No. 15-7022 and 15A539

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS RAY JOHNSON,

PETITIONER,

v.

STATE OF GEORGIA,

RESPONDENT.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS**

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTION PRESENTED

Is Eleventh Circuit Court of Appeals' finding that the district court did not have jurisdiction to entertain the 28 U.S.C. § 2241 petition in accord with this Court's precedent?

When Petitioner had an opportunity to present his actual innocence claim in an original 28 U.S.C. § 2254 petition is the denial of a successive petition in accord with this Court's precedent?

When the Eleventh Circuit and the state court found and the record establishes that Petitioner's evidence was "patently insufficient" to establish a claim of actual innocence is this Court's original writ jurisdiction proper?

BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

This Court should deny Petitioner's petition for a writ of certiorari as the district court properly dismissed Petitioner's attempt to circumvent the AEDPA and file a successive federal petition without authorization of the Circuit Court. Further, Petitioner's attempt to appeal the Eleventh Circuit's denial of his application to file a successive federal habeas petition is not appealable to this Court. Certiorari review should be denied.

SUMMARY OF THE ARGUMENT

A. Application for a Certificate of Appealability from the Dismissal of Petitioner's Improperly Filed Successive Petition: Petitioner attempted to file a successive federal petition without the authorization of the Eleventh Circuit in violation of 28 U.S.C. § 2241. The district court properly dismissed the petition finding that it did not have subject matter jurisdiction and the Eleventh Circuit properly denied Petitioner a certificate of appealabiltiy on that issue. As the dismissal was not in conflict with this Court's precedent, it presents no issue worthy of certiorari review.

B. Application to File a Successive Petition: Petitioner previously raised his claim of actual innocence in the district court. (Doc. 2, pp. 31-35). The district court denied the claim. (Doc. 30, p. 5, n2). The district court also denied Petitioner a certificate of appealability (COA) on the claim and the Eleventh

Circuit denied his request to expand the COA to include the issue of actual innocence. (Doc. 45).

1. Petitioner's arguments in his application to file a successive federal habeas did not support a new claim. It is without question that Petitioner has known since his 1998 trial the factual predicate of his claim, 28 U.S.C. § 2244(b)(2)(B)(i).

2. Also, even viewed as a whole, the evidence did not establish by clear and convincing evidence that but for constitutional error Petitioner would not have been found guilty. 28 U.S.C. § 2244(b)(2)(B)(ii).

Accordingly, Petitioner's application was properly denied by the Eleventh Circuit. As the Eleventh Circuit denial of that application is in direct accordance with the precedent of this Court, there is no issue warranting certiorari review.

STATEMENT OF THE CASE

Petitioner, Marcus Ray Johnson, brutally murdered Angela Sizemore on March 24, 1994 by stabbing her 41 times, including six times to the heart. The medical examiner also discovered that a foreign object had been inserted into the victim's vagina and anus; the object had ruptured the wall of the vagina and lacerated the rectum. He testified that she was alive during the stabbing and genital mutilation.

He was tried before a jury on March 23, 1998 through April 7, 1998. Petitioner admitted to leaving a bar with the victim at 2:30 a.m. with her car keys. He further admits that they had sexual intercourse after leaving the bar. Four eyewitnesses identified Petitioner, four hours later, by his very distinctive clothing, (black leather jacket, blue jeans, boots with silver chain, turquoise ring, and fingerless gloves) leaving the area where the victim's body was found in her car an hour later.

The Georgia Supreme Court summarized other portions of the facts:

> The police determined that Ms. Sizemore was murdered in a vacant lot near Sixteenth Avenue in west Albany. Present in the lot were bloodstains, scuff marks, drag marks, and a pecan branch with blood and tissue on one end. The medical examiner testified that this branch was consistent with the object used to mutilate the victim's vagina. The vacant lot is about two blocks from Fundamentals and about half a block from the house where Johnson lived with his mother.
>
> A friend of Johnson testified that after he called her early on March 24, she picked him up at his house at 9:30 a.m. and took him to her home, where he slept on her couch for several hours. [The friend noticed several scratches on Mr. Johnson's neck, but Mr. Johnson told her he had gotten them by fighting with a couple of guys (T. 1969-1970, 1983-1984)], Johnson then told her he wanted to take a bus to Tennessee and that he needed her to go to the Monkey Palace to pick up some money he was owed. At his request, she dropped him off near a church while she went to get the money. The police were waiting for Johnson to show up, and they returned with the friend and arrested Johnson. Before they told him why they were arresting him, he blurted, "I'm Marcus Ray Johnson. I'm the person you're looking for."
>
> **DNA testing revealed the presence of the victim's blood on Johnson's leather jacket**. Johnson had a pocketknife that was

> consistent with the knife wounds on the victim's body. He had scratches on his hands, arms, and neck. In a statement, Johnson said he and the victim had sex in the vacant lot and he "kind of lost it." According to Johnson, the victim became angry because he did not want to "snuggle" after sex and he punched her in the face. He stated he "hit her hard" and then walked away, and he does not remember anything else until he woke up after daybreak in his front yard. He said, "I didn't kill her intentionally if I did kill her."

Johnson, 271 Ga. at 376-377 (emphasis added).[1]

Petitioner's defense at trial was that he was actually innocent. The jury rejected that defense and convicted Petitioner of felony murder, aggravated assault, armed robbery and rape. The jury also found four statutory aggravating circumstances. Based on the jury's recommendation, Petitioner was sentenced to death for murder.

A. Direct Appeal (1999-2000).

On direct appeal to the Georgia Supreme Court, Petitioner challenged the eyewitness identifications as unreliable and the trial court's denial of an expert to testify as to the unreliability of eyewitness identification. In rejecting the claim of misidentification, the court held that there was no substantial likelihood of misidentification as to the four eyewitness identifications of Petitioner. Johnson, 271 Ga. at 381, 271 S.E.2d at 228-29.

[1] DNA testing was conducted prior to trial and extensive DNA testing was conducted during the extraordinary motion for new trial proceedings.

Also, in affirming Petitioner's convictions and sentences, the Georgia Supreme Court held the evidence was sufficient to convict Petitioner of all the crimes for which he was accused, as well as the statutory aggravators. Johnson, 271 Ga. at 377, 519 S.E.2d at 226. This Court denied certiorari review. Johnson v. Georgia, 528 U.S. 1172 (2000).

