

Application to the
Georgia Board of Pardons and Paroles
on behalf of
Brian Keith Terrell

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Pursuant to Article IV, Section II, Par. II(a) and (d) of the Georgia Constitution of 1983 and O.C.G.A. sections 42-9-20, 42-9-42(a), Brian Keith Terrell, by and through undersigned counsel, applies to the Board of Pardons and Paroles for consideration of his application for commutation of the sentence of death imposed by the Superior Court of Newton County on February 6, 2001, for the murder of John Watson – a crime he did not commit. Mr. Terrell respectfully seeks any relief within this Board’s power to grant, as (a) the State’s principal witness, Jermaine Johnson, has admitted that his statement and testimony against Mr. Terrell was falsified, and (b) the single eyewitness whose testimony was cited as placing Mr. Terrell at the scene of John Watson’s murder insists that the man she saw was not Brian Terrell.

I. INTRODUCTION

This Board has previously stated that it “will not allow an execution to proceed in this State unless and until its members are convinced that there is no doubt as to the guilt of the accused” State Board of Pardons and Paroles, Order Suspending the Execution of Sentence of Death, Troy Anthony Davis, July 16, 2007. On Tuesday, December 8, 2015, however, the State of Georgia proposes to execute Brian Terrell for the murder of John Watson despite lacking any reliable

evidence of his guilt. This Board accordingly should exercise its authority and commute Mr. Terrell's sentence of death.

The case against Mr. Terrell has never been compelling. None of the physical evidence recovered from the crime scene implicated Mr. Terrell in Mr. Watson's murder. Mr. Terrell has always maintained his innocence. The state made separate plea offers for sentences of straight life and life with a contract not to seek parole for 18 years. Mr. Terrell therefore would have been parole-eligible after seven years or eighteen years, respectively, but he refused to confess to a crime that he did not commit. His first trial in 1994 resulted in a hung jury.¹ Despite the dearth of proof, the State tried Mr. Terrell three separate times for this crime over the course of nine years, building each prosecution upon the testimony of Mr. Terrell's cousin and co-defendant, Jermaine Johnson.

Mr. Johnson was arrested along with Mr. Terrell in June 1992. He initially lied to police about his whereabouts on the day of the crime. Further, at least two witnesses identified Mr. Johnson as driving along the highway where Mr. Watson lived at the approximate time of the crime.

After holding Mr. Johnson for more than a year under the threat of the death penalty, the State informed him that Mr. Terrell was the primary target of their investigation. Mr. Johnson responded by providing a statement to the police on

¹Mr. Terrell was convicted and sentenced to death at his second trial in 1995, but his case was overturned on appeal by the Supreme Court of Georgia.

September 3, 1993, in which he claimed that he had driven an armed Mr. Terrell to Mr. Watson's house and later retrieved him, after which Mr. Terrell had confessed to the murder. In exchange for his statement and testimony, Mr. Johnson was allowed to plead guilty to robbery and was sentenced to five years in prison.

The prosecution conceded the centrality of Mr. Johnson's testimony during closing argument of Mr. Terrell's third trial, asking the jury "if you never heard anything about Jermaine Johnson in this case, if he had never testified, would you have enough information to make a decision in this case? *You wouldn't.*" Ex. 10 at 1502-03 (emphasis added).

Mr. Johnson has now informed undersigned counsel that his statement and testimony were untrue. Ex. 1. Mr. Johnson has declined to provide counsel with an affidavit to that effect, asserting that his statement was coerced by the police and the district attorney and that he fears retaliatory arrest and prosecution if he comes forward. Regardless, it is clear his testimony can no longer be relied upon to support Mr. Terrell's conviction and sentence of death.²

Another key trial witness, Marion Foschini, provided testimony that the state argued placed Mr. Terrell near the scene of Mr. Watson's murder and corroborated Mr. Johnson's account of the crime. Ex. 11 at 888-95; Ex. 10 at 1500-01. Ms.

²We respectfully request that this Board issue a subpoena to Mr. Johnson to compel his testimony before the Board.

Foschini recently provided information revealing that her trial testimony was misleading and that the prosecution took advantage of this fact to argue Ms. Foschini had identified Mr. Terrell as being across the street from where Mr. Watson was murdered. As the attached affidavit details, however, Ms. Foschini is adamant that Brian Terrell is not the man whom she saw on the morning of June 22, 1992. Ex. 2.

The purpose of this Board is to ensure that the gravest sentence allowed by law is not carried out unless there is no doubt. In this case, there is plenty of doubt. Mr. Terrell accordingly urges this Board to exercise its authority and commute his sentence.

