

DEATH PENALTY CASE
UNDER WARRANT
EXECUTION SCHEDULED FOR MARCH 15, 2018

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

CARLTON GARY
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

This Petition arises from a final Order by the Supreme Court of Georgia dated January 16, 2018. The due date for this Petition is April 16, 2018. Despite this fact, the State of Georgia has set an execution date for Mr. Gary for March 15, 2018. The claims raised herein, due to no fault of Mr. Gary, have never been reviewed by any federal court. Those claims include the exoneration of Mr. Gary through DNA testing, as well as the destruction of additional DNA evidence by the State, which also would have exonerated Mr. Gary. Mr. Gary's case is perfectly positioned to allow this Court to review Mr. Gary's claims *de novo* and to answer important constitutional questions left unanswered by previous decisions of this Court concerning the execution of an innocent defendant and to answer a unique question never previously confronted by this Court involving the State's destruction of evidence in a death penalty case.

- I. Do the Eighth and Fourteenth Amendments of the United States Constitution prohibit the execution of an actually innocent defendant, where the case for innocence is based on physical evidence of innocence, including DNA evidence, not available at the time of trial?

- II. If such an execution is unconstitutional, what standard should govern the determination of whether a defendant is innocent of the offense for which he is to be executed?
- III. When a State provides a defendant under a death sentence the right to DNA testing of evidence that can prove that the defendant is innocent and then, in the process of testing, the State contaminates and destroys the DNA evidence, does this destruction constitute a violation of the Eighth and Fourteenth Amendments of the United States Constitution so as to bar a defendant's execution, especially when prior secretor testing indicated that the DNA results would exonerate the defendant?
- IV. Does the death penalty violate the United States Constitution because of an unacceptable risk of executing the innocent which is contrary to the evolving standards of decency?

LIST OF PARTIES

The caption fully identifies each of the parties to this
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Mr. Carlton Gary (hereinafter, "Petitioner" or Mr. Gary) respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia.

CITATIONS TO OPINION BELOW

The decision of the Superior Court of Muscogee County, Georgia denying Petitioners' Extraordinary Motion for New Trial or in the Alternative a New Sentencing, based upon newly discovered evidence, is not reported. A copy of this decision, titled "Order on Petitioner's Extraordinary Motion for New Trial

or in the Alternative for a New Sentencing," is attached as Exhibit "A" hereto. The one sentence decision of the Supreme Court of Georgia denying a discretionary appeal is not reported but is attached as Exhibit "B" hereto and the decision of the Supreme Court of Georgia denying reconsideration is attached as Exhibit "C" hereto.

JURISDICTION

This Court has jurisdiction to consider this case by way of a writ of certiorari, pursuant to 28 U.S.C. §1257(a). The decision of the Supreme Court of Georgia was entered on December 1, 2017 and rehearing was denied on January 16, 2018.

CONSTITUTIONAL PROVISIONS INVOLVED

- I. Eighth Amendment to the United States Constitution which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
- II. Fourteenth Amendment to the United States Constitution which provides "[n]or shall any state deprive any person of life, liberty or property, without due process of law."

STATUTORY PROVISIONS INVOLVED

- I. O.C.G.A. §5-5-41(c)(1) which provides "Subject to the provisions of subsections (a) and (b) of this Code section, a person convicted of a felony may file a

written motion before the trial court that entered the judgement of conviction in his or her case for the performance of forensic deoxyribonucleic acid (DNA) testing."

II. O.C.G.A. §17-5-56, which provides "Except as otherwise provided in Code Section 17-5-55, on or after May 27, 2003, governmental entities in possession of any physical evidence in a criminal case, including, but not limited to, a law enforcement agency or a prosecuting attorney, shall maintain any physical evidence collected at the time of the crime that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of the crime as provided in this Code section. Biological samples collected directly from any person for use as reference materials for testing or collected for the purpose of drug or alcohol testing shall not be preserved. (b) In a case in which the death penalty is imposed, the evidence shall be maintained until the sentence in the case has been carried out. Evidence in all felony cases that contains biological material, including, but not limited to, stains fluids, or hair

samples that relate to the identity of the perpetrator of the crime shall be maintained for the period of time that the crime remains unsolved or until the sentence in the case is completed, whichever occurs last."