B. First State Habeas Proceedings (2000-2006).

Petitioner filed a state habeas petition on June 2, 2000. An evidentiary hearing was held on June 24-26, 2002. During those proceedings, Petitioner alleged actual innocence, which the habeas court found to be non-cognizable (2004 Habeas Order, p. 21), but litigated the claim through an allegation of ineffective assistance of counsel. As part of his ineffectiveness claim, Petitioner alleged a biker group and group of men in Albany may have been involved. On January 7, 2004, the state habeas court denied relief finding Petitioner's witnesses, who were presented to attempt to support Petitioner's claim that trial counsel were ineffective in the guilt phase of trial, were not credible. (2004 Habeas Order, p. 24).[2]

Petitioner also attempted to again raise the claim that the trial court erred in now allowing an eyewitness identification expert to testify. The state habeas court found that claim was res judicata. (2004 Habeas Order, p. 6).

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[2] This lack of credibility was based in part on the fact that one eyewitnesses that claimed to have seen and been with the victim in the early morning hours after Petitioner left the victim was shown to be incarcerated on that date.

The Georgia Supreme Court denied Petitioner's application to appeal on July 11, 2005, Johnson v. Head, Case No. S04E1325, cert. denied Johnson v. Terry, 547 U.S. 1059 (2006).

C. Federal Habeas Proceedings (2006-2011).

Petitioner filed his federal habeas petition on June 7, 2006. On September 30, 2009, the federal habeas court denied relief. Although Petitioner raised a claim of actual innocence and challenged counsel's effectiveness in the guilt phase of trial, Petitioner failed to brief these claims to the district court. The district court specifically addressed in detail the claims briefed by Petitioner, but further held that Petitioner had failed to carry his burden of establishing that any of his claims had merit. Johnson v. Hall, 1:06-CV-84, p. 5, n2 (N.D. Ga., Sept. 20, 2009). Petitioner requested a certificate of probable cause to appeal on the issue of actual innocence; however the district court found Petitioner could not meet the standard to obtain a COA on that issue. (Doc. 42). The Eleventh Circuit also denied Petitioner's request to expand the COA to include his claim of actual innocence. (Doc. 45). The court affirmed the denial of relief on August 23, 2010. Johnson v. Upton, 615 F.3d 1318 (11th Cir. 2010), cert. denied Johnson v. Upton, 131 S. Ct. 3041 (2011).

Petitioner asserts that he could not present his actual innocence claim to the federal courts. This is incorrect. Petitioner had the opportunity to file his

extraordinary motion for new trial long prior to his federal habeas petition was filed. He instead chose to wait until 2011, when the first execution warrant was obtained. He could have filed his extraordinary motion and then presented the same evidence in his federal proceedings. Notably, however, all this evidence, with the exception of the DNA testing, was readily available in the first state habeas proceeding.

D. Extraordinary Motion for New Trial (2011-2015).

On September 27, 2011, after 17 years in prison and with his execution seven days away, Petitioner sought an extraordinary motion for new trial and post-conviction DNA testing pursuant to O.C.G.A. § 5-5-41. Petitioner could have filed this extraordinary motion for new trial prior to his state habeas hearing. However, Petitioner chose to wait until the eve of his execution. In those extraordinary motion for new trial proceedings, Petitioner again argued his claim of actual innocence and that the eyewitness identifications were not reliable. To assist in the presentation of his claims, Petitioner was granted DNA testing and obtained several experts, including an eyewitness identification expert.

Petitioner also presented new witnesses to assert a new hypothesis that an acquaintance of the victim or drug dealers, not a biker group or local men, may have been involved in Ms. Sizemore's murder. Although Petitioner attempted to assign guilt to a new cast of characters, one constant remained - the trial court in

that proceeding, like the state habeas court before it, found Petitioner's new supporting witnesses also lacked credibility.

1. **DNA Testing**

In the extraordinary motion for new trial proceedings, the State stipulated to the DNA testing of 16 items of evidence. Those sixteen items were broken down into 48 separate samples. An independent lab determined 13 of the 48 were suitable for testing. Petitioner was allowed to choose the specific sections to test on certain items. "Of those 13 items, blood was found in seven, semen was found in three and male DNA was found in one." (EMNT Order, p. 4).[3]

Once testing was completed, as found by the trial court, Petitioner could not be excluded from the any of the profiles from these samples:

> [N]o other male DNA was found on any items associated with the victim. 4/11/13 Hearing, p. 176; Petitioner's Exhibit 54 (case report)). There was only DNA profiles from which Petitioner could not be excluded and where the probabilities of randomly producing the same profile further support his guilt.

There is no other male DNA because there is no other perpetrator. As found by the trial court, "There was not a single test result obtained from the extensive DNA testing that was exculpatory, much less a result that was so material that it

[3] Sperm was confirmed in the anorectal swab, the oral swab and the thigh swab. Blood was found in the two fingernail clippings, and the samples from the bra, pants, shirt underwear, and vest. Male DNA was found in the nipple swab.

would probably produce a different verdict at either phase of Petitioner's trial. Timberlake v. State, 246 Ga. at 491."

2. Witnesses For Defense's New Theory Found Not Credible

In support of his actual innocence claim, Petitioner also presented the testimony from four witnesses he claimed were previously "unavailable." These witnesses had known Ms. Sizemore and testified that, immediately prior to her murder, she: was selling large quantities of marijuana; had a large amount of cash; and had a common law husband in prison facing serious federal charges. Petitioner also argues that the witnesses from the extraordinary motion for new trial point to the likelihood of other perpetrators involved in Ms. Sizemore's murder. This is not supported by the record, the facts, or the trial court's findings.

On March 23, 1994, Tony Kallergis and Janice Parson met Ms. Sizemore around 6:00 p.m. After attending a funeral visitation for a mutual acquaintance, the three went to Applebee's restaurant and had supper. Mr. Kallergis testified that, he and Ms. Parsons dropped Ms. Sizemore back at her vehicle around 9:00 p.m.

Ms. Sizemore's body was discovered around 6:30 a.m. the following morning. Approximately twelve hours later, Ms. Kallergis and Ms. Parsons went to the Albany Police Department and spoke with the police. As found by the trial court, "Mr. Kallergis' trial testimony is consistent with the statements he gave

police on the evening of March 24, 1994" that he and Ms. Parsons had been with Ms. Sizemore in the early evening and had dropped her off around 9:00 p.m.

Further, as found by the trial court in the extraordinary motion for new trial proceedings, trial counsel, in preparing for trial, investigated and attempted to link Ms. Sizemore's death to drug sales or usage. They attempted to locate witnesses to testify accordingly and, in fact, presented the testimony of Ollie McNair. Mr. McNair testified that he had seen Ms. Sizemore in the area where her body was discovered and that the police had asked him if he thought her death was drug related. At trial, the court did not allow further questioning on this issue as it ruled that it was an attempt to attack the character of the victim.

