IN THE SUPERIOR COURT OF DOUGHERTY COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	
	*	
	*	**Indictment No. 97-R-1723**
v.	*	
	*	
	*	
MARCUS RAY JOHNSON,	*	
Defendant.	*	

ORDER DENYING DEFENDANT'S
EXTRAORDINARY MOTION FOR NEW TRIAL

On September 27, 2011, after 17 years in prison and with his execution seven days away, Defendant sought an "Extraordinary Motion For New Trial and For Post[-]conviction DNA Testing Pursuant To O.C.G.A. § 5-5-41(c)." After extensive testing, review of the evidence by four additional experts,[1] and several hearings, including two evidentiary hearings, Defendant has failed to present any evidence to prevail on his motion.[2]

---

[1] Brian Adams (Senior DNA Analyst, Bode Laboratories, independent DNA laboratory), Steven Cole (Defendant's research psychologist), Marilyn Miller (Defendant's crime scene investigation expert), Greg Hampikian (Defendant's forensic geneticist).

[2] Defendant also litigated a claim of actual innocence, by alleging ineffective assistance of counsel, in his state habeas hearing in 2002. At that hearing, 11 witnesses testified "live" and Defendant presented the affidavit testimony of 35 witnesses and a total of 131 exhibits. The transcript of that proceeding totals 6,923 pages.

"[A]n extraordinary motion for a new trial, as contrasted with a motion for a new trial made within 30 days of a judgment, is 'not favored'; consequently, 'a stricter rule is applied to an extraordinary motion for a new trial based on the ground of newly available evidence than to an ordinary motion on that ground.'" Drane v. State, 291 Ga. 298, 301 (2012), citing Crowe v. State, 265 Ga. 582, 590-591(15) (1995).

The standard for granting an extraordinary motion for new trial is as follows:

> It is incumbent on a party who asks for a new trial on the ground of newly discovered evidence to satisfy the court: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Timberlake v. State, 246 Ga. 488, 491 (1980). "All six requirements must be complied with to secure a new trial." Id. Further, "implicit in these six requirements is that the newly discovered evidence must be admissible as evidence." Id.

The Georgia Supreme Court has further held:

> The statutes which control extraordinary motions for new trial based on newly discovered evidence require a defendant to act without delay in bringing such a motion. OCGA §§ 5-5-23 and 5-5-41 (Code Ann. §§ 70-204 and 70-303). The obvious reason for this requirement is **that litigation must come to an end.** Llewellyn v. State, 252 Ga. 426, 428-429 (2) (314 SE2d 227) (1984) (addressing a four-year

> post-trial delay in seeking the deposition of a witness). Furthermore, we note that the diligence requirement ensures that cases are litigated when the evidence is more readily available to both the defendant and the State, which fosters the truth-seeking process.

Drane v. State, 291 Ga. 298, 304 (2012) (emphasis added).

This Court finds that Defendant has failed to meet the six prongs of Timberlake, all of which are required to prevail on his claims, and denies the extraordinary motion for new trial.

A. Items That Were Tested Do Not Meet *Timberlake* Standard

A multitude of items were chosen by Defendant, represented by counsel and assisted by experts, for DNA testing. After three years of testing those items, the results only inculpate Defendant further. There was not a single test result obtained from the extensive DNA testing that was exculpatory, much less a result that was so material that it would probably produce a different verdict at either phase of Defendant's trial. Timberlake v. State, 246 Ga. at 491.

On September 27, 2011, Defendant filed an extraordinary motion for new trial based on DNA evidence. O.C.G.A. § 5-5-41(c). Although the State argued that Defendant failed to meet the requirements of O.C.G.A. § 5-5-41(c) to obtain DNA testing, the State stipulated to the DNA testing of numerous items of evidence. Initially, the parties agreed to the DNA testing on 16 items of evidence. (4/11/13 Hearing, p. 153). Those sixteen items were subsequently broken down into 48 separate samples for analysis. Of those 48 samples, Bode Laboratories, an

independent lab chosen by Defendant, determined that 13 of those items were suitable for DNA testing. (4/5/12 Hearing, p. 21). DNA testing was conducted on those items and Defendant, with the assistance of counsel and experts, chose the specific sections to test on certain items. Of those 13 items, blood was found in seven, semen was found in three and male DNA was found in one. (Defendant's Exhibit 54, pp. 5-7).[3]

Bode Laboratories conducted STR testing on these items. Experts testified that STR testing, short tandem repeat testing, is "currently the most discriminating method of DNA analysis." (Defendant's Exhibit 1, ¶ 9). From this testing, the independent laboratory was able to obtain DNA results from the oral and nipple swabs from the victim. (Defendant's Exhibit 54, p. 5; samples E02 and E03). It was determined that Defendant could not be excluded from those samples. It was further determined that the probability of randomly selecting this profile, from which Defendant could not be excluded, was 1 in 140 in the Caucasian population,[4] 1 in 500 in the African-American population and 1 in 270 in the Hispanic population. Id.

---

[3] Sperm was confirmed in the anorectal swab, the oral swab and the thigh swab. Blood was found in the two fingernail clippings, and the samples from the bra, pants, shirt underwear, and vest. Male DNA was found in the nipple swab.

[4] Stated differently, only one in 140 Caucasians people have this same profile.

Profiles were also obtained from anorectal, nipple and oral swabs and YSTR testing was conducted on those samples. (Defendant's Exhibit 54, p. 6; samples E01, E02 and E03). YSTR testing is specific to male DNA, the Y chromosome, only. (Defendant's Exhibit 1, ¶13). With regard to the anorectal swabs, Defendant could not be excluded. Id. Further, the probability of randomly selecting this profile, from which Defendant could not be excluded, was 1 in 4114 in the Caucasian population, 0 in 1932 in the African-American population, and 0 in 1601 in the Hispanic population. Id.

Defendant also could not be excluded from the profile developed from the nipple swabs. Id. It was further determined that the probability of randomly selecting this profile, from which Defendant could not be excluded, was 0 in 4114 in the Caucasian population, 0 in 1932 in the African-American population and 0 in 1601 in the Hispanic population. Id.

Likewise, Defendant could not be excluded from the profile developed from the oral swabs. (Defendant's Exhibit 54, p. 7; sample E03). It was also determined that the probability of randomly selecting this profile, from which Defendant could not be excluded, was 254 in 4114 in the Caucasian population, 61 in 1932 in the African-American population and 108 in 1601 in the Hispanic population. Id.

In a second oral swab, a profile was developed and again, Defendant could not be excluded. Id. Additionally, the probability of randomly selecting this profile, from which Defendant could not be excluded, was 214 in 4114 in the Caucasian population, 45 in 1932 in the African-American population and 88 in 1601 in the Hispanic population. Id.

Results and probabilities from the testing varied as the evidence was older and fewer loci were identified on some samples versus others. For example, in the anorectal swab (E01), results were obtained from 16 of 17 loci. (Defendant's Exhibit 54, p. 6).[5] On that sample, out of 4114 Caucasians, there was no probability that it was anyone else but Defendant. In contrast, on the second oral swab (E03), only 4 of 17 loci were obtained. On that sample, out of 4114 Caucasians, 214 would have these same loci matches. (Defendant's Exhibit 54, p. 7; see also p. 10). However, what is clear is that from the 48 items that were analyzed and subsequently tested, using various types of DNA testing, no other male DNA was found on any items associated with the victim. (4/11/13 Hearing, p. 176; Defendant's Exhibit 54 (case report)). There were only DNA profiles from

[5] Modern DNA methods focus on testing the length of DNA at core loci. "The statistical probabilities of a random match to a particular DNA profile is determined by multiplying the odds of a random match at each individual locus." (Defendant's Exhibit 1, ¶ 11).

which Defendant could not be excluded and where the probabilities of randomly producing the same profile further support his guilt.

Although Defendant concedes that all the extensive DNA testing "did not reveal another DNA profile," he continues to argue that the test results, which show he cannot be excluded, are "consistent with" his innocence for murder and rape. (Defendant's brief, p. 2). It was Defendant's burden to establish that the result of the DNA testing "is so material that it would probably produce a different verdict." Timberlake, 246 Ga. at 491. Defendant failed to carry this burden. Thus, there is no basis for the grant of an extraordinary motion for new trial based on the extensive DNA testing.

