IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
v.	)	Case No. SU-75-CR-38335
	)	
JOHNNY LEE GATES,	)	
Defendant.	)	
	)	

ORDER ON DEFENDANT'S

EXTRAORDINARY MOTION FOR NEW TRIAL

The facts, absent editorials from each side, are the same from each party. The facts are extracted from trial testimony and subsequent hearings and briefs by both sides in this hearing of May 2018.

STATEMENT OF FACTS

In January 1977, Gates, a black man, was charged with the murder, rape, and armed robbery of Katharina Wright, a white woman. The trial began on August 30, 1977. In the span of three days, Gates was tried, convicted, and sentenced to death by an all-white jury. The trial prosecutors were Assistant District Attorneys from the Chattahoochee Circuit. The Supreme Court of Georgia affirmed Gates's conviction and sentence on direct appeal, *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied *Gates v. Georgia*, 455 U.S. 938 (1980), and Gates sought habeas corpus relief unsuccessfully in state and federal courts, *Gates v. Zant*, 863

F.2d 1492 (11th Cir. 1989), rehearing denied *Gates v. Zant*, 880 F.2d 293 (11th Cir. 1989), cert. denied *Gates v. Zant*, 493 U.S. 945 (1989).

In 1992, following a subsequent habeas petition, the state habeas court found that Gates was entitled to a trial to determine whether he is intellectually disabled and therefore ineligible for the death penalty. That habeas court specifically advised defendant that his claim of discrimination in jury selection was not being decided at that hearing but could possibly be brought after his mental hearing in a proper habeas court. In 2003, the Court conducted an intellectual disability trial. On the seventh day of the intellectual disability trial, the Court declared a mistrial. Later the same day, the State and Gates agreed to remove the possibility of a death sentence, and Gates was sentenced to life in prison without the possibility of parole.

After he was resentenced, Gates filed a series of pro se motions challenging his conviction. In 2015, attorneys from the Georgia Innocence Project entered the case on Gates's behalf and filed an Extraordinary Motion for Post-Conviction DNA Testing and For New Trial. Gates sought DNA testing on two items of physical evidence that were found at the crime scene. The State's files contained documentation indicating that the two items had been destroyed in 1979; however, the items were discovered in the District Attorney's Office in 2015 by Georgia Innocence Project interns. The Court ordered testing pursuant to the Extraordinary Motion for New Trial statute, O.C.G.A. § 5-5-41(c) (2010). *See* Consent Order

Granting Defendant's Motion for Post-Conviction DNA Testing (Dec. 16, 2015); Supplemental Consent Order (Feb. 1, 2017); Second Supplemental Consent Order (Jul. 6, 2017).

On November 27, 2017, Gates amended his Extraordinary Motion for New Trial to include claims concerning: 1) jury discrimination, 2) destruction of evidence, and 3) suppression of evidence. Gates also sought discovery of the prosecution's jury selection notes from the trial.

At a hearing on January 31, 2018, the Court ordered the District Attorney's Office to locate and produce to the defense all of its materials and information concerning jury selection in six capital cases involving black defendants in Muscogee County in the late 1970s. *See* Order Regarding Rulings Made at the January 31, 2018 Hearing (filed Feb. 8, 2018). Pursuant to the Order, the State disclosed its jury selection notes to Gates for the first time on March 2, 2018. Gates then supplemented his Amended Extraordinary Motion for New Trial, and the Court held an evidentiary hearing on May 7 and 8, 2018.

At the evidentiary hearing, Gates called five witnesses and presented thirty-five exhibits. R. 3-4, 218-19.[1] The State called two witnesses and presented seven

[1] "R. __" refers to the designated page of the reporter's transcript from the May 2018 evidentiary hearing transcript; "T. __" refers to the designated page of the transcript from Gates's 1977 trial.

exhibits. *Id.*

The evidence of systematic race discrimination during jury selection in this case is undeniable.

