IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

SANDEEP BHARADIA,	)	
Petitioner,	)	
v.	)	
KEVIN PERRY,	)	CASE NO. 21-A-01697-7
Warden, Phillips State Prison,	)	
Respondent.	)	

FINAL ORDER AND JUDGMENT GRANTING WRIT OF HABEAS CORPUS

The above-styled case having come before this Court for a hearing on Petitioner Sandeep Bharadia's Petition for Writ of Habeas Corpus, filed on March 28, 2011, and amended on December 30, 2022,[1] and upon consideration of the testimony, evidence, arguments of the parties, and all matters of record, this Court makes the following findings of fact and conclusions of law:

GENERAL PROCEDURAL HISTORY

Petitioner Sandeep Bharadia (hereinafter referred to as "Petitioner" or "Mr. Bharadia") was indicted by a Chatham County grand jury in March 2003, for burglary (count 1), aggravated sodomy (count 2), aggravated sexual battery (count 3), and theft by receiving (count 4). (Resp.1 at 58-59). He was co-indicted with Sterling Flint (hereinafter referred to as "Mr. Flint") in counts 1 and 4. *Id.* Mr. Flint pleaded guilty to theft by receiving and the burglary charge was dismissed. (T-156). As part of his plea agreement, Mr. Flint was required to testify against Mr. Bharadia. (*Id.*). At the June 26-27, 2003, jury trial of Mr. Bharadia, the trial court directed a verdict of acquittal as to the theft by receiving count. (Pet. 1 at 178). Petitioner was found guilty on the remaining counts. (Pet. 1 at 341). Petitioner was sentenced as a recidivist under O.C.G.A. § 17-

[1] Mr. Bharadia clarified in post-hearing briefing that he is only seeking a ruling on the claims raised in his later petition, as it supersedes the earlier filing.

10-7(c) to life without parole for aggravated sodomy and twenty years concurrent for aggravated sexual battery and burglary. (Resp. 1 at 307). Petitioner was represented at trial by Caleb Burch Banks. (Pet. 1 at 1). Steve Sparger entered the case October 14, 2003, and represented Petitioner post-trial and on direct appeal. (Resp. 1 at 312; Resp. 15 at 1). Mr. Sparger filed amendments to the motion for a new trial on November 25, 2003, and March 21, 2005. (Resp. 2 at 8, 42). The trial court denied Petitioner's motion for new trial as amended on September 21, 2005. (Resp. 4 at 246-63). Petitioner filed a timely notice of appeal. (Resp. 4 at 264).

On direct appeal, the Georgia Court of Appeals affirmed Petitioner's convictions and sentences. *Bharadia I*, 282 Ga. App. 556. The Supreme Court of Georgia denied certiorari. *Bharadia v. State*, S07C0522, 2007 Ga. LEXIS 222 (Ga. Feb. 26, 2007), *motion for recon. denied*, March 27, 2007.

Petitioner filed his habeas petition through new counsel in Chattooga County on March 28, 2011. The petition was transferred to Lowndes County in April 2015 upon Petitioner's transfer to Valdosta State Prison. This case was eventually transferred to Gwinnett County in February 2021.

On September 6, 2011, about five months after filing the habeas petition, Petitioner also filed an "Extraordinary Motion for Post-Conviction DNA Testing and a New Trial" in the trial court. (Resp. 4 at 270). The trial court granted Petitioner's request for post-conviction DNA testing. (Resp. 5 at 3). At the extraordinary motion for new trial, Petitioner presented a GBI report showing that DNA obtained from the right batting glove admitted at trial matched the DNA of co-defendant Sterling Flint. (Pet. 6 at 64). On January 11, 2013, the trial court denied the extraordinary motion for new trial. (Resp. 5 at 143; Pet. 5; Pet. 6). Petitioner, through Mr. Sparger and the Georgia Innocence Project, appealed the denial of the extraordinary motion for

new trial, and the Court of Appeals affirmed. *Bharadia v. State*, 326 Ga. App. 827, 755 S.E.2d 273 (2014) ("*Bharadia II*"). (Pet. 8; Resp. 18-20). The Georgia Supreme Court granted the petition for certiorari review and ultimately affirmed the trial court's denial of Petitioner's extraordinary motion for new trial. *Bharadia v. State*, 297 Ga. 567, 774 S.E..2d 90 (2015), *motion for recons. denied*, July 27, 2015. (Pet. 7).

On December 30, 2022, Petitioner filed an amended petition seeking habeas corpus relief. In his amended petition, he raises six grounds of ineffective assistance of appellate counsel, in addition to an actual innocence ground. The Court held a full-day evidentiary hearing on June 20, 2023, at which witnesses testified and documentary evidence was admitted by both parties. The Court gave the parties an opportunity to file post-hearing briefs and submit proposed orders, which this Court has reviewed and considered. The Court also reviewed the entire lengthy transcript in this case and reviewed well the rulings of all prior courts.

THE GROUNDS FOR RELIEF ASSERTED

A. *Ineffective Assistance of Appellate Counsel Claims*

In all six claims (claims B, C, D, E, F, and G) of Part I of his post-hearing brief, Petitioner alleges that he received ineffective assistance of appellate counsel. He specifically alleges that appellate counsel was ineffective when appellate counsel did not: (B) competently present exculpatory DNA evidence; (C) raise or competently raise constitutional issues related to the eyewitness identification; (D) raise constitutional claims related to the State's presentation of false evidence; (E) raise an ineffectiveness claim based on trial counsel's failure to impeach critical witnesses, i.e., Sterling Flint and Det. Conners; (F) raise meritorious claims related to the alibi defense; and (G) raise meritorious claims related to the State's Suppression of evidence, i.e.,

photo lineups and Petitioner's recorded interview. In Claim (H) Petitioner asserts that any errors of counsel should be accumulated under *Schofield v. Holsey*, 281 Ga. 809 (2007)

B. Actual Innocence claim

In his final claim for habeas corpus relief, Petitioner asserts that he did not actually commit the crimes for which he is incarcerated.

C. Summary of Court's Conclusions of Law

After careful review and consideration of the entire record, all testimony, exhibits, arguments of counsel, and the applicable law, the Court hereby GRANTS Mr. Bharadia's Petition for Writ of Habeas Corpus. The Court finds that the following constitutional violation requires the grant of the Writ of Habeas Corpus: Mr. Bharadia's right to the effective assistance of counsel during his direct appeal was violated. *See* U.S. Const. amend. VI; Ga. Const. art. 1, § 1, para. XIV; *Strickland v. Washington*, 466 U.S. 668 (1984). The Court finds that, if appellate counsel had not performed deficiently, there is a reasonable probability that the outcome of Mr. Bharadia's appeal would have been different. *See Nelson v. Hall*, 275 Ga. 792, 794 (2002) (setting out the standard for ineffective assistance of appellate counsel claims).

Pursuant to O.C.G.A. § 9-14-49, the Court makes findings of facts and conclusions of law in support of its ruling below.

RELEVANT FACTS AND PROCEDURAL HISTORY

I. The Underlying Crime and Pre-Trial Investigation

Around midday on Sunday, November 18, 2001, J.F.[2] returned to her home at the River Crossing Apartments, in Thunderbolt, Georgia, to find a man burglarizing her apartment. (P23 p. 1 – J.F.'s Typed

[2] The Court will refer to the victim in this case as J.F., rather than using her full name, to protect her privacy.

Statement;[3] T-51-55).[4] The assailant (who wore batting gloves) pushed J.F. into the bedroom, stripped her naked, and tied her to a chair in her closet, covering her face and threatening her with a knife. (P23 p. 1-2 – J.F.'s Typed Statement; T-54-58, 61-62). The assailant told J.F. that he was a member of Al-Qaeda who had come to steal her computer. (T-59-60).

After the assailant untied J.F. from the chair and tied her to the bed, he proceeded to perform what he called a "fake rape," which consisted of masturbating, taking hold of her hands and "manipulat[ing] [her] fingers over [her] pubic area," and performing oral sex on her. (T-64-67). The assailant ejaculated onto her stomach, groin, and legs. (*Id.*). J.F. felt the assailant clean the semen off her body and the bed with a towel or washcloth. (P2 p. 163 – MNT Hr'g T. May 16, 2005, Def. Ex. 3 (Thunderbolt PD File); T-68).

