(CAPITAL CASE)

NO. 18-_____

In the

Supreme Court of the United States

LEONARD MAURICE DRANE,

PETITIONER,

v.

ERIC SELLERS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

On Petition for a Writ of Certiorari to the Georgia Supreme Court

PETITION FOR WRIT OF CERTIORARI

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July 19, 2018

(CAPITAL CASE)

QUESTIONS PRESENTED

Petitioner Leonard Drane's co-indictee, David Robert Willis, has confessed under oath that he and he alone murdered Ms. Renee Blackmon—the crime for which Petitioner was sentenced to death. This Court has held that the Eighth and Fourteenth Amendments would prohibit the execution of a person innocent of murder.

1. When a prisoner under a sentence of death has acquired compelling and undisputed evidence of his actual innocence after his trial that the state courts fail and refuse to give full and fair consideration, does the Constitution require that his innocence provide an independent and cognizable ground for relief from that sentence?

2. Is this compelling evidence of innocence sufficient to serve as both evidence in support of and a gateway to this Court's consideration of Petitioner's claim that his sentence of death is disproportionate pursuant to *Enmund v. Florida* and its progeny?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the petition. Petitioner in this Court, Petitioner-Appellant below, is Leonard Maurice Drane. Respondent in this Court is Eric Sellers, in his official capacity as Warden of the Georgia Diagnostic & Classification Prison.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Leonard Maurice Drane ("Petitioner") respectfully petitions for a writ of certiorari to review a judgment of the Georgia Supreme Court.

OPINIONS BELOW

The decision of the Superior Court of Butts County denying Petitioner's petition for a writ of habeas corpus, *Drane v. Chatman*, Civil Action No. 2000-V-699, is reproduced in the appendix at Pet. App. 1. The decision of the Georgia Supreme Court, *Drane v. Sellers*, Case No. S17E1366, is reproduced in the appendix at Pet. App. 20.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on February 19, 2018. On May 9, 2018, Justice Thomas extended the time within which to file a petition for writ of certiorari to and including July 19, 2018. *See* No. 17A1241. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. amend. VIII

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, section 1

STATEMENT OF THE CASE

Leonard Maurice Drane has spent nearly twenty-six years on Georgia's death row for the murder of Renee Blackmon—a crime that he did not commit. In 2010, Petitioner's co-indictee, David Robert Willis, broke a two-decade silence and confessed to a state officer evaluating his application for parole that he alone killed Ms. Blackmon to the surprise and horror of Petitioner, who was merely present during the crime. Willis's confession confirms the pretrial statements of Petitioner, who has maintained his innocence from the time of his arrest.

Petitioner has spent the last eight years seeking relief in the Georgia state courts, presenting affidavit and live testimony from Willis on multiple occasions. Those state courts, however, have failed to fully and fairly consider this powerful evidence of Petitioner's innocence. If the decision of the Georgia Supreme Court below is allowed to stand, they never will.

This Court has recognized that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Herrera v. Collins*, 506 U.S. 390, 417 (1993). It is impossible to review the evidence presented to the Georgia courts without concluding that Petitioner is innocent of capital murder and cannot consistent with the Constitution be executed. It accordingly falls to this Court to remedy this violation of Petitioner's

constitutional rights by ordering the Georgia courts to provide an avenue for relief.

I. Course of Proceedings and Statement of Facts

A. The Facts Related To The Crime At Issue

On direct appeal, the Georgia Supreme Court summarized the facts found at Petitioner's trial as follows:

> [Mr.] Drane and co-indictee David Willis picked up Renee Blackmon on June 13, 1990, and drove her to a secluded road. Ms. Blackmon's body was found in a lake on July 1, 1990. She had been shot point-blank in the head with a shotgun and her throat had been cut at least six times. She was tied to a brake drum with a rope. After his arrest, Drane claimed that Willis had sex with the victim and shot her with a shotgun, and then cut her throat because she was still breathing. Drane said he did not know Willis was going to kill the victim and he did not participate in her killing. However, he admitted helping Willis dispose of the body, hide the gun, wash Willis's truck, and burn their clothes; and that he continued to live with Willis for three weeks until their arrest. He claimed he did so because he was afraid of Willis.

Drane v. State, 523 S.E.2d 301,302–03 (Ga. 1999).

As the court conceded, the evidence implicating Petitioner in Ms. Blackmon's death was no more than "slight." *Drane v. State*, 455 S.E.2d 27, 31 (Ga. 1995). After Petitioner and Willis were arrested, Petitioner gave three voluntary statements to police in which he reported that Willis had abruptly shot Ms. Blackmon and cut her throat. Pet. App. 77-80, 99-108. Petitioner stated that he had been shocked by Willis's actions, but that Willis had threatened to "put the crime" on him if he said anything. *Id.* at 77-78. Petitioner subsequently assisted the police in recovering evidence of the crime, including leading them to the place where Willis shot and cut Ms. Blackmon and the bridge where they disposed of her body. *Id.* at 80-88. Willis declined to assist the police.

Despite Petitioner's cooperation, the State elected to charge both Petitioner and Willis with capital murder and tried each man separately. With Petitioner slated for trial first, Willis's counsel informed the trial court, the district attorney, and Petitioner's counsel that Willis would be "exercising his privilege against testifying" in that proceeding. Pet. App. 169-75. Willis would remain silent throughout Petitioner's trial and his own.

Petitioner's trial began in the Superior Court of Spalding County on September 14, 1992. Willis did not go to trial until September 20, 1993—almost a year after Petitioner had been convicted and sentenced to death. Both men had the same prosecutor and the same trial judge. But the prosecution did not present a uniform theory of the case in both trials.

