

In the
Supreme Court of the United States

Carlton Gary,
Petitioner,

v.

State of Georgia,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner, Carlton Gary, spent nearly thirty years attacking his convictions and sentences in state and federal court. On the eve of his execution over seven years ago, Petitioner filed a motion for an extraordinary new trial under O.C.G.A. § 5-5-41 requesting never sought before DNA testing. For the next seven years Petitioner was granted extensive DNA testing and granted three evidentiary hearings during which he was allowed to present evidence regarding the DNA results and other evidence which had already been considered in both state and federal court. During these hearings, the State presented the new DNA results that definitively matched his DNA to the vaginal washings of one of his victims. Ultimately, applying the standard of review announced by the Georgia Supreme Court in *Timberlake v. State*, 246 Ga. 488, 491 (1980), the trial court determined Petitioner had failed to meet the state law requirements in order to receive a new trial. Petitioner asks this Court to grant certiorari review on the following questions:

1. Whether the trial court's factbound decision rejecting his request for a new trial based on adequate and independent state law grounds can be reviewed by this Court in order to create a new standard of review for free-standing actual innocence claims in a state proceeding on an extraordinary motion for new trial?
2. Whether the trial court's factbound determination of a due process claim regarding the preservation of evidence by a state agent can be reviewed by this Court in order to overturn this Court's decision in *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337 (1988)?
3. Whether this Court can grant review of the constitutionality of the death penalty when this claim was not presented below?

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INTRODUCTION

Petitioner requests that this Court grant certiorari review to make factbound error corrections of a state law claim, create a standard of review for a free-standing actual innocence claim in an extraordinary motion for new trial proceeding, and overturn its decision in *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337 (1988). As will be shown below, even if this Court's certiorari review could be granted for Petitioner's claims, as Petitioner has not even made a colorable claim of actual innocence, his case presents no vehicle for the legal questions Petitioner requests this Court to answer.

As unanimously found by the jury, the evidence presented at Petitioner's trial definitively proved he was a serial rapist and murderer. Petitioner did not present a single claim during his extraordinary motion for new trial proceeding that in any way diminished the credibility of the extensive evidence of his guilt. Petitioner's evidence in support of his extraordinary motion consisted of DNA, blood type evidence, a bite mark, and attacks on the fingerprint and confession evidence presented at trial. Significantly, all of the evidence presented by Petitioner was either duplicative of what was presented at trial or evidence which Petitioner has known about for years before filing his extraordinary motion. Moreover, the evidence of Petitioner's guilt still stands overwhelmingly strong. This evidence includes, but is not limited to: 1) eleven nearly identical crimes with very specific modes of commission strongly indicating only one perpetrator; 2) three nearly identical confessions by Petitioner to three different law enforcement agencies in two states for three sets of nearly identical crimes; 3) during these three confessions, Petitioner incredulously blamed three

different men for the nearly identical crimes; 4) Petitioner's detailed confession of the Columbus crimes, which included evidence only the perpetrator could know and facts unknown by law enforcement; 5) fingerprint evidence in both Georgia and New York at the scene of the crimes linking Petitioner to the crimes; and 6) an eyewitness identification of Petitioner as one of the victim's attackers. And now, new evidence submitted during the extraordinary motion for new trial hearing, based on the newly ordered DNA testing—a **positive DNA match between Petitioner and the vaginal washings of one of the Columbus victims.**

STATEMENT

A. The Crimes

Between September 11, 1977 and April 19, 1978, nine attacks on elderly Caucasian women occurred in the Wynnton neighborhood of Columbus, Muscogee County, Georgia.¹ Seven of the attacks proved to be fatal; with Mrs. Gertrude Miller and Mrs. Ruth Schwob being the only

¹ The following abbreviations are used in citations throughout this brief:

“TT” denotes Petitioner’s 1986 trial, followed by page number;

“State Trial Ex.” denotes exhibits admitted during Petitioner’s 1986 trial, followed by page number;

“EMNT” denotes the 2014, 2015, and 2017 Extraordinary Motion for New Trial Hearings, followed by page number;

“Def. Ex.” denotes Petitioner’s exhibits from the 2014, 2015, and 2017 Extraordinary Motion for New Trial Hearings, followed by page number; and,

“Res. Ex.” denotes State’s exhibits from the 2014, 2015, and 2017 Extraordinary Motion for New Trial Hearings, followed by exhibit number and page number.

surviving victims, even though Mrs. Schwob died prior to Petitioner's trial. (TT 3076-77).

The nine victims, in order of the date of their attacks are as follows: Gertrude Miller (Sept. 11, 1977); Mary "Fern" Jackson (Sept. 16, 1977); Jean Dimenstein, (Sept. 24, 1977); Florence Scheible (Oct. 21, 1977); Martha Thurmond (Oct. 25, 1977); Kathleen Woodruff (Dec. 28, 1977); Ruth Schwob (Feb. 11, 1978); Mildred Borom (Feb. 12, 1978); and, Janet Cofer (April 19, 1978). (EMNT, Res. Ex. 53, timeline of offenses).

With regard to the seven so-called "Stocking Stranglings," the prosecution argued that there were 14 common² factors establishing a pattern in the crimes, including the following: 1) all victims were Caucasian; 2) all victims were women; 3) all victims were between the ages of 59 and 89; 4) all victims lived alone; 5) all but one of the attacks occurred in the evening; 6) all victims were sexually assaulted; 7) all victims were found with their bodies either partially or totally covered; 8) all of the attacks involved ligature strangulation; 9) strangulation was usually with the victim's stockings or panty hose; 10) all victims were attacked at home; 11) there was some forced entry or attempted forced entry of the victims' homes; 12) all but one of the attacks occurred in the Wynnton area of Columbus, the exception being the attack on Mrs. Cofer, which took place approximately two miles from the Wynnton area; 13) all of the crime scenes were close to where Petitioner lived at the time of the crimes; and, 14) Petitioner either murdered

² Contrary to Petitioner's statement, and the finding of the trial court, the State actually argued there were 14 not 10 common factors. (See EMNT Res. Ex. 80).

or attempted to murder all victims. (See EMNT Res. Ex. 80, chart of common factors).

A substantial amount of similar crimes evidence was introduced, but Petitioner was only charged with and convicted of burglarizing, raping and murdering three of the victims; Florence Scheible, Martha Thurmond and Kathleen Woodruff. See *Gary v. State*, 260 Ga. 38 (1990).

1. ***The initial link of Petitioner to the “Stocking Stranglings” crimes.***

On April 4, 1984, Petitioner was linked to the crimes through a Ruger pistol stolen during an October 1977 burglary of a home in the Wynnton area.³ (TT 3247; 3265; 3388). The Ruger pistol was traced through Petitioner’s uncle, Jim Gary as having been in Petitioner’s recent possession. (EMNT, 802-804, 880-81). Petitioner was arrested for this burglary in Albany, Georgia, and returned to Columbus. *Id.* at 806-10. Petitioner admitted that he burglarized the residence where the gun was stolen, admitted the Ruger pistol came from this residence, and admitted “they” had also stolen a car from that same residence. (TT 3346-47; EMNT, 840-41).