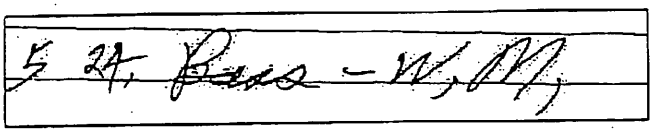
Because Gates's trial took place in 1977, prior to *Batson v. Kentucky*, 476 U.S. 79 (1986), Gates's jury discrimination claim is governed by *Swain v. Alabama*, 380 U.S. 202 (1965). *Swain* requires Gates to show that the State used its peremptory strikes to systematically discriminate based on race *in a pattern of cases*. *Id.* at 223. The ultimate question in a *Swain* inquiry is whether the prosecutors intended to engage in systematic race discrimination. *See Horton v. Zant*, 941 F.2d 1449, 1454-60 (11th Cir. 1991) (finding a *Swain* violation and explaining that "the defendant's goal in demonstrating that the prosecutor struck all or most of the blacks from criminal juries is to enable the court to infer the prosecutor's intent"). When a court is deciding a jury discrimination issue, all of the circumstances that bear upon the issue of racial animosity must be considered. *See id.* at 1459 (approaching a *Swain* analysis with a "broad interpretation of relevance"); *Batson*, 476 U.S. at 93-94 ("Moreover, since *Swain*, we have recognized that a black defendant . . . may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.") (citing *Washington v. Davis*, 426 U.S. 229, 239-42 (1976)); *see also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005)).

The prosecutors clearly engaged in systematic exclusion of blacks during jury selection in this case. They identified the black prospective jurors by race in their jury selection notes, singled them out for peremptory strikes, and struck them to try Gates before an all-white jury. The same prosecutors engaged in the same acts of discrimination in all death penalty trials of black males in Chattahoochee Circuit for the years 1975-1979. The prosecutors then made racially charged arguments to the all-white juries they secured. Based on the evidence presented at the hearing, as detailed below, the discrimination in this case during jury selection was patent. *See Swain v. Alabama*, 380 U.S. 202 (1965); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991); *Timberlake v. Georgia*, 246 Ga. 488, 271 S.E.2d 792 (1980).

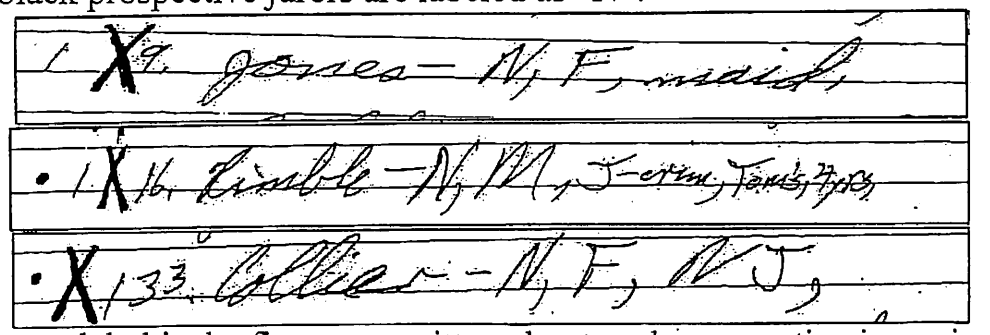
On March 2, 2018, the State turned over to the defense its jury selection notes from Gates's trial, as well as from other capital trials involving black defendants in Muscogee County in the late 1970s. It is uncontested that the Muscogee County District Attorney's Office has been in possession of these notes since the 1970s, with no obligation to give to any defendant absent a proper motion.

The notes support the inference of the prosecutors' practices of race discrimination in jury selection in death penalty cases with Black Defendants in the late 1970s. The notes reflect the following:

First, in Gates's case, the prosecutors labeled the prospective jurors by race. The white prospective jurors are labeled as "W":

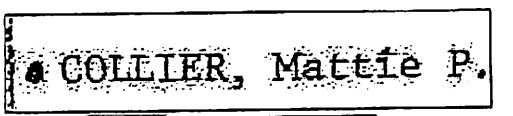


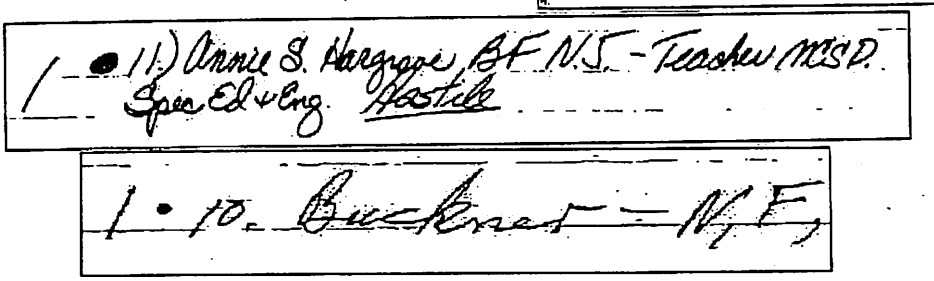
The black prospective jurors are labeled as "N":



This race label is the first note written about each prospective juror, immediately to the right of the jurors' names. In the other cases for which the State produced notes, the prosecutors similarly labeled black prospective jurors with either "N" or "B". These labels were used across multiple cases.

