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Ineffective Assistance of Counsel

State v. Goff, S20A0248 (3/13/20)

Goff was convicted of the malice murder of his girlfriend. The trial court granted Goff a new trial because his trial counsel rendered ineffective assistance by: (1) advising Goff not to testify; (2) failing to move for a mistrial after the jury heard that Goff was on probation; and (3) failing to introduce Goff's booking photos. The State appealed.

The State first argued that the trial court erred in finding that trial counsel was ineffective in advising Goff not to testify. The Court agreed. At the motion-for-new-trial hearing, Goff testified that he had expected to testify at his trial. But when it came time to tell the trial court of his decision, Goff testified, his counsel requested a break and urged him not to testify, saying, "I got this." Counsel testified that he thought he "had enough" evidence without Goff's testimony to support the lesser charges of voluntary and involuntary manslaughter. But, the trial court found, counsel's assessment that he "had enough" evidence without Goff's testimony was unreasonable. The trial court concluded that Goff's testimony was "indispensable" to proving provocation, necessary for a verdict of guilty on voluntary manslaughter, rather than murder.

But, the Court found, as noted by the trial court in its order, trial counsel testified that he was concerned that Goff would not perform well on cross-examination. Thus, Goff did not show that counsel's advice was so patently unreasonable that no competent attorney would have given Goff the same advice. And, even if Goff's proffered testimony might have been sufficient evidence of provocation to support a verdict of guilty on voluntary manslaughter — an issue the Court stated it need not decide — a decision by Goff to testify would have carried the significant risks inherent in testimony by a defendant. In particular, he would have been subjected to cross-examination about his pre-trial statement, in which he said that his scratches were several days old and denied that he had engaged in a physical fight with his girlfriend, contradicting a voluntary manslaughter theory of defense. And although the trial court found Goff's testimony at the motion for new trial hearing "compelling concerning his extreme and sometimes visible remorse," remorse is not a defense to a murder charge. Moreover, a competent defense lawyer may have viewed an emotional client — who also testified at the motion for new trial hearing that he had significant mental health issues of which counsel was aware — as unpredictable on the stand. Therefore, the Court concluded, as Goff had not shown that his trial counsel's advice against testifying was constitutionally deficient, the trial court erred in granting Goff a new trial on this basis.

Next, the State argued that the trial court erred in concluding that trial counsel was ineffective for failing to move for a mistrial after the jury heard that Goff was on probation. Again, the Court agreed. The reference to Goff's probationary status was brief and nonspecific; the witness did not say why Goff was on probation but merely said she had taken him to see his probation officer on a particular date. Trial counsel testified that he declined to press for a mistrial because he thought "we had a pretty good jury and a pretty good trial going[.]" Given the fleeting, nonspecific nature of her reference to Goff's probation status, trial counsel's assessment was not objectively unreasonable.

Finally, the Court also agreed that the trial court erred in its conclusion that counsel was ineffective in failing to introduce Goff's booking photos from his arrest in this case. The trial court found that the photos would have supported Goff's contention that his girlfriend attacked him and his provocation defense, so trial counsel was constitutionally deficient for failing to introduce them. The State argued that the trial court overlooked an objectively reasonable reason for choosing not to introduce them, i.e., that doing so would have required Goff's testimony, inviting the State to impeach Goff with his prior claim that the marks on his body at the time of his arrest for his girlfriend's death were several days old and not the result of any fight with her. Although Goff argued that the photos could have been authenticated by a law enforcement witness, he did not dispute the State's contention that his testimony was necessary to explain the significance of the photos such that their introduction would have supported his defense, nor did he proffer any other witness's testimony in support of his claim about them. Indeed, the trial court appeared to have assumed that Goff's testimony was necessary to explain the photos when it stated that "the booking photos ... could have supported provocation (with appropriate testimony from Goff)." But, the Court found, given Goff's election not to testify — which Goff did not show was the result of deficient performance by counsel — it could not be said that trial counsel rendered deficient performance by failing to introduce Goff's booking photos. Accordingly, the Court reversed the grant of Goff's motion for new trial.

