

BEFORE THE
BOARD OF PARDONS AND PAROLES
STATE OF GEORGIA

APPLICATION OF **MARCUS RAY JOHNSON** FOR A STAY
OF EXECUTION TO PERMIT DNA AND FINGERPRINT TESTING AND FOR
COMMUTATION OF HIS SENTENCE OF DEATH

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Marcus Ray Johnson, by his undersigned counsel, applies to the Georgia Board of Pardons and Paroles, pursuant to Article IV, § II, ¶ II(a) and (d) of the Georgia Constitution, O.C.G.A. 49-9-20, 42-9-42(a) and Chapters 475.2.01 (1) and 475.3.10 (2), (6) of the Rules of this Board: (i) for consideration of his application for commutation of his sentence of death, imposed by the Superior Court of Chatham County on April 28, 1980; (ii) for a ninety (90) day stay of execution, presently scheduled for Wednesday, October 5, 2011 at 7:00 p.m., to permit consideration of his application and for DNA and fingerprint testing; (iii) for a full and fair hearing before the full Board, allowing him to present witnesses and to be heard through his counsel; and after that review, (iv) for the commutation of his sentence of death.

Mr. Johnson bases his application for commutation of his death sentence or, alternatively, for a stay of execution and DNA testing, on the following compelling reasons: (1) There are significant doubts as to Mr. Johnson's guilt in the murder of

Ms. Angela Sizemore, and previously unavailable DNA testing of available biological evidence, as well as previously disallowed fingerprint testing in Mr. Johnson's case can confirm his innocence (or guilt) of the murder and rape of Ms. Sizemore; and, (2) Mr. Johnson's positive character attributes, unremarkable record while incarcerated, and his heroic efforts to save the life of fellow inmate Tim Pruitt warrant the merciful intervention of the Board.

INTRODUCTION

Troubling inconsistencies in the evidence presented at trial have continually raised doubts as to Mr. Johnson's guilt and culpability for the crime for which he was sentenced to death. Unexplained physical evidence that did not fit with the state's theory, questionable eyewitness identifications, and new witnesses who saw Ms. Sizemore alive after she and Mr. Johnson parted ways on the night of the crime, all point to a different perpetrator. Even on the record at trial, the trial court found that the evidence did not foreclose all doubt as to guilt. See Exhibit 25 (Trial Court's Report).

Specifically, *no* physical evidence links Mr. Johnson to Ms. Sizemore other than that which corroborates his initial custodial statement. Further, *no* physical evidence links Mr. Johnson to the vehicle where Ms. Sizemore's body was found. Indeed, hair and fingerprint evidence recovered from the vehicle *excludes* Mr. Johnson. Tenuous cross-racial eyewitness identifications and shoddy police

lineups are the *only* evidence that link Mr. Johnson to the vicinity of where Ms. Sizemore's body was found. Further, as major questions remain as to the location where Ms. Sizemore was actually killed and with what murder weapon, *no* clear evidence connects Mr. Johnson to any crime scene in this case. *No* physical evidence links Mr. Johnson to the location police believed to be where Ms. Sizemore was actually killed. The black, greasy residue found caked to Ms. Sizemore's feet and inside some of her stab wounds has *never* been explained, and was not explained by the State's theory of this case at trial.

The lingering questions regarding the identity of Ms. Sizemore's killer warrant this Board's merciful intervention or a stay of execution to allow for DNA and fingerprint testing. As outlined in detail in this Application, substantial biological evidence was collected in this case that was not subjected to DNA testing at the time of trial, nor during Mr. Johnson's appellate proceedings, despite repeated requests by Mr. Johnson for such. See Exhibits 22-24. (Requests for Testing from Trial, State Habeas, and Federal Habeas Proceedings). Mr. Johnson now seeks testing on a number of items that could exonerate Mr. Johnson as well as identifying another perpetrator or perpetrators. These include semen, saliva, blood, hair, clothing, and a tree branch. The majority of these items were never DNA tested at trial, and for those that were the Georgia Bureau of Investigation ("GBI") used testing methods that are now outdated such that new testing would

yield more precise and probative results. As DNA expert Dr. Greg Hampikian, who has been involved in numerous cases under Georgia's DNA statute, explains:

[I]t is my opinion that DNA testing on the semen, saliva, blood, hair, clothing, fingernail clippings, and other items can produce meaningful results, e.g., clearly inculcating or excluding Mr. Johnson as the perpetrator. Methods such as STR-DNA testing, mitochondrial DNA testing, and Y-chromosome STR testing can effectively extract and identify DNA profiles from the blood, semen, hair and fingernail clippings samples obtained from Ms. Sizemore and from the crime scene. The resulting profiles can be compared to determine whether this biological evidence was deposited by Mr. Johnson or another person. They can also be compared to one another to determine whether the various biological samples were deposited by one person or not.

There is substantial evidence in this case that remains unexplained and inconsistent with the state's theory that Marcus Ray Johnson killed Ms. Sizemore. In particular, there was an unexplained black greasy substance found in the stab wounds of Ms. Sizemore, as well as on her feet. Mr. Johnson's pocketknife, which the state argued was the murder weapon, had no biological material of any kind on it, nor any greasy residue. Furthermore, there is a significant issue regarding how Mr. Johnson could have committed the crime—which involved numerous lacerations to the victim's face, forty-one stab wounds, and movement of the body to a different location—without having more blood on his clothing. The lack of blood on Mr. Johnson was a contentious issue at trial and suggests that is another “hole” in the state's theory of the crime.

Finally, key evidence against Mr. Johnson consists of cross-racial eyewitness identification, a risk factor for wrongful convictions that I have encountered in a number of cases I've worked on and studied including the Calvin Johnson Jr. case in Georgia (Johnson and Hampikian, 2002). Eyewitness errors have been noted as a significant factor in more than 70% of DNA exonerations (Hampikian et al., 2011, attached)

When there are inconsistencies and weaknesses in the evidence as there are in this case, it is my expert opinion that DNA testing must be performed on probative biological evidence that can identify or exclude a perpetrator...Since Mr. Johnson is also sentenced to death and could soon be facing execution, expeditious testing of the above-mentioned evidence is, in my opinion, critical.

Exhibit 4 at 11-12 (Affidavit of Greg Hampikian).¹ Alternatively, commutation would effectuate this Board's stance that it will not allow a defendant to be executed where there remains any doubt as to guilt.

As further grounds for this Board's merciful intervention, the evidence before the Board shows that Mr. Johnson did not have a violent criminal record – indeed virtually no criminal record of note since he was a teenager – prior to this arrest, that he has adjusted well to his incarceration at the Georgia Diagnostic Prison, and that he has exhibited that rare quality in anyone: the potential for

¹ A crime scene expert and forensic pathologist who have reviewed materials in this case concur that DNA testing is needed to resolve the inconsistencies in the evidence and conclusively identify one or more other perpetrators:

Even though Mr. Johnson said he was with the victim the night she was murdered and there is some eyewitness identification of Mr. Johnson being seen in the neighborhood where the victim's body was found, the forensic evidence in this case and the autopsy findings do not support Mr. Johnson being the perpetrator in this case. If there is physical evidence available for DNA testing it should be done in this case. Today, law enforcement and prosecutors rely on DNA testing to identify a perpetrator because it is the most reliable method of accurately identifying a perpetrator.

Exhibit 5 at 7 (Affidavit of Dr. Jonathan Arden); see also Exhibit 6 at 19 (Affidavit of Dr. Marilyn Miller) ("Current DNA testing methods can and should be used to resolve these inconsistencies [in the physical evidence] and confirm once and for all whether or not Mr. Johnson committed these crimes.")

heroism. In November 2009, fellow inmate Tim Pruitt was found by inmates hanging in his cell, not breathing. Prison medical personnel were called, but long before they arrived, Marcus Johnson sprung into action, performing CPR on Mr. Pruitt thereby literally bringing him back to life. See Exhibits 1-3. Mr. Johnson is a redeemable person worthy of mercy.

FACTS

On the morning of March 24, 1994, the body of Angela Sizemore, a Caucasian woman, was found in a white suburban utility vehicle (SUV), which had been parked in a holding pond area in the predominantly African-American neighborhood of East Albany. She had been beaten about the face and head, stabbed repeatedly, and a foreign object had been inserted into her vagina and anus causing internal tearing.² Her nose was cut with dried blood around it. TT at 2234, 2264.³ Ms. Sizemore had a black greasy substance on the bottoms of her feet and in the stab wounds.⁴ This black greasy substance was never collected, tested or explained. Id. at 2258-59.

² See Johnson v. State, 519 S.E.2d 221, 225 (Ga. 1999).

³ TT = Trial Transcript; HT = State Habeas Corpus Evidentiary Hearing Transcript.

⁴ See Exhibit 8 at 2831-32 (GBI Crime Lab records); Exhibit 8 (Photographs); TT at 36 at 2236-38, 2258-59 (Testimony of state pathologist Dr. Clark).

At trial, a friend of Ms. Sizemore's testified that he dropped Ms. Sizemore at her vehicle between 8:30 and 9:00pm on March 23 at the Texas Star restaurant after they returned from a funeral viewing and dinner together. TT at 1769-71 (Testimony of Tony Kallergis). Ms. Sizemore was then seen by another witness at TT at 1773, 1786 (Testimony of John Norberg). After thirty to forty-five minutes of drinking and talking at the club P2, Mr. Norberg and a male companion walked with Ms. Sizemore (who was by then very intoxicated) eastward across Slappey Boulevard to the Fundamentals club, where they continued to drink alcohol. Id. at 1774-77, 1787.⁵ Ms. Sizemore stayed at the bar area of Fundamentals for approximately half an hour, then began wandering around the club. Id. at 1781.

Mr. Johnson was playing pool that night at the Fundamentals club. TT at 1783-84. Mr. Johnson danced with a female witness several times and asked for her number. TT at 1794-98 (Testimony of Donna Paul). Mr. Johnson was seen at the bar wearing his standard biker clothes: black leather jacket, black leather leg chaps, boots, and blue jeans. TT at 1813, 1840. Ralph McDaniel, the bartender at Fundamentals, saw Mr. Johnson and Ms. Sizemore dancing at times and behaving amorously in one of the booths, but Mr. Johnson was not forcing himself on Ms. Sizemore. TT at 1809, 1822. McDaniel observed Ms. Sizemore to be very

⁵ The owner of the bar, Ralph McDaniels, remembered Ms. Sizemore entering the bar sometime between 11:30 pm and 2:00 am. TT at 1808, 1816.

intoxicated, agitated and having mood swings. Id. at 1818-19. Mr. Johnson had drunk several shots of tequila. Id. at 1811. McDaniel testified that he saw Ms. Sizemore exit the bar with Mr. Johnson between approximately 1:30 and 2:30 am. Id. at 1813, 1818. They walked southward across the Fundamentals parking lot, headed out of the parking lot and south toward the vicinity of the Monkey Palace bar (where Mr. Johnson worked) and Palmyra Avenue. Id. at 1807, 1813, 1818-20. The first street they would have come to walking that way would have been 17th Avenue, then 16th Avenue. Id. at 1819.

