IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
v.	)	**Case No. SU-75-CR-38335**
	)	
JOHNNY LEE GATES,	)	
Defendant.	)	
	)	

AMENDED EXTRAORDINARY MOTION FOR NEW TRIAL

Defendant Johnny Lee Gates hereby amends his Extraordinary Motion for New Trial and respectfully requests that this Court grant him a new trial pursuant to O.C.G.A. § 5-5-41, the United States Constitution, the Georgia Constitution, and corresponding case law. This Motion supersedes Gates's prior motions for new trial filed between 2010 and 2015. Gates is prepared to present evidence on the claims included in this Motion at the January 8, 2018 hearing or at a subsequent hearing set by the Court. In support of this Amended Motion, counsel states:

Newly discovered evidence establishes that in the 1970s, the Assistant District Attorneys who prosecuted Gates engaged in a systematic practice of race discrimination in Muscogee County capital cases involving black defendants. The prosecutors used peremptory strikes to exclude all black qualified prospective jurors from such cases as a matter of policy, thereby ensuring that black defendants, including Gates, were tried by all-white juries. This was

unconstitutional at the time of Gates's trial under Swain v. Alabama, 380 U.S. 202 (1965), and remains unconstitutional today.

In addition, the State suppressed material information prior to Gates's trial in violation of Brady v. Maryland, 373 U.S. 83 (1963). Newly discovered evidence reveals that before videotaping Gates's confession at the crime scene, officers from the Columbus Police Department conducted an off-camera, preliminary walk-through with Gates, leading him through the scene of the crime. This evidence would have undermined the prosecution's fingerprint evidence, which hinged on the notion that the only time Gates could have left a fingerprint was on the day of the offense. It also would have undercut the prosecution's argument that Gates must have been the perpetrator because his videotaped confession reflected familiarity with the scene of the offense.

The State also destroyed exculpatory evidence in Gates's case despite having a constitutional duty to preserve it. See Arizona v. Youngblood, 488 U.S. 51, 55 (1988). The destroyed evidence included Type B blood found on a door next to the deceased victim at the crime scene, which was clearly exculpatory because the State was aware that both Gates and the decedent had Type O blood. The Type B blood indicates that a person other than Gates engaged in a struggle with the decedent and committed the offense.

Finally, in 2015, two interns from the Georgia Innocence Project located several items of physical evidence in the District Attorney's files, including the white bathrobe belt and black necktie used to bind the victim's hands. Those items are being tested and analyzed for DNA using newly available technologies of contact DNA testing, MVAC collection, and probabilistic genotyping. Upon receipt of results, Gates will supplement this motion with any claims relevant to the DNA testing.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On November 30, 1976, Katharina Wright, a 19-year-old white woman, was sexually assaulted and shot to death in her Columbus apartment. She was found near her bedroom door, bound with black military neckties and a white bathrobe belt. T. 274-77.[1] Officers from the Columbus Police Department responded to the scene and collected evidence. They searched for fingerprints but did not find any prints of value. T. 266. However, they found a "relatively large spot of smeared blood" on the bedroom door, next to where the body was found. Supplementary Police Report of Hicks (Dec. 15, 1976). A sample taken from the smear was determined to be Type B blood. GBI Crime Laboratory Official Report (Feb. 3, 1977) (p. 2, item 29). This is significant because Katharina Wright had Type O blood. T. 290. Thus, the Type B blood likely belonged to the perpetrator.

[1] "T. __" refers to the designated page of the transcript from Gates's 1977 trial.

The following day, a 19-year-old white man named Lester Sanders was discovered "fondling the body of Wright as it lay in the coffin" at a funeral home. Supplementary Police Report of Ronald Lynn (Dec. 3, 1976). Sanders was arrested by police and confessed to following Wright home, knocking on her door, tying her to her bedroom door, and shooting her in the temple. Supplementary Police Report of Hillhouse, Hicks and Myles (Dec. 13, 1976). At Sanders's preliminary hearing, officers testified that Sanders revealed information to them about the crime scene that was previously unknown to the police. Transcript of Lester Sanders Preliminary Hearing at 4-5 (Dec. 10, 1976). However, Assistant District Attorney William Smith asked the grand jury not to indict Sanders, and the grand jury obliged. T. 228; Carl Cannon, Slaying of German Girl Regains Mystery Status, Columbus Ledger Enquirer at B1 (Jan. 6, 1977).

On January 29, 1977, based on allegations by two young men facing criminal charges unrelated to Wright's murder, the Columbus Police arrested and questioned Johnny Lee Gates, a 21-year-old black man with an IQ of roughly 65. T. 392-97; Supplementary Police Report of Hillhouse, Lynn, Myles, Rowe and Hicks (Jan. 31, 1977); Supplementary Police Report of Lynn at 1-2 (Jan. 30, 1977). An officer ultimately typed up a confession for Gates. T. 395-96, 412-13. No officer ever read the typed confession out loud to Gates. T. 412. Instead, an officer handed the typewritten document to Gates, and Gates looked at the pages

and signed the document that the officer had written. T. 395-96, 412-13. Officers then took Gates to the crime scene for a videotaped confession. T. 415-16. In his confessions, Gates stated that:

- He went to the apartment and told the woman who answered the door that he was from the gas company, T. 399;
- The woman said she had called the gas company earlier, and she invited him in, T. 399;
- The woman handed him a can of oil, and he began working on the heater, T. 400;
- He told the woman that he was robbing her and wanted money, and she responded by offering him sex since she had no money to give him, T. 400;
- After having intercourse with the woman, he demanded money again, and she gave him some money, T. 400;
- He bound and gagged the woman on the bed and was about to leave when she told him that she would identify him, T. 400;
- He shot the woman on the bed and fled the apartment, T. 400.