Subsequently, Petitioner’s fingerprints⁴ were compared with latent prints found at the Jackson, Scheible, Thurmond and Woodruff crime scenes and found to match fingerprints and palm prints located at the crime scenes.

³ The burglary took place between September of 1977 and April of 1978— the time period of the “Stocking Stranglings.”

⁴ Petitioner was fingerprinted when he returned to Columbus after having been arrested in Albany. (TT 3352-53).

(TT 2530-33, 2546, 2557-59, 2569-70, 2709-10, 2789-2791, 2795, 2819-20, 2912-16, 2923).

After being fully advised of his rights (TT 3337-38; EMNT, 809-10; 1040), Petitioner gave an extensive statement to law enforcement during a drive through the neighborhoods in the Wynnton area of Columbus where the crimes occurred. This statement included identifying the location of the homes of the victims, providing unsolicited information about how he gained entry to their homes, what occurred within the homes, and even the names and descriptions of some of the victims. (TT 3358-83; EMNT, 871; 915-17) (notes made of interviews with Petitioner, which were provided to the trial court; Def. Ex. 52). In giving his statements to law enforcement, Petitioner refused to allow his statements to be recorded and did not want the officers to take notes. (EMNT, 871; 894-97).

2. *Crimes for Which Petitioner Received a Death Sentence*

a) *Florence Scheible*

Mrs. Florence Scheible was the first of the three rape/murder/burglary victims for which Petitioner received a death sentence. Eighty-nine year old Mrs. Scheible was found on October 21, 1977, in her home in the Wynnton area of Columbus. (TT 2476-77, 2495-509). Twelve of the 14 common factors were met in the Scheible case, with the only two missing factors being that the crimes did not occur at night and there was no forced entry. (EMNT Res. Ex. 80).

State's Trial Exhibit 13 was a latent print lifted on October 21, 1977, from the door frame leading into Mrs. Scheible's bedroom by the Columbus

Police Department Identification Division. (TT 2530-35). This latent print was later compared to Petitioner's fingerprints (State Trial Exhibit 14), and the comparison revealed that the latent print in State Trial Exhibit 13 was made by Petitioner's right thumb. (TT 2540-49; EMNT, 1154-2258).

Additionally, the prosecution presented evidence from two eyewitnesses who placed Petitioner in the area of Mrs. Scheible's residence near the time of the crimes. (TT 2603-15, 2629-49).

When Petitioner gave his extensive statement to police on the evening of his arrest on May 3, 1984, he specifically pointed out during the drive the home of Mrs. Scheible. (TT 3363-64). Petitioner told police that this house was "where the old lady was on a walker"⁵ (*id.* at 3359), and that "they" entered her apartment by going behind her when she was in the front yard looking in the opposite direction (*id.* at 3361-64). Petitioner confirmed that Mrs. Scheible's house was burglarized during the day. (TT 3361-64).

b) Martha Thurmond

The second rape/murder/burglary victim for which crimes Petitioner received the death penalty was Mrs. Martha Thurmond. Mrs. Thurmond had been brutally beaten about the head, raped and strangled with a stocking. (TT 2697-701). The body of seventy-year-old retired school teacher Mrs. Thurmond was found in her home in the Wynnton area on October 25, 1977. All 14 common factors were met in the Thurmond case. (*See* EMNT Res. Ex. 80).

⁵ Mrs. Scheible could only walk with the aid of a walker. (TT 2495, 2462, 2468).

Petitioner's fingerprint was found near the original point of attempted entry of Mrs. Thurmond's home, specifically the window frame of the rear bedroom window. (TT 2708-18, 2721-22, 2730). Petitioner admitted in his statement to the police that he had burglarized the home of Mrs. Thurmond. In his statement Petitioner also recalled Mrs. Thurmond's name and knew she was a school teacher, but told officers she was not one of his teachers. (TT 3378-79; EMNT, 846).

Petitioner's cousin, Rudolph David and his friends, Charles and Jesse Oliver lived near Mrs. Thurmond. Mr. Oliver testified that he could see Mrs. Thurmond's front door from his front door. (TT 3905). During September and October of 1977, at the time of Mrs. Thurmond's murder, Petitioner was a frequent visitor to the home of Charles Oliver (*id.* at 3897-3902), and Rudolph David (*id.* at 3905-07), who occupied the other half of the same duplex.

c) Kathleen Woodruff

The third rape/murder/burglary victim for whom Petitioner received the death penalty was Mrs. Kathleen Woodruff. Seventy-four-year-old Mrs. Woodruff was found raped and strangled to death with a scarf on December 28, 1977, in her home in the Wynnton area. (TT 2743). All 14 common factors were met in the Woodruff crimes. (See EMNT Res. Ex. 80).

Mrs. Woodruff's home was entered through a rear window, (TT 2788-90), and a latent fingerprint was found on the window screen in the back bedroom, which matched Petitioner's "right little finger" (*id.* at 2767, 2791-94, 2819-20). Additionally a palm print was lifted from the windowsill "just

inside the same window” and matched Petitioner’s palm print. (TT 2793-94, 2820-21).

Petitioner admitted in his statement to police that he had been present in Mrs. Woodruff’s house, even pointing out her house, telling police that when he first saw her she was sitting in a chair in her living room and that a pillow or scarf was “used” on her. (TT 3379-81; EMNT, 849-53, 978-79). Petitioner stated that “they” entered the Woodruff residence through a back window, removing the screen (EMNT, 850-51; TT 3379-81), and the point of entry was in fact the window at the rear of her home where the screen had been removed (TT 2788-90). Petitioner acknowledged that Mrs. Woodruff was raped during the burglary. (EMNT, 852-53; TT 3379-81).

3. *Similar Crimes Committed in Columbus*

a) *Gertrude Miller*

The first similar crime involved the only victim who survived until the time of Petitioner’s arrest and trial, Mrs. Gertrude Miller. Sixty-four-year-old Mrs. Miller was attacked in her home in the Wynnton area on September 11, 1977. (TT 3025). Mrs. Miller’s residence was about four blocks from Fisk Avenue, where Petitioner was living at the time. (EMNT, 1152, 1197). The attack on Mrs. Miller contained many of the commonalities present in the series of rapes and murders committed by Petitioner: the victim’s home was burglarized (TT 3001-02); the victim was attacked with stockings from her dresser and raped (*id.* at 3002-04); the attack took place at the victim’s residence (*id.* at 3001-02); the victim lived alone; the victim lived in the Wynnton area; and the victim was a Caucasian female who was 64-years-old.

(See also EMNT, 1140-44). Knotted stockings were found at the crime scene both in her bed and in her bathroom. *Id.* at 3026.

During trial, Mrs. Miller described her attacker and, despite undergoing extensive and rigorous cross-examination (TT 3009-19), positively identified Petitioner as the man who assaulted and raped her (*id.* at 3004-06; 3008-09).

b) Mary "Fern" Jackson

On September 16, 1977, fifty-eight-year-old victim Mary "Fern" Jackson was discovered in her home in the Wynnton area. (TT 2889-91). Mrs. Jackson had been raped and murdered by being strangled with a stocking and her home had been burglarized. (TT 2891, 2897-98, 2900-02, 2916). All 14 common factors were found in the Jackson case. (See EMNT Res. Ex. 80). Petitioner's palm print was found on the frame of the dining room door at the Jackson residence. (TT 2912-13, 2915-17, 2923-24; State Trial Exhibit 72).⁶

Mrs. Jackson's house was the only one of the "Stocking Stranglings" murders in which there was no admission by Petitioner that he had been in the house. However, although Petitioner did not admit having burglarized Mrs. Jackson's house, when he was driven past her house by law enforcement officers, it was at night and the street light was out, so Petitioner stated he could not tell if he recognized the house because it was too dark. Petitioner further told the police officers, "I'm not saying that I didn't go in there, I'm just saying that I don't remember." (TT 3368-69).

