

Nos. 17-8787, 17A1220

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT EARL BUTTS, JR.,

PETITIONER,

v.

**ERIC SELLERS, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,**

RESPONDENT.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT**

**BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT AND
RESPONSE IN OPPOSITION TO REQUEST FOR STAY OF EXECUTION**

CHRISTOPHER M. CARR
Attorney General

SABRINA D. GRAHAM
Senior Assistant Attorney General

BETH A. BURTON
(Counsel for Respondent)
Deputy Attorney General
40 Capitol Square
Atlanta, Georgia 30334-1300
(404) 656-3499
bburton@law.ga.gov

QUESTION PRESENTED

1. Should this Court grant certiorari to review a decision that was decided solely on independent and adequate state law grounds?
2. Should this Court grant certiorari to review a decision of the state court that does not conflict with any precedent of this Court?

TABLE OF CONTENTS

I. PROCEDURAL HISTORY	1
A. Trial Proceedings (1996-2002)	1
B. State Habeas Corpus Proceeding (2002-2013)	6
C. Federal Habeas Corpus Proceedings (2013-2018).....	6
D. Execution Order	7
E. Extraordinary Motion for New Trial.....	7
II. REASONS CERTIORARI REVIEW IS NOT WARRANTED	8
A. The State Court Dismissed The Petition On Independent And Adequate State Law Grounds.	8
1. Procedural Bar Based Solely on State Law.....	8
2. Alternative Merits Review Based Solely on State Law	10
a. No Due Diligence	11
b. No Materiality	14
3. No Basis for Certiorari Review	15
B. Alternate Holding Does Not Conflict With Precedent of This Court.	16
III. CONCLUSION	17

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

Petitioner filed an extraordinary motion for new trial in the trial court alleging that his death sentence is unconstitutional because no other defendant in Georgia in the past ten years has been sentenced to death for murdering only one victim when the State sought and obtained only one statutory aggravating circumstance. Based solely on state law the trial court held: that only the Georgia Supreme Court could conduct the proportionality review Petitioner was seeking based on O.C.G.A. § 17-10-35(c)(3); that the Georgia Supreme Court had already conducted that review and found Petitioner's case was not disproportionate and that prior holding was the law of the case; and, in the alternative, Petitioner failed to meet the well-established State *Timberlake v. State*, 246 Ga. 48 (1980) standard for obtaining relief on an extraordinary motion for new trial. The holdings of the state court relying solely on state law do not warrant certiorari review.

I. PROCEDURAL HISTORY

A. Trial Proceedings (1996-2002)

Petitioner, Robert Earl Butts, was indicted for malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. On direct appeal,

the Georgia Supreme Court found that the evidence from Petitioner's jury trial established the following:

[O]n the night of March 28, 1996, Butts and Marion Wilson, Jr., drove in Butts's automobile to a local Wal-Mart store and began searching for a victim. Butts entered the store wearing a coat, under which he likely concealed the murder weapon. A witness observed Butts and Wilson standing behind Donovan Corey Parks in a checkout line. The cashier for that checkout line also remembered Butts being in her line. The store's receipts showed that Butts purchased a pack of chewing gum immediately after Parks made his purchase of pet supplies. A witness overheard Butts asking Parks for a ride. After Parks moved items in his automobile to make room for Butts and Wilson, Butts sat in the front passenger seat and Wilson sat in the back seat behind Parks. According to a witness to whom Butts confessed, Butts revealed the shotgun a short distance away, and Parks was ordered to stop the automobile. Wilson dragged Parks out of the automobile by his tie and ordered him to lie facedown on the pavement. Butts then fired one fatal shot to the back of Parks's head with the shotgun. Witnesses nearby heard the shot, believing it to be a backfiring vehicle.

After murdering Parks, Butts and Wilson drove to a service station in Gray, Georgia, where they refueled Parks's automobile and where Wilson was filmed by the service station's security camera. Butts and Wilson then drove to Atlanta in an unsuccessful attempt to exchange Parks's automobile for money at a "chop shop." The pair purchased two cans of gasoline, drove to a remote location in Macon, Georgia, and set fire to Parks's automobile. They then walked to a nearby public phone, where Butts called his uncle and arranged a ride for himself and Wilson back to the Wal-Mart to retrieve Butts's automobile.

