

BEFORE THE  
BOARD OF PARDONS AND PAROLES  
STATE OF GEORGIA

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SUPPLEMENTAL APPLICATION OF **MARCUS RAY JOHNSON**  
FOR A STAY OF EXECUTION TO PERMIT DNA TESTING AND/OR  
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 Dougherty County on April 7, 1998; (ii) for a ninety (90) day stay of execution, presently scheduled for Thursday, November 19, 2015 at 7:00 p.m., to permit consideration of his application and for DNA 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 submitted his initial Application to this Board on September 28, 2011. This supplement incorporates the arguments and allegations made in that prior submission.

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) Mr. Johnson is almost certainly innocent of the murder of Ms. Angela Sizemore; (2) the purported eyewitness “identifications” in this case are completely unreliable, having been obtained through flawed methods the Albany Police Department no longer follows, and Mr. Johnson’s trial was marred by the trial court’s refusal to permit expert eyewitness identification testimony to demonstrate these flaws; (3) newly available evidence casts strong suspicion on a state’s witness, (4) DNA testing the trial court refused to order can confirm or rule out law enforcement’s theory of Ms. Sizemore’s murder; and, (5) Mr. Johnson’s positive character attributes, commendable record while incarcerated at the Georgia Diagnostic Prison, and his heroic efforts to save the life of fellow inmate Tim Pruitt warrant the merciful intervention of the Board.

### **INTRODUCTION**

When Angela Sizemore was brutally stabbed more than 40 times, copious amounts of blood had to have been deposited on her killer and his clothing. Yet no such evidence was found on Marcus Ray Johnson’s person, clothing or belongings when he was arrested the same day Ms. Sizemore was found dead in her SUV in the East Albany neighborhood of Atlanta. Investigators found a mere speck of Ms. Sizemore’s blood on Mr. Johnson’s leather jacket – an amount consistent with Mr.

Johnson's statement to police that he punched Ms. Sizemore in the nose when she became clingy after the two had consensual sex in a vacant lot near the Fundamentals Bar on Slappey Avenue on the other side of town in East Albany. The state found no other blood on his clothes or boots to suggest Mr. Johnson committed the brutal attack. Nor was there blood on the folding pocket knife the State claimed was, or "was consistent" with the murder weapon. Nor was there blood on the pecan tree branch the State claimed was or could have been the instrument used to sodomize the victim. No physical evidence indicated Mr. Johnson had ever touched Ms. Sizemore's SUV, in which her body was found across town in northwest<sup>1</sup> Albany.

Without any direct evidence to establish Mr. Johnson's guilt, the State built a highly circumstantial case based on the testimony of four individuals cross-racially identifying Mr. Johnson as a man they saw in the neighborhood where the victim's body was found, and Mr. Johnson's statement to authorities, in which he admitted he met Ms. Sizemore in a bar where both had become inebriated, had sex with her in a vacant lot after they left it, and punched her in the nose when she tried to restrain him from leaving, and stated, when confronted with her death by investigators, that he perhaps had killed her because he had heard that a strong punch in the nose could

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<sup>1</sup> See Exhibit 62, map, at position 7.

sometimes cause death. Troubling inconsistencies in the evidence presented at trial raised doubts as to Mr. Johnson's culpability for the murder.

The State's trial evidence did not exclude the reasonable hypothesis of Mr. Johnson's innocence.<sup>2</sup> Indeed, the trial court found, even after Mr. Johnson had been sentenced to death, that the evidence did not foreclose all doubt as to guilt. *See* Exhibit 25<sup>3</sup> (Trial Court's Report). Since then, the state's case has only gotten weaker.

In recent proceedings in the Dougherty County Superior Court on an Extraordinary Motion for New Trial, substantial biological evidence was collected in this case that was not and could not be subjected to modern methods of DNA testing at the time of trial, nor during Mr. Johnson's appellate and prior habeas corpus proceedings. Mr. Johnson successfully sought testing, using previously unavailable DNA testing methods, on a number of items, including those likely to

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<sup>2</sup> “[W]here there appears a hypothesis from the evidence, or from the lack of evidence and the defendant's statement, pointing to the innocence of the accused, and which tested by all human experience is a reasonable, [a court] may declare it so as a matter of law.” *Harris v. State*, 236 Ga. 242, 245 (1976) (discussing the rule that a circumstantial evidence can support a conviction only where it excludes every reasonable hypothesis of innocence). In this case, even without Mr. Johnson's statement to investigators, the State's evidence did not present an overwhelming case of guilt. Apart from the lack of physical evidence linking Mr. Johnson to the crime – evidence that would be expected given the ferocity of the attack on Ms. Sizemore – the evidence suggested more than one person was involved, as Ms. Sizemore had bruising on her wrists and ankles indicative of being restrained.

<sup>3</sup> Refers to the exhibit attached to the original Application submitted to this Board in 2011.



have been handled by the killer, that had the potential to exonerate Mr. Johnson and perhaps to identify another perpetrator or perpetrators. These included semen, saliva, blood, hair, and clothing. The majority of these items were never DNA tested at trial because of the comparatively primitive methods available then, and for those that were, the Georgia Bureau of Investigation (“GBI”) used testing methods that are now outdated such that new testing yielded more precise and probative results. Other items, notably Mr. Johnson’s pocket knife and a tree limb which the state assumed were the murder weapons, were unlawfully destroyed by the lower court in 2006.<sup>4</sup> The branch and the knife previously tested negative for any traces of blood.<sup>5</sup>

The recent DNA testing has confirmed that *no* physical evidence links Mr. Johnson to Ms. Sizemore other than that which corroborates his initial custodial statement that the two had consensual sexual intercourse. *See, e.g.*, Exhibit 58 at 216-18 (Dr. Hampikian testimony). The testing further confirmed that *no* physical evidence links Mr. Johnson to the vehicle where Ms. Sizemore’s body was found. It remains true that *no* physical evidence connects Mr. Johnson to any purported crime scene in this case. 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

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<sup>4</sup> *See* Exhibit 26, Evidence Destruction Order.

<sup>5</sup> *See* Exhibit 8, GBI Crime Lab records at 2826.

explained by the State's theory of this case at trial. A recent request to test blood samples taken from a sandy area near Albany's 16<sup>th</sup> Avenue holding pond,<sup>6</sup> where police assume the murder took place, was initially granted by the Dougherty County Superior Court, but, when the testing laboratory performed the wrong test, a test which could not determine whether that blood was Ms. Sizemore's, further testing which could have ruled out the 16<sup>th</sup> Avenue site as an actual crime scene was disallowed. Mr. Johnson asks for a stay so that this testing can be completed now.