Additionally, as found by the trial court, Petitioner's "trial counsel were also aware that Richard Barker, Angela Sizemore's common law husband, was arrested for illegal activities" and they investigated potential "connections between Mr. Barker, Ms. Parsons and/or Tony Kallergis." The trial court further found that trial counsel were aware that Ms. Sizemore had been involved with illegal drugs and arrested for those drug activities.

At the extraordinary motion for new trial hearing, Petitioner presented Janice Parsons, "a self-proclaimed drug dealer." She testified that, in the months preceding Ms. Sizemore's murder, Mr. Kallergis, "her boyfriend and soon to be husband," introduced her to the victim. Id. She testified that, at that time, Ms.

Sizemore was selling marijuana and Mr. Kallergis altruistically introduced the two because he knew Ms. Parsons could sell marijuana for Ms. Sizemore. Indeed, "Ms. Parsons testified that, at the time of the murder, she (not Mr. Kallergis) was selling marijuana she obtained from Ms. Sizemore and that she had given Ms. Sizemore a large sum of cash on the night Ms. Sizemore was killed."[4]

Also, as found by the trial court, "trial counsel argued to the jury that Ms. Sizemore had money on her and whoever killed her had obtained that money;" but that Petitioner, at the time of the murder, did not have even enough money for bus fare. Based on these facts, which are supported by the record, the trial court held:

> So the fact that Ms. Sizemore had a large sum of money with her immediately prior to her murder, which was not found on her person, is not newly discovered evidence, is cumulative and is not so material that it would probably have changed the verdict. Further, Petitioner has failed to show he exercised due diligence in obtaining this new testimony, "which was obtained from a witness who was readily identifiable even pre-trial." See Davis v. State, 283 Ga. 438, 446 (2008).

Petitioner argues that Mr. Kallergis' testimony was misleading. However, as found by the trial court:

> [I]t was actually Ms. Parsons who was in an illegal relationship with Ms. Sizemore, not Mr. Kallergis; however, insofar as Mr. Kallergis could be found to have misled the jury with his testimony, Ms. Parsons' testimony would not only be cumulative of evidence given to the jury, but would only serve to impeach Mr. Kallergis' testimony. Thus, this testimony fails to meet the materiality standard of

[4] Ms. Parsons did not testify at trial.

> Timberlake as it merely serves to impeach, at most, Mr. Kallergis' trial testimony.[5]

Petitioner seems to infer, as he did at the extraordinary motion for new trial, that if this testimony had been available at trial, Mr. Kallergis would have been a suspect. The trial court noted that it was Petitioner's own witness, Janice Parsons, that provided Mr. Kallergis an alibi. "Ms. Parsons testified in an affidavit [] that, after they dropped Ms. Sizemore off at her car the night before Ms. Sizemore was murdered, she and Mr. Kallergis went to his apartment where they stayed together the entire night."

Additionally, the trial court, who heard and saw Ms. Parsons testify determined her testimony was not credible. This finding was based on her alleged inability to recall speaking with police immediately after the murder and her potential bias against Mr. Kallergis, with whom "she was unhappily married to and [at the time of the extraordinary motion for new trial hearing] divorced from."

The trial court reviewed this evidence and concluded:

> Petitioner's newly acquired testimony that Ms. Sizemore was selling marijuana at the time of her murder is not "newly discovered" as he has failed to show that it could not have previously been obtained with the exercise of due diligence. Further, Petitioner's testimony of Ms. Parson, Brian French and Robbin Davis are not material under Timberlake as they do not negate the overwhelming facts establishing

[5] Petitioner seeks to infer some subterfuge from Mr. Kallergis not informing the police that his girlfriend at the time was selling marijuana for Ms. Sizemore; although Petitioner seems to find it perfectly understandable as to why Ms. Parsons did not come forward with this information at the time.

Petitioner's guilt. Arguing that it is "plausible" that Ms. Sizemore's murder "had something to do" with her alleged illegal activities or that his newly constructed theory is in the "realm of possibility" is not the appropriate standard. (Petitioner's brief, pp. 13, 14). Petitioner's far flung hypotheticals are based in large part on evidence known prior to trial and fall far short of the Timberlake materiality, non-cumulative, admissible, and newly discovered evidence requirements.

3. Eyewitness Identification Expert Does Not Undermine Identifications

Petitioner continues to argue the four eyewitness identifications are not reliable and an expert witness, like Dr. Steven Cole who testified at the extraordinary motion for new trial, could have shown them to be weak. The trial court, in denying the extraordinary motion for new trial, found that Petitioner's expert's "testimony is not newly discovered, is cumulative and not material."

The record is clear that, on the night of the murder, Petitioner and victim left Fundamentals together around 2:30 a.m. Several eyewitnesses from the bar described Petitioner's very distinctive clothing: black leather jacket; blue jeans, boots with silver chains; and fingerless gloves. Petitioner does not contest that, after leaving, he and Ms. Sizemore went to a nearby location and had sexual intercourse. The record also shows, that around 6:30 a.m. (four hours after leaving the bar) four eyewitnesses "definitively described a man with shoulder length sandy blonde hair coming from the area where Ms. Sizemore's body was found wearing this same distinctive dress including a black leather jacket, dirty blue

jeans, a unique turquoise and silver ring, fingerless leather gloves and black boots with the silver chains."

Lillie Covin, who lived near the location where Petitioner dumped Ms. Sizemore's body, spoke to police on the day of the murder. She informed police that she saw a white male around 6:45 a.m. in sight distance of the body dump site. "She described him as having shoulder length brown hair, slender build, about 6 feet, 140 pounds, blue jeans, black jacket, rag around head, black gloves with fingers cut out, black cowboy boots, and covered in dirt."

Petitioner alleged that an expert could have shown that Ms. Covin's identification of Petitioner at a subsequent pre-trial hearing, four years after the crime, was unreliable. As found by the trial court, the expert did not "undermine Ms. Covin's succinct and distinctive description of him within hours after seeing him in her complex."

Tammy Sheard spoke with officers at the scene, on the day of the crime, where the body was found and informed them that around 6:45 a.m. she saw a white man in the area, which was a predominately African-American neighborhood. She told the officer that, after her first sighting of Petitioner, he got on the bus that she had already boarded. Significantly, this man asked for a ride to the other side of town and specifically the Monkey Palace, Petitioner's place of employment. Ms. Sheard described the man's clothing "as acid wash jeans

covered with red dirt, black boots with something silver going across the boot, black leather jacket, silver ring, and shoulder length hair."

