No. 21-6012

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL D. RIMMER,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

BRIEF IN OPPOSITION

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CAPITAL CASE

RESTATEMENT OF THE QUESTIONS PRESENTED

I.

Whether the Tennessee Supreme Court properly concluded that the introduction of an informant's prior testimony—after the State made significant but ultimately fruitless efforts to locate the informant for the petitioner's retrial—satisfied the good-faith standard announced in *Barber v. Page*, 390 U.S. 719 (1968).

II.

Whether this Court lacks jurisdiction to consider the petitioner's due process claim related to the destruction of a car because the petitioner raised this issue below, and the Tennessee Supreme Court resolved it, solely under the Tennessee Constitution.

III.

Whether the Court should grant review of the question whether alleged prosecutorial misconduct should have barred retrial under the prohibition against double jeopardy—an issue that was first raised in an amicus brief in the Tennessee Supreme Court and thus was found to be waived—when the petitioner had been denied relief on the misconduct claims, which would have garnered him a new trial even if they had been meritorious.

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The opinion of the Tennessee Supreme Court in this matter (Pet. App. 1a-43a) is reported at 623 S.W.3d 235. The opinion of the Tennessee Court of Criminal Appeals (Pet. App. 44a-72a) is unreported.

JURISDICTIONAL STATEMENT

The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), and his petition is timely. The Tennessee Supreme Court issued its decision in this matter on April 16, 2021. The same court denied the petitioner's petition for rehearing on May 21, 2021. The petition, therefore, was timely if filed on or before October 18, 2021. U.S. Sup. Ct. R. 13.3; Order at 1 (July 19, 2021). The petition was filed on October 15, 2021. The petitioner's second issue, however, regards a claim decided on independent and adequate state-law grounds. (Resp. 9-11, *infra.*)

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in pertinent part that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb, . . . nor be deprived of life, liberty, or property without due process of law." The Sixth Amendment to the U.S. Constitution further provides that in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The Fourteenth Amendment, in turn, provides that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

The petitioner was convicted of murdering Ricci Ellsworth, among other crimes, and he was sentenced to death. (Pet. App. 1a.) He appealed his convictions and sentence, and he now seeks review in this Court.

Before the petitioner murdered Ms. Ellsworth, he had pleaded guilty to raping and assaulting her for which he received a lengthy prison sentence. (Pet. App. 2a.) While in prison, he relayed that he was angry with Ellsworth and was owed some money she received from the settlement of an unrelated civil action. (Pet. App. 2a-3a.) He asked a fellow prisoner to convey to her that if the petitioner did not receive a portion of the money, he would kill her. (Pet. App. 3a.) When describing the threat, the petitioner would get agitated, and saliva would build up in the corners of his mouth. (Pet. App. 3a.)

Later during his incarceration, the petitioner told another inmate that the petitioner was going to kill Ellsworth following his release from prison. (Pet. App. 3a.) He further described how he would get rid of the body. (Pet. App. 3a.) When describing his plan, he got "high strung" and would "sort of foam at the mouth." (Pet. App. 3a.)

Following his release from prison, the petitioner worked for an automotive repair shop with Howard Featherston, among others, and commonly wore a baseball cap. (Pet. App. 3a.) Featherston owned a maroon Honda Accord, which the petitioner had helped repair at Featherston's home and which was driven away without permission the month before the murder. (Pet. App. 3a.) At the time of its disappearance, the car was very clean with no stains in the upholstery. (Pet. App. 45a.)

The day of the murder, the petitioner left work and borrowed five dollars' worth of gas from a colleague. (Pet. App. 3a.) The petitioner was driving a maroon Honda. (Pet. App. 3a.)

That night, Ms. Ellsworth left for work as a night clerk at the Memphis Inn. (Pet. App. 3a.) She interacted with guests behind protective glass and a locked door at the hotel. (Pet. App. 3a.) Two guests recalled seeing her behind the glass between 1:00 a.m. and 2:00 a.m. that night. (Pet. App. 3a.) They remembered that she was with at least two men whom she seemed to know. (Pet. App. 3a.) A guest identified Billy Wayne Voyles as one of the men. (Pet. App. 3a.)

