APPLICATION OF CARLTON GARY FOR COMMUTATION OF HIS SENTENCE OF DEATH

John R. Martin
202 Grant Building
44 Broad Street, N.W.
Atlanta, GA 30303
(404) 522-0400 (office)
(404) 223-6467 (fax)

Michael Kennedy McIntyre
965 Virginia Avenue, NE
Atlanta, GA 30306
(404) 879-1515 (office)
(404) 879-0005 (fax)

Counsel for Carlton Gary

APPLICATION OF CARLTON GARY FOR COMMUTATION OF HIS SENTENCE OF DEATH

Applicant Carlton Gary (hereinafter referred to as "Applicant" or "Mr. Gary"), through undersigned counsel, hereby applies to the Georgia Board of Pardons and Paroles pursuant to Article IV, Section 2, ¶ II(a) and (d) of the Georgia Constitution of 1983 and O.C.G.A. §§ 42-9-20 and 42-9-42(a), for the commutation of his sentence of death.

I. INTRODUCTION

Mr. Gary was convicted and sentenced to death for three murder/rape/burglaries that were part of a series of attacks on elderly women in their homes in Columbus, Georgia, during a six month period in 1977 through 1978. Although Mr. Gary was prosecuted and convicted of the murder/rape/burglary of only three of these women, Kathleen Woodruff, Florence Schieble and Martha Thurmond, the prosecution contended that he was a serial killer, attacking a total of nine women and killing seven of them.

The women were attacked in a ritualistic, signature manner typically involving their own stockings, leading to the perpetrator being dubbed by the media as the "Columbus Stocking Strangler." The common characteristics of these crimes, essentially what the State contended to be the signature modus operandi of the Columbus Stocking Strangler, was that the attacks occurred in a dwelling, the victim was an elderly female, in all but one of the cases the attack occurred at night

after a burglary of the home, each of the victims was sexually assaulted or raped, each was strangled with a ligature type of strangulation and there was physical abuse of the victim. The other claimed victims, about whom similar transaction evidence was introduced during the trial were Mildred Borum, Janet Cofer, Jean Dimenstein, Mary "Fern" Jackson, Gertrude Miller, and Ruth Schwob.The prosecution contended that one and only one person was responsible for all nine of the attacks. As such, a showing that the evidence at even one of the crime scenes excluded Mr. Gary as the perpetrator would prove, under the prosecution's own theory, that Mr. Gary was innocent of all nine attacks.

While the defense at trial was hamstrung in being able effectively to challenge the State's theories because of the lack of any resources, especially expert assistance, and the State's withholding of critical exculpatory evidence, over the intervening years since Mr. Gary's convictions and sentences to death newly discovered evidence has come to the attention of the defense, including, (1) DNA evidence not available at the time of Mr. Gary's trial confirming that Mrs. Miller, the one victim identifying Mr. Gary at trial, was obviously mistaken in her identification, as well as a police report evidencing her statement shortly after the attack on her that she could not identify her attacker, a document which then prosecutor William Smith now admits he should have turned over to the defense; (2) expert serological evidence, not available to the defense at the time of trial, proving that the semen left by the rapist in the Thurmond and Scheible cases could

not have been left by Mr. Gary; (3) a shoeprint from the point of entry in the Schwob case never previously disclosed to the defense but revealed by a former GBI agent who was part of the Task Force assembled by the then Governor to investigate the crimes which does not match Mr. Gary's shoe size; (4) a long missing bite mark mold found by the Coroner as he was cleaning a cabinet of a bite mark in the Cofer case that does not match Mr. Gary; (5) expert evidence raising doubts about the reliability of the fingerprint evidence. This newly discovered evidence was presented at an extensive evidentiary hearing on Mr. Gary's Extraordinary Motion for New Trial or in the Alternative for a New Sentence, from which exhibits and transcripts excerpts are attached hereto.

Counsel for Mr. Gary will describe in detail below the importance of each specific piece of newly discovered evidence. But this evidence should not be considered in isolation. It is the total package of newly discovered evidence undermining the State's theory of prosecution which creates the probability that the jury would have at least had an reasonable doubt as to guilt, but at a minimum lingering or residual doubt, something less than a reasonable doubt, sufficient to cause at least one juror not to vote for death. See, United States v. Chandler, 218 F.3d 1305, 1320 & fn. 28 (11th Cir. 2000)(en banc); Tarver v. Hopper, 169 F.3d 710, 715-716 (11th Cir. 1996)(citing to a comprehensive study of opinions of jurors in capital cases which concludes that "the best thing a capital defendant can do to

improve his chances of receiving a life sentence...is to raise doubt about his guilt.").