When the assailant left the apartment, J.F. was able to free herself and noted the time was 2:40 p.m. (T-73-74). She saw that a number of items had been taken, including jewelry; a computer and floppy disks; CDs; a camera; telephones; an answering machine; and a navy-blue Royal brand suitcase. (P23 p. 9 – J.F.'s Typed Statement). The next day, J.F. spoke to the police on the phone about the incident and met with them in person about one week later. (T-85-86, 89).

A. Whereabouts of the Suspects on the Day of the Crime

About a week after the crime, the police had two suspects: (1) a man named Sterling Flint, because he was in possession of all the items stolen from the victim; and (2) Sonny Bharadia, because Mr. Flint—after being caught with the stolen items—said he got them from Mr. Bharadia. (T-122-25, 157). The record shows the following facts regarding each of these men during the week leading up to the crime:

1. Sterling Flint: According to Mr. Flint's then girlfriend, Asheigh Dold, Mr. Flint brought a U-Haul trailer of items to Savannah four days before J.F. was assaulted. (T-171, 215-16; P24 p. 1 – Ashleigh

[3] All citations to record documents admitted at the habeas hearing will be documented as follows: Petitioner's exhibits will be cited as P# p.# and Respondent's exhibits will be cited as R# p.#. The page numbers refer to the PDF page number in the electronic version of each exhibit.

[4] The trial transcript was admitted into evidence as Exhibit P1 at the habeas corpus hearing, however, for ease of identification, the Court will cite to the trial transcript as T-page#.

Dold's Handwritten Statement).[5] Mr. Flint parked the U-Haul trailer (later revealed to be stolen) in Thunderbolt, just a five-minute walk from J.F.'s apartment. (T-135, 217-18). On Sunday, November 18th (the date of the crime), Mr. Flint drove Ashleigh Dold to work in Savannah in her vehicle. (HT-181). He dropped her off around noon and picked her up at 6:30 p.m. (T-219-20, 222; HT-181-82). Mr. Flint's whereabouts are unaccounted for during the period between 12:00 p.m. and 6:30 p.m. on November 18—the time during which J.F. was attacked.

2. Sonny Bharadia: According to the testimony of Mr. Bharadia, the evening before the crime, he picked up Alisha Colbert from her job at Star Crest Nursing Home in Lithonia, Georgia.[6] (T-200, 250; HT-200, 207). The two of them took four children—friends Keisha and Rasean Pitts' three daughters and Ms. Colbert's daughter—to see the new Harry Potter movie, *Harry Potter and the Sorcerer's Stone*, at the Starlight Drive-in on Moreland Avenue in Atlanta. (T-199, 250; HT-207).[7] The movie ended around midnight. (T-250). Mr. Bharadia and Ms. Colbert brought the Pitts' daughters home and then spent the night at Ms. Colbert's house. (*Id.*; HT-208). Alisha Colbert had provided confusing testimony at the trial as to the weekend that these events took place. She initially testified that these events happened on the previous weekend (two weeks before Thanksgiving), but the Harry Potter movie was not released until the Friday before thanksgiving making the weekend before Thanksgiving the only possible time to have seen the movie. (T-205; P27A, B &C—Atlanta Journal Constitution newspaper articles). Ms. Colbert later in her testimony confirmed that all the previous events happened on the Saturday before the crime. (T-209)

Both Mr. Bharadia and Ms. Colbert testified that on the morning of the 18th—the day of the crime—Mr. Bharadia and Ms. Colbert left Ms. Colbert's house. (HT-200). At approximately 11:00 a.m., they

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[5] Ashleigh Brown—formerly known by her maiden name as Ashleigh Dold—clarified at the recent hearing that her name has changed since the time of the 2001 crime. (HT-177). To avoid confusion, the Court will continue to refer to the witness as Ashleigh Dold, the name she was using at the time of the relevant events.

[6] Ms. Colbert's first name has been previously misspelled as "Alicia" in the record, however, she clarified the spelling of her name during the recent hearing. (HT-196).

[7] Although the date of the trip to the movies was not presented clearly at trial, based on the release date of the movie, the weekend of the attack on J.F. is the only weekend that Ms. Colbert and Mr. Bharadia could have seen the movie. (P27A, B & C – Atlanta Journal Constitution newspaper articles).

stopped at a Wendy's drive-thru on Evans Mill Road in Lithonia, where they were the first customers of the day. (T-252; HT-209-10). Mr. Bharadia then dropped Ms. Colbert at work around 11:30 a.m. (T-252). Next, Mr. Bharadia picked up a wrench set from Alisha Pitts' home. (T-252-53; HT-190-91). According to Mr. Bharadia, he arrived at the Pitts' house at 11:45 a.m., where he greeted their daughters and picked up the socket wrench set. (T-252-53; HT-91, 211). Ms. Pitts had previously testified at trial that Mr. Bharadia came to her home that morning, but a couple of hours earlier. According to Mr. Bharadia, he left the Pitts' house around noon and traveled to the home of Raquel Edwards, who lived in an on-site apartment at her workplace, G&M Personal Nursing Care, at 1635 Stephenson Road in Lithonia. He remained there for a few hours, working on a car. (T-253-54; HT-211-12). That afternoon, Edwards asked Bharadia to pick up her coworker, Nicole, and bring her to work. Mr. Bharadia stopped at the Pitts' house to return the socket wrench set, and then picked up Nicole and took her to G&M Nursing. (T-253-55; HT-213). That evening, Bharadia and Edwards stopped at the Hertz rental car agency at the Atlanta airport to collect some money from Edwards' friend, Miranda, and then went to dinner at a restaurant called Frontera. (T-255-56; HT-214-15).

B. Interaction of Mr. Flint and Mr. Bharadia During the Week After the Crime

The day after J.F.'s assault, Mr. Bharadia drove from his home in metro-Atlanta to Beaufort, South Carolina to pick up his Tahoe, which had previously been reported stolen and was impounded there. (T-256-57, 287-88; HT-217). Mr. Flint, who was in Savannah at the time, agreed to drive Mr. Bharadia's Tahoe back to Atlanta for Mr. Bharadia, so Mr. Bharadia and his girlfriend met Mr. Flint and another woman, Ashleigh Dold, in Savannah for dinner before heading back to Atlanta. (T-225; P24 p. 1-2 – Ashleigh Dold's Handwritten Statement; HT-182-83, 221). Mr. Flint drove Mr. Bharadia's recovered Tahoe, while Mr. Bharadia drove the Ford Explorer, he came down in. (T-277, 287).

According to Mr. Bharadia, in the early hours of Tuesday, November 20, as Mr. Bharadia, his girlfriend, and Mr. Flint neared Atlanta, Mr. Flint disappeared in Mr. Bharadia's Tahoe. (T-266, 278; HT-222). Mr. Bharadia called Mr. Flint multiple times and asked him to return the Tahoe. (T-277). Mr.

Bharadia also called Mr. Flint's mother, telling her that if Mr. Flint did not return the Tahoe, he would report it stolen. (P28 p. 2-3 – Clayton County PD Report; HT-224). According to Mr. Bharadia, Mr. Flint responded by calling Mr. Bharadia's girlfriend, threatening to kill Mr. Bharadia and his family. (P28 at p. 3; HT-224). Mr. Bharadia then filed two criminal complaints against Mr. Flint: the first on November 21 for stealing the Tahoe; and the second on November 23 for making terroristic threats. (P28 at p. 2-5; R5 p. 58-59 – Amendment to Extraordinary MNT, Exhibit C, filed on January 22, 2012; HT-225-26). Mr. Flint then committed at least three burglaries in Cobb County in the stolen Tahoe. (P20 p. 24-28, 45-47 – Cobb County PD Reports).

C. The Cobb County Investigation

Detective Ronald Underwood worked on each of the Cobb County burglaries that Mr. Flint committed. When he ran the license plate number provided by the first victim, he learned that the Tahoe belonged to Mr. Bharadia, who had previously reported the Tahoe stolen by Mr. Flint. (*Id.* at p. 24, 26). By this time, the Tahoe had been recovered by Atlanta police, following a high-speed chase in which Mr. Flint crashed the vehicle and successfully fled on foot. (*Id.* at p. 26; P22 p. 3-4 – Atlanta PD Reports). Detective Underwood contacted Mr. Bharadia and informed him that the Tahoe was damaged. (P20 p. 27 – Cobb County PD Reports). The next day, Mr. Bharadia identified Mr. Flint in a photo array as the individual who had stolen his Tahoe. Mr. Bharadia also told the detective that Mr. Flint had a stolen motorcycle, which could be found at the home of his friend, Ashleigh Dold, at 5803 Betty Drive in Savannah. (*Id.*). Detective Underwood shared the tip about the stolen motorcycle with the Savannah police. (*Id.* at p. 28).

