NO. 115A04-3 JUDICIAL DISTRICT TWENTY-A

SUPREME COURT OF NORTH CAROLINA

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

DEFENDANT-APPELLANT SCOTT DAVID ALLEN'S BRIEF

ISSUES PRESENTED[1]

I. WHETHER THE MAR COURT ERRED BY SUMMARILY DENYING ALLEN'S CLAIMS ALLEGING THAT TRIAL COUNSEL WERE INEFFECTIVE AT THE GUILT-INNOCENCE PHASE OF TRIAL.

II. WHETHER THE MAR COURT ERRED BY SUMMARILY DENYING ALLEN'S CLAIM THAT HE WAS SHACKLED IN THE PRESENCE OF THE JURY WITHOUT THE TRIAL COURT FIRST CONDUCTING A HEARING AND MAKING FINDINGS OF FACT AS TO THE NEED FOR RESTRAINTS.

III. WHETHER THE MAR COURT ERRED BY DENYING, WITHOUT A FULL EVIDENTIARY HEARING, ALLEN'S CLAIMS THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO PROVIDE SMITH'S MEDICAL AND MENTAL HEALTH RECORDS TO DEFENSE COUNSEL.

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[1] The issues presented here differ from those listed in the Petition for Certiorari Review because undersigned counsel have narrowed the focus of the arguments at this stage. However, as noted more specifically below, all issues presented in this brief were preserved and presented for review at the certiorari stage.

Rules

Other Authorities

IV. OTHER ISSUES FOR REVIEW

IV.A. WHETHER THE MAR COURT ERRED BY DENYING ALLEN'S CLAIMS ALLEGING THAT TRIAL COUNSEL WERE INEFFECTIVE AT THE SENTENCING PHASE OF TRIAL.

IV.B. WHETHER THE MAR COURT ERRED BY DENYING ALLEN'S CLAIM THAT THE STATE PRESENTED FALSE AND MISLEADING EVIDENCE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

IV.C. WHETHER THE MAR COURT ERRED BY DENYING ALLEN'S CLAIMS THAT THE STATE WITHHELD MATERIALS ABOUT A WITNESS'S CRIMINAL HISTORY IN VIOLATION OF *BRADY*.

IV.D. WHETHER THE MAR COURT ERRED BY DENYING ALLEN'S CLAIM THAT HIS TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER ARGUMENTS DURING THE STATE'S CLOSING.

IV.E. WHETHER THE MAR COURT ERRED BY DENYING ALLEN'S CLAIM THAT THE DEFICIENT SHORT-FORM INDICTMENT FAILED TO CONFER JURISDICTION ON THE TRIAL COURT.

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES THE DEFENDANT-APPELLANT, Scott David Allen, through undersigned counsel and pursuant to the 27 September 2019, Order of this Court allowing Allen's petition for writ of certiorari to review the multiple orders of the Superior Court, Montgomery County, denying his post-conviction claims.

In support of his request, Allen states the following:

INTRODUCTION

In this capital post-conviction case, and as argued below in Section I, the theory the State presented at trial was that of a premeditated, malicious, and deliberate murder, as described by the State's sole eyewitness, Vanessa Smith—Allen's former girlfriend who had also been charged with murder in connection to this case. The State's case rested almost exclusively on Smith's narrative that Allen pressured the victim, Christopher Gailey, into the woods at night and then, without warning, shot him at close range in the back. At trial, Allen's defense attorneys did not offer the jury any alternative to this inflammatory version of events.

However, an alternative existed: one that was readily available and should have been apparent to trial counsel. Had counsel fulfilled their duty to fully investigate and examine the crime scene evidence, they would have learned that the physical evidence contradicted Smith's account, and suggested strongly that the crime was not premeditated, but instead resulted from a chaotic conflict between two men who were high on cocaine.

Without this understanding of the crime scene, counsel failed to present testimony from a crime scene expert who would have explained how the physical evidence undermined the story told by the State's key witness, and suggested a crime that was much more impulsive than premeditated. Likewise, trial counsel failed to effectively cross examine Smith about the many ways her story did not account for—or directly contradicted—the physical evidence. They further failed to cross examine or call witnesses who could have controverted almost every other important aspect of Smith's testimony.

Had trial counsel not made these errors and presented the available evidence undermining Smith's allegations of premeditation, there is a reasonable probability that Allen would not have been convicted of first degree murder, or sentenced to death. Indeed, the trial court instructed the jury on the lesser-included offenses of second degree murder and voluntary manslaughter, but trial counsel did not offer any evidence, or even make any arguments, in support of conviction of a less serious crime. Trial counsel merely made unsupported arguments that Smith was lying, although there was ample evidence that could have been developed to give the jury specific and credible reasons to doubt her. Even on the existing record, the trial court described the prosecution's case as "a joke," (*see* App. 421, TT 1593:12–22), and this Court on direct appeal described Smith as a witness with "less-than-perfect credibility," *State v. Allen*, 360 N.C. 297, 306, 626 S.E.2d 271, 279 (2006). It is reasonably probable, then, that if trial counsel had effectively shown the jury how the

physical evidence undermined the State's already-tenuous case for premeditation, Allen would not have received a capital murder conviction and death sentence.

In light of all of these circumstances, and as argued in greater detail below in Section I, this Court should reverse the MAR court's summary denial of Allen's guilt-innocence phase ineffective assistance of counsel claims, and remand for an evidentiary hearing.

Finally, the Court should also remand for an evidentiary hearing on Allen's claim that he was improperly shackled in the courtroom in the view of jurors without the trial court making findings as to the need for restraints, as argued in Section II; and his claims that the trial court impaired Allen's ability to defend himself at his capital trial by denying his attorneys access to important medical and mental health records that would have impeached Smith, as argued in Section III.

RELEVANT PROCEDURAL BACKGROUND AND GROUNDS FOR APPELLATE REVIEW

On 24 January 2000, a grand jury indicted Allen for the first degree murder of Christopher Gailey, felonious larceny, and felonious possession of stolen goods. (*See* App. 755, MAR Ex. 23, Indictment.)

The State tried Allen for capital murder before a jury at the 27 October 2003 Criminal Session of Superior Court, Montgomery County before the Honorable Andy Cromer. (*See* App. 246–630, Trial Transcript Excerpts ("TT").) The jury found Allen guilty of first degree murder on the basis of malice, premeditation, and deliberation on 13 November 2003, but made no finding as to two theories of felony murder. (*See*

App. 725–27, MAR Ex. 3, Verdict Sheet.) The jury further found Allen guilty of felonious larceny and felonious possession of stolen goods. (*See id.*)

Following a capital sentencing proceeding, the jury recommended a sentence of death. (*See* App. 728–32, Mar Ex. 4, Issues and Recommendation as to Punishment.) The trial court entered judgement in accordance with that recommendation on 18 November 2003. The trial court also sentenced Allen to 10 to 12 months of confinement for the other offenses.

On 3 March 2006, this Court affirmed the conviction and sentence of death. *State v. Allen*, 360 N.C. 297, 626 S.E.2d 271 (2006). The United States Supreme Court denied certiorari on 2 October 2006. *Allen v. North Carolina*, 549 U.S. 867 (2006).

Allen filed his Motion for Appropriate Relief ("MAR") in the Montgomery County Superior Court before the Honorable V. Bradford Long on or about 2 July 2007, stating ten claims for relief. (*See* App. 1–120, MAR.) He filed a Supplemental Motion for Appropriate Relief ("SMAR") on or about 17 September 2013, supplementing some of his original claims and adding two additional claims for a total of twelve claims. (*See* App. 948–1008, SMAR.) The State filed its Answer and Motion for Summary Denial on 30 September 2014. Allen filed a Response to the State's Motion for Summary Denial on 24 January 2015, and the State filed a Reply on 26 February 2015.

The MAR court entered three orders in response to the Motion for Summary Denial. On 18 August 2016, the MAR court signed an Order Summarily Dismissing Certain Claims of Petitioner's MAR and SMAR. (*See* App. 121–84, Aug. 18, 2016

Order Summarily Dismissing Certain Claims of Petitioner's Motion for Appropriate Relief and Supplemental Motion for Appropriate Relief ("Aug. 18, 2016 Order Summarily Dismissing Claims").) By that Order, the MAR court dismissed Claims I–II, IV–VI, and X–XII in their entirety, and all subparts of Claim III except for subparts H, J, K and a portion of subpart I, which concern the trial court's *in camera* inspection of medical, mental health, and substance abuse records of the State's primary witness, Vanessa Smith. (*See id.*) On that same day, the MAR court signed an Order on the State's Summary Denial Motion on Claims VII, VIII, and IX of Allen's MAR and SMAR, allowing an evidentiary hearing on all three claims alleging ineffective assistance of counsel during the sentencing phase of trial. (*See* App. 185–96, Aug. 18, 2016 Order on State's Summary Denial Motion on Claims VII, VIII, and IX ("Aug. 18, 2016 Order on Claims VII, VIII, and IX").) On 4 April 2017, the MAR court ordered a "limited evidentiary hearing" to determine whether Allen suffered "sufficient prejudice to warrant a full evidentiary hearing" on Claim III subparts H, J, K, and a portion of subpart I, regarding the trial court's *in camera* inspection of Smith's medical, mental health, and substance abuse records. (*See* App. 201–02, Apr. 4, 2017 Order Granting State's Motion for Discovery and Setting Evidentiary Hearing Schedule ("Apr. 4, 2017 Order"), ¶ 11.)

On 25 August 2017, the MAR court conducted the limited evidentiary hearing on the four subparts of Claim III. (*See* App. 1021–29, Limited Evidentiary Hearing Transcript Excerpts ("LEHT").) On 27 September 2017, the MAR court issued a Memorandum of Ruling concluding that a further evidentiary hearing was

unnecessary. (*See* App. 1030–33, Sept. 27, 2017 Ruling on Limited Evidentiary Hearing.) On 5 January 2018, it entered an Order dismissing those claims. (*See* App. 1009–20, Jan. 5, 2018 Order Granting State's Motion to Dismiss Claims 3H, 3J, 3K, and a Portion of 3I of Defendant's Supplemental Motion for Appropriate Relief.)

The MAR court conducted a four-day evidentiary hearing from 12 February through 15 February 2018 on Claims VII–IX of the MAR and SMAR alleging trial counsel was ineffective at sentencing. (*See* App. 631–716, Evidentiary Hearing Transcript Excerpts ("EHT").) On 6 February 2019, it filed an Order dismissing all three of those claims. (*See* App. 205–45, Feb. 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 ("Feb. 6, 2019 Order").)

On 29 April 2019, Allen filed his Petition for Writ of Certiorari and Writ of Mandamus in this Court, pursuant to N.C.G.S. § 15A-1422. The State filed its response on 1 July 2019. On 25 September 2019, this Court entered its Order allowing the petition for writ of certiorari.

RELEVANT FACTUAL BACKGROUND

Allen was represented at trial by Carl W. Atkinson, Jr. and C. Pierre Oldham. Although Atkinson was technically first chair, Oldham did almost all of the work during the guilt-innocence phase of trial, including opening arguments, half of closing arguments, and cross examination of almost all of the State's witnesses.

In his four-page opening statement, Oldham emphasized the importance of the crime scene evidence. He told the jury: "I can guarantee you that a lot of what the

D.A. says the evidence tends to show about what transpired out there in the woods is based upon testimony of Vanessa Smith." (*See* App. 254, TT 1246:3–5.) He promised the jury that they were "going to hear" about inconsistencies between Smith's prior statements to law enforcement. (*See* App. 254, TT 1246:10–12.) Beyond these promised inconsistencies, Oldham offered no alternate theory of the case. (*See* App. 251–55, TT 1243:7–1247:1.)

Smith faced a number of charges related to the crimes in this case, including murder. (*See* App. 374–75, TT 1508:20–1509:5.) Two weeks prior to trial, she entered into an agreement with the State in exchange for her testimony against Allen: the State agreed to drop the murder charge and Smith would plead guilty to five lesser felonies. (*See* App. 375–76, TT 1509:16–1510:5; App. 377–78, TT 1511:19–1512:1.) After explaining this to the jury, Smith described her relationship with Allen. She said that the two had been romantically involved since 1998, when they got together while Allen was in a North Carolina Department of Corrections work release program at Capel Mills. (*See* App. 378–79, TT 1512:24–1513:5.) When Allen escaped from the program later that year, the two moved from hotel to hotel in North Carolina, living off of settlement proceeds from the death of Smith's father. (*See* App. 380–81, TT 1515:13–1516:11.)

Smith's testimony catalogued months of travel across the country and her heavy drug use as she and Allen burned through the settlement proceeds. (*See, e.g.*, App. 381–86, TT 1516:20–1521:11.) To avoid the outstanding warrant against Allen for his escape from work release, Smith paid a friend five hundred dollars for a copy

of his birth certificate and other documents for Allen to use. (*See* App. 383–84, TT 1518:22–1519:10.) As Smith and Allen traveled, Smith sent for her husband and son to join them, but Smith's abuse of methamphetamines was so extreme that she soon sent her husband and son home. (*See* App. 439–40, TT 1681:12–1682:9.) Smith and Allen spent some time in Denver, where Allen met a woman named Kelly Racobs, with whom he eventually became romantically involved. (*See* App. 389–90, TT 1529:15–1530:5.) Smith testified that she and Allen returned separately to North Carolina in March or April of 1999, after running out of money. (*See* App. 389–90, TT 1529:15–1530:23.) The two of them would stay with friends, when possible, or in an abandoned cabin that they broke into. (*See* App. 387–88, TT 1525:20–1526:1.)

Around this time, Allen reunited with one of his old friends, Christopher Gailey. (*See* App. 391, TT 1531:14–16.) In the summer of 1999, Gailey helped Smith and Allen stay at a mobile home near Badin Lake that was rented out by Gailey's friend, Robert Johnson. (*See* App. 322–25, TT 1455:23–1458:10.) Johnson testified that he lived in the mobile home with Gailey, Danny Lanier, and Lanier's family. (*See* App. 322, TT 1455:12–25.) Johnson told the jury that life at the mobile home consisted of partying, drinking, and drug abuse. (*See* App. 327, TT 1460:13–18.) Johnson explained that Gailey sold drugs for a living, and that he provided most of the drugs used at the mobile home. (*See* App. 325, TT 1458:23–24; *see* App. 363–64, TT 1496:21–1497:19.) Smith, Allen, and Gailey were all living at the mobile home until the night of 9 July 1999. (*See* App. 333, TT 1466:18–23.)

Smith was the State's only witness to the shooting that night. Smith testified that Allen told her and Gailey that he had stashed some firearms in a cabin in the Uwharrie Forest that they could sell for money and cocaine. (*See* App. 392–93, TT 1533:21–1534:23.) According to Smith, Gailey did not want to go into the woods at night, but Allen eventually convinced him to. (*See* App. 393–94, TT 1534:24–1535:2.) Smith said that the trio left the mobile home the afternoon of 9 July 1996 while it was still light out. (*See* App. 394, TT 1535:3–4.)

Smith explained that Gailey drove them in his truck to the Uwharrie Forest, which was about twenty minutes away. (*See* App. 394–35, TT 1535:7–1536:2.) She said that when they got to the woods, the three walked for at least an hour. (*See* App. 396, TT 1537:18–20.) Smith testified that Gailey carried a duffel bag and a .45 caliber handgun, which he usually carried with him. (*See* App. 395, TT 1536:11–12; App. 468, TT 1710:6–11.) According to Smith, Allen carried a sawed-off shotgun. (*See* App. 395, TT 1536:13–20.) As they walked, Smith smoked marijuana and Gailey and Allen used powder cocaine. (*See* App. 396, TT 1537:21–25.)

Smith testified that the trail grew so narrow that they had to walk single file, led by Gailey followed by Allen and then Smith. (*See* App. 398, TT 1539:15–18.) Smith said that without warning, Allen turned around and pushed her down to the ground before shooting Gailey without provocation. (*See* App. 398, TT 1539:15–25.) Smith covered her head with her arms and did not see what happened, but she heard other shots. (*See* App. 398–99, TT 1539:15–1540:9.) According to Smith, she and Allen went to a nearby cabin to sit and wait for Gailey to die, and Allen periodically crawled over

to Gailey and threw rocks at his body to see if he was still alive. (*See* App. 399–400, TT 1540:18–1541:24.) Smith told the jury that she and Allen stayed there for seven or eight hours before leaving the forest at dawn. (*See* App. 401, TT 1542:6–24.) Smith testified that as they left, she heard Gailey empty his .45 caliber handgun. (*See* App. 402, TT 1543:1–8.)

Smith explained that when she and Allen drove away from the woods, Allen instructed her to go back to the mobile home to get their belongings and Gailey's wallet. (*See* App. 402, TT 1543:21–25.) Smith said that she complied with this request, slipping in and out of the mobile home without talking to anyone. (*See* App. 403, TT 1544:2–7; App. 482, TT 1724:7–20.)

The only other witness the State called with firsthand knowledge of the night of 9 July 1999 was Johnson. His testimony about that evening conflicted with Smith's in almost every regard. Johnson told the jury that Smith, Gailey, and Allen left in Danny Lanier's truck, not Gailey's. (*See* App. 335, TT 1468:11–19.) He said that the trio left after dark, and that Smith returned alone around three hours later. (*See* App. 336, TT 1469:2–11.) Johnson said that Smith asked him for the keys to Gailey's truck, but Johnson refused to give them to Smith because Gailey did not like other people driving it. (*See* App. 336, TT 1469:13–20.) Johnson testified that he went to bed, but when he woke up Smith and Gailey's keys were gone. (*See* App. 336, TT 1469:17–24.) The other three people at the trailer that night—Danny Lanier, Tanzy Lanier, and Shannon Diehl—made statements to law enforcement consistent with Johnson's testimony, but neither the State nor defense counsel called them to testify. (*See* App.

720, MAR Ex. 1, Stmt. of Danny Lanier to SBI; App. 723–24, MAR Ex. 2, Stmt. of Tanzy Lanier to SBI; App. 913, SMAR Ex. 59, Stmt. of Shannon Diehl to SBI.)

Smith testified that after she and Allen left the trailer, they drove to Shallotte and then Albemarle in search of cocaine. (*See* App. 413–14, TT 1561:21–1562:19.) Smith told the jury that around this time, her memory really started breaking down due to drug use. (*See* App. 415, TT 1563:6–15.) Other witnesses described Smith and Allen attending a party at the home of Jeff Brantley, a friend of Smith's. (*See, e.g.*, App. 491, TT 1749:9–12.)