Second, the prosecutors singled out the black prospective jurors by marking dots in the margins next to their names:



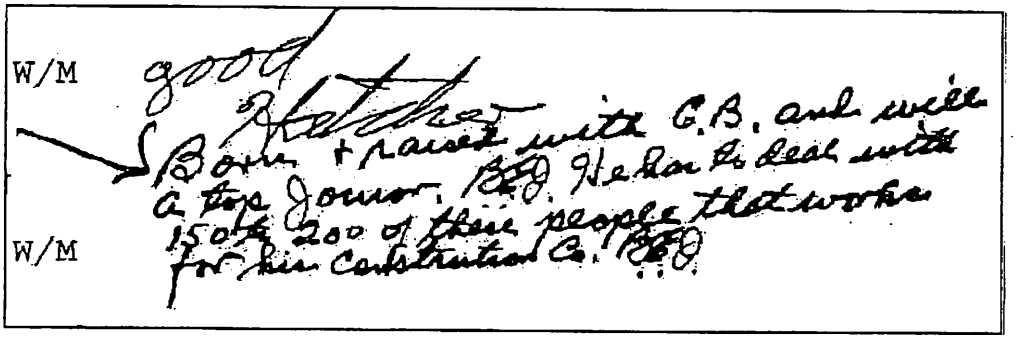


The prosecutors marked dots only for black prospective jurors. As with the "N" and "B" notations, this practice was used across multiple cases, including in Gates's case.

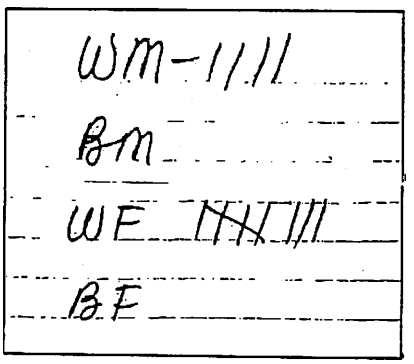
Third, the prosecutors described black prospective jurors as "slow," "old + ignorant," "cocky," "con artist," "hostile," and "fat."

Fourth, the prosecutors routinely ranked black prospective jurors as "1" on a scale of 1 to 5 without any further explanation. In Gates's case, the prosecutors ranked all four black prospective jurors as "1". In contrast, they ranked only one of the 43 white prospective jurors as "1", and they provided a specific explanation for that ranking: the prospective juror was opposed to the death penalty.

Fifth, in the notes from a case involving a 16-year-old black defendant accused of killing a white victim, one prosecutor wrote that a white prospective juror would be a "top juror" because he "has to deal with 150 to 200 of these people that works for his construction co.":



Sixth, in one case, the prosecutors tallied the race of the final jurors selected to serve, with twelve marks in the white column and no marks in the black column:



Taken together, the notes demonstrate a purposeful and deliberate strategy to exclude black citizens and obtain all-white juries. And significantly, both prosecutors from Gates's case wrote notes that reflect intentional discrimination.[2]

The Prosecutors' Strikes Across Cases Confirm the Discriminatory Intent Reflected in the Jury Notes.

The notes do not stand alone. The prosecutors' strikes across the cases confirm the discrimination. Records indicate that from 1975 to 1979, the State brought seven capital cases against black defendants in Muscogee County and struck a total of 41 black prospective jurors. In six of the seven cases, including in Gates's case, the prosecutors removed every black prospective juror to secure all-white juries. In the seventh case, an all-white jury was impossible because the pool of prospective jurors had more black citizens than the prosecutors had strikes.

One ADA was involved in five of the seven cases. In those five cases, the prosecution struck 27 of the 27 black prospective jurors who were qualified to serve. The following chart reflects the strikes in the cases involving this ADA:

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[2] At the May 2018 hearing, Gates presented the testimony of Steven Drexler, a handwriting expert, at the evidentiary hearing. Drexler testified that both ADA authored notes in Gates's case, as well as in each of the other cases for which they were counsel of record matched. R. 195-97.

Case	Qualified jurors called	Jurors struck by prosecution	Qualified black jurors called	Black jurors struck by prosecution	Black jurors on jury
Joseph Mulligan	42	8	4	4	0
Jerome Bowden	45	11	8	8	0
Johnny Lee Gates	47	12	4	4	0
Jimmy Lee Gates	46	11	4	4	0
William Spicer Lewis	42	10	7	7	0

ADA #2 was involved in four of the seven cases. The following chart reflects the prosecution's strikes in the cases involving this ADA:

Case	Qualified jurors called	Jurors struck by prosecution	Qualified black jurors called	Black jurors struck by prosecution	Black jurors on jury
Johnny Lee Gates	47	12	4	4	0
William Brooks	46	11	4	4	0
William Spicer Lewis	42	10	7	7	0
William Henry Hance	37	11	13	10	2

Together, the prosecutors struck 41 black prospective jurors across the seven cases.

