The National Registry of EXONERATIONS

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CURRENTLY 1,063 EXONERATIONS

Glen Edward Chapman

In August, 1992, the bodies of Tenene Yvette Conley and Betty Jean Ramseur – both suspected prostitutes – were found within a week of each other in two abandoned houses in Hickory, North Carolina. Glen Edward Chapman's sperm was found in Conley's body. He was arrested and charged with the murders of both women. Chapman insisted he was innocent, though he admitted to smoking crack with both women, and to having consensual sex with Conley. Aside from the sperm, there was no physical evidence linking Chapman to the crimes.

Chapman's trial began on October 31, 1994. The prosecutor argued that Chapman was the last person seen with Conley before her body was found. The house where Ramseur's body was found had been set on fire; the prosecutor claimed that Chapman had attempted to burn the house down to hide the evidence of the murder. Two witnesses testified that Chapman confessed to them that he had committed the murders, but later recanted, claiming they were afraid of the police and the prosecutors.

Chapman's attorneys, both alcoholics, put little effort into investigating the case. On November 10, 1994, Chapman was convicted of two counts of first-degree murder, and on November 16, he was sentenced to death.

In post-conviction investigation, appellate lawyers found evidence that in both cases the prosecution had withheld a great deal of exculpatory evidence. In the Ramseur case, this evidence included a credible confession by another person, and witness testimony identifying another man as the culprit in a photo lineup. The claim that Chapman had burned down the house where Ramseur's body was found was contradicted by evidence that the fire was set after the body had been removed. In the Conley case, witnesses said they saw the victim days after prosecutors said she had been killed, in the company of a man who had a record of violence towards her. Also, forensic evidence indicated that Conley might not have been murdered at all, but instead had died of a cocaine overdose.

Following six post-conviction hearings over the course of four years, on November 6, 2007, a Superior Court Judge issued a 186-page order granting Chapman a new trial because the state withheld exculpatory evidence and because his defense attorneys were ineffective. The district attorney dismissed charges, and Chapman was released from prison on April 2, 2008.

– Alexandra Gross

Report an error or add more information about this case.

State:	North Carolina
County:	Catawba
Most Serious Crime:	Murder
Additional Convictions:	
Reported Crime Date:	1992
Convicted:	1994
Exonerated:	2008
Sentence:	Death
Race:	Black
Sex:	Male
Age:	24
Contributing Factors:	Perjury or False Accusation, Official Misconduct, Inadequate Legal Defense
Did DNA evidence contribute to the exoneration?:	No

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SUPERIOR COURT DIVISION

COUNTY OF CATAWBA | **92-CRS-18186**
93-CRS-11980

STATE OF NORTH CAROLINA

Vs. | **ORDER ALLOWING MOTION FOR APPROPRIATE RELIEF**

GLEN EDWARD CHAPMAN

These cases came on before Robert C. Ervin, Superior Court Judge, on the defendant's *Second Amended Motion for Appropriate Relief.* After reviewing the files maintained by the Clerk of Superior Court of Catawba County, the transcripts of the defendants' trial, the evidence and testimony presented to the Court in these proceedings, and the various submissions of the parties, this Court makes the following Findings of Fact and Conclusions of Law, and enters the following Order:

PROCEDURAL HISTORY AND BACKGROUND

General case history

1. The issues presented in defendant's *Second Amended Motion for Appropriate Relief* arise from the deaths of Betty Jean Ramseur and Tenene Yvette Conley.

2. On January 11, 1993, an indictment for the first-degree murder of Ms. Ramseur on June 17, 1992, issued against defendant in File No. 92 CRS 18186 (the Ramseur case). (Defendant's Exhibit 52).

3. On August 16, 1993, an indictment for the first-degree murder of Ms. Conley on

August 15, 1992, issued against defendant in File No. 93 CRS 11980 (the Conley case). (Defendant's Exhibit 77).

4. The Ramseur and Conley cases were joined for trial, and defendant was tried during the October 31, 1994 session of Superior Court in Catawba County, North Carolina, the Honorable Forrest A. Ferrell, Superior Court Judge Presiding.

5. At trial, defendant was represented by Robert C. Adams and W. Thomas Portwood, Jr., appointed counsel. The State was represented by Jason R. Parker and Rebecca Haddock, Assistant District Attorneys.

6. On November 10, 1994, the jury found defendant guilty of first-degree murder in both cases. On November 15, 1994, the jury recommended that defendant be sentenced to death in each case. Judgments were entered against the defendant on November 15, 1994, and sentences of death were imposed on November 16, 1994.

7. The defendant appealed his convictions and death sentences to the Supreme Court of North Carolina. The defendant was represented on direct appeal by Adams and Portwood as appointed counsel. On December 8, 1995, the Supreme Court of North Carolina (Justice Webb dissenting) affirmed the defendant's convictions for murder and the sentences of death. *State v. Chapman*, 342 N.C. 330, 464 S.E.2d 661 (1985).

8. The defendant filed a timely petition for writ of certiorari with the United States Supreme Court. On June 24, 1996, the United States Supreme Court denied the petition. *Chapman v. North Carolina*, 518 U.S. 1023 (1996).

Post-conviction proceedings

9. On July 5, 1996, the Appellate Defender of North Carolina, Malcolm Ray Hunter, Jr., filed an *Application for Appointment of Post-Conviction Counsel*. Pursuant to North Carolina General Statute § 7A-451, Judge Ferrell entered an Order appointing E. Fielding Clark, II, and Sherri Wilson Elliott to represent the defendant in his post-conviction proceedings.

10. On behalf of the defendant, Clark and Elliott filed a *Motion for Appropriate Relief* in Catawba County Superior Court on April 23, 1997.

11. On June 17, 2002, Clark died. Elliott later withdrew as post-conviction counsel for the defendant in July 2002.

12. On July 23, 2002, C. Frank Goldsmith, Jr., and Amy E. Ray were appointed as counsel to represent the defendant in these post-conviction proceedings. Goldsmith was appointed as lead counsel, and Ray was appointed as assistant counsel. On December 4, 2002, Ray withdrew as post-conviction counsel for the defendant. On December 30, 2002, Jessica E. Leaven was appointed as substitute assistant counsel to represent the defendant in these post-conviction proceedings.

13. On behalf of the defendant, Goldsmith and Leaven filed *Defendant's First Amended Motion for Appropriate Relief* on June 13, 2003. On or about September 8, 2003, the State, represented by Special Deputy Attorney W. Dale Talbert, filed a responsive pleading entitled *State's Memorandum of Law in Opposition to Defendant's Motion for Appropriate Relief*.

14. On November 10, 2003, the defendant filed his *Second Amended Motion for Appropriate Relief* ("MAR").

Post-conviction discovery

15. The defendant filed a *Motion for Discovery* on March 27, 1997, which the State opposed. On May 5, 1997, the Honorable Jesse B. Caldwell, III, conducted a hearing on the defendant's *Motion for Discovery*, and on June 18, 1997, Judge Caldwell entered an Order Compelling Discovery.

16. On August 1, 2003, the undersigned judge entered an Order requiring the State to make available to defense counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.

17. The State produced additional discovery records to post-conviction counsel in compliance with this Order. The parties stipulated that the following records, among others, were produced in discovery as the material existing and obtained from the custodians at the time discovery was provided in this case.

18. The State produced the files of the District Attorney's office, Bates-stamped 1-1024, and, following a subsequent search, the State produced additional files from the District Attorney's office, Bates-stamped 2475-2796. (05/06 MAR Tr. pp. 150-52).

19. The State produced the files of the Hickory Police Department, Bates-stamped 1216-2161. The State subsequently produced the Ramseur investigative file maintained by the Records Division of the Hickory Police Department, Bates-stamped 2797-3019, which included the Ramseur prosecution summary submitted by Detective Dennis Rhoney to his supervisor, Sergeant Dan Carlsen, Bates-stamped 2906-3019. The State also produced the Conley investigative file maintained by the Records Division of the Hickory Police Department, Bates-

stamped 3020-3157. (05/06 MAR Tr. pp. 150-52).

20. The State produced Hickory Police Department files pertaining to the drug investigation of Detective Mark Sams, Bates-stamped 2294-2337, and Sams' employment with the Hickory Police Department, Bates-stamped 2338-2474. (05/06 MAR Tr. pp. 150-52).

21. The State produced the files of the North Carolina State Bureau of Investigation ("SBI") for testing in 1992 and 1993, Bates-stamped 1025-1198. The State subsequently produced additional SBI files for the DNA testing performed in 1993, Bates-stamped 3320-3374. (05/06 MAR Tr. pp. 150-52).

22. The State produced the complete file of the Office of the Medical Examiner, Bates-stamped 3375-3412. (05/06 MAR Tr. pp. 150-52).

Post-conviction Hearing

23. This Court conducted evidentiary hearings on the defendant's MAR claims during the December 8, 2003; May 17, 2004; August 2, 2004; December 6, 2004; February 13, 2006; and May 15, 2006, sessions of Superior Court in Catawba County, North Carolina. The undersigned judge presided at each of these sessions. The defendant was present for all of these hearings.