In the extraordinary motion for new trial proceedings, Petitioner claims that Ms. Sheard's identification, three months later, was subjected to suggestive questioning and may have been influenced by television coverage. Ms. Sheard's initial identification, which was prior to any television coverage or alleged suggestive questioning, was not challenged. Accordingly, the trial court found, "Dr. Cole's expertise and attacks on police criteria are irrelevant to Ms. Sheard's initial and very accurate description of Petitioner."[6]

A third eyewitness, Mary Ann Florido, was also a passenger on the bus with Petitioner. Petitioner had to transfer to this second bus to get to the west side of town. Ms. Florido gave a statement to police "approximately 12 hours after seeing Petitioner." Ms. Florido told police that Petitioner was on the bus at 7:10 a.m. at the transfer station. As to her view, she sat down facing him. "She described him as wearing a black leather jacket, light colored, dirty blue jeans (like he had been 'crawling in the dirt'), black boots with silver chains across them, gloves with the

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[6] As to any change in Ms. Sheard's description of Petitioner's ring, defense counsel elicited at trial that Ms. Sheard had previously given a statement to the police that Petitioner was wearing a silver wedding band in contrast to her trial testimony of a "blue like ring," in an attempt to impeach her testimony.

fingers cut out, and a turquoise and silver ring. She further estimated Petitioner to be approximately five feet eight inches and approximately 140 pounds."

Again, Dr. Cole did not challenge Ms. Florido's initial description, but alleged that her subsequently choosing him from a book of mug shots was tainted because she only reviewed photos of people with the last names starting with I and J and therefore a lineup that was not randomly chosen. As held by the trial court:

> Petitioner has utterly failed to show how the notebook was suggestive as he has not shown what photos were in the book, how many photos were in the book, whether Ms. Florido could see the names on the back of the photos, whether she knew the name of Petitioner, or whether every person in the book had a beard and mustache and looked identical to Petitioner. Even Dr. Cole had to concede that he had no idea if the photographs in the book looked similar to Petitioner.

Dr. Cole also found fault with the State showing Ms. Florido photos of Petitioner prior to trial. As with the other eyewitnesses, the trial court held: "as Ms. Florido described Petitioner's attire, within hours of her viewing of him, including his distinctive fingerless gloves, boots with silver chains on them, and his silver and turquoise ring, Dr. Cole's concerns about the subsequent identifications are irrelevant."

The fourth eyewitness, Emmitt Wheeler, a bus driver, also spoke to police on the day of the murder. He stated that he had picked up a white male around 6:45 or 7:00 a.m. in the area near where Ms. Sizemore's body was found. He "described the man as having brown, shoulder length hair, dirty blue jeans, and a

black top." Corroborating Ms. Florido's statements, Mr. Wheeler told police the male asked the cost of transferring to another bus and exited Mr. Wheeler's bus at the transfer station. Mr. Wheeler later identified Petitioner from a photographic lineup and at trial.

Petitioner alleges that an expert could have established that it was not until four months after murder that Mr. Wheeler identified Petitioner in a lineup that was not objective and the investigator interviewing Mr. Wheeler used suggestive questioning to in obtaining a description of Petitioner's clothing. As found by the trial court, trial counsel thoroughly cross-examined Mr. Wheeler about his prior statements to police and his identification of Petitioner.

Petitioner also alleges that Dr. Cole could have shown the jury that the lineup that Mr. Wheeler reviewed was suggestive as the other subjects did not look similar to Petitioner. As found by the trial court, "The record shows, however, that the six-subject photo lineup was tendered into evidence for the jury's review. [] Accordingly, the jurors could clearly have made a determination on whether the six men resembled each other."

As to the extraordinary motion for new trial, the trial court concluded:

> In the proceedings before this Court, Dr. Cole testified that the misidentification of witnesses has to be assessed based on proximity, lighting, the passage of time, the affect of stress or violence, and cross-racial issues. (6/26/14 Hearing, p. 80-82). These factors are similar to the legal factors reviewed by the Georgia Supreme Court in concluding that the identifications were reliable. Moreover, Dr. Cole

had to concede that with all the witnesses they accurately described Petitioner's very distinctive dress, as well as his size, weight and hair color within hours after the murder. (6/26/14 Hearing, pp. 136 (Sheard), pp. 140-141 (Covin), pp. 143-144 (Florido), pp. 147-148 (Wheeler). As to lighting and proximity, Ms. Sheard and Ms. Covin were sitting on the bus with Petitioner. (6/26/14, p. 148). Mr. Wheeler spoke with Petitioner about transfers and fares as Petitioner boarded the bus. Id. Dr. Cole conceded all three witnesses were close to Petitioner. Further, as found by the Georgia Supreme Court, "[t]he record shows that these witnesses viewed Johnson from close range in daylight for an extended period of time." Johnson, 271 Ga. at 38. As to age, which Dr. Cole also said could affect identification, the witnesses were of all ages. (6/26/14 Hearing, p. 149 (Covin (40), Sheard (26), Florido (33), Wheeler (56)). Accordingly, Dr. Cole conceded age was not an issue. (6/26/114, p. 149). Dr. Cole also conceded that neither stress nor violence was an issue. (6/26/14, pp. 149-150). Finally, as to cross-racial issues which Dr. Cole stated could also lead to misidentification, Dr. Cole conceded that there was "no overt racial language." (6/26/14, pp. 150-151). Again, Dr. Cole's testimony is largely irrelevant and clearly not material under Timberlake.

It is abundantly clear, as repeatedly found by the state courts, that the identifications of Petitioner leaving the site where he dumped Ms. Sizemore's body are reliable. As found by the trial court, "Petitioner's description of the identification of him leaving Ms. Sizemore's body as 'unreliable' does not withstand even a cursory review of the record."

4. No New Evidence As To The Pocket Knife

As found by the trial court, "testimony was introduced at trial, that Petitioner's pocket knife had no traces of blood on it." (EMNT Order, p. 13).