Mr. Johnson was arrested on the evening of March 24, 1994, near the Monkey Palace bar on Palmyra Avenue. TT at 2042-43. Mr. Johnson was brought to Albany Police headquarters and booked, and a statement was taken from him at 10:35 pm by Albany Police Detectives Gervin, Poole and Williams. TT at 2067, 2072 (Testimony of Officer James Williams).

Mr. Johnson told the police he was with Ms. Sizemore at Fundamentals the previous night and had been drinking a large amount of tequila. TT at 2081. He admitted walking⁶ with Ms. Sizemore from Fundamentals to a grassy vacant lot off 17th Avenue, where they had consensual sex. TT at 2085-86. Mr. Johnson

⁶ Mr. Johnson told police he recalled asking for Ms. Sizemore's keys, but that they had walked to 17th Avenue because they could not locate Ms. Sizemore's vehicle, which was not in the Fundamentals parking lot. TT at 2087-88. Mr. Johnson adamantly denied detectives' assertions that anyone had seen them drive away in Ms. Sizemore's vehicle. Id. at 2088.

admitted he had argued with Ms. Sizemore and “hit her hard” in her nose, causing it to bleed. TT at 2087-88, 2092. Detectives confronted Mr. Johnson with the information from the East Albany eyewitnesses and prodded him to admit killing Ms. Sizemore and driving her body in her SUV to the East Albany holding pond area. TT at 2082, 2096-97, 2099, 2100. Mr. Johnson repeatedly denied these allegations, insisting that he walked away after the argument, leaving Ms. Sizemore alone and alive in the lot on 17th Avenue.⁷ TT at 2089-91, 2093. He stated he later woke up in the front yard of his house. TT at 2091. Mr. Johnson acknowledged that he was afraid he might have killed Ms. Sizemore when he hit her in the nose, thereby jarring her brain. Id. at 2101.

Mr. Johnson’s statement was consistent with the physical evidence linking him to Ms. Sizemore, including evidence that underwent DNA analysis, such as spermatozoa obtained from a vaginal swab from Ms. Sizemore and a trace amount of blood obtained from Mr. Johnson’s leather jacket. See Exhibit 3 at 2824-27 (GBI forensic reports). Ms. Sizemore’s face also showed bruising and a cut on the

⁷ Initially, detectives told Mr. Johnson that they had found evidence of Ms. Sizemore having been killed at the 17th Avenue lot. TT at 2092, 2099. Appearing to gloss over the mistake, a detective then told Mr. Johnson that Ms. Sizemore had been killed on 16th Avenue near the holding pond area. TT at 2100. Mr. Johnson caught the mistake, and adamantly insisted that he had left her alive on 17th Avenue, not at the holding pond off 16th Avenue. TT at 2099-2100. Detectives then told Mr. Johnson she had died on 17th Avenue. Id. at 2100.

nose that had bled in the left nostril, consistent with Mr. Johnson's claim of having hit Ms. Sizemore, causing her nose to bleed. TT at 2234, 2264.

No other physical evidence has ever linked Mr. Johnson to the crime, yet the case ultimately proceeded to trial in March 1998. The GBI found Mr. Johnson's pocketknife to have no blood or residue of any kind on it, and although GBI stated it was not the murder weapon,⁸ the State introduced it at trial and argued that it was used to kill Ms. Sizemore. TT at 2240-41 (Testimony of Dr. Anthony J. Clark); see also TT at 1742, 2794. While the police expected to find substantial blood all over Mr. Johnson's clothing, the lab found only trace amounts of blood on Mr. Johnson's jacket.⁹ Based on this lack of forensic evidence identifying Mr. Johnson as the perpetrator, the State could only rely on circumstantial evidence consisting of four questionable eyewitness identifications of Mr. Johnson in the area where Ms. Sizemore's body was found.¹⁰ As set forth below, DNA testing is necessary to resolve these longstanding evidentiary problems in the case.

⁸ Notes from the GBI file indicate that Albany investigators did not want to test Mr. Johnson's pocketknife, as they did not believe it to be the murder weapon. Exhibit 8 at 2959 (GBI file).

⁹ Notes from a conversation between the GBI lab and Albany investigators indicate that Albany police wanted all of Mr. Johnson's clothing to be tested because they expected them to be covered in blood based on the crime. Exhibit 8 at 2960.

¹⁰ Mr. Johnson was not permitted to present expert testimony on the reliability of eyewitness identifications at trial. See TT at 2579. However, an expert in this field, Dr. Steven Cole, has recently reviewed Mr. Johnson's case and conducted an empirical study on the identifications in the case. He concluded that there are significant problems with the lineup in

I. A Stay of Execution is Warranted in Order to Conduct DNA And Fingerprint Testing to Conclusively Identify the Perpetrator in the Homicide of Angela Sizemore and to Avoid Execution of an Innocent Man.

The State's theory at trial failed to account for numerous inconsistencies in the evidence in this case. Indeed, the identity of Ms. Sizemore's assailant was a hotly contested issue at the guilt-innocence phase of Mr. Johnson's trial. Specifically, defense counsel raised numerous issues regarding the inconsistencies in the physical evidence that indicating that another perpetrator (or perpetrators) killed Ms. Sizemore. See TT at 2499 (Testimony of Dr. Brian Frist). Subsequently, during state habeas proceedings, new witnesses testified that Ms. Sizemore was seen alive after she had parted ways with Mr. Johnson. See Exhibit 13 (Deposition of Jake Dillard); HT 116-94 (Evidentiary hearing testimony of Agnes Hicks¹¹ and Shawn Keith). Additionally, Mr. Johnson's former girlfriend,

this case, as well as a number of factors indicating that all of the eyewitness identifications are unreliable. See Exhibit 7 (Affidavit of Dr. Steven P. Cole).

¹¹ **Error! Main Document Only.**At the habeas hearing, Respondent tendered a Dougherty County Jail computer printout purporting to show that Hicks had been jailed from early March 1994 to late May 1994. See Respondent's Exhibit 223 at HT 6645; HT 283-84 (Capt. Fields testimony). However, the probation files later obtained by the Respondent clarify that while Hicks had been arrested in early March 1994 on a probation warrant, she had at some point after March 9 and before April 12, 1994, been moved to the Pelham city jail to the south of Albany proper. Exhibit 17 at 4633. On March 9, 1994, Richard Mattia had called the probation office in an effort to help Hicks obtain release to continue working for him at the trailer park. Id. Hicks had written a letter to Judge Kelly asking for the opportunity to continue work outside jail on March 8, 1994. Id. at 4759-60. She was moved sometime thereafter to Pelham city jail.

Melissa Windows, testified that Mr. Johnson spent the night with her at her home on the night of the crime. See HT 25-97.¹² Further, the questionable nature of the cross-racial and police-influenced eyewitness identifications is a factor that raises a significant, meaningful doubt as to Mr. Johnson's guilt. See TT at 2566-78; Exhibit 7 (Affidavit of Dr. Cole).

Mr. Johnson's initial statement to police was consistent with the only physical evidence linking him to Ms. Sizemore, including the evidence that underwent DNA analysis: spermatozoa obtained from a vaginal swab from Ms. Sizemore and a trace amount of blood obtained from Mr. Johnson's leather jacket. See Exhibit 8 at 2824-27 (GBI forensic reports). This lack of additional blood, fingerprints, hair or other evidence linking Mr. Johnson to the crime scene was a contentious issue at trial.

Probation worker James Folsom's notes regarding the June 26, 2002 correspondence with the Attorney General's office indicate that Hicks was on work detail at Pelham during March 1994 and may not have been watched closely while working outside the jail. Id. at 4639. Ms. Hicks either had legitimate opportunities to work at Richard Mattia's trailer park or taken the opportunity to abscond periodically to be with Jake Dillard at the trailer park during the period she was ostensibly incarcerated at Pelham city jail.

¹² Ms. Windows' sister, an employee with the District Attorney's office, also testified that her sister had confided in her prior to the trial that Mr. Johnson had been with her on the night before Ms. Sizemore's body was discovered. See HT 97-116.

DNA expert Dr. Greg Hampikian has confirmed that testing of the evidence in this case will be probative in resolving the remaining doubt and inconsistencies in this case and potentially in identifying another perpetrator:

In 1994 and 1997, limited DNA testing was performed in this case, while other physical evidence was only subjected to visual and/or microscopic inspection. It is my professional opinion that additional testing performed today would be highly probative in this case and could point to another perpetrator, thereby exonerating Mr. Johnson. Because there are a number of inconsistencies in the evidence of this case, DNA testing of additional items should be performed to resolve the doubt as to Ms. Sizemore's killer. My opinion is further based on the fact that additional and more advanced testing of the physical evidence in this case will likely yield DNA profiles that were not obtained at the time of Mr. Johnson's trial. There are several types of DNA testing methods that, depending on the type and condition of the specimen, can and should be used to obtain DNA profiles in this case.

Exhibit 4 at 2-3 (Affidavit of Dr. Hampikian).

As detailed below, the significant issues with the evidence against Mr. Johnson require new DNA and fingerprint testing to resolve doubt as to the identity of Ms. Sizemore's killer.

A. The State's Case Relied Heavily on Unreliable Cross-Racial and Police-Influenced Eyewitness Identifications.

As discussed throughout this motion, minimal physical evidence linked Mr. Johnson to Ms. Sizemore's homicide. Accordingly, the state was forced to rely heavily on eyewitness testimony in order to obtain a guilty verdict. However, the

circumstances surrounding these identifications raise serious questions to their reliability in this case.