As Petitioner and Willis were the only witnesses to Ms. Blackmon's murder, and the physical evidence recovered with Petitioner's help did not prove the guilt of one man over the other, the state shifted its characterizations of events and its position on admissible evidence in order to assign maximum culpability to the defendant on trial. At Petitioner's trial, the State presented contradictory hearsay testimony from three witnesses, who alternatively ascribed statements to Petitioner in which he allegedly boasted of having sex with Ms. Blackmon, claimed that Willis had shot her but he had cut her throat, or claimed that he had shot her. Pet. App. 55-57, 68-71, 89-90. At Willis's trial, however, the State called only one of these witnesses, whose testimony had changed in material ways. *Id.* at 179-180

Similarly, when Petitioner attempted to introduce the testimony of Marcus Guthrie, a former cellmate of Willis who claimed that Willis had confessed sole responsibility for the crime, the State objected that the evidence was inadmissible, and the trial court excluded this exculpatory testimony from the guilt-innocence phase of Petitioner's trial as insufficiently reliable, noting that Mr. Guthrie was wrong about the race of the victim. Pet. App. 93-94. At Willis's trial, however, the same district attorney not only called Guthrie as a witness for the State and introduced the same testimony that had been excluded from Petitioner's trial (*Id.* at 177-78), but also called an additional witness to bolster the very testimony that the State had successfully excluded from Petitioner's trial.

The State also tailored its presentation of its expert's conclusions. In Willis's trial, the State maintained that the shotgun wound to Ms. Blackmon's head "would have instantly caused death." Pet. App. 63-64. At Petitioner's trial, however, the State elicited testimony that Ms. Blackmon might have had spasmodic movements of her heart and lungs after being shot that would have made her "technically alive" when her throat was cut. *Id.* at 64-65. The State then relied upon that testimony in closing argument to suggest that Petitioner, whom it alleged had cut Ms. Blackmon's throat after Willis had shot her, had contributed to her death. *Id.* at 94-98.

The different prosecutorial theories led to disproportionate results. On September 25, 1992, Petitioner's jury convicted him of malice murder, felony murder, and aggravated battery and imposed a death sentence for the malice murder which, after a remand on two limited issues (*Drane v. State*, 455 S.E.2d 27 (Ga. 1995)), was affirmed. *See Drane v. State*, 523 S.E.2d 301 (Ga. 1999). While Willis was also convicted of Ms. Blackmon's murder, he was sentenced to life imprisonment after his jury deadlocked on the death penalty. Willis did not appeal his conviction or sentence.

B. Petitioner's Habeas Proceedings

Petitioner filed a *pro se* state habeas petition in the Superior Court of Butts County ("the habeas court") asserting, *inter alia*, that he "is actually innocent" of the murder of Ms. Blackmon, "and his execution would be a miscarriage of justice, in violation of the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution and analogous provisions of the Georgia Constitution . . . ." Pet. App. 194, 201. Petitioner further challenged the proportionality of his sentence pursuant to this Court's decision in *Enmund v. Florida*, 458 U.S. 782 (1982), arguing that "as a matter of substantive Eight [sic] Amendment law 'a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death….'" Pet. App. 200-01 (citing *Cabana v. Bullock*, 474 U.S. 376, 386 (1986)).[1] Petitioner subsequently retained counsel, who submitted an amended petition that expressly incorporated the claims in Petitioner's *pro se* petition.

Following an evidentiary hearing, the habeas court entered a seven-page order on February 20, 2009, that denied Petitioner's petition but did not address his innocence and *Enmund* claims, among others. Pet. App. 25-34. On October 18, 2010, the Georgia Supreme Court granted Petitioner's application for a certificate of probable cause to appeal and remanded to the habeas court for a "proper analysis" of two claims that it had neglected to address, either fully or in part. *Drane v. Terry*, Case No. S09E1103, October 18, 2010.[2] Pet. App. 35-

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[1] In *Cabana* the court interpreted and applied the decision in *Enmund*.

[2] The issues remanded were (1) "Drane's conflict of interest claim, including his claim that trial counsel were rendered ineffective by the 'implicit' direction of the trial court to simultaneously represent him and a prosecution witness, is remanded to the habeas court for a proper analysis, including appropriate findings of fact and conclusions of law"; and

37. The court did not rule in any way upon other unaddressed claims in the habeas petition, including Petitioner's innocence and *Enmund* claims.

Shortly after the remand, however, Petitioner's then-counsel were informed that Willis had been interviewed by an investigator with the State Board of Pardons and Paroles as part of his application for parole, and had given a statement. Counsel contacted the parole board, which ultimately waived its immunity and produced a statement that Willis had given to Chief Parole Officer Harris Childers on July 21, 2010, in which he confessed that Petitioner "was only present during the crime . . . [and] did not play an active part in assaulting or killing the victim." Pet. App. 49.

Officer Childers noted in his report that:

> Though very reluctant at first, inmate Willis discussed his crime candidly. Initially, he refrained, saying that his attorney had instructed him not to make a statement. I informed him that he has already served twenty years of a Life sentence and seemingly has little to lose by telling the truth. After a long hesitation, he began to talk. During his confession, he informed me that he has never

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(2) "Drane's claim that sentencing phase jury charges at his trial were erroneous under *Davis v. State*, 255 Ga. 588, 593–95 (1986) . . ., and *Enmund v. Florida*, 458 U.S. 782 (1982) . . . ."

> admitted his guilt to anyone, including his attorney.

Mr. Willis informed Officer Childers that Ms. Blackmon had "voluntarily left the [liquor] store with them, promising sex in exchange for cocaine."

> After riding around and drinking with the victim they informed her that they did not have any cocaine, and she started arguing with them. Willis said that she agreed to have sex with them even though they had lied about the cocaine, because she had drunk their liquor. He said that she had sex with him, but acted like she was upset. After Willis had sex with the victim, codefendant Drane showed a large switchblade knife to Willis and asked him, "How would you like being stuck with this knife?" Willis stated that he misunderstood Drane, and thought that Drane was insinuating that the knife belonged to the victim and that she had tried to cut him (Willis). "I was enraged. I thought that she had tried to cut me. I had a gun in the truck, and I shot her." He said that Drane "didn't really [do] anything" to the victim.
>
> "After it happened, I couldn't believe what had happened," Willis said. "I was going to try to hide the body. I had heard about [cutting] the head and hands off a body (to avoid

> identification), and I started to do that. I started trying to cut her head off, but I got sick. It was like waking up from a dream. I said 'I can't do this.' . . . ." Willis stated that codefendant Drane did not assault the victim in any way, and he did not participate in Willis's attempt to dismember the body.

