NO._____

IN THE SUPREME COURT OF THE UNITED STATES

HERMINIO REYES, *Petitioner*

vs.

STATE OF GEORGIA, *Respondent.*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in conflict with the holdings of the U.S. Courts of Appeals for the Second, Fifth, Eighth, Eleventh and D.C. Circuits and several State courts of last resort, the trial court erred in failing to find that the police officer must actively be pursuing a lawful means of obtaining evidence prior to the occurrence of the illegal misconduct under the inevitable discovery exception to the exclusionary rule.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were Petitioner Herminio Reyes and Respondent State of Georgia. There are no non-governmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1 (b) (iii), are as follows:

1. Superior Court of Gwinnett County, Case No. 18B-01333-10, State v. Herminio Reyes, Jury trial held October 8-11, 2018; Sentence entered October 17, 2018; Motion for new trial hearing held June 6, 2019; Order denying motion for new trial entered on October 11, 2019.
2. Supreme Court of Georgia, Case No. S20A0780, Herminio Reyes v. State, Opinion entered August 10, 2020; Order denying motion for reconsideration entered September 8, 2020.

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Myron W. Orfield, Jr., Deterrence, *Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992) 19

Robert M. Bloom, *Inevitable Discovery: An Exception beyond the Fruits*, American Journal of Criminal Law 20, (1992): 79-104. 19

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PETITION FOR WRIT OF CERTIORARI

Petitioner Herminio Reyes respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

OPINION AND ORDERS BELOW

The Opinion of the Supreme Court of Georgia affirming Petitioner's judgment of conviction is published and reproduced here. Pet. App. 1a-33a. The order of the Superior Court denying Petitioner's motion for new trial is unpublished and reproduced here. Pet. App. 34a-58a. The order of the Supreme Court of Georgia denying Petitioner's motion for reconsideration is unpublished and reproduced here. Pet. App. 59a.

JURISDICTION

The Supreme Court of Georgia affirmed Petitioner's judgment of conviction on August 10, 2020. Pet. App. 1a-33a. The Supreme Court of Georgia denied Petitioner's motion for reconsideration on September 8, 2020. Pet. App. 59a. On March 19, 2020, this Court entered an Order extending the deadline to file a petition for writ of certiorari for a period of 150 days from the date of the order denying discretionary review. This Court has jurisdiction under 28 U.S.C. § 1257 (a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

The purpose of the exclusionary rule is "to deter – to compel respect for the constitutional guaranty . . . by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). *See also*, Stone v. Powell, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights.").

"The core rationale for extending the exclusionary rule to 'fruit of the poisonous tree' is that the 'admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections . . . On this rationale, the prosecution is not to be put in a better position that it would have been in if no illegality had transpired." Nix v. Williams, 467 U.S. 431, 442-443 (1984).

In Nix, this Court adopted the inevitable discovery exception to the exclusionary rule. In Nix, the respondent was charged with first degree murder of a young child. Id. at 436 I B. While a search was progressing for the victim's body, a police officer who was transporting respondent, obtained incriminating statements from him, including the location of the child's body, in violation of his Sixth amendment right to counsel. Id. at 435-436 I A. The trial court denied Williams's motion to suppress evidence of the body and all related evidence, including the body's condition as shown by an autopsy. Williams was convicted and the Iowa Supreme Court affirmed. Id. at 437 I B.

Subsequent federal court habeas corpus proceedings led to this Court's holding that police had violated Williams's Sixth amendment right to counsel when they obtained his incriminating statements through interrogation. Id. This Court noted that even though Williams's statements could not be admitted at a second trial, "evidence of the body's location and condition 'might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams." Id., citing Brewer v. Williams, 430 U.S. 387, 407, n. 12 (1977).

At Williams's second trial, his incriminating statements were not offered in evidence and the prosecution did not seek to show that he had directed police to the child's body. Id. at 437-438 I (C). But the trial court admitted evidence of the body's location and condition based on its finding that the State had proved that if the search had continued the body would have been discovered within a short time in essentially the same condition as it was actually found, given freezing temperatures. Id. Williams was again convicted of first-degree murder, and the Iowa Supreme Court affirmed. Id. at 438 I C. In subsequent habeas proceedings, the Federal District Court denied relief, finding that the body inevitably would have been found. But the Court of Appeals in the Eighth Circuit reversed, holding that the State had not met the exception's requirement showing that police did not act in bad faith. Id. at 439 I

C. This Court granted the State's petition for writ of certiorari and reversed. Id. at 440.

This Court held that the prosecution is not required to prove the absence of bad faith. It agreed with the trial court and found that because "the search parties were approaching the actual location of the body . . . the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found." Id. at 449-450 II (C). The Court reasoned that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification and impeachment[.]" Id. at 445, n. 5.

The Eleventh Circuit did not change its rule of inevitable discovery after Nix was decided: "there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by police and were being actively pursued prior to the occurrence of the illegal conduct." United States v. Terzado-Madruga, 897 F.2d 1099, 1114 (11th Cir. 1990). The Fifth Circuit also maintained its concept of the rule. *See*, United States v. Brookins, 614 F.2d 1037, 1042 n. 2 (5th Cir. 1980) (prosecution must demonstrate both a reasonable probability that the evidence would have been discovered in the absence

of police misconduct and that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation).