D. The Savannah PD and Thunderbolt PD Investigations

When the Savannah police went to Ashleigh Dold's house to look for the stolen motorcycle, she showed them other items Mr. Flint had left in the U-Haul,[8] her car, and in her spare bedroom, including:

[8] Sometime after Mr. Flint left Savannah to drive to Atlanta, he called Ms. Dold and asked her to retrieve a computer he left in the U-Haul near J.F.'s apartment complex in Thunderbolt. (T-222-23, 235, 237). Dold did so and took the computer to her house. (*Id.* at 223).

J.F.'s stolen computer, jewelry, and CDs, as well as a knife, a tire iron, and a pair of batting gloves that Ms. Dold said belonged to Mr. Flint, among other items.[9] (P24 p. 2 – Ashleigh Dold's Handwritten Statement; P1 p. 375, 377 – State's Trial Ex. 24 & 26; T-122-23, 138-39, 222-23, 236-37, 313).

After Savannah police recovered the stolen property, they notified Detective Conners at the Thunderbolt Police Department that they had found "some items that may be of interest to [him]" at the home of Ashleigh Dold, a few miles from J.F.'s apartment. (T-121-22, 215). Understanding that Mr. Flint brought the computer and other items to Dold's house, Det. Conners asked the Savannah Police Department forensics lab to prepare a photo array that contained a photo of Mr. Flint. (T-139). Each man in the array was a Black male. (T-99). Det. Conners presented the array to J.F., who identified Mr. Flint and another Black man as possibly being the assailant. (P19 – Sterling Flint Photo Array; T-85).

In addition to Mr. Flint naming Mr. Bharadia, Det. Conners testified that Ashleigh Dold also brought Mr. Bharadia to his attention as a suspect. Once Mr. Bharadia became a suspect, Det. Conners asked the Savannah Police Department forensics lab to create a second photo array that included a photo of Mr. Bharadia and did not include a photo of Mr. Flint. (T-139). On or about November 29, Det. Conners presented the second photo array to J.F., under undocumented circumstances. (T-84-85, 126). Although J.F. had previously identified Mr. Flint and another man as the possible assailant, this time she positively identified Mr. Bharadia. (T-84, 126).

Notably, the photo array from which J.F. identified Mr. Bharadia disappeared from the case file prior to trial and has never been recovered. (HT-53-54, 132). J.F.'s identification of Mr. Bharadia enabled Det. Conners to obtain a warrant for Mr. Bharadia's arrest.

E. Trial Counsel's Preparation for Trial

Trial counsel Caleb Banks initially built his trial strategy around discrediting J.F.'s identification by presenting the two photo arrays. (HT-77). Those photo arrays were never produced to Mr. Banks, and he

[9] At trial, J.F. identified the batting gloves as those worn by the perpetrator when he sexually assaulted her and the knife as the one held against her throat. (T-59, 82).

admits that he did not take adequate steps to ensure that he had them before trial because he was "overconfident." (*Id.*). DNA testing was not part of trial counsel's preparation because the GBI reports showed that there were no fluids to test on the recovered items. (P1 p. 354, 355, 384 – State's Trial Ex. 1, 2, & 39; HT-79-80).

F. Mr. Flint's guilty plea

Mr. Flint was initially charged with burglary and theft by receiving stolen property in this case, but he pleaded guilty to theft by receiving in exchange for the burglary charge being dismissed. (T-156). As part of his plea agreement, Mr. Flint was required to testify against Mr. Bharadia. (*Id.*).

II. Mr. Bharadia's Trial and Conviction

Mr. Bharadia went to trial on June 26 and June 27, 2003. (T-1). The State's evidence, which is summarized below, consisted primarily of the testimony of his co-defendant, the victim, and lead investigating officer.

A. Sterling Flint

At trial, Sterling Flint testified that Mr. Bharadia asked him to hold some items, including a computer. (T-156). Mr. Flint said he knew the property was stolen and that Mr. Bharadia intended to sell it. (T-156-57). On cross-examination, Mr. Bharadia's trial counsel, Mr. Banks, asked Mr. Flint about his involvement in a string of similar Cobb County burglaries that he committed using Mr. Bharadia's stolen Tahoe. (T-159-62). Mr. Banks apparently believed that the burglary charges were still pending, but Mr. Flint had already pleaded guilty to those charges. (P21 p. 7, 10 – Sterling Flint Cobb County Plea Documents; T-159-60; HT-90-91). Mr. Flint responded to Mr. Banks' questioning by stating that he had no burglary charges pending against him because all charges had been "disposed of." (T-164). Mr. Banks did not obtain certified copies of Mr. Flint's prior convictions before Mr. Bharadia's trial. (T-162-63; HT-89).

Mr. Flint denied that he stole the Tahoe or that he crashed it during a high-speed chase with police. (T-159). The police records contradicted this testimony, but Mr. Banks failed to obtain those records or

confront Mr. Flint with them. (P20 p. 26 – Cobb County PD Reports; P22 p. 3-4 – Atlanta PD Reports; HT-92-93). Instead, Mr. Banks confronted Mr. Flint with a record of a different, unrelated high-speed chase that occurred a few days later, in which Mr. Flint wrecked his brother's Dodge Caravan. (T-160-61; P22 p. 9-10 – Atlanta PD Reports). Mr. Banks apparently confused the two incidents because although he was most interested in the Tahoe wreck, he did not obtain those records or confront Mr. Flint with them at trial. (HT-92-93).

B. The Victim

At trial, J.F. testified about the circumstances surrounding the sexual assault and burglary. (T-52-77). During her testimony, J.F. identified several items of physical evidence, including a pair of batting gloves that the perpetrator wore during the attack. (T-82).

When the prosecutor asked J.F. about the photo array that included Mr. Bharadia's photo, she said: "When I saw the defendant's face in the photo lineup, I automatically knew that was who it was. [. . .] Without any doubt whatsoever." (T-84). Mr. Banks did not object to this testimony. Notably, the State did not produce either photo array at trial. Mr. Banks did not object to any of J.F.'s testimony about identifying Mr. Bharadia from the missing photo array. Mr. Banks also did not consult with or present an expert in eyewitness identification.

C. The Lead Investigator–Detective Conners

At trial, Det. Conners of the Thunderbolt Police Department testified about the investigation. He explained that he and Chief O'Dwyer took photos and collected evidence from J.F.'s apartment to send to the GBI crime lab. The GBI found no semen or other testable fluids on the towels and no usable prints on the latent lift cards. (P1 p. 354, 355, 384 – State's Trial Ex. 1, 2, & 39).

Det. Conners also testified that, about 10 days after the attack, he got notice from a Savannah detective of "some items that may be of interest to [him]" at Ashleigh Dold's house. (T-122). According to his testimony, when Det. Conners arrived at Ms. Dold's house, she told him that Sterling Flint had brought the items to her house, but that they were not Mr. Flint's belongings. (*Id.*). Det. Conners realized they were

the property stolen from J.F.'s apartment. (*Id.*). Det. Conners testified that "when I was recovering the items, I also learned [from Ms. Dold] that Mr. Bharadia's truck was used to load J.F.'s stolen computer."[10] (T-125, 133). He stated that this information "put [him] on to" Mr. Bharadia and that he did not get "any other information from any source, civilian, police or otherwise," concerning Mr. Bharadia. (T-125, 139).

The record, however, indicates that Det. Conners did receive information about both Mr. Bharadia and Mr. Flint from other sources, namely, Cobb County's Det. Underwood—who originally got the information from Mr. Bharadia himself. (P20 p. 27-28 – Cobb County PD Reports). Further, Ashleigh Dold denied telling Det. Conners or anyone else that Mr. Bharadia's Tahoe was used to move the U-Haul, the computer, or any other stolen property. (HT-185). Neither Ms. Dold's written statement, nor her trial testimony connected Mr. Bharadia or the Tahoe to the U-Haul, the computer, any other stolen property, or any crime. (P24 p. 1-2 – Ashleigh Dold's Handwritten Statement; T-222-23). In fact, Ms. Dold admitted that she used her own vehicle to tow the U-Haul and that she is the person that moved J.F.'s computer from the U-Haul at Mr. Flint's request. (T-216-17, 222-23; HT-180-82). Mr. Bharadia's Tahoe could not have been used to load J.F.'s computer at her apartment on November 18 because: (1) the Tahoe was in the impound lot at the Beaufort County Sheriff's Office in South Carolina from November 17 until November 19; and (2) Ms. Dold later used her own car to move the computer from the U-Haul to her house. (P1 p. 418-21 - Def. Trial Ex. 1 & 2).