Miller Case

On September 11, 1977, Gertrude Miller was assaulted and raped at her residence at 2703 Hood Street, Columbus, Georgia. She survived the attack. She reported that she was awakened by a single black male who raped her. As a consequence, a rape examination was conducted as well as a physical examination of Ms. Miller with respect to evidence of rape. Dr. Andy Warsden observed that "an abrasion on the posterior fourchette"(the folded skin that forms the posterior margin of the vulva) and the fact that the vagina was "exquisitely tender and erytatnantous" (abnormal redness of the skin) were consistent with the rape Ms. Miller reported. As part of the investigation, the clothing that Ms. Miller was wearing at the time of the attack upon her, on which there appeared to be stains that might be semen left by her attacker, were collected and delivered to the Department of Forensic Sciences of the Georgia Bureau of Investigation (the "GBI Crime Lab") for its analysis. These items included a nightgown, an undergarment, a white slip and clothing Ms. Miller was wearing when she was admitted to the St. Francis Hospital where she was taken for treatment immediately after the attack on her.

Ms. Miller was the only person to identify Mr. Gary as the perpetrator of the attacks attributed to the Columbus Stocking Strangler. Indeed, her testimony

identifying Mr. Gary as her attacker was the most dramatic moment during the trial and the most compelling evidence presented by the State to convict and sentence to death Mr. Gary. Questions were raised during cross-examination at the time of trial regarding Ms. Miller's identification of Mr. Gary as her attacker, because her identification was made more than seven years after the attack upon her when she saw Mr. Gary on television surrounded by law enforcement officers after he had been arrested, something former prosecutor Smith conceded was a troubling identification process fraught with the possibility of misidentification. See, e.g., Neil v. Biggers, 409 U.S. 188, 200 (1972) (noting that the "length of time between the crime and the confrontation" as a critical factor in a misidentification); Banks v. State, 203 Ga.App. 355 (1992) ("One-on-one showups have been held to be inherently suggestive, especially where, as here, the accused is obviously in custody and escorted by the same investigating officers who summoned the witnesses to appeal, and no precaution is taken to ensure the integrity of the identification process."); Holbrook v. State, 209 Ga.App. 301, 302 (1993)(identification inherently suggestive where the witnesses viewed the defendant "while he was at the police station," when "he was the lone suspect viewed," and "was surrounded by police officers in uniform.").

Nevertheless, her identification was not shaken during cross-examination and the State heavily relied upon her identification, vigorously arguing to the jury that Ms. Miller would never have forgotten the face of her attacker. As prosecutor

Smith thundered to the jury in closing, it is "burned into her memory, it's forged into her memory, she can't put it out of her mind if she wants to."

During the state habeas corpus proceedings, after the completion of trial and direct appeal, a Columbus Police Department report was finally disclosed to the defense which indicated that Ms. Miller originally stated that she was asleep at the time of the attack, that there were no lights on in her bedroom and that she "would not be able to identify the subject and was not able to describe him." (Exhibit "A" hereto). But more important, the fact that Ms. Miller was mistaken in her identification of Mr. Gary as her attacker was sealed when DNA testing of her clothing, not available at the time of trial, was finally conducted, over opposition by the State, in February, 2012.

In 2011, former GBI Crime lab analyst Connie Pickens and defense expert Dr. Greg Hampikian examined the clothing worn by Ms. Miller sent to the GBI Crime lab for analysis and using a special florescent light located likely semen stains that Ms. Pickens and Dr. Hampikian agreed would be useful for further Y-STR DNA testing that the GBI Crime Lab was not at the time equipped to conduct. Ms. Pickens with the GBI Crime Lab herself did the cuttings.

These cuttings from the clothing that Ms. Miller was wearing at the time of the attack upon her made by Ms. Pickens were sent to the Bode Technology Laboratory, a respected and certified DNA laboratory. The Bode Technology Laboratory has the capacity to perform Y-STR testing, which can isolate any male

portion of any DNA found on an examined item. The examination was conducted by Sara Shields, a senior DNA analyst at Bode Technology Laboratory, who has processed thousands of samples from thousands of cases. From her testing of the clothing of Ms. Miller, she was able to develop two partial Y-STR profiles from two sperm fractions found on the clothing and after comparing these profiles against the DNA profile of Mr. Gary concluded to a scientific certainty that Mr. Gary "is excluded as a possible contributor of the Y-STR profiles obtained from the sperm fractions." (Exhibit "B" and "C").

This newly discovered evidence, not available at the time of Mr. Gary's trial, thoroughly undermines the identification of Ms. Miller, one of the key pillars of the State's case against Mr. Gary. After all, Ms. Miller was an elderly woman living alone with no current sexual partners and the only way that sperm fractions would be on the clothing sent to the GBI Crime Lab for analysis would be from the attacker who raped Ms. Miller. We now know for a fact that Ms. Miller was mistaken when she identified Mr. Gary as her rapist. The DNA profile from the rapist's sperm does not match Mr. Gary.