In 2001, the Georgia Supreme Court adopted the Eleventh Circuit's standard in Taylor v. State, 274 Ga. 269, 275 (2001), where it has remained controlling precedent in Georgia until the instant case was decided. *See*, Teal v. State, 282 Ga. 319, 325 (2007); Mobley v. State, 309 Ga. 59, 76 (4) (b) (2019). It has described the 'active pursuit rule' as "a judicial effort to prevent application of the inevitable discovery doctrine from emasculating the search warrant requirement of the Fourth Amendment." Teal, 282 Ga. at 325 (2). This is consistent with Eleventh and Fifth Circuit precedent. *See*, United States v. Satterfield, 743 F.2d 827, 846 IV B (11th Cir. 1984) ("Because a valid search warrant nearly always can be obtained after a search has occurred, allowing law enforcement to use a warrant after the fact to justify an earlier search would threaten to vitiate the warrant requirement."); United States v. Cherry, 759 F.2d 1196, 1204 II B (5th Cir. 1985).

In November 2016, a Georgia police officer traveled to California, applied for, obtained, and executed a California search warrant to search and seize Petitioner's DNA in connection with a 2004 crime in Georgia. Pet. App. 1a, 7a. The officer was not also actively pursuing a search warrant in Georgia when he obtained the search warrant and took two oral buccal swabs from Petitioner. Pet. App. 60a.

Petitioner's whereabouts were unknown prior to a CODIS hit in July 2016. Pet. App. 6a, 66a.

The Georgia officer freely disregarded the territorial limits of his jurisdiction without regard for the law in violation of Petitioner's Fourth Amendment rights under the U.S. and Georgia Constitutions. No Georgia statute authorized his extraterritorial acts, which were in derogation of common law. California statutes did not help him either. *See*, Cal. Pen Code §§ 1528 (a), 1529, 1530, 1536.

The "touchstone of the Fourth Amendment is reasonableness." Ohio v. Robinette, 519 U.S. 33, 39 (1996), citing Florida v. Jimeno, 500 U.S. 248, 250 (1991). A police officer is required "to have a reasonable knowledge of what the law requires or prohibits." State v. Jackson, 742 N.W.2d 163, 179 III (Minn. 2009).

Viewed objectively, a reasonably trained officer with 19½ years of experience would have known that his execution of a California search warrant and search and seizure of Petitioner's DNA in California was illegal and violated Petitioner's Fourth Amendment rights since he had no power to act as a police officer outside the jurisdiction of his employment. Pet. App. 61a. *See*, Herring v. United States, 555 U.S. 135, 145 (2009) (A court "must determine objectively whether a reasonably well trained officer would have known that the search was illegal."); State v. Whited, 1992 Neb. App. LEXIS 209 [*8] (Seward County officer lacked jurisdiction to execute search warrant in Lancaster County); State v. Griffis, 502 So. 2d 1356, 1357-

1358 (Fla. App. 1987) (because a municipal police officer has no power to act as a police officer outside the territorial limits of his municipality, he unlawfully obtained and executed a search warrant outside his jurisdiction).

Straying from his lawful jurisdiction, Officer Restrepo did not procure Petitioner's DNA legally and acted as an ordinary citizen. *See*, Rebalko v. City of Coral Springs, 2020 U.S. Dist. LEXIS 204958, *25-26 ("When, as here, officers stray from their lawful jurisdiction and act without authority, they are treated as ordinary citizens – without the security blanket of qualified immunity."); Ray v. State, 44 Tex. Crim. 158, 158-159 (1902) (noting that when a peace officer is outside his bailwick, he "cannot perform the functions of his office, and he has no more authority than any other private citizen[]"). The officer's flagrant, reckless and lawless conduct is precisely the type of conduct the exclusionary rule was intended to meaningfully deter. Herring, 129 S.Ct. at 702 II B 3 (exclusionary rule "serves to deter deliberate, reckless, or grossly negligent conduct[]"); Wong Sun v. United States, 371 U.S. 471, 488 (1963) ("Evidence obtained as a direct result of an unconstitutional seizure is plainly subject to exclusion.").

The State used the DNA evidence to prove Petitioner's guilt of murder and aggravated assault in a purely circumstantial evidence case. DNA testing showed that swabbings on the handle of the knife used to stab the victim contained

Petitioner's DNA. Pet. 7a, App. 9a-10a. The jury convicted him of all counts. Pet. App. 1a.

On appeal, Petitioner raised an ineffective assistance of counsel claim based on trial counsel's failure to file a motion to suppress DNA evidence. Pet. App. 1a-2a, 19a-25a. *See*, O.C.G.A. § 17-5-30 (a) (2) ("A defendant aggrieved by an unlawful search and seizure may move the court . . . to suppress as evidence anything so obtained on the grounds that: . . . the warrant was illegally executed."). The trial court found that trial counsel's performance was not deficient because Petitioner "made no showing the State could not obtain another search warrant in Gwinnett County for Defendant's DNA if trial counsel had filed a motion to suppress and successfully had the prior collection of DNA suppressed[,]" and "the State could obtain a search warrant at any time prior to trial." Pet. App. 54a.

