

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

NO. 18-8085

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2017

CARLTON GARY

Petitioner,

v.

State of Georgia,

Respondent.

PETITIONER'S PRELIMINARY REPLY TO BRIEF IN OPPOSITION
FILED BY RESPONDENT

* JOHN R. MARTIN
Georgia Bar No. 473325
44 Broad Street,
Suite 202
Atlanta, Georgia 30303
(404) 522-0400

* MICHAEL KENNEDY McINTYRE
Georgia Bar No. 494075
965 Virginia Avenue, N.E.
Atlanta, Georgia 30306
(404) 879-1515
Attorneys for Carlton Gary
*ATTORNEYS OF RECORD

I. INTRODUCTION

Given that the Petitioner's execution is scheduled for March 15, 2018, counsel for Petitioner files this Petitioner's Preliminary Reply to Brief in Opposition Filed By Respondent in order to respond quickly to some of the more egregious misrepresentations presented by the State in its Brief in Opposition. Should the execution of Petitioner be stayed as requested by Petitioner, Petitioner may file a more comprehensive response to the Brief in Opposition.

II. MISREPRESENTATION OF THE GERTRUDE MILLER EVIDENCE

As described in the Petition for Writ of Certiorari to the Supreme Court of the State of Georgia filed by Petitioner, the DNA evidence proving that Ms. Gertrude Miller was mistaken in her identification of Mr. Gary as her attacker is perhaps the most compelling evidence of Petitioner's innocence. After all, the State has always contended that the attack on Ms. Miller was the first in a series of rapes and murders committed by the so-called one and only Columbus Stocking Strangler and if the DNA evidence proved that Ms. Miller was mistaken in her identification of Petitioner because someone else attacked her, this is compelling evidence that Petitioner did not commit any of the Columbus Stocking Strangler attacks.

The State nevertheless continues to claim that there is no "possible relevance" to the testing of the items in the Miller case because "there was nothing in the record before the trial court which proved that Mrs. Miller was wearing a white gown at either the time of the attack or shortly thereafter when she was taken to the hospital for treatment." (Brief in Opposition, pp. 22-23). The State's argument simply makes no sense.

First of all, as reflected in the Columbus Police Department report and the Georgia Bureau of Investigation Crime Lab report in the Miller case (Defendant's Exhibits 2 and 3 to the state court proceedings, copies of which are attached), it is clear that at the time of the investigation of the Miller case a "white ladies slip recovered from the foot of the bed and also blood stained" was collected, along with other items and the GBI Crime Lab report describes its receipt from the Columbus Police Department of "[o]ne manila envelope sealed with Scotch tape containing one white gown" and "[o]ne sealed manila envelope containing one white slip," which were sent to the GBI Crime Lab for testing. It was these items that GBI Crime Lab technician Connie Pickens tested with a florescent light for the existence of biological evidence and made cuttings which were sent to the Bode Technology Laboratory in Virginia for Y-STR DNA testing, which the GBI Crime Lab was not able to perform.

Does the State seriously contend that the Columbus Police Department sent these items to the GBI Crime Lab for forensic testing even though they had no "possible relevance" to the case? Does the State contend that the Columbus Police Department was just merely rifling through Ms. Miller's closet and bureau for irrelevant items to send to the GBI Crime Lab? Was the GBI Crime Lab being asked to conduct forensic testing of meaningless evidence?

But most compelling of all is the fact that Ms. Miller was an elderly widow lady living alone with no current sexual partner. But the Bode Technology Laboratory testing found that the stains on the cuttings made by Ms. Pickens were from sperm, the DNA of which did not match Petitioner. This sperm came from someone and the only logical conclusion is that that someone was the attacker of Ms. Miller.

Instead of challenging the conclusion by the Bode Technology Laboratory with their own expert, all the State can come up with was this nonsensical theory that the items collected by the Columbus Police Department and sent to the GBI Crime Lab for forensic testing and upon which sperm cells were found by the Bode Technology Laboratory are of no significance and irrelevant, because Ms. Miller must have been secretly sexually active. This bizarre claim is indicative of the State's

willingness to come up with whatever argument it can come up with to try to make go away the compelling evidence that the one witness who identified Petitioner at trial was mistaken in her identification and that someone other than Petitioner attacked her.