24. During the evidentiary hearing, the defendant submitted 131 exhibits and presented the testimony of 49 witnesses: Michael Aguero, Jeffrey Roscoe, Irene Freeman, Gwen Anderson, Lola Chapman, Gail Deal, George Reinhardt, Mark Smith, Teresa Hall, Judge Sherri Elliott, Pankie Armstrong, Mabel Jenkins, Carolyn Williamson, Carl Geter, Mike Cosby, Jason Parker, Merl Hamilton, Mark Sams, Brian Cline, Danny Carter, Nicole Cline, Dennis Rhoney,

Richard Allen, Alvin Creasman, Steve Mueller, Gill Kanupp, Ernie Bueker, Robert Adams, Steve Ehlers, Danny Blackburn, Claudia Coleman, Priscilla Donahue, Mark Worthen, Christopher Walker, Deborah Lattimore, Chris Danner, Frankie Chapman, Tini Chapman, Mark Fagala, Ronald Ostrowski, Anthony Roddey, Quwina Roddey, Bruce Young, Reginald Oates, Allen Eberhardt, Ben Chapman, Murray Marks, Donald Jason, and Meghan Clement.

25. The State submitted 58 exhibits and presented the testimony of Sean McGinnis, Dan Carlsen, and Mark Boodee during the evidentiary hearing.

26. On August 2, 2006, the defendant filed a *Motion to Amend the Claims to Conform to the Evidence*, which this Court granted.

27. This Court has heard the testimony and observed the demeanor of the witnesses, reviewed the exhibits and relevant portions of the Court files and trial transcripts, assessed all of the evidence for its credibility, reliability, accuracy, and consistency with other evidence and with the record as a whole, and considered the presentations of counsel.

Findings of Fact Applicable to Claims

Hickory Police Department's Investigation Report and Prosecution Summary Procedures

28. During the period from 1992 to 1994, the Hickory Police Department followed a uniform procedure for processing investigation reports. The initial responding officer prepared an incident report on a multi-copy State form and provided the report to a supervisor. (08/04 MAR Tr. p. 774; 12/04 T 106). After the supervisor reviewed the incident report, the original report would be sent to the Records Division and the first copy of the report would be sent to the Criminal Investigation Division ("CID"). (12/04 MAR Tr. p. 107). CID then assigned an investigator to the case. (08/04 MAR Tr. pp. 775-76; 12/04 MAR Tr. p. 108). After an OCA

number was assigned to the case, the first copy of the incident report would be provided to the investigator in a folder that became the investigator's work file. (08/04 MAR Tr. p. 776; 12/04 MAR Tr. p. 109). All typed reports created by Hickory Police Department personnel after the incident report were known as supplemental reports, which were also prepared on a multi-copy State form. (12/04 MAR Tr. pp. 111-113). Supplemental reports would be submitted to a supervisor for review and then the original would be sent to the records division and the first copy sent to the investigator. (Id. at 114-115).

29. When the District Attorney's office was satisfied that there was probable cause, the Hickory Police Department would prepare and submit a prosecution summary to the District Attorney's office. (08/04 MAR Tr. pp. 785-786). According to general practice during the period from 1992 to 1994, the prosecution summary would include copies of all typed reports concerning the case: incident reports, supplemental reports, arrest reports, lab reports, and medical examiner and autopsy reports. (08/04 MAR Tr. pp. 217-18, 239, 411-13, 416, 531-33, 788, 806-807; 12/04 MAR Tr. pp. 58-59, 118). The prosecution summary would not include handwritten notes, telephone memos, or pending lab work. (08/04 MAR Tr. pp. 217-18, 238-239, 413, 415-16, 536, 786). A checklist of items would be included with the documents the Hickory Police Department submitted as the prosecution summary. (Defendant's Exhibit 47; 08/04 MAR Tr. pp. 787, 789). Any supplemental reports generated after submission of the prosecution summary would be copied and provided to the District Attorney's office. (08/04 MAR Tr. p. 804; 12/04 MAR Tr. p. 124).

Facts Relating to the Investigation and Prosecution Summary in the Ramseur Case

30. Detective Dennis Rhoney of the Hickory Police Department was assigned to be the lead investigator in the Ramseur case. (08/04 MAR Tr. p. 771).

31. Rhoney testified at the evidentiary hearing that when he prepared the prosecution summary in the Ramseur case, he reviewed the documents in his investigative file and the file in the records division to make sure he was using the complete file to prepare the prosecution summary. (12/04 MAR Tr. pp. 117-20).

32. The prosecution summary in the Ramseur case was received by the District Attorney's office on December 23, 1992. (08/04 MAR Tr. p. 353; 12/04 MAR Tr. p. 117). The prosecution summary in the Ramseur case did not include all of Hickory Police Department's records. (08/04 MAR Tr. p.300).

Facts Relating to the Investigation and Prosecution Summary in the Conley Case

33. Detective Mark Sams of the Hickory Police Department was assigned to be the lead investigator in the Conley case. Sams was the lead investigator until he was suspended without pay on February 25, 1994, and subsequently left the Hickory Police Department. (Defendant's Exhibit 45; 08/04 MAR Tr. pp. 406, 506-507). Rhoney became the lead investigator in the Conley case after Sams left the Hickory Police Department. (08/04 MAR Tr. pp. 777-778).

34. Sams testified at the evidentiary hearing that when he prepared the prosecution summary in the Conley case, he obtained copies of the documents in his investigative file and the file in the records division. (08/04 MAR Tr. pp. 535, 537, 560-61). Sams testified that he

included a handwritten list of suspects and witnesses in the prosecution summary, even though he was not required to do this. (08/04 MAR Tr. pp. 413-16). Numerous records were never submitted to the District Attorney's office, and were not available to the defendant's counsel.

35. The prosecution summary in the Conley case was received by the District Attorney's office on August 13, 1993. (08/04 MAR Tr. p. 352). The prosecution summary received in the Conley case did not include all of the Hickory Police Department's records. (08/04 MAR Tr. p. 300).

Catawba County District Attorney's Office "Open File" Policy

36. Assistant District Attorney Jason Parker was the chief prosecutor in the Catawba County District Attorney's office from late 1990 until 2002. (08/04 MAR Tr. p. 181). During the period from 1992 through 1994, the Catawba County District Attorney's office had an "open file" policy in murder cases. (08/04 MAR Tr. p. 190-191). The "open file" policy meant that the entire District Attorney's file, which included the prosecution summary and subsequently delivered supplemental reports, was available to defense counsel. (02/06 MAR Tr. pp. 161-62, 167-168). The "open file" policy did not extend to the Hickory Police Department's files. (08/04 MAR Tr. pp. 807-08). If items were not included in the District Attorney's file, the defendant's attorneys would not have access to them under the "open file" policy. (12/04 MAR Tr. pp. 307-08).

37. Parker testified at the evidentiary hearing that pursuant to the "open file" policy, defense attorneys were able to review the file and place a yellow tab on the pages they wanted to have copied. Parker would then review the yellow tabs and provide defense attorneys with

copies of the requested documents, unless he felt that a copy of the document should not be provided. (08/04 MAR Tr. pp. 190-192).

38. Adams testified at the evidentiary hearing that according to his understanding of the "open file" policy, he was able to review the file and make notes regarding the material, but that he was not allowed to have copies of the documents contained in the file. (12/04 MAR Tr. pp. 303-04). Adams did testify, however, that if he needed one particular document, he may have been able to obtain a copy of that document. (12/04 MAR Tr. pp. 304, 539).

39. Parker asserted at the evidentiary hearing that he complied with his *Brady* obligations through allowing defense counsel to have access to the District Attorney's file under the "open file" policy. (08/04 MAR Tr. pp. 238, 311-12). According to Parker, he did not request all of the materials in the Hickory Police Department's file, did not ask to examine the Hickory Police Department's file on either murder, and did not instruct law enforcement to provide exculpatory or mitigating evidence to the District Attorney's office. (08/04 MAR Tr. pp. 241, 417; 12/04 MAR Tr. p. 18). Parker merely assumed that all of the typewritten reports were included in the prosecution summary. (08/04 MAR Tr. p.300).

Pretrial Discovery

40. Adams and Portwood were both allowed access to the District Attorney's files in these cases pursuant to the "open file" discovery during their representation of the defendant. (08/04 MAR Tr. pp. 342-343).

41. Pursuant to Adams' understanding of the "open file" policy, he reviewed the District Attorney's file and took notes on the material contained therein, but he did not recall

obtaining copies of the material in the file. (12/04 MAR Tr. pp. 301, 303, 534, 539). When Adams reviewed the files, it appeared to be the prosecution summaries for both cases. (12/04 MAR Tr. pp. 536, 574). There were no phone memos or handwritten notes in the material Adams reviewed, with the exception of forms that were handwritten instead of typed and a Sams's suspect list in the Conley case. (12/04 MAR Tr. pp. 323, 353, 538-39).

42. All of the discovery materials that defense counsel had access to and received in these cases came from the District Attorney's files. (12/04 MAR Tr. p. 319). Neither defense counsel nor defendant's investigators examined the Hickory Police Department's files because they were not permitted to do so. (12/04 MAR Tr. pp. 18-20, 319, 405, 605, 651).

43. Based upon his understanding of the "open file" policy of the District Attorney's office, Adams believed, and reasonably relied upon his belief, that the State had provided the defense with true open file discovery, including access to all exculpatory information or *Brady* material. (12/04 MAR Tr. pp. 319, 364, 405, 534-35).