Between 1:30 and 2:00 a.m., a couple, James Darnell and Dixie Presley, attempted to book a room at the hotel and observed a man in a baseball cap depositing a thick bundle, which was wrapped in a pink blanket or comforter, in the trunk of a maroon Honda in the parking lot. (Pet. App. 3a-4a.) The car, it was observed, sank down with the added weight of the bundle. (Pet. App. 3a-4a.) Darnell and the man in the cap entered the hotel where Darnell saw that the night clerk's door was open and that a third man was pushing cash from the office's cash register through the window. (Pet. App. 4a.) The man in the cap received the money. (Pet. App. 4a.) Both men had bloody hands. (Pet. App. 4a.) Sensing a bad situation, Darnell quickly left and would later identify Billy Wayne Voyles as one of the two bloody men at the hotel. (Pet. App. 4a.)

Later, a railroad yard master, attempting to contact his crew at the hotel and receiving no answer on the telephone from the front desk, drove to the hotel and found the clerk's office open, bloody, and in disarray. (Pet. App. 4a.) Police were summoned, and they discovered copious blood, especially in the bathroom area of the night clerk's office. (Pet. App. 4a.)

Meanwhile, later that morning, the petitioner arrived in a muddy maroon Honda at the home of his brother, Richard. (Pet. App. 5a.) The petitioner was tired and unfocused and had a shovel with him. (Pet. App. 5a.) He asked his brother to clean a blood stain from the back of the car, though the petitioner attributed the stain to sex with a menstruating woman. (Pet. App. 5a.) Richard refused. (Pet. App. 5a.) That night, Richard saw the news reports of Ms. Ellsworth's

disappearance and panicked. (Pet. App. 5a.) He disposed of the shovel, which the petitioner had left behind. (Pet. App. 5a.)

The petitioner himself never returned to work. (Pet. App. 3a.) He did not pick up his last paycheck and did not pay back his colleague who had loaned him the gas money. (Pet. App. 3a.) Instead, he went on a sudden, cross-county road trip in the maroon Honda. (Pet. App. 46a.) He would be apprehended in Indiana almost a month later. (Pet. App. 5a, 46a.) The Indiana authorities processed the car and found blood stains in the back seat. (Pet. App. 5a.) The contents of the car were removed and inventoried, and the evidence technician took 96 photographs of the car. (Pet. App. 5a-6a.) The evidence and the car later would be transported to Tennessee for further analysis. (Pet. App. 6a.)

Memphis police and the Tennessee Bureau of Investigation found multiple blood stains in the care when they processed it. They took even more photographs of it. (Pet. App. 6a.) Law enforcement also processed the evidence from the hotel crime scene, including the blood found there. (Pet. App. 6a.) The DNA from the blood samples taken from the maroon Honda and the hotel were consistent with Ms. Ellsworth's DNA. (Pet. App. 7a, 8a.) The Memphis police then released the car back into the custody of Featherston because the police did not have storage capacity to keep the car longer. (Pet. App. 6a.) Items taken from the car, the bloody patches of upholstery cut from the back seat, and the abundant photographs of the car were all preserved and would later be made available to defense counsel. (Pet. App. 14a.)

During his incarceration, the petitioner made at least three attempts to escape from custody. (Pet. App. 7a.) And he told a fellow inmate, James Allard, that he had murdered his "wife" at the motel where she worked. (Pet. App. 7a.) The petitioner said he had shot her twice and had beaten her in the back of hotel behind the service desk, thereby leaving the back room "pretty bloody."

(Pet. App. 7a.) He told Allard that he had erased the motel's security camera, put the victim's body in his car, and buried her in a wooded area. (Pet. App. 7a.) He could not believe the police had failed to discover the body. (Pet. App. 7a.) While describing the murder, the petitioner began to sweat a lot, and he frequently went to wash his hands. (Pet. App. 7a.)

Ms. Ellsworth was never seen again though she was a dependable employee and a devoted wife, mother, and grandmother. (Pet. App. 2a.) She is presumed dead. (Pet. App. 2a.)

The petitioner was tried and convicted of first-degree murder and aggravated robbery, among other offenses, and sentenced to death in 1998. But the Tennessee Court of Criminal Appeals uncovered errors in his sentencing hearing and remanded for re-sentencing. (Pet. App. 2a.) On remand, a second jury again imposed the death penalty, and the judgments were affirmed on appeal. (Pet. App. 2a.)