The day after Angela Sizemore's body was discovered in her truck at the East Albany holding pond area near Swift Court Apartments, Albany Police investigators spoke with three witnesses who claimed to have seen a man fitting Mr. Johnson's description on the morning of March 24, 1994: Mary Ann Florido, Tammy Sheard and Lillie Covin. Lillie Covin and Tammy Sheard lived at the Swift Court Apartments, next to the holding pond area. TT at 34 at 1858, 1864, 1878. Covin and Sheard claimed to have seen Mr. Johnson in the apartment complex area at approximately 6:30-7:00 am. Id. at 1859, 1879, 1881. Shortly after seeing the man they claimed was Mr. Johnson, Sheard got on a bus with her children. TT at 1879. She testified Mr. Johnson flagged down and entered the bus around Dewey Street. TT at 1879.

Bus driver Eugene Emmitt Wheeler, who came to the police station four months later, testified Mr. Johnson flagged down and boarded his bus (Ms. Sheard's bus) near Dewey Street. TT at 1937-38. Mary Ann Florido testified she saw Mr. Johnson on the bus she took from the downtown Albany station at approximately 7:10 am. TT at 1910-11. Ms. Florido and Mr. Wheeler purportedly identified Mr. Johnson from photo arrays. TT at 1917, 1942.

The witnesses generally described the man's clothes as being heavily soiled with red clay dirt.¹³ Witnesses varyingly described the man's jeans as being black, white, acid washed and light blue.¹⁴ None of the witnesses claimed to have seen the suspect wearing leather chaps. Only one witness could recall anything even vaguely about the man's facial hair, and her recollection changed after seeing Mr. Johnson's picture on television.¹⁵ Two witnesses described the man's hair as shoulder length, one described it as long, and three described it as sandy brown or blond.¹⁶ Mr. Johnson's arrest photo shows Mr. Johnson to have dark hair¹⁷ ending above the shoulders. Exhibit 12 (TT Exhibit 95). Two witnesses stated they saw a ring on the white male, but their reports were conflicting and trial counsel was able to show some arguable evidence of coaching on the part of one witness as to the

¹³ See e.g., TT at 1882.

¹⁴ See TT at 1881, 1924, 1953.

¹⁵ Tammy Sheard told police she was not paying attention to the man she saw and recalled Mr. Johnson having a mustache only after she saw his picture on the news. TT at 1896, 1898; see also Exhibit 18 (Sheard interview). Ms. Florido also called police only after television news reports had aired the evening of March 24, 1994. *Id.* at 1916. Lilly Covin admitted the man she saw in 1994 had his hands up obscuring his face. *Id.* at 1875.

¹⁶ See TT at 1894, 1927-28, 1953 and statements to police, referenced *supra*.

¹⁷ Trial counsel pointed out this discrepancy in his argument at TT at 2743.

description of the ring.¹⁸ The witnesses were conflicting in their reports of the lighting that morning, ranging from darkness to full daylight.¹⁹

News reports of the murder carried the description of the white male seen in the holding pond area around noon and 6:00 pm on March 24, 1994. TT at 1814; TT at 1885, 1915-16. Ralph McDaniel called police after seeing the report because he remembered seeing Mr. Johnson with Ms. Sizemore at the bar and the description sounded like what Mr. Johnson had been wearing. TT at 1814. They looked for Mr. Johnson at his home, speaking at one point with Mr. Johnson's next-door neighbor, Lee Libby. Libby told police he had seen Mr. Johnson that morning and that Mr. Johnson was wearing a black leather jacket, boots, as well as leather leg chaps, a noticeable clothing item that the other witnesses never

¹⁸ At trial, Ms. Sheard described the ring on the man she saw as having a blue setting on it and identified Mr. Johnson's actual ring as the one she saw in 1994. TT at 1882-83, 1892. It was revealed on cross that she had earlier told police that the ring she saw on the man was a flat silver wedding band and in a subsequent interview that it had a diamond on it. Id. at 1891, 1900; see also Exhibits 19-20 (APD memo and DA memo and note). Ms. Sheard reminded trial counsel on cross that she had described Mr. Johnson's ring in a 1997 pretrial hearing as having a blue setting on it. TT at 1892. Jurors did not learn that Ms. Sheard had been interviewed by an assistant district attorney less than a month before the September 1997 pretrial hearing, during which she could not identify Mr. Johnson's ring. See Exhibit 19 (Typed notes from Dougherty County District Attorney's File).

¹⁹ See TT at 1867, 1906, 1943.

mentioned. See Exhibit 9 (Albany Police Reports).²⁰ Mr. Libby did not mention anything about Mr. Johnson's clothes being heavily soiled with red clay dirt.

At Mr. Johnson's trial, the trial judge excluded expert testimony regarding the unreliability of the eyewitness identifications. TT at 2579. Recently, however, an eminently qualified expert on eyewitness identification, Dr. Steven P. Cole, has reviewed Mr. Johnson's case, conducted an empirical study, and concluded that there are numerous problems with the each of the eyewitnesses' testimony in this case. He testified:

One of the most difficult kinds of identification to make is that of a stranger who is of a different race than the eyewitness. The suspect viewed by the eyewitnesses and the defendant in this case are non-white, thus, the decreased identification accuracy associated with the cross-racial effect needs to be considered. The eyewitnesses viewed the suspect at dawn and dim lighting also needs to be considered when evaluating the reliability of eyewitness identification.

During the period of time following the crime, when the eyewitnesses stored and retrieved information about the crime, a number of procedural safeguards for eyewitness evidence were not followed. For Lilly Covin, there was no identification procedure such as a lineup and her in-court identification was made more than four years after the crime. Tammy Sheard initially provided a basic description of a suspect wearing a plain silver wedding band with no mention of facial hair. After seeing the suspect on the evening news and being questioned suggestively by APD officers, Ms. Sheard testified about the suspect's sideburns and mustache and details of a turquoise ring.

²⁰ Mr. Johnson had been seen wearing the leather leg chaps the night before at Fundamentals. See TT at 1813; TT at 1840. Yet the chaps, arguably obvious and eye-catching articles of "biker" outerwear, were not mentioned by any of the East Albany witnesses.

She never was given the opportunity to try to identify the suspect from a lineup.

Eyewitness Mary Ann Florido was shown a book of photos after a suspect was arrested whose photo was in the mug book. The procedure was highly suggestive: the book was labeled I-J, that is, “I” and “J” were the initials of the first letter of the last name of persons in the book and it was possible for the witness to actually view the written name of the suspect on the back of the photo. Video or at least tape recording an eyewitness identification procedure is a key safeguard. However, the tape recorder was turned off for Ms. Florido’s mugshot search. To taint Ms. Florido’s testimony even further, an Assistant District Attorney showed her the defendant’s photo prior to the trial.^[21] Finally, eyewitness Eugene Emmitt Wheeler was given the opportunity to view a photographic lineup but it was more than 4 months after the crime, it was an unfair lineup, and again, the tape recorder that was on for his interview was turned off while he studied the photographs for 20-30 minutes.

Exhibit 7 at 39-40 (Affidavit of Dr. Cole).

Dr. Cole further concluded that the police lineup used in Mr. Johnson’s case was wholly unreliable:

The photographic lineup used in this case does not meet the most basic research and professional standards: the suspect should not stand out in the lineup as being different from the decoys and the lineup should depict persons with similar physical characteristics. However, in this case, the defendant is the only person in the lineup who matches the description. In conclusion, the photographic lineup used in this case did not provide a reliable assessment of the eyewitness’s recognition memory.

Exhibit 7 at 41 (Affidavit of Dr. Cole).

²¹ See Exhibit 21 (note from DA file regarding showing of photo to Ms. Florido).

We now know that mistaken identification is the leading cause of wrongful convictions in this country. As Dr. Steven Cole testifies:

Psychologists have long known that human perception and memory are highly fallible. By the mid-1990s, though, hundreds of programmatic experiments on eyewitness identification had been published in peer-reviewed journals. The empirical results from these experiments designed specifically to assess factors affecting eyewitness identification documented the unreliable nature of eyewitness identification.²² In 1995, the National Institute of Justice launched a review of cases in which persons were released from prison as a result of post-trial testing of DNA evidence. The resulting report indicated that 80% of these innocent people had been mistakenly identified by one or more eyewitnesses.²³ By 2008, psychological scientists reported more than 200 exonerations based on post-conviction DNA testing and mistaken identification was involved in over 75% of the exonerations, more than all other causes combined.²⁴ As of September 20, 2011, there have been 273 post-conviction DNA exonerations in the United States and eyewitness misidentification was a factor in approximately 75% of them.²⁵ These known exonerations are undoubtedly only a small percentage of the innocent people who have been convicted on mistaken eyewitness identification evidence.

Exhibit 7 at 9-10.

²² Cutler, B.L., & Penrod, S.D. (1995). Mistaken identification: The eyewitness, psychology, and the law. New York: Cambridge University Press.

²³ Connors, E., Lundregan, T., Miller, N., & McEwan, T. (1996). Convicted by juries, exonerated by science: Case studies in the use of DNA evidence to establish innocence after trial. Alexandria, VA: National Institute of Justice.

²⁴ Wells, G.L., & Quinlivan, D.S. (2009). Suggestive eyewitness identification procedures and the Supreme Court's reliability test in light of eyewitness science: 30 years later. Law and Human Behavior, 33, 1-24.

²⁵ Innocence Project. (September 20, 2011). Retrieved from <http://www.innocenceproject.org/for>.

Indeed, eyewitness misidentification evidence is the most common contributing factor to wrongful convictions and is four times more likely to contribute to a wrongful conviction than a false confession.²⁶ In a study of 250 cases in which defendants were exonerated by DNA evidence after conviction, law Professor Brandon L. Garrett stated that the “role of mistaken eyewitness identifications in these wrongful convictions is now well known. Eyewitnesses misidentified 76% of the exonerees (190 of 250 cases).”²⁷ Approximately 36% of the cases involving mistaken eyewitness identification involved multiple eyewitnesses who incorrectly identified an innocent defendant.²⁸

Based on the clear problems with the eyewitness identifications in this case, commutation or a stay to allow DNA and fingerprint testing is critical to ensure that Mr. Johnson’s murder conviction and death sentence are reliable before he is executed.

²⁶ In a Department of Justice report studying 28 felony convictions subsequently overturned on the basis of DNA evidence, 85% of the convictions resulted primarily from erroneous eyewitness identifications. Christian A. Meissner & John C. Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psychol. Pub. Pol’y. & L. 3, 23–24 (2001).

²⁷ Brandon L. Garrett, Convicting The Innocent: Where Criminal Prosecutions Go Wrong 48 (2011).

²⁸ Id.