Additionally, wholly unreliable cross-racial eyewitness identifications obtained through the shoddiest, most discredited ad-hoc police methods (methods recently abandoned by the Albany Police Department), including brazen coaching, are the *only* evidence that purport to link Mr. Johnson to the vicinity in which Ms. Sizemore's body was found. Dr. Steven Cole recently testified extensively in the Dougherty County Superior Court, detailing how this country is in the midst of a crisis of wrongful convictions stemming largely from faulty eyewitness identifications such as those which feature in Mr. Johnson's case.<sup>7</sup> No modern court of law would allow the tainted and unreliable "identifications" made in this case.<sup>8</sup>

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<sup>6</sup> See Exhibit 62 (Albany Map) at position 6.

<sup>7</sup> See, e.g., Exhibit 7 (Dr. Cole affidavit) and Exhibit 58 (Dr. Cole testimony) at 64-162.

<sup>8</sup> In 1998, the trial court disallowed critical eyewitness identification expert testimony and gave the jury a now outlawed charge (see *Brodes v. State*, 279 Ga. 435 (2005)) urging the jury that

Finally, the issues above should be considered in light of new evidence that strongly suggests that the foul play in this case case stemmed from Ms. Sizemore's risky drug-trafficking conduct and likely had nothing to do with Mr. Johnson. Investigation conducted in the course of recent proceedings in Dougherty County has uncovered troubling new evidence that one of the state's first trial witnesses, Tony Kallergis, an Albany tailor, concealed the details of extensive and suspicious interactions with Ms. Sizemore in the time leading up to and on March 23, 1994. Specifically, he facilitated a series of sales, by Ms. Sizemore, of large quantities of marijuana in Albany, the last such sale for \$3000 worth occurring in Mr. Kallergis' presence on the night Ms. Sizemore died. Revelations about Kallergis' connection to Ms. Sizemore and the fact that he concealed incriminating information about that relationship point to the likelihood of another perpetrator's or perpetrators' involvement in Ms. Sizemore's murder.<sup>9</sup>

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they could infer from witnesses' expressions of certainty that their identifications were accurate. *See* TT 2813-14.

<sup>9</sup> Importantly, neither Ms. Sizemore's purse nor any large amount of cash was recovered during the homicide investigation. However, a former bouncer at the Fundamentals bar, Ira Thomas "Tommy" Brown, testified that he recalled that another Fundamentals bouncer, Teddy Geiger, who was at the bar along with Brown the night Ms. Sizemore and Mr. Johnson were seen there on March 23, 1994, suddenly came into possession of ample cash money immediately after Ms. Sizemore's murder. *See* Exhibit 74 at 3-4. Meanwhile, Mr. Johnson was arrested while attempting to obtain \$15.00 at the Monkey Palace bar where he was employed. *See* Exhibit 65 at 3. No money other than some change was recovered from Mr. Johnson. Ms. Sizemore's purse was never recovered, although it was last accounted for as likely being behind the bar at Fundamentals. TT 1812.

Significant doubts about Mr. Johnson's guilt warrant this Board's merciful intervention or a stay of execution to allow for DNA and testing.

As further grounds for this Board's merciful intervention, as discussed in the initial Application, 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 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.

#### **I. DNA Testing Results Are Exculpatory of Mr. Johnson.**

Recent DNA testing has confirmed the lack of any direct evidence tying Mr. Johnson to a violent assault on Angela Sizemore at any of the purported crime scenes, even though there should be abundant evidence linking him to the bloody crime. Some, but not all, of the evidence collected during the investigation of Ms. Sizemore's homicide has been subjected to DNA testing pursuant to O.C.G.A. §5-5-41(c) *et seq.*, and those test results are consistent with Mr. Johnson's innocence of murder and rape. The DNA testing did not reveal another DNA profile that could

resolve who did in fact commit the heinous crimes against Ms. Sizemore. This does not, however, negate the significance of the absence of evidence linking Mr. Johnson to the crime scenes or to the violence perpetrated against Ms. Sizemore. The only clear evidence pointing to Mr. Johnson's DNA profile is consistent with his statements to police on March 24, 1994 that he and Ms. Sizemore had consensual sexual contact contact – and Mr. Johnson's account, in turn, is consistent with witnesses from the bar who testified that "Johnson and Ms. Sizemore [were] kissing and behaving amorously" at the bar. *Johnson v. State*, 271 Ga. 375, 376 (1999).<sup>10</sup>

To convict and condemn Mr. Johnson, the State misrepresented to the jury the significance of various items of evidence now known to have no connection to the homicide (*e.g.*, the pecan limb found at the northwest Albany holding pond area and Mr. Johnson's pocket knife), and circumstantial evidence that stands on what we now know to be an extremely weak foundation (*e.g.*, unreliable eyewitness identifications<sup>11</sup>).

Had the recent DNA testing results in this case been available at the time of trial, the jury would have been presented with evidence that eliminates any evidence

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<sup>10</sup> The only test results where Mr. Johnson's DNA cannot be excluded are all consistent with his and Ms. Sizemore's sexual activity in the lot just behind the Fundamentals Bar that night. *See* Exhibit 60, Bode Technology, Forensic Report, October 18, 2012; Exhibit 58 at 216-18 (Dr. Hampikian testimony).

<sup>11</sup> *See* Exhibit 7 (Dr. Cole affidavit) and Exhibit 58 (Dr. Cole testimony) at 64-162.

of a crime scene and directly contradicts the State's case against Mr. Johnson, raising a reasonable probability that the verdict would have been different.

**A. There Is No Evidence That Angela Sizemore Was Murdered, Or Ever Present, at the 16<sup>th</sup> Avenue Site.**

The significance of the 16<sup>th</sup> Avenue site for the State is that it is conceivably on the way from the Fundamentals bar<sup>12</sup> to Mr. Johnson's home at the time, and potentially within the scope of Mr. Johnson's and Ms. Sizemore's movements the night of her murder. However, it is now clear that this location had nothing to do with Ms. Sizemore's murder.

Three items were collected by the police from 16<sup>th</sup> Avenue – a pecan limb, soil with blood in it, and a sock. Exhibit 9, Police Reports. None of these items has a connection to Ms. Sizemore.<sup>13</sup> There was no other evidence presented at trial, and thus no evidence exists that this location on 16<sup>th</sup> Avenue was at all involved in the murder of Ms. Sizemore. As Dr. Marilyn Miller testified in the Dougherty County Superior Court, "there is no evidence that individualizes this scene [16<sup>th</sup> Avenue] to this victim." Exhibit 59 at 34.

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<sup>12</sup> See Exhibit 62 at position 5.