Secretor Evidence

Although a significant amount of forensic material was obtained from the charged and uncharged crime scenes and victims, none of this evidence implicated Mr. Gary as the perpetrator. Indeed, if anything, it tended to exclude Mr. Gary. The most important of this evidence was semen found in the vaginal washings or on the

body of Mrs. Thurmond and on stains in the sheets of Mrs. Scheible. It was determined by the GBI Crime Lab in each case that the semen was left by a person who was a "weak secretor or non-secretor of blood group O." As a consequence, it was routine to test the secretor status of suspects by taking a saliva sample to see if the person was possibly the type O non-secretor who had committed the Thurmond and Scheible attacks, and as soon as Mr. Gary was arrested a saliva sample was taken from Mr. Gary to test his secretor status. Although Mr. Gary was determined to have type O blood, to the prosecution's surprise, when his secretor status was tested, by testing his saliva, the normal procedure, the test showed that he was a normal secretor, not a non-secretor as was the person who left the semen samples at the crime scenes.[1]

Because the secretor evidence excluded Mr. Gary as the rapist of Ms. Thurmond and Ms. Scheible, the prosecution offered at trial the testimony of John Wegel, a crime lab technician with the GBI Crime Lab, to explain the discrepancy between Mr. Gary's status as a secretor and the semen samples recovered at the crime scenes. Mr. Wegel testified that Mr. Gary "could not be eliminated" because Mr. Gary is a type O secretor and therefore could be included as a donor who is

[1]Approximately 80% of the population secretes antigens of their blood type into other bodily fluids, such as saliva, semen, vaginal secretions, tears and perspiration. 20% of the population does not. This is a genetic factor based upon a recessive gene and was an important investigative tool in rape cases before the advent of DNA analysis. The person who left the semen on the victims was

possibly a type O weak secretor into his semen. The technician explained that although the GBI test showed that Mr. Gary was a strong secretor, the test was of his saliva. According to Mr. Wegel, some people may not secrete their blood type substance into their semen at the same rate as they do into their saliva. As Mr. Wegel opined, Mr. Gary may be "someone who was type O but who secretes weakly in their seminal fluid." Mr. Wegel further claimed that studies had shown "that people could not only vary between their different fluids, but, as time goes on, it just may vary on its own." Thus, according to Mr. Wegel, Mr. Gary may have been a secretor at the time of the saliva test in 1984, but a weak or non-secretor in 1977 and 1978, when the attacks were committed. The State never consulted any Ph.D. expert to be assured of the validity of Mr. Wegel's claims and merely accepted them at face value.

At no time during the trial was Mr. Gary afforded funds to obtain his own forensic expert to advise his counsel in this technical area and to testify concerning the accuracy and reliability of Mr. Wegel's analysis and work product and the opinions he offered at trial. Nor were work papers related to the tests and exams that Mr. Wegel and other members of the GBI Crime Lab performed ever produced at trial or during state post-conviction proceedings.

---

determined by the GBI Crime Lab to be a non-secretor, while Defendant Gary tested as a strong secretor, thereby eliminating him.

Now that counsel for Mr. Gary has been able to obtain expert assistance regarding the secretor evidence and the actual work papers recording the results of the tests performed by the GBI Crime Lab, we know that the testimony that Mr. Wegel gave at the time of trial in an attempt to rescue the prosecution's case from the fact that the semen left in the Thurmond and Scheible cases could not have been left by a normal type O secretor, such as Mr. Gary, was patently false. The defense called at the evidentiary hearing on his Extraordinary Motion for a New Trial or in the Alternative a New Sentencing Dr. Greg Hampikian, a well-known and highly respected professor of biology at Boise State University, where he teaches forensic biology to both graduate and undergraduate students. He has been qualified as an expert in numerous states and has an impressive Curriculum Vitae. Dr. Hampikian reviewed the GBI Crime Lab reports and the relevant work papers, which only became available long after trial, and described in detail how secretor/non-secretor analysis can be "very solid evidence" in excluding a suspect in a rape case. As to the results in this case he explained, "the slight H antigen reactions reflected in the work papers in some of the undiluted samples likely came from the victims themselves, which would be consistent with the semen donator being a non-secretor and the victim a secretor of the H antigen." The results in the Thurmond and Scheible cases are almost identical, as Dr. Hampikian concluded, and the only valid scientific conclusion is that "we have a non-secretor who deposited the semen on Thurmond and the stain in Scheible," excluding Mr. Gary,

because all the tests clearly show Mr. Gary to be a positive secretor. (Exhibit "D" hereto, p. 166).

