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STATE OF NORTH CAROLINA
COUNTY OF MONTGOMERY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
99 CRS 3818 & 99 CRS 3820

MONTGOMERY CO., C.S.C.
BY

STATE OF NORTH CAROLINA)
)
v.)
)
SCOTT DAVID ALLEN)
)

SUPPLEMENTAL MOTION FOR APPROPRIATE RELIEF (Under Seal)[1]

Defendant Scott David Allen amends and supplements his pending claims set forth in the Motion for Appropriate Relief filed on July 2, 2007 ("MAR"), submitting the following:

Exhibit 6, Affidavit of Dolly Ponds[2]

Exhibit 41, Affidavit and Report of Gregg O. McCrary

Exhibit 42, Affidavit of Troy D. Spencer

Exhibit 43, Affidavit of Robert Gray Johnson

Exhibit 44, Affidavit of Christina Fowler Chamberlain

Exhibit 45, Affidavit of Joseph B. Loflin

Exhibit 46, Affidavit of Larry Smith

Exhibit 47, Affidavit of Joyce Allen

[1] This Supplemental MAR is being filed under seal pursuant to this Court's Order dated March 7, 2007, because it contains identifying information about jurors who served at the trial of this case. In addition, the medical and mental health records of Vanessa Smith, marked as Exhibit 50, the Affidavit of Dr. John F. Warren, marked as Exhibit 51, and related discussion and argument cannot be disclosed to persons other than those listed in this Court's Order dated July 1, 2007.

[2] There were 40 Exhibits filed with the original MAR. The Affidavit of Dolly Ponds was marked and filed as Exhibit 6, but due to clerical error, page 3 of the affidavit was omitted from some service copies. Although corrected copies of Exhibit 6 were subsequently served on all parties, counsel are filing a new copy of the complete affidavit for the convenience of the Court and parties.

Exhibit 48, Affidavit of Lois Lawson

Exhibit 49, Letter to trial counsel from Troy Spencer

Exhibit 50, Vanessa Smith's medical and mental health records

Exhibit 51, Affidavit of Dr. John F. Warren

Exhibit 52, Affidavit of [redacted]

Exhibit 53, Statement of Robert Gray Johnson

Exhibit 54, Affidavit of Gladys Byrd Barclay

Exhibit 55, Affidavit of [redacted]

SUPPLEMENT TO CLAIM I

THE PRESENTATION OF FALSE AND MISLEADING EVIDENCE BY THE PROSECUTOR VIOLATED SCOTT ALLEN'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE RULE IN *NAPUE V. ILLINOIS*.[3]

Allen supplements Claim I of the original MAR with the following extension of the arguments and evidence set forth in that claim:

The gravamen of Claim I is that the State constructed its case against Scott Allen based on perjured testimony by the State's chief witness, Vanessa Smith, misleading testimony by other, self-interested witnesses induced by plea arrangements, and representations of fact contradicted by physical evidence in the case

[3] On direct appeal, Scott Allen's counsel assigned error to the prosecution's use of two portions of Vanessa Smith's false testimony: 1) that she and Allen waited seven to eight hours in the Uwharrie Forest for the victim to die, and 2) that she "heard, I'm assuming it was Chris empty his gun out." *State v. Allen*, 360 N.C. 297, 305, 626 S.E.2d 271, 279 (2005). While expressing doubt about the credibility of Vanessa Smith and the story she told the jury, the North Carolina Supreme Court ruled that the prosecution "could have truly believed" those portions of the testimony. *Id.* at 306; 626 S.E.2d at 279-80. This post-conviction claim is based upon evidence not available to the Court on direct appeal.

and related forensic testing. MAR, pp. 26-34.

Gregg McCrary is a retired FBI Special Agent with over forty years of experience examining crime scenes, conducting investigations of homicides and other violent crimes, consulting with law enforcement agencies, and teaching at the FBI Academy and other institutions. *See* Exhibit 41, Affidavit and Report of Gregg O. McCrary, with attached resume. Agent McCrary has reviewed the testimony of Vanessa Smith, the descriptions of the crime scene reported by law enforcement, the crime scene and autopsy photographs produced to post-conviction counsel, police incident reports and numerous other documents relevant to this case. He concludes, based on his vast experience and the physical and forensic facts available to the prosecution at trial, that the shooting of Christopher Gailey could not possibly have occurred in the manner described by Vanessa Smith:

> Ms. Smith's purported scenario that they were on the way to retrieve guns to sell to get cash to buy cocaine is questionable. Ms. Smith further asserted that they already possessed enough cocaine for both Scott Allen and Chris Gailey to use, which she claims they did as they hiked through the woods that evening. Also, with over $1,900 in cash on or near his body, it is clear that Chris Gailey had enough cash to buy cocaine...
>
> Ms. Smith testified that hours after having been fatally shot, the victim managed to repeatedly fire his handgun. This assertion is unfathomable. It is contrary to the medical examiner's finding that the victim died relatively quickly after having suffered two massive shotgun wounds. Also, if the victim had managed to repeatedly fire his

> .45-caliber semi-automatic handgun either before or after being shot, one would expect to find spent .45-caliber shell casings at the scene. Except for a single empty casing found in the chamber, there were none.
>
> Ms. Smith alleged that the shooting occurred while the three of them walked down the trail. However, the fact that the victim's shirt was placed on a rock with another rock on top is more consistent with the victim having taken a break from hiking when the confrontation occurred. It appears that the rock on top of the shirt is more likely to have been placed there rather than randomly coming to rest there after having been thrown.
>
> As noted above, Ms. Smith told investigators that Chris Gailey never got his gun out. However, the weapon was out and had been fired. Also, as noted above, loose live rounds were on the ground near his ammo pouch, which contained additional live .45 caliber rounds. Additionally, a magazine with live .45-caliber rounds was found on the ground near the body and a small nylon holster was recovered 13 feet from the Gailey's head. These facts refute Ms. Smith's assertion that Mr. Gailey was assassinated in cold blood, never having got his gun out.

Id., at 6-7 (footnotes omitted).

In short, it is Agent McCrary's opinion that the jury relied on false and misleading testimony by Vanessa Smith to find Allen guilty of first degree murder, and that "the totality of the evidence at the scene...significantly contradicts and discredits Ms. Smith's story...." *Id.*, at 11. It is also his opinion that the physical and forensic evidence shows a very different kind of confrontation, one resulting in a "gunfight and not the execution style murder alleged by Ms. Smith...." *Id.*, at 7.

Additional post-conviction investigation has also shown that

the District Attorney ignored readily available witnesses who knew that Vanessa Smith was lying about the events of July 9, 1999. Smith told Troy Spencer, her boyfriend and roommate prior to Allen's trial, that she, not Allen, shot Christopher Gailey:

> On several occasions, Vanessa insinuated that it was her, not Scott, who pulled the trigger and killed Chris Gailey. In fact, one time she said, "that [expletive deleted] couldn't even do it and I had to do it myself." Those are her exact words.

Exhibit 42, Affidavit of Troy D. Spencer, at ¶ 11.

Smith also disclosed her motive for killing Gailey to Mr. Spencer:

> She also told me that she wanted the "big bag of cocaine" and "big roll of cash" that Chris Gailey always carried. She said it was her idea to jump Gailey and take it, and that Scott didn't want to hurt Chris. She planned it all, not Scott.

Id.

The State knew that Smith had moved in with Spencer prior to trial, since he helped make the arrangements for her house arrest and she continued to wear an electronic monitoring device at trial. *Id.*, at ¶¶ 3-5. Spencer also knew that, contrary to the prosecution's closing argument, Smith did not abandon her pattern of severe substance abuse, prevarication and manipulation following her arrest in 1999. *Id.*, at ¶¶ 6-7, 10, 12. She was not, in short, the sober

and reformed eyewitness portrayed to the jury.[4] Tr. Vol. 7, p. 1511; Tr. Vol. 11, p. 2233.[5]

Robert Gray Johnson, another witness known by the prosecution and law enforcement, also directly contradicts Vanessa Smith's testimony about the night of July 9-10, 1999:

> On Friday, July 9, 1999, I saw Chris, Scott and Vanessa leave the trailer about 8:00 or 9:00 p.m. It was already starting to get dark. They left in a low-rider truck owned by Danny Lanier, who also lived at the trailer. Chris had his pistol; he took that pistol with him everywhere he went. *I didn't see anyone else with a firearm, certainly not a shotgun, but think Chris had a flashlight.* Both Chris and Scott had on camouflage pants and dark shirts. Vanessa had on a dark shirt and dark pants.

Exhibit 43, Affidavit of Robert Gray Johnson, at ¶ 6 (emphasis supplied).

Johnson was interviewed by law enforcement and testified during the prosecution's case-in-chief. Tr. Vol. 7, pp. 1450-1471, 1482-1506. Although he told Lieutenant Christopher Poole of the Montgomery County Sheriff's Office that Gailey's estranged business partner, Dustin Maness, may have been in the Uwharrie Forest on the night of the murder, neither Johnson nor his "source," Michael Simpson, were called to testify on that point. *See* Exhibit 53, Statement of Robert Gray Johnson dated July 18, 1999, at 000914.

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[4] *Cf.* Exhibit 6, Affidavit of Dolly Ponds, filed herewith, at ¶ 11.

[5] References to the trial transcript throughout this Supplemental Motion for Appropriate Relief appear in the format, "Tr. Vol. __, pp. __-__."

Moreover, Johnson knew that Gailey's sawed-off shotgun, which the prosecution contended Allen used to kill Gailey, was left in the closet of his bedroom. Exhibit 43, Affidavit of Robert Gray Johnson, at ¶ 15. According to Johnson, Allen left on the expedition into the Uwharrie Forest on July 9, 1999, which the State contended he planned for days with murderous intent, completely unarmed. *C.* State's closing argument, Tr. Vol. 11, pp. 2199, 2213.