Mr. Banks asked Det. Conners a limited series of questions about the missing photo arrays. Det. Conners confirmed that the first array contained all Black men, including Mr. Flint, and that Mr. Flint was one of two in the first array that J.F. identified as the possible perpetrator. (T-140). Regarding the disappearance of both photo arrays from the case file, Mr. Banks asked about the location of the first array with Sterling Flint, and Det. Conners replied that it "would be in the investigator file." (*Id.*). Mr. Banks

[10] Det. Conners testified on cross examination that Mr. Bharadia also told him "about Sterling loading computers and stuff in [Mr. Bharadia's] truck." (T-134). He also testified that the interview was video, and audio recorded but said he did not put the recordings into evidence and did not know where they were. (*Id.*).

asked no follow-up questions to establish why the two photo arrays were not produced in discovery or whether they could be produced at trial. He also failed to ask the same questions about the second photo array containing Mr. Bharadia's photo.

D. Mr. Bharadia's Defense

Mr. Banks' original defense strategy had been to show the jury the two photo arrays in which J.F. had identified three different men as the possible perpetrator, none of whom looked alike. (HT-77, 83, 106). The photo arrays were never produced, so instead, Mr. Banks asserted an alibi defense. (HT-76).

Mr. Banks called Deputy Sheriff Jason Sweeny and Lieutenant Mark Maddox, both of the Sheriff's Department of Beaufort, South Carolina. They confirmed that Mr. Bharadia's Tahoe was towed to the impound lot on Saturday November 17, 2001 (the day before the crime), where it stayed until it was released to Mr. Bharadia on the afternoon of November 19, 2001. (T-182, 188).

Mr. Banks called two alibi witnesses, who he expected would testify to Mr. Bharadia's whereabouts the weekend of the crime (as outlined above). However, these witnesses were not properly prepared. In fact, Ms. Colbert was never told she would be called as a witness and was only in court that day because she traveled with her friend, Mrs. Pitts, who was going to be called as a witness. (HT-197-98). As a result, Ms. Colbert gave conflicting testimony as set forth above about which weekend, she and Mr. Bharadia took the kids to see the new *Harry Potter* movie, and she mistakenly testified to having seen it on a date that could not possibly be correct, because the movie was not yet released. (T-199, 250; HT-207; P27A, B & C – Atlanta Journal Constitution newspaper articles).

Mr. Banks also called Ashleigh Dold as a witness, who testified that Mr. Bharadia was not at her house on Sunday, November 18th. She said she first saw him the following evening. *(Id.)*. Ms. Dold also recounted how two Savannah Police Department officers arrived at her house the following week to ask about the stolen motorcycle Mr. Flint had left there. (T-221). Later the same day, Thunderbolt PD contacted Ms. Dold about other property Mr. Flint left at her house. (T-221-22). Ms. Dold showed the property (including jewelry, CDs, and a computer) to the police. (T-222-23).

On cross-examination, Ms. Dold expressed confusion about the exact days on which certain events occurred. She admitted she was not sure whether she saw Mr. Bharadia the Monday or Tuesday before Thanksgiving. (T-230). She was also unsure whether it was Monday or Tuesday that Mr. Flint called her to ask her to retrieve the computer from the U-Haul. (T-233-34). Ms. Dold acknowledged that "it's been a while" since the events she described and "[t]hat whole week was kinda jumbled together." (T-229, 233, 234). Ms. Dold was not asked whether she told Det. Conners that Mr. Bharadia's truck was used to load J.F.'s stolen items. Mr. Banks did not meet with Ms. Dold prior to calling her as a trial witness. (HT-186).

During closing arguments, the prosecutor seized upon the discrepancies in the testimony of Mr. Bharadia's unprepared witnesses. (T-320). Mr. Bharadia was convicted of burglary, aggravated sodomy, and aggravated sexual battery and sentenced to life in prison without the possibility of parole. (T- 340-41, 351).

III. Direct Appeal Proceedings

Steven Sparger was Mr. Bharadia's appointed counsel for his motion for new trial and direct appeal. After Mr. Bharadia's trial, Mr. Sparger obtained DNA testing that excluded Mr. Bharadia as a contributor to the male DNA recovered from the batting gloves worn by the man that assaulted J.F. Mr. Sparger did not have previous experience with DNA testing, but had reached out to Aimee Maxwell, the executive director of the Georgia Innocence Project (GIP), which was the only organization in Georgia that regularly used DNA testing in criminal cases at the time. Ms. Maxwell recommended that Mr. Sparger contact Forensic Science Associates (FSA), a laboratory in California run by Dr. Edward T. Blake. (HT-117). At the time, the lab was one of the most advanced and was known to find DNA when others could not. (R6 p. 20 – *Ex Parte* Motion for Additional Funds filed on October 7, 2004; HT-66-71, 117, 126, 130). Mr. Sparger contacted FSA, and Dr. Blake advised Mr. Sparger to send all available pieces of evidence to the lab for examination. (HT-117-18).

Mr. Sparger then met with the trial judge at an *ex parte* chambers conference where Mr. Sparger requested, and eventually obtained, funds to have physical evidence tested for "touch" DNA at FSA.[11] (*Id.*). He arranged for the evidence to be sent to FSA, including the Diet Coke can from J.F.'s trash bin, and the blue and white batting gloves that J.F. confirmed were worn by the perpetrator during the attack. (P2 p. 52-53 – MNT Hr'g T. May 16, 2005, Def. Ex. 1 (Forensic Science Associates Report, Nov. 16, 2004 (p. 5-6); HT-118). While FSA conducted the testing, Mr. Sparger returned to the judge two more times to request additional funding, as the cost continued to exceed the amount the court had already authorized. (P32 – Ex Parte Motion for Additional Funds filed on May 26, 2004; R6 p. 7-80 – Ex Parte Motion for Additional Funds filed on October 7, 2004; R7 p. 6–13 – Ex Parte Motion for Additional Funds filed on June 20, 2005; HT-118). In the last meeting, Mr. Sparger offered to forgo his own pay for the time he spent on Mr. Bharadia's case to help save the county money and the judge accepted Mr. Sparger's offer. (HT-119).

On November 16, 2004, FSA released its report. (P2 p. 48-134 – MNT Hr'g T. May 16, 2005, Def. Ex. 1 (Forensic Science Associates Report, Nov. 16, 2004)). FSA identified a female DNA profile from epithelial skin cells recovered from the Diet Coke can, which it dubbed "Unknown Female #1" (UF1). (*Id.* at p. 60-61.) The FSA report suggested that UF1 was likely J.F. given that the same DNA profile was found on the batting gloves. (*Id.* at p. 61). In addition, FSA identified an unknown male profile inside of the gloves, which it dubbed "Unknown Male #1" (UM1). (*Id.* at p. 62). Unknown Male #1 was identified as a likely contributor at every location on the gloves where a male profile was detected. Mr. Bharadia was eliminated as a possible contributor at every location. (*Id.* at p. 61, 62, 64, 66).

The FSA report recommended that "reference samples in the form of oral swabs be provided by the significant players in this case including J.F. and Sterling Flint," to determine whether either of those individuals were UF1 or UM1. (*Id.* at p. 67). Mr. Sparger then returned to the trial court to ask that reference DNA samples be taken from Sterling Flint and J.F. to compare to UM1 and UF1. In chambers, the State

[11] "Touch" DNA refers to DNA left behind by skin cells, rather than bodily fluids. (HT-66).

stipulated that UF1 was likely J.F., but objected to a reference sample being taken from Mr. Flint. (HT-121). The court denied Mr. Sparger's request for reference samples. (HT-122). This conference in chambers was not recorded. (HT-173). Mr. Sparger did not file a written motion asking for a reference sample, did not raise the issue on the record at the motion-for-new-trial hearing, did not seek or obtain a written ruling from the judge, and did not appeal from the trial court's denial of the request for a reference sample from Mr. Flint. (HT-123-24, 173-74).