II. The Murder of John Watson

In the end, little is known about the actual crime for which Brian Terrell has been sentenced to death. On Monday morning, June 22, 1992, the body of John Watson was found outside his home on Highway 142 in Covington, Georgia. Mr. Watson had been shot four times and had suffered blunt force trauma to his face and head. He was discovered by police officers and neighbors who had been summoned to his home by Brian's mother, Barbara Terrell. Ms. Terrell had begun assisting Mr. Watson with meals and errands in 1989 and had recently become engaged to marry him. Ms. Terrell had driven to Mr. Watson's house that morning

after receiving a call informing her that he had not shown up for his morning dialysis appointment.

Police appear to have quickly focused their suspicion upon Brian because of his admitted involvement in forging checks against Mr. Watson's bank account. That previous Saturday, June 20, Mr. Watson had reported Mr. Terrell to the police after discovering ten checks forged for a total of \$8,700. Three of the checks (totaling \$2,100) had been made out to Mr. Terrell, while the other seven checks were made out to Dexter Victor. Barbara Terrell identified her son's handwriting on the first three checks made out in his name. Mr. Watson had declined to press charges, however, telling the police and Barbara Terrell that he would not seek an arrest warrant on Brian as long as he received a substantial repayment by the following Monday, June 22. Mrs. Terrell relayed Mr. Watson's message to Brian, who took responsibility for all of the checks and promised to make repayment.³

The police speculated that Brian must have murdered Mr. Watson on June 22 to prevent him from pressing charges for the forgeries, which would result in the revocation of his parole. But this motive does not withstand scrutiny. The police already knew of Brian's involvement in the forgeries – and, more critically, Brian knew that they knew. It strains credulity to conclude that Brian would

³As Mr. Terrell detailed in his trial testimony, he forged only the first three of the checks against Mr. Watson's account. However, because he had taken the checkbook and allowed it to fall into the hands of others, Mr. Terrell took responsibility for the other seven checks.

commit a murder to prevent his prosecution for a crime already known to law enforcement. But it is certainly true that another person involved in the forgeries might have a motive to murder Mr. Watson, knowing that suspicion would settle on Brian. As discussed below, however, those lines of inquiry were not followed here.

Outside of this shaky, counterintuitive motive, nothing connected Brian to the crime. None of the considerable physical evidence recovered from the crime scene implicated him. Shoe impressions taken from the disturbed dirt around Mr. Watson's body and car keys were left by feet smaller than Brian's. Thirteen latent prints collected and tested by the GBI did not match Mr. Terrell's fingerprints. The GBI did identify a palm print as matching Mr. Terrell's uncle, Tim Terrell, but he was never arrested or charged, despite the conclusion by the state's expert witness that the print had been made within 24 hours of the crime.

Nor did any eyewitness place Mr. Terrell at or near Mr. Watson's house on the day of the murder.⁴ Two witnesses, however, saw Brian's cousin, Jermaine Johnson driving along the stretch of Highway 142 where Mr. Watson lived at the approximate time of his murder. Virginia Kines, the co-owner of the Dixie Grocery convenience store on Highway 142, identified Mr. Johnson from a photographic and in person lineup as the man she encountered driving an "older

⁴The prosecution argued that Marion Foschini had seen Mr. Terrell. As Ms. Foschini's attached affidavit shows, she did not.

model blue Cadillac . . . fairly slow” along Highway 142, past where Mr. Watson lived, on the morning of the crime. Ex. 3 at 869; *see also* Ex. 4.

Ms. Kines first found herself following Mr. Johnson as she drove hurriedly back to the store to relieve her husband, who had jury duty that morning. Ms. Kines followed the car into the driveway of the Dixie Grocery, where it “pulled on through the parking lot and out the other exit and turned and went back toward Covington.” Ex. 3 at 871. “At least ten minutes” later, Mr. Johnson drove “back in the parking lot from the east side, coming from Covington . . . [and] pulled up and parked on the front side of the building.” *Id.* at 880, 873. Mr. Johnson sat in the car a few minutes before coming into the store, where Ms. Kines thought he “acted a little nervous. He was kind of antsy, you know, just like he was killing time He was just, you know, not really acting like a regular customer and that made me pay attention to him more.” *Id.* at 876-77. Ms. Kines described Mr. Johnson as wearing a “ball uniform, just beige color maybe with thin pin-stripe[s] . . . Short-sleeved, v-neck . . . no color.” *Id.* at 876.⁵ She also noted that Mr. Johnson had a “geometrical” haircut, *ibid* at 872, and “a dusty kind of dingy appearance,” like he had been walking “on a dirt road” – a noteworthy observation, given that Mr. Watson’s body was found in a patch of disturbed dust and dirt. *Id.*

⁵“He had on a [sic] outfit that looked like a ball uniform, but not a regular league uniform, it was -- it looked like a sport outfit, no collar, light in color, a faint pinstripe type outfit” with “short pants.” Ex. 4 at 2.