The prosecutors' discriminatory intent is further reflected in the closing arguments they made across multiple cases. After securing all-white juries, the prosecutors made racially charged closing arguments. The racially charged arguments spanned across multiple cases, including Gates's case. For example, in the closing argument in *State of Georgia v. Jerome Bowden*, the prosecutor referred to Bowden as a "wild beast" and told the all-white jury, "It took more courage to build this great nation and it will take courage to preserve it, from this man and his like." R. Ex. 18 (Bowden Closing). In several closings, the prosecution employed "us" versus "them" language, R. Ex. 18-21 (Closing Arguments), which is also echoed in the prosecution's own jury selection note stating that a white prospective juror would be a "top juror" because he "has to deal with 150 to 200 of these people that works for his construction co.," R. Ex. 13. In Gates's case, the prosecutor inquired of the all-white jury, "Do you feel as free as you did ten years ago?," referencing the period from 1967 to 1977. T. 591. Accordingly, the closing arguments demonstrate the racial overtones that infected the prosecutions of these black defendants.

The factual matters described above are largely unrebutted. The State offered no rebuttal evidence.

The State argued that Gates should have shown a pattern across more than seven cases. R. 392. The Court rejects that argument. The seven cases addressed

at the hearing represent all of the capital cases tried against black defendants in Muscogee County from 1975 through 1979. That period covers the year of Gates's trial, which was 1977, as well as the two years before Gates's trial and the two years after it. The cases included in this period establish that the prosecution's race discrimination was pervasive and systematic.

Moreover, the ultimate focus of a *Swain* inquiry is the intent of the prosecutors. *See Horton v. Zant*, 941 F.2d 1449, 1454-60 (11th Cir. 1991). Each of the six other cases were tried by one or both of the same prosecutors who tried Gates. Accordingly, these seven cases are pointedly probative as to the prosecutors' practices at the time of Gates's trial. In addition, the evidence of discriminatory intent is overwhelming. Both prosecutors made notes that reflect racial animus in jury selection.

The preceding analysis and Findings of discriminatory intent are necessary to provide Defendant the relief he seeks, but such Finding is not sufficient. Defendant must also satisfy the six prongs required by *Timberlake v. State*, 246 Ga. 488 (1980).

"[T]he procedural requirements for ... [extraordinary motions properly brought before the courts] are the product of caselaw." *Dick v. State*, 248 Ga. 898,899 (1982). The long-standing requirements, pursuant to case law, for granting an extraordinary motion for new trial are set forth in *Timberlake v. State*, 246 Ga. 488 (1980). Under *Timberlake*, Defendant must prove:

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

Id. at 491. "[O]ne who seeks to overturn his conviction for murder many years later bears a heavy burden to bring forward convincing and detailed proof." *Davis*, 283 Ga. at 446. Defendant's failure to meet even one of the requirements under *Timberlake* is grounds for a denial of relief. *See Dick*, 248 Ga. at 900; *see also Timberlake*, 246 Ga. at 491. Application of the rigorous *Timberlake* standard presented during the hearings conducted in this Court, in context of the evidence presented at Defendant's trial and in light of the lengthy post-conviction process pursued by Defendant, demonstrate that Defendant has failed to meet the prong of *Timberlake* requiring due diligence.

Defendant fails to reasonably account for the delay in bringing forth his motion sooner. His "litigation must come to an end." *See Drane v. State*, 291 Ga. 298, 304 (2012). Relief for this Jury Discrimination Issue is Denied.

Evidence of an alleged walk-through prior to Defendant's videotaped confession is not newly discovered.

Under *Timberlake*, to obtain the grant of an extraordinary motion for new trial, Defendant must show that "the evidence has come to his knowledge since the trial."

Timberlake, 246 Ga. at 491. Defendant's current counsel claim that they have recently discovered that Defendant was walked through the crime scene by the Columbus Police Department before he gave his confession that was videotaped there.

The most important witness to both the videotaped confession and any alleged, prior walk-through is Defendant. Evidence of an alleged walk-through, in the nature of things, must have been known to Defendant at trial. *See Ogelsby v. Cason*, 65 Ga. App. 813, 816 (1941) ("Evidence which in the nature of things must have been known to the accused before his trial was ended, cannot after verdict be treated as newly discovered."); *see also Bissell v. State*, 157 Ga. App. 711, 714 (1981) (holding that a ground of a motion for new trial is without merit when it appears from the ground that such evidence must have been known to the defendant before his trial).