<sup>13</sup> Mr. Johnson was consistent and clear during his interrogation and his statement, that he and Ms. Sizemore had sexual relations in a field just behind the Fundamentals bar on 17<sup>th</sup> Avenue (see Exhibit 62 at position 7), not 16<sup>th</sup> Avenue, as police insisted. Exhibit 63, Marcus Johnson police interview at 4, 6-13, 15. Police, however, did not bother to investigate that location, although an officer who walked by the field claimed to see a large indentation in the grass.

**1. No Evidence From Either Ms. Sizemore or Mr. Johnson Was Found on the Pecan Limb, Which the Prosecutor Claimed Had Been Used to Mutilate the Victim.**

The portion of the pecan limb observed as smelling like feces by the police was tested by Dian J. Riley (“DJR”) of the GBI, and was negative for blood. Exhibit 8, GBI file, at 2826. The limb was entered as evidence against Mr. Johnson at trial (State’s Trial Exhibits 51 and 52). *See* TT 2154-55, 2167, 2170, 2172, 2272-73. Despite the complete absence of any evidence linking it to the offense, prosecutor Greg Edwards told the jury: “Physical evidence is something that you can see, you can feel, you can touch, something like this stick that was used to mutilate Angela Sizemore.” TT 2662. Moreover, the State misled their own witness, the state forensic pathologist who testified at trial. Dr. Anthony Clark, who testified the limb could have been used to mutilate the victim, was never told that the limb had tested negative for blood by the GBI Crime Lab, and if he had been so informed, he would have told the jury that the lack of blood on the limb “would preclude it from being the instrument that caused the injuries to the decedent.” Exhibit 61 at 4.<sup>14</sup>

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<sup>14</sup> As with the pecan limb, the pocketknife taken from Mr. Johnson when he was arrested was tested by Dian J. Riley (“DJR”) of the GBI, and was negative for blood. Exhibit 8, GBI file at 2826. Nevertheless, it was entered into evidence against Mr. Johnson at his trial, as the weapon used to stab Ms. Sizemore 41 times. (State’s Trial Exhibit 36). TT 2240-41, 2247.

**2. The Blood In The Soil At The 16th Avenue Site Has Not Been Identified As, and Cannot Be Said To Be Ms. Sizemore's.**

Bode Technology's testing of the sample from the blood found in the soil at the 16<sup>th</sup> Avenue site did not find a DNA profile. *See* Exhibit 64, Bode Labs Report from August 27, 2014. All that has been determined of this blood sample is that it is Type A. Exhibit 8, GBI file at 2826. Blood typing, however, is not useful for identifying the person whose blood is in the soil. Exhibit 58 at 194-5; Exhibit 59 at 12. That the blood from the soil was tested as Type A only narrows the pool of people who could have bled at 16<sup>th</sup> Avenue to 40% of the world's population. *See id.* Blood typing has been supplanted by DNA testing in forensic science, as DNA testing can identify a profile that only belongs to one or a few people. *See id.* Additionally, the 16<sup>th</sup> Avenue site contained pooled blood, but had none of the blood spatter pattern one would expect to find given Ms. Sizemore's numerous stab wounds. Exhibit 59 at 9-11 (Dr. Miller testimony).

**3. The Sock Collected From the 16th Avenue Site Has No Connection to This Case.**

This sock, which the police believed to have dried semen on it, tested negative for seminal fluid. Exhibit 8, GBI file at 2846. It was not used at trial, and is not relevant to Ms. Sizemore's murder.



The State presented virtually no evidence demonstrating that the 16<sup>th</sup> Avenue site was the scene of Ms. Sizemore's murder and the evidence, in fact, is to the contrary. Regardless, had the jury been apprised of DNA and blood testing results at the time of trial, it is likely that, lacking any reliable or credible evidence as to where Ms. Sizemore was killed, a competent defense would have garnered an acquittal or at least a sentence less than death.

**B. No Evidence Of Mr. Johnson Was Found Anywhere on the Exterior or Interior of Ms. Sizemore's Vehicle - The Scene Where Her Body Was Discovered. Neither Was Any Evidence Of Mr. Johnson Found on Any of the Items in Ms. Sizemore's Vehicle.**

None of Mr. Johnson's DNA was found in the recent testing that Bode Labs did on items collected from Ms. Sizemore's vehicle. *See* Exhibit 60. There is now no evidence that Mr. Johnson was ever in or anywhere near Ms. Sizemore's vehicle.<sup>15</sup>

Had the total lack of evidence of Mr. Johnson's DNA in Ms. Sizemore's vehicle or at the 16th Avenue purported crime scene been presented to the jury in

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<sup>15</sup> Witness testimony at trial established that late on the night of March 23, 1994, Ms. Sizemore had parked her SUV at a bar called P2, across the street from the Fundamentals bar. TT **Error! Main Document Only.**1774-77, 1787, 1789, 1820. Ms. Sizemore, at this point very intoxicated, and some companions walked across Slappey Boulevard from P2 to Fundamentals. *Id.* Later, she and Mr. Johnson were seen exiting Fundamentals, walking southward across the parking lot, toward Palmyra Avenue and the 17<sup>th</sup> Street vacant lot (position 7 on the map at Exhibit 62) where Mr. Johnson told police (*see* Exhibit 63 at 12) he and Ms. Sizemore had sex. TT 1807, 1813, 1818-20.

this case, it is highly likely that an acquittal would have been forthcoming, or at least a verdict less than death.

## **II. Previously Unavailable Witnesses Provide Non-Cumulative Testimony Supporting a Theory of Ms. Sizemore's Murder Which Does Not Involve Mr. Johnson.**

Investigation conducted in the course of the Extraordinary Motion for New Trial proceedings uncovered troubling new evidence that one of the state's first trial witnesses, Tony Kallergis, concealed the details of extensive and suspicious interactions with Ms. Sizemore in the time leading up to and on the day before her murder in the early hours of March 24, 1994. Revelations about Kallergis' connection to Ms. Sizemore and the fact that he concealed incriminating information about that relationship point to the likelihood of another perpetrator's or perpetrators' involvement in Ms. Sizemore's murder. This new and previously unavailable information warrants merciful intervention of the Board.

Tony Kallergis told police and testified that he was an acquaintance of Ms. Sizemore's and that on March 23, 1994, she had called him and arranged to attend a mutual friend's funeral that evening. *See* Exhibit 65 (March 24, 1994, Supplemental Investigation Report) at 3; TT 1764. Kallergis testified he and his girlfriend, Janice "Jane" Parsons, picked Ms. Sizemore up at the Texas Star restaurant and attended the funeral, after which they dropped Ms. Sizemore off at the Texas Star restaurant and never saw her again. *Id.* Ms. Parsons reportedly told police that Ms. Sizemore

“had a lots [sic] of money on her.” Exhibit 65 (March 24, 1994, Supplemental Investigation Report) at 3.