The post-conviction court granted petitioner a new trial on the ground of ineffective assistance of counsel. (Pet. App. 313a.) It found that the petitioner's trial counsel did not sufficiently investigate public sources to discover the eyewitness identifications of Voyles and, consequently, did not cross-examine the eyewitnesses at trial regarding their identifications of another potential culprit. (Pet. App. 234a-241a, 243a-251a, 292a-295a.) Although the post-conviction court was critical of the State for not disclosing all the evidence regarding the eyewitness identifications of Voyles, it found that the claims of prosecutorial misconduct were not meritorious because the withheld information was otherwise made available to counsel or could have been found from public sources. (Pet. App. 197a-208a, 229a-230a, 243a-251a, 292a-294a.)

The new trial resulted again in conviction for first-degree murder and aggravated robbery for which the petitioner again received a capital sentence in 2016. (Pet. App. 1a.) The State used

Allard's testimony from the petitioner's first trial because law enforcement could not locate Allard despite extensive searches of state and national databases. (Pet. App. 58a-59a.)

On direct appeal, the petitioner raised 19 issues, including one regarding Allard's testimony. (Pet. App. 44a.) But the petitioner did *not* argue that retrial was precluded by any alleged prosecutorial misconduct in connection with his initial trial and sentencing hearings. (Pet. App. 44a.) And while he argued that the State erred in releasing the maroon Honda, he confined his arguments to the Tennessee precedent of *State v. Merriman*, 410 S.W.3d 779 (Tenn. 2013), and *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). (*See* Pet. App. 51a-53a; Resp. App. 44.) The Tennessee Court of Criminal Appeals affirmed his judgments, and the Tennessee Supreme Court undertook automatic review. (Pet. App. 1a-2a, 44a.)

In the Tennessee Supreme Court, the petitioner again contended that the State's release of the maroon Honda violated *Merriman* and *Ferguson*. (Pet. App. 10a-14a; Resp. App. 44.) And again, he did *not* argue that alleged prosecutorial misconduct from his initial trial proceedings precluded the State from trying him again. (Pet. App. 1a-2a, 10a-11a; Resp. App. 13-15, 38-69.) Rather, that argument was made only by an *amicus curiae,* who presented for the first time the notion that the retrial violated double jeopardy due to the alleged misconduct. (Pet. App. 11a.) Notably, the Tennessee Supreme Court found that the issue was waived because it had not been raised earlier, and the Supreme Court found no plain error. (Pet. App. 11a.) After review of the issues, the unanimous court affirmed the judgments and sentences. (Pet. App. 2a, 21a-22a.)

REASONS FOR DENYING THE PETITION

I. The Petitioner Has Not Identified Any Conflict in the Law Regarding His Confrontation Issue but Alleges a Mere Misapplication of a Properly Stated Rule of Law.

The Court should decline to review the petitioner's first issue, in which the petitioner contends that the state courts misapplied a properly stated rule of law. A "petition for writ of certiorari is rarely granted when the asserted error consists of [alleged] erroneous factual findings or misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10. The Court should not veer from that principle here.

The petitioner appears to concede that the state courts applied the *Barber v. Page*, 390 U.S. 719 (1968), good-faith-effort standard he acknowledges to be controlling. (Pet. 15-16.) Indeed, the State courts directly addressed and applied the standard quoted in his petition. (Pet. 16; Pet. App. 30a, 58a-60a.) Nor does the petitioner claim that there is a split in the circuits or in the States over how to apply *Barber*. (Pet. 15-22.) Rather, he merely argues that the state courts erred in the conclusions they drew regarding this issue. (Pet. 15-22.) As noted, this is no basis for granting a petition for writ of certiorari.

Nor did the State courts err in holding that the State made good-faith efforts to find Allard for the second trial. The Tennessee Bureau of Investigation searched for his whereabouts via multiple databases, both state and national in scope.[1] (Pet. App. 58a-59a.) The bureau searched real-estate records, other civil records, and criminal records. (Pet. App. 58a.) The bureau also searched databases on driver's licenses, vehicle information, criminal histories, and incarceration

[1] The Petitioner argues that the State failed to show that it searched outside Tennessee for Allard. (Pet. 17.) To the contrary, in its proof, the State noted that, in addition to the Tennessee-specific databases, national databases, such as the National Crime Information Center ("NCIC"), were used in the search. (Pet. App. 77a.) Indeed, the one, if ultimately fruitless, lead was in North Carolina. (Pet. App. 78a.)

information. (Pet. App. 58a-59a.) The bureau further searched the NCIC database and death records to locate Allard, all in vain. (Pet. App. 59a.) Law enforcement even conducted Google searches to find him. (Pet. App. 58a.) When the bureau found a potential lead, the lead was pursued but proved to be a dead end. (Pet. App. 59a.) The State made concerted efforts to locate Allard.[2] The petitioner did not suffer constitutional deprivation because Allard's prior testimony, including the petitioner's cross-examination of him, was read to the jury at his second trial.