44. The Court finds that defense counsel had access to the documents Bates-stamped 1-1024 and 2475-2796 through the District Attorney's "open file" policy. These are all of the materials from the District Attorney's files that were made available to defense counsel as discovery in these cases. (08/04 MAR Tr. pp. 237, 241; 02/06 MAR Tr. pp. 170-71). Testimony at the evidentiary hearing indicates that neither Parker nor the Catawba County District Attorney's office knew of any documents that were not currently in the District Attorney's file, but were in the file at the time of the defendant's trial. (08/04 MAR Tr. p. 393; 02/06 MAR Tr. p. 171).

45. The Court finds that defense counsel had access to the documents in Defendant's

Exhibit 47, Bates-stamped 1497 through 1613, through the District Attorney's "open file" policy. These are all of the materials in the prosecution summary in the Ramseur case as contained in the Hickory Police Department's files presented to defense counsel during discovery in this case. (05/06 MAR Tr. pp. 150-52). Defendant's Exhibit 47 is essentially identical to two sets of the prosecution summary that are bound, clipped together, and located in the Hickory Police Department's files. (08/04 MAR Tr. p. 960; 12/04 MAR Tr. pp. 58, 66). Some of the items contained in Defendant's Exhibit 47 are not in the District Attorney's file presented to defense counsel during discovery in this case and neither Parker nor Rhoney could recall whether Exhibit 47 contains all of the material in the prosecution summary that went to the District Attorney's office. (08/04 MAR Tr. p. 799). Although the Court, therefore, has some doubt as to whether all of the documents in Defendant's Exhibit 47 were submitted to the District Attorney's office, the Court finds that Exhibit 47 contains the documents in the prosecution summary in the Ramseur case that was submitted to and received by the District Attorney's office.

46. On April 16, 1993, trial counsel filed a *Request for Voluntary Discovery* in the Ramseur case. (Defendant's Exhibit 90). Counsel filed a *Request for Voluntary Discovery* in the Conley case on October 13, 1994. (Defendant's Exhibit 91).

47. Defense counsel received copies of certain materials from the State in the Conley and Ramseur cases on October 14, 1994, as listed in Defendant's Exhibit 1 and Defendant's Exhibit 2. (Defendant's Exhibits 1 and 2). The materials provided by the State included SBI lab reports on the Conley and Ramseur investigations. (Defendant's Exhibit 1; 12/04 MAR Tr. p. 308). The discovery produced to defense counsel also included reports of witness interviews regarding the Conley case, Bates-stamped 462-72. (Defendant's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10,

11, and 12; 08/04 MAR Tr. pp. 242-44; 12/04 MAR Tr. pp. 308-312). This was the only discovery defense counsel received in a fashion that required them to acknowledge its receipt. (12/04 MAR Tr. p. 400). Parker testified at the evidentiary hearing that he was not aware of any additional evidence that was produced to defense counsel. (08/04 MAR Tr. p. 220).

48. The defendant's private investigators received copies of the discovery listed in Defendant's Exhibit 1 and Exhibit 2 on October 17, 1992. (Defendant's Exhibit 72; 12/04 MAR Tr. pp. 599-602). Defendant's investigators also received documents attached to a *Notice of Intention to Introduce Evidence at Trial*, dated October 14, 1994, which included a copy of Officer Wiles' interview with Lavar Gilliam on November 19, 1992, with all references to Gilliam's name redacted. (Defendant's Exhibit 72; 12/04 MAR Tr. p. 601). This is the total sum of discovery provided to the defendant's investigators by defense counsel. (Defendant's Exhibit 72; 12/04 MAR Tr. p. 603).

49. Adams also recalled receiving copies of some documents from the State that were provided during jury selection, but he was unable to recall the nature of those documents other than that Parker had received the documents the same or the previous day. (12/04 MAR Tr. p. 313).

50. The Court finds that the above-referenced materials are the only discovery materials that were provided to or made available to the defendant's trial counsel.

Facts Related to the Prosecution of the Ramseur and Conley Cases

51. Rhoney was the chief investigator in the Ramseur and Conley cases at the time of trial. (08/04 MAR Tr. p. 868).

52. Rhoney testified that when he prepared for trial, he reviewed the investigator's

files and the records division files of the Hickory Police Department. (08/04 MAR Tr. pp. 778-79, 801-02, 868; 12/04 MAR Tr. p. 60). Rhoney obtained two accordion file folders, one for the Ramseur case and one for the Conley case, and placed the contents of the investigator's files and the records division files into the accordion file folders to bring to trial. (12/04 MAR Tr. pp. 109-10).

53. Rhoney testified at the evidentiary hearing that he produced to the prosecution all information or material that may have been exculpatory or have mitigating value to the defense. (08/04 MAR Tr. pp. 808-09). Based upon the testimony of other witnesses at the evidentiary hearing and the evidence that was found in the Hickory Police Department's files, but not in the District Attorney's files, the Court finds that Rhoney's testimony to this effect is not credible.

54. The Court finds that documents Bates-stamped 1216 through 2161 were included in the Hickory Police Department's file at the time of trial; documents Bates-stamped 2797 through 3019 were included in the Ramseur investigative file maintained by the Records Division of the Hickory Police Department; and documents Bates-stamped 3020 through 3157 were included in the Conley investigative file maintained by the Records Division of the Hickory Police Department. These are all of the materials contained in the Hickory Police Department's files that were provided to defense counsel during post-conviction discovery in these cases. (05/06 MAR Tr. pp. 150-52). Based upon the testimony of witnesses at the evidentiary hearing and evidence that was not found in the Hickory Police Department's files, the Court finds that the Hickory Police Department's files also included additional documents trial that were lost, misplaced, or destroyed.

55. According to Rhoney's testimony at the evidentiary hearing, he attended the

entire trial. Rhoney sat beside Parker and assisted him with the presentation of evidence. (08/04 T p. 817, 867). Rhoney had the Hickory Police Department files for the Ramseur case and the Conley case with him during the defendant's trial. (12/04 MAR Tr. pp. 109-10).

Pre-Trial Motion

56. Before trial, the defendant's counsel filed a *Motion to Produce Exculpatory Evidence*. At the hearing on the motion, Adams stated: "The State ha[s] informed me they have provided me with all of the exculpatory evidence they have." (Trial Tr. Vol. II pp. 4, 13). Adams further informed the Court that "(w)e have been told by Mr. Parker there is not any other such evidence that he has not provided us with." (Trial Tr. Vol. II, p. 14). Parker stated: "Judge, there is now in the file a receipt of evidence that shows where the exculpatory evidence was given to them. Since that time we have also provided them with other evidence." (Tr. Vol. II p. 14).

I. Claims that the State Failed to Disclose Evidence in Violation of *Brady v. Maryland*
(MAR Claims I(A))

57. Defendant's MAR alleges that exculpatory or impeachment evidence that was material was withheld from the defendant and his counsel, in violation of the defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under Article I, Sections 19, 23, and 27 of the North Carolina Constitution. The Court will now address these allegations that the State failed to disclose material exculpatory or impeachment evidence to the defense at the time of the defendant's trial.

Legal Principles Applicable to Claims

58. The Fifth, Sixth, and Fourteenth Amendments to United States Constitution and Article I, Sections 19 and 23, of the North Carolina Constitution require the State to disclose material exculpatory or impeachment evidence in the possession of state agencies to the defense. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State v. Canady*, 355 N.C. 242, 252, 559 S.E.2d 762, 767 (2002); *State v. Bates*, 348 N.C. 29, 38, 497 S.E.2d 276, 281 (1998). In *Brady v. Maryland*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Subsequently, the Supreme Court held the duty to disclose such information is applicable whether or not a defendant specifically requests such favorable evidence, *United States v. Bagley*, 473 U.S. 667, 682 (1985), and the duty encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

59. Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. A reviewing court should consider not only the potential effect of the undisclosed material on the jury, but also its effect on the preparation or presentation of the defendant's case in light of the totality of the circumstances, *id.* at 683, and determine "whether in its absence [defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Finally, materiality is to be

determined by examining the record as a whole. *Id.* at 436; *Canady*, 355 N.C. at 252, 559 S.E.2d at 767.

60. The State's affirmative duty to disclose "*Brady* material" extends beyond the prosecutor's office to include State investigative agencies. *Kyles*, 514 U.S. at 437-38. In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437; *see also* N.C. Const. art. IV, § 18 (district attorneys are responsible for the prosecution of criminal cases "on behalf of the State"); *Bates*, 348 N.C. at 38, 497 S.E.2d at 281 ("State's liability [under *Brady*] is 'not limited to information in the actual possession of the prosecutor and certainly extends to any in the possession of state agencies subject to judicial control.' (citation and internal quotations omitted)).

61. Defense trial counsel is entitled to rely upon the State's representation that the State follows an "open file" policy in fulfillment of the defendant's statutory and constitutional rights to pretrial discovery including *Brady* material. *Banks v. Dretke*, 540 U.S. 668, 692-98 (2004); *Strickler v. Greene*, 527 U.S. 263, 283-84 (1999).

62. The Fourth Circuit Court of Appeals has held that the requirements of Brady are not violated "if the information allegedly withheld by the prosecution was reasonably available to the defendant." *Hoke v. Netherland*, 92 F.3d 1350, 1355 (4th Cir. 1996); *see also United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990).

63. In order to establish a *Brady* violation, and thus a violation of Federal and State constitutional standards, the defendant must establish that: (1) evidence was withheld by the State; (2) the evidence was favorable to the defendant either because it was exculpatory on the

issue of guilt, provided grounds for the impeachment of a witness, or provided a basis for the mitigation of his sentence; and (3) the withheld evidence was material. *Strickler v. Greene,* 527 U.S. 263, 282 (1999).