Newly available evidence reveals that Kallergis’ statements to police and trial testimony were incomplete, false and misleading. Janice Parsons, Kallergis’ former girlfriend, testified recently that she was introduced by Kallergis<sup>16</sup> to Ms. Sizemore at his home in Leesburg in January of 1994 for the purpose of finding buyers for large quantities of marijuana, which Ms. Sizemore would transport from Florida to sell in Albany in part to help finance her partner Richard Barker’s legal representation in Florida. *See* Exhibit 66 at 1-2. Ms. Sizemore would receive a thousand dollars cash from Parsons for each pound of marijuana sold. *Id.* Ms. Sizemore made three trips from Florida to Albany transporting marijuana for Ms. Parsons to sell, the last of which brought Ms. Sizemore to Albany shortly before her murder. *Id.* at 2. On March 23, 1994, Parsons and Kallergis met Ms. Sizemore, and Parsons delivered the proceeds from the sale of three pounds of marijuana -- \$3000 in cash, which Ms. Sizemore put in her purse. *Id.* The three then went to the funeral

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<sup>16</sup> Parsons testified that Kallergis was involved with Albany’s criminal element and that she and Kallergis had been arrested in 1993 for running an illegal gambling event at Kallergis’ Lee County home. Exhibit 66 at 1. *See also* Exhibit 69 (documenting Parsons and Kallergis arrest and conviction for illegal gambling).

home, as Kallergis discussed in his statements to police and at trial. *Id.*<sup>17</sup> After Ms. Sizemore's body was discovered, Parsons confronted Kallergis, who advised a horrified Parsons to "go back to work, not to worry about it and he would take care of it." Exhibit 58 at 20.

Parsons' testimony is independently supported by the testimony of former friends of Ms. Sizemore, Florida residents Brian French and Robbin Davis. Both French and Davis were close friends of Ms. Sizemore and her common law husband, Richard Barker, and all were actively involved in drug smuggling in Florida.<sup>18</sup> Brian French, who retrieved the SUV Ms. Sizemore had been driving from Albany after her murder, testified that shortly before her last trip from Florida to Albany, Georgia, he helped to load the SUV with marijuana which he understood Ms. Sizemore would sell in Albany to support herself and her daughter and to help pay for Richard

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<sup>17</sup> Ms. Parsons reiterated her affidavit testimony in court at the June 26, 2014, hearing in Dougherty County Superior Court. *See* Exhibit 58 at 8-33.

<sup>18</sup> *See also* Exhibit 70 (Defendant's Trial Exhibits 30-33), documenting the state's limited inquiry into Richard Barker's prosecutions and incarceration stemming from drug running and smuggling undocumented immigrants in 1994 shortly before the murder. Approximately one year previously, Richard Barker and Angela Sizemore had been arrested while offloading approximately 150 pounds of marijuana from a boat at a Boynton Beach, Florida, address. *See* Exhibits 71-72. Also involved was Richard Barker's father, Cecil Barker. Exhibit 71. Brian French testifies that the Barkers had a long-standing drug operation which they ran out of West Palm Beach. *See* Exhibit 67 at 1; Exhibit 58 at 34, 36-38. Barker was in prison facing immigrant and drug smuggling charges and was in debt to drug smugglers and dealers for approximately half a million dollars at the time of Ms. Sizemore's death. *See* Exhibit 58 at 37.

Barker's legal representation. *See* Exhibit 67 at 2; Exhibit 58 at 38-39.<sup>19</sup> Davis, who was Ms. Sizemore's "best friend," also recalled that French helped load the SUV for that final trip to Albany shortly before the murder. Exhibit 68 at 2; Exhibit 58 at 55.<sup>20</sup>

The testimony of Parsons, French and Davis show that Ms. Sizemore was embroiled in dangerous and illegal activities for some time before<sup>21</sup> and in the weeks and days leading up to, and including, the time of her murder, and that she had thousands of dollars in cash on her person at the time she was attacked. That money was not found, though it is clear that Mr. Johnson did not have it, as he attempted to collect \$15 from his job at the Monkey Palace in order to have enough money for a bus ticket to leave town. *See* Exhibit 65. Meanwhile, Ms. Sizemore's common law husband, Richard Barker, was in prison facing serious federal charges and was in debt to drug smugglers for a half a million dollars. *See* Exhibit 58 at 37.

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<sup>19</sup> *See also* Robbin Davis' testimony, Exhibit 58 at 55.

<sup>20</sup> Davis also recalled that after Ms. Sizemore left for Albany, Davis received a money order for \$175.00 in compensation for money Davis had loaned her. Exhibit 68 at 2. The receipt for the money order was found in Ms. Sizemore's SUV on her body. *See* Exhibit 73 (copies of State's 58 and direct photo of receipt taken by Bode Labs during recent DNA analysis). Ms. Davis identified her own name on the money order stub which corresponded to the money order she received from Ms. Sizemore at the time. *See* Exhibit 58 at 52-53 (Robbin Davis testimony).

<sup>21</sup> Again, these witnesses' testimony on this point is directly corroborated by official police records. *See e.g.*, Exhibits 71-72.

Moreover, the evidence shows that Tony Kallergis was not an innocent bystander, but *actively misled investigators and Mr. Johnson's jury* about his involvement with Ms. Sizemore right up to the time of her murder. He was complicit in and facilitated Ms. Sizemore's illegal activities around the time of the murder and knew that she had thousands of dollars of drug profits on her person at the time he was with her. Additionally, Janice Parsons testified that Kallergis was a threatening figure not averse to employing violence. Exhibit 66 at 3. When she accompanied Kallergis to speak to the police in 1994 (an interview she does not now recall), she was not inclined to dispute anything Kallergis told police both for fear of Kallergis' retaliation and because she would have had to incriminate herself. *See* Exhibit 58 at 21-22. Kallergis behavior towards Ms. Parsons immediately after the murder, described above, was also extremely suspicious.

