NO. _____ JUDICIAL DISTRICT TWENTY-A

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA,	)	
	)	
v.	)	From Montgomery
	)	99 CRS 3818, 3820
SCOTT DAVID ALLEN	)	
Defendant.	)	
	)	

PETITION FOR WRIT OF CERTIORARI AND WRIT OF MANDAMUS

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES THE PETITIONER, Scott David Allen, and respectfully moves this Court, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, for a Writ of Certiorari to review the orders of the court below denying his Motion for Appropriate Relief ("MAR") and Supplemental Motion for Appropriate Relief ("SMAR"), to vacate the lower court's orders, and to grant the relief requested in the MAR and SMAR. In the alternative, Mr. Allen seeks a Writ of Mandamus pursuant to Rule 22, compelling a full evidentiary hearing on all claims in his MAR and SMAR arising from the guilt-innocence phase of his trial before a different superior court judge, who can act as a neutral fact finder thereby ensuring full and fair post-conviction review.

Mr. Allen incorporates in this Petition, as if fully set forth, his MAR and SMAR (including all exhibits thereto), and his Response to State's Motion for Summary Denial (including all exhibits thereto). The transcript of the "limited evidentiary hearing" on four subparts of guilt-innocence phase Claim 3 held on August 25, 2017, and the transcript of a full evidentiary hearing on sentencing phase claims held the week of February 12, 2018, should be on file with this Court. In addition, the full transcript of the trial proceedings should be on file with this Court from Mr. Allen's direct appeal. However, Mr. Allen will promptly supply a copy of these transcripts upon request from the Court.

INTRODUCTION

Scott Allen is entitled to a new trial and sentencing hearing based on the claims set forth in his MAR and SMAR. The prosecution's case against Allen relied almost entirely on the testimony of a single witness, Allen's bitter ex-girlfriend, Vanessa Smith. Smith was angry at Allen because he left her for another woman, and she vowed to destroy Allen before going to the police with the story that Allen killed Gailey.

The shotgun that Smith claimed Allen used to shoot Gailey and then buried in the woods was found in a closet in the trailer where Allen, Smith, and Gailey lived with several other people. Smith claimed that Allen shot Gailey in the back,

suddenly and without provocation, as the three were walking single file through the forest. According to Greg McCrary, a crime scene expert with thirty-five years' experience at the FBI, her story does not hold water. Gailey's knife was found on top of his duffle bag covered in blood, but there was no blood surrounding Gailey's body and his t-shirt was neatly draped over a nearby rock. Gailey's jammed .45 caliber pistol was found underneath his body with another round in the chamber, and there were unspent .45 caliber rounds scattered around the crime scene.

According to McCrary, Gailey was killed during an ongoing gun fight in the dark woods. Gailey may have cut or stabbed someone during the affray, and Gailey's body was most likely moved after he was shot. Smith testified that she spent the entire night in the forest with Allen and Gailey's body, but credible witnesses saw Smith return to the trailer alone only an hour or two after she had originally left. Smith told the jury that Allen forced her to use Gailey's ATM card, which she admittedly stole the day after the murder, but bank videos show that Smith and another woman used the card after Allen left Smith for another woman.

Records sealed by the trial court show that Smith suffered from severe cocaine abuse and mental illness. She had a long history of mental health

treatment and had been involuntarily committed a year before Gailey's death. The prosecution knew that key parts of Smith's testimony were false, and that her testimony was inconsistent both with crime scene evidence and statements of other witnesses. Nevertheless, prosecutors failed to correct Smith's false testimony and withheld critical impeachment evidence from the defense.

The MAR and SMAR further establish that trial counsel failed to undertake an adequate investigation of alternate suspects, a crucial alibi witness, and potential areas for impeachment. Counsel also failed to pursue a rigorous investigation of potential mitigating factors, and failed to present readily available mitigation evidence at Allen's capital sentencing proceeding.

In summarily denying Allen's guilt-innocence phase claims, the lower court made numerous errors of fact and law. The court misapplied the standards under *Strickland v. Washington* and *Napue v. Illinois*, made findings of fact unsupported by competent evidence, and ignored evidence of misconduct by law enforcement and the prosecution. In denying Allen's sentencing claims, the lower court ignored compelling evidence from friends, family and expert witnesses that, for the first time, provided a full portrayal of Allen's lifetime experiences and traumas, and raised residual doubt about Allen's responsibility for the death of Christopher Gailey.

For these and other reasons discussed herein, the lower court's order should be vacated and the relief sought granted or, alternatively, an evidentiary hearing before a neutral finder of fact should be ordered on all claims for which an evidentiary hearing was denied.

QUESTIONS PRESENTED

I. WHETHER THE LOWER COURT ERRED BY DENYING RELIEF ON CLAIM I OF MR. ALLEN'S MOTION FOR APPROPRIATE RELIEF AND SUPPLEMENTAL MOTION FOR APPROPRIATE RELIEF, CLAIMS V AND VI OF HIS MOTION FOR APPROPRIATE RELIEF, AND CLAIM XII OF THE SUPPLEMENTAL MOTION FOR APPROPRIATE RELIEF, ON THE GROUND THAT THEY ARE PROCEDURALLY BARRED?

II. WHETHER THE LOWER COURT ERRED BY SUMMARILY DENYING MR. ALLEN'S GUILT-INNOCENCE PHASE CLAIMS ON THE MERITS?

III. WHETHER THE LOWER COURT ERRED BY DENYING MR. ALLEN'S SENTENCING CLAIMS ON THE MERITS AND DENYING HIM A NEW CAPITAL SENTENCING HEARING?

PROCEDURAL HISTORY

Allen was convicted of murder, felonious larceny, and felonious possession of stolen goods at the October 27, 2003 Criminal Session of Superior Court, Montgomery County, the Honorable Andy Cromer presiding. After a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. The trial court entered judgment in accordance with that recommendation on November 18, 2003. Allen was represented at trial by attorneys Carl W. Atkinson, Jr. and C. Pierre Oldham.

The North Carolina Supreme Court affirmed Allen's conviction and sentence. *State v. Allen*, 360 N.C. 297, 626 S.E.2d 271, *cert. denied*, 549 U.S. 867 (2006).

Allen filed his initial MAR with the trial court on or about July 2, 2007, raising ten claims for relief. On or about September 17, 2013, Allen filed his SMAR, supplementing MAR Claims I, II, III, VIII, and IX and adding Claims XI and XII, for a total of twelve claims for relief.

On or about September 30, 2014, the State filed an Answer and Motion for Summary Denial. Allen filed a response to the State's motion for summary denial on or about January 26, 2015. The State filed a reply to Allen's response on or about February 24, 2015. Allen filed a "Memorandum in Response to

State's Oral Argument" at an April 4, 2016 scheduling hearing on or about May 9, 2016.

On August 18, 2016, the trial court entered an order summarily dismissing all of Allen's guilt-innocence claims, except for subparts H, J, and K of Claim III, and the portion of subpart I of Claim III relating to the *in camera* examination of sealed mental health and substance abuse records of prosecution witness Vanessa Smith. (August 18, 2016 Order Dismissing Certain Claims of Defendant's MAR and SMAR) In so ruling, the Court found that Claim I of the MAR and SMAR, Claims V and VI of the MAR, and Claim XII of the SMAR were procedurally barred, and, in addition, that Claims I through VI (with the exception of subparts H, I, J, and K of Claim III), and Claims XI and XII were without merit. (*Id.*) By separate order, the trial court reserved the right to conduct a limited evidentiary hearing on the remaining guilt-innocence phase claims in subparts H, I, J and K of Claim III. (August 22, 2016 Order on Four Subparts of Claim 3 of Defendant's SMAR for Which Court Has Reserved Ruling) The limited evidentiary hearing was held on August 25, 2017. On January 4, 2018, the trial court entered an order concluding that no further evidentiary hearing on subparts H, I, J, and K of Claim III was necessary and dismissing those claims. (January

4, 2018 Order Granting State's Motion to Dismiss Claims 3H, 3J, 3K and a portion of 3I of Defendant's SMAR)

The trial court granted Allen a full evidentiary hearing on Claims VII, VIII, and IX of his MAR and SMAR, all of which allege ineffective assistance of counsel regarding the sentencing phase of his trial. (August 18, 2016 Order on State's Summary Denial Motion on Claims 7, 8, and 9) The evidentiary hearing was held on February 12 to 15, 2018. On February 6, 2019, the trial court entered an order dismissing all three sentencing phase claims. (February 6, 2019 Order Granting State's motion to Dismiss Claims 7, 8, and 9 of Defendant's Motion for Appropriate Relief and Supplemental Motion for Appropriate Relief)[1]

SUMMARY OF EVIDENCE

A. According to Smith, she and Allen had been romantically involved since 1998. (Tpp 1512-13).[2] When Allen escaped from a North Carolina Department of Corrections work release program in 1998, the couple moved from hotel to hotel in North Carolina, living off of settlement proceeds from the death of Smith's father. (Tpp 1515-16). Allen and Smith eventually traveled to and resided in Chicago, Illinois; Spokane, Washington; San Diego, California; and

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[1] All three dispositive orders entered by the lower court were drafted by the State and based on its briefs and arguments.

[2] Citations to the trial transcript in this Petition are in the format "Tpp __-__," or "Tpp __,__" with page numbers indicated.

Denver, Colorado, where the couple lived with Greg Fritz and Allen became romantically involved with a woman named Kelly. (Tpp. 1516-18, 1520, 1528, 1694-96). Throughout this period, Allen and Smith used illegal drugs. (Tpp 1682-85). To avoid the outstanding warrant against Allen for escape from work release, Smith paid a friend, Byron Johnson, five hundred dollars for a copy of his birth certificate and another identifying documents. Allen eventually obtained a Washington State driver's license in the name of Byron Johnson. (Tp 1518-19).

B. Allen and Smith returned to North Carolina in March or April of 1999, traveling separately. (Tpp 1697-98). Allen moved into a mobile home near Badin Lake, and Smith moved in with him. (Tpp 1456, 1532-33). The mobile home was rented by Robert Johnson, who lived there with Christopher Gailey, and Danny Lanier and his family. (Tpp 1534 1709). Allen and Gailey were long-time friends, but Smith never considered Gailey a friend. (Tp 1531). Life at the mobile home consisted of partying, drinking, and drug abuse. (Tpp 1460, 1533, 1708). Gailey, who dealt extensively in illegal drugs, provided most of the drugs. (Tpp 1488, 1497, 1707).

C. According to Smith, Allen told her and Gailey that he had stashed some firearms in a cabin in the Uwharrie Forest, and that they should retrieve them to sell the firearms for drugs. (Tp 1534). Smith testified they left the

mobile home late in the afternoon of July 9, 1996 in Gailey's GMC pickup truck, valued at around $16,000. (Tpp 1535, 2098). Robert Johnson attested that he saw the trio leave his house in a truck owned by another housemate, Danny Lanier. (Aff. Of Robert Gray Johnson, Exhibit 43, ¶ 6) Danny Lanier told law enforcement the same thing. (Statement of Danny Ray Lanier, Jr., Exhibit 1, p. 4)[3]

D. The three arrived at the Uwharrie Forest and walked for what Smith described as at least an hour. (Tpp 1535, 1537). According to Smith, Gailey carried a .45 caliber handgun, while Allen carried Gailey's sawed-off shotgun. (Tpp 1536, 1543). Johnson testified on *voir dire* that a sawed-off shotgun found by police in a closet at the mobile home fit the description of Gailey's shotgun. (Tp 1420).

E. Smith testified that as she, Allen, and Gailey walked single file down a narrow trail, Allen pushed her down to the ground. (Tp 1539). Allen then, without provocation, fired the shotgun at Gailey. (Tp 1539). Gailey was shot twice, with a heavy buckshot blast to the back and a lighter birdshot blast to the knee. (Tp 2005). According to Smith, she and Allen went to a nearby cabin to sit and wait for Gailey to die, and Allen periodically crept over and threw rocks at

[3] Unless otherwise noted, exhibits cited in this Petition are exhibits filed with the MAR or SMAR, or otherwise submitted to the lower court in the course of post-conviction proceedings.