As this Court has noted, the videotaped confession was not consistent with the crime scene. See Transcript of Hearing at 44 (Oct. 8, 2002) (Honorable John D. Allen) ("I can show you something right now in these [crime scene] photographs that contradicts what was said on [Gates's] confession."). But the prosecution later argued at trial that Gates's familiarity with the apartment, as displayed in the video, demonstrated that his confession was authentic and accurate. See T. 499-500.

Although Gates's fingerprints were not found in the apartment on the day of the offense, the police claimed to have discovered a key fingerprint just one hour after Gates gave his videotaped confession in the apartment. T. 438-41.[2] That print matched Gates and was used against him at trial. T. 454. The police explained the unnatural durability of the fingerprint by suggesting that since Gates had stated in his confession that he had handled an oil can while fixing the heater for the victim, the oil from the can must have caused the fingerprint to harden, such that the print could be lifted more than two months later. T. 456-58.

Undersigned counsel recently have discovered that the videotaped confession was not the first time the officers from the Columbus Police Department walked Gates through the crime scene. Officers led Gates through the apartment for an off-camera walk-through prior to taping the confession. This fact, which was suppressed for forty years, suggests that Gates left his fingerprint at the scene during his off-camera prior walk-through, not during the crime. It also suggests that Gates's familiarity with the apartment was attributable to the prior walk-through, not his recollections of the crime. See Claim II (alleging that the State's suppression of evidence was unconstitutional under Brady v. Maryland, 373 U.S. 83 (1963)).

[2] Fingerprint technician Eddie Florence testified that he was summoned to the apartment on January 31, 1977, two months after the offense, and the detective on the case showed him exactly where to look for fingerprints. T. 454.

After securing Gates's videotaped confession and the new fingerprint, the police conducted a line-up identification procedure with Donald Hudgins, who lived in the same apartment complex as the victim. T. 309-17. Hudgins had informed the police two months earlier that a man had come to his apartment on the day of the crime and sought entry by saying he was from the gas company. T. 311, 314. Hudgins had described the man who came to his door as 5'9" or 5'10" and approximately 170 pounds. Supplementary Police Report of Reynolds (Dec. 1, 1976). Yet at the line-up, Hudgins identified Gates, who was 5'5" and 133 pounds at the time. T. 317, 320; Supplementary Police Report of Hillhouse, Lynn, Myles, Rowe and Hicks at 2 (Jan. 31, 1977). Undersigned counsel have recently discovered that Hudgins saw Gates with the police at the apartment on the same day the police asked Hudgins to identify Gates, immediately before the identification. This fact undermines the reliability of Hudgins's identification.

Gates went to trial on August 30, 1977. Prosecutors William Smith and Douglas Pullen used peremptory strikes to exclude all four black qualified prospective jurors from Gates's venire. Undersigned counsel have discovered recently that the striking of black prospective jurors by Smith and Pullen was not a coincidence, but part of broader pattern of race discrimination. See Claim I (alleging that the systematic discrimination against black prospective jurors was unconstitutional under Swain v. Alabama, 380 U.S. 202 (1965)).

Having secured an all-white jury, the prosecution built its case on three pillars: Gates's confessions, T. 491-502, Gates's fingerprint found two months after the offense, T. 502-06, and Hudgins's identification of Gates as the man who sought entry into his apartment on the day of the crime, T. 487-91. Based on this evidence, Gates was convicted and sentenced to death. T. 547, 614-19.

Gates's conviction was upheld on direct appeal, Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied Gates v. Georgia, 455 U.S. 938 (1980), and he unsuccessfully sought habeas corpus relief in state and federal court, Gates v. Zant, 863 F.2d 1492 (11th Cir. 1989); rehearing denied Gates v. Zant, 880 F.2d 293 (11th Cir. 1989), cert. denied Gates v. Zant, 493 U.S. 945 (1989). In 1992, a state habeas court found in response to a successive habeas petition that Gates was entitled to a trial to determine whether he is intellectually disabled and therefore ineligible for the death penalty. In 2003, on the seventh day of the intellectual disability trial, this Court declared a mistrial based on improper testimony elicited by the prosecution. Later the same day, the State and Gates agreed to remove the possibility of a death sentence in exchange for the imposition of a sentence of life without the possibility of parole—a sentence that otherwise would have been barred because at the time of the offense, murder carried a life sentence with parole eligibility. See Settlement, Agreement, and Waiver (Nov. 12, 2003).