In addition, Dr. Hampikian exposed as spurious Mr. Wegel's trial claims that someone might secrete differently in one body fluid as opposed to another or that secretor levels may vary over time. After all, as Dr. Hampikian testified, secretor status is a genetic feature, just as blood type is, and the scientific research rejects any conclusion that you would secrete less blood group substance from day to day or that you would secrete less into semen than saliva. Indeed, the scientific literature indicates that people actually secrete more blood group substance into their semen than into their saliva. (Exhibit "D" hereto).

To buttress his opinions, Dr. Hampikian identified articles from respected scientific journals subject to peer review supporting the conclusion that a person secretes more blood group substances into his semen than into his saliva and that it does not vary over time. (Doriell, M.J. and P.H. Whitehead, 1979, A Quantitative Study of ABH Blood Group Substances in Saliva and Semen, Forensic Sci. Int. 14:111(H Blood Group substances, as in Mr. Gary's case, "are, on average, 20 times higher" in semen than in saliva); (Sato, M. and F. Ottensooer, 1967, Blood group Substances in Body Fluids. Comparison of Concentrations in Semen and Saliva. J. Forensic Med. 14:30-38 ("As for saliva, the group substance level in each individual is considered to be relatively stable and even a constitutional, inherited property. Our data suggest that this may hold true also for semen.")("The

result described in this paper demonstrating that semen contains more blood group substances than saliva confirms earlier observations.") ("The H substance in different semen samples from the same individual show relatively small fluctuations in inhibition titer.")).

In sum, Applicant has now available to him qualified expert testimony, not available at the time of trial, which flatly refutes the testimony of Mr. Wegel, along with supporting scientific literature. This evidence would have proven that there is no way that Mr. Gary could have been the person who was the rapist in the Thurmond and Scheible cases, because that person was a non-secretor and Mr. Gary is a secretor. At the very minimum this testimony would have likely, indeed certainly, raised a reasonable doubt as to Mr. Gary's guilt in the Thurmond and Scheible cases, two of the cases for which Mr. Gary was specifically convicted and sentenced to death.

While DNA analysis certainly would have further evidenced the fact that Mr. Gary was not the perpetrator of the rapes of Ms. Thurmond and Ms. Scheible, unfortunately when relevant samples, long thought to be lost, were sent to the GBI Crime Lab for DNA testing they were contaminated as the result of grossly reckless procedures of the GBI Crime Lab in failing properly to sterilize their equipment. As Dr. Hampikian testified, this was "outrageous" and "egregious" for a forensic laboratory that is reporting "serious matters in serious cases to national databases." (Exhibit "D" hereto).

The actions of the GBI Crime Lab have effectively violated the rights of a capital defendant to the preservation of exculpatory biological material, O.C.G.A. §17-5-56(a), as well as his rights to competent DNA testing of this material. O.C.G.A. §5-5-41(c). As a consequence, the State's spoliation of exculpatory evidence should cause this Board to presume that DNA analysis in the Thurmond and Scheible cases would have excluded Mr. Gary.

The Schwob Footprint

In 1977 and 1978, as the "Columbus Stocking Strangler" murders continued, Governor Busbee became concerned and directed the Georgia Bureau of Investigation to form a Task Force with the Columbus Police Department to assist in the investigation of the "Columbus Stocking Strangler" cases. As part of this Task Force, then GBI Special Agent Edward J. Covington investigated the crime scene connected with the February 11, 1978 attack on Mrs. Ruth Schwob. A noticeable shoeprint was observed on an outside air conditioning unit at the point of entry to Mrs. Schwob's home. Agent Covington obtained a shoe that matched the style and size of the crime scene shoeprint. Xerox copies of the shoe and its shoeprint were distributed to law enforcement officers to aid in the investigation of suspects. The recovered shoeprint was of a size ten (10) shoe. Mr. Gary's shoe size is thirteen and a half (13 ½). (Exhibit "E" hereto). The defense contacted a forensic podiatrist Dr. Charles L. Fenton, III, who examined Mr. Gary's feet and

concluded without doubt that he could not fit his foot into a size 10 shoe. (Exhibit "F" hereto).

The existence of the shoeprint and of a Xerox copy of the shoe matching the footprint was never disclosed to counsel for Mr. Gary at the time of trial despite counsel's repeated requests for anything what would be exculpatory in law enforcement files regarding the Schwob case. Nor was this information revealed during the state habeas corpus proceedings.

Indeed, the existence of the shoeprint material that demonstrated someone other than Mr. Gary left the shoeprint at the point of entry at the Schwob crime scene was not disclosed until August of 2006, during the pendency of federal habeas corpus proceedings, when former GBI Special Agent, and Task Force member, E.J. Covington, contacted Defendant Gary's counsel. This was the first contact Mr. Covington had with any counsel representing Mr. Gary. (Exhibit "E" hereto).