2. Evidence That Was Destroyed and Not Further Tested Is Not "Presumed Exculpatory" And Does Not Meet *Timberlake*[6]

Defendant also alleges that evidence that was destroyed "could have definitely exonerated" him and this alleged due process violation entitles him to a new trial. (Defendant's brief, p. 3). Defendant further claims that this Court "must [] assume[] that modern testing methods would have ruled out the presence of any inculpatory DNA" on the pecan limb, the pocket knife, and his jacket. (Defendant's brief, p. 3).[7] Yet, Defendant cites to no legal authority to support this

---

[6] Defendant's brief, p. 2

[7] Defendant has not established that his jacket was destroyed.

standard of review. This Court finds that there is no legal "assumption" given to any items that were inadvertently destroyed. Instead, Defendant was required to show that any item that was destroyed was material, that its exculpatory value was known to the State prior to the destruction and that the State acted in bad faith in destroying the item. Defendant failed to meet any of the prongs necessary to support his due process claim or his extraordinary motion for new trial.

Additionally, as to the Timberlake standard, further DNA testing to establish that there was no blood or DNA on these items of evidence would not be newly discovered, non-cumulative or material under Timberlake. Thus, Defendant has failed to meet the requisite prongs of Timberlake, all six of which must be met, to obtain a new trial.

Specifically, to establish a due process violation arising from the destruction of evidence, the Georgia Supreme Court has held:

> In dealing with the failure of the state to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. Arizona v. Youngblood, 488 U.S. 51 (109 S. Ct. 333, 102 L. Ed. 2d 281) (1988). To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant would be unable to obtain
>
> comparable evidence by other reasonably available means. California v. Trombetta, 467 U.S. 479 (104 S. Ct. 2528, 81 L. Ed. 2d 413) (1984).

Walker v. State, 264 Ga. 676, 680 (1994).

In California v. Trombetta, 467 U.S. 479 (1984), the United States Supreme Court held:

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality [] evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. at 488-489.

Defendant argues it must be assumed that the evidence that was destroyed was exculpatory, that he is unable to obtain comparable evidence by other reasonable means, and therefore, he is entitled to a new trial. (Defendant's brief, pp. 3-4). However, the law holds, not simply that the evidence must be amenable to DNA testing or possibly be exculpatory. Instead, longstanding law requires that Defendant establish that the evidence that was destroyed had exculpatory value that was known to the State prior to its destruction. Defendant cites to Youngblood as the applicable precedent; but, he makes the same error in his legal analysis as the state court did in Youngblood. The state court's holding in that case was reversed by the United States Supreme Court.

In Youngblood, the state court, although finding no bad faith on the part of the State, reversed a defendant's convictions by improperly reasoning that timely tests of the lost evidence **may have** exonerated the defendant thus, the loss was

material and a denial of due process. Youngblood, 488 U.S. at 55. However, on certiorari review, the United States Supreme Court reversed the judgment of the Arizona Court of Appeals and held:

> **The possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in Trombetta.** Second, we made clear in Trombetta that the **exculpatory value of the evidence must be apparent "before the evidence was destroyed."** Ibid. (emphasis added). Here, respondent has not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy's clothing; this evidence was **simply an avenue of investigation that might have led in any number of directions**. The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.

Youngblood, 488 U.S. at 56 (emphasis added).[8]

In State v. Mizell, 288 Ga. 474, 476-477 (2010), the Georgia Supreme Court held in accordance with Youngblood. The Court found that "[w]ith regard to materiality, the fact that evidence may be 'potentially useful' in a defendant's attempt at exoneration is insufficient to sustain a claim that the defendant has suffered an abridgment of due process of law due to the destruction or loss of the evidence." State v. Mizell, 288 Ga. at 476-477; see also State v. Miller, 287 Ga. 748 (2010); Krause v. State, 286 Ga. 745, 752 (8) (2010) ("was no apparent reason

---

[8] In Youngblood, the destroyed evidence was semen, evidence clearly containing DNA. In the instant case, the destroyed evidence is a pecan limb and a knife, which were both found not to have blood on them.

for the police to think that the bat would tend to exonerate rather than further inculpate"). Thus, the courts are clear that Defendant's argument that the items of evidence "may have" been useful to his claims does not meet constitutional muster.

This Court finds that Defendant failed to show that the items that were destroyed had any exculpatory value and that value was known to the State prior to the destruction; nor has Defendant shown bad faith on the part of the State.

1. No Exculpatory Value on Destroyed Items

Defendant has failed to show what items of evidence were destroyed. Defendant merely cites to a court destruction order entered in 2006, but the order specifies no items of evidence. (Defendant's Exhibit 36). It is clear that not all the evidence in Defendant's case was destroyed as he has received testing on numerous items. The Court will address the items specifically referenced by Petitioner in his briefs and pleadings.

a. Jacket Not Destroyed

The only item of evidence that Defendant claims was destroyed that contained biological evidence is Defendant's jacket. (Defendant's brief, p. 3). Defendant did not argue for further testing of the jacket. Further, it was shown at trial that the jacket had Ms. Sizemore's blood on it. (TT, pp. 2304-2305).

Defendant's investigator, Jeff Walsh of the Georgia Resource Center, testified by affidavit on October 3, 2011 that he had reviewed the physical items of

evidence from Defendant's case on September 27, 2011. (Defendant's Exhibit 32, p. 3). Mr. Walsh testified, "I made a written inventory of the evidence I was given in 2011. That inventory is attached as Exhibit E." (Defendant's Exhibit 32, p. 4). Exhibit E, attached to Mr. Walsh's affidavit, clearly lists "leather jacket" as one of the physical items he reviewed. (Defendant's Exhibit 32, attachment E, p. 2). Additionally, in Defendant's renewed motion to preserve evidence filed in this Court on November 2, 2011, Defendant's counsel stated that it was their understanding that Defendant's leather jacket was in the State's possession. (See Motion, pp. 3-4). Accordingly, any due process claim concerning the jacket is moot.

b. Knife Testing Would be Cumulative and Not Material

Assuming Defendant's pocket knife has been destroyed, Defendant has failed to show a due process violation or that he can meet the mandates of Timberlake. As to his due process claim, Defendant failed to show that the State had any reason to believe further testing of the item would be exculpatory. Additionally, comparable evidence was available and submitted at trial. As to Timberlake, testing to show there was no DNA on the knife is not newly discovered, non-cumulative or material.

As conceded by Defendant, it was determined prior to trial and testimony was introduced at trial, that Defendant's pocket knife had no traces of blood on it.

(Defendant's brief, pp. 5-7). Defendant's trial counsel inquired into the knife having blood on it at trial. Dr. Anthony Clark, the State medical examiner, testified that he "would expect that there would be blood on that knife and within the crevices of the knife." (TT, p. 2276). Further, defense counsel presented Dr. Brian Frist, a medical examiner, who also testified at trial that if the pocketknife was the murder weapon, he believed the knife would have blood "on it some place." (TT, p. 2491). As the State did not present evidence that there was any blood on the knife, trial counsel argued to the jury that the State's expert had testified there would be blood in the crevices of the knife if it was the murder weapon, but there was none. (TT, pp. 2754-2755). Specifically, trial counsel argued:

> It is impossible to get blood -- not get blood on the knife. The doctor-- their doctor said there would be blood in the crevices of the knife. How do you stab a person -- where is the knife? ... There is no blood on this knife even in the crevices ... .

(TT, pp. 2754-2755).