I. STATEMENT OF THE CASE

A. INTRODUCTION

1. This Petition represents the first federal review of the Petitioner's constitutional claims

Mr. Gary was tried, convicted and sentenced to death in Columbus, Georgia in 1986. The constitutional claims raised in this Petition, however, arose from an Extraordinary Motion for New Trial which was decided on September 1, 2017. These constitutional claims have been reviewed by a Georgia Superior Court and the Supreme Court of Georgia. Due to no fault of the Petitioner, these constitutional claims have never been reviewed by a federal court. Review by this Court represents the first, and possibly only, federal review of the constitutional claims in the Petitioner's case.

2. A death sentence resulting from representation by uncompensated counsel and no funds for expert assistance

Mr. Gary is under a sentence of death as a result of a eight week trial which took place in Columbus, Georgia in 1986. In proving Mr. Gary's guilt and in sentencing him to death in this very complex trial the State relied upon a number of experts prior to trial and at trial, including a hypnotist, a serologist, a forensic dentist, a fingerprint expert, a hair and fiber expert, numerous doctors, and many investigators.

Mr. Gary was represented by an impoverished, volunteer attorney who was not paid one cent for his representation of Mr. Gary and was not provided with one cent for expert assistance, or for investigation, prior to or during Mr. Gary's trial.

3. The State's theory of prosecution: there was only one Columbus Stocking Strangler

The State contended that Mr. Gary, an African-American man, was a serial killer, portrayed in the media as the "Columbus Stocking Strangler", who committed the three rape/murders for which he was charged and convicted, as well as five other uncharged attacks. All of the victims were older white women. The State asserted the attacks were committed in a highly distinctive manner, during a relatively short period of time in 1977 and 1978, in a single neighborhood in Columbus, Georgia, making evidence of these uncharged attacks admissible as "modus operandi" evidence to prove Mr. Gary's guilt and sentence him to death. The State's key witness at trial was the only surviving victim of all of these attacks, Ms. Gertrude Miller. Ms. Miller dramatically identified Mr. Gary in court as the individual who attacked and raped her. In relying upon Ms. Miller as their key witness to prove that Mr. Gary was the one and only Columbus Stocking Strangler, the prosecutor proclaimed in his closing argument that Mr. Gary's face is "burned into her memory, it's

forged into her memory, she can't put it out of her mind." As we now know, DNA proves that Ms. Miller was wrong.

4. Based upon recent DNA testing Mr. Gary has now been excluded as Ms. Miller's attacker

Based upon proceedings in a Georgia Superior Court, which concluded on September 1, 2017, we now know from DNA testing of semen stains on Ms. Miller's clothing that Ms. Miller was wrong in her identification of Mr. Gary and that, contrary to the State's theory, Mr. Gary is not the Columbus Stocking Strangler. This fact, proving that Mr. Gary is not the Columbus Stocking Strangler, as will be described below, was consistent with a significant amount of exonerating physical evidence. Once again, due to no fault of Mr. Gary, the fact that Mr. Gary is innocent of the attack on Ms. Miller was only recently discovered and has never been reviewed by any federal court.

5. Additional DNA testing would have exonerated Mr. Gary with respect to another attack, but the State destroyed the DNA evidence

Mr. Gary was charged and convicted for the rape/murder of Ms. Martha Thurmond. The State had long represented that biological evidence no longer existed with respect to the attack on Ms. Thurmond. However, during the recent proceedings in a Georgia Superior Court, Mr. Gary was able to obtain glass slides of semen found in and on the body of Ms. Thurmond. For reasons described in Section I(C)(5), testing of these slides would have

certainly exonerated Mr. Gary with respect to the attack on Ms. Thurmond. Incredibly, however, the Georgia Crime Laboratory, which was tasked with conducting the DNA testing, inexcusably contaminated and destroyed this DNA evidence. The State's inexcusable conduct in this life or death situation denied Mr. Gary the opportunity to utilize DNA evidence which would have certainly exonerated him. Once again, due to no fault of Mr. Gary, the State's inexcusable conduct, which only recently occurred, has never been reviewed by any federal court.

B. COURSE OF PROCEEDINGS

On August 26, 1986, Petitioner was convicted in the Superior Court of Muscogee County, Georgia of malice murder, rape and burglary. The victims were Ms. Florence Scheible, Ms. Martha Thurmond and Ms. Kathleen Woodruff. The offenses occurred during a brief period in late 1977 and early 1978. The day after being convicted, on August 27, 1986, Petitioner was sentenced to death on the malice murder convictions.