The Schwob footprint is significant not only in the Schwob case, but also with respect to the attack on Ms. Borum, because it was always the State's contention that both incidents occurred on the same night, described by prosecutor Smith as the "Night of Terrors," by the same individual. But we now know that the shoe size of this perpetrator does not match, even closely, that of Mr. Gary, thereby excluding him as the perpetrator in all three of these incidents, or at least probably and almost certainly raising a reasonable doubt as to his guilt for these crimes.

Cofer Bite Mark

During the observation of the body of the victim Janet Cofer, a mark was observed on her left breast. It was believed to be a bite mark. Dr. Kenneth Galbreath, a local Columbus dentist, was instructed to make an impression of this bite mark.

Prior to the trial, the prosecution contacted Dr. Thomas J. David, a respected forensic odontology expert who was a consultant with the GBI, to give his opinion about the bite mark evidence. Dr. David told the prosecution that the teeth pattern on the bite mark impression was sufficiently "distinctive" so that he felt "confident" that he could provide an opinion as to whether the bite mark could be attributed to Mr. Gary based upon a comparison of the bite mark impression to Mr. Gary's teeth. When asked whether his comparison might exclude Mr. Gary, Dr. David responded that this was a possibility. When told that Dr. David's conclusion might support Gary's innocence, the prosecution did not allow Dr. David to conduct this comparison and never contacted him again. (Exhibit "G" hereto).

The prosecution failed to disclose to counsel for Mr. Gary at the time of trial the existence of the bite mark impression or a mold made of it nor their consultation with Dr. David. As a consequence, the defense was never able to have the bite mark evidence compared with his own teeth.

On November 9, 2005, when Mr. Gary's federal habeas corpus action was in the Eleventh Circuit and had already been briefed, an Assistant Attorney General

informed Mr. Gary's counsel that then Muscogee County Coroner, James Dunnavant, who remembered that the prior Coroner, Mr. Kilgore, had custody of a bite mark mold of the bite mark in the Cofer case, had located the Cofer bite mark mold. It was found in the bottom of a drawer in a filing cabinet when they were cleaning out the office.

Once it was produced, the bite mark mold was examined by Dr. David using a stereomicroscope that was available at the GBI Crime Lab. Dr. David is the only diplomate of the American Board of Forensic Odontology in Georgia, a member of the editorial board of the Journal of Forensic Sciences, published by the American Academy of Forensic Sciences, and has an impressive resume. Dr. Galbreath confirmed Dr. David's outstanding reputation in the dentistry community as an expert forensic dentist.

Dr. David's examination of the bite mark exemplar with a stereomicroscope showed that an impression had been made of both the upper and lower teeth of the person who had left the bite mark on Ms. Cofer. This was consistent with his recollection of the impression that he had been shown by representatives of the District Attorney's Office shortly after Defendant Gary's arrest in the 1980's. It is also consistent with the fact that the Medical Examiner and the Coroner had observed bite marks both above and below the nipple and Dr. Galbreath would have made an impression of any bite mark that they would have instructed him to make.

Dr. David made an impression of Mr. Gary's teeth from which he created a "model" of Mr. Gary's teeth and compared photographs he made with the stereomicroscope of the bite mark exemplar with the model of Mr. Gary's teeth. It was Dr. David's expert opinion that the person who left the bite mark on Ms. Cofer had a noticeable gap in his upper front teeth. This gap can be easily observed with the naked eye on the bite mark exemplar itself and was highlighted by Dr. Galbreath, who also noticed this gap, with arrows made by him, which can still be seen on the mold, and would be noticeable to anyone when the person smiled. Dr. David also concluded from the more difficult to see indentations on the exemplar, only observable with a stereomicroscope, that the person who left the bite mark had a crooked lower tooth which does not match Mr. Gary's lower teeth, where Mr. Gary had had no intervening dental work. (Exhibit "G" hereto).

Based upon the bite mark exemplar itself, when compared to Mr. Gary's lower teeth, Dr. David testified that Mr. Gary more likely than not was not the person who left the bite mark on Ms. Cofer. Indeed, his opinion is closer to a reasonable degree of scientific certainty, analogous to beyond a reasonable doubt, based upon the lower teeth alone. (Exhibit "G" hereto, p. 410).[2]

---

[2]Although Dr. Galbreath believed he made an impression only of the upper teeth, his recollection is contradicted by the facts that (1) he was instructed to make an impression of any suspected bite mark and the contemporaneous police report and autopsy report indicate that it was believed that there were bite marks both above and below the nipple. (2) Dr. David clearly remembers that the exemplar he was shown in 1984 included both upper and lower teeth. (3) Dr. David's recollection

Dr. David further added that there is no doubt that the person who left the bite mark had a noticeable gap in his front teeth. (Exhibit "G" hereto). Dr. Galbreath saw the same gap and it is apparent on the mold itself. But an expert opinion about this gap in the upper teeth was problematic due to intervening dental work on Mr. Gary's upper teeth. Nevertheless, the defense offered credible and unrebutted evidence in the testimony of reputable witnesses who knew Mr. Gary as an adult at the time of the attack on Ms. Cofer and swore that he had no noticeable gap in his front teeth.

