

CASE NO. 17-8388
IN THE UNITED STATES SUPREME COURT

JAMES AREN DUCKETT,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

WHETHER THIS COURT SHOULD GRANT REVIEW OF THE FLORIDA SUPREME COURT'S REJECTION OF DUCKETT'S SUCCESSIVE ATTEMPT TO OBTAIN POST-CONVICTION RELIEF FOR AN ALLEGED GIGLIO VIOLATION WHERE THE HAIR COMPARISON TESTIMONY PRESENTED BY THE STATE, AS A WHOLE, WAS NOT FALSE AND THE FACT SPECIFIC DECISION BELOW DOES NOT CONFLICT WITH ANY OF THIS COURT'S PRECEDENT OR PRESENT AN UNSETTLED ISSUE OF CONSTITUTIONAL LAW?

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CITATION TO OPINION BELOW

The decision below is the Florida Supreme Court opinion reported at *Duckett v. State*, 231 So.3d 393 (2017), affirming the denial of Duckett's successive motion for post-conviction relief.

STATEMENT OF JURISDICTION

Respondent acknowledges that this Court has jurisdiction to review a final judgment by the highest court of a state pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner cites to the Fifth, Sixth, Eighth, and Fourteenth Amendments as the constitutional provisions implicated in this case. However, none of these constitutional provisions are implicated in the resolution of this fact specific ruling state court below.

STATEMENT OF THE CASE AND FACTS

This capital case is before the Court upon the affirmance of the denial of a successive post-conviction motion for relief by the Florida Supreme Court. *Duckett v. State*, 231 So.3d 393 (2017). Respondent rejects Petitioner's statement of facts because it is both argumentative and incomplete. Respondent relies instead upon factual summaries compiled from various court opinions below.

Duckett is in state custody and under sentence of death pursuant to a valid judgement and sentence for the first-degree murder and sexual battery of eleven-year-old T.M.¹ which the Florida Supreme Court affirmed on September 6, 1990. *See Duckett v. State*, 568 So.2d 891 (1990) (*Duckett I*). On May 1, 1992, Duckett sought collateral relief in state court. On August 10, 2001, after many amendments and evidentiary hearings, the trial court denied relief. The Florida Supreme Court affirmed the trial court's ruling and denied a petition for writ of habeas corpus. *Duckett v. State*, 918 So.2d 224 (2005) (*Duckett II*), *cert denied Duckett v. Florida*, 549 U.S. 846 (2006). On January 8, 2007, Duckett filed a petition for federal writ of habeas corpus in the United States District Court, Middle District of Florida. On March 25, 2010, the district court denied the petition with prejudice. *Duckett v. McDonough*, 701 F.Supp.2d 1245, 1300 (2010).

Duckett then filed successive motion for post-conviction relief which the trial

¹ The victim's initials are being used due to the sexual component of the crime.

court summarily denied. On October 6, 2014, the Florida Supreme Court affirmed. The court's decision summarized the relevant history of this case in the following way:

James Aren Duckett, a prisoner under sentence of death, appeals the circuit court's order summarily denying his successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction of this appeal under article V, section 3(b)(1), Florida Constitution.

I. BACKGROUND

Duckett was a police officer in the City of Mascotte when he murdered eleven-year-old Teresa McAbee. *Duckett v. State (Duckett I)*, 568 So.2d 891, 892 (Fla.1990). Although we more fully detailed the facts of the case in our prior decision in *Duckett I*, *id.* at 892–94, we briefly review them here. On the morning of May 13, 1987, the victim's body was found in a lake less than one mile from the convenience store from which she disappeared between 10 and 11 p.m. on the evening before. *Id.* at 892–93. During that time period, Duckett, the only officer on duty that night, was at the convenience store, and he inquired about the victim's name and age from the convenience store clerk. *Id.* at 892. Upon exiting the store, he spoke to the victim and put her in the front passenger side of his patrol car. *Id.* He then got into the driver's seat. In a pre-arrest statement, Duckett stated that the victim had not been on the hood of his patrol car and denied being at the lake on the evening of the murder. *Id.* at 893. However, “[b]oth Duckett's and Teresa's fingerprints were discovered on the hood of Duckett's patrol car.” *Id.* In addition, a crime scene technician from

the sheriff's department and an expert witness both testified that the "very unusual" tire tracks at the lake matched the tracks of Duckett's patrol car. *Id.* The medical examiner testified that the victim had been sexually assaulted while still alive, strangled, and then drowned. After a jury trial at which Duckett testified in his own defense, he was convicted of sexual battery and first-degree murder. *Id.* at 893–94.