Christina Fowler Chamberlain, who knew Scott Allen in high school and while attending college in Wilmington, also knew that Vanessa Smith's version of events was fictional, since she and Allen had spent substantial time together on July 8, 9 and 10 of 1999. In fact, Allen spent most of the night of the shooting, Friday, July 9th, at Ms. Chamberlain's house, and not in the Uwharrie Forest with Ms. Smith:

> In late June, 1999, Scott called me and told me he was returning from out West. He came to my house about a week later, which was the Thursday after the Fourth of July holiday. Scott told me he had been on vacation. He stayed for two nights. All he had with him was a black duffle bag. I know it was Thursday, because it was my first day back at work after the holiday.
>
> When Scott arrived at my house, I told him that I had to go to work and could not stay and hang out. I was working at the Badin Lake Boat and Tennis Club, and had to be at work between five and six p.m. on that Thursday. Scott was at the house when I left for work. I returned to the house between midnight and two a.m. Friday morning, and found Scott sound asleep on the

> couch. I left and spent the night with a friend, Tonya Monk, who also worked at the club.
>
> I went back to my house around noon that Friday and found that Scott had left. I knew he would be back because he had left his duffle bag. He came back later that afternoon, and we hung out together until I left for work between five and six p.m. *When I returned home around one or one-thirty a.m. on Saturday morning, I found Scott was again asleep on the couch. I woke him up and we talked for a little while.* He did not seem intoxicated. I went on to bed, and sometime later he came into my room and crawled into bed with me. Scott was gone when I awoke. I do not know what time I woke up, but it was light outside.

Exhibit 44, Affidavit of Christina Fowler Chamberlain, at ¶¶ 11-13 (emphasis supplied).

According to Ms. Chamberlain, there were a number of other witnesses that the District Attorney should have interviewed before presenting Vanessa Smith's story, unvarnished, to the jury:

> I remember several other visitors to my house during the time of Scott's visit in 1999. Sometime during Scott's visit I remember a large, silver or light blue car pulling up in my driveway with three people inside. The male driver and male front seat passenger switched places. One of the men was tall with dark hair. I do not recall seeing Scott on that occasion. Another visitor during this time was Scott's friend, Amy Little, who came by my house and saw Scott on the Friday after the Fourth of July holiday. My friend Tonya Monk also came by that Friday around five p.m. to pick up her car, which she had left there a few days before. Joe Loflin, a customer at the Badin Lake Boat and Tennis Club, drove her to my house and they both saw Scott. I remember that Joe asked Tonya if

she was afraid of Scott.

Id., at ¶ 14.

Joe Loflin, who has no other connection to this case, corroborates Chamberlain's recollection that Allen was at her house on the day of the crime. Exhibit 45, Affidavit of Joseph B. Loflin, at ¶¶ 4-7. In short, the State knew or should have known that Vanessa Smith's story about Scott spending the night in the Uwharrie Forest throwing rocks at Chris Gailey's body, and participating in her theft of Gailey's truck and ATM card, was false and concocted solely to get back at Allen for leaving her for another woman.

The prosecution knew or should have known from several available sources that Smith's story to the police was prompted by jealously and a desire for revenge, and should not have been credited without substantial corroboration. Smith's former husband, Larry, recalls that Allen had been cheating on Smith for many months prior to the shooting, and that she was furious when Allen returned to Denver to see his girlfriend, Kelly Racobs, in mid-July:

> Scott had a relationship with a woman named Kelly Racobs in Denver, but I do not think Vanessa knew it when they went to Denver. When all of us were traveling together, Scott would call Kelly every chance he got. Scott had met Kelly through a tattoo artist named Greg Fritz. I think Scott wanted to be with Kelly the entire time, but was respectful enough not to tell Vanessa.
>
> Vanessa was in love with Scott. She was

> infatuated with him. She kind of hounded him. Scott had charisma with the ladies. Vanessa was very angry when Scott went back to Colorado to be with Kelly.

Exhibit 46, Affidavit of Larry Smith, at ¶¶ 6-7.

Allen's ex-wife, Joyce, also recalls Smith's infatuation with Scott, and that she made threats if Allen did not come back from Denver:

> Vanessa was in love with Scott. She was obsessed with him. She was very angry that Scott had gone back to Colorado to be with Kelly. When Vanessa returned from Denver, she told me to tell Scott to come get her or she would "make his life miserable." Shortly after that, she went to the police.

Exhibit 47, Affidavit of Joyce Allen, at ¶ 5.

Smith repeated those same threats to Troy Spencer prior to testifying at Allen's trial:

> She told me once when she was drunk that 'she held the cards, and she has Scott Allen's soul in the palm of her hand.' She used to laugh and laugh about how she was going to make Scott Allen pay for what he had done to her.

Exhibit 42, at ¶ 10.

The physical evidence at the crime scene, coupled with other facts and information readily available to the prosecution in 1999, compel the conclusion that Vanessa Smith concocted her story to get back at Allen for using her and then abandoning her for another woman. Taken together, the evidence strongly suggests that Smith's testimony

was fabricated for the sole purpose of misleading the jury and prejudicing Mr. Allen. It demonstrates that Smith wanted Allen to pay for spending all her money and running off to Denver with Kelly Racobs. Even when confronted with compelling evidence, such as the scattering of ammunition at the crime scene, the bloody knife placed atop the gym bag, and other physical facts directly contradicting Smith's version of events, the prosecutor chose to accept and adopt her story. As Gregg McCrary states in his report, "the totality of the evidence at the scene...significantly contradicts and discredits Ms. Smith's story...." Exhibit 41, at 11. He also believes that the overall investigation into the murder of Christopher Gailey was "deficient and substandard." *Id.*, at 10-11. Where Gailey's death could not have happened in the manner argued by the State, and the prosecution presented evidence it knew or should have known to be false, Mr. Allen is entitled to a new trial on the basis of prosecutorial misconduct.

SUPPLEMENT TO CLAIM II

INEFFECTIVE ASSISTANCE OF COUNSEL: TRIAL COUNSEL FOR SCOTT ALLEN FAILED TO INVESTIGATE AND CALL KEY DEFENSE WITNESSES WHO COULD HAVE PRESENTED EXCULPATORY EVIDENCE TO THE JURY, AND OTHERWISE FAILED TO TAKE APPROPRIATE STEPS TO CHALLENGE FALSE EVIDENCE.[6]

Allen supplements Claim II of the original MAR with the following extension of the arguments and evidence set forth in that claim:

As Gregg McCrary's report makes clear, trial counsel should have engaged a qualified crime scene analyst to interpret the physical evidence at the crime scene and rebut the false and misleading story presented by the prosecution. If trial counsel had done so, they could have shown that the prosecution's theory of the case was premised on "serious discrepancies between the crime, the crime scene evidence and Ms. Smith's allegations." Exhibit 41, Report of Gregg O. McCrary, at 5.

According to Agent McCrary, any reliable hypothesis has to account for, and be tested against, the material physical facts at the crime scene:

- The victim's .45-caliber handgun, which was found between his feet, was jammed with a spent casing in the chamber.

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[6] Allen's counsel on direct appeal raised a similar claim, stating that trial counsel had failed to take appropriate steps when prosecutors elicited and relied on false evidence. Recognizing that further factual development was required, the North Carolina Supreme Court dismissed the assignment of error without prejudice. 360 N.C. at 316, 626 S.E.2d at 286.

- There were eleven loose .45-caliber live rounds on the ground near the victim's body,
- There were additional live .45-caliber rounds in an ammo pouch near the victim's body.
- A magazine loaded with .45-caliber ammunition was found a few feet from the victim's head.
- There were no .45-caliber shell casings found at the scene other than the one spent casing jammed in the victim's .45-caliber handgun.
- A small, nylon handgun holster was found 13 feet from the victim's head.
- There were five spent shotgun shells and a number of loaded shotgun shells strewn about the scene.
- A blood-stained knife was found sitting on top of the victim's duffel bag.
- The victim had no knife wounds.
- The victim's shirt was found on a rock with another rock on top of it.
- The victim's shirt had no blood and no defects consistent with having been worn when the victim was attacked.
- There was a yellow plastic canister containing $1,944.05 in cash found at the body recovery site.
- There was suspiciously little blood located at the body recovery site considering that the medical examiner found little or no blood in the victim's body.

Id., at 5-6.

An experienced crime analyst like Agent McCrary, confronted with these facts, could have testified that the totality of the

evidence at the crime scene significantly contradicts and discredits Ms. Smith's story. *Id.*, at 11. He could have told the jury, based on his experience investigating violent drug crimes, that Smith's story about hiking through the woods to retrieve stolen guns in order to sell them and obtain drugs was questionable from the start. *Id.*, at 6. He could have explained to the jury that drug dealers and users like Gailey, with cash and cocaine on hand, are unlikely to make strenuous efforts to obtain more cash or more drugs, until they run out of one or both. He could have testified that Smith's claim that Gailey fired his pistol multiple times hours after he was shot, is simply "unfathonable" and contradicts both the medical evidence in the case and the physical evidence at the scene. *Id.*, at 7. He could have pointed out, as Agent McCrary does in his report, that the physical and forensic evidence points to a very different scenario - a confrontation that resulted in a brawl or gunfight rather than a cold-blooded execution. *Id.* As Agent McCrary states in his report, the crime scene facts "refute Ms. Smith's assertion that Mr. Gailey was assassinated in cold blood, never having got his gun out." *Id.*

The testimony of an expert crime scene analyst would have assisted the jury in understanding and weighing the physical evidence and in judging the credibility of prosecution witnesses. It would have made clear that the prosecution's chief witness, Vanessa Smith,

was either lying about what she saw and did or was not present at the shooting at all.