Investigators had recorded the license plate numbers of the vehicles parked in the Wal-Mart parking lot on the night of the murder, and Butts's automobile was among them. A shotgun loaded with an uncommon type of ammunition was found under Wilson's bed during a search, and a witness testified that Butts had given the weapon to

Wilson to hold temporarily. Two of Butts's former jail mates testified that he had admitted to being the triggerman in the murder.

Butts v. State, 273 Ga. 760, 761-62 (2001).

During the sentencing phase of trial, the State offered testimony and evidence regarding FOLKS gang paraphernalia found in Petitioner's bedroom and car. *Butts v. Warden, Ga. Diagnostic & Classification Prison*, 2015 U.S. Dist. LEXIS 140874, at *56 (M.D. Ga. Oct. 16, 2015). The State also introduced evidence to show Petitioner started a fire in his jail cell, participated in a fight with an inmate, and wrote the FOLKS gang phrase "O.G." (original gangster) on his shoes to wear to a pretrial hearing in the instant case. *Id.*

Following the jury trial, Petitioner was convicted as charged in the indictment. On November 21, 1998, the jury found as a statutory aggravating circumstance that Petitioner committed the murder of Donovan Parks while engaged in the commission of another capital felony, armed robbery (O.C.G.A. § 17-10-30(b)(7)). The trial court, based on the jury's binding recommendation, sentenced Petitioner to death for the murder conviction.

The Georgia Supreme Court affirmed Petitioner's convictions and sentences. *Butts v. State*, 273 Ga. 760 (2001), *cert. denied*, *Butts v. Georgia*, 534 U.S. 1086 (2002).

B. State Habeas Corpus Proceeding (2002-2013)

Petitioner filed a state habeas petition on October 30, 2002. The record developed in the state habeas proceedings established that, preparing for trial, trial counsel obtained Petitioner's school records, which showed Petitioner "was an average student until around age 15 or 16 when he had to be placed in an alternative school for behavioral problems." *Butts v. Warden, Ga. Diagnostic & Classification Prison*, 2015 U.S. Dist. LEXIS 140874, at *43. Trial counsel also testified that the "school records revealed that he was an average student until he lost interest in his education at age 15 or 16." *Id.* at *33.

The habeas court denied state habeas relief on April 11, 2011. Thereafter, on January 22, 2013, the Georgia Supreme Court denied Petitioner's application for certificate of probable cause to appeal.

C. Federal Habeas Corpus Proceedings (2013-2018)

Petitioner filed his federal petition for writ of habeas corpus in the Middle District of Georgia on May 31, 2013. The district court denied relief on October 16, 2015. On March 9, 2017, after considering the briefs of the parties and oral argument, the Eleventh Circuit affirmed the denial of habeas relief. *Butts v. Warden, Georgia Diagnostic & Classification Prison*, 850 F.3d 1201 (11th Cir. 2017). Petitioner's petition for rehearing *en banc* was denied by the Eleventh

Circuit on May 2, 2017. Thereafter, Petitioner's petition for writ of certiorari in this Court was denied on January 22, 2018. *Butts v. Sellers*, 138 S. Ct. 925 (2018).

D. Execution Order

On April 16, 2018, the trial court signed an order setting Petitioner's execution for May 3, 2018 at 7:00 p.m. On April 27, 2016, Petitioner filed this successive state habeas petition.

E. Extraordinary Motion for New Trial

On April 18, 2018, Defendant filed an Extraordinary Motion for New Trial alleging that his death sentence is unconstitutional because no other defendant in Georgia in the past 10 years has been sentenced to death for a murder involving one victim and one statutory aggravating circumstance. On April 26, 2018, the trial court denied the motion finding the claim was not properly before it, barred, and in the alternative that Petitioner had failed to meet the standard of *Timberlake v. State*, 246 Ga. 488 (1980). The trial court found that, by Georgia statute, "[t]he 'Georgia Supreme Court 'alone is charged with the responsibility of conducting a proportionality review.'" (April 20, 2018 Order, p. 1). The trial court additionally held:

...the Georgia Supreme Court has already conducted its proportionality review and concluded that [Petitioner's] death sentence is not disproportionate (*Butts*, 273 Ga. 771-72), thus, this Court is bound by that ruling as the law of the case. *See Foster v.*

State, 290 Ga. 599, 601 (2012); *Hayes v. State*, 298 Ga. 339, 341, n.3 (2016).