at 880.⁶ Ms. Kines was so unsettled by Mr. Johnson's appearance and conduct that she suspected he planned to rob her and asked another customer, Julius Hays, to remain in the store until he left. *Id.* Mr. Hays would later identify Mr. Johnson, as well.⁷

On the day of the crime, the state obtained a statement from Marion Foschini, who lived in a duplex down and across the highway from Mr. Watson. Ex. 6. Ms. Foschini reported hearing a gunshot while “doing [her] hair in her bedroom.” *Id.* at 1. A few minutes later, Ms. Foschini looked out of her front door and saw a “long, long car” that she thought was “blue and white” in color parked in her landlord's driveway, which was next to her house, with its “hood up.” *Id.* A “very tall and lean” black man with a “white T-shirt on and . . . jeans” was “looking in [at] the motor.” Ex. 6 at 1-2. Ms. Foschini was never shown a lineup that included either Mr. Terrell or Mr. Johnson.

A. Mr. Johnson Takes a Plea

At that point in the case, no evidence pointed to Mr. Terrell. Mr. Johnson, however, had been placed at the scene by two witnesses. When questioned by law enforcement agents, Mr. Johnson lied about his whereabouts and his hairstyle. Ex.

⁶ In her first statement to police, Ms. Kines noted that Mr. Johnson looked “dirty all over.” Ex. 4 at 2.

⁷ Mr. Hays told police that Mr. Johnson was wearing “a V-neck white shirt that was short-sleeved and I believe blue jeans but I am not sure.” Ex. 5 at 1.

7. He was subsequently arrested on June 30, 1992, and held in jail for more than fourteen months. Finally, on September 3, 1993 -- after being informed by police that Mr. Terrell was the primary target of their investigation -- he agreed to testify against Mr. Terrell to avoid the death penalty. Ex. 7. Upon providing a taped statement to police and agreeing to testify, he was allowed to plead guilty to robbery and was sentenced to five years imprisonment.

In his rambling statement, Mr. Johnson claimed that he and Mr. Terrell had checked into a motel on the night of Sunday, June 21, as there was no room in their grandmother's home for them to sleep. Mr. Johnson stated that when they were ready to leave the next morning, "the keys were locked in the car," so he "broke ... [the] back glass window in the car and left." Mr. Johnson claims that after they "rode around" for a while, Mr. Terrell "pulled over to the side," asked him to drive, then directed him to Highway 142. Ex. 7 at 1. Mr. Terrell "got out of the car" and "[w]ent up to the house." *Id.* at 2. Mr. Johnson claims that he went back and forth to the hotel at least twice, making stops at a Wal-Mart and "the store . . . at the top of the road . . . [for] something else to snack on." *Id.* at 3.

Mr. Johnson then claimed that he returned to the motel yet again and, upon returning to Highway 142, heard Brian call out to him from the other side of the road. Mr. Johnson stated that when he pulled over, Brian told him to "pop the hood" and climbed in the passenger seat while Mr. Johnson got out to close the

hood and trunk (which he had opened by mistake). *Id.* Mr. Johnson said that they returned to the motel before driving to Belk's, where they bought clothes. They then went to their grandmother's house, where Mr. Johnson dropped Brian off and went to vacuum out the car. When he returned, Brian was taking a bath and left "a little while later and went to the zoo." *Id.* at 4.

After some prompting by the officers, Mr. Johnson stated that he had "forgot to tell" that when Brian had first "got back in the car[] [h]e told me he had . . . fucked up." *Id.* at 5. After an officer assured him "that's fine," Mr. Johnson added that "[h]e had shot somebody, like that." *Id.* Mr. Johnson then reiterated all of his and Mr. Terrell's purported movements ("back to the motel. From the motel to Belk's. From Belk's to my grandmama house [sic]," followed by three separate mentions of vacuuming the car) before claiming that Mr. Terrell had returned from the zoo and "told me, uh . . . he needed to holler at me. Then he was telling me what happened." *Id.* at 6. After prompting, Mr. Johnson claimed that Mr. Terrell told him that he had shot at and missed a man; the man tried to run; that he had knocked him down, shot him, and then dragged him "over beside the water water house water pump. Water house or whatever."⁸ *Id.* at 6.