**III. THE GOVERNMENT'S RELIANCE ON FRAUDULENT TESTIMONY
CONCERNING SECRETOR EVIDENCE**

The State continues to assert that the testimony of the GBI Crime Lab technician John Wegel is sufficient to refute the unequivocal testimony of Dr. Greg Hampikian, a Ph.D. professor of forensic biology to both graduate and undergraduate students at Boise State University, who is highly respected in the field of forensic biology, that the only valid conclusion from the secretor testing was that the perpetrator was "a non-secretor who deposited the semen on Thurmond and the stain in Scheible," thereby excluding Petitioner who had tested as a normal positive secretor. The claim that "Dr. Hampikian did not directly contradict or undermine Mr. Wegel's opinion concerning the testing results," is simply contradicted by the record. (Brief in Opposition, p. 24). And even more important, Dr. Hampikian made clear that the testimony of Mr. Wegel that Mr. Gary could not be excluded because of the possibility that Petitioner was someone whose secretion levels would vary over time and that he might be someone who would secrete less into his semen than into

his saliva was simply bogus science. (Brief in Opposition, p. 24).

As Dr. Hampikian testified, secretor status is an unchangeable genetic feature, just as blood type is, and the scientific research rejects any conclusion that you would secrete less blood group substance from day to day or that you would secrete less into semen than saliva. Indeed, the scientific literature indicates that people actually secrete more blood group substance into their semen than into their saliva.

To buttress his opinions, Dr. Hampikian identified articles from respected scientific journals subject to peer review supporting the conclusion that a person secretes more blood group substances into his semen than into his saliva and that it does not vary over time. (Doriell, M.J. and P.H. Whitehead, 1979, A Quantitative Study of ABH Blood Group Substances in Saliva and Semen, Forensic Sci. Int. 14:111(H Blood Group substances, as in Petitioner's case, "are, on average, 20 times higher" in semen than in saliva); (Sato, M. and F. Ottensooer, 1967, Blood group Substances in Body Fluids. Comparison of Concentrations in Semen and Saliva. J. Forensic Med. 14:30-38 ("As for saliva, the group substance level in each individual is considered to be relatively stable and even a constitutional,

inherited property. Our data suggest that this may hold true also for semen.") ("The result described in this paper demonstrating that semen contains more blood group substances than saliva confirms earlier observations.") ("The H substance in different semen samples from the same individual show relatively small fluctuations in inhibition titer.")). In sum, the testimony of Dr. Hampikian flatly refutes the testimony of Mr. Wegel, which is also contradicted by all supporting scientific literature.

Moreover, while DNA analysis certainly would have further evidenced the fact that Petitioner was not the perpetrator of the rapes of Ms. Thurmond and Ms. Scheible, unfortunately when relevant samples, long thought to be lost, were sent to the GBI Crime Lab for DNA testing they were contaminated and destroyed as the result of grossly reckless procedures of the GBI Crime Lab. As Dr. Hampikian testified, this was "outrageous" and "egregious" for a forensic laboratory that is reporting "serious matters in serious cases to national databases."

IV. THE STATE'S MISREPRESENTATION REGARDING DR. DAVID'S TESTIMONY CONCERNING THE BITEMARK

The State appears to argue that Dr. David's opinion that the bite mark excluded Petitioner as the person who left a bite mark on Ms. Cofer's breast should be discounted because Petitioner had had intervening dental work on his upper teeth.

(Brief in Opposition, pp.25-26). But Dr. David's opinion was based on the lower teeth where there had been no intervening dental work.

The State makes much of the fact that Dr. David indicated that the impressions on the bite mark exemplar of the lower teeth were not clearly observable with the naked eye and that this evidence was not of the "highest quality." But what the State fails to point out is that Dr. David was able to examine the bite mark exemplar with a stereomicroscope which clearly revealed to his expert eye a curved lower bite mark pattern in which one of the teeth was irregular. In addition, after Dr. David examined the Petitioner's teeth and made a mold of them, he observed that Mr. Gary's lower teeth were "virgin teeth," in which there had been no intervening dental work, and that based upon the fact that Petitioner's teeth did not have a crooked lower tooth more likely than not Petitioner was excluded as the biter. Indeed, he went on to say that his opinion was closer to a reasonable degree of scientific certainty, analogous to beyond a reasonable doubt, based upon the lower teeth alone.