One of the people at Brantley's party was Jeffery Lynn Page. Page testified that Allen offered to sell him Gailey's 1998 GMC truck, worth approximately $16,000, for $800. (*See* App. 510–11, TT 1781:20–1782:6; App. 575, TT 2098:7–10.) Page said that Allen told him the truck was owned by a man he shot in the woods to prevent the man from turning him in for escaping from prison. (*See* App. 509–10, TT 1780:15–1781:4; App. 512–13, TT 1784:24–1785:3.) Page told the jury that Allen threw rocks at the man to see if he was dead because Allen knew he had a gun, and the victim continued to shoot his gun in response to the rocks. (*See* App. 510, TT 1781:13–19.) Page bought Gailey's truck from Allen and subsequently sold it to a junk dealer in South Carolina. (*See* App. 514, TT 1788:1–19.) Like Smith, Page was charged in connection with Gailey's murder as an accessory after the fact and testified pursuant to an agreement with the State. (*See* App. 507–08, TT 1776:16–1777:4.)

A few days after selling the truck, Allen returned to Denver to be with Racobs. (*See* App. 416, TT 1565:18–25.) Smith testified that she woke up several days later at

the home of her former lover, Lilly Efird; the two then traveled back to Shallotte. (*See* App. 470, TT 1712:5–13.) According to Smith, when she heard that Allen had gone to Denver to be with his new girlfriend, Efird loaned her money and a car to travel to Denver. (*See* App. 470–71, TT 1712:19–1713:5.) Efird testified that Smith stole her money and her car. (*See* App. 557, TT 1872:12–22.) Smith testified that when she got to Denver, she and Allen argued. (*See* App. 417–18, TT 1567:11–1568:5.) Smith returned to North Carolina, where she went to the police to accuse Allen of killing Gailey. (*See* App. 419–20, TT 1569:5–1570:20.)

The defense asked few or no questions of most of the State's witnesses who described finding and investigating the crime scene in the Uwharrie Forest. Wesley Hopkins testified that he notified law enforcement after finding Gailey's body on 11 July 1999 while riding a four-wheeler through the woods. (*See* App. 256–59, TT 1283:13–1286:6.) Several law enforcement officers described the rest of the evidence found at the scene, including: (1) a .45 caliber semi-automatic handgun between Gailey's feet (*see* App. 267, TT 1326:1–4); (2) live rounds of .45 caliber ammunition next to Gailey (*see* App. 271, TT 1330:16–18); (3) a magazine containing live rounds several feet from Gailey's head (*see* App. 267, TT 1326:16–23); (4) a black t-shirt draped over a rock with another smaller rock on top of it about four feet from Gailey (*see* App. 269, TT 1328:1–6); (5) five expended shotgun shells scattered about (*see* App. 280, TT 1344:5–9); (6) a nylon handgun holster located approximately fifteen feet from Gailey (*see* App. 279, TT 1338:8–15); (7) a hunting knife located on top of a duffel bag (*see* App. 268, TT 1327:22–23); and (8) a yellow container with $1,944.00 in cash

on Gailey's body (*see* App. 289, TT 1357:3–9). Gailey's .45 caliber handgun was loaded with a magazine containing five live rounds, with one spent .45 caliber shell casing jammed in the receiver. (*See* App. 267–68, TT 1326:251–1327:4.)

The State's forensic pathologist testified that Gailey was hit twice: once with buckshot at close range to the back of his right shoulder, and once at a farther distance with birdshot to his right knee. (*See* App. 560, TT 2005:1–16; App. 561, TT 2010:7–24.) The forensic pathologist told the jury that it was "extremely unlikely" that Gailey survived for even an hour or two, and that he likely lost consciousness "within a matter of minutes" before succumbing to his wounds. (*See* App. 564, TT 2014:3–14.) The State's other forensic witnesses explained that there was no fingerprint, DNA, or other forensic evidence connecting Allen to the crime scene. At one point during trial, the court commented on this lack of evidence:

> [The jury is] going to go back there because you're not going to bring in fingerprints on a bag, you're not going to bring in a weapon that was recovered, there's no fingerprints on a knife found on a rock, we don't have any DNA from the well, . . . so now the jury goes back there deliberating, they say hey, what about the rock and the DNA evidence. Oh, gosh, I mean this is -- It looks like a joke. I mean I'm just being honest here with you, perhaps too honest.

(*See* App. 421, TT 1593:13–22.)

The defense offered no evidence during the guilt-innocence phase of the trial.

During closing arguments, the State relied heavily on Smith's testimony to argue that Gailey's murder was premeditated, malicious, and deliberate—especially her insistence that Allen threw rocks at Gailey's body for seven or eight hours before giving up and leaving the woods with Gailey still alive. (*See, e.g.*, App. 583, TT

2221:8–19.) In the defense closing, neither Atkinson nor Oldham offered any explanation for the crime beyond their insistence that Smith was lying. (*See* App. 584–618, TT 2243:15–2277:17.) Although the trial court instructed the jury on the lesser-included offenses of second degree murder and voluntary manslaughter (*see* App. 725, MAR Ex. 3, Verdict Sheet), defense counsel did not even mention them, much less make any arguments that would support a jury finding of a less serious crime than first degree murder (*see* App. 584–618, TT 2243:15–2277:17).

During the sentencing proceeding, the State presented victim impact evidence from Gailey's family but rested on evidence from the guilt-innocence phase in support of each of the three aggravating circumstances submitted to and found by the jury. (*See* App. 624–30, TT 2614:5–2620:12.) Once again, the State relied on Smith's testimony about rocks to support the especially heinous, atrocious, and cruel aggravating circumstance. (*See* App. 629, TT 2619:9–18.) The State also cited evidence from Page in support of this and the other two aggravating circumstances: that the murder was committed for pecuniary gain and for the purpose of avoiding a lawful arrest. (*See* App. 624–30, TT 2614:5–2620:12.)

The defense presented testimony of a few family members, a former teacher's assistant, and a prison expert who testified that Allen would adapt well to prison life. Family members described Allen as a loving son and father who remained an active member of his family even while incarcerated. (*See, e.g.*, App. 620–21, TT 2427:2–2428:6; App. 622–23, TT 2463:2–2464:8.) The defense submitted one statutory mitigating circumstance and fourteen non-statutory mitigating circumstances, but

the jury found just two non-statutory mitigating circumstances: (1) Allen was deeply affected by the death of his grandfather; and (2) Allen's death would have a detrimental impact on his mother, father, daughter, and other family members. (*See* App. 728–32, Mar Ex. 4, Issues and Recommendation as to Punishment.)

I. THE MAR COURT ERRED BY SUMMARILY DENYING ALLEN'S CLAIMS ALLEGING THAT TRIAL COUNSEL WERE INEFFECTIVE AT THE GUILT-INNOCENCE PHASE OF TRIAL.[2]

Allen alleged in his MAR and SMAR that his trial counsel were ineffective at the guilt-innocence phase for their failures to investigate and develop exculpatory evidence, to call key witnesses, to adequately cross-examine the State's witnesses, and to challenge the State's evidence against him. Allen argued that trial counsel's deficiencies prejudiced him individually and cumulatively. In support of this claim, Allen submitted hundreds of pages of exhibits, including witness statements to law enforcement made prior to trial, witness affidavits from the post-conviction investigation, and a report from crime scene expert Greg McCrary.

The MAR court summarily denied Allen's claims without an evidentiary hearing, rejecting his factual allegations. (*See* App. 136–54, 174–80, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 43–130, 155–76.) This was error, and this Court must reverse and remand for an evidentiary hearing because Allen alleged facts upon which relief could be granted.

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[2] Allen raised the issues discussed in this section in Claims II, III, III(A)–(G), III(I), X, and XI of his MAR and SMAR (*see* App. 35–60, 118–19, MAR, pp. 35–60, 118–19; App. 959–67, 980–87, 999–1006, SMAR, pp. 12–20, 33–40, 52–56), and presented them in his Petition for Writ of Certiorari, pp. 39–55.

A. Courts are required to hold an evidentiary hearing when an MAR alleges facts that, if true, would entitle a movant to relief.

North Carolina law provides mandatory post-conviction procedures designed to ensure that capital defendants receive a " 'thorough and complete review' " of any trial errors alleged through motions for appropriate relief. *See State v. Williams*, 351 N.C. 465, 468, 526 S.E.2d 655, 656 (2000) (quoting *State v. Bates*, 348 N.C. 29, 37, 497 S.E.2d 276, 280–81 (1998)). Consistent with this goal, the law requires courts to hold evidentiary hearings on post-conviction motions for appropriate relief "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 . . . ." *State v. McHone*, 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998) (citing N.C.G.S. §§ 15A-1420(c)(1)–(4)). " 'Thus, the 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. Martin*, 244 N.C. App. 727, 735, 781 S.E.2d 339, 344 (2016) (quoting *State v. Jackson*, 220 N.C. App. 1, 6, 727 S.E.2d 322, 328 (2012)).

A MAR need not present sufficient evidence to compel actual relief in order to necessitate an evidentiary hearing. *Martin*, 244 N.C. App. at 736, 781 S.E.2d at 345. Rather, a defendant is entitled to an evidentiary hearing when a MAR is supported by affidavits or other exhibits that "demonstrate[] the factual nature of the dispute and the significance of the [evidence to be further developed at a hearing]." *Id.* Moreover, "North Carolina does not mandate that *admissible* evidence must be

submitted to an MAR court before an evidentiary hearing can be conducted." *Conaway v. Polk*, 453 F.3d 567, 583 (4th Cir. 2006) (emphasis added). If the MAR proffers evidence demonstrating factual disputes, "the MAR court must then conduct an evidentiary hearing and, at that time, assess the admissibility of the proffered evidence." *Id* at 584 (citing N.C.G.S. § 15A-1420(c)(4)).

Evidentiary hearings are frequently needed to resolve allegations of ineffective assistance of counsel, because these fact-intensive claims require reviewing courts to consider "questions of trial strategy and counsel's impressions" and issues of demeanor. *State v. Stroud,* 147 N.C. App. 549, 556, 557 S.E.2d 544, 548 (2001) (dismissing IAC claims on direct appeal without prejudice because "an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues"); *see also, e.g.*, *Martin*, 244 N.C. App. at 736, 781 S.E.2d at 345. Ineffective assistance of counsel claims may be resolved without an evidentiary hearing only in rare cases, such as when the issue raised is purely legal, *see, e.g.*, *State v. Jones*, 260 N.C. App. 104, 109–110, 816 S.E.2d 921, 925 (2018) (rejecting ineffectiveness claim based on trial counsel's failure to request self-defense instruction during bench trial because presiding judge would have known applicable law and weighed relevant facts), or when the factual allegations are entirely unsupported, *see, e.g.*, *State v. Aiken*, 73 N.C. App. 487, 501, 326 S.E.2d 919, 927 (1985) (affirming summary denial where "Defendant filed no supporting affidavit and offered no evidence beyond the bare allegations in the motion for appropriate relief"). This Court has not hesitated to reverse and remand summary denials of MARs

alleging ineffectiveness where MAR courts failed to hold an evidentiary hearing necessary to assess these fact-intensive claims. *See, e.g.*, *State v. Todd*, 369 N.C. 707, 712–13, 799 S.E.2d 834, 838 (2017) (reversing summary denial of MAR alleging appellate IAC and remanding for an evidentiary hearing because the MAR court did not develop a record to support that counsel's choices were strategic or reasonable).

This Court reviews the MAR court's decision to deny an evidentiary hearing *de novo*. *See Martin*, 244 N.C. App. at 734, 781 S.E. 2d at 344; *see also State v. Marino*, 229 N.C. App. 130, 140, 747 S.E.2d 633, 640 (2013), *disc. review denied*, 367 N.C. 263, 749 S.E.2d 889 (2013) ("Whether the trial court was required to afford defendant an evidentiary hearing is primarily a question of law subject to *de novo* review."). It is error for the MAR court to make the determination that an evidentiary hearing is unnecessary "by deciding issues of fact contrary to the [d]efendant's allegations." *Martin*, 244 N.C. App. at 734, 781 S.E.2d at 343 (reversing summary denial of ineffective assistance of counsel claims presented in MAR and remanding for an evidentiary hearing). Instead, the MAR court must consider the evidence offered in support of the defendant's claims "in the light most favorable to the defendant." *See State v. Ramseur*, --- S.E.2d ----, 2020 WL 3025852 at *16 (N.C. June 5, 2020).

B. Allen alleged facts that would entitle him to a new trial based on his counsel's ineffectiveness at the guilt-innocence phase of trial.

Allen contends that his trial counsel were ineffective for failing to conduct a thorough pretrial investigation, failing to call key witnesses, and failing to adequately challenge the State's evidence. "When a defendant attacks his conviction on the basis

that counsel was ineffective, he must [first] show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 247–48 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). Although counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. To determine what is reasonable, the Supreme Court has long advised that the American Bar Associations Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases represent helpful guides of "prevailing norms of practice." *Id.*, at 688–89; *see also Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

If a defendant can establish that counsel performed deficiently, they must then demonstrate that counsel's deficient performance prejudiced their defense. *Braswell*, 312 N.C. at 561–62, 324 S.E.2d at 247–48 (citing *Strickland*, 466 U.S. at 687–88). To establish prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" considering the "totality of the evidence before the judge or jury." *Id.* at 694–95. A defendant need not even establish that counsel's deficient performance "more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. A "reasonable probability" of a different outcome

is a threshold lower than the preponderance of evidence. *See id.* at 694. ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.") And, importantly, a different outcome does not mean an acquittal; a reasonable probability of a different outcome means a reasonable probability that at least one juror would have found at least one reasonable doubt. *See id.* at 694–95; *see also id.* at 686 (holding that the same standards of deficient performance and prejudice apply in capital sentencing proceedings).

i. Trial counsel were ineffective because they failed to investigate the State's evidence and consult with an expert, which would have allowed them to demonstrate that the crime scene was inconsistent with the State's theory of first degree murder.

Trial counsel knew that the State's key witness, Vanessa Smith, was not telling the truth, and they centered their trial strategy on undermining her credibility. Only Smith claimed any firsthand knowledge of what happened in the woods, so the physical evidence at the crime scene was the lone way to challenge her narrative of the shooting. Despite physical evidence that was obviously inconsistent with Smith's story, trial counsel failed to adequately investigate or to consult with appropriate experts to interpret the crime scene.

Had they done so, the jury could have heard expert testimony that "the totality of the [crime scene] evidence is more consistent with a dispute that deteriorated into a gunfight" and not the premeditated, execution-style murder Smith described. (*See* App. 831, SMAR Ex. 41, McCrary Report, p. 11.) Without this knowledge of the

evidence and expert evidence, trial counsel were unable to effectively question Smith about what happened in the woods—a point the State highlighted in closing arguments. (*See* App. 582, TT 2203:8–10.) If the jury heard evidence of the inconsistencies between Smith's story and the crime scene, there is a reasonable probability that they would have had credible doubts about the State's theory of first degree murder.

a. Trial counsel were deficient because they failed to investigate the crime scene.

The State's theory that Allen committed a premeditated murder was based on the testimony of Smith. Trial counsel knew from the start that Smith was not telling the truth and that the State's case for premeditation relied heavily on her testimony:

> I recall that from the very beginning, we believed that the chief prosecution witness, Vanessa Smith, who claimed to be an eyewitness to the murder, was not telling the truth in her various statements to law enforcement. I also recall that the State's case was based almost entirely on her testimony. . . . I do not recall Mr. Atkinson and me making any strategic decisions to limit the cross-examination of the State's witnesses, including Vanessa Smith.

(App. 918–19, SMAR Ex. 63, Affidavit of Pierre Oldham, ¶¶ 3, 7.) Oldham even informed the jury of the State's reliance on Smith during his opening statement: "I can guarantee you that a lot of what the D.A. says the evidence tends to show about what transpired out there in the woods is based upon testimony of Vanessa Smith." (App. 254, TT 1246:3–5.)

Even before trial, defense counsel had a preview of Smith's testimony based on two lengthy statements she had made to law enforcement. (*See* App. 870–87, SMAR

Ex. 57, Vanessa Smith's Statement to Charlotte Police, August 10, 1999; App. 888–911, SMAR Ex. 58, Vanessa Smith's Statement to Montgomery County Sheriff's Department, August 11, 1999; App. 920–26, SMAR Ex. 65, Lists of material produced by the State under *Brady v. Maryland* (documenting Smith statements).) Although Smith's statements contained inconsistencies, her story included that Allen lured Gailey into the woods even though Gailey did not want to go; that the trio hiked on a narrow path in a single file line led by Gailey, carrying the only flashlight; that Allen turned and pushed Smith to the ground before shooting Gailey without warning, at close range; and that Allen then threw rocks at Gailey for hours after he had been shot. (*See* App. 870–87, SMAR Ex. 57, Vanessa Smith's Statement to Charlotte Police, August 10, 1999; App. 888–911, SMAR Ex. 58, Vanessa Smith's Statement to Montgomery County Sheriff's Department, August 11, 1999.) These statements put counsel on notice of the State's theory of premeditated, malicious, and deliberate first degree murder.

In light of Smith's statements and the physical evidence recovered from the crime scene, trial counsel should have immediately "identified several troubling anomalies, which even a cursory examination of the State's [physical] evidence revealed." *Soffar v. Dretke*, 368 F.3d 441, 471–472, amended, 391 F.3d 703 (5th Cir. 2004) (explaining counsel's deficient performance for failing to consult with an expert about crime scene evidence). Smith did not mention, much less explain, how Gailey's shirt was removed before the shooting. Smith described the trio hiking single file along a "very narrow" path. (App. 398, TT 1539:17–18.) But the ten-foot-wide path

where Gailey's body was found would have been plenty wide for three people to comfortably walk side by side, sharing a flashlight; it made no sense that they were hiking single file with only Gailey able to use a flashlight in the lead. If Gailey had been shot at such close range, it should have led counsel to question how the person who fired the shotgun managed to miss at least three times, and where those shots landed. No part of Smith's extensive statements explained the holster and the magazine loaded with .45 ammunition far from Gailey's body, nor the live shotgun shells and .45 rounds scattered about. Although Smith alleged that Gailey survived for hours, no evidence at the crime scene suggested that Gailey had moved after hitting the ground. Similarly, no physical evidence supported Smith's statements that Allen had thrown rocks at Gailey. Because of these inconsistencies, trial counsel should have recognized that this was a complicated crime scene requiring independent investigation and expert interpretation: "the known evidence would [have] le[d] a reasonable attorney to investigate further." *Wiggins*, 539 U. S. at 527.

It is paramount that defense counsel thoroughly investigate the facts of the alleged crime itself. *See, e.g.*, *Todd*, 369 N.C. at 711, 799 S.E.2d at 837–38 (citing *Strickland*, 466 U.S. at 688, 690–91). An independent investigation of the testimonial and forensic evidence related to the crime itself is essential, for "[t]o assume the accuracy of whatever . . . the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel." American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003) ("2003 ABA Guidelines"), Commentary to Guideline 1.1.; *see also* American Bar Association,

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ("1989 ABA Guidelines"), Guideline 11.4.1 (explaining obligation to thoroughly investigate). This is because "the custodians of authority in our democracy are ordinary people with imperfect skills and human motivations." *Elmore v. Ozmint*, 661 F.3d 783, 859 (4th Cir. 2011). Thus, "the duty of the defense lawyer 'is to make the adversarial testing process work in the particular case' " by rigorously and independently investigating the evidence. *Id.* (quoting *Strickland*, 466 U.S. at 690).