Further, trial counsel presented this evidence through expert testimony to the jury, argued this fact to the jury, and even had the State concede in closing argument that Petitioner's knife, which was placed into evidence, might not be the murder weapon. (EMNT Order, pp. 13-15, citing TT, pp. 2794, 2754-2755). I have to prove is that he murdered her. I don't have to prove any particular knife." [7]

Thus, the trial court properly held:

> The record is clear that the knife did not contain any exculpatory value known to the State prior to its destruction. Moreover, the evidence that there was no blood on the knife, if such was concluded from testing, would be cumulative evidence of that presented at trial and the evidence would not be newly discovered. Thus, "the evidence lacks materiality since the state's own admission constitutes comparable, exculpatory evidence." Walker v. State, 264 Ga. 676, 680 (1994). Petitioner's due process and Timberlake claims both fail.

(EMNT Order, p. 14).

5. No New Evidence As To The Pecan Limb

As with the pocket knife, "the jury was informed that the pecan limb had no traces of blood on it," the defense argued the State had not established it was the instrument used to torture and mutilate the victim, and the State "conceded that the pecan limb may not be the object used to mutilate Ms. Sizemore." (EMNT Order, p. 15, citing TT, pp. 2738-2739, 2774). The trial court properly concluded:

[7] Dr. Clark testified at trial that a knife "like" Petitioner's pocketknife had been used in the murder. Dr. Clark testified at trial that he was not saying the pocketknife was or was not the murder weapon, but that "this type of knife could cause the injuries" to Ms. Sizemore.

> Further, regardless of the instrument utilized, it is without question that Ms. Sizemore was stabbed 41 times and sodomized with an object causing horrendous pain and disfigurement of her genital area. Petitioner's argument that additional testing that Petitioner's DNA was not on the limb, which was conceded at trial, is not newly discovered, non-cumulative or material. As with the knife, "the evidence lacks materiality since the state's own admission constitutes comparable, exculpatory evidence." Walker, 264 Ga. at 680. Further, like Youngblood, Petitioner has not shown that the pecan limb had any alleged exculpatory value that was apparent prior to the loss of this item. Petitioner's due process and Timberlake claims both fail.

(EMNT Order, p.16).

6. No New Evidence As To Sixteenth Avenue

At trial, the State presented evidence that Petitioner murdered Ms. Sizemore on Sixteenth Avenue, a location between his home and Fundamentals bar, where they were last seen leaving together. Petitioner argues that there is no evidence that links the murder to the Sixteenth Avenue lot, and therefore he is entitled to a new trial. In denying his extraordinary motion, the trial court properly held, "the facts now are the same as the facts at trial. Petitioner has produced no new, non-cumulative evidence that is so material it would, in reasonable probability, change the outcome of his trial or his sentence." (EMNT Order, p. 17).

In the initial investigation, a pecan limb and a black sock with a sticky, clear substance on it were found at Sixteenth Avenue lot. As set forth above, the trial court found that it was shown at trial that the pecan limb did not have blood on it and was "possibly not the instrument[] used to torture and murder Ms. Sizemore."

(EMNT Order, p. 18). Additionally, the trial court found that the black sock was tested, but no evidence was found to tie it to the crime and thus, it was not introduced at trial. These facts are established by the record. Accordingly, as to these two items, the evidence now is the same as at trial.

Additionally, at the Sixteenth Avenue dirt lot, a few short hours after the murder, there "were indications of a struggle, scuff marks, drag marks and what police noted to be 'a large amount' of blood pooled in the dirt." (EMNT Order, pp. 18-19, citing TT, pp. 2027-2031, 2154, 2170, 2172; Petitioner's Appendix 6, p. 2; See also, TT, p. 2035 and Attachment B). Prior to trial, testing was conducted on a sample of the soil taken from the lot. At that time, it was shown to contain human blood, "with an A antigen, characteristic of blood group A, which was Angela Sizemore's blood type." (EMNT Order, pp. 18-19, citing Petitioner's Exhibit 6, 8/31/94 Report, p. 6 of 8; See also Attachment C).

As part of the extraordinary motion for new trial, Bode Laboratory attempted DNA testing on the soil sample. As found by the trial court, in the initial stages of testing, no human DNA was detectable. Thereafter, as the trial court's order stated that Bode was to determine what tests to utilize and to utilize the tests that would most likely yield results, Bode followed that order and utilized

YSTR testing.[8] YSTR testing is specific to the male population. The lab was unable to obtain a profile. Therefore, as found by the trial court, all "the facts and evidence from trial remain unchanged." (EMNT Order, p. 19).

As found by the trial court, even the failed arguments remain unchanged. At trial, trial counsel argued there was no blood on the limb or the knife. They argued that no evidence connected Petitioner to the Sixteenth Avenue lot. (TT, p. 2739).

These arguments failed and they failed because, as found by the trial court:

> What the evidence also shows, however, is that this bloody vacant lot location on Sixteenth Street was discovered by police because Petitioner and Ms. Sizemore left Fundamentals together in the early morning hours immediately preceding her death. They were last seen walking in the direction of the Sixteenth Avenue vacant lot, (T, p. 1803); and as found by the Georgia Supreme Court, "[t]he vacant lot is about two blocks from Fundamentals and about half a block from the house where Johnson lived with his mother." Johnson v. State, 271 Ga. 375, 376 (1999).
>
> Most significantly, there was a large pool of fresh blood located at the Sixteenth Avenue vacant lot. As conceded by Petitioner, that large pool of blood was Type A, the same type as Ms. Sizemore. [] Moreover, Petitioner's motion for new trial expert, Marilyn Miller, also testified "that somebody who is a type-A person was bleeding here for a period of time." (6/26/14 Hearing, pp. 16, 34). She further testified that "there was enough blood that it would be a significant wound to bleed that much." (6/26/14Hearing, p. 35). Thus, a person, that was bleeding profusely, remained in one location where the blood was found. Because the blood was fresh, its release and pooling had to occur around the same time as Ms Sizemore's murder. Although Petitioner infers to the contrary, Ms. Miller specifically testified that

[8] The order was drafted by the State and reviewed by the defense. Petitioner did not object to the order as written or request to alter or amend the order in any manner.