Gailey's body to see if he made a noise. (Tpp 1540-42) During this seven to eight hour waiting period, Allen told Smith that Gailey would never call her a "bitch" again and that he could not believe Gailey turned on him. (Tpp 1561, 1722). According to Smith, she and Allen left the forest the next morning. (Tp 1542). On their way out, Allen told Smith that their story would be that someone in the forest shot Gailey, and that a guy named Dustin had reason to want to harm Gailey. (Tp 1665). Smith testified that Gailey lived throughout the night and that she heard Gailey fire his handgun numerous times as she and Allen left the forest the following morning. (Tp 1542-43).

F. According to Smith, at Allen's direction, she drove alone to the mobile home to get their belongings and steal Gailey's wallet, which contained his ATM card. (Tpp 1543-44). Smith testified she picked up Allen in the woods and they drove to Shallotte. (Tp 1544). Smith testified that Allen hid Gailey's shotgun in the Uwharrie Forest. (Tp 1543).

G. In direct contrast to Smith's testimony, Robert Johnson testified that Smith returned to the trailer around 11:00 p.m. or midnight, not in the morning, spent the night at the trailer without Allen, and left early the following morning. (Tp 1469). Danny and Tanzy Lanier also told police that Smith returned to the trailer within a few hours after leaving. (Statement of Danny

Lanier to SBI, Exhibit 1, p. 4; Statement of Tanzy Lanier to SBI, Exhibit 2, p. 3). Tanzy Lanier specifically recalls that she left work at 9:00 p.m. that evening and arrived home around 9:30 p.m. (Aff. of Tanzy Lanier, Exhibit 5, ¶ 6). Gailey, Allen, and Smith were at the trailer when she arrived home and left sometime after that. Smith returned to the trailer in one or two hours. (*Id.*, ¶ 7). Lanier was the only sober witness to these events. Neither of the Laniers was called to testify by the prosecution or the defense.

H. According to Smith, she and Allen drove to Shallotte to see one of Smith's friends, Jeff Brantley. (Tpp 1561, 1564). Smith and Allen talked to some of the partygoers at Brantley's house, including Jeffrey Page. (Tp 1563-64). Allen allegedly offered to sell Gailey's truck to Page for eight hundred dollars, and explained to Page that the truck was owned by a "fellow" he shot in the forest. (Tpp 1564, 1750, 1780-1). Page testified that Allen said he shot the "fellow" to prevent him from "ratting him out." (Tpp at 2208, 2211-13, 2217, 2225, 2239). Smith testified that she took eight Xanax pills during her time in Shallotte and did not remember much of what happened, except for a few times when Allen allegedly forced her to use Gailey's ATM card. (Tpp 1562-3, 1669). Smith testified that she woke up some time later at the home of her former lover, Lilly Efird. (Tpp 1565, 1703, 1729).

I. Page testified that he bought Gailey's truck from Allen and subsequently sold it to a junk dealer in South Carolina. (Tpp 1782-88).

J. Allen left for Denver a few days later to live with his new girlfriend, Kelly Racobs. (Tpp 1565-66). Smith and Efird traveled back to Shallotte. (Tp 1712). According to Smith, when she heard that Allen had gone to Denver to be with his new girlfriend, she borrowed or, according to Efird, stole, Efird's money and car in order to travel to Denver, claiming she was pregnant with Allen's baby. (Tpp 1712-14, 1872). Smith testified that after she arrived in Denver, she argued with Allen and became afraid he was going to kill her. (Tp 1568). Smith returned to North Carolina in early August and immediately went to the police in Charlotte, accusing Allen of killing Gailey. (Tpp 1569-70). Allen made no incriminating statements upon his arrest in Denver and has continuously denied killing Gailey. (Tpp 1588-89).

K. The defense did not offer any evidence during the guilt-innocence phase of the trial. (Tpp 2173).

L. In the penalty proceeding, the State presented victim impact evidence from Gailey's family. (Tpp 2382-89). The defense presented testimony of a few family members, a former teacher's assistant, and a prison expert who opined that Allen would adapt well to prison life. (Tpp 2410-2501, 2518-38).

The jury found three aggravating factors: (1) The murder was committed for the purpose of avoiding or preventing a lawful arrest; (2) the murder was committed for pecuniary gain; and (3) the murder was especially heinous, atrocious, or cruel. (Issues and Recommendations as to Punishment, Ex. 4 to MAR). The jury found two non-statutory mitigating factors: (1) Scott Allen was deeply affected by the death of his grandfather; and (2) Scott Allen's death would have a detrimental impact on his mother, father, daughter, and other family members. (*Id.*)

GROUNDS FOR GRANTING THE PETITION

I. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN VIOLATION OF N.C.G.S. §15A-1419 BY DENYING RELIEF ON CLAIM I OF THE MAR AND SMAR, CLAIMS V AND VI OF THE MAR, AND CLAIM XII OF THE SMAR, ON THE GROUND THAT THEY ARE PROCEDURALLY BARRED.

A. The Lower Court's Order of August 18, 2016.

In its August 18, 2016 Order, the lower court concluded that Claim I of the MAR and SMAR is procedurally barred under N.C. Gen. Stat. § 15A-1419(a)(2) as to "those portions of Smith's testimony which were raised on direct appeal and ruled upon by the Supreme Court of North Carolina." (August 18, 2016 Order, p. 15). It also concluded that "Defendant has failed to show good cause and actual prejudice to justify this Court's lifting of the procedural bar for evaluation of

Defendant's claim on the merits," and that Defendant failed to show that a miscarriage of justice will result if it does not review the claim on the merits. (*Id.*)

The lower court also concluded that "Claim I of Defendant's MAR and SMAR is procedurally barred with regard to those portions of Smith's testimony not raised on direct appeal and is procedurally barred with regard to the entirety of Johnson's testimony pursuant to N.C.G.S. § 15A-1419(a)(3)." (August 18, 2016 Order, p. 15-16). It further concluded that "Defendant has failed to show good cause and actual prejudice to justify this Court's lifting of the procedural bar for the evaluation of Defendant's claim on the merits" pursuant to N.C. Gen. Stat. § 15A-1419(b)(1), and failed to show that a miscarriage of justice will result if this Court does not review his procedurally defaulted claims" under N.C. Gen. Stat. § 15A-1419(b)(2). (*Id.*, p. 16).

Similarly, the lower court held that Claim V of the MAR is procedurally barred under N.C. Gen. Stat. § 15A-1419(a)(2) on the ground that the issue of the constitutionality of the short-form indictment had been determined on the merits on the direct appeal. (*Id.*, pp. 49-50) The lower court also held that Claim VI of the MAR concerning trial counsel's failure to object to certain statements during the State's closing argument, and Claim XII of the SMAR concerning Allen's appearance in restraints before the jury, are procedurally barred under N.C. Gen.

Stat. § 15A-1419(a)(3) on the ground that "upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." (*Id.*, pp. 51-52, & 60-61) As with Claim V, the lower court held as to these three claims that Allen had failed to show "good cause and actual prejudice" and that a "miscarriage of justice will result if this Court does not review his procedurally defaulted claims" under N.C. Gen. Stat. § 15A-1419(b)(1) & (2). (*Id.*, pp. 51-52, & 61)

B. N.C. Gen. Stat. § 15A-1419

Section 15A-1419(a) provides that a motion for appropriate relief may be denied for any of the following reasons:

> (1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so [...]
>
> (2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.
>
> (3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.
>
> (4) The defendant failed to file a timely motion for appropriate relief as required by N.C. Gen. Stat. §15A-1415(a).

The motion for appropriate relief should not be denied if the defendant can show either: "(1) [g]ood cause for excusing the grounds for denial listed in subsection (a) of this section and can demonstrate actual prejudice resulting from the defendant's claim; or (2) [t]hat failure to consider the defendant's claim will result in a fundamental miscarriage of justice." N.C. Gen. Stat. §15A-1419(b). The latter provision gives the Court the right, in its discretion, "to grant relief even though the right to relief is barred under the provisions of subsection (a)." N.C. Gen. Stat. §15A-1419, Official Commentary.

None of the claims contained in the MAR AND SMAR, with the exception of Claim V[4], could have been raised on direct appeal from Allen's conviction, because they are all based on evidence outside of the record and require additional investigation. *See, e.g., State v. Hyman*, 371 N.C. 363, 382-85, 817 S.E.2d 157, 169-171 (2018). Furthermore, Allen did not file an untimely motion for appropriate relief and there was no previous determination of the claims on their merits. Accordingly, the only available basis for a procedural default of any claim in the MAR and SMAR, with the exception of Claim V, would be if Allen were in a position to raise the claim in an earlier motion for appropriate relief but

[4] Claim V alleges that the short-form indictment of Allen failed to state the elements of first degree murder and the aggravating circumstances to be submitted to the jury, and was included in the MAR to preserve the issue for further appellate review upon a change in the law.

failed to do so. Because Allen was not in a position to raise Claims I, VI and XI previously, as discussed below, there is no basis for finding procedural default. Furthermore, because the claims raise serious questions of innocence, summary dismissal of them would result in a fundamental miscarriage of justice.

Although partially raised on direct appeal, Claim I concerning the prosecution's presentation of false evidence to the jury was not fully developed in the cold record before this Court and could not have been adequately presented on direct appeal.[5] The record on appeal did not contain expert testimony regarding the meaning and significance of the crime scene evidence, directly contradicting Smith's story (Aff. of Greg McCrary, Exhibit 41); it did not contain contradictory statements and confessions by Smith from witnesses Dolly Ponds and Troy Spencer (Aff. of Dolly Ponds, Exhibit 6, ¶¶ 2-3; Aff. of Troy D. Spencer, Exhibit 42, ¶ 11); it did not contain testimony by Tina Fowler Chamberlain and Joe Loflin providing an alibi for Mr. Allen for most of the night of the murder (Aff. of Christina Fowler Chamberlain, Exhibit 44, ¶¶ 11-14; Aff. of Joseph B. Loflin,

[5] This Court denied the direct appeal relating to Claim I, specifically noting that its review and decision were limited to the record below. *State v. Allen*, 360 N.C. 297, 306, 626 S.E.2d 271, 280, *cert. denied*, 549 U.S. 867 (2006). Allen's appellate counsel assigned error to the prosecution's use of only two portions of Vanessa Smith's false testimony: 1) that she and Allen waited seven to eight hours in the Uwharrie Forest for the victim to die, and 2) that she "heard, I'm assuming it was Chris empty his gun out." *Id.*, at 305; 626 S.E.2d at 279. While expressing doubt about the credibility of Vanessa Smith and the story she told the jury, the Supreme Court ruled that the prosecution "could have truly believed" those portions of the testimony. *Id.*, at 306; 626 S.E.2d at 279-80.

Exhibit 45, ¶¶ 4-7); it did not contain Ms. Smith's medical and mental health records from the Julian F. Keith Center in Black Mountain (the "Black Mountain records"), which were withheld from trial counsel, or any expert interpretation of those records, which go directly to Smith's credibility (Records subpoenaed from the Julian F. Keith Center, Exhibit 50; Aff. of Dr. John F. Warren, Exhibit 51, ¶¶ 10-15); it did not contain roommate Tanzy Lanier's statement pinpointing when Smith returned to Robbie Johnson's trailer (Aff. of Tanzy Lanier, Exhibit 5, ¶¶ 6-7); it did not contain Robbie Johnson's statement that Gailey, armed with a pistol, Allen and Smith left the trailer in Danny Lanier's truck around 8:00 or 9:00 p.m. on the night of the murder, but that no one carried a shotgun (Aff. of Robert Gray Johnson, Exhibit 43, ¶ 6); it did not contain Johnson's subsequent statement about Smith's return to the trailer alone "in a couple of hours" on the night of the murder to steal the keys to Gailey's truck (*Id.*, ¶ 9); and it did not contain clear still images of the bank ATM videos showing that Smith and Efird used Gailey's ATM card without Allen and after Smith and Allen split up (Exhibit 56).