Trial counsel knew the evidence at the crime scene was important—in a four-page opening statement, Oldham spent almost two pages describing it. (*See* App. 251–53, TT 1243:14–1245:8.) Nevertheless, trial counsel ignored the "red flags" presented by the physical evidence at the crime scene, *see, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 392–93 (2005) (finding counsel ineffective for failing to follow up on "red flags" in files relevant to mitigation defense), and failed to adequately investigate the forensic evidence, *see Elmore*, 661 F.3d at 858–64 (ruling that because counsel's investigation of forensic evidence "never started, there could be no reasonable strategic decision either to stop the investigation or to forgo use of the evidence that the investigation would have uncovered").

Counsel rendered deficient performance because they failed to consult with a crime scene expert. For over 30 years, the ABA Guidelines have made clear that counsel in capital cases must[3] consult with expert witnesses to prepare a defense, to

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[3] Although Guideline 11.4.1(D)(7) uses the term "should," the introduction to the Guidelines explain " '[s]hould' is used throughout as a mandatory term and refers to activities which are minimum requirements." 1989 ABA Guidelines, Introduction (emphasis added); *see also* 2003 ABA Guidelines, Definitional Notes of Guideline 1.1 ("As in the first edition, 'should' is used as a mandatory term.").

understand the prosecution's case, and to "rebut any portion of the prosecution's case at the guilt/innocence phase . . . of the trial." 1989 ABA Guidelines, Guideline 11.4.1(D)(7). A full decade before the crime in this case, "[u]tilization of experts ha[d] become the rule, rather than the exception, in proper preparation of capital cases." *Id.*, Commentary to Guideline 1.1. Nearly a year before the trial in this case, the ABA adopted updated guidelines which further emphasized the importance of experts in crime scene investigation, explaining that "[w]ith the assistance of appropriate experts, counsel should . . . aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." *Id.*, Commentary to Guideline 10.7. Again, the updated Guidelines stressed that "additional expert assistance specific to the case will almost always be necessary for an effective defense." *Id.*

Despite the importance of expert assistance, trial counsel did not consult with a crime scene expert to better understand the complicated crime scene evidence and whether it contradicted Smith's account of a premeditated murder. (*See* App. 919, SMAR Ex. 63, Affidavit of Pierre Oldham, ¶ 7.) There were no other purported eyewitnesses to rebut Smith; the key to refuting her narrative of what happened in the woods depended on analyzing the forensic evidence. *See Draughon v. Dretke*, 427 F.3d 286, 296 (5th Cir. 2005) (holding that failure to seek expert assistance in investigating the forensics of the fatal bullet constituted deficient performance in a capital case in which evidence of intent was based on the distance at which the shot was allegedly fired). Courts are especially likely to find trial counsel deficient for

failing to consult with experts where, as here, the prosecution rests its case on the credibility of a witness rather than physical evidence. *See, e.g., id.*; *Gersten v. Senkowski*, 426 F.3d 588, 608–11 (2nd Cir. 2005) (holding that defense counsel performed deficiently for failing to consult with a medical expert when physical evidence undermined victim's account); *see also Martin*, 244 N.C. App. at 736, 781 S.E.2d at 345 (reversing and remanding for evidentiary hearing because trial counsel failed to consult with a competent expert in a rape case that turned on the victim's credibility rather than any forensic evidence). In this case, "it was objectively unreasonable . . . to fail to consult with a [crime scene] expert to determine whether they could develop expert testimony as to physical evidence that tended to undermine the credibility and reliability of [the State's key witness]." *Soffar*, 368 F.3d at 476 (finding counsel's performance deficient for failing to consult with a ballistics expert who could have established that the crime scene was consistent with the surviving victim's statements and inconsistent with the state's key evidence, the defendant's supposed confession).

Without expert assistance to help understand the differences between the crime scene evidence and Smith's story, trial counsel were unable to challenge Smith about these inconsistencies. Instead, Oldham spent the bulk of his time interrogating Smith about her drug use and the effect of those drugs on her capacity to perceive and remember events. (*See, e.g.*, App. 427–52, TT 1669:12–1694:21.) In contrast, Oldham spent almost no time questioning Smith about her account of what happened in the woods, (*see* App. 425–45, 449–90, TT 1667:18–1687:20, 1691:23–1732:6), a fact

that the State highlighted in its closing argument, (*see* App. 582, TT 2203:8–10 ("You noticed they didn't ask a whole lot of questions of her about what actually happened in the woods. Why is that?")). Nor did trial counsel cross examine law enforcement witnesses about the scope of their search or the significance of the holster, magazine, and spent and scattered rounds. *See, e.g.*, *Stouffer v. Reynolds*, 214 F.3d 1231, 1234–35 (10th Cir. 2000) (concluding counsel was ineffective for failing to elicit evidence on cross examination about the discrepancies between the physical evidence at the crime scene and the state's theory of the case). Because counsel did not adequately investigate the crime scene, they were unable to rebut almost any aspect of the State's theory. *See Andrus v. Texas*, 590 U.S. ___, *slip. op.* at 13 (June 15, 2020) (holding counsel's performance was deficient at sentencing due to their failure to investigate both available mitigation evidence and the State's evidence in support of aggravation).

Notably, this is not a case where the MAR court was called upon to second-guess trial counsel's strategic decision-making, an area traditionally afforded some deference. As Oldham explained:

> I do not recall having the impeachment information set forth in Allen's Claim III, nor the resources to interview and investigate every witness called by the State. We did not have an expert crime scene analyst to assist our understanding of the crime scene, or to help us use that information to impeach Ms. Smith's story of the crime.

(*See* App. 919, SMAR Ex. 63, Affidavit of Pierre Oldham, ¶ 7.) And Oldham "does not recall [Atkinson and him] making any strategic decisions to limit the cross-examination of the State's witnesses, including Vanessa Smith." (*Id.*) Thus, Oldham

does not rely on any strategic reason for these deficiencies: counsel's performance was merely a case of oversight, and therefore deficient. *See Wiggins*, 539 U.S. at 526 (holding counsel's performance was deficient because his "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment"); *see also Harris v. Cotton*, 365 F.3d 552 (7th Cir. 2004) (explaining counsel's deficiency where the sole defense at trial was self-defense and counsel did not obtain a victim's toxicology report solely due to "oversight," even though he knew that the victim's behavior prior to the shooting was "absolutely critical" to the defense); *Fisher v. State*, 299 Ga. 478, 484–85, 788 S.E.2d 757, 762–63 (2016) (concluding counsel was deficient for failing to subpoena a witness and failing to request an instruction due to oversight).

Undeterred by the dearth of evidence that would support trial counsel's deficiencies as the product of reasonable, strategic choices, the MAR court heavily relied on a brief colloquy at the end of the State's guilt-phase case to conclude that "defense counsel['s] decision not to call any witnesses at the guilt-innocence phase of Defendant's trial was a tactical decision that was made after consultation with the Defendant." (App. 136–37, 150, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 45, 87 (citing TT 2163–66).) This conclusion is a drastic over-reading of Allen's statements at trial: "I don't know anything. I don't know what happened, so I have nothing to contribute to it." (App. 579, TT 2165:12–14.)

More important, the MAR court's conclusion does not evaluate whether this purported tactical decision was *reasonable*, or whether it was based on a *reasonable*

investigation. This Court routinely denies ineffectiveness claims without prejudice on direct appeal so that the reasonableness of counsel's decisions can be assessed after the record is developed through MAR proceedings, *see, e.g.*, *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004), as it did in this case on direct appeal, *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 ("Here, we believe further factual inquiry is required into these allegations of ineffective assistance of counsel."). However, the MAR court declined to do that necessary work here.

The MAR court further misconstrued Allen's assertions about the significance of a crime scene analyst to his case. It concluded that presenting such evidence was inconsistent with trial counsel's apparent strategy to undercut Smith's credibility rather than present a case of "innocence." (*See* App. 140, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶ 56.) But this evidence was not necessarily about developing a theory that Allen was never in the woods and was "innocent" in the way the MAR court seems to suggest. It was relevant, even essential, to demonstrate that Smith lacked credibility in her account of a premeditated, execution-style murder, and that whatever happened in the woods was more consistent with second-degree murder or voluntary manslaughter as a result of a heated confrontation between two or more armed individuals. This key evidence was not in opposition to trial counsel's strategy, as the MAR court found. Rather it was *necessary* for that strategy to be effective: nothing else did or could confute Smith's account of the crime itself. *See, e.g., Wiggins*, 539 U.S. at 526 (concluding that trial counsel was deficient where they intended to present a mitigation defense, but failed "to develop the most powerful

mitigation case possible" and "put on a halfhearted mitigation case . . . ."); *Ex parte Saenz*, 491 S.W.3d 819, 829 (Tex. Crim. App. 2016) (explaining that counsel was deficient after he failed to impeach a witness in part because the impeachment "would have been consistent with trial counsel's stated strategy").

The MAR court also speculated that counsel could not have cross examined Smith based on any theories about the crime scene evidence because she was not really an eye witness to the crime: she "covered her head in fear" and, as she testified at trial, she never saw any shots actually hitting Gailey. (App. 149, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶ 82.) Not only does this conclusion that Smith was not a true eyewitness conflict with the MAR court's assertion that Smith was part of the State's "overwhelming" case, it defies both logic and the rules of evidence to conclude that trial counsel would have been unable to question Smith about what she saw and heard in the woods on the night of 9 July 1999. Had trial counsel appreciated the significance of the crime scene evidence after consulting with an expert, they could have cross examined Smith about: whether Allen and Gailey argued; whether Smith heard anything else in the woods prior to the shooting; her ability to determine the difference of the sound of different weapons; and many other factual matters within her stated perceptions of the crime that would have demonstrated that she either did not remember what happened, or was lying—as other evidence that could have been presented supports.

Because trial counsel failed to challenge the State's witnesses about inconsistencies between the crime scene and Smith's testimony, and failed to consult

with an expert to interpret the State's crime scene evidence, their performance does not comport with any standard of reasonableness. *See Richey v. Bradshaw*, 498 F.3d 344, 362–63 (6th Cir. 2007) (holding that counsel performed deficiently by failing to fully consult with an expert, which left counsel unable to effectively cross-examine the State's witnesses).

b. Counsel's deficient performance prejudiced Allen because the jury did not hear independent, expert analysis explaining the many ways that the State's theory of the crime itself was not supported by the physical evidence at the crime scene.

Courts analyze prejudice by considering all of the trial and post-conviction evidence favoring the defendant and then reweighing that against the State's evidence presented at trial. *Elmore*, 661 F.3d at 868 (referring to *Strickland*'s standard); *Thomas v. Chappell*, 678 F.3d 1086, 1102 (9th Cir. 2012) (explaining that a court must "compare the evidence that actually was presented to the jury with that which could have been presented had counsel acted appropriately"). "Under that standard, the court should . . . evaluate[] the collective trial evidence together with the collective evidence that a reasonable investigation of the State's forensic evidence would have uncovered." *Elmore*, 661 F.3d at 868.

Had trial counsel adequately investigated Allen's case and vigorously challenged the State's evidence based on that investigation, the jury would have heard credible evidence that this was not the premeditated, malicious, and deliberate first degree murder that the State argued. Although the trial court instructed the jury on both second degree murder and voluntary manslaughter, trial counsel offered

no coherent theory of the case that would have supported a conviction on one of these lesser-included charges. By presenting expert testimony and successfully highlighting the weaknesses and inconsistencies in the State's case, effective trial counsel could have substantially strengthened the case for acquittal of first degree murder and conviction of one of the lesser charges already before the jury. And this same expert testimony would have left the jury with doubts about the aggravating circumstances at the sentencing phase of Allen's trial.

After the post-conviction investigation, Allen submitted an expert report by Greg McCrary detailing some of the expert testimony that could have been presented at trial had counsel effectively investigated the crime scene. (*See* App. 821–32, SMAR Ex. 41, McCrary Report, pp. 1–12.) McCrary—a retired Supervisory Special Agent with the Federal Bureau of Investigation and an established expert in crime scene analysis—explained that the crime scene facts "refute Ms. Smith's assertion that Mr. Gailey was assassinated in cold blood, never having got his gun out." (App 827, *id.* p. 7.) Instead, "the totality of the [crime scene] evidence is more consistent with a dispute that deteriorated into a gunfight and significantly contradicts and discredits Ms. Smith's story . . . ." (App. 831, *id.* p. 11.) McCrary is a seasoned former law enforcement officer whose analysis and testimony has been in demand both nationally and internationally. (*See* App. 804–20, SMAR Ex. 41, McCrary Report, CV.) His testimony as a disinterested but remarkably qualified witness would have lent significant credibility to the defense case. *Cf. Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (explaining that a jailer testifying in support of the defense would be

particularly credible because the jailer would be "disinterested" and "would have had no particular reason to be favorably predisposed toward one of their charges").

Smith described a spontaneous, unprovoked shooting while she, Allen, and Gailey were hiking on a "very narrow path" in the dark forest. (App. 398, TT 1539:17–25.) Crime scene evidence undermines each part of this story, and an expert like McCrary would have helped counsel present that evidence coherently to the jury. First, the crime scene demonstrated that the trio was on a ten-foot wide trail. (App. 281, TT 1348:17.) Second, evidence that Gailey had been shot after taking his shirt off and placing it down suggested that the group had not been hiking, but rather had paused for a rest. (App. 827, SMAR Ex. 41, McCrary Report, p. 7.) Third, and most critically, the evidence implies a roaming confrontation between at least two shooters. (App. 827–28, *id.* pp. 7–8.) This is because, as McCrary could have explained, a shotgun was fired five times, but only two rounds hit Gailey. (App. 828, *id.* p. 8.) Not only did the shotgun shooter therefore miss at least three times, but they also seemed to frantically reload based on the scattered live shotgun shells. (*Id.*) The .45 handgun was fired just once, resulting in the spent casing jamming the weapon, but the magazine of live ammunition, scattered live rounds, and holster likewise suggest a hurried attempt to reload and significant movement around the area. (*See* App. 827–28, *id.* pp. 7–8.) McCrary would have further testified that the State never tested the hunting knife found at the scene for blood, which may have been used at the outset of the conflict before it escalated to a gunfight. (App. 829, *id.* p. 9.)

An expert like McCrary could have explained to the jury how these and other portions of Smith's testimony were fundamentally incompatible with the physical evidence. Smith said that Gailey emptied his gun out as she and Scott left the woods around dawn, seven to eight hours after the shooting. (App. 401, TT 1542:8.) Were this true, there would have been multiple spent .45 casings near Gailey's body. But, as explained above, the only spent .45 casing was found jammed in the weapon. McCrary could have testified that Smith's claim that Gailey fired his pistol multiple times, hours after he was shot, is "unfathomable" and contradicts both the medical evidence in the case and the physical evidence at the scene. (App. 827, SMAR Ex. 41, McCrary Report, p. 7.) Trial counsel's failure to consult with an expert to develop and present alternative interpretations of the crime scene evidence left the jury with no knowledge of these critical discrepancies that undermined the State's theory. *See Hash v. Johnson*, 845 F. Supp. 2d 711, 743 (W.D. Va. 2012) ("Had . . . trial counsel conducted a reasonable investigation and presented evidence of an alternate theory of the crime that evidence would have shown the jury why the Commonwealth's multi-perpetrator theory was inconsistent with the evidence at the crime scene").

Significantly, such expert testimony about the crime scene would have been consistent with some of the evidence offered by the State. Even without Allen testifying, a defense theory of a dispute that turned deadly could have been supported by testimony that Gailey and Allen had reasons to disagree.[4] In addition, Smith

[4] Testimony at trial suggested that Gailey and Allen may have disagreed about Gailey referring to Joyce Allen, Allen's then-estranged wife, as a "bitch," (App. 532, TT 1824:22–25), or Gailey alerting authorities about Allen's status as an escaped offender, (App. 513, TT 1785:1–3).

testified that Gailey and Allen used cocaine while hiking that night. (App. 396, TT 1537:22–25.) Beyond this evidence admitted at trial, counsel could have called Joyce Allen—Allen's then-estranged wife who was in a relationship with Gailey at the time of the crime—to testify that Gailey's personality changed when he did cocaine. (*See* App. 846, SMAR Ex. 47, Affidavit of Joyce Allen, ¶ 6.) Counsel could have also elicited testimony from Dustin Maness, a friend of Gailey's, that Gailey was trigger happy and had pulled a knife on Maness after a minor disagreement. (*See* App. 751, MAR Ex. 16, Affidavit of Dustin Maness, ¶¶ 9–10.) Maness could have further testified that Gailey was easily spooked in the woods at night and would react by shooting at random. (*See* App. 751, *id.* ¶ 9.) Through expert testimony and this available evidence, counsel could have crafted a compelling argument that Gailey's cocaine use heightened his nerves and fueled his escalation of a physical conflict in the dark forest.

In offering such an explanation for the shooting, effective counsel would have further highlighted that neither the crime scene evidence nor the State's own witnesses supported the State's assertions that Allen threw large rocks and "boulders" in an attempt to "stone" Gailey to death after shots were fired. (App. 583, TT 2291:11–19 (State's closing).) McCrary could have testified that the rocks found on top of Gailey's shirt seemed to have been placed there deliberately. (App. 827, SMAR Ex. 41, McCrary Report, p. 7.) Officer Wright testified that some other rocks "appeared to have slid downward on [a] slope" at the crime scene. (App. 269, TT 1328:5–6.) And had defense counsel solicited evidence from Wesley Hopkins—the

witness who discovered Gailey's body—that his All Terrain Vehicle sometimes stirred up gravel and rocks, they could have further supported the likelihood that movement around the scene caused the rock displacement described by Wright. This kind of testimony would have demonstrated that no physical evidence supported this key detail, just as the physical evidence was incompatible with the rest of Smith's story.

Trial counsel's failure to consult with and call a crime scene expert also prejudiced Allen at sentencing. At the penalty phase, the State relied on three aggravating circumstances: (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. If trial counsel had performed effectively and presented the case described above, it would have cast significant doubt on the State's theory that Allen acted with intent to silence or steal from Gailey and that Allen remained in the woods throwing rocks at Gailey as he died. *See Smith v. Wainwright*, 741 F.2d 1248, 1255 (11th Cir. 1984) (explaining that counsel's deficient performance during the guilt-innocence phase can cause prejudice at both the guilt-innocence and sentencing phases).

Regarding prejudice, the MAR court relied on an almost talismanic repetition of its conclusion that the evidence against Allen was "overwhelming." (App. 153, 161–62, 177, 179–80, 183, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 96, 116, 120, 166, 170, 174, 186.) But this was "not a case where counsel's deficient performance had no bearing on the outcome due to otherwise strong or overwhelming evidence of guilt." *Hardy v. Chappell*, 849 F.3d 803, 824 (9th Cir. 2016). Indeed, this

was the first time that any court described the evidence in this case as "overwhelming"[5]: in fact, both the trial court and this Court on direct appeal acknowledged weaknesses in the State's case. At one point during trial, the trial court went so far as to describe the State's case as "a joke":

> [The jury is] going to go back there because you're not going to bring in fingerprints on a bag, you're not going to bring in a weapon that was recovered, there's no fingerprints on a knife found on a rock, we don't have any DNA from the well, . . . so now the jury goes back there deliberating, they say hey, what about the rock and the DNA evidence. Oh, gosh, I mean this is -- It looks like a joke. I mean I'm just being honest here with you, perhaps too honest.