Further, the State conceded in closing argument that Defendant's knife, which was placed into evidence, might not be the murder weapon. (TT, p. 2794). The prosecutor argued, "I don't even know if this is the knife. He might have thrown the knife in one of the ponds. I don't know, but I do know that it's not

essential for me to prove this is the knife. All I have to prove is that he murdered her. I don't have to prove any particular knife." Id.[9]

The record is clear that the knife did not contain any exculpatory value known to the State prior to its destruction. Moreover, the evidence that there was no blood on the knife, if such was concluded from testing, would be cumulative evidence of that presented at trial and the evidence would not be newly discovered. Thus, "the evidence lacks materiality since the state's own admission constitutes comparable, exculpatory evidence." Walker v. State, 264 Ga. 676, 680 (1994). Defendant's due process and Timberlake claims both fail.

c. Limb Testing Would be Cumulative and Not Material

Assuming the pecan limb has been destroyed, Defendant has also failed to show a due process violation or that he can meet the mandates of Timberlake as he cannot show the requirements necessary to obtain relief on either basis. As with

---

[9] Further, Dr. Clark testified at trial that a knife **"like"** Defendant's pocketknife had been used to murder Ms. Sizemore. (TT, p. 2240) (emphasis added). Accordingly, the Georgia Supreme Court found, "Johnson had a pocketknife that was consistent with the knife wounds on the victim's body." Johnson v. State, 271 Ga. at 377. Also of note, although Dr. Clark gave an affidavit to this Court which states that the lack of blood "militates" the knife being the murder weapon, he does not unequivocally conclude that it could not be the murder weapon. (Defendant's Exhibit 41, p. 3). Dr. Clark testified accordingly at trial that he was not saying the pocketknife was or was not the murder weapon, but that "this type of knife could cause the injuries" to Ms. Sizemore. (TT, p. 2285).

the knife, testing to show there was no DNA on the knife is not newly discovered, non-cumulative or material.

The jury was informed that the pecan limb had no traces of blood on it. (TT, pp. 2738-2739). Additionally, the State also conceded that the pecan limb may not be the object used to mutilate Ms. Sizemore. (TT, p. 2774). However, the State argued it could have been used to sodomize Ms. Sizemore causing complete tearing of the anal/vaginal wall as it was found next to the pool of blood on Sixteenth Street and appeared to have fresh feces on it hours after the murder. (TT, pp. 2027, 2031, 2154). As argued by the State at trial, "we know she was mutilated by some foreign object and the Judge is not going to charge you, you have to find that she was mutilated by this stick. I don't know if it was this stick. It might have been another one that he threw away, but I don't have to prove that." (TT, p. 2774).[10] Defense counsel followed up in argument that the State had not shown that this was the instrument used to torture and mutilate Ms. Sizemore. (TT, p. 2738).

---

[10] Dr. Clark did testify at trial that the mutilation to Ms. Sizemore's vagina and rectum was from an object that "was rough, was dirt encrusted, or vegetative encrusted." (TT, p. 2247). Further, the Georgia Supreme Court held, "[t]he medical examiner testified that this branch was consistent with the object used to mutilate the victim's vagina." Johnson, 271 Ga. at 376.

Further, regardless of the instrument utilized, it is without question that Ms. Sizemore was stabbed 41 times and sodomized with an object causing horrendous pain and disfigurement of her genital area. Testing to potentially show that Defendant's DNA was not on the limb, which was conceded at trial, is not newly discovered, non-cumulative or material. As with the knife, "the evidence lacks materiality since the state's own admission constitutes comparable, exculpatory evidence." Walker, 264 Ga. at 680. Further, like Youngblood, Defendant has not shown that the pecan limb had any alleged exculpatory value of any kind that was apparent prior to the loss of this item. Defendant's due process and Timberlake claims both fail.

2. No Bad Faith

Defendant has also shown no bad faith on the part of the State or law enforcement with regard to the destruction of any evidence. In Arizona v. Youngblood, 488 U.S. 51, 58 (1988), the United States Supreme Court held that, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." See, e.g., Illinois v. Fisher, 540 U.S. 544, 547-48 (2004) (following the rule of Youngblood and finding no due process violation from the destruction of evidence by police pursuant to normal police procedures).

In the instant case, Defendant had requested to test one hair in 2001-2002 and have latent prints run through the national data base. (Attachment 1). That request was denied. Subsequently, five years later, after the United States Supreme Court had denied certiorari review from the denial of state habeas relief, Chief Judge Loring Gray entered an evidence destruction order for approximately 85 cases. Defendant's case was in a mass listing for destruction of evidence. The evidence in his case was not singled out, but was destroyed with a volume of other evidence. Defendant failed to show there was any bad faith on the part of the State in the destruction of the any evidence in this case. His due process claim fails.

C. <u>No New, Material, Non-Cumulative Evidence As To Sixteenth Avenue</u>

Defendant alleges that there is no evidence that Ms. Sizemore was murdered at the Sixteenth Avenue site and therefore, he is somehow entitled to a new trial or new sentencing trial. Defendant relies on the facts that DNA was not obtained from the soil sample taken from that area, that DNA was not on the pecan limb and there was no DNA on a sock from that area that was not entered into evidence. As set forth above, the facts now are the same as the facts at trial. Defendant has produced no new, non-cumulative evidence that is so material it would, in reasonable probability, change the outcome of his trial or his sentence.

Initially, as set forth above, it was established at trial, in front of the jury, that neither the pecan limb nor the knife had blood on them and were possibly not the instruments used to torture and murder Ms. Sizemore.

Further, the black sock at the Sixteenth Avenue murder scene was not introduced at trial. At the scene, the police noted the sock as having a "clear sticky substance" on it and took it into evidence. (Defendant's Appendix 6, p. 2). The suspicion during the investigation was that there was semen on the sock. However, testing was conducted on the sock prior to trial and it was determined to have no seminal fluid or DNA on it. As noted by Defendant, however, this article of clothing was never used at trial or in the prosecution of Defendant. (Defendant's brief, p. 8).[11]

Finally, found to be present in the Sixteenth Avenue dirt lot, mere hours after the murder, were indications of a struggle, scuff marks, drag marks and what police noted to be "a large amount of blood" pooled in the dirt. (TT, pp. 2027-2031, 2154, 2170, 2172; Defendant's Appendix 6, p. 2). A soil sample was taken from this pool of blood.

Prior to trial, testing was conducted on the soil sample and it was determined to be human blood, with an A antigen, characteristic of blood group A, which was

---

[11] Moreover, as the murder scene was "lovers' lane" for couples and a "hangout" for others, the fact that a sock with someone else's DNA on it would not be material.

Angela Sizemore's blood type. (Defendant's Exhibit 6, 8/31/94 Report, p. 6 of 8). Further DNA testing was not conducted at that time.

In July and August of this year, Bode Laboratory attempted DNA testing on the soil sample. No human DNA was detected in the sample at the initial testing stage. The scientists determined the best chance to obtain any type of DNA profile was to utilize YSTR testing, which is specific to the male population. However, even with this type testing, the lab felt that any results would be partial. The lab was not able to obtain a YSTR, or male, profile from this blood. Thus, the facts and evidence from trial remain unchanged.

At trial, 16 years ago, trial counsel, in addition to arguing there was no blood on the limb or the knife, argued:

> There is not a piece of evidence in this case that connects Ray Johnson to Sixteenth Avenue where they say she was killed nor is there any evidence that connects her with that except there was dirt on a stick and there was dirt in her vagina. That's it. That is it.

(TT, p. 2739).

What the evidence also shows, however, is that this bloody vacant lot location on Sixteenth Street was discovered by police because Defendant and Ms. Sizemore left Fundamentals together in the early morning hours immediately preceding her death. They were last seen walking in the direction of the Sixteenth Avenue vacant lot, (TT, p. 1803); and as found by the Georgia Supreme Court, "[t]he vacant lot is about two blocks from Fundamentals and about half a block

from the house where Johnson lived with his mother." Johnson v. State, 271 Ga. 375, 376 (1999).

Most significantly, there was a large pool of fresh blood located at the Sixteenth Avenue vacant lot. As conceded by Defendant, that large pool of blood was Type A, the same type as Ms. Sizemore. (Defendant's brief, p. 7). Moreover, Defendant's motion for new trial expert, Marilyn Miller, also testified "that somebody who is a type-A person was bleeding here for a period of time." (6/26/14 Hearing, pp. 16, 34). She further testified that "there was enough blood that it would be a significant wound to bleed that much." (6/26/14Hearing, p. 35). Thus, a person, that was bleeding profusely, remained in one location where the blood was found. Because the blood was fresh, its release and pooling had to occur around the same time as Ms Sizemore's murder. Ms. Miller specifically testified that she could not say that this scene had no relationship to Ms. Sizemore's murder. (6/26/14 Hearing, p. 34).

