sidewalk and Officer Cocciolone collapsed on the front yard. Both officers still had their pistols snapped into their holsters. Officer Sowa was shot five times in the back, buttocks, and chest, and, according to the medical examiner, died almost immediately. Officer Cocciolone was hit three times in the head, arm, and buttocks. Despite a shattered pelvis, damaged intestines, and permanent brain injury, she survived and testified at Lawler's trial.
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> One of the responding officers, Sergeant Adams, peered through Lawler's front window and saw Ms. Rodgers sitting on the floor. He opened the front door and entered the apartment. While inside, he heard footfalls upstairs and the sound of a rifle action being worked so he retreated from the apartment and took Ms. Rodgers with him. After a six-hour stand-off, a hostage negotiator convinced Lawler to surrender. The murder weapon, the AR-15 rifle, was found in the apartment along with numerous other firearms and several different types of ammunition. Lawler's co-worker testified that Lawler had expressed his "extreme dislike" of the police and stated that if any tried to enter his home he would be ready for them.

Lawler v. State, 76 Ga. at 230-31.

REASONS CERTIORARI REVIEW IS NOT WARRANTED

I. PETITIONER'S CLAIM THAT THE DEATH PENALTY IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDEMNT WAS REJECTED ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

Petitioner alleges that death penalty is cruel and unusual punishment and violates the Eighth Amendment because it is "imposed in an arbitrary or capricious manner" is "unusual" due to its alleged "decline" and is "unreliable." The state court found this claim was procedurally barred from review based on state law grounds. Certiorari review is unwarranted.

The Georgia Supreme Court, in denying Petitioner's application to appeal the denial of habeas relief, found that Petitioner had not raised this ground on direct appeal. The Court still concluded that Petitioner's claim was procedurally barred, ostensibly on the adequate and independent state law ground of procedural default.[1] See Black v. Hardin, 255 Ga. 239 (1985); Valenzuela v. Newsome, 253 Ga. 793 (1985); O.C.G.A. § 9-14-48(d); White v. Kelso, 261 Ga. 32 (1991); Earp v. Angel, 257 Ga. 333 (1987). Further, absent the procedural bar to this claim, it is utterly without merit as this Court recently held, by a majority, that the death penalty is constitutional. Glossip v. Gross, __ U.S. __, 135 S. Ct. 2726, 2732 (2015) (***"it is settled that capital punishment is constitutional"***) (emphasis added).

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[1] Petitioner did not raise these Eighth Amendment claims on direct appeal, but the Georgia Supreme Court sua sponte found that the sentence was not imposed in an arbitrary and capricious manner and was not disproportionate to the crimes he committed. Lawler, 276 Ga. at 236. When he challenged his death sentence as "arbitrary and capricious" and "disproportionate" in his original state habeas proceeding, the state habeas court found they were barred under the state law doctrine of res judicata. Likewise, the state habeas court reviewing the current successive petition found the claims remained res judicata.

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).

Because the Georgia Supreme Court found the claim was procedurally defaulted, Petitioner had to show cause and prejudice to overcome the bar. He has not shown his arguments were not available on direct appeal. Moreover, he has failed to show prejudice because he has not shown that a reasonable probability that the Georgia Supreme Court would have found his death sentence was unconstitutional. This Court found the death penalty was constitutional in Gregg v. Georgia, 428 U.S. 153 (1976) and specifically reviewed Petitioner's death sentence for arbitrariness and proportionality and found it violated neither. Consequently, the state court correctly found Petitioner's claims alleging the death penalty is unconstitutional were procedurally barred.

Petitioner alleges that the manner in which the death penalty is imposed based upon funding, race, geography, etc., makes it arbitrarily imposed. These are clearly not new arguments and have long-been touted by death penalty opponents as alleged proof of the unconstitutionality of the death penalty. Moreover, these are not new arguments that did not exist at the time of Petitioner's direct appeal.

Petitioner's specific argument that his death sentence is allegedly arbitrary because other defendants who killed law enforcement did not receive the death penalty is not new either. Indeed, Petitioner's alleged data in support begins with the murder of law enforcement from *1980* forward. Petitioner has failed to present new facts that were not available.

Petitioner also alleges that the death penalty is unreliable because innocent people could be executed. Again this is not a new argument, and Petitioner fails to explain how this argument was not available during his direct appeal. Pretermitting the fallacy in many of Petitioner's statements, he fails to show how this argument relates to his death sentence. There is no doubt that he committed the crime.

Because of the unassailable fact of his guilt, Petitioner alleges that his death sentence is not reliable because he allegedly suffers from ASD and the jury did not hear this evidence. But even if Petitioner could show cause to overcome the default of this portion of his claim, he cannot show prejudice. At trial the jury had before it Petitioner's diagnosis of Paranoid Personality Disorder (PPD) as an explanation for his crimes. There is no precedent holding that the substitution of a new mental health disorder, which is not Intellectual Disability, renders a death sentence unreliable.

Petitioner's other argument in support of his claim that the death penalty is unconstitutional is the decline in the use of the death penalty. But again, even if Petitioner could show cause, he cannot show prejudice. There are many factors that have contributed to this decline not the least of which is the decline in crime over the past few decades and the availability of life without parole as a sentencing option. Petitioner failed to present any law which would support a finding that the mere decline in the use of the death penalty establishes unconstitutionality.