The Georgia Supreme Court affirmed the trial court's judgment, finding that trial counsel "could reasonably determine that a motion to suppress would not ultimately have succeeded in excluding evidence that [Petitioner's] DNA matched the DNA samples taken from the crime scene, as it seems likely as counsel suggested, the State would have simply sought and executed a new warrant for the collection of the DNA sample from [Petitioner] had the first sample been suppressed." Pet. App. 23a-24a.

Both the trial court and the Georgia Supreme Court misunderstand Nix, *supra*, and its own precedent regarding the inevitable discovery exception. There was no active pursuit of a search warrant in Georgia for Petitioner's buccal swabs in November 2016 when the officer applied for, obtained, and executed the California search warrant. Pet. App. 6a. Contrary to the trial court's conclusion, the critical juncture is *not* "at any time prior to trial[,]" but "at the time of the misconduct." Cherry, 759 F.2d at 1204 II B. *Accord* Nix, 467 U.S. at 449 (finding that inevitable discovery exception applied because a search party had commenced search of the child's body and was approaching the location five hours before defendant led the police to the body); Mobley, 309 Ga. at 76 (4) (b) (inevitable discovery applies "prior to the occurrence of the illegal misconduct").

Here, the trial court used a meat axe, rather than a surgeon's scalpel in analyzing this issue and failed to hold the State to its statutory burden of proof regarding the lawfulness of the search and seizure, including any exception to the exclusionary rule. *See*, 5 Wayne R. LaFave, Search and Seizure, § 11.4 (a), p. 244 (1996) ("[I]n carving out the 'inevitable discovery' exception . . . courts must use a surgeon's scalpel and not a meat axe."); United States v. Jones, 72 F.3d 1324, 1334 (7th Cir. 1995) ("Inevitable discovery is not an exception to be invoked casually, and if it is to be prevented from swallowing the Fourth Amendment and the exclusionary rule, courts must take care to hold the government to its burden of

proof.") (Citation omitted); O.C.G.A. § 17-5-30 (b) ("[T]he burden of proving that the search and seizure were lawful shall be on the state.")

The Georgia Supreme Court blindly accepted the trial court's analysis and defied its own precedent in Taylor, Teal, and Mobley as well as Eleventh Circuit authority, all of which is consistent with Nix. Nix, 467 U.S. at 445, n. 5, 449-450 II C. "Speculation and assumption do not satisfy the dictates of Nix[.]" Jones, 72 F.3d at 1334. "To admit unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway would be to cripple the exclusionary rule as a deterrent to improper police conduct." United States v. Castellana, 488 F.2d 65, 68 (5th Cir. 1974), modified, 500 F.2d 325 (5th Cir. 1974) (*en banc*).

STATEMENT OF THE CASE

This case presents the important question of whether police must be actively pursuing a lawful means to discover objectionable evidence prior to the occurrence of the illegal misconduct under the inevitable discovery exception.

1. In August 2004, the victim, Petitioner's girlfriend, was found dead in her bedroom apartment; the cause of death was stab wounds to her neck and back. The weapon was her own knife. Pet. App. 1a-2a, 5a, 7a. The police interviewed the victim's family members and other individuals who resided at the apartment and took and examined physical evidence. There were no witnesses to the assault or

killing. Pet. App. 1a-6a. After the victim went to sleep at 1:00 a.m. on August 1, 2004, none of the five adults who lived in the apartment heard any cries or screams for help. Pet. App. 3a-6a, 10a, 35a-36a.

The victim's nephew was the last person to see both the victim and Petitioner. At 1:00 a.m., the victim told her nephew that she was going to sleep. Petitioner left in a red car with his suitcase after the victim told him to leave. Pet. App. 3a, 10a.

The police subsequently took out warrants for Petitioner's arrest, but they could not locate him in Georgia. Pet. App. 6a. Over a decade later, a July 2016 COIDS hit alerted police to Petitioner's presence in California. Pet. App. 6a-7a.

2. In November 2016, Gwinnett County Police Officer Restrepo and an investigator with the county District Attorney's office traveled to California to obtain a DNA sample from Petitioner, who had been arrested on unrelated charges. Pet. App. 7a, 20a, 36a. Appearing before Santa Clara County Superior Court Judge Alcala, Officer Restrepo applied for and obtained a search warrant to search and seize Petitioner's buccal swabs. Pet. App. 20a-21a, 36a. The search warrant issued by Judge Alcala was addressed to "any Sheriff, Constable, Marshal, Policeman or Peace Officer in the County of Santa Clara." Pet. App. 20a-21a, 60a. Officer Restrepo executed the search warrant by taking oral buccal swabs from Petitioner and returned to Georgia with swabs in hand. Pet. App. 21a. He then submitted the DNA sample to the Georgia Bureau of Investigation for DNA testing and

comparison to evidence found at the scene for prosecution of this case. Pet. App. 7a, 21a, 36a. Reyes was later extradited to Georgia. Pet. App. 31a.