A. Motion for New Trial Proceedings

A hearing on Mr. Bharadia's motion for new trial was held in three parts on May 16, June 16, and August 4, 2005. Mr. Sparger then filed a post-hearing brief containing a total of 11 claims, including the following claims that relate in some way to issues that are currently before the Court:[12]

1. The newly discovered evidence proves that the evidence used to establish Mr. Bharadia's guilt was insufficient as a matter of law. Mr. Sparger presented the DNA test results from FSA showing that an unknown male's DNA (not Mr. Bharadia's) was on the batting gloves as new evidence of innocence. However, Mr. Sparger failed to show how the new evidence satisfied the procedural requirements from *Timberlake v. State*, 246 Ga. 488 (1980). Among other things, Timberlake requires a proponent of new evidence to show that the evidence came to his knowledge since the trial, and that it was "not owing to the want of due diligence" that it was not acquired sooner. *Timberlake*, 246 Ga. at 488. The DNA had been recovered from the evidence using touch

[12] Mr. Sparger also made a number of claims that do not relate to any issues currently before the Court, including: (1) the verdict is against the weight of the evidence (P11 p. 4 – Order on MNT filed on September 20, 2005); (2) admitting Mr. Bharadia's prior convictions violated Mr. Bharadia's right to due process (*Id.* at p. 6-7); (3) Mr. Bharadia was denied due process by the trial court's failure to limit its instruction on impeachment by a crime of moral turpitude to Sterling Flint (*Id.* at p. 7-8); (4) Mr. Bharadia was denied his right to due process when the State improperly commented about the trial court's entry of a directed verdict on the count of theft by receiving (*Id.* at p. 8-9); (5) the trial court erred by including the "level of certainty" language in the eyewitness identification jury instruction (*Id.* at p. 9); (6) the trial court erroneously sentenced Mr. Bharadia to life without the possibility of parole for aggravated sodomy (P11 p. 10-11 – Order on MNT filed on September 20, 2005); (8) ineffective assistance of trial counsel for placing Mr. Bharadia's character in evidence by introducing evidence that he was on parole at the time of the offense at issue; failing to properly object to the State's erroneous introduction of certified copies of convictions; failing to object to the trial court's failure to limit its instruction on impeachment; failing to object to comment made by the State in closing argument about the entry of a directed verdict on the theft by receiving charge; failing to object to the State being allowed to reuse certified copies of convictions for recidivist purposes; and failing to be prepared to argue that a sentence under O.C.G.A. §17-10-7(c) denied Mr. Bharadia his right to due process (*Id.* at p. 11-18).

DNA technology, which was not widely available before Mr. Bharadia's trial. However, responding to the lack of evidence that Mr. Sparger presented on the diligence issue, the trial court rejected Mr. Sparger's argument without analysis, stating only that "DNA testing of the gloves was available to the Defendant prior to the trial." (P11 p. 2 – Order on MNT filed on September 20, 2005). The trial court also adopted the State's argument that the unknown male DNA profile inside the assailant's batting gloves was immaterial, even though it did not match Mr. Bharadia, because of the time and location where the gloves were collected. (*Id.* at p. 2-3).

2. Mr. Bharadia was denied due process and a fair trial due to the missing photo arrays. (*Id.* at p. 5-6). While Mr. Sparger asserted that the Bharadia photo array was exculpatory on its face, he did not present evidence of exculpatory value, and instead, argued that the array was presumptively suggestive since the State failed to preserve it. (P9 p. 25-26 – Post-hearing Brief on Motion for New Trial filed on August 8, 2005). The court denied this claim, stating that in the absence of a showing of exculpatory value, Mr. Bharadia would have had to show bad faith. (P11 p. 4-6).

3. Mr. Bharadia was denied effective assistance of counsel due to Mr. Banks' failure to obtain expert assistance to examine various items of evidence for DNA. At the motion-for-new-trial hearing, Mr. Banks testified about the Coca-Cola can and the skull cap, explaining that he thought that the lab could not get prints off the can, and the only hair on the skull cap was animal hair. (P2 p. 20 – MNT Hr'g T. May 16, 2005). Mr. Sparger began to discuss the batting gloves, but before he could complete his question, the State objected that Mr. Sparger was testifying himself. (*Id.* at p. 21). Mr. Sparger moved on. As a result, he failed to elicit a response from Mr. Banks as to why Mr. Banks did not seek DNA testing on the batting gloves, specifically. The court denied this claim, finding that non-matching DNA results would not have made a difference in the verdict. (P11 p. 12-13 - Order on MNT filed on September 20, 2005). Given the presumption of reasonable

strategy and the fact that Mr. Banks did not explain why he did not seek DNA testing on the gloves, the court also determined that Mr. Banks' lack of action was entitled to deference. (*Id.*).

4. Mr. Bharadia was denied effective assistance of counsel due to Mr. Banks' failure to litigate the motion to preserve evidence. Because Mr. Sparger did not show that the missing evidence had exculpatory value, as discussed above, the court denied this claim. (*Id.* at p. 12).

5. Mr. Bharadia was denied effective assistance of counsel due to Mr. Banks' failure to obtain expert witness assistance to provide testimony about eyewitness identification. Because Mr. Sparger failed to elicit testimony from Mr. Banks at the MNT hearing as to why Mr. Banks did not obtain an eyewitness expert, the court presumed that Mr. Banks' inaction was strategic and was therefore not ineffective assistance. (*Id.* at p. 13).

6. Mr. Bharadia was denied effective assistance of counsel due to Mr. Banks' failure to properly interview or prepare Mr. Bharadia's alibi witness, Alisha Colbert, or Mr. Bharadia. The trial court ruled that Mr. Sparger did not establish that Mr. Banks failed to sufficiently prepare his witnesses. (*Id.* at p. 14-15). The court further found that Mr. Banks' failure to prepare his own client was not a basis for an ineffective assistance of counsel claim. (*Id.*).

7. Mr. Bharadia was denied effective assistance of counsel due to Mr. Banks' failure to impeach Sterling Flint by use of his prior convictions. At the motion-for-new-trial hearing, when asked about failing to obtain or introduce certified copies of Sterling Flint's prior convictions to impeach Mr. Flint as to both veracity and bias, Mr. Banks testified: "The jurors, I'm morally certain, just disregarded his testimony, so I didn't introduce them. He was, to me, incredible." (P2 p. 27 – MNT Hr'g T. May 16, 2005). The trial court ruled that it was a strategic decision for Mr. Banks not to use Mr. Flint's prior convictions for general impeachment purposes. (P11 p. 16 – Order on MNT filed on September 20, 2005).

8. Mr. Bharadia was denied effective assistance of counsel due to Mr. Banks' failure to challenge the police investigation of the case based on missing evidence. At the hearing, Mr.

Banks testified that he was surprised not to receive the photo arrays in discovery. (*Id.* at p. 17-18). When asked whether he had a strategic reason for failing to challenge the loss of the photo array, Mr. Banks replied that he "just got overconfident." (*Id.* at p. 18). Det. Conners testified as well and acknowledged that neither the photo arrays nor his "very lengthy" investigative report were still in the investigative file for the Bharadia case. (P3 p. 11-12 – MNT Hr'g T. June 16, 2005). He explained that, at the time of Mr. Bharadia's case, the department did not have a property room, but merely "a closet they kept stuff in." (*Id.* at p. 16). Det. Conners also claimed there was no individual in charge of the property room, and that the responsible party was "whoever the investigator is at that time." (*Id.*). The trial court ruled that Mr. Banks' failure to challenge the police investigation, or the missing evidence was strategic. (P11 p. 16-17 – Order on MNT filed on September 20, 2005).

