No. 07-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2007

WILLIAM EARL LYND,

Petitioner,

-v-

HILTON HALL, Warden
Georgia Diagnostic Prison,

Respondent.

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

CAPITAL CASE: EXECUTION SCHEDULED FOR 7:00 PM, MAY 6, 2008

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QUESTIONS PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

The State's case for death hinged on the testimony of a non-physician "medical examiner" whom the prosecutor referred to as "Doctor." That testimony has now been shown to have "no basis in medical science" and to be "patently erroneous."

> Can eligibility for the death penalty ever be based on "materially inaccurate" junk science?

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Petitioner, William Earl Lynd, respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of Georgia, entered in the above case on May 6, 2008.

OPINIONS BELOW

The decision of the Supreme Court of Georgia, entered May 6, 2008, denying Petitioner's request for a certificate of probable cause to appeal from the denial of habeas corpus relief, is unpublished. A copy of the decision is attached hereto as Appendix A. The state habeas court's May 1, 2008, decision upheld by the Supreme Court of Georgia is unreported and attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia denying Petitioner's appeal from the denial of state habeas relief was entered on May 6, 2008. See Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and United States Supreme Court Rule 10(c), Petitioner asserting a deprivation of his rights to due process and freedom from cruel and unusual punishments secured by the Constitution of the United States, and the Supreme Court of Georgia having resolved his claim in contravention of this Court's precedent.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. "No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property without due process of law...." U.S. Const. amend. V. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...." U.S. Const. amend. VI. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV §1.

STATUTORY PROVISIONS INVOLVED

O.C.G.A. 17-10-30(b)(2): "The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree."

PROCEEDINGS BELOW

A. Statement of Facts

Petitioner, William Earl Lynd, is currently under sentence of death in Georgia for the murder of Virginia "Ginger" Moore on or about December 22, 1988, in Berrien County, Georgia. Petitioner was also convicted of kidnapping with bodily injury. He was sentenced to death on the basis of two statutory aggravating circumstances: that the murder occurred in the course of a kidnapping with bodily injury and in the course of an aggravated battery. O.C.G.A. § 17-10-30(b)(2).

The basis for the kidnapping charge and corresponding aggravating circumstance was the testimony of Warren Tillman, a biochemist who was not a medical doctor or any other kind of doctor, but whom the prosecutor repeatedly referred to as "Dr." Tillman. T. 1614, 1616, 1627. claimed that Ms. Moore could have suffered a lingering, torturous death in the trunk of her car, culminating in a final, cold-blooded shot to the head by Mr. Lynd. See T. 1618-28. The State used Tillman's unrebutted "expert" testimony, as well as Mr. Lynd's unreliable confession, as the basis for its argument to the jury:

> We don't know how much time passed between the first shot and second shot, second shot and third shot, but some time passed. He drove several miles to get there.... There was some period. He carried her against her will, and then she's alive, there is a flutter of hope. Let's say he killed her accidentally. There's a flutter of hope. She's alive, my God! The person I love is alive. I can save her. Rush her to the hospital." But he's angered. He's angry because she's thumping. And you wonder was it a little thump? Was it a (indicating) like that or just a thump every now and then or ramming, "Let me out of here'? We don't know. But it's chilling to think that the woman he loved, that he came out of the car, threw open the trunk and shoots her again....
>
> And I wonder and I want you to wonder, when he opened the trunk before the third shot, did she plead with him not to shoot her? Was she able to speak a

> spoken word to say, "Please, don't"? Or was she able to reach out with her hand for help as if to say, "Please, please, don't." Was she able to open her eyes and to look at him with those big brown eyes that you'll see in the picture that ate alive, that are bright? Was she able to look out with those big brown eyes of hers, though she couldn't move her arms, though she couldn't speak, and plead for him, "Please, don't." The last vision she had of the man she loved was poised in the dark in a desolate area with a gun pointing at her head. What did Earl say as he squeezed the last shot, the third shot, into her skull? He was angry with her for thumping in the trunk, thumping. Merry Christmas, Ginger, Merry Christmas.

T. 2208-09, 2212. The jury convicted Mr. Lynd of murder and kidnaping with bodily injury, and sentenced him to death.

The Georgia Supreme Court, having reviewed a record featuring no rebuttal to Mr. Tillman's testimony, found that "[t]he evidence is persuasive that [Ms. Moore] regained consciousness and vigorously protested her confinement in the trunk of her car before Lynd shot her a third time and killed her." Lynd v. State, 262 Ga. 58, 60 (1992).

B. Procedural History

Mr. Lynd was convicted of murder and kidnaping with bodily injury and thereafter sentenced to death in the Superior Court of Berrien County on February 27, 1990. The Supreme Court of Georgia affirmed Mr. Lynd's convictions and sentence of death on February 27, 1992. Lynd v. State, 262 Ga. 58, 414 S.E. 2d 5 (1992). A timely filed Motion for Reconsideration was denied on March 18, 1992. Mr. Lynd timely filed a Petition for Writ of Certiorari in this Court that was denied on November 2, 1992. Lynd v. Georgia, 506 U.S. 958 (1992).