(April 20, 2018 Order, pp. 1-2).

However, the trial court also held in the alternative, “if this issue is properly before this Court for review, the Court would deny relief as [Petitioner] has failed to establish that he is entitled to the requested relief under the applicable standard of *Timberlake v. State*, 246 Ga. 488 (1980).” (Petitioner’s Appendix C, p. 2).

The Georgia Supreme Court summarily denied his application to appeal. (*Butts v. State*, Case No. S18W1179).

II. REASONS CERTIORARI REVIEW IS NOT WARRANTED

A. The State Court Dismissed The Petition On Independent And Adequate State Law Grounds.

Petitioner alleged below that his death sentence violates his Eighth Amendment rights because he only murdered one person and only statutory aggravator was sought and obtained by the State. Relying on state law, the state court found that Petitioner had failed to establish his claim. As the state court’s denial was on adequate and independent state law grounds, which are routinely applied in Georgia, the Court should deny certiorari review.

1. Procedural Bar Based Solely on State Law

Foster v. State holds that where the Georgia Supreme Court had made a decision in an earlier case and “the same question is again raised” in a “second

appearance” by the same parties, and the facts remain the substantially the same as on the first appearance, “the ruling of this court in its first decision is ‘the law of the case,’ and a final adjudication of such question.” 290 Ga. 599, 601 (2012). Similarly, in *Roulain v Martin*, 266 Ga. 353, 354 (1996), a habeas case, the Georgia Supreme Court held it, as well as the state habeas court, were bound by the Georgia Supreme Court’s prior ruling on a habeas petitioner’s direct appeal of his criminal trial. *See also Hall v. Lee*, 286 Ga. 79, 97 (2009) (“The habeas court correctly found that portion of Lee’s claim ‘wherein he assert[ed] his death sentence [wa]s disproportionate’ was res judicata. *See Lee v. State, supra*, 270 Ga. at 804.”).

In conducting its proportionality review on direct appeal, this Court held:

Although the trial judge’s report indicates that the evidence did not “foreclose all doubt” in this case, we note that the evidence supporting the jury’s finding of guilt was very strong. The fact that Butts asked the victim for a ride, even though he had driven his own automobile to the store, shows that he was involved in the motor vehicle hijacking from the beginning. The evidence also suggested that Butts carried the shotgun with him into the store as he sought out a victim. Testimony at trial showed that Butts had worked with the victim previously, suggesting that Butts intended from the beginning to murder the victim in order to ensure the victim’s silence. Several of Butts’s former jail mates testified that he had admitted being the triggerman. Evidence presented during the sentencing phase showed that Butts had a history of criminal conduct. These circumstances all might reasonably have urged the jury to impose a death sentence.

Our proportionality review “includes special consideration of the sentences received by co-defendants in the same crime.” In this

regard, we note that Butts's co-perpetrator, Marion Wilson, Jr., also has received a death sentence.

We find, considering both the crime and the defendant, that the death sentence imposed in this case is neither excessive nor disproportionate to the penalties imposed in similar cases in Georgia.

Butts, 273 Ga. at 771-72.

These facts have not changed and the holding is the law of the case. *Foster*, 290 Ga. at 601; *Hayes*, 298 Ga. at 341, n.3; *Roulain*, 266 Ga. at 354. Defendant knew Donovan Parks, approached him for a ride, and then had him drive to a rural area, made him lie down on the yellow line of the highway, and blew his brains out for the purposes of stealing Parks' car for money¹ and potentially advancing his rank in the FOLKS Gang. Defendant later confessed to three inmates to being the shooter and, in the state habeas proceedings, trial counsel testified that Defendant also confessed to being the shooter to the defense's independent polygraph examiner. *Butts*, 2015 U.S. Dist. LEXIS 140874 at * 169; Habeas Transcript, Vol. 1, pp. 86-87. As the state court properly found that this claim was barred by state law as the law of the case, certiorari review is unwarranted.