B. Direct Appeal - Court of Appeals

Mr. Sparger appealed several of the claims that the trial court rejected in the motion for new trial.[13] He primarily argued that the exculpatory DNA results would have made a difference to a jury, and thus Mr. Banks was ineffective for not conducting DNA testing before trial. (R15 p. 34 – Appellant's Br. filed on March 3, 2006). Mr. Sparger did not present any evidence or argument about Mr. Banks' reasoning for not testing the gloves for DNA but, instead, only reiterated Mr. Banks' stated reasons for not testing the Diet Coke can or the skull cap. (*Id.* at p. 36). Based upon the limited record before it, the Court of Appeals agreed with the trial court that Mr. Banks' failure to obtain DNA testing was strategic. *Bharadia v. State* ("Bharadia I"), 282 Ga. App. 556, 559-60 (2006). Just as Mr. Sparger did, the Court recited Mr. Banks' stated reasons for not testing the Diet Coke can or the skull cap. *Id.* at 560. The Court then noted: "Bharadia and his

[13] Mr. Sparger did not appeal the following claims: (1) newly discovered DNA evidence; (2) the State's failure to preserve evidence; (3) Mr. Banks' failure to suppress the victim's identification of Mr. Bharadia; (4) Mr. Banks' failure to prepare alibi witnesses; and (5) Mr. Banks' failure to challenge the police investigation. While Mr. Sparger stated that his reasoning for dropping some claims, in part, was the page limitation imposed by the Court of Appeals, it is also readily apparent from Mr. Sparger's testimony that he did not adequately understand the facts or law underlying many of the claims and, therefore, could not have made a reasonable strategic decision about which claims to appeal. (HT-124, 126-27, 130, 137, 150,165-66).

appellate attorney did not elicit any further testimony from trial counsel explaining his decision not to hire a DNA expert." *Id.* The Court of Appeals never acknowledged the exculpatory DNA on the batting gloves.

Mr. Sparger also argued that Mr. Banks was ineffective for failing to obtain an eyewitness identification expert. (R15 p. 36-39 – Appellant's Br. filed on March 3, 2006). But once again, in the absence of a stated reason for Mr. Banks' inaction, the Court of Appeals, like the trial court, presumed that he made a strategic decision. *Bharadia I*, 282 Ga. App. at 449. Mr. Sparger also argued that, by failing to introduce certified copies of Mr. Flint's prior convictions, Mr. Banks was ineffective for failing impeach his credibility and show that he was lying to the jury. (R15 p. 46-49 – Appellant's Br. filed on March 3, 2006). Mr. Sparger did not include that Mr. Banks' failure was also ineffective because it denied Mr. Bharadia the opportunity to prove Mr. Flint's bias and motive to seek revenge upon Mr. Bharadia. The Court of Appeals affirmed the denial of the ineffective assistance of counsel claim.

IV. Extraordinary Motion for New Trial Proceedings

In September 2011, Mr. Sparger and new co-counsel, the Georgia Innocence Project (GIP), filed an extraordinary motion for post-conviction DNA testing and for a new trial (EMNT). (R4 p. 270-280 – Extraordinary MNT filed on September 6, 2011). The EMNT requested that the gloves be subjected to further DNA analysis by the GBI to identify the unknown male profile. (*Id.* at p. 276-77). The court did not order any additional testing on the batting gloves; however, it ordered that the "Unknown Male #1" DNA profile be run through a comprehensive search on Combined DNA Index System (CODIS) for comparison to known convicted offenders. (R5 p. 3-4 – Order Granting CODIS Search filed on April 18, 2012). On April 26, 2012, the GBI reported the results of the CODIS search: the man that left the "Unknown Male #1" DNA profile on the gloves was Sterling Flint. (P17B p. 1 – GBI CODIS Hit Report to Flint).

The trial court found that the new evidence was material and could have produced a different verdict if known to the jurors. (P12 p. 11 – Order on EMNT filed on January 11, 2013). Nevertheless, the court denied Mr. Bharadia a new trial, stating that Mr. Bharadia should have obtained the DNA test results before

trial.[14] Mr. Sparger and GIP appealed the denial of the EMNT, asserting that the DNA profiles from the gloves and the CODIS match to Sterling Flint were not known to Mr. Bharadia before trial. (R18 p. 17-20 – Appellant's Br. filed on June 24, 2013).

Nonetheless, the Court of Appeals affirmed the denial of the EMNT. *Bharadia v. State* ("Bharadia II"), 326 Ga. App. 827 (2014). The Court concluded that Mr. Bharadia and his counsel did not exercise due diligence because they took no steps to seek DNA testing on the gloves before trial. *Id.* at 830-31. The Court of Appeals did not address or disturb the trial court's finding that Mr. Bharadia had satisfied the other four *Timberlake* factors. The Georgia Supreme Court granted certiorari on the single issue of whether the Court of Appeals correctly analyzed the due diligence prong of *Timberlake*. (R21 p. 3 – Appellant's Br. filed on September 29, 2014). The Supreme Court affirmed the Court of Appeals' analysis of the diligence factor and, consequently, the denial of Mr. Bharadia's EMNT. *Bharadia v. State* ("Bharadia III"), 297 Ga. 567 (2015) (stating that "the record reflects no evidence showing that Bharadia was unable to obtain this evidence prior to trial.")

V. Habeas Corpus Petition and Hearing

Mr. Bharadia filed a timely petition for writ of habeas corpus on March 28, 2011. He then filed an amended petition and extensive brief in support on December 30, 2022. This Court held an evidentiary hearing in support of the amended petition on June 20, 2023.

At the evidentiary hearing, the parties admitted a significant number of documentary exhibits.[15] (*See generally* P1-P33 and R1-7, 15-27).[16] Mr. Bharadia called nine witnesses. Both Mr. Bharadia's trial and

[14] The trial court's conclusion did not arise from any evidence establishing that the DNA testing was available through the exercise of due diligence before Mr. Bharadia's trial, rather, it rested only on Mr. Sparger's prior assertions that Mr. Banks was ineffective for not obtaining the DNA test results before trial and Ms. Sparger's failure to provide any evidence to contradict that assertion in the EMNT. The performance of counsel and the availability of DNA testing at/before Mr. Bharadia's trial is discussed in detail in section II(*B*) of the Conclusions of Law below.

[15] Attorney Alissa Jones and investigator Matthew Ryan Ralston testified primarily to admit certain documents into the record. (HT-51-62).

[16] Exhibits P32 and P33 were admitted after the hearing per this Court's July 18, 2023, Order.

appellate attorneys—Caleb Banks and Steven Sparger, respectively—testified extensively about their representation of Mr. Bharadia, including their general preparation, strategy, and decision-making. (HT-73-174). A GBI forensic biology expert testified to the cutting-edge nature of "touch" DNA testing at the time of Mr. Bharadia's conviction. (HT-63-71). Two defense trial witnesses, Ashleigh Dold and Alisha Colbert, also testified about their lack of preparation before trial and expanded and clarified their earlier trial testimony. (HT-177-86, 196-201). Although alibi witness Keisha Pitts is now deceased, her husband, Rasean Pitts, testified to his recollection of the events supporting Mr. Bharadia's alibi. (HT-188-95). And finally, Mr. Bharadia also testified, detailing his extensive alibi leading up to, during, and after the crime took place. (HT-202-35). The Warden cross-examined many of Mr. Bharadia's witnesses but did not call any witnesses of his own.

Specific facts from the documentary evidence and witness testimony presented at the evidentiary hearing will be documented below as they apply to each of Mr. Bharadia's claims.

CONCLUSIONS OF LAW

I. *Res Judicata* and Law of the Case

As a preliminary matter, neither *res judicata* nor the "law of the case" doctrine prevent this Court from granting Mr. Bharadia habeas corpus relief.

The doctrine of *res judicata* is codified at O.C.G.A. § 9-12-40:

> A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.

The purpose of this doctrine is to prevent "the relitigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action." *Karan, Inc. v. Auto-Owners Ins. Co.*, 280 Ga. 545, 546 (2006).

It is well-established that the doctrine of *res judicata* does not generally apply in habeas corpus proceedings. *McCleskey v. Zant*, 499 U.S. 467, 479 (1991); *Salinger v. Loisel*, 265 U.S. 224, 230 (1924);

Wong Doo v. United States, 265 U.S. 239, 240 (1924); *Andrews v. Aderhold*, 201 Ga. 132, 142 (1946). The Supreme Court of Georgia has narrowly applied a qualified version of *res judicata* in habeas corpus actions in two circumstances: (1) to restrict petitioners from raising the same issues in successive habeas claims (*see Andrews v. Aderhold*, 201 Ga. 132, 139-40 (1946)) (discussing *Salinger* and *Wong*), and (2) to bar "only those issues *actually litigated and decided* on direct appeal." *Shelton v. Lee*, 299 Ga. 350, 351 (2016) (emphasis added); *see also Schofield v. Palmer*, 279 Ga. 848, 851 (2005) (stating that a *Brady* claim that was not raised in earlier proceedings is not procedurally barred in habeas corpus); *Turpin v. Lipham*, 270 Ga. 208, 208 (1998) (reasoning that claims that were litigated and decided on direct appeal are barred from review on habeas corpus). Neither of these circumstances apply here, given that this original habeas corpus action is Mr. Bharadia's first opportunity to raise the claims of ineffective assistance of appellate counsel that he has brought before this Court.