The Evidence Against The Defendant in the Ramseur Case

64. The State's evidence against the defendant in the Ramseur case was not overwhelming, and the State's case was based upon circumstantial evidence. (08/04 MAR Tr. pp. 185, 196).

65. The evidence at trial linking defendant to the killing of Ms. Ramseur primarily consisted of the testimony of Weyburn Smith, Ms. Ramseur's probation officer, seeing Ms. Ramseur with a black male on June 11, 1992; a hearsay statement made by Alvin Creasman, who saw a black male and white female together the morning of the June 12, 1992, fire at 407 Highland Avenue; the fire on June 12; and Nicole Cline, Brian Cline, and Lavar Gilliam, who testified that they heard or overheard defendant make statements about murdering Ms. Ramseur. (08/04 MAR Tr. pp. 202-05). The defendant testified at trial and denied killing Ms. Ramseur.

66. On August 22, 1992, Ms. Ramseur's partly skeletonized body was found in a crawl space under a house located at 407 Highland Avenue, SE, in Hickory. (Trial Tr. Vol. III pp. 208, 213, 318).

67. Dr. Brent Hall, the pathologist who performed the autopsy on August 23, 1992, determined Ms. Ramseur died sometime in June 1992. (Trial Tr. Vol. III pp. 317, 324, 326). Dr. Hall opined that Ms. Ramseur had died as a result of a blunt-trauma injury to the head, and that the injury was consistent with use of a hard object like a brick or a hammer. (Trial Tr. Vol. III

pp. 317, 320, 324, 326).

68. According to the trial testimony, Ms. Ramseur was on probation and was last seen by Weyburn Smith on June 11, 1992. Smith testified that he saw Ms. Ramseur on June 11, 1992, when she came to the Catawba County Courthouse for a hearing on a probation violation. After Ms. Ramseur's case was continued, Smith saw her leave the courtroom with a black man. (Trial Tr. Vol. III pp. 340, 342, 345-47).

69. Chris Walker, a black male, testified that he was Ms. Ramseur's constant companion for three years. (Trial Tr. Vol. IV p. 3). Walker was in prison for a parole violation from May or June 1992 until January 1993. (Trial Tr. Vol. IV pp. 5-6).

70. Hazel Williamson, Walker's parole officer, testified that Walker was arrested on May 30, 1992, and remained in custody until January 14, 1993. (Trial Tr. Vol. IV p. 10).

71. On the morning of June 12, 1992, a fire at 407 Highland Avenue in Hickory was reported. Alvin Ray Creasman, a vagrant who had been living at 407 Highland Avenue, told Raymond Mitchell, a fire inspector with the Hickory Fire Department, that he had seen a black male and a white female at the house around daybreak on June 12. Following a hearing where Detective Rhoney testified that Creasman could not be located for trial, Creasman's hearsay statement was allowed into evidence through Mitchell's testimony, over defense counsel's objection. (Trial Tr. Vol. IV pp. 26, 30-33). Creasman's statement was read to the jury as follows:

> There was a fire in the living room. There was clothing found in the area of the living room. I was in the hallway asleep upstairs. The smoke woke me up. I noticed a black male and a white female there this morning about day break. I stayed all night here. I am a smoker. (Trial Tr. Vol. IV p. 30).

72. Thomas Rasmussen, an SBI fire investigator, determined that the fire had been

caused by human hands, either accidentally or intentionally. Rasmussen also testified that he was unaware of anyone going under the house into the crawl space, and that there would have been no occasion for anyone to go into the crawl space. Rasmussen also testified that he was called back to a second fire at 407 Highland Avenue a couple of months after the fire on June 12, 1992. (Trial Tr. Vol. IV pp. 13, 16, 19).

73. Nicole Cline testified at trial that in June or July of 1992, the defendant told her he had just killed Chris Walker's girlfriend by cracking her in the head with a brick. The defendant pointed from Nicole Cline's residence to the house located at 407 Highland Avenue and said he put her in the bottom of the basement of the house. On August 22, 1992, Nicole Cline was sitting on the balcony braiding a woman's hair when she smelled a funny smell and then looked over towards 407 Highland Avenue and saw police and an ambulance there. After Nicole Cline learned that a body was found at 407 Highland Avenue, she told her father, Harold Chapman, about her earlier conversation with the defendant. (Trial Tr. Vol. III pp. 228, 231-233, 236, 239).

74. Brian Cline testified that he overheard a conversation between Nicole Cline and the defendant in the summer of 1992. Brian Cline saw them on the balcony and heard the defendant tell Nicole Cline "something about he killed the girlfriend of Chris Walker." Following this conversation, but before Ms. Ramseur's body was discovered, Brian Cline testified that he and the defendant were driving down "the street where the house was located on" when the defendant pointed to the house and said, "If people keep fucking with me they would end up like that bitch that was under the house." (Trial Tr. Vol. III pp. 241, 242, 244).

75. Lavar Gilliam testified that during the summer of 1992, he overheard the

defendant tell two or three people, including Gwendolyn Anderson, that he killed a woman, her body was in the house on Highland Avenue, and he was going to burn the house down so the body could not be found. (Trial Tr. Vol. III pp. 248, 250-54).

76. The defendant testified that he knew Ms. Ramseur through Chris Walker, and he had previously smoked crack with them on occasion. The defendant further denied telling Nicole and Brian Cline that he had killed somebody, and he denied ever having seen Lavar Gilliam before he testified. The defendant testified that he was not with Ms. Ramseur in court in Newton on June 11, 1992, and he denied killing Ms. Ramseur. (Trial Tr. Vol. IV pp. 148-149, 151-52, 157).

77. The prosecution argued to the jury that the defendant murdered Ms. Ramseur on June 12, 1992, and deliberately set two fires to the house in a bungled attempt to burn her body, which he had left in the crawl space underneath the house. (Trial Tr. Vol. IV pp. 217-19; 08/04 MAR Tr. pp. 197, 203, 817). The State argued that the defendant was the black man seen with Ms. Ramseur in court on June 11, and it could not have been her boyfriend, Chris Walker, because he was in prison. (Trial Tr. Vol. IV p. 217; 08/04 MAR Tr. p. 202-204). Moreover, the State argued that the black male and white female seen by Alvin Creasman at 407 Highland Avenue on the date of the June 12 fire were the defendant and Ms. Ramseur. (08/04 MAR Tr. pp. 203-04).

<u>Withheld Evidence Pertaining to Alvin Creasman and the Fires at 407 Highland Avenue</u>

Exhibit 25: Alvin Creasman's photographic lineup

78. As part of his investigation of the Ramseur case, Detective Rhoney showed a

photographic lineup to Alvin Creasman on December 23, 1992. Defendant's Exhibit 25 is a witness instruction form establishing that Creasman was shown a series of six photographs, and he identified Photograph Number 6 as a "positive identification" of the person he saw at 407 Highland Avenue prior to the fire on June 12, 1992. (Defendant's Exhibit 25; 08/04 MAR Tr. pp. 857-61, 866).

79. Testimony at the evidentiary hearing established that Defendant's Exhibit 25 should have been accompanied by two other items: (1) the six photographs shown in the lineup and (2) a supplemental report of the results generated by Rhoney. (08/04 MAR Tr. p. 268; 12/04 MAR Tr. pp. 23-24).

80. Defendant's Exhibit 25 establishes that Creasman identified someone other than the defendant as the black male who was present at 407 Highland Avenue on the morning of June 12, 1992. (08/04 MAR Tr. pp. 866-67). This evidence contradicts the State's theory at trial that the defendant was seen by Creasman on June 12, 1992 at 407 Highland Avenue with Betty Ramseur, and that he murdered her that day.

81. Creasman's testimony at the evidentiary hearing confirmed that Rhoney showed Creasman a series of photographs and that Creasman identified the black male that he saw at 407 Highland Avenue on June 12, 1992, as someone other than the defendant.

82. Creasman testified that he lived in a vacant house on Highland Avenue during the summer of 1992, and he recalled waking up the morning of the fire pretty early and seeing a black male and white female. (08/04 MAR Tr. pp. 1014-16). Creasman was able to get "quite a good look" at the black male, who was medium height and clean shaven, had black hair and sunken cheekbones, and was skinny. (08/04 MAR Tr. pp. 1016-17, 1020-21). Creasman

testified that the defendant was not the black man that he saw the morning of the fire. (08/04 MAR Tr. p. 1021).

83. Creasman testified that at some later date, the police picked him up and took him to the police station where Rhoney showed him a photographic lineup. (08/04 MAR Tr. pp. 1021-22). When Rhoney conducted the photographic lineup, he asked Creasman to look at photographs of six black males and to identify the black male that he saw at the scene of the fire. (08/04 MAR Tr. p. 1023). According to Creasman, he had no difficulty identifying the black man he saw; he picked out the photograph and told Rhoney. (08/04 MAR Tr. pp. 1024-25). Rhoney was present when Creasman made the identification. (08/04 MAR Tr. p. 1025). Rhoney then told Creasman that he was free to go. (08/04 MAR Tr. p. 1025).

84. The Court finds that Creasman's testimony at the evidentiary hearing was credible.

85. Creasman signed Defendant's Exhibit 25, and he wrote "Positive identification as photograph shown to me." (Defendant's Exhibits 25 and 41; 08/04 MAR Tr. pp. 1024, 1041-1042).