Claim VI alleges ineffective assistance of counsel (IAC) for failure to object to portions of the State's closing argument in the guilt-innocence phase of the trial. On direct appeal, this Court expressly dismissed Claim VI without prejudice to raise it on post-conviction review. *State v. Allen*, 360 N.C. 297, 315-

16, 626 S.E.2d 271, 285-86, *cert. denied*, 549 U.S. 867 (2006). Claims of ineffective assistance of counsel are rarely decided on direct appeal because they depend on evidence not normally included in the transcript or court filings, including the reasoning behind trial counsel's actions. *Hyman*, 371 N.C. at 383, 817 S.E.2d at 170; *See also, State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, at 525 (2001) ("because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal.") Claims brought on direct review are decided on the merits only when "the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *Id.*, at 166, 557 S.E.2d at 524. IAC claims brought prematurely on direct appeal will be dismissed without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding. *See State v. Al-Bayyinah*, 359 N.C. 741, 751-52, 616 S.E.2d 500, 509-510 (2005) (declining to adjudicate direct appeal claim of ineffective assistance of counsel based on trial counsel's alleged failure to present available exculpatory and impeaching evidence outside the trial record); *State v. Watts*, 357 N.C. 366, 378, 584 S.E.2d 740, 749 (2003) (same with regard to claim of trial counsel's alleged failure to present mitigating evidence at sentencing); *State v. Hyatt,* 355 N.C. 642,

668, 566 S.E.2d 61, 78 (2002) (same with regard to trial counsel's alleged failure to procure certain records); *State v. Long*, 354 N.C. 534, 539-40, 557 S.E.2d 89, 93 (2001) (same with regard to trial counsel's alleged failure to prepare a particular defense). Here, direct appeal counsel would have had no meaningful insight into trial counsel's strategic reasoning at the time of the direct appeal, and no opportunity to investigate the issue beyond reference to the record. Accordingly, Claim VI of the MAR is not procedurally barred.

Similarly, evidence supporting Claim XI of the SMAR concerning the physical restraints worn by Allen in front of the jury, was not in the record below, and could not have been litigated on direct appeal. The evidence supporting this claim was uncovered during post-conviction investigation. Because Allen was not in a position to adequately raise this claim in a prior proceeding, it is not subject to procedural bar.

C. Dismissal of these Claims Based on Procedural Default Would Result in a Fundamental Miscarriage of Justice.

Even if this Court finds that Allen could have brought these claims at an earlier time, it may still consider them if failing to do so would result in a "fundamental miscarriage of justice." N.C. Gen. Stat. §15A-1419(b)(2). Where the claims in this MAR raise issues of actual innocence, failing to consider them

simply because they were not brought at an earlier proceeding would be nothing less than a perversion of the criminal justice system.

Under the statute, the "fundamental miscarriage of justice" standard is met if, "(1)[t]he defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense; or (2) [t]he defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty." N.C. Gen. Stat. §15A-1419(e).

Undersigned counsel have found no North Carolina Supreme Court decision with any substantial discussion of N.C. Gen. Stat. §15A-1419(b)(2), subsection 15A-1419(e) or the phrase "fundamental miscarriage of justice" in the context of procedural bar doctrine. However, the term is regularly used in federal jurisprudence to establish an exception to the usual rules of procedural bar in federal *habeas* proceedings. *See Schlup v. Delo,* 513 U.S. 298(1995); *Royal v. Taylor*, 188 F.3d 239 (4th Cir. 1999).

In *Schlup*, the U.S. Supreme Court explained the circumstances under which a procedural bar must give way on *habeas* review in order to avoid a fundamental miscarriage of justice:

> [I]f a petitioner [...] presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the

> court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

513 U.S. at 316.

The Court explained the role of this exception to the procedural bar rule, stating that, "the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Id.*, at 324.

Because Schlup alleged constitutional violations at trial, the Court found that his evidence of innocence need not be as strong as that required of a petitioner not alleging constitutional error: "the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice *unless* his conviction was the product of a fair trial." *Id.*, at 316. In other words, "if the habeas court were merely convinced that those new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims." *Id.*, at 317.

The Supreme Court, rejecting a more stringent test, applied the gateway

standard it enunciated in *Murray v. Carrier,* 477 U.S. 478 (1986) ("the *Carrier* standard") to Schlup's claim of actual innocence, holding that "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.,* at 327. In applying the *Carrier* standard to a petitioner's claim of actual innocence, the Court held that the reviewing tribunal may "consider the probative force of relevant evidence that was either excluded or unavailable at trial," *Id.,* at 327, and must "make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.,* at 329. The Court explicitly tied the meaning of "actual innocence" to the concept of reasonable doubt, stating "[t]he *Carrier* standard reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to reasonable doubt." *Id.,* at 328. The Court made clear that the fact the jury had sufficient evidence at trial to convict the defendant does not defeat a claim of actual innocence. *Id.,* at 331 ("petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict.")

In this case, a number of constitutional violations occurred at trial, including the withholding of *Brady* materials. Accordingly, the standard the United States Supreme Court applied in *Schlup* when considering the issue of

procedural bar is instructive. In order to demonstrate that applying the procedural bar would result in a fundamental miscarriage of justice, Allen must demonstrate that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.

The evidence unearthed during post-conviction discovery raises more than a reasonable doubt as to Allen's guilt. Accordingly, this Court should vacate the lower court's order holding that Claims I, V, VI and XII are procedurally barred and grant the relief requested by Petitioner in his MAR and SMAR.

II. THE LOWER COURT ERRED BY SUMMARILY DENYING MR. ALLEN'S GUILT-INNOCENCE PHASE CLAIMS ON THE MERITS.

Where an MAR states a *prima facie* claim of a constitutional violation, yet there are disputed issues of material fact, the reviewing court should provide an evidentiary hearing. *See* N.C. Gen. Stat. § 15A-1420(c); *State v. McHone,* 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998) (under N.C. Gen. Stat. § 15A-1420(c)(4), "an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law"). "[T]he ultimate question that must be addressed in determining whether a motion for appropriate relief should be summarily denied is whether the information contained in the

record and presented in the defendant's motion for appropriate relief would suffice, if believed, to support an award of relief." *State v. Jackson*, 220 N.C. App. 1, 6, 727 S.E.2d 322, 328 (2012). At an evidentiary hearing, the defendant "has the burden of proving by a preponderance of the evidence every fact essential to support the motion [for appropriate relief]." N.C.G.S. § 15A-1420(c)(5).

A motion for appropriate relief is, by nature, a trial without a jury, where the judge acts as the finder of fact as well as the arbiter of law. It is incumbent upon the trial judge to weigh the credibility of witnesses, resolve crucial conflicts, and make appropriate findings of fact. Without such findings and conclusions, the appellate courts cannot determine whether the judge correctly found the facts or accurately applied the law to those facts. *Jones v. Murdock*, 20 N.C. App. 746, 747, 203 S.E.2d 102, 103 (1974).

North Carolina provides for certain mandatory procedures which are designed to ensure that review of a post-conviction motion for appropriate relief in a capital case is "thorough and complete." and that the defendant received a "full and fair hearing" on the motion. *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276, 280-81 (1998); N.C.G.S. §15A-1420(c)(7). In other words, the following

procedures are in place to ensure the capital defendant will be afforded meaningful review of his claims:

> (1) The court must determine, on the basis of these materials and the requirements of this subsection whether an evidentiary hearing is required to resolve questions of fact. N.C.G.S. §15A-1420(c)(1)
>
> (2) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. The defendant has a right to be present at the evidentiary hearing and to be represented by counsel. N.C.G.S. §15A-1420(c)(4)
>
> (3) The court's ruling must be based on the record and transcript in the case. N.C.G.S. §15A-1420(c)(7)

In its Order summarily denying Allen's guilt-innocence phase claims, the lower court failed to make adequate findings as to why an evidentiary hearing was not warranted. This was an egregious error where the MAR and SMAR were supported by numerous expert and lay witness affidavits and other evidentiary materials, and the State's Answer and Motion for Summary Denial failed to attach *any* evidence.

In *McHone*, this Court concluded that the defendant was entitled to an evidentiary hearing because a question of fact existed regarding an allegedly improper *ex parte* communication: the MAR alleged that neither the defendant nor his attorney had been served with a copy of a proposed order that was

subsequently signed by the judge. Although the State presented an affidavit signed by a legal assistant that a copy of the order was mailed to defense counsel, this Court determined that a hearing was nevertheless required to resolve the question.

Here, each of the guilt-innocence phase claims in Allen's MAR and SMAR is fact intensive, and the material facts have been unopposed by the State except by assumption, argument and speculation. Where the MAR and SMAR raise guilt-innocence phase issues that mandate an evidentiary hearing, Allen requests the Court to remand the case to a neutral judge for an evidentiary hearing on his guilt-innocence claims for relief.

Mr. Allen is entitled to relief from his conviction and death sentence because they were obtained in violation of his federal and state constitutional rights. For any constitutional claim raised in the MAR and SMAR, the violation is deemed prejudicial unless the State proves that the violation was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1420(c)(5) and § 15A-1443(b). Here, the State has offered no affidavits or other factual evidence to refute Mr. Allen's claims, which are fully supported by affidavit and other documentary evidence.

A. THIS COURT HAS THE AUTHORITY TO TREAT THIS PETITION AS A MOTION FOR APPROPRIATE RELIEF AND TO GRANT RELIEF ON THE MERITS.

This Court has the authority to grant relief on the merits based on the facts and law presented in Mr. Allen's MAR and SMAR. *See, e.g., State v. Spruill,* 358 N.C. 730, 601 S.E.2d 196 (2004) (granting writ of *mandamus* and ruling, based on the record developed below, that the petitioner was entitled to relief as a matter of law); *State v. McHone,* 350 N.C. 825, 539 S.E.2d 642 (1999) (treating petitioner's application for writ of *certiorari* as a motion for appropriate relief and deciding the motion on the merits); *State v. Skipper*, 342 N.C. 650, 467 S.E.2d 702 (1996) (same). The State has submitted no affidavits or other factual evidence to refute Allen's claims. To the extent that he is entitled, on the facts in evidence, to relief as a matter of law, this Court is now in a position to grant relief on the merits of Mr. Allen's claims.

This Court possesses the same inherent authority to grant relief on the pleadings as a matter of law as do judges at the superior court level. The following motions for appropriate relief have been granted on the pleadings without evidentiary hearings: *State v. Craig*, No. 81 CRS 9846 (Cabarrus County, July 12, 2002) (Balog, J.); *State v. Anthony*, No. 81 CRS 9846 (Cabarrus County, July 12, 2002) (Balog, J.); *State v. Gell*, No. 95 CRS 1884 (Bertie County,

December 9, 2002) (Grant, J.); *State v. Hamilton*, No. 95 CRS 1670 (Richmond County, April 23, 2003) (Beale, J.); *State v. Hoffman*, No. 95 CRS 15695 (Union County, April 30, 2004) (Spainhour, J.); *State v. McClain*, No. 94 CRS 30181 (Mecklenburg County, December 11, 2002) (Lamm, J.); *State v. Robinson*, No. 86-CRS-25054 (Guilford County, November 7, 2003) (Greeson, J.); *State v. Gibbs*, No. 91 CRS 4081 (Beaufort County, June 30, 2004) (Griffin, J.); *State v. Anthony Hipps*, 95 CRS 14790 (Rowan County, August 1, 2005) (Ford, J.). Here, Mr. Allen has presented evidence, undisputed by the State, that the murder of Christopher Gailey did not, and could not, have happened in the manner presented to the jury and that trial counsel failed to conduct an adequate pretrial or mitigation investigation. Accordingly, Mr. Allen submits that he is entitled to relief on these claims.