Immunity from Prosecution; Dismissal of Indictments

State v. Remy, S19A1410 (3/13/20)

After a jury trying Remy for murder and other crimes could not reach a verdict, the court granted a mistrial. Remy then filed a motion for immunity from prosecution under OCGA § 16-3-24.2, arguing that he shot the victim in defense of himself and others. Before the hearing on the immunity motion occurred, the State re-indicted Remy for the same incident, omitting a count of aggravated assault and adding a second charge of possession of a firearm by a convicted felon. After the hearing, the trial court granted Remy immunity. The court then dismissed the new indictment because it was issued after a court-ordered deadline for the filing of new indictments. The State appealed.

First, the State argued that a motion for immunity under OCGA § 16-3-24.2 must be made before trial and, therefore, was unavailable to Remy because his case went through a full trial and was submitted to a jury before the court declared a mistrial. The Court disagreed. Even assuming that motions for immunity under OCGA § 16-3-24.2 must be made before trial, Remy was now back in a pretrial position. A defendant may file a motion for immunity under OCGA § 16-3-24.2 after the grant of a new trial because when a new trial is granted, it is as though no trial had been had. The declaration of the mistrial put Remy in the same situation: a mistrial is equivalent to no trial at all, and the case stands, when the mistrial is declared, as though it had never been entered upon. Accordingly, the Court held, Remy was entitled to file a motion for immunity under OCGA § 16-3-24.2 after the trial court declared a mistrial.

Nevertheless, the State contended, Remy's status as a convicted felon precluded the trial court's finding of immunity. The Court again disagreed. When read together, OCGA §§ 16-3-21 and 16-11-138 create the following rule of law: A person is justified in threatening or using force against another, or in engaging in conduct that is otherwise prohibited under Title 16, Chapter 11, Article 4, Part 3 of the Code, when and to the extent that he or she reasonably believes that such threat or force or conduct otherwise prohibited under Title 16, Chapter 11, Article 4, Part 3 is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force. Accordingly, if Remy's possession of a firearm at the time of the shooting was justified under the rule of law produced by the combination of OCGA §§ 16-3-21 and 16-11-138, then it cannot be said that Remy was 'committing a felony' when he shot the victim, and the preclusive bar of OCGA § 16-3-21 (b) (2) would not apply.

However, the Court stated, Remy may not be completely immunized from prosecution as a felon in possession of a firearm in violation of OCGA § 16-11-131, if he possessed a firearm outside the period of time when there was a necessity to defend himself or another person pursuant to OCGA § 16-3-21. Accordingly, regarding the original indictment, the judgment was affirmed as to all of the counts except the charge of being a felon in possession of a firearm, which was vacated, and the case was remanded for the trial court to conduct further proceedings.

Finally, the State argued that the trial court erred in dismissing its second indictment. The Court agreed. A trial court may dismiss an indictment sua sponte only in limited circumstances. For example, a court may dismiss an indictment when there is a defect on its face and may dismiss criminal charges without prejudice for want of prosecution. But a trial court cannot dismiss criminal charges without a proper legal basis. And here, the Court noted, the trial court did not cite any authority, and the Court stated it was unaware of any, allowing a trial court to dismiss a subsequent indictment because it was not filed by a date set forth in a trial court order pertaining to the original case. Therefore, because the trial court failed to provide a legal basis for dismissing the charges in the second indictment, that ruling was reversed.

Successive Habeas Petitions; Reasonable Exercise of Due Diligence

Watkins v. Ballinger, S19A1506 (3/13/20)

In 2001, appellant was convicted of felony murder and related offenses. His conviction was affirmed on appeal. *Watkins v. State*, 276 Ga. 578 (2003). He thereafter filed an unsuccessful state habeas petition and unsuccessful federal habeas petition. In 2017, he filed a second state habeas petition. First, he alleged that a juror, contrary to the trial court's explicit instructions not to visit the scene or conduct timed-drive experiments, conducted just such an experiment. Second, he alleged that the State failed to reveal exculpatory evidence to him and allowed a witness to testify that such evidence did not exist. The warden filed a motion to dismiss the petition as untimely and successive. The habeas court dismissed the petition and the Court granted appellant a certificate of probable cause.