3. At trial, the State introduced evidence of the officer's application for and execution of a California search warrant to search and seize Petitioner's buccal swabs, his return to Georgia with the buccal swabs, where he submitted the evidence for testing at the GBI and the results of DNA testing. The evidence showed that (i) the male profile DNA deduced from the vaginal and rectal swabs taken at the victim's autopsy matched Petitioner's DNA and (ii) Petitioner's DNA was on the handle of the knife used to stab the victim. Pet. App. 7a, 10a, 31a.

The jury convicted Petitioner of all counts, and the trial court sentenced him to life imprisonment. Pet. App. 1a.

4. Petitioner filed a motion for new trial and raised *inter alia*, the sufficiency of the evidence and an ineffective assistance of counsel claim based on trial counsel's failure to file a motion to suppress evidence challenging the search and seizure of his DNA. Pet. App. 1a-2a, 21a. The trial court denied the motion, essentially finding that the inevitable discovery exception applied. Pet. App. 54a.

5. On appeal, the Georgia Supreme Court affirmed the trial court's judgment denying the motion for new trial on this ground. Pet. App. 19a-25a.

REASONS FOR GRANTING THE PETITION

"When the police forego legal means of investigation simply in order to obtain evidence in violation of a suspect's constitutional rights, the need to deter is paramount and requires application of the exclusionary rule." Cherry, 759 F.2d at 1205. *See also*, Satterfield, 743 F.2d at 846 IV B ("The Government cannot later initiate a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery was inevitable."). As Justice Stevens noted in his concurring opinion in Nix, "the more relevant cost is that imposed on society by police officers who decide to take procedural shortcuts instead of complying with the law." 467 U.S. at 457. "[T]he more serious the crime, the greater the officer's desire to see the perpetrator convicted and, because the police care more about convictions in these cases, the more potent the exclusionary rule's deterrent effects." (footnote omitted). Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule (Law and Truth – The Twenty-First Annual National Student Federalist Society Symposium on Law and Public Policy – 2002),* Harv. J.L. & Pub. Pol'y 26, no. 1 (2003): 119-40 at 132.

Here, "[t]he question is not what police might have done had they not behaved unlawfully. The question is what they did do. Was there set in motion an independent chain of events that would have inevitably led to the discovery and seizure of the

evidence despite, and independent of that behavior? The answer here is 'no.'" Hudson v. Michigan, 547 U.S. 586, 616 III A (2006) (dissenting opinion, J. Breyer).

"The legislative expression of a peace officer's jurisdiction must be found in some . . . statute or be controlled by common law." Angel v. State, 740 S.W.2d 727, 732 (Tex. 1987). At common law, the traditional rule "restricted the geographical jurisdiction of peace officers[.]" State v. Rasmussen, 70 Wn. App. 853, 855 (1993). "Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States." Huntington v Attrill, 146 U.S. 657, 669 (1892).

Officer Restrepo lacked the power to execute a search warrant outside the jurisdiction of his employment and when he did so, he violated Petitioner's Fourth Amendment rights under the United States and Georgia Constitutions. *See*, O.C.G.A. § 17-5-20 (a) (In Georgia, "[a] search warrant may be issued only upon the application of an officer of this state or its political subdivisions[.]"). *See also*, Garcia v. State, 296 S.W.3d 180, 184 (Tex. App. 2009) ("[A] peace officer is a peace officer only while in his jurisdiction and when the officer leaves that jurisdiction, he cannot perform the functions of his office."); Whited, 1992 Neb. App. LEXIS 209 at *[8] (finding the same jurisdictional limitation that existed at common law regarding an officer's statutory authority to arrest someone outside his jurisdiction applies to an officer's execution of search warrants outside his jurisdiction); Griffis, 502 So. 2d at

1357-1358 (holding that police officer did not have the power to execute a search warrant outside his territorial jurisdiction); Ray, 44 Tex. Crim. at 158-159 (when a peace officer is outside his bailwick, he "cannot perform the functions of his office[]"). *See also*, Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893, 912 VII A (9th Cir. 2002) (holding that "a reasonable county officer, executing the search warrant on the tribal property at the time the search warrant was executed against the Bishop Paiute Tribe, would have known that the search warrant was being executed outside of his jurisdiction and thus in violation of the Fourth Amendment."). No Georgia or California statute authorized his extra-territorial acts.

This is not a case of isolated negligence. Rather, this is a case involving a Georgia police officer's flagrant manipulation of the judicial process to obtain a search warrant to search and seize DNA evidence, a deliberate violation of Petitioner's constitutional rights and Georgia and California statutes. The officer's actions were tantamount to a warrantless search and seizure as he lacked any power to act in California. He "cease[d] to act as a government official and instead act[ed] on his own behalf." Harbut Int'l, Inc. v. James, 157 F.3d 1271, 1281 (11th Cir. 1998).

Notably, the search warrant is addressed to a police officer in Santa Clara County, California. Pet. App. 60a. *See*, Cal. Pen Code § 1529 (describing the form of a search warrant which is addressed to any peace officer in the County so named in the warrant). While California statutes are specifically listed in the search warrant

itself, supporting affidavit, affidavit for DNA sample and the return, the officer blatantly disregarded these laws. Pet. App. 60a-63a, 67a. *See*, Cal. Pen Code §§ 1528 (a) (providing that if a magistrate finds probable cause for the issuance of a search warrant, he must issue it "to a peace officer in his or her county commanding him . . . to search the person or place named for the property or things or person or persons specified, and to retain the property or things in his custody subject to or order of the court as provided in Section 1536[]"), 1536.