This evidence was unavailable at the time of trial and previous state habeas proceedings, given the self-incriminatory nature of their testimony. However, it casts a significant new light on Ms. Sizemore's activities and whereabouts on the day before her body was discovered in her SUV and suggests plausible alternative scenarios for her murder which are corroborated by multiple witnesses as well as police and court documents. It is plausible that Ms. Sizemore's murder had something to do with her and her partner Richard Barker's involvement in the world of drug and immigrant smuggling, and the fact that Barker was at the time

incarcerated facing federal charges of immigrant smuggling and would have been in a position to cooperate with law enforcement. He was also in debt to drug dealers and smugglers for hundreds of thousands of dollars. It is well within the realm of possibility that her murder was bound up with her activity selling marijuana in Albany, given that it occurred immediately after a sale worth thousands of dollars.<sup>22</sup>

The false and misleading testimony by Tony Kallergis, as revealed by the testimony of Ms. Parsons, is also game changing in that, had it been exposed at trial, the jury would have had to direct suspicion for Ms. Sizemore's murder at Mr. Kallergis and his connection to illegal drugs. Given that Tony Kallergis felt the need to lie about his interactions with Ms. Sizemore on the night she was murdered, he must be now -- and would have been in 1994 -- considered by fair minded jurors to be a suspect at some level in light of these new facts. Armed with the credible testimony of Ms. Parsons, Mr. French, and Ms. Davis, competent defense attorneys could have made a compelling argument for reasonable doubt as to guilt, or failing that, residual doubt as to execution-worthiness at sentencing. Indeed, it is more than likely that a reasonable doubt as to Mr. Johnson's guilt, or at least execution-worthiness, would have been engendered among fair-minded jurors by a defense

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<sup>22</sup> It is also clearly plausible that her murder had to do with the \$3000 in cash she had on her person on the night of March 23, 1994.

armed with this information. This Board can now act on this information by granting clemency in light of the doubt it casts on Mr. Johnson's guilt.

**III. Like Most Of The Wrongful Convictions Exposed In Recent Years, Mr. Johnson's Conviction Rests On Fundamentally Unreliable Eyewitness Identification Testimony.**

Mr. Johnson's original trial counsel attempted at his 1998 trial to present the testimony of an expert, Dr. John Brigham, on eyewitness identifications but was denied permission to present that testimony by the trial court.

However, landscape has dramatically changed since Mr. Johnson's trial, especially in light of the very recent explosion in exonerations through DNA testing leading up to the commencement of this proceeding in 2011. *See, e.g.*, Exhibit 7 (Dr. Steven Cole affidavit) at 10; Exhibit 58 at 92-93 (Dr. Cole testimony). There have now been over 300 exonerations due to advances in DNA testing, and in approximately 75% of those cases, the cause of the wrongful conviction was faulty eyewitness identifications. Exhibit 58 at 92.<sup>23</sup> The exposure of mistaken eyewitness identifications as the cause of hundreds of wrongful convictions in both capital and non-capital cases has additionally "triggered ... new research about the understanding that lay people have and jurors in particular have about eyewitness

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<sup>23</sup> *See also* "The Causes of Wrongful Conviction," The Innocence Project: <http://www.innocenceproject.org/causes-wrongful-conviction> (demonstrating that mistaken eyewitness identification is a factor in approximately 72 percent of wrongful convictions).



identifications,” which shows that “there is still a large gap between what jurors believe about the factors affecting eyewitness identification and what we know from solid scientific research.” *Id.* at 132-33.<sup>24</sup>

Had the fact of hundreds of recent exonerations in both capital and non-capital cases, as well as advances in understanding of juror perceptions of eyewitness identification evidence, been available at the time of Mr. Johnson’s trial, there is little doubt that in a case like this, where the eyewitness identifications were absolutely central to the state’s case, an eyewitness identifications expert like Dr. Brigham or Dr. Steven Cole would have been permitted to testify before the jury. *See, e.g., Johnson v. State*, 272 Ga. 254, 257 (2000); *Brodes v. State*, 279 Ga. 435 (2005) (“level of certainty” charge on identifications outlawed based in part on the testimony of eyewitness identifications expert Dr. Steven Cole).<sup>25</sup> Further, a defense armed with the kind of testimony presented by Dr. Cole would have dealt a potentially fatal blow to the state’s case for guilt and, at the very least, likely ensured a sentence less than death. This Board now has the power to act, given what we now

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<sup>24</sup> *See, e.g., Schmechel, Timothy P. O’Toole, Catharine Easterly & Elizabeth F. Loftus, Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 *Jurimetrics J.* 177, 177–214 (2006).

<sup>25</sup> This discredited charge was given in Mr. Johnson’s case. *See* TT 2814. The prosecutor argued that the eyewitnesses’ certainty validated their identifications in closing argument. TT 2665, 2782.

know about the unreliability of eyewitness identifications and how they have sent an appalling number of innocent people to prison and death row.

**A. All Four of the Purported Eyewitness Identifications Are Totally Unreliable as Evidence Against Mr. Johnson.**

Dr. Steven Cole's testimony in the Dougherty County Superior Court establishes that all four of the purported eyewitness identifications in this case are totally unreliable as evidence against Mr. Johnson because the "indicators of [the witnesses'] ability to make an accurate identification" were "outweighed by the corrupting effect" of the suggestive circumstances in which the identifications were made. *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977). Specifically the law enforcement and court procedures in which all of the witnesses purported to identify Mr. Johnson were irretrievably unreliable in that they "created a substantial likelihood of misidentification." *Neil v. Biggers*, 409 U.S. 188, 201 (1972).

**1. Lily Covin's Purported Identification of Mr. Johnson is Totally Unreliable.**

Dr. Cole explained in his testimony in the Dougherty County Superior Court why Lily Covin's initial identification of Mr. Johnson at a pre-trial hearing four years after her initial statements to police was completely unreliable. Dr. Cole testified that Ms. Covin's identification was unreliable in part simply because the four-year retention interval between her initial statement and her in-court identification was too long to allow the identification to be accurate. Exhibit 58 at 100, 104-05.

Second, when she made her identification, Mr. Johnson was the only suspect in the courtroom and he was wearing a bright red jail jumpsuit, thus irredeemably biasing her identification. *Id.* at 100. This procedure was virtually identical to a “show up” technique where, ordinarily under exigent circumstances, police bring a single suspect in close proximity to a witness for identification. *Id.* at 102-03. This technique is far less reliable than a line-up, where several suspects are brought within a witness’ field of vision (*id.* at 102) because the witness’ likely assumption is that the police would not show her a suspect who is not the perpetrator. *Id.* at 103. Moreover, Ms. Covin was never shown a line-up or photo array of similar suspects, indicating to Dr. Cole that police “were not necessarily confident in her ability to identify the defendant in an objective identification procedure.” *Id.* at 101. The procedures used in Ms. Covin’s identification did not comply with guidelines<sup>26</sup> for reliable suspect identification. *Id.* at 130.