> she could not say that this scene had no relationship to Ms. Sizemore's murder. (6/26/14 Hearing, p. 34).
>
> The Sixteenth Avenue dirt lot also had fresh marks where something or someone had been dragged. (TT, p. 2031). Correspondingly, as found by the Georgia Supreme Court, Ms. Sizemore's body "had bruises and marks from being hit and dragged." Johnson v. State, 271 Ga. at 376. Further, Dr. Clarke testified at trial that Ms. Sizemore's body had abrasion from being dragged and the wounds indicated that she was dead at the time, (TT, p. 2214); thus, accounting for the drag marks at the Sixteenth Avenue scene and the pooling of the blood in the one location.
>
> Additionally, Ms. Sizemore had pecan leaves in her hair although there were no pecan trees in the vicinity of the site where Petitioner left her body in the truck. (TT, p. 2025). The Sixteenth Avenue dirt lot, however, sits among pecan trees. (TT, p. 2033).
>
> Thus, the evidence shows Sixteenth Avenue: is an area Ms. Sizemore was in on the night she was murder; had a large amount of fresh blood that had pooled in a small area that came from a "significant" wound that was Ms. Sizemore's blood type and in which no male DNA could be detected; had fresh drag marks in the dirt corresponding to the drag marks on Ms. Sizemore's body; and had pecan trees and leaves like those found in Ms. Sizemore's hair. There is clearly evidence that Ms. Sizemore was at the Sixteenth Avenue site and was killed in the dirt in that area or very nearby in the thick vegetation before being drug out into the dirt to be loaded into her own vehicle for Petitioner to drive her to the other side of town to dump her body.
>
> ***
>
> The evidence in regard to the Sixteenth Avenue is exactly the same as it was at trial. There is no newly discovered, non-cumulative evidence that was not available with due diligence that would, in reasonable probability change either phase of Petitioner's trial.

(EMNT Order, pp. 19-22).

The trial court denied the motion on all grounds on April 20, 2105.[9] The Eleventh Circuit denied Petitioner's application for discretionary appeal on August 19, 2015.

E. Successive State Habeas Petition (2015)

On November 16, 2015, with his execution scheduled for November 19, 2015, Petitioner filed a state habeas petition again alleging that his execution would violate the Eighth and Fourteenth Amendments to the Georgia and United States Constitution because he is actually innocent. The state habeas court, relying on Georgia procedural law, dismissed Petitioner's second state habeas petition as successive.

On November 18, 2015, Petitioner filed an application to appeal to the Georgia Supreme Court. That court denied Petitioner's request to appeal holding, "Upon consideration of Johnson's application for a certificate of probable cause to appeal the dismissal of his second state habeas corpus petition, the Warden's response thereto, and the record, the application is denied as lacking arguable merit as a matter of Georgia procedural law." Johnson v. Chatman, (November 19, 2015). Petitioner filed a petition for writ of certiorari with this Court which is currently pending at the time of the filing of this pleading.

[9] Insofar as Petitioner infers some misconduct in the District Attorney drafting an order for the Court, which was ultimately adopted by the Court, Petitioner failed to raise this as a claim during his application to appeal to the Georgia Supreme Court from the extraordinary motion for new.

F. Attempt to File A Successive Federal Petition (Nov. 19, 2015)

Petitioner filed his first federal habeas petition in the district court on June 7, 2006. Johnson v. Hall, Civil Action No. 1:06-CV-84 (N.D. Ga., Sept. 30, 2009). On September 30, 2009, the court denied relief. In his first petition, Petitioner raised the same claims of actual innocence and ineffectiveness that he attempts to raise in the current successive petition. However, Petitioner failed to brief those claims to the court. The district court specifically addressed in detail the claims briefed by Petitioner, but further held that Petitioner had failed to carry his burden of establishing that any of his claims had merit, noting Petitioner had not briefed all his claims. (Johnson v. Hall, Civil Action No. 1:06-CV-84, p. 5, n. 2 (N.D. Ga., Sept. 30, 2009)).[10] The Eleventh Circuit affirmed the denial of federal habeas relief on August 23, 2010. Johnson v. Upton, 615 F.3d 1318 (11th Cir. 2010), cert. denied Johnson v. Upton, 131 S. Ct. 3041 (2011).

Petitioner lodged a successive federal petition with the district court on November 18, 2015. Respondent lodged a motion to dismiss on that same date. Both the petition and the motion to dismiss were filed today, November 19, 2015. The district court immediately granted Respondent's motion to dismiss for lack of subject matter jurisdiction as Petitioner had failed to obtain authorization from Eleventh Circuit to file a successive federal habeas petition in accordance with 28

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[10] Document 30, p.5, n2.

U.S.C. § 2244. The district court and the Eleventh Circuit denied Petitioner a COA on the dismissal.

Petitioner then appealed to the Eleventh Circuit from the dismissal of the district court and he also requested authorization to file a successive federal hbeas petition. The Eleventh Circuit denied both requests. The Elventh Circuit held that In re Davis, 557 U.S. 952 (2009) did not allow Petitioner to circumvent the AEDPA, as that case allowed the filing of an original writ with this Court, but did eviscerate the requirements of § 2244(b).

REASONS FOR NOT GRANTING THE WRIT

A. District Court's Holding That it did not have Subject Matter Jurisdiction Does Not Conflict With This Court's Precedent

Petitioner's attempted to file a successive federal petition in the district court without authorization from the Circuit Court as required by 28 U.S.C. § 2244. To circumvent the requirements of 28 U.S.C. § 2244, Petitioner attempted to latch onto the language of 28 U.S.C. § 2241(c)(3) which states "the writ of habeas corpus shall not extend to a prisoner unless he is in custody in violation of the Constitution or laws or treaties of the United States." Petitioner argued his detention is in violation of the Constitution and therefore he can file a second federal petition, without authorization under §2244. The district court found that "argument has no merit." (Doc. 14, p. 3). The district court held that as Petitioner was challenging his state conviction and sentence it fell within the purview of 28

U.S.C. § 2254. Id. The court further concluded that Petitioner could not circumvent the AEDPA by mislabeling his petition an action under 28 U.S.C. § 2241. Id. (citing Gonzalez v. Crosby, 545 U.S. 524, 531 (2005); Spivey v. State Bd. of Pardons and Paroles, 279 F.3d 1301, 1302, n.1 (11th Cir. 2001); Gilreath v. State Bd. of Pardons and Paroles, 273 F.3d 932, 933 (11th Cir. 2001)).

Noting this potential conflict, when the same claim was raised by another petitioner, Eleventh Circuit sought to "harmonize" § 2241 and § 2254. In that analysis, the court reviewed the "canon of statutory construction that the more specific takes precedence over the more general." Medberry v. Crosby, 351 F.3d 1049, 1060-1061 (11th Cir. 2003) (citing Edmond v. United States, 520 U.S. 651, 657 (1997); Tug Allie-B, Inc. v. United States, 273 F.3d 936, 948 (11th Cir. 2001); Bouchard Transp. Co. v. Updegraff, 147 F.3d 1344, 1351 (11th Cir. 1998)). Eleventh Circuit further found that the canon of statutory construction instructed that any provision, or even any word, of a statute should not be read so as to make any part of the statute superfluous. Medberry v. Crosby, 351 F.3d 1049, 1060 (11th Cir. 2003) (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("Courts should disfavor interpretations of statutes that render language superfluous . . . .")).

