No. COA19-1055 JUDICIAL DISTRICT 27A

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Gaston
	)	
MARK BRADLEY CARVER	)	

****

DEFENDANT-APPELLEE'S BRIEF

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Periodicals

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Online Sources

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v.	)	From Gaston
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MARK BRADLEY CARVER	)	

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ISSUES PRESENTED

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I. Did the trial court err by granting Mr. Carver's ineffective assistance of counsel and newly discovered evidence claims?

II. Did the trial court err by denying Mr. Carver's *Brady* violation and misrepresentation of critical evidence claims?

III. Did the trial court err by holding that it lacked legal authority to rule on Mr. Carver's innocence claim?

STATEMENT OF THE CASE

Pursuant to N.C. R. App. P. 28(c), the Defendant-Appellee, Mr. Mark Bradley Carver, agrees with the State-Appellee's Statement of the Case.

GROUNDS FOR APPELLATE REVIEW

Under N.C. Gen. § 15A-1445(a)(2), the State may appeal only "questions of law" that arise from the trial court's granting of Mr. Carver's newly discovered evidence claim. The State has no right to appeal from the trial court's granting of Mr. Carver's claim of ineffective assistance of counsel. Mr. Carver raises two additional issues pursuant to N.C. R. App. P. 28(c).[1]

STATEMENT OF THE FACTS

Mr. Carver is a 52-year-old, physically disabled man who cannot read or write. (R pp 2, 448-467; App. p 15).[2] He was incarcerated for more than eight years for the murder of Irina Yarmolenko. (R pp 10-11, 165-175). He has always maintained his innocence. (Trial T p 194; T pp 1101, 1313).[3] On 12 June 2019, the Honorable Christopher W. Bragg filed an order in Gaston

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[1] On this date, Mr. Carver has filed a Motion to Dismiss State's Appeal / Motion to Strike Portions of State's Brief and a Petition for Writ of Certiorari. This Brief incorporates the Motion and Petition by reference as if fully set forth herein.

[2] The Defendant-Appellee's Brief will use these designations: March 2011 trial transcript (Trial T p ___); April 2019 hearing transcript (T p ___); Record on Appeal and Supplement to Record on Appeal (R p ___); and Appendix (App. p ___).

[3] Before trial, Mr. Carver declined to plead guilty to second-degree murder and receive a 94-to-122-month sentence. (App. p 30; T pp 626-627, 1101).

County Superior Court which vacated Mr. Carver's 21 March 2011 first-degree murder conviction and awarded him a new trial. (R pp 165-175). The State asks this Court to reverse that order and return Mr. Carver to prison for the rest of his life. (Brief for the State pp 12, 30).

A. Mr. Carver Was Convicted of First-Degree Murder in March 2011

Ms. Yarmolenko was a physically active, 20-year-old UNC Charlotte student. (App. p 119; Trial T pp 73-74). In the early afternoon of 5 May 2008, she was found lying next to her car in a wooded, isolated area at the bottom of a steep bank on the Catawba River. (R p 258; Trial T pp 35-38, 48-52, 92-93, 114). She had been strangled to death with a drawstring from her sweatshirt, a ribbon cut from a bag in her car, and a bungee cord similar to cords in the car's trunk. (R p 260; App. pp 119-120; Trial T pp 118, 128-129, 131-134, 313-316). She was not sexually assaulted. (Trial T pp 326-327).

Seven months later, on 12 December 2008, the Mount Holly Police Department (MHPD) arrested Mr. Carver and his older cousin, Neal Cassada. (R pp 2-3, 269; Trial T pp 184). The arrest came two days after the MHPD learned that the men's DNA had purportedly been found on Ms. Yarmolenko's car. (R p 269). A grand jury indicted both men with first-degree murder and conspiracy to commit first-degree murder on 15 December 2008. (R p 4; Trial T p 2).

One day later, the Capital Defender's office appointed Brent Ratchford to represent Mr. Carver. (T p 1187). At the time, Ratchford served on the Capital Defender's private assigned counsel roster. (T pp 1081-1082). Ten days before Mr. Carver's trial, David Phillips joined as co-counsel. (T p 1083). Phillips initially represented Mr. Cassada, who died of a heart attack the day before his October 2010 trial. (R p 391; T pp 1019, 1083, 1214).

At trial, the State's evidence tended to show that Mr. Carver and his cousin had been fishing nearby when Ms. Yarmolenko was found on the river bank, with her body, clothes, and hair in wet condition. (Trial T pp 100, 118).[4] From where they fished, the State contended, one could hear people at the crime scene talking in "normal" voices and "small rocks" being tossed into the water. (Trial T pp 105-106, 140-141). In the car's trunk, investigators found a camera with exposures showing on the counter, "and it appeared that two pictures were taken." (Trial T pp 134-135). They lifted no fingerprints from the car with sufficient detail to allow comparison to anyone. (Trial T p 224-226, 242-243). But on the car, they did find DNA from skin cells, or "touch DNA," which allegedly matched Mr. Carver's and his cousin's DNA profiles. (Trial T pp 271-272, 274-275). When confronted with this evidence, Mr.

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[4] The distance between the two spots was an estimated 250 feet. (R p 258). Three people who saw Mr. Carver at the river on 5 May 2008, including MHPD officer Robert Ellison, testified at the hearing that he was not wet and had no mud or scratches on him. (T pp 352, 705, 732). He acted normal and talked about his family and fishing. (T pp 705, 732).

Carver repeatedly denied that he saw or touched Ms. Yarmolenko or her car, as he did in prior interviews. (R p 269; Trial T p 196).[5] He said he heard only a bulldozer scraping sound. (R p 417; Trial T p 192). The State asserted that he told investigators that Ms. Yarmolenko was a "little thing" and demonstrated her height relative to his own. (Trial T pp 196-198).

Mr. Carver's counsel provided the State with no discovery and presented no evidence at trial. (Trial T pp 3, 337-340). Although the court dismissed the conspiracy charge, the jury found Mr. Carver guilty of first-degree murder. (R p 7; Trial T pp 336-337, 851). He received a mandatory life sentence. (R pp 8-11; Trial T p 854-855). A divided panel of this Court upheld Mr. Carver's conviction, finding that "DNA found on the victim's vehicle was, with an extremely high probability, matched to [him]." *State v. Carver*, 221 N.C. App. 120, 122, 725 S.E.2d 902, 904 (2012), *aff'd per curiam*, 366 N.C. 372, 736 S.E.2d 172 (2013). The dissent noted that touch DNA evidence was, at the time of the case, "relatively new and not as accurate as blood or saliva DNA testing." *Id.*, 221 N.C. App. at 128, 725 S.E.2d at 908.

B. Mr. Carver Sought Post-Conviction Relief in December 2016

On 8 December 2016, Mr. Carver filed a Motion for Appropriate Relief (MAR) in Gaston County Superior Court. (R pp 22-51). He amended it on 26 July 2018 and 8 April 2019. (R pp 100-122, 156-162). Mr. Carver asserted:

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[5] Mr. Cassada also asserted his innocence and denied touching the car. (R p 269).

(1) He received ineffective assistance of counsel due to his trial counsel's failure to investigate his medical records (relevant to whether he was physically capable of committing the murder), his intellectual limitations (relevant to his competency and statements he made to investigators about Ms. Yarmolenko's height), and the validity of the State's touch DNA evidence (the State's only physical evidence). (R pp 39-46, 103-114).

(2) Newly discovered evidence relating to advances in DNA mixture interpretation, which the State Crime Lab failed to adopt before his trial, exposed the State's touch DNA evidence to be invalid. (R pp 109-110).

(3) In violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the State withheld information which inculpated another person. (R p 117-118).

(4) The State knowingly misrepresented at trial that: (1) A "hearing test" which detectives conducted at the river was valid; (2) no fingerprints "of value" were found on Ms. Yarmolenko's car; (3) her body, clothes and hair were wet when she was discovered; (4) a camera from the victim's trunk indicated two pictures were taken prior to film being removed; and (5) no other person's DNA, particularly male DNA, was on the drawstring and bungee cord used to kill her. (R pp 115-117, 156-160; T p 1586).[6]

(5) His actual innocence. (R pp 47-48).

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[6] At the hearing, Mr. Carver elicited evidence of and asserted in closing argument that the State misrepresented evidence about the camera. (T p 1586).

C. The Evidentiary on Mr. Carver's MAR Was Held in April 2019

Mr. Carver and the State presented a combined 25 witnesses and 156 exhibits over the course of a nine-day evidentiary hearing in April 2019. (R pp 146-155). The trial court also reviewed "the entire record and the materials provided by the parties." (R p 165).[7] The evidence showed:

In May 2008, Mr. Carver suffered from a physical disability that qualified him for benefits. (R pp 448-467; T p 1392). A former mill worker, he had undergone multiple surgeries. (R pp 450-451; App p. 75; T p 1412). Still, he continued to feel "sharp shooting throbbing aching burning type of pain" in his arms and wrists, "day and night," due to carpal and radial tunnel syndromes, and he was being evaluated for further surgery. (App. pp 5, 103-105). Mr. Carver's family members and friends said his strength and grip issues affected his ability to lift heavy objects and hold items as light as a coffee cup for any extended time. (T pp 228-229, 239-240, 242, 269-270, 310, 329-330, 344-345). He needed help with "anything physical," including doing laundry, carrying groceries, netting fish, hauling deer, pulling back a crossbow, loading his boat, and tying his shoes. (T pp 228-229, 238-240, 246, 275, 284-285, 289, 301-302, 310, 334).

