

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

NO. _____

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

CARLTON GARY
Petitioner,
v.
STATE OF GEORGIA,
Respondent.

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

APPENDICES FOR PETITION FOR WRIT OF CERTIORARI

- APPENDIX A:** Muscogee County Superior Court Order dated September 1, 2017 denying Mr. Gary's Extraordinary Motion for New Trial or in the Alternative for a New Sentencing
- APPENDIX B:** Decision of the Supreme Court of Georgia dated December 1, 2017 denying Mr. Gary's Application for Discretionary Appeal, Carlton Gary v. State, Case No. S18D0399
- APPENDIX C:** Decision of the Supreme Court of Georgia dated January 16, 2018 denying Mr. Gary's Motion for Reconsideration, Carlton Gary v. State, Case No. S18D0399

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APPENDIX A

Muscogee County Superior Court Order dated September 1, 2017
denying Mr. Gary's Extraordinary Motion for New Trial or in the
Alternative for a New Sentencing

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY

STATE OF GEORGIA

GEORGIA, MUSCOGEE COUNTY
CLERK'S OFFICE SUPERIOR COURT
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3:47pm MG
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CARLTON GARY,
Petitioner,

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Indictment Nos. 48573 and 48937

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v.

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STATE OF GEORGIA,
Respondent.

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ORDER ON PETITIONER'S EXTRAORDINARY MOTION FOR NEW TRIAL

OR IN THE ALTERNATIVE FOR A NEW SENTENCING

The above and foregoing matter having come before the Court on February 24-28, 2014, February 5-6, 2015, and January 12-13, 2017 on a remand from the Supreme Court of Georgia on the Petitioner's Motion for the Performance of Forensic Deoxyribonucleic Acid (DNA) Testing, as well as the Petitioner's Extraordinary Motion for a New Trial or Alternative Sentencing, with Petitioner represented by counsel, it is hereby ADJUDGED, DECREED, and ORDERED as follows:

I.

The Petitioner was indicted for the Malice Murder, the Rape, and the Burglary of Florence Gerche Scheible; the Malice Murder, the Rape, and the Burglary of Martha B. Thurmond; and the Malice Murder, the Rape, and the Burglary of Kathleen Koonce Woodruff. The State produced at trial evidence of the attacks on the remaining six Columbus, Georgia victims, the attacks on three New York victims, and the three burglaries in Columbus that did not

involve personal assault. All of the indicted crimes occurred in the Wynnton neighborhood near downtown Columbus, Georgia.

II. FACTS

A brief recitation of the facts is as follows:

Evidence shows that on September 11, 1977, sixty-four-year-old Gertrude Miller was violently beaten and raped. Similar to the crimes to follow, a knotted stocking was found at the scene of the crime. Mrs. Miller survived the attack and eventually identified Carlton Gary as her attacker, even though Mrs. Miller had been unable to identify or describe her attacker for a number of years. Mrs. Miller's eye witness testimony was a key component in identifying the Petitioner as the "Stocking Strangler." Several body fluid samples were taken from Mrs. Miller's night gown, sheets, and slip and were tested initially for secretor evidence and ultimately for DNA evidence. The State did not seek an indictment in Mrs. Miller's case but alleged that case was a similar transaction.

Shortly after the attack on Gertrude Miller the body of fifty-eight-year-old Mary Jackson was discovered on September 16, 1977. She had been beaten, raped, and ultimately strangled with a stocking and a sash from a dressing gown. A rolled right palm print was found in the dining room of Mrs. Jackson's house that matched Carlton Gary. The State did not seek an indictment in Mrs. Jackson's case but alleged that case was a similar transaction.

On September 24, 1977, seventy-one-year-old Jean Dimenstein was found having been raped and strangled to death with a stocking in her home. Her body was covered with sheets and pillows. During the Petitioner's confession, he stated that he gained entry into the house by

removing the hinge pins from the door. Additionally, fluid samples were taken from the vaginal washings of Mrs. Dimenstein which were later used for DNA testing which matched Carlton Gary. The State did not seek an indictment in the Dimenstein case, but alleged it was a similar transaction.

On October 21, 1977, eighty-nine-year-old Ruth Scheible was raped, beaten and then strangled to death with a stocking. At the time she was legally blind and could only walk with the assistance of a walker. Her son and daughter-in-law discovered her body. A right thumb print was found at Mrs. Scheible's residence on the door leading into the bedroom which matched Carlton Gary. The Petitioner also identified Mrs. Scheible's house during his confession which is supported by the testimony of an eyewitness that saw him leaving the house. Petitioner was indicted for the murder, rape, and burglary of Mrs. Scheible.

Sixty-nine year-old Martha Thurmond's body was discovered just four days after Mrs. Scheible. A pillow, blankets, and a sheet covered her body. The evidence at trial showed that Mrs. Thurmond was sexually assaulted, beaten, and strangled with a stocking. A right middle fingerprint was found on the bathroom window screen frame at Mrs. Thurmond's residence, which matches Carlton Gary. The window was located on the backside of the house. Vaginal washings were also collected from Mrs. Thurmond for the purpose of testing for secretor and DNA evidence. During the DNA testing, by the GBI crime lab, the sole testing sample available was contaminated by the control sample resulting in its complete destruction. Petitioner was indicted for the murder, rape, and burglary of Mrs. Thurmond.

One week later on December 28, 1977, Kathleen Woodruff was discovered. Her body was partially covered and the evidence showed that she had been raped and then strangled with a

scarf. Two prints were recovered from Mrs. Woodruff's residence that matched the Petitioner. A right little fingerprint was found on a screen outside of the victim's window and a left palm print was found at the point of entry as well. Vaginal washings were taken but no viable DNA profile could be obtained. Mr. Gary was indicted for the murder, rape, and burglary of Mrs. Woodruff.

On February 11, 1978, Mrs. Ruth Schwob, age seventy-four, was found alive sitting on the edge of her bed with a stocking tied around her neck. Mrs. Schwob never identified her attacker and she died before Mr. Gary was formally charged and tried. A footprint was found outside of the residence near the point of entry. The State did not seek an indictment in the Schwob case, but alleged it was a similar transaction.

The day following the attack on Mrs. Schwob, February 12, 1978, the killer struck again. Seventy-eight-year-old Mildred Borom was found in the hallway of her home, lying on her back with her face covered. Mrs. Borom had been raped and then strangled with the cord from her venetian blinds. The State did not seek an indictment in the Borom case, but alleged it was a similar transaction.

On April 19, 1978 sixty-one-year-old Janet Cofer was found lying in her bed covered with sheets and a pillow over her face. It was determined that she had been raped and strangled with a stocking. A bite mark was observed on Mrs. Cofer's left breast. A mold was created from this bite mark. Mrs. Cofer differed from the other victims, as she did not live in the Wynnton area of Columbus. She did however attend choir practice at the Wynnton Methodist

Church and had been there the night of her murder¹. The State did not seek an indictment in the Cofer case, but alleged it was a similar transaction.

At trial, the State presented the similarities between the crimes: (1) all of the victims were white women; (2) all of the victims were age 55 and over; (3) all of the victims were strangled; (4) all of the victims were attacked within a span of seven months; (5) all of the crimes took place in the victims' homes; (6) forced entry occurred in all of the attacks except Mrs. Scheible's because her door was open; (7) all of the rape and murder victims lived alone; (8) all of the victims, when discovered, were covered except Mrs. Schwob; (9) all of the victims, except Mrs. Cofer, lived in the Wynnton Road area; and (10) all of the crimes, excluding Mrs. Scheible's attack, occurred at night. Common Factors of the Case Chart, State's Exhibit 80.

¹ Evidence of several other crimes were admitted as similar transactions by the Petitioner along with the murders and rapes discussed above. On April 14, 1970 the authorities in Albany, New York found the body of Nellie Farmer who had been raped and strangled. Trial Transcript, Vol. 11, p. 2186. Carlton Gary, AKA Carlton Michaels, was arrested for this crime based off fingerprint evidence found on a trunk in the bedroom of the victim. Id. Gary claimed that while he was at the scene, he was not the one to kill Mrs. Farmer, that instead it was an individual named John Lee Mitchell. Mr. Mitchell was acquitted of these charges. Gary v. Hall, 558 F.3d 1229, 1232 (2009). On June 28, 1975 in Syracuse, NY the body of Marion Fisher was discovered having been raped. MNT, Vol. 4, p. 768. Fingernail scrapings, a red towel, and a vaginal swab were all taken from the crime scene. Id. at 795. Testing on the towel and the vaginal swabbings came back as a positive match to Carlton Gary. Id. at 799. On January 2, 1977, in Syracuse, New York, Jean Frost was attacked and raped during a burglary of her home. Gary v. Hall, 558 F.3d at 1232. During the crime, a watch was taken from the home and was found to be in the possession of Carlton Gary two days later. Id. Gary admitted to being at the scene but only as a lookout while stating that a Dudley Harris was the one that actually committed the rape and burglary. Id. On October 8, 1977 the home of Callye East in Columbus, GA was burglarized through a window in her kitchen. Trial Transcript, Vol. 17, p. 3341. During the crime, a .22 Ruger was taken from the home that was found and later traced back to Carlton Gary. Trial Transcript, Vol. 17, p. 3339. On December 20, 1977 the Swift family residence, in Columbus, GA was burglarized at night. The Swift residence was identified as a previous target of Carlton Gary during his admission to police. Trial Transcript, Vol. 17, p. 3381. On January 1 and February 11, 1978 the home of Abraham Illges was burglarized. Gary pointed out the residence during his admission to police as the scene of a burglary he participated in. Trial Transcript, Vol. 17, p. 3371.

III. PROCEDURAL HISTORY

The procedural history is as follows:

A. State Court Proceedings

On May 4, 1984, Petitioner was indicted in the Superior Court of Muscogee County, Georgia for raping, murdering with malice aforethought, and burglarizing the homes of Martha Thurmond, Ruth Scheible, and Kathleen Woodruff. Petitioner went to trial on July 28, 1986, and the jury returned a verdict of guilty on August 26, 1986. On August 27, 1986, Petitioner was sentenced to death on the malice murder convictions. He also received sentences of life imprisonment on the rape convictions and 20 years imprisonment on the burglary convictions, all to run consecutively. On September 25, 1986, Petitioner filed a Motion for a New Trial, which was denied on October 18, 1986.

Petitioner appealed his conviction and sentence to the Supreme Court of Georgia. On June 26, 1987, the Supreme Court of Georgia remanded the case to the Superior Court of Muscogee County with direction to appoint competent counsel to represent Petitioner for the purpose of a hearing to determine whether Petitioner failed to receive effective assistance of counsel for any reason, including lack of funds.² A remand hearing was held in this Court before Judge Followill on November 4, 12, and 16, 1987. In its order dated June 12, 1989, this Court determined Petitioner “knowingly, intelligently, and voluntarily” waived his ineffective assistance of counsel claim. Following the remand proceedings, the Supreme

² On August 14, 1987, the court appointed two attorneys, H. Haywood Turner, III and Peter B. Hoffman, to represent Petitioner in the remand proceeding; however, Petitioner’s trial counsel, Mr. Siemon, along with Frank L. Derrickson, represented Petitioner at his remand hearing. During remand proceedings, counsel for Petitioner invoked the attorney-client privilege or work product doctrine on Petitioner’s behalf and argued that it was the trial court’s rulings that denied Petitioner the effective assistance of counsel.