This was a circumstantial evidence case, and we summarized the evidence presented that was inconsistent with any reasonable hypothesis of innocence as follows:

(1) [T]he victim was last seen in Duckett's patrol car; (2) the tire tracks at the murder scene were consistent with those from Duckett's car; (3) no one saw Duckett, the only policeman on duty in Mascotte, from the time he was last seen with the victim until the time he met the victim's mother at the police station; (4) numerous prints of the victim were found on the hood of Duckett's patrol car, although he denied seeing her on the hood; (5) a pubic hair found in the victim's underpants was consistent with Duckett's pubic hair and inconsistent with the others in contact with the victim that evening; and, (6) during a five-month period, Duckett, contrary to department policy, had picked up three young women in his patrol car while on duty and engaged in sexual activity with one and made sexual advances toward the other two.

Id. at 894–95. By an eight-to-four vote, the jury recommended a sentence of death for the murder, and the trial court so sentenced him after finding two aggravating factors (the murder was heinous, atrocious, or cruel and was committed during the course of a sexual battery), one statutory mitigator (Duckett lacked a significant criminal history), and nonstatutory mitigation (Duckett had a strong and supportive family and had attempted to improve his education). *Id.* at 894. The trial court also sentenced Duckett to life in prison with a twenty-five-year mandatory minimum for the sexual battery. *Id.*

Duckett appealed his convictions and sentences, and we affirmed. *Id.* at 896. Subsequently, we also affirmed the denial of his initial postconviction motion and denied his petition for a writ of habeas corpus. *Duckett v. State (Duckett II)*, 918 So.2d 224, 239–40 (Fla.2005). In addition, the federal district court denied Duckett's federal habeas petition, in which he alleged a number of constitutional violations. *Duckett v. McDonough*, 701 F.Supp.2d 1245, 1256–1300 (M.D.Fla.2010).

II. ANALYSIS

In this appeal, Duckett argues that (A) the circuit court erred in summarily denying his claim that newly discovered evidence demonstrates that a Federal Bureau of Investigation (FBI) analyst's testimony at trial regarding hair evidence was erroneous and this Court should remand his case to the postconviction court for an evidentiary hearing on this claim; (B) the failure to apply the United States Supreme Court's decision in *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), retroactively to his claims violates his constitutional rights to due process and equal protection; (C) newly discovered evidence that a trial witness recanted her testimony requires that Duckett be granted a new trial; and (D)

section 837.021, Florida Statutes (1997), relating to perjury by contradictory statement, is invalid. For the reasons explained below, we affirm the circuit court's summary denial of relief of Duckett's successive postconviction motion.

A. Hair Analysis Expert

Michael Malone, an FBI hair and fiber analyst, testified at Duckett's trial regarding the pubic hair found in the victim's underpants. In this first issue, Duckett contends that the postconviction court erred in summarily denying his claim that a 2011 independent analysis of Malone's 1987–88 lab work and trial testimony in this case constitutes newly discovered evidence that Malone's trial testimony was false and misleading.

1. Related Facts

At the time of trial, Malone was a well-qualified and recognized FBI expert in the area of hair and fiber analysis. *Duckett I*, 568 So.2d at 893. On direct appeal, we summarized Malone's trial testimony in this case as follows:

A pubic hair was found in the victim's underpants. While other experts could not reach a conclusion by comparing that hair with Duckett's pubic hair, Michael Malone, an FBI special agent who had been qualified as an expert in hairs and fibers in forty-two states, examined the hair sample, concluding that there was a high degree of probability that the pubic hair found in her underpants was Duckett's pubic hair. Malone also testified that the pubic hair did not match the hairs of the sixteen-year-old boy, the uncle,

or the others who were in contact with the victim that evening.