Ernestine Flowers has worked throughout her entire adult life in law enforcement, with the Muscogee County Sheriff's Department and the Department of Corrections, including serving as a probation officer with the Department of Corrections. She testified as a prosecution witness at trial. She and Mr. Gary were close, because Mr. Gary's mother and her mother were friends and Mr. Gary and she were about the same age. She then renewed her relationship with Mr. Gary when he returned to Columbus in the 1970's and stayed in touch during the time of

---

was supported by an affidavit that he executed in 1994. (4) Dr. Galbreath was careful in creating the stone cast bite mark exemplar, vibrating the material so as to eliminate any irregularities that might be caused by air bubbles, and had no explanation for indentations or other marks on the exemplar other than that they came from the gel impression he made of the bite mark on Mrs. Cofer's breast. (5) the bite mark exemplar, when carefully examined under a stereomicroscope, clearly shows a pattern of lower teeth, with one at an odd angle, and (6) The discrepancies between the mold and Mr. Gary's teeth is clearly observable from the exhibits Dr. David made which were admitted into evidence.

the attacks, even helping him obtain employment. Probation officer Flowers testified unequivocally that she was well aware of Mr. Gary's appearance and that he never had a noticeable gap in his upper teeth. (Exhibit "H")

At the time of the attack on Ms. Cofer, Mr. Gary was a male model for the Moving Man Clothing Store, a popular men's clothing store in downtown Columbus. Walter Hewell, the owner of the store, testified that the store used television advertising and used Mr. Gary as a male model in advertising for the store. Mr. Hewell testified that Mr. Gary liked to talk and laugh and that he never saw a noticeable gap in Mr. Gary's upper teeth. (Exhibit "I" hereto). Otherwise he would not have used him as a male model. J. T. Frazier, who worked at the store, testified that he was also observant of Mr. Gary's appearance, and Mr. Gary, whose teeth you could clearly see when he would laugh and talk, never had a noticeable gap in his upper front teeth. Otherwise they would have never used him in their advertising. (Exhibit "J").

In contrast, there was no evidence offered by the State that at the time of the Cofer incident Mr. Gary had a noticeable gap in his upper front teeth. All the State could summon were elementary school pictures of Mr. Gary as a child with what might be a small gap. But this evidence was refuted by the testimony of expert forensic orthodontist, Dr. Holland Maness, who gave unrebutted testimony that such a small gap in a 10 or 11 year old is hardly evidence of what his teeth would have looked like as an adult, because a child's canine teeth do not begin to come in

until 11 ½ and would almost certainly close any small gap. Indeed, she testified that she would have advised any parent requesting orthodontic treatment for a gap in a 10 or 11 year old to wait because the gap will likely close with the normal eruption of the canine teeth. (Exhibit "K" hereto). Nor did the State offer any expert testimony challenging any of the opinions of Dr. David regarding the difference in the lower teeth on the bite mark exemplar and the impression of Mr. Gary's teeth.

In sum, Mr. Gary offered uncontradicted testimony that the bite mark exemplar made from the impression of the bite mark observed on Ms. Cofer's left breast evidenced that the person who left that bite mark had crowded lower teeth with one tooth rotated at an odd angle and that this does not match Mr. Gary's teeth. There had been no intervening dental work on Mr. Gary's lower teeth. Although there had been intervening dental work on Mr. Gary's upper teeth, the bite mark exemplar clearly shows that the person who left the bite mark had a noticeable gap in his upper front teeth, and Mr. Gary offered credible evidence from substantial citizens in the community with knowledge of Mr. Gary's appearance at the time of the attack on Ms. Cofer, who had a reason carefully to observe his appearance, including his teeth, and each of these witnesses testified under oath that Mr. Gary had no noticeable gap in his upper front teeth. Based on this uncontradicted evidence a jury would likely have had a reasonable doubt about Mr. Gary's being the attacker of Ms. Cofer thereby further undermining the State's

entire prosecution theory. At a minimum, it would have created more lingering doubt as to sentence.

Fingerprint Evidence

At the time of trial there were already reasons to suspect the validity of the fingerprints that the State in part relied upon, such as (1) the fact that two Columbus police fingerprint experts found no match with Mr. Gary for prints relied upon by the State, (2) the fact that although prints were found at the point of entry in the Thurmond case where the front door lock was taken apart, these prints did not match Mr. Gary and the print claimed to match Mr. Gary was supposed to have been found not at the point of entry and not on the first day but only on the second day of processing the scene, (3) the fact that two of the claimed matches were not made until July 3, 1985, more than a year after Mr. Gary's arrest, (4) the fact that former prosecutor Smith himself conceded that the Scheible print "may not be one hundred percent infallible" and the Jackson palm print was "a very weak print," and (5) the fact that no photographic record was made of the claimed prints in situ prior to their being lifted so as to verify where they were found, contrary to standard fingerprint protocol.