B. Although Ms. Sizemore Died as a Result of Excessive Blood Loss from Forty-One (41) Stab Wounds, Mr. Johnson's Clothing had almost no Blood on Them.

Items of clothing worn by Mr. Johnson or in his possession at the time of his arrest, including the leather jacket, a pair of leather chaps and boots were identified by various witnesses as items worn by Mr. Johnson the night prior to the homicide. He was arrested the next day wearing the same clothes from the night before. Exhibit 9 (Albany Police Reports). None other than the jacket bore any traces of blood.²⁹ Exhibit 8 at 2826 (GBI report). Despite the fact that Ms. Sizemore lost copious amounts of blood,³⁰ the jacket bore only trace amounts of type A and type O blood.³¹ TT at 2825-26, 2870, 2884-85. After unsuccessful attempts to match the blood on the jacket with Ms. Sizemore's DNA, it was determined that the trace amount of type A blood on Mr. Johnson's jacket "could have originated from Angela Sizemore." PT (December 12, 1997) at 16.

At trial, defense pathologist Dr. Frist was not permitted by the court to provide his expert opinion that the lack of blood transfer on Mr. Johnson's clothing

²⁹ During Mr. Johnson's interrogation, detectives told Mr. Johnson's that his jacket was covered in blood. TT at 2094. Mr. Johnson told police that while there might have been a "little bit" of blood on the jacket, there couldn't have been as much as the detectives were saying. Id. Mr. Johnson was correct in his assumption.

³⁰ Ms. Sizemore's shirt and pants were covered in blood. Exhibit 8 at 2825 (GBI report).

³¹ The blood of both Ms. Sizemore and Mr. Johnson was determined to be type A. Exhibit 8 at 2825 (GBI report).

indicated he was not Ms. Sizemore's killer. See TT at 2486-93. Recently, Dr. Marilyn Miller, a crime scene expert who specializes in blood spatter evidence has reviewed Mr. Johnson's case and not only concurs with Dr. Frist's limited testimony on this issue, but testifies further about the significance of the lack of blood:

I am a bloodstain pattern analyst expert, and I have reconstructed a multitude of crime scenes utilizing scientifically reliable tools and methods. It is my expert opinion that there would have been a great deal of blood loss and transfer of blood from the victim to the perpetrator during this crime. If Mr. Johnson was the perpetrator in this case, his leather clothing, jewelry and shoes would have been covered in the victim's blood. Every time the perpetrator struck or touched the victim, impact spatter or transfer spatter would have been transferred to Mr. Johnson's clothing. However, only minute traces of blood were found on the left lapel and right arm of Mr. Johnson's leather jacket. The blood on Mr. Johnson's jacket was described as "trace" amounts of blood. In spite of evidence that the victim bled, due to the 41 stabs wounds in her chest and abdomen, and was carried by the perpetrator to her car, the defendant's clothing and shoes tested negative for the presence of blood and his jacket tested positive for only minute traces of blood. Given this scenario of transporting the body and the type of injuries sustained by the victim, it is my expert opinion that the perpetrators of this homicide would most likely have a great deal of blood on them.

Exhibit 6 at 7 (Affidavit of Dr. Miller).

Moreover, forensic pathologist Dr. Jonathan Arden recently reviewed Mr. Johnson's case and not only concurred with Dr. Miller, but explained medically why there would have had to have been significantly more blood on Mr. Johnson's clothing:

[I]t is my expert opinion that a perpetrator would have a substantial amount of blood on his clothing and person after committing this crime. As I mentioned previously, the victim would have lost approximately 850-900 milliliters of blood other than what was recovered internally at autopsy. This amount of blood loss is equivalent to 28.7-30.4 ounces. *This is a great deal of blood and would have come in contact with the perpetrator in this case.* Therefore, I agree with Dr. Miller that the perpetrators of this crime would have had a great deal of blood on them. The blood would have transferred during the assault, the struggling of the victim while attempting to resist or escape, and handling of the body (dressing and undressing the victim before and after the assault, assaulting the victim, and moving the victim from the murder scene to her car). In this case, however, only a trace amount of blood was found on any of Marcus Ray Johnson's clothing, suggesting that was not the perpetrator of this crime.

Exhibit 5 at 5 (Affidavit of Dr. Arden).

Drs. Arden and Miller's findings are consistent with notes indicating that Albany Police investigators expected Mr. Johnson's clothing to be covered in blood if he had killed Ms. Sizemore. Exhibit 8 at 2960 (Notes from GBI file). Thus, the mere trace amounts of blood on Mr. Johnson's clothing—that have never been conclusively matched to that of the victim—supports the theory that Mr. Johnson was not the perpetrator and weighs strongly in favor of commutation or for a stay in order to conduct DNA testing.

C. The State Failed to Explain Why Ms. Sizemore's Feet Were Caked with Black Greasy Residue and Why Similar Residue was Found in her Stab Wounds, While No Such Substance was Found on Mr. Johnson or Any of His Belongings.

Another troubling element aspect of the evidence in this case is the black greasy substance that was caked on the sides of Ms. Sizemore's feet and in several of her stab wounds. See Exhibit 8 at 2831-32; Exhibit 11 (Evidence, Crime Scene, Autopsy Photos); TT 2236-38, 2258-59 (Testimony of Dr. Clarke). The black greasy substance was never collected or tested, and its makeup and origin was never explained at the time of trial. TT at 2258-59.³²

³² During state habeas proceedings, Mr. Johnson presented evidence that linked Ms. Sizemore to a mechanic's garage where she could have been killed, a theory that was consistent with the black greasy substance found on Ms. Sizemore's body. See Exhibits 14-16 (Affidavits of Greg Bigler, Ollie McNair, and Greg McNair); see also Exhibit 13 (Deposition of Jake Dillard). Trial attorney Tony Jones further testified at that proceeding that the same theory of a mechanic-perpetrator or perpetrators had come up shortly before trial in connection with the crime lab photos of the black greasy substance on Ms. Sizemore's feet, which defense counsel had only recently been given by the State. HT at 236-37. Mr. Jones testified:

Her feet looked like they needed a good washing. The stuff was more like black than brown. And so Mr. Lane and I discussed that. And I believe we had somebody look at those pictures. And it seemed that that was oil or something on her feet. All I know is that it was black. And so we started thinking where could this lady have been to get this on her feet.... [S]omehow in the course of the trial, or maybe before, there was some discussion about a guy.... We tried to find a particular guy, and we tried to put him under subpoena because we felt he might have some connection to how the stuff got on the bottom of her feet.

* * * * *

I am not so sure that ... we didn't get some information from somebody who was at Fundamentals that the guy that we thought might have had a connection to being a mechanic was at Fundamentals.

Recently, crime scene expert Dr. Miller reviewed the relevant evidence regarding the greasy substance and conducted a reconstruction to determine what type of movement would have caused the greasy residue to be on Ms. Sizemore's feet in this particular pattern:

The victim [] had a greasy black residue in some of the stab wounds and on the edges of both feet. I reconstructed the dragging of the victim, as testified by the medical examiner, and conducted a test with a laboratory dummy. I constructed a sling around the dummy's abdomen and right leg as displayed in photos of the victim. After dragging the dummy with the sling, I determined that the greasy black stains on the feet would have occurred as the body was being carried and dragged from the crime scene. The feet would have hung down as the body was carried in these slings. This transfer of evidence would have occurred as the victim's feet were being drug through this black greasy substance at the accurate crime scene location. This residue is critical evidence in helping to identify where the victim was killed, the primary crime scene. Once again, no substance similar to the greasy black substance found on the victim was identified as being in the areas where the State suggests the victim was murdered or her body was found. Photos of the area show a sandy field with no black greasy substance. Also, testimony from Officer Chris Miller at this scene describes this soil as white and sandy. There is no mention of a black greasy substance or residue.

Exhibit 6 at 9 (Affidavit of Dr. Miller).³³

HT at 237-38 (Testimony of Tony Jones). Unfortunately, trial counsel never followed through on their theory.

³³ Dr. Arden further testified to the significance of this evidence that was wholly ignored by the State in this case:

Typically, samples of unknowns found on the victim's body would be collected for

Dr. Miller's findings are consistent with the defense theory at trial and the evidence presented in state habeas proceedings—namely that the black greasy residue is wholly inconsistent with the State's theory of how and where Ms. Sizemore was killed. Mr. Johnson's pocketknife—the alleged murder weapon—bears no such residue.

D. The “Grip Marks” in the Bruising on Ms. Sizemore’s Body Indicate more than One Perpetrator Assaulted Ms. Sizemore.

At trial, both state and defense pathologists acknowledged the bruising on Ms. Sizemore's neck, arms, and ankles were indicative of “grip marks,” meaning that the perpetrator held Ms. Sizemore down with such force that it caused bruising on her body. See TT at 2219, 2223, 2233-39 (Testimony of Dr. Clarke);³⁴ TT at 2505-06 (Testimony of Dr. Frist). Dr. Frist further testified that these marks

analysis. Significant locations on the victim's body had traces of this substance (stab wounds and sides of both feet). These areas would be expected to yield important evidence that can link a perpetrator to a crime. I can offer no expert opinion about this material since no samples of this greasy black substance were taken for analysis. However, I can say it is very relevant to the criminal investigation and should have been tested and analyzed.

Exhibit 5 at 7 (Affidavit of Dr. Arden).

³⁴ Dr. Clarke refers to the bruising as “grab marks in the autopsy. See Exhibit 10 at 7 (Autopsy of Angela Sizemore).

indicated more than one person committed the crime, which was at odds with the State's theory that Mr. Johnson alone was the perpetrator. Id. Both forensic pathologist Jonathan Arden and crime scene expert Marilyn Miller concur:

The state pathologist Dr. Clarke testified that small oval or round bruises consistent with finger or "grip marks" were found on the victim's ankles, knees, wrists and arms. These bruises are considered restraint bruises and the victim was covered in them suggesting she was restrained by multiple perpetrators as she struggled to escape or struggle from the frontal assault to her body. The grip marks further confirm that Ms. Sizemore was still alive when the bruising occurred because a person's blood must still be circulating to acquire bruises on their body. Therefore, these marks could not be a result of moving Ms. Sizemore body after she died.

Exhibit 6 at 8 (Affidavit of Dr. Miller).