"A part of the evidence called newly discovered is not so ... [if the defendant knew of it], and should have informed counsel." *Cobb v. State*, 219 Ga. 388, 391 (1963). "No valid excuse is offered for [Defendant's] failure to disclose his alleged knowledge." *Id.* "There is not attached to the extraordinary motion for new trial any affidavit by the movant, or any affidavit by counsel representing him on his trial, to the effect that they did not know of the matters ... at the time he was tried." *See Hall*, 215 Ga. at 376.

"Such affidavits are essential to an extraordinary motion for new trial where newly discovered evidence is relied on." *See Id.* During his state habeas evidentiary hearing held on September 16, 1980, Defendant testified that he informed trial counsel that Mr. Hicks walked him through the crime scene three times before his videotaped confession. Thus, Defendant fails to show that the facts set forth in this claim "were unknown to [Defendant or trial counsel] before trial." *Ogelsby*, 65 Ga. App. at 816.

The Georgia Supreme Court has repeatedly held that defendants who wait years to bring to the Court's attention evidence either that was known or could have been discovered by reasonable diligence were not entitled to relief. *See Bharadia*, 297 Ga. at 573; *Drane*, 291 Ga. at 304; *Davis*, 283 Ga. at 445; *Llewellyn v. State*, 252 Ga. 426, 428-29 (1984).

On February 10, 2018, almost 41 years after his trial, Defendant procured an affidavit from Mr. Hicks which allegedly reveals that Defendant was walked through the crime scene before his videotaped confession at the same crime scene. "[T]he record reflects no evidence showing that [Defendant] was unable to obtain this evidence prior to trial." *See Bharadia*, 297 Ga. at 573. Mr. Hicks was still employed by the Columbus Police Department at the time of Defendant's trial. (State's Response in Opposition to Defendant's Second Supplement to his Amended Extraordinary Motion for New Trial at Attachment K) He was clearly available to

be called as a witness by Defendant. *See Davis*, 283 Ga. at 445. "[Defendant] has failed to show that he has exercised due diligence in obtaining this new testimony, which was obtained from a witness who was readily identifiable pre-trial." *See Id.* at 446.

"[I]n considering due diligence under *Timberlake*, [the courts] look to the action and inaction of the defendant, including his counsel and defense team." *Bharadia*, 297 Ga. at 543 n.9. This evidence was at least discoverable during Defendant's first state habeas proceedings in 1980. In 2002, during his intellectual disability proceedings, defense counsel alleged that "it's quite possible that when [members of the Columbus Police Department] took [Defendant to Mrs. Wright's apartment] to give his confession, they had put his hand on that heater and that's how his handprint got there." (10-8-2002 Hearing at 49).

Defendant has failed to show any reason for his failure to exercise due diligence in coming forward with this affidavit sooner. This Court finds that Defendant cannot meet the second requirement of *Timberlake*, "that it was not owing to the want of due diligence that he did not acquire it sooner." *Timberlake*, 246 Ga. at 491.

Defendant fails to show that Mr. Hicks's affidavit is not merely impeaching.

Under *Timberlake*, Defendant must also show that his alleged new evidence is not merely impeaching. Defendant fails to satisfy these requirements.

Defendant's trial counsel thoroughly cross-examined Detective Hillhouse and Officer Lawrence regarding a walk-through of the crime scene with Defendant by members of the Columbus Police Department, including Mr. Hicks, prior to Defendant's videotaped confession. Both officers denied the allegation. TT 428-36. Importantly, the focus of the cross-examination was the existence of a prior walk-through during which Defendant's fingerprints were allegedly planted at the crime scene by police. TT 429-36. Therefore, Mr. Hicks's testimony about the existence of the alleged walk-through would merely serve to impeach the credibility of Detective Hillhouse and Officer Lawrence.

The State did not suppress favorable information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *supra.* Hicks was known to defendant at the time of trial but not called as a witness. Besides, issues of credibility are not within the province of this Court.

Accordingly, Gates is not entitled to a new trial based on the suppression of evidence claim.

The Newly Available DNA Evidence Is Exculpatory and Entitles Gates to a New Trial.

Gates presented DNA evidence at the May 2018 hearing that demonstrates that he is excluded as a contributor to the DNA on two key items of physical evidence used by the perpetrator to bind the victim's hands – a white bathrobe belt

and a black necktie. The State did not contest the defense's DNA test results. The exclusion of Gates's profile to the DNA on the two items is material and may be considered exculpatory. Therefore, Gates is entitled to a new trial.