In addition to this expert testimony, the defense could have called a number of fact witnesses to refute the prosecution's weak and circumstantial case:

Robert Johnson knew that Gailey, Allen and Smith left for the Uwharrie Forest with only one weapon, Gailey's .45 semi-automatic pistol, and that Gailey's shotgun - the supposed murder weapon - remained in his bedroom closet.[7] Exhibit 43, Affidavit of Robert Gray Johnson, at ¶¶ 6 & 15. This testimony was critical because it undermines the prosecution's theory that Allen planned the expedition into the Uwharrie Forest with the specific intent to use the opportunity to rob and kill Chris Gailey. Tr., Vol. 11, pp. 2199, 2213. This testimony would also have rebutted Vanessa Smith's testimony that Allen carried Gailey's shotgun along the forest trail and then suddenly and without provocation shot him in the back. Tr., Vol. 7, pp. 1535, 1538-39.

Johnson also could have testified that Gailey and his partner in the drug business, Dustin Maness, never "patched" things up after Gailey threatened Maness with a knife at Johnson's trailer. *Id.*, at ¶¶ 13-14. He could also have attested that Maness, following the

[7] Johnson's testimony could also have been brought out on cross-examination, since he was called as a witness in the prosecution's case in chief.

discovery of Gailey's body in the Uwharrie Forest, proclaimed that he was glad Gailey was dead and that Gailey "had deserved it." *Id.*, at ¶ 14. This would have directly rebutted Maness's testimony for the prosecution that he called Gailey about a week after the altercation at the trailer and that they were "friends again" at the time of the murder. Tr. Vol. 9, pp. 1836-37. In addition, Robert Johnson could have testified about his report to Lieutenant Poole that Dustin Maness was camping in the Uwharrie Forest on the night of the murder, and that he saw Scott Allen there. Exhibit 43, Affidavit of Robert Johnson, at ¶ 12; Exhibit 53, Statement of Robert Gray Johnson dated July 18, 1999, at 000914. This testimony would have rebutted the prosecution's *assumption* (based solely on Vanessa Smith's testimony) that there were only three individuals - Allen, Gailey and Smith - present at the time of the shooting. It would also have assisted the jury in understanding the chaotic crime scene and array of physical evidence discovered by law enforcement.

Lois Lawson could have testified that her then-husband, Jamie Fender, went out looking for Allen on the night of the murder, armed and angry, and may have been in the Uwharrie Forest at the time of the shooting:

> Scott Allen had taken some rare LP albums from Jamie. Jamie was furious with Scott, who had once been his close friend. On the day that Chris Gailey disappeared, Chris told Jamie that Scott was hanging out at a house or trailer near

> the lake with Robbie Johnson and some other people.
>
> Jamie went out looking for Scott just after dark. He was dressed up in camouflage clothing and had an assault rifle. He told me to lock all the doors, set the alarm, put the baby in bed and not to let anyone in.
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> Once Jamie left, I called Robbie Johnson's place and spoke with Scott. I told him that Jamie was on his way and to get out of the house. My sister, Joyce Allen, who had been married to Scott, had already told Vanessa Smith and Scott that Jamie knew about Scott taking the LP albums. Some of the albums showed up later at Joyce's house.
>
> I do not know whether Jamie had enough time to find Scott that night. He was gone for about one and a half or two hours. There may have been people other than Chris, Scott and Vanessa Smith out in the woods that night, but I do not know whether Jamie was one of them. When Jamie came home, he put up the gun and went to bed.

Exhibit 48, Affidavit of Lois Lawson, at ¶¶ 3-6. Like Johnson, Lawson's testimony could have assisted the jury in understanding the crime scene and rebutted, at least in part, Vanessa Smith's story that there were only three people in the woods when the shooting occurred.[8]

Troy Spencer, who delivered a detailed letter to trial counsel prior to trial,[9] could have testified that while he was living with

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[8] According to Robert Johnson, Jamie Fender had a motive to harm Chris Gailey even stronger than his desire to harm Scott Allen: Gailey was rumored to be sleeping with his wife, Lois Lawson, at the Whip-O-Will trailer. Exhibit 43, Affidavit of Robert Johnson, at ¶ 5.

[9] Exhibit 49, Letter to trial counsel from Troy Spencer.

Vanessa Smith, she repeatedly confessed to shooting Gailey and stated that the murder was her plan, not Allen's:

> On several occasions, Vanessa insinuated that it was her, not Scott, who pulled the trigger and killed Chris Gailey. In fact, one time she said, "that [expletive deleted] couldn't even do it and I had to do it myself." Those are her exact words. She also told me that she wanted the "big bag of cocaine" and "big roll of cash" that Chris Gailey always carried. She said it was her idea to jump Gailey and take it, and that Scott didn't want to hurt Chris. She planned it all, not Scott.

Exhibit 42, Affidavit of Troy D. Spencer, at ¶ 11.

Spencer also could have testified that Vanessa Smith admitted to him that her motive in testifying at Allen's trial was personal revenge:

> She told me once when she was drunk that "she held the cards, and she has Scott Allen's soul in the palm of her hand." She used to laugh and laugh about how she was going to make Scott Allen pay for what he had done to her.

Id., at ¶ 10.

Spencer also could have testified that contrary to Smith's testimony that she had been "drug free" for four years, Smith had continued to abuse substances and to lie, make threats and manipulate others even after her arrest. *Id.*, at ¶¶ 6-7, 10, 12; *C.* Tr. Vol. 7, p. 1511. This testimony would have directly refuted the prosecution's attempt to bolster Smith's credibility during closing argument, by claiming that Smith was "a different lady than she was

four years ago." Tr. Vol. 11, p. 2233.[10]

Christina Fowler Chamberlain could have testified that, contrary to Smith's story, Allen spent the night of July 9-10, 1999, at her house. Exhibit 44, Affidavit of Christina Fowler Chamberlain, at ¶ 13. This testimony would have directly contradicted Smith's claim that Allen spent the night in the Uwharrie Forest, periodically throwing rocks at Gailey's wounded body to see if it was safe to rob him of his drugs and money. Tr. Vol. 7, pp. 1540-41. Chamberlain, who worked at the Badin Lake Club, also recalls that a customer of the club, Joseph Loflin, saw Scott Allen when he came by her house on July 9, 1999, to drop off a friend and co-worker, Tonya Monk. *Id.*, at ¶14. If called to testify, Mr. Loflin could have corroborated Chamberlain's recollection. Exhibit 45, Affidavit of Joseph B. Loflin, at ¶¶ 4-8.

Like Troy Spencer, Vanessa Smith's former husband, Larry Smith, Allen's former wife, Joyce Allen, and Joyce Allen's sister, Lois Lawson, could all have testified about how angry Vanessa got when she learned in mid-July, 1999 that Allen had gone back to Denver to see his new girlfriend, Kelly Racobs. Exhibit 46, Affidavit of Larry Smith, at ¶¶ 6-7; Exhibit 47, Affidavit of Joyce Allen, at ¶ 5; Exhibit

[10] Dolly Ponds, who was Vanessa Smith's cell mate at the Montgomery County Jail, could also have testified to Smith's continued use of illicit drugs and manipulative behavior after her arrest in August of 1999. Exhibit 6, Affidavit of Dolly Ponds, at ¶¶ 4-16.

48, Affidavit of Lois Lawson, at ¶ 8. Joyce Allen also recalls that Vanessa threatened to "make his life miserable" if he did not come back to North Carolina and get her. Exhibit 47, Affidavit of Joyce Allen, at ¶ 5. This testimony is critical because Vanessa Smith went to the police in Charlotte and accused Allen of murdering Gailey immediately upon learning that Allen intended to stay in Denver with his new girlfriend.[11]

Confronted with the above-described testimony, there is a reasonable probability that the jury would have returned a different verdict in this case. They would have been presented with a number of credible witnesses who directly contradicted the self-serving story presented by Vanessa Smith. They would have heard that Smith had a clear motive to kill Gailey, that she admitted to being the shooter, and that her story to the Charlotte police in August, 1999 was motivated by rage against Allen for spending her money and abandoning her, and her profound jealousy of Kelly Racobs. The failure of trial counsel to subpoena these witnesses and adduce this testimony fell below the standard for counsel in capital cases in 1999. Counsel's failure to present evidence directly impeaching Vanessa Smith was unquestionably prejudicial and entitles Scott Allen to a new trial.

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[11] Agent McCrary discusses the significance of these facts at some length in his report. Exhibit 41, Affidavit and Report of Gregg O. McCrary, pp. 9-10.

SUPPLEMENT TO CLAIM III

INEFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT-INNOCENCE PHASE: TRIAL COUNSEL FAILED TO CROSS-EXAMINE THE STATE'S WITNESSES EFFECTIVELY.

Allen supplements Claim III of the original MAR with the following new subparts H, I, J and K:[12]

H. Allen's Rights Under The North Carolina And United States Constitutions Were Violated By The Trial Judge's Refusal To Reveal Medical And Psychiatric Records Of The State's Key Witness, Rendering Trial Counsel Ineffective.

Allen was prejudiced by the trial court's erroneous exclusion of Vanessa Smith's medical and mental health records (hereinafter, "Smith's records"), produced under seal and reviewed only by the judge and Smith's personal attorney. Smith's records are attached hereto as Exhibit 50, subject to the restrictions set forth in this Court's Order dated July 1, 2007.[13]

Relevant Facts

Trial counsel subpoenaed Smith's medical records from the Alcohol Rehabilitation Center and tried to obtain petitions and other documents relating to Smith's involuntary commitment in 1998.[14]

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[12] Claim III in the original MAR contained subparts A-G.