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[7] The Record on Appeal, Supplement to Record on Appeal and Appendix contain exhibits that were attached to the MAR and its amendments and/or presented at the evidentiary hearing and, thus, reviewed by the trial court.

Dr. Vikram Shukla had treated Mr. Carver for mental health issues since 2005 after an incident in which Mr. Carver believed his former wife tried to take his property, drove a four-wheeler to her home and shot into the floor with a shotgun. (T pp 45, 335-337, 1381). Additionally, in 2007, Mr. Carver accidentally shot his son, Brad, while they were "wrestling" in his camper. (T pp 71, 74, 77-78, 221, 1365-1367).[8] Dr. Shukla described Mr. Carver as a "well-controlled paranoid schizophrenic" who took his medication. (T p 79). On 3 April 2008, he noted that Mr. Carver was "nonparanoid" and "better with current treatment." (App. p 5). On 5 May 2008, the day of Ms. Yarmolenko's murder, he observed that Mr. Carver was overweight and could not walk fast due to his asthma. (App. p 6).

Mr. Carver's family and friends said he could not read or write, needed help filling out forms, and struggled with memory, times, and details. (T pp 205-207, 215, 254, 260-261, 310, 346). Psychologist Ashley McKinney evaluated Mr. Carver in November 2016 and determined he had an "extremely low range" IQ of 61. (T p 124).[9] If evaluated in 2010, his score would have been about the same. (T p 125). Someone with Mr. Carver's IQ would not likely remember specific times, dates, weeks, or months, she said.

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[8] In March 2007, Brad Farmer told the Gaston County Police Department (GCPD) that his father could not "wrestle long because he has carpal tunnel[.]" (App. p 16).

[9] N.C. Department of Adult Correction records showed Mr. Carver's IQ to be between 68 and 73. (App. p 15; T p 127).

(T p 140). He would struggle to answer questions, repeat things without understanding them, and agree to what others said. (T pp 129-130, 139-140).

After being appointed, Ratchford requested and received $4,000 from Indigent Defense Services (IDS) to get a psychological evaluation of Mr. Carver. (App. pp 99-101). "[I]t was one of the things that IDS want[ed] counsel to do. … IDS was requesting or strongly urging counsel to get together their team … [which included] … a psychiatrist," he testified. (T pp 1092-1093). Because he believed Mr. Carver was "simple" but competent based on his conversations with him, Ratchford said, he did not get the evaluation. (T pp 1092, 1193). Counsel knew Mr. Carver was illiterate and suffered from mental illness. (R pp 661; T pp 1059-1060, 1263).

Counsel said they talked with Mr. Carver's family. (T pp 1072, 1288). Seven of Mr. Carver's family and friends, including his two brothers, two daughters, and sister-in-law, stated that neither attorney interviewed them. (T pp 209-210, 240, 271, 290-291, 302, 317, 338). Ratchford told Mr. Carver that he would get his medical records, but he did not get any records or speak with Dr. Shukla. (T pp 65-66, 313, 1097).

Ratchford knew Mr. Carver received disability benefits and described himself as "crippled," but Ratchford did not believe he was disabled. (R pp 661-662; T p 1103). He saw Mr. Carver at the crime scene and fishing spot, and Mr. Carver told him that he hunted, fished, and drove. (T pp 1096, 1202-

1204, 1264). Ratchford said he did not get Mr. Carver's medical records because he didn't want to assume the burden of proving that Mr. Carver could not have physically committed the murder. (T pp 1097, 1100-1101, 1263-1264). Phillips knew of Mr. Cassada's prior heart attacks and breathing problems and of Mr. Carver's carpal and radial tunnel surgeries. (T pp 1029-1030). He said he also did not seek either man's medical records for the same reason as Ratchford. (T pp 1029-1030, 1060, 1070-1071). The attorneys planned to "poke holes" in the State's case. (T pp 1228-1229).

After the State rested, Ratchford said, counsel and Mr. Carver decided to not present evidence, including video of the 10 December 2008 interview with MHPD detective William Terry and SBI agent David Crow. (T pp 382-383, 1058, 1228, 1267). At trial, Ratchford acknowledged the video was "exculpatory more than inculpatory." (Trial T p 6). At the hearing, he said the video's "bad outweighed the good." (T p 1105). Counsel said they did not want to play the video at trial and reinforce that Mr. Carver identified Ms. Yarmolenko's height and weight. (T pp 1058, 1228). Phillips expressed concern the jury would learn from the video that Mr. Carver was schizophrenic and once fought with his son for 45 minutes with a stick. (T p 1060).

Mr. Carver played the video at the hearing. (T pp 384-385). In the interview, Crow described Ms. Yarmolenko as a "little girl" to Mr. Carver six

times and called her a "little ol' bitty thing." (Defense MAR Exhibit No. 29 at 9:35, 23:27 to 23:37, 28:12 and 28:37). Crow compared Ms. Yarmolenko's height to his body by standing and putting his hand to his eyes before urging Mr. Carver to "stand up and show me about how tall she was on you" in the same way. (Defense MAR Exhibit No. 29 at 28:53 to 29:10). Mr. Carver stood and put his hand up to his eyes. (Defense MAR Exhibit at 29:00 to 29:10).

In February 2010, Ratchford requested and received IDS funds for a DNA expert, and he hired retired UNC Charlotte professor Dr. Ron Ostrowski. (R pp 614-616; T pp 1106-1107, 1112).[10] Ratchford stated in the IDS request that "DNA is the only evidence connecting defendant to victim." (R p 615). "Sarah Rackley had either made the recommendation or referred me to a list of DNA experts, but I remember being told specifically about Dr. Ostrowski because he was local, he was close, and he was a professor at UNCC, and he had been used before and approved by IDS," Ratchford said. (T pp 1238-1239).[11] Ratchford did not get Ostrowski's CV or review his prior testimony. (T pp 1305-1306).

On 15 April 2010, Ratchford wrote to Ostrowski with a copy of the State's DNA "documentation." (R pp 617-618). In the letter, he said that he

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[10] Ostrowski died before the evidentiary hearing. (T p 1239).

[11] Mr. Carver's postconviction counsel noted to Ratchford that Sarah Rackley Olson started at IDS as Forensic Resources Counsel in October 2010. (T p 1306).

suspected Mr. Carver's and his cousin's DNA was on the car because they touched it when they looked in it after hearing a crash sound at the river. (R pp 617-618; T pp 1109, 1157). Mr. Carver had denied ever looking in the car or hearing a crash. (Trial T p 537; T p 1109).

Ostrowski gave Ratchford "very rudimentary" instruction on the "nuts and bolts of DNA." (T p 1240).[12] He told Ratchford that the State's DNA evidence was "good science." (T pp 1112, 1157, 1249). Ratchford testified that Ostrowski advised him not to interview the State's DNA experts or call on him to testify. (T pp 1093, 1156-1157, 1256). Ostrowski drafted cross-examination questions for the State's DNA experts which focused on possible "secondary transfer" of Mr. Carver's DNA to the car. (App. pp 114-118; T pp 1110-1111, 1249-1250). Before trial, Ratchford did not obtain DNA samples from any officers who were at the crime scene. (T p 1114).

Ratchford received no report from Ostrowski and could not recall taking notes during his meetings with him. (T pp 1110). He did not ask all of Ostrowski's cross-examination questions at trial. (T pp 1114, 1253-1255). When one of the State's DNA experts gave conflicting testimony about "tertiary" and "secondary" transfer, he did not point out the inconsistency or

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[12] Ratchford said he was aware that the Capital Defender required roster attorneys to have "substantial familiarity with scientific and medical evidence, including mental health, social history and pathology evidence," and to have substantial familiarity with the use of expert witnesses." (T p 1082).

seek clarification. (Trial T pp 289, 297-298, 306-307; T p 1254). Ratchford and Ostrowski never discussed the SWGDAM (Scientific Working Group on DNA Analysis Methods) revised guidelines on DNA mixture interpretation, which were published in April 2010, prior to trial. (T p 1257). Ratchford consulted with no other DNA expert. (T p 1301).

Karen Winningham of the SBI Crime Lab analyzed the touch DNA evidence in Mr. Carver's case and testified as an expert at trial. (Trial T pp 265).[13] She said the partial DNA profile in a sample from the pillar above the driver's side rear door of Ms. Yarmolenko's car (Item 34-2) was a mixture, with the predominant profile matching Mr. Carver's DNA profile. (R pp 469, 478; Trial T pp 271-272). She calculated that the profile was 126 million times more likely to come from Mr. Carver than from any other unrelated person in the state's Caucasian population. (R p 471; Trial T p 273). She also testified that Mr. Carver could not be excluded from the DNA mixture found on the seatbelt button in the passenger side rear seat (Item 34-15). (R p 470; Trial T pp 280-281). Mr. Carver's DNA was not on the three ligatures around Ms. Yarmolenko's neck, she said. (Trial T p 297). Kristin Hughes of the SBI Crime Lab reviewed Winningham's work, found she complied with the lab's policies and procedures, and agreed with her results. (Trial T p 301-303).[14]

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[13] Winningham died before the hearing. (T p 906). Hughes did not testify.

Dr. Maher Noureddine testified as a DNA expert at the hearing. (T p 800).[15] He stated that the SBI Crime Lab followed more "subjective" policies and procedures in DNA mixture interpretation when Winningham analyzed the touch DNA evidence in Mr. Carver's case. (T p 853). The revised SWGDAM guidelines set a "corrective course" and promoted more "objective" interpretation of DNA mixtures, he said. (R pp 528-555; T pp 811-812). The guidelines called for labs to establish a stochastic threshold for the interpretation of DNA mixtures, or a "peak height at which you can be reasonably confident that you have all the DNA representation at a particular marker." (T p 815).[16] If a peak fell below the stochastic threshold, "you have to assume there is data missing from the electropherogram or DNA profile," and the profile could not be used for comparison, he said. (T pp 814-815). It is often called the "match interpretation threshold." (T p 817).