The Court noted that OCGA § 9-14-42 (c), enacted in 2004, provides a four-year limitation period on petitions for habeas corpus from felony convictions, with four potential dates from which the time may begin to run. See OCGA § 9-14-42 (c) (1) - (4). Subsection (c) (4) provides that the limitation period begins at "the date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence." OCGA § 9-14-42 (c) (4). Other procedural provisions of the Habeas Corpus Act contain similar language. For example, OCGA § 9-14-48 (e) provides, with respect to habeas corpus petitions challenging "convictions had before July 1, 2004," that if the respondent seeks

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dismissal on the basis of prejudicial delay, the petitioner may avoid dismissal by showing “by a preponderance of the evidence that [the petition] is based on grounds of which he or she could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the respondent occurred.” And here, the Court found, the trial court erred in dismissing appellant’s petition because it and the attached affidavits showed that appellant sufficiently alleged that he acted in a reasonable and diligent manner to uncover the grounds upon which he seeks to rely.

As to the juror misconduct claim, the Court noted that in 2016, a juror was interviewed by an investigative reporter who was working on a story about the case, and the juror told the reporter about her experiences on the jury, including her timed drive. In 2017, the juror spoke with the Georgia Innocence Project and the attorneys of record on this appeal. She added that no other attorneys or investigators had contacted her. An issue in the case was whether appellant could have reached the crime scene at the time the murder was committed. Both the State and defense offered cell phone evidence on this issue. The juror, who stated that she was leaning towards acquittal, took it upon herself to drive the route appellant allegedly took and determined it was possible for him to have been at the murder scene and voted to convict.

The habeas court concluded that appellant “with the exercise of due diligence, could have spoken with this juror once his trial was over in 2001 to determine whether any juror misconduct had occurred.” But the Court concluded that the exercise of due diligence does not require so extensive an investigation, particularly under the circumstances presented here. First, the trial court instructed the jury not to visit the scene or attempt a time-driven experiment and jurors are presumed to follow a court’s instructions. Second, there was no evidence in the record of juror misconduct. Finally, in the absence of any indication of irregularity, due diligence did not require appellant to seek out trial jurors in order to uncover any possible misconduct. The contrary view would require convicted defendants, or their counsel, family, or friends on their behalf, to interview in every case each and every juror within four years of a felony conviction becoming final, even with no suggestion of jury misconduct, or risk possible dismissal of a future habeas claim. This would place a heavy burden not only upon counsel, but also upon jurors, who would be questioned about such matters and perhaps harassed, even without any indication that they had engaged in improper conduct. Thus, the Court concluded, the record showed that appellant had alleged sufficient facts to survive a motion to dismiss. Taking appellant’s allegations as true, he made a sufficient showing at this stage that he could not have discovered the facts underlying his jury misconduct claim at an earlier time through the exercise of due or reasonable diligence. The habeas court therefore erred in dismissing this claim.

Appellant’s second claim involved the trial testimony of the victim’s father that he discovered a dead dog in the vicinity of the victim’s grave, with some indication that the dog had earlier been placed on the grave itself. Upon examining the dog more closely, the victim’s father discovered that it had been shot between the eyes. Briefly stated, the State at trial contended that the bullet had never been recovered and that it was unknown what type of bullet it was. In closing, the State emphasized the dead dog, contending that appellant shot the dog and left it on the victim’s grave as a “calling card” or “signature” of his crime.

Appellant contended that he made numerous open record requests seeking information about the dead dog. But, it was only when a Georgia Innocence Project lawyer found the former GBI pathologist, who was living in Alabama, and learned of the correct file number that another Open Records Act (ORA) request revealed that the bullet was recovered and that its caliber did not match the caliber of the weapon used to kill the murder victim. Nevertheless, the habeas court found that appellant could have discovered these facts under the ORA in 2003, because the files were “available for public inspection” pursuant to statute on or about August 17, 2003, when appellant’s convictions became “final”.

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However, the Court found, the facts upon which he based his claims could not have been discovered earlier through the exercise of due diligence and could not reasonably have been raised in his original petition. He was not obligated in the exercise of due diligence to assume that the State was concealing or neglecting to produce evidence which the crime lab manager and the prosecutor represented did not exist, nor was he required to request at some earlier time material which the State should have disclosed in the first instance. The habeas court therefore erred in concluding that, through the exercise of due diligence, appellant could have discovered these facts under the ORA in 2003.

In conclusion, the Court held that appellant alleged facts showing grounds for relief which could not reasonably have been raised in his original habeas petition and which could not have been discovered by the reasonable exercise of due diligence. This was sufficient to satisfy the requirements of OCGA §§ 9-14-42 (c) (4) and 9-14-51, to withstand a motion to dismiss, and to entitle him at least to an evidentiary hearing on these allegations. The Court therefore reversed the habeas court's dismissal of appellant's petition and remanded the case for further proceedings.