I concur with Dr. Frist that the victim was alive when she sustained the multiple bruises around her ankles, knees, wrists and arms. The bruises are consistent with grip marks and restraining bruises. There would be no need for restraint marks on her extremities if the victim was unconscious. Typically, when an individual is struggling, restraints are placed around thrashing legs and arms as evidenced by the multiple grip mark bruises on the victim. Although Dr. Clarke testified these were consistent with marks sustained when dragging the body, I concur with Dr. Frist's findings that the victim would have died soon after the fatal blow or stab wounds to the heart. Bruising cannot occur after the victim is dead. The locations of the bruises on the extremities are more consistent with restraint bruises than bruises caused when dragging a body. This essentially means Ms. Sizemore was dead before her body was moved to her vehicle. Another important fact to point out about the time of death is the lack of bleeding into the rectal and vaginal area. The minimal amount of blood flow and associated tissue hemorrhage from these injuries is consistent with them having been inflicted on someone who was dead or nearly so, again indicating that she was dead prior to having been moved.

Exhibit 5 at 5 (Affidavit of Dr. Arden).

Thus, these grip marks are highly significant, undermining the State's theory that Mr. Johnson alone killed Ms. Sizemore by the 16th Avenue holding pond and then subsequently moved her body.

E. No Forensic Evidence Ever Substantiated the State's Theory that Mr. Johnson's Pocketknife was the Murder Weapon and New Evidence Suggests Two Weapons Were Used to Stab Ms. Sizemore.

Mr. Johnson's pocketknife, which was alleged to have been the murder weapon at trial, was found to bear no traces of blood after crime lab analysis. TT at 2826. Not only is this inconsistent with the quantity of blood found at the crime scene, but evidence suggests that two different blades were used to stab Ms. Sizemore. After crime scene expert Dr. Miller observed two different types of stab wounds,³⁵ forensic pathologist Dr. Jonathan Arden concurred:

Regarding the murder weapon, I have carefully viewed the photos of the stab wounds on the victim's chest and found there to be substantial

³⁵ Dr. Miller testified:

The state also argued that a pocketknife found on Marcus Ray Johnson was the sole murder weapon in the case. The state's pathologist testified that the injuries were all caused by the same blade. From my years of experience as a crime scene expert, the shape and size of the stab wounds to the victim's chest 10appear to be made with two different weapons. A forensic pathologist should be consulted about these injuries.

Exhibit 6 at 10-11 (Affidavit of Dr. Miller).

evidence of two weapons. Specifically, there are several stab wounds located around the victim's breast and in her abdomen area, which appear to be consistent with a single-edged knife. However, they could have been inflicted with a multitude of knife blades other than the defendant's pocketknife, which was not found to have any of the victim's blood on it. Typically, a murder weapon would have at least traces of the victim's blood that could then be compared to the victim's wounds to confirm it was utilized in the assault, but there was none in this case.

Significantly, there is also an oval cluster of eight similar wounds on the victim's left chest area that differ from the knife wounds described above. These puncture wounds appear to have a clearly defined abrasion collar or bruising around them. This cluster of eight stab wounds on the victim's upper left chest area is not consistent with a knife. These wounds appear to be consistent with a round instrument or tool such as an awl or ice pick. Stab wounds from this type of weapon will often mimic a small caliber gunshot wound, which includes abrasions or bruising around the puncture. From looking at the photos of these wounds, there is clearly a well-defined abrasion collar around these punctures. These abrasion collars are created as the weapon scrapes the tissue while penetrating the tissue. Also, when looking into the wound, there is a clear circular pattern in the wound which would also be consistent with an ice pick or awl.

Exhibit 5 at 4 (Affidavit of Dr. Arden).

Dr. Arden's theory is consistent with the trial testimony of state pathologist Dr. Clarke, who testified that there were two different types of stab wounds on Ms. Sizemore's body. TT at 2240-41. It is, however, *inconsistent* with Mr. Johnson's pocketknife being the murder weapon. TT at 2240. Indeed, both Dr. Miller and Dr. Arden concurred that the lack of blood or greasy residue on the knife made it unlikely that Mr. Johnson's knife was the murder weapon:

In addition, none of the greasy black substance found in the wounds of the victim was found on the knife. The injuries contaminated with the greasy black substance suggest a crime scene where the weapon has been dropped, laid, or shoved into this greasy black substance. The soiled weapon was then used to stab the victim. Because of the nature of the violent assault, I would also expect to find some blood evidence on the murder weapon in the multiple grooves and hinges of the knife or in a perpetrator's pocket where the knife was placed. However, no blood was found on Mr. Johnson's knife or on Mr. Johnson's pants.

Exhibit 6 at 11 (Affidavit of Dr. Miller); see also Exhibit 5 at 3-4 (Affidavit of Dr. Arden) ("Typically, a murder weapon would have at least traces of the victim's blood that could then be compared to the victim's wounds to confirm it was utilized in the assault, but there was none in this case.")

Because the State's theory was that Mr. Johnson acted alone and stabbed Ms. Sizemore with his pocketknife, this new evidence suggesting the stab wounds from two different weapons is highly significant. Further, it weighs heavily in favor of conducting DNA testing.

F. No Biological Evidence Confirmed the Location where Ms. Sizemore was Killed, yet the State Prejudicially Argued that Mr. Johnson had Sexually Assaulted Ms. Sizemore with a Pecan Tree Branch.

Once Albany police had identified Mr. Johnson as a suspect, officers combed the area around Palmyra Avenue and 16th Avenue, near where Mr. Johnson had been seen walking with Ms. Sizemore. While surveying a holding pond area near 16th Avenue for clues, police at one point found blood on a dirt road

and in some grass. TT at 2026. Near that area, police found a pecan tree branch, one end of which appeared to be (but through testing at GBI was found not to be) covered in feces. Id. at 2027. Police assumed that this was the crime scene where Ms. Sizemore had been killed and that the limb was the object used to mutilate Ms. Sizemore's vagina and anus. Id. at 2030; Exhibit 8 at 2959-60 (GBI records). They sent the soiled blood samples and the tree limb to the Georgia Bureau of Investigation (GBI) Forensic Services Department for testing. However, the blood could not be linked to Ms. Sizemore; nor did the tree limb have any blood or seminal fluid on it. Id. at 2826 (GBI report).

Crime scene expert Marilyn Miller analyzed the crime scene and has concluded that the area identified by police as where Ms. Sizemore was killed is inconsistent with the physical evidence:

After reviewing the above materials, it is my expert opinion that the primary murder scene was never identified by law enforcement in this case. Identifying the murder scene is critical in identifying the perpetrator or perpetrators. A fundamental tenet of any criminal investigation is to collect evidence to link the victim to the perpetrator, victim to the scene and perpetrator to the scene. The Albany Police Department identified the primary murder scene as an area located near 16th Avenue and the railroad tracks near a holding pond in Albany, Georgia. The area identified as the murder scene is a sandy field containing a small patch of blood. Photographs were taken of this area and several items were taken into evidence from this area to support this as being the primary crime scene where the victim was murdered. These items included dirt samples with blood, a pecan tree limb, and a pair of socks with a mucous-like substance. However, none of this evidence, as tested, or photographs of this area,

suggests this was the primary crime scene or the site where the stabbings occurred.

The death of Angela Sizemore was a vicious murder which would have resulted in a tremendous amount of bloodshed. The victim's clothing was removed from her body and she was stabbed 41 times. Additionally, she was anally and vaginally violated with a foreign object, which at trial was believed to be a pecan tree limb found at the scene. However, if this had been the primary crime scene, there would have been significantly more transfer blood stains and a multitude of medium impact bloodstain patterns on the ground. Impact spatter would have been generated every time the victim's body was struck with a weapon. Furthermore, blood would have been generated every time the victim moved or struggled to escape from her attacker or attackers to cause more contact transfer patterns of blood and pools of blood in this area. In my opinion, the state pathologist's explanation at trial that the lack of blood was due to Ms. Sizemore bleeding internally, is inaccurate.

Moreover, the ground in the area where Ms. Sizemore was killed should have been covered with impact spatter, numerous contact transfer bloodstains, and also, contain more pools of blood from the victim being detained there for an extended period of time. Instead, there is only a small pool of blood in the crime scene photographs and no impact spatter or transfer stains. The state's theory of the crime was that Mr. Johnson was the sole perpetrator in this case. The medical examiner, Dr. Clarke, testified that the crime could have been done by one individual if it had taken place over a 4 hour period of time. However, there is far too little blood in this location to suggest the victim was murdered here, and certainly not for a 4 hour period of time.

Exhibit 6 at 4-6 (Affidavit of Dr. Miller).

In addition to Dr. Miller's conclusion based on her blood pattern expertise, forensic pathologist Dr. Jonathan Arden offered a medical explanation for why there would be substantially more blood wherever Ms. Sizemore was killed:

With regard to the issue of the victim's blood loss, Dr. Clarke, the state medical examiner, found that cause of death was due to exsanguination, or loss of blood. Dr. Clarke also found in the autopsy report that Ms. Sizemore had lost 800 milliliters of blood into her left chest cavity and 50 milliliters of blood into the pericardial sac around her heart. He also found that there was some minimal amount of blood internally in her pelvic area. In addition, Dr. Clarke testified at trial that there need be no other significant loss of blood for Ms. Sizemore to die from loss of blood.

In my opinion, Ms. Sizemore would have had to lose significantly more blood than the amount Dr. Clarke measured in her body cavities in order to die from blood loss. Ms. Sizemore was a 160 pound woman. Conservatively, she would have needed to lose twice the amount of blood Dr. Clarke documented for loss of blood to be fatal. Since this blood is not located inside of the victim it would be expected to be located at the crime scene, on the victim, and on the perpetrator(s). I also viewed photos of the alleged murder scene and concur with Dr. Miller's findings. *The small amount of blood on the ground would not account for the actual loss of blood of the victim (including spatter and pooling) and indicates some other location is the actual murder scene.*

Exhibit 5 at 4-5 (Affidavit of Dr. Arden).

Drs. Miller and Arden also both concluded that it was unlikely that the pecan branch was used in the assault of Ms. Sizemore. This is consistent with evidence at the time of trial that there was no blood on the pecan branch (See Exhibit 8 at 2826) (GBI Report):

If [the pecan branch] was the weapon used to assault the victim, as a blood stain pattern analyst, I would expect to see more blood and tissue in the nooks and crannies of the bark of the tree limb. Once again, this lack of corroborating evidence suggests this was not the area where the victim was murdered. If this was the weapon utilized to assault the victim, touch DNA can be extracted from the portion of

the tree limb held by the perpetrator; also, more sophisticated DNA testing can identify smaller samples of DNA transferred to the tree limb during the assault of the victim.