Petitioner's convictions and sentences were affirmed by the Supreme Court of Georgia, and a Petition for a writ of certiorari to this Court was denied. Gary v. State, 260 Ga. 38 (1990); Gary v. Georgia, 498 U.S. 881 (1990); 498 U.S. 994 (1990). State habeas corpus proceedings were pursued, as well as federal habeas corpus proceedings, to no avail. Gary v.

Schofield, 336 F.Supp.2d 1337 (M.D.Ga 2004); Gary v. Hall, 558 F.3d 1229 (11th Cir. 2009); Gary v. Hall, 558 U.S. 1052 (2009).

After the denial of his federal habeas corpus proceedings, an execution window was set between December 16, 2009 and December 23, 2009. Clemency was denied by the Georgia State Board of Pardons and Paroles on December 15, 2009. However, Petitioner had filed on December 7, 2009, a Motion for the Performance of Forensic Deoxyribonucleic Acid Testing, pursuant to O.C.G.A. §5-5-41(c), which was not enacted until 2003 and which gave a convicted prisoner the right to DNA testing of relevant evidence never previously tested which, depending on the results, could serve as a basis for a new trial or new sentencing as newly discovered evidence under Georgia procedures for an extraordinary motion for new trial. See, O.C.G.A. § 5-5-41. The Motion was denied by the Superior Court of Muscogee County. This denial was appealed to the Supreme Court of Georgia, which on December 16, 2009, on the very eve of Mr. Gary's execution, reversed the decision of the Superior Court of Muscogee County, stayed his execution and ordered the Superior Court to conduct DNA testing.

On July 9, 2012, within the deadline of a scheduling order entered by the Superior Court of Muscogee County, the Petitioner filed his Extraordinary Motion for New Trial or in the

Alternative for New Sentencing. Evidentiary hearings were held by the Superior Court of Muscogee County on February 28, 2014, February 5 and 6, 2016, and on January 12 and 13, 2017. On September 1, 2017, the Superior Court of Muscogee County entered an Order which denied Petitioner's Extraordinary Motion for New Trial or in the Alternative New Sentencing.

Petitioner sought a discretionary appeal to the Supreme Court of Georgia and, without comment, the Supreme Court of Georgia denied Petitioner's discretionary appeal on December 1, 2017. The Supreme Court of Georgia denied Petitioner's request for reconsideration on January 16, 2018. On February 23, 2018, the Superior Court authorized Mr. Gary's execution to occur between March 15, 2018 and March 22, 2018. The Petitioner's execution is currently set for March 15, 2018.

C. STATEMENT OF FACTS

1. The State's theory of prosecution

Although Mr. Gary was convicted and sentenced to death for the three murders/rapes for which he was charged, Ms. Thurmond, Ms. Scheible and Ms. Woodruff, the State also presented substantial evidence regarding five other rapes or murders of older white women living alone in the same Columbus neighborhood during the same time period, Ms. Miller, Ms. Dimenstein, Ms. Cofer, Ms. Borom and Ms. Schwob, as modus operandi evidence. It

was the State's consistent claim and sole theory of prosecution, expressed from opening statement, throughout the trial and still today, that Mr. Gary was the one and only Columbus Stocking Strangler, who over a period of months in late 1977 and early 1978, committed the charged offenses for which he was convicted, as well as the other uncharged offenses, with a signature modus operandi, including strangling his victims. The State contended that this stark similarity of the uncharged offenses made the evidence regarding these uncharged offenses proof of the identity of the Columbus Stocking Strangler, who the State contended was Mr. Gary.

There were 10 common characteristics to all of the offenses, both charged and uncharged. The striking similarities in the charged and uncharged offenses were (1) all of the victims were white women; (2) all of the victims were age 55 and over; (3) all of the victims were strangled; (4) all of the victims were attacked within a span of seven months; (5) all of the offenses took place in the victims' homes; (6) forced entry occurred in all of the attacks except Ms. Scheible's because her door was open; (7) all of the rape/murder victims lived alone; (8) all of the victims, when discovered, were covered, except Ms. Schwob; (9) all of the victims, except Ms. Cofer, lived in

the Wynnton Road area; and (10) all of the offenses, excluding Ms. Scheible's attack, occurred at night.