Judicial Comments; False Testimony

DeLoach v. State, S19A1299. S19X1300 (3/13/20)

DeLoach was convicted of the murder of Biggins on April 26, 2015 and of the murder of Law on June 20, 2015. The trial court denied his motion for new trial as to Law, but granted it as to Biggins. DeLoach appealed and the State cross-appealed.

DeLoach argued that his counsel rendered ineffective assistance by failing to object or move for a mistrial under OCGA § 17-8-57 (a) (1) when the trial court made a statement referencing appellate review before its final charge to the jury. The Court disagreed.

The Court found that the trial judge's statement that she would "get reversed probably" if she failed to read the jury charge did not violate OCGA § 17-8-57 (a) (1). The statement was not made in connection with any evidence against DeLoach or in a context that would have implied that the judge believed DeLoach would be found guilty because only he can appeal from a verdict in a criminal case. Nor did it suggest that the judge believed that the trial would necessarily end with DeLoach's conviction. Instead, the Court concluded, the clear import of the judge's statement was that jury instructions are so important that her failure to read them would be a violation of her duty. Accordingly, under these circumstances, the statement was not erroneous. And because the judge's statement did not violate OCGA § 17-8-57 (a) (1), DeLoach failed to establish that his trial counsel's decision not to object to it constituted deficient performance.

The State contended that the trial court erred in granting DeLoach a new trial on the ground that the prosecutor knowingly failed to correct a witness's false testimony that he had not been offered a plea deal in exchange for his agreement to cooperate with the State in its prosecution of DeLoach. The relevant evidence showed that after he had been arrested for Law's murder but before he had been indicted for Biggins' murder, DeLoach told a fellow prison inmate, Trishon Collins, about how and why he had killed Biggins. Collins, who was then in jail on drug charges, initiated contact with the detectives investigating Biggins' death, hoping that he might get leniency in his pending case for information concerning

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DeLoach's involvement in the Biggins shooting. In a video-recorded statement made on March 1, 2016, Collins told the detectives what DeLoach had recounted to him.

The Court stated that the knowing use of material, false evidence by the State in a criminal prosecution violates due process. This rule applies equally when the State, although not soliciting perjured testimony, allows such testimony to stand uncorrected after learning of its falsity. Further, it is of no consequence that the falsehood bears upon the witness' credibility rather than directly upon the defendant's guilt. But, to prevail on such a claim, a defendant is required to show that the prosecutor knowingly failed to correct the witness's false testimony, and that the falsehood was material.

First, the Court found that Collins repeatedly testified that he had not been offered a deal by the State in exchange for his cooperation and agreement to testify in DeLoach's trial. However, the record showed that Collins, in fact, reached a plea agreement with the State in exchange for his cooperation in the DeLoach prosecution and that Collins entered a negotiated guilty plea on August 22, 2016, which reflected that fact. Second, although the prosecutor handling the trial stated that he did not know of this plea deal, the prosecutor who handled the plea certainly did. Thus, given that both prosecutors were part of the same office that prosecuted DeLoach, the trial court was authorized to impute to the trial prosecutor the plea prosecutor's knowledge that Collins had accepted the plea offer and had entered a guilty plea. Thus, the Court found that the trial court was authorized to find that there was false testimony that the trial prosecutor knowingly failed to correct.

However, the Court found that the evidence was not material. The transcript of Collins' trial testimony showed that he was not a cooperative State's witness. In fact, Collins did not honor the terms of his 2016 plea agreement when he recanted his prior statement and gave testimony favorable to DeLoach. Because Collins' trial testimony was inconsistent with what he had told a detective about the murders in his prior statement, the prosecutor had to confront Collins with his prior statement and lay a foundation for the statement's use as substantive evidence. That statement was recorded on March 16, 2016, before any prosecutor had met with Collins to discuss offering him leniency in his pending 2015 drug possession case in exchange for his cooperation in the DeLoach prosecution.