Mr. Johnson added that he had dropped Brian off at Mr. Watson's house "[e]arly in the morning about six, six-thirty." *Id.* at 8. He also corrected himself,

⁸ There was no water house on Mr. Watson's property.

stating that he and Brian had discovered that the keys were locked in the car the night before, but insisting that he had not broken the window until the next morning. *Id.* at 10. When asked if he had seen Brian “get a gun out” when dropping him off, Mr. Johnson said that he had taken a “black revolver with a brown handle” that was “[a]ny where [sic] from a . . . thirty-eight or a three fifty-seven,” *ibid* at 12, and that he had vacuumed the car “to get the glass up that I broke.” *Id.* at 14. Mr. Johnson also claimed that Mr. Terrell had told him that he had disposed of the murder weapon at the zoo. *Id.* at 15.

Mr. Johnson would ultimately testify against Mr. Terrell in all three of his trials. The first ended in a hung jury, with four jurors later citing Mr. Johnson’s doubtful credibility as a major weakness in the State’s case.⁹ By the third trial, Mr. Johnson appeared resistant to again testify against Mr. Terrell. When the district attorney brought him copies of his previous testimony, he refused delivery. 3T at 1088.¹⁰ He also informed Brian’s counsel, John Strauss, that he was not going to testify. *Id.* at 1091. Taking the position that Mr. Johnson had “no right not to testify” because he had completed his sentence in the case, *id.* at 1091, the trial

⁹The four jurors from Mr. Terrell’s first trial who responded to the District Attorney’s questionnaires *all* cited Jermaine Johnson’s impaired credibility as a major weakness in the state’s case.

¹⁰This application cites to Mr. Terrell’s first trial as “1T at ____,” his second trial as 2T at ____, and his third trial, which underlies his conviction and sentence of death, as “3T at ____.” We include some portions of his third trial record as exhibits to this application and cite them accordingly.

court evidently summoned an attorney to consult with Mr. Johnson prior to his testimony. *Id.*; *see also id.* at 1106 (attorney discussing his “almost overnight appearance as counsel for Witness Johnson”). The following day, Mr. Johnson’s attorney informed the Court that he “was not going to testify,” but suggested to the trial court that he could be ordered to testify. The trial court accepted that advice and summoned Mr. Johnson to the stand, informing him that “whatever you say in this trial you cannot incriminate yourself” for Mr. Watson’s murder, but quickly adding this admonition:

I don't mean this to be coercive, but you need to understand this:
There is a statute called perjury. Perjury means lying, lying under oath In a death penalty trial, if you have lied under oath and it has led to somebody receiving the death penalty, then you possibly could face a life sentence.

3T at 1110-11. Mr. Johnson chose to testify.

Recognizing the weakness in Mr. Johnson’s testimony, the State attempted to buttress it testimony with that of Raymond Graham, who was serving a life sentence for murder and rape, and had written the district attorney on July 9, 2000 -- three months after being denied parole -- to claim that Mr. Terrell had confessed to him some eight years earlier. When Mr. Graham was called to the stand and asked his name, he responded by saying “Well, before I say anything, I would like to” *Id.* at 1251. After the court excused the jury, Mr. Graham explained that he anticipated that a deal would be made for his testimony and, when informed by

this Court that “[t]here will be no deal for your testimony,” he responded by stating “Then I don’t want to talk.” *Id.* at 1253. The court then granted the prosecution a recess to speak with Mr. Graham, after which the prosecutor reported that Mr. Graham would testify in exchange for providing a transcript of his testimony and a letter on his behalf to the parole board. *Id.* at 1254-55.

Mr. Graham ultimately testified to a version of events that was flatly contradicted by the physical evidence in the case.¹¹ When cross-examined, Mr. Graham was candid about his motivations.

Q You wrote this letter to Mr. Cook July 9th of 2000, correct?

A Yes, sir.

Q Some what? Eight years after this case –

A Yes, sir.

Q -- first came up. You haven't talked to anybody about this in those eight years?

A No.

Q So you just decided eight years afterwards you might be able to help yourself out?

A Yes.

¹¹Mr. Graham testified that Mr. Terrell told him that he shot the victim in the ear and dragged his body into the back of the yard. 3T at 1262. On cross-examination, Graham stated he was positive that Mr. Terrell had said that he had shot Mr. Watson in the back of the head, possibly twice. *Id.* at 1273. Both of Graham’s versions of events were contrary to the physical evidence in the case.

Q Isn't that right?

A Yes, sir.

Q In fact, you told my investigator Mr. Goldman that the only reason you were doing this is because you wanted to get paroled on this case, right?

A Right.

Q. Back when you came out and the judge sent the jury out, you were told it wasn't going to be any deal, you said it wasn't going to be any testimony?

A Right.

3T at 1264-65.