Meanwhile, the State had destroyed critical evidence from the case. This included the Type B blood sample taken from the bedroom door, near where the body of the victim was found. GBI Crime Laboratory Official Report at 2, item 29 (Feb. 3, 1977).[3] As noted above, the victim had Type O blood. T. 290. Gates also had Type O blood. See Correspondence from Aubrey Walker, Dept. of Corrections, to William Smith (May 31, 1977). Therefore, Gates was not a match with the blood stain found next to the victim's body, which further suggests that he was not the perpetrator. Yet despite the exculpatory nature of the blood evidence, the State destroyed it less than two years after Gates's 1977 trial. See Claim III (alleging that the State's destruction of exculpatory evidence was unconstitutional under Arizona v. Youngblood, 488 U.S. 51 (1988)).

In addition, the State represented for decades that all of the physical evidence from Gates's case had been destroyed, but that was not accurate. In

[3] Additional evidence destroyed by the State includes (1) two semen slides collected from the victim's cervix and vagina during a sexual assault examination, which were not typed; (2) the bathrobe the victim was wearing, which was positioned underneath her body when she was found and contained seminal stains; (3) numerous Caucasian hairs collected from the victim and the crime scene, which could not belong to Gates; and (4) the heater covers from the apartment containing Gates's fingerprints, which were never tested for the presence of oil. Other items of evidence, including blood samples and the bullet extracted from the victim, were destroyed in 1992 and 1998. Gates was not informed of the State's intent to destroy any of this evidence until after the evidence was destroyed. See Record of Evidence Received by the Crime Laboratory at 48-54, 74-76 (Dec. 1, 1976); Transcript of Evidentiary Hearing at 48-54, 74-76 (Nov. 8, 2002) (Testimony of B. Blankenship and J. Claassens).

2015, two interns from the Georgia Innocence Project located several items of physical evidence in the District Attorney's files—specifically, a black necktie and a white bathrobe belt that were taken from the victim's wrists. See Defendant's Amended Extraordinary Motion for Post-Conviction DNA Testing and for a New Trial (Aug. 18, 2015). Those items have been submitted to the Georgia Bureau of Investigation and now to a defense expert for DNA testing. See Claim IV (explaining the status of the DNA claim).

Between 2010 and 2015, Gates filed multiple hand-written Extraordinary Motions for New Trial from prison. On August 8, 2015, on behalf of Gates, attorneys from the Georgia Innocence Project filed an Amended Extraordinary Motion for Post-Conviction DNA Testing and For a New Trial.[4] On August 27, 2015, this Court granted a hearing on all pending motions. That hearing was scheduled for November 7, 2017.

In October 2017, undersigned counsel and the State requested that this Court convert the November 7, 2017 hearing to a scheduling hearing because the parties were exploring the possibility of resolving the case through settlement. On

[4] The instant Amended Extraordinary Motion for New Trial, filed today, supersedes all previous Extraordinary Motions for New Trial filed, including the August 8, 2015 motion filed by the Georgia Innocence Project, as well as all of Gates's pro se motions, including those filed on October 20, 2010; April 15, 2011; February 3, 2012; May 24, 2012; June 12, 2012; November 13, 2012; May 27, 2014; June 27, 2014; and January 26, 2015.

November 7, 2017, this Court set a briefing schedule for the defense to file its pleadings, and the State to respond. A hearing on this matter is currently scheduled for January 8, 2018.

ARGUMENT

I. GATES IS ENTITLED TO A NEW TRIAL BECAUSE THE STATE ENGAGED IN SYSTEMATIC RACE DISCRIMINATION IN JURY SELECTION IN THIS CASE AND OTHER CAPITAL CASES FROM 1976 THROUGH 1979.

Newly discovered evidence demonstrates that the prosecutors who tried Gates, Douglas Pullen and William Smith, engaged in systematic race discrimination in capital cases involving black defendants in Muscogee County, including during Gates's 1977 trial. From 1976 to 1979, Pullen and Smith prosecuted black defendants in seven capital cases in Muscogee County. They used peremptory strikes to exclude qualified black prospective jurors as a matter of policy, thereby ensuring that the black defendants, including Gates, were tried by all-white juries. The prosecutors then capitalized on their racial discrimination in jury selection by appealing to racial prejudice in their closing arguments. The discriminatory policy employed by the State at Gates's trial violated the Fourteenth Amendment to the United States Constitution, the Georgia Constitution, and corresponding case law. See Strauder v. West Virginia, 100 U.S. 303 (1880); Swain v. Alabama, 380 U.S. 202 (1965); see also Foster v. Chatman, 136 S. Ct.

1737 (2016). The discrimination was materially harmful to Gates, as well as to the community and the integrity of the judicial system.

A. Gates Has Discovered Evidence Of Race Discrimination That Was Not Previously Available.

The evidence of racial discrimination is extensive and undeniable. Evidence not previously available to Gates includes (1) the record and decision in Foster v. Chatman, 136 S. Ct. 1737 (2016), in which the United States Supreme Court found that Pullen engaged in similar discrimination during jury selection in the case of a black capital defendant in Rome, Georgia in 1987; (2) Chattahoochee County jury selection notes created by Pullen that reflect a sharp focus on the race of prospective jurors; (3) records documenting the prosecutors' racial discrimination in Muscogee County from 1976 to 1979; and (4) accounts of former Muscogee County District Attorney employees with knowledge of the intentional racial discrimination employed in jury selection. Gates is prepared to present the above-listed evidence in support of his race discrimination claim at the January 8, 2018 hearing or at another hearing set by the Court.