After trial further concerns became apparent. At trial the defense was denied any funds for expert assistance in examining crime scene evidence. However, during the state habeas corpus proceedings with respect to this case, the defense was able to obtain the assistance of a former supervisor with the FBI Latent

Fingerprint Section, who stated in an affidavit his "grave concern" about the fingerprint evidence, including (1) the lack of sufficient points of comparison, rendering any identifications "borderline" at best, (2) the fact that there were no photographs of the actual fingerprints where they were allegedly lifted, so there would be independent evidence that the fingerprints were actually found at the crime scenes, contrary to standard fingerprint procedures, and (3) the fact that the fingerprints were allegedly found in odd locations, so that, for example, the fingerprints which were lifted from a window screen at one of the crime scenes could have only been left if the person removing the screen had crossed his arms while lifting the screen, an implausible scenario. (Exhibit "L" hereto)

Gary's Statement

Mr. Gary also denied that he ever gave the claimed "admission" that he was present during the attacks for which he was convicted. The fact that this claimed statement was never recorded nor documented in a written signed statement, based upon the claim that Mr. Gary objected to a recording or a signed statement, is especially suspicious in light of the fact that Mr. Gary, when interviewed by New York police twice, freely agreed to a recorded statement and to sign written statements.

There are further reasons to question the claimed statement of Mr. Gary. Dr. Gregory DeClue, a forensic psychologist specializing in police interrogations techniques, testified that current research shows that alleged confessions are often

false even though they appear to be reliable due to claimed consistency with known factual details. Here, the police practices in obtaining claimed confessions, assumed to be reliable based upon the recitation of verifiable details, are particularly suspect in light of the detailed confession of Jerome Livas, who was determined to be absolutely innocent when the strangling murders continued after his arrest, consistent with what the research and literature tell us. One wonders how Livas, who was innocent of the two murders he confessed to, would know the specific details concerning these attacks to which he allegedly confessed, such as how entry was made, where hinges were hidden, and details about the interior of the homes, if the police were not comfortable creating a false, and of course unrecorded, confession. Had the murders stopped upon Mr. Livas' arrest, he almost certainly would have been prosecuted and his "confession," so full of corroborating details, would have been the State's primary evidence. Simply put, the unrecorded and undocumented claimed custodial statement of Mr. Gary, contrary to best police practices, especially in light of the claimed Livas confession, fits all the recognized hallmarks of a false confession that never occurred. At least the new evidence raises serious doubts about the claimed confession. (Exhibit "M" hereto).

Two final quirks are worth mentioning. When faced with the Schwob and Farmer footprints, the State now claims that Mr. Gary stated that as a child he wore shoes too small for him which caused a deformity in his toes and admitted that he

wore shoes at least 3 ½ sizes smaller than his 13 ½ shoe size in order to mislead the police, something he had learned to do as a child, an incredible assertion as confirmed by expert podiatrist, Dr. Charles F. Fenton, III. (Exhibit "F" hereto, pp. 2442-2443). Obviously, Mr. Gary could not have said such a thing, because it simply is not true based on Dr. Fenton's observation of Mr. Gary's feet. Instead, this claim reflects the cynical willingness of the officers involved to make up whatever needs to be made up to make a case against Mr. Gary, perhaps believing the defense would not bother to call them on it with expert testimony. Another lapse undermining the reliability of the confession was the claim that Gary, a black man, said he had gone to school with Chris Gingell, a white man, even though Columbus schools were not integrated when they were in school. The claimed "confession" simply does not ring true.

The Claimed Dimensten Match

The State will no doubt claim that a semen sample from the Dimenstein case matched Mr. Gary. But there are highly suspicious circumstances regarding this claimed match. The original match was based upon the CODIS national DNA data bank, but the normal procedure is to confirm such a match with a sample of Mr. Gary's DNA to be preserved in an envelope in which the swabs were to be maintained. But when Stephanie Fowler, the Assistant Manager of Forensic Biology and the State CODIS Administrator for the GBI Crime Lab, went to get the sample to confirm the match the envelope was empty and the swabs missing

(Exhibit "N" hereto), a highly suspicious circumstance especially for a troubled laboratory which contaminated the Thurmond samples. One wonders whether the Dimenstein sample was contaminated by the missing swabs, something that Ms. Fowler could not explain, especially given the hard physical evidence exonerating Mr. Gary in the other similar cases. Moreover, Mr. Gary was not convicted and sentenced to death for the Dimenstein attack, for which the State can now prosecute him if they so chose.