Therefore, a Georgia officer lacks the power to search and seize Petitioner's buccal swabs in California and retain same for use outside a California proceeding. Id. The search warrant return was not signed by Officer Restrepo; it was signed by California Officer Brian Meeker, in which he swore that pursuant to Penal Code sections 1528 and 1536, the two buccal swabs obtained from Petitioner "will be retained in custody, subject to the order of [the Santa Clara County Superior] court or any other court in which the offense in respect to which the seized property is triable." Pet. App. 67a.

Our courts have applied the exclusionary rule to suppress evidence illegally obtained by a police officers' unlawful extraterritorial acts in violation of a defendant's constitutional rights. *See*, Mattos v. State, 199 So. 3d 416, 419-421 (Fla. 4th DCA 2016) (finding an extra-jurisdictional investigation unlawful because the officer attempted to have [the suspect] submit to a breathalyzer and perform field

sobriety exercises, thereby obtaining evidence only available to him in his capacity of a law enforcement officer); State v. Sills, 852 So.2d 390, 394 (Fla. 4th DCA 2003) (officers "may not employ the power or color of their office either expressly or by implication in order to gather evidence"; evidence obtained by officers acting outside their jurisdiction was suppressed).

Here, trial counsel did not thoroughly investigate the law and facts relevant to plausible options in determining his strategy. Strickland v. Washington, 466 U.S. 668, 690-691 (1984). A reasonable attorney would have litigated a motion to suppress DNA evidence in a circumstantial evidence only case. The trial court was constrained to find that Petitioner made a strong showing that the DNA evidence would have been suppressed had trial counsel filed a motion to suppress DNA evidence. *See*, Thrasher v. State, 300 Ga. App. 154, 155 (1) (2009) (when ineffective assistance of counsel claim is grounded in a failure to file a motion to suppress evidence, defendant must "make a 'strong showing' that the evidence would have been suppressed had a motion to suppress being filed.") (citation omitted). There was a reasonable likelihood that the outcome of the trial would have been different if the DNA evidence had been suppressed. Id.

Notably, the trial court's analysis of the issue was fraught with error. It failed to focus its analysis "upon historical facts capable of ready verification and not speculation." Nix, 467 U.S. at 444 n. 5. Rather than "viewing affairs as they existed

at the instant before the unlawful search," the trial court viewed the case from the perspective of what would have happened down the road after Petitioner was extradited to Georgia or at any time prior to trial. United States v. Kennedy, 61 F.3d 494, 498 (3d Cir. 1998). It did not consider whether the officer was actively pursuing a lawful means to obtain Petitioner's DNA when he executed the California search warrant, as required by Nix. Pet. App. 54a.

"If the police officer knows that the evidence illegally obtained cannot be used at a later trial, he will be deterred from violating an individual's rights." Robert M. Bloom, *Inevitable Discovery: An Exception beyond the Fruits*, American Journal of Criminal Law 20, (1992), p. 79. In a Chicago study, Myron Orfield interviewed 13 judges, 11 prosecutors and 14 public defenders in the Chicago criminal court system. His study gleaned that "officers care about convictions and experience adverse personal reactions when they lose evidence." Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992).

"[A]ll evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." Mapp v. Ohio, 367 U.S. 643, 655 (1961). "To hold otherwise," would be "to grant the right but in reality to withhold its privilege and enjoyment." Id. at 656.

I. FEDERAL COURTS OF APPEALS AND STATE COURTS ARE DIVIDED ABOUT THE MEANING OF INEVITABLE DISCOVERY.

The Georgia Supreme Court's decision departs from its own precedent and the Fifth and Eleventh Circuits and widens the conflict over whether police must actively be pursuing a lawful means or alternative line of investigation to seize evidence prior to the occurrence of the illegal misconduct.

The Second, Fifth, Eighth, Eleventh, and D.C. Circuits hold that the inevitable discovery rule does not immunize an unlawful seizure of evidence where the police subsequently obtained, or could have obtained, a search warrant to discover the objectionable evidence. *See*, United States v. Conner, 127 F.3d 663, 667 (8th Cir. 1997); United States v. Cabassa, 62 F.3d 470, 473 (2d Cir. 1995); United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars, 955 F.2d 712, 720-721 (D.C. Cir. 1992); United States v. Lamas, 930 F.2d 1099, 1101 (5th Cir. 1991); Terzado-Madruga, 897 F.2d at 1114 (11th Cir. 1990).

These courts hold that the government must prove that the police officer "was actively pursuing an alternative line of investigation" or "lawful means" of obtaining the evidence at the time of the unlawful search. *See*, Cherry, 759 F. 2d at 1204 II B; Satterfield, 743 F.2d at 846 IV B.