The state habeas court would subsequently find that Mr. Graham's testimony lacked all credibility. The prosecution at the third trial had earlier appeared to agree, conceding in closing argument that both Mr. Johnson and Mr. Graham had "a lot of baggage" and that it "wished that it did not have to rely upon the Jermaine Johnsons and the Raymond Grahams of the world." Ex. 10 at 1502. In an acknowledgment of the centrality of Mr. Johnson's testimony to its flimsy case – and, implicitly, the inadequacy of Mr. Graham's testimony to support a conviction and death sentence – the prosecution made a remarkable concession:

If you never heard anything about Jermaine Johnson in this case, if he had never testified, would you have enough information to make a decision in this case? *You wouldn't.* Jermaine Johnson fills in so many *gaps* that you needed to hear, it was *necessary* for you to hear it and you wouldn't have heard it without a plea agreement.

Id. at 1502-03 (emphases added).

B. Marion Foschini

The prosecution relied upon the testimony of Marion Foschini to corroborate Mr. Johnson's account of the morning of June 22 and to place Mr. Terrell at the scene of the crime. Ms. Foschini testified that on June 22nd, she lived in a duplex "across the highway" and "[a] little ways down" from the home of John Watson. Ex. 11 at 882-883.¹² At around "9:00 or 10:00" in the morning, Ms. Foschini was drying her hair when she heard a gunshot. *Id.* at 888.

A few minutes later, Ms. Foschini looked out of her front door and saw a car sitting in her landlord's driveway, which was just to the left of her house, no more than three car lengths away. *Id.* at 888-889, 893. A man stood at the front of the open hood of the car, looking down at the engine. Ms. Foschini described him at trial as "a young black man, very tall." *Id.* at 891. When asked to describe his clothing, Ms. Foschini stated "I am not positive, but I think he had on a white type of a tee shirt, you know I . . . just saw sideways, so . . . I am just assuming a white shirt of some kind, not a dress shirt or anything, looked like a tee shirt of

¹²Ms. Foschini testified that if one were to look out the front door of her duplex, Mr. Watson's home would be down the road to the left. Ex. 11 at 883.

some kind.” *Id.* at 892. Ms. Foschini also testified that the man was wearing “jeans or . . . something like that.” *Id.*

Ms. Foschini answered in the negative when asked if she had “see[n] anyone in the area that was wearing a ball jersey that was some color background with stripes and a geometric hairstyle,” *ibid* at 895, but later attested that she never saw the front of the man’s shirt, and could not say if it had buttons. Nor could she rule out that it might have been “light gray” in color. *Id.* at 897.

The prosecution never asked Ms. Foschini if she could identify Mr. Terrell as the man in her landlord’s driveway. The prosecution nonetheless asserted precisely that in its closing arguments, claiming that Ms. Foschini’s testimony both corroborated Mr. Johnson’s statement and placed Mr. Terrell near the scene of the crime.

And here is where we come with another element of corroboration. According to Jermaine, after he circled the area several times, he finally hears his cousin, Chico holler at him, but he has already gone passed the house. It is too late for him to stop right, there. He goes up again, turns around, pulls off near Ms. Foschini’s house, in all likelihood this driveway that Ms. Foschini has described, and Chico Terrell has crossed the street and yelled pop the hood, pop the hood, so nobody will get wise and think it is car trouble and not somebody working and loitering in the area.

And Ms. Foschini, who had already heard the . . . gunshot fired out maybe five or ten minutes previously, maybe longer. Goes to her front door and looks out and what does she see? She sees a clean-cut, young

black male with a white shirt and no geometric haircut, no stripes, no ballshirt insignia.¹³

In short, she saw the Defendant. *She saw Brian Chico Terrell*. More corroboration.

Ex. 10 at 1500-01 (emphasis added).¹⁴

C. No Reliable Evidence Implicates Mr. Terrell

In the end, the state's case against Brian Terrell – by its own admission -- rested upon the testimony of Jermaine Johnson and the corroboration provided by Marion Foschini. But undersigned counsel's investigations have established that neither witness's testimony reliably implicates Mr. Terrell in Mr. Watson's murder.

In conversations with undersigned counsel and Melanie Goodwill, an investigator with the Federal Defender Program, Mr. Johnson has admitted that his statement and testimony in Mr. Terrell's trials are false. *See* Ex. 1. Mr. Johnson now admits that "Brian never told him that he had shot Mr. Watson." Ex. 1 at 2.

¹³No witness identified Mr. Johnson as wearing a shirt with a "ballpark insignia."

¹⁴The prosecution first argued that "this murder took place sometime between probably 9:00 and 9:30 . . . because Ms. Foschini heard the gunshot during approximately that time," despite the fact that Ms. Foschini attested to a broader range of time. Ex. 10 at 1484. The prosecution also resolved the ambiguities in Ms. Foschini's description of the man in an attempt to implicate Mr. Terrell, describing him as "the person in the blue jeans and the white shirt that Ms. Foschini described to you" – the wardrobe that Mr. Terrell had stated he was wearing on the morning of June 22. *Id.* at 1501.