The Experts for the State and Defense Agreed that Gates's DNA Is Not on the Bathrobe Belt or the Necktie, used to bind the victim.

At the hearing, Gates presented the expert testimony of Dr. Mark Perlin, the chief executive and scientific officer at Cybergenetics. R. 225-305. Dr. Perlin has a medical degree, a Ph.D in mathematics, and a Ph.D in computer science. R. 225-26. He was qualified, without objection, as an expert in the field of DNA interpretation and probabilistic genotyping. R. 226, 233. Dr. Perlin is the creator of a new DNA interpretation technology called TrueAllele. R. 227-29. TrueAllele is a computer program that uses probabilistic genotyping to objectively interpret degraded, low level, and complex mixtures of DNA. R. Ex. 26 (Cybergenetics Report). TrueAllele deconvolutes complex mixtures and can produce a statistic that indicates the likelihood that a given person's DNA profile is present or is not present in a DNA sample. R. 227-28. It is uncontested that TrueAllele was implemented by the Georgia Bureau of Investigations (GBI) in January 2018. R. 231, 316-17. Dr. Perlin trained the GBI staff in how to use TrueAllele. R. 231, 332. Dr. Perlin's testimony was credible. Dr. Perlin testified that the TrueAllele software determined

that Gates is excluded as a contributor to the DNA on the two items of evidence collected from the crime scene. R. 247-48.

The State called two witnesses at the evidentiary hearing, Ms. Kristen Pfisterer and Mr. James Sebestyen. They testified that human interpretation of the DNA, which was done prior to interpretation with TrueAllele, yielded inconclusive results. R. 311. The inconclusive human interpretation results are relevant insofar as they demonstrate the ability of TrueAllele to interpret what human interpretation methods could not (and the reason the GBI purchased it for use in its casework). R. 327-28, 339-40. Dr. Perlin testified that TrueAllele is designed to interpret complex, low level DNA mixtures, such as the mixtures in this case, where human interpretation cannot. R. 282 ("Human review methods don't separate out genotypes, so, [human interpretation methods] wouldn't have been able to [interpret the DNA]."); R. 290-91 ("The older human review systems would have difficulty getting interpretable results, whereas the more modern . . . computers don't have the same issue."). The State did not contest the accuracy of the TrueAllele results, and the State's witnesses testified that TrueAllele is "scientifically valid" in its approach to using data that falls below the human interpretation threshold. R. 317, 333-35.

It is noteworthy that, largely, Ms. Pfisterer and Mr. Sebestyen's testimony did not contradict, but instead supported, Dr. Perlin's testimony. This was the rare hearing in which the scientist who trained the GBI scientists testified on behalf of

the defense. R. 231, 332. Dr. Perlin presented well, answered questions in a direct and unbiased manner, and was the most qualified and credible of the three DNA experts who testified.

In light of the unified opinion of the experts that Gates is excluded as a contributor to the DNA on the two items taken from the crime scene, the State argued that (1) it stored the belt and necktie in such a way that Gates's DNA degraded, and is no longer on the items; and (2) Gates's DNA could have fallen off of or otherwise been lost from the items over time. R. 312-14, 325-28. The Court should reject these theories for the reasons provided below.

The evidence presented at the May 2018 hearing established that the perpetrator's DNA would be embedded in the bathrobe belt and necktie because of the way in which the crime occurred. At trial, the District Attorney's investigator testified for the State that the perpetrator tied the bathrobe belt "very, very tightly" around the victim's hands, "bound her wrists," and double knotted the belt. T. 276; *see also* R. Ex. 27 (GBI photographs depicting the knots). The necktie also was tied around the victim's hands, with knots binding it together. *Id.*

Citing a peer reviewed study, Dr. Perlin explained that manipulation of the belt and necktie in this manner would transfer a significant amount of DNA from the perpetrator's hands onto the items. R. 267-72; R. Ex. 28 (Goray Study) (discussing variables affecting DNA transfer onto cloth, including friction, pressure, and length

of time engaging with the material). Furthermore, Dr. Perlin testified that even if the perpetrator washed his hands prior to touching the bathrobe belt and necktie, he still would have transferred DNA to the items. R. 273.