[13] Smith's records were unsealed by the Order dated July 1, 2007, following a hearing and an opportunity for Ms. Smith to appear and object. The Order limits disclosure of Smith's records to counsel of record in this post-conviction proceeding and defense experts appointed by the Office of Indigent Defense Services.

[14] Documents from the Alcohol Rehabilitation Center refer to other medical records from Piedmont Area Mental Health of Albemarle, the Woodhill treatment

After hearing Smith's lawyer argue against release of the records, Judge Cromer ordered Smith's records to be produced to the Clerk of Court under seal. The judge reviewed Smith's records *in camera*, with only Smith's personal attorney in chambers, and announced that they did not contain any evidence relevant to the case. Smith's records remained sealed and were not made available to either party at trial or on direct appeal.

A post-conviction review of Smith's records reveals that they did in fact contain significant information that trial counsel could have used to impeach Smith's testimony: the duration and extent of her drug and alcohol abuse, the multiple mental health assessments by mental health professionals in several clinical institutions, and her involuntary commitment to a mental treatment facility for extreme drug use less than a year before the crime.

Trial counsel were not aware that Smith had been involuntarily committed for mental illness and substance abuse. The sealed records show that on May 21, 1998, 14 months before the crime, Smith's mother petitioned for involuntary commitment, referring to Smith's history of "constant drug abuse" since the age of 15.

Smith's mother cited Smith's several voluntary admissions to inpatient treatment programs, and noted that within a period of five

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facility, Appalachian Hall, and Broughton Hospital. Those records may well be relevant to this issue as well.

months Smith had spent about $40,000, principally to obtain drugs. Smith's records, pp. 93-96.

Dr. Lisa J. Brandyberry evaluated Smith and approved the involuntary commitment based on her observations that:

- Smith "is mentally ill (substance abuse)";
- "based on [Smith's] treatment history, [Smith] is in need of treatment in order to prevent further disability or deterioration which would predictably result in dangerousness;" and
- Smith's "current mental status or the nature of [her] illness limits or negates [her] ability to make an informed decision to seek treatment voluntarily or comply with recommended treatment."

Id., at 83.

Dr. Brandyberry noted that Smith showed "obvious evidence of cocaine [use]." *Id.* She diagnosed Smith as having cocaine dependency and marijuana use. *Id.* Although Smith admitted at trial that she had used drugs and alcohol in the past, she did not reveal the duration and severity of her addictions and related mental health problems.

Earlier medical records also give significant details about Smith's extreme drug use. In 1993, Smith was diagnosed at ARC's in-patient treatment program with alcohol dependency, cocaine dependency, cannabis dependency, poly-substance abuse (sedatives), and nicotine dependency. *Id.*, at 7-8, 10, 25 & 33-34. Smith's long history of chronic substance abuse began earlier in her life than

she admitted on the stand and was more severe than she revealed:

- Smith began using cocaine at the age of 14. At trial, Smith said she had only begun using cocaine at age 17. Tr. Vol. 8, p. 1673. She prefers to take cocaine intravenously when possible; otherwise she snorts or smokes cocaine. In September of 1992, she was using about a gram of cocaine each day. Smith's records, at 8, 13-15, 17, 21, 27-28, 30 & 32.

- Smith began drinking alcohol, both beer and liquor, at age 12. Since March 1993, she had been drinking daily to get "as drunk as I possibly can get." Usually she consumed a pint of liquor and between 6 and 12 beers per day. *Id.*, at 8, 13-15, 17, 22, 27, 30 & 32.

- Smith began smoking marijuana when she was 13 years old. Before her admission for treatment, she was smoking 9 to 10 joints every day. *Id.*, at 8, 13-15, 17, 22, 27, 30 & 32. Her initial urine screen at the treatment facility was positive for cannabinoids. *Id.*, at 9, 48-52, & 54.

- Smith began using sedatives at age 16. She reported using pills about twice a month, each time taking several pills and drinking alcohol with them. She was clean between November 1992 and March of 1993, but between March and her admission for treatment, she estimated that she had gone through 70 valium tablets and 25 phenobarbital tablets. *Id.*, at 8, 14-15, 17, 32 & 62.

Smith described her "normal day" as "wake up, get high, get drunk and pass out." *Id.*, at 29.

Trial counsel were also unaware that Smith had been in mental treatment on and off since she was 14 years old and had been adjudged an "undisciplined child" in family therapy. One of her counselors referred to her as being "spiritually bankrupt." At the behest of

her then boyfriend (not Allen), she had become involved in Satanism and the occult. *Id.*, at 11, 14, 28 & 31. She described herself as "too nice and soft-hearted until crossed." *Id.*, at 30. Smith left the treatment center early, against clinical advice. *Id.*, at 9, 12 & 63.

Although Smith testified briefly about having used drugs and having received mental health treatment in the past, details of her substance abuse and commitment were not available to trial counsel. This information was directly relevant and material to Smith's credibility on the stand. Without access to this information, trial counsel was unable to expose Smith's testimony as unreliable at best, if not entirely fabricated.

In addition to Smith's records, other evidence discovered during post-conviction demonstrates Smith's long history of lying and manipulative behavior, which if discovered before trial would have provided substantial grounds for impeachment through cross-examination:

Dolly Ponds was an inmate with Smith at the Montgomery County Jail for over 120 days following the Gailey murder. According to Ponds, Smith "showed no remorse; she would laugh while talking about crimes she was involved in." Exhibit 6, Affidavit of Dolly Ponds, at ¶ 2. Furthermore, Smith "acted like she had it in for her former boyfriend [Allen]; she called him 'a worthless piece of shit.'" *Id.*,

at ¶ 4.

One incident in particular, as described by Ponds, evinces Smith's manipulative character. When a prison guard learned of Smith's sexual relationship with two trustees at the jail, he became involved with Smith too, meeting her for sex in a stairwell. Smith used a towel to wipe the guard's semen off the wall. *Id.*, at ¶¶ 11-15. Several days later, detectives collected the towel and a pair of Smith's underwear from her cell, and she was released from jail. Smith told Ponds, "I got my free ticket out of here, I got everything [the guard] put on the wall." *Id.*, at ¶ 16.

Post-conviction counsel retained psychologist John F. Warren, Ph.D., who testified briefly for the defense at trial, to review Smith's medical and mental health records and other newly-discovered evidence concerning her extensive drug use and history of mental illness. Based on his post-conviction review, Dr. Warren believes that Smith's records and other newly-discovered evidence would have been invaluable in preparing his expert testimony at trial, and in assisting trial counsel to cross-examine Vanessa Smith.

Dr. Warren notes that Smith was diagnosed with alcohol dependence, cocaine dependence, cannabis dependence, polysubstance abuse - sedatives, and nicotine dependence. Her behavioral problems from an early age included substance abuse from age 12-13, forgery, DWI charges, prostitution in exchange for residence, sexual and

physical abuse, leaving treatment facilities against medical advice, and participation in satanic rituals. Exhibit 51, Affidavit of Dr. John F. Warren, at ¶¶ 5-6. Warren notes that the records refer to Smith repeatedly as "spiritually bankrupt." *Id.*, at ¶ 7. Smith's substance abuse and extravagant spending to maintain her habit prevented her from caring for her child. Significantly, the records reveal that she repeatedly lied to treatment providers. *Id.*, at ¶¶ 9-10.

Dr. Warren also considered Ponds' affidavit (Exhibit 6), which he believes strongly corroborates the medical records, showing Smith's behaviors as "self-centered, manipulative, exploitative, promiscuous, antisocial, and self-protective at the expense of others." *Id.*, at ¶ 11.

Dr. Warren concludes, based on this evidence, that Smith meets the criteria for antisocial personality disorder, particularly with regard to her deceit and manipulation of others. In addition, Smith shows signs of borderline personality disorder, reflected in her "sudden and dramatic shifts in [her] view of others," and possibly dissociative symptoms when under extreme stress. *Id.*, at ¶ 15. He concludes that "trial counsel would have been invaluably assisted in the examination/cross-examination of Ms. Smith, had her mental and legal records been available to them." *Id.*, at ¶ 16.

Legal Standard

"It is well settled that in a criminal case an accused 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, 243-254, 302 S.E. 2d 174, 182-188 (1983)(citing N.C. Const. art. I, § 23; *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289, *cert. denied*, 409 U.S. 1043, 93 S.Ct. 537, 34 L.Ed. 2d 493 (1972); *State v. Davis*, 294 N.C. 397, 241 S.E. 2d 656 (1978); 1 H. Brandis on North Carolina Evidence, *Witnesses*, § 35 (2d Rev. Ed. 1982)). Under North Carolina law, this right includes cross-examining an adverse witness regarding past mental health and drug abuse problems. In *State v. Williams*, 330 N.C. 711, 412 S.E. 2d 359 (1991), the defendant was granted a new trial because the trial court prevented the defendant from cross-examining a witness on his suicide attempts, psychiatric history, and history of chronic abuse of marijuana and cocaine. The North Carolina Supreme Court, relying on Rule of Evidence 611(b), stated that "[w]hile 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. Where the witness' testimony is crucial to the State's case, the

defense's right to cross-examine the witness about mental health and substance abuse issues is clear cut: "where, as here, the witness in question is a key witness for the State, this jurisdiction has long allowed cross-examination regarding the witness' past mental problems or defects." *Id.*, 330 N.C. at 723, 412 S.E. 2d at 367.

North Carolina courts allow cross-examination on mental health or substance abuse history even where the history is relatively remote in time from the crime. In *Newman, supra*, the North Carolina Supreme Court held that the defendant was entitled to discredit a prosecuting witness' testimony based on mental health and drug abuse records going back 3 to 4 years before the crime. In *State v. Conrad*, 275 N.C. 342, 349, 168 S.E.2d 39, 44 (1969), the court allowed evidence of a state witness' suicide attempt two years before the trial. In *Williams, supra*, the Court cited with approval a federal case involving mental health treatment ten years before the trial. *United States v. Lindstrom*, 698 F.2d 1154, 1160 (11th Cir. 1983)(new trial where trial court limited cross-examination regarding witness' mental illness: "Certain forms of mental disorder have high probative value on the issue of credibility.")