⁶ Additionally, Mrs. Jackson's car was also stolen and left on Benner Avenue at a location about two blocks from where Petitioner was living at the time. (TT 2908-10).

c) *Jean Dimenstein*

Seventy-one-year-old Jean Dimenstein was discovered in her home in the Wynnton area on September 24, 1977. (TT 2948). All 14 common factors were found in the Dimenstein crimes. (See EMNT Res. Ex. 80).

At the time of the crime, Mrs. Dimenstein's car was found missing and the side door under her carport leading to her kitchen had been removed from the hinges and was propped against the front of the door. (TT 2943-45, 2947-48; 2951-53). When giving his statement to police, Petitioner specifically stated that Mrs. Dimenstein's house was the one where "Crittenden" allegedly removed the hinges from the door. (EMNT, 842-45; 974-76). Moreover, Mrs. Dimenstein's stolen automobile was recovered on a street which intersected the same street where Ms. Jackson's automobile was recovered. (TT 2975, 2909). Additionally, the location where Mrs. Dimenstein's car was found was also very near the home that Petitioner shared with his aunt. (EMNT, 1146-49).

Based on recent post-conviction DNA testing which was requested by Petitioner, DNA taken from Mrs. Dimenstein's vaginal washings, indisputably matched Petitioner's DNA. When the GBI CODIS administrator entered the profile into the CODIS database, the profile was matched to the DNA sample provided by Petitioner several years prior. (EMNT, 650; EMNT Res. Ex. 19). This CODIS match was subsequently confirmed (EMNT, 727; EMNT Res. Ex. 25), and during the February 2014 hearing before the trial court, even Petitioner's expert admitted that the male DNA found on the Dimenstein slide matched Petitioner (EMNT, 185).

d) *Ruth Schwob*

On February 11, 1978, police discovered 74 year-old Mrs. Ruth Schwob in her home in the Wynnton area. (TT 3083). Mrs. Schwob was found sitting on the edge of her bed with a stocking tied around her neck. (TT 3080). Mrs. Schwob never identified her assailant and died before Petitioner was charged and tried. (TT 3077).

The point of entry at the Schwob residence was the kitchen window over the sink at the back of the house. *Id.* at 3078. In his statement to police, Petitioner directed the police to Mrs. Schwob's home and informed them that the driveway of Mrs. Schwob's home ran toward the back of her house. *Id.* at 3372-73.

Petitioner stated that he was almost caught when Mrs. Schwob's alarm went off. Mrs. Schwob had installed a buzzer alarm on her bed that notified her neighbor and the audible alarm sounded in the neighbor's bedroom. The neighbor called the police. (TT 3074-76). Neighbor Fred Burdette testified at trial that he lived next door to Mrs. Schwob and that at 5:45 a.m. on February 11, 1978, he was awakened by the alarm. *Id.* at 3074-76.

Additional corroboration of this crime was presented. Approximately thirty minutes before Mrs. Schwob's alarm sounded, another alarm went off in a nearby home of the Illges. (TT 3343-44). Petitioner described this home as the "castle" and confessed to burglarizing it on two occasions. *Id.* His second burglary was on the night of his attack on Mrs. Schwob.⁷

⁷ Petitioner admitted to having burglarized "the castle," on an earlier occasion and stealing the car keys and the car. (TT 3346-47).

e) *Mildred Borom*

The body of seventy-eight-year-old Mildred Borom was found lying in a hallway in her home on February 12, 1978. All 14 common factors were met with respect to the Borom crimes. (See EMNT Res. Ex. 80).

Petitioner pointed out Mrs. Borom's home as one that he had burglarized. *Id.* at 3371-72. Petitioner even accurately described Mrs. Borom to police as being a large woman, plain, stout and extremely strong. (EMNT, 831; TT 831).

f) *Janet Cofer*

The body of sixty-one-year-old Janet Cofer was discovered in her home on Steam Mill Road in Columbus on April 19, 1978, after she did not report for work. (TT 3177-78, 3193-96, 3216-17). Mrs. Cofer's home was close to the Wynnton area,⁸ as well as being close to a former residence of Petitioner and being three to four blocks from Petitioner's residence at the time. (See EMNT Res. Ex. 36, map of Wynnton area). Mrs. Cofer had been raped and was murdered by ligature strangulation with a stocking. (TT 3218-19).

Petitioner admitted to police that he burglarized a house off of Steam Mill Road. (TT 3428-30; EMNT, 1047-49). Petitioner also stated to the police that the house next door to the house he burglarized on Steam Mill Road had an old fire truck in the driveway, which was corroborated during the police investigation. (TT 3187-91). Mrs. Cofer's next door neighbor testified at trial that she had a 1929 pickup truck that resembled a fire truck which was

⁸ Mrs. Cofer's murder was the only one which did not take place in the Wynnton area of Columbus.

parked in the carport next to Mrs. Cofer's driveway. (TT 3187-91; State Trial Ex. 134).

4. *Similar Crimes Committed in New York State*

a) *Nellie Farmer*

Prior to moving back to Columbus in 1977, Petitioner had moved from Georgia to Albany, New York in November of 1969. (EMNT, 1125-1129). Evidence showed that in his time in New York he was involved in two similar crimes before moving back to Georgia to continue his serial rape and murder spree.

The rape/murder/burglary of Ms. Nellie Farmer, who was eighty-nine – years-old, which occurred on April 14, 1970 was presented at trial as a similar crime. (TT 3612, 3615). A fingerprint taken from the Farmer crime scene matched Petitioner's fingerprint. (TT 3612, 3615).

When Petitioner's fingerprint was found at the crime scene, Petitioner named John Lee Mitchell as the perpetrator, even though Mr. Mitchell was never at the Farmer crime scene and did not participate in the Farmer crime. (TT 3647-49). Petitioner admitted to Albany, New York, authorities in his statement given on July 21, 1970, that he had burglarized the Farmer residence but claimed that Mr. Mitchell had murdered Ms. Farmer. *Id.* at 3626-38. Petitioner pleaded guilty to a lesser included offense of robbery and testified for the prosecution in Mr. Mitchell's trial. *Id.* at 3647-49. However, Mr. Mitchell was ultimately acquitted of the murder when he was tried on that charge. *Id.* at 3597-600, 3623-24, 3646-66. Mr. Mitchell testified at Petitioner's trial and stated that he did not go with Petitioner to Ms. Farmer's hotel room and did not rape and strangle Ms. Farmer. *Id.* at 3647.

b) *Jean Frost*

In another case which demonstrated Petitioner's pattern of conduct, Jean Frost was attacked and raped during a burglary of her apartment in Syracuse, New York, on January 2, 1977. Ms. Frost survived this attack, but lost consciousness when the attacker strangled her and could only state that she had been strangled and raped by a black man with a mustache. (TT 3687, 3700-702).