A minority of the state courts agree, including Georgia. *See*, Mobley, 307 Ga. at 76 (4) (b); State v. Flippo, 212 W. Va. 560, 566 (2002); People v. Diaz, 53 P.3d 1171, 1176 (Colo. 2002); State v. Anderson, 787 A.2d 601, 606 (Conn. App. Ct. 2001); State v. Harris, 642 A.2d 1242, 1251 (Del. 1993); Taylor v. State, 274 Ga. at 269; People v. Perez, 630 N.E.2d 158, 162 (Ill. App. Ct. 1994); In the Interest of J.D.F., 553 N.W.2d 585, 590-591 (Iowa 1996); State v. McKessor, 785 P.2d 1332, 1337 (Kan. 1990); State v. Hatton, 389 N.W.2d 229, 234 (Minn. Ct. App. 1986); White v. State, 735 So. 2d 221, 223 (Miss. 1999); State v. Lashley, 803 A.2d 139, 142 (N.J. 2002); State v. Romero, 28 P.3d 1120, 1122 (N.M.Ct. App. 2001); Harjo v. State, 882 P.2d 1067, 1073 (Okla. Crim. App. 1994); Commonwealth v. Wideman, 385 A.2d 1334, 1336 (Pa. 1978); State v. Trepanier, 600 A.2d 1311, 1319 (R.I. 1991); State v. Boll, 651 N.W.2d 710, 716 (S.D. 2002); Wilkins v. Commonwealth, 559 S.E.2d 395, 400 (Va. Ct. App. 2002); State v. Lopez, 559 N.W.2d 264, 269 (Wis. 1996).

On the other hand, the First, Third Fourth, Sixth, Seventh, Ninth, and Tenth Circuits do not interpret Nix as requiring active pursuit or initiation of lawful means by police to acquire evidence prior to the illegal seizure. *See*, United States v. Scott, 270 F.3d 30, 42-43 (1st Cir. 2001); United States v. Reilly, 224 F.3d 986, 994 (9th Cir. 2000); United States v. Ford, 184 F.3d 566, 577 (6th Cir. 1999); United States v. Allen, 159 F.3d 832, 841 (4th Cir. 1998); United States v. DeReyes, 149 F.3d 192

(3d Cir. 1998); United States v. Larsen, 127 F.3d 984, 987 (10th Cir. 1997); Jones, 72 F.3d at 1330 (7th Cir. 1995).

However, several circuits hold the Government to a minimum burden of proof, i.e. the Government "must do more than establish the possibility that the evidence would have been discovered." De Reyes, 149 F.3d at 195. In the Third Circuit, "the record must support a finding that the police had relevant procedures in place, that those procedures would have been followed, and that would have inevitably led to the discovery of the evidence in question." Id. The Second, Fourth, Seventh, and Ninth Circuits have reached similar conclusions. *See*, United States v. Marrocco, 578 F.3d 627, 639 (7th Cir. 2009) (if investigating officers "undoubtedly would have followed routine, established steps resulting in the issuance of a warrant[,]" the inevitable discovery rule applies.) (citations omitted); United States v. Ramirez-Sandoval, 872 F.2d 1392, 1399 III (B) (9th Cir. 1989) (The government "can meet its burden by establishing that, by following routine procedures, the police would inevitably have uncovered the evidence.") (citations omitted); Allen, 159 F.3d at 841 (the doctrine "may apply where additional routine or factually established investigative steps would inevitably lead to discovery of the evidence without undertaking any search.").

But, the Second Circuit has an additional requirement. It holds that the inevitable discovery doctrine "is available only where there is a high level of

confidence that each of the contingencies required for the discovery of the disputed evidence would in fact have occurred." United States v. Heath, 455 F.3d 52, 55 (2d Cir. 2006). The Tenth Circuit agrees. *See*, United States v. Souza, 223 F.3d 1197, 1205 (10th Cir. 2000).

The state courts are also split. The majority of state courts do not construe Nix to require the police to have initiated lawful means to acquire evidence prior to the occurrence of the illegal misconduct. *See*, Jones v. State, 615 So. 2d 1293, 1295 (Ala. Crim. App. 1993); Smith v. State, 992 P.2d 605, 608 (Alaska Ct. App. 1999); Miller v. State, 27 S.W.3d 427, 432 (Ark. 2000); State v. Paxton, 925 P.2d 721, 725 (Ariz. Ct. App. 1996); People v. Carpenter, 21 Cal. 4th 1016 (2000); Craig v. State, 510 So. 2d 857, 862-863 (Fla. 1987); State v. Lopez, 896 P.2d 889, 907 (Haw. 1995); State v. Cook, 677 P.2d 522, 530 (Idaho 1984); Hughes v. Commonwealth, 2002 Ky. LEXIS 163; State v. Clark, 499 So. 2d 332, 336 (La. Ct. App. 1986); Commonwealth v. Balicki, 762 N.E.2d 290, 303 (Mass. 2002); State v. St. Yves, 751 A.2d 1018, 1023 (Me. 2000); Oken v. State, 612 A.2d 258, 271 (Md. 1992); People v. Brzezinkski, 622 N.W.2d 528, 532 (Mich. Ct. App. 2001); State v. Jackson, 756 S.W.2d 620, 622 (Mo. Ct. App. 1988); State v. Miller, 709 P.2d 225, 243 (Or. 1985); State v. Soukharith, 570 N.W.2d 344, 358 (Neb. 1997); Proferes v. State, 13 P.3d 955, 958 (Nev. 2000); State v. Holler, 459 A.2d 1143, 1146 (N.H. 1983); People v. Turriago, 90 N.Y.2d 77 (1997); State v. Garner, 417 S.E.2d 502,

508 (N.C. 1992); State v. Johnson, 531 N.W. 2d 275, 280 (N.D. 1995); State v. Perkins, 480 N.E.2d 763, 766-767 (Ohio 1985); State v. Walker, 47 P.3d 65, 68 (Or. Ct. App. 2002); State v. Coury, 657 S.W.2d 777, 780 (Tenn. 1983); State v. Topanotes, 14 P.3d 695, 697 (Utah Ct. App. 2000); State v. Thompson, 51 P.3d 143, 151 (Wash. Ct. App. 2002).