Exhibit 6 at 9-10 (Affidavit of Dr. Miller). Dr. Arden concurred that the branch should have had more blood on it if it was used to violate Ms. Sizemore:

Forensic testing of the tree branch indicates there was no blood on the limb. As a pathologist, I would expect to find considerable blood on a tree limb used to vaginally and anally violate the victim. Dr. Clarke testified that there was stretching, tearing, and lacerations of the victim's vagina and rectum. Even if the victim was dead, there would still to be a passive release of blood due to the lacerations and tearing of tissues that are engorged with blood. Thus, I agree with Dr. Miller that the lack of blood found on the tree branch in this case suggests that it was not the weapon used to violate the victim.

Exhibit 5 at 6-7 (Affidavit of Dr. Arden).

Evidence that Ms. Sizemore was not killed at the location the state theorized significantly weakens the case against Mr. Johnson. Specifically, the main link between Ms. Sizemore and Mr. Johnson was that they were drinking at a bar in this area and that Mr. Johnson admitted to having consensual sex with Ms. Sizemore in an area near the alleged crime scene. However, without any definitive evidence that the crime occurred anywhere near where Ms. Sizemore and Mr. Johnson had intercourse, the state's case again relies almost entirely on the questionable eyewitness identifications that placed Mr. Johnson in the neighborhood where the body was found. As discussed in further detail below, these identifications are

unreliable, and DNA testing is needed to provide hard evidence of the perpetrator of this crime.

G. Hair and Fingerprint Evidence Found near Ms. Sizemore's Body Exclude Mr. Johnson as the Perpetrator.

No physical evidence linked Mr. Johnson to the vehicle in which Ms. Sizemore's body was found. One usable fingerprint lifted from the vehicle's interior matched neither Ms. Sizemore nor Mr. Johnson. TT at 1999-2001. While this print was run through AFIS at the time of trial, no match was identified.³⁶

Further, while processing the crime scene, police also collected a hair sample from within the vehicle in which Ms. Sizemore's body was found. See

³⁶ Dr. Miller testified:

Thirty-eight fingerprints were lifted from the victim's car, however, only one latent print was considered usable. The usable latent print lifted from victim's car (driver's side back door) was run in the Georgia AFIS database because of its evidentiary value. Unfortunately, there was no match found in the state AFIS. AFIS is short for Automated Fingerprint Identification System. AFIS is a type of biometric system that uses digital imaging to capture a fingerprint, which can then be compared to a database of fingerprint records to help determine the identity of an individual. It is commonly used in law enforcement where sets of prints are recorded at crime scenes and then compared to known fingerprint records in the AFIS system. The fingerprint from the victim's car should still be in the state AFIS system and can now be run in IAFIS. IAFIS is the Integrated Automated Fingerprint Identification System maintained by the FBI, it is a national fingerprint and criminal history system that helps local and federal law enforcement agencies solve crimes. IAFIS provides automated fingerprint search capabilities and latent search capability based on fingerprints in the national database. IAFIS came into existence in 1999, and the print found on the victim's car can easily be run in IAFIS today.

Exhibit 6 at 17.

Exhibit 6 (APD Supplemental Report Item 26). This hair sample, Item 12 in the GBI crime lab report, did not match known hair samples of Mr. Johnson and Ms. Sizemore. GBI crime lab analysts determined that the questioned hair sample was “[a head hair of possible Negroid origin.” Exhibit 3 at 2822-23; 2827 (GBI report). Ms. Sizemore and Mr. Johnson are white. No DNA testing was ever performed on the questioned hair, yet this hair is highly probative evidence in this case:

It is typically considered evidence of significant value to find an unknown hair in close proximity to or on the victim’s body. A Negroid hair was found in the back seat of the victim’s car in close proximity to where the victim’s body was found. This Negroid hair should not be ignored by law enforcement because it was found close to the victim’s body and also, close to dirty footwear impressions left by the perpetrator in the backseat of the victim’s car. Please note the victim had dirt on her body and clothes that appear to be consistent with the dirty footprints on the rear floorboard of the victim’s vehicle.

Exhibit 6 at 16 (Affidavit of Dr. Miller).

Additionally, Dr. Clarke took tape lifts from Ms. Sizemore’s body that revealed other hairs inconsistent with Mr. Johnson and Ms. Sizemore. Exhibit 8 at 2827. Dr. Miller testified that these hairs are significant evidence in investigating a homicide case:

In a brutal assault case, tape lifts are often taken from the body of the victim. A basic principle in forensic science is the expected transfer of material when two objects come into contact and a high expectation of finding probative associative physical evidence that when tested in the forensic laboratory will identify the perpetrator in criminal investigations. These tape lifts taken from the victim’s body catch

hair and fiber evidence that can be used to identify a perpetrator or link a victim to the perpetrator at a crime scene.

Exhibit 6 at 12 (Affidavit of Dr. Miller).

This highly probative evidence that did not link Mr. Johnson to the crime again militates in favor of commutation or a stay to allow DNA and fingerprint testing. The lack of evidence against Mr. Johnson shows that if he had been excluded as a donor through DNA and fingerprint testing, there is a reasonable probability he would have been acquitted at trial.

H. Extensive Biological Material was Collected in this Case that Should be DNA Tested using Modern Methods.

Biological materials exist in this case that can be DNA tested by modern methods which were unavailable in the early to mid-1990s. While extensive physical evidence was collected, Mr. Johnson requests specific items to be tested, the results of which could have resulted in his acquittal.

1. Numerous Items of Evidence Collected in Mr. Johnson's Case Could Exonerate Him.

Much of the evidence collected by law enforcement in this case—much of which was transferred to the GBI—was never subjected to DNA testing. Those limited items that were tested were done so using techniques that have now been rendered obsolete.

At the time DNA testing was performed in the mid- to late- 1990's, such testing required larger quantities of biological material. Further, the results were less discriminating, and more subject to interpretation due to the quality of blots and images produced. Because numerous pieces of evidence in this case either could not be DNA tested at the time of trial or could not be tested with great precision, it is my professional opinion that this case meets the requirement in O.C.G.A. § 5-5-41(c)(3)(B) in that the "technology for the testing was not available at the time of trial."

Exhibit 4 at 3 (Affidavit of Dr. Hampikian).³⁷

Thus, with the limited testing that was performed prior to trial and the ample evidence and techniques that could now make new testing more probative, DNA testing is critical in this case. Below are the specific items for which Mr. Johnson is requesting testing, and the significance of each item in identifying the perpetrator of this crime, potentially exonerating Mr. Johnson.

a. Semen Slide³⁸

The only successful DNA testing at trial was on the semen slide taken from Ms. Sizemore's vagina. The GBI's results indicated that Mr. Johnson had

³⁷ Dr. Hampikian further explained the specific testing performed at the time of trial:

Specifically, the GBI crime lab sought to obtain DNA profiles through a number of testing methods that were commonly used in that era—including enzyme analysis, Restriction Fragment Length Polymorphism (RFLP), and early Polymerase Chain Reaction (PCR) tests which relied on dot blots—but were not able to obtain DNA on any physical evidence other than the semen slide.

Exhibit 4 at 3.

³⁸ This slide is identified as GBI Item 1E in the 1998 Report.

contributed the semen, which was consistent with his initial statement to police. However, the testing conducted was imprecise and additional testing may reveal a different profile on the semen:

[W]ith regard to the semen, the GBI was able to develop only four alleles that were different from the victim. To provide context, the minimum number of alleles that must be identified for a convicted offender DNA profile to be entered in the FBI's CODIS database is now twenty-six.

The GBI concluded that Marcus Ray Johnson could not be excluded as a contributor of the sperm DNA. However, because there were only three loci where Ms. Sizemore differed from the sperm DNA, this result was less definitive than more modern testing could yield. While Mr. Johnson admitted to having consensual sex with Ms. Sizemore, more sensitive and discriminating testing may now indicate additional DNA from another male donor. There have always been questions in this case as to whether after Ms. Sizemore and Mr. Johnson engaged in intercourse, Ms. Sizemore was sexually assaulted and killed by one or more other individuals. Thus, re-testing of the vaginal slide with modern STR and Y-STR techniques could result in identification of the actual perpetrator(s).

Exhibit 4 at 3, 6 (Affidavit of Dr. Hampikian).

b. Saliva³⁹

During Ms. Sizemore's autopsy, saliva swabs were collected from her thigh and breast area. See Exhibit 8 at 2821. While the GBI performed testing to

³⁹ These swabs are identified as GBI Items 1G & 1I in the 1998 Report.

confirm the swabs contained saliva, they did no further testing. Id. at 2826. This biological evidence could yield a profile that could identify the perpetrator in this case. Dr. Hampikian explains:

The GBI did not perform DNA testing on these swabs at the time of trial. It is my opinion that STR-DNA testing could be performed on these swabs that could reveal a male DNA profile, whether it is Marcus Ray Johnson or another male. These results would obviously be highly probative in conclusively identifying the perpetrator in this case.

Exhibit 4 at 6 (Affidavit of Dr. Hampikian).

c. Fingernail Clippings⁴⁰

Fingernail clippings were taken from Ms. Sizemore during the autopsy and one of her pinky fingernails was noted as being torn.⁴¹ However, after a visual examination of the clippings, the GBI concluded that the nails contained no tissue and did no further testing. TT 2270-71 (Testimony of Dr. Clarke). However, with the advent of Y-STR testing, it may now be possible to obtain a male DNA profile from minute amounts of DNA remaining on the fingernail clippings:

However, modern DNA testing, specifically Y-STR testing, could now produce a male DNA profile. Before Y-STR testing, fingernail scrapings and clippings taken in sexual assault cases were usually not viable for DNA testing because the male DNA (likely skin cells under

⁴⁰ This evidence is identified as GBI Items 5C & 5D in the 1998 Report.

⁴¹ Exhibit 10 at 4 (Autopsy of Angela Sizemore).

the nail) was overwhelmed by the female DNA of the victim. For this reason, testing of biological material under the fingernails rarely gave a probative answer until Y-chromosome STR testing protocols were developed. Because Ms. Sizemore may well have scratched her attacker during the violent assault that led to her death—in fact, during the autopsy Dr. Clarke noted that the fingernail on her left pinkie finger was torn—a male DNA profile from Ms. Sizemore’s fingernail clippings would be critical evidence in determining the identity of her attacker.