Court of Georgia affirmed Petitioner's convictions and sentence in Gary v. State, 260 Ga. 38 (1990). Petitioner filed a Motion for Reconsideration, which the court denied on March 28, 1990. The United States Supreme Court denied Petitioner's Writ for Certiorari, Gary v. Georgia, 498 U.S. 881 (1990), and his petition for reconsideration, 498 U.S. 994 (1990).

B. State Habeas Corpus Proceedings

On January 11, 1991, Petitioner filed his first state habeas corpus petition in the Superior Court of Butts County, which contained six claims for relief.³ The superior court denied habeas relief in orders dated January 27 and November 13, 1995. The Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal from the denial of state habeas corpus relief on October 7, 1996. On May 27, 1997, the United States Supreme Court denied Petitioner's Writ of Certiorari. Gary v. Turpin, 520 U.S. 1244 (1997).

C. Federal Habeas Corpus Proceedings

On November 10, 1997, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Georgia and on February 2, 1998, Petitioner filed an amended petition raising twenty-nine grounds for relief.⁴ On September 28,

³ Petitioner filed his first amended habeas petition on June 20, 1994 and filed a second amended habeas petition, which contained thirty-two grounds for relief, on June 24, 1994.

⁴ On March 13, 2000, Petitioner filed a *Motion for an Evidentiary Hearing* regarding numerous issues as well as a *Motion for Access to Physical Evidence and Funds to Pay for Expert Assistance*. In an order dated June 30, 2000, the court granted Petitioner's *Motion for an Evidentiary Hearing* on the semen evidence at issue, specifically Petitioner's request to present evidence regarding certain recently obtained work papers from the GBI Crime Lab. Gary v. Schofield, 336 F. Supp. 2d 1337, 1346 (2004). The court held an evidentiary hearing on November 21, 2000, and both State forensic expert John Wegel and Petitioner's expert, Roger Morrison, testified regarding Petitioner's blood type and his status as a secretor/non-secretor. Following this hearing, the federal habeas court declined to order the testing of the Petitioner's semen, concluding that Petitioner's current secretor/non-secretor status "does not prove he is innocent of the rapes that occurred in 1977." Federal Habeas Order, June 29, 2001, p. 6. The federal habeas court also held hearings on November 10, 2003 and November 25, 2003, to address the bite mark exemplar; however, the exemplar had not yet been located. Gary, 336 F. Supp. 2d 1337, 1346-1347.

2004, the district court denied Petitioner's Application for Writ of Habeas Corpus. Gary v. Schofield, 336 F. Supp. 2d 1337 (M.D. Ga. 2004).

Petitioner filed a Notice of Appeal and a Motion for a Certificate of Appealability. The court granted a Certificate of Appealability as to certain issues, including issues regarding the bite mark on Mrs. Cofer's breast,⁵ and the case proceeded on appeal to the United States Court of Appeals for the Eleventh Circuit. On February 12, 2009, the United States Court of Appeals for the Eleventh Circuit affirmed the ruling of the district court. Gary v. Hall, 558 F.3d 1229 (11th Cir. 2009). The United States Supreme Court denied certiorari on November 30, 2009. Gary v. Hall, 558 U.S. 1052 (2009).

⁵ During state habeas corpus proceedings, Petitioner first learned that Dr. Carlos Wayne Galbreath, a dentist from the Columbus area, had made an exemplar of a bite mark on Mrs. Cofer's breast. Mrs. Cofer, a sixty-one year old female whose body was found on April 20, 1978, had been raped and strangled with a stocking. Petitioner was not charged with the rape or murder of Mrs. Cofer; however, the State introduced evidence regarding Mrs. Cofer's strangulation death as a similar transaction at Petitioner's trial. At trial, there was testimony from Dr. Joe Webber, a medical examiner that he observed what appeared to be tooth marks on Mrs. Cofer's breast during autopsy. Dr. Webber also testified that he consulted odontology experts who determined that a reliable comparison between the bite mark and Petitioner's teeth could not be made because Petitioner had dental work between the time of Mrs. Cofer's murder and the time of his arrest. It was not disclosed to the defense, either prior to trial or at trial, that an exemplar had been made of the bite mark on Mrs. Cofer's left breast.

During habeas proceedings Petitioner learned that Dr. Galbreath had made the bite mark exemplar and that the prosecutors consulted with Dr. Thomas J. David, a forensic odontologist, regarding the bite mark exemplar prior to Petitioner's trial. Petitioner's attorneys questioned both of the prosecutors from Petitioner's trial regarding the location of the bite mark exemplar at Petitioner's state habeas hearing; however, both testified that they were unaware of its whereabouts and Petitioner was not able to locate the exemplar while his state habeas corpus action was pending.

While Petitioner's appeal was pending in the Eleventh Circuit Court of Appeals, the Muscogee County Coroner discovered the missing bite mark exemplar and, on November 23, 2005, the Eleventh Circuit Court of Appeals remanded the case to the district court to consider the significance of this evidence to Petitioner's defense. The district court held a hearing regarding the bite mark exemplar and concluded that although the state did not turn over the exemplar to the defense, Petitioner failed to show that introduction of the exemplar at trial, even when considered collectively with the other undisclosed evidence, would have resulted in a reasonable probability of a different result. Gary v. Schofield, 493 F. Supp. 2d 1255 (M.D. Ga. 2007).

D. Proceedings in This Court

On December 3, 2009, this Court entered an order setting Petitioner's execution window to commence on December 16, 2009 and to end on December 23, 2009. Petitioner's request for clemency filed with the Georgia State Board of Pardons and Paroles was considered and denied on December 15, 2009. On December 7, 2009, Petitioner filed a *Motion for the Performance of Forensic Deoxyribonucleic Acid (DNA) Testing* in this Court, which was denied on December 9, 2009. Petitioner appealed the denial of his motion to the Georgia Supreme Court, which on December 16, 2009, reversed the decision of this Court, stayed Petitioner's scheduled execution, and ordered this Court to consider DNA testing.⁶

An initial hearing on the motion for testing was held on February 1, 2010, at which Petitioner requested additional time, and a new hearing date was set for February 22, 2010. However, prior to this hearing, Respondent and Petitioner entered into a stipulation allowing certain specific items to be subjected to DNA testing. On February 19, 2010, this Court issued a Consent Order for Limited DNA Testing providing for the testing of certain semen evidence on slides created by the GBI Crime Lab at the time of the initial investigation of the cases, including a slide identified as vaginal washings from Mrs. Thurmond.

On July 9, 2012, Petitioner filed his *Extraordinary Motion for a New Trial or in the Alternative for a New Sentencing*, and on August 27, 2012, Respondent filed its response in opposition to Petitioner's motion. This Court conducted evidentiary hearings on Petitioner's Extraordinary Motion for New Trial or in the Alternative for a New Sentencing on February 24-

⁶ While Petitioner was litigating his requests for DNA testing in this Court, Petitioner's counsel was concurrently litigating their petition for federal funds in federal court. The District Court denied the motion and the Eleventh Circuit Court of Appeals affirmed that ruling on July 12, 2012. See Gary v. Diagnostic Prison, 686 F.3d 1261 (11th Cir. 2012).

28, 2014 and February 5-6, 2015. On April 29, 2016, Petitioner filed an Amendment to his Extraordinary Motion for New Trial. This Court held two more evidentiary hearings on the evidence introduced by the Amended Extraordinary Motion for New Trial or in the Alternative for a New Sentencing on January 12 and 13, 2017. The parties were given a subsequent briefing period and this order follows review of all pleadings and transcripts from the original trial and subsequent hearings.

IV. Petitioner's Extraordinary Motion for New Trial Evidence

In support of his Extraordinary Motion for a New Trial, the Petitioner relies on the following as newly discovered evidence: (1) DNA evidence extracted from the vaginal washings of Mrs. Thurmond and Mrs. Miller clothing; (2) work papers consisting of the scientific results of the secretor testing conducted on the biological evidence found in the Thurmond and Scheible cases, and expert testimony that interprets those work papers and the Georgia Bureau of Investigation ("GBI") Crime Lab Reports on the secretor testing as well as challenges to the expert testimony presented at trial by the State's expert serologist; (3) a mold of the bite mark found on Mrs. Cofer's breast and expert testimony on the comparison between the bite mark mold and the Petitioner's dental impression; (4) the alleged inadequate quality of the fingerprint point comparison utilized by the GBI Crime Lab after discovering fingerprints at the homes of Mrs. Thurmond, Mrs. Scheible, Mrs. Woodruff, and Mrs. Jackson; (5) the incompatibility between the shoeprint size found outside the Schwob residence and the Petitioner's shoe size; (6) expert testimony discussing the general unreliability of confessions and custodial statements.

The Petitioner amended his Extraordinary Motion after the discovery of a briefcase containing documents related to the Petitioner's case, including (7) the composite sketch allegedly created during a hypnosis session by Mrs. Miller of her alleged attacker, which cannot be said to be the Petitioner with any certainty.

A discussion of each new piece of evidence follows:

A. DNA EVIDENCE

After the Petitioner filed his Motion for the Performance of Forensic DNA Testing, and upon remand from the Supreme Court of Georgia, the State and the Petitioner agreed that the Bode Technology Laboratory (hereinafter "Bode Lab") would perform DNA testing on four pieces of evidence: the vaginal washings slide of Mrs. Thurmond, a slide from the swab of Mrs. Thurmond's abdomen, the vaginal washings slide of Mrs. Dimenstein, and the vaginal contents slide of Mrs. Woodruff. Consent Order For Limited DNA Testing, filed February 19, 2010. Further, this Court granted the Petitioner's Motion for Additional DNA Testing on Mrs. Miller's sleeping gown, underclothing, and white slip. Order Granting Defendant's Motion For Additional DNA Testing, filed August 31, 2011.

The Petitioner hired an expert witness, Dr. Greg Hampikian, who testified at the February 24, 2014 hearing that the initial Y-STR DNA testing results for Mrs. Thurmond's vaginal washings excluded the Petitioner as the semen depositor. EMNT, Vol. 1, pp. 172. He also testified that the results were later invalidated due to contamination. EMNT, Vol. 1, pp. 172. He affirmed on cross-examination that the vaginal washings slide from the Woodruff case was tested, which resulted in no usable DNA profile. EMNT, Vol. 1, pp. 201-202.

Dr. Hampikian agreed that a Bode Lab report indicated that a partial Y-STR profile was obtained from partial sperm fraction found on Mrs. Miller's clothing. EMNT, Vol. 1, pp. 154. He further testified that the DNA profile found on the two stains on Mrs. Miller's clothing did not match the Petitioner's DNA profile. EMNT, Vol. 1, pp. 157. Sara Shields, a senior DNA analyst at the Bode Lab, performed the DNA testing on Mrs. Miller's sleeping gown and compared the DNA profile extracted from the two stains on the sleeping gown to the Petitioner's DNA profile. EMNT, Vol. 1, pp. 258-263. Ultimately, Mrs. Shields also concluded that the Petitioner was "excluded as a possible contributor of the partial Y-STR profiles..." EMNT, Vol. 1, pp. 263.