In a single sentence, petitioner also appears to suggest that the state post-conviction court's finding of ineffective assistance of counsel at his first trial rendered unfair the State's reliance on Allard's testimony for the second trial. (Pet. 22.) But the state post-conviction court never found that trial counsel was ineffective in their cross-examination of Allard, who testified about his conversation with the petitioner while the petitioner was incarcerated in Indiana long after the murder. (Pet. App. 232a-251a, 292a-295a.) Rather, counsel was ineffective for failing to adequately investigate the accounts of two independent eyewitnesses, James Darnell and Dixie Roberts, who were present at the hotel around the time of the murder and could have testified about another potential culprit. (Pet. App. 245a-251a.) There were no problems under the Confrontation Clause or the Due Process Clause in connection with Allard's testimony.[3] Accordingly, the petitioner's request for error correction should be denied.

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[2] The petitioner now complains that the State's witness did not explicate what search terms he employed in the various databases. (Pet. 18.) But the petitioner has not identified any law stating that such granular details as database search terms are required to establish good-faith efforts to locate a missing witness. (*Id.*) Nor did the petitioner cross-examination the witness on the subject. (Pet. App. 79a-82a.)

[3] As part of his argument, the petitioner "maintains" that his confession to Allard is not corroborated by the descriptions of the crime scene. (Pet. 15, 21-22.) Not so. The petitioner claimed that he killed his victim at her workplace at a hotel. (Pet. App. 7a.) Ellsworth was at her place of employment, a hotel, when she was killed. (Pet. App. 2a, 3a.) He said that he beat her in a back room behind a service desk. (Pet. App. 7a.) Ellsworth was working behind a service desk

II. This Court Should Decline Review of the Petitioner's Due Process Claim Because He Sought and Received Review of this Issue Only on State Constitutional Grounds.

The petitioner's complaint about the State's release of the maroon Honda suffers from a significant jurisdictional problem: the petitioner sought and got review of this issue solely under the Tennessee Constitution's Due Process Clause. (Resp. App. 44; Pet. App. 12a.) Because this Court will not review judgments of state courts that rest on independent and adequate state-law grounds, *Michigan v. Long*, 463 U.S. 1032, 1037-42 (1983), it should not grant review of this issue.

The petitioner stated in his brief before the Tennessee Supreme Court: "Mr. Rimmer relies upon the cases of *State v. Merriman*, 410 S.W.3d 779 (Tenn. 2013), and *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999)." (Resp. App. 44.) *Ferguson* and *Merriman*, however, specifically rest upon the Due Process Clause of Tenn. Const. art. I, § 8, because the Tennessee Supreme Court found the state provision to be more expansive and protective than its federal counterpart. *Merriman*, 410 S.W.3d at 784-85; *Ferguson*, 2 S.W.3d at 916-17. In doing so, the Tennessee Supreme Court formulated a state-law balancing test under the Tennessee Constitution, which is more generous to defendants, to address issues of lost evidence while eschewing the more limited

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at the hotel, and the rooms behind it were chaotic and bloody. (Pet. App. 2a, 4a.) Expert testimony agreed that the blood stains were consistent with blunt-force trauma. (Pet. App. 7a.) He claimed that he took the motel's security-camera tape and erased it. (Pet. App. 7a.) The security camera at the hotel was missing its tape. (Pet. App. 4a.) He boasted that he put the victim's body in his car and buried the body in a wooded area. (Pet. App. 7a.) Witnesses spotted a man putting a wrapped bundle in the trunk of the maroon Honda, which sunk down from the weight and which the petitioner was seen driving both before and after the murder. (Pet. App. 3a-4a, 5a.) And the petitioner's brother, who lived in a wooded area, observed that the petitioner arrived at his house with a muddy car and a shovel shortly after Ellsworth's disappearance. (Pet. App. 5a.) The only detail that law enforcement could not corroborate was that the petitioner also shot Ellsworth. (Pet. App. 7a, 8a.)

bad-faith inquiry employed by *Arizona v. Youngblood*, 488 U.S. 51 (1988), in connection with the Fifth Amendment. *Id.*

Significantly, the Tennessee Supreme Court applied that state constitutional test in this matter under the auspices of *Ferguson*. (Pet. App. 12a-14a.) In fact, the section of the opinion regarding the issue was entitled, "*Ferguson Analysis*." (Pet. App. 12a.) The petitioner, in other words, asks this Court to overrule a state-court decision on a state constitutional issue that used a state-formulated test. Consequently, the Court should decline to exercise jurisdiction over an independent and adequate state constitutional issue here.