Exhibit 4 at 7 (Affidavit of Dr. Hampikian).

d. Hair Samples & Tape Lifts⁴²

Hairs retrieved from the vehicle where Ms. Sizemore’s body was found do not match Mr. Johnson. In particular, a hair of “possible Negroid origin” has never been DNA tested despite requests throughout Mr. Johnson’s trial and appeals. See Exhibits 23-25.

In Mr. Johnson’s case, a number of hairs were collected from the crime scene and were subjected to microscopic examination. Some hairs were identified as being consistent with Mr. Johnson’s, while others were identified as not being consistent, and one hair was identified as being of Negroid origin, which was found in the back of Ms. Sizemore’s vehicle. This hair evidence can and should be subjected to DNA testing which has been shown to be far superior to microscopic examination. *Several exonerations have relied on DNA tests from hair that contradicted earlier microscopic comparisons, and identified the actual perpetrators.*

Exhibit 4 at 7 (Affidavit of Dr. Hampikian).

⁴² These items are identified as GBI Items 1J, 5A, 5B & 12 in the 1998 report.

In addition, tape lifts were taken from Ms. Sizemore's body that contain hairs that did not match Mr. Johnson after microscopic examination. Exhibit 3 at 2827 (GBI Report). These lifts are significant as they were found on the victim's body:

GBI microanalyst, James W. Howard, looked at these lifts and found obvious hairs, however, he deemed them irrelevant because he found no hairs consistent with the state's suspect, Marcus Ray Johnson. These hairs were found in an area on the victim's body expected to yield highly probative evidence or evidence deposited by the perpetrator. Because of its location on the victim's body, this hair evidence should not be ignored and can now be examined for nuclear DNA or mitochondrial DNA to identify the assailant in this case.

Exhibit 6 at 13 (Affidavit of Dr. Miller).

Accordingly, all the hair evidence should be tested and could identify the profile of a perpetrator other than Mr. Johnson.

e. Blood Evidence⁴³

DNA testing of several items of blood evidence could be highly probative in identifying the perpetrator in this case. First, DNA testing of blood evidence from the soil at the alleged crime scene would confirm whether it is the location where Ms. Sizemore was killed:

⁴³ These bloodstain cards are identified as being made from GBI Items 17 and 24 in the 1998 report.

Blood evidence was obtained from the area where the state argued the victim was killed. This soil sample mixed with blood was not DNA tested at that time due to the limited available DNA testing. However, new technology allows us to separate even limited and degraded DNA from other impurities, including dirt. A DNA profile can now be obtained from this blood evidence. The state linked Mr. Johnson to Ms. Sizemore's death by identifying the crime scene in close proximity to the bar where they were last seen together, however, if the blood in this sample does not match Ms. Sizemore's DNA, the results would be highly suggestive that the crime did not occur where and how the police theorized. The DNA testing of this evidence would provide additional scientific support for Mr. Johnson's claim of innocence.

Exhibit 6 at 6 (Affidavit of Dr. Miller).

Furthermore, additional testing of the blood on Mr. Johnson's jacket would also be probative in confirming whether or not her blood is on the jacket.

f. Pecan Tree Branch – Two Parts⁴⁴

The state argued at trial that a pecan tree branch found at the 16th Avenue site identified as the murder scene was the weapon used to sodomize Ms. Sizemore. However, the Georgia Bureau of Investigation forensic testing report indicates no blood evidence was found on it. Exhibit 8 at 2826 (GBI Report).

Two types of DNA testing of the tree branch would confirm whether this was the weapon used to sexually assault Ms. Sizemore. First, the end of the branch identified as being covered with what seemed to be feces, and thus the end

⁴⁴ This evidence is identified as Albany Police Department Item 26 in its 1994 Supplemental Report and GBI Item 9 in its March 3, 1998 report (Exhibit 8 at 2822).

allegedly inserted into Ms. Sizemore's anus, should be re-tested for any biological material. Second, the end held by the perpetrator should be tested using Touch DNA to identify if any skin cells were left behind.

If this was the weapon used to assault the victim, as a blood stain pattern analyst, I would expect to see more blood and tissue in the nooks and crannies of the bark of the tree limb. Once again, this lack of corroborating evidence suggests this was not the area where the victim was murdered. If this was the weapon utilized to assault the victim, touch DNA can be extracted from the portion of the tree limb held by the perpetrator; also, more sophisticated DNA testing can identify smaller samples of DNA transferred to the tree limb during the assault of the victim.

Exhibit 6 at 9-10 (Affidavit of Dr. Miller).

The state also argued that the tree branch suggested that the murder scene was a sandy area located in close proximity to where Mr. Johnson lived. If the tree branch was not used to violate Ms. Sizemore, then it does not identify the area near the holding pond off 16th Avenue and the railroad tracks as the murder scene.

g. Clothing Items⁴⁵

Several items of clothing were taken into evidence that are considered highly probative items of evidentiary value: they are likely to identify the perpetrator in this case. In this case, Ms. Sizemore's bra and panties were cut off of her body.

⁴⁵ This evidence is identified as GBI Items 6 and 11 in the 1998 Report, and Albany Police Department Item 35 in the 1994 Supplemental Report.

The police found the panties in the back seat of her vehicle, and the bra was found tied around her right thigh. They were clearly handled by the perpetrator and could provide useable DNA profiles and therefore should be tested.

Specifically, Ms. Sizemore's attacker (or possibly attackers) tied pieces of her clothing to parts of her body to move her from where she was killed into her car. Ms. Sizemore's bra was tied around her thigh, while her shirt was tied in knots and then wrapped around her chest. In addition, a pair of panties that had been cut was found in the backseat of the vehicle with reddish brown stains on them, which were presumably cut off Ms. Sizemore by the perpetrator. Each of these items was handled extensively by the perpetrator, but neither were suitable for the type of DNA testing used by the GBI at the time of trial. Now, "touch DNA" profiles could likely be obtained through testing of the clothing items. Because of their clear link to Ms. Sizemore's killer, those results would be highly probative.

Exhibit 4 at 9-10 (Affidavit of Dr. Hampikian).

These items are of significant evidentiary value because they are so directly linked to the perpetrator, and DNA testing should identify the perpetrator.

In addition to the bra and panties, the Albany Police Department also identified a pair of black socks with a sticky mucous-like substance on them near the 16th Avenue holding pond. The state argued that these items were used to gag the victim. DNA testing on these items can reveal if this was actually the gag used on the victim. Touch DNA can also yield a DNA profile identifying the perpetrator:

[A] sock was retrieved from the area where police believed Ms. Sizemore was killed. The sock was noted to have a "mucous-like"

substance that was never subjected to testing. Because this substance appears to be biological material from the crime scene, the results could yield a DNA profile of Ms. Sizemore's killer. While the state suggested that the material on the socks was Ms. Sizemore's saliva, no confirmatory tests were conducted and this substance could just as likely be other biological material from the perpetrator.

Exhibit 4 at 10 (Affidavit of Dr. Hampikian).

h. Items Found in Ms. Sizemore's Vehicle⁴⁶

Several items found in the victim's vehicle were identified and taken into evidence by the Albany Police Department. These items were given individual evidence numbers because of their probative value. These items included a cellophane candy wrapper with a blood like substance on it, a partially eaten piece of candy, a diet Pepsi cup with lid and straw, and a Styrofoam cup. These are of significant evidentiary value because they were found in close proximity to the victim's body (on the front seat and front floorboard of the vehicle), and also next to a set of sandy footprints left in the middle floorboard of her vehicle. It appears that Ms. Sizemore's vehicle was used to transport her body and leave both in a secluded part of town. Because of the location of the evidentiary items, they can identify the perpetrator in this case:

⁴⁶ This evidence is identified as Albany Police Department Items 4, 17 and 20 in the 1994 Supplemental Report.

Specifically a cellophane candy wrapper was collected that had blood on it, but was never tested. While the blood may belong to Ms. Sizemore, if the perpetrator ate the piece of candy, a DNA profile could be obtained from skin or mouth cells on the wrapper. Additionally, two disposable drinking cups were retrieved from the back of Ms. Sizemore's vehicle near two unidentified shoe prints, in the same area from which the Negroid hair was collected. If one or more of Ms. Sizemore's assailants drank from these cups, DNA profiles could be obtained from them. Moreover, DNA profiles of males off these cups would be consistent with the state's theory that more than one perpetrator participated in the killing of Ms. Sizemore. Accordingly, these items could also be probative in conclusively identifying Ms. Sizemore's killer(s) and potentially exonerating Mr. Johnson.

Exhibit 4 at 10-11 (Affidavit of Dr. Hampikian).

DNA testing can yield profiles from the cups, straw, candy and cellophane wrapper that would include skin cells and saliva for DNA typing. Because of the location of these items, DNA testing should be done to identify the perpetrator.

2. That Some Critical Evidence May Have Been Destroyed by the Dougherty County Superior Court Clerk's Office Militates in Favor of Testing What Evidence Remains Extant.

Prior to filing this Application, undersigned counsel inquired into the locations and viability of the evidence from Mr. Johnson's case. In response to this inquiry, on August 25, 2011, Evonne Mull, the Dougherty County Superior Court Clerk ("Clerk"), told undersigned counsel that the physical evidence in Mr. Johnson's case housed at the Clerk's office was unavailable for inspection because it had been destroyed pursuant to court order in 2006, long prior to the conclusion

of Mr. Johnson's capital habeas corpus proceedings. Indeed, a 2006 evidence destruction order verifies that evidence tendered at Mr. Johnson's capital trial in 1998 was destroyed. See Exhibit 26. This violated a statute which mandates preservation of evidence which could yield biological material suitable for DNA testing, particularly in capital cases. See O.C.G.A. § 17-5-55 and 56.

The destruction of the evidence in Mr. Johnson's case means that critical items of evidence, including the pecan branch, Mr. Johnson's pocket knife, items of his clothing, and other items can never be tested for evidence which might exculpate him in the murder of Ms. Sizemore. The interests of justice therefore strongly favor either commutation or a stay of execution in order to facilitate testing of the evidence which remains in existence. Indeed, in support of his decision to commute the death sentence of Robin Lovitt on the eve of his execution after the clerk of court had destroyed the biological evidence in his case, Virginia Governor Warner explained:

[C]apital punishment is the Commonwealth's most severe and final sanction. The system must operate with complete integrity and with the confidence of Virginians....However, I also believe that the Chief Deputy Clerk's act obscures the judicial branch's careful and serious consideration of this case, the destruction of evidence by an agent of the Commonwealth breached the public trust in the system, and the Commonwealth must therefore bear the burden of its agent's mistake.