The United States Constitution also protects a defendant's right to effective cross-examination of adverse witnesses:

> Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified

> with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood,(b); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment, and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Alford v. United States, 282 U.S. 687, 691-692, 51 S. Ct. 218, 219-220, 75 L. Ed. 624, 627-628 (1931) (citations omitted).

Under the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth Amendment, defense counsel should have been allowed to cross-examine Smith on the severe mental illness and substance abuse that were revealed in the sealed records.

In *United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009), the court of appeals ruled that the trial judge erred in reviewing

a witness' mental health records *in camera* and in refusing to make the records available to the defendant. Finding a violation of the defendant's rights under the Due Process and Confrontation Clauses, the court found that the minimal evidence of substance abuse before the jury was inadequate, in light of the detail and length of the witness' problems revealed in the records:

> Had defense counsel been permitted to view the medical records and conduct a proper cross-examination, the jury would have seen a different picture. It would have learned that the CI [Confidential Informant] had been a heavy drug user since 2000 and had recently been abusing alcohol, cannabis, opioids, benzodiazepine, Valium, Klonopin, Darvocet, and Hydrocodone. The medical records contain admissions by the CI that he had smoked a half-pound of marijuana in a single day shortly before trial and that he had been smoking a pound of marijuana per week. The jury would also have heard that the CI had a "long history of mental illness" starting in 2000, which included auditory hallucinations, seeing 'things out through the window that are not really there' ... If the jury had been aware of this information, it may well have rejected the CI's testimony, without which Robinson could not have been convicted.

Id., at 1267.

In ruling that the trial court erred in not allowing the defense to view the medical records in question, the *Robinson* court relied heavily on the fact that the informant's testimony was uncorroborated by any other testimony or physical evidence. *Id.*, at 1271. Because there was a reasonable probability that the verdict would have been

different had the jury learned of the content of the records, Robinson was granted a new trial. *Id.*, at 1270.

In *United States v. Lindstrom, supra*, the court ruled that the defendant was entitled to use a witness' mental health records, including a psychologist's description of the witness as "'immature, egocentric, [and] manipulative,' having superficial relationships causing 'marital problems and sexual conflicts in general,' and seeing authority as something to be manipulated for self-gratification." 698 F.2d at 1161. *See also Hargrave v. McKee*, 2007 U.S. App. LEXIS 22956, page 20 (6th Cir. 2007) (granting *habeas* relief because the trial court limited defendant's cross-examination regarding witness' ongoing psychiatric condition).

Argument

Like the witnesses in the federal and state cases cited above, Vanessa Smith is subject to impeachment by cross-examination. Her cursory admissions of some level of drug use did not paint an accurate portrait of her as a witness; the details of her history would have shown her to be an extremely unreliable witness.

Impeaching Smith was crucial to Mr. Allen's defense. Smith was the only witness who claimed that Allen had a gun and shot the victim. Her statement was uncorroborated by other testimony or physical evidence. Without Smith's testimony, the State's case would have collapsed. Smith's records were essential to challenge her

reliability through the details of her mental illness and substance abuse.

The courts in *Williams*, *Robinson*, and *Lindstrom* ordered new trials because the details of mental illness and substance abuse were so extreme that jurors would probably have returned a different verdict had they been properly informed. Smith's records in this case are as shocking and revelatory as the records that the state and federal courts have faced. Mr. Allen should be granted a new trial.

I. Ineffective Assistance of Counsel in the Guilt-Innocence Phase: Trial Counsel Failed to Cross-Examine the State's Witnesses Effectively.

1. Ineffective Cross-Examination of Vanessa Smith

Defense counsel's cross-examination of Vanessa Smith was inadequate and ineffective for the reasons set forth in Section H, above, which is incorporated herein by reference.

In addition, the report of crime scene expert Gregg McCrary makes clear that an experienced crime scene analyst, if retained prior to trial, could have assisted trial counsel in understanding the crime scene and impeaching virtually every aspect of Smith's supposed eyewitness testimony about the shooting and aftermath:

- Trial counsel could have cross-examined law enforcement witnesses concerning the significance of the spent casing in Gailey's .45 caliber pistol, the second round jammed in the receiver, the loaded .45 caliber magazine found near the victim's head, and the eleven loose .45 caliber rounds strewn around the body. Counsel could have shown, through this

cross-examination, that the evidence pointed to a brawl and gunfight, not the execution-style killing described by Vanessa Smith.

- Trial counsel could have pointed out, through cross-examination of law enforcement witnesses, that the five spent shotgun shells and numerous loaded shotgun shells strewn about the crime scene were consistent with a running gunfight, rather than a sudden, execution-style killing.

- Trial counsel could have asked law enforcement witnesses whether the bloody knife found at the scene belonged to Gailey, Allen or Smith, and whether anyone associated with Gailey, Allen or Smith had a knife wound or had reported to hospital with a laceration or similar injury.

- Trial counsel could have pointed out, through cross-examination, that the shirt draped over a rock near the victim's body showed no signs of blood or struggle, and that Gailey had, in all likelihood, stopped in the forest to rest or reconnoiter with third parties.

- Trial counsel could have cross-examined law enforcement witnesses on the discovery of $1,944.05 in cash on the victim, and pointed out the likelihood that the venture into the forest was to meet an unknown party or parties and to purchase illegal drugs.

- Trial counsel could have shown through cross-examination that the absence of blood at the scene, coupled with the nearly complete absence of blood in the victim's body at the autopsy, point to a shooting that occurred somewhere other than where the victim was found.

In short, with the assistance of an expert crime scene analyst like Agent McCrary, trial counsel could have brought out, through the prosecution's own law enforcement witnesses, that "the totality

of the evidence at the scene...significantly contradicts and discredits Ms. Smith's story...." Exhibit 41, Affidavit and Report of Gregg O. McCrary, at 11.

Effective trial counsel could also have pressed Vanessa Smith about her testimony that she and Allen spent the night in the Uwharrie Forest. Had trial counsel conducted an adequate investigation, they would have known that Allen spent the night of July 9, 1999 at Christina Fowler Chamberlain's house, and could have confronted Smith on the reliability of her recollection and the credibility of her story that she and Allen stayed together, in the forest, watching Chris Gailey die. Exhibit 44, Affidavit of Christina Fowler Chamberlain, at ¶ 13; Exhibit 45, Affidavit of Joseph Loflin, at ¶¶ 4-8 (corroborating Chamberlain's recollection that Allen was at her house at various times on the day of the murder).

Had trial counsel followed-up on Troy Spencer's letter, which was left in Mr. Atkinson's mail box prior to trial, they could have cross-examined Vanessa Smith on her continued substance abuse while under house arrest and her admissions of responsibility for Gailey's murder. Exhibit 49, Troy Spencer's letter to trial counsel; Exhibit 42, Affidavit of Troy Spencer, at ¶¶ 6, 10-11, 14. Counsel could have pointed out to the jury that Smith's accusations against Allen were prompted by her desire to get revenge for Allen's alleged mistreatment of her, and that she, and not Allen, was the manipulative

and dominant partner in their relationship. *Id.*, at ¶¶ 6-7, 10, 12.[15]

Dolly Ponds, like Spencer, met Vanessa Smith while an inmate at the Montgomery County Jail and got to know her well. Exhibit 6, Affidavit of Dolly Ponds, at ¶ 1. Ponds' conversations with Smith showed the vagaries and inconsistencies in her accusations against Allen, her continued substance abuse following arrest, and her manipulative and cunning treatment of others to obtain whatever she wanted. *Id.*, at ¶¶ 2-16. Trial counsel could have used this information to challenge Smith on the stand, pointing out the many discrepancies between her direct testimony and the statements she made to Ponds about the Gailey murder. *Id.*, at ¶ 2. For example, in the version Smith told Ponds, Allen demanded money from Gailey and Gailey refused, which led to Allen hitting Gailey over the head with a shovel or shooting him in the head. *Id.* There is nothing in this version about a hike in the woods to retrieve stolen weapons, Allen's allegedly pushing Smith down to get off a shot, Gailey's firing his pistol to get help, or most of the other details that Smith told the jury. *Id.* Trial counsel could also have pressed Smith about her substance abuse while incarcerated in the Montgomery County Jail, which contradicts her direct testimony and the prosecution's

[15] Larry Smith, Joyce Allen and Lois Lawson could all have provided information to trial counsel about Smith's anger and determination to get back at Scott Allen in support of this line of cross-examination. Exhibit 46, Affidavit of Larry Smith, at ¶¶ 6-7; Exhibit 47, Affidavit of Joyce Allen, at ¶ 5; Exhibit 48, Affidavit of Lois Lawson, at ¶ 8.

closing argument, and her remorseless lying to, and manipulation of, men to obtain whatever she wants. *Id.*, at ¶¶ 6-16; Tr. Vol. 7, p. 1511; Tr. Vol. 11, p. 2233.

Trial counsel should have also cross-examined Smith about her claim that Allen carried Gailey's sawed-off shotgun into the Uwharrie Forest and used it to kill Chris Gailey. Tr. Vol. 7, pp. 1535-39. Trial counsel knew that Gailey's sawed-off shotgun was found at the lake trailer and seized by law enforcement. Exhibit 43, Affidavit of Robert Gray Johnson, at ¶¶ 15. Had trial counsel interviewed Robert Johnson, they would also have known that Allen, Gailey and Smith left the trailer *without the shotgun*, and that Smith's version of these events cannot possibly be accurate. *Id.* This critical discrepancy in Smith's story could have been pointed out during cross-examination of either Smith or Johnson.