Thus, the Court found, given these facts, it would have been in *State's* interest to correct Collins' false testimony about not having a plea deal and to offer evidence of the plea agreement. After correcting Collins' false testimony, the State could have argued that, when Collins gave his recorded statement to the detective, it was in his interest to provide useful, verifiable, truthful information about DeLoach's involvement in the murders in order to convince a prosecutor to give him a plea deal. The State also could have argued that Collins later breached his plea agreement to testify truthfully for the same reason that he changed his story at trial: he was afraid of DeLoach and his gang associates. Additionally, given that Collins' trial testimony was favorable to and tended to exculpate DeLoach, it would have been in DeLoach's interest not to impeach Collins' credibility and undermine his trial testimony. Consistent with that approach, DeLoach's counsel attacked Collins' prior recorded statement, arguing that Collins had lied to the detective about DeLoach's involvement in the murders because Collins hoped to be offered a plea deal. Finally, Collins amply demonstrated his questionable credibility at trial: He testified that he was on drugs when he gave his prior statement, and he claimed to be on medication during his trial testimony. He testified that he did not recall much of his statement and that he had lied to the police. Collins also admitted that he had prior criminal convictions and pending criminal charges. Therefore, the Court held, under these circumstances, there was no reasonable likelihood that Collins' false testimony about his plea agreement could have affected the jury's assessment of Collins' credibility and contributed to the verdict. Consequently, because the false statement in this case was not material, the trial court erred in granting DeLoach's motion for a new trial on this basis.

Habeas Corpus; Statutory Deadline for Filing Petitions

Stubbs v. Hall, S19A1253 (3/13/20)

In 2005, appellant was convicted of armed robbery, hijacking a motor vehicle, and many other offenses for which he was sentenced to life plus 31 years. His convictions were affirmed on appeal. *Stubbs v. State*, 293 Ga. App. 692 (2008). In 2012, he filed a writ of habeas corpus through an attorney, which the habeas court dismissed as untimely. He then filed an application for a certificate of probable cause which the granted.

The Court stated that under OCGA § 9-14-42 (c) (1), the limitations period begins running when a conviction becomes “final.” Specifically, subsection (c) (1) provides that, for a felony, a habeas action must be brought within four years from the judgment of conviction becoming final “by the conclusion of direct review or the expiration of the time for seeking such review.” Thus, because appellant was convicted of felonies in which the death sentence was not imposed, he had four years from the date of his judgment of conviction becoming “final” to file a timely habeas petition under OCGA § 9-14-42 (c) (1).

However, the Court stated, the question of exactly when a judgment of conviction becomes final under OCGA § 9-14-42 (c) (1) is not well settled. The Court, in interpreting the statute, found that a conviction is “final” when direct review, including the time to file a petition for a writ of certiorari to the United States Supreme Court, has concluded or where the time for seeking further appellate review has expired. For example, for a defendant whose conviction was affirmed on direct appeal by the Georgia Court of Appeals, the “conclusion of direct review”—if exercised to its fullest—would occur when, after Georgia Supreme Court denied the defendant's petition for certiorari or granted the defendant's petition for certiorari and affirmed the defendant's conviction, the United States Supreme Court either affirms the defendant's conviction or denies the defendant's petition for certiorari. By contrast, the expiration of the time for seeking direct review would occur when the defendant's time to petition the Court for a writ of certiorari expires without the defendant filing a petition, see Ga. Sup. Ct. R. 38 (2), because a party cannot file a petition for certiorari in the United States Supreme Court unless a judgment has been “entered by a state court of last resort.” U.S. Sup. Ct. R. 13.1.

And here, the Court found, the habeas court erred when calculating finality for purposes of determining the statute of limitations for appellant's habeas petition. Specifically, the court ruled that appellant's habeas petition was untimely because, by its calculation, appellant's “convictions were ‘final’ as of October 6, 2008”—10 days after the Court of Appeals affirmed appellant's convictions on September 24, 2008, and appellant failed to “either move for reconsideration or file a notice of intent to apply for certiorari review.” Under that theory, appellant had “four years from that date, or until October 6, 2012, to file a timely habeas petition challenging these convictions,” but appellant “filed [his] action on December 19, 2012, more than two months late.”

However, the Court stated, the habeas court erred when it identified the notice of intent to apply for certiorari—a document filed in the Court of Appeals under Supreme Court Rule 38 (1) and Georgia Court of Appeals Rule 38 (a) (1)—as the terminal appellate action in its finality calculation because the filing of a notice of intent is not jurisdictional and the Court will not generally dismiss or deny a petition for certiorari for failure to timely file a notice of intent. As a result, a petitioner's filing of a notice of intent in the Court of Appeals—which is a non-jurisdictional, procedural requirement—

has no bearing on when a judgment of conviction becomes final under OCGA § 9-14-42 (c) (1). The habeas court therefore erred when it ruled that appellant's convictions became final 10 days after the Court of Appeals affirmed his convictions on direct review.