Id. Officer Childers noted that "[i]n my opinion, he is being truthful. He seemed resigned to the prospect that his confession may adversely affect his chances for release." *Id.* at 52. Officer Childers concluded by stating that he would notify the "Director of Clemency of this new information in this case, in the event that the Board may want to review the case of codefendant Leonard Drane . . . ." *Id.*

Petitioner immediately sought state avenues in which to offer this new evidence. Petitioner's then-counsel moved the habeas court to stay its proceedings pending the filing and resolution of an extraordinary motion for new trial ("EMNT") in the trial court. That motion was granted, and Petitioner filed an EMNT in the Superior Court of Elbert County pursuant to the six-factor standard promulgated by the Georgia Supreme Court in *Timberlake v. State*, 271 S.E.2d 792 (Ga. 1980).

On June 24, 2011, the trial court conducted an evidentiary hearing on Petitioner's EMNT, at which Willis testified under oath that he, and he alone, had shot Ms. Blackmon and cut her throat, that Petitioner had no inkling that Willis would commit those acts, and that Petitioner's only involvement in

the murder of Ms. Blackmon was to assist Willis in hiding her body after Willis had killed her. Pet App. 204-54. Willis expressly rejected the prosecutor's suggestion that he had testified to gain an advantage in his parole application.

> . . . I really thought that when I told [Officer Childers] that, it would hurt my chances of getting out because the way I looked at it and the way the case was handled and everything, that they looked at Drane and they put him on death row and I was the one that looked like that I didn't have any part in the crime and like Drane did. If I was wanting to get out, I would have told them . . . Drane did the killing and I didn't know what to do. I just went along with it. I would have told him that and they might would have let me out. They might would have not, but I sure wouldn't have told them that I did it.

Id. at 235-37.

The superior court ultimately denied Petitioner's EMNT in a four-page order concluding that it did not "have the power to grant this motion for a new trial under existing case law and the constraints put on its authority." Pet. App. 41-42. The superior court similarly concluded that it did not have the authority to grant Petitioner a new trial as to his death sentence only, but seemed to question the constitutionality of that sentence, given the "precedent for the proposition that only the person who commits the murder is constitutionally eligible

for the death penalty." *Id.* at 42 (citing *Enmund v. Florida*; 458 U.S. 782 (1982)). While feeling that "it d[id] not have the authority to grant a new trial as to sentencing only in order to *comply* with *Enmund*," the superior court noted that such relief "may be a matter to be considered by the Court hearing the Habeas Corpus petition," *id.* (emphasis added).

The Georgia Supreme Court granted Petitioner's application for a discretionary appeal of the denial of his EMNT but ultimately affirmed that ruling. *See Drane v. State*, 728 S.E.2d 679 (Ga. 2012). The court held that the superior court had erred in concluding that it could not address the issue of sentencing, but declined to remand because it found no abuse of discretion in the superior court's holding that Petitioner had not met the diligence requirement of the *Timberlake* standard, which it found to provide "an independently-sufficient basis for this Court to affirm." *Id.* at 683.[3]

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[3] The court also noted in *dicta* that the superior court would not have abused its discretion if it had concluded that Willis's confession was not material to sentencing, as his insistence that he had not confessed to Mr. Guthrie would have "minimized" the effect of his testimony because "it would have given the jury reason to doubt the credibility of Willis, Mr. Guthrie, or both." *Id.* at 683. Because the superior court had made no findings on that point, however, the Supreme Court held that if Petitioner's want of diligence had not provided an "independently-sufficient basis for this Court to affirm the trial court's complete denial" of the EMNT, it would have remanded the case for "a clear finding on the materiality of Willis's testimony with regard to the jury's sentencing verdict." *Id.* at 683–84.

C. Petitioner's Habeas Proceedings Resume

Following the denial of his EMNT and the conclusion of its appeal, Petitioner filed a Motion to Reopen the Evidence in his state habeas proceedings on January 29, 2013. The motion was granted, a joint consent scheduling order entered, and on August 20, 2015, the habeas court conducted an evidentiary hearing in which Willis again confessed that he alone murdered Ms. Blackmon. Pet. App. 109-70.

In his detailed testimony, Willis explained that Petitioner played no role in the arrangement he made with Ms. Blackmon. As Willis related, on the evening of June 13, 1990, Willis and Petitioner were riding around Elberton, Georgia, in Willis's truck when they decided to stop at a liquor store. *Id.* at 126-28. Petitioner went into the store, while Willis remained in the truck. *Id.* at 127-28. While Petitioner was inside the store, Ms. Blackmon approached Willis, and the two agreed to exchange drugs for sex. *Id.* at 127-30. Once Petitioner returned from the store, Willis, Ms. Blackmon, and Petitioner left together in the truck. *Id.* at 128-30. Willis had not discussed any such arrangement with Petitioner prior to this encounter, and Petitioner was not a part of Willis's discussions with Ms. Blackmon. *Id.* at 128-29.

Willis also affirmed that he murdered Ms. Blackmon on impulse, and that Petitioner could have had no inkling that he would do so. Willis detailed how, after driving for a short while into rural Elberton, the three pulled off onto a side road. *Id.* at

128-31. Petitioner then exited the truck, and Willis began having sex with Ms. Blackmon. *Id.* at 130-32. Willis ended this encounter shortly after it began, and he and Ms. Blackmon exited the truck. *Id.* at 132-33. Sometime after Willis had dressed, Petitioner approached him and showed him an unfamiliar knife. *Id.* Willis became enraged, assuming that Petitioner had taken the knife from Ms. Blackmon, and that she had intended to stab him with it. *Id.* at 131-35. Seeing Ms. Blackmon walking back to the truck, Willis decided, on his own and without consulting with Petitioner, to retrieve a sixteen-gauge shotgun that he kept behind the seat of his truck. *Id.* at 134-36. With Petitioner now some distance away, and without any advance warning, Willis shot Ms. Blackmon in the head at close range. *Id.* at 135-38. Willis described it as follows:

> Q. What did you do once you got the gun?
>
> A. Well, I didn't get the gun until I seen Ms. Blackmon walking towards, back towards the truck. I seen her coming back, and that's when I got the gun. And by the time she – she just about got to the truck I had gotten the gun out from behind the seat. And I walked around on the side of the truck – I'm on the driver's side of the truck and I walked around to the side. And about the time I walked around to the side – I had it in my left hand because I'm left-handed. By the time she walks around –

and she never sees the gun – I just pull the gun up and I shoot her.

Q. You have a distinct memory of the events you just described?

A. Yes, sir.

Q. No doubt in your mind that it happened just as you described it?

A. No, sir.

Q. Did you say anything to her before you shot her?

A. No, sir.

Q. Did she say anything to you?

A. No, sir.

Q. Where did you shoot her?

A. In the head.

Q. How many times?

A. Once.

Q. What impact did it have on Ms. Blackmon?

A. Well, when the shotgun blast hit her she just, I mean, she just immediately fell backwards and hit the ground. And I – I knew she was dead on impact because, I mean, there was no movement, she just – that was it, she just hit the ground just flat.

Q. Was she moving after you shot her?

> A. No, sir.
>
> Q. Could you tell whether or not she was breathing?
>
> A. Well, I didn't – I didn't get close to her, or anything. I mean, I – I – the way she hit, I mean the way she hit the ground, I mean, the shotgun blast was in the head, I mean, I just thought for positive that she was dead on impact.
>
> Q. Where was Lenny when you shot Ms. Blackmon?
>
> A. He was – he was a little ways up that road. It was probably a little distance away. I could see him. It was dark but I could see, like, his shadow, where he was standing at. I could see that he was standing up.

Id. at 135-37.

Willis crossed the twenty or thirty yards that separated him from Petitioner, who had not moved, and said "I shot her." *Id.* at 137-38. Evidently stunned by the events, Petitioner made no response except to say "I know." *Id.* at 138.

Panicked, Willis decided that he would try to hide what he had done by cutting off Ms. Blackmon's head and hands—something he had heard "the mob" would do—in order to complicate any future attempt to identify her body. *Id.* at 138-39. Willis admits that he came up with this idea on his own and that he never once told Petitioner what he intended to do. *Id.* at 138-40. Willis returned to Ms. Blackmon's

body and, using his pocket knife, began sawing at Ms. Blackmon's throat, only to stop shortly afterwards because he felt he could not "keep doing this." *Id.* at 140-42. After abandoning his attempt to decapitate Ms. Blackmon, Willis decided that he had to "talk to Lenny because I didn't know what he was going to do. I didn't know whether he was going to turn on me or he was going to run or what he was going to do." *Id.* at 140-41. For that reason, Willis directed Petitioner to help him put Ms. Blackmon's body in the truck. *Id.* at 140-42.

At the conclusion of his direct examination, Willis acknowledged his complicity—and Petitioner's innocence—as follows:

> Q. All right, Mr. Willis, I want to sum up what you've testified to, and I want to make sure that we are clear on these few points. Did Mr. Drane shoot Ms. Blackmon?
>
> A. No, sir.
>
> Q. Is there any doubt in your mind whatsoever as to whether or not Mr. Drane shot Ms. Blackmon?
>
> A. No doubt at all.
>
> Q. Did you tell Mr. Drane that you intended to shoot Ms. Blackmon before you shot her?
>
> A. No, sir.
>
> Q. Is there any doubt in your mind about whether you told Mr. Drane that

you intended to shoot Ms. Blackmon before you shot her?

A. No, sir. I didn't tell him.

Q. Did Mr. Drane ever cut Ms. Blackmon?

A. No, sir.

Q. Is there any doubt in your mind about whether Mr. Drane cut Ms. Blackmon?

A. No, sir.

Q. Did you tell Mr. Drane that you intended to cut Ms. Blackmon before you cut her?

A. No, sir.

Q. Is there any doubt in your mind about whether you told Mr. Drane that you intended to cut Ms. Blackmon before you cut her?

A. No, sir.

Q. Mr. Willis, was Mr. Drane involved in any way in causing the death of Ms. Blackmon?

A. No, sir.

Id. at 142-45.

The State offered no witnesses at the August 20 hearing to contradict the essential facts Willis offered and conducted a perfunctory cross-examination.

On January 4, 2017, the habeas court entered an order that appeared to acknowledge the veracity and significance of Willis's testimony. After discussing the facts Willis offered during the habeas hearing, while offering no alternative view regarding the events that led to Ms. Blackmon's death, the habeas court accepted the critical conclusions advanced by Willis's testimony—most notably that "Willis was clear that Drane did not shoot or cut Blackmon, and was unaware of [Willis's] intention to do so." Pet. App. 4-7.

The habeas court nevertheless denied Petitioner relief. The court held that "[w]hile Willis's confession would *certainly have been relevant to several issues raised in Drane's original habeas petition and the amendments thereto*, it is simply not relevant to the two specific issues on remand." Pet. App. 6-8. (emphasis added). On this basis, the habeas court held that it "is without the authority to consider this claim." *Id.* at 7-8. The habeas court did note, however, that it had not ruled upon Petitioner's innocence and *Enmund* claims in its original order denying his petition.

Petitioner timely filed an application for a certificate of probable cause to the Georgia Supreme Court. In a four-page order, that court denied Petitioner's application, holding that the habeas court, in "recogniz[ing] 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, . . . correctly refused to consider Drane's actual innocence . . . claims." Pet. App. 20. The court then refused to

authorize any further consideration of that claim. Noting that it "has never found a freestanding innocence claim as cognizable in the habeas court," the court held that Petitioner's innocence "claim should come by means of an extraordinary motion for new trial." Pet. App. 20-21. The court then held that because "Drane has, in fact, litigated his actual innocence claim in his original trial court through an extraordinary motion for new trial . . . his actual innocence claim is barred by *res judicata*." *Id.* at 21. The court thus premised its denial of relief upon its earlier application of the largely procedural *Timberlake* standard. The court further held that Willis's unqualified admission of guilt—which became available only years after Petitioner's sentencing—was no different from the hearsay testimony presented at trial regarding Willis's purported jailhouse confession to Guthrie. *Id.* at 23-24. The court thus refused to reconsider Petitioner's claim that his sentence is disproportionate under *Enmund*.

REASONS FOR GRANTING THE PETITION

Willis's confession confirms what Petitioner has maintained for almost thirty years: he is innocent of the murder of Renee Blackmon. Petitioner and Willis were the only two witnesses to Ms. Blackmon's murder, and their accounts of that night, though given decades apart, correspond in every meaningful regard. Had Willis made his confession prior to Petitioner's trial, it seems certain that Petitioner would not even have been charged with Ms. Blackmon's murder, much less convicted and

sentenced to death. The fact that Petitioner is on death row while Willis serves a sentence of life imprisonment is a travesty and a gross violation of Petitioner's constitutional rights. When given an opportunity to rectify this injustice, however, the Georgia courts refused to act. This Court should accordingly grant certiorari review.

I. It is Unconstitutional to Execute Petitioner Without a Merits Ruling on His Claim of Actual Innocence

This Court has long recognized that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Herrera*, 506 U.S. at 417. Petitioner's case presents precisely that circumstance. The courts below have acknowledged the relevance and reliability of Willis's sworn confession, which has been subject to adversarial testing in two proceedings. As detailed above, however, the Georgia state courts have now closed every avenue for relief based upon Willis's confession.

A. A Compelling Case of Innocence Must Be Independently Cognizable In State Habeas Absent Another Available Vehicle

"[D]ecisions of this Court clearly support the proposition that it would be an atrocious violation of our Constitution and the principles upon which it is based to execute an innocent person." *In re Troy Anthony Davis,* 130 S. Ct. 1, 2 (2009) (Stevens, J.,

joined by Ginsburg, J., and Breyer, J., concurring) (transferring original habeas petition to district court for findings regarding innocence) (internal quotations omitted). In his opinion in *Herrera*, Justice Blackmun put an even finer point on it: "The execution of a person who can show that he is innocent comes perilously close to simple murder." *Herrera*, 506 U.S. at 446 (Blackmun, J., joined by Stevens, J. and Souter, J., dissenting). At least four other justices in *Hererra* agreed that the Constitution would not tolerate the execution of a defendant who could put forth a truly persuasive case of innocence, and this Court has never retreated from that principle. *Id.* at 419 (O'Connor, J., joined by Kennedy, J., concurring) ("[E]xecuting the innocent is inconsistent with the Constitution."); *id.* at 430–31 (Blackmun, J., joined by Stevens, J. and Souter, J., dissenting) ("We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. . . . I do not see how the answer can be anything but yes.").

B. Willis's Undisputed Testimony Conclusively Exonerates Petitioner of Murder

Willis has admitted, in compelling and unequivocal testimony, that he bears sole responsibility for the murder of Ms. Blackmon. He has stated:

- that he, not Petitioner, propositioned Ms. Blackmon and agreed to exchange drugs for sex (Pet. App. 128-29);

- that he, not Petitioner, drove Ms. Blackmon to a secluded place in rural Elbert County (*Id.*);
- that he, not Petitioner, began to have sex with Ms. Blackmon in the front seat of Willis's truck after Petitioner left the vehicle (*Id.* at 130-32);
- that he, not Petitioner, became enraged after ending the sexual encounter and incorrectly believing that Ms. Blackmon intended to harm Willis (*Id.* at 133-35);
  - that he, not Petitioner, decided to get a shotgun that Willis carried in the vehicle and did so without telling Petitioner what he was going to do with the firearm (*Id.* at 134-35);
- that he, not Petitioner, shot Ms. Blackmon at close range while Petitioner was "a little ways up that road" and without telling Petitioner what he intended to do (*Id.* at 136-37);
- and that he, not Petitioner, began cutting Ms. Blackmon using Willis's knife in an attempt to dismember her and cover up his crime (*Id.* at 138-39).

In other cases, including *Herrera*, this Court has ultimately concluded that the claim of actual innocence was not sufficiently supported by the record to compel the Court to address whether it was independently cognizable. *See, e.g., Herrera*, 506 U.S. at 417–19; *Jones v. Taylor*, 763 F.3d 1242, 1251 (9th Cir. 2014). Here, there is no such barrier. The evidence Petitioner has presented is strikingly more powerful than any contemplated in this Court's earlier cases.

This Court has recognized the increased probative value of a "spontaneous statement recounted by . . . eyewitnesses with no evident motive to lie." *House v. Bell*, 547 U.S. 518, 552 (2006);. As noted, Willis's initial admissions were provided spontaneously to an officer of the State Board of Pardons and Paroles after years of silence. Willis's previous refusal to make such a statement (Pet. App. 144-45), his initial reluctance to share the whole story regarding Ms. Blackmon's death with the officer, and his evident shame "about what [he] did" are powerful indicia of his credibility, as is the fact that—sometime later, and in an effort to further guarantee that his exoneration of Petitioner would not remain hidden—Willis also confessed to his prison chaplain. *Id.* at 149-50.

Willis not only had no motive to lie in confessing; he had every reason to keep silent. He detailed his sole responsibility for Ms. Blackmon's death at a time when doing so was directly contrary to his interests. Pet. App. 47-52. As he made plain during his testimony in this case, following a confession as to his sole responsibility, "any chances for me ever getting the case overturned or appealed or anything like that, it's just gone, it's vanished." *Id.* at 146-49 (Willis testifying, among other things, that he knew he was "eliminating any chance that [he] would get parole."). Notwithstanding the acknowledged, adverse impact on his own situation, Willis made no attempt to minimize his responsibility for Ms. Blackmon's death. Indeed, Willis, in admitting that he attempted to mutilate Ms. Blackmon's body in order to conceal his crime, took responsibility for

conduct even more aggravated than what had been charged to him.