Ms. Frost testified at Petitioner's trial that one of the items taken during the burglary was her watch. (TT 3688; 3690). When Petitioner was taken into custody two days later for a different burglary, he had the watch in his pocket. *Id.* at 3709-11. After being caught in possession of Ms. Frost's watch, Petitioner admitted acting as "the lookout," but blamed the violence on another man named Dudley Harris.⁹ *Id.* at 3724-28. However, all of the evidence in that case pointed to the existence of only one perpetrator. *Id.* at 3684-42. Petitioner pled guilty to possession of stolen property and his parole was revoked and he was sentenced to one year at Onondaga County Penitentiary. *Id.* at 3820. Petitioner escaped from Onondaga Penitentiary on August 22, 1977 and in September of 1977, he returned to Columbus. *Id.* at 3826-34; 3845-46. His rape/murder crime spree in Georgia began a month later.

⁹ Although Dudley Harris was arrested for another armed robbery, he was never arrested, charged or tried for the rape and burglary of Ms. Frost. *Id.* at 3728.

B. Trial

Petitioner was tried before a jury on August 11-27, 1986, and, as previously stated, he was convicted of three counts of malice murder, rape and burglary. Based on the jury's mandatory recommendation, Petitioner was sentenced to death for each count of malice murder. Petitioner appealed his convictions and sentences, but on June 26, 1987, the Georgia Supreme Court remanded the case to the trial court to decide Gary's ineffective assistance of counsel claim. *Gary v. State*, 260 Ga. 38, 39 (1990). On appeal following the remand, the Georgia Supreme Court affirmed Petitioner's convictions and sentences on March 6, 1990. *Gary v. State*, 260 Ga. 38 (1990), *cert. denied*, *Gary v. Georgia*, 498 U.S. 881 (1990). Notably, Petitioner did not challenge the sufficiency of the evidence of his guilt. *Gary*, 260 Ga. at 39 ("The Petitioner does not question the sufficiency of the evidence, and we find that it supports the conviction.").¹⁰

C. State Habeas Proceeding

During the time period from 1991 to 1995, Petitioner filed a state habeas corpus petition and two amended state habeas petitions challenging his convictions and death sentences. The state habeas court conducted evidentiary hearings on January 30-31, 1995 and in March of 1995. Petitioner was denied state habeas relief in two orders entered on January 27, 1995, and November 13, 1995. The state habeas court rejected claims

¹⁰ Additionally, the court held that as Petitioner had refused to waive his attorney-client privilege he had waived his ineffective assistance claims including his alleged denial of effective assistance for lack of funds for a serologist, a fingerprint expert, and a hair expert. *Id.* at 39-40.

relating to Mrs. Miller's statements and the bite mark exemplar and ultimately concluded that "the combined effect of these [materials] does not undermine confidence in the verdict, and there is no reasonable probability that the result of the trial would have been different if these documents were given to the defense at trial." *Gary*, 558 F.3d at 1248.

The Georgia Supreme Court denied Petitioner's application to appeal on October 7, 1996. *Gary v. Turpin*, Case No. S96R1981, *cert. denied*, *Gary v. Turpin*, 520 U.S. 1244 (1997), *rehearing denied*, *Gary v. Turpin*, 521 U.S. 1137 (1997).

D. Federal Habeas Proceeding

Petitioner filed his federal habeas petition on November 10, 1997. On December 9, 1999, the federal habeas court denied Petitioner's motion for discovery, finding in pertinent part that he was provided "extensive opportunity in the state courts to discover facts in support of his habeas petition" and that "there now exists a voluminous record before this court." (Federal Habeas Order, 12/9/99, p. 10). However, on June 30, 2000, the federal habeas court granted Petitioner's motion for an evidentiary hearing on "serological evidence—semen and blood—the police had found at four of the murder scenes." *Gary*, 558 F.3d at 1248. The federal habeas court also held an evidentiary hearing on November 21, 2000, regarding specific GBI Crime Lab work papers. (See EMNT Res. Ex. 11).

Following this hearing, the federal habeas court declined to order the testing of Petitioner's semen, concluding that Petitioner's current secretor-non-secretor status "does not prove he is innocent of the rapes that occurred in 1977." (Federal Habeas Order, 6/29/01, p. 6). As noted by the Eleventh

Circuit, the federal habeas court in denying Petitioner relief on the secretor claim, also found that any failure to provide counsel with Crime Lab notes and work sheets “did not deny Gary due process because their contents were not material; there was not ‘a reasonable probability that, had the [notes and] worksheets been disclosed to the defense, the result of the proceeding would have been different.’” *Gary*, 558 F.3d at 1255.

On September 28, 2004, the federal habeas court denied relief. *Gary v. Hall*, 336 F. Supp. 2d 1337 (2004). After federal habeas corpus relief was denied, but while Petitioner’s case was on appeal to the Eleventh Circuit, the coroner of Muscogee County located a missing bite mark exemplar taken from similar crime victim Janet Cofer. As a result, Petitioner’s case was remanded to the federal district court for further proceedings on the bite mark exemplar. *See Gary*, 558 F.3d at 1258.

Petitioner’s motions for discovery concerning the bite mark exemplar and for funds for expert evaluation of the bite mark exemplar were granted by the district court. The federal district court held an evidentiary hearing solely on the bite mark exemplar on February 14, 2007. (See EMNT Res. Ex. 51, transcript of 2/14/07 hearing). As noted by the Eleventh Circuit, the federal habeas court reaffirmed the denial of federal habeas relief to Petitioner after concluding “that the [bite mark] evidence would have played no role in the presentation of Gary’s defense.” 558 F.3d at 1250.

The Eleventh Circuit Court of Appeals affirmed the denial of relief on February 12, 2009. *Gary v. Hall*, 558 F.3d 1229 (11th Cir. 2009), *cert. denied*, *Gary v. Hall*, 558 U.S. 1052 (2009).

E. Extraordinary Motion for New Trial

On December 7, 2009, after 31 years in prison and with his execution nine days away, Petitioner sought post-conviction DNA testing pursuant to O.C.G.A. § 5-5-41. The Georgia Supreme Court entered an order on December 16, 2009, remanding the case to the trial court to determine whether Petitioner was entitled to DNA testing. On July 9, 2012, Petitioner filed an extraordinary motion for new trial. Extensive testing was conducted and three evidentiary hearings were held on February 24-28, 2014, February 5-6, 2015, and January 12-13, 2017. Petitioner's extraordinary motion attacked his convictions and sentences with DNA from a garment not proven to have been worn by the victim at the time of the crime. Additionally, Petitioner relied upon: 1) the inclusive blood type and bite mark evidence, which had already been rejected as part of a *Brady* claim in his federal habeas proceeding; 2) a Xerox copy of the bottom of a shoe that may have matched a footprint from home of similar crime victim Ruth Schwob; and 3) a repeated challenge from trial and state habeas of the fingerprint and confession evidence based on largely ineffectual conjecture.

As will be shown below, the State presented counter arguments and evidence to Petitioner's evidence. And, most importantly, as part in of its response, the State presented the new DNA evidence, produced as part of Petitioner's request, showing that his DNA was found in the vaginal washings of the similar crime victim Jean Dimenstein.