Applying the proper calculation of finality for purposes of OCGA § 9-14-42 (c) (1) the Court concluded that appellant's convictions actually became final on October 14, 2008: the date on which appellant's time for seeking a petition for certiorari in the Court expired without appellant filing one. Because appellant did not file a petition of certiorari within that timeframe, his convictions became final on October 14, 2008 — 20 days after the Court of Appeals affirmed his convictions on direct review. Thus, using the correct finality date, appellant, as a convicted felon not sentenced to death, had four years from October 14, 2008—or until October 15, 2012—to file his habeas action. But because appellant's petition was filed on December 19, 2012, over two months after October 15, 2012, the habeas court's miscalculation was harmless under the circumstances presented here. Accordingly, the Court agreed with the habeas court's conclusion that appellant's petition was untimely under OCGA § 9-14-42 (c) (1).

Nevertheless, appellant contended, he was not informed by the trial court of the limitations period for filing a habeas petition, and that this violation of the statutory mandate to inform defendants of the limitations period under OCGA § 9-14-42 (d) at sentencing should toll the limitations period. The Court disagreed. The Court concluded that the General Assembly did not include a tolling provision in OCGA § 9-14-42, much less a provision specific to alleged violations of subsection (d). And especially considering the comprehensive and prescriptive statutory scheme the General Assembly enacted to govern habeas corpus, the Court found that it has no authority to judicially create such a remedy.

Finally, appellant requested the Court provide an equitable remedy for his untimely habeas petition by either applying the doctrine of equitable tolling and allowing him to file an untimely petition, or—at the very least—remanding his case to the habeas court to assess whether equitable tolling of the statute of limitations period is appropriate. But, the Court declined to read into OCGA § 9-14-42 a remedy that stretches the statutory text beyond the General Assembly's enactment, thus rewriting Georgia's habeas laws by judicial order. Given the complete dearth of authority supporting the application of equitable tolling to the statute of limitations provision for habeas corpus petitions in Georgia, the Court declined to adopt that doctrine for the first time in this case.

Extraordinary Motions for New Trial; DNA Evidence

State v. Gates, S19A1130. S19X1131 (3/13/20)

In 1977, Gates, who was 19 years old, was convicted of the murder, rape and armed robbery of Katrina Wright and sentenced to death. The evidence, very briefly stated, showed that Wright was found in her apartment by her husband. She was lying on the floor of the apartment with an apparent gunshot wound to her head. There was blood on the floor beside her head. Her hands had been tied behind her waist with a white bathrobe belt and a black necktie, and she had three other neckties wrapped around her face. A neighbor stated that he saw a man who was claiming to be from the Gas Company at the apartment complex that day. Two months later, he identified Gates as that person in a live line-up. Gates, who had a sixth grade education, confessed and agreed to accompany the officers back to the apartment and walk them through what happened. After the walk through, two latent fingerprints of Gates were lifted from the heater in the apartment, although no fingerprints were originally found in the apartment.

Gates' convictions and sentence were affirmed on direct appeal. See *Gates v. State*, 244 Ga. 587 (261 SE2d 349) (1979). Gates then unsuccessfully sought state and federal habeas corpus relief during the 1980s. See *Gates v. Zant*, 863 F2d 1492, 1496 (II) (11th Cir. 1989). As part of his federal habeas corpus petition, Gates filed a motion to expand the record to include, among other things, the official report from the GBI Crime Lab dated December 10, 1976. That report reflected that, on December 1, 1976, the crime lab received, among other items, "one manila envelope sealed with scotch tape containing four black neck ties and one white cloth belt." The record did not reflect any request on Gates' part to actually obtain these items as part of his federal habeas proceeding.

Gates then filed a second state habeas, seeking a psychological evaluation and claiming that he was ineligible for the death penalty due to an intellectual disability. The proceedings stretched for more than a decade. During that time, Gates' counsel requested an inventory of the evidence that had been collected from the crime scene. In 2002, at an evidentiary hearing, the State produced a document which listed "Item 3" as "4 black neck ties and 1 white cloth belt." The document also contained the following stamped notation: "DESTROYED May 2 1979." In November 2003, the trial court finally conducted an intellectual-disability trial. On the seventh day of that trial, the court declared a mistrial. Later that day, Gates and the State agreed to remove the possibility of a death sentence based on his conviction for Wright's murder, and Gates was resentenced to serve life in prison without the possibility of parole.