1. The Supreme Court Held in Foster v. Chatman in 2016 That Douglas Pullen, Who Also Prosecuted Gates's Case, Engaged in Blatant Race Discrimination in Jury Selection in a Case Tried Ten Years After Gates's Case.

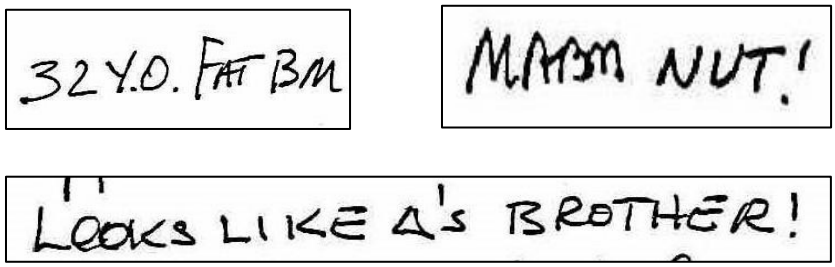
In Foster, the United States Supreme Court held in 2016 that Pullen discriminated on the basis of race when he struck all four black prospective jurors

from a black defendant's 1987 capital trial in Rome, Georgia. The State's Foster voir dire notes show that the prosecution used green marker to highlight the names of the black prospective jurors on their juror questionnaires and placed a "B" next to the black jurors' names, in order to identify them by race. Id. at 1744. The United States Supreme Court found that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury." Id. at 1755. The fact that Pullen has been found by the Supreme Court to have engaged in race discrimination elsewhere supports a finding of discriminatory intent in this case. See Horton v. Zant, 941 F.2d 1449, 1455 (11th Cir. 1991) (explaining when addressing a pre-Batson claim of jury discrimination that "we can infer the prosecutor's intent from the prosecutor's past allegedly discriminatory actions.").

The Supreme Court's decision in Foster came twenty-nine years after the trial in the case. Although the State argued to various courts that the race discrimination claim was barred because it had been litigated previously, the claim was ultimately adjudicated in Foster because it was based on new evidence—specifically, the prosecutors' notes. Id. at 1745-47.

2. Gates Has Discovered That Pullen and Other Muscogee County Prosecutors Routinely Created Jury Selection Notes Similar to the Discriminatory Notes That Formed the Basis of the Supreme Court's Decision in Foster.

Newly discovered evidence demonstrates that Pullen's racially discriminatory jury selection practices, which were exposed in Foster, infected the Muscogee County criminal justice system for years, including in Gates's case.[5] Newly discovered jury selection notes created by Pullen during voir dire in other capital cases are similar in substance to the notes at issue in Foster. Like the notes in Foster, the newly discovered notes reflect a sharp focus on the race of the prospective jurors, including the race-based designation "B" for black prospective jurors. For example, Pullen's notes from one death penalty case include the following designations for black prospective jurors:



[5] Along with this motion, Gates is filing a discovery motion requesting that this Court compel the Muscogee County District Attorney's Office to comply with Georgia's Open Records Act and produce all other jury selection material from its Muscogee County death penalty cases involving black defendants from 1976 to 1979. This information is necessary to properly litigate Gates's racial discrimination claim.

The newly discovered notes establish that Foster was not an aberration, but instead a pattern of racial discrimination by the State in jury selection in capital cases.

3. Records Now Available Demonstrate that Pullen and William Smith, Who Prosecuted Gates Together, Repeatedly Struck All Qualified Black Prospective Jurors to Ensure All-White Juries in Capital Cases Involving Black Defendants in the Late 1970s.

Records document the prosecutors' discriminatory policy in action from 1976 to 1979. During that time, the State brought seven capital cases against black defendants in Muscogee County, including against Gates. Either Pullen or Smith, or both, were involved in prosecuting each case. Across those seven cases, the State struck a total of forty black prospective jurors, including all four black qualified prospective jurors in Gates's trial. In six of the capital trials, including Gates's trial, the prosecutors used peremptory strikes to remove every black qualified prospective juror. Each of those six black men was tried and convicted by an all-white jury. The seventh capital case contained a single black alternate juror, whom the prosecution was unable to strike because the alternate pool had more black prospective jurors than the prosecution had strikes. The cases and strikes are set forth on the following page:

Muscogee County Capital Cases Involving Black Defendants, 1976-1979

Case	Prosecutors on case	Qualified jurors called	Jurors struck by prosecution	Qualified black jurors called	Black jurors struck by prosecution	Black jurors on jury
Joseph Mulligan (1976)	Pullen Whisnant	42	8	4	4	0
Jerome Bowden (1976)	Pullen Whisnant	31	11	8	8	0
Johnny Lee Gates (1977)	Pullen Smith	47	12	4	4	0
William Brooks (1977)	Smith Whisnant	46	11	5	5	0
Jimmy Lee Graves (1977)	Pullen Whisnant	46	11	4	4	0
William Spicer Lewis (1979)	Pullen Smith	42	10	6	6	0
William Henry Hance (1978)	Smith Conger	38	11	12	9	1