The "law of the case" doctrine provides that: "[A]ny ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be."[17] O.C.G.A. § 9-11-60(h). It is important to note in the context of this case that the doctrine only applies to rulings made by an appellate court, not to facts or other statements. *See Hicks v. McGee*, 289 Ga. 573, 713 (2011) ("[w]ithout an express ruling . . . the law of the case rule as articulated in OCGA § 9-11-60 (h) is inapplicable here."); *Parks v. State Farm Gen. Ins. Co.*, 238 Ga. App. 814, 815 (1999) (stating that the law of the case rule "applies only to actual *decisions* . . .") (emphasis in original). The statement by the Supreme Court of Georgia that Mr. Bharadia's trial counsel could have conducted touch DNA testing on the gloves before trial is not a ruling and, therefore, is not encompassed in the law of the case.[18]

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[17] Mr. Bharadia argued in post-hearing briefing that the "law of the case" doctrine should not apply in habeas corpus actions, given that the parties are not the same as the parties involved in his underlying criminal conviction.

[18] It is also important to note that this statement on the availability of DNA evidence prior to Mr. Bharadia's trial was not supported by any actual evidence in the record.

Further, there is an important, long-recognized exception to the "law of the case" rule that applies in Mr. Bharadia's case: the previous law of the case does not remain binding when the evidentiary posture of the case has changed. *McElrath v. State*, 315 Ga. 126, 128 (2022); *McDonald v. State*, 305 Ga. 5, 6 (2019); *Hicks v. McGee*, 289 Ga. 573, 578 (2011); *Moon v. State*, 287 Ga. 304, 309 (2010) (Nahmias, J., concurring). For example, the evidentiary posture of a case changes when "a new issue not previously addressed by an appellate court is properly raised, or when the original evidence is insufficient but is later supplemented." *Lowman v. Advanced Drainage Sys.*, 228 Ga. App. 182, 183-84 (1997); *McLean v. Cont'l Wingate Co.*, 222 Ga. App. 805, 806 (1996); *see also Cohen v. Rogers*, 338 Ga. App. 156, 164 (2016); *Pierce v. State*, 278 Ga. App. 162, 163-64 (2006).

The evidentiary posture exception to the "law of the case" rule applies in this case because Mr. Bharadia presented additional evidence at the habeas hearing that squarely addresses the basis of the prior appellate rulings:

Prior Appellate Ruling	**Reasoning to Support Appellate Ruling**	**2023 Habeas Hearing New Evidence**
Mr. Bharadia did not show that his failure to obtain the DNA evidence earlier was not the result of a lack of due diligence[19]	Mr. Bharadia's trial counsel could have obtained the DNA test results prior to the 2003 trial[20]	Touch DNA testing was not available through the exercise of due diligence before Mr. Bharadia's 2003 trial[21]

[19] *Bharadia v. State*, 326 Ga. App. 827, 832 (2014).

[20] *Id.* at 568, 569, 571, 572, 573, 573 n.8, 9, & 10, 574.

[21] HT-66-71.

With this additional evidence on the record, the previous total absence of evidence is supplemented such that the appellate court ruling becomes "clearly wrong due to a change in the evidentiary record" and the law of the case doctrine does not apply. *Moon*, 287 Ga. at 309 (Nahmias, J., concurring).

In sum, this Court finds that neither *res judicata* nor the "law of the case" doctrine prevent this Court from granting relief on Mr. Bharadia's meritorious ineffective assistance of appellate counsel claims.

II. Mr. Bharadia's Appellate Counsel Provided Ineffective Assistance

The majority of Mr. Bharadia's habeas corpus claims relate to the alleged ineffective assistance of his appellate counsel, Steven Sparger. This Court finds Mr. Bharadia's claims meritorious and further finds that Mr. Sparger performed deficiently in a number of ways (detailed below), which prejudiced Mr. Bharadia during the course of his appellate proceedings. While Mr. Bharadia's first claim for ineffective assistance for appellate counsel's failure to competently present exculpatory DNA evidence by itself warrants habeas relief, the cumulative prejudice resulting from the remaining deficiencies is also grounds for relief (as explained in subsection *C* below).

A. Legal Standards Applicable to Ineffective Assistance of Claims

A criminal defendant's Sixth Amendment right to counsel encompasses "the right to the *effective* assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (internal quotations and citations omitted) (emphasis added). Counsel deprives a defendant of this right when he fails to lend "adequate legal assistance." *Id.* Under the *Strickland* standard, to establish that he received ineffective assistance of counsel, a petitioner must show that his counsel's performance was professionally deficient and that, absent the deficiencies, there is a reasonable probability that the outcome of his case would have been different. *Id.* at 694.

When it comes to appellate counsel specifically, an attorney's failure to raise a claim on appeal is unreasonable when the claim "had clear and strong merit under the law as it existed at the time of the appeal." *Benton v. Hines*, 306 Ga. 722, 724 (2019) (internal quotations omitted); *see also Taylor v. Metoyer*,

299 Ga. 345, 349-50 (2016) (affirming grant of habeas relief where appellate counsel was ineffective for failing to raise strong ineffective assistance of trial counsel claim on appeal). In addition, an appellate attorney may be ineffective for failing to introduce evidence to support the claims he does raise. *Cartwright v. Caldwell*, 305 Ga. 371, 381 (2019).

B. Appellate Counsel Failed to Competently Present Exculpatory DNA Evidence

It is undisputed that DNA test results obtained after Mr. Bharadia's trial show that his DNA is not present in or on the gloves worn by the perpetrator—instead, Sterling Flint's DNA was discovered inside of the gloves. (P2 – MNT Hr'g T. May 15, 2005, Def. Ex. 1 (Forensic Science Associates Report, Nov. 16, 2004 (p. 14–20)); P17B – GBI CODIS Hit Report to Flint; P17C – GBI Confirmatory Match Report). As outlined below, the Court finds that these exculpatory DNA test results were not competently presented to the trial court due to Mr. Sparger's ineffective assistance of counsel.

First, Mr. Sparger performed deficiently when he raised an ineffective assistance of counsel claim related to the DNA on the gloves, because there was no evidence to support the idea that Mr. Bharadia's trial counsel, Caleb Banks, could have obtained the DNA results with reasonable diligence before the 2003 trial. *See Brown v. State*, 302 Ga. 454 (2017) ("To carry this burden [on an ineffective assistance of counsel claim], he must show that no reasonable lawyer would have done what his lawyer did or would have failed to do what his lawyer did not"). In coming to this conclusion, the Court credits the testimony of expert witness James Sebestyen, Forensic Biology Manager at the Georgia Bureau of Investigation, that the "touch" DNA testing conducted on the gloves post-trial was "cutting-edge," pushed the bounds of existing science, and was not being routinely performed at the time of Mr. Bharadia's trial. (HT-66-71).

The Court also finds that the efforts Mr. Sparger undertook to obtain the DNA test results in 2004 were extraordinary, rather than ordinary, further proving the point that Mr. Banks would not have been expected to obtain the DNA results through the exercise of reasonable or ordinary diligence in 2003. *See Watkins v. Ballinger*, 308 Ga. 387, 389 (2020) (explaining that due diligence is "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge

an obligation") (citing Black's Law Dictionary (11th ed. 2019)); *Britten v. State*, 173 Ga. App. 840, 841 (1985) ("[W]hether diligence used was ordinary, or less than ordinary, must be determined in each case by comparing the conduct under consideration with that of the *ordinary man* under similar circumstances") (internal quotations omitted) (emphasis added). Mr. Sparger testified at the habeas corpus hearing that he was under the impression that the testing was available at the time of trial and did not realize until much later that he was mistaken about this key fact. (HT-126, 130, 166). Because Mr. Banks could not have obtained the DNA test results through the exercise of reasonable diligence, it was unreasonable for Mr. Sparger to have raised an ineffective assistance of counsel claim against Mr. Banks for his failure to do so.

