

Nos. 16-7096, 16A559

---

IN THE SUPREME COURT OF THE UNITED STATES

---

WILLIAM SALLIE,

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

---

CHRISTOPHER CARR  
Attorney General

BETH A. BURTON  
Senior Assistant Attorney General

SABRINA D. GRAHAM  
Senior Assistant Attorney General  
(*Counsel for Respondent*)  
40 Capitol Square  
Atlanta, Georgia 30334-1300  
(404) 656-7659  
sgraham@law.ga.gov

## **QUESTION PRESENTED**

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

## TABLE OF CONTENTS

|  |   |
|--|---|
| QUESTION PRESENTED .....   | i |
| STATEMENT OF THE CASE .....  | 1 |
| REASONS CERTIORARI REVIEW IS NOT WARRANTED.....  | 4 |
| PETITIONER’S CLAIMS WERE REJECTED ON ADEQUATE AND<br>INDEPENDENT STATE LAW GROUNDS ..... | 4 |
| I. Claims Properly Dismissed on State Law Grounds.....                                   | 5 |
| II. There is No Federal Question for Review .....  | 9 |
| CONCLUSION .....   | 9 |

## **BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT**

In his second state habeas petition, Sallie asserted two claims for relief. First, Sallie alleged that his sentence of death is unconstitutional because the State of Georgia will execute him, but if he had been sentenced in another state his sentenced would not be carried out. Secondly, he alleged that the statutory 20-day notice he has been given of his execution, which follows the completion of 26 years of appeals, does not allow him due process to challenge any additional potentially meritorious issues. Relying solely on state law, the state habeas court dismissed the claims as non-cognizable (O.C.G.A. § 9-14-42(a)), or in the alternative, procedurally barred from review (O.C.G.A. § 9-14-51). These holdings applying state law provide no issue warranting certiorari review.

### **STATEMENT OF THE CASE**

Twenty-six years ago, in 1990, after separating from his wife Robin Moore, Sallie broke into Moore's parents' home where she was staying with their two-year-old son. *Sallie v. State*, 276 Ga. 506, 506-7 (2003). Sallie shot Moore's mother and father, John and Linda Moore, killing John. *Id.* He then handcuffed Moore's nine-year-old brother Justin to his wounded mother Linda and connected the handcuffs to the bed post. *Id.* Leaving his two-year-old son among the carnage, Sallie kidnapped Moore and her nineteen-year-old sister, took them to his home, and raped them. *Id.* He later released the women. *Id.* Following a jury

trial, Sallie was convicted of malice murder, aggravated assault, kidnapping with bodily injury (two counts), burglary, and possession of a firearm during the commission of a felony. Sallie was sentenced to death for malice murder.

Sallie appealed to the Georgia Supreme Court, which reversed his convictions and death sentence due to a conflict of interest of Sallie's trial counsel. *Sallie v. State*, 269 Ga. 447-448 (1998).

Following a retrial in 2001, Sallie was again convicted of the same crimes and again sentenced to death. He again challenged those convictions and sentences. Sallie filed a motion for new trial in 2001, and later amended the motion. The trial court denied the motion for a new trial, as amended, in 2002. The Georgia Supreme Court affirmed the convictions and sentences. *Sallie v. State*, 276 Ga. 506 (2003). Sallie filed a petition for writ of certiorari in this Court, which was denied. *Sallie v. Georgia*, 540 U.S. 902 (2003), *rehearing denied*, *Sallie v. Georgia*, 540 U.S. 1086 (2003).

Sallie filed a state habeas corpus petition in 2004, and an amended petition in 2006. An evidentiary hearing was conducted over the course of two days in 2007. The state habeas evidentiary hearing transcript is comprised of 17,658 pages. At that hearing, Sallie presented 84 exhibits, 10 witnesses and 7 affidavits. The habeas court denied the petition for habeas corpus relief in its entirety in 2009.

Sallie filed an application for a certificate of probable cause to appeal in the Georgia Supreme Court, which was denied. Sallie did not seek certiorari review.