Mr. Johnson explains his falsified testimony by stating that he was “being pressured” by the investigators in the case, Dell Reed and Troy Pierce, and the district attorney, Alan Cook, to implicate Brian. *Id.* at 1. Over the course of more than a year, Mr. Johnson was told repeatedly that “he would be prosecuted and sentenced to death for Mr. Watson’s murder unless he testified against Brian Terrell.” *Id.* at 2. Mr. Johnson, who “felt he was alone and had no choice but to do what the prosecutor and police asked,” said that he “held out for as long as he could but didn’t have an adult to advise him.” *Id.* Mr. Johnson was 18 years old at the time. When he finally agreed to testify against Brian, “the police told him what to say if he wanted to avoid a death sentence.” *Id.*

When Mr. Johnson met with undersigned counsel and Ms. Goodwill to review his statement to law enforcement, he confirmed that parts of it are untrue, and gave as an example its most inculpatory portion: where he claims that Mr. Terrell had taken him around the side of their grandmother’s house and offered a detailed confession to lying in wait, ambushing, and murdering Mr. Watson. *Id.* at 2-3. Mr. Johnson informed counsel and Ms. Goodwill that this conversation never occurred, but that Mr. Reed and Mr. Pierce “told him that was how they thought the crime went down and that was what he had to say in order to get his five-year plea deal.” *Id.* at 3.

After vacillating, Mr. Johnson has thus far declined to provide an affidavit to this effect, offering a number of explanations for that decision. While expressing anger that the police were able to pressure him into making a statement – which he attributes to his being only eighteen years old at the time – he is afraid that he will face retaliatory arrest and prosecution if he were to come forward. Mr. Johnson reports that “every time something happens in Brian’s case, he gets picked up by the police,” and that “he is often arrested and held in custody any time there is a hearing or if someone comes to talk to him about Brian’s case.” *Id.* at 3. On the other hand, Mr. Johnson said that he “has not had any peace since all of this happened,” and has only “gone along with his statement in Brian’s trials because he doesn’t want to get locked up again if he said why it was wrong.” *Id.* Mr. Johnson also expressed concern about his ability to provide for his young daughter if he were again incarcerated. *Id.* at 3-4. As he stated to Ms. Goodwill, he “wants people to know the truth but is afraid to come forth.” *Id.* at 4.

This is not the first time that Mr. Johnson demonstrated a desire to tell the truth and a fear of its consequences. Over the years, Mr. Johnson has indicated to numerous people that Brian is innocent of Mr. Watson’s murder and – perhaps anticipating that he would find the courage to step forward when the time came – reassured them that Brian would not be executed. At Mr. Terrell’s trial in 2001, Lester Terrell, uncle to both Brian and Mr. Johnson, testified that he had a

conversation with Mr. Johnson after Johnson had completed his five year sentence for his involvement in Mr. Watson's murder.¹⁵ Ex. 12 at 1396-98. In that conversation, Mr. Johnson told Lester Terrell "not to worry about [Brian, that] he would be [released from prison] in 2000, that [Brian] didn't do it, [Brian] didn't kill that man." *Id.* at 1398. In the state habeas proceedings, Mr. Terrell presented affidavits and testimony from two other individuals who were told similar statements by Mr. Johnson: Sonya Benton,¹⁶ Mr. Terrell's cousin, who worked as an officer at the Newton County Jail at the time of trial, and defense investigator, Dan Goldman. *See* Ex. 14 and 15.

Prior to and during Mr. Terrell's third trial in 2001 trial, Jermaine Johnson was incarcerated in a holding cell at the Newton County Jail, where Ms. Benton was employed. Ex. 14 at 5662. Ms. Benton attested that shortly before the start of the 2001 trial, a district attorney's investigator came to the jail to visit Johnson. *Id.* The investigator brought transcripts and left them with Johnson. *Id.* After the investigator left, Mr. Johnson told Ms. Benton that he did not want the transcripts because "he was going to tell the truth this time, and that he was doing it for Big

¹⁵ The Georgia Department of Corrections website indicates that Mr. Johnson was released from prison related to this offense on February 26, 1996. See <http://www.dcor.state.ga.us/GDC/OffenderQuery/jsp/OffQryRedirector.jsp> re: Jermaine Johnson, GDC identification number 617061 (last visited December 3, 2015).

¹⁶ Ms. Benton (now Viera) also describes how Mr. Terrell saved her life when she was choking as a child.