In order for Petitioner to obtain a new trial based upon his "new" evidence, he had to meet each of the six requirements set out by the Georgia Supreme Court in *Timberlake v. State*, 246 Ga. 488, 491 (1980):

(1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

After examining all of the evidence, and applying the *Timberlake* standard, the trial court denied Petitioner's extraordinary motion for new trial on September 1, 2017. (Pet. App. A).

1. DNA Testing

In February of 2010, the State and Petitioner entered a stipulation to have the GBI Crime Lab test four items of evidence: 1) a slide prepared from vaginal washings of similar transaction victim Mrs. Dimenstein, (Dimenstein slide); 2) a slide prepared from vaginal washings of Mrs. Woodruff, (Woodruff slide); 3) a slide prepared from vaginal washings of Mrs. Thurmond, (Thurmond slide #2); and, 4) a slide prepared from swabbings of Mrs. Thurmond's stomach, (Thurmond slide #55).¹¹ The trial court later ordered testing of clothing found in the bedroom of similar crime rape victim Mrs. Miller over the objection of State that there were no "intimate" items available for testing that would result in relevant test results.

¹¹ The slides from the vaginal washings of Mrs. Woodruff and Mrs. Thurmond are not at issue as they failed to provide results with evidentiary value.

a) *Dimenstein DNA*

The Dimenstein slide¹² was processed by GBI forensic Crime Lab scientist Connie Pickens.¹³ The DNA on the slide was identified as a male DNA profile which Ms. Pickens submitted for entry into the CODIS database. (EMNT, 725). The GBI CODIS administrator entered the profile into the database, which automatically searches against all profiles in CODIS, and received notification of a CODIS match to a convicted offender sample for Carlton Gary.¹⁴ (EMNT, 650, EMNT Res. Ex. 19). Ms. Pickens then requested a new sample from Petitioner and confirmed the CODIS match. (EMNT, 727, EMNT Res. Ex. 25). Petitioner's expert admitted that the male DNA found on the Dimenstein slide matched Petitioner. (EMNT, 185).

b) *Thurmond DNA*

With regard to Thurmond slide #55, the slide which Petitioner alleges provides exculpatory evidence, Ms. Pickens processed the slide and originally determined it contained a male profile that did not match Petitioner's DNA profile. (EMNT, 734). GBI personnel entered the profile into the CODIS

¹² As discussed in the statement of facts, Ms. Dimenstein was a similar crimes victim. (TT 2966-68).

¹³ Ms. Pickens provided her credentials when she testified at Petitioner's trial. She obtained a degree in biology and was a registered medical technologist and had also taken numerous scientific workshops in the field of serology. (TT 3546). Ms. Pickens had been qualified as an expert in this field from 65 to 70 times before she testified as an expert at Petitioner's trial. Ms. Pickens retired from the GBI Crime Lab in April of 2013 and passed away before the February 2014 hearing in the trial court. (EMNT, 672).

¹⁴ Inmates convicted of sexual offenses are required to provide a DNA sample for inclusion in the CODIS database. (EMNT, 623). Petitioner's profile was entered into CODIS in 2004. (EMNT, 671).

database and received notice of a possible CODIS match to another unknown profile from a 2011 Atlanta case. (EMNT, 661). Measures later taken by the GBI Crime Lab to identify possible error in sterilization of lab instruments explained this unusual result.

Quality control samples are known DNA samples that are processed in the same set of samples as the unknown material to make sure that all equipment is working properly and to verify the accuracy of the test results. Prior to 2013, GBI protocol was to check DNA profile results against control samples in the set of samples tested, but control sample DNA profiles were not entered in the CODIS system to check for “cross-set” errors. In 2013, GBI began entering all past and present control samples into the CODIS database as a cross-check against errors in sterilizing lab instruments between sets of testing samples, which could lead to false results. (EMNT, 661-664). As a consequence of this practice, the DNA profile believed to be developed from the Thurmond slide #55 was proven to come from a quality control sample that was used in the same work area on the previous day. (EMNT, 665; EMNT Res. Ex. 24). Ms. Pickens was not able to develop any other profile based on her testing of slide #55, so there was no relevant evidence developed from the testing of slide #55. (EMNT, 671).

The trial court analyzed whether to draw an adverse inference from the contamination. (Pet. App. A, pp. 41-42). The trial court identified the test set forth by the Georgia Supreme Court in *State v. Mussman*, 289 Ga. 586, 590 (2011), which holds that an adverse inference is not given unless the evidence in question was: “constitutionally material” and; the State acted in “bad faith” in its destruction of the evidence. The trial court found the DNA

evidence from the Thurmond slide was “constitutionally material” but found there was no evidence the State acted in “bad faith.” (Pet. App. A, p. 42).

2. Miller DNA

After the testing of the slides referred to above, over the objection of the State, Petitioner requested testing of several items of clothing maintained by the Columbus Police Department as possible evidence in the Miller similar crimes case. Specifically, Petitioner requested that three clothing garments be tested: a white gown, underclothing, and a white slip. (Pet. Report Regarding Expert Examination and Request for Further Testing, p. 3). The trial court ordered that the three items be tested. (Trial Court Order, August 25, 2011). Cuttings from the clothing were tested by the GBI Crime Lab and then by Bode Laboratories. The initial testing done at GBI failed to reveal the presence of seminal fluid. (EMNT, 151; EMNT Pet. Ex. 3). Sixteen cuttings were then sent to Bode to conduct Y-STR testing as the GBI did not perform this type of testing at that time. Y-STR testing of two of the cuttings from stains on the white gown showed a male DNA profile that did not match Petitioner. (EMNT, 145-156, 263).

The State objected to this testing in the trial court arguing, in part, that Petitioner had not shown the possible relevance of these items due to his failure to establish an evidentiary link between the items and the attack of Mrs. Miller. (State’s Response to Defendant’s Supplemental Brief in Support of Additional Forensic Deoxyribonucleic Acid (DNA) Testing, pp. 3-7).

Despite Petitioner’s claims to the contrary there was nothing in the record before the trial court which proved Mrs. Miller was wearing the white gown at either at the time of the attack or shortly thereafter when she was taken to

the hospital for treatment. The trial court determined the Miller DNA was not material. (Pet. App. A, pp. 48-49).

3. *Secretor Evidence*

At trial, evidence was presented regarding biological evidence found at the crime scenes for two of the victims—Thurmond and Scheible. Specifically, the International Blood Group and secretor status of this evidence compared to the blood type and secretor status of Petitioner was presented. During Petitioner's trial, it was shown that Petitioner's blood and saliva were tested by forensic serologist Connie Pickens prior to trial, and it was determined that Petitioner was International Blood Group "O" and a normal secretor. (TT 3547-49). John Wegel, a forensic serologist for the GBI testified at trial that in 1977, he tested semen samples from the Scheible and Thurmond crime scenes. (TT 3561-66, 3574-77). He determined that both samples were from a donor with Type "O" and was either a non-secretor or weak secretor.¹⁵ *Id.* at 3564-67. Consequently, Mr. Wegel testified that Petitioner could not be excluded as a possible donor of the semen for both the Thurmond and Schieble biological matter. (TT 3565-67).