(*See* App. 421, TT 1593:13–22.) On direct appeal, this Court described Smith as a witness whose "prior convictions and other circumstances of her lifestyle . . . made her a witness with less-than-perfect credibility." *Allen*, 360 N.C. at 306, 626 S.E.2d at 279 (describing Smith as a "confessed drug addict . . . under the influence of drugs at the time of the murder"); *see also id.* at 360 N.C. at 305, 626 S.E.2d at 279 (noting that in closing, the State "admitted that Smith's perception of time 'may not have been correct' ").

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[5] This case bears no resemblance to the level of evidence that this Court has characterized as "overwhelming." *See, e.g.*, *State v. McNeill*, 371 N.C. 198, 204, 213–215, 813 S.E.2d 797, 804, 809-810 (2018) ("overwhelming evidence" included security video footage, "forensic serology and forensic DNA analysis," "forensic geochemistry and forensic geology" analysis of soil samples, chemical analysis of metal fibers, eyewitness testimony, and cell phone activity analysis); *State v. Peterson*, 361 N.C. 587, 589–592, 594, 652 S.E.2d 216, 219–222 (2007) ("overwhelming evidence" included a recorded 911 call, detailed crime scene observations from first responders, medical evidence of multiple injuries from an autopsy, blood splatter analysis and luminol testing, expert testimony from a neuropathologist regarding time and manner of death); *State v. Burrus*, 344 N.C. 79, 93, 472 S.E.2d 867, 877 (1996) ("overwhelming" evidence included detailed eyewitness testimony, scientific ballistic evidence, and confessions of guilt to long-time friends of the defendant).

Prejudice is especially clear in this case because "the prosecution's entire case rested on the credibility of [Smith and a]ll other evidence presented by the prosecution was indirect evidence offered to corroborate aspects of [her] story." *See Gersten*, 426 F.3d at 611–12 (explaining that counsel's deficient performance prejudiced the defendant where the prosecution's case relied entirely on the testimony of the victim and failing "to consult with or call an expert precluded counsel from offering a potentially persuasive affirmative argument" that the victim was lying and that the medical evidence did not support the victim's testimony). Moreover, no witnesses except Allen could have refuted Smith's testimony about what happened in the woods: undermining her story with expert testimony based on the evidence at the crime scene was the most effective way to provide the jury with an alternative theory of the crime itself. *See Draughon*, 427 F.3d at 297 (finding prejudice at the guilt-innocence phase where only the defendant or an expert could have refuted the State's theory about the distance at which the fatal shot was fired, even though the defendant testified unhelpfully at the sentencing phase).

By employing an expert and effectively cross examining the State's witnesses, effective trial counsel could have explained every piece of the crime scene evidence in a way that supported an unpremeditated shooting in the heat of passion, thus giving the jury articulable reasons to substantiate any general doubts about Smith's credibility and the State's aggravating circumstances at sentencing. Had trial counsel effectively done so, "there is a reasonable probability of a different verdict." *Elmore*, 661 F.3d at 871.

ii. Trial counsel were ineffective because they failed to present available evidence that would have devastated the credibility of Smith, the State's key witness.

Just as crime scene evidence could have undermined Smith's account of what happened in the woods, other available evidence could have undermined the rest of Smith's story. Counsel failed to call or effectively cross examine five witnesses who would have contradicted Smith's statements that she and Allen were in the woods all night while Allen threw rocks at Gailey and waited for him to die. Two of the State's witnesses could have testified that Gailey loved going into the woods at night, casting doubt on Smith's testimony that Allen lured Gailey into the dark forest against his will. Counsel also failed to effectively cross examine the only witness who corroborated Smith's narrative of the crime, Jeffery Page, about his evolving story to law enforcement. Had counsel performed effectively, this evidence would have demonstrated that Smith—and thus, the State's theory of the case—could not be believed.

a. Trial counsel were deficient because they failed to investigate and present evidence that the premeditated, malicious, and deliberate account of the crime provided by Smith was highly unreliable.

Pretrial discovery in counsel's possession pointed to important discrepancies in Smith's story. Just as Oldham flagged the importance of the crime scene evidence in his brief opening, he also informed the jury during opening that they were "going to hear" about inconsistencies between Smith's previous statements. (*See* App. 254, TT 1246:3–12.) However, trial counsel failed to fully investigate Smith's statements,

the State's witnesses, or other leads that could have supported defense counsel's stated trial strategy of demonstrating Smith's lack of credibility. As a result, the jury never heard the promised evidence of Smith's inconsistencies and inaccuracies that was readily available to trial counsel.

Counsel has an "obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005) (citation omitted). This includes "not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events." 2003 ABA Guidelines, Commentary to 1.1. Atkinson and Oldham failed to fulfill this basic but essential obligation: they simply did not undertake the pretrial investigation necessary to fully reveal the unreliability of Smith's account. This was patently deficient and cannot be considered the product of any reasonable strategy.

Counsel's deficient investigation manifested in deficient performance at trial in two ways. First, counsel failed to confront Smith with inconsistencies in her timeline of 9 July 1999 and her account of subsequent events that were apparent through her own statements, the physical evidence, and the statements of others. Second, counsel failed to effectively challenge Page, the only witness the State called to corroborate portions of Smith's account of what actually happened in the woods that night.

Counsel knew of multiple sources of evidence conflicting with Smith's account of 9 July 1999, including her own prior statements. Beginning with the timeline of the evening, Smith testified that she, Gailey, and Allen set out for the woods when there was "still daylight," in "late afternoon." (App. 394, TT 1535:4.) She told the jury that they drove for about "ten or twenty minutes," and it was "still light" when they reached the woods. (App. 395, TT 1536:1–5.) She further testified that the trio hiked for around an hour before the shooting occurred. (*See* App. 396–97, TT 1537:18–20, 1538:1–3, 1538:11–15.) Smith claimed that she and Allen remained in the woods for "approximately seven or eight hours," (App. 401, TT 1542:8), until dawn, (App. 401, TT 1542:22–25). She also insisted that she did not speak to Johnson that morning when she returned to the trailer. (App. 482, TT 1724:11–20.)

However, Smith had previously told law enforcement that the shooting did not occur until 10:00 or 11:00 p.m., (App. 875, SMAR Ex. 57, Vanessa Smith's Statement to Charlotte Police, August 10, 1999, p. 6), which would make no sense if, as Smith testified, the shooting occurred after an hour in the woods and it was still light out when the trio first arrived. Oldham did not use Smith's prior statement to question her timeline and thus cast doubt on her claim that she was in the woods with Allen all night while he threw rocks at Gailey. In fact, Oldham only attempted to impeach Smith with her prior statements once—on an irrelevant point about a location in Denver. (App. 473–75, TT 1715:20–1717:5.) *See Ex parte Saenz*, 491 S.W. at 829 (explaining that counsel's failure to impeach a witness with prior inconsistent

statements was deficient because impeachment would have undermined the witness's credibility and was consistent with the defense strategy).

Robert Johnson, who lived at the trailer where Smith, Allen, and Gailey were staying, contradicted Smith's timeline. He testified that the trio left the trailer after dark, later than 8:00 p.m., and Smith came back after only "three to four hours." (App. 336, TT 1469:2–9.) Johnson said that he had a conversation with Smith when she returned. (App. 358, TT 1491:9–15.) The other three witnesses at the trailer that night supported Johnson's timeline rather than Smith's, and each remembered speaking with her upon her return: Danny Lanier told law enforcement that Smith left around 9:00 p.m. and came back three to four hours later (*see* App. 720, MAR Ex. 1, Stmt. of Danny Lanier to SBI); Tanzy Lanier remembered Smith leaving sometime after 9:00 p.m. and returning one to two hours later (App. 723–24, MAR Ex. 2, Stmt. of Tanzy Lanier to SBI; App. 734, MAR Ex. 5, Tanzy Lanier Aff, ¶¶ 6–7); and Shannon Diehl told the police that Smith came back to the trailer around 10:00 p.m. (App. 913, SMAR Ex. 59, Stmt. of Shannon Diehl to SBI). Despite this available evidence, Oldham did not cross examine Smith about her timeline and failed to call Danny Lanier, Tanzy Lanier, or Diehl.

Counsel also failed to call Christina Fowler Chamberlin, a witness who would have further undermined Smith's timeline based on her recollection of significant portions of the evening when Allen was with her at her home.[6] (App. 840–41, SMAR

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[6] Fowler Chamberlin testified at the evidentiary hearing for Allen's sentencing IAC claims, discussed *infra*, Section IV.A. In denying these claims, the MAR court found that Fowler Chamberlin's "testimony regarding her interaction with Defendant on the night of Gailey's murder is not credible because it was in direct conflict with the pretrial statements she made to Defendant's trial counsel

Ex. 44, Affidavit of Christina Fowler Chamberlin, ¶¶ 11–14.) Again, Oldham recalls no strategic reason for failing to call Fowler Chamberlin.[7] (App. 918–19, SMAR Ex. 63, Affidavit of Pierre Oldham, ¶ 6.) Counsel's failure to call these four available witnesses, coupled with Oldham's inability to recall any strategic reason not to do so, constituted deficient performance. *See Martinez v. State*, 304 S.C. 39, 40–41, 403 S.E.2d 113, 113–14 (S.C. 1991) (holding counsel performed deficiently where counsel conceded he had no reason not to call a witness that would have supported the defense theory and undermined the State's timeline of the crime).

Trial counsel were also deficient because they failed to cross-examine Smith on her inconsistent claim that the crime was motivated by pecuniary gain. For example, Oldham failed to question Smith about her first statement to law enforcement that Allen stole about $1,000 from Gailey's body. (App. 875, SMAR Ex. 57, Vanessa Smith's Statement to Charlotte Police, August 10, 1999, p. 6.) Smith never mentioned this at trial, and it made no sense in light of the nearly $2,000 recovered at the scene. Smith also suggested to law enforcement that Allen's intent was to rob Gailey, (App.

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when she emphatically denied that Defendant was at her house on the night Gailey was killed." (*See* App. 233–34, Feb. 6, 2019 Order, ¶ 50.) However, because the hearing was focused on the sentencing phase of Allen's trial, Atkinson only briefly testified about his interactions with Fowler Chamberlin. (*See* App. 714, EHT 689:22–690:18.) The MAR court's finding is wrong: it is supported only by limited and underdeveloped testimony that was not relevant to the subject of the hearing, and Allen did not have the opportunity to present other witnesses who could have further substantiated Fowler Chamberlin's sworn testimony and sworn affidavit. (*See* App. 842–43, SMAR Ex. 45, Affidavit of Joseph B. Loflin, ¶¶ 4–8; *see also* App. 636, EHT 22:11–28:18 (Fowler Chamberlin testimony); App. 840–41, SMAR Ex. 44, Affidavit of Christina Fowler Chamberlin, ¶¶ 11–14.)

[7] At the MAR hearing regarding the sentencing claims, Fowler Chamberlin conceded that she did not remember the exact date Allen was with her at her first meeting with Atkinson, but that she subsequently provided the defense investigator with more details, (App. 641–42, MAR Trans. at 27:12–28:20); Atkinson alleged that Fowler Chamberlin denied Allen was at her home on 9 July 1999, and made clear that she did not want to testify (App. 714–16, *id.* at 689:14–691:4). These conflicting statements further demonstrate the need for an evidentiary hearing to resolve this factual issue.

905, SMAR Ex. 58, Vanessa Smith's Statement to Montgomery County Sheriff's Department, August 11, 1999, p. 18), which contradicted the State's theory that Allen murdered Gailey to prevent him from turning Allen in to the police as a prison escapee.

Next, Oldham failed to effectively challenge a new detail Smith added at trial: that Gailey emptied his .45 handgun at dawn as Smith and Allen left the woods. (*See* App. 401–02, TT 1542:23–1543:8.) Instead of impeaching her with prior statements missing this key fact, Oldham accepted that she did not know or remember if it was in her statements to law enforcement. (*See* App. 478–79, *id.* at 1720:21–1721:18.) Oldham did not cross examine interviewing Officer Poole about whether Smith had ever told him this detail, even though Poole read Smith's prior statements to the jury; moreover, Oldham did not ask Officer Poole about *any* inconsistencies in Smith's statements and trial testimony in his one-page cross-examination. (*See* App. 576–77, TT 2124:8–2125:6.) Oldham further failed to call any of the law enforcement officers who collected evidence at the scene of the crime to testify about the lack of spent .45 casings or any physical evidence in support of Smith's trial revelation regarding Gailey emptying his handgun at dawn.

And just as counsel failed to fully investigate and challenge Smith's story about 9 July 1999, they further failed to fully investigate Smith's account of the few events she claimed to remember in the days after the crime. For example, Smith told law enforcement that Efird loaned her money and a car so that Smith could drive to Denver, (App. 908, SMAR Ex. 58, Vanessa Smith's Statement to Montgomery County

Sheriff's Department, August 11, 1999, p. 21), but Efird maintained that Smith stole them (App. 557, TT 1872:12–22). Trial counsel only cursorily cross examined Efird about this, (*see id.*), and failed to elicit testimony that Efird actually filed a police report against Smith for the theft (*see id.*; *see also* App. 753–54, MAR Ex. 18, Auto Larceny Report by Efird). In addition, trial counsel had spoken to at least one witness, Kelly Racobs, who said that Smith had threatened Allen before going to the police, (App. 916, SMAR Ex. 60, Affidavit of Kelly Racobs, ¶ 15), suggesting that Smith may have had an ulterior motive in implicating Allen. Despite flying Racobs to North Carolina, counsel did not have her testify.[8] (App. 916, *id.* ¶ 18.)

Trial counsel were similarly ineffective in their treatment of Page—the only witness who corroborated Smith's account of what happened in the woods. Page, like Smith, added a new, crucial detail at trial that was missing from his prior statements to law enforcement. Page testified that Allen told him that he threw rocks at Gailey to see if he was dead, causing Gailey to shoot his gun, (App. 510, TT 1781:13–18), but he never mentioned this fact before trial (*see* App. 748, MAR Ex. 13, Nov. 1, 1999 Montgomery Co. Narrative Rep., p. 2; App. 749, MAR Ex. 14, Nov. 1, 1999 Montgomery Co. Narrative Rep., p. 3). Oldham did not ask Page a single question about this late revelation. (*See* App. 516–31, TT 1790:23–1805:24.)

Likewise, although the State asked Page about lying to law enforcement on one occasion and his agreement with the State to testify (*see* App. 507–08, 515–16,

[8] Racobs testified at the evidentiary hearing regarding Allen's sentencing IAC claims, but the MAR court made no findings about Racobs's statement that Smith threatened Allen. (*See* App. 234–35, Feb. 6, 2019 Order, ¶ 51.)

TT 1776:21–1777:23, 1789:3–1790:6), Oldham failed to cross examine Page about the facts that: Page lied to law enforcement not once but twice; Page only implicated Allen after he had hired a lawyer to negotiate his surrender to police and had already been charged as an accessory to murder; and Page faced substantial punishment if his agreement with the State to testify fell through and he was convicted of that charge. (*See* App. 516–31, TT 1790:23–1805:24; *see also* App. 748, MAR Ex. 13, Nov. 1, 1999 Montgomery Co. Narrative Rep., p. 2; App. 749, MAR Ex. 14, Nov. 1, 1999 Montgomery Co. Narrative Rep., p. 3). Nor did Oldham challenge Page's account that Allen randomly and voluntarily confessed murder to a complete stranger at a house party. (*See* App. 516–31, TT 1790:23–1805:24.) This was contradicted by other witness statements that Allen stayed in a bedroom throughout the party at Jeff Brantley's house where the alleged confession occurred, (App. 491, TT 1749:9–12), and that Allen was generally quiet and kept to himself (*see, e.g.*, App. 912, SMAR Ex. 59, Stmt. of Shannon Diehl to SBI).

There were just as many reasons to doubt Page's recounting of Allen's alleged confession—which grew more specific after each encounter with law enforcement—as there were to doubt Smith's account of the crime. These two witnesses were the only way that the State connected Allen to the crime scene at all. Counsel's decisions not to actively investigate the weaknesses in Smith's and Page's testimony, and not to develop and present evidence of those weaknesses at trial, resulted in deficient performance. *See Smith*, 741 F.2d at 1255–56 (remanding for evidentiary hearing where counsel failed to impeach the prosecution's two key witnesses with evidence of

their evolving stories to law enforcement); *see also, e.g., Stouffer*, 214 F.3d at 1234 (holding that counsel was deficient for failing to effectively cross examine the prosecution's witnesses and use crime scene evidence to demonstrate discrepancies in the witness accounts).

Inconsistencies that may have seemed like oversight or memory error individually could have collectively revealed that Smith's and Page's accounts were entirely unsupported by anything but their self-serving and evolving stories. *See Tejeda v. Dubois*, 142 F.3d 18, 24 (1st Cir. 1998) (concluding that counsel was ineffective for failing to uncover key inconsistencies in the police account of the crime, which would have supported defense theory of police fabrication); *see also Rutland v. State*, 415 S.C. 570, 577, 785 S.E.3d 350, 353 (S.C. 2016) (holding that counsel was ineffective for failing to cross examine prosecution's key witness about two prior inconsistent statements). Allen was "entitled to have his lawyer urge to the jury that the discrepancies supported the graver conclusion" that Smith and Page were lying rather than misremembering, and to have his lawyer support that argument with available evidence. *See Tejeda*, 142 F.3d at 24 (describing counsel's failure to develop inconsistencies that could have arguably distinguished sloppy police work from possible fabrication of evidence); *see also Moffett v. Kolb*, 930 F.2d 1156, 1160– 61 (7th Cir. 1991) (holding that counsel was deficient for failing to elicit witnesses' prior statements that defendant's brother had fired the gun in a case where no witness saw the moment of the shooting).