Dr. David is the only Diplomate of the American Board of Forensic Odontology in Georgia, a member of the editorial board of the Journal of Forensic Sciences, published by the American Academy of Forensic Sciences, and has an impressive resume. He

is the same doctor that the prosecution consulted prior to trial based upon the bite mark impression he was shown at that time, which he described as sufficiently "distinctive" that he felt "confident" that he could provide an opinion as to whether the bite mark could be attributed to Petitioner based upon a comparison of the bite mark impression and Petitioner's teeth. However, when Dr. David also explained that his comparison might exclude Petitioner, the prosecution did not allow Dr. David to conduct this comparison and never contacted him again.

The State had the clear opportunity for Dr. David to examine the evidence when it had been recently collected but declined that opportunity because of the possibility that he might exonerate Petitioner. Now they complain that the same dentist who the State consulted but refused to use at the time of trial has concluded on the evidence that is now available that more likely than not Petitioner is excluded and that his opinion might be closer to beyond a reasonable doubt if the evidence had been presented to him in a timely fashion. They cannot have it both ways.

The simple truth is that Dr. David, whose credentials are unquestioned, has sworn under oath that his opinion is that the bite mark found on Ms. Cofer did not match Petitioner and although the State had the opportunity to have its own expert

examine the evidence, they decided to forego that opportunity and instead attack Dr. David, the person they had first consulted regarding the bite mark. The simple truth of the matter is that the bite mark that was left on Ms. Cofer's breast does not match Petitioner and under the State's theory that there was one and only one Columbus Stocking Strangler, the fact that this bite mark does not match Petitioner is further evidence of his innocence in all the attacks.

V. THE STATE'S BIZARRE DEFENSE REGARDING THE SHOEPRINT EVIDENCE

There is no question that the Xerox of the shoeprint found at the point of entry in the Schwob case showed that the assailant wore a size 10 shoe while Petitioner wears a 13 ½ size shoe. The defense offered expert testimony from a forensic podiatrist, Dr. Fenton, that there was no way that Mr. Gary could fit his size 13 ½ foot into a size 10 shoe. The State's bizarre explanation is a claim that Petitioner had stated that as a child he wore shoes too small for his feet and that he could somehow or another bend his toes underneath his feet in order to wear shoes as small as a size 9 in order to fool the police. (Brief in Opposition, p. 29).

As Dr. Fenton testified, this type of explanation is simply ludicrous. The foot is not so flexible and there was nothing unusual about Petitioner's foot or toes which would allow him to

wear shoes so small. The State offered no contrary expert testimony, and contrary to the State's representations, this alleged statement was not documented at an early stage in the investigation, but appears more likely to have been something made up once the shoeprint had been disclosed to the defense.

Moreover, the perpetrator of the Schwob attack had to be someone who was climbing in a window from the base of an outside air conditioning unit and was apparently avoiding detection by the police by running and hiding in the foliage in the area. Does it make any sense Petitioner could be doing all this with his toes curled under his feet and wearing size 10 shoes? And if the perpetrator had gone through all of this trouble to avoid the police, why did not the perpetrator wear gloves, so as to avoid claimed fingerprint evidence, which the defense expert, a former Supervisor of the Fingerprint Identification Section of the FBI with 33 years experience in fingerprint analysis found to be in suspicious locations and were borderline at best.

This is just another example of the State's attempting to come up with explanations for evidence that they could otherwise explain. Here the fact is that the perpetrator of the Schwob attack, and the Borom attack as well since it was on the same evening, wore a size 10 shoe while Petitioner wears a 13 ½ size shoe and an expert forensic podiatrist gave his opinion,

unrebutted by the State, that it would have been impossible for Petitioner to fit his foot into a size 10 shoe. The claimed statement of Petitioner could not have occurred and is further reason to doubt this claimed unrecorded and unsigned statement.

VI. GARY'S SUSPICIOUS CUSTODIAL STATEMENT

The State also relies on the claimed custodial statement of Petitioner. (Brief in Opposition, p. 32). The fact that this claimed statement was never recorded or documented in a written signed statement, based upon the claim that Petitioner objected to a recording of a signed statement, is especially suspicious in light of the fact that Petitioner when interviewed by New York police twice freely agreed to a recorded statement and a signed written statement.