## **2. Emmet Wheeler’s Purported Identification of Mr. Johnson is Totally Unreliable.**

As Dr. Cole explained, the circumstances under which Emmet Wheeler made his initial identification, approximately four months after the crime, of Mr. Johnson as the man he saw on his bus on March 24, 1994, were also such as to render it

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<sup>26</sup> *See, e.g.*, Exhibits 75-77. Georgia did not adopt modern eyewitness identification procedures until 2011. *See* Exhibit 78.

completely unreliable. First, there was the months long interval between his initial sighting and his identification, which decreases accuracy of memory retrieval. Exhibit 58 at 104, 108-09. Then, Investigator York used highly suggestive questioning to steer Wheeler towards a description of Mr. Johnson's clothing that was consistent with what police believed he was wearing at the time. *Id.* at 105-06. For example, when Mr. Wheeler told York that the man he saw was wearing black pants, York suggested they were blue jeans, and Mr. Wheeler agreed. *Id.* at 105.

Most problematic is the six-subject photo array (Exhibit 12) shown to Wheeler by Inv. York. Dr. Cole persuasively demonstrated that the identification made from this array is wholly untrustworthy and effectively rigged (intentionally or not) to cause Wheeler or any witness to pick Mr. Johnson. As Dr. Cole explained, the array thoroughly violated standard guidelines for maintaining objectivity and accuracy in a line-up because it set up Mr. Johnson as the subject who by far most closely resembled the descriptions given by the four witnesses. *See, e.g.*, Exhibit 58 at 113, 118. For example, the subjects were not chosen for their resemblance to Mr. Johnson or the purported physical characteristics of the suspect and in fact were "not significantly comparable." *Id.* at 118. All five of the subjects were significantly older and "at least 40 pounds heavier than Mr. Johnson." *Id.* at 112. Further, one wore glasses, ruling him out immediately as none of the witnesses had described seeing a man with glasses and Mr. Johnson did not wear glasses. *See, e.g., id.* at

118. Further, Mr. Johnson's picture stands out because it shows him bearing a large confederate flag tattoo on his arm, while only one other subject has a tattoo that is far less visible. *Id.* at 114-15. A fair line-up would have had subjects with similar tattoos or had the tattoo covered up. *Id.*

Dr. Cole also performed an experiment in which he had thirty African-American subjects (three out of four of the eyewitnesses were African American) view the same array and pick out a suspect based on the physical characteristics described by the Albany witnesses. The result was that 53% of the test subjects chose Mr. Johnson, a result which clearly demonstrated that the array was effectively rigged so that any witness was extremely likely to pick Mr. Johnson because he stood out significantly from the other subjects in the array. Exhibit 58 at 117-119. In other words, bias was built into the construction of the array, intentionally or not, rendering Wheeler's identification using the array completely unreliable. *Id.*

Additionally, Inv. York turned off the tape recording during the time Wheeler was studying the pictures. York claimed that the tape was off for only "thirty seconds to a minute" (pretrial hearing 9/23/97 at 93), but Wheeler testified it took him between twenty and thirty *minutes* to make his selection. Exhibit 58 at 110. Dr. Cole testified that the lack of recording contributed to the unreliability of the identification because it is impossible to know what cues, if any, might have been telegraphed, even unintentionally, to the witness during selection. *Id.* at 107.

Finally, after Wheeler chose Mr. Johnson from the flawed array, Inv. York showed Wheeler a solo picture of Mr. Johnson and indicated that this was the man Wheeler had identified and was the defendant in the case charged with murder. Exhibit 58 at 109. Dr. Cole explained that such reinforcement tends to bias the witness so as to “affect [his] confidence in later testifying. It might change his memory for the event. And ... it might impact his willingness to testify.” *Id.*

### **3. Mary Florido’s Purported Identification of Mr. Johnson is Totally Unreliable.**

Mary Florido’s purported identifications of Mr. Johnson are also in no way reliable evidence because they are tainted by procedures which clearly injected bias into the identifications. First, as Dr. Cole explained, Ms. Florido’s initial identification of Mr. Johnson, made from a book of mugshots of suspects with last names beginning with I-J, thus by definition *not* randomly chosen subjects who resemble Mr. Johnson’s physical characteristics. Exhibit 58 at 125. Modern guidelines do not treat mugshot books as a valid identification procedure, but view them as “an investigative tool prior to arrest.” *Id.* Exacerbating the inherent unreliability of a mugshot identification is the fact that the names of the suspects were visible on the backs of the photographs at a time when Ms. Florido may have already been exposed to his name. *Id.* at 126. Further, Det. Williams did not record the mugshot view, so there is no way to know what intentional or unintentional cues

were telegraphed to Florido that might have influenced her choice. *Id.* No objective line-up type procedure was used to obtain a reliable identification from Florido.

Critically, in 1997, one month before a pre-trial hearing at which Florido made her first in-court identification of Mr. Johnson, Assistant District Attorney Brad Pierce had a special meeting with Florido during which he showed her two pictures: one of Mr. Johnson taken at police headquarters and one of his alleged ring. *See* Exhibit 58 at 128; Exhibit 21 (Pierce's memo documenting the meeting). Dr. Cole described this meeting as "horrendous" and "incredible" (*id.* at 127, 155) because it clearly made "any subsequent description unreliable." *Id.* at 128. When she examined the photo, moreover, she claimed that it "showed more of a beard than she recalled, but the lighting was different in the bus." Exhibit 21. Fair minded jurors, enlightened as to the biased procedures used to reinforce her identification, would likely have substantially discounted the reliability of her identification of Mr. Johnson had they heard the testimony of someone like Dr. Cole.

#### **4. Tammy Sheard's Purported Identification of Mr. Johnson is Totally Unreliable.**

Tammy Sheard, too, was not permitted to pick Mr. Johnson out of anything resembling an objective line-up or photo array. Her identifications of Mr. Johnson are deeply problematic in part because they were almost certainly biased as a result of Sheard's exposure to television coverage of Mr. Johnson as the suspect before she

made any identification. Exhibit 58 at 120-21. Additionally, she was subjected to extremely suggestive questioning by Inv. York about Mr. Johnson's physical appearance, particularly regarding his beard and mustache, which she had not referenced in her initial statement to police, and about the ring the suspect was wearing. *Id.* at 120-24. This "intrusive"<sup>27</sup> questioning clearly contributed to the evolution in Sheard's statements about the ring from a description of a silver band to an "unusual" ring which "stood out like a sore thumb" with a turquoise stone on it. *Id.* at 123-24; TT 1881. Dr. Cole showed that Sheard's identifications of Mr. Johnson violated modern guidelines for obtaining reliable identifications, were irretrievably biased by Inv. York's inappropriately suggestive questioning, and were thus not reliable.

**B. The Jury Never Heard From Lee Libby, Mr. Johnson's Neighbor, Whose Sighting of Mr. Johnson on March 24, 1994, Contradicted the Other Eyewitnesses' Descriptions of the Man They Saw.**

Moreover, the jury never heard from the most reliable eyewitness, Mr. Johnson's neighbor, Lee Libby, who saw Mr. Johnson the morning of March 24, 1994, wearing a key piece of conspicuous clothing never mentioned by the other witnesses -- his motorcycle chaps, leather leggings which covered his pants. *See*

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<sup>27</sup> Exhibit 58 at 124.