In 2015, several interns for Gates' attorneys went to the district attorney's office to search for records regarding destruction of physical evidence from Gates' trial. While there, the interns located a white bathrobe belt and four black neckties inside a manila envelope that were later confirmed to be the items introduced at Gates' 1977 trial. Gates filed an extraordinary motion for post-conviction DNA testing of the belt and ties and for a new trial. The trial court held a hearing on the motion and granted Gates' motion for DNA testing pursuant to OCGA § 5-5-41 (c) on December 16, 2015. The GBI tests showed the presence of at least three individuals' DNA on the belt and one of the ties but that the GBI was "unable" to conduct further analysis of the results with the methods then in use by the GBI. However, the trial court also permitted Gates to analyze the results and comparison through probabilistic genotyping software known as TrueAllele. That analysis was conducted by a company known as Cybergenetics. The GBI's initial analysis of the DNA samples was inconclusive, but the TrueAllele analysis excluded Gates as a contributor to the DNA mixture found on the belt and tie. Based on this TrueAllele tests, the trial court granted Gates a new trial and the State appealed.

The State argued that the trial court abused its discretion by finding that Gates exercised diligence under *Timberlake v. State*, 246 Ga. 488, 491 (1) (1980) in seeking the DNA evidence. The Court disagreed.

The Court found that the record supported the trial court's determination that the ties and belt were not available to Gates for the relevant DNA testing and TrueAllele analysis until 2015. Although it was not clear from the record whether the prosecutor brought the belt and ties to the October 8, 2002, hearing, the record showed that the State's records for Gates' case and testimony by a GBI official given in a November 8, 2002, evidentiary hearing indicated that the belt and ties admitted in his 1977 trial were destroyed by the GBI in 1979. Those items were not rediscovered by Gates' attorneys until 2015. Moreover, although Gates knew about the existence of these items at the time of his trial in 1977, touch DNA testing and TrueAllele analysis did not exist at the time, and indeed did not come into common use in the United States until the decades that followed. Thus, there would have been no basis at the time of his trial for Gates to request that such items be subjected to DNA testing or that those items be preserved for later testing.

Nevertheless, the State contended, the trial court abused its discretion in determining that the new DNA evidence obtained through the TrueAllele analysis was so material that it would probably produce a different verdict. The Court again disagreed.

The Court found that the evidence presented against Gates at his 1977 trial was strong. Nevertheless, the newly discovered DNA evidence now available to Gates casts significant doubt on the State's theory that Gates was the perpetrator. Although the results of the TrueAllele analysis do not point to another specific individual who committed these crimes, that evidence directly undermines Gates' connection to a central assumption of the State's case: that the person who bound Wright's hands was the same person who murdered her. The evidence establishes that the person who bound Wright in the manner suggested by the testimony presented in the 1977 trial "would" have transferred DNA to the belt and tie used to bind her and that at least a portion of such DNA "would" have remained on those items to the present day. But the TrueAllele analysis has now excluded Gates as a contributor to the DNA mixtures found on those items. The trial court found this evidence and the supporting testimony to be material and exculpatory.

Furthermore, the Court found that DNA evidence is likely to be especially resonant with a jury, even in light of some contradictory testimony establishing the defendant's guilt. Even in the face of considerable evidence offered by the State, DNA evidence showing that the inculpatory evidence cannot be true may be sufficient to create reasonable doubt in the mind of a reasonable juror. Moreover, the newly discovered DNA evidence would probably also have limited the weight given by the jury to the eyewitness' identifications of Gates and might have also undermined the weight to be given to the fingerprint evidence linking Gates to the crime scene.

Thus, the Court held, although the State presented strong evidence of Gates' guilt, Gates could have much more effectively countered such evidence had he also been able to present the newly discovered DNA evidence. In light of the weight given to such evidence by jurors, the trial court did not abuse its discretion when it determined that the newly discovered evidence—the TrueAllele analysis of the DNA test results and the testimony supporting it—is so material that it would probably produce a different verdict. And, since the trial court did not abuse its discretion when it determined that Gates satisfied each of the *Timberlake* factors with regard to such evidence, the Court affirmed the judgment of the trial court granting his motion.