The FBI, which manages the CODIS DNA database and develops standards for accreditation and auditing of forensic DNA labs, placed the

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[14] The SBI Crime Lab excluded Mr. Carver and Mr. Cassada as contributors to DNA mixtures found in Ms. Yarmolenko's fingernail scrapings. (R pp 473-474; App. pp 56-57). The lab found additional alleles on the bungee cord. (R p 471; App. p 54).

[15] Dr. Noureddine holds the same American Board of Criminalistics certification in molecular biology as a State Crime Lab forensic scientist. (App. p 36; T p 796).

[16] The guidelines were not meant to be applied retroactively, but the SBI Crime Lab analyzed Items 34-2 and 34-15 in 2010 after the guidelines' release and should have reanalyzed the items, Dr. Noureddine noted. (R pp 476-481; T pp 877-878, 889).

revised SWGDAM guidelines on its website. (T pp 811-812). Dr. Noureddine estimated that 75-80 percent of forensic labs across the country adopted the guidelines by the end of 2010. (T p 813). However, when the SBI Crime Lab analyzed the DNA evidence in Mr. Carver's case, the lab did not use a stochastic threshold. (T p 894). The lab did not establish one until completing validation studies for a new DNA extraction kit in 2013. (T p 879-880).[17]

Dr. Noureddine used the "more accurate and objective interpretation standards" of the revised SWGDAM guidelines to review the SBI Crime Lab's interpretation of the DNA mixtures in Items 34-2 and 34-15, and he issued a report on 20 November 2016. (R pp 176-179; T pp 826-827). The DNA mixture profile from Item 34-2 had too much missing data and could not be used for "any reliable matching," he found. (R p 177; T pp 831-832). The profile was "inconclusive" instead of a match to Mr. Carver's DNA profile. (R p 177; T p 832). He described Winningham's interpretation as "highly erroneous and scientifically baseless." (R p 177; T p 832). He also found the DNA sample from Item 34-15 to be "inconclusive" and of such low quality that one could not do "anything" with it. (R p 178; T pp 853-857).

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[17] Mark Boodee, who worked at the SBI Crime Lab for 27 years, testified that "everybody in DNA" knew of the revised SWGDAM guidelines after their release in 2010. (App. pp 97-98; T pp 921, 923). Because of an investigation of the SBI Crime Lab, which led to the Forensic Sciences Act of 2011, the lab made a conscious decision to delay adoption of a stochastic threshold. (T p 928). "There was not a focus on science at that time," Boodee said. (T p 928).

Mackenzie DeHaan, the State's only DNA expert to testify at the hearing, prepared a Quality Assurance Record (QAR), which she described as a "response" to Dr. Noureddine's report and not "an opinion of his opinion." (App. pp 129-131; T pp 1483-1486). She reviewed Winningham's work and determined that Winningham used the standards and practices that were in place at the SBI Crime Lab at that time. (App. p 130; T p 1492). She also stated that a DNA expert "maybe" should have known about the SWGDAM guidelines in 2010. (T p 1494). "Back in 2010 we did not have the dissemination capabilities we have in 2019," she said. (T p 1494).

Terry had been a detective for four years, and this was the second murder case for which he served as lead investigator. (T pp 420-421). He failed to keep a crime scene log. (T p 431). He also did not require officers to write down information of people they interviewed if it was not "pertinent." (T p 512).[18] He admitted that neither his investigative report nor any other investigative report stated that Ms. Yarmolenko's body, hair, and clothes were wet at the crime scene. (R pp 258-270; T p 460). He said he observed it without documenting it. (T p 463). He also testified that, on 21 June 2010, he examined the camera from Ms. Yarmolenko's trunk and learned that its counter would advance without film in it. (R pp 255, 493; T p 449).

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[18] Officer Ellison, who spoke with Mr. Carver on 5 May 2008, did not write a statement about the encounter until 16 October 2008. (R p 419; T pp 355-356).

Terry's summary investigative report made no mention of MHPD Sergeant Jeff Skidmore's conversation with Angel Beatty on 5 May 2008. (R pp 258-270). Beatty testified that she was planting flowers outside of her home on Pearl Beatty Road near the crime scene the day of the murder. (R p 734; T p 745). She saw a black male running from the nearby Water's Edge construction area towards the main road. (R p 734; T p 746). The man was wet with water or sweat, and he carried a book bag under his arm. (R p 734; T p 746). She spoke with an officer that day about what she saw but could not recall his name. (R p 734; T pp 749-750). In a 5 May 2008 e-mail, Skidmore informed Sgt. Fred Tindall that he spoke with Beatty. (App. p 29). He did not disclose her information about the man she saw that day. (App. p 29).[19]

William Stetzer was lead prosecutor, with Stephanie Hamlin assisting. (Trial T p 1; T pp 625-626). Hamlin elicited testimony from GCPD detective Jim Workman in which he stated that he could not compare fingerprint lifts from Ms. Yarmolenko's car to "anybody." (Trial T pp 225-226, 243). At the hearing, Workman clarified that officers actually compared prints "of value" to Mr. Carver's and his cousin's samples and found no match. (R p 475; T pp 572-573). They also ran fingerprints through the AFIS database. (T p 571).

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[19] On 5 May 2008, MHPD officer Scott Wright reported seeing a black male with a "lazy left eye" at the Highway 273 and YMCA Drive intersection, near the crime scene. (App. p 17; T p 776). Wright, who was not on duty at the time, said the man looked nervous and sweating and carried a computer case. (App. p 17; T p 776).

At trial, Stetzer asked Terry and MHPD detective Lloyd Addis about their hearing test at the river. (Trial T pp 105-106, 140-141). Stetzer had conducted a similar test before trial with James and John Beatty. (T pp 708-710, 737-738). At the hearing, the Beattys testified that when one person stood at the crime scene, and the other stood at the fishing spot, they could not hear each other even when they "hollered." (T pp 709-710, 738). James Beatty was subpoenaed but never called to testify at trial. (T p 710).

Stetzer outlined the State's theory in his closing argument notes. (R pp 651-660; T pp 668-670).[20] He asserted that Ms. Yarmolenko went to the river to take photos of kayakers and caught Mr. Carver and his cousin "doing something they weren't supposed to be doing." (R p 655-656). The two men strangled her and pushed her car down the bank. (R p 656). When the car didn't go in the river, they threw her body in the water, which revived her. (R p 656). So, they strangled her with two more ligatures. (R p 656). Stetzer's notes described Ms. Yarmolenko as "soaking wet" and stated, "NOBODY's DNA other than IRA was found on the cord." (R pp 658-659).[21] Stetzer told

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[20] Opening and closing arguments were not recorded. (Trial T pp 33, 359).

[21] The Richland County (S.C.) Crime Lab conducted Y-STR testing of the ligatures, which targets the male Y chromosome. (R pp 490-492; App. pp. 69-96). The lab sent the results directly to the Gaston County District Attorney's office. (T p 437). In his notes, Stetzer wrote, "Y testing gave us nothing." (R p 650; T p 657). The Y-STR testing revealed that unknown male DNA was on the bungee cord and drawstring, with Mr. Carver and his cousin excluded as contributors. Those results were not included in any lab report. (R p 491; App. pp 86-87; T pp 629-634, 1152-1155).

the jury "there was no DNA on the ligatures other than Ms. Yarmolenko's because it was washed off in the river," Ratchford said. (T p 1156).

Mr. Carver was the last defense witness to testify at his hearing. (T p 1311). The following exchange took place on direct examination:

> "Q. Mr. Carver, did you ever see Ira Yarmolenko at the Catawba River, dead or alive?
> A. No, ma'am.
> Q. And where was the first time you saw [her] car?
> A. It was on TV, on the news.
> Q. Did you ever touch Ira Yarmolenko's car in any way?
> A. No, ma'am.
> Q. Did you ever go near her car when it was at the Catawba River?
> A. No, ma'am.
> Q. Did you ever touch Ira Yarmolenko in any way?
> A. No, ma'am.
> Q. Did your attorney try to convince you to admit that you touched the car?
> A. Yes, ma'am." (T pp 1312-1313).

D. The Trial Court Partially Granted Mr. Carver's MAR in June 2019

In the 12 June 2019 order, the trial court addressed five claims that Mr. Carver raised in his MAR. (R pp 165-175). The court denied Mr. Carver's claims that the State committed a *Brady* violation and misrepresented critical evidence at trial. (R pp 172, 174). The court also found that it lacked authority "to declare any defendant actually innocent" and denied Mr. Carver's actual innocence claim. (R pp 172, 174). The legislature enacted N.C. Gen. Stat. § 15A-1460, *et seq.*, to provide "a means in which a defendant can seek a finding of factual innocence," the court held. (R p 172). The court

concluded that an MAR was "not the proper legal vehicle," and Mr. Carver needed to go through the N.C. Innocence Inquiry Commission. (R p 172).

The court made findings of fact on Mr. Carver's ineffective assistance of counsel and newly discovered evidence claims. (R pp 166-172).[22] Based on those findings, the court held that Mr. Carver met his burden of proof and established both claims by a preponderance of the evidence. (R p 174). In turn, the court set aside Mr. Carver's first-degree murder conviction and granted him a new trial. (R p 175). The State appealed. (R pp 180-181).