If, *arguendo*, the Court were to assume jurisdiction, there was no violation of the Fifth Amendment under *Youngblood*, and, therefore, there is no reason to accept review even for mere error correction. It was unrebutted that, per agency policy, law enforcement released the maroon Honda to its owner because the authorities did not have the storage capacity to retain a whole automobile indefinitely—not because the State in bad-faith intended to deprive the petitioner of exculpatory evidence. (Pet. App. 6a, 14a.) The due-process inquiry under *Youngblood* ends there. *Youngblood*, 488 U.S. at 57-58.

Indeed, it appears that the petitioner *concedes* there was no bad faith by the State in this case. (Pet. 25-26.) He asks this Court instead to reject its prior holding in *Youngblood* and to adopt a new legal standard consistent with Justice Stevens's concurrence in *Illinois v. Fisher*, 540 U.S. 544 (2004). (Pet. 25-26.) Significantly, and as discussed, state law permits the sort of claim suggested by Justice Stevens. *See Merriman*, 410 S.W.3d at 784-85; *Ferguson*, 2 S.W.3d at 916-17. But even under this more relaxed state constitutional standard, the Tennessee Supreme Court concluded that the petitioner failed to establish a due process violation. (Pet. App. 12a-14a.)

That decision was well supported by the record. The State preserved a host of evidence from the car, including blood-soaked patches of upholstery, swabs of blood, tennis shoes, blue jeans, a steel hammer, a pillow with blood splatter, a white towel, a roll of duct tape with hair on it, a spray bottle, a glass jar, and a stained men's watch. (Pet. App. 6a.) Law enforcement also preserved for defense counsel's review the inventory of the car, the vacuumed hair or fiber samples, and over 100 photographs taken of the car. (Pet. App. 6a.) The petitioner cannot credibly contend that he was deprived of due process and a fair trial.[4]

III. The Petition Presents a Poor Vehicle to Explore a Waived Double Jeopardy Issue that Was First Raised by an *Amicus Curiae* in the Second Tier of Direct Review and Rests Upon Misconduct Claims For Which He Was Denied Relief Years Ago.

This matter is a poor vehicle to explore the petitioner's last issue, *i.e.*, whether alleged prosecutorial misconduct that failed to garner him relief on state collateral review should nonetheless have triggered double-jeopardy protections that would have precluded his retrial. The Tennessee Supreme Court held, rightly, that the issue was waived because the petitioner failed to raise it in the trial court, in the Tennessee Court of Criminal Appeals, or even in his briefing in the Tennessee Supreme Court. (Pet. App. 11a.) The *amicus curiae* first raised this curious issue in the Tennessee Supreme Court. (Pet. App. 11a.) The petitioner's failure to properly preserve the issue for plenary review makes this matter a poor vehicle to explore the issue in this Court.

And, as the Tennessee Supreme Court correctly held, there was no clear error in retrying the petitioner. Significantly, the petitioner's misconduct claims, including his *Brady* claims, were found not to be meritorious on state collateral review before his retrial. (Pet App. 197a-208a, 229a-230a, 243a-251a, 292a-294a.) Even if his *Brady* claims had been found to be meritorious—

[4] As an aside, the petitioner inserts a cumulative-error claim in the petition. (Pet. 27-28.) But since there was no error, much less multiple ones, the claim holds no water.

and they were not—the relief would have been a new trial, which is precisely what he received due to his ineffective-assistance claims. *See*, *e.g.*, *Giglio v. United States*, 405 U.S. 150, 155 (1972). Nor can it be credibly said that the State's disclosure of only some of the evidence regarding another potential culprit was intended to goad a mistrial and thereby trigger the double-jeopardy protections under *Oregon v. Kennedy*, 456 U.S. 667 (1982). And petitioner cites absolutely no precedent for the extension of the *Kennedy* rule to this context. This issue, besides being presented in a poor vehicle, plainly lacks merit. This Court, therefore, should deny the petition.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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