B. MR. ALLEN IS ENTITLED TO A NEW TRIAL AND/OR SENTENCING HEARING BASED ON THE CLAIMS IN HIS MAR AND SMAR.

1. The Lower Court Erred in Denying Mr. Allen's First Claim For Relief in his MAR and SMAR Based on the Presentation of False and Misleading Evidence by the Prosecutor in Violation of the Fourteenth Amendment to the United States Constitution and the Rule in *Napue v. Illinois.*

In *Napue v. Illinois*, 360 U.S. 264 (1959), the United States Supreme Court stated that a prosecutor's use of false or misleading evidence is a violation of the

defendant's rights under the Fourteenth Amendment of the United States Constitution and so taints the conviction. That principle holds even where the misinformation does not bear directly on the guilt of the defendant, but relates only to the credibility of a single witness:

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. (citing *People v. Savvies*, 1 N.Y. 2d 554, 557, 136 N.E. 2d 853, 854-855 (1956))

360 U.S. at 269-270.

The fact that a prosecutor did not act with malice or specific intent to prejudice the rights of a defendant is no excuse: "That the district attorney's silence was not the result of guile or desire to prejudice matters little for its impact was the same, preventing, as it did, a trial that could in any real sense be fair." *Id.*

The State may not produce evidence that, while literally correct, is misleading to the jury:

> [The witness'] denial that any promise had been made to him might be semantically accurate but was substantively false. The prosecution knew the situation and objected to cross-examination about it; and the court sustained the objection. Knowing use by the

> prosecution of materially false testimony violates a defendant's right to a fair trial. This is true whether the evidence is solicited by the prosecutor or is simply allowed to stand uncorrected when it appears.

Gunning v. Cousin, 452 F. Supp. 916 (W.D.N.C. 1978). The State has an affirmative duty to correct false impressions. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (State may not leave false evidence before the jury; it has a duty to correct whether the evidence was knowingly or negligently placed in evidence; "[W]hether the non-disclosure was the result of negligence or design it is the responsibility of the prosecutor.").

Even where the defendant could have found the truth with due diligence, the State remains responsible for ensuring the accuracy of evidence it produces or allows to remain before the jury. In *Scott v. Holtz*, 612 F. Supp. 50 (E.D. Mich. 1985), for example, the court found that the lower court erred in shifting the burden to the defendant. Instead the burden of providing true evidence and eliminating false or misleading evidence remains on the State at all times, particularly where the State itself elicits the false evidence and relies on it in argument to the jury:

> *Napue* and *Giglio* clearly place the burden on the government which should have known about the perjury and prevented it... A conviction must fall where the prosecution, although not soliciting it, allows perjured

> testimony to go uncorrected when it appears even though it is relevant only on the issue of credibility.

Id., at 55.

This Court has recognized the ruling in *Napue*. *See State v. Morgan*, 60 N.C. App. 614, 299 S.E. 2d 823 (1983).

The State built its case against Scott Allen on the testimony of his bitter, estranged girlfriend, Vanessa Smith, an individual with a history of mental illness, severe substance abuse and completely lacking in credibility. The State knew Smith's testimony about how Gailey died could not possibly be true. Based on the crime scene evidence, the testimony of the Chief Medical Examiner, and credible witnesses interviewed by law enforcement but not called at trial, Smith committed perjury at Allen's trial.

a. The Lower Court's Order.

After holding that Allen's Claim I is procedurally barred, the lower court also concluded that the claim without merit, in that Defendant has failed to show the testimony of Smith and Johnson was false and that "the state knew the testimony was false and intentionally used it to Defendant's prejudice." (August 18, 2016 Order, pp. 6 & 16) (emphasis added). Accordingly, the lower court ruled that "Defendant is not entitled to an evidentiary hearing on Claim I of his MAR and SMAR." *Id.*

b. The State Knew That Smith's Testimony Was False.

The State knew that Vanessa Smith was lying when she told the Charlotte Police that Allen carried the sawed-off shotgun into the Uwharrie Forest, used it to kill Christopher Gailey, then buried it in the Uwharrie Forest. (Montgomery County Sheriff's documents, 000930, 000935, 000940 and 000956, Exhibit 57). Law enforcement and the District Attorney knew Smith's statements were false because, following the murder, the Montgomery County Sheriff found and seized the sawed-off shotgun from Robbie Johnson's bedroom closet at his trailer where he, Smith, Allen, and Gailey lived.

The State knew that Vanessa Smith was lying when she testified that Scott Allen suddenly shot Chris Gailey in the back while she, Gailey and Allen were hiking down a trail in the Uwharrie Forest. Law enforcement and the prosecutor knew from the crime scene evidence that prior to the shooting, Gailey paused along the trail and took off his shirt, which was found undamaged and neatly draped over a large rock near his body. (*See, e.g.*, Aff. of McCrary, Exhibit 41B, p. 7)

The State knew that Vanessa Smith was lying when she testified that she and Allen spent the night in the Uwharrie Forest, that Allen spent all night crawling back and forth throwing rocks at Gailey to see if he were dead, and that

as they left the forest after daybreak they heard Gailey fire his pistol multiple times. Law enforcement and the District Attorney had evidence from multiple witnesses that Smith returned to Robbie Johnson's trailer on the night of the murder and did not spend the night in the Uwharrie Forrest waiting for Gailey to die. (Statement of Tanzy Lanier to SBI, Exhibit 2, at 01913; Statement of Robert Gray Johnson, Exhibit 53, at 000913; Statement of Shannon James Diehl, Exhibit 59, at 001338) They also knew from the crime scene evidence and the medical examiner's report that Gailey could not have shot his pistol multiple times around daybreak to summon help.[6]

The State knew that contrary to her testimony, Vanessa Smith returned to Robbie Johnson's trailer *within a few hours*, which did not give her time to drive to the trail head, hike into the Uwharrie Forest to the crime scene, witness the killing, witness Allen periodically crawling up to the body and throwing rocks, hike out of the forest in the dark and drive back to the trailer. (Aff. of Tanzy Lanier, Exhibit 5, ¶¶ 6-7; Testimony of Robert Johnson at Probable Cause Hearing, Exhibit 59, at 000381; Statement of Shannon James Diehl, Exhibit 59, at 001338)

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[6] As noted above, the trial record does not contain the testimony of Tina Fowler Chamberlain or Joe Loflin, who provide Allen with an alibi for much of the night. Diligent investigation by either law enforcement or the defense would have discovered that fact (Aff. of Christina Fowler Chamberlain, Exhibit 44, paras. 11-14; Aff. of Joseph Loflin, Exhibit 45, paras. 4-7)

The State knew that Vanessa Smith lied about Allen forcing her to use Gailey's ATM card. One of the women in the ATM videos produced by the State is Vanessa Smith. (Aff. of Troy D. Spencer, Exhibit 42, ¶ 13) Smith left Shallotte sometime on July 11 after a fight with Allen. (John Blackwelder testimony, Tpp. 1751-54; *see also* Jeffery Page testimony, Tpp. 1802-03) The ATM videos show her using the card on Monday, July 12, 1999, *a day after* she broke up with Allen and left Shallotte with other friends. (Still photographs of Vanessa Smith taken from ATM videos, Exhibit 56)

The State knew that the only witness directly corroborating any part of Vanessa Smith's story, her close friend Jeffrey Page, lied to the jury about his criminal record. Allen's trial counsel timely sought the criminal records of all the State's witnesses, but material portions of Page's criminal history were withheld by the State. (*See,* Criminal Records of Jeffrey Page, Exhibit 12, obtained through post-conviction investigation)

The State knew that, in addition to lying about his criminal record, Page: A) coordinated his statement to law enforcement and subsequent testimony with another trial witness from Shallotte, his close friend John Blackwelder; B) crafted his proffer to the District Attorney to resemble Smith's story in order to avoid prosecution as an accessory-after-the-fact to murder; and C) entered into a

stipulation making his case and legal fate hinge on the outcome of the case against Allen, because it would not be calendared until after Allen's trial. (*See, e.g.,* Agreement between State and Jeffrey Page, Exhibit 10; Stipulation in *State v. Page*, Exhibit 11; Testimony of John Blackwelder, Tp. 1773)

c. The Lower Court Erred in Its Findings of Fact and Application of the Law.

The lower court erred in concluding that "the only witnesses who Defendant claims gave false testimony at Defendant's trial are Smith and Johnson." (August 18, 2016 Order, p. 3) While not specifically raised in Claim 1, Defendant alleges that at least three witnesses gave false testimony: Smith, Johnson, and Jeffrey Page,[7] who was the only witness who corroborated material portions of Smith's testimony. Page, who was a close friend of Smith's, was the only witness other than Smith who claimed that Allen had confessed to killing Gailey. (Tp 1780-81) It was also Page's testimony that provided the State with what prosecutors repeatedly claimed to be the primary motive for the killing – the fear of Gailey's telling on Allen or turning him in. (Tpp 2208, 2211-13, 2217, 2225 & 2239) Page's testimony about motive was also argued by the State in the penalty phase of the trial, to support the aggravating circumstance that the crime "was committed for the purpose of avoiding or preventing a lawful arrest." (Tp

[7] *See, e.g.,* Claim 3 of the MAR , pp. 46-51.

2614) Accordingly, Page's concealment of his criminal record and coordination of his story with another witness is not merely incidental, but critical to the State's capital prosecution of Allen.

The lower court misapplied *Napue* throughout its opinion on Claim I. The summary denial on the merits is premised almost entirely on two erroneous assumptions by the court: 1) that post-conviction affidavits that conflict with earlier witness statements to law enforcement cannot be used to prove that testimony was false or misleading, and 2) that the Defendant must establish that the State actually knew the testimony was false and that it presented the false testimony out of guile or a desire to prejudice the jury. Both assumptions are erroneous.

In *State v. McHone*, this Court held that under N.C. Gen. Stat. §15A-1420(c), "an evidentiary hearing is *required* unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law." 348 N.C. 254, 258, 499 S.E.2d a761, 763 (emphasis added). The fact that post-conviction affidavits conflict materially with earlier statements to law enforcement is, therefore, a basis to deny the State's motion for summary denial, not to grant it. In this case, the affidavits filed by Allen raise material issues of fact that can only be resolved by a full evidentiary

hearing, where the witnesses can be examined and cross-examined on any conflicts in their recollections and statements, and their credibility assessed by the post-conviction court.

The lower court also ruled, repeatedly, that post-conviction affidavits "cannot be used to prove that Smith's testimony at trial was in fact false, much less that the State knew it was false and intentionally used this false testimony to prejudice Defendant." (*See, e.g.,* August 18, 2016 Order, at 7) That is not the correct legal standard. Under *Napue* and *Giglio*, the U.S. Supreme Court made clear that the State has a duty to correct false evidence whether it was knowingly or negligently placed in evidence: "[W]hether the non-disclosure was the result of negligence or design it is the responsibility of the prosecutor." *Giglio,* 405 U.S. at 154. It is irrelevant whether a diligent jury could have discerned the conflicts in testimony without the assistance of the State's attorneys: that the district attorney's silence was not the result of guile or a desire to prejudice matters little for its impact was the same, preventing a trial that could in any real sense be fair.