The State introduced the Dimenstein DNA results through eliciting testimony from two witnesses. On cross-examination, Dr. Hampikian stated that Connie Pickens performed DNA testing on the Dimenstein case evidence and found a match between the Petitioner's DNA and the DNA found in the Dimenstein vaginal washings. EMNT, Vol. 1, pp. 185. He further testified that he did not know if the match between the Dimenstein DNA and the Petitioner was not a result of contamination. EMNT, Vol. I, pp. 184. However, he admitted that the specific contamination that occurred with the Thurmond DNA testing would not have caused the Dimenstein DNA match. EMNT, Vol. 1, pp. 185.

Stephanie Fowler, a GBI Crime Lab Combined DNA Index System ("CODIS⁷") Administrator, testified on direct examination that the Dimenstein DNA profile was entered into CODIS and it matched the Petitioner's DNA profile. EMNT, Vol. 3, pp. 649-650. Mrs. Fowler

⁷ CODIS is the acronym for the Combined DNA Index System and is the generic term used to describe the Federal Bureau of Investigation's (FBI's) program of support for criminal justice DNA databases as well as the software used to run these databases. <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>

also testified that the male DNA profile found in the Thurmond vaginal washings slide was from a quality control sample donor. EMNT, Vol. 3, pp. 691. She testified that she was responsible for investigating how the contamination occurred. EMNT, Vol. 3, pp. 669. She testified that a scientist who shared the same lab space as Connie Pickens had worked with a particular quality control sample that was solely used for male DNA screening, and that Mrs. Pickens was not using that quality control sample during her Thurmond DNA testing. EMNT, Vol. 3, pp. 669. Mrs. Fowler concluded that the quality control sample the scientist used at that shared lab area was the same quality control sample that contaminated the Thurmond DNA slide. EMNT, Vol. 3, pp. 670-671.

The Petitioner makes several arguments concerning the DNA evidence. First, the Petitioner argues that the State's reckless preservation of the Thurmond vaginal washings, resulting in the sample's contamination, constitutes bad faith and demands that the Court make the adverse inference against the State that the Thurmond DNA results would have excluded the Petitioner. Second, the Petitioner argues that the Miller DNA results prove that Mrs. Miller's identification of the Petitioner as her attacker was a mistake. Third, the Petitioner contends that the DNA results from Mrs. Dimenstein's vaginal washings should not be considered by this Court because the State lacks the legal precedent to offer alleged newly discovered evidence to support its case against the Petitioner when that evidence was not presented at the original trial. Furthermore, the Dimenstein case was not indicted but was presented as a similar transaction.

The State denied the Petitioner's bad faith claim and opposed the Court rendering an adverse inference against the State. While the State has not disputed the Bode Lab's conclusion that the DNA found in the Miller case does not match the Petitioner's DNA profile, the parties

dispute whether Mrs. Miller was wearing the gown when she was attacked. Finally, the State contends that the Petitioner agreed to test the Dimenstein DNA evidence as part of the Consent Order and that the Thurmond DNA contamination has no effect on the validity of the Dimenstein DNA test results.

B. SECRETOR EVIDENCE

Eighty percent of the population secretes their blood type group into their bodily fluids such as their sweat, saliva, seminal fluids, and vaginal fluids. EMNT, Vol. 9, pp. 202. This group of individuals are referred to as secretors. Id. The other twenty percent of the population do not secrete their blood type and are referred to as non-secretors. Id. at 203. Prior to the advent of DNA test, this test was used for forensic serological examination. Id.

Prior to this trial, secretor testing was performed and a GBI Crime Lab Secretor Report was generated based upon Carlton Gary's saliva and a series of work papers were generated from the same results. EMNT, Vol. 9, pp. 14.

More than a decade after trial, the Petitioner's current counsel filed an Open Records Act request to obtain the work papers consisting of the scientific results of the secretor testing (which were the foundation for the GBI Crime Lab secretor reports and the expert testimony offered at trial by the prosecution's serology expert). EMNT, Vol. 1, pp. 38.

Mr. Bud Siemon, the Petitioner's counsel at trial, testified that he received some GBI Crime Lab reports, but had no recollection as to whether he received a specific report. EMNT, Vol. 1, pp. 99. He also testified that he had neither seen the work papers associated with the GBI Lab reports nor the worksheet on the Petitioner's secretor status. EMNT, Vol. 1, pp. 99-100. He reiterated on cross-examination that he never received the serological worksheets, but he did

have the GBI Crime Lab reports and used them at trial during his cross-examination of Mr. John Wegel, a forensic serologist during the Stocking Strangler investigations and the State's expert serologist. EMNT, Vol. 1, pp. 117-119.

Dr. Greg Hampikian was called as a witness on secretor evidence on behalf of the Petitioner. Dr. Hampikian testified on the secretor papers and GBI Crime Lab Reports as well, asserting that, in his opinion, the work papers showed that the semen was left by a non-secretor in both the Thurmond and Scheible cases. EMNT, Vol. 1, pp. 164-165. He further stated that, based upon the work papers, the Petitioner is a secretor. EMNT, Vol. 1, pp. 165-166. On cross-examination, he agreed that Mr. Wegel concluded that the semen was left by either a weak secretor or non-secretor, and that Mr. Wegel stated this conclusion in his report, at trial, and at the Federal habeas corpus proceedings. EMNT, Vol. 1, pp. 213. After the State asserted that Mr. Wegel was "not definitive about either one", Dr. Hampikian responded: "I would say – I mean, my impression is he was trying to be very cautious." EMNT, Vol. 1, pp. 213. He continued, stating, "I think the evidence to me is non-secretor, but it's possible, you know..." EMNT, Vol. 1, pp. 213. He also stated that "the only thing I would dispute is that wording about possible weak secretor, but otherwise it seems to be an accurate test." EMNT, Vol. 1, pp. 214.

Mr. Wegel testified that it was standard practice to provide law enforcement with the GBI Crime Lab report without the worksheets or work papers attached. EMNT, Vol. 3, pp. 514. He also testified that it was, and remains, standard policy that if a defense attorney wishes to discuss the serological results, he gets their phone number, contacts the prosecuting attorney, verifies the defense attorney's identity and whether he or she is the attorney of record for the defendant, provide the prosecuting attorney with the meeting date and time, and inquire whether the

prosecuting attorney wants to attend. EMNT, Vol. 3, pp. 514-515. Mr. Wegel testified that the Petitioner's trial counsel, Bud Siemon, made an appointment with the GBI Crime Lab, but failed to show up. EMNT, Vol. 3, pp. 533. Mr. Wegel testified that he had the work papers in his possession as he testified during the trial and that, if Mr. Siemon had asked, he would have shown the papers to him before the trial began or before he testified. EMNT, Vol. 3, pp. 533.

Mr. Wegel testified that, after testing the vaginal washings and abdomen swab in the Thurmond case, he concluded, and stated at trial, that the semen donor was either a weak secretor or nonsecretor. EMNT, Vol. 3, pp. 517-519. He also stated that, after comparing the Thurmond secretor results to the Petitioner's secretor results seven years later, he concluded that the Petitioner "could possibly fit in the group that I determined seven years earlier when I did the test, he could be possibly be a donor of that semen." EMNT, Vol. 3, pp. 520. Mr. Wegel also conducted the secretor testing for the Scheible case and produced an official report, which would not have had his notes attached when disseminated to the prosecutor and defense attorney. EMNT, Vol. 3, pp. 526-528. After testing several items in the Scheible case, Mr. Wegel concluded that the semen donor was a non-secretor or weak secretor. EMNT, Vol. 3, pp. 529-530. Mr. Wegel offered testimony on the reasoning behind the term "weak" when designating whether a semen donor is a secretor or nonsecretor, explaining that the term arises "when you're looking at the fluids themselves in a dried stain" and that it "can also depend, typically, sometimes, on the size of the stain." EMNT, Vol. 3, pp. 531. He also concluded that the Petitioner would not be excluded as the semen donor in the Thurmond and Scheible cases. EMNT, Vol. 3, pp. 532.

Mr. Wegel testified on cross-examination, when presented with Connie Pickens's secretor test of the Petitioner's saliva, that "that's pretty normal" and when asked by Petitioner's counsel that "It's a normal secretor, not a weak secretor, correct?" he responded "based on his saliva." EMNT, Vol. 3, pp. 555. He also testified that it "is a possibility" that the Petitioner is an individual who secretes less into his semen than into his saliva. EMNT, Vol. 3, pp. 556. When asked if he had conducted "any independent research of the literature on that subject", the witness responded negatively. EMNT, Vol. 3, pp. 556.

The Petitioner contends that it was the State's responsibility to turn the work papers over to the Petitioner and the State failed to do so. He further contends that the secretor work papers and Dr. Hampikian's testimony demonstrates that the Petitioner was not the semen donor in the Thurmond case and the Scheible case. The State opposes this argument, asserting that the Petitioner knew about the secretor evidence at trial and his trial counsel, Bud Siemon, had an opportunity to review the work papers and failed to attend his scheduled appointment with Mr. Wegel. The State further contends that Dr. Hampikian's testimony on the secretor evidence operates solely to impeach Mr. Wegel's expert testimony. In addition, the State argues that the Petitioner has litigated the secretor evidence issue during the federal habeas corpus proceedings, the District Court and the Eleventh Circuit have made findings of facts and determinations of materiality on the issue, and this Court does not have the authority to overrule a federal court. The State argues that, because the Petitioner raised the secretor issue as part of his federal habeas corpus proceedings and it has been litigated in the Eleventh Circuit, the Petitioner's secretor evidence does not pass the due diligence requirement of Timberlake.

C. BITE MARK EVIDENCE

The Petitioner also alleges that the mold of the bite mark found on Mrs. Cofer's breast is newly discovered evidence that the State failed to turn over to the defense before trial. James Dunnavant, a former Deputy Coroner, testified at the EMNT evidentiary hearing that Don Kilgore was the Coroner during the Columbus Stocking Strangler investigations. EMNT, Vol. 2, pp. 303. He testified that, as neither he nor Mr. Kilgore were medical doctors, Dr. Joe Webber, a local doctor, performed the autopsies for the Coroner's Office. EMNT, Vol. 2, pp. 303-304. He further testified that, sometime after being served with the Petitioner's Open Records Act request to produce the bite mark mold, he found the bite mark mold in the bottom drawer of Mr. Kilgore's file cabinet. EMNT, Vol. 2, pp. 304-305. While on direct examination, when asked whether Mr. Kilgore said the bite mark was the Stocking Strangler's bite mark, Mr. Dunnavant responded "A couple of times he might have." EMNT, Vol. 2, pp. 304.