2. The State's evidence at trial

The State's case was built on three pillars: (1) Questionable fingerprint evidence not originally matched to Mr. Gary and about which a former supervisor with the Federal Bureaus of Investigation Latent Fingerprint Section expressed in an affidavit his "grave concerns," including the lack of sufficient points of comparison rendering any identifications "borderline" at best; (2) A claimed admission by Mr. Gary to the Columbus Police Department that he was present at the crime scenes but had not committed the rape/murders, which was unrecorded and unsigned, and which suspiciously tracked claimed corroborating details in a previous "confession" by another suspect which was determined to be fabricated by the Columbus Police Department; and (3) Finally, and most important, the testimony of Ms. Miller, who survived the attack on her and was the only surviving victim at the time of the trial. She was the State's key witness. She identified Mr. Gary in the courtroom as her attacker, and delivered the most dramatic moment of the entire trial.

3. New DNA evidence which exonerates Mr. Gary and disproves Ms. Miller's trial testimony

New DNA evidence, not available at the time of trial, now proves to a scientific certainty that Ms. Miller's trial testimony was wrong and that someone other than Mr. Gary committed the attack on her which the State contended was one of the highly identical attacks of the Columbus Stocking Strangler.

DNA testing was performed on Ms. Miller's sleeping gown, underclothing and white slip, collected by the Columbus Police Department at the crime scene. The rape kit in her case had long been lost.

This DNA testing was performed by a reputable forensic laboratory in Virginia, the Bode Technology Laboratory, using procedures that were not available to the Georgia Crime Laboratory. The Bode Laboratory testing found to a scientific certainty that the stains on Ms. Miller's clothing were semen which did not match Mr. Gary's DNA profile.

The significance of this development cannot be overstated. It was Ms. Miller who was the only surviving victim at the time of trial and it was Ms. Miller who identified Mr. Gary as her attacker. Additionally, it was Ms. Miller's testimony on which the prosecutor relied to argue in closing argument that Ms. Miller would never forget Mr. Gary's face, or as the prosecutor stated: it is "burned into her memory, its forged into her

memory, she can't put it out of her mind if she wants to". Now we know, based upon irrefutable DNA evidence, that Ms. Miller was wrong. Someone other than Mr. Gary was her attacker, and this attack fit all of the similarities of the modus operandi of the Columbus Stocking Strangler.

This DNA evidence not only refuted the dramatic but incorrect identification by Ms. Miller, but was also entirely consistent with the significant amount of physical evidence which exonerates Mr. Gary.

4. Exonerating physical evidence which was disclosed to Mr. Gary after his trial

a. Impoverished volunteer attorney and not one cent for experts or for investigation

Prior to trial, and at the time of trial, Mr. Gary was represented in this very complex case by an impoverished volunteer attorney, who was not paid one cent for his representation of Mr. Gary. Additionally, prior to trial, and during trial, Mr. Gary was not provided one cent for expert assistance or for investigation by the Superior Court of Muscogee County.

During postconviction proceedings in Mr. Gary's case, when the venue of his case was not the Superior Court of Muscogee County, Mr. Gary was provided with compensated counsel and with funds for expert assistance. We now know there existed at the

time of trial a significant amount of exonerating physical evidence which would have proven that Mr. Gary is not the Columbus Stocking Strangler.

b. The exonerating secretor evidence

At trial the State relied upon semen found in the vaginal washings or on the body of Ms. Thurmond and on stains on the sheets of Ms. Scheible to prove that Mr. Gary was the Columbus Stocking Strangler. The State relied upon testing by the Georgia Crime Laboratory and the testimony of James Wegel, a Crime Laboratory Technician.

After trial and during postconviction proceedings Mr. Gary was provided with work papers concerning testing by the Georgia Crime Laboratory and with expert assistance to interpret the work papers and to scrutinize the trial testimony of Mr. Wegel. We now know that Mr. Wegel's testimony was false and that Mr. Gary did not commit the attacks on Ms. Thurmond and Ms. Scheible.

The semen found at the Thurmond crime scene and the Scheible crime scene was provided to the Georgia Crime Laboratory. It was determined in each case that the semen was left by a person who was a "weak secretor or non-secretor of

blood group O."1 As a consequence, it was routine to test the secretor status of suspects in the Columbus Stocking Strangler case by taking a saliva sample to see if the suspect was possibly the type O non-secretor who had committed the Thurmond and Scheible attacks. Indeed, as soon as Mr. Gary was arrested, a saliva sample was taken from Mr. Gary to test his secretor status. Although Mr. Gary was determined to have type O blood, when his secretor status was tested it was also determined that he was a normal secretor, not a non-secretor, or even a so-called "weak secretor," as was the person who left the semen samples at the crime scenes.