But there is an even more suspicious circumstance regarding this claimed custodial statement. Earlier in the investigation of the Columbus Stocking Strangler murders police arrested Jerome Livas, who gave a detailed confession to two of the murders in which he allegedly gave specific details concerning these attacks, such as how entry was made, where hinges were hidden, and details about the interiors of the homes, that only the perpetrator would know. But it was quickly determined that Mr. Livas, who had mental issues, was absolutely innocent, even though the alleged confession he gave recounted details which

only the perpetrator would know. And now, the State claims that the alleged custodial statement by Petitioner. also includes details that only the perpetrator would know, just like the false or fabricated "confession" of Mr. Livas.

The defense called as a witness Dr. Gregory DeClue, a forensic psychologist specializing in police interrogation techniques, who testified that current research shows that alleged confessions are often false or fabricated even though they appear to be reliable due to claimed consistency to known details. This was obviously true with regard to the Livas confession and is reason enough to be concerned with the claimed custodial statement of Petitioner, which Dr. DeClue testified fits all the recognized hallmarks of a false or fabricated confession that never occurred.

VII. CLAIM THAT THE DEFENSE DID NOT RAISE BELOW THE ISSUE OF THE DESTRUCTION OF FAVORABLE EVIDENCE

The State's claim that the defense did not adequately raise the reckless destruction of favorable evidence below is belied by the State's own argument regarding its version of how the constitutional issues raised in Arizona v. Youngblood, 488 U.S. 51 (1988) should have been applied to this case. (Brief in Opposition, pp. 34-35). While the Superior Court did cite to State v. Mussman, 289 Ga. 586, 590 (2011), that does not mean that the defense had not raised the federal constitutional issue

as analyzed by this Court in cases such as Arizona v. Youngblood, and more important California v. Trombetta, 467 U.S. 479 (1984). Indeed, Mussman specifically relies upon Arizona v. Youngblood. 298 Ga. at 589. And as to the raising of the Eighth Amendment claim, one only needs to look at the argument made below both in the pleadings and in oral argument to the Court that the State's reckless destruction of evidence which would certainly have exculpated Petitioner, whether in good faith or bad faith, should "take the death penalty off the table." The State's claims are just not supported by the record.

VIII. CONCLUSION

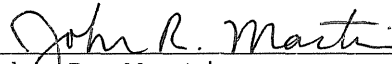
Counsel for Petitioner is filing this Preliminary Reply to Brief in Opposition Filed By Respondent to address some of the more glaring problems with the State's Brief in Opposition given the fact that an execution is soon on the horizon and counsel needed to alert the Court to the problems with the State's arguments as quickly as possible. Counsel urgently request that the Court stay the execution in this case so that this case can be more comprehensively briefed and an informed decision be made as to whether or not to grant certiorari.

However, it is hoped that this Reply will help the Court recognize some of the problems with the assertions made by the State in the Brief in Opposition, especially the claim that

somehow the Miller DNA evidence is unimportant, when obviously it was probably the most important piece of evidence indicating innocence. It is simply not believable that the items collected by the Columbus Police Department and tested by the GBI Crime Lab and ultimately by the independent Bode Technology Laboratory are irrelevant to this case. They clearly are and show to a scientific certainty that Ms. Miller was mistaken in her identification of Mr. Gary as the Columbus Stocking Strangler and that someone else actually attacked her, as well as all the other victims.

This 15th day of March, 2018.

Respectfully submitted,



John R. Martin
44 Broad Street, N.W.
Suite 202
Atlanta, Georgia 30303
(404) 522-0400



Michael K. McIntyre
965 Virginia Avenue, N.E.
Atlanta, Georgia 30306
(404) 879-1515

ATTORNEYS FOR CARLTON GARY

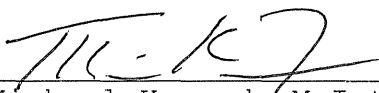
CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing **PETITIONER'S PRELIMINARY REPLY TO BRIEF IN OPPOSITION FILED BY RESPONDENT** by transmitting the same electronically to:

Ms. Julia Slater
jslater@columbusga.org

Ms. Sabrina Graham
sgraham@law.ga.gov

Dated: This 15th day of March, 2018.



Michael Kennedy McIntyre