STANDARD OF REVIEW

Upon review of a trial court's ruling on a motion for appropriate relief, the Court must determine whether the trial court's "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. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). If competent evidence supports a trial court's findings of fact, even when there is conflicting evidence, those findings are binding on appeal and cannot be disturbed unless the trial court abused its discretion. *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006). See also *State v. Rook*, 304 N.C. 201, 212, 283 S.E.2d 732, 740 (1981). Conclusions of law are reviewed *de novo*. *State v. Taylor*, 212 N.C. App. 238, 243-244, 713 S.E.2d 82, 86 (2011).

[22] The findings of fact and conclusions of law are discussed in detail in Issue I.

ARGUMENT

I. THE TRIAL COURT COMMITTED NO ERROR BY GRANTING MR. CARVER'S INEFFECTIVE ASSISTANCE OF COUNSEL AND NEWLY DISCOVERED EVIDENCE CLAIMS.

The trial court's findings of fact and conclusions of law established: (1) Mr. Carver's trial counsel prejudiced his defense by failing to investigate his medical condition, his intellectual limitations, and the State's touch DNA evidence; and (2) newly discovered evidence about advances in the interpretation of DNA mixtures, which the SBI (now State) Crime Lab had failed to adopt before Mr. Carver's March 2011 trial, exposed the only physical evidence in the State's case against him to be "doubtful at best." (R p 166-174). Thus, the court committed no error in granting Mr. Carver's Motion for Appropriate Relief (MAR) on the grounds of ineffective assistance of counsel and newly discovered evidence. (R p 175). The order vacating Mr. Carver's conviction and awarding him a new trial must be affirmed.

A. Ineffective Assistance of Counsel

The Sixth Amendment of the U.S. Constitution and Article I, Section 23 of the N.C. Constitution guarantee a defendant's right to effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561-563, 324 S.E.2d 241, 247-248 (1985). Because a defendant's access to an attorney's skill and knowledge is necessary to meet the prosecution's case, this right plays a crucial role in ensuring that the defendant receives a fair trial. *Strickland v. Washington*,

466 U.S. 668, 685 (1984). Thus, "[t]he essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair, and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). To establish an ineffective assistance claim, a defendant must show that his counsel's performance was (1) deficient and (2) prejudicial to his defense. *Strickland*, 466 U.S. at 687. See *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004) ("[t]he two-part test for ineffective assistance of counsel is the same under both the state and federal constitutions.").

Counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Id.*, 466 U.S. at 687-688. For guidance, this Court may turn to standards such as those promulgated by the American Bar Association. See *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (using *ABA Standards for Criminal Justice: Defense Function* § 4-4.1, 2d ed. 1982 Supp., to assess counsel's investigative efforts). Counsel's decisions are reviewed "in light of the information available to [counsel] at the time and not with the benefit of hindsight." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citing *Wiggins v. Smith*, 539 U.S. 510, 523 (2003)).

Prejudice exists where "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 court can consider the cumulative

effect of counsel's alleged errors. See *Williams v. Taylor*, 529 U.S. 362, 398-399 (2000). However, even an isolated error may violate a defendant's right to effective assistance "if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

1. Deficient Performance

The adversarial process "generally will not function properly unless defense counsel has done *some* investigation into the prosecution's case and into various defense strategies." *Kimmelman*, 477 U.S. at 384 (emphasis added). Here, Mr. Carver's ineffective assistance claim stems from his trial counsel's failure to investigate his medical condition, his intellectual limitations, and the State's touch DNA evidence. (R pp 39-46, 103-114).

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and 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 690-691. Simply put, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, 466 U.S. at 691. Thus, counsel's "particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

In *Wiggins*, the defendant claimed that his counsel's failure to investigate and present mitigating evidence of his dysfunctional background at his capital sentencing proceeding violated his right to effective assistance. *Wiggins*, 539 U.S. at 516. The Court held that the attorneys' decision to not expand their investigation beyond a pre-sentence investigation report (noting his "misery as a youth") and Department of Social Services records about his foster care fell short of professional standards which prevailed in Maryland at that time. *Id.*, 539 U.S. at 524. Even though standard practice for the state's capital defense attorneys was to prepare a social history report, and the public defender's office gave counsel funds to retain a social worker, counsel did not get a report. *Id.* Thus, they abandoned their investigation of the defendant's background "after having acquired only rudimentary knowledge of his history from a narrow set of sources," the Court held. *Id.*

Counsel's investigation was also unreasonable considering what they knew about the defendant's background, the Court held. *Id.*, 539 U.S. at 525. None of that evidence suggested that a mitigation case "would have been counterproductive, or further investigation would have been fruitless." *Id.* Because counsel ended their investigation at an "unreasonable juncture," it made a "fully informed decision with respect to sentencing strategy impossible." *Id.*, 539 U.S. at 527-528. The Court noted that counsel's failure to thoroughly investigate a mitigation strategy "resulted from inattention,

not reasoned strategic judgment." *Id.*, 539 U.S. at 526. Because counsel had not abandoned a mitigation defense until the court denied their bifurcation motion one day before sentencing, counsel had "every reason to develop the most powerful mitigation case possible" but failed to do so. *Id.*

However, in *Frogge*, our Supreme Court found that counsel's performance was adequate under *Wiggins*. *Frogge*, 359 N.C. at 245, 607 S.E.2d at 637-638. In a second trial and sentencing hearing, the defendant was convicted of first-degree murder and received the death penalty. *Id.*, 359 N.C. at 230, 607 S.E.2d at 628. The defendant filed an MAR, alleging his counsel provided ineffective assistance at his second sentencing proceeding by failing to get neurological testing of him and offer evidence that, at the time of the murders, he suffered residual effects of a head injury. *Id.*, 359 N.C. at 234, 607 S.E.2d at 631. If counsel had obtained the neurological testing, counsel would have been led to a qualified expert who could have testified on the head injury's role in the murders, the defendant claimed. *Id.*

The Court distinguished the defendant's case from *Wiggins*. The Court observed that counsel interviewed the defendant and his siblings and obtained his psychological reports and school, hospital, and correctional systems records. *Id.*, 359 N.C. at 241, 607 S.E.2d at 635. Counsel also watched the first trial unfold and saw how a mitigation strategy incorporating the head injury was unsuccessful. *Id.* By the defendant's second

trial, counsel had consulted with two experts – one whose performance they found unsatisfactory at the first trial, and a second expert whom counsel had worked with before and held a favorable opinion of – and neither one recommended neurological testing. *Id.* Thus, in contrast to *Wiggins*, the defendant's counsel made their decision after acquiring more than "only rudimentary knowledge of [the defendant's] history from a narrow set of sources," the Court held. *Id.*

Mr. Carver's case aligns more closely with *Wiggins* than *Frogge*. Thus, the trial court committed no error in concluding that Mr. Carver met his burden of proof and established his ineffective assistance claim. (R p 174). The court based its conclusion on findings of fact – fully supported by the evidence – which established that Mr. Carver's counsel failed to make reasonable decisions when they eschewed investigating his medical condition, his intellectual limitations, and the State's DNA evidence. (R pp 166-169).

First, the court found that Mr. Carver's counsel failed to obtain "***any***" medical records regarding his carpal and radial tunnel surgeries and other health issues or interview "***any***" family members or friends who could describe or discuss his physical limitations. (R p 167) (emphasis in original). Additionally, the court found that Mr. Carver's counsel failed to get "***any***" medical records or interview "***any***" family members or friends of Mr. Carver's cousin, who had suffered prior heart attacks and was limited in his physical

activity and ability. (R p 167) (emphasis in original). Their failure to investigate this area was "not reasonable," the court held, considering that Mr. Carver and his cousin were accused of strangling a healthy and seemingly fit young woman. (R pp 172-173).

Second, the court found that Mr. Carver's counsel failed to get a psychological evaluation for him despite requesting and getting approval from IDS to spend $4,000 for that purpose. (R p 168). Counsel also failed to interview or get any records from Dr. Shukla, the psychiatrist who treated Mr. Carver for several years before the murder and on the very day of the murder, or interview any family members about his intellectual limitations. (R p 168). In light of Mr. Carver's "obvious and apparent intellectual limitations," which the court observed in Mr. Carver's hearing testimony as well as in audio and video recordings, and the statements which Mr. Carver gave to investigators, it was "not reasonable" for counsel to fail to take those basic investigative steps, the court concluded. (R pp 168, 173).

Finally, the court found that counsel failed to "independently and adequately research, investigate and educate [themselves] on the science related to the one, key piece of evidence in this case" – the State's touch DNA evidence. (R pp 168-169, 173). The court noted that Ratchford consulted with an expert, Ostrowski, but had little information about him and no reports from him. (R p 168). Ratchford also did not learn about the revised SWGDAM

guidelines on DNA mixture interpretation or meet with or discuss the testimony of the State's DNA experts, Winningham and Hughes. (R p 168). He thus had no footing to challenge Ostrowski's opinions, including his assessment that the State's touch DNA evidence was "good science." (R pp 168-169).[23] The court concluded that counsel's failure to investigate this area was "not a reasonably supported professional judgment" in light of the key role of the State's DNA evidence as well as Mr. Carver's strenuous denial that he had any involvement in Ms. Yarmolenko's death. (R pp 173-174).