Mr. Lynd filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County on December 20, 1995. On January 14, 1998, the Superior Court denied Mr. Lynd's habeas petition. A timely filed Application for a Certificate of Probable Cause to Appeal was filed in the Supreme Court of Georgia on April 17, 1998. The Supreme Court of Georgia denied Petitioner's Application on September 11, 2000. Petitioner's Motion for Reconsideration was

denied on October 6, 2000. Mr. Lynd's Petition for Writ of Certiorari was denied by this Court on June 18, 2001. Lynd v. Turpin, 533 U.S. 921 (2001). A timely filed petition for rehearing was denied on August 27, 2001. Lynd v. Turpin, 533 U.S. 971 (2001).

Mr. Lynd filed a Petition of Writ of Habeas Corpus in the Federal District Court for the Middle District of Georgia on October 5, 2001. On October 31, 2005, the District Court entered an order denying all relief. The Court then denied Petitioner's timely filed Motion to Alter and Amend on November 16, 2005. Petitioner appealed to the Eleventh Circuit Court of Appeals, and his appeal was denied on November 28, 2006. Lynd v. Terry, 470 F.3d 1308 (11th Cir. 2006). A timely filed Petition for Panel Rehearing was denied on February 1, 2007.

On April 22, the Superior Court of Berrien County issued a warrant setting a window for Mr. Lynd's execution opening May 6, 2008 and extending until May 13, 2008. On April 25, 2008, Mr. Lynd filed a second petition for writ of habeas corpus and a motion for stay of execution in the Superior Court of Butts County, Georgia. The court granted Respondent's motion to dismiss the petition and deny the stay motion on May 1, 2008. See Appendix B. On May 5, 2008, Mr. Lynd filed a motion for stay of execution and an application for certificate of probable cause to appeal the denial of habeas relief in the Supreme Court of Georgia. The Supreme Court of Georgia denied his application on May 6, 2008. This petition follows.

STATEMENT OF THE CASE

A. The State's Theory of the Case at Trial

Mr. Lynd lived with his girlfriend, Ginger Moore, in her home in Berrien County. After Ms. Moore's death, Mr. Lynd surrendered himself at the Berrien County Sheriff's Office. His confession thereafter was the foundation of the State's case, along with the testimony of medical examiner Warren Tillman. The GBI report memorializing Mr. Lynd's statement concluded:

> Lynd was very emotional at times during the interview and it was obvious that he was having difficulty in discussing the assault on Ginger Moore. . . . Lynd stated that his memory of the shooting of Moore was very painful to recall and that ***he was having trouble remembering everything that happened***.

Appendix E, GBI Report of Mr. Lynd's Statement (emphasis supplied).

According to the GBI, late afternoon on December 23, 1988, Mr. Lynd and Ms. Moore drove to a nearby lake. Their car got stuck, but with help got the car out. They returned home and "[e]verything was great between us at that time." Once home, Ms. Moore "started acting crazy saying she wanted to go to Florida to see her friend Tammy." Mr. Lynd did not understand the relationship between Ms. Moore and Tammy, so they argued about going to Florida. Mr. Lynd "did not initially remember Lamar Eason coming by that house that night." Upon questioning, Lynd recalled that he and Ms. Moore stopped arguing "because we were fixing to go to bed and have sex when someone knocked at the door." He put on Ms. Moore's bathrobe, answered the door and told Eason to come back tomorrow. Id.

After Eason left, Mr. Lynd and Ms. Moore argued again about going to Florida and Mr. Lynd gave in. He didn't recall when they left, but recalled they forgot the gifts for Tammy and her child from under the Christmas tree. They drove south on I-75 almost to I-10 when Ms. Moore decided to return home. While driving north on I-75, Ms. Moore said to check the oil because of an oil pan leak. Mr. Lynd checked the oil, closed the car hood, and then Ms. Moore

> accelerated and tried to run me over. Ginger continued driving off so I walked across the interstate and while doing so Ginger came back by in the car and almost ran me down. I walked up the embankment on the interstate where I sat down and a short time later Ginger came back by calling my name. After talking with Ginger I got back in the car and everything seemed all right.

Id. However, they began arguing again and continued until arriving home. Mr. Lynd let Ms Moore out then drove for cigarettes, hoping that Ms. Moore would be asleep when he got home.

She was still up on his return and the arguing continued. At some point, Ms. Moore "began hitting me on my chest like she usually does." While in the bedroom, Ms. Moore hit Mr. Lynd in the face. He remembered having a gun in his hand, a two shot Derringer pistol, and he shot Ms. Moore and she fell backwards on the waterbed. He then went out to smoke a cigarette on the front porch. Shortly later, Ms. Moore came up behind him, jumping on his back. Mr. Lynd "didn't even get up I just brought the gun around which was in my right hand over my left shoulder and shot one time and she fell down." Id.

Mr. Lynd was concerned a neighbor heard the shot. He reported that he placed Ms. Moore's body in the trunk of her car. He was scared and needed time to think. He drove out to a field to think about what he should do. He woke up and heard Ms. Moore thumping around in the trunk. He opened the trunk and shot her a third time. Id.