The prosecutors' racial discrimination led to the near-total exclusion of black citizens on juries in capital cases with black defendants, which is particularly striking since 27.5% of the people living in Muscogee County in 1977 were black. See Br. for Pet. at 7 n.3, Gates v. Zant, No. 87-8870, 11th Cir. (filed Mar. 8, 1988) (discussing the black population percentage in Muscogee County in 1974 to 1977).[6]

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[6] At the status hearing on November 7, 2017, the State suggested that this Court should bar Gates from pursuing the race discrimination claim in his not-yet-filed Amended Extraordinary Motion for New Trial because a race discrimination claim concerning the jury pool had already been litigated in state and federal habeas. This Court should reject that argument.

As this Court can now see, Gates's current claim is different from the claim Gates litigated in state and federal habeas. The current claim challenges the District Attorney's use of peremptory strikes in capital cases involving black defendants in Muscogee County from 1976-1979, including the striking of all four black prospective qualified jurors in Gates's case, in violation of Swain v. Alabama, 380 U.S. 202 (1965). As Assistant District Attorney Lewis pointed out at the November 7, 2017 hearing, the previously litigated claim concerned a different subject matter that he defined as "discrimination in the jury pool," Transcript of Status Conference at 13 (Nov. 7, 2017), "discrimination in the selection of the jury pool," id., "the selection of the jury pool," id., and "[w]hether there was racial discrimination in the selection of the jury venire," id. at 29.

Indeed, Gates previously litigated a claim concerning underrepresentation of black citizens and women in the jury pool. See Br. for Pet. at 1, Gates v. Zant, No. 87-8870, 11th Cir. (filed Mar. 8, 1988) (defining the claim as "[w]hether Petitioner was deprived of his Sixth and Fourteenth Amendment rights to a nondiscriminatory petit jury pool where the record clearly shows systematic underrepresentation of blacks and establishes cause and prejudice excusing the procedural default of this claim"); id. at 21 (describing Gates's challenge to the jury pool and stating that "at the time of Petitioner's trial, the Muscogee County jury selection system operated in a non-random manner and substantially underrepresented black and female citizens of the county"); Gates v. Zant, 863 F.2d 1492, 1497 (11th Cir. 1989) ("At issue is [Gates's trial lawyer's] failure to

After securing all-white juries, the prosecutors capitalized on their racial discrimination by appealing to racial prejudice in their closing arguments. For example, in his closing argument in Gates's case, Smith argued to the jury that Gates's confession stating he had consensual sex with the victim belied "common sense" and "God-given logic" because the victim was a white woman and Gates was a black man. T. 510. In capital defendant Jerome Bowden's 1976 death penalty sentencing, Pullen referred to Bowden as a "wild beast" and implored the jury to preserve "this great nation . . . from this man and his like." Transcript of Prosecution Sentencing Argument at 6-11, State v. Bowden, Indictment No. 37693 (Dec. 9, 1976).

These arguments further confirm the prosecutor's discriminatory intent in striking prospective black jurors. Significantly, two of the United States Supreme Court's most recent cases on race discrimination and jury selection—Foster and Snyder v. Louisiana, 552 U.S. 472 (2008)—involved prosecutors making similar appeals to racial prejudice in closing argument. See Brief of Petitioner at 22, Foster, 136 S. Ct. 1737 (2016) (discussing the prosecutor's closing argument at the penalty phase, in which he argued that death would "deter other people out there in

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raise the challenge that blacks and women were unconstitutionally underrepresented on the petit jury venire.").

Because the claims are different, this Court should reject the State's argument and permit Gates to proceed on the race claim included in this Extraordinary Motion for New Trial.

the projects from doing the same again," as indicative of the prosecutor's discriminatory intent in striking black jurors where more than 90 percent of the units in the local housing projects were occupied by black families); Brief of Petitioner at 16-17, 39-45, Snyder, 552 U.S. 472 (2008) (discussing the prosecutor's closing argument, in which he compared the defendant to O.J. Simpson, as indicative of the prosecutor's discriminatory intent in striking black jurors).

4. Former Employees of the Muscogee County District Attorney's Office Confirm That Pullen and Smith's Discriminatory Practice of Striking Black Prospective Jurors in Capital Cases Involving Black Defendants was Deliberate and Intentional.

The Muscogee County District Attorney's racially discriminatory practice of striking black prospective jurors was not a coincidence. Instead, former employees of the Muscogee County District Attorney's Office confirm the strikes were intentional and the product of a deliberate attempt to obtain all-white juries in cases involving black defendants.

B. The New Evidence of Discrimination Entitles Gates to a New Trial.

As the State concedes, it was unconstitutional for the prosecution to strike prospective jurors on the basis of race at the time of Gates's trial. At the November 7, 2017 hearing, Assistant District Attorney Fredrick Lewis stated, "It

was against the law [at the time of Gates's trial] to racially discriminate based on strikes . . . ." See Transcript of Status Conference at 33 (Nov. 7, 2017).