Mr. Wegel was thoroughly cross-examined regarding his opinion that people who were secretors could not be excluded as a donor of the Scheible and Thurmond samples. (TT 3573-80). Mr. Wegel did not change his position.

¹⁵ Mrs. Scheible's blood type was International Blood Group "A" and she was a non-secretor. (TT 3564). Mrs. Thurmond's blood type was International Blood Group "O" and she was a secretor. (TT 3566).

The testimony of Mr. Wegel was attacked again in Petitioner's federal habeas proceeding under a *Brady v. Maryland* claim. During a federal evidentiary hearing, Petitioner presented an expert, Roger Morrison, to counter the testimony of Mr. Wegel. However, Mr. Wegel still agreed with his trial testimony. (EMNT 520-21). As pointed out by the Eleventh Circuit, "Wegel countered Morrison's conclusion by stating (1) that secretion levels vary over time and that eighteen years had passed between the dates the donor deposited the semen and the date of Morrison's examination, and (2) that secretion levels of semen and saliva may differ and that while Wegel examined semen, Morrison examined saliva." *Gary*, 558 F.3d at 1249. The district court ultimately held that Petitioner had failed to show a "reasonable probability of different outcome at trial with his new evidence. *Id.* at 1255. The Eleventh Circuit affirmed the district court's denial of this *Brady* claim. *Id.* at 1256.

During Petitioner's extraordinary motion, he again attacked the secretor evidence through the presentation of another expert—this time Dr. Greg Hampikian. Dr. Hampikian did not directly contradict or undermine Mr. Wegel's opinion concerning the testing results. Instead, Dr. Hampikian merely stated that in his opinion, the evidence showed that the donor was a non-secretor. (EMNT, 213). Mr. Wegel stated that if asked to provide his opinion reached in 1977 about tests he performed at that time, he would give the same opinion. (EMNT 584-85).

Therefore, the overall evidence was merely two experts providing opposing positions. The trial court found Petitioner had failed to show materiality. (Pet. App. A, pp. 48-49).

4. *Bite Mark*

Petitioner also relied upon the bite mark exemplar from the bite mark found on the left breast of similar crime victim Janet Cofer. As he did in federal court, Petitioner alleged the bite mark exemplar contained bite marks from lower teeth which did not match his lower teeth. Petitioner also alleged the two upper teeth marks showed a gap which Petitioner alleged he did not have at the time of the commission of the crimes against Mrs. Cofer. As stated above, prior to Petitioner's extraordinary motion, this evidence was reviewed under a *Brady* claim in Petitioner's federal habeas proceeding, which was denied, in part under the materiality standard. *See Gary*, 558 F.3d at 1257.

At the time of Mrs. Cofer's autopsy, the coroner asked local dentist, Dr. Galbreath, to make a bite mark impression from the bite mark on the body of Mrs. Cofer. (EMNT, 316-17, 334-35, 358). Dr. Galbreath testified that there were only two teeth marks above Mrs. Cofer's left breast and that he did not take an impression of anything other than two upper teeth marks. (EMNT, 337-38). Petitioner presented the testimony of another expert, Dr. Thomas David, who claimed there were also impressions of lower teeth in the exemplar. However, Dr. David qualified his opinion about the existence of lower teeth marks by testifying that the alleged impressions of these marks on the exemplar were not observable with the "naked eye" and that "evidence" of the lower teeth marks was "not the highest quality evidence." (EMNT, 425-27; 432).

Regarding the upper teeth marks, it was shown that Petitioner had intervening dental work between his attack on Mrs. Cofer and his arrest. Supplemental Report of the Columbus Police Department dated May 7, 1984,

showed that on April 30, 1984, Detective Miller of the Columbus Police Department contacted the Kirkland Correctional Institute in Greenville, S.C. and learned that while Petitioner had been incarcerated in South Carolina,¹⁶ he had dental work performed by dentist Dr. Paul Hahn. (EMNT Res. Ex. 49, p. 1). Subsequently, on May 7, 1984, Detective Miller made contact with Dr. Hahn. Dr. Hahn informed Detective Miller that he “had placed a crown on one of Gary’s teeth.” *Id.* The tooth on which Dr. Hahn put a crown was tooth #8, which is the upper tooth left of center if you were looking at a person. *Id.* Additionally, Dr. Hahn informed Detective Miller that Tooth #9, located to the upper right of center when facing a person, was a “false tooth and could be taken in or out by Gary whenever he wished.” (EMNT Res. Ex. p. 2).

Petitioner attempted to rebut this by showing that the upper teeth marks in the exemplar showed a person with a gap in his two front teeth. Through the presentation of lay witnesses, Petitioner alleged he never had a gap in his two front teeth. Yet Petitioner never presented a single picture to prove he did not have a gap. In response to Petitioner’s less than credible evidence, the State presented two school photographs of Petitioner showing a *noticeable* gap in his permanent teeth. (EMNT Res. Exs. 54, 55). Petitioner attempted to refute this evidence by presenting Dr. Holland Maness, a forensic orthodontist. However, Dr. Maness admitted that she had no specific

¹⁶ On February 26, 1979, Petitioner pled guilty to a series of armed robberies in Greenville, South Carolina, and was sentenced to 21 years concurrently with each offense. (TT 4536-37). On March 29, 1979, Petitioner pled guilty to armed robbery in Cherokee County, South Carolina, and was sentenced to 21 years to run concurrently to the Greenville sentences. *Id.* at 4536-37. On March 15, 1984, Petitioner escaped from a South Carolina prison. (EMNT, Res. Ex. 53, timeline of offenses).

knowledge about whether Petitioner had a gap in his upper front teeth as a child or an adult, but could merely state that any child with a gap in the Fifth Grade “would not *necessarily* exhibit this gap in adulthood.” (EMNT, 2426) (emphasis added).

The trial court ultimately concluded that Petitioner’s evidence was not material. (Pet. App. A, pp. 48-49).

5. *Fingerprint Evidence*

Petitioner also attacked the fingerprint evidence used at trial as part of the State’s case. However, Petitioner’s complaints were largely a regurgitation of the underwhelming attacks he made at trial,¹⁷ albeit with the benefit of an expert. (See TT 2714, 2731, 2801, 2806, 2822-23, 2925, 4261-622, 4284). Overall, Petitioner’s complaints were centered on when the matches were made and the number of comparison points found on the prints. But none of his hair-splitting proved the fingerprint evidence in his case was unreliable.

Relying upon an affidavit obtained in his state habeas from a former FBI fingerprint examiner, Mervin Smith, Petitioner again attacked the fingerprint evidence during his extraordinary motion proceeding. Petitioner cites Mr. Smith’s affidavit testimony where he states he has “grave concern” about the Woodruff fingerprints.¹⁸ (Pet. brief, p. 12). Specifically, Mr. Smith states that little finger prints are least likely to result in positive

¹⁷ Indeed, Petitioner did not challenge the fingerprint evidence on direct appeal. *See generally* Gary, 260 Ga. 38.

¹⁸ Although Petitioner’s brief seems to apply this “grave concern” to all of the fingerprint evidence, the phrase is only used in the specific discussion of the Woodruff incident. (*Compare* Def. brief, p. 71 and EMNT Ex. 65).

identification. However, the fingerprint analysts were able to match sixteen points of comparison between the latent print lifted from the screen and the known, rolled print of Petitioner's right little finger. (TT 2797-99). Mr. Smith provided no explanation of how the actual sixteen points of comparison were in error.