The evidence presented at the May 2018 hearing established that TrueAllele yielded informative results, notwithstanding the possibility of degradation of the DNA over time. The State suggested that it stored the evidence in conditions so extreme that the conditions caused extensive bacterial growth resulting in the total degradation of the DNA on the items. R. 313-14, 326-27. There is no indication that the DNA on the items had completely degraded due to bacterial growth or any other reason. Instead, Dr. Perlin testified that while the DNA on the bindings had indeed degraded over time, the samples still uniformly yielded informative results that could be and were interpreted reliably by TrueAllele. R. 289-91, R. 298 ("[T]he data are really dispositive here. We see there's degradation. We see it's not complete degradation."); R. 302 ("We don't see a complete elimination of the data, we see a degradation pattern that shows longer sentences are producing less signal while shorter sentences are producing quite a good signal."). Dr. Perlin credibly explained the several ways that TrueAllele is able to accommodate for and interpret degraded DNA. R. 255.

In addition, the State suggested that the GBI's "inconclusive" findings following human interpretation attempts were due to the extent of DNA degradation

on the bindings. R. 311-13. However, Dr. Perlin explained that the inconclusive findings were not due to an inability of the degraded DNA to yield informative results, but rather due to an inability of the GBI to interpret the degraded, low level complex mixture using human interpretation methods. R. 290-91.

The evidence presented at the May 2018 hearing established that the perpetrator's DNA would not have transferred off of the items simply because other individuals touched the items. The State argued that Gates's DNA could have fallen off of the items because the items were handled by several people over the years and taken in and out of a manila envelope. R. 293, 340. The State's expert was unable to cite any studies to support the State's proposition. R. 316. In support of its theory, the State observes that only three or four DNA profiles were located by TrueAllele on each item, yet the State asserts that many more individuals handled the items.[3]

Dr. Perlin testified that once deposited, fabrics such as a cloth bathrobe belt or necktie would retain the DNA. R. 271 ("DNA sticks around for a long time . . . If it's in the weave of a fabric, it's going to stay there."). Dr. Perlin testified that if additional individuals touched the cloth bindings, their DNA could be added, creating a more complex mixture, but the touching would not remove the perpetrator's DNA. R. 274-76. Dr. Perlin explained that one reason that the items

[3] Although the State's counsel suggested that "dozens" of people handled the items, R. 326, there is no evidence to support that assertion.

may include fewer DNA profiles is because casual or brief touching of the items would result in less DNA, or possibly no DNA, being deposited. R. 298-99; R. Ex. 28 (Goray Study) (explaining the less friction, pressure, and time spent manipulating material, the less DNA deposited).

Gates has met the six elements of *Timberlake* with respect to the DNA issue and therefore is entitled to a new trial.

First, the exculpatory DNA evidence in this case has come to Gates's knowledge since the trial.

Second, Gates was diligent in obtaining the exculpatory DNA evidence. The DNA in Gates's case consists of a low level, degraded, complex mixture. The State and defense experts agreed that the DNA on the two items could be meaningfully interpreted through TrueAllele's probabilistic genotyping, whereas it could not be meaningfully interpreted by traditional human analysis. *See* R. 290-91 (Perlin) (testifying that "[t]he older human review systems would have difficulty getting interpretable results, whereas the more modern . . . computers don't have the same issue"); R. 316-17 (Pfisterer) (testifying that the GBI implemented TrueAllele so that it could analyze low level complex DNA mixtures, like the mixture in Gates's case); R. 333-35 (Sebestyen) (testifying that TrueAllele is a "scientifically valid" method that is able to interpret information below the analytical threshold).

Furthermore, the State and defense agreed that TrueAllele was adopted by the GBI in January 2018. R. 231, 316-17.

The State argued that Gates should have secured DNA testing when contact DNA testing first became available in the 1990s. The State's argument is flawed. According to O.C.G.A. § 5-5-41(c)(7)(C), the Court must grant DNA testing when "it would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior results." The evidence at the hearing demonstrated that TrueAllele's results are more discriminating and probative of the identity of the perpetrator than the prior results obtained by human interpretation of complex mixtures. Therefore, Gates satisfies the diligence requirement.

Alternatively, independent from the grounds above, Gates was diligent in his request for DNA testing because he requested the testing immediately after Georgia Innocence Project interns located the two items of evidence in the District Attorney's Office in 2015.[4] At a hearing in November 2017, an Assistant District Attorney

[4] While the State contends that the two items of evidence may have been present in court at a hearing held in October 2002, the State subsequently represented, in November 2002, that the two items of evidence at issue were destroyed in 1979. *See* Transcript of Hearing at 64-65 (Nov. 8, 2002) (indicating that the belt and necktie were among the items destroyed by the crime laboratory in 1979); GBI Record of Evidence Received by Crime Laboratory at 1, item 3 (attached as Ex. B to State's Supplement filed Apr. 9, 2018, indicating the same).

acknowledged that the items were "new evidence located in 2015." *See* Transcript of Status Hearing at 12 (Nov. 7, 2017).