Mama [their grandmother].” *Id.* Then, just after the third trial commenced, Mr. Johnson again told Ms. Benton that he was ready to tell the truth and that he wanted to speak with Mr. Terrell’s trial counsel, John Strauss. *Id.*

When Mr. Strauss’s investigator, Dan Goldman, came to the jail, Ms. Benton informed him that Johnson wanted to talk to Mr. Strauss. Ex. 14 at 5662. Mr. Goldman later confirmed this in his testimony. Ex. 15, at 306-07. Mr. Goldman further testified that he spoke with Mr. Johnson after Ms. Benton told him what Mr. Johnson had been saying, and that although Mr. Johnson ultimately did not change his story, he did tell Goldman that “one of these days he was going to tell ... the truth.” *Id.* at 307.

D. Marion Foschini Testimony

The key remainder of the State’s case is equally unsound, as Ms. Foschini’s testimony cannot be relied upon either to place Mr. Terrell at the scene of the murder or to corroborate Mr. Johnson’s now admittedly-false statement. While the prosecution never asked Ms. Foschini the question invited by her testimony -- whether the man she saw in her landlord’s driveway was Brian Terrell – her attached affidavit provides the answer. It was not. “When I saw Brian in the courtroom” at the beginning of his first trial, Ms. Foschini attests, “I knew he wasn’t the man I had seen in [my landlord’s] driveway.” Ex. 2 at 1.

Brian looked very different from the young black man I saw in the driveway. The man I saw was much skinnier than Brian and seemed taller than him, too If I had been asked to identify him in court, I am sure I would have told them Brian wasn't the man I saw parked in the driveway that day.

Ex. 2 at 1-2.

But somehow Ms. Foschini was never asked to identify Brian, despite the State's dependence upon her testimony. Nor did Ms. Foschini know to raise the issue herself.

I had moved to Jasper, Alabama shortly after Mr. Watson was killed and was no longer living in Covington, Georgia. I didn't know the details of the crime and thought I was just testifying about what I saw that day. I didn't know why the prosecutor thought my testimony was important. I knew they had arrested Brian and were saying that he had murdered Mr. Watson, but I didn't have any details about how they thought it had all happened *I never heard that the prosecutor thought Brian was the person who was parked in the McGibony's driveway.*

Ex. 2 at 1-2 (emphasis added).

Given this testimony from Ms. Foschini, the prosecution's dependence upon her testimony is untenable. Viewed in light of this new evidence, the case against Mr. Terrell evaporates. All that remains are questions as to how and why Brian's case has come so close to a tragic end.

III. The State's Incomplete Investigation

A. Role of Tim Terrell

Of the many “gaps” papered over by Mr. Johnson’s testimony, among the most peculiar is the state’s failure to investigate other suspects – particularly Tim Terrell, Brian’s maternal uncle. During Brian’s first trial, the state’s fingerprint examiner testified that fingerprints recovered from the inside of Mr. Watson’s truck on the day of the crime were made by Tim Terrell. 1T at 668-69, 672. Given the condition of the prints, moreover, the expert opined that they had been made very recently – within the last two days, at most. 1T at 671, 673. The State’s handwriting expert further testified that several of the forged checks appeared to have Tim Terrell’s handwriting on them. 1T at 653. Brian’s counsel attempted to hold the State accountable for its curious disinterest in Tim Terrell, eliciting from Newton County Sheriff’s Department investigator Dell Reed that Tim Terrell had been evasive when questioned whether he had ever been in Mr. Watson’s truck. 1T at 443-44, 450. Counsel also argued effectively that Tim Terrell’s fingerprints both demonstrated his involvement in the crime and damaged the credibility of Jermaine Johnson, who had denied Tim Terrell’s involvement. The trial ended in a hung jury.

When the state’s experts testified similarly at Brian’s retrial in 1995, counsel presented testimony from Spence Barber, the defense investigator, who attested

that during his interview with Tim Terrell, Tim had become violently defensive and denied knowing that Mr. Watson had a truck, denied ever being in the truck, and denied that his prints were in the truck. 2T at 1839, 1865. During state habeas proceedings, Mr. Barber described Tim Terrell's violent reaction in even more detail. But the second jury returned a verdict against Mr. Terrell, which was later overturned. The State did not relent in its pursuit of Brian (and in ignoring Tim Terrell), trying him for a third time in 2001. But that time, his counsel inexplicably failed to elicit any testimony regarding Tim Terrell's fingerprints, his writing on the checks, and his potential culpability for the murder into the defense case. Tim Terrell's role in Mr. Watson's murder is a large unanswered question -- a proven reasonable doubt that merits this Board's intervention.

B. Undisclosed Evidence

Throughout the pendency of each of his three trials, and well into state habeas corpus proceedings, the state also failed to turn over critical videotaped evidence that would have directly refuted the state's theory of Mr. Terrell's involvement in Mr. Watson's murder and supported Mr. Terrell's testimony related to the forgeries and the murder. Videotapes obtained by law enforcement officers prior to Mr. Terrell's first trial included footage depicting someone other than Mr. Terrell cashing the checks forged on Mr. Watson's bank account. See Ex. 17, 18, 19, 21. This evidence was critically important given the state's argument that Mr.