Mr. Lynd returned home with Ms. Moore's body in the trunk. He cleaned up the blood in the bedroom with sheets, pillows and towels, which he then put in the car. He said he drove north on I-75, but he couldn't remember what route he took to I-75 or actually getting on to I-75. His next memory was waking up parked on I-75. He had no idea how long he had been there. He did remember "checking the trunk to see if Ginger was there and she was and I became concerned and immediately drove to the very next exit" around Tifton. Mr. Lynd found a farm shed with a shovel inside and buried Ms. Moore and the bloody items. Based upon a description of the farm provided by Mr. Lynd, Ms. Moore's body was located. Id.

Ms. Moore's car was found in Florida where Mr. Lynd reported abandoning it. Blood of the AB type, Ms. Moore's blood type, was discovered in the trunk, on the rear tail light, and in the front passenger compartment of the car. Mr. Lynd reported that he sold the gun he had shot Ms. Moore with to a man in a bar in Ohio. The man, Mr. Blevins, was located and confirmed

Mr. Lynd's story. T. 1784-90. Ballistic tests confirmed that the bullets taken from Ms. Moore were fired from the weapon. T. 1639-40.

Warren Tillman, a medical examiner – but not a physician or doctor of any kind[1] -- conducted the autopsy. He testified that: the first shot fired into the victim's face was not fatal; the second shot entered her brain, but the victim would have been able to regain consciousness and move her arms and legs; and even after the third shot, the victim may have been able to achieve consciousness for a period of time prior to her death. T. 1618-28.[2]

In closing argument, the Prosecutor described the crimes as tortuous, vile, inhumane and black-hearted, accusing Mr. Lynd of perpetrating a prolonged, torturous crime culminating in the burial of Ms. Moore in the ground while still alive:

> The State contends that the killing, the murder of Ginger Moore was done over the course of a time period. It was not the three quick shots that ended her life . . . and we don't know then if death was instantaneous. How long she lived. . . Did she live from that home to the spot where he went to sleep on I-75? Did she live from that spot after he waked up to the point that he put her in the ground behind the old shed? Was she dead at the time that he put her in the ground?

T. 2362.

The Georgia Supreme Court, having reviewed a record featuring no rebuttal to Mr. Tillman's testimony, found that "[t]he evidence is persuasive that [Ms. Moore] regained

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[1] Mr. Tillman is not a medical doctor nor does he hold a doctorate degree. Rather, he has a Master's Degree in Biochemistry. T. 1614-15. Respondent erroneously referred to Mr. Tillman as "Dr. Tillman" in the Appellee's Brief on direct appeal before the Georgia Supreme Court.

[2] Mr. Tillman's testimony was lent the appearance of medical authoritativeness by the Prosecutor's repeated reference to Tillman as "Dr. Tillman," even though Tillman was not a physician or any other kind of doctor. See, T. 1614, 1616, 1627. In fact the Prosecutor, knowing Tillman was not a doctor, began his examination of Tillman by saying, "Dr. Tillman, tell the jury who you are and what you do." T. 1614. Neither Tillman nor the Prosecutor ever corrected the misimpression that Tillman was a doctor

consciousness and vigorously protested her confinement in the trunk of her car before Lynd shot her a third time and killed her." Lynd v. State, 262 Ga. 58, 60 (1992). Nothing could be more prejudicial than such a scenario – and nothing could be further from the truth.

We now know that the State's theory of this case, as well as this Court's previous finding, "has no basis in medical science," is inconsistent with the physical evidence and that Ms. Moore died within seconds of being shot on her front porch. See Appendix H (affidavit of Dr. Brian Frist) at 4; Appendix I (affidavits of Robert Tressel).[3] In short, the science and the facts establish that the State's theory of the crime is not just "materially inaccurate,"[4] but in fact altogether impossible. This crime was hot blooded and without premeditation. It was fueled by substance abuse, repeated fights with Ms. Moore, and her assault on Mr. Lynd. Tragic – yes. Cold blooded – no.[5] Mr. Lynd's conviction and death sentence thus rest on constitutionally unreliable "junk science" testimony by a fake "doctor," and should therefore be vacated.

B. The State's Theory of the Crime is Without Scientific, Evidentiary or Factual Support.

Mr. Lynd is innocent of the kidnaping of Ginger Moore, as well as the aggravating circumstance that this murder was committed while the offender was engaged in another capital felony, kidnaping with bodily injury. Contrary to the State's case, Ms. Moore was not alive when she was placed in the trunk of the car and she was not alive in the trunk of the car when

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[3] Exhibits attached to the state habeas petition below are referenced as "Ex. __." Exhibits attached to this application will be referenced as "Appendix ___." References to the first state habeas corpus evidentiary hearing are "H.T. __."

[4] Johnson v. Mississippi, 406 U.S. 578 (1988).

[5] See Appendix J (affidavit of Dr. Kimberly Ackerson); Appendix E (GBI materials – Exhibit 3, 41); Appendix G (affidavit and report of Dr. Fabio Cabrera-Mendez); Appendix F (affidavit and report of Robert Church).

shot a third time. The State's theory was based upon Mr. Lynd's unreliable statement and Tillman's materially inaccurate "junk science" testimony.