Exhibit 79 (APD police summaries re Lee Libby). As Dr. Cole explained, a person who is describing having seen someone he knows is obviously a more reliable witness. In this instance, the more reliable witness of March 24, 1994, is consistent with witnesses who observed Mr. Johnson as wearing chaps at the Fundamentals bar prior to leaving with Ms. Sizemore. TT 1813, 1840. Neither Sheard, Florido, Wheeler or Covin reported that the man they saw was wearing motorcycle chaps.

**C. The Jury's Assessment of the Reliability of the Eyewitness IDs in This Case was Further Biased by the now Unlawful Witness Certainty Instruction Given by the Trial Court.**

In considering whether Dr. Cole's testimony would have tilted a jury verdict in favor of acquittal or, at least, a sentence less than death, this Court must assume that the jury would not have received the "level of certainty" charge outlawed in *Brodes v. State*, 279 Ga. 435 (2005), years after Mr. Johnson's case was decided by the Georgia Supreme Court. Mr. Johnson's jury was, in fact, charged that the level of certainty of the eyewitnesses in this case could be considered as to their reliability. *See* TT 2813-14. In *Brodes*, based in part on the testimony of Dr. Cole, this charge was deemed to impermissibly bias a jury's perception of the reliability of eyewitness identifications and courts were instructed not to use this charge in future. It undoubtedly injected further unnecessary and prejudicial bias into Mr. Johnson's jury's consideration of the eyewitness testimony in this case, particularly given the trial court's refusal to permit the defense to present an expert to testify about the

unreliable nature of the eyewitness identifications. Only this Board can remedy this injustice by commuting Mr. Johnson's death sentence.

**D. The Eyewitness Identifications Were Decisive In A Case Where No Physical Evidence Tied Mr. Johnson To The Murder, And Absent the Unreliable Identifications, It Is Almost Certain That Mr. Johnson Would Have Been Acquitted Or Sentenced To Life.**

Because the eyewitness identifications made by Sheard, Covin, Florido and Wheeler were the central pillar of the State's case against Mr. Johnson, and have now been shown to be unreliable, thus casting significant doubt on Mr. Johnson's guilt, commutation is appropriate. As discussed above and in the initial Application, the remaining evidence is extremely circumstantial, at best. No physical evidence, including DNA evidence, ties Mr. Johnson to a crime scene in this case. The evidence is entirely consistent with Mr. Johnson's statement that he had sexual intercourse with Ms. Sizemore and left her alive very close to the Fundamentals Bar on March 24, 1994. *See, e.g.*, Exhibit 58 at 216-18. No death sentence in 2015 should be allowed to proceed when a conviction is based on the kind of circumstantial evidence as is present in this case. Merciful intervention is appropriate.

**IV. Because The Dougherty County Superior Court Arbitrarily Disallowed Proper DNA Testing To Be Performed On The Soil Blood Cards After The Wrong Testing Was Done, Mr. Johnson**

**Asks This Board To Impose A Stay Of Execution So That Testing Can Be Completed.**

The purpose of subjecting the soil blood samples to DNA testing in the first place was to determine whether the blood collected at 16<sup>th</sup> Avenue is in fact that of Angela Sizemore, the victim in this case, as the State argued at Mr. Johnson's trial.

On August 28, 2014, Bode Technology completed their report on the testing of the blood stain from the soil sample submitted to them by the GBI. *See Exhibit 64.* However, the lab performed a kind of test – Y-STR – that can only test for a male DNA profile. Accordingly, no useful results were obtained. Y-STR testing can only detect DNA from the Y-Chromosome of a *male*, and thus *cannot* determine if the blood in the soil is that of Angela Sizemore, a female. *See id.* Therefore, the intent of this testing was thwarted by use of an unsuitable testing method. However, despite having been alerted to the mistake, the Dougherty County Superior Court denied any further testing on the soil card blood samples in its final order.

**A. The Purpose Of DNA Testing Of The Blood Found At The 16th Avenue Site Was To See If It Matched Angela Sizemore's DNA Profile; That Purpose Was Not Fulfilled By The Testing Method Used.**

As Mr. Johnson argued before the Dougherty County Superior Court, completion of DNA testing of the soil blood stain cards/wicks is warranted because the purpose of the testing is to determine whether the blood found at the 16th Avenue site was Angela Sizemore's blood. The Superior Court ordered the requested testing

and ordered any female DNA profile to be compared to that of Angela Sizemore. However, Bode Labs used the wrong method – the Y-STR testing method - which *can only isolate male DNA profiles*. For this reason, the Y-STR test could never have produced a DNA profile which could be compared to Ms. Sizemore’s profile, thus contravening the explicit purpose of the testing and the Court’s order. Mr. Johnson’s counsel alerted the Superior Court that further testing using the correct test would decisively resolve the question of whether the blood found at the 16th Avenue site was Angela Sizemore’s or not, but the court denied all further testing. Completion of the testing should have been permitted and could still be expeditiously performed.

**B. The 16th Avenue Site And Evidence Recovered From The Site Were Critical Parts Of The State’s Arguments That Mr. Johnson Was Guilty Of Angela Sizemore’s Murder And Worthy Of Execution.**

As the trial transcript clearly shows, the 16th Avenue site was a critical element of the State’s case against Mr. Johnson because it was claimed that the site was where Ms. Sizemore was murdered and where a purported implement of her mutilation and assault was discovered, i.e., the pecan limb. Defense counsel at trial focused much effort on disputing that the 16th Avenue site had any connection to the homicide and excoriating police for failing to investigate the site near

Fundamentals bar and 17th Avenue where Mr. Johnson had told police he last saw Ms. Sizemore. *See, e.g.*, TT 2735-40.

However, if the 16th Avenue site had been ruled out as having any connection to the homicide of Ms. Sizemore, then the State would not have been able even to imply that they knew where the homicide had taken place, and any evidence located at that site, including the blood and the pecan limb, would have had no relevance to the case.

Although, the GBI Crime Lab found no traces of blood on the pecan limb, the jury at Mr. Johnson's trial was told just the opposite.<sup>28</sup> The pecan limb and its status as a weapon used to viciously assault and mutilate Ms. Sizemore was front and center at Mr. Johnson's trial and sentencing. The state invoked the pecan limb repeatedly to inflame the jury against Mr. Johnson at both phases of trial. At the February 26, 2015, hearing, Mr. Edwards stated that he had conceded at trial that the pecan limb may not have actually been used to assault Ms. Sizemore, but something like it could have, and that therefore it makes no difference whether or not the 16th Avenue site is eliminated from the picture.