86. Defendant's Exhibit 25, Bates-stamped 1434, has been in the possession of the Hickory Police Department continuously since its creation in 1992 because it was located in the Hickory Police Department's file and provided to the defendant's current counsel, pursuant to their request for discovery from the State in these post-conviction proceedings. (Defendant's Exhibit 25; 05/06 MAR Tr. pp. 150-52).

87. The lineup photographs are missing from the Hickory Police Department files, and the supplemental report was also not located. (08/04 MAR Tr. pp. 864-865). Detective

Rhoney did not offer any credible explanation for these missing items. Rhoney testified at the evidentiary hearing that he would have prepared a supplemental report of the results and the Court finds that portion of his testimony was credible. (08/04 MAR Tr. p. 864).

88. Defendant's Exhibit 25, Rhoney's supplemental report, and the lineup photographs were not in the possession of the District Attorney's office in 1992, 1993, and 1994 because they were not provided by the Hickory Police Department. (08/04 MAR Tr. pp. 263-66, 268). Rhoney did not tell Parker that Creasman had identified someone else other than Chapman during the photographic line-up. (08/04 MAR Tr. pp. 872).

89. The State did not produce Defendant's Exhibit 25, Rhoney's supplemental report, or the lineup photographs to defense counsel prior to the trial or during the trial or permit defense counsel to review them through the District Attorney's "open file" policy. (12/04 MAR Tr. pp. 335-36).

90. Neither Defendant's Exhibit 25 nor Rhoney's supplemental report nor the lineup photographs nor substantially equivalent evidence were available to defendant's counsel, with reasonable diligence, at trial, other than through disclosure by the State. Since Creasman could not be located to testify at trial and since Rhoney withheld this evidence, the defendant did not have any means to ascertain these facts.

91. Rhoney testified at the evidentiary hearing that Defendant's Exhibit 25 would have been extremely valuable information for the defense. (08/04 MAR Tr. pp. 863, 867). Rhoney also admitted that Creasman's positive identification of someone other than the defendant is significant and should have been provided to the defense. (12/04 MAR Tr. pp. 45-56).

92. Jason Parker testified at the evidentiary hearing that evidence that the black man and white woman seen by Creasman were not the defendant and Ms. Ramseur would be "highly relevant." (08/04 MAR Tr. pp. 207-08, 265).

93. If Adams had learned that Rhoney conducted a photographic lineup with Creasman, and that Creasman had identified someone other than the defendant, the defense would have investigated whether the black male Creasman saw was someone other than defendant. (12/04 MAR Tr. p. 341). Adams testified at the evidentiary hearing that without the inference that the black male Creasman saw was the defendant, the State would not have been able to pursue the theory that the defendant attempted to burn down the house to hide Ramseur's body. (12/04 MAR Tr. pp. 341-42).

94. Defense counsel could have used Defendant's Exhibit 25 and the results of photographic lineup to cross-examine Detective Rhoney at trial, had they known of it. More importantly, however, this evidence significantly contradicted the State's theory that the defendant murdered Ms. Ramseur on June 12, 1992, and set fire to the house on that date in an attempt to burn her body. Creasman would have been in a position to testify that the black male that he saw at 407 Highland Avenue with the white female on the morning of June 12, 1994 was not the defendant. Creasman's testimony would have rebutted a significant aspect of the State's theory in this case.

95. The evidence that Creasman identified someone other than Chapman as the black male who was present at 407 Highland Avenue on June 12, 1992 was withheld from the defense and that evidence was exculpatory since it would have placed another black male at the scene where Betty Ramseur's body was eventually found shortly before the fire occurred. That

evidence was material since there is a reasonable probability that the outcome of the trial would have been different if this evidence had been made available to the defendant's attorneys prior to trial.

Exhibit 27: Hickory Police Department's file of the June 12, 1992, fire

96. Defendant's Exhibit 27 is the Hickory Police Department's file on the June 12, 1992, fire at 407 Highland Avenue. The file includes an incident report of the fire that was prepared by Officer Jewell, that indicates that a suspect can be identified, and a Hickory Police Department computer printout of data on Creasman, including his criminal record. Officer Steve Mueller's handwritten notes of an interview with Creasman on June 12, 1992 are also included. Mueller's notes mention that Creasman was smoking cigarettes and he put them in a drink can. According to Mueller's notes, Creasman also gave the following description of the black male: red coat, blue jeans, 5'6" to 5'7", 130 to 135 pounds, short hair. Creasman described the white female as follows: white sweater, jeans, auburn hair, 5'4" to 5'5", 110 pounds. (Defendant's Exhibit 27; 12/04 MAR Tr. pp.39-40, 172).

97. Defendant's Exhibit 27 provides relevant data and tends to establish that Creasman was a suspect in the fire and may have caused the fire by failing to extinguish a cigarette. Moreover, Mueller's notes provide a more detailed description of the individuals that Creasman observed on June 12, 1992 than the one that was provided by Raymond Mitchell at the trial, a description of an individual who is somewhat shorter and lighter than the defendant. (Trial Tr. Vol. III p. 32, 08/04 MAR Tr. pp. 843, 852, 873-74).

98. Rhoney described the defendant as approximately 5'9" and 165 pounds in the application for a search warrant in the Ramseur case. (Defendant's Exhibit 48). The defendant

was described as approximately 5'9" and 170 pounds in the application for a search warrant in the Conley case. (Defendant's Exhibit 20).

99. The testimony of Sergeant Steve Mueller at the evidentiary hearing confirmed that he interviewed Creasman when he arrived at the scene of the fire at 407 Highland Avenue and took handwritten notes of the interview which are contained in Defendant's Exhibit 27. (12/04 MAR Tr. pp. 168, 170-72). Mueller testified regarding his conversation with Creasman, who gave a detailed description of the black male and the white female and commented that he had seen the black male before. (12/04 MAR Tr. p. 176). Creasman also said that he smoked a few cigarettes and put them in a drink can. He then commented that he usually "piss[es] on the cigarettes to put it out," but that he did not know if he took the cigarette with him when he went "to go piss." (12/04 MAR Tr. pp. 177-78). Creasman also said that he had been involved in a previous fire where he was drinking and passed out, and a mattress and pillow caught on fire probably because of his cigarettes. (12/04 MAR Tr. p. 174). According to Mueller, a fire investigator at the scene was also present during the interview with Creasman. (12/04 MAR Tr. p. 183). Mueller also called Officer Kurz, who said that Creasman had provided him with information in the past. (12/04 MAR Tr. p. 180). Mueller did not recall preparing a report of his interview with Creasman, and testified that if the fire was determined to be accidental, no further police activity would be required, and he would have turned in his handwritten notes. (12/04 MAR Tr. pp. 184, 195). The Court finds that Mueller's testimony at the evidentiary hearing was credible.

100. Creasman testified at the evidentiary hearing that the day of the fire, he spoke to one or two people from the police department or the fire department and gave them a description

of the black man and white woman. (08/04 MAR Tr. p. 1020). Creasman said that they took notes of the conversation and asked how to contact him if they needed to later. (08/04 MAR Tr. p. 1020). The Court finds that Creasman's testimony at the evidentiary hearing was credible.

101. Defendant's Exhibit 27 has been in the possession of the Hickory Police Department since its creation in 1992 because it was located at the Hickory Police Department and provided to defendant's current counsel by the State in this proceeding. (12/04 MAR Tr. pp.39-40).

102. Rhoney and Mueller should have known at the time of the defendant's trial that Defendant's Exhibit 27 was in the possession of the Hickory Police Department. Rhoney testified at the evidentiary hearing that he was at the scene of the June 12, 1992, fire with Mueller. (08/04 MAR Tr. p. 829). Moreover, Mueller testified at the evidentiary hearing that after Ms. Ramseur's body was discovered, Rhoney was looking for information on the black male who was with the white female, and Mueller showed him the handwritten notes of his interview with Creasman. (12/04 MAR Tr. pp. 185-86, 188). Mueller specifically recalled telling Rhoney: "There's a description of a black male. Look at the height. Look at the weight. There's a white female. Look at the hair color. Look at the height. Look at the weight." (12/04 MAR Tr. p. 186). The Court finds that this testimony is credible.

103. Mueller's notes that were contained in Defendant's Exhibit 27 were not in the possession of the District Attorney's office in 1992, 1993, and 1994 because that exhibit was not provided by the Hickory Police Department. (08/04 MAR Tr. pp. 261-62).

104. The State did not produce Mueller's notes of his interview of Creasman to defense counsel prior to trial or during trial nor permit defense counsel to review Mueller's notes

through the District Attorney's "open file" policy. (12/04 MAR Tr. p. 340). The defense had a copy of the Hickory Fire Department's records on the June 12, 1992 fire at 407 Highland Avenue. Tom Portwood specifically made reference to the Fire Department report during his cross-examination of SBI Agent Rasmussen and marked the report as defendant's Exhibit 1. (Trial Tr. Vol. IV, p. 14). Portwood's questioning of Rasmussen reflects a familiarity with the Fire Department's report. Furthermore, Jason Parker served a Notice of Intention To Introduce Hearsay Statements At Trial and attached Raymond Mitchell's report of his interview of Creasman to the Rule 805(b)(5) notice. Mitchell's report of this interview was part of the Hickory Fire Department's records that were identified as Exhibit 26 during the MAR proceedings. It does not appear from these references that the defense had access to the Hickory Police Department's records concerning the June 12, 1992 fire.