1. Dr. Frist's testimony directly contradicts that of fake "doctor" Warren Tillman.

In proceedings below, Respondent contended that Tillman's testimony "allows for the same scenario posed by Mr. Lynd's current expert, Dr. Brian Frist, i.e., that the victim 'may never have gained consciousness after the second shot.' (Trial Transcript, p. 1633)." Motion to Dismiss Petition for Writ of Habeas Corpus at 4. In fact, Tillman's opinion testimony is the *exact opposite* of Dr. Brian Frist's opinion. Tillman testified that a) the first shot which entered Ms. Moore's brain was "***not an instantaneous type of death wound*** . . . a person can live for some period of time" (T. 1626); b) it was ***possible*** for the victim "to regain consciousness from a wound to the cerebral hemispheres [of the brain]" (T.1627);[6] and c) that Ms. Moore could have been conscious of pain and moved her arms and legs after being shot in the brain and put in the truck of the car. T. 1627-28.[7] Tillman was asked: "Would they hypothetically be able to – if

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[6] Tillman was asked "If a person was shot in the face as you examined this person, and was subsequently shot under the left ear one time, would they be dead then?" He responded: "It's going to take some period of time. I've had cases that I'm aware of where a person has shot themselves in the cerebral hemisphere, regained consciousness, and then shot themself in the head again in a suicide attempt. So, you have a situation where it's possible to regain consciousness from wound to the cerebral hemispheres." T. 1627.

[7] Tillman was asked: "Dr. Tillman, if a person was shot in the face and shot one time as you've described under the left ear, would that person, if loaded in the truck of a car, be able to move their arms and legs?" He responded: "It's possible that – initially you would think that an individual, and I think that majority of the cases the person that's shot like that this is going to be unconscious for some period of time. It may be a minute, it may be five minutes, but generally you think this type of wound is going to cause unconsciousness, although it's possible that they wouldn't be unconscious even from the wound initially. But, again, if they regain consciousness form a wound like this, it's my opinion, yes, they can have movement of their extremities." T. 1628.

placed in the trunk of an automobile, be able to thump on the side of the lid or thump on the side, make noise, that much force?" He answered: "I think that is possible, yes, sir." T. 1628. On cross-examination, trial counsel asked Tillman: "Isn't it true that in a majority of cases from bullet wounds in the side of the head as you've described, the victim never regains consciousness?" Tillman answered: "If you want to say the majority is 51 percent, I'd say that's probably true, yes sir." T. 1633. He admitted that it was possible Ms. Moore never regained consciousness (id.) and that nothing from the autopsy indicates that she regained consciousness. T. 1636.

In federal habeas proceedings, Mr. Lynd's counsel retained Brian Frist, M.D., an eminently qualified and licensed physician and pathologist who reviewed materials relating to the injuries and death of Ms. Moore. See Appendix H (affidavit of Dr. Brian Frist). Dr. Frist opined that the first gunshot wound to Ms. Moore's cheek was neither fatal nor necessarily resulted in unconsciousness. Id. at 2. As to the second and third shots, which hit Ms. Moore's brain, Dr. Frist opined, contrary to Tillman, that it was ***"medically impossible*** that Ms. Moore may have regained consciousness from either of these two wounds [to the brain]" and that either shot to the brain would, in fact, have caused virtually instantaneous death. Id. at 4. Dr. Frist explained that the first shot to the brain (the second of three total shots):

> immediately resulted in brain death and caused a cessation of all life processes most likely within a matter of seconds but certainly no longer than within a minute and a half.

Id. at 2.

Moreover, Dr. Frist's testimony renders impossible the scenario enabled by Tillman's outlandish testimony, where Ms. Moore could have been struggling inside the trunk of the car and then been killed by a third and final shot:

> The trajectory of both of these gunshots to Ms. Moore's head are essentially identical, and nothing about the characteristics of either wound supports even a remote possibility that Ms. Moore could have somehow survived the first of these two shots -- even for a brief amount of time -- but then be killed by the second of the shots she sustained to this same location behind her left ear....
>
> ***Contrary to Mr. Tillman's testimony about these injuries, it is medically impossible that Ms. Moore may have regained consciousness from either of these two wounds.*** Quite simply, Ms. Moore was instantly incapacitated, rendered unconscious and incapable of any movement due to massive trauma to the brain. Her death followed with extreme rapidity. Indeed, Mr. Tillman notes in his autopsy report at page 5 that one of the gunshots sustained behind Ms. Moore's left ear struck the stella turcica (the base of the brain) and then glanced posteriorly into the left cerebral hemisphere. An injury such as this to the base of the brain immediately caused significant swelling and a concussive effect. By its nature, this is simply not an injury from which Ms. Moore could ever have revived. By this same accord, there is no medical possibility that Ms. Moore was alive at the time she was placed in the car trunk. Nevertheless, the prosecutor's questioning of Mr. Tillman at Mr. Lynd's trial and subsequent closing arguments offered a theory that Ms. Moore was alive at the time she was placed in the trunk and physically struggled for her freedom. ***This theory has no basis in medical science and Mr. Tillman's testimony as to the possibility of a lingering death from either of these wounds is patently erroneous.***

Appendix H at 3, 4 (emphasis supplied).