Additionally, Mr. Smith's other testimony on which Petitioner relies regarding the alleged "borderline" status of the points of comparison was based upon an inaccurate representation of the facts by Mr. Smith. (Pet. brief, p. 12). Mr. Smith's reference to "borderline" identification is mentioned only in his discussion of the Jackson case and specifically refers to the match being based on seven points of comparison. (EMNT Ex. 65, pg. 4). However, the Jackson match was based on nine points of comparison. (TT 2920).

Accordingly, the trial court found Petitioner had failed to show this evidence was material. (Pet. App. A, pp. 37, 48).

6. Shoeprint Evidence

Petitioner alleged a shoeprint found at the Schwob similar crime scene exonerated him because it was of a smaller size shoe than he wore at the time of the crimes. However, Petitioner **never produced an impression, photograph, or sketch of an actual footprint taken from the Schwob crime scene.** Instead he has presented a *Xerox Copy* of the bottom of a shoe—which Petitioner had obtained from the private file of a former GBI agent during his federal habeas proceeding—that allegedly matched a shoeprint taken from the Schwob crime scene. (EMNT, 132; Def. Ex. 22).

Additionally, nearly thirty years ago, during Petitioner's pre-trial statement wherein he admitted to breaking into Mrs. Schwob's home, the

officer who took his statement noticed Petitioner's feet due to the unnatural looking bend in his toes and questioned him about the condition of his feet. (EMNT, 1052-1054). Petitioner informed Mr. Sellers, which was contained in the police report summarizing Petitioner's statement, that he had worn the wrong kind of shoes when he was "a kid." (EMNT, 1052-1054). Petitioner also informed the officer, which was placed in the summary, that Petitioner wore shoes ranging in size from "9 to 11" to "fool the police." (EMNT, 858-59, 1052). Petitioner presented evidence that the shoeprint from the Xerox copy was a size 10. (EMNT, 466, 2441, 2444).

Once again, the trial court found Petitioner's evidence was not material. (Pet. App. A, pp. 48-49).

The trial court ultimately collectively examined all of Petitioner's "new" evidence, the evidence presented at trial, and the State's evidence in rebuttal and determined that Petitioner had failed to show the materiality component of the *Timberlake* standard for either the guilt or sentencing phase. (Pet. App. A, pp. 48-49).

Following denial of Petitioner's extraordinary motion for new trial, Petitioner filed an application for discretionary appeal in the Georgia Supreme Court on November 1, 2017 and the court summarily denied the application and motion for reconsideration on December 1, 2017 and January 16, 2018, respectively. Petitioner filed his Petition for Writ of Certiorari on Friday, March 9, 2018. This response follows.

REASONS FOR DENYING THE PETITION

- I. The trial court's factbound application of long-standing state law requirements governing extraordinary motions for new trial presents no issue warranting this Court's exercise of its certiorari jurisdiction.**

Petitioner seeks this Court's certiorari review of the trial court's decision applying well-established state court precedent in affirming the denial of Petitioner's extraordinary motion for new trial. The clear state law basis for the trial court's denial of Petitioner's extraordinary motion for new trial establishes that this decision rests on an adequate and independent state law ground, authorizing the denial of this petition for a writ of certiorari under this Court's longstanding precedent. *See Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."). What is more, Petitioner is requesting this Court perform a purely factbound analysis of innocence, which this Court's own rules do not favor. *See* Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") Consequently, Petitioner's request for certiorari review should be denied.

As an initial matter, it must be pointed out that, "Once a Petitioner has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399, 113 S. Ct. 853, 860 (1993). "Thus, in the eyes of the law, [P]etitioner does not does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law of [three] brutal murders." *Id.* at 400. Petitioner's convictions and sentences

have been exhaustively reviewed for the past 30 years in both state and federal court and found to be constitutionally sound.

As found by the trial court in denying Petitioner's extraordinary motion, (Pet. App. A, p. 35), the standard for granting an extraordinary motion for new trial is as follows:

- (1) that the evidence has come to his knowledge since the trial;
- (2) that it was not owing to the want of due diligence that he did not acquire it sooner;
- (3) that it is so material that it would probably produce a different verdict;
- (4) that it is not cumulative only;
- (5) that the affidavit of the witness himself should be procured or its absence accounted for; and
- (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Timberlake, 246 Ga. at 491. "All six requirements must be complied with to secure a new trial." *Id.* The trial court applied only this standard and other relevant state law in making its determination. *See* Pet. App. A.

As stated above, Petitioner's extraordinary motion for new trial proceeding spanned seven years with three evidentiary hearings and substantial post-hearing briefing. The trial court examined all of the evidence presented and determined that it cumulatively failed to meet *Timberlake's* materiality standard. (Pet. App. A, pp. 36-49). As discussed above, Petitioner's evidence in support of his motion was: 1) DNA on a garment which was not proven to have been worn by the similar crime victim Gertrude Miller at the time of the crime; 2) dueling expert opinions regarding blood type evidence taken from the bodies of Florence Scheible and Martha Thurmond; 3) dueling expert opinions regarding a bite mark taken from similar crime victim Janet Cofer; 4) insubstantial attacks on the fingerprint evidence from an "expert" who incorrectly stated the evidence; and 5) a Xerox

copy—taken from the file of a former GBI agent—of the bottom of shoe that *may* have matched a footprint from similar crime victim Ruth Schwob’s home.

Stacked against Petitioner’s evidence was the following: 1) nearly identical crimes in both Georgia and New York, from the time periods Petitioner was known to live in those states, suggesting only one possible perpetrator; 2) Petitioner’s confessions in both Georgia and New York admitting to being present at the crime locations but blaming the rapes and murders on three different men; 3) Petitioner’s fingerprints at the crime scenes in Georgia and New York; 4) eyewitness identification of Petitioner by Mrs. Miller as her attacker; and, 5) **a positive match of Petitioner’s DNA in the vaginal washings of similar crime victim Jean Dimenstein.** Plainly, the trial court’s materiality determination was not the product of any abuse of discretion and based solely on the state law standard announced in *Timberlake*.

Seemingly knowing he cannot obtain review of his state law claim, Petitioner alleges he is actually innocent and the trial court’s determination is a violation of the Eighth and Fourteenth Amendments. Petitioner argues that “[t]his case...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 defender.” (Pet. brief, p. 23). Rule 10(c) states that review may be granted by this Court where “a state court ...has decided an important question of federal law that has not been, but should be, settled by this Court.” However, the trial court was not tasked with, nor did it determine, Petitioner’s actual innocence under the Eighth and Fourteenth Amendments. Instead, it decided whether Petitioner’s “new”

evidence met the materiality standard under the state law standard announced in *Timberlake* in order for Petitioner to receive a new trial.