2. The Lower Court Erred in Dismissing Claim II and Concluding Trial Counsel Were Not Ineffective in Failing to Conduct a Reasonable Pretrial Fact Investigation and Present Available Evidence of Innocence And/Or Reasonable Doubt

Criminal defense attorneys have a professional and ethical obligation to

zealously defend their clients and to conduct a thorough pretrial investigation. *See, e.g., State v. Cole*, 343 N.C. 399, 411, 471 S.E.2d 362, 367 (1996); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *State v. Braswell,* 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). Because whether a criminal defendant receives a fair trial is largely dependent upon trial counsel's actions, the United States Supreme Court has recognized that the Constitutional right to counsel must be interpreted as the right to the *effective* assistance of counsel. *See Strickland*, 466 U.S. at 686.

1. Allen's guilt phase defense was significantly compromised due to trial counsel's failure to conduct an adequate pretrial investigation and to present readily available evidence to the jury. There was material and admissible evidence that bolstered Allen's claim of innocence and undercut Vanessa Smith's credibility that was not investigated or presented by trial counsel. This evidence included the following:Vanessa Smithconfessed to Troy Spencer that she planned Gailey's murder, and that it was she, not Allen, who shot and killed Gailey. She told Spencer that Allen did not want to harm Gailey and did not shoot him.

2. Spencer, Joyce Allen, and Kelly Racobs overheard Smith threaten to destroy Allen and make him pay because he used her and left her for Racobs.

3. Robert Johnson saw Allen leave the trailer on July 9, 1999 unarmed. According to Johnson, the only shotgun at the trailer belonged to Chris Gailey. It was found in Johnson's bedroom closet after the murder. It was not removed from the trailer on

July 9 or 10, 1999 and could not have been the murder weapon as Smith told police.

4. Allen spent most, if not all, of the night of July 9th at the home of his friend Christina Fowler Chamberlain.

5. Smith had relapsed and was abusing drugs heavily at the time of her testimony at trial.

6. There were other individuals with a motive to harm Gailey who were never investigated.

7. The knife found at the crime scene with blood on the blade belonged to Gailey.

The State has argued that the fact the defense presented no evidence and Allen did not testify somehow constitutes evidence of a tactical decision by trial counsel. The State's argument, and the lower court's subsequent conclusion, is both circular and contrary to the law governing IAC claims, which focuses on the investigation leading up to the decision whether to present evidence, and directly contradicts the affidavit of trial counsel Pierre Oldham (Oldham Aff., Exhibit 63, ¶¶ 5 & 6). Oldham does not recall making any strategic decision not to present evidence favorable to Allen, and concedes that the evidence raised in the MAR and SMAR warranted further investigation. (*Id.*)

"The relevant question in deciding whether counsel has been ineffective is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). A key inquiry into whether trial

counsel's decisions were reasonable is whether counsel conducted an adequate investigation to justify, in this case, not presenting evidence favorable to Allen. *See Wiggins v. Smith*, 539 U.S. 510 (2003)(holding that evidence trial counsel did not perform a reasonable investigation sufficient to develop a trial strategy rebutted the general presumption that counsel performed adequately); *See also, Rompilla v. Beard*, 545 U.S. 374, 387 (2005)(quoting the ABA Standards for Criminal Justice: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.")

The State has offered no evidence to support a finding that counsel undertook a thorough factual investigation before deciding not to present any evidence or call any witnesses at trial. To the contrary, the unopposed affidavits submitted by Allen show that counsel failed to interview important witnesses and that counsels' decision not to call any witnesses was not reasonable given the evidence that could have been presented in Allen's favor.

Tanzy Lanier, who returned from work to Robert Johnson's trailer at 9:30 p.m. on the night of the murder, was the only sober person in the household. (Aff. of Tanzy Lanier, Exhibit 5, ¶¶ 6 & 7) Although she was questioned by police and subpoenaed to appear at trial, there is no evidence that trial counsel

ever interviewed her. Lanier's testimony was material to the case because she placed Vanessa Smith as returning to the trailer on the night of July 9th, only 1 or 2 hours after she left. This evidence would have rebutted Smith's testimony that she was in the forest all night with Allen and Gailey's body. Lanier's statements are corroborated by Robert Johnson's testimony at the probable cause hearing that Smith was only gone from the trailer for 1 to 2 hours.[1] Johnson has reaffirmed that testimony in his sworn affidavit.[2] The fact that Lanier was sober would have made her a more reliable witness than the others at the trailer with regard to time.

Trial counsel never interviewed Dolly Ponds, Smith's pre-trial cellmate at the Montgomery County Jail. Knowing that Smith was the State's principal witness and the only proclaimed eyewitness to the murder, trial counsel were obliged to thoroughly investigate her activities prior to trial. Statements made to other inmates while a witness is in custody are a well-known source for impeachment material, and it would not have been difficult for counsel to check the jail register to find Ponds. Ponds' testimony was important because it showed that Smith was a liar and that she told different accounts of the crime. Ponds' statement also showed Smith to be extremely manipulative and capable of

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[1] *See* Exhibit 62 (Johnson's Testimony at Probable Cause Hearing.)

[2] Johnson's trial testimony, that Smith was gone 3 to 4 hours, was given pursuant to a plea deal and while Johnson was under considerable pressure from the prosecution.

concocting a story to put Allen behind bars as revenge for his leaving her. According to Ponds, Smith had sexual relations with a jailer to garner special treatment, then saved a towel containing his DNA as proof of their improper relationship. The jailer was later fired from his job, and she was released to house arrest. Where Smith's credibility was the key to the prosecution's case, the State cannot reasonably argue that evidence showing her to be a liar and a manipulative schemer was not material.

Allen's former wife, Joyce Allen, and his new girlfriend, Kelly Racobs, were also material witnesses whose testimony could have affected the verdict. Joyce Allen overheard the prosecution's chief witness, Vanessa Smith, say that she intended to make Allen's life miserable because he left her for Kelly Racobs in Colorado. (Aff. of Joyce Allen, Exhibit 47, ¶ 5) Kelly Racobs confirms that Smith was in a rage and felt used by Allen. Smith made threatening statements against Allen, telling Racobs, "I will do whatever it takes to keep him away from you." (Aff. of Kelly Racobs, Exhibit 60, ¶ 15) The lower court held that this evidence was not needed because the jury heard Smith admit that she was jealous of Racobs and angry at Allen because he left her. However, the statements by Joyce Allen, Kelly Racobs, and Troy Spencer establish the extent of Smith's rage and that she threatened to ruin Allen's life prior to going to police. (*See also,* Aff.

of Troy D. Spencer, Exhibit 42, ¶¶ 6 & 10) This evidence was directly material to Smith's credibility at trial.

Trial counsel never consulted with a crime scene analyst in preparation for trial. (Aff. of Pierre Oldham, Exhibit 63, ¶ 7) The ABA Guidelines in place at the time called for counsel to "secure the assistance of experts" as part of their investigation where necessary to prepare the defense case and to rebut "any portion of the prosecution's case." (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 1989, Guideline 11.4.1) The crime scene evidence here was neither simple nor straightforward and, most importantly, it did not match Smith's account of the crime in any respect. (*See generally,* Aff. of Gregg O. McCrary and attached report on crime scene, Exhibit 41) The testimony of a crime scene expert was material because without an expert of its own, the defense was dependent on the State's witnesses to explain the crime scene evidence to the jury.

Without allowing an evidentiary hearing or testimony from defendant's crime scene expert, the lower court found that even if counsel had called a crime scene expert to highlight and explain the inconsistencies between Smith's testimony and the physical evidence, it would not have affected the jury's verdict because there were other witnesses besides Smith who tied Allen to the murder.

August 18, 2016 Order, at 19-20) The lower court points specifically to Coy Honeycutt and Smith's close friends, Harold Blackwelder and Jeffrey Page. However, none of these witnesses claimed to be an eyewitness to the murder. Blackwelder and Honeycutt's testimony was primarily about the sale of Gailey's truck. Page, while parroting some of Smith's story, was far from a reliable witness. Clearly, the charge of first-degree murder based on premeditation and deliberation would not have survived a motion to dismiss if based only on testimony that Allen sold Gailey's truck for a low price and that Allen purportedly said he "shot a fellow." No one else but Vanessa Smith claimed to be an eyewitness to the murder and testified that Allen shot Gailey in the back with no provocation. Without Smith's testimony, the State would have no case for premeditated murder. Even if the State could have made a case for felony-murder, the case for death would have been substantially weakened. Accordingly, the fact that the crime scene evidence disputed Smith's version of events was material to the case both at guilt and at sentencing.

The lower court's conclusion that trial counsel's failure to call a crime scene expert "is the very type of trial tactic that warrants deference," makes little sense in this context, where counsel failed to engage an expert or to investigate the crime scene evidence. Nor does the lower court's conclusion that "trial

counsel's apparent decision to focus on the doubt created by Smith's gaps in memory, addiction and use of controlled substances ...rather than attempting to prove Defendant's innocence through the use of a crime scene analyst" was a "sound tactical decision." Such a decision would be objectively reasonable only if counsel had conducted a sufficient investigation to determine what an expert witness could have added to the case or if counsel had made a reasonable decision that rendered further investigation unnecessary. The lower court's speculation as to why trial counsel may have foregone important areas of investigation is directly contrary to trial counsel Oldham's affidavit and is not a sufficient basis for summarily denying this claim.

Another critical witness was Christina Fowler Chamberlain, who could have provided Allen with an alibi for much of the night of the murder. Allen was at her house when she left for work between 5:00 and 6:00 pm, and he was there asleep when she returned between 1:00 a.m. and 2:30 a.m. (Aff. of Christina Fowler Chamberlain, Exhibit 44, ¶12; *see also,* Sentencing Tpp 24-28)[8] They talked for a bit and Chamberlain went to bed. Sometime later, Allen came and got in bed with her. Chamberlain's account of the evening would have directly

[8] The transcript of the evidentiary hearing on sentencing claims, held February 12-15, 2018, is cited herein as (Sentencing Tp ___).

contradicted Vanessa Smith's testimony that she and Allen spent the entire night in the forest, waiting for Gailey to die.

Alibi evidence that conflicted with Smith's testimony was critical to the defense. The lower court's order does not present a reasonable explanation as to why it was sound strategy for trial counsel not to call Chamberlain. Although providing only a partial alibi for the night of the murder, Chamberlain's testimony would have presented the jury with facts that directly impeached the story told by the prosecution's chief witness, Vanessa Smith. Moreover, trial counsel Oldham recalls no strategic reason for failing to call Chamberlain and concedes that her story merited further investigation. (Aff. of Pierre Oldham, Exhibit 63, ¶ 6).

The lower court also found that counsel's failure to call witnesses Robert Johnson, Lois Lawson, and Troy Spencer, or to use their statements when cross-examining other witnesses, was objectively reasonable because, among other things, none of them had "first-hand knowledge" of Gailey's murder. (August 18, 2016 Order, at 22-24) This is not the test for materiality. Each of the witnesses had information relating to the events surrounding Gailey's murder or to the credibility of Vanessa Smith, as did Tanzy Lanier, Danny Lanier, and Shannon Diehl.

The lower court concluded:

> [f]irst and foremost, the record shows defense counsels' decision not to call any witnesses at the guilt phase of Defendant's trial was a tactical decision that was made after consultation with Defendant. After the trial court denied Defendant's motions to dismiss at the close of the State's evidence, Defendant's counsel, Mr. Pierre Oldham ("Mr. Oldham") announced to the trial court that Defendant would not be offering any evidence during the guilt-innocence phase. (T p. 2163) The trial court then had Defendant sworn and inquired whether Defendant understood his rights and whether he wished to present evidence, to which Defendant responded, "Well, I don't know anything. I don't know what happened, so I have nothing to contribute to it." (T pp. 2164-65) Defendant also indicated that he did not wish to testify and that he understood the consequences of not doing so. (T p. 2165) The trial court then found that Defendant voluntarily, knowingly, and willingly understood his rights, chose not to testify, and conceded in the judgement of his counsel in not presenting any evidence. (T p. 2166)

On this slender basis, and directly contrary to trial counsel Oldham's affidavit, the lower court concluded in its August 18, 2016 Order that "defense counsels' decision not to call any witnesses at the guilt phase of the Defendant's trial was a tactical decision that was made after consultation with Defendant." (August 18, 2016 Order, at 17; Aff. of Pierre Oldham, Exhibit 63, ¶¶ 5, 6 & 8)

Unsupported speculation regarding why trial counsel failed to present material evidence at trial is not sufficient to merit summary denial of Claim II. The material issues of fact raised by Allen's claim and supporting affidavits,

including what investigation trial counsel undertook, their reasons for limiting their investigation, and their decision not to present evidence in Allen's defense, mandate an evidentiary hearing.