Second, Mr. Sparger performed deficiently by improperly arguing and failing to support a newly-discovered-evidence claim under *Timberlake v. State*, 246 Ga. 488 (1980). *Timberlake* requires, in part, that the moving party prove that a lack of due diligence is not the reason that the newly discovered evidence was not discovered sooner. *Id.* at 491. With respect to the DNA test results, Mr. Sparger argued that Mr. Bharadia was diligent in obtaining the results. However, he also argued that ineffective assistance of trial counsel explained why the DNA results did not come to Mr. Bharadia's attention sooner and why the results were discovered after trial. (P9 p. 18, 20 – MNT Post-Hr'g Br. filed August 8, 2005). Rather than making the required showing under *Timberlake*—that Mr. Sparger and Mr. Banks were both diligent—Mr. Sparger only argued about his own diligence. *Timberlake*, 246 Ga. at 491 ("[D]ue diligence before trial will not be inferred from diligence after conviction"). Although Mr. Sparger could have educated the trial court about the lack of availability of "touch" DNA testing in 2003 and, therefore, shown that both he *and* Mr. Banks had exercised due diligence, he did not.

Third, Mr. Sparger performed deficiently when he did not further pursue a comparison of the DNA found inside the gloves to Sterling Flint after that process was recommended by the DNA lab, but the trial court denied the request in an unrecorded in-chambers conference. (P2 – MNT Hr'g T. May 15, 2005, Def. Ex. 1 (Forensic Science Associates Report, Nov. 16, 2004 (p. 20)); R7 p. 10 – *Ex Parte* Motion for Additional Funds filed on June 20, 2005; HT-121-24). Given that the gloves were located among J.F.'s

stolen property (T. 124); J.F. identified the gloves as the gloves worn by her attacker (T. 59, 82); and that a DNA expert recommended additional testing to identify the unknown male DNA on the gloves, it was unreasonable for Mr. Sparger not to seek a written ruling from the trial court that he could then appeal. Mr. Sparger testified that it was simply not something he thought of at the time. (HT-123). Instead of further pursuing the additional recommended testing, Mr. Sparger waited six years, until long after Mr. Bharadia's direct appeal was resolved, to renew his request to compare the DNA inside the gloves to Sterling Flint's DNA profile. (R4 p. 270-280 – Extraordinary MNT filed on September 6, 2011). This request ultimately resulted in a match of the DNA inside the gloves to Mr. Flint's DNA (P17B – GBI CODIS Hit Report to Flint; P17C – GBI Confirmatory Match Report) and could have been fulfilled years earlier if Mr. Sparger had asked the trial court for a written ruling and appealed the decision to deny the comparison to Mr. Flint's DNA.

Fourth, Mr. Sparger performed deficiently when he did not appeal the trial court's ruling on the newly discovered evidence claim. Mr. Sparger testified that he had to drop some claims on appeal because of page number limitations (*see e.g.,* HT-127). Mr. Sparger further testified that he dropped this claim because he did not understand how the newly discovered evidence standard applied in a motion-for-new-trial hearing (*Id.* at p. 124, 165) and that he thought that the ineffective assistance of counsel claim was stronger. Mr. Sparger was admittedly wrong about the law and the facts underlying the DNA-related claims (*Id.* at p. 166). An attorney's mistake on a point of law fundamental to his case constitutes unreasonable performance. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). Furthermore, "an attorney's strategic decision is not reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Turpin v. Christenson*, 269 Ga. 226, 239 (1998).

The four instances of deficient performance recounted above were harmful to Mr. Bharadia. The Court finds that, but for Mr. Sparger's errors, he would have: (1) discovered in 2004 that Mr. Flint's DNA was inside the gloves and brought that evidence to the trial court, which with the very same information—years later—found that the evidence was so material that there was a reasonable probability that it would

have changed the outcome of trial (R5 p. 152–53 – Order on Extraordinary MNT filed on January 11, 2013); and (2) competently raised a newly-discovered evidence claim related to the DNA evidence. The combination of these two efforts would have resulted in a reversal at the motion-for-new-trial stage.

C. Additional Grounds for Habeas Relief

The Court finds that the above-stated claim of ineffective assistance of appellate counsel regarding the DNA requires habeas corpus relief. However, the Court also notes that Petitioner raised a number of additional claims of ineffective assistance of appellate counsel which the Court finds persuasive. While none of the additional claims listed below are sufficient standing alone to support the granting of habeas corpus relief, the Court finds that the cumulative effect of these additional appellate counsel errors further mandates the granting of habeas corpus relief.

The DNA claims are the primary basis upon which this Court grants habeas relief. However, the Court finds the following arguments—taken cumulatively—further support the Court's granting of Habeas relief.

1. *Appellate Counsel Failed to Raise or Competently Raise Constitutional Issues Related to the Eyewitness Identification, which has multiple indicators of unreliability, and the Photo Arrays which went missing prior to trial*

2. *Appellate Counsel Failed to Raise an Ineffective Assistance of Counsel Claim Based on Trial Counsel's Failure to Impeach Critical Witnesses on critical aspects of Mr. Bharadia's defense*

3. *Appellate Counsel Failed to Raise Meritorious Claims Related to the Alibi Defense and trial counsel's significant deficiencies in preparing defense witnesses to establish the defense*

4. *Appellate Counsel Failed to Raise Meritorious Claims Related to the State's Suppression of Exculpatory Evidence*

Viewing appellate counsel's errors and the evidence taken as a whole, the Court finds that the cumulative effect of those failures cannot be reasonably questioned. *See Schofield v. Holsey*, 281 Ga. 809, 812, n.1 (2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Mr. Bharadia's alibi witnesses placed him hundreds of miles away and there is compelling DNA evidence excluding him (and positively

identifying Mr. Flint) as the perpetrator. The errors that appellate counsel made strike at the heart of these critically important issues.

Each claim the Court addressed above describes a separate instance of deficient performance by appellate counsel (many of them predicated on underlying claims of ineffective assistance of trial counsel) and each instance independently prejudiced Mr. Bharadia. It is reasonably probable that Mr. Bharadia would have been granted a new trial during his direct appeal proceedings if counsel had not performed deficiently in any one of the ways described in this order. And when all the ineffective assistance of appellate counsel claims are considered cumulatively, the Court can only find that they prejudiced Mr. Bharadia's appeal.

If appellate counsel had not been deficient in the ways enumerated in this order, Mr. Bharadia's motion for new trial and appeal would have changed in at least the following ways:

(1) DNA results that excluded Mr. Bharadia and identified the actual perpetrator of the crime would have been presented to the court, along with a showing that the results satisfied the procedural requirements for newly-discovered evidence, thereby requiring the trial court to grant a new trial;

(2) The trial court would have found that the victim's out-of-court identification of Mr. Bharadia was inadmissible due to the State's destruction of the photo lineup and because the lineup was impermissibly suggestive;

(3) The trial court would have found that the State presented false evidence, requiring a new trial;

(4) The trial court would have found that trial counsel was ineffective for failing to impeach critical State's witnesses;

(5) The trial court would have found that trial counsel was ineffective when he failed to adequately present Mr. Bharadia's alibi defense; and

(6) The trial court would have found that the State suppressed material, exculpatory evidence, requiring a new trial.

An effective appeal would have resulted in the reversal of Mr. Bharadia's conviction on any of several grounds, including both the new evidence of his innocence and the constitutional violations at his trial. Given the cumulative effect of appellate counsel's errors, it is apparent that Mr. Bharadia was denied effective assistance of counsel and is entitled to a new trial.

III. Actual Innocence

The Warden argues that an actual innocence claim cannot be the basis for relief in a habeas corpus action. That is an open question in Georgia,[22] and other jurisdictions have held that such a claim is cognizable in habeas. This Court need not reach that question though, given the ample evidence of ineffective assistance of appellate counsel that entitles Mr. Bharadia to the granting of habeas corpus relief.

CONCLUSION

Based on a thorough review of the transcripts, records, and the applicable law, the Court finds that Defendant's constitutional rights were violated as set forth above. Therefore, for all the reasons stated above, the Court **GRANTS** Mr. Bharadia's habeas corpus petition on his ineffective assistance of appellate counsel claim.

SO ORDERED this 5th day of April, 2024.

Laura Tate, Judge
Gwinnett County Superior Court
Gwinnett Judicial Circuit

LAURA M. TATE
Judge, Superior Court
by designation

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[22] *See Mitchum v. State*, 306 Ga. 878, 881 n.2 (2019) (noting in dictum that while actual innocence is not "traditionally" cognizable in habeas, this question "remains an unsettled area of the law").

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