Dr. Carlos Galbreath, a former dentist who assisted law enforcement during the investigations, testified that he was called to assist law enforcement during the investigations, and did so by creating a cast of the bite marks found on both Mrs. Cofer and Mrs. Woodruff.⁸ EMNT, Vol. 2, pp. 315. He testified that he created both the rubber gel impression and the stone model of the bite mark from Mrs. Cofer's breast. EMNT, Vol. 2, pp. 319. He further affirmed that the person who left the bite mark would have had a noticeable gap in their teeth, as well as a rotated tooth. EMNT, Vol. 2, pp. 326. On cross-examination, he testified that the stone bite mark model would not represent the teeth of an individual who, subsequent to the creation of the model, had dental work. EMNT, Vol. 2, 348. He also testified that he disagreed with Dr.

⁸ The Petitioner has not offered the Woodruff bite mark as newly discovered evidence to be considered by this Court.

Webber's report concerning the teeth marks, in which Dr. Webber wrote that there were lower teeth bite marks on Mrs. Cofer's breast. EMNT, Vol. 2, pp. 347.

Dr. Galbreath, after being shown a photograph of Mrs. Cofer's breast, testified that the markings of Mrs. Cofer's breast were upper teeth marks. EMNT, Vol. 2, pp. 337. He stated that the upper teeth marks were on Mrs. Cofer's left breast, and that the marks were above her areola. EMNT, Vol. 2, pp. 337. He further testified that he did not see any bite marks below Mrs. Cofer's nipple, that he saw dark spots in that area of Mrs. Cofer's breast, and that those dark spots are not bite marks. EMNT, Vol. 2, pp. 338. He also stated once more that he did not see any bite marks below Mrs. Cofer's nipple and that if he had "seen anything that resembled that", he "would have made the impression." EMNT, Vol. 2, pp. 339.

The Petitioner also called as a witness Dr. Thomas David⁹, the forensic dentist who conducted the comparison between photographs of the bite mark mold and the Petitioner's dental impression. EMNT, Vol. 2, pp. 406-407. He testified that Dr. Webber's report indicated that there was a bite mark both above and below Mrs. Cofer's nipple. EMNT, Vol. 2, pp. 393.

⁹ According to Dr. David's testimony in 1984, after the arrest of Carlton Gary, he was contacted by the District Attorney's Office of Muscogee County. He was soon visited by District Attorney Smith and Chief ADA Pullen and was shown photographs and an impression of a bite mark. EMNT, Vol. 2, p. 384. He states that he was shown the gel impression and not the stone mold which was made from the impression. Id. Using the photos that he was shown, Dr. David determined that there were two arches that composed the bite mark, one from the upper teeth and one from the lower teeth. Id. at 387. Out of the two types of evidence shown to him at the time of the visit, Dr. David opined that the mold was of better evidentiary quality than the photos. Id. He went on to say that he could tell from the mold of the bite that there was probably crowding in the lower front teeth. Id. at 388. D.A. Smith then asked Dr. David if you could look at a person and tell that they had that level of crowding in the bottom teeth, to which Dr. David responded in the affirmative. Id. Dr. David went on to explain that the next step would be to take an impression of a suspect's teeth and compare the impression to the mold. Id. at 389. D.A. Smith proceeded to ask Dr. David if there was a chance that he could exclude a suspect based off the comparison of their teeth to which Dr. David responded that it was certainly possible. Id. at 389. Shortly after hearing Dr. David's response that he could possibly exclude someone if he had their teeth to compare to the mold, District Attorney Smith and Chief Assistant District Attorney Pullen left. He was not contacted by the District Attorney's office again. Id. at 390.

Contradicting Dr. Galbreath, Dr. David asserted that, based upon the photograph of Mrs. Cofer's breast, there were bite marks from an individual's lower teeth. EMNT, Vol. 2, pp. 393. He further opined that dental work on the upper teeth would not preclude an analysis of the lower teeth. EMNT, Vol. 2, pp. 393-394. He stated that while the upper teeth marks on the stone mold were "readily apparent", the "lower markings are much more subtle." EMNT, Vol. 2, pp. 395.

On direct examination, Dr. David testified that he examined, and took photographs of, the stone bite mark model with a stereo microscope. EMNT, Vol. 2, pp. 396. Based upon the stone model, he stated that the biter had a rotated lower tooth and space between two upper teeth. EMNT, Vol. 2, pp. 404-405. Dr. David also created the mold of the Petitioner's teeth for the purpose of comparing the stereo microscope photographs of the lower teeth on the stone model and the Petitioner's lower teeth on his two dental impressions. EMNT, Vol. 2, pp. 405-406. Dr. David asserted, based on his expertise, that the Petitioner is "probably not the biter," but that he "cannot absolutely exclude" the Petitioner. EMNT, Vol. 2, pp. 408-410.

On cross-examination, Dr. David admitted that he testified during the Federal court habeas hearing and that, during the hearing, he gave the following testimony:

"No. I said I didn't see something that jumped out at me as being from the lower teeth. I saw some markings that might have been, but under just looking at it quickly from the naked eye, I was uncertain of how much evidence there was going to be."

EMNT, Vol. 2, pp. 426, quoting Federal Habeas Corpus Transcript, pp. 139, line

16.

He further testified that he did not consider the upper teeth while conducting his comparison, stated that “quantitatively, my analysis was limited”, and admitted that his testimony solely concerned the lower teeth marks. EMNT, Vol. 2, pp. 429. On re-cross examination, he further stated that there were inconsistencies between his mold of the Petitioner’s teeth and the photographs of the stone bite mark model created by Dr. Galbreath. EMNT, Vol. 2, pp. 447-448.

The Petitioner called three additional witnesses, all of whom knew the Petitioner personally in one capacity or another, to testify about the condition and appearance of the Petitioner’s teeth.¹⁰ Each of those witnesses stated that the Petitioner did not have a gap in his teeth. EMNT, Vol. 2, pp. 451-460.

The Petitioner alleges that the mold of the bite mark found on Mrs. Cofer’s breast is newly discovered evidence that the Petitioner requested the bite mark at trial and the State failed to turn over. Petitioner’s Extraordinary Motion for New Trial or in the Alternative for a New Sentencing, pp. 21, 2012. He further argues that the inconsistencies between the stone cast model of the bite mark (the model and the photographs of the model) and the Petitioner’s own dental impression demonstrate that the Petitioner could not have left the bite mark on Mrs. Cofer’s breast. Id. at 24. The State opposes the Petitioner’s contentions, arguing instead that the Petitioner was aware of the bite mark at trial. EMNT, Vol. 9, pp. 87 (2017). The State also argues that the bite mark evidence fails the Timberlake due diligence requirement because the Petitioner raised the bite mark issue as part of his federal habeas corpus proceedings and litigated the issue in the federal court and the Eleventh Circuit, instead of bringing an extraordinary

¹⁰ Ernestine Flowers testified that she grew up with the Petitioner, and that their mothers were close friends. EMNT, Vol. II, pp. 451-455. Walter Gene Hewell testified that he employed Petitioner as a model. EMNT, Vol. II, pp. 456-458). J.T. Frazier testified that he also employed Petitioner as a model. EMNT, Vol. II, pp. 458-460.

motion for a new trial first. Id. at 84. The State did not seek an indictment in the Cofer case, but alleged it was a similar transaction

D. FINGERPRINT EVIDENCE

The Petitioner argues that the fingerprint evidence presented by the State at trial was an unreliable source of identification. Edward Covington, an investigator and supervisor to the Columbus Stocking Strangler Task Force, testified that while he had no personal knowledge of the fingerprint evidence produced at trial, a GBI Official Report indicated that “positive fingerprint identification matching Mr. Gary was lifted from the Martha Thurmond, Florence Scheible, Kathleen Woodruff, and Mary Fern Jackson” crime scenes. EMNT, Vol. 1, pp. 241. A right little finger print on a screen and a left palm print was found on a windowsill of the Woodruff residence, a right thumb print was found in the bedroom of the Scheible residence, a right middle fingerprint was found on a screen at the Thurmond residence, and a right palm print was found in the dining room at the Jackson residence. EMNT, Vol. 9, pp. 99 (2017).

Mr. Covington admitted on cross-examination that he had no knowledge of the State presenting fingerprint evidence at the trial. EMNT, Vol. 1, pp. 233. He further admitted that the GBI Official Reports about the fingerprints do not address the quality of the fingerprints. EMNT, Vol. 1, pp. 244. Additionally, he admitted on re-cross examination that he had no independent personal knowledge of the existence of fingerprint cards from this case, whether the fingerprints found at the victims’ homes were compared to any known suspects, whether those fingerprints were viable, or whether Columbus had the Petitioner’s fingerprints on record in 1977 or 1978. EMNT, Vol. 1, pp. 249-250.

Michael Sellers, a Sergeant with the Columbus Police Department at the time of the investigations, testified that the fingerprint found in the Woodruff case turned out to match the Petitioner's fingerprints, which were obtained from a correctional center in South Carolina from which the Petitioner escaped. EMNT, Vol. 5, pp. 1032-1036.

At trial, Harold Harris, of the Identification Division of the Columbus Police Department, was called to take the stand to introduce the five finger and palm prints into evidence. Trial Transcript, Vol. XIV, pp. 2793. Mr. Harris examined each latent fingerprint and compared them to the rolled ink prints that were created when the Petitioner was initially booked into the jail. Id. at 2794. From these comparisons, Mr. Harris stated that in his opinion, these five prints belonged to the Petitioner. Id. According to Mr. Harris, the left palm print found at the Woodruff residence had approximately seven points of comparison in common with the Petitioner. Id. at 2793. He went on to point out using enlarged photos of the latent print of the right little finger that there were at least thirteen points of comparison. Id. at 2797.

The Petitioner argues that the fingerprint evidence presented by the State at trial was an unreliable source of identification. Petitioner's Extraordinary Motion for New Trial, p. 6. The Petitioner denotes the lack of numerical standards in terms of points of comparison during fingerprint analysis. Id. The Petitioner contends that the points of comparison found in each fingerprint analysis were too low, and, thus, too unreliable, to have positively identified the Petitioner. Id. To further his point, Petitioner alleges that the photos of where the prints were lifted from were either non-existent or too low of quality to be valid. Id. The State opposes this evidence as a ground for a new trial because the Petitioner knew about the fingerprint evidence at trial. EMNT, Vol. 9, p. 87.

E. COMPOSITE SKETCH EVIDENCE

The Petitioner also proffers as newly discovered evidence a composite sketch of Mrs. Miller's alleged attacker whose drawing Mrs. Miller dictated during a hypnosis session. Mrs. Miller could not testify at hearings for Petitioner's Extraordinary Motion for New Trial as she was deceased.

Former District Attorney William Smith, the prosecutor during the Petitioner's trial, testified at the Extraordinary Motion for New Trial that Mrs. Miller identified the Petitioner as her attacker after seeing the Petitioner on the television. EMNT, Vol. 5, pp. 1143. He stated further that Mrs. Miller identified the Petitioner as her attacker in the courtroom during the trial, and maintained her identification of the Petitioner as her attacker after undergoing rigorous cross-examination. EMNT, Vol. 5, pp. 1143-1144. On cross-examination, District Attorney Smith admitted that Mrs. Miller never identified her attacker by photograph. EMNT, Vol. 5, pp. 1233.