II. THE DECISION BELOW IS WRONG.

The trial court's application of the inevitable discovery exception was erroneous for several reasons. First, the trial court misapprehends the law regarding which party bears the burden of proving an exception to the exclusionary rule. By finding that "Defendant has made no showing the State could not obtain another search warrant in Gwinnett County for Defendant's DNA if trial counsel had filed a motion to suppress and successfully had the prior collection of DNA suppressed[,]" the trial court improperly placed the burden on Petitioner to show the inapplicability of the inevitable discovery exception. Pet. App. 59a. *See*, Nix, 467 U.S. at 444 (the State "bears the burden of proving inevitable discovery by a preponderance of the evidence."). The State has the burden to prove that the search was lawful, including any exception. *See,* Leon-Vasquez v. State, 269 Ga. App. 760, 761 (1) (2004) ("When a defendant moves to suppress evidence based on an illegal search, the State must bear the burden of proving that the search was lawful."); O.C.G.A. § 17-5-30

(b) ("[T]he burden of proving that the search and seizure were lawful shall be on the State.").

Second, the trial court erred by failing to find that the State did not meet its evidentiary burden by a preponderance of the evidence. Here, the trial court implicitly relied upon the inevitable discovery exception when it found that "trial counsel could have reasonably believed that the officer could simply have obtained a second search warrant." Pet. App. 54a.

In the order denying motion for new trial, the trial court makes no mention of whether the police officer was actively seeking a search warrant in Georgia to search and seize Petitioner's buccal swabs at the time he applied for a search warrant in California in November 2016. Pet. App. 34a-59a. It never evaluated whether it, in fact, mattered that the officer never obtained a second search warrant for Petitioner's DNA in Georgia. Since the record is devoid of any evidence to support a finding that the officer was actively seeking a Georgia search warrant in November 2016, and the trial court was required to consider the officer's actions "prior to the occurrence of the illegal misconduct," the State failed to meet its evidentiary burden. Mobley, 309 Ga. at 76 (4) (b) (relevant time frame for inevitable discovery is "prior to the occurrence of the illegal misconduct"); Cherry, 759 F.2d at 1204 (inevitable discovery applies "at the time of the police misconduct").

Notably, the officer's November 2016 search warrant application to Judge Alcala does not state that he has applied for a search warrant in Georgia to search and seize Petitioner's DNA. Pet. App. 60a-66a. It was an impossibility because the officer did not know Petitioner's whereabouts for 14 years. Pet. App. 6a, 66a. The trial court's failure to account for all the demonstrated historical facts in the record undermines its conclusion. *See*, Nix, 467 U.S. at 444, n. 5 (district court must consider "demonstrated historical facts capable of ready verification."); De Reyes, 149 F.3d at 195 II (same).

Third, the trial court wrongly assumed that the officer would have applied for a search warrant in Georgia to search and seize Petitioner's buccal swabs and that a Georgia Judge would have found probable cause for the issuance of a hypothetical search warrant. These factual contingencies may not have been resolved in the State's favor. *See*, Cabassa, 62 F.3d at 474 ("the magistrate judge might not be satisfied as to the showing of probable cause").

Thus, there is nothing to support the trial court's conclusion that "the State could obtain a search warrant at any time prior to trial." Pet. App. 54a. *See*, Nix, 467 U.S. at 445 II; Satterfield, 743 F.2d at 846 IV B (holding that "the Government had not yet initiated the lawful means that would have led to the discovery of the evidence[]"); Mobley, 309 Ga. at 76-77 (because there is no evidence that any of the investigating officers applied for a warrant, were preparing an application for a

warrant, or even contemplating a warrant before the investigator retrieved the crash data, inevitable discovery exception does not apply); Davis v. State, 262 Ga. 578, 583 (4) (1992) ("The state has not shown that a warrant would have been sought as part of the inevitable, routine procedure of the Douglas County Sheriff's Department [in these circumstances]"); Norton v. State, 283 Ga. App. 790 (3) (2007) (inevitable discovery doctrine inapplicable due to State's failure to show that officers had available to them lawful means of investigation that were being actively pursued prior to the illegal conduct).