Rejecting the same argument now made by Petitioner and "harmonizing" the two statutes, Eleventh Circuit held:

> Our reading of §§ 2241 and 2254 as governing a single post-conviction remedy, with the § 2254 requirements applying to petitions brought by a state prisoner in custody pursuant to the judgment of a State court, gives meaning to § 2254 without rendering § 2241(c)(3) superfluous. Under our reading, there remain some state prisoners to whom § 2254 does not apply. Section 2254 is limited to state prisoners "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254 (a). State pre-trial detention, for example, might violate the Constitution or the laws or treaties of the United States. Yet a person held in such pre-trial detention would not be "in custody pursuant to the judgment of a State court." Such a prisoner would file an application for a writ of habeas corpus governed by § 2241 only. To read §§ 2241 and 2254 other than as we do would effectively render § 2254 meaningless because state prisoners could bypass its requirements by proceeding under § 2241.
>
> If § 2254 were not a restriction on § 2241's authority to grant the writ of habeas corpus, and were instead a freestanding, alternative post-conviction remedy, then § 2254 would serve no function at all. It would be a complete dead letter, because no state prisoner would choose to run the gauntlet of § 2254 restrictions when he could avoid those limitations simply by writing "§ 2241' on his petition for federal post-conviction relief. All of Congress's time and effort in enacting § 2254, amending it in 1966, and further amending it in 1996 with AEDPA would have been a complete waste. Section 2254 would never be used or applied, and all of the thousands of decisions over the past half-century from the Supreme Court and other federal courts interpreting and applying the provisions of § 2254 would have been pointless. Section 2254 would be a great irrelevancy because a state prisoner could simply opt out of its operation by choosing a different label for his petition.

Medberry v. Crosby, 351 F.3d at 1060-1061.

Petitioner claimed that this Court's holding in In re Davis gave the district court jurisdiction under 28 U.S.C. § 2241 as he is allegedly innocent of the brutal murder of Angela Sizemore. The district court found "This argument has even less merit." (Doc. 14, p. 4). As found by the district court "Davis, a state habeas petitioner, invoked the Supreme Court's original jurisdiction pursuant to 28 U.S.C. § 2241 and Sup. Ct. R. 20." Id. The district court found that "at most" In re Davis suggests that Petitioner may filed an original writ pursuant to 28 U.S.C. § 2241 and Sup. Ct. R. 20, but not a successive federal habeas in the district court. (Doc. 14, p. 4). This holding is supported by this Court's analysis in Felker in which it held the Court held, "We first consider to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as **original matters in this Court** pursuant to 28 U.S.C. §§ 2241 and 2254. We conclude that although the Act does impose new conditions on our authority to grant relief, it does not deprive **this Court** of jurisdiction to entertain original habeas petitions." Felker, 518 U.S. at 659 (emphasis added).

As the lower courts' holdings are in direct accordance with this Court's precedent, the issue does present an issue worthy of certiorari review.

B. The Circuit Court's Denial of Petitioner's Application To File A Successive Federal Petition is Not Appealable to This Court

28 U.S.C. § 2244(b)(3)(E) states:

> The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

Certiorari review should be denied.

C. The Circuit Court's Denial of Petitioner's Application To File A Successive Federal Petition is Does Not Conflict With the Precedent of This Court

Petitioner, invoking the Eighth and Fourteenth Amendments, argued that he has new facts that would show by clear and convincing evidence that he would not have been found guilty. Petitioner's evidence wholly failed to meet the 28 U.S.C. § 2244(b)(2)(B)(ii).

The standard that must be met to authorize the filing of a successive federal habeas petition is not an easy one to meet. As held by this Court:

> When it enacted AEDPA, Congress "further restrict[ed] the availability of relief to habeas petitioners" and placed new "limits on successive petitions." Felker v. Turpin, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed. 2d 827 (1996). Instead of the judicial discretion that governed second or successive habeas applications prior to AEDPA, Congress **required dismissal** of all second and successive applications except in **two specified** circumstances. § 2244(b)(2).

AEDPA thus eliminated much of the discretion that previously saved second or successive habeas petitions from dismissal.

Panetti v. Quarterman, 551 U.S. 930, 966 (2007) (emphasis added). See also Tyler v. Cain, 533 U.S. 656, 661-662 (2001) ("if the prisoner asserts a claim that was not presented in a previous petition, the claim must be dismissed unless it falls within one of two narrow exceptions; Gonzalez v. Sec'y for the Dep't of Corr., 366 F.3d 1253, 1271 (11th Cir. 2004) (noting the "severe restrictions on revisiting final judgments that are contained in § 2244(b)"). Petitioner failed to meet these "severe restrictions" and "narrow exceptions" to the statute. Gonzalez v. Crosby, 545 U.S. 524, 530 (2005). The denial of his application was in direct accordance with these holding of this Court.

1. Claim Previously Presented and Must Be Dismissed 2244(a)

As held by this Court, "[u]nder § 2244(b), the first step of analysis is to determine whether a 'claim presented in a second or successive habeas corpus application' was also 'presented in a prior application.' If so, the claim **must be dismissed**; if not, the analysis proceeds to whether the claim satisfies one of two narrow exceptions." Gonzalez v. Crosby, 545 U.S. at 530 (emphasis added). See also Tyler v. Cain, 533 U.S. at 661-662 (2001); In re Lambrix, 624 F.3d 1355, 1362 (11th Cir. 2010) ("Because Claims 7, 8, and 10 were previously presented by Lambrix, they cannot be the basis of a claim for leave to file a successive habeas petition. See 28 U.S.C. § 2244(b)(1)."); Gonzalez v. Sec'y for the Dep't of Corr.,

366 F.3d at 1269 (noting the "total ban on claims that were presented in a prior petition, § 2244 (b)(1)"). Petitioner's allegation of actual innocence was been previously determined by the district court.