Id. We rejected Duckett's challenge to Malone's qualifications as an expert, noting that defense counsel declined to object to Malone's testimony at trial. *Id.* at 895. Moreover, we pointed out that the expert's credibility was "extensively challenged ... during the cross-examination of Malone and during the testimony of a Florida Department of Law Enforcement expert on hair analysis." *Id.*

We subsequently rejected claims related to Malone's testimony at trial that were raised on appeal from the denial of Duckett's initial postconviction motion. *Duckett II*, 918 So.2d at 234–35. Duckett argued here that (1) the prosecution engaged in "expert shopping" in obtaining Malone's testimony; and (2) Malone's expert testimony was not credible. *Id.* at 234. In addition, Duckett contended that the prosecution violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose (3) a second, unknown hair that was found on the victim and (4) impeachment evidence against Malone. *Id.* at 234–35. We held that the first claim was procedurally barred and affirmed the postconviction court's denial of the second claim, noting Malone's established proficiency and credentials in the field of hair analysis. *Id.* at 234. As for the third argument regarding the unknown hair, we held that the claim was conclusory and insufficiently pleaded. Finally, the fourth claim was based on a 1997 report issued by the Department of Justice that was critical of the FBI laboratories and some of the forensic examinations of the agency's analysts, including Malone. The report "indicat[ed] that Malone testified falsely in a[n] [unrelated] court proceeding in 1985." *Id.* at 235. Duckett alleged that the

State failed to timely disclose this evidence that could have been used to impeach Malone's credibility at trial. In affirming denial of this *Brady* claim, we noted that the "report did not exist" at the time of Duckett's 1988 trial or his 1990 direct appeal. *Id.*

After the 1997 Department of Justice report was issued, the FBI hired independent experts to examine the prior work and testimony of various agent analysts, including Malone. One independent analyst reviewed many cases—particularly death penalty cases—in which Malone offered expert testimony. Subsequently, in August 2011, the same independent analyst reviewed Malone's hair-analysis work and testimony in Duckett's trial and issued a report (2011 Report).

In the 2011 Report, the independent analyst addressed the same areas that he had examined in his prior reviews of Malone's work in other cases. In sum, the analyst concluded that no written protocols prescribing the scientifically acceptable examination and testing procedures for hair analysis existed until a decade after Malone's work in this case was done. Accordingly, the independent analyst could not determine whether Malone's work conformed to the standards or analytic techniques applicable at the time Malone worked on this case. Second, Malone's laboratory reports were not adequately documented in the laboratory bench notes, as there was no abbreviation key, small portions of notes were illegible, and some notes were undated. Finally, Malone's testimony at trial was not consistent with the laboratory reports, the bench notes, or Malone's area of expertise.

In reaching the conclusion that Malone's trial testimony was inconsistent with his reports, notes, and

area of expertise, the independent analyst explained that at trial, Malone sometimes overstated or exaggerated the accuracy of hair analysis. For example, the independent analyst opined that some of Malone's testimony conveyed the idea that no person other than Duckett could be the source for the pubic hair found in the victim's underpants. Similarly, Malone testified that there was a “high degree of probability” the pubic hair found in the victim's underpants was Duckett's. *Duckett I*, 568 So.2d at 893. The independent analyst explained that hair analysis does not support this degree of analytical certainty. That is, microscopic hair analysis can show consistency but not absolute identity.

Nevertheless, the independent analyst also found that in other instances, Malone properly stated the correct standard in his trial testimony. For example, Malone correctly testified that the pubic hair found in the victim's underpants was “consistent with Duckett's pubic hair” but was not consistent with the pubic hairs of others who had been in contact with the victim that evening. *Id.* at 895. Malone also explained that hair analysis is not as precise as fingerprints for identifying someone. Malone expressly stated that he could not say that a particular hair came from a specific person to the exclusion of anyone else.

The postconviction court concluded that the findings of the 2011 Report did not provide a basis for relief because Duckett's successive motion constituted mere relitigation of the same hair-analysis issues that were previously decided adversely to Duckett. As we explain below, we agree that Duckett is not entitled to any relief.

Duckett v. State, 148 So.2d 1163, 1164-1167 (Fla. 2014) (*Duckett III*).