The Sixteenth Avenue dirt lot also had fresh marks where something or someone had been dragged. (TT, p. 2031). Correspondingly, as found by the Georgia Supreme Court, Ms. Sizemore's body "had bruises and marks from being hit and dragged." Johnson v. State, 271 Ga. at 376. Further, Dr. Clarke testified at trial that Ms. Sizemore's body had abrasion from being dragged and the wounds indicated that she was dead at the time, (TT, p. 2214); thus, accounting for the

drag marks at the Sixteenth Avenue scene and the pooling of the blood in the one location.

Additionally, Ms. Sizemore had pecan leaves in her hair although there were no pecan trees in the vicinity of the site where Defendant left her body in the truck. (TT, p. 2025). The Sixteenth Avenue dirt lot, however, sits among pecan trees. (TT, p. 2033).

Thus, the evidence shows Sixteenth Avenue: is an area Ms. Sizemore was in on the night she was murder; had a large amount of fresh blood that had pooled in a small area that came from a "significant" wound that was Ms. Sizemore's blood type and in which no male DNA could be detected; had fresh drag marks in the dirt corresponding to the drag marks on Ms. Sizemore's body; and had pecan trees and leaves like those found in Ms. Sizemore's hair. There is evidence that Ms. Sizemore was at the Sixteenth Avenue site and was killed in the dirt in that area or very nearby in the thick vegetation before being drug out into the dirt to be loaded into her own vehicle for Defendant to drive her to the other side of town to dump her body.

Even assuming, that someone else bled copious amounts of blood into the ground near Fundamentals on the night Angela Sizemore was brutally stabbed to death, it does not negate the fact that Defendant was the last person seen with her alive at 2:30 a.m. and the person seen leaving her dead body at 6:30 a.m.

The evidence in regard to the Sixteenth Avenue is exactly the same as it was at trial. There is no newly discovered, non-cumulative evidence that was not available with due diligence that would, in reasonable probability change either phase of Defendant's trial.

D. No New, Material, Non-Cumulative Evidence In Ms. Sizemore's Vehicle

Defendant argues that "there is now no evidence that Mr. Johnson was ever in or anywhere near Ms. Sizemore's vehicle." (Defendant's brief, p. 8). This is not new, non-cumulative or material evidence as there was no evidence submitted at Defendant's trial that established his presence inside the car. This lack of evidence was presented and argued to the jury by defense counsel. Trial counsel argued:

> … and if he was in that truck, why are his fingerprints not on it? Now, they went through all of the fingerprint business. They had a print -- an identifiable print that they refused to send to the national data bank to see if it belonged to somebody that the F.B.I. had a fingerprint on. The F.B.I. had been collecting fingerprints since 1922. They obviously have yours. I know they have mine. Everybody in the military has the. They have them. They don't send it up there. They don't' want to find out whose fingerprint it was bad enough to send it.

(TT, p. 2742). This is the same argument being made by Defendant today; however, we now know the fingerprint that could be matched was actually identified, in these proceedings, as law enforcement. (4/11/13 Hearing, pp. 20-21). Moreover, as previously argued and as found by this Court, the fact that other

fingerprints were found inside or outside the truck, which had been in Ms. Sizemore's possession for less than two months, would not exonerate or tend to exculpate Defendant. (Order of August 22, 2013).

The record shows, Defendant was the last person with the keys to Ms. Sizemore's vehicle. The bartender of Fundamentals actually gave the keys to Defendant when Defendant left the bar in the early morning hours with Ms. Sizemore. (TT, pp. 1812, 1841). He stated that Ms. Sizemore was not capable of driving at that point. (TT, p. 1842). Defendant was also seen, a few short hours later, on the other side of town from Fundamentals, walking away from Ms. Sizemore's vehicle. The facts and the arguments Defendant presents to this Court are the same now as they were sixteen years ago. He has failed to provide newly discovered, non-cumulative testimony that could not have been discovered with due diligence that would, in reasonable probability, change the result of either phase of his trial.

E. Newly Acquired Cumulative Testimony and Speculative Theories Do Not Meet The *Timberlake* Standards

Defendant has also presented testimony from witnesses he claims were previously "unavailable" to offer a speculative theory that, prior to her murder, Ms. Sizemore was selling large quantities of marijuana, that she had a large amount of cash on her near the time of her death, that her common law husband was in prison facing serious federal charges, and the jurors may have found it "plausible" that

this activity somehow led to her murder.[12] (Defendant's Brief, p. 13). This evidence is not newly discovered; it is cumulative; Defendant was not diligent; some portions are not admissible; and the "evidence" is not material. Thus, Defendant has failed to meet the Timberlake standard.

At trial, Tony Kallergis testified that, on March 23, 1994, he and his girlfriend, Janice Parson, met Ms. Sizemore around 6:00 p.m. to attend visitation at a local funeral home for a mutual acquaintance who had passed away. (TT, pp. 1764-1766). The three then went to Applebee's restaurant and had supper. (TT, p. 1769). Mr. Kallergis testified that, after eating, they took Ms. Sizemore back to her car and left her around 9:00 p.m. (TT, pp. 1769-1771).

The following evening, after Ms. Sizemore's body was found, Ms. Kallergis and Ms. Parsons went to the Albany Police Department. (Defendant's Exhibit 6). Police spoke with both of them. Id. Mr. Kallergis' trial testimony is consistent with the statements he gave police on the evening of March 24, 1994.

---

[12] Defendant had a three-day state habeas evidentiary hearing in 2002 where one of his main grounds was that trial counsel were ineffective in not showing his innocence. In that proceeding, Defendant presented testimony from three witnesses who claimed they were all together and with Ms. Sizemore after she left the bar and left Defendant. It was brought out by the Respondent in those proceedings that one of the three witnesses was incarcerated at the time and could not have been present or seen Ms. Sizemore. The state habeas court found these witnesses, who clearly perjured themselves, lacked all credibility. (Attachment 2, pp. 24-25). Defendant retendered their testimony in this proceeding.

At that time, Ms. Parsons also spoke to police and told them that Ms. Sizemore had "lots of money on her" when they were together the previous evening. Id. Thus, the fact that Ms. Sizemore had money near the time of her death is not new evidence and the fact that Ms. Parsons is the witness who could testify to this is not new information.

Further, prior to trial, trial counsel investigated whether Ms. Sizemore had previously been in the area where her body was discovered attempting to link her death to drug sales or usage. Trial counsel also attempted to locate witnesses to testify accordingly at Defendant's trial. Trial counsel were able to locate Ollie McNair prior to trial and called Mr. McNair as a witness during trial. (TT, p. 2454). Mr. McNair testified that he had seen Angela Sizemore in the area where her body was subsequently found prior to her murder. (TT, p. 2455). He further testified, in front of the jury, that police officers asked him during the investigation of Ms. Sizemore's murder if he thought her death was drug related. (TT, p. 2459). However, the trial court refused to allow defense counsel to go so far into this line of questioning as to attack the character of the victim. (TT, p. 2455-2456).

Trial counsel were also aware that Richard Barker, Angela Sizemore's common law husband, was arrested for illegal activities. (Attachment 3, HT, p. 614, 20 ¶ 2). As shown by Defendant's exhibits, the State even investigated Mr. Barker and actually looked for connections between Mr. Barker, Ms. Parsons

and/or Tony Kallergis. (Defendant's Exhibits 51-53). Further, it was shown at Defendant's state habeas proceedings that trial counsel was aware that Ms. Sizemore had been involved with illegal drugs. (Attachment 4, HT, pp. 205-209). The fact that Mr. Barker and Ms. Sizemore had previously been arrested for drug activities and the fact that Mr. Barker had been arrested for federal charges is clearly not new evidence under Timberlake.

