ATTACHMENT A

SUPREME COURT OF GEORGIA
Case No. S17E1366

Atlanta, February 19, 2018

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

LEONARD MAURICE DRANE v. ERIC SELLERS, WARDEN.

This Court has thoroughly reviewed Drane's application for a certificate of probable cause to appeal the denial of his petition for habeas corpus, the Warden's response, the habeas court's order, and the entire trial and habeas records. In doing so, we note that the habeas court recognized that the scope of its authority to act on remand was limited to the specific purpose of making findings of fact and conclusions of law on the issues delineated by this Court, and the habeas court thus correctly refused to consider Drane's actual innocence and proportionality claims. See Order, p. 5 (HR, p. 1,758); Head v. Hill, 277 Ga. 255, 263 (II) (C) (587 SE2d 613) (2003) (quoting Marsh v. Way, 255 Ga. 284, 285 (2) (336 SE2d 795) (1985)). In his application for CPC, Drane contends that we should once again remand his case to the habeas court in order for the habeas court to rule on those claims. However, we decline to do so for the following reasons.

With regard to Drane's actual innocence claim, this Court has never found a freestanding innocence claim as cognizable in the habeas court. See, e.g., Fryer v. Stynchcombe, 228 Ga. 576, 577 (2) (186 SE2d 885) (1972) ("It is not the function of the writ of habeas corpus to determine the guilt or innocence of

the petitioner."). Instead, such a claim should come by means of an extraordinary motion for new trial. See Bush v. Chappell, 225 Ga. 659, 661 (2) (171 SE2d 128) (1969) ("If the evidence which the appellant presented at the habeas corpus hearing was newly discovered evidence, his remedy is by extraordinary motion for new trial, and not by habeas corpus."). Drane has, in fact, litigated his actual innocence claim in his original trial court through an extraordinary motion for new trial, and, thus, his actual innocence claim is barred by res judicata. See Drane v. State, 291 Ga. 298 (728 SE2d 679) (2012) ("Drane III") (affirming the trial court's complete denial of Drane's extraordinary motion for new trial that was based on newly discovered evidence in the form of the testimony of Drane's co-defendant claiming that he alone was responsible for the victim's killing).

As to Drane's proportionality claim, it would be improper to remand that claim to the habeas court, as this Court alone is charged with the responsibility of conducting proportionality review. See OCGA § 17-10-35 (c) (3); Godfrey v. Francis, 251 Ga. 652, 661 (8) (308 SE2d 806) (1983); Wilson v. State, 250 Ga. 630, 639 (12) (300 SE2d 640) (1983). Furthermore, Drane's claim that his death sentence is disproportionate is res judicata. See Drane v. State, 265 Ga. 255, 260 (14) (455 SE2d 27) (1995) ("Drane I") (finding no merit to Drane's claim that his death sentence was disproportionate to the life sentence that his co-defendant received); Drane v. State, 271 Ga. 849, 855 (7) (523 SE2d 301) (1999) ("Drane II") (conducting a review of the proportionality of Drane's death sentence as required by OCGA § 17-10-35 (c) and reiterating this Court's previous finding "that Drane's death sentence is not disproportionate to the life sentence [that his co-defendant] received for the same murder"). See also Hall v. Lee, 286 Ga. 79, 97 (III) (684 SE2d 868) (2009) (declining to re-examine proportionality on habeas corpus); Schofield v. Meders, 280 Ga. 865, 871 (8) (632 SE2d 369) (2006) (same). However, "[t]his Court allows claims to be revisited on habeas corpus where new facts have developed since the time of the direct appeal." Humphrey v. Morrow, 289 Ga. 864, 875 (III) (A) (717 SE2d 168) (2011). Drane claims that new facts in the form of his co-defendant's testimony that he alone killed the victim show that Drane's death sentence is disproportionate punishment, but at trial Drane presented testimony in the sentencing phase that his co-defendant had confessed to a fellow inmate that he

alone had murdered the victim. Therefore, Drane's co-defendant's testimony does not constitute new facts that have developed since the time of Drane's direct appeal.

Drane has also failed to show that the writ is necessary to avoid a miscarriage of justice. See OCGA § 9-14-48 (d); Walker v. Penn, 271 Ga. 609, 611 (2) (523 SE2d 325) (1999); Turpin v. Todd, 268 Ga. 820, 831 (4) (493 SE2d 900) (1997). The miscarriage of justice exception to restrictions on habeas corpus relief, which must be based on evidence of actual innocence, see Perkins v. Hall, 288 Ga. 810, 824 (II) (D) (708 SE2d 335) (2011), "is an extremely high standard and is very narrowly applied," Penn, 271 Ga. at 611 (2). See Valenzuela v. Newsome, 253 Ga. 793, 796 (4) (325 SE2d 370) (1985) (suggesting that the miscarriage of justice exception is to be applied in cases where the accused "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"). For the same reasons that this Court affirmed the trial court's denial of Drane's extraordinary motion for new trial based on his co-defendant's testimony with regard to his murder conviction, see Drane III, 291 Ga. at 301-304 (3) (a), Drane's actual innocence claim based on that same co-defendant's testimony falls short of establishing the miscarriage of justice exception to overcome the procedural bar to this claim and thus does not constitute sufficient reason to re-examine the sentence in his case, which otherwise is res judicata in light of this Court's consideration of the issue in Drane II, 271 Ga. at 855 (7), and Drane I, 265 Ga. at 260 (14).

While we do not find a need to discuss our reasoning in detail, our review of the record reveals that the remaining claims properly raised and argued by Drane are without arguable merit. See Supreme Court Rule 36; Redmon v. Johnson, No. S16H1197, 2018 Ga. LEXIS 1 (Jan. 16, 2018) (explaining this Court's procedure in considering applications for certificates of probable cause to appeal).

In light of the foregoing and upon consideration of the entirety of the currently pending application for a certificate of probable cause to appeal the

denial of habeas corpus, it is hereby denied as lacking arguable merit. See Supreme Court Rule 36.

All the Justices concur, except Nahmias, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk