

In The
Supreme Court of the United States

LEONARD MAURICE DRANE,
Petitioner,
v.
ERIC SELLERS WARDEN,
Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia**

BRIEF IN OPPOSITION

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[CAPITAL CASE]
QUESTIONS PRESENTED

Did the Georgia Supreme Court's decision that a freestanding actual innocence claim is not cognizable in state habeas conflict with this Court's decision in *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993)?

Did the Georgia Supreme Court correctly determine that the state-law ground of res judicata barred consideration of Petitioner's actual innocence claim and proportionality claim?

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OPINIONS BELOW

The decisions of the Georgia Supreme Court in the criminal direct appeals are published at 265 Ga. 255 (1995) and 271 Ga. 849 (1999).

The initial decision of the state habeas court denying relief is not published, but is included in Petitioner's Appendix C.

The decision of the Georgia Supreme Court granting the application for certificate of probable cause to appeal and remanding the case to the state habeas court is not published, but is included in Petitioner's Appendix D.

The decision of the Georgia Supreme Court denying Drane's extraordinary motion for new trial is published, and is included in Respondent's Appendix A.

The final decision of the state habeas court denying Drane's petition for habeas corpus relief is not published, but is included in Petitioner's Appendix A.

The decision of the Georgia Supreme Court denying Drane's application for certificate of probable cause to appeal is not published, but is included in Petitioner's Appendix B.

JURISDICTION

The Supreme Court of Georgia entered its judgment in this case on February 19, 2018. On May 10, 2018, Justice Thomas extended the time within which

to file a petition for a writ of certiorari to and including July 19, 2018, and the petition was filed on July 19, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution states:

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

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

No State shall . . . 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.

STATEMENT

1. *Drane's Crimes.* On June 13, 1990, petitioner Leonard Drane and co-defendant David Robert Willis got into Willis' truck and went to a liquor store where they met Renee Blackmon.¹ *Drane v. State*, 265 Ga.

¹ Renee Blackmon was an African-American woman, while Drane and Willis are Caucasian. Evidence of a racial motive for Ms. Blackmon's murder was presented during trial. *Drane v. State*, 271 Ga. 849, 849 n.1 (1999).

255 (1995). Ms. Blackmon asked Drane and Willis for cocaine and subsequently rode with Drane and Willis to a nearby lake. *Id.* After arriving at the lake, Ms. Blackmon was shot in the head. *Id.* The bullet blew off a part of Ms. Blackmon's skull and also detached her brain. *Id.* Additionally, Ms. Blackmon's throat was slashed at least six times. *Id.* Evidence was presented that either the throat injury or the gunshot wound could have been the cause of death. (Pet. App. 64). After Ms. Blackmon's murder, Drane helped Willis dispose of Ms. Blackmon's body. *Id.*

Nearly three weeks later, Ms. Blackmon's body was found in the lake where Drane and Willis had disposed of the body. *Id.* Ms. Blackmon had been tied to a brake drum with rope. *Id.* After Drane's arrest, he claimed that Willis had sex with Ms. Blackmon, shot Ms. Blackmon with a shotgun, and then cut her throat because she was still breathing. *Drane v. State*, 271 Ga. 849, 849 (1999). Drane admitted to helping Willis dispose of Ms. Blackmon's body, hide the shotgun, wash Willis' truck, and "burn their clothing." *Id.* Drane also stated that after Ms. Blackmon's murder that, due to his fear of Willis, he lived with Willis for the next three weeks. *Id.*

2. *Trial Proceedings.*

a. During the guilt phase, the State presented testimony from several witnesses to whom Drane had confessed participation in the murder of Ms. Blackmon. Tammy Gaines testified that after Ms. Blackmon's murder, Drane confessed to her that he and

Willis “picked this [black] girl up at the Huddle House in Elberton, Georgia, and that it would be the last ride she’d ever take.” *Drane*, 271 Ga. at 849-50 (brackets in original); *see also* (TT: 1192-96). Drane also confessed to Ms. Gaines that he “[had sex with] her so bad that she’d never have any more babies,” and that he and Willis subsequently threw her in the lake. *Id.* at 850 (brackets in original); *see also* (Pet. App. 55-56). According to Ms. Gaines, Drane stated that his only mistake was not placing enough blocks on her body to keep it submerged. (Pet. App. 56). Ms. Gaines testified that when she asked if he had raped Ms. Blackmon, Drane laughed. *Id.* at 56-57. Also, May Young testified that on the night of the crime she observed scratch marks all over Drane’s chest, as though he had been in a fight. (TT: 1661).

Additionally, the State presented testimony from multiple witnesses who testified that Drane confessed to either shooting Ms. Blackmon or cutting her throat. According to Carey Fortson, Drane informed him that Willis shot the victim, but that Drane cut Ms. Blackmon’s throat because she was still alive. *Drane*, 271 Ga. at 850; *see also* (Pet. App. 68-70). Antoinette Smith testified that Drane confessed to shooting Ms. Blackmon and that he repeatedly stated that he did not place enough blocks on Ms. Blackmon’s body to keep it submerged. (Pet. App. 89-90).

Evidence was also presented from law enforcement officials who interviewed Drane as part of their investigation. The State presented Drane’s initial July 7, 1990 statement to law enforcement during which he

admitted that he and another individual picked up Ms. Blackmon and traveled “down a road” with her; however, she later exited the vehicle. (TT: 1579-82). Drane also stated that he was not aware that Ms. Blackmon was missing or had been murdered. (TT: 1582).

Subsequently, Drane provided another statement on July 9, 1990, to Investigator Jean Hughes Sutton. (TT: 1460-61). During Investigator Hughes’ interview, Drane admitted that if he and Willis were arrested for Ms. Blackmon’s murder, “he was going to try to put it on Willis and that Willis would put it on him.” (TT: 1465).

During closing arguments, the State argued that Drane and Willis were responsible for Ms. Blackmon’s murder, and at the trial’s conclusion, the jury convicted Drane of malice murder, felony murder, and aggravated battery. *Drane*, 271 Ga. at 849; (see also TT: 1845-52).²

² Contrary to Drane’s repeated assertions in his brief, during Willis’ and Drane’s trials the State argued the same theory to the jury—that Drane *and* Willis murdered Ms. Blackmon. (See TT: 1841-58). For example, the prosecutor argued in closing that: “they [Drane and Willis] killed her”; that there was a “conspiracy” between Drane and Willis; and “he [Drane] killed Renee along with Willis.” *Id.* at 1843, 1846-47, 1852.

Drane raised this claim in his initial state habeas proceeding. (Pet. App. 31-33). The state habeas court found the claim was procedurally defaulted and Drane failed to show cause and prejudice or a miscarriage of justice to overcome the default. *Id.* In finding there was no miscarriage of justice, the habeas court pointed out that there were “two potentially fatal attacks on the victim.” (See Pet. App. 39 (trial court finding that the state “crime lab was

b. During the sentencing phase, the State resubmitted all of the evidence and testimony that had been presented during the guilt phase. Additionally, Lynn Rousey testified that Drane forced her to orally sodomize him at knife-point the night of Ms. Blackmon's murder. (TT: 1911-18).

In mitigation, Drane presented Marcus Guthrie who testified that Willis confessed to him that he alone shot Ms. Blackmon and cut her throat. (TT: 1925-27). Mr. Guthrie also stated that Willis threatened to kill Drane "if he wouldn't go through with what he wanted to do." (TT: 1929). Drane also presented his brother Steve Drane who testified that Drane was afraid of Willis. (TT: 1932).

At the end of the sentencing phase, the jury recommended the death penalty. *Drane*, 271 Ga. at 849.

3. *Initial State Habeas Corpus Proceeding.* Drane filed a petition for habeas corpus relief in the Superior Court of Butts County (state habeas court) on November 29, 2000. (Pet. App. 181). In his original state habeas petition, Drane alleged that he was actually innocent of Ms. Blackmon's murder. (Pet. App. 194-95).

Following an evidentiary hearing in state habeas court, the parties submitted post-hearing briefs. Petitioner neither presented evidence in support during

unable to determine . . . whether the shot to the head or the cuts to the throat were the principle cause of death"). The prosecutor's arguments that both Drane and Willis were culpable for the murder of Ms. Blackmon were therefore not improper. *Id.* at 32-33.

his evidentiary hearing nor addressed his actual innocence claim in his post-hearing brief. The state habeas court entered an order denying Drane's petition for habeas corpus relief on February 20, 2009. (Pet. App. 25-34). The court did not specifically address Drane's actual innocence claim in its order denying relief.

Drane timely filed an application for certificate of probable cause to appeal in the Georgia Supreme Court. (Pet. App. 35). The application did not mention Drane's claim of actual innocence. The Georgia Supreme Court remanded Drane's case to the state habeas court, directing the court to conduct further analysis on two of Drane's claims: 1) the conflict of interest of counsel; and 2) whether the trial court's sentencing phase instructions were contrary to *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368 (1982) and *Davis v. State*, 255 Ga. 588 (1986). *Id.*

4. *Extraordinary Motion for New Trial.* While the remand proceedings in the state habeas court were still pending, Drane filed an extraordinary motion for new trial in the Superior Court of Elbert County (trial court), where his criminal trial occurred, based on newly discovered evidence on December 8, 2010.³ *Drane v. State*, 291 Ga. 298, 298-99 (2012). The newly discovered evidence asserted by Drane consisted of

³ Drane filed a motion in the state habeas court requesting a stay of proceedings until his extraordinary motion for new trial was resolved. Although the state court did not enter an order granting the stay, there was no activity in the habeas case until after this Court denied Drane's petition for writ of certiorari from the denial of his extraordinary motion for new trial.

co-defendant Willis' statements to a parole officer on July 22, 2010, that he was the sole perpetrator in Ms. Blackmon's murder. *Id.* at 299; Pet. App. 207.

The trial court granted a hearing on Drane's motion. At the hearing, Willis testified that he told his version of events surrounding Ms. Blackmon's murder to his parole officer, who was preparing a report regarding Willis' fitness for parole. *Drane*, 291 Ga. at 301. According to Willis' testimony at this hearing, he and Drane promised Ms. Blackmon drugs in exchange for sex, but later he and Drane argued with Ms. Blackmon because they did not have any drugs to give her. *Id.* Willis subsequently had sex with Ms. Blackmon in the back of his truck, but stopped because she appeared to be upset. *Id.* Drane and the victim then walked fifty yards away and returned to the truck roughly five to ten minutes later. *Id.* Upon returning to the truck, Willis stated that he shot Ms. Blackmon and repeatedly cut her throat in an effort to sever her head to make identification of her body more difficult. *Id.*

The trial court denied Drane's extraordinary motion for new trial in a written order. (Pet. App. 38-43). In denying the motion, the court applied the standard of review announced by the Georgia Supreme Court in *Timberlake v. State*, 246 Ga. 488, 491 (1980):

It is incumbent on a party who asks for a new trial on the ground of newly discovered evidence to satisfy the court: (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;

(3) that it is so material that it would probably produce a different verdict; (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.

(*See* Pet. App. 40).

Concerning the guilt phase of trial, the court determined that Drane had failed to “satisfy the first, second, third and fourth requirements” of *Timberlake*. (Pet. App. 41). Regarding the materiality requirement, the court held:

Looking at the third requirement, 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.

Id. As to the sentencing phase, the trial court held that it “fe[lt] constrained by the existing precedents, that it does not have authority to grant a new trial as to sentencing only.” *Id.* at 42.

The Georgia Supreme Court granted Drane’s application for discretionary appeal, which was followed by briefing and oral argument. On June 25, 2012, the Georgia Supreme Court affirmed the trial court’s denial of Drane’s extraordinary motion for new trial. *Drane*, 291 Ga. 298. The court first examined whether

Drane had met the *Timberlake* requirements as to the *guilt phase* of trial. The court held Drane had failed to establish “at least” two of the requirements—materiality and due diligence. *Id.* at 301-04.

As to materiality, the court explained at length why Willis’ testimony “would not have probably produced a different result in the guilt/innocence phase.” *Drane*, 291 Ga. at 303. Specifically, the court pointed to testimony from the trial proceedings that Willis told Drane that he planned to murder an African-American person on the night of Ms. Blackmon’s murder and Drane knew Willis had a “sawed-off shotgun” on the night of the crime. *Id.* at 302. The court also referenced several witnesses from trial who testified that Drane had confessed to committing one of the potentially killing acts. *Id.* Additionally, the court noted that the evidence produced at trial showed that Drane and Willis were close friends who agreed prior to their arrest to “work in concert to protect one another from prosecution.” *Id.* at 303. For these reasons and more, the court concluded that the trial court did not abuse its discretion in finding that Drane failed to establish the materiality requirement. *Id.*

Regarding diligence, the court noted that Willis’ attorney would not allow Willis to testify during Drane’s trial because Willis’ case was still pending. *Id.* at 304. However, the court noted that “this excuse was eliminated a year after Drane’s trial,” and Drane failed to show what steps he took to secure Willis’ testimony in the seventeen years since Willis’ trial. *Id.* Therefore, the court concluded that Drane also failed to show that

he exercised due diligence in bringing forth his claim. *Id.*

Additionally, the Georgia Supreme Court examined the trial court's decision regarding whether Drane was entitled to a new sentencing hearing. The court noted that the trial court's order "strongly suggest[ed]" that it was not "empowered to grant a new trial solely on the question of" sentence, which the Georgia Supreme Court held was error. *Drane*, 291 Ga. at 303. However, the Georgia Supreme Court stated:

Our review of Willis' testimony in the hearing held on Drane's extraordinary motion for a new trial and the original trial testimony suggests that the trial court *would not have abused its discretion if it had found that Willis' testimony at the hearing on Drane's extraordinary motion for a new trial would not have probably changed the jury's sentencing verdict* if it had been presented at Drane's trial.

Id. (emphasis added). Ultimately, the court held that as Drane had not met the due diligence requirement therefore, the question of whether Willis' testimony was material for the sentencing phase would not be remanded back to the trial court. *Id.* at 304.

Drane subsequently sought certiorari review from the Georgia Supreme Court's decision. Drane argued that the Georgia Supreme Court's decision not to remand the case back to the trial court regarding whether he was entitled to a new sentencing trial was unconstitutional under *Enmund v. Florida*. Additionally, Drane

argued the Court should grant certiorari review of the Georgia Supreme Court’s decision to correct factual and legal errors. This Court denied review. *Drane v. Georgia*, 568 U.S. 1034 (2012).

5. *Second State Habeas Corpus Proceeding.* After this Court’s denial of certiorari review, Drane sought to reopen the evidence in his remanded state habeas proceeding to submit Willis’ testimony that Willis was the sole perpetrator of Ms. Blackmon’s murder in support of Drane’s actual innocence claim. (Pet. App. 4). The state habeas court held an evidentiary hearing and permitted Willis to testify. *Id.* At the hearing, Willis recounted the same version of events he provided during proceedings for Drane’s extraordinary motion for new trial—that after having sex with Ms. Blackmon, he shot her and attempted to cut off her head with a knife. *Id.* at 4-6.

In denying Drane’s habeas corpus petition, the state habeas court explained that only two issues were before the court on remand from the Georgia Supreme Court: 1) Drane’s conflict of interest claim; and 2) whether the sentencing phase jury instructions violated *Enmund* and *Davis*. (Pet. App. 7-16). Although the court stated the testimony of Willis was “relevant to several issues raised in Drane’s original habeas petition,” the court concluded that it was without authority to address Drane’s freestanding actual innocence claim and his proportionality claim. (Pet. App. 7-8). The court denied Drane relief as to the two claims that were properly before it. *Id.* at 8-19.

Drane filed an application for certificate of probable cause to appeal with the Georgia Supreme Court, arguing that the state habeas court erred in refusing to address his actual innocence and disproportionality claims. (Pet. App. 20).

Relying solely on state law, the Georgia Supreme Court “note[d] . . . 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.” *Id.* (citing *Head v. Hill*, 255 Ga. 255 (2003); *Marsh v. Way*, 255 Ga. 284 (1985)). Consequently, the court determined the habeas court “correctly refused to consider Drane’s actual innocence and proportionality claims.” (Pet. App. 20).

Regarding Drane’s freestanding actual innocence claim, the Georgia Supreme Court stated it “ha[d] never found a freestanding innocence claim as cognizable in the habeas court.” (Pet. App. 21). Again, relying upon state law, the court explained that claims of actual innocence “should come by means of an extraordinary motion for new trial.” *Id.* Since Drane had already “litigated his actual innocence claim through an extraordinary motion for new trial” proceeding, the court determined that his state habeas claim was “barred by res judicata.” *Id.*

Likewise, the court determined Drane’s proportionality claim was also barred by res judicata as it was previously decided during both of Drane’s direct

appeal proceedings.⁴ (Pet. App. 21-22). To determine whether the state procedural bar was sound, the court examined whether Drane had shown “new facts” to remove the procedural bar. *Id.* at 22. After analyzing the record, the court determined that Willis’ habeas testimony that he was the sole perpetrator of the murder was not “new evidence” because “at trial Drane presented testimony in the sentencing phase that [Willis] had confessed to a fellow inmate that he alone had murdered the victim.” (Pet. App. 22)

Finally, the Georgia Supreme Court considered, pursuant to Ga. Stat. Ann. § 9-14-48(d),⁵ whether Drane had shown that the denial of habeas relief would result in a miscarriage of justice. (Pet. App. 22). Citing again to state-law precedent, the court explained that to meet the miscarriage of justice exception, relief “must be based on evidence of actual innocence.” *Id.* at 22-23. The court determined that Drane’s evidence had not shown he was actually innocent of the crimes “for the same reasons” it had denied Drane’s extraordinary motion for new trial. *Id.* at 23. In sum, the court held that Willis’ testimony fell “short” of proving Drane was actually innocent of murdering Ms. Blackmon. Accordingly, the court denied Drane’s

⁴ The Georgia Supreme Court also noted that it “alone is charged with the responsibility of conducting proportionality review.” (Pet. App. 21).

⁵ Ga. Stat. Ann. § 9-14-48(d), states, in part, “In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice.”

application for certificate of probable cause to appeal for “lacking arguable merit.” *Id.* at 23-24.

REASONS FOR DENYING THE PETITION

I. The Georgia Supreme Court’s determination that there is no cognizable freestanding actual innocence claim in state habeas does not conflict with this Court’s precedent.

The Georgia Supreme Court held, in accordance with its previous decisions, that *state* law does not recognize a “freestanding actual innocence” claim in state “habeas court.” (Pet. App. 21). Drane requests this Court grant certiorari review to force Georgia, and by consequence every other state, to make cognizable in state habeas proceedings a freestanding actual innocence claim. However, Drane fails to show that the Georgia Supreme Court’s decision conflicts with this Court’s precedent. Moreover, even if a freestanding actual innocence claim was cognizable in state habeas, Drane’s actual innocence claim is barred from certiorari review due to its dismissal by the Georgia Supreme Court’s on an adequate and independent state law ground, *res judicata*. Because these are plainly not grounds upon which this Court grants certiorari review, Drane’s request should be denied.

A. The Georgia Supreme Court’s decision does not conflict with any precedent from this Court.

In *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993), this Court expressly held that “claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . .” *Herrera*, 506 U.S. at 400 (quoting *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923) (“What we have to deal with [on habeas review] is not the petitioners’ innocence or guilt but solely the question whether their constitutional rights have been preserved.”)). Based upon this precedent, the federal courts of appeals have held that freestanding claims of actual innocence have yet to be recognized in *federal* habeas proceedings. *See, e.g.*, *Crump v. United States*, No. 18-10480-G, 2018 U.S. App. LEXIS 19820, at *2 (11th Cir. July 17, 2018); *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 183 (3d Cir. 2017); *United States v. Fields*, 761 F.3d 443, 479 (5th Cir. 2014). Thus, since this Court has not held that a freestanding claim of actual innocence can be brought in a *federal* habeas court, the Georgia Supreme Court’s determination that this claim was not cognizable in *state* habeas court is not in conflict with this Court’s precedent.

Admittedly though, in *Herrera*, the Court “assumed” “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 (emphasis added). Assuming for the sake of argument that *Herrera* left open the question of whether a freestanding claim of actual innocence is cognizable in *state* habeas,⁶ the two concerns of *Herrera*—whether there is a persuasive claim of actual innocence and whether there is a state avenue for an actual innocence claim—are not present in Drane’s case.

First, Drane has not made a persuasive showing of actual innocence. In *Herrera*, this Court emphasized that “the threshold showing” for actual innocence in a habeas proceeding “would necessarily be extraordinarily high” and that a claim of innocence “must be evaluated in the light of the previous proceedings in [that] case.” *Herrera*, 506 U.S. at 398, 417. Drane was unable to prove his innocence under the *Timberlake* materiality standard—that the new evidence would probably produce a different guilt phase verdict. Both the trial court and the Georgia Supreme Court had to examine the substance of Willis’ statements under *Timberlake*. Although Willis testified in the extraordinary motion for new trial hearing that he alone was responsible for

⁶ Whether this Court could mandate such a requirement to the states is itself unclear. *See generally Mu’Min v. Virginia*, 500 U.S. 415, 422, 111 S. Ct. 1899, 1903 (1991) (noting that claims in federal court are subject to the Court’s supervisory powers whereas claims from state courts limit the Court’s “authority . . . to enforcing the commands of the United States Constitution.”). *Id.* at 411 (quoting *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 2322 (1977)) (internal quotation marks and citations omitted in original).

Ms. Blackmon's murder, the testimony presented at trial that Drane was involved in the actual murder of Ms. Blackmon was not recanted. Thus, Drane's characterization of Willis' testimony as "undisputed" is belied by the record.

Tammy Gaines, Carey Fortson, and Antoinette Smith testified at trial that Drane confessed participation in the murder of Ms. Blackmon. To Ms. Gaines, Drane confessed that he and Willis "picked this [black] girl up at the Huddle House in Elberton, Georgia, and that it would be the last ride she'd ever take." *Drane*, 271 Ga. at 849-50; *see also* (TT: 1192-96). Drane also confessed to Ms. Gaines that he "[had sex with] her so bad that she'd never have any more babies," that he and Willis subsequently threw her in the lake, and when asked if he had raped Ms. Blackmon, Drane laughed. *Drane*, 271 Ga. at 850; *see also* (Pet. App. 55-57). Mr. Forston testified that Drane confessed cutting Ms. Blackmon's throat, and Ms. Smith testified that Drane admitted to shooting the victim. *Id.* at 68-70, 89-90. Ms. Gaines and Ms. Smith both testified that Drane stated it was a mistake not to place more blocks on Ms. Blackmon's body to keep it submerged.⁷ *Id.* at 56, 89-90. And another witness, May Young, testified at trial that she observed scratch marks all over Drane's chest

⁷ Additionally, Willis' statements and Drane's statements had contradictions of their own. For example, in one of Drane's initial statements to law enforcement, Drane said that Willis murdered Ms. Blackmon because of her race. (TT: 1694). However, Willis denied this accusation and testified that he murdered Ms. Blackmon because he mistakenly thought she was going to kill him. (Pet. App. 220-24, 238).

on the night of the crime, as though he had been in a fight. (TT: 1661).

None of Drane's arguments "conclusively" prove his innocence because they do not conclusively prove that these witnesses provided false testimony at his trial. Instead, Drane's often misleading rendition of the record and myopic reliance on Willis' statements show that he, not the state courts, failed to engage and refute all of the evidence of his guilt. Therefore, as Drane was unable to meet the lower materiality standard of *Timberlake*, he has necessarily failed to prove he can meet the arguably more onerous "extraordinarily high" standard of proof required by *Herrera*.

Second, Drane has not shown he has no "state avenue open to process" his actual innocence claim. *Herrera*, 506 U.S. at 417. In *Herrera*, the Court dealt with an actual innocence claim that arose in Texas. At that time, a freestanding claim of actual innocence was "not cognizable in the state courts of Texas." *Id.* at 400.⁸ However, the Court pointed out that Herrera was not "left without a forum to raise his actual innocence claim" because he could "file a request for executive clemency." *Herrera*, 506 U.S. at 411.

⁸ This was so because "to obtain a new trial based on newly discovered evidence, a defendant must file a motion within 30 days after imposition or suspension of sentence" which the Texas courts had "construed" "as jurisdictional." *Herrera*, 506 U.S. at 400.

In Georgia a defendant has two avenues to raise a claim of actual innocence—an extraordinary motion for new trial and a clemency request with Georgia’s State Board of Pardons and Paroles. *See* Pet. App. 21; Ga. Const. Art. IV, § II, Para. II. Drane alleges that “the Georgia state courts have now closed every avenue for relief based upon Willis’s confession.” (Pet. brief, p. 22). This is an incorrect statement of law and fact and fails to meet the mandate of *Herrera*. First, every avenue has not been “closed” as Drane can still apply for clemency. Second, simply because the Georgia Supreme Court denied his extraordinary motion for new trial—after he was afforded a hearing in the trial court, two rounds of briefing in the Georgia Supreme Court, and oral argument—does not amount to being “left without a forum to raise his actual innocence claim.” *Herrera*, 506 U.S. at 411. He was provided a “forum” and he failed to meet the state law “materiality” standard to prove his claim in the state designated “forum.” Drane’s disagreement with the state court’s decision of his claim of actual innocence does not show the Georgia Supreme Court’s decision not to recognize a free-standing actual innocence claim in state habeas is in conflict with this Court’s precedent.

Because there is no conflict between the Georgia Supreme Court’s decision and any decision from this Court, certiorari review should be denied in this case.

B. The state court's decision rests on adequate and independent state law grounds.

The Georgia Supreme Court also held that because Drane's claim of actual innocence was previously decided in his extraordinary motion for new trial proceedings, the claim was barred by res judicata. (Pet. App. 23). "This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260, 109 S. Ct. 1038, 1042 (1989). A state court decision, premised on the res judicata law of that state, provides an adequate and independent state ground. *Durley v. Mayo*, 351 U.S. 277, 281-84 (1956). Drane has failed to show that the state law res judicata bar is not an adequate and independent ground barring certiorari review in his case.

The doctrine of res judicata "prevents the relitigation of all claims which have already been adjudicated" between the same parties on "identical causes of action." *Odom v. Odom*, 291 Ga. 811, 812 (2012) (quoting *Waldroup v. Greene County Hosp. Auth.*, 265 Ga. 864, 865 (1995)). This bar stands unless new facts can be proven, new law is enacted, or there is a showing of a miscarriage of justice. *Bruce v. Smith*, 274 Ga. 432, 434 (2001).

Here, the Georgia Supreme Court previously adjudicated the merits of Drane's actual innocence in his extraordinary motion for new trial appeal.⁹ (Pet. App. 21). Drane argues this Court's precedent "suggests that the state courts' (sic) reliance upon *Timberlake* is not an adequate ground to avoid full consideration of the innocence claim." (Pet. brief, p. 34). But the state court did not rely upon *Timberlake*, it determined it was foreclosed from reconsidering his actual innocence claim based upon the state law bar of res judicata. Moreover the cases relied upon by Drane, *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163 (1958) and *Davis v. Wechsler*, 263 U.S. 22, 44 S. Ct. 13 (1923), while dealing with the proper handling of federal claims by state courts, have no bearing on Drane's case as neither involve whether a state court's dismissal of a claim based upon a state procedural bar, in a habeas proceeding, is an adequate and independent state law ground. "To qualify as an 'adequate' procedural ground, capable of barring federal habeas review, a state rule must be firmly established and regularly followed." *Johnson v. Lee*, 136 S. Ct. 1802, 1805 (2016) (emphasis added) (quoting *Walker v. Martin*, 562 U.S. 307, 316, 131 S. Ct. 1120, 1128 (2011)). Georgia's res judicata rule is both "firmly established" and "regularly followed." See *Rollf v. Carter*, 298 Ga. 557, 558 (2016); *Bruce v. Smith*, 274 Ga. 432, 436 (2001);

⁹ Drane repeatedly alleges the state courts failed to adjudicate his actual innocence. (See, e.g., Pet. brief, pp. 22, 28). This erroneous assertion will be addressed below in Section II.

Roulain v. Martin, 266 Ga. 353 (1996); *Gunter v. Hickman*, 256 Ga. 315 (1986); *Elrod v. Ault*, 231 Ga. 750 (1974).

To the extent Drane is arguing that the state court's previous *Timberlake* decision, which foreclosed reconsideration of his actual innocence claim, is not "independent" of federal law, he is wrong. (Pet. brief, pp. 34-35). The relevant question is not whether the state court's *Timberlake* decision is intertwined with state law, but whether the state court's assertion of the res judicata bar is intertwined with federal law. The res judicata bar is a state rule, independent of any federal law, which precludes the re-litigation of claims already adjudicated. *Gunter*, 256 Ga. at 316 (as the issue in question "was actually litigated, i.e., raised and decided" in a previous appeal, "the issue [could] not be reasserted in habeas corpus proceedings."). The Georgia Supreme Court's dismissal of Drane's claim under the state procedural bar of res judicata does not involve an examination of Drane's actual innocence claim. Simply because the underlying claim involves Drane's federal constitutional rights does not mean the Georgia Supreme Court's decision is intertwined with federal law. If this were so, the res judicata bar would never stand as a ground barring this Court's jurisdiction in state habeas cases as all claims are based upon federal constitutional rights.

The state court's res judicata determination is therefore an adequate and independent state law bar precluding jurisdiction of this Court to entertain

Drane's federal claim. Certiorari review should be denied.

II. Drane's request for alleged error correction does not warrant review.

Drane's real request is for this Court to engage in error correction of the state court's decision denying his extraordinary motion for new trial, which is disapproved by this Court's own rules. *See* Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Although Drane repeatedly alleges his actual innocence claim was not decided by the state courts (*see, e.g.*, Pet. brief, pp. 22, 28), the Georgia Supreme Court made clear it had previously denied his actual innocence claim in his extraordinary motion for new trial. (Pet. App. 21-23). Additionally, the Georgia Supreme Court, based upon its previous denial of his extraordinary motion, held Drane had failed to show actual innocence to prove a miscarriage of justice to overcome the state bar to his claim. *Id.* Presumably because Drane cannot reasonably ask this Court to ignore these clear determinations, he instead again seeks certiorari review for the purpose of error correction of the Georgia Supreme Court's denial of his extraordinary motion. As this is not a proper ground for certiorari review, his request should be denied.

Even assuming for the sake of argument that the Georgia Supreme Court’s denial of Drane’s extraordinary motion was before the Court, he does not show that the Georgia Supreme Court’s denial of his extraordinary motion is in conflict with any other state or federal court’s precedent or in conflict with this Court’s precedent. Instead, he spends a considerable portion of his brief arguing that the state court’s decision is “inconsistent” (Pet. brief, p. 29) with *state* precedent, and that this Court should grant review to “set aside the fact-findings” (Pet. brief, p. 34) of the state court. These were the same arguments Drane previously made to this Court in his petition for certiorari review of the Georgia Supreme Court’s denial of his extraordinary motion for new trial. (*See* Res. Att. 1-44). However, this Court has long held that “state courts are the ultimate expositors of state law. . . .” *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and requests for factbound review of cases typically do not warrant certiorari review. *See* Rule 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . .”).

Without doubt, Drane’s innocence was adjudicated in his extraordinary motion for new trial. Drane presented Willis’ testimony for no other purpose than to allege he was innocent of Ms. Blackmon’s murder. Both the trial court’s and the Georgia Supreme Court’s determination that this evidence was not so material as to have produced a different guilt phase verdict are synonymous with a determination that Drane was not innocent of Ms. Blackmon’s murder.

What is more, the Georgia Supreme Court’s denial of Drane’s application for certificate of probable cause to appeal included a determination that Drane had not shown that a miscarriage of justice would occur if relief were denied. (Pet. App. pp. 22-23). In Drane’s case, that determination was equivalent with an actual innocence determination. *Id.*; *see also Perkins v. Hall*, 288 Ga. 810, 824-27 (2011) (explaining the state miscarriage of justice exception and its application to those *ineligible* for a death sentence, e.g., the intellectually disabled, and those “*factual[ly]* innocent” of a crime) (emphasis added).

Drane complains for several pages that the Georgia Supreme Court made erroneous fact-findings in its denial of his extraordinary motion. (*See, e.g.*, Pet. brief, pp. 30-35). However, these same allegations were raised in Drane’s petition for writ of certiorari to this Court from the denial of his extraordinary motion (*see* Pet. brief, pp. 31-38, filed September 24, 2012), which Respondent denied in his brief in opposition (*see* Res. brief, pp. 52-60, filed October 26, 2012). This Court already declined certiorari review of Drane’s very same claims of erroneous fact-finding once before, and there is no reason that it should take the opposite tack here—especially where an adequate and independent ground bars jurisdiction over Drane’s current claim.

Similarly, Drane merely repeats his previous attacks on the Georgia Supreme Court’s legal determinations of his extraordinary motion. Specifically, he argues that the Georgia Supreme Court applied *Timberlake* in an “inconsistent” manner by allegedly

allowing *Timberlake*'s procedural due diligence barrier to "sideline[]" the "core question" of whether Willis' testimony of Drane's alleged innocence was material. (*Compare* Pet. brief, p. 30, filed September 24, 2012, *with* Pet. brief, p. 29 (both citing *Davis v. State*, 283 Ga. 438, 447 (2008))).¹⁰ This does not accurately portray the state court's decision. While the Georgia Supreme Court only suggested that Willis' testimony was not material for purposes of the *sentencing* phase, it plainly held that Willis' testimony was not material regarding the *guilt* phase. *Drane*, 291 Ga. at 301-04. Regarding whether Drane was entitled a new *guilt* phase trial, the court specifically explained and held Willis' testimony was not material. *Id.* at 301-03 (" . . . Willis' testimony at the hearing would not have probably produced a different result in the guilt/innocence phase if it had been presented at Drane's trial."). The Georgia Supreme Court's suggestion that Willis' testimony would not have been material for the sentencing phase is irrelevant to whether Drane is *innocent* of the murder of Ms. Blackmon. *Herrera*, 506 U.S. at 405 (1993) (pointing out that Herrera's request to "simply" vacate his death sentence based upon his actual innocence claim "would be a rather strange jurisprudence" as he would be an alleged innocent man sitting in prison for the remainder of his life).

¹⁰ Contrary to Drane's statement, the trial court's mere mention in its order that Willis testified that he alone committed the murder does not "imply" that the court found this testimony to be credible. (Pet. brief, p. 27).

Even if Drane's actual innocence claim was not barred on a state law ground, his request for certiorari review for mere error correction should be denied.

III. The Georgia Supreme Court's dismissal of Drane's proportionality claim rests upon adequate and independent state law grounds.

The Georgia Supreme Court also determined that Drane's proportionality claim—like his claim of actual innocence—was barred by res judicata. (Pet. App. 23). That determination serves as an adequate and independent ground precluding this Court's jurisdiction of Drane's proportionality claim. *See Herb v. Pitcairn*, 324 U.S. 117, 125, 65 S. Ct. 459, 463 (1945); *supra* Section I (B). Ignoring the state law bar, Drane argues that his sentence violates *Enmund v. Florida*, 458 U.S. 782 (1982). But the Georgia Supreme Court did not decide again the proportionality of Drane's sentence. It held the claim was barred by res judicata, thus the Georgia Supreme Court's decision does not conflict with *Enmund*.

Even assuming Drane's proportionality claim was not barred by an adequate and independent state law ground, *Enmund* does not provide an avenue for certiorari review as it is easily distinguishable from this case. In *Enmund*, an elderly couple was robbed and murdered at their home. 458 U.S. at 783-84. Four defendants, including Earl Enmund, were tried for first-degree murder and robbery. *Id.* at 784. Enmund was found guilty and sentenced to death. *Id.* at 785.

On appeal, the Florida Supreme Court found the only evidence of Enmund's participation in the crimes was an "inference that he was the person in the car by the side of the road near the scene of the crimes." *Id.* at 786 (quoting *Enmund v. State*, 399 So. 2d 1362, 1370 (1981)). Despite this finding, the Florida Supreme Court affirmed his conviction and sentence. *Id.* This Court reversed and held the Eighth Amendment precluded a sentence of death for one "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* at 797.

Here, the evidence presented at trial showed much more than an "inference" that Drane was involved in Ms. Blackmon's murder. Multiple witnesses testified to various confessions by Drane admitting to his direct participation in Ms. Blackmon's murder. Willis' testimony nearly two decades after Drane's trial that he alone committed the murder does not prove false the testimony of multiple witnesses at trial. Since there remains evidence showing Drane participated in murder, wielding at least one of the murder weapons, the *Enmund* preclusion is inapplicable.

Because the state court dismissed Drane's proportionality claim based upon an adequate and independent state law ground, and because Drane's proportionality claim—even if properly before this Court—would fail under *Enmund*, certiorari review should be denied.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted,

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