In the words of one juror, Vanessa Smith "testified without anyone really challenging her or questioning her true involvement in the death of Chris Gailey." Exhibit 52, Affidavit of [redacted], at ¶ 8.

2. Ineffective Cross-Examination of Lieutenant Bunting

Lieutenant Bunting of the Randolph County Sheriff's Department, the first law enforcement officer at the crime scene, testified about his initial observations of Gailey's body, its orientation to a nearby cabin and the boundary between Montgomery and Randolph

Counties. He was not asked on cross-examination about any details of the crime scene other than the general position of Gailey's body and the location of a handgun at the scene. Had trial counsel consulted with an experienced crime scene analyst, such as Agent Gregg McCrary, counsel could have asked Bunting a number of significant questions regarding the physical evidence at the scene and the processing of that evidence by law enforcement. For example, trial counsel could have asked Bunting about the lack of blood at the crime scene and in the victim's body, and whether law enforcement searched nearby areas in the forest or any other possible locations where the killing may have occurred. Counsel could also have pressed Bunting about the spent casing in Gailey's .45 caliber pistol, the second round jammed in the receiver, the loaded .45 caliber magazine found near the victim's head, the bloody knife on the gym bag, the spent and unspent shotgun shells scattered about the crime scene, and the eleven loose .45 caliber rounds strewn around the body. Counsel could have pressed Bunting as to whether this evidence pointed to a melee and gunfight, or a sudden shot in the back, as Vanessa Smith claimed.

3. Ineffective Cross-Examination of Robert Johnson

Trial counsel failed to bring out on cross-examination that Robert Johnson, who witnessed Allen, Gailey and Smith leave for the Uwharrie Forest on July 9, 1999, saw Gailey carrying a handgun but

did not see Allen or Smith with any other weapons, "certainly not a shotgun." Exhibit 43, Affidavit of Robert Gray Johnson, at ¶ 6. Counsel also could have shown that Chris Gailey's sawed-off shotgun with the special pistol grip - the supposed murder weapon - was found in Johnson's bedroom closet following the crime. *Id.*, at ¶ 15. According to the trial record, Allen never returned to the trailer and the shotgun was never found or tested. These points would have impeached material portions of Vanessa Smith's story and raised serious questions about the integrity and credibility of law enforcement's investigation.

Johnson was not asked on cross-examination about his statement to Lieutenant Poole that Dustin Maness was camping in the Uwharrie Forest on the night of the murder. Exhibit 53, Statement of Robert Johnson dated July 18, 1999, at 000914. Trial counsel also failed to press Johnson about the fact that Maness and Gailey had been involved in a violent dispute in his home, that the two former friends never "patched" things up, and that after Gailey's death Maness told Johnson that Gailey "deserved it." *Id.*, at ¶¶ 13-14. This testimony would have directly challenged material portions of Maness's testimony, including his statement that he and Gailey became "friends again" and that he intended to drop the assault charges. Tr. Vol. 9, pp. 1836-37.

4. Ineffective Cross-Examination of Dustin Maness

Trial counsel failed to press Dustin Maness on cross-examination about his violent falling out with Gailey, the assault charges he brought against Gailey and never dropped, and police reports that he may have spent the night of the murder, July 9, 1999, camping somewhere near the crime scene. *See* Exhibit 53, Statement of Robert Gray Johnson, at 000914. He should also have been asked about reports that he was glad that Gailey died, and that he "deserved it." Exhibit 43, Affidavit of Robert Gray Johnson, At ¶ 14.

Trial counsel also failed to bring out on cross-examination that Gailey frequently sold drugs at Maness's house, and that some of his customers were extremely upset with him for "cutting" the cocaine he sold them. *See* Exhibit 16, Affidavit of Dustin Maness, at ¶¶ 7-8, filed with original MAR on July 2, 2007. This testimony would have rebutted the prosecution's argument that only Scott Allen had a motive to harm Gailey. Tr. Vol. 11, p. 2237.

J. Scott Allen's Rights Under The North Carolina And United States Constitutions Were Violated Because He Was Unable To Conduct *Voir Dire* Of Smith And Psychologist John Warren Regarding The Importance Of The Medical And Psychiatric Records.

Records dealing with mental health and substance abuse are not readily interpreted by a layman. For that reason, North Carolina courts and the Court of Appeals for the Fourth Circuit provide for

voir dire of mental health witnesses to assist the court in determining the proper scope of cross-examination. *See, e.g., State v. Williams, supra,* 330 N.C. at 713, 412 S.E. 2d at 362 (*voir dire* of state's witness regarding his mental illness and substance abuse); *State v. Durham,* 74 N.C. App. 159, 166, 327 S.E. 2d 920, 925 (1985) (mental health care witness allowed to testify because defendant failed to conduct *voir dire*); *United States v. Lopez,* 611 F. 2d 44, 46 (4th Cir. 1979) (party challenging evidence of mental impairment should make offer of proof).

The trial court in this case would clearly have benefitted from development of the mental health testimony through *voir dire* of Smith herself or of Dr. Warren. However, because no one was permitted to review Smith's records, the court did not have any expert guidance as to the significance of the records for impeachment purposes. As a result, the court essentially forced trial counsel into error by preventing them from demonstrating the value and materiality of the records.

K. Mr. Allen's Rights Under The North Carolina And United States Constitutions Were Violated Because He Was Not Allowed To Submit Extrinsic Evidence Of Smith's Unreliability.

The defense was entitled to submit extrinsic evidence on the issue of Vanessa Smith's mental health and credibility. *See* State *v. Williams, supra,* and *State v. Newton, supra.* Because the trial

court denied counsel access to Smith's records, counsel were unable to call defense psychologist Dr. Warren to testify about Smith's lack of credibility and ability to observe clearly and testify accurately against Allen.[16]

Supplement to Claim VIII

INEFFECTIVE ASSISTANCE OF COUNSEL IN THE SENTENCING PHASE: FAILURE TO INVESTIGATE AND PRESENT AVAILABLE MITIGATION EVIDENCE

Mr. Allen supplements Claim VIII of the original MAR with the following extension of the arguments and evidence set forth in that claim:

Trial counsel failed to adequately investigate and present mitigation evidence from two witnesses who knew Scott Allen better than almost anyone else. Scott's maternal grandmother, Gladys Byrd Barclay, testified during the sentencing phase but was never interviewed or prepared to testify by trial counsel. Tr. Vol. 13, pp. 2347- 2459; Exhibit 54, Affidavit of Gladys Byrd Barclay, at ¶¶ 24-26. Had she been interviewed, by trial counsel or by a mitigation investigator, Barclay could have testified to important details about Allen's childhood and family relationships and provided the jury with a fuller understanding of his upbringing:

> Scott was always well-behaved at our house. He would do any chore I asked him to do; in fact, he would do them without being asked. He'd chop

[16] To the extent that trial counsel failed to proffer this evidence, Mr. Allen submits that their failure constituted ineffective assistance of counsel.

> wood, feed the pets, and help in the yard.
>
> Scott was also very considerate and thoughtful towards his PawPaw and me. He always bragged about and complimented my cooking, and he always showed appreciation for home-cooked meals and the gifts that we got him. Scott always let me know that he appreciated and respected me. He also respected his PawPaw.
>
> Scott was a very loving child - more so than the other grandkids (even though they were loving too). Scott initiated affection and hugs. He would just come up to me out of blue, and he would hug me and tell me he loved me. Scott also acted this way towards his mother and his PawPaw.

Id., at ¶¶ 12-14.

Barclay could have provided insight into Allen's struggles with his father and older brother:

> Scott and his father Benny were not as affectionate towards each other. I am familiar with Benny's family, and I do not believe it was an affectionate one like the Byrd family.
>
> Scott and Benny were not as close as Kenny and Benny were. Benny's hobby is hunting. Kenny began hunting at a young age so he and Benny shared a common interest. Scott did not like hunting and, in fact, did not approve of it. Scott loved animals. We always had cats and dogs at our house, and Scott always showed an interest in them. I remember Scott telling me how upset he was that his dad killed animals for sport.

Id., at ¶¶ 15-16.

Barclay could have testified about the marital instability in Allen's childhood home, and her perception of how it affected Allen

growing up:

> Sherry and Benny had marital problems during Scott's upbringing which led to separations - sometimes lengthy separations...
>
> ...When his parents would break up, Scott would go with Sherry and Kenny would go with Benny. At one point, Scott and Sherry moved to Alabama and another time they moved to the North Carolina Mountains. I believe Scott bottled up his emotions regarding his parents' problems.

Id., at ¶¶ 17-18.

This testimony from Allen's elderly grandmother would have helped explain Allen's somewhat withdrawn and taciturn character at trial. Moreover, her testimony would have allowed the jury to see Allen as a loving and affectionate person despite his tattoos and outward appearance.

Although Christina Fowler Chamberlain was interviewed twice by trial counsel and a defense investigator, she was not asked to testify at Allen's trial even though she was one of Allen's oldest and closest friends:

> I first met Scott Allen in a physical education class when he was around fourteen years old. He was a freshman in high school and had just moved to Denton, North Carolina. I was a cheerleader at the high school and a year ahead of Scott in school. I remember that Scott stood out because he had a "Mohawk" haircut. Our friendship began when he offered me some bubble gum, which happened to be my favorite brand.
>
> From that moment on, Scott and I hung out a lot, although we never dated. Our relationship was

> always platonic. We had two separate groups of friends, and each set of friends found it odd that Scott and I were so close.
>
> Scott dropped out of school by the time I graduated from high school in 1990. It happened very suddenly, and I do not remember why he dropped out. Afterwards, Scott and I kept in touch, even after I moved to Wilmington to attend UNC-Wilmington. We saw each other one or two times a year, and kept in touch by telephone. When I was a sophomore, Scott came down to Wilmington to visit and the two of us went to Myrtle Beach and stayed at Scott's cousin's house.