105. The presence of exculpatory evidence in the files of a local law enforcement agency is imputed to the prosecution and must be disclosed. The fact that the prosecutor did not know of the existence of this evidence is irrelevant. See State v. Smith, 337 N. C. 658, 662, 447 S. E. 2d. 376 (1994). Since Dennis Rhoney, the lead investigator in this case, had knowledge of this information, the State is deemed under Brady to have had knowledge of the information as well. Smith, 337 N. C. at 662.

106. Neither Mueller's notes concerning his interview of Alvin Creasman or substantially equivalent evidence were available to defendant's counsel, with reasonable diligence, at trial, other than through disclosure by the State.

107. If Adams learned the information contained in Mueller's notes concerning his interview of Creasman, this would have been investigated by the defense. (12/04 MAR Tr. p.

341). Adams testified at the evidentiary hearing that without the inference that the black male Creasman saw was the defendant, the State would have had difficulty pursuing the theory that defendant attempted to burn down the house to hide Ramseur's body. (12/04 MAR Tr. pp. 341-42).

108. Defense counsel could have used Defendant's Exhibit 27 and the information contained therein to cross-examine Raymond Mitchell, Detective Rhoney, Agent Rasmussen, and Officer Mueller at trial, had they known of it. Defense counsel could have used Mueller's notes in an attempt to locate Creasman and call him as a witness. Most importantly, however, this evidence could have been used by the defense to challenge the State's theory that the defendant murdered Ms. Ramseur on June 12, 1992, and set the fire in an attempt to burn her body. Creasman's description of the black male would have permitted the defense to argue that the defendant was not the black male who Creasman observed at 407 Highland Avenue on June 12, 1992 and provided evidence to support the argument that the June 12, 1992 fire was carelessly lit by Creasman. This evidence was material to the defense in that it rebutted contentions advanced by the State in support of its theory that Chapman was present at 407 Highland Avenue with Betty Ramseur on June 12, 1992 and that he started a fire at the vacant house in an attempt to destroy her remains.

109. This evidence was withheld by officials at the Hickory Police Department and it was exculpatory in that it rebutted the State's theory of the case. The evidence was material in that there is a reasonable probability that if this evidence had been made available to the defense that the outcome of the defendant's trial would have been different.

Exhibit 29: State Bureau of Investigation's report of the November 14, 1992, fire

110. Defendant's Exhibit 29 is a North Carolina State Bureau of Investigation report of a second fire at 407 Highland Avenue that occurred on November 14, 1992. The fire's origin was determined to have been incendiary. The report also mentioned that the structure was damaged beyond repair during a fire on June 12, 1992. (Defendant's Exhibit 29).

111. Defendant's Exhibit 29 tends to establish that the second fire at 407 Highland Avenue occurred on November 14, 1992, which was after Ms. Ramseur's body was found on August 22, 1992. (08/04 MAR Tr. pp. 273, 276).

112. Ernie Bueker testified at the evidentiary hearing as an expert in the field of fire investigation. (12/04 MAR Tr. p. 245). Bueker was Assistant Special Agent in Charge with the North Carolina State Bureau of Investigation when he responded to the scene of the June 12, 1992 and November 14, 1992 fires at 407 Highland Avenue. (*Id*. at 244-45, 253). Bueker, who prepared Defendant's Exhibit 29, testified that the fire on November 14 was much more extensive than the June 12 fire. (*Id.* at 254).

113. Defendant's Exhibit 29 has been in the possession of the North Carolina State Bureau of Investigation since its creation in 1992 because it was located in the SBI's files and provided to defendant's current counsel by the State in this proceeding. There is no indication that the SBI or the Hickory Police Department transmitted Exhibit 29 to the District Attorney's office prior to the defendant's trial in 1994.

114. For the purposes of disclosing exculpatory evidence pursuant to Brady v. Maryland, the State's liability is "not limited to information in the actual possession of the prosecutor and certainly extends to any in the possession of state agencies subject to judicial

control." State v. Bates, 348 N. C. 29, 38, 476 S. E. 2d. 276 (1998). Based on the decision in Bates, it appears that this rule extends to records in the possession of the State Bureau of Investigation. This is particularly true if the lead detective had knowledge of the substance of the information possessed by the SBI.

115. Detective Rhoney knew at the time of defendant's trial that the second fire at 407 Highland Avenue occurred after Ms. Ramseur's body was found. Rhoney testified at the evidentiary hearing that he knew at trial that the second fire occurred after Ms. Ramseur's body was found on August 22, 1992. (08/04 MAR Tr. pp. 853-54; 12/04 MAR Tr. pp. 71-72).

116. SBI Agent Rasmussen testified as a witness for the prosecution at trial. During his re-direct examination of Rasmussen, Parker asked whether he was "called back to another fire at the same residence at a later time." (Trial Tr. Vol. IV p. 19).

117. The State did not produce Defendant's Exhibit 29 to defense counsel prior to trial or during trial nor permit defense counsel to review it through the District Attorney's "open file" policy. Moreover, the State did not provide defense counsel with information about the date of the second fire at 407 Highland Avenue. (12/04 MAR Tr. p. 423).

118. Neither Defendant's Exhibit 29 nor substantially equivalent evidence was available to defendant's counsel, with reasonable diligence, at trial, other than through disclosure by the State.

119. Defendant's Exhibit 29 could have been used by defendant to challenge the State's theory that defendant murdered Ms. Ramseur on June 12, 1992, and set fire to the house on two different occasions. It was relevant to the soundness of the State's theory that the second fire occurred before Ms. Ramseur's body was found in August. This evidence, in and of itself,

was not material in that there is no reasonable probability that the outcome of the trial would have been different if this evidence had been available to defense counsel prior to trial. However, this evidence, when considered with the other evidence in this case that was withheld in contravention of the principles set forth in Brady and its progeny, bolsters the Court' ultimate conclusion that the exculpatory evidence that was not made available to defense counsel was material in that if the withheld evidence in its totality had been disclosed to defendant's attorneys then the outcome of the trial would likely have been different. Since the materiality of suppressed evidence is considered collectively and not item by item, the cumulative effect of this evidence together with the other evidence withheld in this case in contravention of the rule enunciated in Brady v. Maryland entitles the defendant to a new trial. See Kyles v. Whitley, 514 U. S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

Withheld Evidence Implicating Other Individuals in Ramseur's Murder

Exhibit 38: Telephone memo from Richard Allen

120. Defendant's Exhibit 38 is a telephone memo directed to Rhoney dated September 2, 1992, which states that a Richard Allen, whose address and telephone number were noted, had overheard a conversation regarding Betty Ramseur in the Catawba County Jail and should be home all day the next day. Although Rhoney did not recall the substance of the conversation, his testimony at the evidentiary hearing tended to show that he had a conversation with Allen, wrote Allen's address on the front of the memo, and made the following notation on the back of the memo: "D Block, 9-1-92, Two B-guys, "Mike" Did, Last Frazier, "E.R. Frazier." (Defendant's Exhibit 38; 08/04 MAR Tr. pp. 895-97).

121. Defendant's Exhibit 38 tends to establish that Allen provided information to

Rhoney about a conversation that he overheard concerning the Ramseur murder in the Catawba County Jail between two black males.

122. Richard Allen testified at the evidentiary hearing regarding the conversation that he overheard about Ms. Ramseur in the Catawba County Jail and his subsequent conversation with Rhoney. During the summer of 1992, Allen was in the Catawba County Jail for a few days for failure to pay child support. (08/04 MAR Tr. p. 1000). While in the jail, Allen overheard a conversation between two black male inmates, one much larger than the other. (*Id.* at 1006). According to Allen, the larger man asked the smaller man if he heard about that "little skinny white bitch." (*Id.* at 1001, 1006, 1010-1011). The larger man then said he met her on the corner, they hit a rock, and he "was going to hit that pussy," but his "rock was already gone and here that bitch wouldn't come across," or something to that effect. (*Id.* at 1001, 1011). Allen then heard the larger man say, "I choked the bitch out." (*Id.* at 1001, 1011-12). The larger man then commented, "What I done with her, I thought they would never find her unless they tore the damn house down." (*Id.* at 1001-1002, 1011).

123. Allen testified that he learned about the Ramseur murder after he was released from jail, and he called the Hickory Police Department and asked for the detective investigating the murder. (*Id.* at 1004). When Rhoney returned his phone call, Allen told Rhoney the details of the conversation that he overheard. (*Id.* at 1004, 1006). Rhoney responded that anything he overheard was jailhouse gossip and hearsay and probably would not be admissible in court. Rhoney also said, "We've got a pretty good handle on it and we appreciate your calling." (*Id.* at 1004-05). Rhoney then asked Allen if he would like to make some money working as an informant for the police, which Allen declined. (*Id.* at 1005-06, 1009).

124. The Court finds that Allen's testimony at the evidentiary hearing was credible.

125. While Rhoney ultimately admitted at the evidentiary hearing that he recalled speaking to Allen about the Ramseur murder, he claimed that he did not recall any details of the conversation and, therefore, was unable to dispute Allen's testimony. (12/04 MAR Tr. pp. 143, 154-57). The Court finds that Rhoney's testimony that he did not recall the substance of the conversation with Allen was credible.