3. The Lower Court Erred in Dismissing Claim III and Concluding that Trial Counsel Were Not Ineffective in Cross-Examining the State's Witnesses.

The State is not entitled to summary denial of this claim where the evidence gathered during post-conviction investigation shows that counsel's cross-examination of the State's witnesses fell below professional standards for capital cases. The State has offered no support, beyond mere speculation, for its conclusion that trial counsel's failure to cross-examine the State's witnesses thoroughly was part of a reasoned trial strategy.

a. The Lower Court's Orders.

In its August 18, 2016 Order, the lower court granted the State's motion for summary denial of Claim III of the MAR and SMAR, except for subparts H, I, J, and K relating to the trial court's withholding of Vanessa Smith's mental health and substance abuse records from the Julian F. Keith Center in Black Mountain following an *in camera* inspection of those records attended only by Smith's personal attorney. (August 18, 2016 Order, at 28) The lower court subsequently dismissed subparts H, I, J and K following a "limited evidentiary hearing" on

August 25, 2017, to determine if the defendant suffered "any sufficient prejudice" to warrant a full evidentiary hearing on those claims. (January 4, 2018 Order)

b. Trial Counsel Failed to Adequately Cross-Examine a Number of Critical Prosecution Witnesses.

Counsel failed to cross-examine Vanessa Smith about the inconsistencies among her various statements to law enforcement, her testimony at trial, the various stories she told to others, and the physical evidence. Smith originally told police that Allen stole $1,000 from Gailey. This statement was omitted during her trial testimony. More than $1,900 in cash was found in a container near Gailey's body, indicating that no money was stolen. Smith twice told police that Allen used Robert Johnson's shotgun to kill Gailey and then buried it in the forest. The shotgun, which actually belonged to Gailey, was later found in Johnson's closet. No shotgun was found buried in the forest. Smith testified that she, Gailey, and Allen drove Gailey's truck to the forest. According to all of the witnesses at the trailer, they took Danny Lanier's truck to the forest. Smith stole Gailey's truck when she returned to the trailer that evening. Smith told Troy Spencer and Dolly Ponds completely different stories about Gailey's murder than what she told police and the jury.

There is nothing to indicate that counsels' actions in failing to cross-examine Smith were part of a reasoned trial strategy as the State argues,

especially given that the defense was not planning to, and did not, present evidence of its own. Oldham does not recall making a strategic decision to limit his cross-examination of Smith and the other prosecution witnesses. (Aff. of Pierre Oldham, Exhibit 63, ¶ 6)

The State and the lower court incongruously assert that cross-examining Smith about the crime scene would not have benefitted Allen's case because Smith did not see the crime scene, even though she claimed to be there, and because she was not part of the investigation. While she was not an investigator, defense counsel was entitled to ask, and should have asked, Smith to explain why her testimony was contradicted in nearly every respect by the physical evidence at the crime scene. First, Smith claimed that Allen shot Gailey in the back ambush-style as the three were walking through the woods, and that she and Allen then ran to the nearby cabin. The evidence showed that Gailey had removed his shirt prior to being shot and neatly draped it over a rock. His unzipped bag was nearby, and his knife, stained with blood, was lying on top of the bag. There were numerous unspent .45 rounds scattered nearby. Nothing in Smith's testimony accounts for any of this evidence.

Smith testified that she heard Gailey fire his pistol repeatedly on the morning of July 10th, some seven hours after he was shot. However, only one

spent .45 shell was found at the scene, and Gailey's gun was jammed when it was found under his body. This evidence, in combination with the medical examiner's opinion that Gailey would have bled out quickly from his wounds, directly contradicted Smith's account of events.

The evidence discovered during post-conviction investigation also shows that trial counsel failed to undertake an adequate investigation in preparing to cross-examine the State's other witnesses:

> Trial counsel did not interview Robert Johnson prior to his testimony at trial. Johnson saw Allen, Gailey, and Smith leave the trailer on the evening of July 9, 1999. None of them had a shotgun, and Allen was completely unarmed. The only sawed-off shotgun that Johnson knew about belonged to Gailey and remained in Johnson's bedroom closet on July 9th and 10th.
>
> According to Johnson, Dustin Maness and Gailey had a violent dispute at the trailer weeks before the murder, and had not "patched things up" as Maness testified. After discovery of Gailey's body, Maness told Johnson and others that Gailey "deserved it." Johnson was extremely intoxicated on the evening of July 9, 1999, when Vanessa Smith returned to the trailer, and may have been unclear about exactly how long she was gone.
>
> Counsel did not interview Dustin Maness prior to his testimony at trial. Gailey sold illicit drugs from Maness' house. Maness knew that some of Gailey's customers were extremely angry that Gailey sold them cocaine "cut" with other substances. Maness also knew about Gailey's irresponsible behavior with firearms and his penchant for nighttime hikes and shooting firearms in the woods, which

> directly contradicted Smith's testimony that Gailey was not used to walking in the woods.
>
> Maness had a violent falling out with Gailey several weeks before the killing, and he brought assault charges against Gailey that were never dropped. According to police reports, Maness was camping in the Uwharrie Forest on the night of the murder somewhere near the crime scene. Maness told Johnson after the murder that Gailey "deserved it." Maness knew that Gailey carried a large knife. Gailey had threatened Maness with a knife similar to the one found at the crime scene covered in blood.
>
> Counsel failed to retain a crime scene expert to review the evidence in preparing to rebut Smith's testimony and the prosecution's theory of the case.

Because defense counsel put on no witnesses, it was essential for them to show that the State's witnesses were unreliable: they had significant motives to testify against Allen and their testimony was in direct conflict with the physical evidence itself. The State suggests that there was no need to question witnesses about their prior inconsistent statements if they admitted making prior false statements. However, those prior statements were so detailed that counsel should have pointed out to the jury that, with increasing pressure from law enforcement, the witnesses' stories began to converge along the lines that law enforcement suggested.

The lower court's order contains little more than mere speculation and conjecture as to why trial counsel did not cross-examine the State's witnesses on

key points. The court concluded, without any evidence, that counsel did not cross-examine Lillie Efird about the fact that Smith was high on muscle relaxers when she talked to Efird about the crime, because trial counsel needed the jury to believe that Smith made statements to Efird that were true and inconsistent with Smith's trial testimony. (August 18, 2016 Order, at 44) However, the point of cross-examination was to impeach Smith's credibility. The fact that Smith was taking drugs and telling different stories to different people, regardless of whether they were true, impeached her credibility at trial.

The State is not entitled to summary denial of this claim based on unsupported statements regarding counsels' reasoning, which conflict with counsels' statements regarding their actions. It is for the lower court to determine, after a full evidentiary hearing and an opportunity to assess the credibility of the witnesses, the myriad issues of fact raised by Allen's claims, including what investigation trial counsel undertook to prepare for cross-examination and what their reasons were for limiting the cross-examination of key witnesses.

c. The Lower Court Erred in Dismissing Subparts H, I, J & K Without a Full Evidentiary Hearing.

By order dated April 4, 2017, the lower court scheduled a "limited evidentiary hearing" to determine if Allen suffered sufficient prejudice to warrant

a full evidentiary hearing on subparts H, J, and K of Claim III in the SMAR, and that portion of subpart I of Claim III that related to the trial court's *in camera* examination of Vanessa Smith's medical and mental health records from the Julian F. Keith Center in Black Mountain. Defendant's claims were that: 1) his federal and state constitutional rights were violated by the trial court's refusal to reveal the Black Mountain records to trial counsel, thus rendering them ineffective (subpart H); 2) his federal and state constitutional rights were violated because he was unable to conduct a *voir dire* examination of Smith and forensic psychologist Dr. John Warren regarding the importance of the Black Mountain records (subpart J); 3) his federal and state constitutional rights were violated because he was unable to submit extrinsic evidence of Smith's unreliability contained in the Black Mountain records (subpart K); and 4) he received ineffective assistance of counsel in the guilt-innocence phase of his trial because trial counsel did not have access to the Black Mountain records when cross-examining Smith (portion of subpart I that incorporates by reference subpart H).

Following the limited evidentiary hearing on August 25, 2017, the lower court concluded that the testimony of Allen's expert psychologist, Dr. John Warren, was "wholly unpersuasive," denied Allen a full evidentiary hearing on

these claims, and summarily dismissed them based on the court's own reading of the records. (January 4, 2018 Order, at 11-12)

Smith's mental health records from the Black Mountain facility, unsealed in post-conviction, showed that she suffered from extreme cocaine addiction, mental illness, and characterological issues that led to her involuntary commitment for mental illness and substance abuse in 1998. The records document a wide-array of behavioral problems from an early age, including prostitution and satanic ritual practices. (Aff. of Dr. John F. Warren, Exhibit 51, ¶ 5) Professional caregivers described Smith as "spiritually bankrupt" and untruthful on a number of occasions. (*Id.*, ¶¶ 7 & 10) Smith's behaviors were consistent with Anti-Social Personality Disorder and Borderline Personality Disorder. (*Id.*, ¶ 12) This evidence was directly material to Smith's credibility as the chief prosecution witness in Allen's case. Trial counsel sought the mental health records, but Judge Cromer refused to make them available even though the trial court had no assistance from a mental health or substance abuse expert in interpreting and assessing the documents. Counsel was rendered ineffective in its cross-examination by the trial court's arbitrary ruling. Trial counsel Pierre Oldham believes that the material contained in the records would have been helpful in preparing to cross-examine Smith, and that he would have needed

guidance from a mental health expert to fully understand and interpret them. (Aff. of Pierre Oldham, Exhibit 63, ¶ 4)

At the August 25, 2017 "limited evidentiary hearing" on these claims, Dr. Warren testified at length about the significance of the Black Mountain records and how they reflected characterological and credibility issues similar to those described in post-conviction affidavits:

> Q. Going back to the Black Mountain records...in general what did you learn about Ms. Smith from those records?
>
> A. Well, I learned as you mentioned a moment ago that she had the prior treatment at other treatment facilities; that her history was described with behavioral disturbances, behavioral problems ranging from forgery, I think, school expulsions, prostitution, different – I think there's even a reference to satanic rituals....
>
> ...
>
> Q. Was Ms. Smith given any specific diagnoses in the records from Black Mountain?
>
> A. Yes, she was. The diagnoses included polysubstance abuse, which was a catch-all phrase for someone who is a versatile drug abuser that they don't necessarily have only one drug of choice but will use whatever is available. But also alcohol dependence, cocaine dependence, sedative abuse and nicotine dependence.
>
> ...
>
> Q. Dr. Warren, on two or three occasions in the [Black Mountain records]...there is a reference to Ms. Smith being either "completely spiritually bankrupt" or "spiritually bankrupt." Do you recall that?
>
> A. I do.

Q. Does that have any therapeutic significance or meaning?

A. It has significant meaning for counselors and psychotherapists. It's a relative term of art which talks about someone who is bereft of prevailing ethical code. Other terms of art that may be more familiar to laypeople would be lacks a true north, you know, doesn't have a moral compass, that sort of thing. It's a description of someone who tells – acts however he or she needs to behave at a particular time in order to accomplish what their particular wants or needs are.

...

Q. Would that include someone who uses manipulation and lying to get what he or she wants?

A. Yes. And it would be consistent with the history that was reported in terms of forgery and prostitution, specifically, and maybe some of the other history.