Sallie filed a federal petition for writ of habeas corpus on February 28, 2011, and amended that petition twice. After three years of review and extensive briefing of issues by the parties, the federal habeas court dismissed the petitions as untimely. The Eleventh Circuit Court of Appeals denied Sallie's request for a certificate of appealability (COA) and his motion for reconsideration. Sallie filed a petition for writ of certiorari in this Court, which was denied on November 14, 2016. *Sallie v. Sellers*, 2016 U.S. LEXIS 6849 (2016).

Sallie then filed a Federal Rule of Civil Procedure 60(b) motion to reopen his 28 U.S.C. § 2254 petition in the federal district court on November 15, 2016.

While the Rule 60(b) motion was pending, and after over 26 years of due process in the courts, the State of Georgia obtained an execution warrant on November 17, 2016, setting Sallie's execution for December 6, 2016 at 7 p.m.

With the execution warrant pending, the district court allowed briefing and held a teleconference with the parties on Sallie's Rule 60(b) motion. On November 22, 2016, the district court denied the motion and denied a COA. Sallie then requested a COA on the denial of the Rule 60(b) motion from the Eleventh Circuit Court of Appeals. On November 28, 2016, the Eleventh Circuit denied the

request for COA. Sallie currently has a petition for writ of certiorari pending before his Court in that case. *Sallie v. Warden*, Nos. 16-7067, 16A548.

Then, two weeks after the State obtained the execution warrant, Sallie filed a successive state habeas petition alleging: his execution is unconstitutional because his lawful sentence will be carried out; and because the statutory 20-day notice does not allow him due process to raise potentially additional meritorious issues.<sup>1</sup> On December 5, 2016 the state habeas court denied relief. Sallie then filed an application for a certificate of probable cause with the Georgia Supreme Court, which was denied December 6, 2016.

Following this 26-year appellate trek, and after the State of Georgia obtained an execution warrant on November 17, 2016, Sallie has litigated claims through all the various state and federal courts. He has clearly not been denied due process.

**REASONS CERTIORARI REVIEW IS NOT WARRANTED**

**PETITIONER'S CLAIMS WERE REJECTED ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.**

In his successive state habeas petition, Sallie alleged for the first time that his sentence of death is unconstitutional because the State of Georgia will execute him and that the statutory 20-day notice he has been given of his execution does not allow him due process. Relying solely on state law, the state habeas court

---

<sup>1</sup> Sallie also had a clemency hearing December 5, 2016.

dismissed the claims as non-cognizable, or in the alternative, procedurally barred from review. Certiorari review should be denied.

## **I. Claims Properly Dismissed on State Law Grounds**

### **A. Not Cognizable**

In dismissing Sallie's second state habeas petition, the state habeas court found that habeas was not a forum to raise the claims asserted. The court found Sallie's claims were non-cognizable under Georgia statutory **habeas** law holding:

Sallie alleges that his execution is unconstitutional because his sentence will be imposed, which he claims may not occur if he was sentenced in another state. Sallie also alleges that Georgia's statute for obtaining an execution warrant (O.C.G.A. § 17-10-40), which requires notice to the condemned of no less than 10 days and no more than 20 days, does not provide him due process. Neither of these claims challenge the proceedings which resulted in his convictions or sentences as required by O.C.G.A. § 9-14-42(a). They are noncognizable and not properly before this Court for review.

*Sallie v. Sellers*, Civil Action No. 2016-HC-18, Superior Court Butts Co., Dec. 5, 2015 Order, p. 1.

Georgia law is clear that the scope of habeas corpus relief is limited to violations of state or federal constitutional rights in the proceedings which resulted in the petitioner's conviction and sentence. *See* O.C.G.A. § 9-14-42(a). As found by the state habeas court, Sallie is not challenging any of the proceedings which resulted in his conviction or sentence.



As to his arbitrary and capriciousness claim, Sallie actually concedes that he is not challenging his death sentence, but the order setting his execution. (Petition, ¶15). His second challenge is to Georgia's statute, O.C.G.A. § 17-10-40, which sets for the procedure for obtaining an execution warrant if the original time period, as set forth in the sentence, has passed. He alleges no errors, much less errors of constitutional dimension, that were committed during the proceedings that led to his conviction and sentence.

### **B. Barred from Review**

The state habeas court alternatively found that if Sallie's claim were cognizable in habeas, he had waived the claims by not asserting them in his prior petition. The court properly applied the law and dismissed the claims on this alternative basis.