126. Testimony at the evidentiary hearing established that Rhoney should have generated a supplemental report to document his conversation with Allen. (08/04 MAR Tr. p. 903).

127. The Court finds that Allen overheard a conversation between Robert Frazier and Michael Ramseur, and that Frazier made the incriminating comments. Defendant's Exhibit 80 is a copy of the September 1, 1992, jail log for the D block in the Catawba County Jail. (Defendant's Exhibit 80; 08/04 MAR Tr. pp. 897, 906). The names Richard Allen, Michael Ramseur, and Robert "E.R." Frazier are all listed on the jail log. Ramseur is described as a black male, age 43, and Frazier is described as a black male, age 19. (Defendant's Exhibit 80; 08/04 MAR Tr. pp. 907-08). Chris Walker testified at the evidentiary hearing that Michael Ramseur, who was nicknamed "Dirty Mike," was an older, "[l]ittle bitty guy." (12/04 MAR Tr. pp. 1005-06). Walker also testified that Robert Frazier, who went by the name "E.R." was a big man. (12/04 MAR Tr. pp. 1004).

128. Rhoney testified at the evidentiary hearing that E.R. Frazier was one of the individuals driving or riding in Ms. Ramseur's car, that he was engaged in criminal activity and had a history of violent behavior. (08/04 MAR Tr. pp. 898, 901-902).

129. Defendant's Exhibit 38, Bates-stamped 1490-91, has been in the possession of the Hickory Police Department since its creation in 1992 because a copy of the phone memo was located in the Hickory Police Department's file and provided to the defendant's current counsel, pursuant to their request for discovery from the State in this proceeding. (Defendant's Exhibit 38; 05/06 MAR Tr. pp. 150-52). The State concedes that Exhibit 38 was present in the Hickory Police Department files from 1992 until disclosed in discovery during the MAR proceedings.

130. The Court finds that Rhoney knew or should have known at the time of defendant's trial about Defendant's Exhibit 38 and the information he learned from Allen.

131. A supplemental report of Rhoney's conversation with Allen was not located in the Hickory Police Department file. The Court finds that Rhoney did not prepare a written report of his conversation with Allen, and he did nothing to investigate the information he learned from Allen. (08/04 MAR Tr. pp. 904; 12/04 MAR Tr. pp. 14-15). Rhoney's evidentiary hearing testimony did not establish any justification or excuse for failing to follow up on this conversation, prepare a supplemental report, and provide this information to the District Attorney. (08/04 MAR Tr. pp. 903-05). Rhoney admitted that he had "no excuse" for not following up on the information provided by Richard Allen. (12/04 MAR Tr. p. 90).

132. Defendant's Exhibit 38 was not in the possession of the District Attorney's office in 1992, 1993, and 1994 because it was not provided by the Hickory Police Department. The District Attorney's office was not aware of the information that Allen provided to Rhoney. (08/04 MAR Tr. pp. 306-07, 906; 12/04 MAR Tr. pp. 16-17; 12/04 MAR Tr. p. 21). The State concedes that Exhibit 38 and the information that it contained was not in the possession of the District Attorney's office or in its files.

133. The State did not produce Exhibit 38 or the information from Allen to defense counsel prior to trial or during trial nor permit defense counsel to review them through the District Attorney's "open file" policy. (08/04 MAR Tr. p. 307; 12/04 MAR Tr. pp. 21, 344). The State concedes this fact as well.

134. Neither Defendant's Exhibit 38 nor the information from Allen nor substantially equivalent evidence were available to defendant's counsel, with reasonable diligence, at trial, other than through disclosure by the State.

135. Adams testified that if he were provided with Exhibit 38 or information about Allen's conversation with Rhoney, he would have interviewed Allen. (12/04 MAR Tr. p. 345).

136. Defendant's Exhibit 38 and the information provided to Rhoney by Allen would have been very significant to the defense. (*Id.* at 13). A confession by another person to a killing that fits closely to the facts of the Ramseur murder would be exculpatory. (12/04 MAR Tr. pp. 13-14). Defendant's Exhibit 38 could have also led the defense to interview Allen and use him as a witness for defendant.

137. Evidence that another person committed the crime for which the defendant is charged is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. State v. Cotton, 318 N. C. 663, 667, 351 S. E. 2d 277 (1987). In this case, the evidence points directly to the guilt of another and the evidence does much more than create a mere conjecture of another's guilt.

138. In Cotton, the evidence indicated that on the same night, three homes in close proximity were broken into and the female occupants were sexually assaulted. Id. at 667. Each case involved a similar modus operandi. Id. The Supreme Court concluded that from the

evidence "the jury reasonably could have concluded that the three attacks were committed by the same person." Id. Nothing in the evidence in Cotton indicated that the crimes in that case were committed by more than one person. The excluded evidence in Cotton was relevant because it "tended to show that the same person committed all of the similar crimes in the neighborhood in question on that night and that the person was someone other than the defendant." Id. The State in these cases has contended that the same person, namely the defendant, committed both of the murders in these cases and that the similarities between these murders indicated that the perpetrator of one committed the other one. Evidence that someone else committed the Ramseur murder tends to indicate that someone other than the defendant also committed the alleged Conley murder. Based on Cotton, the withheld evidence in this case was admissible and material to the defendant's defense.

139. The evidence that Detective Rhoney withheld in the Ramseur investigation was exculpatory in that it tended to indicate that someone other than the defendant killed Betty Ramseur and it was material to the defense in both of these cases. Based on this Brady violation, the defendant is entitled to a new trial in both of these cases.

Exhibit 51: The polygraph of Larry Erby

140. Defendant's Exhibit 51 contains documents pertaining to a polygraph examination that was given on December 30, 1993, to Larry Wayne Erby, a black male who was a suspect in the murder of Ms Ramseur. The polygraph examination was given by Lieutenant Lamberth, who determined that Erby was truthful in his response to questions about the Ramseur murder. Defendant's Exhibit 51 includes a copy of Lamberth's report, the polygraph release form, the polygraph test form, and Erby's contact information. (Defendant's Exhibit 51; 12/04

MAR Tr. pp. 88-89).

141. Defendant's Exhibit 51 tends to indicate that Erby was a suspect in the Ramseur murder and that he was given a polygraph in the Ramseur case a year after defendant was indicted for that murder.

142. Rhoney's testimony at the evidentiary hearing confirmed that Erby was a suspect in the Ramseur case. (12/04 MAR Tr. pp. 88-90).

143. Exhibit 51, Bates-stamped 1337-40, has been in the possession of the Hickory Police Department since its creation in 1993 because it was located in the Hickory Police Department's file and was provided to defendant's current counsel, pursuant to their request for discovery from the State in these post-conviction proceedings. (Defendant's Exhibit 51; 05/06 MAR Tr. pp. 150-52).

144. Defendant's Exhibit 51 was not in the possession of the District Attorney's office in 1993 and 1994 because it was not provided by the Hickory Police Department. (08/04 MAR Tr. p. 319; 12/04 MAR Tr. p. 91-92).

145. The State did not produce Defendant's Exhibit 51 to defense counsel prior to trial or during trial nor permit defense counsel to review it through the District Attorney's "open file" policy. (08/04 MAR Tr. pp. 320-321).

146. Neither Defendant's Exhibit 51 nor substantially equivalent evidence was available to defendant's counsel, with reasonable diligence, at trial, other than through disclosure by the State.

147. If Adams had learned that Erby was a suspect, who was given a polygraph in the Ramseur case, the defense could have investigated Erby. (12/04 MAR Tr. p. 359).

148. The defendant contends that defendant's Exhibit 51 could have been used by defendant in cross-examination of Rhoney to establish that Erby was a suspect in the Ramseur case. The evidence that Erby had been a suspect in the Ramseur murder, without more, would not have been admissible since it would not do more than create an inference or conjecture that another person was guilty of the Ramseur murder. See State v. Williams, 355 N. C. 501, 565 S. E. 2d 609 (2002); State v. Cotton, 318 N. C. 663, 351 S. E. 2d 277 (1987). Furthermore, the polygraph evidence itself was not exculpatory since it only tended to exculpate Erby. The defendant further contends that the disclosure of Exhibit 51 would have led the defense to investigate Erby and his possible involvement in the Ramseur murder. Withheld evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U. S. 667, 682 (1985). There is no indication that an investigation of Larry Erby as a suspect in this case would have produced any evidence that would create a reasonable probability that the result of the defendant's trial would have been different. There was no evidence offered in these proceedings to indicate what such an investigation would have revealed. The evidence of Larry Erby's polygraph examination was not material under Brady and this particular claim is denied.

Other Withheld Evidence in the Ramseur Case

Exhibit 55: Lavar Gilliam's status as juvenile runaway at trial

149. Defendant's Exhibit 55 is an *Authorization to Apprehend Runaway*, which establishes that Loren Lavar Gilliam ran away from Stonewall Jackson School on September 14,

1994. (Defendant's Exhibit 55). Copies of this document were sent to the local PIN system, the Catawba County Sheriff's Department, the referral or committing agency, and the student's cumulative record. (Defendant's Exhibit 55; 08/04 MAR Tr. pp. 324, 329). The State concedes that, by law or regulation that the North Carolina Department of Human Resources was required to provide copies of this document to the Catawba County Sheriff's office and the former "Police Information Network and that the Sheriff's Department presumably received the runaway report. Parker also testified that the Hickory Police Department and Catawba County Sheriff's Department had access to Defendant's Exhibit 55 through the PIN system. (08/04 MAR Tr. p. 330).