Dr. Hampikian, a well-known and highly respected DNA expert and forensic scientist, reviewed the Georgia Crime Laboratory reports and the relevant work papers, disclosed to Mr. Gary long after trial, and described in detail how secretor/non-secretor analysis can be "very solid evidence" in excluding a suspect in

1 A person who is a "secretor" is one who passes his blood group into his other body fluids such as semen and saliva. A "non-secretor" does not secrete his blood type into body fluids. Approximately 80% of the population secretes antigens of their blood type into other bodily fluids, such as saliva, semen, vaginal secretions, tears and perspiration. 20% of the population does not and are classified as non-secretors. This is a genetic factor based upon a recessive gene and was an important investigative tool in rape cases before the advent of DNA analysis to include or exclude suspects.

a rape case. The results of the secretor testing in the Thurmond and Scheible cases are almost identical, and, as Dr. Hampikian unequivocally concluded, the only valid scientific conclusion is that "we have a non-secretor who deposited the semen on Thurmond and the stain in Scheible," excluding Mr. Gary, because all the tests clearly show Mr. Gary to be a positive secretor.

c. The exonerating bite mark evidence

At the time of trial the State failed to disclose the existence of a bite mark mold from the body of Ms. Cofer. The State continued to represent that the bite mark mold was missing until it was finally discovered during postconviction proceedings. Once discovered, it was also learned that the State had consulted with the most respected forensic dentist in Georgia, Dr. Thomas David, prior to trial, but had failed to provide Mr. Gary with any information pertaining to that consultation. During postconviction proceedings Dr. David testified on Mr. Gary's behalf that it was his conclusion that Mr. Gary could not have left the bite mark on Ms. Cofer.

d. The exonerating shoeprint evidence

At the time of trial the State was in the possession of a shoeprint at the point of entry where the individual entered Ms. Schwob's home at the time of her attack. The person wore a size 10 shoe. The State did not provide this shoeprint to Mr. Gary at

the time of trial. During postconviction proceedings the shoeprint was finally disclosed to Mr. Gary by a former Georgia Bureau of Investigation agent involved in the investigation of the Columbus Stocking Strangler attacks.

Mr. Gary obtained the assistance of an expert forensic podiatrist who testified that Mr. Gary wears a size 13 ½ shoe and that it was impossible for Mr. Gary's feet to fit into a size 10 shoe. This evidence, of course, raises doubts about all of the charged and uncharged offenses, but especially with respect to the Borum case, because of the States' claim that the Borum offense occurred on the same night and in the same vicinity of the Schwob offense.

5. The Destruction of DNA Evidence

During the investigation of the Thurmond offense vaginal washings were taken, as well as a sample of a specimen of suspected semen found on her abdomen. Although the State had always claimed that all of the biological evidence had been destroyed, during postconviction proceedings slides of semen samples taken from Ms. Thurmond at the time of the offense were discovered by Mr. Gary's counsel in the property room of the Columbus Police Department.

The samples were found to be positive for sperm and particularly suitable for DNA testing. Given the previous

secretor results with respect to the Thurmond offense as described above this DNA testing would have proven once and for all Mr. Gary's innocence as to the Thurmond offense. Consequently, given the State's theory of one and only one Columbus Stocking Strangler, this DNA testing would have proven Mr. Gary's innocence as to the other offenses.

Testing was ordered pursuant to Mr. Gary's rights under O.C.G.A. § 5-5-41(c). This testing was conducted by the Georgia Crime Laboratory. Results were returned and, originally, it was concluded that the DNA from the samples did not match Mr. Gary. However, shortly thereafter, it was determined that this conclusion was in error. According to the State, the Georgia Crime Laboratory personnel failed to sterilize properly their equipment and the samples from the Thurmond case had been contaminated by a control sample that had actually come from another individual at the Georgia Crime Laboratory. According to the State, it was this person's DNA that had actually been found on the sample. This purported conduct on behalf of the Georgia Crime Laboratory with respect to critical life or death evidence was described by defense DNA expert, Dr. Hampikian, as "outrageous" and "egregious."

More important than this purported contamination of the samples particularly useful for DNA testing was the fact that

the State destroyed the entire sample, it was rendered useless, and it was no longer suitable for DNA testing. In short, the State had in its hands critical evidence in a death penalty case and destroyed it.