Petitioner has failed to show prejudice with regard to any of his claims as he has failed to show that on appeal the Georgia Supreme Court would have found his death to be unconstitutional. The death penalty had long-been held to be constitutional and Petitioner viciously attacked with an AR-17 and armor piercing bullets two members of his community that had sworn to serve and protect the people who had not even removed their weapons from their holsters. Indeed, the evidence strongly supports the fact that he had stockpiled weapons and ammunition in preparation to commit such an act. Petitioner has failed to show that the denial of prejudice was not in accord with this Court's precedent.

Accordingly, as Petitioner's claim was denied on adequate and independent state law grounds, Petitioner fails to present a claim worthy of this Court's certiorari review.

II. PETITIONER'S CLAIM THAT HIS ALLEGED NEW MENTAL HEALTH DISORDER VIOLATES THE EIGHTH AMENDMENT WAS REJECTED ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

Petitioner also alleges in this successive state habeas corpus petition that his execution would violate the state and federal constitutions as he suffers from a mental disorder - Autism Spectrum Disorder. During Petitioner's original state habeas proceeding he alleged his mental illness, albeit at that time Bi-Polar Disorder, precluded him from being eligible for the death penalty under the Eighth Amendment. The habeas court found this claim was procedurally defaulted as Petitioner failed to raise the claim on direct appeal. As Petitioner was asserting the same claim, although with a different disorder, for a second time, the habeas court properly found the claim was procedurally defaulted based on state law. Certiorari review should be denied.

At trial, Petitioner presented his claim that he was mentally ill – allegedly suffering from Paranoid Personality Disorder. The jury did not find that Petitioner's evidence of mental illness so mitigating as to preclude a death sentence. He did not raise a constitutional claim on direct appeal regarding the constitutionality of his sentence in relation to that alleged mental illness.

Thereafter, Petitioner argued in Claim VI of his first state habeas corpus petition, that he was mentally ill (although he had changed his diagnosis to Bi-Polar Disorder), and that his execution would violate the Eighth Amendment to the

United States Constitution. The habeas court found the claim was procedurally defaulted and that Petitioner had failed to show cause and prejudice or a miscarriage of justice to overcome that default. See Black v. Hardin, 255 Ga. 239 (1985); Valenzuela v. Newsome, 253 Ga. 793 (1985); O.C.G.A. § 9-14-48(d); White v. Kelso, 261 Ga. 32 (1991); Earp v. Angel, 257 Ga. 333 (1987). Petitioner did not appeal this holding to this Court following the denial of habeas relief.

In his second state habeas proceeding, Petitioner alleged his third new diagnosis (ASD), precluded him from eligibility of the death penalty under the Eighth Amendment. However, as found by the habeas court, even with a third new diagnosis (ASD), Petitioner cannot establish prejudice or a miscarriage of justice to overcome the default of this claim. Directly on point, the Georgia Supreme Court has found that there was no merit to the claim that evolving standards of decency and a national consensus ban the execution of someone alleging a mental illness:

> **Furthermore, as an independent, alternative holding, we conclude that, unlike the case of juvenile offenders and mentally retarded persons, there is no consensus discernible in the nation or in Georgia sufficient to show that evolving standards of decency require a constitutional ban, under either the Constitution of the United States or under the Georgia Constitution, on executing all persons with mental illnesses**, particularly persons who have shown only the sort of mental health evidence that Brannan has shown. Compare Roper v. Simmons, 543 U.S. 551 (125 SC 1183, 161 LE2d 1) (2005) (declaring the execution of juvenile offenders to violate the Constitution of the United States); Atkins v. Virginia, 536 U.S. 304 (122 SC 2242, 153 LE2d 335) (2002) (declaring the execution of mentally retarded persons to violate the Constitution of the United States); Fleming v. Zant, 259 Ga. 687 (386 SE2d 339) (1989)

(declaring the execution of mentally retarded persons to violate the Georgia Constitution).

Hall v. Brannan, 284 Ga. 716, 725-726 (2008) (emphasis added).

Although Petitioner goes into great detail about his new diagnosis in this second habeas petition, what is indisputably clear is that this Court has never held that the execution of the mentally ill violates the Eighth Amendment. Consequently, the denial of prejudice is in direct accord with this Court's precedent.

Accordingly, the state courts' correctly determined that Petitioner had failed to overcome the procedural bar based on state law grounds to this claim and this claims presents no issue for this Court's certiorari review. 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).

CONCLUSION

Accordingly, as the state habeas court's holding was based upon adequate and independent state law grounds and does not conflict with the precedent of this Court, certiorari review is unwarranted and the accompanying request for stay should be denied.

Respectfully submitted,

SAMUEL S. OLENS 551540
Attorney General

BETH A. BURTON 027500
Senior Assistant Attorney General

SABRINA D. GRAHAM 305755
Senior Assistant Attorney General

KATHERINE L. IANNUZZI 076220
Assistant Attorney General

CERTIFICATE OF SERVICE

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

Gerald W. King, Jr.
Jeff Ertel
Federal Defender Program, Inc.
101 Marietta Street, N.W. Suite 1500
Atlanta, Georgia 30303
Gerald_King@fd.org
Jeff_ertel@fd.org

This 19th day of October, 2016.

KATHERINE L. IANNUZZI
Assistant Attorney General