2. The Crime Scene Physical Evidence is Inconsistent with the State's Theory.

Robert Tressel, a forensic and crime scene expert with over 27 years experience in criminal investigations and over five hundred homicide scenes processed and examined, reviewed the investigative files in this case and opined that ***"the totality of the evidence supports the scenario that Mr. Lynd fired two shots in rapid succession causing wounds Nos. 2 and No. 3 to the left side of Ms. Moore's head."*** Appendix I (first affidavit) at ¶ 11. According to Mr. Tressel, the first non-fatal wound "is consistent with Mr. Lynd's statement that he first shot Ms. Moore when she assaulted him in the bedroom and struck him in the face. He reported that she fell back on the bed wounded and that he left her there. This is consistent with the items of

bedding with blood on them recovered in Dooly County." Id. at ¶ 8. Mr. Lynd told his brother that he then went out to the front porch and contemplated suicide. Id. at ¶ 9. Mr. Tressel opined that a "shell casing recovered on the front porch near the front door" is consistent with "Mr. Lynd remov[ing] the spent shell casing from the derringer and reload[ing] the derringer to shoot himself." Id. According to Mr. Lynd, Ms. Moore came up behind him, jumped on his back and he "didn't even get up I just brought the gun around which was in my right hand over my left shoulder and shot." Id. at ¶ 10. Mr. Tressel opined that "the totality of the evidence supports the scenario that Mr. Lynd fired two shots in rapid succession causing" the two fatal wounds which "are virtually overlapping and the angle of both wounds are the same." Id. at ¶ 11. He finds these wounds ***"forensically consistent with Mr. Lynd's statement, i.e, he shot Ms. Moore over his left shoulder after she attacked him from behind on the front porch."*** Id. at ¶ 10 (emphasis supplied). He also points to the "two additional spent shell casings . . . recovered from the ground to the side of the front porch, consistent with three total shots being fired at the residence." Id. at ¶ 11. Finally, Mr. Tressel agrees with Dr. Frist that Ms. Moore was dead when she was placed in the trunk of the car based on the small amount of blood on the front porch and in the car. Id. at ¶ 12. He further explained:

> If Ms. Moore had been alive and struggling, one would expect to see multiple violent blood smears throughout the trunk, and, indeed, a far larger amount of blood than is seen in the photos or reported in the testimony and records.
>
> Moreover,... if Ms. Moore had been shot, while alive, in the trunk, one would expect to see ample photographic evidence of high-velocity blood spatter throughout the trunk, as well as reports of same by the crime scene technician. In short, the trunk area, which features four small transfer stains of blood, is forensically completely *inconsistent* with Ms. Moore having been alive in the trunk and then shot a third time in the head.

Appendix I (second affidavit) at 1-2.

Simply stated, the State's theory of the crime is without scientific and evidentiary support. Qualified forensic experts could have shown that the most aggravating and inculpatory portions of Mr. Lynd's confession, as well as the testimony of Warren Tillman, are totally inconsistent with the forensic evidence. Mr. Lynd's memory of the events as recounted to the GBI agents is simply unreliable as a result of the drug use, lack of sleep and emotional trauma surrounding the death of Ms. Moore. Mr. Tillman's testimony, by the same token, is unreliable, "junk science." The jury was severely misled about the manner and timing of Ms. Moore's death, and thereby deprived of significant and compelling evidence which dramatically changes the nature of the crime and lessens Mr. Lynd's culpability. Without this evidence, the jury could not reliably judge Mr. Lynd's legal culpability nor accurately assess his moral blame.

3. Mr. Tillman Now Agrees that Ms. Moore's Heart Was Most Likely Not Pumping When Put In the Trunk.

Tillman was recently interviewed regarding his autopsy of Ms. Moore and was shown crime scene photographs from Moore homicide investigation for the first time. Based on those photographs, he made the following addition to his previous findings:

> I never saw any crime scene photos prior to my testimony and I was never asked about any by the prosecution or defense counsel when testifying. I have reviewed photographs of the car reported to have transferred Ms. Moore's body to Tift County. (Attachment 1-4). As a medical examiner, these photographs tell me that Ms. Moore was probably dead when she was put in the trunk of the car. If Ms. Moore's heart was still pumping there would heave (sic) been a significant amount of blood in the truck of the car. Injuries to the head bleed profusely when the heart is still pumping. The only blood in the trunk appears to be minimal contact transfer stains. Based on these photos, ***I believe that Ms. Moore's heart was most likely not pumping when she was put in the trunk of the car.***

Appendix K at ¶ 6.

4. Mr. Lynd's Memory of the Events Is Unreliable.

The most aggravating and inculpatory portions of Mr. Lynd's confession are inconsistent with the forensic evidence. His memory of the events is clearly unreliable. Indeed, after reviewing materials related to Mr. Lynd's confession, the crime and his life history, forensic psychologist Kimberly Ackerson found clear indications and specific reports that Mr. Lynd had been experiencing emotional distress, had consumed alcohol, and had been without substantial sleep for twenty-four hours prior to the custodial interrogation. Appendix J (affidavit of Kimberly Ackerson, Ph.D.). She opined that heightened emotional distress, alcohol intoxication and withdrawal and fatigue "raise serious concerns about the accuracy and reliability Mr. Lynd's memory and ability to recall the incidents surrounding the crime." Id. at ¶ 5. Dr. Ackerson's review of the evidence raises "serious concerns about [Mr. Lynd's] mental state at the time of the shooting and thereafter," consistent with the expert opinions of Dr. Frist and Mr. Tressel. Id. at ¶ 15.