Defendant has now presented the additional testimony of Janice Parsons, a self-proclaimed drug dealer, who did not testify at trial. (6/26/14 Hearing, p. 21). Ms. Parsons testified before this Court that in the months preceding Ms. Sizemore's murder, Tony Kallergis, her boyfriend and soon to be husband, introduced her to Ms. Sizemore. (6/26/14 Hearing, p. 10). Ms. Parsons testified that, at that time, Ms. Parsons had already established a marijuana selling operation in the Albany area. Id. at 15. According to Ms. Parsons, Mr. Kallergis introduced the two women because he knew Ms. Sizemore had marijuana and knew that Ms. Parsons sold marijuana. Id. at 10.

Ms. Parsons testified that, at the time of the murder, she (not Mr. Kallergis) was selling marijuana she obtained from Ms. Sizemore and that she had given Ms. Sizemore a large sum of cash on the night Ms. Sizemore was killed.[13] As his own

---

[13] Ms. Parsons claimed to remember the insignificant description of Ms. Sizemore's purse; however, she failed to recall going to the police station and being questioned about her contact with Ms. Sizemore, an event after the murder

exhibits show, Janice Parsons told investigators prior to trial that, the last time she saw Angela Sizemore, Ms. Sizemore "had a (sic) lots of money on her at the time, she stated that she saw when [Angela] paid for everybody (sic) drinks." (Defendant's Exhibit 46, p. 3). Further, trial counsel argued to the jury that Ms. Sizemore had money with her and whoever killed her had obtained that money. (TT 2741). Trial counsel also pointed out that at the time Defendant was attempting to leave town, hours after the murder, he was attempting to borrow money for a bus fare because he had no money. Id. So the fact that Ms. Sizemore had a large sum of money with her immediately prior to her murder, which was not found on her person, is not newly discovered evidence, is cumulative and is not so material that it would probably have changed the verdict. Further, Defendant has failed to show he exercised due diligence in obtaining this new testimony, "which was obtained from a witness who was readily identifiable even pre-trial." See Davis v. State, 283 Ga. 438, 446 (2008).

Defendant also argues that Ms. Parsons' testimony is material because Mr. Kallergis' testimony was false and misleading and claims that Mr. Kallergis "actively misled investigators" and the jury about his involvement with Ms. Sizemore. (Defendant's brief, p. 13). The record reveals, however, that it was

---

which would presumably be embedded in one's memory, particularly if one conducting illegal activities in the area and with the deceased.

actually Ms. Parsons who was in an illegal relationship with Ms. Sizemore, not Mr. Kallergis; however, insofar as Mr. Kallergis could be found to have misled the jury with his testimony, Ms. Parsons' testimony would not only be cumulative of evidence given to the jury, but would only serve to impeach Mr. Kallergis' testimony. Thus, this testimony fails to meet the materiality standard of Timberlake as it merely serves to impeach, at most, Mr. Kallergis' trial testimony.

Further, as to Defendant's claim that Mr. Kallergis would have been a suspect, (Defendant's brief, p. 14), his own witness, Ms. Parson provided an alibi for Mr. Kallergis. Ms. Parsons testified in an affidavit to this Court that, after they dropped Ms. Sizemore off at her car the night before Ms. Sizemore was murdered, she and Mr. Kallergis went to his apartment where they stayed together the entire night. (Defendant's Exhibit 47, ¶ 13).

Further, any statements allegedly made by Mr. Kallergis to Ms. Parsons are hearsay, not admissible and thus, cannot be the basis of any extraordinary motion for new trial. As held by the Georgia Supreme Court "Implicit in these six requirements [of Timberlake] is that the newly discovered evidence must be admissible as evidence." Timberlake, 246 Ga. at 491.

Moreover, Ms. Parsons was adamant that she did not speak to police. (6/26/14 Hearing Transcript, pp. 24-26). However, the record shows that not only did she speak to police, she and Mr. Kallergis went together to the police station to

speak with the police. (Defendant's Exhibit 6). This fact alone calls into question Ms. Parsons credibility. Further, Ms. Parsons' attempts to cast aspersions on Mr. Kallergis must also be considered in light of the fact that, according to her own testimony, she was unhappily married to and now divorced from Mr. Kallergis. (6/26/14 Hearing Transcript, pp. 22, 26).

This testimony does not "cast[] a significant new light on Ms. Sizemore's activities and whereabouts on the day before her body was discovered." (Defendant's brief, p. 13). It does not change any of the facts that the jury had before them at the time of trial: Ms. Sizemore left Ms. Parsons and Mr. Kallergis around 9:00 p.m. with a large sum of cash; Ms. Sizemore eventually went to Fundamentals where she met and left with Defendant around 2:30 a.m.; upon leaving Fundamentals, Defendant took Ms. Sizemore's car keys; Ms. Sizemore and Defendant were seen walking toward Sixteenth Avenue; the two had sex; within hours, Defendant was seen walking away from Ms. Sizemore's body and her car around 6:30 a.m.; the following morning he had scratches on his neck and lied about their origin (TT, pp. 1969-1970,1983-1984); immediately attempted to sneak out of town on a bus (TT, pp. 1972-1973, 1976); and when arrested told police, "I think I killed her." (Record on Appeal, p. 986; 10/25/95 Hearing, p. 2082).

Defendant further speculates that Ms. Sizemore had a large amount of cash in her purse immediately prior to the murder and the cash and her purse were never

found. Defendant then alleges that a bartender at Fundamentals, who was known to steal from the bar, uncharacteristically had a large amount of cash immediately following her murder. As to the purse, Janice Parsons now claims Ms. Sizemore was carrying money in a purse on the night of the murder. (Defendant Exhibit 47, p. 2, ¶ 10). The record shows, however, that Leonard Davis, who was working security and as the bar back at Fundamentals on the night of the murder, told police at the time of the murder that Ms. Sizemore was not carrying her money in a purse, but in her bra. (TT 1832, 1837-1838, 1832). Likewise, during the murder investigation in 1994, the owner and manager of Fundamentals, Ralph McDaniel, also told police that Ms. Sizemore retrieved money from her bra, not a purse. (Record on Appeal, p. 490). Although Ralph McDaniel testified that the bartenders kept purses or keys behind the bar for safekeeping for customers, he testified only that he had kept Ms. Sizemore's keys on the night she was murdered. (TT, p. 1812).[14] Moreover, upon leaving, the only item of hers that was returned was the same set of keys, although Mr. Davis gave those to Defendant. (TT, pp. 1812, 1838, 1841).

---

[14] Defendant's argument that Mr. Geiger came into possession of a large amount of money after Ms. Sizemore was killed and her purse had gone missing from behind the bar where Mr. Geiger was a bouncer and where Mr. Geiger was known to steal from Fundamentals, does not exculpate Defendant. (Defendant's Exhibit 55, p. 4). It clearly does not rise to the level of materiality of Timberlake.

To establish that he is entitled to a new trial, Defendant must show that his request is based on newly discovered evidence that could not previously been available if due diligence was exercised, that is not merely cumulative of evidence presented at trial and that the evidence would have probably led to a different result at trial. This evidence fails to meet those criteria.

Defendant's newly acquired testimony that Ms. Sizemore was selling marijuana at the time of her murder is not "newly discovered" as he has failed to show that it could not have previously been obtained with the exercise of due diligence. Further, Defendant's testimony of Ms. Parson, Brian French and Robin Davis are not material under Timberlake as they do not negate the overwhelming facts establishing Defendant's guilt. Arguing that it is "plausible" that Ms. Sizemore's murder "had something to do" with her alleged illegal activities or that his newly constructed theory is in the "realm of possibility" is not the appropriate standard. (Defendant's brief, pp. 13, 14). Defendant's argument, based in large part on evidence known prior to trial, fall short of the Timberlake materiality, non-cumulative, admissible, and newly discovered evidence requirements.

F. The Georgia Supreme Court Has Already Found The Identifications Of Defendant Leaving the Scene Are Reliable

1. Dr. Cole's Testimony Does Not Meet Timberlake Requirements

Defendant also argues that his conviction stands on a weak foundation of four eyewitnesses' identifications of Defendant walking away from Ms.

Sizemore's body three to four hours after leaving Fundamentals with her. In support of this claim, Defendant relies on the testimony of Steven Cole. The Court finds that Dr. Cole's testimony is not newly discovered, is cumulative and not material.