On August 25, 2015, Duckett filed a second successive motion for post-conviction relief based on a 2014 Department of Justice review of Michael Malone’s (“Malone”) lab work and testimony.² Duckett argued four claims, one of which asserted that the state committed a *Giglio*³ violation because it knowingly presented misleading evidence; specifically, Malone’s testimony. On April 1, 2016, the trial court denied summarily Duckett’s second successive post-conviction motion. In affirming the trial court’s finding, the Florida Supreme Court stated:

In his third claim on appeal, Duckett asserts that the postconviction court erred in summarily denying his claim that the State violated *Giglio* by knowingly presenting false testimony at his trial through Malone. “To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material.” *Guzman v. State*, 868 So.2d 498, 505 (Fla. 2003). “This Court applies a mixed standard of review to *Giglio* claims, ‘defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law.’ ” *Suggs v. State*, 923 So.2d 419, 426 (Fla. 2005) (alterations in original) (quoting *Sochor v. State*, 883 So.2d 766, 785 (Fla. 2004)).

Duckett's *Giglio* claim fails to clear the hurdle of the first prong of *Giglio*. As explained previously, Duckett has

² The report determined that on a majority of Malone’s microscopic hair comparison analysis testimony or laboratory report included some erroneous statement that exceeded the limits of science. The science underlying the hair comparison was not the subject of the report.

³ *United States v. Giglio*, 405 U.S. 150 (1972)

“not establish[ed] that Malone's [trial] testimony—when considered in its full context— was false.” *Duckett III*, 148 So.3d at 1168 (emphasis added).

We therefore affirm the postconviction court's summary denial of Duckett's *Giglio* claim.

Duckett v. State, 231 So.3d 393, 400-401 (Fla. 2017) (*Duckett IV*), rehearing denied *Duckett v. State*, 2017 WL 6616899 *1 (Fla. Dec. 28, 2017). This petition followed.

REASONS FOR DENYING THE WRIT

ISSUE I

THIS COURT SHOULD DECLINE REVIEW OF THE FLORIDA SUPREME COURT’S REJECTION OF DUCKETT’S SUCCESSIVE ATTEMPT TO OBTAIN POST-CONVICTION RELIEF FOR AN ALLEGED GIGLIO VIOLATION BECAUSE THE HAIR COMPARISON TESTIMONY PRESENTED BY THE STATE, TAKEN AS A WHOLE, WAS NOT FALSE AND THE FACT SPECIFIC DECISION BELOW DOES NOT CONFLICT WITH ANY OF THIS COURT’S PRECEDENT OR PRESENT AN UNSETTLED ISSUE OF CONSTITUTIONAL LAW?

Duckett asserts that the Florida Supreme Court erred by conducting a *de novo* review of the trial court’s findings of facts regarding Malone’s testimony contrary to established Supreme Court precedent. However, Duckett’s claim challenging Malone’s testimony that the pubic hair found on the victim was microscopically identical to Duckett’s because of the 2014 report calling into question Malone’s

findings, was untimely and plainly insufficient to warrant post-conviction relief under well-established state law.⁴ Further, Duckett's petition fails to assert either a conflict with this Court's precedent, or with any other state supreme court. Nor does Duckett assert this case presents an important unsettled issue or law. *See* Rule 10, Supreme Court Rules of Practice and Procedure (Certiorari review appropriate for case which decide an "important question of federal law" which represents a conflict with relevant decisions of this court, between United States Courts of Appeal, among state courts of last resort, or, present "a significant unsettled question" for this court). Duckett simply complains that under the facts of this case, as he sees them, he was entitled to post-conviction relief based on misleading or inaccurate forensic testimony. Accordingly, there is clearly no basis certiorari review of the decision below. *See Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for

⁴ Although the State argued below that the claim was time barred under well-established state rules of procedure, the Florida Supreme Court assumed for the purpose of deciding the issue on the merits that the claim was timely. *Duckett*, 231 So. 3d at 399 ("Even assuming that Duckett's claim is timely []"). However, the court did find "[t]o the extent that Duckett claims that the 2014 Office of the Inspector General Report (2014 OIG Report) constitutes newly discovered evidence, that claim is untimely." (quoting *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008) ("To be considered timely filed as newly discovered evidence, [a] successive rule 3.851 motion [is] required to have been filed within one year of the date upon which the claim became discoverable through due diligence.")) (additional citation omitted). *Duckett*, 231 So. 3d at 400. To the extent Petitioner relies upon this report in support of certiorari review, the state court decision rests upon an adequate and independent ground and this Court lacks jurisdiction to consider it.

exercise of certiorari jurisdiction); *United States v. Johnston*, 268 U.S.220, 227 (1925) (“We do not grant certiorari to review evidence and discuss specific facts.”). Duckett also fails to articulate a legitimate constitutional controversy worthy of this Court’s review. As found by the post-conviction court, there is nothing presented of such a nature that would probably produce an acquittal at trial. Because no constitutional question has been presented, Respondent submits that this Court should deny review of the instant case.

Florida provides defendants a means to obtain post-conviction relief based on *Giglio* violations. However, to obtain a new trial based on a *Giglio* violation, Duckett must meet three requirements: 1) the testimony given was false; 2) the State knew the testimony was false; and 3) the statement of material. *Guzman v. State*, 868 So.2d 498, 505 (Fla. 2003). The post-conviction court made the factual finding that the 2014 report questioning Malone’s findings was reflective of a 2011 report, which the Florida Supreme Court concluded “did not give rise to a reasonable doubt as to Duckett’s culpability.” *Duckett III*, 148 So.3d at 1169. In affirming the lower court’s decision, the Florida Supreme Court referred to its decision in *Duckett III*, which states:

As outlined above, the thrust of the 2011 Report by the independent analyst was that Malone's testimony at trial was not consistent with his lab work because some of his testimony at trial exceeded Malone's area of expertise. Specifically, the science of hair analysis could not support

a conclusion of absolute identity. As a result, any suggestion that it was highly unlikely that the pubic hair found in the victim's underpants belonged to anyone other than Duckett—as Malone testified in at least one instance—overstated or exaggerated the degree of accuracy of hair analysis. On the other hand, the independent analyst recognized that at trial Malone also accurately represented the reliability of hair analysis by testifying that hair analysis is not on a par with fingerprints for purposes of identification. In fact, Malone expressly and correctly stated that hair analysis cannot support a conclusion that a hair came from a single person to the exclusion of anyone else and accurately testified that the pubic hair from the victim's underpants was consistent with having come from Duckett. Thus, although some of Malone's testimony overstated the significance of the hair comparison, Duckett did not establish that Malone's testimony—when considered in its full context—was false. Moreover, as we noted in our decision affirming Duckett's convictions and sentences, Malone's testimony was “extensively challenged” at trial, first on cross-examination and then “during the testimony of a Florida Department of Law Enforcement expert on hair analysis.” *Duckett I*, 568 So.2d at 895.

Appellant seeks remand for an evidentiary hearing, likening his case to those of the defendants in *Smith v. State*, 75 So.3d 205 (Fla.2011), and *Wyatt v. State*, 78 So.3d 512 (Fla.2011). However, these cases, in which the defendants' convictions rested at least in part on comparative bullet lead analysis (CBLA), provide Duckett no support. In 2004, a report from the National Research Council discredited the reliability of CBLA evidence. *See Wyatt*, 78 So.3d at 525–26. The next year, the FBI abandoned the forensic science of CBLA entirely and contacted states regarding this decision. *Id.* In *Smith*, we

reversed the denial of relief on the defendant's successive postconviction motion and remanded the claim for further proceedings based in part on the FBI's letters regarding the CBLA expert testimony offered at Smith's 1990 retrial. 75 So.3d at 205–206. In *Wyatt*, this Court also relinquished jurisdiction for a hearing but ultimately denied relief on the defendant's newly discovered evidence claim where, although the FBI admitted that the expert's CBLA trial testimony “exceed [ed] the limits of the science,” 78 So.3d at 526, the overwhelming evidence of guilt presented and the relative unimportance of the CBLA evidence would not probably result in an acquittal on retrial. *Id.* at 527.

Unlike CBLA, the field of forensic hair analysis has not been discredited, and the FBI has not discontinued the use of such analysis. Moreover, Malone's expert testimony in this case was not without basis. Although some of his testimony overstated the degree of accuracy of his analysis, other statements were well within the bounds of the field. Nothing has been presented that undermines Malone's testimony that the pubic hair from the victim's underpants was consistent with Duckett's and inconsistent with the pubic hair of others who had been in contact with the victim on the night she disappeared. In addition, as previously noted, his testimony was challenged extensively at trial. *See Duckett I*, 568 So.2d at 895.

Id. at 1168-1169.