Specifically, Dr. Ackerson noted as significant the following: "substantial and extensive conflict between Mr. Lynd and the victim in the hours immediately prior to the offense" (Appendix J at ¶ 14); Mr. Lynd's use of Valium prior to the crime which "reduces executive functioning, e.g., judgment and produces a strong state of emotional disinhibition" (id.); observations of Mr. Lynd on the day of the crime that he was "pretty upset," "crying," "confused," and "baffled;" and that "a week following the shooting incident Mr. Lynd continued to present as emotionally distressed and such distress was particularly prominent during his recall of the specific incident." Id. at ¶ 13. Dr. Ackerson found that "[c]learly, Mr. Lynd's state of mind immediately around the time of the offense was one of heightened emotionality and such emotionality was atypical for him." Id. Dr. Ackerson concluded that an adequate understanding

of Mr. Lynd's alleged criminal behavior and his mental state at the time of the crime would require a comprehensive forensic evaluation, which had never been done. As Dr. Ackerson reported the available evidence raises "serious concerns about [Mr. Lynd's] mental state at the time of the shooting and thereafter." Id. at ¶ 15.

There is simply no credible dispute that the testimony of an actual medical doctor that Ginger Moore was killed instantly and could not have revived after the first shot to the head would have substantially rebutted or even prevented Warren Tillman's misleading and damaging testimony and the prosecutor's misleading argument, and thereby markedly improved Mr. Lynd's chances for a manslaughter or non-death verdict. There is easily a reasonable possibility that the false and misleading testimony and argument impacted the jury's deliberations, and there is more than a reasonable probability that the outcome of sentencing would have been different had the testimony of a real forensic pathologist and crime scene expert been deployed to confront the State's witnesses with this compelling and material evidence. United States v. Bagley, 473 U.S. 667, 674 (1985). This Court can have no confidence in the reliability of Mr. Lynd's death sentence, predicated as it was on what we now know to be materially inaccurate and highly prejudicial evidence and argument. Johnson v. Mississippi, 108 S.Ct. 1981 (1988). Reversal of Mr. Lynd's death sentence is warranted.

C. Within Months of Mr. Lynd's Trial, Warren Tillman Lost His Qualification to Perform Autopsies for the State of Georgia.

In proceedings below, Respondent claims that Warren Tillman was duly qualified to testify as to the manner and timing of Ms. Moore's death. Response in Opposition to Application for CPC at 12. However, shortly after Mr. Lynd's trial, Tillman was disqualified from performing autopsies in Georgia by a change in the law prompted by concerns that

unqualified coroners and medical examiners were issuing unreliable findings as to cause of death.

The peril of having non-physician state advocates perform autopsies and testify to critical issues with respect to time and manner of death is most acute in a capital context where the tolerated margin of error with respect to fact-findings is lowest. The peril in Mr. Lynd's case turned into actual harm — Warren Tillman was wrong, the jury and this Court relied upon him, and no other person in the country would be sentenced to death on the basis of such testimony. As the testimony of Dr. Frist and Mr. Tressel confirm, Tillman's opinion is not reliable. Under these circumstances, a new sentencing is required.

Tillman's opinion ought not to provide the basis for executing Mr. Lynd. Having non-physicians conduct autopsies and testify with respect to cause and time of death has caused great controversy in Georgia and led to reform — reform which came too late for Mr. Lynd.[8] Even more problematic was the policy of allowing non-physicians from the state crime lab to conduct autopsies and testify for the state in criminal prosecutions.[9] Because of the clear potential for

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[8] See "Getting Away With Murder," The Atlanta Constitution, June 4, 1989 ("'Georgia is the only state in the country and the only jurisdiction in the western world that allows non-physicians to do autopsies."); "Critics advocate death of Georgia Coroner System." The Atlanta Constitution, August 15, 1988, Al ("'The coroner system in this state should have gone out with the horse and buggy."); "Experts Urge lawmakers to Revamp Coroners System," The Atlanta Constitution, September 14, 1989, C1 ("Besides an autopsy, death scene investigations--and standards for conducting them--need to be adopted in Georgia, the experts told legislators.").

[9] "The freedom of forensic pathologists to present their findings in court — whether in favor of the defense or the prosecution — is at the heart of the debate over a bill that would change Georgia's system of death investigation.... Georgia remains the only state in the nation that allows non-physicians to perform autopsies.... National model standards for medical examiners indicate that, ideally, those who perform autopsies should be free from any political pressure." "Question of control dominates bill to upgrade coroners system," The Atlanta Constitution, September 12, 1990, E3. Problems of non-independence and bias arise when the witness about cause and time of death is a Georgia Bureau of Investigation employee. Id.

unreliable autopsy findings and other abuses, the Georgia Death Investigations Act was passed during the 1990 legislative session, after Mr. Lynd's trial ended in February 1990. See O.C.G.A. § 45-16-20 et. seq. The Act requires that autopsies be performed by medical examiners who are licensed physicians, like Dr. Brian Frist. Thus, had Ms. Moore's death occurred a few years later than it did, a competent physician would have provided conclusions about the manner and timing of Ms. Moore's death which would likely have ruled out the death penalty for Mr. Lynd.