Finally, the State did not raise a due diligence argument when Gates initially requested DNA testing in 2015.[5] And in 2017—after the State had secured the GBI's inconclusive human interpretation results, but before receiving the exculpatory TrueAllele results—the State explicitly conceded that the DNA testing was appropriate and proper. *See* Transcript of Status Hearing at 25 (Nov. 7, 2017) (Assistant District Attorney Bickerstaff) ("[W]e thought it proper that DNA should be tested on those items . . ."); *id.* ("[The items] were there and available and they decided they wanted to test them and we thought that was proper."); *id.* ("[T]he DNA testing would be proper based on the statute."); *id.* at 36 (Assistant District Attorney Lewis) (stating that it is "the State's position" that Gates is entitled to a statutory right to DNA testing); R. 224 (Lewis) ("There is no challenge here as to the testing that took place.").

Third, the exculpatory DNA evidence is material. For the reasons described above, the DNA evidence is meaningful and exculpatory because it demonstrates that Gates was not the person who bound the victim's hands.

Fourth, the exculpatory DNA evidence is not cumulative.

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[5] The State initially opposed DNA testing in 2015 on materiality grounds. *See* Transcript of Hearing at 41, 70-74 (Dec. 16, 2015).

Fifth, Gates submitted affidavits from expert witnesses prior to the evidentiary hearing, including affidavits and reports from Dr. Greg Hampikian and Dr. Mark Perlin. *See* Gates's Supplement to Amended Extraordinary Motion for New Trial Explaining DNA Test Results that Exclude Gates as a Contributor to the DNA on the Physical Evidence (filed Jan. 29, 2018); Notice of Additional Witnesses (filed Apr. 18, 2018). Accordingly, Gates satisfied the affidavit requirement.

Sixth, the evidence presented does not impeach the credibility of a witness. Instead, it provides substantive evidence that Gates did not commit the offense for which he was convicted.

The DNA evidence discussed above is even more concerning given the State's history of destruction of evidence in this case.[6] The State argues that the DNA test results are not sufficient to warrant a new trial for Gates, yet the State itself destroyed the bulk of the remaining evidence that could have been subjected to testing. The State destroyed most of the remaining evidence in 1979, less than two years after Gates's trial and before the Georgia Supreme Court affirmed Gates's conviction and sentence in this death penalty case. *See* GBI Record of Evidence Received by Crime Laboratory (attached as Ex. B to State's Supplement filed Apr. 9, 2018, indicating

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[6] During the Extraordinary Motion for New Trial proceedings, the Court repeatedly requested that the State produce a list of evidence taken from the crime scene, the tests that were conducted on that evidence, and the test results. *See* Court Order (filed Feb. 23, 2018). To date, the State has not complied with the Court's request.

that all but five items of physical evidence in Gates's case were destroyed on May 2, 1979).

Some of the evidence destroyed by the State was material and exculpatory evidence. *See Arizona v. Youngblood*, 488 U.S. 51 (1988). One piece of material and exculpatory evidence included Type B blood found on a door next to the deceased victim at the crime scene. *See* GBI Crime Lab Supplementary Report at 1-2 (Feb. 3, 1977) (attached as Ex. B to State's Supplement filed Apr. 9, 2018, indicating that item 29—the red brown stains on the door—is positive for blood of human origin that is Type B). GBI records indicate that the blood was among the items destroyed in 1979.[7] *See* GBI Record of Evidence Received by Crime Laboratory at 1-2 (attached as Ex. B to State's Supplement filed Apr. 9, 2018). The Type B blood was material and exculpatory evidence because it placed a third party on the scene, as Gates and the decedent each had Type O blood. *See* T. 290 (noting the victim had O positive blood type). The State's destruction of evidence, when considered in conjunction with the new DNA evidence described above, provides further reason why Gates is entitled to a new trial.

[7] Additional evidence destroyed by the State includes, in part, (1) two semen slides collected from the victim's cervix and vagina during a sexual assault examination; (2) the bathrobe the victim was wearing, which contained seminal stains; and (3) numerous Caucasian hairs collected from the victim and the crime scene.

Defendant is Granted a new trial on the DNA findings pursuant to O.C.G.A. § 5-5-41(C) (2010).

Defendant is Denied relief on all other grounds alleged in his Extraordinary Motion for New Trial.

SO ORDERED this 10th day of January, 2019.

John D. Allen

Honorable John D. Allen
Superior Court Judge
Chattahoochee Judicial Circuit