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<sup>28</sup> Defense counsel was egregiously mistaken in stating in argument that the pecan limb had fecal matter and blood on it. TT 2737. It did not. *See* Exhibit 9 (GBI file) at 2826. Prosecutor Edwards compounded defense counsel's error by telling the jury that Ms. Sizemore's blood was on the stick. TT 2773.

However, as the trial transcript reveals, this supposed concession, if made, was eclipsed by Mr. Edwards' and Ken Hodges' inflammatory invocation of the pecan limb as the actual weapon used against Ms. Sizemore. For example, in closing argument at the guilt-innocence phase of trial, Mr. Edwards told the jury:

Physical evidence is something that you can see, you can feel, you can touch, something like this stick that was used to mutilate Angela Sizemore.

TT 2662. Mr. Edwards told the jury -- erroneously -- that Ms. Sizemore's blood was on the limb and that "[t]his just established that this was used to mutilate the victim." TT 2773.

Towards the end of his guilt-phase closing, Mr. Edwards told the jury in passing that the State did not have to prove conclusively that the pecan limb was the actual implement used to assault Ms. Sizemore. *See* TT 2774. However, at sentencing, prosecutor Ken Hodges told the jury very clearly: "She was alive when that pecan tree branch mutilated her vagina." T Sent. 177. Mr. Edwards, furthermore, concluded his sentencing phase closing with the following inflammatory argument:

What kind of man is Marcus Ray Johnson? He is a man who deserves the death penalty. What kind of man would be able to take a woman he just met and do the things that he did? This wasn't about sex; he had sex, albeit without consent. He could have stopped. This wasn't enough. This was about torture. This was about humiliation. This was a spit in the victim's face and all of these things represent a mirror to

his mind. They're a mirror to his mind. There's something horrible setting in his mind....

You wouldn't even do a dog the way he did Angela. No one would tolerate a dog being done this way. Most people would have a violent reaction if they saw someone stabbing a dog, sticking a stick in a dog's sexual organs, dragging a dead dog's body around. People don't forget; all of these things were done to a human being. These things are inhumane even to an animal and they were done to a human being. Marcus Ray Johnson deserves no mercy from you because of what he did, and because of what he is....

*What kind of man, while this woman is still live, would vaginally mutilate her with a tree limb?*

T. Sent. 201-02.

Thus, the elimination of the 16th Avenue holding pond site as the site where the murder occurred, along with all evidence collected at the site, would undermine a critical component of the state's case against Mr. Johnson.

**V. Other DNA Testing Is Incomplete; A Stay Of Execution In Order To Complete It Is Appropriate.**

To give practical effect to the DNA testing provided for in OCGA §§5-5-41, et. seq., the State Assembly of Georgia enacted the Evidence Preservation Statute, OCGA §17-5-55, 56, because our society values discovering the truth, and our representatives wanted to make that possible through modern DNA testing methods. Appendix 34 at 178. Additionally, the Albany Police Department crime scene specialists who collected the evidence did so because of their knowledge of each piece of evidence's probative nature. *See id.* at 189-90; Appendix 35 at 28-29.

Ms. Sizemore's body was found in the front floorboard of the vehicle. At the very least, one person involved with her murder was in that vehicle. It is a primary crime scene, and evidence collected from the vehicle is likely to contain DNA evidence of one or more of the perpetrators. Exhibit 58 at 18-29. DNA testing is feasible and should be completed.

**A. Hairs from Ms. Sizemore's Vehicle**

Evidence from the vehicle is significant in this case and was collected to assist in reconstructing the details of the crime, including the identity of the perpetrator(s). Exhibit 59 at 28-29. Hairs were collected from the back seat of the vehicle, near items of Ms. Sizemore's clothing and sandy footprints, making them important evidence in this case. *Id.* at 23. Seventeen of these hairs had some portion of root intact, and five of those have been analyzed and tested thus far. Exhibit 60, Bode Technology, Forensic Report, October 18, 2012. There was no result from any of these five. *Id.*

There is no difference among the hairs from the crime scene with intact roots – those not tested are as valuable as evidence as the five that were. Exhibit 58 at 186-190. The testing was interrupted and ended prematurely. *Id.* The other twelve hairs with intact roots still need to be tested. *Id.* In practice, it commonly takes several rounds of testing to interpret the data available in a case. *Id.* at 189-90, 206. Testing should be completed.



## **B. Latent Print Cards from Ms. Sizemore's Vehicle**

Thirty-eight (38) latent fingerprints and palm prints were recovered from the crime scene of Ms. Sizemore's vehicle. DNA expert Dr. Gregory Hampikian testified in the Dougherty County Superior Court that each latent print contains DNA evidence, and should be subjected to scientific analysis to determine if this DNA is viable for comparison.

On June 27, 2014, Dr. Marilyn Miller testified specifically as to the location and quality of each latent print in this case, giving her expert opinion on the evidentiary value of each. Exhibit 59 at 20-28. Generally, the prints that were lifted from the vehicle's interior, and from "door handles or mirrors," which would likely have been touched by anyone who had put Ms. Sizemore's body in the vehicle, are the most probative, according to Dr. Miller. *Id.*

Prints that were lifted from the front seat of the vehicle right next to Ms. Sizemore's body, the "focal point of the crime scene", are the most significant: "It would be very difficult for someone to go into this vehicle to put the body there without, at the very least, touching this area." *Id.* at 24. In additional support, Dr. Miller did not see any evidence of the prints in the vehicle having been wiped down or cleaned. *Id.* at 33-34. Prints that were lifted from the back seat of the vehicle are "essential", as they are near Ms. Sizemore's clothing and "sandy footwear impressions." *Id.* at 23.

Dr. Miller’s uncontroverted expert opinion is that the prints lifted from the vehicle in this case would “likely” belong to someone involved with Ms. Sizemore’s murder. *Id.* at 32. As she said, “the whole point of them [the prints] being searched for at the crime scene is to associate the person who left these fingerprints with this criminal investigation.” *Id.* at 32-33. Thus, there are multiple pieces of evidence, viable for DNA testing, that would likely identify the perpetrator(s) of Ms. Sizemore’s murder.<sup>29</sup> A stay should be granted so as to allow for this remaining testing to be completed.

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<sup>29</sup> Subsequent to the DNA testing in this case by consent of the parties, and to Mr. Johnson’s discovery of the latent print cards’ existence, the Superior Court denied Defendant’s request for any further testing.

### **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 DNA testing can be conducted on available biological evidence which could further exclude him as the perpetrator of the attack on Ms. Sizemore or identify the actual perpetrator. 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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