Similar to *Wiggins*, Mr. Carver's attorneys fell short of meeting prevailing professional standards. The court cited *ABA Standards for Criminal Justice: Defense Function* § 4-4.1(a), 3d ed. 1993 – the most recent edition at the time of his March 2011 trial. (R p 167). Under those standards, defense counsel "should conduct a prompt investigation of the circumstances of the case and *explore all avenues* leading to facts relevant to the merits of the case[.]" (emphasis added). By failing to obtain information about Mr. Carver's physical disability and limited mental capacity, and by failing to thoroughly investigate and educate themselves about the State's touch DNA evidence (which was a "relatively new and not as accurate" area of forensic science at that time, *Carver*, 221 N.C. App. at 128, 725 S.E.2d at 908), his

[23] Mr. Carver contends that Ostrowski partially based his assessment on Ratchford's stated belief that Mr. Carver touched the car. (R pp 617-618).

counsel did not "explore all avenues" which could have led to helpful evidence in his case. Their lack of investigation made it impossible for them to have made any "fully informed" decisions about their defense strategy. *Wiggins*, 539 U.S. at 527-528.

Mr. Carver's counsel also did not meet IDS standards. Ratchford failed to get a psychological evaluation for Mr. Carver even though "it was one of the things that IDS want[ed] counsel to do" and despite getting approval for $4,000 from IDS for that purpose. (T pp 1092-1093). This was no different from the defense counsel's failure in *Wiggins* to follow "standard practice" by obtaining a social history report even though they received funds for one. *Wiggins*, 539 U.S. at 524. Counsel did not get any of Mr. Carver's medical or mental health records or discuss their client's physical or mental health with the treating psychiatrist, Dr. Shukla. (T pp 65-66, 313, 1029-1030, 1097). By failing to adequately investigate the State's touch DNA evidence, they also failed to acquire "substantial familiarity" with the State's key piece of evidence as the Capital Defender required. (T p 1082).

As in *Wiggins*, counsel's lack of investigation was unreasonable considering what they knew about Mr. Carver's physical disability, limited mental capacity, and the role of the State's DNA evidence in his case. None of the information they had acquired suggested that pursuing a defense in those areas would have been "counterproductive," or that further investigation

would have been "fruitless." *Wiggins*, 539 U.S. at 525. They knew Mr. Carver received disability payments and suffered from carpal and radial tunnel syndromes, and his cousin had prior heart attacks – medical issues that were relevant to whether they could have committed the highly physical attack alleged by the State. (R pp 656, 661-662; T pp 1029-1030, 1263). They also knew Mr. Carver was "simple" and suffered from mental health issues, which would have been relevant to statements he gave to investigators in multiple interviews. (T pp 1059-1060). Ratchford was also aware that DNA was the only evidence linking Mr. Carver to the murder, and that Mr. Carver denied that he ever saw or touched Ms. Yarmolenko or her car. (R p 615; T pp 1109, 1176-1177). A full investigation of the State's DNA evidence was crucial.

The State attacks the trial court's order on several fronts. First, the State challenges the court's findings that Mr. Carver's counsel failed to obtain any information about his surgeries and health-related issues or to interview any of his family members. (Brief for the State p 22). Counsel testified that they were "aware" of Mr. Carver's carpal tunnel diagnosis and "claim of disability," and they said they "talked" with his family, which contradicted those findings, the State asserts. (Brief for the State p 22).

However, if competent evidence supports a court's findings, they are binding on appeal, even if there is conflicting evidence. *Rook*, 304 N.C. at 212, 283 S.E.2d at 740. Here, counsel admitted that they did not get Mr. Carver's

medical or mental health records or interview his psychiatrist. (T pp 65-66, 313, 1030, 1097). Also, seven of Mr. Carver's family members and friends stated that neither attorney interviewed them. (T pp 209-210, 240, 271, 290-291, 302, 317, 338). Therefore, the court did not abuse its discretion, and the court's findings are binding on appeal.

Furthermore, counsel's awareness of Mr. Carver's medical, intellectual, and mental health issues underscores why it was unreasonable for them to not get his medical records or interview his family. Counsel should have realized that "pursuing such leads was necessary to making an informed choice among possible defenses." *Wiggins*, 539 U.S. at 525. If Mr. Carver's counsel actually had talked with his family and friends, as the State claims, they would have learned that he could not lift heavy objects or grip even light items. (T pp 228-229, 239-240, 242, 269-270, 310, 329-330, 344-345). They also would have learned that he needed help with "anything physical." (T pp 228-229, 238-240, 246, 275, 284-285, 289, 301-302, 310, 334). If counsel had this information, "no strategic reason could [have been] given for [their] failure to investigate further" by obtaining his medical records. *United States v. Roane*, 378 F.3d 382, 411 (4th Cir. 2004), *cert. denied*, 546 U.S. 810 (2005).

Second, the State contends that "professional judgment" supported counsel's restricted investigation. (Brief for the State p 20). They made a "strategic decision" to not offer evidence of his disability and assume the

burden of proving he physically could not have committed the murder, and they could not "in good faith" raise his competency as an issue, the State claims. (Brief for the State pp 19-20, 23). Their decision to forego a psychological evaluation or interview Mr. Carver's psychiatrist should also be "understood in the context of the prejudice that would result from eliciting such evidence at trial," the State contends. (Brief for the State p 22). This argument strains credulity.

First, counsel abandoned their investigation of Mr. Carver's medical history based solely because of Ratchford's lay assessment that "[f]rom what I saw … he was not disabled," and Mr. Carver's ability to hunt, fish, and drive. (T pp 1096, 1103). Thus, they acted on "rudimentary knowledge" from a "narrow set of sources." *Wiggins*, 539 U.S. at 524. Their information about Mr. Carver's medical condition fell far short of the information counsel in *Frogge* collected before they abandoned a defense based on their client's head injury, which included the defendant's psychological, school, hospital, and correctional systems records, and interviews with the defendant and his siblings. *Frogge*, 359 N.C. at 241, 607 S.E.2d at 635.

Second, Mr. Carver's intellect was relevant to issues beyond competency. It was particularly relevant to statements he gave SBI agent Crow in the recorded 10 December 2008 interview. At trial, the State relied on Terry's testimony that, during the interview, Mr. Carver described Ms.

Yarmolenko as a "little thing" and indicated how tall she was relative to his body. (Trial T pp 196-198). However, in contrast, the video shows Crow calling Ms. Yarmolenko a "little girl" and "little ol' bitty thing" and demonstrating her height relative to his own body by putting his hand up to his eyes before urging Mr. Carver to "stand up and show me about how tall she was on you." (Defense MAR Exhibit No. 29 at 9:35, 23:27 to 23:37, 28:12, 28:37, 28:53 to 29:10). As McKinley testified, someone with Mr. Carver's IQ would likely repeat things without understanding them and simply agree to what others said. (T pp 129-130, 139-140). Thus, his limited mental capacity was relevant to whether Mr. Carver independently knew Ms. Yarmolenko's height or merely reacted to Crow's verbal and physical cues.

Third, if counsel had gathered information from Mr. Carver's medical records, interviewed his doctors and family members, and obtained a psychological evaluation, they were under no obligation to present it as evidence. If they offered none of it as evidence, they would not have been required to even disclose it in discovery. *See* N.C. Gen. Stat. § 15A-905(b). Counsel could have simply used the information to assess their strategy.

Finally, the State claims that counsel strategically chose to not introduce the video of the 10 December 2008 interview because it would have reinforced that Mr. Carver knew Ms. Yarmolenko's height and weight and potentially opened the door to “other, more prejudicial evidence.” (Brief for

the State pp 19, 22). The State points to Phillips' testimony that he did not want the jury to know Mr. Carver was a schizophrenic, and he once "fought" with his son for 45 minutes with a stick. (Brief for the State pp 11, 19).[24] However, this argument merely underscores that counsel made a choice about the video with only "rudimentary knowledge" from a "narrow set of sources." *Wiggins*, 539 U.S. at 524. Without a psychological evaluation, they did not know that someone with Mr. Carver's IQ could be susceptible to suggestive words and phrases such as those which Crow used when he asked Mr. Carver about Ms. Yarmolenko's size and height. Without interviewing or getting records from Mr. Carver's psychiatrist, Dr. Shukla, they did not know that he was a "well-controlled paranoid schizophrenic," complained of feeling pain in his arms and wrists "day and night," and struggled with asthma on the day of the murder. (App. pp 5-6; T pp 79-80). If they had interviewed family members, they would have learned that the "wrestling" incident with his son was accidental, and Mr. Carver could not "wrestle long because he has carpal tunnel[.]" (App. p 16; T pp 220-221, 231-234). Lacking this information, counsel simply was in no position to make an informed decision about the video and reasonably assess whether it was prejudicial.

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[24] Ratchford and Phillips discussed other issues about the video. The State raises only these two issues. Thus, the State has abandoned any additional issues for appellate review. N.C. R. App. P. 28(b)(6). See *State v. Hester*, 254 N.C. App. 506, 529, 803 S.E.2d 8, 24 (2017) (litigants "waive the arguments they fail to make").

The State further claims that the trial court erred by finding that Mr. Carver's counsel failed to adequately investigate, educate themselves, and become familiar with the State's touch DNA evidence. (Brief for the State p 22). The State suggests that counsel reasonably relied on Ostrowski, whom IDS "recommended." (Brief for the State p 22). However, the State presented no evidence that IDS recommended Ostrowski.[25] Even if IDS had recommended him, it was still counsel's duty to perform due diligence and assess whether Ostrowski was appropriate for the case. However, Ratchford did not get Ostrowski's CV or review his prior testimony. (T pp 1110, 1239, 1305-1306). He had no report from Ostrowski and could not recall taking notes in their meetings. (T pp 1110). Ratchford got only "very rudimentary" DNA instruction from Ostrowski, never interviewed the State's DNA experts, or consulted with any other expert. (T pp 1135-1136, 1240, 1301).