Trial counsel's deficient preparations and performance at trial was not the result of any strategy. (*See* App. 918–19, SMAR Ex. 63, Affidavit of Pierre Oldham, ¶¶ 5–7, 9.) And although Oldham acknowledged at trial that he had been distracted by "some illness and personal matters in the preceding weeks," (App. 246, TT 429:2–3), he was responsible for cross examining every important witness and three quarters of the witnesses defense counsel cross examined at all.[9] Counsel pointed out some inconsistencies in closing, including: that Smith and Johnson disagreed about which vehicle the trio drove into the woods; that Smith's statements differed between whether Scott "pulled" her to the ground or "pushed" her to the ground; that Smith made conflicting statements to Efird about where Gailey was shot and when she left the woods; and Smith's new allegation at trial that Gailey emptied his gun at dawn. (*See* App. 584–618, TT 2243:15–2277:17.) Like in all trials, the jury was instructed that these arguments were not *evidence* on which they could base a verdict. (*See* App. 580–81, TT 2198:18–2199:15.) These closing arguments were not enough to overcome trial counsel's failure, throughout the trial, to provide competent evidence in support of their insistence that Smith was lying. *See Hines v. Mays*, --- Fed.Appx. ----, 2020 WL 2498042, *30–32 (6th Cir. 2020) (holding that counsel was deficient because they

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[9] (*See* App. 260–63, 264–66, TT 1298:22–1301:16, 1304:15–1306:15 (Bunting Cross by Oldham); App. 282–301, 302–308, 1350:7–1369:8, 1435:24–1441:8 (Wright cross by Oldham); App. 350–73, 1483:7–1506:8 (Johnson Cross by Oldham); App. 422, 1643:3–18 (Gose Cross by Atkinson); App. 423–24, 1654:23–1655:21 (Webster Cross by Atkinson); App. 425–45, 449–90, 1667:19–1687:20, 1691:23–1732:6 (Smith Cross by Oldham); App. 492–506, 1760:15–1774:23 (Blackwelder Cross by Oldham); App. 516–31, TT 1790:23–1805:24 (Page Cross by Oldham); App. 533–546, 1825:9–1838:10 (Maness Cross by Oldham); App. 547–48, 1851:2–1852:17 (Luper Cross by Atkinson); App. 549–59, 1864:21–1874:14 (Efird Cross by Atkinson); App. 562–66, 2012:23–2016:12 (Butts Cross by Oldham); App. 567–70, 2020:14–2021:21, 2024:18–2025:6 (McIver Cross by Oldham); App. 571–72, 2029:23–2030:11 (McSwain Cross by Oldham); App. 573–74, 2042:5–2043:8 (Faggart Cross by Oldham); App. 576–77, 2124:8–2125:6 (Poole Cross by Oldham).)

failed to investigate and "meaningfully cross examine" key witness, even though counsel highlighted in closing some inconsistencies that could have been developed after proper investigation and cross examination).

Trial counsel knew that Smith was unreliable and planned to make that the linchpin of their defense. But instead of developing evidence that key facts in her narrative were false and that she had a reason to lie, counsel focused almost exclusively on Smith's drug use and a generalized attack on her credibility. Put simply, trial counsel failed to present the jury with available and substantial reasons to doubt the State's case, and this failure constituted deficient performance. *See Tejeda*, 142 F.3d at 24 (holding counsel was deficient because their "impotent presentation [of the defense case] fell short of raising a reasonable doubt").

b. Counsel's deficient performance prejudiced Allen because the jury did not learn about evidence contradicting Smith's account of the evening of the crime and surrounding events.

Had trial counsel performed effectively, they could have used cross-examination of the State's witnesses to provide the jury with evidence that contradicted Smith's story from start to finish. Testimony from Dustin Maness and Robert Johnson would have undermined Smith's claim that Allen lured Gailey into the woods against his will. Johnson would have likewise testified that Gailey was not nervous about going into the woods, and even declined Johnson's offer to accompany him on the night of the crime. (*See* App. 836–37, SMAR Ex. 43, Affidavit of Robert Gray Johnson, ¶ 7.) Maness, a friend of Gailey's, would have testified that Gailey loved going into the woods at night and even had night vision goggles to do so. (*See*

App. 751, MAR Ex. 16, Affidavit of Dustin Maness, ¶ 9.) He would have explained that Gailey sometimes got spooked and would start randomly shooting on his trips into the woods. (*See id.*) These witnesses could have supported a defense theory of second-degree murder or voluntary manslaughter involving a dispute between the two men, rather than the State's version of a premeditated shooting after Gailey had been coerced to going into the woods on false pretenses.[10]

Effective counsel would have crossed Smith about the many details that contradicted her testimony, beginning with her prior inconsistent statements. As set forth *supra*, Section I.B.ii.a., these statements conflict with Smith's testimony in at least three key ways: 1) Smith's earlier statements do not match the timeline of the crime she described at trial; 2) Smith previously claimed that Allen stole money from Gailey's body, which is inconsistent with the crime scene; and 3) Smith never previously told law enforcement that she heard Gailey empty his gun at dawn as she and Allen left the woods. Trial counsel would have interrogated Smith about physical evidence at the crime scene which did not match her story, including the width of the path, Gailey's shirt, and the hunting knife. And an effective defense lawyer would

[10] Had trial counsel properly investigated the case, they may have been able to present evidence of third-party guilt. Trial counsel knew or should have known about evidence implicating other people, including Dustin Maness, Jamie Fender, and even Smith herself. Regarding Maness, Johnson told law enforcement that he had heard from Mike Simpson that Maness was camping in the Uwharrie Forest the night of the crime, including statements that "[Maness] could be involved" and "[Maness] knows something." (App. 864, SMAR Ex. 53, Statement of Robert Johnson to SBI.) As to Fender, Johnson said that Gailey had been sleeping with Fender's then-wife, Lois Lawson, (*see* App. 836, SMAR Ex. 43, Affidavit of Robert Gray Johnson, ¶ 5), and Johnson told law enforcement that Fender had gotten Scott in trouble in the past (App. 861, SMAR Ex. 53, Statement of Robert Johnson to SBI). And several months before trial, counsel received a letter from Troy Spencer, Smith's then-boyfriend, implicating her in the crime and contradicting her statements to law enforcement. (App. 851–56, SMAR Ex. 49, Letter from Troy Spencer to Trial Counsel, March 31, 2003.) Oldham recalls no strategic reason to limit investigation of potential subjects, and concedes that this information should have led to further investigation. (App. 919, SMAR Ex. 63, Affidavit of Pierre Oldham, ¶ 9.)

have asked Officer Poole about whether Smith told him that she heard a .45 fired at dawn, and would have called law enforcement witnesses to ask about whether any evidence supporting that statement was discovered at the crime scene.

Effective trial counsel would have also vigorously challenged the only other witness that connected Allen to the crime in any way: Page. Not only had Page repeatedly lied to law enforcement: when he allegedly told the truth, he failed to include a detail he added at trial, alleging for the first time in front of the jury that Allen told him that he threw rocks at Gailey in the woods. (App. 510, TT 1781:13–18.) Although this detail was key to the State's theory of first degree murder and the heinous, atrocious, and cruel aggravating circumstance at sentencing, counsel did not question Page *at all* about this new revelation. (*See* App. 516–31, TT 1790:23–1805:24.) If counsel had performed effectively, the jury would have learned that Page, like Smith, had inserted new details at trial and had substantial motive to lie. "Particularly because the state's case . . . relied entirely on witness credibility, there is a reasonable probability that counsel's failure to challenge the credibility of the state's witnesses in important ways affected the outcome of the case." *Harrison v. Tegels*, 216 F. Supp. 3d 956, 972 (W.D. Wis. 2016).

Testimony from additional witnesses that trial counsel failed to call could have shifted the jury's calculus from weighing issues of the credibility of the State's witnesses to considering independent corroboration of a defense theory of the case that the shooting was the result of an escalating cocaine-fueled conflict. As outlined above, *supra*, Section I.B.ii.a, Danny Lanier, Tanzy Lanier, and Shannon Diehl would

have testified consistently with Johnson's account that Smith was gone from the trailer for a couple of hours at most, and not in the Uwharrie Forest all night with Allen as he threw rocks at Gailey. And Fowler Chamberlin could have further testified that regardless of when Smith returned to the trailer, Allen was not in the woods all night because he was at her home by the time she returned from work.[11] Despite slight differences in the statements of these four witnesses, their collective testimony would have substantially undermined Smith's claim that Smith remained in the woods all night. *See Brown v. Myers*, 137 F.3d 1154, 1157–1158 (9th Cir. 1998) (holding defendant was prejudiced where counsel failed to call alibi witnesses, whose testimony was vague but consistent with the defense theory). This evidence would have damaged not just Smith's credibility at the guilt-innocence phase, but also the State's arguments in support of the heinous, atrocious, and cruel aggravating circumstance at sentencing.

Trial counsel also failed to call witnesses who could have challenged Smith's motive in testifying and thereby her general credibility as a witness. Three witnesses could have testified that Smith threatened Allen before going to the police with her story. (*See* App. 833–34, SMAR Ex. 42: Affidavit of Troy D. Spencer, ¶ 6 (Smith said she was "going to make [Allen] pay, if it's the last thing she ever does"); App. 846, SMAR Ex. 47, Affidavit of Joyce Allen, ¶ 5 (Smith said she "would make [Allen's] life

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[11] *See supra*, n. 6.

miserable"); App. 916, SMAR Ex. 60, Affidavit of Kelly Racobs, ¶ 15 (Smith said "I will do whatever it takes to keep [Allen] away from you.").)[12]

All of this evidence would have dramatically "alter[ed] the entire evidentiary picture." *Strickland*, 466 U.S. 696. Allen was prejudiced by his counsel's failure to cross examine witnesses with prior inconsistent statements. *See, e.g.*, *Rutland*, 415 S.C. at 577–78, 785 S.E.2d at 353 (holding counsel's performance prejudiced defendant where counsel failed to cross examine key witness with prior inconsistent statements). He was prejudiced by his counsel's failure to call critical witnesses. *See Brown*, 137 F.3d at 1157–1158 (concluding counsel's failure to call witnesses who would have undermined the prosecution's timeline and supported the defense theory prejudiced defendant). And he was prejudiced by counsel's failure to present evidence that the State's star witness had a motive to lie and had threatened to do so. *See Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013), amended, 733 F.3d 794 (9th Cir. 2013) (holding counsel prejudiced defendant by failing to call a witness who could have testified that the alleged victim, the key prosecution witness, had a motive to lie).

"The question [of prejudice] is . . . whether the omitted evidence 'creates a reasonable doubt that did not otherwise exist.' " *Stouffer*, 214 F.3d at 1234–35 (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976)). Here, effective counsel could have

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[12] Witnesses including Dolly Ponds, Troy Spencer, Lois Lawson, Joyce Allen, Larry Smith, and Kelly Racobs could have testified that Smith was obsessed with Allen and angry that he had gotten involved with another woman. (*See* App. 736, MAR Ex. 6, Affidavit of Dolly Ponds, ¶ 4; App. 833–34, SMAR Ex. 42: Affidavit of Troy D. Spencer, ¶ 6; App. 849, SMAR Ex. 48, Affidavit of Lois Lawson, ¶ 8; App. 846, SMAR Ex. 47, Affidavit of Joyce Allen, ¶ 5; App. 845, SMAR Ex. 46, Affidavit of Larry Smith, ¶ 7; App. 916, SMAR Ex. 60, Affidavit of Kelly Racobs, ¶¶ 14–17.)

developed evidence that would have given the jury specific, credible, and supported reasons to doubt.

iii. Counsel's deficient performance cumulatively prejudiced Allen because the jury heard none of the evidence that could have supported a defense theory of the crime itself, and almost none of the available evidence that undermined nearly every aspect of the State's theory.

Counsel's numerous errors described here cumulatively prejudiced Allen. "[B]ecause ineffective assistance of counsel claims focus on the reasonableness of counsel's performance, courts can consider the cumulative effect of alleged errors by counsel." *State v. Lane*, No. COA19-877, --- S.E.2d ----, 2020 WL 2123651 at *6 (N.C. Ct. App. May 5, 2020) (citing *Williams*, 529 U.S. at 395–99 (holding that the lower court correctly considered the cumulative effect of failure to raise mitigation evidence in ruling upon an ineffective assistance of counsel claim)); *see also State v. Campbell*, 359 N.C. 644, 705, 617 S.E.2d 1, 39 (2005) (recognizing cumulative argument but dismissing ineffective assistance of counsel claim on other grounds); *Thompson*, 359 N.C. at 121–22, 604 S.E.2d at 880–81 (same).

Cumulative prejudice is especially likely where, as here, the State's case relies on witness credibility. *See, e.g.*, *Harrison*, 216 F. Supp. 3d at 972 (holding counsel's deficient performance cumulatively prejudiced defendant because "counsel had the opportunity to present potentially compelling impeachment evidence of the state's two most important witnesses, but he failed to do so, even though he promised he would" in opening statements); *Usher v. Ercole*, 710 F. Supp. 2d 287, 312–14 (E.D.N.Y 2010) (concluding counsel's performance was cumulatively prejudicial, in a child sex

case relying on expert and victim testimony, because counsel failed to call or consult with an expert witness and ineffectively cross examined the prosecution's witnesses). Despite what trial counsel promised during opening, the jury heard almost no *evidence* of the inconsistencies in Smith's story and the testimony of other prosecution witnesses. And they heard nothing at all about the many ways that the physical evidence at the crime scene suggested a very different shooting than that presented by the State, as an expert like McCrary could have explained. Therefore,

> [i]n this case, it cannot be fairly said that the omissions and failures of trial counsel, while argumentatively explainable, do not raise a reasonable doubt in the guilty verdict. It is conceivable that had counsel performed those duties they failed to do, had they been able to lay proper foundations for the introduction of relevant evidence, had they taken the time to prepare for and challenge the State's evidence, had they taken the opportunity to set forth for the jury the defendant's theory of the case . . . reasonable doubt would have been created in the minds of the jury.

Stouffer, 214 F.3d at 1245 (explaining cumulative prejudice holding). It is clear counsel "did not just botch one witness or one argument or one issue—[they] repeatedly demonstrated the lack of diligence required for a vigorous defense." *Madrigal v. Yates*, 662 F. Supp. 2d 1162, 1192 (C.D. Cal. 2009) (finding cumulative prejudice where, among other deficiencies, counsel failed to deliver on promises made in opening statement and failed to present alibi evidence).

The State's arguments that Allen committed premeditated murder after luring Gailey into the woods under false pretenses against his will would be far weaker in light of the evidence that could have been presented. The jury certainly did not believe all of Smith's testimony and declined to convict Allen based on two theories of felony

murder: Allen's first degree murder conviction rests only on the jury's finding that the murder was premeditated, malicious, and deliberate. (*See* App. 725–26, MAR Ex. 3, Verdict Sheet.)[13] Moreover, the State's argument that Allen remained in the woods all night throwing rocks and boulders at Gailey would have been contradicted by multiple witnesses, both as to timing and as to the physical evidence at the scene, which played an important role in the State's case for death. Cumulatively, there is a reasonable probability that counsel's persistent errors affected the outcome at both phases of Allen's trial.

The MAR court declined to consider the cumulative effects of trial counsel's deficiencies due to its incorrect analysis that each of Allen's individual claims lacked merit. (*See* App. 174, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶ 155.) The MAR court further explained that "it is settled law in the Fourth Circuit that there is no cumulative error analysis for IAC claims," citing *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998). (*See* App. 174–75, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶ 156.) The MAR court's reliance on *Fisher* was error: as explained above, this Court considers cumulative ineffectiveness. *See, e.g.*, *Campbell*, 359 N.C. at 705, 617 S.E.2d at 39 (2005); *Thompson*, 359 N.C. at 121–22, 604 S.E.2d at 880–81. Moreover, the *Fisher* court analyzed cumulative ineffectiveness only after concluding that counsel's performance was not deficient in any way. 163 F.3d at 852. The Fourth Circuit has since overturned a district court decision relying on *Fisher* to find no cumulative ineffectiveness, clarifying that *Fisher* only controls when the

[13] The jury left blank all of the questions on the verdict form about felony murder. (*See* App. 725–26, MAR Ex. 3, Verdict Sheet.)

individual claims of deficient performance were considered and correctly denied on the merits. *See United States v. Russell*, 34 Fed. Appx. 927, 927–28 (4th Cir. 2002) (unpublished).[14] (App. 940–41, *United States v. Russell*.) Finally, the Fourth Circuit's *Fisher* holding rejecting cumulative analysis of ineffectiveness claims is in the drastic minority of its sister circuits, joined by only the Eighth Circuit.[15] This is certainly not the way the vast majority of courts actually handle IAC claims. *See Williams*, 529 U.S. at 373, 396 (considering together numerous diverse deficiencies of trial counsel, including failure to seek records, failure to return the call of a "potentially persuasive character witness," and failure to seek testimony from prison officials).

In sum, taking all of Allen's factual allegations as true, and drawing all inferences in his favor, he has stated claims that his counsel's numerous deficiencies prejudiced him individually and cumulatively. Trial counsel's performance deprived

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[14] This unpublished opinion has precedential value in relation to a material issue, and there is no published opinion that would serve as well. U.S. Ct. of App. 4th Cir. Rule 32.1, 28 U.S.C.A.

[15] *See Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005) ("*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced"); *Lindstadt v. Keane*, 239 F.3d 191, 199 (2nd Cir. 2001) (holding that *Strickland* directs courts to consider multiple errors "in the aggregate"); *McNeil v. Cuyler*, 782 F.2d 443, 451 (3d Cir. 1986) (relying on the "cumulative effect" of counsel's errors to determine ineffectiveness); *Richards v. Quarterman*, 566 F.3d 553, 571–72 (5th Cir. 2009) (considering "the cumulative effect of [counsel's] inadequate performance"); *United States v. Dado*, 759 F.3d 550, 563 (6th Cir. 2014) ("In addition, the court must consider the cumulative effect of [counsel's] alleged errors . . . ."); *Sussman v. Jenkins*, 636 F.3d 329, 360–61 (7th Cir. 2011) ("Here, however, we are not faced with a single error by counsel and, therefore, must consider the cumulative impact . . . ."); *Sanders v. Ryder*, 342 F.3d 991, 1000–01 (9th Cir. 2003) ("Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance. They are, in other words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel."); *Cargle v. Mullin*, 317 F.3d 1196, 1206–07 (10th Cir. 2003) (requiring any claim establishing deficient performance to be considered in a cumulative analysis). *But see Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir. 2002) (determining that in the Eighth Circuit, "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test").

Allen of any coherent or compelling defense case, which could have readily been developed and presented based on the evidence available to defense counsel at the time of the trial. Effective counsel would have devastated the State's theory of premeditated first degree murder, and further undermined the State's evidence presented during the guilt-innocence phase that was used to support aggravating circumstances during the sentencing phase. The MAR court impermissibly rejected Allen's factual allegations and failed to develop the necessary factual record to correctly adjudicate these claims. Therefore, this Court must reverse and remand for an evidentiary hearing.

II. THE MAR COURT ERRED BY SUMMARILY DENYING ALLEN'S CLAIM THAT HE WAS SHACKLED IN THE PRESENCE OF THE JURY WITHOUT THE TRIAL COURT FIRST CONDUCTING A HEARING AND MAKING FINDINGS OF FACT AS TO THE NEED FOR RESTRAINTS.[16]

Allen alleged in his SMAR that his due process rights were violated because jurors saw him shackled at trial even though the trial court failed to hold a hearing and make findings as to the need for restraints. In support of his claim, Allen submitted affidavits of two jurors and the statements of a third, through counsel's representations, alleging that each had seen Allen in shackles, including in the courtroom, during trial. The MAR court found that the claim was procedurally barred because it was not raised by trial counsel, and summarily denied it on the merits. This was error, and this Court must reverse and remand for an evidentiary hearing

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[16] Allen raised the issue discussed in this section in Claim XII of his SMAR (*see* App. 1004–07, SMAR, pp. 57–60), and presented it in his Petition for Writ of Certiorari, pp. 75–79.

because the claim is not procedurally barred and Allen alleged facts upon which relief could be granted.