In *Herrera*, this Court found that newly-obtained affidavits questioning the defendant's culpability lacked reliability because they were not subject to cross-examination or any other credibility determinations in open court, were made after the alleged perpetrator had died, and contained hearsay. *Herrera*, 506 U.S. at 417–18. Additionally, there were inconsistencies between the affidavits and evidence that had been presented at trial. *Id.* at 418. And of course, the petitioner in *Herrera* had pleaded guilty. *Id.*

Willis's confession has none of these faults. By accepting sole responsibility for the crime in a manner and time directly contrary to his self-interest, Willis reveals his confession as precisely the sort of "trustworthy eyewitness account[]" that this Court has theorized would be sufficient to show actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *see also Stockton v. Angelone*, 70 F.3d 12, 13–14 (4th Cir. 1995) (regarding non-eyewitness accounts with skepticism in actual innocence analysis); *Cox v. Burger*, 398 F.3d 1025, 1031 (8th Cir. 2005) (discounting testimony from a witness who was not present at the scene of the crime in assessing an actual innocence claim). Willis has now testified to his complete culpability in open court on two occasions, each of which was subject to cross-examination by the State. Willis's testimony is based on his own firsthand eyewitness knowledge of the crime, and he has told precisely the same story on multiple occasions, consistently maintaining over

these intervening years that Petitioner took no part in the murder of Ms. Blackmon. Willis's confession is also consistent with Petitioner's pretrial statements and is not contradicted by other evidence, as Petitioner never pled guilty and has always maintained his innocence, and there is no eyewitness testimony tying Petitioner to the murder of Ms. Blackmon. *Cf. Herrera*, 506 U.S. at 418 (finding that the threshold showing for actual innocence was not met where there were two eyewitness identifications, numerous pieces of circumstantial evidence tying Herrera to the crime, a handwritten letter apologizing for the murders, and Herrera's guilty plea). These facts present the truly compelling case of innocence that simply must be cognizable in habeas.

C. This Evidence Has Not Been Properly Evaluated In State Court

The Georgia state courts have occupied Petitioner in an eight-year shell game in which he has been directed down one avenue after another, only to find himself at a dead end with no full and fair consideration of his new evidence, still subject to execution for a crime he unquestionably did not commit. Both the EMNT and state habeas courts who heard Willis's testimony acknowledged its relevance to his innocence and *Enmund* claims—and, implicitly, its credibility—but believed themselves procedurally constrained from granting relief. For its part, the Georgia Supreme Court disregarded its own precedent and misconstrued the record in affirming those denials. These proceedings, which have dismissed or denied Petitioner's claims based upon

procedural gambits or far-fetched fact-findings, are insufficient to protect his constitutional rights and should not be sanctioned by this Court.

As the court with the last word on Petitioner's state court proceedings, the Georgia Supreme Court essentially used the same opinion twice: its 2012 affirmance of the denial of Petitioner's EMNT, which it later referenced as dispositive of Petitioner's innocence claim when affirming the state habeas court's refusal to address it. But this opinion did not actually consider the merits of the innocence claim and cannot foreclose this Court's review.

In the first place, the Georgia courts' review of Petitioner's innocence claim was conducted through the prism of the state-law *Timberlake* standard governing EMNT's, which contains a mixture of purely procedural and partially substantive showings that a movant must make in order to receive a new trial. Even setting aside the question of how the application of such a particularized standard could prohibit consideration of an innocence claim in habeas on *res judicata* grounds, five of the six *Timberlake* showings are procedural in that they contemplate circumstances in which evidence will not be considered "new" in spite of its substance because of how and when it was presented or its relationship to the evidence already put before the court—barriers that this Court has found cannot obstruct relief for innocent defendants. [4] Only one prong directly

[4] A petitioner must show: "(1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; . . .

addresses the substantive question raised by new evidence of innocence: whether "(3) . . . [the evidence] is so material that it would probably produce a different verdict." *Timberlake,* 271 S.E.2d at 795–96.

The Georgia Supreme Court's application of *Timberlake* in Petitioner's case is inconsistent with its stated approach in capital cases when the defendant has presented evidence of innocence. Perhaps in recognition of this Court's unwillingness to allow procedural barriers in such cases, the Georgia Supreme Court has stated that it will "look beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with [a defendant's] allegedly-new testimony would probably find him not guilty or give him a sentence other than death" and instead "focus primarily on [*Timberlake*'s] requirement that the new evidence be 'so material that it would probably produce a different verdict.'" *Davis v. State*, 660 S.E.2d 354, 362–63 (Ga. 2008) (quoting *Timberlake*, 271 S.E.2d at 795). In Petitioner's case, however, the Georgia Supreme Court allowed this "core question" to be sidelined by the ""bare legal principle[]" of *Timberlake*'s diligence criterion, finding that Petitioner's supposed want of it was a sufficient ground to deny his EMNT.

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(4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness." *Timberlake*, 271 S.E.2d at 795–96.

Indeed, no state court has addressed this "core question." As discussed *supra*, the superior court's order denying Petitioner's EMNT contained only conclusory findings, dismissing the materiality of Willis's confession with a single, incredible sentence asserting that "testimony from Willis and not just Drane, that Drane did not shoot or cut the throat of Ms. Blackmon does not rise to the level of being so material that the Court feels there probably could have been a different verdict." Pet. App. 41. In defending this sparse finding, the Georgia Supreme Court attempted to minimize the import of Willis's confession by making factual findings that were either unsupported by the record or did not support the propositions for which they were cited.