CONCLUSION

There is a host of physical evidence not available at the time of trial, either because the defense was denied expert assistance to challenge the State's expert testimony, the type of testing now available did not exist at the time of trial or because the evidence was not disclosed to the defense at the time of trial, which raise serious doubts as to Mr. Gary's guilt, much less lingering doubt as to a death sentence. Ms. Miller's dramatic identification of Mr. Gary as her attacker has been completely undermined by recent DNA testing. The prosecution failed to disclose the existence of the bite mark mold which excluded Mr. Gary as the attacker of Ms. Cofer at the time of trial and continued to represent that it was missing, until it was finally discovered by the Coroner during the appeal of the federal habeas corpus proceedings and expert examination proved that Mr. Gary was not the biter. A similar undisclosed bite mark not matching Mr. Gary was found on Mrs. Woodruff, one of the cases for which the Defendant was convicted and sentenced

to death. The defense had no idea of the existence of the shoeprint exonerating Mr. Gary from the Schwob and Borum crimes until it was disclosed by former GBI Agent Covington long after trial when Mr. Covington on his own contacted counsel for Mr. Gary. Finally, we now know that the secretor evidence excludes Mr. Gary as the rapist/murderer of Ms. Thurmond and Ms. Scheible and that the State's attempts to discount this evidence at trial were fatally flawed. Clearly, each piece of exculpatory physical evidence came to the knowledge of counsel for Mr. Gary only after the trial and it was not owing to the want of diligence that counsel for Mr. Gary was not aware of this evidence sooner.

In addition, the newly discovered evidence is directly exculpatory and is not merely impeaching. It is direct physical evidence of Mr. Gary's innocence, which is not cumulative of other evidence nor is it based on suspicious witnesses who came forward only after trial. Indeed, at the time of trial the prosecution went to great lengths to try to explain why the physical evidence did not exclude the Defendant when, as we now know, it in fact excluded Mr. Gary as the perpetrator of the crimes for which he was convicted and sentenced to death.

The DNA evidence absolutely excludes Mr. Gary as the rapist of Ms. Miller and the bite mark evidence and shoeprint evidence similarly exclude Mr. Gary as the perpetrator of the Cofer, Schwob and Borum attacks, which were offered as extrinsic crimes/similar transaction evidence, supporting the theory that Mr. Gary was the one and only "Columbus Stocking Strangler." There are reasons to

question the fingerprint evidence, as well as the highly suspicious unrecorded "confession." And we now know that the secretor evidence offered at trial was false. In fact the secretor evidence exonerates Mr. Gary of the Thurmond and Scheible attacks, which certainly would have been confirmed with DNA evidence had not the State recklessly destroyed the still available evidence, in violation of Mr. Gary's due process rights and his statutory right to DNA testing under O.C.G.A. §§ 5-5-41(c) and 17-5-56(a). This reckless destruction of what would almost certainly have been exculpatory evidence is itself enough to support a commutation of Mr. Gary s death sentence.

Had the jury known that this newly discovered physical evidence so powerfully excluded Mr. Gary as the perpetrator of the crimes for which he was convicted and sentenced to death, the jury would probably have had a reasonable doubt as to his guilt and would have not convicted Mr. Gary of the three murder/rape/burglaries for which he was convicted. There is even a greater probability that at least one juror would not have returned a death sentence due to lingering doubts as to guilt in light of this powerful and persuasive physical evidence undermining guilt. Simply put, this evidence shows that the State's theory that Mr. Gary was a serial killer who had committed seven different rape/murders was not in fact true.

These are the types of circumstances that call for the commutation of Mr. Gary's sentence of death. Due to the fact of our all too error prone judicial system,

the power of this Board to commute a death sentence is the failsafe to insure that we do not impose the ultimate and irreversible penalty of death when serious doubt exists as to guilt. There is nothing more terrifying and horrible than for the State to take the life of an actually innocent citizen and this Board stands as a bulwark against that calamity. Here, there is just too much doubt about Mr. Gary's guilt not known at the time of his trial to countenance his execution. We are not talking about questionable recanting witnesses who came forward long after trial, but hard physical evidence of innocence. This Board should exercise its important function by commuting Mr. Gary's death sentence.

[signatures on next page]

This 7th day of March, 2018.

Respectfully submitted,

John R. Martin

Martin Brothers P.C.
202 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(tel) 404-522-0400
(fax) 404 223 6467
jack@martinbroslaw.com

Michael K. McIntyre

Michael Kennedy McIntyre & Assoc.
965 Virginia Avenue, N.E.
Atlanta, Georgia 30306
(tel) (404) 879-1515
(fax)(404) 879-0005
mkm@georgiapostconviction.com

ATTORNEYS FOR APPLICANT CARLTON GARY