The record shows that Defendant left Fundamentals with the victim around 2:30 a.m. (TT, p. 1813). The evidence from the eyewitnesses at Fundamentals was that Defendant was dressed in very distinctive clothing, as he usually was, in a black leather jacket, blue jeans, boots with silver chains, and fingerless gloves. (TT, pp. 1813, 1829). The evidence is uncontested that, after leaving the bar around 2:30 a.m. or later, Defendant and Ms. Sizemore went to a nearby location and sexual intercourse occurred. Further, the evidence established that approximately four hours after Defendant was seen leaving Fundamentals with the victim, four eyewitnesses definitively described a man with shoulder length sandy blonde hair coming from the area where Ms. Sizemore's body was found wearing this same distinctive dress including a black leather jacket, dirty blue jeans, a unique turquoise and silver ring, fingerless leather gloves and black boots with the silver chains. As found by the Georgia Supreme Court:

> Four people testified that they saw Johnson about an hour before the body was found. Two witnesses testified that they saw him walk from the area where the victim's Suburban was parked through an apartment complex to a bus stop. He boarded a bus and asked if the bus would take him to the Monkey Palace (a bar where Johnson worked) in west Albany. Three witnesses, including the bus driver,

> identified Johnson as being on the bus (one of the witnesses who saw Johnson walk through the apartment complex boarded the same bus as he did). Two witnesses stated that their attention was drawn to Johnson because that area of Albany is predominantly African-American, and it was extremely unusual to see a Caucasian there at that time of day. All the witnesses testified that Johnson's clothes were soiled with dirt or a substance they had assumed to be red clay. The witnesses gave similar descriptions of his clothing; in court, two witnesses who sat near Johnson on the bus identified his jacket, boots and distinctive turquoise ring.

Johnson, 271 Ga. at 376.

Defendant's description of the identification of him leaving Ms. Sizemore's body as "unreliable" does not withstand even a cursory review of the record. Four eyewitnesses saw Defendant in the early morning hours leaving the area and all described his very distinctive clothing and appearance.

Lillie Covin talked to police the day of the murder. She informed them that she saw a white man around 6:45 a.m. on Swift Avenue, which is in the immediate vicinity and sight distance of where Ms. Sizemore's body was found, walking south through her complex. (Defendant's Exhibit 6). She described him as having shoulder length brown hair, slender build, about 6 feet, 140 pounds, blue jeans, black jacket, rag around head, black gloves with fingers cut out, black cowboy boots, and covered in dirt. Id.

Defendant now claims that an expert like Dr. Cole could have shown that Ms. Covin's initial identification of Defendant "**at a pre-trial hearing** four years after her initial statement to police was completely unreliable." (Defendant's brief,

p. 20). Defendant does not undermine Ms. Covin's description of him within hours after seeing him in her complex. Accordingly, Dr. Cole's expertise and attacks on police criteria are not material to Ms. Covin's initial description of Defendant.

Tammy Sheard approached officers at the scene where the body was found to inform them that she had seen the suspect leaving the area early that morning. (TT, pp. 1878-1879). She told officers that around 6:45 a.m. she saw a white man on Blakely and Swift Courts. Id. Ms. Sheard got on the city bus near her home and soon thereafter, saw the same man get on the same bus between Dewey Street and Clark Avenue. Id. He wanted a ride to the other side of town to the Monkey Palace, Defendant's place of employment. Ms. Sheard described the man's attire as acid wash jeans covered with red dirt, black boots with something silver going across the boot, black leather jacket, silver ring, and shoulder length hair. Id.

Defendant now claims that Ms. Sheard's identification was subjected to suggestive questioning by Investigator York about a potential beard, mustache and ring. (Defendant's brief, p. 26). The interview referenced by Defendant, however, occurred three months after the murder. Ms. Sheard's initial identification of Defendant and his very distinctive clothing, as set forth above, was given less than six hours after viewing him on two separate occasions, prior to television coverage and in response to "tell me what you know about this incident here." Dr. Cole's

expertise and attacks on police criteria are not material to Ms. Sheard's initial description of Defendant.

Moreover, trial counsel alleged at trial that Ms. Sheard's testimony had changed since her additional statement. On direct examination at trial, Ms. Sheard testified that Defendant was wearing a "blue like ring." (T. Tr. 1881). To refute this testimony, defense counsel elicited that Ms. Sheard had previously given a statement to the police in which she described the ring as a silver wedding band. Ms. Sheard testified that she may have described the ring as a silver wedding band, but she could not recall making that statement. (Tr. T. 1890-1892, 1905). Thus, defense counsel clearly elicited at both a pretrial hearing and at trial that Ms. Sheard had previously given a statement to the police that Defendant was wearing a silver wedding band in an attempt to impeach her testimony and call into question her description of Defendant. (9/23/97 Pre-trial Hearing, pp. 75, 78, 81-82, TT. 1890-1892, 1905).

Subsequently, in the extensive state habeas proceedings, Defendant raised the claim that trial counsel were ineffective in failing to establish that Ms. Sheard had been coached to describe the color of the ring Defendant was wearing when she saw him on the bus on the morning of the murder. However, the state habeas court held:

> Petitioner also claims that counsel were ineffective in failing to discover and utilize a memo written by an Assistant District Attorney

> regarding his August 24, 1997 interview with Tammy Sheard which Petitioner alleges would have established that Ms. Sheard had been coached to describe the color of the ring Petitioner was wearing on the bus the morning of the murder. (Pet. Ex. 56, HT 3593). **The court finds that, in light of counsels' reasonable cross-examination of Ms. Sheard attacking her description of Petitioner and his attire**, (PT 9/23/97, pp. 75, 78, 81-82, Tr. T. 1890- 1892, 1905), as counsel hired an expert to review the eyewitness identifications and attempted to call the expert at trial to show the alleged unreliability of eyewitness identifications, **and as Petitioner was identified by three other eyewitnesses, Petitioner failed to establish deficiency or prejudice as to this claim.**

(Attachment 2, pp. 35-36, see also p. 34) (emphasis added).

These eyewitnesses' identifications were corroborated further by Mary Ann Florido, who was a passenger on the second bus onto which Defendant transferred to connect to the west side of town. Ms. Florido gave a statement to police at 7:18 p.m. on March 24, 1994, approximately 12 hours after seeing Defendant. (Attachment 5, p. 3659). Ms. Florido told police she saw Defendant on the bus on which she was riding around 7:10 a.m. at the transfer station. Id. She sat down on the bus facing him. Id. She described him as wearing a black leather jacket, light colored, dirty blue jeans (like he had been "crawling in the dirt"), black boots with silver chains across them, gloves with the fingers cut out, and a turquoise and silver ring. (Attachment 5, pp. 3659-3660). She further estimated Defendant to be approximately five feet eight inches and approximately 140 pounds. Id.

Ms. Florido's trial testimony never wavered from the initial description she gave the police immediately following the murder. (11/7/97 Hearing, pp. 51-74; TT, pp. 1909-1935).

Dr. Cole did not challenge Ms. Florido's initial description of Defendant, but claimed that Ms. Florido's choosing Defendant from a book of mug shots was tainted because it only had people with last names from "I to J" and names were written on the back of the photos. (Defendant's brief, p. 24). Initially, the Court finds that Defendant has failed to show how the notebook was suggestive as he has not shown what photographs were in the book, how many photographs were in the book, whether Ms. Florido could see the names on the back of the photographs, whether she knew the name of Defendant, or whether every person in the book had a beard and mustache and looked identical to Defendant. Even Dr. Cole conceded that he had no idea if the photographs in the book looked similar to Defendant. (6/26/14, pp. 146-147).

Dr. Cole also found fault with the Assistant District Attorney showing Ms. Florido photos of Defendant prior to trial. However, as Ms. Florido described Defendant's attire, within hours of her viewing of him, including his distinctive fingerless gloves, boots with silver chains on them, and his silver and turquoise ring, Dr. Cole's concerns about the subsequent identifications are not material.