For example, the Court found that "Willis told Drane *on the evening of the murder* that he was going to murder an African-American person . . . ." *Drane v. State*, 728 S.E.2d 679, 682 (Ga. 2012) (emphasis added). There is no evidence to that effect. The Court is presumably referencing one of Petitioner's pretrial statements to police, which related an incident that occurred *a week before the crime* in which Willis, after having beer bottles thrown at his truck while asking a group of men outside a pool hall for the whereabouts of a man named "Rooster," threatened to "kill a n*****" in this town to straighten it out." Pet. App. 88-89. The state also presented testimony from James Leroy Burton that Willis was looking for a man named Rooster on the night of the crime and told Burton that he "was going to kill [Rooster]." *Id.* at 72-74. It is plainly unreasonable to conclude, as the Georgia Supreme Court did here, that these comments show that Willis

told Petitioner that he intended to kill an African-American person on the night of the crime, much less "demonstrate that Drane was aware that a murder was going to be committed *when he joined Willis in inviting Ms. Blackmon to leave with them in Willis' truck*." *Drane*, 728 S.E.2d at 682.

The Georgia Supreme Court also stated that Petitioner's "version of events" from his pretrial statements to investigators were "belied" by the state's witnesses. *Id.* This finding fails to acknowledge that Petitioner's version of events was corroborated in every meaningful particular by Willis, the only other eyewitness to Ms. Blackmon's murder. In any event, the court's summary of this testimony also contains a clearly erroneous fact-finding that underscores the unreliability of the state's witnesses. The court concluded that Petitioner "had admitted to various persons that he had either cut Ms. Blackmon's throat or both shot her *and* cut her throat." *Id.* (emphasis in original). In fact, *no witness* testified that Petitioner had claimed to shoot Ms. Blackmon and cut her throat.[5] The court's confusion is understandable, however, as the state's evidence came from witnesses with questionable reliability[6], contained factual errors

[5] One witness, Toni Smith, testified that Petitioner had claimed that he shot Ms. Blackmon, but did not say that he cut her throat. Another witness, Carey Fortson, testified as to the opposite: that Petitioner said Willis shot Ms. Blackmon, but that Petitioner cut her throat. But the twain do not meet in any witness.

[6] Gaines (who had known Willis "all my life," Pet. App. 178-79) and Smith admitted on cross-examination that they

that call its veracity into doubt[7], and attributed statements to Petitioner that were inconsistent with each other[8]—even though some were purportedly

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were good friends with Willis and had moved into his home and cared for him for several weeks after his car accident. *Id.* at 57-58, 91-93. This relationship calls into question their assignment of primary criminal responsibility to Petitioner. Fortson knew Ms. Blackmon and did not come forward with his account until two years after the crime, claiming that Petitioner had made a statement to him in "February through March of 1991" while both were incarcerated at the Hart Detention Center—a fact that did not come out at trial. *Id.* at 65-70. Evidence of Mr. Fortson's criminal background and custodial status calls into question the credibility of his account of Petitioner's purported statement.

[7] According to Gaines and Smith, Petitioner said that he and Willis had met Ms. Blackmon at "the Huddle House"—even though, as noted by Petitioner, the state, and other witnesses, Petitioner and Willis met Ms. Blackmon at a liquor store at Porter's Corner, or "the hot corner." Pet. App. 54-55, 71-72, 74-75. Smith claimed that Petitioner said he had shot Ms. Blackmon with a "30-06," which is a rifle cartridge. *Id.* at 90-91. The evidence at trial, however, indicated that Ms. Blackmon had been shot with a shotgun or pistol, (*Id.* at 59-63)—a finding corroborated by Willis's testimony. Fortson asserted that Petitioner claimed that Ms. Blackmon was shot in the back of the head, (*Id.* at 68-70), but this description is not consistent with her injuries. *Id.* at 60-61. Gaines and Smith describe Petitioner bemoaning tying "only one block" to Ms. Blackmon's body, (*Id.* at 56-57, 89-90), but Ms. Blackmon's body was attached to a brake drum (*Id.* at 58-59). Fortson also testified that the crime occurred in South Carolina, not Georgia. *Id.* at 69-70.

[8] Smith testified that Petitioner had repeatedly claimed that he had shot Ms. Blackmon, but made no mention of any cutting. Pet. App. 89-90. Fortson testified that Petitioner had told him that Willis shot Ms. Blackmon, but that Petitioner cut

made within the *same conversation*.[9] In short, there is a reason why the court itself previously characterized this contradictory hearsay testimony as "slight," *Drane*, 455 S.E.2d at 31.

The Supreme Court also volunteered that Willis might have testified untruthfully because of what it characterized as his agreement with Petitioner "before their apprehension . . . that they would work in concert to protect one another from prosecution." *Drane*, 728 S.E.2d at 682. This, too, finds no support in the record. As Petitioner explained in his statement to police, his initial silence was not because the men had agreed to protect each other, but because Willis had *threatened* Petitioner. Pet.

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her throat. *Id.* at 68-71. Gaines makes neither allegation, instead testifying that Petitioner had bragged about having sex with Ms. Blackmon, said that the ride she took with him and Willis was the last ride that she would ever take, and that he should have used more "blocks" when disposing of her body in the lake. *Id.* at 56-57. While this testimony attributes despicable remarks to Petitioner, it is also contradicted by the evidence at trial and—even if true—does not implicate Petitioner in Ms. Blackmon's murder beyond helping to hide her body, to which he has already admitted.

[9] Gaines and Smith each purported to describe their conversation with an inebriated Petitioner on or around July 1, 1990. Despite Smith's insistence that Petitioner had repeatedly confessed to shooting Ms. Blackmon in Gaines's presence (Pet. App. 89-90), Gaines made no mention of that statement at Petitioner's trial. At Willis's trial, however, Gaines incorporated that statement into her testimony, claiming that Petitioner had told them "he had killed a black girl." *Id.* at 179-80. Smith did not testify at Willis's trial.

App. 78-80 ("[Willis] told me . . . if I ever said anything that he was going to put it on me . . . .")