A. The MAR court erred in finding this claim procedurally barred, because it could not have been raised on direct appeal and was therefore properly raised for the first time in post-conviction.

The MAR court held that this claim was procedurally barred under N.C.G.S. § 15A-1419(a)(3), which provides that a post-conviction claim may be denied summarily when "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present [MAR claim] but did not do so." (App. 180–81, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶ 178.) Contrary to the MAR court's holding, this provision has no application under the facts of this claim.

In order to be in a position to adequately raise an issue on appeal, the issue must be evident from the lower court record. The "general principle [is] that, on direct appeal, the reviewing court ordinarily limits its review to material included in 'the record on appeal and the verbatim transcript of proceedings, if one is designated.' " *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524–25 (2001) (citing N.C. R. App. P. 9(a)); *see also Jackson v. Housing Auth. of City of High Point*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988) ("The appellate courts can judicially know only what appears of record."). Thus, "in order to be subject to the procedural default specified in N.C.G.S. § 15A-1419(a)(3), the direct appeal record must have contained sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question." *State v. Hyman*, 371 N.C. 363, 383, 817 S.E.2d 157, 170 (2018).

In this case, there is nothing in the trial transcript, the record on appeal, or the superior court file indicating that Allen was shackled during trial, in the courtroom, in the view of jurors. As a result, Allen was not in a position to adequately raise his shackling claim on direct appeal, and § 15A-1419(a)(3) does not apply to his post-conviction claim. *See, e.g.*, *Hyman*, 371 N.C. at 384, 817 S.E.2d at 170–71 (holding § 15A-1419(a)(3) inapplicable, in part, because "[t]he record developed at trial did not contain any information affirmatively tending to show" the evidence needed to raise the claim on direct appeal).

Nevertheless, the MAR court concluded that Allen's shackling claim was procedurally barred. First, the MAR court asserted Allen's claim was barred because Allen and his trial counsel would have known he was shackled, and "it was incumbent upon [them] to timely raise the issue at trial." (App. 180–81, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶ 178.) This reasoning is beside the point. The narrow, relevant question is whether, under § 15A-1419(a)(3), Allen was in a position to raise this claim on appeal. As discussed above, he was not, because there was no evidence of it in the trial record. The fact that Allen's trial counsel failed to make a record of the shackling has no bearing on whether Allen could have raised the issue on direct appeal, according to the statutes setting forth the post-conviction procedural bar framework. *See* N.C.G.S. § 15A-1419.

To the extent that the State argues that Allen may not raise a claim in post-conviction that his trial counsel failed to note, that argument finds no support in the law. The Legislature narrowly and specifically set forth the grounds for procedural

bar. *See* N.C.G.S. § 15A-1419(a)(1)–(a)(4). Much as the State may want those provisions to cover the situation here—where an issue is not reflected at all in the trial record, in part due to trial counsel's oversight—they simply do not. Neither the State nor the MAR court has suggested any authority that would allow our procedural bar doctrine to be extended beyond the statutory parameters the Legislature defined. *See State v. Dorton*, 182 N.C. App. 34, 40, 182 S.E.2d 357, 362 (2007) ("[W]e see no reason to conclude[] that N.C. Gen. Stat. § 15A-1419 is ambiguous.").

This Court's decision in *State v. Hyman* is instructive on the question of whether the silence of Allen's trial counsel can be used to procedurally default his claim in post-conviction. In *Hyman*, at trial, a State witness claimed he saw the defendant shoot the victim. 371 N.C. at 364, 817 S.E.2d at 159. However, the defendant's trial counsel cross-examined that witness by pointing out that the witness was previously represented by trial counsel on a probation violation, and in the course of that representation, the witness made a statement that contradicted his trial testimony. *Id.* at 371 N.C. at 365–66, 817 S.E.2d at 160. In post-conviction, the defendant argued for the first time that his right to effective, conflict-free counsel was violated, because his trial counsel was a critical defense witness concerning the credibility of the State's trial witness. *Id.* at 371 N.C. at 369, 817 S.E.2d at 161–62. The lower court found this claim procedurally barred on the ground that the defendant could have raised it on direct appeal. But this Court reversed, holding that the claim could not have been raised on direct appeal, because the trial record "did not contain any information affirmatively tending to show" the evidence and

testimony needed from the defendant's trial counsel to support the ineffective assistance claim. *Id.* at 371 N.C. at 384–85, 817 S.E.2d at 170–71.

Critically, the Court reached this result in *Hyman* even though the defendant's trial counsel could have made a record at trial of her potential testimony concerning her own client's case, but failed to do so. This fact did not prevent the Court from rejecting the procedural bar, because the inadequate trial record left the defendant unable to raise the claim on direct appeal. *See id.* So too here. The fact that Allen's trial counsel could have, but did not, make a record of the shackling at trial, does not change the fact that the claim could not have been raised on direct appeal due to the trial record's inadequacy. Just as in *Hyman*, Allen's post-conviction claim is not procedurally barred because the trial record was silent on key questions pertaining to the claim. And, as *Hyman* demonstrates, the fact that Allen's trial counsel could have remedied that silence, but did not, does not change the result.

The North Carolina Court of Appeals' unpublished decision in *State v. Konifka*, 254 N.C. App. 346, 2017 WL 2945881 (July 5, 2017), is consistent with this Court's procedural bar analysis in *Hyman*. (*See* App. 931–39, *State v. Konifka*.) In *Konifka*, the trial court, without detailed explanation or discussion, ordered the defendant to remain in shackles during trial, and the record on direct appeal was unclear as to whether or to what extent the shackles were visible to the jury. *Konifka*, 2017 WL 2945881 at *9. Moreover, while defense counsel noted "concern" that visible shackles would lead to "a bad flavor with the Defendant to the jury that he couldn't get a fair trial," defense counsel did not actually object to the shackling. *Id.* at *9–10. On this

unclear record, and in the absence of a trial objection, the Court of Appeals dismissed the defendant's due process claim without prejudice to his ability to reassert it in post-conviction. *Id.* at *10–11. This Court should reach the same result in this case. Even in the absence of an objection from Mr. Allen's trial counsel, the Court should allow an opportunity for evidentiary development of a potential shackling violation for the first time in post-conviction.

In its procedural bar analysis, the MAR court next relied on *State v. Thomas*, 134 N.C. App. 560, 518 S.E.2d 222 (1999), and *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976), to support its finding of waiver by trial counsel. (App. 180–81, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶ 178.) But *Thomas* and *Tolley* are direct appeal cases where the shackling of the defendant was evident from the trial record, and trial counsel failed to object. *See Tolley*, 290 N.C. at 370, 226 S.E.2d at 369; *Thomas*, 134 N.C. App. at 570, 518 S.E.2d at 229. In contrast, this is a post-conviction case, governed by different procedural default rules than those that apply on direct appeal. Moreover, in this case, the courtroom shackling is not evident in the trial record to any degree. Importantly, no North Carolina case has ever held that a shackling violation discovered and documented for the first time at the post-conviction stage is procedurally barred.

Finally, the MAR court reasoned that Allen's shackling claim was procedurally barred because, on direct appeal, his attorney could have learned from Allen or trial counsel whether physical restraints were used, and could have made those facts part of the record on appeal and argued that the trial court failed to make the required

findings under N.C.G.S. § 15A-1031 (establishing procedures that must be followed before subjecting a defendant to physical restraint in the courtroom). (App. 181, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶ 179.) As discussed above, however, direct review is limited to the trial transcript and other matters already in the superior court file. Because those sources of information contained no indication that Allen was shackled in the courtroom, there was no basis for his direct appeal counsel to pursue more information on that subject.

Further, even if Allen's direct appeal counsel had learned about an allegation of shackling, and had included that information in the record on appeal, *see* N.C. R. App P. 9(c)(1) (permitting parties to include "non-evidentiary hearings, and other trial proceedings" in the record in "narrative form"), at most, that would have created a factual dispute over whether and to what extent Allen was shackled in the courtroom. In turn, it would have resulted in this Court dismissing the claim without prejudice to Allen's right to raise it again at the post-conviction stage, because appellate courts do not resolve factual questions. *See Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986) ("Fact finding is not a function of our appellate courts."); *see also State v. Gay*, 334 N.C. 467, 481, 434 S.E.2d 840, 848 (1993) (refusing to consider affidavits that are not part of the trial record, and that contradict what is reflected in the transcript).

Allen properly presented this extra-record claim in his post-conviction proceedings. Because he could not have raised it on direct appeal, it is not procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3).

B. The Court must remand the claim for an evidentiary hearing because, if true, Allen's allegation that he was shackled in the courtroom, in view of the jury, entitles him to relief.

Three jurors stated that they saw Allen shackled during the trial. Alternate Juror [redacted] explained: "I noticed Scott Allen's appearance and demeanor in the courtroom. I saw that he had tattoos on his body and that he was wearing leg irons." (*See* App. 1159, SMAR Ex. 52, Affidavit of [redacted] ¶ 6.) Juror [redacted] also observed that Allen had "some type of shackles or restraints on during the trial," but she could not remember if she saw the restraints "while he was sitting at the table in the courtroom." (*See* App. 1162, SMAR Ex. 55, Affidavit of [redacted], ¶ 6.) [redacted] also explained that a deputy would accompany jurors outside for smoke breaks, and the "deputy said that we were not supposed to see Scott Allen when he was being moved by the deputies." (*See* App. 1161–62, *id.*, ¶ 5.) Juror [redacted] said that Allen was shackled and "there were deputies all around him."[17]

Although the trial court made no record of any decision to allow Allen to be shackled in the courtroom, it did contemplate that the jury may be irreparably prejudiced by seeing Allen in shackles at all, even during transit—as Jurors [redacted] and [redacted] described. After jury selection, but before trial began, the trial court made the decision to transfer the proceedings from Montgomery County to Randolph County. In making this finding, the trial court concluded the transfer would reduce the likelihood that the jurors would see Allen shackled in transit, which was

[17] There is no affidavit or other statement in support of this evidence, but it is asserted in the MAR, with a note from counsel that [redacted] declined to sign an affidavit. (*See* App. 1006, SMAR, p. 59.)

important because that "may have some impact on the jurors that could not be overcome with a limited instruction." (*See* App. 247–50, TT 1130:3–1133:10.)

The law is clear that it violates due process for a defendant to be shackled at trial in the absence of appropriate findings by the trial court about the need for restraints. *See, e.g.*, *Deck v. Missouri*, 544 U.S. 622, 629 (2005) ("[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial."); *Tolley*, 290 N.C. at 366, 226 S.E.2d at 367 (explaining, before *Deck*, that "in the absence of a showing of necessity therefor, compelling the defendant to stand trial while shackled is inherently prejudicial in that it so infringes upon the presumption of innocence that it 'interfere(s) with a fair and just decision of the question of . . . guilt or innocence' " (citation omitted)); *see also* N.C.G.S. § 15A-1031. The trial court failed to make these necessary findings as to the need for restraints. Thus, whether there is a constitutional violation in this case turns on two factual questions: 1) whether, and to what extent, the jurors saw and were prejudiced by Allen in shackles; and 2) whether, and to what extent, the shackles interfered with Allen's ability to communicate with counsel, and the dignity of the trial process. *See Deck,* 544 U.S. at 631 (describing the prejudice shackling may cause to a defendant's Sixth Amendment right to counsel as well as to the dignity of the judicial process); *Tolley*, 290 N.C. at 366, 226 S.E.2d at 367; *see also State v. Jackson*, 162 N.C. App. 695, 701, 592 S.E.2d 575, 579 (2004) (explaining that a court's obligation to make findings prior to

shackling are not excused when the court attempts to conceal restraints from the jury because the court must also consider the effects of the shackles on the defendant).

Recently, the Georgia Supreme Court reversed a conviction because the trial court failed to make adequate findings justifying the use of shackling at trial. *Hill v. State*,--- S.E.2d ----, 2020 WL 2108194 at *5–6 (Ga. 2020). The *Hill* Court carefully analyzed the potential prejudice to the defendant, including the fact that the prosecution's case relied on circumstantial evidence and could not "be characterized as overwhelming." *Id.* at *6. The Court ultimately determined that, even though jurors knew the defendant was incarcerated at the time of both the murder and the trial, his appearance in shackles was prejudicial because it reinforced the prosecution's theory that he was a dangerous individual. *Id.*

Here, because of the limited record, the MAR court could not have conducted this kind of prejudice inquiry—and therefore determined whether Allen was entitled to relief—without holding an evidentiary hearing and making additional findings. In cases where the direct appeal record is insufficient to address an issue of restraints at trial, it is necessary to conduct further fact-finding regarding prejudice on post-conviction review. *See Konifka*, 2017 WL 2945881 at *10–11 (dismissing shackling claims without prejudice on direct appeal because they "directly implicate[] the prejudice analysis required under N.C. Gen. Stat. § 15A-1031" and therefore "require further evidentiary development"). And courts have found evidentiary hearings necessary in post-conviction proceedings to determine prejudice, even when bound by prior factual conclusions that the restraints used were "not visible to the jury." *See*

Gonzalez v. Pliler, 341 F.3d 897, 903–04 (9th Cir. 2003) (remanding shackling claim for evidentiary hearing despite AEDPA's restrictive provisions). This is because the prejudice inquiry is broader than the jury's observations, and requires analysis of the defendant's ability to participate at trial. *See id.* (explaining that "the record is completely devoid of any evidence concerning the effect the [stun] belt had on the defendant's ability to communicate with his lawyer [or] on his ability to assist in his own defense . . . . [and t]here is no record of whether the jury was aware of the use of the stun belt from means other than observing the defendant").

The MAR court nonetheless denied this claim without an evidentiary hearing. (*See* App. 181–83, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 181–89.) The MAR court first reasoned that Allen failed to present sufficient evidence that jurors saw him in shackles *inside* the courtroom. This was error, because the MAR court reached this conclusion by taking the evidence in the light most favorable to the State, and resolving factual disputes against Allen's assertions. A correct analysis requires the opposite. *See Ramseur*, 2020 WL 3025852 at *16 (reversing and remanding for an evidentiary hearing because, "taken in the light most favorable to defendant," the evidence alleged in the MAR stated a claim sufficient to trigger an evidentiary hearing); *Martin*, 244 N.C. App. at 734, 781 S.E.2d at 343 (reversing and remanding for an evidentiary hearing because the MAR court "decid[ed] issues of fact contrary to Defendant's allegations").

Accepting Allen's factual allegations as true and viewing the evidence "in the light most favorable to [Allen]," *see id.*, as the MAR court was required to do, there is

a clear inference from the existing record that Allen was shackled in the courtroom. In its conclusion to the contrary, the MAR court relied on Juror Ewing's inability to remember the precise location where she saw Allen restrained. It discounted Juror McDowell's statements because there was no supporting affidavit. And the MAR court failed to address Alternate Juror Capel's affidavit, stating that Allen was "wearing leg irons" "in the courtroom."[18] The MAR statute does not require affidavits; it allows MAR claims to be supported by "other documentary evidence" as well. *See* N.C.G.S. § 15A-1420(b)(1). Where, as here, an MAR claim is supported in part by affidavits, and in part by a statement of counsel as an officer of the court, reviewing courts must consider that evidence in its totality when determining whether to grant a hearing. *Compare Martin*, 244 N.C. App. at 736, 781 S.E.2d at 345 (acknowledging that an affidavit, standing alone, may not be enough to grant *relief* on an MAR "but it demonstrates the factual nature of the dispute" and reversing summary denial and remanding for an evidentiary hearing) *with Aiken*, 73 N.C. App. at 501, 326 S.E.2d at 927 (summarily denying MAR claim because "Defendant filed no supporting affidavit and offered no evidence beyond the bare allegations in the motion for appropriate relief").

Furthermore, even accepting the MAR court's improper factual conclusion that, at most, the jurors only saw Allen in shackles outside the courtroom, an evidentiary hearing would still be required to determine prejudice. On those facts, it would still be possible that a due process violation occurred, depending on the nature

[18] Although Alternate Juror Capel's affidavit was attached to Allen's SMAR, it was not specifically referenced in it.

of what jurors saw. *Cf. State v. Perry*, 316 N.C. 87, 109, 340 S.E.2d 450, 463 (1986) (affirming denial of a motion for mistrial where "[t]here was evidence that a juror had inadvertently seen defendant handcuffed and that others may have seen him in the custody of an officer," because the trial court "conducted an extensive hearing and found no misconduct or prejudice to defendant"); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (explaining in the context of improper prosecutorial argument that, even in the absence of a violation "of a specific provision of the Bill of Rights, such as the right to counsel," events at trial may "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."). Indeed, the trial court acknowledged a risk of irreparable prejudice if the jury saw Allen shackled while in transit. (*See* App. 247–50, TT 1130:3–1133:10.) Here, because the trial court held no hearing at all, it cannot yet be determined that there was no prejudice to the defendant.

Ultimately, the MAR court found no prejudice, citing evidence before the jury that Allen had previously escaped from work release and was therefore a "flight risk," that Allen was in custody prior to trial, and that evidence of guilt was "overwhelming." (*See* App. 182–83, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 184–86.) In relying on the jurors' knowledge of Allen's flight risk and custody status, the MAR court did not contemplate that shackling may nonetheless have affected the jurors' perceptions of Allen's dangerousness. *See Deck*, 544 U.S. at 633, (explaining that appearance in shackles "inevitably affects adversely the jury's perception of the character of the defendant"); *Holbrook v. Flynn*, 475 U.S. 560, 569

(1986) (observing that shackling is an "unmistakable indication[] of the need to separate a defendant from the community at large"); *Hill*, --- S.E.2d at ----, 2020 WL 2108194 at *6 (holding that the defendant was prejudiced even though jurors knew that he was in prison at the time of the crime because "[t]he appearance of [the defendant in shackles] undoubtedly reinforced the impression that he was dangerous and framed the lens through which the jurors viewed [him]"). The jury's assessment of Allen's "dangerousness" was relevant to the jury's consideration of the State's theory during the guilt-innocence phase that the murder was a premeditated, execution-style murder of one of Allen's close friends, as well as the defense arguments at sentencing that Allen would adapt well to the carceral environment and would not be a danger within prison.

Finally, the MAR court erroneously relied on waiver in its merits analysis, just as it did in its procedural bar analysis. The North Carolina legislature has placed the burden on the trial court to first make a record of its findings supporting restraints, N.C.G.S. § 15A-1031(1), and *then* "give the restrained person an opportunity to object," N.C.G.S. § 15A-1031(2). The MAR court cites only N.C.G.S. § 15A-1031 to support its conclusion that "Defendant has waived any error by failing to make a timely objection or motion at trial to allow the court to rule . . . ." (App. 181, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶ 181.) This erases the trial court's obligation to make affirmative findings on the record before providing counsel with an opportunity to object. Accordingly, trial counsel's alleged error in failing to object

cannot independently support a denial of this claim on the merits, without an evidentiary hearing to determine prejudice.