As set forth above, Petitioner filed a federal habeas corpus petition on June 7, 2006, raising a claim of actual innocence. (Doc. 2, pp. 31-35). Petitioner also filed a motion for federal discovery and a federal evidentiary hearing in an attempt to prove his actual innocence. (Docs. 9-10, 17). The federal habeas court denied Petitioner discovery and an evidentiary hearing. (Docs. 14, 19). On September 30, 2009, the federal habeas court denied relief on this claim. (Doc. 30, p. 5, fn. 2). On January 6, 2010, the federal habeas court denied Petitioner's request for a certificate of appealability on his claims of actual innocence and ineffective assistance of counsel in failing to present witnesses who claimed to have seen the victim with someone other than Petitioner on the night of her murder. (Doc. 42). The Eleventh Circuit subsequently denied Petitioner's application for expansion of the certificate of appealability on those same claims. (Doc. 45). The Eleventh Circuit affirmed the denial of relief on August 23, 2010. Johnson v. Upton, 615 F.3d 1318 (11th Cir. 2010), cert. denied Johnson v. Upton, 131 S. Ct. 3041 (2011).

The record is clear that Petitioner raised the claim of actual innocence in his first federal petition and that claim was denied by the district court. Therefore a successive federal petition was properly denied.

2. Failed to Meet Either of Two Narrow Exceptions

Petitioner also alleged that he should be allowed to file a successive federal habeas petition as he can show that he has new facts that establish his actual innocence.

a. Factual Predicate Known - 2244(b)(2)(B)(i)

Under 28 U.S.C. § 2244(b)(2)(B)(i), Petitioner had to show that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence…." Clearly the factual predicate was known to Petitioner during the prior proceedings as he has raised his claim of actual innocence in every state and federal court. All the evidence Petitioner now seeks to introduce in a successive federal habeas petition, was reviewed by the trial court as part of the extraordinary motion for new trial. Tellingly, as set forth above, that court found that this evidence was not newly discovered and not material. Moreover, as trial counsel hired an eyewitness identification expert, who was not allowed to testify at trial, Petitioner failed to show why he could not have presented this same evidence in his prior state habeas proceeding. His application was properly denied.

b. "New Evidence" Does Not Establish Clearly and Convincingly that Petitioner Would Not Be Found Guilty – 2244(b)(2)(B)(ii)

In addition to being able to show a new factual predicate that was previously unavailable, Petitioner had show that "facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear

and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offenses." 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added). Petitioner failed to meet this mandate.

As the facts set forth above in Statement of the Case establish, the evidence seeks to present in a successive federal habeas does not "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Petitioner] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). The Circuit Court properly denied his application to file a successive federal petition.

D. This Case Does Not Warrant This Court Exercising Its Original Jurisdiction

If this Court interprets the AEDPA to allow an appeal based on a claim of a miscarriage of justice, Respondent notes that in Herrera v. Collins, 506 U.S. 390 (1993), this Court expressly held that "claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying state criminal proceeding…." Herrera, 506 U.S. at 400 (quoting Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) ("What we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved")). Further, the Court has repeatedly stated that "[it] has never held that [the miscarriage of justice exception]

extends to freestanding claims of actual innocence." (Herrera v. Collins, 506 U.S. 309 (1993); see also House v. Bell, 126 S.Ct. 2064, 2086 (2006)). Cf Sibley v. Culliver, 388 F.3d 1196, 1207 (2004) (holding actual innocence is not a claim under § 2254, but a gateway to have procedurally barred constitutional claims addressed).

Significantly, the Herrera Court noted “for the sake of argument” a “truly persuasive demonstration of ‘actual innocence’ may render a petitioner’s execution unconstitutional **if there is not a state avenue to process such a claim.”** Herrera, 506 U.S. at 405; emphasis added). Under Georgia law, there is a state avenue to process a claim of actual innocence which is an extraordinary motion for new trial. See Herrera, 506 U.S. at 410-411, n. 11, citing O.C.G.A. § 5-5-41. Petitioner took advantage of that readily available avenue over a four year period. He was granted extensive DNA testing, experts and two evidentiary hearings and the trial court found Petitioner’s evidence was not newly discovered or material and denied the extraordinary motion for new trial.[11]

[11] Although Petitioner asserts he never had the opportunity to present this evidence to a federal court, he could have filed his extraordinary motion for new trial before filing his federal petition and presented this same evidence in federal court. He could have also presented much of this evidence in his first state habeas proceedings and it would have been available in the subsequent federal proceedings.

This Court has provided recent guidance regarding the miscarriage of justice, or actual innocence, exception. It shows Petitioner cannot qualify:

> [A] credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief. "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." Herrera [v. Collins, 506 U.S. 390, 404 (1993)].
>
> We have applied the miscarriage of justice exception to overcome various procedural defaults. These include "successive" petitions asserting previously rejected claims, see Kuhlmann v. Wilson, 477 U.S. 436, 454, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986) (plurality opinion), "abusive" petitions asserting in a second petition claims that could have been raised in a first petition, see McCleskey v. Zant, 499 U.S. 467, 494-495, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991), failure to develop facts in state court, see Keeney v. Tamayo-Reyes, 504 U.S. 1, 11-12, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992), and failure to observe state procedural rules, including filing deadlines, see Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); [Murray v.] Carrier, 477 U.S. [478, 495-496 (1986)].
>
> The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage. In Calderon v. Thompson, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998), we applied the exception to hold that a federal court may, consistent with AEDPA, recall its mandate in order to revisit the merits of a decision. Id., at 558, 118 S. Ct. 1489, 140 L. Ed. 2d 728 ("The miscarriage of justice standard is altogether consistent . . . with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence."). In Bousley v. United States, 523 U.S. 614, 622, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998), we held, in the context of § 2255, that actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review. Most recently, in House [v. Bell, 547 U.S. 518, 537-538 (2006)], we reiterated that a prisoner's proof of actual innocence may provide a

> gateway for federal habeas review of a procedurally defaulted claim of constitutional error.
>
> These decisions "see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." Schlup [v. Delo, 513 U.S. 298, 324 (1995)].

McQuiggin v. Perkins, 133 S. Ct. 1924, 1931-1932 (2013) (some citation omitted).

As McQuiggin demonstrates, this Court has created no equitable exception where Petitioner makes no credible showing of actual innocence. As found by the Eleventh Circuit in denying request for file a successive federal petition, "Johnson's 'newly discovered evidence' is patently insufficient in light of the wealth of evidence proving guilt." Johnson v. Warden, Case No. 5:15-CV-173 (11th Cir. Nov. 19, 2015), p. 17.

CONCLUSION

This Court should deny Petitioner's petition for a writ of certiorari and his request for a stay of execution.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed the within and foregoing RESPONSE, with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

Brian Kammer
Brian.kammer@garesource.org

This 19th day of November, 2015.

s/Beth Burton___________________
BETH BURTON
Deputy Attorney General