II. REASONS FOR GRANTING THE WRIT

A. TO EXECUTE MR. GARY WOULD VIOLATE THE CONSTITUTION GIVEN THE COMPELLING EVIDENCE OF HIS INNOCENCE

It is undeniable from the time of trial to the present time that the State's position has been that there was only one Columbus Stocking Strangler and that individual was Mr. Gary. We now know with absolute certainty that Mr. Gary is innocent of the attack on Ms. Miller and, based upon the State's position, Mr. Gary is innocent of being the Columbus Stocking Strangler.

This assertion is supported by a significant amount of exonerating physical evidence. Specifically:

- The secretor evidence regarding the attack on Ms. Thurmond exonerates Mr. Gary;

- The secretor evidence regarding the attack on Ms. Scheible exonerates Mr. Gary;

- The bite mark on Ms. Cofer exonerates Mr. Gary; and

- The shoeprint from the Schwob crime scene exonerates Mr. Gary.

The newly discovered evidence is directly exculpatory and is not merely impeaching. It is direct physical evidence of Mr.

Gary's innocence, which is not cumulative of other evidence. Indeed, at the time of trial the State went to great lengths to try to explain why the physical evidence did not exclude Mr. Gary when, as we now know, it in fact excludes Mr. Gary as the perpetrator of the offenses for which he was convicted and sentenced to death. Given all of this physical evidence of innocence, no reasonable jury hearing all of the evidence now available, but not available at trial, would convict Mr. Gary, much less sentence him to death.

Although the issue has been raised to this Court on several occasions, the Court has never directly addressed whether in and of itself the execution of an actually innocent person would violate the Constitution and, if so, by what standard should a freestanding claim of actual innocence be judged. For example, in Herrera v. Collins, 506 U.S. 390, 417-19 (1993), the Court rejected an innocence claim based on the particular facts of the case without deciding the issue of the viability of a claim of actual innocence. Subsequent cases in this Court have similarly skirted this fundamental issue. E.g., House v. Bell, 547 U.S. 518, 554-55 (2006); Schlup v. Delo, 513 U.S. 298, 313-317 (1995). Moreover, federal and state courts have struggled with this issue. See, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is*

There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(G-1)?, 76 Albany Law Review, 1453 (2013).

Nevertheless, in Herrera the concurring and dissenting opinions, constituting a majority of the Court, suggested that the execution of an innocent person would violate the Constitution. Justice O'Connor, joined by Justice Kennedy, opined, "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution." 506 U.S. at 419. Justice Blackmun, joined by Justices Stevens and Souter, in dissent proclaimed, "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience than to execute a person who is actually innocent." 506 U.S. at 430 (citation omitted).

Additionally, this Court has repeatedly described the legitimate penological goals of criminal punishment, especially the death penalty, as retribution and deterrence. E.g., Kennedy v. Louisiana, 554 U.S. 407, 442 (2008) ("Our decision is consistent with the justifications offered for the death penalty. Gregg instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct societal purposes served by the death penalty: retribution and deterrence of capital crimes.").

However, it is patently manifest that executing an actually innocent defendant in no way furthers either justification for the death penalty. There is no harm caused by an actually innocent defendant for which there is a need for retribution. Similarly, executing the innocent serves no deterrent purpose, since there is no culpable conduct to deter.

Because executing the innocent does not serve either interest justifying the death penalty, it has no constitutional basis. This case, therefore, offers the Court the opportunity under Supreme Court Rule 10(c) to answer whether a freestanding claim of innocence is sufficient to bar the execution of an actually innocent defendant.

If, as Petitioner contends, and the case law of this Court appears to suggest, that executing the innocent would offend the Constitution, then the question becomes how should that be determined and by what standard of proof. While the decisions of this Court intimate that the burden of proving a persuasive case of innocence should be "extraordinarily high," the Court has never defined precisely what that might mean. House v. Bell, 547 U.S. at 554-555. This case however offers the Court the opportunity to answer that question.

This case is unlike Herrera, where the claimed evidence of innocence involved inconsistent affidavits of questionable

witnesses who came forward years after the crime despite a letter signed by the defendant admitting his guilt. Instead, Mr. Gary's actual innocence is based upon physical evidence. Is such physical evidence sufficient to prove Mr. Gary's innocence? This is an important undecided issue which is worthy of review by the Court under Rule 10(c).