In sum, taking Allen's factual allegations as true, and drawing all inferences in his favor, he has stated a claim that his due process rights were violated when he was shackled in view of jurors. The MAR court was not in a position to make that determination before holding a hearing to develop all of the relevant facts. Therefore, this Court must remand for a full hearing on the claim.

III. THE MAR COURT ERRED BY DENYING, WITHOUT A FULL EVIDENTIARY HEARING, ALLEN'S CLAIMS THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO PROVIDE SMITH'S MEDICAL AND MENTAL HEALTH RECORDS TO DEFENSE COUNSEL.[19]

Allen alleged in his SMAR that his constitutional rights were violated because the trial court did not allow defense counsel to review Smith's medical and mental health records before trial. The MAR court ordered a "limited evidentiary hearing to determine if Defendant suffered any sufficient prejudice to warrant a full evidentiary hearing" on these claims. (*See* App. 201–02, Apr. 4, 2017 Order, ¶ 11.) The MAR court held the limited evidentiary hearing on 25 August 2017, during which defense counsel were only able to present the testimony of one witness, forensic psychologist Dr. John Warren. After the hearing, the lower court indicated that additional defense witnesses could be called at a later date. However, on 27 September 2017, the lower

[19] Allen raised the issues discussed in this section in Claims III(H), III(J), III(K), and part of III(I) of his SMAR (*see* App. 968–89, SMAR, pp. 21–42), and presented them in his Petition for Writ of Certiorari, pp. 55–64.

court notified counsel by an email memorandum: 1) that Dr. Warren's report was "wholly unpersuasive"; 2) that it intended to deny Allen any further hearing on these claims; and 3) that it intended to dismiss them based on the court's own reading of the records. (*See* App. 1030–33, Sept. 27, 2017 Ruling on Limited Evidentiary Hearing.) On 4 January 2018, the MAR court denied these claims on the limited record before it, ruling that "Defendant has failed to establish that he suffered any sufficient prejudice to warrant a full evidentiary hearing on those claims." (*See* App. 1019, Jan. 5, 2018 Order Granting State's Motion to Dismiss Claims 3H, 3J, 3K, and a Portion of 3I of Defendant's Supplemental Motion for Appropriate Relief, p. 11.) This was error because Allen was not given a full opportunity to develop the facts alleged in his SMAR and to demonstrate prejudice, and this Court should remand for a full evidentiary hearing.

A. Allen alleged that the trial court's conduct deprived him of his constitutional rights to confrontation, due process, and counsel, and that this denial prejudiced him.

An accused in a criminal matter "is assured his right to cross-examine adverse witnesses by the constitutional guarantee of the right of confrontation." *State v. Newman*, 308 N.C. 231, 254, 302 S.E.2d 174, 187 (1983) (citing N.C. Const. Art. I, § 23); *see also* U.S. Const. amends. V, VI; *Alford v. United States*, 282 U.S. 687, 691–92 (1931) (citations omitted). Under North Carolina law, this right includes cross-examining an adverse witness on the witness's mental health and drug abuse. *See State v. Williams*, 330 N.C. 711, 724, 412 S.E.2d 359, 367 (1991) (granting a new trial because the trial court prevented the defendant from cross-examining a critical

witness regarding suicide attempts, psychiatric history, and history of chronic abuse of marijuana and cocaine). This Court has made clear that although

> specific instances of drug use or mental instability are not directly probative of truthfulness, they may bear upon credibility in other ways, such as 'to cast doubt upon the capacity of a witness to observe, recollect, and recount, and if so they are properly the subject not only of cross-examination but of extrinsic evidence.'

Id., 330 N.C. at 719, 412 S.E. 2d at 364 (citations omitted).

Cross-examination on mental health issues or substance abuse history is permitted even where the history was remote in time from the crime. *See, e.g.*, *Newman*, 308 N.C. at 243–54, 302 S.E. 2d at 182–88 (allowing cross-examination on mental health and drug abuse records of a witness from years before the crime); *State v. Conrad*, 275 N.C. 342, 349, 168 S.E. 2d 39, 44 (1969) (allowing evidence of a prosecution witness's suicide attempt two years before trial); *see also Williams*, 330 N.C. at 722, 412 S.E. 2d at 366 (citing with approval *United States v. Lindstrom*, 698 F.2d 1154, 1160 (11th Cir. 1983) (allowing cross examination on mental health treatment ten years before the trial because "[c]ertain forms of mental disorder have high probative value on the issue of credibility")). This Court is especially protective of that right "where, as here, the witness in question is a key witness for the State." *Williams*, 330 N.C. at 723, 412 S.E. 2d at 367. Likewise, cross examination may be particularly important when the witness's testimony is uncorroborated by the physical evidence. *See, e.g.*, *United States v. Robinson*, 583 F.3d 1265, 1271 (10th Cir. 2009).

Because records dealing with mental health and substance abuse are not readily interpreted by a judge or jury without expertise, voir dire of mental health witnesses may be necessary to assist the court in determining the proper scope of examination. *See, e.g.*, *Williams*, 330 N.C. at 713, 412 S.E.2d at 361–62 (allowing voir dire of state's witness regarding his mental illness and substance abuse); *see also State v. Durham*, 74 N.C. App. 159, 166, 327 S.E.2d 920, 925 (1985) (allowing mental health care witness to testify); *United States v. Lopez*, 611 F.2d 44, 46 (4th Cir. 1979) (explaining that the party challenging evidence of mental impairment should make offer of proof). And extrinsic evidence, including testimony from experts, is admissible to illustrate issues of perception, memory, or mental illness. *See Williams*, 330 N.C. at 719; *see also* The New Wigmore, A Treatise on Evidence: Impeachment and Rehabilitation, § 5.9 The Exclusion of Extrinsic Evidence of Inconsistent Statements About Collateral Matters.

Trial counsel knew that the State's case depended on the credibility of their chief prosecution witness, Vanessa Smith. (*See* App. 918, SMAR Ex. 63, Affidavit of Pierre Oldham, ¶ 3.) Accordingly, prior to trial, they moved for an order compelling production of her mental health records from the Julian F. Keith Alcohol and Drug Abuse Treatment Center, also known as the Black Mountain Treatment Center ("Black Mountain"), and her involuntary commitment records from the Stanly County Clerk of Court. The motion was granted, but the resulting written order provided that upon return, the documents would be examined *in camera* to determine whether they should be disclosed to the State and the defense.

The trial court reviewed these records *in camera* during a recess in Smith's direct testimony at trial, without any testimony or assistance from a mental health expert appointed by the court or engaged by the parties, and with only Smith's attorney present. (*See* App. 405–12, TT 1546:22–1553:2.) The trial court withheld all of the records obtained from the Black Mountain Treatment Center, which related to in-patient treatment of Smith in September and October of 1993. (*See* App. 407–08, TT 1548:13–1549:3.) The court stated that there was no evidence of mental health issues in the records except for information about Smith's history of substance abuse, which she had admitted on direct examination. (*See id.*) Trial counsel interjected that the defense was "interested in exploring whether there is anything in the mental health record that would disclose other problems, mental health problems other than substance abuse problems . . . ." (*See* App. 408, TT 1549:18–22.) The trial court reiterated that the records did not include any such information. (*See* App. 409, TT 1550:5–20.) The trial court further ruled that Smith's involuntary commitment records from Stanly County would be released to counsel, but kept them under seal and required the parties to advise the court in advance of what materials, if any, they intended to use from these records. (*See* App. 406, TT 1547:6–25.)

In his SMAR, Allen alleged that this deprivation of his constitutional rights prejudiced him.[20] (*See* App. 968–89, SMAR, pp. 21–42.) As explained *supra*, Sections I.B.i.–ii., impeaching Smith was crucial to Allen's defense: she was the only eye witness to the shooting and the only witness who said that Allen had a gun and shot

[20] Smith's records were not included in the appellate record, and these claims therefore could not be raised until post-conviction proceedings. (*See* App. 201, Apr. 4, 2017 Order, ¶ 11.)

the victim. However, her story was completely at odds with the physical evidence. *See supra*, Section I.B.i. Thus, Smith's records were essential to challenge her reliability through the details of her mental illness and substance abuse. *See, e.g.*, *Williams*, 330 N.C. at 723–24, 412 S.E. 2d at 367; *Robinson*, 583 F.3d at 1271. Allen further alleged that, had the defense been able to review Smith's records, trial counsel would have been able to call an expert who could have testified: about the severity of Smith's substance abuse and its cognitive effects; about evidence in Smith's records supporting a diagnosis of a personality disorder; and about evidence demonstrating Smith's propensity to tell different stories at different times to manipulate the facts and achieve her own goals.

B. The MAR court erred by denying Allen's claims without giving him a full opportunity to support his factual allegations.

The MAR court held a one-day, limited evidentiary hearing, confining the defense to just one witness, Dr. John Warren. Warren noted that the Black Mountain records showed Smith had been previously treated at Appalachian Hall in Asheville, a "long-term residential center for people with personality disorder specializing in borderline personality," but not substance abuse. (*See* App. 1029, LEHT 81:3–8.) Dr. Warren also explained that the trial court would not necessarily have been able to understand the mental health significance of the long history of Smith's aberrant behavior reflected in the Black Mountain records, which included various behavioral "disturbances" such as extreme drug use, drug crimes, forgery, and prostitution. (*See* App. 1028, LEHT 80:10–23.) In addition to Smith's treatment at Appalachian Hall in

Asheville, Dr. Warren found evidence of a personality disorder in the clinical notes from Black Mountain. Specifically, Smith made conflicting statements to different therapists, which is consistent with both Borderline and Anti-Social Personality Disorders. (*See* App. 1026–27, LEHT 70:5–10, 72:15–22.) In addition, Dr. Warren explained that the phrase "spiritually bankrupt" as noted in the records is a term of art used to document Cluster B personality disorders. (*See* App. 1021–22, LEHT 60:5–61:14; *see also* App. 1038–1157, SMAR Ex. 50, Smith Medical and Mental Health Records.)

The MAR court concluded that Dr. Warren's testimony was "wholly unpersuasive" and that Allen failed to demonstrate that the trial court's withholding of Smith's records violated his constitutional rights to confrontation, due process, or counsel. (*See* App. 1016, 1018–19, Jan. 5, 2018 Order Granting State's Motion to Dismiss Claims 3H, 3J, 3K, and a Portion of 3I of Defendant's Supplemental Motion for Appropriate Relief, pp. 8, 10–11.) Ruling that Allen could not establish that he was entitled to any relief, the MAR court declined to hold a full evidentiary hearing. (*See* App. 1019, *id.*, p. 11.) This was error because the MAR court deprived Allen of a full opportunity to support his factual allegations that he was entitled to a new trial. Not only do the MAR court's truncated procedures fail to comport with the law governing when a court must hold an evidentiary hearing, *see McHone*, 348 N.C. at 258, 499 S.E.2d at 763 (citing N.C.G.S. §§ 15A-1420(c)(1)–(4)), Allen subsequently provided additional evidence demonstrating the prejudice he suffered due to the trial court's error.

At the evidentiary hearing for Allen's sentencing phase IAC claims, *see infra*, Section IV.A, the MAR court allowed post-conviction counsel to provide a further offer of proof regarding Smith's withheld medical records through the testimony of a neuropsychologist, Dr. Kristine Herfkens. Outside of the presence of the MAR court, Dr. Herfkens testified about the scope of Smith's polysubstance abuse, explaining: "It was profound. I mean, this -- you know, I've read more medical records than I could even wrap my head around, honestly, over the course of my career, and this is among the worst descriptions of a substance abuse disorder that I've seen." (App. 1036–27, EHT 429:23–430:1.) She explained the risks of permanent effects on the brain from this "profound" substance abuse:

> Q. [Ms. Lumsden] Is there a risk of permanent effects on the brain from – resulting from this degree of drug use?
>
> A. Oh, from the degree I see referenced in this record? Absolutely.
>
> Q. Can you explain a little bit what that would do to a brain?
>
> A. It – it – so the answer is going to vary a little bit depending on the substance. You know, the first – I think the first thing to consider is her age during the time that all this was happening, so her brain was still developing. And really any substance abuse in a developing brain is problematic. But this severe, really profound type of substance abuse is – is really devastating to developing brains and can lead to life long cognitive changes.
>
> Q. And what kind of cognitive changes?
>
> A. Problem with executive function, problems with attention and processing speed . . .
>
> Q. Would that affect anyone's memory, do you think?

> A. Well, the level of alcohol use for sure would have a potentially deeply negative impact on memory function.

(App. 1034–35, EHT 410:18–411:18.) These conclusions go far beyond any information made available to the jury through Smith's direct testimony or cross-examination.

Dr. Herfkens further gleaned from the clinical records evidence that Smith may have a personality disorder relevant to her credibility. She testified:

> [T]he clinical information, first of all, gives rise to concerns on my part that she has a personality disorder that is characterized by some manipulativeness and a tendency towards being deceitful . . . . So there's a variety of evidence in the records that I've read that would strongly suggest that she's manipulative and is, you know, trying to advance her own interests in ways that are harmful to others . . . . [S]o the thing I would be most concerned about is borderline personality disorder . . . [although] . . . that could also be related to antisocial personality disorder, also to narcissistic personality disorder. So all three of those ought to be on the table.

(App. 1164–65, EHT 418:19–419:13.) The jury heard no evidence that Smith may suffer from a personality disorder that affected her truthfulness.

Based on Dr. Herfkens's testimony during the offer of proof, it is clear that Allen can demonstrate that the trial court's refusal to release the Black Mountain records prejudiced his counsel's ability to challenge Smith's credibility and deprived him of the right to present extrinsic evidence from experts who could have interpreted Smith's records to contextualize the scope of her polysubstance and personality disorders. Accordingly, this Court should reverse and remand for a full evidentiary hearing.

IV. OTHER ISSUES FOR REVIEW

A. The MAR court erred by denying Allen's claims alleging that trial counsel were ineffective at the sentencing phase of trial.[21]

In his MAR and SMAR, Allen alleged that his trial counsel were ineffective at the sentencing phase of his trial for failing to call a mental health expert, failing to investigate and present available mitigation evidence, and failing to adequately prepare for the sentencing phase of trial. Allen argued that these deficiencies prejudiced him individually and cumulatively. In support of these claims, Allen submitted numerous exhibits, including affidavits from the mitigation investigator who worked on his case, mental health experts, and family members and friends.

The MAR court held a four-day evidentiary hearing on these claims. At the hearing, Allen produced evidence that trial counsel failed to direct and supervise the mitigation investigation and that many of his friends and family were not interviewed, including several critical witnesses. The evidence demonstrated that trial counsel failed to interview mental health professionals who treated Allen during childhood and adolescence, even though they had collected his mental health records. Trial counsel further failed to call a mental health expert to testify at sentencing. The post-conviction evidence presented at the hearing supports the statutory mitigating circumstance that Allen was suffering from a mental or emotional disturbance at the time of the crime, and many non-statutory mitigating circumstances that were

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[21] Allen raised the issues discussed in this section in Claims VII, VIII, and IX of his MAR and SMAR (*see* App. 77–119, MAR, pp. 77–119; App. 989–98, SMAR, pp. 42–51), and presented them in his Petition for Writ of Certiorari, pp. 79–100.

presented to but rejected by the jury. The MAR court denied all of Allen's sentencing phase ineffectiveness claims, concluding that counsel's performance was not deficient and did not prejudice Allen. (*See* App. 197–245, Feb. 6, 2019 Order.) These are erroneous legal conclusions, and this Court should reverse the MAR court's denial of these claims and grant Allen a new sentencing hearing.

i. Trial counsel were ineffective because they failed to call a mental health expert at the sentencing phase of the trial, who could have contextualized Allen's appearance and affect and supported numerous mitigation circumstances that were submitted to but not found by the jury.

The same legal standards set forth, *supra*, Section I, in Allen's guilt-phase ineffectiveness claims apply to his sentencing-phase ineffectiveness claims. Here, however, the MAR court held an evidentiary hearing. Therefore, in assessing the denial of a motion for appropriate relief, this Court's inquiry "is to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Matthews*, 358 N.C. 102, 105–06, 591 S.E.2d 535, 538 (2004). This Court reviews the trial court's conclusions of law *de novo*. *State v. Jackson*, 220 N.C. App. 1, 8, 727 S.E.2d 322, 329 (2012). Under the *de novo* standard, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (internal citation omitted).

At the evidentiary hearing, Allen called trial counsel Pierre Oldham and two mental health experts: Dr. John Warren, a forensic psychologist, and Dr. Kristine

Herfkens, a neuropsychologist. Oldham testified that he and co-counsel Will Atkinson first retained psychologist Dr. J. Gary Hoover to evaluate Allen. (*See* App. 644, EHT 49:4–15.) Upon Dr. Hoover's death, they retained Dr. Warren. (*See* App. 644, EHT 49:11–15.) However, by the time of trial, Dr. Warren told trial counsel that he had not been given enough time or information to testify at trial. (*See* App. 662–63, TT 203:7–204:12.) Oldham testified that he and Atkinson did not make a strategic decision not to call a mental health expert at trial. (*See* App. 646–47, TT 53:17–54:1.) He also did not recall moving for a continuance after Dr. Hoover's death. (*See* App. 648, EHT 100:4–11.)

Dr. Warren testified that he received materials during the post-conviction investigation that trial counsel had not provided to him before trial, including medical and psychological records, educational records, and extensive interviews with family members and teachers. (*See* App. 660–61, EHT 201:14–202:3.) Dr. Warren explained that Allen's reaction to his grandfather's death, the instability of his parents' marriage and their frequent separations and affairs, a family history of substance abuse, and traumatic events in his childhood were all highly significant to the jury's understanding of Allen's mitigation circumstances. (*See, e.g.*, App. 661, EHT 202:20–23; App. 665, EHT 206:6–15; App. 666, EHT 207:5–9; App. 668, EHT 244:1–5; App. 669–70, EHT 277:11–278:13; *see also* App. 757, MAR Ex. 24, Affidavit of John F. Warren, III, ¶¶ 6–8.) Warren could have testified in support of mitigating circumstances 1–6 and 9, which the jurors rejected. (*See* App. 728–32, Mar Ex. 4, Issues and Recommendation as to Punishment.)

Dr. Herfkens testified that she relies on extensive social histories that are prepared by experienced mitigation investigators and incorporate: interview notes from family members, friends, teachers, and other community members; school records; prior psychological tests; the defendant's developmental and social history; and medical records of the defendant and the defendant's mother during pregnancy. (*See* App. 673, EHT 308:7–16; App. 674, EHT 314:2–16.) Using materials developed through post-conviction investigation, Dr. Herfkens diagnosed Allen with untreated ADHD. (*See* App. 686–91, EHT 349:15–354:24.) She explained that Allen's development of a tic as a child was consistent with ADHD and "should have been . . . a red flag." (*See* App. 683, EHT 327:15–24.) Dr. Herfkens explained that untreated ADHD has a lasting effect on a child: without treatment, ADHD can "interfere with relationships, interfere with education, ultimately interfere with vocational functioning . . . these are kids who don't achieve their potential even remotely." (*See* App. 685, EHT 329:14–20.)