Q. ...Does that suggest the possibility of any more scientific diagnoses of mental illness?

A. Yes.

Q. And what would it suggest as a term of art when a therapist puts that in the record?

A. It would suggest one of the cluster B personality disorders. Those include antisocial borderline and narcissistic.

(August 25, 2017 Transcript, at 58 – 61)

Dr. Warren defined antisocial personality disorder as "someone who doesn't recognize the rights and boundaries of others when they act to get their

own needs met" and explained that older terms included "psychopathy, or sociopathy, psychopaths, [and] sociopaths." (*Id.*, at 61) He explained that borderline personality disorder is a little more difficult to understand, but "it basically talks about a person who doesn't get very well formed in terms of their personality and their sense of self, their sense of others, boundaries with others, their ethics." (*Id.*, at 62) As a result, "they often quickly form attachments and put others, and particularly romantic partners, on a pedestal, but just as quickly go to the other extreme where they villainize them, attack them." (*Id.*) Dr. Warren also testified that individuals with borderline personality fear abandonment, as occurred in the present case when Ms. Smith believed Scott Allen had abandoned her for another woman:

> Q. And is that fear of abandonment necessarily based on reality or can it be based on imagined circumstances?
>
> A. Both...I describe borderline as really an incompletely formed personality, not a fully integrated personality who can accept success and failure and ups and downs with a normal amount of resiliency. Instead, they move through the world in a much more precarious often manipulative and exploitive way, often in a victimology way, and it can shift rapidly from being the victim to the aggressor.

(*Id.*, at 62-63)

Noting that mental health professionals have a "great deal" of difficulty treating borderline personalities, Dr. Warren explained that "they are just prone to either say you're the best doctor ever, or you're the worse (sic) and go off running down the hall screaming, you know, he tried to rape me or he offered me drugs." (*Id.*, at 64) Dr. Warren also confirmed that the diagnostic descriptions in the Black Mountain records are consistent with descriptions of Smith's behavior by various post-conviction witnesses. For example, he found the description of Smith's behavior by her former cell-mate in county detention corroborative of the Black Mountain facility's assessment:

> Q. What did you find significant in the affidavit of Dolly Ponds and the interview notes that are also attached as Exhibit Number 3 for identification?
>
> A. Generally, there was significance in that there was corroboration with some of the history that had been memorialized in the Black Mountain treatment records. But beyond that, Ms. Ponds, in her affidavit interview, alleges that Ms. Smith was remorseless, she was manipulative, she was exploitive, she used sexual favors to get by; that she was intensely angry with a former boyfriend and very demeaning of him, and generally seemed to support the history reported at Black Mountain as well as the impressions that this could be one or more of a cluster B personality disorder lifestyle.
>
> ...

Q. And would you also say that some of what appears in Dolly Ponds' affidavit expands your understanding of the Black Mountain records?

A. Yes. There was corroborative allegations from Ms. Ponds and there was nothing that was divergent with the Black Mountain records.

(*Id.*, at 67-68)

Dr. Warren further opined that the Black Mountain records contained information directly relevant to Smith's credibility as a witness:

Q. So are you suggesting that there is – that there is something in the Black Mountain records that suggests a propensity by Ms. Smith to tell inconsistent stories or to describe events that are inconsistent with reality in some way?

A. Yes, I am. You know, that's made obvious by the use of the term spiritually bankrupt on those occasions, as well as by the inconsistencies of how Ms. Smith interacted and reported things to various workers there at the facility during the time she was there and before she left against medical advice.

(*Id.*, at 69-70)

Due to time restraints on August 25, 2017, Defendant was unable to call the other witnesses subpoenaed for the limited evidentiary hearing, including an additional expert, trial counsel, and chief prosecution witness Vanessa Smith. The additional expert, on stand-by, was a handwriting expert prepared to show that Smith wrote several letters to Allen prior to trial, including one declaring his

innocence, which were among the documents reviewed and relied upon by Dr. Warren. Smith was subpoenaed to testify concerning her medical and mental health treatment at the Black Mountain facility, to assist the lower court in understanding the records that had been withheld from trial counsel. Trial counsel was subpoenaed to testify concerning Smith's recantation of her allegations against Allen in the 1994 church break-in case[9] and the reasons for seeking the Black Mountain records prior to trial, and how they were material to the Defendant's strategy. The hearing was recessed, with the subpoena of the only adverse witness, Vanessa Smith, left in "full force and effect." (*Id.*, at 112-13) However, on September 27, 2017 Judge Long issued a memorandum to all counsel of record indicating that "a further evidentiary hearing on SMAR claims 3H, 3J, 3K and a portion of 3I is not needed," and announced his intention to deny the remaining subparts of Claim III, without providing Defendant with any further opportunity to present additional witnesses or other evidence. A formal written order was subsequently entered by the lower court on January 4, 2018, denying these claims.

In its January 4, 2018 order, the lower court dismissed Dr. Warren's testimony as "wholly unpersuasive" as it turns "primarily on the use of the term

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[9] *See* Oldham's testimony at the February 2018 evidentiary hearing on sentencing claims (Sentencing Tpp 44-48) and Allen's Exhibit 5 admitted at that hearing.

'spiritually bankrupt' and his assumption that there was no Axis II diagnosis in the Black Mountain Records because no one capable of making an Axis II diagnosis examined Smith." (January 4, 2018 Order, at 8, ¶ 23) Instead, the lower court relied on its own review of the Black Mountain records, without opposing evidence from the State, consultation with a mental health professional, or other available testimony, to conclude – directly contrary to Dr. Warren's testimony - that the Black Mountain records "are bereft of any evidence to support an Axis II Personality B Complex Array diagnosis." (*Id.*, at 8, ¶ 25) Accordingly, the lower court denied Allen a full evidentiary hearing on these claims, and summarily dismissed them based on its own reading of the records. (*Id.*, at 11-12)[10]

4. The Lower Court Erred in Dismissing Claim IV and Concluding that the State Had Not Withheld Materials In Violation of *Brady v. Maryland* and *Napue v. Illinois*.

The State argued to the lower court that "not all nondisclosure of what is casually referred to as *Brady* material warrants a new trial." However, the prior criminal record of an important corroborating witness is not "casually" called *Brady* material, where the State's case rests primarily on the testimony of an

[10] Defendant made a further offer of proof concerning the Black Mountain records during the evidentiary hearing on the sentencing claims, by calling forensic psychologist Dr. Kristine Herfkens to testify regarding the meaning and significance of those records. (Sentencing Tpp 405-440) Judge Long, having already ruled on subparts H, I, J and K of Claim III, excused himself from the proceedings during the offer of proof. (*Id.*, at 404-05)

unreliable witness like Vanessa Smith. Furthermore, the prosecution not only withheld the requested material, it failed to correct the witness's false testimony at trial.

a. The Lower Court's Order.

The lower court held that Claim IV is without merit, primarily analyzing the claim under *Napue v. Illinois* and related cases but failing to substantively address the disclosure standard announced in *Brady v. Maryland,* 373 U.S. 83(1963) and its progeny. "The Court concludes that Defendant has failed to show that the State had a constitutional duty to provide him with Page's 1997 convictions for injury to personal property because Defendant could have obtained the records from other sources through the exercise of due diligence." (August 18, 2016 Order, at 46) The lower court also found that the defendant "has failed to show that there is a reasonable probability that the result of the proceeding would have been different if the suppressed documents had been disclosed to the defense." (*Id.,* at 47)

b. The Lower Court Misapplied the Law.

Impeachment evidence is exculpatory evidence subject to production under *Brady*. *See, e.g., United State v. Bagley,* 473 U.S. 667 (1985); *see also State v. Williams*, 368 N.C. 628, 636, 669 S.E.2d 290, 297 (2008). Here, the trial court

repeatedly instructed the prosecution to provide its witnesses' criminal records to the defense, and trial counsel reasonably relied on the prosecution to comply with the trial court's direct orders. Nevertheless, discovery produced during post-conviction shows, and the State does not contest, that a portion of Jeffrey Page's criminal record was withheld.[11]

The State used Page to corroborate portions of Smith's testimony about the murder, to establish motive, and to show that Allen sold Gailey's truck. Page testified that Allen approached him about selling Gailey's truck for $800, and that Allen told him he had "shot a fellow." According to Page, Allen told him that after he shot the man, he "heard the boy groaning." Allen said he threw rocks at the man, which caused the man to shoot his gun. Allen also allegedly told Page that he shot the man because he thought he was going to rat him out to police as an escapee from prison.

The State acknowledged in its arguments to the lower court that Page's testimony was important to the State's case because he corroborated Smith's story. Nevertheless, the State also argued that information relating to Page's prior criminal record was not material at trial. The lower court concluded that this

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[11]Exhibit 64 (incomplete criminal record of Jeffrey Page produced to trial counsel); *See also* Exhibit 65 (complete list of *Brady* materials produced to trial counsel) and Exhibit 12 (Jeffrey Page's full criminal record)

additional evidence would not have made a difference to the jury, because it already knew that Page had been convicted of DUI and that he drove drunk with his child in the backseat of his car with Smith when they drove from Shallotte to Albemarle. (August 18, 2016 Order, at 47) However, the jury is charged with weighing the evidence. Evidence that Page had two additional prior arrests was relevant and material to his credibility. The conclusion by the lower court that the credibility of a central State's witnesses was not material is unreasonable and inconsistent with *Brady*.

In addition, counsel failed to cross-examine Page about the severity of charges against him: if convicted as an accessory after the fact to murder, he would be sentenced for a Class C felony and faced mandatory jail time of at least forty-four months. Counsel also did not adequately cross-examine Page regarding prior inconsistent statements.

This claim involves material issues of fact that can only be resolved at an evidentiary hearing, including whether trial counsel reasonably had access to the withheld information through other sources as the lower court assumed in its order.

5. The Lower Court Erred in Denying Allen's Fifth Claim for Relief in His MAR, in that His Conviction for First-Degree Murder and his Sentence of Death Should Be Vacated Because the Indictment for First-Degree Murder Did Not Confer Upon the Court Jurisdiction to Try Allen for First-Degree Murder, and Did Not Confer Jurisdiction to Impose a Sentence of Death.

Claim V of the MAR was raised and decided on Allen's direct appeal from his conviction. As stated above, this claim was included in the MAR in order to preserve the issue in the event of a change in the law.

6. The Lower Court Erred in Denying Mr. Allen's Sixth Claim for Relief in His MAR Based on Trial Counsel's Failure to Object to Inappropriate Prosecution Closing Arguments.

During its closing argument, the prosecution argued that Smith was too short to have shot Gailey herself, Gailey removed his shirt because of hot weather, and Allen's alleged excuse for luring Gailey into the woods, to look at some guns, was verifiably false because no guns were found. None of these statements was supported by evidence admitted at trial. Nevertheless, defense counsel failed to object to the improper arguments and the issue was not preserved for appellate review.[12]

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[12] As noted above, this issue was raised as an ineffective assistance of counsel claim in Allen's direct appeal, and this Court dismissed the claim *without prejudice* on the basis that "further factual inquiry is required into these allegations of ineffective assistance of counsel." *State v. Allen*, 360 N.C. at 315-16, 626 S.E.2d at 285-86.

a. The Lower Court's Order.

The lower court held that this Court's ruling on direct appeal was dispositive of this claim, and that it was bound by the law of the case:

> Since Defendant presented the same facts and questions regarding the State's closing arguments to the Supreme Court of North Carolina, i.e., that they were improper because they were not supported by the record evidence, and since the resolution of those facts and questions were necessary for the determination of the case on direct appeal, those facts and questions are also resolved for the purpose of post-conviction review.