Thus, counsel lacked the ability to assess Ostrowski's opinion that the State's touch DNA evidence was "good science," he should not testify, and they should focus on "secondary transfer" in cross-examination of the State's DNA experts – a focus based on Ratchford's "suspicion" that his client lied

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[25] The current Forensic Resources Counsel website indicates that IDS merely provides a forensic expert database "compiled based upon the experts' appearance or work in prior cases or requests to be added … [which] … is not based on any assessment of whether an expert is qualified or is the appropriate expert for a specific case," and it instructs counsel to "do your own due diligence to evaluate the expert." See Forensic Resources, N.C. Office of Indigent Defense Services, at https://forensicresources.org/browse-all-experts/ (last visited 24 June 2020).

about not touching the car. This distinguishes Mr. Carver's case from *Frogge*, where counsel had obtained the defendant's records, interviewed him and his family, consulted with two experts (one whom they had worked with before), and seen how the first trial unfolded before they abandoned a head-injury defense. *Frogge*, 359 N.C. at 241, 607 S.E.2d at 635.

As in *Wiggins*, Mr. Carver's counsel failed to investigate the State's touch DNA evidence due to "inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. Counsel decided that Mr. Carver touched the car and did not explore the validity of the State's DNA evidence. (R pp 617-618; T pp 1109, 1157, 1313). Moreover, counsel failed to fully execute the "secondary transfer" strategy by not getting DNA samples of any officers who were at the crime scene, failing to ask all of Ostrowski's cross-examination questions, and failing to clarify Winningham's confusing testimony about "tertiary" and "secondary" transfer. (Trial T pp 289, 297-298, 306-307; T pp 1114, 1253-1255). Finally, and importantly, counsel failed to recognize that Y-STR DNA testing of the drawstring, the tightest ligature around the victim's neck, revealed DNA from an unidentified male, providing strong counter-evidence to the State's assertion to the jury that the only DNA on the murder weapons was Ms. Yarmolenko's. (App. p 87; T pp 1152-1155).

The trial court's findings and conclusions show that Mr. Carver's counsel provided deficient performance by failing to investigate his medical

condition, his intellectual limitations, and the State's touch DNA evidence. If counsel had truly waited until the close of the State's case to decide whether to put on evidence, as they claimed, then they would have had "every reason to develop the most powerful [defense] possible." *Wiggins*, 539 U.S. at 526. Thus, reasonable professional judgment could not have possibly supported their decision to not investigate those areas of his case. Thus, the court committed no error by holding that Mr. Carver met his burden of proof and established his ineffective assistance claim.

2. Prejudice

The State contends that the trial court did not understand "it was necessary for [Mr. Carver] to show that that, but for counsel's alleged errors, the result of the proceeding would have been different." (Brief for the State p 16). The State also asserts that the court "made no findings or conclusions regarding prejudice because there was none to find." (Brief for the State pp, 12, 16, 23). This argument is flawed.

First, the State misrepresents the prejudice standard. "*Strickland* and *Braswell* do not place on [a] defendant the burden of proving that the trial outcome would have been different." *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987). Instead, the defendant must show a "*reasonable probability* that, but for counsel's ineffective performance, the result of the proceedings would have been different." *Id.* (emphasis added). Under this

standard, “a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case," *Strickland*, 466 U.S. at 693. Rather, the defendant must show "a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694. The defendant meets this burden if he can demonstrate that "at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

Second, if this Court holds that the trial court’s findings on prejudice were insufficient to allow review, the proper remedy would be to remand this case for further findings of fact – not reverse the court’s order, as the State contends. *State v. Salinas*, 366 N.C. 119, 124, 729 S.E.2d 63, 67 (2012) (remand necessary where the court failed to make findings that allowed the reviewing court to apply the correct legal standard).

However, neither remand nor reversal are necessary. The court's findings and conclusions established that his counsel’s objectively unreasonable failure to investigate his case prejudiced Mr. Carver's defense. Sufficient investigation into his physical disability, limited mental capacity, and the State's touch DNA evidence would have revealed powerful defense evidence. There is a reasonable probability that a competent attorney would have chosen to present that evidence in an admissible form, and upon hearing the evidence, the jury would have reached a different result. See *Wiggins*, 539 U.S. at 534-536.

An investigation of Mr. Carver's medical condition would have revealed that he had multiple surgeries which failed to relieve pain in his wrists, arms, and shoulder and his doctor was considering another surgery. (R pp 450-451; App. pp 103-105; T p 1412). He actually felt pain, "day and night," and on the morning of the murder, he could not walk fast due to his asthma. (App. pp 5-6). Disability Determination Services found he had an actual – not "alleged" – disability. (R pp 448-467). Also, he could not do "anything physical" because of his strength and grip issues. (T pp 228-229, 238-240, 246, 275, 284-285, 289, 301-302, 310, 334). As the court noted, this evidence was relevant given the "force and strength necessary to overcome resistance by a victim of strangulation." (R p 173). There is a reasonable probability that a competent attorney would have used this evidence in direct or cross examination, and at least one juror would have found the State's theory of how Mr. Carver strangled Ms. Yarmolenko to be implausible, as would be any theory of strangulation by Mr. Carver.

The court also noted that evidence about Mr. Carver's intellectual limitations was relevant to his statements to SBI Agent Crow. (R p 173). If Mr. Carver's counsel had obtained a psychological evaluation of him, they would have learned that his "extremely low range" IQ made him susceptible to Crow's verbal and physical cues in the 10 December 2008 interview. (T pp 129-130, 139-140). This evidence would have supported that Mr. Carver did

not independently know Ms. Yarmolenko's height, merely agreed with Crow's description of her as a "little girl," and mimicked him when comparing her height to his height. Talking with family members and his psychiatrist also would have revealed that Mr. Carver was a "well-controlled schizophrenic," his son described the "wrestling" incident as an accident, and his disability prevented him from wrestling for a long period with his son. (App. p 16; T pp 220-221, 231-234). This evidence would have weakened – if not eliminated – any "prejudicial" effect from presenting the interview video.

Finally, as the court found, Mr. Carver's counsel was unaware of the revised 2010 SWGDAM guidelines. (R p 168). Even though the SBI Crime Lab had not adopted those guidelines at the time of Mr. Carver's trial, Dr. Noureddine testified that 75-80 percent of forensic labs nationally had done so, and the FBI had placed the guidelines on its website. (T pp 811-813, 879-880). "[E]verybody in DNA" knew about the revised guidelines after they came out, Boodee said. (T p 923). An investigation of the DNA evidence in Mr. Carver's case likely would have led to knowledge of these guidelines and the fact that Items 34-2 and 34-15 were "inconclusive." (R p 177; T pp 831-832). Any reasonably competent attorney would have found a way to present this evidence to the jury – through either direct or cross examination. After hearing evidence that the State's DNA evidence was flawed, and in the absence of any other physical evidence linking Mr. Carver to the murder,

there is a reasonable probability that "at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

3. Conclusion

In each instance, the failure of Mr. Carver's counsel to investigate his medical condition, his intellectual limitations, and the State's touch DNA evidence was "sufficiently egregious and prejudicial" to merit relief. *Murray*, 477 U.S. at 496. Cumulatively, their lack of investigation of those three areas "so upset the adversarial balance between defense and prosecution that [his] trial was rendered unfair, and the verdict rendered suspect." *Kimmelman*, 477 U.S. at 374. Thus, the trial court committed no error in holding that Mr. Carver met his burden of proof. The court's granting of Mr. Carver's ineffective assistance claim must be affirmed.

B. Newly Discovered Evidence

When a defendant raises a newly discovered evidence claim in an MAR pursuant to N.C. Gen. Stat. § 15A-1415(c), the defendant must establish:

> (1) that the witness or witnesses will give newly discovered evidence, (2) that such newly discovered evidence is probably true, (3) that it is competent, material and relevant, (4) that due diligence was used and proper means were employed to procure the testimony at the trial, (5) that the newly discovered evidence is not merely cumulative, (6) that it does not tend only to contradict a former witness or to impeach or discredit him, (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will

> prevail. *State v. Hall*, 194 N.C. App. 42, 48-49, 669 S.E.2d 30, 35 (2008), *rev. denied*, 363 N.C. 377, 679 S.E.2d 393 (2009).

Here, the trial court's findings supported its conclusion that Mr. Carver satisfied all seven factors, met his burden of proof, and established his newly discovered evidence claim. (R pp 169-172, 174, 176-179). Thus, the court made no error in granting Mr. Carver's MAR on this basis. (R pp 174-175).

First, the court concluded that a witness would give newly discovered evidence, or "evidence which was in existence but not known to a party at the time of trial." *State v. Nickerson*, 320 N.C. 603, 609, 359 S.E.2d 760, 763 (1987). Contrary to the State's assertion, the court did not find Dr. Noureddine's 20 November 2016 report to be the newly discovered evidence. (Brief for the State pp 14-16, 20-23). Instead, the court accepted, adopted, and incorporated his report, opinions, and conclusions "as facts for the purposes of supporting this Order." (R p 171). In his report and testimony, Dr. Noureddine discussed the newly discovered evidence – advances in DNA mixture interpretation which the SBI Crime Lab failed to adopt until two years after Mr. Carver's March 2011 trial. (R pp 176-179). The court recognized that Mr. Carver had asked in his MAR for the court to find those advances to be the newly discovered evidence. (R pp 110, 169).

Dr. Noureddine testified that SWGDAM published new guidelines for DNA mixture interpretation in April 2010, one year before Mr. Carver's trial.