Steven Sikes, a Lieutenant in the Muscogee County Sheriff's Department, testified that he was involved in securing a briefcase that was found to contain documents related to the Petitioner's case.¹¹ EMNT, Vol. 8, pp. 32-38. He stated that he was told that Chief Deputy John Fitzpatrick was given a briefcase, and that he was to place it into evidence. EMNT, Vol. 8, pp.

¹¹ During the January 12, 2017 hearing, Chief Deputy John Fitzpatrick testified that he had a conversation with the a former Muscogee County deputy sheriff, Robert Grubbs, and he learned that Mr. Grubbs had found a briefcase in the attic of his mother-in-law's residence, in which he was residing. EMNT, Vol. 8, pp. 23. According to Mr. Fitzpatrick, Mr. Grubbs believed that the briefcase contained documents related to the Petitioner's case. EMNT, Vol. 8, pp. 23. Mr. Grubbs's mother-in-law may have been married, at one time, to Don Miller, a former Muscogee County deputy sheriff and investigator; however, Mr. Fitzpatrick had did not know whether Mr. Miller was involved in the Stocking Strangler investigations. EMNT, Vol. 8, pp. 23-24. Mr. Fitzpatrick obtained the briefcase from Mr. Grubbs, looked through the documents, and eventually met with Judge McBride. Judge McBride notified both Judge Allen and Judge Jordan, and the documents were made available so the Petitioner's counsel and the District Attorney could review them. After the files were reviewed, the briefcase and its contents were re-secured by Lieutenant Steven Sikes, who maintained custody of the briefcase and placed it in evidence storage.

33. Mr. Siemon testified that it came to his attention during the Petitioner's trial that Mrs. Miller may have been hypnotized. EMNT, Vol. 8, pp. 66-67. He further stated that he raised the hypnosis issue during the trial and received the transcript of Mrs. Miller's hypnosis session from the District Attorney's Office. EMNT, Vol. 8, pp. 67. He recalled that he based his cross-examination of Mrs. Miller during the trial on the hypnosis session transcript. EMNT, Vol. 8, pp. 67-68. After reviewing a portion of the trial transcript, he further testified that he learned at trial that a sketch may have been created, that he had wanted to see if the sketch resembled the Petitioner, and he had, for that reason, requested it from the State. EMNT, Vol. 8, pp. 68-69. He testified that he did not receive the sketch from the State. EMNT, Vol. 8, pp. 69. He also testified that, had he obtained the sketch, he would have used it to cross-examine Mrs. Miller. EMNT, Vol. 8, pp. 75. Mr. Siemon acknowledged, after reviewing the trial transcript, that he cross-examined Mrs. Miller about her attacker's eyebrows and face, and that District Attorney Smith stated that Mrs. Miller never adopted the sketch. EMNT, Vol. 8, pp. 79-80.

The Petitioner contends the State failed to turn the sketch over to the defense before trial, the sketch looks nothing like the Petitioner, and the sketch proves that Mrs. Miller was mistaken when she identified the Petitioner as her attacker. Petitioner's Amendment to Extraordinary Motion for New Trial, p. 8 (April 29, 2016). The State argues that the sketch would be inadmissible at a new trial because Mrs. Miller provided the description to the sketch artist while she was under hypnosis. EMNT, Vol. 8, p. 9. The State also argues that there are authentication issues attached to the composite sketch – the State argues that no one could authenticate the sketch because the artist is deceased, and that Mr. Sikes is unable to authenticate the sketch because he was not involved in the case. Id. Additionally, the State argues that the Petitioner

cannot use the hypnosis session transcript to authenticate the sketch because it contains testimonial hearsay, it does not fall under a hearsay exception, and they are not bound by the prosecution's decision at trial to waive its objection to the transcript when Mr. Siemon cross-examined Mrs. Miller using the transcript. Id. at 10-12. Lastly, the State asserts that Mrs. Miller never adopted the sketch and the Petitioner knew that the sketch existed at trial. EMNT, Vol. 9, p. 166.

F. SHOEPRINT EVIDENCE

Petitioner offers a Xerox copy of a shoeprint found on the outside air conditioning unit in front of the Schwob residence as newly discovered evidence.

Mr. Siemon, the Petitioner's attorney at the original trial, testified that he did not recollect seeing the Task Force Xerox copy shoeprint document connected to the Schwob case. EMNT, Vol. 1, pp. 101-102. The Petitioner also elicited testimony on the issue from Jeffery Ertel, the Petitioner's counsel during his State habeas corpus proceedings. EMNT, Vol. 1, pp. 121. Mr. Ertel testified that he neither recalled seeing the Task Force shoeprint document in Mr. Siemon's file nor recalled receiving the document during the State habeas corpus proceedings. EMNT, Vol. 1, pp. 127.

Mr. Covington identified the Task Force shoeprint document, testifying that it was a memorandum with a Xerox copy of a shoeprint that was similar to the shoeprint found at the Schwob residence. EMNT, Vol. 1, pp. 226-227. He testified that it was created the day Mrs. Schwob was attacked and was used as an "investigative tool to look and see if the individual happened to have a shoe that fit that pattern." EMNT, Vol. 1, pp. 227. He also testified that he was never contacted by the State in regard to the shoeprint, and he sent the shoeprint document

to the Petitioner's present counsel on or around August 2006. EMNT, Vol. 1, pp. 231-232. He stated on cross examination that, for the Xerox copy, Agent Horace Walters found a shoe that was similar in type and pattern as the shoeprint found at the Schwob residence. EMNT, Vol. 1, pp. 235. He further stated that he was not told the size of the shoe that left the shoeprint at the Schwob residence, but that the Task Force shoeprint document was "an accurate depiction of what the size of the shoe was." EMNT, Vol. 1, pp. 235. Id.

Mr. David Rose, an individual who assisted the Petitioner's legal counsel in investigating the Petitioner's case also writing a book about the case, measured both of the Petitioner's feet using a device he obtained from a shoe store. EMNT, Vol. 2, pp. 464. He measured one of the Petitioner's feet at the evidentiary hearing - with the Petitioner's sock off, the Petitioner's foot or shoe size was a size thirteen and a half (13 ½). EMNT, Vol. 2, pp. 466-467. With the Petitioner's sock on, the Petitioner's foot or shoe size was almost a size fourteen (14). EMNT, Vol. 2, pp. 466-467. Mr. Rose then proceeded to testify that the Petitioner, at that moment, was wearing a size fourteen shoe. EMNT, Vol. 2, pp. 467. Mr. Rose also took the Petitioner's shoe, placed it on top of the Xerox copy, and stated that the heel of the Petitioner's shoe "is well behind the heel of the photocopy and almost coming off the paper" when the toe of the Petitioner's shoe was aligned with the toe of the Xerox copied shoe. EMNT, Vol. 2, pp. 186-187.

Mr. Richard Boren, a detective assigned to the drug unit with the Columbus Police Department at the time of the investigations, testified on direct examination that, while driving the Petitioner around as he identified the victims' homes, the Petitioner stated that he would change his shoe size from a size nine to a size eleven to fool the police. EMNT, Vol. 4, pp. 858.

He testified on cross examination that he summarized the statements the Petitioner made on May 5, 1984 during the ride-around, that he wrote in that summary that the Petitioner stated he usually wore soft shoes for grip, and that he was unsure whether the Petitioner made the shoe-changing statement on May 5th or the night before. EMNT, Vol. 4, pp. 916-917. He admitted that he did not have any independent knowledge of the Petitioner's shoe size. EMNT, Vol. 4, pp. 917. He further testified that during the Petitioner's Jackson v. Denno hearing, he was asked about a female companion of the Petitioner bringing the Petitioner a pair of shoes. EMNT, Vol. 4, pp. 930. He asserted that he did not recall there being any mention during that hearing of those shoes being a size eleven. EMNT, Vol. 4, pp. 931. On redirect examination, he asserted that, if he had been asked the size of the shoes at the Jackson v. Denno hearing, he would have said "Adidas size 11s." EMNT, Vol. 4, pp. 931.

Petitioner alleges that the Xerox copy of the shoeprint was distributed to various law enforcement officers as an investigation aid. Petitioner's Extraordinary Motion for New Trial, p. 16. The Petitioner alleges that the shoeprint was a size ten (10) and his own shoe size is thirteen and a half (13 ½). Id. at 17. Petitioner argues that the prosecution failed to turn over the Xerox copies to the defense before or during trial. Id. Petitioner also argues that the size of the shoeprint, in relation to Petitioner's own shoe size, demonstrates that Petitioner did not commit the Schwob attack, the Borom murder, or the Illges burglary because the State, at trial, argued that all three crimes were committed on the same night by the same person. EMNT, Vol. 9, p. 197. The State opposes this Court finding that the shoeprint evidence is newly discovered evidence on the ground that the Petitioner knew about the shoe print at trial. Id. at 171.

G. CONFESSION EVIDENCE

Petitioner maintains in his Extraordinary Motion for New Trial that he never gave the claimed “admission” to the attacks for which he was convicted. In light of the statement never being recorded or documented in a written signed statement, Petitioner insinuates that the evidence is “especially suspicious.” Petitioner’s Extraordinary Motion for New Trial or in the Alternative for a New Sentencing, p. 7 (2012). On May 3, 1984 then Sergeant Michael W. Sellers took custody of Carlton Gary from the Albany Police Department. Trial Transcript, Vol. 17, p. 3335. Around eight o’clock that night Sergeant Sellers, Detective Boren, and Lieutenant Charles Rowe began the transportation of the Petitioner from Albany to Columbus, Georgia. During their drive to Columbus, Gary begins to speak with the officers about several crimes that he had participated in while he was in town. Id. at 3338.

Petitioner begins by telling the officers about the Callye East burglary. Id. That while he typically did not “do burglaries” he was with a friend when they drove to the residence in a truck. Id. at 3340. Through the course of the discussion, Petitioner went on to give details of the burglary such as their method of entry into the house, descriptions of the backyard, and that they stole a Toyota and accurately described where they dumped the vehicle¹². Id. at 3342.

¹² During the East burglary on October 8, 1977, a Ruger .22 was taken from the home. Trial Transcript, Vol. 17, p. 3339. On April 10th, 1984, after being alerted that the Ruger had been located by a police department, Sergeant Sellers sent out a communication nationwide for any police department that had recovered a Ruger .22 caliber semi-automatic, serial number 13-70073, to contact him. EMNT, Vol. 5, p.1028. The next day the Michigan State Firearms Records Division contacted Sergeant Sellers and stated that while they were not in possession of the weapon, it had been recorded to be in Kalamazoo, Michigan. Id. From there it was discovered that an Aaron Sanders was the current owner of the firearm. Id. at 1029. A local detective spoke with Mr. Sanders and traced the ownership of the gun to his mother, Lucille Gary Sanders, currently living in Gary, Indiana. Id. The detective was able to contact Mrs. Sanders at which point he was able to determine that she received the gun in 1980 from her brother, Jim Gary, who had lived in Phenix City, Alabama. Id. Sergeant Sellers, along with Detective Lem Miller, went to Phenix City and spoke with Mr. Jim Gary about where he received the gun. Id. at 1031. While Mr. Jim Gary was initially unsure about the origins of the Ruger .22, after being shown a different Ruger of the same model and style, he remembered that he received the original from his nephew Carlton Gary, who had been in custody in a

At around 9:40 the police arrived at the Columbus Police Department. Gary was placed into an interrogation room and questioning commenced after Sgt. Sellers got him a glass of water. Trial Transcript, Vol. 17, p. 3352. He was read his rights and when asked if the interview could be recorded he refused. Id. In the interest of continuing the questioning, Sgt. Sellers decided to continue despite the interrogation not being recorded. Id.