Terrell killed Mr. Watson because Mr. Watson had discovered that Terrell had forged checks on his bank account. Moreover, the videotapes were critically important because they would have corroborated Mr. Terrell's testimony at the third trial that he did in fact forge and cash three checks from Mr. Watson's account totaling \$2100, 3T at 1335-36, but that he believed Curtis Bernard Bagby was responsible for forging and cashing the rest of the checks stolen from Mr. Watson totaling \$6600. *Id.* at 1334-35. *Mr. Bagby admitted to cashing forged checks during the state habeas proceedings.* Ex. 24.

The existence of the videotapes only came to light in 2006, after inquiries into other matters by Mr. Terrell's habeas counsel revealed that Newton County Sheriff's Deputy Wardell Reed had obtained -- and kept in his personal possession after his retirement -- a separate box of evidence in Mr. Terrell's case that included the videotapes. Ex. 23. These exculpatory tapes were never provided to the defense over the course of three capital murder trials, and they were never contained in the District Attorney's files prior to any of those trials. Indeed, the withheld evidence did not come to light until over five years after the conclusion of Mr. Terrell's third trial, during his state habeas proceedings, despite the defense's explicit *Brady* requests. *See* Ex. 20, Motion for Disclosure of Exculpatory and Impeaching Information, filed July 18, 2000. The videotapes were further withheld even after initial requests through the Open Records Act. Ex. 22 (noting

that entirety of Newton County Sheriff's Department files in Mr. Terrell's case were held by the Newton County District Attorney's office).

The resulting damage to Mr. Terrell's ability to defend himself was further compounded by Deputy Wardell Reed's false and obfuscating testimony about the tapes during Mr. Terrell's second and third trials. During the third trial, when asked whether any tapes or photographs were furnished by the bank pursuant to his investigation of the forgeries, Deputy Reed replied:

There was tapes, but tapes have been recorded over, some of the locations were drive-thrus that didn't have video equipment to do videos and the length of time from the times the checks was cashed, there was a very good possibility that some of the tapes had been taped over.... So we weren't able to really gain anything or any knowledge from that.

3T at 936.

Deputy Reed acknowledged that he was able to obtain two still photographs from the bank on June 20, 1992, two days before the murder, but nothing prior to that time. The June 20th photographs depicted Mr. Watson cashing one of his own checks before he was killed and do not relate to the forgeries. And Deputy Reed also testified falsely during Mr. Terrell's second trial that the tapes did not exist. 2T at 1101-1102. Deputy Reed's false testimony deprived Mr. Terrell of evidence that would have supported his defense that another individual who was involved in the cashing of forged checks was responsible for Mr. Watson's death.

The prosecutor compounded Deputy Reed's false and misleading testimony during his closing argument, by suggesting that the investigating agents did not have the opportunity to "verify" Mr. Terrell's testimony about Mr. Bagby's involvement, saying:

It was sprung on this investigator eight and a half years later. Is it true? We can't say. We haven't had the opportunity to verify it. Maybe it is, maybe it isn't, but the bottom line is that he is as guilty as if he had passed them himself and he may have. He may have.

Ex. 10 at 1465.

Without the state-suppressed videotapes showing other individuals cashing the forged checks, the defense could not adequately corroborate Mr. Terrell's testimony regarding Mr. Bagby, and the jury therefore had no evidence supporting his credibility. The jury also was denied critical information for assessing Mr. Terrell's guilt, since they were unaware of evidence demonstrating that others had forged or cashed the checks and therefore had motive to kill Mr. Watson.

IV. Conclusion

Brian Terrell has only days to live. He can no longer wait for Mr. Johnson to "tell the truth." Nor can this Board. Regardless of the circumstances under which Mr. Johnson provided his false statement and testimony, it is clear that his testimony hardly eliminates "doubt as to the guilt of the accused"; rather, it creates it. That alone is reason for this Board to act. The tragedy of 20 years on death

row for a crime he did not commit would be multiplied beyond human understanding by Brian Terrell's execution. We respectfully pray that this Board will prevent such cruel injustice and spare his life.

For all the reasons contained in this Application and appendices, and for the reasons found in the evidence and argument presented at the hearing on this Application, Brian Keith Terrell respectfully asks this Board to grant a stay of execution for ninety (90) days to permit the Board to review and deliberate over the evidence presented on his behalf and to exercise its awesome power to bestow mercy and commute Mr. Terrell's death sentence, or to grant whatever relief is within its power to give.

Respectfully submitted,

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