Id., at ¶¶ 2-3, 9.

As a close friend, Chamberlain had an opportunity to know Allen's family growing up and gained valuable insight into Scott's background:

> I knew Scott's parents, Benny and Sherry Allen, fairly well. Benny seemed harsh to me. I overheard him raise his voice to Sherry and call Scott a "brat" in front of me. Sherry always seemed sweet and kind to me.

Id., at ¶ 7.

Chamberlain understood that Allen, while a "little rebellious" in high school, was not a trouble-maker:

> Scott was a little rebellious in high school, but had a mild, calm demeanor. He was quiet and very interesting to me. I never knew Scott to get into any fights or to drink...

Id., at ¶ 4.

Chamberlain could have testified that the tattoos on Allen's head and body, while unusual, did not signal any aggressiveness or

evil intention towards others:

> Scott began getting body art during high school. I recall him having a tattooed hand print on his arm. The other tattoos came after high school. He always thought he was average, and the tattoos shocked people and made him stand out. I never heard him say anything racist, bigoted or anti-religious about any group of people and do not believe the tattoos express his true feelings. Scott was mild and thoughtful, not aggressive.

Id., at ¶ 8.

The testimony of Gladys Barclay and Christina Fowler Chamberlain was critical to the defense's mitigation case. It would have helped the jury understand that Allen, despite his tattoos and apparent lack of emotion, was a generally considerate and thoughtful person who did not subscribe to violence, even towards animals. It would have rebutted the prosecution's theory at sentencing that Allen was a selfish, manipulative and violent man who killed his best friend senselessly and without remorse, simply to steal his truck and avoid arrest.[17] *See* Tr. Vol. 14, pp. 2614-18. In addition, had Mrs. Barclay and Christina Chamberlain testified to all they knew about Scott Allen and his background, there is a reasonable probability that one or more members of the jury would have found at least four of the proposed mitigating factors that the jury rejected: that Allen

[17] The jury considered three statutory aggravating factors: (e)(4) murder committed for the purpose of avoiding or preventing a lawful arrest; (e)(6) murder committed for pecuniary gain; and (e)(9) murder that was especially heinous, atrocious or cruel. N.C. Gen. Stat. ' 15A-2000(e).

was a loving son; that he had the love of his immediate and extended family; that he had been affected by numerous separations of his parents; and that he did not believe that his father loved him as much as his brother. *See* Exhibit 4, Issues and Recommendations as to Punishment, filed with the original MAR on July 2, 2007.

There is a reasonable likelihood that these four mitigating factors, coupled with the mitigating factors that were found by the jury,[18] would have altered the balance when the jury weighed the mitigating circumstances and aggravating circumstances and led to imposition of a life sentence. Accordingly, trial counsel's failure to adequately investigate these two important witnesses, and to present their readily available testimony, prejudiced Mr. Allen's case at sentencing.

Supplement to Claim IX

INEFFECTIVE ASSISTANCE OF COUNSEL IN THE SENTENCING PHASE: FAILURE TO ADEQUATELY PREPARE WITNESSES TO TESTIFY OR OTHERWISE PREPARE FOR SENTENCING.

Mr. Allen supplements Claim IX of the original MAR with the following extension of the arguments and evidence set forth in that claim:

As set forth in the MAR, trial counsel entered the sentencing

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[18] The jury found two mitigating factors to exist: that Allen was deeply affected by the death of his grandfather, and that Allen's death would have a detrimental impact on his mother, father, daughter and other family members. Exhibit 4, Issues and Recommendations as to Punishment.

phase with a skeletal mitigation plan. Counsel failed to adequately interview and prepare the witnesses to testify. MAR, at 104-118. Allen's maternal grandmother, Gladys Byrd Barclay, testified during the sentencing phase, but was never interviewed at all prior to taking the stand:

> I received a call from one of Scott's trial attorneys about two weeks after his trial had already started. This was my first contact with his legal team. The attorney asked me to testify for Scott in an effort to keep him from getting the death penalty. I was concerned that my health would not let me go, but I agreed to testify because I wanted to support Scott. During this phone call, the attorney did not tell me what I was supposed to testify about, he just told me to come to court.
>
> The morning that I testified, I met, for the first time, Scott's attorney. Prior to my testimony, the attorney (who had called me) and I met in a small room in the courthouse for about five minutes. He did not interview me or ask me questions about Scott and our family. He told me that he had met everyone in the family but needed to meet me. He also told me that he wanted me to testify about Scott's relationship with his PawPaw. I assumed that the attorney already knew the story of my husband's death because he told me to testify about it. I remember he also had a photo of Scott with his PawPaw.
>
> I was terrified to get on the witness stand because I did not know what I was supposed to say. It seemed like such an important task, yet I did not know what I was doing.

Exhibit 54, Affidavit of Gladys Byrd Barclay, at ¶¶ 24-26; *see* Tr. Vol. 13, pp. 2347-2459.

Counsel's failure to prepare Mrs. Barclay to testify was particularly egregious, because she was the wife of "PawPaw," the beloved grandfather whose death had so deeply affected Allen, and was herself very close to her grandson. Exhibit 54, Affidavit of Gladys Byrd Barclay, at ¶¶ 10-14. Mrs. Barclay was with her husband when Scott reported that his motorbike had broken down, when her husband took Allen out to retrieve it, and when Allen learned that PawPaw had died trying to find it. Tr. Vol. 13, pp. 2454-58. Had she been interviewed and adequately prepared by trial counsel, Mrs. Barclay could have testified to details about the effect this tragedy had on Allen, and how deeply he missed his grandfather. Exhibit 54, Affidavit of Gladys Byrd Barclay, at ¶¶ 20-21. She could also have testified about his character as a child, and his relationships with his mother and grandparents:

> Scott was always well-behaved at our house. He would do any chore I asked him to do; in fact, he would do them without being asked. He'd chop wood, feed the pets, and help in the yard.
>
> Scott was also very considerate and thoughtful towards his PawPaw and me. He always bragged about and complimented my cooking, and he always showed appreciation for home-cooked meals and the gifts that we got him. Scott always let me know that he appreciated and respected me. He also respected his PawPaw.
>
> Scott was a very loving child - more so than the other grandkids (even though they were loving too). Scott initiated affection and hugs. He would just come up to me out of blue, and he would

> hug me and tell me he loved me. Scott also acted this way towards his mother and his PawPaw.

Id., at ¶ 12-14.

Mrs. Barclay could also have provided insight into Allen's struggles with his father and older brother:

> Scott and his father Benny were not as affectionate towards each other. I am familiar with Benny's family, and I do not believe it was an affectionate one like the Byrd family.
>
> Scott and Benny were not as close as Kenny and Benny were. Benny's hobby is hunting. Kenny began hunting at a young age so he and Benny shared a common interest. Scott did not like hunting and, in fact, did not approve of it. Scott loved animals. We always had cats and dogs at our house, and Scott always showed an interest in them. I remember Scott telling me how upset he was that his dad killed animals for sport.

Id., at ¶¶ 15-16.

She could also have testified about the marital instability in Allen's childhood home, and her perception of how that affected Allen growing up:

> Sherry and Benny had marital problems during Scott's upbringing which led to separations - sometimes lengthy separations...
>
> ...When his parents would break up, Scott would go with Sherry and Kenny would go with Benny. At one point, Scott and Sherry moved to Alabama and another time they moved to the North Carolina Mountains. I believe Scott bottled up his emotions regarding his parents' problems.

Id., at ¶¶ 17-18. This testimony from Allen's elderly grandmother could clearly have helped the jury understand Allen's unusual demeanor, and that his seemingly indifferent manner was a protective mask for an insecure and emotionally troubled young man. It would have added weight to the mitigating circumstances found by the jury that Allen was deeply affected by the death of his grandfather, and that execution would have a detrimental impact on his mother, father, daughter and other family members. Exhibit 4, Issues and Recommendations as to Punishment.

Had Mrs. Barclay been adequately prepared and testified to all she knew about Scott Allen and his background, there is a reasonable probability that one or more members of the jury would have found at least four additional mitigating factors that the jury rejected: that Allen was a loving son; that he had the love of his immediate and extended family; that he had been affected by numerous separations of his parents; and that he did not believe that his father loved him as much as his brother. *Id.* Accordingly, trial counsel's failure to interview and prepare Mrs. Barclay to testify in the sentencing proceeding, coupled with their concurrent failure to plan and present a coherent mitigation case, severely prejudiced Mr. Allen in the sentencing phase of his trial.

CLAIM XI

Allen supplements the MAR by adding a new Claim XI:

INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S FAILURE TO INVESTIGATE EVIDENCE POINTING TO A THIRD PARTY'S GUILT.

A defendant in a criminal case has a right under North Carolina law and the United States Constitution to present testimony supporting the guilt of a third party. Post-conviction investigation has uncovered substantial evidence that someone other than Scott Allen murdered Christopher Gailey.[19] Although trial counsel were aware of evidence pointing to other suspects, counsel did not conduct a reasonable investigation that would have allowed them to develop an alternative theory of the crime.