2. Alternative Merits Review Based Solely on State Law

Petitioner chose to raise this claim in an extraordinary motion for new trial in the trial court. To prevail on an extraordinary motion for new trial in Georgia,

¹ Unable to find a chop shop, Defendant and his Co-Defendant simply set the car on fire and walked away. *Butts*, 273 Ga. at 762.

Petitioner had to establish he had met Georgia's longstanding *Timberlake v. State*, 246 Ga. 488 (1980), standard. The state court conducted the proper review and found Petitioner had failed to establish the requisite due diligence or materiality components of *Timberlake*.

The standard for granting an extraordinary motion for new trial is as follows:

(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.

Timberlake, 246 Ga. at 491 . “All six requirements must be complied with to secure a new trial.” *Id.* Further, “implicit in these six requirements is that the newly discovered evidence must be admissible as evidence.” *Id.*

a. No Due Diligence

Petitioner ignores the standard he was required to meet in the lower court, however, the “due diligence” component of *Timberlake* “require[s] a defendant to act without delay in bringing such a motion.” *Drane v. State*, 291 Ga. 298, 304 (2012). “The obvious reason for this requirement is that litigation must come to an end.” *Id.* Furthermore, “[t]he grant of an extraordinary motion for new trial on the ground of newly discovered evidence is reserved for cases in which the facts at issue in the motion **were previously impossible to ascertain by the exercise of**

proper diligence.” *Bharadia v. State*, 297 Ga. 567, 573 (2015) (emphasis added).

The Georgia Supreme Court has repeatedly held that defendants who wait years to bring to the court’s attention evidence either that was known or could have been discovered by reasonable diligence were not entitled to relief. *See Bharadia*, 297 Ga. at 573; *Drane*, 291 Ga. at 304; *Davis v. State*, 283 Ga. 438, 445 (2008); *Llewellyn v. State*, 252 Ga. 426, 428-29 (1984).

Under *Timberlake* the defendant bore the burden of proving diligence. *See Timberlake*, 246 Ga. at 491-492 (emphasis added) (“The rule is that ‘It is incumbent on a party who asks for a new trial on the ground of newly discovered evidence to satisfy the court . . .’ as to each of the six requirements.”) (quoting *Bell v. State*, 227 Ga. 800, 805 (1971)). “[I]n considering due diligence under *Timberlake*, [the courts] look to the action and inaction of the defendant, including his counsel and defense team.” *Bharadia*, 297 Ga. at 573 n.9.

In *Llewellyn*, 252 Ga. at 428-429, the Georgia Supreme Court held that “[t]he statutes which control extraordinary motions for new trial based on newly discovered evidence require a defendant to act without delay in bringing such a motion. OCGA § 5-5-23 and 5-5-41(Code Ann. § 70-204 and 70-303).” The Court found *Llewellyn* had failed to meet the due diligence requirement by waiting two years to raise allegedly exculpatory evidence in an extraordinary motion for new trial. *Id.*; *see also Davis*, 283 Ga. at 445.

In the instant case, Petitioner did not present newly discovered evidence, but newly created “evidence” to the trial court. He asserted, with the assistance of statistics covering his chosen time period, that because no defendant has been sentenced to death for only murdering one victim when only one statutory aggravator was found, his sentence of death is disproportionate. He failed to show any due diligence in presenting these arguments. Petitioner even argued that “no one in Georgia has been sentenced to death for a murder involving one decedent and one aggravating circumstance **in over a decade.**” (Petition, p. 5) (emphasis added). Indeed, taking Defendant’s Attachment 1, Exhibit B at face value, his chart indicates that in the past 12 years (since 2006) no defendant convicted of murdering one victim with the finding of statutory aggravator has received a death sentence. Accordingly, Petitioner could have attempted to raise this claim in his state habeas proceeding which occurred during 2002-2011. He also could have attempted to raise this claim in the Georgia Supreme Court in his application for a certificate of probable cause to appeal from the denial of habeas relief in 2013. Instead, he waited until the State obtained an order for his legal execution that he raised this challenge for the first time.