In affirming the trial court, the Georgia Supreme Court breaks from precedent without citing any authority and finds that "[c]ounsel could reasonably determine that a motion to suppress would not ultimately have succeeded in excluding evidence that [Petitioner's] DNA matched the DNA samples taken from the crime scene, as it seems likely that, as counsel suggested, the State would have simply sought and executed a new warrant for the collection of a new DNA sample from [Petitioner] had the first sample been suppressed." Pet. App. 23a-24a. "Seems likely" is not the standard under Nix or Mobley. The inevitable discovery exception "requires something more where the discovery is based upon the expected issuance of a warrant. Otherwise, it would result in illegally seized evidence being received when there was a 49% chance that a warrant would not have issued or would not have

issued in a timely fashion, hardly a showing of inevitability." Cabassa, 62 F.3d at 474.

The Georgia Supreme Court's reliance on speculative "would have" language is misplaced. The relevant inquiry requires the trial court to consider "demonstrated historical facts" in the record "at the time of the illegal conduct." Nix, 467 U.S. at 444, n. 5. *See also*, United States v. Eng, 971 F.2d 854, 861 (2d Cir. 1992) (the "focus on demonstrated historical facts keeps speculation to a minimum, by requiring the district court to determine, viewing affairs as they existed at the instant before the unlawful search occurred[]").

The Court also erred in countenancing the trial court's assumption that certain factual contingencies would have been resolved in the State's favor. *Cf.* United States v Roberts, 852 F.2d 671, 676 (2d Cir. 1988) (holding that the issuance of a subpoena may not 'inevitably result[] in the discovery of . . . suppressed documents because several contingencies may not have been resolved in the government's favor"). Its conclusion was based on rank speculation. "[N]o one can say with any certainty how much time would have taken to complete the application, to submit it to the magistrate judge for consideration, and to secure the warrant's issuance." Cabassa, 62 F.3d at 474.

Contrary to the trial court's judgment, a motion to suppress DNA evidence was not a futile motion. Pet. App. 54a. Because the trial court's decision rests upon

an errant conclusion of law and an improper application of law to fact, the Georgia Supreme Court erred in affirming the trial court's judgment on this ground. *See*, Phillips v. Harmon, 297 Ga. 386, 397 II (2015) (holding that an appellate court "cannot affirm a trial court's reasoning when it is based upon an erroneous legal theory."); Rivers v. United States, 777 F.3d 1306, 1312 II (11th Cir. 2015) ("An abuse of discretion occurs where the [trial] court's decision rests upon an erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact.").

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION.

This Court should resolve the circuit split concerning the contours of the inevitable discovery exception, a recurring question. Search and seizure issues stemming from illegal arrests and searches are commonplace in criminal cases. An empirical study by Thomas Davies reveals that the "concentration of illegal searches [is found] in drug arrests (and possibly weapons possession arrests) and the extremely small effects in arrests for other offenses, including violent crimes." (Footnote omitted). Kamisar, *supra*, at 131.

Because this Court has not specifically defined the contours of what inevitable discovery means, without a bright-line rule, the danger is in the trial court's "application in a loose and unthinking fashion." LaFave at 244. This Court should adopt the minority view reflected in Georgia's precedent in Taylor, Mobley, the

Second, Fifth, Eighth, Eleventh and D.C. Circuits and other state courts as it closely aligns with Nix's interpretation of the inevitable discovery rule. "[I]f police are allowed to search when they possess no lawful means and are only required to show that lawful means could have been available though not pursued, the narrow 'inevitable discovery' exception would 'swallow' the [constitutional warrant] protection." Flippo, 212 W. Va. at 580.

Suppression is appropriate to encourage an officer's future compliance with the laws of his state and foreign states, deter police misconduct, and safeguard a defendant's constitutional rights of privacy and to be free from unlawful searches and seizures. *See*, United States v. Ortiz, 422 U.S. 891, 895 (1975) ("[T]he central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials."); Terry v. Ohio, 392 U.S. 1, 12 (1968) ("[E]xperience has taught that [the Fourth Amendment] is the only effective deterrent to police misconduct in the criminal context[.]"); People v. Hyde, 774 N.W.2d 833, 840 (Mich. App. 2009) ("Exclusion of improperly obtained evidence serves as a deterrent to police misconduct, protects the right of privacy, and preserves judicial integrity."). The exclusionary rule "also serves other important purposes: It 'enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,' and it 'assur[es] the people – all potential victims of unlawful government conduct – that the government would not profit from its lawless

behavior, thus minimizing the risk of seriously undermining popular trust in government." (Citations omitted). Herring, 129 S.Ct. at 707 (dissenting opinion, J. Ginsburg).

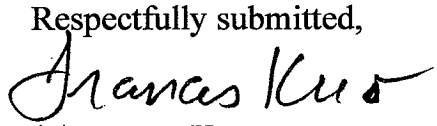
Since 1949, this Court has recognized the "obvious futility of relegating the Fourth Amendment to the protection of other remedies." Mapp, 367 U.S. at 652. *See, e.g.*, People v. Cahan, 4 Cal.2d 434, 447 (1955) (majority opinion of Traynor, J.) ("Experience [in California] has demonstrated, . . . that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures"). Civil remedies cannot rectify a reversal of Petitioner's conviction and life sentence. The benefits of deterrence outweigh any cost. Herring, 555 U.S. at 140-141; Hudson, 547 U.S. at 591.

CONCLUSION

The petition for writ of certiorari should be granted.

This 5th day of February, 2021.

Respectfully submitted,



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