(R p 177; T pp 811-812). Although the guidelines were not to be applied retroactively, Dr. Noureddine noted that the SBI Crime Lab issued reports on the touch DNA evidence implicating Mr. Carver *after* the guidelines came out. (R pp 476-481; T pp 877-878, 889). The guidelines called for labs to use a stochastic threshold when interpreting DNA mixtures in order to ensure "more accurate and objective" results. (R p 177). When the SBI Crime Lab analyzed the touch DNA evidence in Mr. Carver's case – specifically Items 34-2 and 34-15 – it had not adopted a stochastic threshold, Dr. Noureddine noted. (R p 177; T p 832). When Dr. Noureddine used a stochastic threshold, he found that Item 34-2 should have been deemed "inconclusive" rather than matching Mr. Carver's DNA profile, as the SBI Crime Lab had found. (R p 177). He also found that Item 34-15 should have been deemed "inconclusive" due to the low quality of the sample. (R p 178; T pp 853-857).

As the court found, Mr. Carver's counsel never discussed the SWGDAM guidelines with Ostrowski, and he was not aware of them. (R p 170). Furthermore, the State's only DNA expert to testify at the evidentiary hearing, DeHaan, stated that Ostrowski may not have known of the guidelines. (R p 171). Thus, the trial court's findings established that the SBI Crime Lab's failure to adopt advances in DNA mixture interpretation was evidence that was "in existence but not known" to Mr. Carver at the time of trial. *Nickerson*, 320 N.C. at 609, 359 S.E.2d at 763.

The court also held that the newly discovered evidence, as documented in Dr. Noureddine's report, was "probably true," which satisfied the second factor. (R p 174). The court correctly found that the State did not present any evidence at the evidentiary hearing which contradicted Dr. Noureddine's opinion that the State's DNA evidence was scientifically invalid. (R pp 170-171). In fact, DeHaan testified that she prepared a "response" to Dr. Noureddine's report that was not an "opinion of his opinion." (T pp 1486).

The advances in DNA mixture interpretation which Dr. Noureddine discussed in his report were "competent, material and relevant" and met the third factor. The State's touch DNA evidence was the only physical evidence which linked Mr. Carver to Ms. Yarmolenko's murder, making it the "lynchpin and basis" for his conviction, as the court found. (R p 171). The scientific baselessness of the State's touch DNA evidence thus had a direct bearing on issues at Mr. Carver's trial. If the State's key evidence was revealed to be "doubtful at best" at another trial, as the court found, a different result probably would be reached, satisfying the seventh factor. (R pp 172, 174). The trial court noted that this Court relied on the State's touch DNA evidence in previously upholding Mr. Carver's conviction. (R p 171).

With regard to the fifth factor, the trial court concluded that Mr. Carver's evidence of advances in DNA mixture testing, analysis, and interpretation was not cumulative. (R p 174). Mr. Carver's counsel cross-

examined Winningham at trial about secondary transfer of DNA, but he never questioned her about the validity of the State's touch DNA evidence in light of the revised SWGDAM guidelines. (Trial T pp 297-298).

As for the sixth factor, the court's findings supported its conclusion that evidence of a shift in DNA mixture interpretation standards would not have merely contradicted, impeached, or discredited the State's DNA experts. It would have exposed the State's touch DNA evidence to be, as Dr. Noureddine found, "scientifically baseless." (R p 177; T pp 830-832). Because that DNA evidence served as the only physical evidence linking Mr. Carver to the crime, it would have "completely undermined the credibility of the State's entire theory of the case." *State v. Peterson*, 228 N.C. App. 339, 346, 744 S.E.2d 153, 159, *disc. review denied*, 367 N.C. 284, 752 S.E.2d 479 (2013).

Finally, the State asserts that the trial court "simply omitted the fourth factor: that due diligence was used and proper means were employed to procure the testimony at trial." (Brief for the State p 29). Although the court found "in place of this factor" that Mr. Carver's counsel was unaware of the revised 2010 SWGDAM guidelines, it does not mean that the information was unavailable, or his counsel was ineffective for not seeking it, the State contends. (Brief for the State p 29). However, the SBI Crime Lab recognized the invalidity of the DNA mixture interpretation methods it used in Mr. Carver's case when, in 2013, it finally adopted the revised SWGDAM

guidelines. Even if Mr. Carver's counsel had used "due diligence" and "proper means," they could not have discovered the lab's 2013 shift in methods before his 2011 trial. See, in contrast, *State v. Rhodes*, 366 N.C. 532, 538, 743 S.E.2d 37, 40-41 (2013) (information implicating defendant's father was available to defendant before his conviction).

If Mr. Carver's counsel was unaware of the revised 2010 SWGDAM guidelines, their ignorance was necessarily due to either the information being unavailable at the time or their failure to use "due diligence" and employ "proper means" to obtain and present it. *State v. Britt*, 320 N.C. 705, 713, 360 S.E.2d 660, 664 (1987). If counsel failed to act with due diligence, the only conclusion would be that they provided deficient representation.

The State claims that the "proper vehicle" for Mr. Carver to challenge the reliability of the State's DNA evidence is through a motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269. (Brief for the State pp 29-30). However, the evidence does not require re-testing. It simply needs to be correctly interpreted under the advanced standards that the SBI Crime Lab had failed to adopt at the time of his trial, which Dr. Noureddine documented in his report. Moreover, "nothing precludes [this Court] from reviewing … post-conviction DNA test results as newly discovered evidence" pursuant to N.C. Gen. Stat. § 15A-1415(c). *State v. Howard*, 247 N.C. App. 193, 205, 783 S.E.2d 786, 794 (2016).

C. Conclusion

The trial court's findings supported its conclusions that Mr. Carver met his burden of proof and established his ineffective assistance and newly discovered evidence claims by a preponderance of the evidence. (R p 174). The court committed no error in granting Mr. Carver's MAR on those grounds. (R p 175). The court's order granting both claims must be affirmed.

II. THE TRIAL COURT ERRED BY DENYING MR. CARVER'S *BRADY* VIOLATION AND MISREPRESENTATION OF CRITICAL EVIDENCE CLAIMS.

When a trial court holds an evidentiary hearing on the claims raised in an MAR, N.C. Gen. Stat. § 15A-1420(c)(4) requires the court to make findings of fact. The purpose of requiring findings of fact is to allow the reviewing court to determine "whether the trial court's conclusions of law are supported by the evidence." *State v. Leach*, 227 N.C. App. 399, 406, 742 S.E.2d 608, 612-613, *rev. denied*, 367 N.C. 222, 747 S.E.2d 543 (2013) (citing *State ex rel. v. Williams*, 179 N.C. App. 838, 839, 635 S.E. 2d 495, 497 (2006)). See *Frogge*, 359 N.C. at 240, 607 S.E.2d at 634 (reviewing court must determine whether the trial court's findings of fact support its conclusions of law). Where the trial court fails to make required findings of fact, the proper remedy is to remand to the trial court. See *Salinas*, 366 N.C. at 124, 729 S.E.2d at 67.

Here, Judge Bragg presided over the nine-day evidentiary hearing in April 2019. (R p 166). At the hearing, Mr. Carver presented substantial

evidence in support of his *Brady* violation and misrepresentation of evidence claims. However, the trial court denied both claims without any oral or written findings of fact regarding this evidence. (R p 174; T p 1599). The court merely concluded that Mr. Carver failed to establish the claims by a preponderance of the evidence. (R p 172; T p 1599).

The court's only "findings of fact" which addressed either claim was that "the defense failed to meet its burden of proof." (R p 172; T p 1599). However, those findings required the exercise of judgment or application of legal principles, and thus, they were conclusions of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675-676 (1997). See also *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) (the trial court's classification is "not determinative, and, when necessary, the appellate court can reclassify an item[.]") Therefore, the trial court erred by failing to make the findings of fact required by N.C. Gen. Stat. § 15A-1420(c)(4). His case should be remanded. *Salinas*, 366 N.C. at 124, 729 S.E.2d at 67.

Assuming, *arguendo*, that the trial court's findings of fact were sufficient, they lacked the support of competent evidence and amounted to an abuse of discretion. The court's denial of both claims would require reversal.

To establish a *Brady* violation, Mr. Carver needed to show: (1) The prosecution suppressed evidence; (2) the evidence was favorable to his defense; and (3) the evidence was material to an issue at his trial. *State v.*

McNeil, 155 N.C. App. 540, 542, 574 S.E.2d 145, 147 (2002), *disc. rev. denied*, 356 N.C. 688, 578 S.E.2d 323 (2003). See also *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (the duty of disclosure applies to evidence "known only to police investigators"). Mr. Carver presented evidence that Angel Beatty gave information to an MHPD officer on 5 May 2008 which inculpated another person in Ms. Yarmolenko's murder – a man whom she saw running from the Water's Edge area near the crime scene, and who matched Officer's Wright description of a suspect. (R pp 734-735; App. p 17; T pp 744-750, 776). In a 5 May 2008 e-mail, Sgt. Skidmore of the MHPD stated that he talked with Beatty but made no mention that she saw the man. (App. p 29). Detective Terry, the MHPD's lead investigator, had no policy which required officers to document their interviews about the case. (T p 512). His investigative report did not mention Beatty's information. (R pp 258-270). Thus, Mr. Carver established that the MHPD failed to disclose to prosecutors or defense counsel material evidence which was favorable to his defense.