Indeed, the discrimination employed by the State at Gates's trial violates the Fourteenth Amendment to the United States Constitution, the Georgia Constitution, and Georgia case law. The United States and Georgia Constitutions prohibit the exclusion of black citizens from jury service on the basis of race, as they did in 1977. See Strauder v. West Virginia, 100 U.S. 303 (1880); Swain v. Alabama, 380 U.S. 202 (1965); see also Foster v. Chatman, 136 S. Ct. 1737 (2016). This prohibition applies both to state laws and to policies adopted by state officers. Norris v. Alabama, 294 U.S. 587, 589 (1935). A criminal defendant convicted by a jury selected under a racially exclusionary law or policy has the right to a new trial. Peters v. Kiff, 407 U.S. 493, 505 (1972).

Because race discrimination in jury selection undermines the integrity of the entire trial, courts have long viewed such discrimination as a structural error requiring automatic reversal. See Horton v. Zant, 941 F.2d 1449, 1453-60 (11th Cir. 1991) (reversing a capital defendant's conviction and granting a retrial in a pre-Batson case after finding a Swain violation, without requiring the defense to prove prejudice); see also Order Granting Writ of Habeas Corpus, Foster v. Chatman, No. 1989-V-2275, Superior Court Butts County (filed Oct. 20, 2016) (setting aside Foster's capital conviction, without requiring the defense to prove

prejudice). Therefore, the strength of the State's case against Gates is irrelevant to the jury discrimination claim.

In addition to materially harming Gates, the discrimination inflicted was harmful to the community and the integrity of the judicial system. See Miller-El v. Dretke, 545 U.S. 231, 238 (2005) (discussing how discrimination in jury selection "casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial") (quoting Powers v. Ohio, 499 U.S. 400, 412 (1991)); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 140 (1994) (discussing how jury discrimination "causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded"); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 62 (1991) ("Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."); Powers v. Ohio, 499 U.S. 400, 412 (1991) (discussing how discrimination by prosecutors "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); Batson v. Kentucky, 476 U.S. 79, 87 (1986) (finding race discrimination against jurors "harms not only the accused whose life or liberty they are summoned to try," but also "the excluded juror" and "the entire community," because "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the

fairness of our system of justice"); Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (finding discrimination against racial minorities is "an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others").

More than forty years after the trial in this case, the State of Georgia is still incarcerating Gates based on a process defined by race discrimination. That fact undermines the integrity of the criminal justice system. Put simply, the State's systematic practice of race discrimination was unconstitutional at the time of Gates's trial. It is unconstitutional today. Accordingly, Gates is entitled to a new trial.

II. GATES IS ENTITLED TO A NEW TRIAL BECAUSE THE STATE SUPPRESSED EVIDENCE THAT POLICE OFFICERS WALKED GATES THROUGH THE CRIME SCENE PRIOR TO HIS VIDEOTAPED CONFESSION, WHICH UNDERMINES BOTH THE CONFESSION AND OTHER EVIDENCE IN THE CASE.

Newly discovered evidence demonstrates that prior to trial, the State suppressed favorable information in violation of Brady v. Maryland, 373 U.S. 83 (1963). Undersigned counsel recently discovered that before videotaping Gates's confession at the crime scene, officers from the Columbus Police Department conducted an off-camera, preliminary walk-through with Gates, leading him through the scene of the crime. This evidence would have undermined the validity

of Gates's videotape confession and the significance of the fingerprint evidence taken from the crime scene.

The State is required to produce any information favorable to the defense that is material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963). Suppression of favorable evidence violates due process, irrespective of the good faith or bad faith of the prosecution. Id.

A. The State Suppressed Evidence That Officers from the Columbus Police Department Walked Gates Through the Crime Scene Prior to the Gates's Videotaped Confession.

Muscogee County police officers authored police reports detailing every aspect of Gates's videotaped confession. However, none of the police reports disclosed that the police had taken Gates on an off-camera, preliminary walk-through before the videotaped confession was made.

At trial, Detective C. E. Hillhouse testified that, to his knowledge, no other officers conducted a preliminary off-camera walk-through of the apartment with Gates. T. 428-29. Hillhouse testified that from 1:30 pm to 4:00 pm on the date of the videotaped interview, Gates was in the detective office. T. 431. Further, Officer Lowrance testified that he did not see anyone conduct a preliminary off-camera walk-through of the scene. T. 435 ("Q: All right. Prior to the actual starting of that film, did you see anybody walk Johnny Lee Gates through the activities performed there on the screen before you started to film it? A: No, sir,

they did not."). Therefore, the jury was left with the misimpression that no off-camera initial walk-through occurred.

B. The Suppressed Evidence About the Prior Walk-Through Was Favorable to the Defense Because It Would Have Undermined the Authenticity of the Confession and Provided an Alternate Explanation for the Fingerprint Evidence.