It was during this interrogation that Gary first stated that he had gone into a house on Buena Vista Road, a house he believed belonged to a Mrs. Woodruff. Id. at 3358. According to Sgt. Seller's testimony, it was the Petitioner who first used the name Woodruff and it had not been mentioned by any of the officers prior. Id.

Following this, according to testimony, Petitioner stated that he and Malvin Alamichael Crittenden were accomplices. Id. at 3359. Malvin (sometimes referred to as Michael or Mike) was reported to be the one that assaulted and raped the women while Gary was simply the burglar. Id. at 3362.

Gary then began to tell investigators about a crime against an elderly lady using a walker on Dimon Street. Id. at 3361. He described using the side door to enter the residence while the victim was still out in the yard. Id. at 3362. Once in the house, the two found a yellow envelope in the closet that contained about twelve hundred dollars. Id. at 3363. Upon finding a nice television in the house, Gary stated that he left the house to pull the vehicle around back to load

South Carolina Correctional Facility. Id. at 1032. Sergeant Sellers then contacted said facility and learned that Mr. Gary had escaped on March 15th. Id. at 1033. As the East robbery was thought to be connected to the "Stocking Strangler" murders, Sergeant Sellers requested Mr. Gary's records along with a set of fingerprints to be sent to him so that he could have them compared to the prints lifted from the Woodruff crime scene. Id. Four days later, the prints were delivered to Sergeant Sellers who immediately had them compared to the Woodruff prints by Sergeant Schaffer of the Columbus Police Department. Id. Sergeant Schaffer after comparing the prints retrieved from South Carolina and the latent prints from the Woodruff residence stated that they were a match. Id. at 1034. This information formed the basis that led to Sergeant Sellers, along with other officers, taking custody of Carlton Gary in Albany, GA and ultimately him being indicted.

it. Trial Transcript, Vol. 17, p. 3363. He expected Malvin to come out with the TV but instead he came back empty handed and the two left with only the twelve hundred dollars. Id. at 3364. That victim was Mrs. Florence Scheible.

The questioning continued until 1:30 AM the following morning at which point Gary stated that it would be easier for him to show the investigators the houses that he had been to than to tell them about it. Id. at 3366. According to Sgt. Sellers, Gary never expressed that he was tired; to the contrary, Sellers stated that he was caught up “recapping all this stuff.” Id.

From this point, Gary, Sergeant Sellers, Lieutenant Rowe, and Detective Boren got back into a police cruiser and drove around the Wynnton Road area while Gary discussed different houses that he and Malvin had been to.¹³

As they continued, the Petitioner and Sergeant Sellers drove past Mrs. Scheible’s house at which point Gary stated, “that’s the house right there where I saw the old lady in the front yard with her walker.” Id. at 3375. He then proceeded to show police the side door that he used to enter the residence. Id.

¹³ The first residence that the Petitioner and police visit during his admission is the residence of Mrs. Ferne Jackson. Trial Transcript, Vol. 17, p. 3368. When asked if he recognized the house, Gary responded that he did not recall whether he ever went into that particular house. Id. at 3369. Following the Jackson residence, the Petitioner directed police to Forest Avenue and the home of Abraham Illges. Id. at 3370. The Petitioner recognized the home because he referred to it as “the castle.” Id. From there, the Petitioner stopped at the Borom home. Id. at 3371. He recognized the long driveway that went around the back of the house. Id. Upon seeing the driveway he confirmed that this was the house that Michael said that he had a bit of a problem with the woman who was “big and strong.” Id. at 3372. The next house that Gary pointed out was on Carter Avenue and belonged to Ruth Schwob. Id. at 3373. Gary went on to say that it was this house that Michael was almost caught because of an alarm going off. Id. After driving a bit longer, Gary eventually pointed out the home of Jean Dimenstein. Id. at 3378. Gary stated that Michael took the pins out of the door in order to gain entry. Id. During the hearing for Extraordinary Motion for New Trial Detective Boren testified that Gary stated that Mike went into the Dimenstein house two separate times, ultimately never returning to the car after going in the second time. EMNT, Vol. 4, p. 843. After driving by and identifying the Thurmond and Woodruff homes, Gary stopped again at the home of Mr. and Mrs. Swift. He identified the house due to its large columns. Trial Transcript, Vol. 17, p. 3381.

As the drive continued, Gary pointed to another house and stated that the house he indicated was where he first saw “Michael” on top of the woman. This house belonged to Martha Thurmond. Trial Transcript, Vol. 17, p. 3379. Gary stated that he saw Michael on top of Thurmond in a “combination room,” but he knew that the room had a bed in it. EMNT, Vol. 4, p. 847. During the time in the house, Gary found a small amount of money and then he and Michael left the residence. Id. at 848.

The next house that the Petitioner took the police to he referred to as “Mrs. Woodruff’s” house. Id. at 849. Gary identified Mrs. Woodruff’s house out of three possible nearby houses as the one with red bricks. Id. According to Detective Boren, Gary informed the officers that Michael went in through a back window and took a screen off to gain entry. Id. Once they were inside, Gary checked a closet and a chest of drawers when he then saw Michael dragging the lady down the hall. Id. at 851. He then saw Michael toss the lady onto a bed and unbuckle his pants. Id. Gary then stated he left and met Michael later once he came back outside. Id.

Ultimately, the drive ended around 3:30am in the morning when the officers returned the Petitioner to the jail.

V. Denial of Funds - The Supreme Court of Georgia’s Ruling is Binding on this Court

The Petitioner’s argument that the defense was “hamstrung in being able to effectively challenge the State’s theories because of the lack of resources, especially expert assistance,” is essentially an ineffective assistance of counsel claim, which Petitioner raised on direct appeal and in both the state and federal habeas courts. Defendant’s Post-Evidentiary Hearing Brief in

Support of His Extraordinary Motion for New Trial or In The Alternative For a New Sentencing, p. 3, 2015.

On direct appeal, the Georgia Supreme Court remanded the case back to the trial court to specifically determine whether the Petitioner was prejudiced by the lack of effective representation resulting from the denial of funds and, in fact, any other reason. Defendant's Consolidated Memorandum and Motions for Meaningful Relief, p. 1, 1984. At the hearing before the trial court, the Petitioner prevented his attorneys from testifying on any issues regarding the Petitioner's ineffective assistance of counsel claim, which included the denial of funds, by repeatedly refusing to waive the attorney-client privilege. The trial court found that:

“to each and every question material question the defendant asserted his privilege not to have his counsel testify. This is true even though the defendant was made inescapably aware by this court that this was his opportunity to have these possible issues litigated. It is therefore the finding of this court that as to those issues addressed during the hearings on remand that the defendant knowingly, intelligently and voluntarily waived those issues after having been repeatedly advised by the court that his conduct would amount to such a waiver.”

Order on Remand, pp. 26-27.

After the trial court rendered its ruling, the case was re-docketed and argued before the Supreme Court of Georgia. In its opinion, the Supreme Court of Georgia asserted that the Petitioner, in his post-remand brief, continued to claim that “the trial court’s refusal (prior to the

original trial) to appoint additional counsel or to provide funds for forensic and investigative assistance was an abuse of discretion.” Gary v. State, 260 Ga. 38, 40, 389 S.E.2d 218, 221 (1990). The Supreme Court of Georgia ultimately affirmed the trial court, finding that the Petitioner “knowingly, voluntarily and intelligently has waived any issue effectiveness of trial counsel.” Gary v. State, 260 Ga. at 40, 389 S.E.2d at 221 (1990). The Georgia Supreme Court decided that “the defendant was given the opportunity to prove that the denial of funds for legal, investigative, and forensic assistance prejudiced his defense; i.e. that because of the trial court’s denial of funds, attorney Siemon could not effectively represent his client. The defendant waived that opportunity, and we need not further address his contentions in this regard.” Id.. The Supreme Court of the United States denied the Petitioner’s Writ of Certiorari to the Supreme Court of Georgia¹⁴, and denied the Petitioner’s Petition for Rehearing¹⁵.

The Petitioner then litigated the denial of funding issue through state habeas corpus proceedings and federal habeas corpus proceedings. Each court rendered a final ruling that was adverse to the Petitioner’s position on the issue, regularly denying the Petitioner habeas corpus relief on the issue¹⁶.

It is clear under the Constitution of the State of Georgia that the “the decisions of the Supreme Court shall bind all other courts as precedents.” G.A. CONST. art. VI, § 6, ¶ VI. Therefore, this Court shall adhere to the Supreme Court of Georgia’s decision on the matter, and find that the Petitioner knowingly, voluntarily and intelligently waived any issue concerning

¹⁴ Gary v. Georgia, 498 U.S. 881, 111 S. Ct. 226 (1990).

¹⁵ Gary v. Georgia, 498 U.S. 1043, 111. S. Ct. 720 (1991).

¹⁶ Gary v. State, 260 Ga. 38, 40-41, 389 S.E.2d 218 (1990).

¹⁷ Gary v. Warden, Georgia Diagnostic Prison, 686 F.3d 1261 (2012).

effectiveness of trial counsel and waived his opportunity to prove that the trial court's denial of funds rendered his trial counsel ineffective.

VI. EXTRAORDINARY MOTION FOR NEW TRIAL LEGAL ANALYSIS

"Extraordinary motions for a new trial are not favored, and a stricter rule is applied to an extraordinary motion for a new trial based on the ground of newly available evidence than to an ordinary motion on that ground." Wallace v. State, 205 Ga. 751 (Ga. 1949). The standard for granting an extraordinary motion for a new trial based on newly discovered evidence is well-established law. Timberlake v. State, 246 Ga. 488, 491, 271 S.E.2d 792, 795-796 (Ga. 1980). The movant is obligated to prove to the satisfaction of the trial court:

"(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."

Timberlake v. State, 246 Ga. 488, 491, 271 S.E.2d 792, 795-796 (Ga. 1980); Emmett v. State, 232 Ga. 110, 117, 205 S.E.2d 231 (1974); Bell v. State, 227 Ga. 800, 805, 183 S.E.2d 357 (1971); Burge v. State, 133 Ga. 431, 432, 66 S.E. 243 (1909).

Further, the movant must demonstrate that the newly discovered evidence would be admissible if a new trial was granted. Dick v. State, 248 Ga. 898, 900, 287 S.E.2d 11 (1982), citing Timberlake, 246 Ga. at 491. A new trial may not be granted when the sole effect of the newly discovered evidence is the impeachment of a witness's credibility. See Caldwell v. State, 269 Ga. App. 84, 86, 603 S.E.2d 506, 509 (Ga. Ct. App. 2004). "This is true even though the witness whose credibility would be impeached gave the only testimony on some vital point in the case." Caldwell v. State, 269 Ga. App. at 86, citing Weems v. State, 268 Ga. 142, 143(1), 485 S.E.2d 767 (1997).