B. TO EXECUTE MR. GARY WOULD VIOLATE THE CONSTITUTION GIVEN THE STATE'S DESTRUCTION OF DNA EVIDENCE

As was stated above, DNA analysis of the Thurmond samples would have proven once and for all Mr. Gary's innocence as to the Thurmond offense, and would have been entirely consistent with the previous secretor evidence. This, however, was made impossible by the State's inexcusable destruction of the DNA evidence. As Dr. Hampikian testified, this was "outrageous" and "egregious" for a forensic laboratory that is reporting "serious matters in serious cases to national databases."

Petitioner's counsel recognize, at least in the context of a non-death penalty case, when evidence which is only "potentially useful" is destroyed, "bad faith" by the State must be shown. Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.") (Emphasis added). As this Court explained in Illinois v.

Fisher, 540 U.S. 544, 548-549 (2004), Youngblood dealt with the situation where testing of the destroyed evidence offered "only hope for exoneration" that was "potentially useful," not a situation as here, where, based upon the secretor evidence excluding Mr. Gary, DNA analysis would not have been only "potentially useful," but instead certainly exculpatory, raising the issue of a due process violation. See, also, California v. Trombetta, 467 U.S. 479, 489 (1984) ("To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.") (citation omitted). Here, in light of the secretor evidence excluding Mr. Gary as Ms. Thurmond's attacker, Mr. Gary has met both criteria.

In addition, the actions of the Georgia Crime Laboratory effectively violated the rights of a capital defendant to the preservation of exculpatory biological material, O.C.G.A. §17-5-56(a), as well as his rights to competent DNA testing of this material. O.C.G.A. §5-5-41(c). As a consequence, the State's spoliation of exculpatory evidence should cause this Court to presume that DNA analysis in the Thurmond case would have excluded Mr. Gary and should preclude his execution. Otherwise,

the State can defeat a capital defendant's right to competent DNA testing with impunity.

In addition, the application of the Youngblood/Trombetta standard has been troubling lower federal and state courts calling for further clarification by this Court, especially in the context of a death penalty case and the destruction of potentially exonerating evidence. See, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 Wash. U. L. Rev. 241 (2008); *The Youngblood Success Stories: Overcoming the "Bad Faith" Destruction of Evidence Standard*, 109 W. Va. L. Rev. 421 (2006-2007).

This case therefore raises serious due process and cruel and unusual punishment issues not previously addressed by this Court, especially in the context of a death penalty case, which call for direction and clarification justifying the granting of review by a writ of certiorari under Rule 10(c) of the Rules of this Court. If, as this Court has repeatedly held, there is a "heightened concern for fairness and reliability" when death is at stake, e.g., Ford v. Wainwright, 477 U.S. 399, 414 (1986); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) does the Eighth Amendment prohibit executing someone where the State destroys evidence upon which guilt or innocence depends, much less life itself, especially when there is every reason to

believe based on physical evidence that the testing of this evidence would have exonerated the defendant? Moreover, given the heightened reliability required in a death case, should the standard be at a minimum that anytime the State destroys evidence which could totally exonerate a capital defendant, execution of the capital defendant should not be allowed? In short, the State should be precluded from seeking the death penalty. These are issues worthy of review by this Court under Rule 10(c).

C. THE DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE OF THE UNACCEPTABLE RISK OF EXECUTING THE INNOCENT

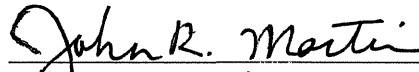
This case, as well as numerous other recent DNA exonerations in death penalty cases, reflects the inherent risk that the innocent could be found guilty and sentenced to death. Because "death is different" it cannot satisfy developing standards of decency, Trop v. Dulles, 356 U.S. 86, at 101 (1958), to allow for our all too error prone judicial system to impose such an ultimate and irreversible penalty. A healthy dose of modesty about our system supports a conclusion that the death penalty is beyond our ability to ensure that no innocent person is executed. That risk is constitutionally unacceptable and this Court should so conclude.

CONCLUSION

For all of the reasons stated above, the Petitioner respectfully requests that the Court grant the writ of certiorari in this case in order to review the judgment of the Supreme Court of Georgia.

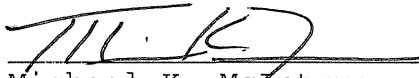
This 9th day of March, 2018.

Respectfully submitted,



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