See Exhibit 27 (excerpt from "List of Pardons, Commutations, Reprieves, and Other Forms of Executive Clemency").

3. Agencies in Possession of Biological and Physical Evidence in this Case.

Those agencies who currently have custody of the evidence from Mr. Johnson's case, to the best of undersigned counsels' knowledge, are the Georgia Bureau of Investigation in Decatur, Georgia, and the Albany Police Department. According to the GBI, they currently have custody of vaginal, oral and rectal swabs from Ms. Sizemore's autopsy, swabs of saliva from her thigh and breast, and threads and blood stain cards from Mr. Johnson's jacket and the soil samples. The Albany Police appear to be in possession of Mr. Johnson's jacket, items of Ms. Sizemore's clothing, and numerous hairs and other items discovered in Ms. Sizemore's vehicle. This evidence is available and can and should be tested, or commutation ordered.

II. Marcus Ray Johnson is a Hero Who Saved the Life of a Fellow Inmate.

On or about November 19, 2009, fellow UDS inmate Tim Pruitt was found by inmates hanging in his cell by a sheet, not breathing and without a pulse. See Exhibit 2 (James Ray Ward affidavit). Medical staff were called but took approximately 30 minutes to respond. See Exhibit 1 (Clay Barrett affidavit). Once his fellow inmates had brought Mr. Pruitt down, Marcus Ray Johnson and Clay Barrett immediately began CPR procedures. James Ray Ward testifies: "I said that someone needed to do CPR to try to get Tim breathing again. I did not know how

to do it. Without hesitation, Marcus Ray Johnson said he could do it and immediately began to perform CPR on Tim.” Exhibit 2. Inmate Clay Barrett remembers also:

As soon as we got Pruitt out there, Cowboy [Mr. Johnson] started giving him mouth-to-mouth resuscitation while I did chest compressions. We kept going ‘til we got a pulse and had resuscitated him. It was unbelievable when I felt his heart beat finally. As I remember, it took about ten minutes for him to come back. I believe God worked through Cowboy and me – we were just vessels.

We - me and Cowboy - stayed with Pruitt until the medical team got there. It took them about thirty minutes to come from the time we started the CPR on Pruitt. Cowboy and I had to go to our cells and lock down with everyone else in the cellblock before the medical team would come in.

Even though Pruitt did not survive very long after that day - he died December 6, 2009 - at least we gave him a chance to be with his family and for them to see him before he was gone.

Exhibit 1. Indeed, Mr. Pruitt lived for approximately another three weeks in the hospital before he ultimately passed away. See Exhibit 3 (news article).

Undersigned counsel has come before this Board many times before, but never has undersigned been able to point to a pure act of heroism on the part of the defendant whose case has come to this point. Mr. Johnson’s act of life-saving heroism is consistent with the kind of man undersigned has come to know Mr. Johnson to be over the past 12 years – a man with goodness and a strong sense of right and wrong in his heart. Mr. Johnson’s heroism should serve as concrete

proof that he is redeemable, that he cares about people, especially people who are suffering, and that he will act quickly to come to another's aid. Whether or not this Board harbors doubt about Mr. Johnson's guilt in the death of Ms. Sizemore, it should be clear that there is far more to Mr. Johnson than the worst act of which he has been accused. Mercy is duly warranted in this case.

III. Mr. Johnson's Family and Loved Ones Consistently Speak of His Generosity and Kindness, That He Is a Hard Worker Who Has Taught Himself Valuable Skills In Order To Provide for Himself and Those in His Care, And That He is a Caring and Loving Person.

Contrary to the nature of the crimes for which he has been convicted, Mr. Johnson's family and loved ones all describe him as a generous, thoughtful and caring man, who has shown particularly tender care and affection for children and his elders. See Exhibits 28-33 (Affidavits of Julie Ann Ragan, Larry Johnson, Barbara Johnson, Connie Givens, Rosemary Johnson and Donald Heaven).

His mother, Rosemary Johnson, testifies in her affidavit about Ray's fondness for both of her parents. Exhibit 32 at 5-6. Of her own mother, Ms. Johnson says, "Ray would spend hours talking with his grandmother, and he would do things for her, like walk to the grocery store to buy her food or cigarettes." Id. at 5. Similarly, Mr. Johnson spent time assisting his maternal grandfather with his work: "Working with his grandfather was something special for Ray. Ray respected and looked up to his grandfather." Id. at 6.

Mr. Johnson's kindness toward family and friends, especially children and his elders, his taking responsibility to care and provide for others, and his working hard to support himself and his family and friends refutes the image of Mr. Johnson depicted by the State at trial of a malicious killer with a penchant for violence.

A. Mr. Johnson Always Took His Responsibilities Seriously, Working From His Teenage Years Until He Was Arrested To Support Himself And Those In His Care.

From the time he was old enough to contribute financially to whatever household in which he was living, Mr. Johnson's family and friends report that he would work hard, often at more than one job at a time, to support himself and others. See Exhibits 28-34. His mother, Rosemary Johnson, testifies that he was "someone who helped people and tried to make a living as best he could using his own two hands. Ray helped our family survive the hardest years when we lived basically in poverty. He was a support to me." Exhibit 32 at 8.

His father, Larry Johnson, stepmother Barbara and sister Julie Ragan recall that Mr. Johnson held down two part-time jobs – one at a car wash and one washing dishes at a restaurant – while he was in high school in California. See Exhibits 28-30. He also would help his father at the repair shop where he worked. Exhibit 29 at 4.

When Mr. Johnson was living with his girlfriend Connie Givens and her children, he worked two jobs doing carpentry to help support the family. Exhibit 31 at 2. Ms. Givens remembers that he “felt a real obligation to help out like that.” Id. He was “always fixing things around the house” and she “always felt that Ray was making an effort to contribute to the household and be a part of our lives.” Id.

Mr. Johnson’s strong work ethic is also well remembered by one of his employers in California, David Doglione: “Ray was a good worker. He showed up every morning on time and never missed work...He was respectful to me and to the rest of the management and other employees. We valued Ray’s abilities and work ethic.” Exhibit 34 (Affidavit of David Doglione) at 1.

B. From The Age Of Seventeen, Mr. Johnson Took It Upon Himself To Bridge The Divide Between His Mother And His Family In Georgia, And His Father And His Family In California.

When Mr. Johnson (“Ray”) and his brother Randy were teenagers, their father, Larry Johnson, left the family without a word. See Exhibits 29, 32. They had no idea where their father was and did not hear from him for months. When he did finally contact them to say he was living in California and not returning to them, they were all devastated. Randy responded by cutting off contact with his father. Ray, however, wanted to have a relationship with both his mother and his

father, so he went to California at the age of seventeen to reconnect with the father who had abandoned his family. See Exhibits 29, 32.

Ray worked to become a part of his father's new family in California, endearing himself to his new siblings, stepmother, step-grandmother, and his father. He especially took care of his stepmother's mother, Mimi, and his nieces and nephews. Exhibit 28 at 3-4; Exhibit 29 at 5-6; Exhibit 30 at 4. His sister Julie Ann Ragan describes the respect, dignity and companionship he provided to their grandmother:

When Ray had free time, he would often go to her [Mimi's] house and spend time with her. Ray enjoyed talking to Mimi and vice-versa. He would go to the grocery store for her and help her around the house, fixing things and cleaning up and so on.

I remember one time when the family go together at my mother's house, Ray went to the store to buy Mimi some Depends...Ray came home and started to open the package for her, and we all laughed. But Ray said, "Quiet down now, she needs this!"

Ray was really devoted to her and would do anything for her. He felt like she really was his grandmother, and she would say that Ray was her "other grandson".

Exhibit 28 at 4.

Barbara Johnson's testifies that "Ray would do anything Mimi asked. If she needed something, Ray would get it for her....Ray would take her arm and help her along. Ray was willing to spend time with Mimi when she was craving

company....They kept up that special relationship after she moved in with us and until she died....Ray made her last years a lighter burden for her.” Exhibit 30 at 4.

Ray returned to Albany, Georgia, and then traveled to California, several more times. On one of the occasions when he was back in Albany, he and Connie Givens began a romantic relationship that became quite serious, and he moved in with her and her children. See Exhibit 31 (Affidavit of Connie Givens) at 1. Ms. Givens speaks highly of Ray’s relationship with her children, noting how he made sure to spend time with them:

He was wonderful to my children. He would take them to sports events and play with them. Sometimes he would look after them...They got more loving attention from Ray than from their own father.

I remember that right before Christmas came in 1992, Ray took my son Eric out to a pine tree farm to get a tree. Ray helped Eric to chop down a big one...Eric beamed with pride that he had helped get it for us...They [my children] were so happy to have such a big wonderful tree, and they loved Ray for bringing it to our home. It was the happiest Christmas I had had with the kids for a long time.

Exhibit 31 at 1-2.

This holiday event was not an isolated incident for Mr. Johnson with Ms. Givens and her children. Ms. Givens states that, during the time they were together, he “was always good to me.” Exhibit 31 at 3.

I trusted Ray then to be an intimate part of my life and my kids’ lives, and I would trust him now to be the same good, caring person who looked out for us in those years past.

Id.

For the rest of his life outside jail and prison, Ray traveled back and forth between Albany, Georgia and the area around Monterey, California, working to keep strong relationships with everyone in his family. This has clearly meant a great deal to his father, mother, sister, stepmother, and a host of nieces, nephews and grandparents. See Exhibits 28-30, 32. His mother Rosemary visited Ray regularly at both the jails and prison up until two weeks before her death from colon cancer in 2005. His father and sister continue to travel from California to visit him, and his other siblings and his stepmother correspond with him regularly.

The testimony referenced above should help this Board see that the acts for which Mr. Johnson was convicted and sentenced to death were not consistent with his character as it was observed over time, and as he has shown most recently in his effort to save the life of his fellow inmate, Tim Pruitt. Mercy is warranted in this case.

PRAYER FOR MERCIFUL INTERVENTION

On behalf of Marcus Ray Johnson, his counsel respectfully request that the Board intervene mercifully and order commutation of his death sentence. In the alternative, Mr. Johnson requests a 90-day stay of execution so that fingerprint testing can be performed and so that DNA testing can be conducted on available biological evidence which could exclude him as the perpetrator of the attack on Ms. Sizemore. Mr. Johnson presents a compelling case for commutation of his death sentence. The merciful intervention of this Board is warranted.

Respectfully Submitted,



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