The movant must prove all six requirements before a new trial can be granted. Timberlake, 246 Ga. at 491, citing Offutt v. State, 238 Ga. 454, 455, 233 S.E.2d 191 (Ga. 1977). The failure to prove, to the satisfaction of the trial court, even one requirement is an appropriate ground for denying an extraordinary motion for a new trial as to that count of the indictment. Drane v. State, 291 Ga. 298, 300, 728 S.E.2d 679 (Ga. 2012), citing Timberlake, 246 Ga. at 491; Davis v. State, 283 Ga. 438, 440, 660 S.E.2d 354 (Ga. 2008); see Wright v. State, 310 Ga. App. 80 (2011) (Georgia Court of Appeals affirms trial court which granted extraordinary motion on one count of the indictment and denied the remaining indictment counts).

Below, the Court discusses the evidence proposed by the Petitioner that fails Timberlake on issues other than materiality.

A. Fingerprint Evidence – Fails Timberlake

The fingerprint evidence offered by the Petitioner as newly discovered evidence fails to satisfy Timberlake. Here, the Petitioner has not presented any new fingerprint evidence that has

come to his knowledge since the trial. The Petitioner has not disputed that he had knowledge of the fingerprint evidence at trial. Rather, the Petitioner is challenging the sufficiency, reliability, and accuracy of evidence that was introduced, admitted, and litigated at trial. At trial, the State presented as evidence the fingerprints lifted from the points of entry found at several of the victims' homes, including the homes of Mrs. Woodruff, Mrs. Thurmond, Mrs. Scheible, whose cases were indicted. Trial Transcript, Vol. XIV, p. 2792. It is clear from the record that the Petitioner challenged the fingerprint evidence at trial as well. Id. at 2801.

As to the reliability and sufficiency of the fingerprints that were entered into evidence at trial, the opinions of experts on any question of science or skill shall always be admissible. O.C.G.A. 24-7-707 (2013). The testimony of an expert as to the comparison of the defendant's fingerprints to the latent fingerprint found at the scene of the crime is sufficient to authorize the expert opinion that the Petitioner made the prints. Colbert v. State, 149 Ga. App. 266, 253 S.E.2d 882 (1979). Therefore, there is no question of reliability for this Court to answer.

Based upon the foregoing reasons, the Petitioner's fingerprint evidence fails Timberlake.

B. Composite Sketch Evidence – Fails Timberlake

The composite sketch offered by the Petitioner as newly discovered evidence fails to satisfy the Timberlake requirements because the Petitioner knew of the sketch's existence during the trial and the Petitioner's sole purpose in introducing this evidence is to impeach the testimony of Mrs. Miller, who identified the Petitioner as her attacker at trial.

Despite the discovery of the composite sketch after the trial, the Petitioner was clearly aware during the trial that the sketch existed, which is evident from Mr. Siemon's discussion with

District Attorney William Smith on the record about Mr. Siemon's interest in the sketch. Under Timberlake, the evidence must have come to the Petitioner's knowledge since the trial.

Timberlake, 246 Ga. at 491, 271 S.E.2d at 795-796. While the Petitioner has discussed how the sketch was found and that it was found after the trial, it is clear from testimony elicited during the evidentiary hearings that the Petitioner had knowledge of the sketch at trial.

It is apparent from the evidentiary hearing testimony that the Petitioner's sole intention in introducing the composite sketch is to attack Mrs. Miller's identification of the Petitioner as her attacker and, thus, attack her credibility. Furthermore, the evidentiary hearing testimony shows that Mrs. Miller never adopted the sketch as an accurate depiction of her attacker, that Mrs. Miller identified the Petitioner as her attacker in the courtroom during the trial, that Mr. Siemon cross examined Mrs. Miller extensively on her identification of the Petitioner and used the hypnosis session transcript to do so, and that Mrs. Miller, in the face of this rigorous cross examination, maintained her belief that the Petitioner was her attacker. "A new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness." Timberlake, 246 Ga. at 491, 271 S.E.2d at 795-796.

Based upon the foregoing reasons, the Petitioner's composite sketch evidence fails Timberlake.

C. Confession Evidence – Fails Timberlake

Petitioner has not sufficiently demonstrated that the evidence presented is, in fact, newly discovered evidence, and that said evidence is so material that it would have likely produced a different result in the guilt-innocence phase if it had been presented at trial.

Petitioner claims that the testimony given by officers at trial that Gary admitted to participating in certain trials is “especially suspicious” in light of the fact that Mr. Gary had allowed police to record statements in the past. Petitioner’s Extraordinary Motion For New Trial or in the Alternative For a New Sentencing, p. 7. Petitioner continues by introducing testimony of Dr. Gregory DeClue, a forensic psychologist specializing in police interrogation techniques, who testified that current research has shown that once thought reliable confessions were actually false. Petitioner also relies on the confession given by Jerome Livas, a prior suspect in the Stocking Strangler cases in Columbus. Like Gary, Livas was able to give police detailed descriptions regarding crimes that were associated with the Stocking Strangler. It was only when the murders continued after he was arrested that he was released from custody.

The first requirement of the Timberlake analysis is that the evidence introduced must be new, meaning that it must not have been known at trial. In regards to evidence regarding the admission given to officers, the Petitioner offers no new evidence that was not already known at trial. The admissions were heavily litigated during the trial both on direct and cross examination. Sergeant Sellers took the stand for the prosecution and introduced all evidence pertaining to Petitioner’s admissions made during his first night at the Columbus Police Station and during the night time ride around the Wynnton Road area. Petitioner’s attorney, Mr. Siemon cross examined Sergeant Sellers on the circumstances of the alleged admissions and relied heavily on the lack of record during his closing arguments.

Furthermore, the testimony of Dr. Gregory DeClue fails the Timberlake standard on many different standards. While the testimony itself is new, it is simply a new perspective on the same evidence. Timberlake requires that the new evidence be so material that it would probably

produce a different verdict as well as the evidence not being cumulative or that it is not introduced for the purposes of impeachment only. Timberlake, at 491.

Dr. DeClue's testimony is not material. While the testimony was highly educational about the safeguards that should be in place to prevent a false confession, it does not gain any relevance beyond being informative. Dr. DeClue provides the Court with the information that contrary to the belief of many ordinary people and even of some experts, when people have given false confessions, the false confessions were not devoid of details. EMNT, Vol. 5, p. 1290. He goes to state that he believes his testimony is relevant to the case at hand because the public is not yet aware of the fact that oftentimes false confessions are very detailed. Id. at 1300. When questioned about determining whether a confession is false, Dr. DeClue explains that determining whether a confession is false is completely out of his realm of expertise. Id. at 1298. For the foregoing reasons, this Court does not find the argument that there exists the possibility of falsified confessions to be strong enough to possibly produce a different verdict. This is supported by the fact that Mr. Siemon in his closing arguments spent a great deal of time discussing the possibility of the confession being created solely by the police. Trial Transcript, Vol. 23, p. 4221. While without the testimony of an expert to show that false confessions had been given in the past in other cases, the jury in this case heard the attorney's suggestion that the confession was indeed false and still chose to convict the Petitioner on all nine counts.

The Petitioner also brings into the discussion the alleged confession of Jerome Livas. In making the argument that the police helped fabricate the confession or possibly fed information to Mr. Gary, the Petitioner shows that Mr. Livas had a very detailed, very similar confession. Id. In October of 1977, Mr. Livas was questioned about the crimes that were attributed to the

Stocking Strangler. MNT, Vol. 21, p. 4137. In his testimony at trial, Livas indicated that his original statement indicated that he knew that Mrs. Miller lived in a nursery school, that a window had been used as a point of entry, and that he ripped the telephone off the wall of her apartment upon leaving. Id at 4140-4142. Additionally, he states that his original statement indicated that he used a screwdriver to gain access to Mrs. Jackson's residence. Id.

This testimony too fails the Timberlake standard, mainly because it is not evidence that has been discovered since the trial has taken place. In fact, Mr. Livas took the stand during the original trial against the Petitioner. Both parties had adequate time and ability to question Mr. Livas in front of the jury to discover the possible source of the strange coincidences.

For the foregoing reasons, the Petitioner's confession-related evidence fails Timberlake.

D. The Court Will Not Draw an Adverse Inference Against the State for the Contamination of the Thurmond DNA Evidence

The Court will not draw the adverse inference against the State that the Thurmond DNA evidence exculpates the Petitioner. The Petitioner has not demonstrated to the satisfaction of the Court that the State contaminated the Thurmond sample in bad faith. The testimony at the evidentiary hearing demonstrated that the Thurmond sample was contaminated with a specially used quality control sample, which was handled by another scientist who used shared the same lab area as Mrs. Pickens, who was testing the Thurmond sample. In order to obtain an adverse inference against the State for failing to properly preserve evidence, the Petitioner must prove that the DNA evidence was constitutionally material and that, in this case, the GBI Crime Lab,

and therefore the State, acted in bad faith. State v. Mussman, 289 Ga. 586, 590, 713 S.E.2d 822, 825 (Ga. 2011).

“Evidence is constitutionally material when its exculpatory value is apparent before it was lost or destroyed and is of such a nature that a Petitioner would be unable to obtain other comparable evidence by other reasonably available means.” Mussman, 289 Ga. at 590, 713 S.E.2d at 825. Here, the exculpatory value of the DNA from the Thurmond vaginal washings was apparent when the parties entered into the Consent Order agreement to test, among other evidence, the Thurmond evidence. Further, the Petitioner is unable to obtain comparable evidence because there is no other biological evidence available from the Thurmond case from which DNA could be extracted. While the extracted DNA, the subject of the contamination claim, remains available, the swabbings themselves were destroyed during the analysis process.

Bad faith is evident when the State’s conduct demonstrates “some intent to wrongfully withhold constitutionally material evidence from the Petitioner.” Mussman, 289 Ga. at 591, 713 S.E.2d at 826. In this case, the Petitioner has failed to present any evidence that the GBI Crime Lab or the State, in failing to preserve the evidence properly, acted with any improper motive or through a conscious doing of wrong, or that the State contaminated the evidence with the intent of keeping exculpatory evidence out of the Petitioner’s hands.

Therefore, the Court finds that the State’s conduct in failing to preserve the Thurmond DNA evidence does not constitute bad faith and, thus, will not draw an adverse inference against the State.

E. The Materiality of the Petitioner's DNA, Secretor, Shoeprint, and Bite Mark Evidence

This Court finds that the existence of DNA evidence, the secretor work papers, the Schwob shoe print, and the bite mark mold was not known at trial by the Petitioner or his attorneys. The Court also finds that the Petitioner did not fail to show due diligence by failing to file an Extraordinary Motion for New Trial at the time each piece of evidence was discovered. These select pieces of evidence are not cumulative in the fact that the introduction of each piece illustrated new information to the jury that had not been shown by existing evidence. Furthermore, the introduction of DNA evidence, the secretor evidence work papers, the Schwob shoe print, and the bite mark mold would constitute substantive evidence because it would allow the jury to have direct evidence and could not be limited to only impeaching other evidence. Lastly, due to the evidentiary hearings that included testimony on each new piece of evidence, the need for affidavits is eliminated.