Mr. Emmitt Wheeler, a bus driver, spoke to police on the day of the murder. (Defendant's Exhibit 6). At that time, he told police that he picked up a white male around 6:45 and 7 a.m. in the Swift Court area. (Id.; TT, pp. 1939-1940). Mr. Wheeler described the man as having brown, shoulder length hair, dirty blue jeans, and a black top. Id. The white male asked Mr. Wheeler how much it cost to transfer to another bus and exited Mr. Wheeler's bus at the transfer station. Id. Subsequently, Mr. Wheeler identified Defendant from a photographic lineup. (Record on Appeal, pp. 438-439). In a follow up interview and at trial, Mr. Wheeler remained firm in his description and identification of Defendant. (TT , pp. 1938-1939).

Defendant alleges that an expert like Dr. Cole could have brought out the facts that: it was four months between the murder and Mr. Wheeler's identification of Defendant; the investigator interviewing Mr. Wheeler allegedly used "suggestive questioning" to steer Mr. Wheeler's description of Defendant's clothing; and that the six-subject photo array reviewed by Mr. Wheeler was not objective. (Defendant's brief, pp. 21-22). The record shows, however, trial counsel thoroughly and extensively cross-examined Mr. Wheeler about his prior statements to police, (TT, pp. 1946-1958), including the elapsed time from seeing Defendant until his identification months later (TT, pp. 1947-1948), and his description of Defendant's shoes, jacket and pants. (TT, p. 1956). Additionally,

trial counsel also cross-examined Mr. Wheeler about the length of time he took reviewing the six-subject photo-lineup. (TT, pp. 1956-1958).

Defendant asserts that a witness like Dr. Cole could have testified that the photo lineup was suggestive as: the other five men in the lineup did not resemble Defendant because they were older and heavier; one wore glasses; and the other five men did not have a confederate flag tattoo like Defendant. (Defendant's brief, p. 22). The record shows, however, that the six-subject photo lineup was tendered into evidence for the jury's review. (State's Exhibit 13). Accordingly, the jurors could clearly have made a determination on whether the six men resembled each other. Additionally, no one identified the suspect as having a tattoo, as they saw him wearing a black leather jacket, so Defendant's tattoo being visible in the lineup is not material.

Further, the identification of Defendant was corroborated by multiple sources and was not in a vacuum. Witnesses that knew Defendant testified that when Defendant left Fundamentals with Ms. Sizemore around 2:30 a.m., he was dressed, as he usually was, in a black leather jacket, blue jeans, boots with silver chains, and fingerless gloves. (TT, pp. 1813, 1829, 1840). Four eyewitnesses that did not know Defendant placed him at the scene of the body at four hours later at 6:30 a.m. They gave specific details of his unique clothing hours after the murder. These witnesses did not know Defendant, but their descriptions matched each other

and were almost identical to the witness descriptions from Fundamentals. Further, these witnesses described Defendant taking the bus back to the area of his home. Thereafter, Defendant's neighbor, Lee Libby, saw Defendant before 9:30 a.m. the morning following the murder and described Defendant as being dressed as described by the above witnesses. (Defendant's Exhibit 46, p. 2). Additionally, the description of this dress was so unique that, after it was reported on television what the suspect in the murder had been wearing from eyewitness descriptions, Ralph McDaniel, the owner of Fundamentals, called the police and identified Defendant as the possible suspect. (TT, p. 1814).

Defendant attempts to give some import to the fact that the eyewitnesses on the bus did not see him wearing leather chaps. Contrary to Defendant's arguments, however, Mr. Libby did not tell police that Defendant had on chaps the morning following the murder, but that he "normally" wore them. (See Defendant Exhibit 88 "normally wears"). Moreover, even if Defendant had been wearing chaps at the time he left the bar with Ms. Sizemore, he was within walking distance of his house and could have taken them to his house or hidden them to pick up before walking home from the bus stop, as he had to take the same route.[15] Thus, Mr.

---

[15] Witnesses testified that Defendant took the bus from Swift Court to the Monkey Palace, which was within walking distance of Defendant's home and the murder site was between the bus stop and the Monkey Palace.

Libby description does not undermine the solid, reliable eyewitness identifications of Defendant, which corroborate each other.

It is also noteworthy that, on direct appeal to the Georgia Supreme Court, Defendant alleged that the trial court abused its discretion by not allowing Dr. Brigham to testify as an expert on witness identification. The Georgia Supreme Court denied this claim holding:

> Johnson claims that the trial court erred by refusing to allow the testimony of a defense expert on eyewitness identification. After a hearing where the expert testified, the trial court ruled that "in exercising my discretion, [I] grant the motion to exclude this testimony because in the Court's opinion, **this information that would be provided by this witness is information that is within the knowledge of the jurors** and is not a proper subject for expert testimony under these circumstances." After reviewing the proposed testimony, we conclude that the trial court did not abuse its discretion in making this ruling. See Gardiner v. State, 264 Ga. 329 (5) (444 S.E.2d 300) (1994).

Johnson v. State, 271 Ga. at 382 (emphasis added). Not only is the information Defendant alleges Dr. Cole could impart within the keen of the jurors, it was also brought to the attention of the jury by defense counsel.

Further, this Court has previously reviewed these same identifications and found them reliable in denying Defendant's motion for new trial. (Record on Appeal, p. 1818). This Court held:

> In order to suppress eyewitness identification, there must be evidence of inherent unreliability or that the evidence was the result of police misconduct. The Defendant has failed to produce any evidence of any physical inability of any of the witnesses, such as vision problems,

> light conditions or time limitation. Likewise, there is no evidence of any police coercion or persuasion.
>
> Accordingly, this ground is without merit, and the Court herewith denies the Motion on this enumerated ground.

(Record on Appeal, pp. 1818-1819).

Moreover, on direct appeal, in rejecting Defendant's claim of misidentification of Defendant or the "unreliability" of these eyewitnesses, the Georgia Supreme Court specifically held:

> The procedure used for the pretrial identification of Johnson by the witnesses who saw him in east Albany near the body's location was not impermissibly suggestive, nor was there a substantial likelihood of misidentification. [] Only two witnesses were shown a photographic lineup and both picked Johnson as the man they saw. The police did not suggest an identification of Johnson with regard to either photo array, and Johnson's photo was not distinct from the others. The photo identifications were not improperly suggestive. [].
>
> In addition, viewing the totality of the circumstances, there was no substantial likelihood of misidentification with these four witnesses. The factors to be considered in determining whether an identification was reliable are: 1) the opportunity for the witness to view the defendant; 2) the degree of attention of the witness; 3) the accuracy of the prior description; 4) the witness's level of certainty; and 5) the length of time between the viewing and the identification. [] The record shows that these witnesses viewed Johnson from close range in daylight for an extended period of time. All four witnesses provided the police with descriptions of Johnson on March 24, 1994, the same day they saw him. Two of the witnesses said their attention was drawn to Johnson because it was rare to see a Caucasian in that neighborhood at that time of the morning, and his appearance was even more unusual because of his biker-style clothing. The witnesses gave similar descriptions of his clothing; in court, the two witnesses who sat across from Johnson on the two buses he rode identified his leather jacket, biker boots and turquoise ring. They all remembered

> that he was soiled with dirt or red clay. Two witnesses identified Johnson within 24 hours of seeing him, one witness picking him from a photo array and one witness recognizing him from a television news report (after providing police with his description). The bus driver picked Johnson out of a photo lineup five months after seeing him. The fourth witness did not make an identification of him until a court hearing several years later. All the witnesses were certain about their identification. We conclude
> that there was no substantial likelihood of misidentification and the identification testimony was properly admitted.

Johnson, 271 Ga. at 381 (emphasis added).

Also, at trial, trial counsel, in addition to attempting to impeach the witnesses' identifications of Defendant, also hired an expert, Dr. John Brigham, very early in their investigation to review the identifications made by the eyewitnesses and to testify on this matter. Counsel attempted to call Dr. Brigham as a witness at trial, but the trial court excluded his testimony. (TT, pp. 2564, 2575). In the instant case, as set forth above, Defendant has now presented the testimony of Dr. Cole to testify to the possibility of misidentification of eyewitnesses. A review of his testimony establishes that testimony like Dr. Cole's is not material, is cumulative and would largely serve only as impeachment. Thus, testimony like that of Dr. Cole's does not meet the Timberlake standard.