Duckett's claim that the Florida Supreme Court erred in its review of *Giglio* violation is patently incorrect. In addressing this claim, the court applied a mixed standard of review, deferring to the factual findings of the lower court to the extent that they are supported by competent substantial evidence, but reviewed *de novo* the

application of those facts to the law. *Duckett IV*, 231 So.3d at 400. Because Duckett's claim failed to clear the first prong, there was no reason for the court to address the other two prongs. The court also noted that Duckett's newly discovered evidence claim was untimely, and that Duckett's case was not included in the 2014 OIG Report. *Id.* at 399 n.2.

Even if the court erred, the error is harmless since Duckett's alleged *Giglio* violation fails to meet the other two prongs. It is illogical to infer that the state knew the testimony was false when the first report questioning Malone's results and testimony was not available until 2011, long after Duckett was convicted and sentenced. Similarly, Duckett's claim fails to meet the third prong of materiality. The following evidence also supported Duckett's conviction, separate and apart from the hair: the victim was last seen in Duckett's patrol car; the unusual tire tracks at the lake where the victim was found matched those of Duckett's patrol car; Duckett's and the victim's fingerprints were discovered on the hood of the patrol car, "Duckett's prints were commingled with the victim's, who prints indicated that she had been sitting backwards on the hood and had scooted up the car." *Duckett II*, 918 So.2d at 228-229.⁵

⁵ Duckett incorrectly asserts that the post-conviction court found, and the state conceded, that Malone's testimony was false. However, the reports and the post-conviction court's order indicate that Malone's testimony "exceeded the bounds of science", not that it was false.

Duckett further alleges that advancements in science demonstrate that juries, in this and other cases, have heard misleading and/or inaccurate evidence on scientific findings. Duckett suggests that advancements in science should be part of a *Giglio* or *Brady*⁶ analysis. In this case before the Court, this is incorrect and unnecessary. The reports issued by the Department of Justice do not question the underlying science in hair comparison. They call into question Malone's testimony, his lab work, and whether he had exceeded his area of expertise. While some of Malone's testimony overstated the significance of the hair comparison, "Duckett did not establish that Malone's testimony-when considered in its full context-was false." *Duckett III*, 148 So.3d at 1168. Furthermore, if advancements in science provide exculpatory evidence and/or demonstrate that evidence is misleading, defendants are not prevented from filing the appropriate post-conviction motions presenting this new information to the court. They are, however, required to meet the requirements necessary to warrant relief.

Duckett also contends that Malone's testimony implicated Eighth Amendment analysis under *Johnson v. Mississippi*, 486 U.S. 578 (1988), because the jury considered evidence that materially inaccurate. This too is incorrect. In *Johnson*, this Court held that allowing the petitioner's death sentence to stand violated the Eighth Amendment because the sentence was partially based upon on a

⁶ *Brady v. Maryland*, 373 U.S. 87 (1963)

vacated New York conviction so it vacated Johnson sentence and remanded the case to Mississippi Supreme Court. *Johnson*, 486 U.S. 587-590. *Johnson* is factually distinguishable and inapplicable to case before the court. As argued previously, Duckett's conviction was supported by much more evidence than the hair evidence. Furthermore, Malone's testimony was extensively challenged at trial, first on cross-examination and then during the testimony of a Florida Department of Law enforcement expert on hair analysis. Malone's credibility was weighed by the jury. *Duckett I*, 568 So.2d at 895. This is unlike *Johnson*, where an aggravating circumstance was supported solely by a vacated conviction.

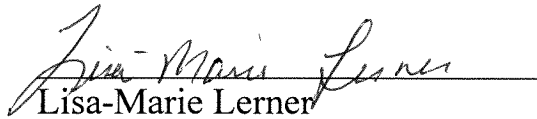
In conclusion, Petitioner has failed to show a denial of any constitutional right or conflict with prior precedent of this court. The instant petition presents a fact specific claim, relying on factual assertions which were rejected by the lower courts. There are no implications beyond the parties involved in this case, mandating the denial of certiorari review. *Butler v. McKellar*, 494 U.S. 407 (1990); *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974).

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Lisa-Marie Lerner", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Mary Elizabeth Wells, Esq., 623 Grant Street, Atlanta, GA 30312, and via electronic filing to mewells@comcast.net, this 4th day of May, 2018.



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