The arbitrariness and unreliability of the process employed to determine that Mr. Lynd was guilty of malice murder and aggravated kidnaping and deserved the death penalty thus violated the Mr. Lynd's right to due process of law and to be free from cruel and unusual punishment, guaranteed by both the United States and the Georgia Constitutions. The State of Georgia is the only jurisdiction in the western world which would allow a conviction and death sentence based upon the flawed and incorrect testimony provided by the State's expert in this case. Plainly Georgia is out of step, is wrong, and is poised to execute a person whose guilt and eligibility for death was unfairly and wrongly determined. The Constitution should not tolerate horse and buggy justice. Trop v. Dulles, 78 S.Ct. 590 (1958).

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Mr. Lynd's claim under Johnson v. Mississippi, 108 S.Ct. 1981 (1988) and related precedent was raised in his petition for writ of habeas corpus filed in the Superior Court of Butts County, Georgia. Upon denial of the petition by the state habeas court on May 1, 2008, Mr. Lynd raised the claim in his Application for Certificate of Probable Cause to Appeal in the Supreme Court of Georgia, which denied the Application on May 6, 2008.

REASONS WHY THE PETITION SHOULD BE GRANTED

There are substantial reasons why this petition should be granted. As discussed herein, the new evidence would have dealt a devastating blow to the State's theory of the case and very likely prevented the State from mounting as effective a case for the death penalty as it did. The new evidence not only establishes that Mr. Lynd is innocent of the kidnapping of Ginger Moore, but also that her death was the product of an impulsive act which was instantaneously fatal, in contrast to the State's grisly scenario depicting Ms. Moore's prolonged ordeal. The new evidence demonstrates that Mr. Lynd's death sentence was predicated upon the "materially inaccurate" junk science testimony of Warren Tillman, who, abetted by the prosecutor, pretended to be a medical doctor in order to lend his dubious conclusions the weight and authority of actual medical opinion. Johnson v. Mississippi, 108 S.Ct. 1981 (1988). This Court is Mr. Lynd's last hope of having the opportunity to provide a jury with all of the material facts before it determines his fate.

ARGUMENT

Where the Factual Basis for a Statutory Aggravating Circumstance is Shown to be Materially Inaccurate, the Death Sentence is Rendered Constitutionally Unreliable.

Mr. Lynd is innocent of the kidnaping of Ginger Moore, as well as the aggravating circumstance that this murder was committed while the offender was engaged in another capital felony, kidnaping with bodily injury. Contrary to the State's case, Ms. Moore was not alive when she was placed in the trunk of the car and she was not shot a third time while in the trunk. The State's theory was based upon Mr. Lynd's unreliable statement and Tillman's erroneous "junk science" testimony.

Capital proceedings must be accompanied by all the accoutrements of due process "befit[ting] a decision affecting the life or death of a human being." Ford v. Wainwright, 106 S.Ct. 2595, 2602-03 (1986). It is axiomatic that procedures surrounding the judicial finding of facts which will result in a person living or dying must "aspire to a heightened standard of reliability." Ford, supra, 106 S.Ct. at 2602; see also Eddings v. Oklahoma, 102 S.Ct. 869, 878 (1982) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.") (O'Connor, J., concurring). Mr. Lynd's death sentence is without question completely unreliable.

The determinative issue as to the kidnapping aggravator and the malice murder charge in Mr. Lynd's case was the possibility that the victim lingered long enough to experience being kidnapped and then confronted with a final, cold-blooded shot to the head. The only evidence that the death occurred when the State said it did was Mr. Lynd's unreliable statements and the "expert" testimony of a non-physician employed by the prosecution arm of the State of Georgia. On the other hand, Dr. Frist's and Robert Tressel's testimony on the time of death points to a homicide which occurred in a split second in the heat and chaos of a mutual domestic dispute between Ms. Moore and Mr. Lynd. The process employed by the State of Georgia for determining whether Mr. Lynd was guilty of malice murder and aggravated kidnaping, and deserving of death, was seriously flawed, and the State has no legitimate interest in such a flawed process. Ake v. Oklahoma, 105 S.Ct. 1087, 1094-95 (1985) ("[t]he State's interest in prevailing at trial. . . is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases").

In proceedings below, Respondent argued that even if the b(2) kidnapping statutory aggravator is negated by the new evidence Mr. Lynd has presented, the death sentence still stands because the b(2) aggravated battery aggravator is still supported by the evidence (i.e., the shot to Ms. Moore's cheek). Response at 13-14. This argument, and the Georgia Supreme Court's acquiescence in that argument, contravenes this Court's well-settled precedent which mandates that where the factual predicate for a statutory aggravator which formed the basis for a death sentence is shown to be "materially inaccurate," the death sentence must be vacated even if other aggravators are supported by the evidence. Johnson v. Mississippi, 108 S.Ct. 1981, 1989 (1988); Zant v. Stephens, 103 S.Ct. 2733, 2748 (1983).