Pretermitted the lack of a state court judgment on federal law, Petitioner admits this Court has never definitively announced a standard for judging a free-standing claim of actual innocence following finality of conviction and sentence.¹⁹ However, as also admitted by Petitioner, this Court has stated that “the threshold showing” for an actual innocence claim “would necessarily be extraordinarily high.” *Herrera*, 506 U.S. at 417. Indeed, this Court explained that the “probably resulted” standard determining miscarriage of justice in a habeas context was lower than the *Herrera* “extraordinarily high” standard. *Schlup v. Delo*, 513 U.S. 298, 326-27, 115 S. Ct. 851, 867 (1995); *House v. Bell*, 547 U.S. 518, 554-55, 126 S. Ct. 2064, 2086-87 (2006). Therefore, Petitioner is inexplicably advocating for this Court to grant review of his case to announce a definitive standard that would be unquestionably higher than *Timberlake*’s materiality standard that the evidence must “probably produce a different verdict.” As Petitioner failed to meet the *Timberlake* materiality standard, he certainly could not meet a more stringent “extraordinarily high” standard.

The granting of certiorari in this case is clearly unwarranted, as the record demonstrates that Petitioner is merely seeking to have this Court “correct a state court judgment.” As this Court explained in *Herb*, “Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong

¹⁹ Of important note is that the cases relied upon by Petitioner concern actual innocence claims as part of a habeas proceeding, not an extraordinary motion for new trial.

judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.” *Herb*, 324 U.S. at 125-26. To review this decision of the Georgia Supreme Court based on state law grounds, would result in the issuance of a mere advisory opinion by this Court and therefore, certiorari should be denied.

The Georgia Supreme Court’s interpretation and application of state court decisions governing extraordinary motions for new trial, in the context of the particular facts of Petitioner’s case²⁰ and the lengthy procedural history of Petitioner’s post-conviction challenges, constitutes an adequate and independent state ground which warrants the denial of this petition for a writ of certiorari. *See Herb*, 324 U.S. 117 (1945).

II. The trial court’s factbound determination of Petitioner’s due process claim regarding the contamination of the Thurmond DNA sample does not warrant review.

Petitioner alleges that the unintended contamination and resultant consumption through testing of the Thurmond DNA sample violated his Eighth and Fourteenth Amendment rights. In the trial court, Petitioner did not allege this contamination and consumption violated his Eighth Amendment rights. Therefore, this argument is not properly before this Court for review. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997); *see also Citizens United v. FEC*, 558 U.S. 310, 330 (2010). Regarding Petitioner’s

²⁰ This Court has repeatedly emphasized that it does not grant certiorari to “review specific facts.” *See United States v. Johnson*, 268 U.S. 220, 227 (1925) and *Texas v. Mead*, 465 U.S. 1041 (1984).

Fourteenth Amendment violation, Petitioner alleged in one-sentence in his post-hearing brief to the trial court that the contamination created a *Brady* due process claim. (Def. Post-Hearing brief, pp. 15-16). In response, the trial court analyzed the contamination under state law, which applied this Court's decision in *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337 (1988), and determined that while the evidence had "exculpatory value" there was no "bad faith" on the part of the State regarding the contamination. (Pet. App. A, p. 42). As this decision was merely a factbound application of this Court's precedent, this claim presents is not worthy of certiorari review.

As explained above, a quality control sample used by the GBI Crime Lab unintentionally contaminated the Thurmond DNA sample. (EMNT, 665; EMNT Res. Ex. 24). As a natural by-product of the DNA testing, the sample was wholly consumed. The trial court analyzed this issue under *State v. Mussman*, 289 Ga. 586, 590 (2011), which applies the due process test announced by this Court in *Arizona v. Youngblood* regarding evidence not properly preserved by a state agent. *Youngblood* holds that where the state has failed to preserve "potentially useful evidence" a Petitioner must show "bad faith" on the part of the state in order to prove a due process claim. The trial court found Petitioner had failed to make this showing. Regarding the first prong, the court held "Here, the exculpatory value of the DNA from the Thurmond vaginal washings was apparent when the parties entered into the Consent Order agreement to test, among other evidence, the Thurmond evidence." (Pet. App. A, p. 42). But, with regard to the second prong, the trial court held,

In this case, the Petitioner has failed to present any evidence that the GBI Crime Lab or the State, in failing

to preserve the evidence properly, acted with any improper motive or through a conscious doing of wrong, or that the State contaminated the evidence with the intent of keeping exculpatory evidence out of the Petitioner's hands.

Id. Petitioner provides no argument, as there is none, showing this to be an incorrect determination of fact.

Instead, Petitioner makes the unreasonable argument that the trial court should have presumed that the DNA results from the Thurmond sample would have exonerated him “in light of the secretor evidence excluding [him] as Mrs. Thurmond’s attacker,” thereby relieving him of having to show “bad faith” on the part of the State. (Pet. brief, pp. 25-26). In making this argument, Petitioner is clearly requesting this Court grant certiorari review to craft a new standard of review for his due process claim. In support, relying solely upon law review articles, Petitioner alleges that lower courts have been “trouble[ed]” with how to apply *Youngblood*²¹ to due process claims regarding potentially useful evidence the State has not properly preserved.

Even assuming it were true that some courts have been “troubled” by the *Youngblood* standard, Petitioner’s case does not present an appropriate vehicle to overturn this Court’s long-standing precedent. While the consumed Thurmond DNA sample may have been “potentially useful” to Petitioner, the mountain of evidence proving his guilt strongly negates this possibility. But more importantly, this case certainly does not present appropriate facts or procedural posture for removing the “bad faith” requirement of *Youngblood*. The error that occurred in this case was due to

²¹ Petitioner also cites to *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528 (1984), the precursor to *Youngblood*.

unintentional contamination of a DNA sample that occurred during testing requested by a Petitioner pursuant to a state statute governing extraordinary motions for new trial. As pointed out by this Court in *Herrera*, the “Constitution...makes no mention of new trials” and the Court could not “say” that refusal to even consider new evidence years after a conviction “transgress[ed] a principle of fundamental fairness ‘rooted in the traditions and conscience of our people.’” *Herrera*, 506 U.S. at 411 (quoting *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 2322 (1977)). This Court should decline to review its *Youngblood* decision simply because Petitioner is unable to meet its reasonable standard.

Therefore, as Petitioner has failed to show that the trial court’s factbound application of this Court’s precedent was incorrect, certiorari review should be denied.

III. Petitioner did not present a claim to the trial court that the death penalty is unconstitutional.

Finally, Petitioner alleges that due to the alleged risk of executing the innocent, the death penalty is unconstitutional. Petitioner did not present this claim to the trial court and he does not now present any evidence or law in support. Consequently, this claim is not properly before this Court for review. See *Adams*, 520 U.S. at 86; see also *Citizens United v. FEC*, 558 U.S. at 330. Moreover, this Court has firmly held that the death penalty is constitutional. See *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) (“it is settled that capital punishment is constitutional”). And, based on the scientific results of the DNA testing in Mrs. Dimenstein’s case and the overwhelming evidence of Petitioner’s guilt presented at his original trial, it

is absolutely clear that Carlton Gary is indeed the Columbus “Stocking Strangler.” Certiorari review of this claim is unwarranted.

Conclusion

For the reasons above, this Court should deny the petition for certiorari.

Respectfully submitted.

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March 13, 2018

CERTIFICATE OF SERVICE

I do hereby certify that I have this day, March 13, 2018, served the within and foregoing pleading, prior to filing the same, by email and post-prepaid and properly addressed upon:

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