Petitioner failed to show any reason for his failure to exercise due diligence in coming forward with this newly created evidence earlier. *See Davis*, 283 Ga. at 445. Consequently, the state court properly found that Petitioner did not meet the

second requirement of *Timberlake*, “that it was not owing to the want of due diligence that he did not acquire it sooner.” *Timberlake*, 246 Ga. at 491.

b. No Materiality

The state court also found that Petitioner had failed to establish with his statistics the materiality requirement of *Timberlake*. (April 20, 2018 Order, pp. 2-3). The trial court concluded:

Applying the *Timberlake* materiality standard to the data presented in [Petitioner’s] motion and affidavits, specifically viewed in the context of the evidence presented during [Petitioner’s] trial, this Court finds that the evidence presented in his motion is not “so material that it would probably produce a different verdict.” *Timberlake*, 246 Ga. at 491.

Id.

As held in *Timberlake*, “implicit in these six requirements is that the newly discovered evidence must be admissible as evidence.” *Timberlake*, 246 Ga. at 491. The admissibility of Petitioner’s newly created evidence was questionable at best. First, the decision whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases was not one to be made as such by the jury. *Blake v. State*, 239 Ga. 2927, cert. denied, 434 U.S. 960 (1977). Second, in Georgia, the sentencing phase is for the introduction of evidence relevant to the “individual background and character” of the defendant. *See Barnes v. State*, 269 Ga. 345, 360 (1998); *see also Devier v. State*, 253 Ga. 604, 621 (1984) (“In death penalty cases a constitutional requirement exists that the sentencer focus on the

character of the individual defendant.”). Petitioner’s evidence did not relate to his background or character. Accordingly, it was not be admissible and could not meet the *Timberlake* materiality standard.

Even if the newly created evidence was admissible, it still failed to meet the materiality standard. Applying the rigorous *Timberlake* materiality standard to Petitioner’s motion and affidavits, specifically viewed in the context of the overwhelming evidence of guilt presented during Petitioner’s trial, the evidence in aggravation, and the lengthy post-conviction process pursued by Petitioner, it was clear that Petitioner’s statistics did not meet the standard. Petitioner’s newly created “evidence” did not diminish his guilt or undermine the evidence in aggravation presented at trial; instead it sought to strip from the district attorneys of this State the discretion to seek a death sentence under the Georgia’s constitutional statutory scheme. As such, this newly created “evidence” fell far short of proving that it was so material that it would probably produce a different verdict during Petitioner’s sentencing phase of trial.

3. No Basis for Certiorari Review

This Court has held on numerous occasions that a state court judgment which rests on an independent and adequate state law ground presents no federal question for adjudication by this Court in a petition for a writ of certiorari. *See, e.g., Fox Film Corp. v. Miller*, 296 U.S. 207, 210 (1935); *Herb v. Pitcairn*, 324

U.S. 117, 125-126 (1945); *Michigan v. Long*, 463 U.S. 1032 (1983). Therefore, as the decision of the state court, which Petitioner is requesting that this Court review, clearly rests upon adequate and independent state law grounds, this Court should deny the petition for writ of certiorari.

B. Alternate Holding Does Not Conflict With Precedent of This Court.

Also, the finding Petitioner has failed to show any materiality with regard to his extraordinary motion for new trial does not conflict with any precedent of this Court. Petitioner has cited to no legislation that has been passed exempting individuals from the death penalty who only murder one person for which the State pursued and obtained only one statutory aggravating circumstance. As stated in *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), “We have pinpointed that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” In *Graham v. Florida*, 560 U.S. 48 (2011), this Court held that before adopting a “categorical rule,” such as prohibiting the execution of certain classes of offenders, “[t]he Court first considers ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice,’ to determine whether there is a national consensus against the sentencing practice at issue.” *Graham*, 560 U.S. at 61 (quoting *Roper, supra*, at 563). Neither the Georgia legislature, nor any other state legislature of which the State is aware,

has made the dramatic shift Petitioner seeks. Accordingly, there is no “evolving standard of decency” that prohibits Petitioner’s execution.

III. CONCLUSION

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

Respectfully submitted,

CHRISTOPHER M. CARR	112505
Attorney General	

<u>s/Beth A. Burton</u>	
BETH A. BURTON	027500
Deputy Attorney General	

SABRINA D. GRAHAM	305755
Senior Assistant Attorney General	

CERTIFICATE OF SERVICE

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

Philip E. Holladay, Jr.
W. Ray Persons
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, Georgia 30308

This 4th day of May, 2018.

s/Beth Burton
BETH BURTON
Deputy Attorney General