Legal Standard: North Carolina Law

Evidence of a third party's guilt is admissible if it is relevant and suggests that another person actually committed the crime. The North Carolina cases that control on this issue are *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987); *State v. McElrath*, 322 N.C. 1,

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[19] The evidence points to three other suspects: Vanessa Smith, Dustin Maness and Jamie Fender, all of whom had a motive and opportunity to commit this crime. That evidence has already been summarized in previous claims and need not be repeated here. *See, e.g.*, Supplements to Claims I and II, at 5-6 & 17-18 (as to Vanessa Smith); Supplements to Claims I and II, at 6 & 15 (as to Dustin Maness); and Supplement to Claim II, at 16-17 & footnote 7 (as to Jamie Fender). *See also*, Exhibit 42, Affidavit of Troy Spencer; Exhibit 43, Affidavit of Robert Gray Johnson; and Exhibit 48, Affidavit of Lois Lawson. In addition, the post-conviction investigation has revealed evidence that Christopher Gailey was "cutting" the cocaine he sold and had angered some of his customers in the drug trade. *See* pp. 39-40, *supra*, and Exhibit 16, Affidavit of Dustin Maness, at ¶¶ 7-8, filed with original MAR on July 2, 2007.

366 S.E.2d 442 (1988); and *State v. Israel*, 353 N.C. 211, 539 S.E.2d 633 (2000).

In *Cotton*, the evidence tended to show that the victim was asleep in her apartment in Burlington when she was awakened by an assailant who committed sexual offenses. The victim positively identified Ronald Junior Cotton at a lineup.[20] Cotton introduced evidence that two other break-ins and sexual assaults were committed in the same manner, on the same night, near the site of the crime for which he was charged. The defense then proffered evidence that a person other that the defendant was identified by a victim of one of the other attacks. The trial court excluded this evidence. On appeal, the North Carolina Supreme Court ruled that this evidence was relevant and admissible under Evidence Rules 401 and 404(b) and that it was error to exclude it:

> [W]e conclude that the excluded evidence was relevant within the meaning of Rule 401 of the North Carolina Rules of Evidence, even though it was offered as evidence of the guilt of one other than the accused. . . . The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy. N.C.G.S. § 8C-1, Rule 401 (1986).

318 N.C. at 665-67, 351 S.E.2d at 278-279.

A year later in *McElrath*, the North Carolina Supreme Court

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[20] Ronald Cotton was eventually cleared of all the charges by DNA analysis implicating another man.

applied this rule to a case not involving Rule 404(b). The defense moved to admit a map of the defendant's summer home found on the homicide victim, theorizing that the map indicated the victim had planned to burglarize the defendant's home and that one of the victim's co-conspirators, not the defendant, killed the victim. Finding that the trial court erred in excluding this evidence, the Supreme Court stated that:

> The relevance standard to be applied in this and other cases is relatively lax. After all, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. . . . We note also that the standard in criminal cases is particularly easily satisfied. "Any evidence calculated to throw light upon the crime charged" should be admitted by the court.

322 N.C. at 13, 366 S.E.2d at 449 (internal citation omitted).

In *Israel*, the defendant was captured on a surveillance videotape entering and leaving the apartment building where the victim lived during the period when she might have died. 353 N.C. 211, 539 S.E.2d 633 (2000). A number of fingerprints in the apartment matched the defendant, but defendant had lived in the apartment for two to three weeks. Defendant proffered evidence that the victim's ex-boyfriend, who had a history of assaulting the victim, was also captured on the videotape on a day more likely to have been the date of death. Other evidence that the jury was not allowed to

hear included an officer's testimony that the victim's boyfriend had been a suspect in the city-county investigation of the victim's murder. The Supreme Court found exclusion of this evidence to be reversible error as the defendant had proffered the identity of another suspect, along with evidence of opportunity and motive.

> Relevant evidence is, as a general matter, admissible. N.C.G.S. § 8C-1, Rule 402 (1999). "The standard [of relevance] in criminal cases is particularly easily satisfied. 'Any evidence calculated to throw light upon the crime charged' should be admitted by the trial court." . . .Because the excluded evidence cast doubt upon the State's evidence that defendant was the perpetrator of this crime and because it implicated another person as that perpetrator beyond conjecture or mere implication, it was relevant and admissible.

353 N.C. at 219, 539 S.E.2d at 638. The Court held that barring the admission of this evidence was error.

Legal Standard: United States Constitution

Denying a defendant the opportunity to present competent evidence to a jury concerning another possible suspect violates his constitutional rights. In *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the United States Supreme Court recognized a defendant's constitutional right under the Due Process Clause of the Fourteenth Amendment to offer evidence tending to show that a third party committed the crime.

In *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164

L.Ed.2d 503 (2006), the United States Supreme Court stated that trial courts must allow a defendant to present evidence suggesting that another person committed the crime, and expanded the rule to allow defendants to impeach the credibility of the state's witnesses. In that case, the defendant was precluded from presenting evidence that another man was *rumored* to be the culprit. The South Carolina Supreme Court erred because it required the defendant to show evidence of his own innocence and declined to consider the evidence that undermined the state's case. The United States Supreme Court stated, "[T]he true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence." *Id.*, 547 U.S. at 330, 126 S.Ct.2d at 1734, 164 L.Ed.2d at 512.

The Supreme Court further stated that the South Carolina Supreme Court had ignored "the credibility of the prosecution's witnesses or the reliability of its evidence," and said that "the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact." *Id.*, 547 U.S. at 330, 126 S.Ct. at 1734, 164 L.Ed.2d at 512.

CLAIM XII

Allen supplements the MAR with a new Claim XII:

ALLEN IS ENTITLED TO A NEW SENTENCING HEARING BECAUSE HE WAS SHACKLED IN THE PRESENCE OF THE JURY, WITHOUT A HEARING OR FINDINGS OF FACT AS TO THE NEED FOR RESTRAINTS.

In North Carolina, a defendant in a criminal trial may not appear shackled in court unless the trial judge has found, on the record, that extraordinary circumstances compel the use of physical restraint. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976). The North Carolina Supreme Court noted that a defendant's constitutional right to a fair trial is damaged when a defendant is shackled in the presence of the jury because "(1) it may interfere with the defendant's thought processes and ease of communication with counsel, (2) it intrinsically gives affront to the dignity of the trial process, and most importantly, (3) it tends to create prejudice in the minds of the jurors by suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion." *Id.*, 290 N.C. at 366, 226 S.E.2d at 367. The United States Constitution also prohibits the use of shackles in the presence of the jury without a showing that the shackles are necessary. The United States Supreme Court has acknowledged that physical restraints like shackles should only be used as a last resort: "Not only is it possible that the sight of shackles and gags may have a significant effect on the jury's feelings about the

defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Illinois v. Hall*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L. Ed. 2d 353, 359 (1970).

The decision to require a defendant to be shackled during the trial must be made by a judge in his sound discretion. Though the judge has discretion to keep order in the courtroom, the judge may only require a defendant to be shackled when it is necessary to prevent escape, to protect others in the courtroom, or to maintain order during the trial. *State v. Tolley, supra*, 290 N.C. at 367, 226 S.E.2d at 367. The judge is required to hold a hearing, however informal, and must state his reasons for the record outside the presence of the jury. *Id.*, 290 N.C. at 368, 226 S.E.2d at 369.

The State has the burden of proof to show that shackles are essential:

> [B]ecause of the inherent prejudice engendered by the use of shackles, the rule since the earliest cases has been that the burden of showing necessity for such measures rests upon the State....In certain cases, shackling the defendant may be justified, not because no prejudice is engendered thereby, but because it is shown by the State to be necessary notwithstanding any such prejudice.

Id., 290 N.C. at 366-67, 226 S.E.2d at 367.

In this case, the fact that Allen was shackled during both phases of the trial drew notice from the jury. Juror [redacted] attests

that Allen had "some type of shackles or restraints on during the trial." Exhibit 55, Affidavit of [redacted], at ¶ 6. Another juror, [redacted] told post-conviction investigators that Allen was shackled and "there were deputies all around him," although he declined to sign an affidavit.

The trial court did not give reasons for having Allen shackled; in fact, the judge tried to ensure that the jurors did not see that Allen was wearing restraints. Discussing the arrangements to transport Allen to the courtroom, the judge said:

> I'd assume that when [Allen] gets out of the car he's got shackles on his legs and on his hands and probably a chain running between the hands and the feet.

Captain Little confirmed that Mr. Allen had on "full restraints" while being transported. The judge continued:

> And so my concern is with all the jurors that are around here, they're going to see that....I am not sure that I can ensure that he's going to have a fair and impartial trial if we have [the trial] here because of the transport issue.

(Tr. Vol. V, pp. 1122-1123)

The judge decided to move the trial to Randolph County, at least partly to avoid having the jurors see Mr. Allen shackled:

> The Court finds it to be difficult to imagine or at least difficult in making certain that the defendant will not be seen shackled by any one of the prospective jurors in this case and that that fact may have some impact on the jurors that could not be overcome with a limited

instruction.

(Tr. Vol. V, p. 1129)

Despite the trial court's efforts, Allen was noticeably shackled in the presence of the jury, and the shackling was not ordered by the court on the record after a hearing as required under *Tolley*. Accordingly, under state and federal law, Scott Allen is entitled to a new trial.

CONCLUSION

For the reasons set forth herein and in the original MAR filed on July 2, 2007, Scott David Allen is entitled to a new trial on all charges for which he was convicted, and to a new sentencing hearing. Mr. Allen also renews his request for an evidentiary hearing on all of his claims set forth in the original MAR and in this Supplemental MAR.

Respectfully submitted, this 16th day of September 2013.

Scott David Allen

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing Supplemental Motion for Appropriate Relief has been duly served upon the Office of the District Attorney, Judicial District 19B, 305 Courthouse, 176 E. Salisbury Street, Asheboro, North Carolina 27203, and upon Jonathan P. Babb, Special Deputy Attorney General, N.C. Department of Justice, P.O. Box 629, Raleigh, North Carolina 27602-0629, by depositing the copies in a mailbox maintained by the United States Postal Service, first-class postage prepaid.

This the 12th day of September, 2013.

Michael L. Unti