(August 18, 2016 Order, at 53)

N.C. Gen. Stat. § 15A-1230 expressly prohibits lawyers from basing their closing arguments on materials outside the record. The prosecution violated the statute a number of times. There was no evidence in the record supporting the prosecution's claim that Smith could not have shot Gailey in the back because she was too short. There was also no evidence that the weather was hot, causing Gailey to remove his shirt, or that police had searched and established there were no guns in the surrounding area. Because defense counsel failed to object, Allen's claim on direct appeal was reviewed for plain error, the most stringent standard of review: that the arguments were "so grossly improper" that they rendered Allen's trial "fundamentally unfair."

Although this Court found on direct appeal that the prosecution's remarks did not meet that level of prejudice, this Court declined to determine whether trial counsel was ineffective for failing to object at trial. Thus, this Court's decision did not address why counsel failed to object to the erroneous arguments and whether this failure amounted to IAC.

7. The Lower Court Erred in Denying Allen's Tenth Claim for Relief, Which Asked the Court to Assess Prejudice Cumulatively.

The lower court dismissed Claim X on two grounds: 1) that none of Allen's ineffectiveness claims have merit; and 2) that precedence in the United States Circuit Court for the Fourth Circuit does not assess ineffectiveness claims cumulatively. (August 18, 2016 Order at 54-55) As shown in the MAR, SMAR, and this Petition, trial counsel's errors identified in Claims II, III, VI, VII, VIII, IX and XI violated Allen's constitutional right to effective assistance of counsel. Further, under this Court has held that the prejudicial effect of errors at trial is assessed cumulatively. *State v. Canady*, 355 N.C. 242, 246, 559 S.E.2d 762, 764 (2002).

8. The Lower Court Erred in Denying Claim XI of the SMAR, Which Shows That Trial Counsel Failed to Adequately Investigate Other Suspects

Allen has always maintained that he did not shoot Gailey. Thus, it was incumbent on trial counsel to investigate other potential suspects in the murder. Evidence that was available to counsel pointed to at least three other people who had the motive and opportunity to harm Gailey: Vanessa Smith, Dustin Maness, and Jamie Fender. Smith told her boyfriend Troy Spencer that she shot Gailey. (Aff. of Troy D. Spencer, Exhibit 42, ¶ 11) Maness, who was reportedly in the Uwharrie Forest the night of Gailey's murder, fought with Gailey just weeks before and had taken out assault charges against Gailey. (Statement of Robert Gray Johnson, Exhibit 53, at 000914; Aff. of Robert Gray Johnson, Exhibit 43, ¶ 13) Jamie Fender was married to Lois Lawson, who was having an affair with Gailey. (Sentencing Tpp 562-63, 575) Fender was seen leaving his home the night of the murder armed and wearing camouflage clothing. (*Id.*, at 561-62)

The lower court misreads the case law on third-party guilt, imposing a higher standard for relevance than North Carolina requires. This Court has stated, "The relevance standard to be applied to this and other cases is relatively lax... Any evidence calculated to throw light upon the crime charged should be admitted by the Court." *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 4449

(1988) (internal citation omitted). This Court applied that principle in *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987), involving pretrial identification. The defendant, charged with burglary and rape, had been identified by the victim as her assailant. The Court ruled that the defendant was entitled to present evidence that similar crimes had been committed and that a victim in one of those cases identified another man. That evidence did not rise to the level that the lower court now deems necessary: there was no direct identification of the third party, whereas Allen's trial counsel had information available that a third party had actually confessed to the crime. Using the standard in *Cotton*, it would have been error for the trial judge to exclude Smith's statements to Spencer.

The lower court's reliance on *State v. Israel*, 353 N.C. 211, 539 S.E.2d 633 (1987), is misplaced. In *Israel*, this Court granted a new trial where the trial judge excluded evidence that the victim's ex-boyfriend had a history of violence towards the victim and may have been in the apartment building on one of the nights when the crime could have been committed. Even though there was significant evidence of the defendant's guilt, this Court reversed the conviction, stating:

> We conclude that the evidence, when viewed in the light most favorable to the State, was sufficient to warrant its submission to the jury and to sustain defendant's conviction of murder in the first degree. But no matter how ample and damning this

> evidence may be, when other evidence tending to show the crime was perpetrated by another is erroneously excluded from the jury's consideration, the sufficiency of the remainder is eroded, the evidentiary foundation for the conviction is unreliable, and the defendant is entitled to a new trial.

Id. at 212, 539 S.E.2d at 634.

The United States Supreme Court's holding in *Holmes v. South Carolina*, 547 U.S. 319 (2006) is also instructive. In that case, the Supreme Court vacated the lower court's ruling that evidence of third party guilt was inadmissible: "[T]he rule applied in this case by the State Supreme Court violates a criminal defendant's right to have a meaningful opportunity to present a complete defense." *Id.* at 331. The Supreme Court further stated,

> Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

Id. at 330.

Similar to the case at bar, the Supreme Court ruled that evidence that another man had been seen in the area around the time of the crime and had made statements suggesting that he was guilty should have been admitted.

Allen's evidence of third-party guilt is at least as reliable as the evidence in *McElrath, Cotton,* and *Holmes*, and certainly enough to warrant further investigation by trial counsel. Troy Spencer tried to tell trial counsel that Smith's involvement in the crime was far greater than she admitted. Had trial counsel thoroughly interviewed Spencer, they would have found, as post-conviction counsel has found, that Smith said she pulled the trigger herself. The lower court points out that there are differences in the letter Spencer delivered to trial counsel and the affidavit he gave post-conviction counsel. (August 18, 2016 Order at 56-57) That very difference demonstrates why this Court should grant an evidentiary hearing on this claim, to permit a post-conviction court to take evidence and determine what trial counsel could have learned with a more thorough investigation.

Evidence regarding Maness shows that he was reportedly in the woods the night Gailey was killed, that he fought with Gailey shortly before the murder, and that he told people that he was glad Gailey was killed because he deserved to die. (Statement of Robert Gray Johnson, Exhibit 53, at 000914; Aff. of Robert Gray Johnson, Exhibit 43, ¶ 14) While Robert Johnson did not directly accuse Maness of the murder, he could have linked Maness to the crime scene and provided a motive. Likewise, Lois Lawson could have testified that her husband, Jamie

Fender, had gone into the woods armed that night. This evidence is at least as compelling as the material found admissible in *McElrath, Cotton,* and *Holmes*.

The prejudice to Allen is significant: the jury never heard that the State's primary witness confessed to committing the crime herself. Even if the jury felt that Allen was involved with the crime, it would have been essential evidence that Allen did not shoot Gailey and, at worst, followed Smith's lead and did not stop it. In a capital case, such a distinction is vital. Similarly, the jury could have heard evidence against Maness and Fender establishing that others had a motive and opportunity to harm Gailey. Because determination of this claim is dependent on the facts developed through an evidentiary hearing, including trial counsels' reasons for failing to investigate other suspects, State and federal constitutional law precludes summary denial.

9. The Lower Court Erred in Denying Claim XII of the SMAR, Which Alleges That Allen Was Noticeably Shackled in Front of the Jury During the Sentencing Phase Without the Required Hearing or Finding of Facts on the Record.

Criminal defendants are entitled to appear at trial free from all bonds or shackles except in extraordinary instances. *State v. Tolley*, 290 N.C. 349, 365, 226 S.E.2d 353, 366 (1976). "Because of the inherent prejudice engendered by the use of shackles, the rule since the earliest cases has been that the burden of

showing necessity for such measures rests upon the State. *Id.* at 366-367, 226 S.E.2d at 367. Trial courts may order a defendant to be restrained only after making findings on the record regarding why restraints are reasonably necessary. N.C. Gen. Stat. § 15A-1031. Here, Allen was shackled at trial, but the record contains no findings as to why the restraints were necessary. Allen was prejudiced by the use of restraints, where they were visible to the jury and created the inference that he was dangerous and difficult to control.

Allen wore full physical restraints in the courtroom while the jury was present, which were noticed by at least two jurors and one alternate juror. Restraints are authorized under N.C. Gen. Stat. § 15A-1031, only "when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons." If the court orders a defendant to wear restraints, it is required to undertake the following actions:

> (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and
>
> (2) Give the restrained person an opportunity to object; and
>
> (3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.

N.C. Gen. Stat. § 15A-1031.

The trial court here did none of these things and, therefore, violated the terms of the statute, which essentially codifies the defendant's constitutional due process rights. The lower court found that Allen has presented no "competent evidence that the jury saw Allen in shackles or restraints inside the courtroom." (August 18, 2016 Order at 61) However, Juror Shirlene Ewing stated in her sworn post-conviction affidavit that she knew that Allen was wearing restraints during the trial. (Aff. of Shirlene Ewing, Exhibit 55, ¶ 6) Alternate Juror Elmer Capel also saw that Allen was wearing leg irons during trial. (Aff. of Elmer Capel, Jr., Exhibit 52, ¶ 6) Ewing's and Capel's credibility and the significance of their testimony should be tested at an evidentiary hearing. Juror Johnny Randall McDowell also told post-conviction investigators that Allen was shackled at trial and surrounded by deputies. Although McDowell declined to sign an affidavit, the lower court could take his testimony at an evidentiary hearing and weigh the significance of the evidence.

The prejudice standard for violations of a defendant's constitutional right is harmless error. N.C. Gen. Stat. §15A-1443(b). The lower court held that Allen "has not shown that the alleged shackles or restraints in any way impaired his ability to assist in his defense, citing *State v. Holmes*, 355 N.C. 719, 565 S.E.2d 154 (2002). However, the inability to assist counsel is only one of three concerns

raised by the North Carolina Supreme Court in *Holmes*. Shackling also prejudices criminal defendants because "(2) it intrinsically gives affront to the dignity of the trial process, and most importantly, (3) it tends to create prejudice in the minds of the jurors by suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion." *Id.* at 727-728, 565 S.E.2d at 162 (quoting *Tolley*, 290 N.C. at 366, 226 S.E.2d at 367)(emphasis added). Furthermore, the trial court in *Holmes* held a hearing, received evidence about why restraints were necessary, and made findings based on that evidence. None of that was done here. In *Holmes*, this Court found that the trial court did not abuse its discretion in requiring the defendant to wear restraints where the evidence showed that the defendant had numerous instances of misconduct while in jail awaiting trial, including fighting with detention center staff and refusing to be handcuffed. The State made no such showing in this case, and the lower court's speculation as to why the trial court ordered the restraints does not constitute evidence sufficient to merit summary denial of this claim.

The lower court also held that the trial court's error was harmless because of the "overwhelming" evidence of Allen's guilt. This should not be upheld. There was no forensic evidence tying Allen to the murder; Allen was not known to carry guns; and no murder weapon was ever found. The only witness to the

alleged murder was a woman with no credibility and a vendetta against Allen. Virtually every part of her story has been shown to be false. The State has never established a credible theory as to why Allen would have killed his closest friend.

Where there are material issues of fact that must be resolved, Allen is entitled to an evidentiary hearing.

III. THE LOWER COURT ERRED IN DENYING ALLEN'S SENTENCING PHASE CLAIMS VII, VIII, AND IX ON THE MERITS, AND FAILING TO ORDER A NEW CAPITAL SENTENCING HEARING.

Claim VII of the MAR, and Claims VIII and IX of the MAR and SMAR, involve counsels' performance at Allen's capital sentencing hearing. Although Allen has always maintained his innocence, trial counsel were charged with preparing for a capital sentencing hearing in the event of a conviction. Given that counsel did not present evidence during the guilt phase, they had no excuse for failing to conduct a thorough mitigation investigation and formulate a well-reasoned strategy for sentencing. Post-conviction investigation has revealed that counsel's preparation for and presentation of evidence at sentencing fell far short of the professional standards for counsel at a capital sentencing hearing.

Claim VII alleges that trial counsel were ineffective in failing to call a mental health expert to explain the significance of lay testimony during the sentencing phase and other matters placed before the jury. Claim VIII alleges