Finally, the court notes that the superior court would not have abused its discretion if it had concluded that Willis's confession was not material to sentencing, as his insistence that he had not confessed to Guthrie would have "minimized" the effect of his testimony and "given the jury reason to doubt the credibility of Willis, Mr. Guthrie, or both." *Drane*, 728 S.E.2d at 683. This is unreasonable. Even if the jury believed that Willis had indeed spoken to Guthrie, the only implication of that conclusion is that *Willis had previously confessed.* The jury would still be confronted with two witnesses who agreed as to the only material point before them: that Petitioner was innocent, because Willis and Willis alone killed Ms. Blackmon.

This Court's precedent suggests that the state courts' reliance upon *Timberlake* is not an adequate ground to avoid full consideration of the innocence claim or to prevent certiorari review of this claim, *see Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *NAACP v. Alabama*, 357 U.S. 449, 455–58 (1958). This Court has held that it must not be "completely bound by state court determination of any issue essential to a decision of a claim of federal right, else federal law could be frustrated by distorted fact-finding." *Stein v. New York*, 346 U.S. 156, 181 (1953). Petitioner respectfully submits that this Court should review and ultimately set aside the fact-findings discussed above, as they meet both of the exceptions to this Court's general demurral when asked to reconsider a state court's fact-findings. *Fiske v. Kansas*, 274 U.S.

380, 385–86 (1927). Petitioner first contends that his "Federal right[s] ha[ve] been denied as the result of a finding shown by the record to be without evidence to support it." *Id.* Secondly, the state court's "conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Id.*

When these clearly erroneous fact-findings are set aside in favor of the record as it truly is, it is clear that Petitioner's sentence of death is unconstitutional and must be set aside. The Georgia courts have failed to provide a meaningful avenue for review. This Court should not allow this most profound of Petitioner's federal rights to "be frustrated by distorted fact-finding." *Stein*, 346 U.S. at 181. Thus the petition should be granted.

II. Compelling Evidence of Petitioner's Innocence For Murder Proves that His Execution is Not Proportional to His Crime

The compelling evidence establishing that Petitioner is innocent of the murder for which he was sentenced to death also supports Petitioner's claim that his death sentence is disproportionate and, accordingly, is prohibited by the Eighth and Fourteenth Amendments and the equivalent provisions of the Georgia Constitution. (Sept. 15, 2011 Order of the Superior Court of Elbert County at 3–4, Ex. B to Post-Hearing Brief (citing *Enmund v. Florida*, 458 U.S. 782 (1982))). The Georgia Supreme Court failed to evaluate this evidence as to this proportionality claim.

The "concept of proportionality is central to the Eighth Amendment," *Graham v. Florida*, 560 U.S. 48, 59 (2010), and it is the "precept of justice that punishment for crime should be graduated and proportional to both the offender and the offense," *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012), citing *Weems v. United States*, 217 U.S. 349, 367 (1910); *see also Graham*, 560 U.S. at 59 (same). Accordingly, the Supreme Court has held that the Eighth Amendment does not permit "the imposition of the death penalty on one . . . who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed," *Enmund*, 458 U.S. at 797; *Tison v. Arizona*, 481 U.S. 137 (1987); *see also Kennedy*, 554 U.S. 407 (2008) (capital punishment impermissible for crime that "did not result, and was not intended to result, in death of the victim"). This Court has further held that when assessing the validity of a death sentence for an individual defendant, "[t]he focus must be on *his* culpability, not on that of those who committed [the murder], for we insist on individualized consideration as a constitutional requirement in imposing the death sentence . . . ." *Enmund*, 458 U.S. at 798 (emphasis in original), *quoting Lockett v. Ohio*, 438 U.S. 586, 605 (1978), *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

Willis's confession is plain and powerful evidence that Petitioner, as with *Enmund* himself, "did not kill or attempt to kill; and . . . [that] the record . . . does not warrant a finding that [Petitioner] had any intention of participating in or facilitating a murder." *Id.* Willis's confession is also evidence that Petitioner did not demonstrate "reckless indifference" to Ms.

Blackmon's life. *Tison*, 481 U.S. at 158. Finally, given that in the separate trials of Petitioner and Willis, the State pursued inconsistent claims and introduced inconsistent evidence, the State should not now seek to prevent full consideration of the disproportionate results.

To the extent the Georgia Supreme Court evaluated this issue at all, it vacillated between contending that this evidence was no different than what was presented during Petitioner's sentencing (Pet. App. 21-23) or somehow barred by *res judicata* (*Id.* at 23).[10] Regardless, this Court has repeatedly held that evidence of actual innocence serves as a gateway through procedural barriers that might otherwise stand in the way of the Court's consideration of an innocence claim, as allowing an innocent man to be denied redress would constitute a miscarriage of justice. See *Schlup v. Delo*, 513 U.S. 298 (1995) (federal court may reach merits of defaulted claims in federal habeas petition upon showing of actual innocence); *House*, 547 U.S. 518; *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (reaching merits of claims absent showing of cause and prejudice where fundamental miscarriage of justice

[10] At bottom, the Georgia Supreme Court appears to believe that Willis's unqualified admission that he and he alone committed the murder of Ms. Blackmon was not materially different than hearsay testimony from Guthrie, where he contended that Willis confessed that he was solely responsible for the crime. But evidence of a jailhouse confession is no substitute for the unqualified admission—under oath and made repeatedly—that Willis was alone responsible for the death of Ms. Blackmon.

would result because constitutional error "probably" resulted in conviction of actually innocent defendant); *Sawyer v. Whitley*, 505 U.S. 333, 343 (1992) ("innocence of the death penalty" justifies review of defaulted claims). Petitioner is unquestionably entitled to a determination on this issue, and the Georgia courts have refused to provide one.

CONCLUSION

Petitioner was sentenced to death for a crime he did not commit, while the confessed killer avoided the death penalty. Now that the uncontradicted confession of the actual killer is available, the execution of Petitioner without full and fair consideration of his claim of innocence would violate his rights under the Constitution. The Georgia courts have refused to provide such consideration. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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