Mr. Carver also presented substantial evidence that the State violated his due process rights by knowingly misrepresenting critical evidence at his trial. See *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *State v. Boykin*, 298 N.C. 687, 693-694, 259 S.E.2d 883, 887-888 (1979), *cert. denied*, 446 U.S. 911 (1980). First, he presented evidence that the State knowingly mispresented that Ms. Yarmolenko was found "soaking wet," even though Terry admitted

that neither he nor any other officer ever documented that she was in a wet condition. (R pp 258-270, 658; Trial T p 118; T pp 460, 463). Second, Mr. Carver presented evidence that the State knowingly elicited false testimony from Detective Workman of the GCPD that fingerprint lifts from Ms. Yarmolenko's car were of "no value" and could not be compared to Mr. Carver or "anybody." (Trial T pp 224-226, 242-243; T pp 572-573). Third, Mr. Carver's evidence established that the State knowingly misrepresented at trial that, from the spot where Mr. Carver fished on 5 May 2008, one could hear people at the crime scene talking in "normal" voices and tossing "small rocks" into the water. (Trial T pp 105-106, 140-141; T pp 708-710, 737-738). The lead prosecutor, Stetzer, conducted the test, himself, before trial, and he knew the detectives' testimony about their hearing test could not have been true. (T pp 708-710, 737-738). Fourth, the evidence established that the State knowingly misrepresented to the jury that Mr. Carver and Mr. Cassada were motivated to murder Ms. Yarmolenko because she took pictures of them "doing something they weren't supposed to be doing." (R p 655-656). The State supported its theory of the case with evidence that her camera advanced to two exposures. (R pp 655-656; Trial T pp 134-135). However, at the hearing, Terry admitted he knew the counter could advance without film. (R pp 255, 493; T p 449). Finally, evidence showed that the State told the jury in closing that "NOBODY's DNA other than IRA was found on the cord"

despite knowing that the SBI Crime Lab found additional alleles on the bungee cord, and Y-STR testing by the Richland (S.C.) Crime Lab revealed unknown male DNA on both the drawstring and bungee cord. (R pp 471, 650; App. pp 86-87; T pp 629-531, 657). See *Berger v. United States,* 295 U.S. 78, 88-89 (1935) (probable cumulative effect of prosecutorial misconduct upon the jury, including improper suggestions in closing arguments, could not be disregarded as inconsequential).

The State's evidence provided a false explanation for why Mr. Carver's DNA would have been found on Ms. Yarmolenko's car even though his DNA was not on any ligatures, and his fingerprints were not on the car. It also undermined the credibility of Mr. Carver's statement to investigators that he neither saw nor touched Ms. Yarmolenko or her car and only heard a scraping sound at the river. (R p 417; Trial T p 196). Thus, there is a "reasonable likelihood" that this false evidence could have affected the jury's judgment. *State v. Sanders*, 327 N.C. 319, 336, 395 S.E.2d 412, 424 (1990), *cert. denied*, 498 U.S. 1051 (1991).

Accordingly, the portion of the trial court's order denying Mr. Carver's *Brady* violation and misrepresentation of critical evidence claims should be remanded to the trial court for further findings of fact. Should this Court find the trial court's findings of fact to be sufficient, the court's denial of both claims must be reversed due to their lack of evidentiary support.

III. THE TRIAL COURT ERRED BY HOLDING THAT IT LACKED LEGAL AUTHORITY TO RULE ON MR. CARVER'S ACTUAL INNOCENCE CLAIM.

Where a statute's language is "clear and unambiguous," a court has no need to engage in statutory construction and must "apply the statute to give effect to the plain and definite meaning of the language." *In re Nantz*, 177 N.C. App. 33, 40, 627 S.E.2d 665, 670 (2006). Here, N.C. Gen. Stat. § 15A-1417(a)(1)-(4) permits a trial court to grant relief in an MAR that includes a new trial, dismissal of charges, referral of factual innocence claims to the N.C. Innocence Inquiry Commission (NCIIC), or "[a]ny other appropriate relief." By including a catch-all provision in N.C. Gen. Stat. § 15A-1417(a)(4), the statute clearly and unambiguously gives a trial court broad authority to grant "[a]ny other appropriate relief" in addition to relief "specifically enumerated in the statute." *State v. Roberts*, 351 N.C. 325, 327, 523 S.E.2d 417, 418 (2000). The statute contains no term such as "shall" which mandates referral of innocence claims to the NCIIC. *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979). Thus, under the plain language of N.C. Gen. Stat. § 15A-1417(a)(4), the court had legal authority to declare Mr. Carver factually innocent. The court erred by holding otherwise and concluding an MAR was the only "proper legal vehicle" for his innocence claim. (R pp 172).

Should this Court view N.C. Gen. Stat. § 15A-1417(a)(1)-(4) to be unclear or ambiguous, this Court would interpret the statute by looking to indicia of legislative intent, including:

> "the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means … Statutory provisions must be read in context[,] [and those] dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each. *State v. McCravey*, 203 N.C. App. 627, 638-639, 692 S.E.2d 409, 418-419 (2010) (citing *Trayford v. N.C. Psychology Bd.*, 174 N.C. App. 118, 123, 619 S.E.2d 862, 865 (2005)).

North Carolina enacted the N.C. Innocence Inquiry Commission Act in 2006 in response to several highly publicized wrongful convictions. Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 Duke Law Journal 1345, 1356-1357 (2007). (App. pp 143-144). The act was codified in N.C. Gen. Stat. § 15A-1460, *et seq.*, or Article 92, and led to the NCIIC's formation. See S.L. 2006-184. The Act's express purpose was to "expeditiously" address "claims of factual innocence supported by verifiable evidence not previously presented at trial or at a *hearing granted through postconviction relief*." *Id.* (emphasis added). Thus, the legislature intended for claims pursued through the NCIIC to serve

as an alternative vehicle for seeking relief based on factual innocence but not as the only "proper legal vehicle," as the court held. (R p 172).

The legislature's intent for an NCIIC claim to serve as one option – but not the sole option – for factual innocence claims can also be gleaned from N.C. Gen. Stat. § 15A-1411(d). The statute provides that a claim of factual innocence asserted through the NCIIC "does not constitute a motion for appropriate relief and does not impact rights or relief provided for" in Article 89 ("Motion for Appropriate Relief and Other Post-Trial Relief"). Additionally, under N.C. Gen. Stat. § 15A-1470(b), a factual innocence claim asserted through the NCIIC "shall not adversely affect the convicted person's rights to other postconviction relief."

Finally, to interpret N.C. Gen. Stat. § 15A-1417(a)(3a) as requiring a trial court to refer all factual innocence claims to the NCIIC could lead to absurd consequences and violate a fundamental rule of statutory construction. *State v. Spencer*, 276 N.C. 535, 547, 173 S.E. 2d 765, 773 (1970). Mr. Carver's case presents that scenario. He offered evidence of his factual innocence at his evidentiary hearing, including evidence that the State's touch DNA evidence – the key evidence in his conviction – was "highly erroneous and scientifically baseless." (R p 177; T p 832). Because he presented that evidence "at a hearing granted through postconviction relief," his case could not meet the definition of a "claim of factual innocence" under

N.C. Gen. Stat. § 15A-1460(1). Thus, the NCIIC would be statutorily barred from reviewing his case. Certainly, the legislature did not intend for a defendant claiming factual innocence to face such a consequence.

Thus, the trial court erred when it concluded that it lacked legal authority to rule on Mr. Carver's innocence claim in his MAR and denied it on that basis. (R pp 172, 174). Because the court failed to make any findings which addressed the factual basis for Mr. Carver's claim, the proper remedy would be to vacate the portion of the court's order denying the claim and to remand his case for reconsideration in light of controlling law. See *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 38, 591 S.E.2d 870, 894 (2004) ("rather than usurping the trial court's role by making a privity determination on the basis of a cold record, we deem it advisable to reserve this factual question for the trial court to address on remand.").[26]

CONCLUSION

For the foregoing reasons and authorities, the Defendant-Appellee, Mr. Mark Bradley Carver respectfully requests that this Court: (1) Affirm the trial court's order granting the ineffective assistance of counsel and

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[26] In *State v. Williams, et al.*, No. 00 CRS 65084-85; 00 CRS 65087; 01 CRS 6334-35 & 03 CRS 00093 (Buncombe County Superior Court, 30 September 2015), the court found it had authority to rule on the defendants' innocence claims, noting that, pursuant to N.C. Gen. Stat. § 15A-1411(d), a claim of factual innocence before the NCIIC does not constitute an MAR or impact a defendant's right to seek relief through an MAR. (App. pp 138-149).

newly discovered evidence claims raised in his Motion for Appropriate Relief; (2) reverse the court's ruling on his *Brady* violation and misrepresentation of evidence claims or, in the alternative, remand for findings of fact on those claims; and (3) remand his actual innocence claim for findings of fact.

Respectfully submitted, this 27th day of July 2020.

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CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(j)(2)

Undersigned counsel hereby certifies that this Brief complies with N.C. R. App. P. 28(j)(2) and this Court's 2 July 2020 Order in that it is printed in 13-point Century font and contains no more than 14,000 words in the body of the Brief, footnotes and citations included, as indicated by the word-processing program used to prepare this Brief.

This 27th day of July 2020.

s/Electronically filed

Christine C. Mumma

s/Electronically filed

Guy J. Loranger

ATTORNEYS FOR DEFENDANT-APPELLEE

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellee's Brief has, on this date, been filed in the North Carolina Court of Appeals by electronic delivery.

I further hereby certify that a copy of the above and foregoing Brief has, on this date, been duly served upon the State-Appellant, by electronic mail as permitted by N.C. R. App. P. Rule 26(c) addressed to:

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On this 27th day of July 2020.

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