Dr. Herfkens further testified that Allen's family's instability affected him profoundly. (*See* App. 676, EHT 316:13–24; App. 692, EHT 356:8–16.) On at least one occasion, there was the threat of violence in the home: Allen saw his father point a shotgun at his mother's head before his older brother grabbed the gun away. (*See* App. 675, EHT 315:5–22.) And Allen's father was frequently verbally abusive to his mother. (*See* App. 675, EHT 315:11–15; *see also* App. 782, MAR Ex. 35, Affidavit of Vera Kaye Coble ¶ 8; App. 774–75, MAR Ex. 31, Affidavit of Michael Kevin Byrd, ¶ 7; App. 839, SMAR Ex. 44, Affidavit of Christina Fowler Chamberlin, ¶ 7). Dr.

Herfkens further explained how Allen's relationship with his father was fraught. (*See* App. 676, EHT 316:8–12; App. 680–81, EHT 324:6–325:25.) She testified that a child who does not feel physically threatened or unloved can nevertheless suffer developmentally and lack an understanding of how to manage emotion and other important social skills. (*See* App. 677–79, EHT 317:4–319:18; *see also* App. 765–66, MAR Ex. 25, Affidavit of Kristine M. Herfkens, ¶ 32.) Dr. Herfkens's testimony would have supported mitigating circumstances 1–4 and 6–7 and 9, which the jurors rejected. (*See* App. 728–32, Mar Ex. 4, Issues and Recommendation as to Punishment.)

The lower court found that trial counsel's failure to call a mental health expert was a reasonable decision because trial counsel lacked any evidence that such testimony would be helpful and Allen was reluctant to participate in psychological testing. (*See* App. 223, Feb. 6, 2019 Order, ¶ 28.) This conclusion is erroneous. Counsel's failure to call a mental health expert was not a reasonable strategic decision because counsel had not performed an adequate mitigation investigation. *See, e.g.*, *Strickland*, 466 U.S. at 690–91; *Elmore*, 661 F.3d at 858–64. Furthermore, a client's reluctance to cooperate does not obviate the duty to prepare for sentencing. *See* 1989 ABA Guidelines, 11.4.1; *see also id.*, Commentary to 11.4.2. The MAR court's conclusion "resembles more a post-hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Wiggins*, 539 U.S. at 526–27.

The MAR court further found that not calling a mental health expert did not prejudice Allen because, among other reasons, "the evidence presented by Defendant's mental health experts at his MAR evidentiary hearing would not support the submission of additional non-statutory mitigating circumstances." (*See* App. 224, Feb. 6, 2019 Order, ¶ 30.) This ignores the significant evidence that the testimony of a mental health expert would have provided in support of numerous non-statutory mitigating circumstances that were submitted to but not found by the jury. The jury only found two of fourteen non-statutory mitigation circumstances, and the testimony of a mental health expert could have provided evidence for at least eight other circumstances that the jury did not find. Had the jury found even half of those circumstances, there is a reasonable probability that the weighing of the aggravating and mitigating circumstances would have resulted in a sentence of life in prison without parole. *See Strickland*, 466 U.S. at 686.

ii. Trial Counsel were ineffective because they failed to adequately investigate and present available mitigation evidence that supported numerous mitigation circumstances that were submitted to but not found by the jury.

At the evidentiary hearing, Janet Herzog Adams, the mitigation specialist retained by trial counsel, gave compelling testimony about the extreme deficiencies in the mitigation investigation and preparations of Allen's trial team. Adams testified that while she was working on Allen's case, she was a full-time legal assistant at the Cumberland County Public Defender's Office where she carried a typical caseload of 20 to 30 serious felonies, including some non-capital murder cases. (*See* App. 649–50,

EHT 132:24–133:17.) Adams had permission to work on capital cases only if they did not interfere with her regular caseload, so she began working on capital trials at night and on weekends. (*See* App. 651–52, EHT 134:9–135:10.) In 2007—years after Allen's trial—Adams began working at the Capital Defender's Office, which gave her new perspective on how inadequate her work for Allen was. (*See* App. 650, EHT 133:5–7; App. 658, EHT 150:5–16.)

Adams testified that trial counsel did not give her any specific guidance by Allen's trial lawyers, and the trial team did not have regular meetings. (*See* App. 653–55, EHT 136:12–138:1.) Adams explained that she should have collected more extensive medical and educational records and interviewed more members of Allen's extended family, and that the meetings she did have were inadequate. (*See* App. 653, EHT 136:7–19; App. 656, EHT 139:2–23; App. 657, EHT 144:3–11.) Adams did not look for or interview any therapists or social workers who had worked with Allen in his youth; in fact, her only contact outside the immediate family was with one of Allen's former teachers, during trial. (*See* App. 655–56, EHT 138:2–139:12.) Adams told the MAR court that she did not do Allen's case justice due to her inexperience and lack of guidance from trial counsel. (*See* App. 659, EHT 151:3–12.)

The testimony of other witnesses further illustrates the scope of the mitigation case that could have been presented had trial counsel performed effectively. Lois Fender Lawson, Allen' s sister-in-law, testified that Allen was always quiet and calm, never losing his temper. (*See* App. 694, EHT 559:6–24.) Lawson further testified about Allen's loving relationship with his then-eight-year-old daughter, Jordan Allen.

(*See* App. 695, EHT 560:5–12.) She explained that the tattoo that reads "HATE" across most of Allen's head is a benign reference to a song, and that several of Allen's friends had similar tattoos. (*See* App. 693–94, EHT 558:19–559:2.)

Other friends and family supported these statements. Christina Fowler Chamberlin, a friend of Allen's since high school, described their close friendship and Allen's kind demeanor. (*See* App. 631–35, EHT 16:7–20:18.) And Allen's first cousin, Michael Kevin Byrd, provided important testimony about Allen's relationship with his family. He explained that Allen did not hunt like the other men in the family because "he had a love of animals . . . and he didn't like to see anybody killed." (*See* App. 705, EHT 590:4–6.) Byrd testified about the devastating impact of Allen's grandfather's death and how Allen continued to blame himself for the death. (*See* App. 706–08, EHT 591:7–593:15.) Although similar in age and close to Allen growing up, Byrd was never contacted by trial counsel, or anyone on their team, and was never asked to testify in Allen's behalf. (*See* App. 710, EHT 595:11–18.)

The MAR court concluded that trial counsel's mitigation investigation was neither deficient nor prejudicial. (*See* App. 242–43, Feb. 6, 2019 Order, ¶¶ 63–64.) But merely retaining a mitigation investigator and conducting *some* mitigation investigation does not comport with the constitutional requirements in capital cases. *See Rompilla*, 545 U.S. at 390–93 (concluding that counsel was ineffective during sentencing phase even though they interviewed the defendant and five members of his family). As the evidence developed in post-conviction demonstrates, the mitigation efforts by Adams, trial counsel, and the entire defense team were woefully

inadequate. Had the jury heard from these and the many other available witnesses who either testified at the evidentiary hearing or provided affidavits to post-conviction counsel in support of the mitigating circumstances submitted at trial, there is a reasonable probability that they would not have imposed a death sentence. *See Strickland*, 466 U.S. at 686.

iii. Trial Counsel were ineffective because they failed to adequately prepare witnesses or otherwise prepare for the sentencing hearing.

Trial counsel's lack of preparation for the sentencing phase of trial severely prejudiced Allen and constituted ineffective assistance of counsel. Trial counsel told Allen's family "that there were no problems in Scott's case and that there should not be a sentencing hearing." (*See* App. 777, MAR Ex. 34, Affidavit of Robert Keith Byrd, ¶ 5.) Some family members with material knowledge of Allen's background were never interviewed in advance of trial: even Allen's grandmother, Gladys Byrd Barclay, with whom he had lived part-time, was never interviewed prior to taking the stand. (*See* App. 868–69, SMAR Ex. 54, Affidavit of Gladys Byrd Barclay, ¶¶ 24–26.) Other family members were interviewed only once, years before the trial began. (*See* App. 781–82, MAR Ex. 35, Affidavit of Vera Kaye Coble, ¶ 4; App. 786, MAR Ex. 36, Affidavit of Alice Fay Blalock ¶ 4; App. 792–93, MAR Ex. 37, Affidavit of Benny Allen, ¶¶ 15–16; App. 796, MAR Ex. 38. Affidavit of Kenneth W. Allen, ¶ 24.)

Trial counsel did not ask family member witnesses to testify until shortly before or during trial. (*See* App. 712, EHT 609:1–3; *see also* App. 786–87, MAR Ex. 36, Affidavit of Alice Fay Blalock, ¶¶ 4–5; App. 777–78, MAR Ex. 34, Affidavit of

Robert Keith Byrd, ¶¶ 5–8; App. 802, MAR Ex. 39, Affidavit of Sherry Allen ¶¶ 26–28; App. 781–82, MAR Ex. 35, Affidavit of Vera Kaye Coble, ¶ 4; App. 793, MAR Ex. 37, Affidavit of Benny Allen, ¶ 17.) The few family members who testified at trial were either prepared very briefly in a group setting or not at all. (*See* App. 711–12, EHT 608:22–609:15; *see also* App. 777, MAR Ex. 34, Affidavit of Robert Keith Byrd, ¶ 5.) As mitigation specialist Adams testified, this is simply not "adequate" in a capital sentencing proceeding. (*See* App. 658, EHT 150:8.)

In denying this claim regarding trial counsel's preparation of the limited mitigation case presented to the jury, the MAR court simply repeated its legal conclusions regarding the adequacy of the mitigation investigation, almost verbatim. (*See* App. 244, Feb. 6, 2019 Order, ¶¶ 69–70.) Had these witnesses been properly prepared and made aware of the non-statutory mitigating circumstances that trial counsel intended to support through their testimony, there is a reasonable probability of a different outcome during sentencing. *See Strickland*, 466 U.S. at 686.

For all the above reasons, this Court should reverse the MAR court's denial of these claims and grant Allen a new sentencing hearing.

B. The MAR court erred by denying Allen's claim that the State presented false and misleading evidence in violation of his constitutional rights.[22]

Allen argued that the State violated his constitutional rights because it knew that Smith's testimony was false and misleading, based on much of the evidence described *supra*, Sections I.B.i.–ii. *See Giglio v. United States,* 405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264, 269–70 (1959); *State v. Williams*, 341 N.C. 1, 16, 459 S.E.2d 208, 217 (1995). The MAR court denied this claim as procedurally barred and summarily denied the merits without an evidentiary hearing. (*See* App. 123–36, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 6–42.)

The MAR court is incorrect that this claim is procedurally barred. (*See* App. 124–26, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 8–12.) Although Allen did raise portions of this claim on direct appeal, *see Allen*, 360 N.C. at 304–06, 626 S.E.2d at 279–80, the claim articulated in Allen's MAR and SMAR relies extensively on extra-record evidence that could only be developed in the post-conviction investigation. (*See* App. 26–34, MAR, pp. 26–34; App. 949–58, SMAR, pp. 2–11.) The evidence developed in support of this claim includes the report of Greg McCrary and the statements and affidavits of many witnesses who did not testify at trial, including Danny Lanier, Tanzy Lanier, Shannon Diehl, and Christina Fowler Chamberlin. Because Allen was not in a position to adequately raise this claim prior to his MAR, it is not procedurally barred. *See* N.C.G.S. § 15A-1419(a)(3).

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[22] Allen raised the issue discussed in this section in Claim I of his MAR and SMAR (*see* App. 26–34, MAR, pp. 26–34; App. 949–58, SMAR, pp. 2–11), and presented it in his Petition for Writ of Certiorari, pp. 30–39.

The MAR court further erred in denying this claim on the merits without an evidentiary hearing. (*See* App. 126–36, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 13–42.) Allen's claim relies on the statements of many witnesses who were not called at trial and whose credibility has never been assessed by any court. (*See* App. 126, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶ 14; App. 26–34, MAR, pp. 26–34; App. 949–58, SMAR, pp. 2–11.) Although Allen alleged facts upon which relief could have been provided, the MAR court failed to hold an evidentiary hearing as required, *see McHone*, 348 N.C. at 258, 499 S.E.2d at 763 (citing N.C.G.S. §§ 15A-1420(c)(1–(4)), and made impermissible factual conclusions contrary to Allen's assertions, *Martin*, 244 N.C. App. at 734, 781 S.E.2d at 343. This Court should reverse and remand for an evidentiary hearing.

C. The MAR court erred by denying Allen's claims that the State withheld materials about a witness's criminal history in violation of *Brady*.[23]

Allen alleged that the State failed to disclose Page's complete criminal record because the records that the State provided to trial counsel did not include Page's two prior convictions for injury to personal property over $200. (*See* App. 740–47, MAR Ex. 12, Criminal Records of Jeffery Page.) These convictions would have been admissible at trial for the purpose of impeaching Page's credibility. *See* N.C. R. Evid. 609; *see also* N.C.G.S. § 14-160 (the crime of injury to personal property in excess of $200 is a Class 1 misdemeanor). The State further failed to correct Page's testimony

[23] Allen raised the issue discussed in this section in Claim IV of his MAR (*see* App. 60–67, MAR, pp. 60–67), and presented it in his Petition for Writ of Certiorari, pp. 64–67.

when he omitted the two withheld convictions from his account of his criminal record. Because Page was the only witness other than Smith who connected Allen to the crime, his credibility was a central issue to the State's case and there is a reasonable probability of a different outcome had the jury heard about these two additional convictions. The State's failures violated Allen's constitutional rights. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio*, 405 U.S. at 153–54; *Napue*, 360 U.S. at 269–70; *see also United States v. Bagley*, 473 U.S. 667, 676–77 (1985) (holding that, for *Brady* purposes, there is no distinction between exculpatory evidence and impeachment evidence).

The MAR Court summarily denied this claim. (*See* App. 166–69, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 131–41.) The MAR court concluded that the nondisclosure was not a *Brady* violation because the records were public and would have been available to counsel with the exercise of due diligence. This ignores Allen's claims that the State defied the trial court's repeated orders to turn over these records. (*See* App. 61–63, MAR, pp. 61–63.) The MAR court further concluded, without an evidentiary hearing, that the State did not know about these records and thus was under no obligation to correct Page's testimony. Finally, the MAR court found that there was no reasonable probability of a different outcome had these errors not occurred, ignoring Allen's allegations to the contrary. This ruling relies on impermissible factual conclusions contrary to Allen's assertions. *See Martin*, 244 N.C. App. at 734, 781 S.E.2d at 343. This Court should reverse and remand for an evidentiary hearing.

D. The MAR court erred by denying Allen's claim that his trial counsel were ineffective for failing to object to improper arguments during the State's closing.[24]

In his MAR, Allen argued that counsel were ineffective because they failed to object to three statements in the State's closing that were unsupported by evidence admitted at trial: 1) that Smith was too short to have shot Gailey herself; 2) that Gailey removed his shirt because of hot weather; and 3) that Allen's alleged excuse for luring Gailey into the woods, to look at some guns, was verifiably false because no guns were found. The MAR court denied this claim as procedurally barred and summarily denied the merits without an evidentiary hearing. (*See* App. 170–74, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 146–54.)

The MAR court is incorrect that the claim is procedurally barred because Allen failed to raise this record-based claim on appeal. (*See* App. 171–72, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 147–48.) On direct appeal, this Court acknowledged Allen's claim that his counsel were ineffective for "failing to object during the prosecution's guilt . . . phase closing arguments" and ultimately dismissed it without prejudice, along with the other record-based ineffectiveness claims Allen included in his direct appeal. *See Allen*, 360 N.C. at 315, 626 S.E.2d 285–286. Therefore, the claim is not procedurally barred.

In addition to bringing this claim on direct appeal through ineffective assistance of counsel, Allen also claimed that the State's arguments violated the law

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[24] Allen raised the issue discussed in this section in Claim VI of his MAR (*see* App. 72–77, MAR, pp. 72–77), and presented it in his Petition for Writ of Certiorari, pp. 68–70.

and deprived him of a fair trial. *Id.* at 306–08, 626 S.E.2d at 280–81. Because counsel did not preserve the issue by objecting, this Court reviewed for plain error—the most stringent standard of review—and concluded that the arguments were not "so grossly improper" that they rendered Allen's trial "fundamentally unfair." *Id.* The MAR court mistakenly relied on this ruling as the "law of the case" and denied Allen's ineffectiveness claim on the merits without conducting an evidentiary hearing to determine whether counsel were reasonable in their failure to object and whether that failure prejudiced Allen, whether individually or cumulatively. (*See* App. 172–73, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 149–51.) *See also Strickland*, 466 U.S. at 688. This Court should reverse and remand for an evidentiary hearing.

E. The MAR court erred by denying Allen's claim that the deficient short-form indictment failed to confer jurisdiction on the trial court.[25]

Allen alleged in his MAR that his short-form indictment failed to state the elements of first degree murder and the aggravating circumstances to be submitted to the jury, thus violating his constitutional rights. *See* N.C. Const. Art. I, 22; U.S. Const. amends. V, VI, XIV. The MAR court found the claim procedurally barred and summarily denied it. (*See* App. 169–70, Aug. 18, 2016 Order Summarily Dismissing Claims, ¶¶ 142–45.)

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[25] Allen raised the issue discussed in this section in Claim V of his MAR (*see* App. 67–72, MAR, pp. 67–72), and presented it in his Petition for Writ of Certiorari, p. 68.

The trial court lacked jurisdiction based on the deficient indictment. *See State v. Wallace*, 351 N.C. 481, 503, 528 S.E. 2d 326, 341 (2000) (explaining that a facially invalid indictment may be challenged at any time because it implicates jurisdiction); *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (holding that a valid indictment is essential to the jurisdiction of the trial court to try an accused for a felony); N.C.G.S. § 15A-1415(b)(2). The indictment did not include allegations related to premeditation and deliberation, *see* N.C.G.S. § 14-17, nor did it include any of the statutorily enumerated aggravating circumstances necessary to render Allen eligible for the death penalty, N.C.G.S. § 15A-2000. (*See* App. 755, MAR Ex. 23, Indictment.) Because the indictment did not allege each and every element of first degree murder, or each and every element of capital murder, the indictment was insufficient as a matter of federal constitutional law. *See Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."); *see also Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (extending *Jones*'s requirements to state criminal statutes through the Fourteenth Amendment).

CONCLUSION

This court should vacate the MAR court's order summarily denying relief and remand for an evidentiary hearing on Allen's guilt-innocence phase claims. The Court should further vacate the MAR court's order denying Allen's sentencing phase claims and grant Allen a new sentencing hearing.

Respectfully submitted, this the 18th day of June, 2020.

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