All of the cases cited by Respondent in proceedings below (Response in Opposition to Application for CPC at 14) in support of this argument involve statutory construction problems or jury instruction errors which rendered one of the aggravators legally invalid, *but did not otherwise compromise the validity of the evidence presented to the jury.*[10] In other words, the court presumed that the jury would have heard the same evidence at sentencing, regardless of whether some of the aggravators were invalid. See, e.g., Zant v. Stephens, 103 S.Ct. at 2747-49; Stephens, supra, 250 Ga. at 100.

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[10] See Whatley v. State, 270 Ga. 296, 304 (1998) (jury returned verdict imposing death for armed robbery, leaving b(2) armed robbery and b(9) escape aggravators intact); Hill v. State, 263 Ga. 37, 46-47 (1993) (jury returned finding of (b)(7) aggravator in disjunctive, rather than conjunctive, language, leaving intact b(1) prior capital felony aggravator; b(2) aggravated battery aggravator); Burger v. Zant, 718 F.2d 979, 981-82 (11th Cir. 1983) (court erroneously failed to instruct jurors on robbery and kidnapping aggravators, leaving b(7) torture, depravity and aggravated battery aggravator intact); Zant v. Stephens, 250 Ga. 97, 99 (1982) (portion of statutory aggravator found void for vagueness, leaving intact b(1) prior capital felony aggravator; b(9) escape aggravator); Crowe v. State, 265 Ga. 582, 582, 594-95 (1995) (even if trial court had erred in failing to define "maliciously" part of charge on aggravated battery, no harm since b(2) armed robbery, b(4) murder for money, b(7) depravity/aggravated battery aggravators left intact; Lipham v. State, 257 Ga. 808, 813 (1988) (jury found b(7) aggravator in disjunctive, but left intact b(2) armed robbery, rape and burglary aggravators).

In Stephens, this Court reviewed this Court's decision to uphold a death sentence despite the invalidation for vagueness of a portion of one of the statutory aggravators.[11] In affirming the Georgia Supreme Court's ruling, this Court reasoned that since the accuracy and admissibility of the evidence underlying the invalid statutory aggravator were not in dispute, the invalid aggravator merely attached the label of "statutory" to otherwise permissible and accurate aggravating evidence. "Hence the erroneous instruction [on the invalid aggravator] does not implicate our repeated recognition that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.'" Stephens, 462 U.S. at 887-88 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978).

Indeed, in its opinion in the Stephens case, the Georgia Supreme Court also expressed concerns about the reliability of death sentences imposed in cases where the jury could have heard more or different evidence presented in support of an invalidated aggravator: "A different result might have been reached in a case where evidence was submitted in support of a statutory circumstance which was not otherwise admissible, and thereafter the circumstance failed." Zant v. Stephens, 250 Ga. at 100. Mr. Lynd's case presents precisely the kind of scenario which worried both the Georgia Supreme Court and this Court in Stephens.

In Johnson v. Mississippi, 108 S.Ct. 1981 (1988), moreover, this Court encountered the kind of inaccurate factual predicate for a single statutory aggravator which it speculated in Stephens would render a death sentence unconstitutional. In Johnson, the defendant was

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[11] The invalidated aggravating circumstance in Stephens was the portion of the (b)(1) aggravator which required a finding that the defendant have a substantial history of serious assaultive criminal convictions. Stephens, 103 S.Ct. at 2737-38. The Court reasoned that because evidence of the history of prior serious assaults was properly admitted and its accuracy was not challenged, the erroneous jury instruction did not compromise the reliability of the death sentence. Id. at 2748.

sentenced to death on the basis of three aggravating circumstances, "any one of which, as a matter of Mississippi law, would have been sufficient to support a capital sentence." Johnson, 108 S.Ct. at 1984. As to one of the aggravators, the jury found that Johnson "was previously convicted of a felony involving the use or threat of violence." Id. at n.1. However, Johnson had succeeded in reversing that conviction, rendering the factual predicate for the prior conviction aggravator "materially inaccurate." Id. at 1989.

This Court found Johnson's death sentence to be constitutionally unreliable, noting that the prosecutor had "repeatedly"[12] and "vigorously argued [the prior conviction] to the jury as a basis for imposing the death penalty." Johnson, 108 S.Ct. at n.8. The Court found that "even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.'" Id. at 1987 (citations omitted). Thus, the death sentence had to be reversed, even though two other valid statutory aggravating circumstances were left intact:

> [T]he error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider *evidence that has been revealed to be materially inaccurate*.

Id. at 1989 (emphasis supplied). The Court specifically contrasted its decision in Zant v. Stephens as having hinged on the fact that the accuracy of the underlying factual predicate of the aggravator invalidated in that case had not been disputed. Id. at n.9.

Mr. Lynd's case also involves a "materially inaccurate" factual predicate underlying the b(2) kidnapping aggravator, which was argued repeatedly and vigorously to the jury as a basis for imposing the death sentence. Under Johnson v. Mississippi and this Court's decision in Zant

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[12] 108 S.Ct. at 1987.

v. Stephens, his death sentence must be reversed regardless of the fact that the b(2) aggravated battery aggravator may still stand.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari in order to correct the Georgia Supreme Court's erroneous determinations of law and fact.

Respectfully submitted,

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No. 07-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2007

WILLIAM EARL LYND,

Petitioner,

-v-

HILTON HALL, Warden
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by hand delivery on counsel for Respondent at the following address:

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This the 6th day of May, 2008.

Attorney