First, Dr. Cole's testimony that the witnesses were mistaken in their identifications of Defendant would serve only to impeach testimony from trial. The law is clear, however, that "a new trial will not be granted if the only effect of

the evidence will be to impeach the credit of a witness." Timberlake, 246 Ga. at 491.

Further, in addition to the irrelevancy of Dr. Cole's testimony as set forth above, his testimony and theories are not material under the Timberlake standard. In the proceedings before this Court, Dr. Cole testified that the misidentification of witnesses has to be assessed based on proximity, lighting, the passage of time, the affect of stress or violence, and cross-racial issues. (6/26/14 Hearing, pp. 80-82). These factors are similar to the legal factors reviewed by the Georgia Supreme Court in concluded that the identifications were reliable. Moreover, Dr. Cole had to concede that with all the witnesses they accurately described Defendant's very distinctive dress, as well as his size, weight and hair color within hours after the murder. (6/26/14 Hearing, p. 136 (Sheard), pp. 140-141 (Covin), pp. 143-144 (Florido), pp. 147-148 (Wheeler). As to lighting and proximity, Ms. Sheard and Ms. Covin were sitting on the bus with Defendant. (6/26/14, p. 148). Mr. Wheeler spoke with Defendant about transfers and fares as Defendant boarded the bus. Id. Dr. Cole conceded all three witnesses were close to Defendant. Further, as found by the Georgia Supreme Court, "[t]he record shows that these witnesses viewed Johnson from close range in daylight for an extended period of time." Johnson, 271 Ga. at 38. As to age, which Dr. Cole also said could affect identifications, the witnesses were of all ages. (6/26/14 Hearing, p. 149 (Covin

(40), Sheard (26), Florido (33), Wheeler (56)). Accordingly, Dr. Cole conceded age was not an issue. (6/26/114, p. 149). Dr. Cole also conceded that neither stress nor violence was an issue. (6/26/14, pp. 149-150). Finally, as to cross-racial issues which Dr. Cole stated could also lead to misidentification, Dr. Cole conceded that there was "no overt racial language." (6/26/14, pp. 150-151). Dr. Cole's testimony is largely not material under Timberlake.

2. Jury Instruction Is Not Retroactive

Defendant also argues that if the jury had not been given the pattern jury instruction on eyewitness identification, which, at the time, instructed the jurors that they may consider a witness's level of certainty in his or her identification in assessing the reliability of the identification, the outcome of his trial or sentencing would have been different. In Brodes v. State, 279 Ga. 435 (2005), the Georgia Supreme Court advised that giving this instruction could be harmful error; however, the Court later made it clear that this analysis did not apply retroactively. Chatman v. Brown, 291 Ga. 785 (2012). Additionally, the Court finds that, even if this charge was not given, in light of the solid and multi-corroborated identifications of Defendant as well as other evidence supporting his guilt, there is no reasonable probability of a different outcome.

G. Additional Request For DNA Testing

Following the conclusion of the evidentiary hearing, Defendant again requested additional DNA testing on items from Ms. Sizemore's car: hairs and latent prints. On August 22, 2013, this Court denied Defendant's request for DNA testing of these latent print cards and further testing on additional hairs as the Court properly concluded that such testing would not meet the standards set out in O.C.G.A. § 5-5-41(c).

As to testing additional hairs from a clump of hair from the backseat of the vehicle Ms. Sizemore had possession of for less than a month, the Court held:

> A clump of hair was found in the back of the vehicle in which the victim's body was found. Defendant requested DNA testing of those hairs on September 27, 2011. The clump of hairs was sent to Bode Laboratories for testing. Upon receipt of these hairs, Bode Laboratories determined that 17 hairs with intact roots were suitable for nuclear DNA analysis. Out of those 17 hairs, the five best hairs for testing, as determined by the Bode scientists, were processed further. No male DNA was detected in any of the samples. Based on that finding from those five hairs, additional testing was not recommended. (4/11/13 Hearing, p. 166). In his May 9, 2013 motion, Defendant requests STR and/or YSTR DNA testing to be conducted on the remaining 12 hairs. The Court denies this motion.
>
> The Court notes that the additional 12 hairs were part of a clump of hair, which included the previously tested five hairs, located in the back floorboard of a large and unclean vehicle. (4/11/13 hearing, p. 101; Record on Appeal, p. 1580). Evidence established that the victim only had possession of the vehicle for a short period of time and her body was in the front seat of the vehicle. There were no hairs found on the victim's body or in the victim's hands. Further, the clump of hair also contained animal hairs and fibers, (id.), indicating

> it was random debris in the vehicle having little or no probative value to the murder.
>
> The record also establishes that the hair clump was examined prior to trial and it was determined that it was "possibly Negroid hair." Johnson v. State, 271 Ga. at 380; 4/11/13 hearing, p. 102. Defendant's expert testified to this Court that the hairs being in a clump suggested that they came from one source. (4/11/13 hearing, p. 102). It is uncontested that the man leaving the area where the body was discovered was a Caucasian male with sandy blonde hair. (Trial Transcript, pp. 1858-1859, 1878-1879, 1885, 1894).
>
> O.C.G.A. § 5-5-41(c)(3)(D) requires that "the requested DNA testing would raise a reasonable probability that the Defendant would have been acquitted if the results of the DNA testing had been available at the time of the conviction, in light of all the evidence in the case." This Court finds that, even if additional hairs from this clump of hair are tested and a usable DNA profile established, it would not meet the mandates of O.C.G.A. § 5-5-41(c)(3)(D).

(8/23/13 Order, pp. 1-3).

> As to the latent prints, this Court held:
>
> Defendant also requests that the 38 latent fingerprints, which were taken from inside and outside the vehicle, be tested for touch DNA. As testified to by the experts, there was no way to determine how long the fingerprints had been on the vehicle. (4/11/13 hearing, pp. 31, 39). Again, the victim only had possession of the car for less than a month. Additionally, numerous people could have touched the outside of the car. Even if additional prints are tested for DNA and a usable profile developed, this Court finds that Defendant could not meet the mandates of O.C.G.A. § 5-5-41(c)(3)(D).

The facts and the legal analysis remain unchanged. The fact that someone else had touched the outside or interior of Ms. Sizemore's vehicle or the fact that someone left hair, which included dog hair in a clump, in the backseat of a very

dirty vehicle, which the victim owned for less than a month, does not make these prints or the DNA obtained from these prints or hair exculpatory or material. This type of evidence does not meet the Timberlake standard.

CONCLUSION

Defendant has presented evidence to this Court by way of live testimony, affidavit and extensive testing; however, the record in this case establishes that Defendant failed to establish the six requirements of Timberlake as to any of his evidence, singularly or in the aggregate.

The Georgia Supreme court has held that "extraordinary motions for a new trial are not favored, and a stricter rule is applied to an extraordinary motion for a new trial based on the ground of newly available evidence than to an ordinary motion on that ground." Wallace v. State, 205 Ga. 751(2). Accord, Music v. State, 244 Ga. 832, 833 (1979). Defendant has had several hearings to present his evidence, and he has submitted newly acquired testimony to attempt to support various hypothetical scenarios of the events surrounding Ms. Sizemore's murder. Defendant had extensive discovery in his state habeas hearing and the hearings before this Court, yet he has failed to present any exculpatory evidence. His argument and evidence are the same as those presented at trial. Thus, he has failed to present any newly discovered, admissible evidence, that is not cumulative, and that is so material that it would probably produce a different result at trial.

The United States Supreme Court has noted that the "State and the victims of crime have an important interest in the timely enforcement of a sentence." Hill v. McDonough, 547 U.S. 573, 584 (2006). This is especially significant in light of the fact that Defendant's crime occurred in 1994. Accordingly, Defendant's extraordinary motion for new trial is denied.

SO ORDERED, this 20th day of April, 2015.

Chief Judge Willie E. Lockette
Dougherty County Superior Court

Prepared by:
Gregory Edwards
District Attorney, Dougherty County