The state habeas court held:

Alternatively, the Court also finds that these claims are procedurally barred from its review. These claims were not presented on direct appeal or in Sallie's first state habeas petition. He has not shown new facts or new law to establish that these claims could not have been previously raised in those appellate and collateral proceedings nor has he shown a miscarriage of justice. Consequently, the claims are barred from review. See O.C.G.A. § 9-14-51; State v. Cusack, 296 Ga. 534 (2015).

*Sallie*, Civil Action No. 2016-HC-18, Order, pp. 1-2.

Georgia law requires that all allegations for habeas corpus relief be raised in the original or amended habeas corpus petition otherwise the claim is

“waived.” *State v. Cusack*, 296 Ga. 534, 538, n. 4 (2015); O.C.G.A. § 9-14-51; *Tucker v. Kemp*, 256 Ga. 571, 575 (1987); *Smith v. Zant*, 250 Ga. 645 (1983). As recently explained by the Georgia Supreme Court:

Ordinarily, habeas relief is not available on the filing of a second habeas petition. Rather, under OCGA § 9-14-51,

[a]ll grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

\*\*\*\*

When considering a successive petition under OCGA § 9-14-51, the habeas court must determine, as the threshold matter, whether the petitioner is entitled to a hearing on the merits of his belated claims. [Cit.] In order to be so entitled, the petitioner must raise grounds which are either constitutionally nonwaivable or which could not reasonably have been raised in the earlier petition. [Cits.] *Tucker v. Kemp*, 256 Ga. 571, 573 (351 SE2d 196) (1987). A claim that could not reasonably be raised in an earlier petition would likely include a circumstance in which a change in the law after the first petition “might render a later challenge successful. [Cit.]” *Id.*

*Cusack*, 296 Ga. at 534-53. Sallie’s newly raised challenges – that carrying out his execution is unconstitutional and Georgia’s statutory process for obtaining an execution warrant violates due process - are not based on new facts or new law and

therefore could have been raised in his first state habeas petition. O.C.G.A. § 9-14-51.

Sallie alleges that his claims did not become available until the State obtained the execution order on November 17, 2016. The notice provision of O.C.G.A. § 17-10-40 was the law during Sallie's trial, his direct appeal and his state habeas actions. It is not new law and the claim could have previously been raised.<sup>2</sup>

Sallie's arbitrary and capriciousness claim is the same. Pointing to California, he alleges that certain states have carried out fewer death sentences imposed on capital defendants than the State of Georgia and this fact makes his execution unconstitutional.<sup>3</sup> Sallie does not allege any new facts or new law. To the contrary, all Sallie's legal citations pre-date his sentence. Moreover, all the "authorities" on which he relies examine the arbitrary and capricious nature of *sentencing*, not execution. The claim could have previously been raised.

---

<sup>2</sup> Moreover, obtaining an execution warrant under O.C.G.A. § 17-10-40 is merely the resetting of the date of the lawfully imposed sentence, nothing more. *See Fowler v. Grimes*, 198 Ga. 84, 93-94 (1944); *Smith v. Henderson*, 190 Ga. 886 (2) (1940). This act is not a new conviction or sentence available for challenge. There is no due process violation.

<sup>3</sup> This is a problem which the citizens of California voted in November of this year to rectify with the passing of Proposition 66. This law will aid the State of California in reducing the time between conviction and sentence and execution and assist in carrying out executions.

## II. There is No Federal Question for Review

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). Certiorari review should be denied.

### 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,

CHRISTOPHER M. CARR                      112505  
Attorney General

BETH BURTON                                      027500  
Deputy Attorney General



SABRINA GRAHAM                                      305755  
Senior Assistant Attorney General

Please serve:  
SABRINA GRAHAM  
Senior Assistant Attorney General  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334-1300  
(404) 656-7659  
sgraham@law.ga.gov

**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:

Joseph John Perkovich  
Philips Black Project  
P.O. Box 2171  
New York, NY 10008

John R. Martin  
Martin Brothers, P.C.  
202 The Grant Building  
44 Broad Street, N.W.  
Atlanta, Georgia 30303

This 6th day of December, 2016.



SABRINA GRAHAM  
Senior Assistant Attorney General