Had the initial off-camera walk-through been disclosed to the defense prior to trial, it would have undermined the State's evidence. The State's case at trial relied on three pillars of evidence: Gates's confessions, Gates's fingerprint found at the scene, and the account of a witness who claimed that he saw Gates at the apartment complex on the day of the offense.

Defense counsel recognized that it would be significant if the police had taken Gates to the scene of the crime prior to the videotaped confession. Counsel asked several law enforcement officers whether an off-camera walk-through occurred, yet each time they were met with denials. See T. 428 (Cross-Examination of Detective C.E. Hillhouse) ("Do you know whether any other people in the Columbus Police Department had taken Johnny Lee Gates down [to the scene of the crime] prior to you taking him down there [for the videotaped confession]?"); id. at 429 ("Do you know whether anybody had walked with him through that apartment doing the very thing that you put on film prior to you taking that film?"); id. ("Do you know whether Director Hicks and a sergeant took him down [to the scene of the crime] prior to you taking him down there?"); id. at 430

("Do you know any sergeant with the police department that might have been with Director Hicks some two hours before you went down there that day?").

Due to the suppression of this favorable evidence, the defense was unable to offer any testimony about the prior walk-through. In turn, the prosecutor exploited the suppression of this important evidence in his closing argument. Id. at 505 ("It's tried to be implied that the police led [Gates] through [the crime scene] before that tape was made . . . Officer Lowrance, who took the video, swore to you that this man was not led through the apartment and pointed out what to say, point out where to touch before he took that video tape.").

The suppressed evidence would have undermined the authenticity of Gates's already questionable videotaped confession.[7] The prosecutor, in his closing argument, emphasized Gates's videotaped confession as proof of Gates's guilt: "Again, perhaps the best evidence, though was [Gates's] so called demeanor, the way you act sometimes is more important than what you say. His demeanor on that video tape, . . . you can easily and quickly tell that he had an intimate knowledge of items within the apartment, of locations, of locations of something that you couldn't get unless you had been there." T. 498. That argument simply

[7] There were reasons to doubt Gates's videotaped confession even before the new evidence regarding the prior walk-through was discovered, as this Court has recognized. See Transcript of Hearing at 44 (Oct. 8, 2002) (Honorable John D. Allen) ("I can show you something right now in these [crime scene] photographs that contradicts what was said on [Gates's] confession.").

could not have been made if the prosecution had disclosed that Columbus police officers had taken Gates on an off-camera walk-through prior to the videotaped confession. Furthermore, the prosecution's reliance on the confession, which could have been undermined had the State not suppressed evidence, suggests that the suppressed evidence was material. See Banks v. Dretke, 540 U.S. 668, 700-01 (2004).

The suppressed evidence also would have undermined the State's fingerprint evidence, which hinged on the notion that the only time Gates could have left a fingerprint was on the day of the offense. The prosecutor, in closing, argued that: "If [the fingerprints] didn't get there by [Gates] touching them, touching the panels on the day of this offense, then how did they get here?" T. 505. The initial police-led walk-through provided an opportunity for Gates, off-camera, to have touched objects in the apartment, including the heater on which Gates's fingerprints were found.

C. The Suppressed Evidence About the Prior Walk-Through Was Material Because Once Doubt Is Cast on the Confession and the Fingerprint Evidence, the Prosecution's Case Is Weak.

The suppressed evidence about the prior walk-through was material because if disclosed, it would have cast the State's case in a weaker light. Suppressed evidence is material when the "government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. 419, 443

(1995) (citing United States v. Bagley, 473 U.S. 667 (1985)). In other words, in determining materiality, the question for this Court is not whether Gates "would more likely than not have received a different verdict with the evidence, but whether in its absence, he received a fair trial, understood as a trial resulting in a verdict worth of confidence." Id. Here, Gates did not receive a fair trial. Because the State withheld evidence, its case against Gates was much stronger, and the defense case was much weaker, than the full facts would have revealed. Id. at 429.

As noted above, the State's case rested on three pillars of evidence. The first was Gates's alleged statements, which would have been undermined by the fact that the police conducted a walk-through with Gates prior to the videotaped confession. The second was Gates's fingerprint taken from the scene, which would have lost its value as evidence if the jury knew that Gates had done a walk-through prior to the videotaped confession—and thus had an opportunity to leave the fingerprint then instead of at the time of the offense. The third was the account of a Donald Hudgins, who claimed he saw Gates in the apartment building around the time of the offense. Hudgins's testimony was unreliable for many reasons, which is significant once the confession and the fingerprint evidence are called into question.

First, Hudgins had only a brief encounter with the man he identified as Gates. T. 310-12. Therefore, he had a limited opportunity to view the man, which reduces the reliability of an identification.

Second, Hudgins's description did not match Gates. He testified that the suspect "could not have been younger than twenty-three to twenty-seven" years old. T. 318. Gates was twenty at the time of the offense. He also testified that the suspect was "about five-nine, five-ten." T. 320. Gates is five foot five inches.

Third, Hudgins acknowledged that "didn't pay attention" to key identifying features of the suspect, including whether the suspect had facial hair. T. 321. He also testified that he could not recall how the man he saw was dressed. T. 312.