Particularly in this death penalty case where a man might soon be executed, this Court endeavors to look beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Gary's allegedly-new testimony would probably find him not guilty or give him a sentence other than death. In that spirit, this Court looks to the Supreme Court in *Davis v. State*, who chose to focus primarily on one of the required showings for an extraordinary motion for new trial, the requirement that the new evidence be "so material that it would probably produce a different verdict." *Davis v. State*, 283 Ga. 438, 447, 660 S.E.2d 354, 362 (2008) (citing *Timberlake*, 246 Ga. at 491).

In light of this approach, the evidence the Court now analyzes with respect to the materiality requirement of Timberlake centers on the Petitioner's DNA, secretor work papers, shoeprint, and bite mark evidence. The Court considers the weight of this evidence singularly and collectively.

1. DNA Evidence

DNA evidence has been obtained from four cases, Thurmond, Woodruff, Dimenstein, and Miller. The DNA for the Thurmond case, an indicted case, were ultimately contaminated with a quality control sample through no bad faith on the part of the State. The Thurmond DNA results, therefore, neither inculcate nor exculpate the Petitioner. DNA testing was performed on the vaginal washings of Woodruff, another indicted case. Testing of the Woodruff vaginal washings resulted in no usable DNA profile being found.

The parties consented to the DNA testing of the vaginal washings of Mrs. Dimenstein, an unindicted case presented by the State during trial as a similar transaction. The DNA test resulted in a match between the male DNA profile found in the Dimenstein vaginal washings and the Petitioner's DNA profile. The parties dispute whether the Dimenstein DNA test results can be considered by this Court. The State wished to present the Dimenstein DNA test results to the Court to counter the Petitioner's DNA evidence. The State relies on the Consent Order entered into by both parties and argues that, because the Petitioner consented to the testing, the State is permitted to present the results to the Court. The State also cites the Supreme Court of Georgia case Bell v. State to support its action of introducing new evidence. Bell v. State, 227 Ga. 800, 809 (Ga. 1971). The Petitioner contends that, while the State "can bring in contrary evidence"

and challenge their new evidence, “they can't bring in new, substantive evidence.” EMNT, Vol. 9, pp. 49-50. As it is clear from the Consent Order that the Petitioner consented to the DNA testing of the Dimenstein vaginal washings, the Court will consider the Dimenstein DNA results in its analysis. Consent Order For Limited DNA Testing, filed February 19, 2010.

Lastly, DNA testing was conducted for the Miller case, an unindicted case presented at trial as a similar transaction, on several articles of clothing, including a white sleeping gown. The results of the DNA test excluded the Petitioner as the semen donor. The parties dispute whether Mrs. Miller was wearing the sleeping gown when she was attacked.

2. Secretor Evidence

The Petitioner hired an expert witness, Dr. Hampikian, to construe several documents: work papers containing the scientific results of the secretor testing conducted in the Thurmond and Scheible cases, GBI Crime Lab reports the secretor testing results, and the Petitioner's secretor test. He also examined the expert testimony Mr. Wegel gave at trial. Dr. Hampikian testified that the semen donor in both the Thurmond and Scheible cases was a non-secretor and that, based upon the Petitioner's secretor testing, the Petitioner was a normal secretor. He ultimately excluded the Petitioner as the semen donor in the Thurmond and Scheible cases. He further disputed Mr. Wegel's testimony, asserting that an individual cannot be a weak secretor, that one is either a secretor or non-secretor. He admitted that Mr. Wegel was likely being cautious when he made his findings.

3. Shoeprint Evidence

The Petitioner presented a Xerox copy of a shoe as newly discovered evidence. A shoeprint was found on an air conditioner unit outside of a window of the residence of Mrs. Schwob, another victim whose case was unindicted but presented at trial as a similar transaction. As that window was considered the point of entry, an agent investigating the crime secured a shoe that was similar in size and pattern, made a Xerox copy of it, and distributed it to law enforcement to be used as an investigative tool. The Petitioner presented testimony from Mr. Rose, who was assisting the Petitioner's legal team, as well as writing a book on the case. Mr. Rose measured one of the Petitioner's feet and determined that his shoe or foot size was thirteen and a half. He further testified that the shoe the Petitioner was wearing at that moment was a size fourteen, and the Petitioner's shoe did not match up with the Xerox copy.

Mr. Siemon and Mr. Ertel both testified that they neither saw the Xerox copy nor received the Xerox copy from the State. Mr. Covington also testified that the Xerox copy was made by obtaining a shoe of similar size and pattern as the shoe print found on the air conditioner unit. He further testified that the Xerox copy of that shoe was used by law enforcement as an investigative tool.

4. Bite Mark Evidence

The Petitioner presented evidence of a bite mark mold that was created from the wound left on Mrs. Janet Cofer's left breast. This bite mark mold was created by Dr. Galbreath upon request of Mr. Don Kilgore the current Coroner at the time. Dr. Thomas David, a forensic dentist, testified that District Attorney Smith and Chief District Attorney Pullen came to visit

him with the bite mark mold and photographs of the wound. When he told both the prosecutors that he could possibly exclude a suspect based off the comparison of their teeth to the mold, they left and did not contact him again. This mold was never turned over at trial and was not discovered again until Federal Habeas proceedings.

VII. CONCLUSION

A. Guilt/Innocence Phase

During trial, the jury heard expert fingerprint analysis that included the three indicted crimes as well as the unindicted crime against Mrs. Jackson. Additionally, the jury heard the admission by Mr. Gary through Sergeant Seller's testimony in which he was thoroughly examined and cross-examined. The jury also heard several eyewitness testimonies placing Petitioner in the area at the time of the crimes.

In addition to the testimony at trial, this Court also considered the charge that the jury received at trial as to similar transactions.

The jury was charged that "He the Petitioner is not on trial on account of any other alleged offense or offenses, and any evidence in this case with reference to any other alleged offense or offenses, if any, is admitted for the purpose of your consideration, solely and only under the provision of law that where knowledge, common design, modus operandi, motive, intent, good or bad faith, bent of mind, plan, scheme, and course of conduct, identity, or other matters dependent upon a person's state of mind, are involved as material elements in the offense for which he is on trial." Trial Transcript, Vol. 23, p. 4387. "Evidence of the defendant's conduct with reference to similar transactions or other related crimes is admitted solely for

consideration as it might tend to illustrate the Defendant's state of mind on the subjects involved." Id. They were further charged that if they believed that the accused had related or similar transactions, they will bear in mind that in connection with any such evidence they must consider it solely with reference to the mental state, identity or intent of the Defendant, insofar as the same is applicable to, or illustrates the charge contained in the bill of indictment and for no other purpose." Id. at p. 4388.

In light of this, each piece of evidence presented by Petitioner in his Extraordinary Motion for New Trial that pertains to a similar transaction, i.e. the DNA evidence of Dimenstein and Miller, the Schwob shoeprint, and the Cofer bite mark, could have only been considered by the jury at trial for the limited purposes of showing the identity, common design, modus operandi, bent of mind, or scheme of Carlton Gary as the perpetrator.

This Court finds, in considering the testimony and other evidence submitted during the trial together with the evidence presented by the Petitioner in his Extraordinary Motion for New Trial, that the evidence the Petitioner has put forth in his Extraordinary Motion for New Trial is not so material that it would probably result in a different verdict and, therefore, fails Timberlake.

B. Alternative Sentencing/Sentencing Phase

In the alternative to a new trial, Petitioner requests the Court to consider granting a new trial on the issue of punishment. After considering the testimony and other evidence submitted at trial together with the evidence presented by the Petitioner in his Motion for Alternative Sentencing, this Court finds as follows as to the newly presented evidence:

Based upon the foregoing reasons set out herein, the Petitioner's fingerprint evidence fails Timberlake.

Based upon the foregoing reasons set out herein, the Petitioner's composite sketch evidence fails Timberlake.

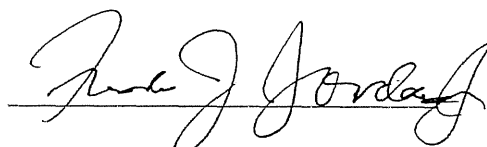
Based upon the foregoing reasons set out herein, the Petitioner's confession evidence fails Timberlake.

This Court will not draw an adverse inference against the State for the contamination of the Thurmond DNA evidence.

Based upon the foregoing reasons set out herein, the remaining newly admitted evidence, the DNA, secretor work papers, shoeprint, and bite mark, does not rise to the level of being so material as to probably result in a different sentencing verdict and, therefore, fails Timberlake.

For the foregoing reasons, Petitioner's Extraordinary Motion For New Trial and in the Alternative a New Sentencing Is Hereby DENIED.

SO ORDERED, this 1st day of September 2017.



Judge Frank J. Jordan, Jr.

Muscogee County Superior Court

CERTIFICATE OF SERVICE

I, Bowie Link, Law Clerk to Judge Frank J. Jordan, Jr., hereby certify that on or around the date of the attached order's signature, I promptly mailed a copy of the foregoing Order to the individuals listed below with the following contact information:

John R. Martin
Martin Brothers, P.C.
44 Broad Street, N.W.
Suite 202
Atlanta, GA 30303

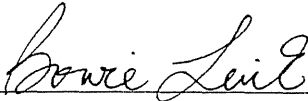
Michael McIntyre
965 Virginia Ave, NE
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Julia Slater,
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Columbus, GA 31901

Susan Boleyn
Special Assistant District Attorney
125 Inverness Rd.
Athens, GA 30606

Sabrina Graham
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334

This 1st day of September, 2017.



G. Bowie Link
Law Clerk
Office of Judge Frank. J. Jordan, Jr.
Muscogee County Superior Court
Chattahoochee Judicial Circuit

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

NO. _____

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

CARLTON GARY
Petitioner,
v.
STATE OF GEORGIA,
Respondent.

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

APPENDIX B

Decision of the Supreme Court of Georgia dated
December 1, 2017 denying Mr. Gary's Application for
Discretionary Appeal, Carlton Gary v. State, Case No.
S18D0399



SUPREME COURT OF GEORGIA
Case No. S18D0399

Atlanta, December 01, 2017

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

CARLTON GARY v. THE STATE

From the Superior Court of Muscogee County.

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby denied. All the Justices concur.

Trial Court Case No. 48573, 48937

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sei C. Bullock, Chief Deputy Clerk

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

NO. _____

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CARLTON GARY
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STATE OF GEORGIA,
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TO THE SUPREME COURT OF THE STATE OF GEORGIA

APPENDIX C

Decision of the Supreme Court of Georgia dated January
16, 2018 denying Mr. Gary's Motion for
Reconsideration, Carlton Gary v. State, Case No.
S18D0399



SUPREME COURT OF GEORGIA
Case No. S18D0399

Atlanta, January 16, 2018

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

CARLTON GARY v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Theresa A. Barnes
, Clerk