Fourth, two months passed between the date of the offense and the date on which Hudgins identified Gates. T. 315. This type of interval is a leading contributor to misidentifications.

Fifth, the line-up identification procedure at the police station was suggestive. Hudgins testified that not all of the men in the lineup looked like Gates. One man was "considerably heavier" than Gates. Another man was "considerably taller" than Gates. T. 313. Furthermore, newly discovered information reveals that immediately prior to the line-up identification procedure, Hudgins saw Gates at his apartment, being led through the crime scene by police.

Sixth, the in-court identification was entirely unreliable because Gates was the only black man in the courtroom. T. 313 (noting defense counsel's objection to the in-court identification).

The problems with Hudgins's identification of Gates highlight the importance of the videotaped confession and the fingerprint evidence—and thus the materiality of the State's suppression of the off-camera walk-through. In addition, the suppressed evidence about the prior walk-through indicates that the investigation and prosecution of Gates's case were not conducted in good faith, which further supports a finding of materiality. See Kyles v. Whitley, 514 U.S. 419, 445 (1995) (discussing how suppressed evidence can cause widespread damage to the prosecution's case, including raising questions about the "thoroughness and even the good faith of the investigation").

Finally, the State not only suppressed evidence favorable to Gates, but it also presented evidence that was affirmatively misleading in violation of Napue v. Illinois, 360 U.S. 264 (1959). For all of the reasons stated above, Gates was denied due process, and is entitled to a new trial. Gates is prepared to present evidence concerning the State's suppression of evidence and how it affected his trial at the January 8, 2018 hearing or on a subsequent hearing date.

III. GATES IS ENTITLED TO A NEW TRIAL BECAUSE THE STATE DESTROYED EXCULPATORY EVIDENCE.

The State destroyed exculpatory evidence in Gates's case, including the blood collected from the bedroom door next to the victim's body at the crime scene. See Transcript of Hearing at 53-54 (Nov. 8, 2002); see also GBI Crime Lab Report at 2 (Feb. 3, 1977). Prior to the evidence's destruction, the State determined that the blood on the door was Type B. See GBI Crime Lab Report at 2 (Feb. 3, 1977). Both the decedent and Gates have Type O blood. See T. 290 (noting the victim had O positive blood type); Correspondence from Aubrey Walker, Dept. of Corrections, to William Smith (May 31, 1977) (noting that Gates has O blood type). The State was aware of this inconsistency at the time of the blood's destruction. It also was aware of the obvious exculpatory nature of the Type B blood next to the victim's body at the crime scene. The destruction of this exculpatory evidence is particularly troubling given that most of the forensic evidence[8] in Gates's case was destroyed in 1979, less than two years after Gates's conviction, and long before the conclusion of Gates's death penalty appeal.

The State has an affirmative duty to preserve material evidence. See Arizona v. Youngblood, 488 U.S. 51, 55 (1988) (recognizing constitutionally guaranteed evidence). The destruction of material evidence with exculpatory value

[8] Additional evidence destroyed by the State is listed in footnote 3, *supra*.

violates due process, even absent a showing of bad faith. State v. Blackwell, 537 S.E.2d 457, 462 (Ga. 2000) (finding a due process violation in the absence of bad faith where the exculpatory value of the destroyed evidence was obvious to the State prior to destruction). Furthermore, the presence of obviously exculpatory evidence triggers the State's affirmative duty to preserve other evidence similar in kind to the exculpatory evidence.

Here, the Type B blood collected from the crime scene, which did not match Gates or the decedent, is undeniably exculpatory. It indicates that a person other than Gates engaged in a struggle with the decedent and committed the offense. The State knew of the exculpatory nature of the blood evidence and had an affirmative duty to preserve the blood and supporting forensic evidence. The destruction of the exculpatory blood evidence violates Gates's right to Due Process. Accordingly, Gates is entitled to a new trial.

IV. GATES'S ONGOING DNA TESTING AND ANALYSIS MAY RESULT IN A REQUEST FOR A NEW TRIAL.

DNA testing and analysis of physical evidence in this case is currently in progress, including testing of the white bathrobe belt and black neckties. Upon completion of those tests, Gates may supplement this motion with the test results. Should those results exclude Gates as a contributor to the DNA on the physical evidence, or identify a potential perpetrator, Gates will be prepared to present evidence on January 8, 2018, or on a subsequent date, concerning the materiality

and legal significance of those results when considered in conjunction with other evidence in the case.

Pursuant to O.C.G.A. § 5-5-41, the United States Constitution, the Georgia Constitution, and corresponding case law, Gates respectfully requests that this Court (1) provide Gates an opportunity to present evidence in support of this motion, and (2) grant Gates a new trial. Gates is prepared to present evidence at the January 8, 2018 hearing or at another hearing set by the Court.

Respectfully submitted, this 27th day of November, 2017.

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IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
v.	)	**Case No. SU-75-CR-38335**
	)	
JOHNNY LEE GATES,	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Amended Extraordinary Motion for New Trial was served by U.S. Mail, with adequate postage thereon, on opposing counsel at the below address on this 27th day of November, 2017.

Mr. Frederick Lewis, Assistant District Attorney
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