150. Parker testified at the evidentiary hearing that he knew that Gilliam was a runaway from a juvenile facility when he testified at trial. (08/04 MAR Tr. pp. 324, 330-31). When Parker sent a writ for Gilliam to Swannanoa Juvenile Evaluation Center in October 1994, the District Attorney's office received a DCI report stating that Gilliam was a runaway. (08/04 MAR Tr. pp. 324, 328). The District Attorney's Office subsequently destroyed the DCI report. (08/04 MAR Tr. p. 328).

151. Defendant's Exhibit 56 is Division of Youth Services form entitled Runaway/Return which indicates that a court counselor picked Gilliam up in Catawba County Jail and returned him on November 18, 1994. The Catawba County Sheriff's Department was notified of Gilliam's return on the same date. (Defendant's Exhibit 56; 08/04 MAR Tr. pp. 330-31).

152. Defendant's Exhibit 55 and Defendant's Exhibit 56 have been in the possession of the North Carolina Department of Juvenile Justice and Delinquency Prevision since their

creation in 1994 because a copy of this information was located in that agency's file and provided to defendant's current counsel in this proceeding, pursuant to a Court order dated April 22, 2004.

153. Defendant's Exhibit 55 was provided to the Catawba County Sheriff's Department in September 1994 and available to the Hickory Police Department and the Catawba County Sheriff's Department prior to trial and during trial. (Defendant's Exhibit 55; 08/04 MAR Tr. p. 330).

154. The Court finds that the District Attorney's office knew at the time of defendant's trial that Gilliam was a juvenile runaway. A DCI Report stating that Gilliam was a runaway was in the possession of the District Attorney's office in October 1994, and Parker knew that Gilliam was a runaway. (08/04 MAR Tr. pp. 324, 328, 330-31).

155. The State did not disclose Defendant's Exhibit 55, the DCI report, or Gilliam's runaway status to defense counsel nor permit defense counsel to review them through the District Attorney's "open file" policy. (08/04 MAR Tr. p. 328; 12/04 MAR Tr. pp. 365-66).

156. Neither Defendant's Exhibit 55 nor the DCI report nor Gilliam's runaway status nor substantially equivalent evidence was available to defendant or his counsel, with reasonable diligence, at trial, other than through disclosure by the State.

157. The defendant contends that Exhibit 55, the DCI report, or information that Gilliam was a runaway could have been used by defense counsel for impeachment purposes during the cross-examination of Gilliam. (12/04 MAR Tr. p. 366). Rule 608(b) of the North Carolina Rules of Evidence permits specific instances of the conduct of a witness to be inquired into on cross-examination of the witness concerning his character for truthfulness or

untruthfulness. Because the only purpose for which this evidence is admissible is to impeach or bolster the credibility of the witness, the focus is upon whether the conduct sought to be inquired into is of the type which is indicative of the witness' character for truthfulness or untruthfulness. State v. Morgan, 315 N. C. 626, 340 S. E. 2d 84 (1986). Under North Carolina law, prior misconduct including evading, resisting and assaulting a police officer has been held to be inadmissible under Rule 608(b) since the evidence was not probative of the witness' character for truthfulness. State v. Harrison, 90 N. C. App. 629, 369 S. E. 2d 624 (1988) (another holding in this case was overruled on Rule 609 issues in State v. Lynch, 334 N. C. 402, 432 S. E.2d 349 (1993). In State v. Johnson, 161 N. C. App. 504, 588 S. E. 2d 488 (2003), the Court of Appeals held that the trial court properly excluded extrinsic evidence in the form of testimony of a defense witness that the prosecution's sole eyewitness had assisted a prisoner escape from jail. In dicta, the Court of Appeals indicated that the defendant could have used cross-examination to challenge the eye witness' credibility. That passing observation in Johnson does not appear to accurately set forth the applicable law. Other jurisdictions considering the use of misconduct such as an escape under Rule 608(b) have precluded the use of such conduct for impeachment purposes. See United States v. Miquel Morrow, 2005 U. S. Dist Lexis 41035 (D. C. D. C. 2005), Hamm v. State, 301 Ark. 154, 782 S. W. 2d 577 (Ark 1990), State v. Drummond, 111 Ohio St. 3d 14, 854 N. E. 2d 1038 (2006). The evidence concerning Loren Gilliam's status as a runaway would not have been admissible under Rule 608(b) of the North Carolina Rules of Evidence and, therefore, that information was not material under the principles derived from Brady. This claim does not afford a basis for a new trial.

Exhibit 83: Rhoney's interview with Nicole Cline

158. Defendant's Exhibit 83 is a one page handwritten note of Detective Rhoney's interview with Nicole Cline on August 25, 1992, which states, in total, the following: "Subject stated that sometime around the week of 5-11 July Edward Chapman came to her house and said he had killed Chris Walker's girlfriend and put her in the basement of the house where the Mayfields lived." (Defendant's Exhibit 83; 08/04 MAR Tr. p. 947).

159. Rhoney testified that Defendant's Exhibit 83 did not appear to be a complete copy of his notes concerning his interview of Nicole Cline on August 25, 1992. (08/04 MAR Tr. pp. 952-954). The Court finds it exceedingly credible that Rhoney could have lost or misplaced the remainder of his notes of this interview.

160. Defendant's Exhibit 83, Bates-stamped 1366, has been in the possession of the Hickory Police Department continuously since its creation in 1992 because it was located in the Hickory Police Department's file and provided to defendant's current counsel, pursuant to their request for discovery from the State in this proceeding. (Defendant's Exhibit 83; 05/06 MAR Tr. pp. 150-52).

161. Defendant's Exhibit 83 was not in the possession of the District Attorney's office in 1992, 1993, and 1994 because it was not provided by the Hickory Police Department. (05/04 T p. 239; 08/04 T p. 783).

162. The State did not produce Defendant's Exhibit 83 to defense counsel prior to trial or during trial nor permit defense counsel to review it through the District Attorney's "open file" policy.

163. In pretrial discovery, the State did disclose Defendant's Exhibit 84, a typed report

of Rhoney's interview with Nicole Cline on August 25, 1992, that was submitted on October 26, 1992, and that document includes a number of additional details that were not included in Defendant's Exhibit 83, a one page note that was a portion of the basis of the typed report. The disclosed typed report states that when defendant made these comments to Cline, he "appeared to be impaired and mad" because he said that "if people didn't quit messing with him, he was going to kill them and put them under there just like he did that white girl." It also states that Cline "really was afraid" of defendant, he "was capable of killing someone," and he had "victimized members of her family." (Defendant's Exhibit 84). Rhoney indicated that the one page note was not a complete copy of his notes of the interview of Nicole Cline on August 25, 1992 and this explanation accounts in part for the inconsistencies between his handwritten note and the typed report at the evidentiary hearing. (08/04 MAR Tr. pp. 952-954).

164. The State also disclosed a case synopsis prepared by Rhoney in mid-December 1992 as part of the prosecution summary in the Ramseur case. Rhoney's case synopsis claims that during his August 25, 1992, interview with Cline, she stated that "Edward Chapman told her that he had hit her in the face and that when she came to that she screamed and that he then hit her with a brick." (Defendant's Exhibit 47; 08/04 MAR Tr. p. 955). Rhoney was unable to completely account for the inconsistencies between his handwritten notes, the typed report, and his case synopsis. (Defendant's Exhibits 83 and 84; 08/04 MAR Tr. p. 956-957).

165. Nicole Cline testified at the evidentiary hearing that she did not make any of the above-referenced additional statements in Defendant's Exhibit 84 and Rhoney's case synopsis during her interview with Rhoney on August 25, 1992. (08/04 MAR Tr. pp. 761, 706-09).

166. Neither Defendant's Exhibit 83 nor substantially equivalent evidence was

available to defendant's counsel, with reasonable diligence, at trial, other than through disclosure by the State.

167. Defense counsel could have used Defendant's Exhibit 83 to cross-examine Nicole Cline and Rhoney at trial, had they known of it.

168. The Exhibit 83 was withheld by Detective Rhoney and it was not made available to defense counsel for use at trial. The information was exculpatory in that it could have been used to impeach the testimony of Nicole Cline. Given Rhoney's explanation that Exhibit 83 was an incomplete document, the defense's ability to effectively utilize this document to impeach Nicole Cline was limited. The information was not material and there is no reasonable possibility that the outcome of the trial would have been different if Exhibit 83 had been disclosed to defense counsel prior to the defendant's trial in 1994.

Exhibit 35: Rhoney's September 2, 1992, Interview with Chris Walker

169. Defendant's Exhibit 35 is Rhoney's handwritten notes of his interview with Chris Walker on September 2, 1992, in which Walker provided the names of individuals who may have information about Betty Ramseur's murder and who were driving her car. The notes contain the following information:

> Margaret Thompson's daughter "Wannie" might tell
>
> Tina Hill "Oua (sic)
>
> Carolyn Williamson liked Betty and will tell who was driving.

(Defendant's Exhibit 35; 08/04 MAR Tr. pp. 988-89).

170. Defendant's Exhibit 35 was a source of leads for persons who might have

information about the Ramseur case.

171. Carolyn Williamson testified at the evidentiary hearing that she saw Ms. Conley at the pool room, alone, the day before her body was found. (08/04 MAR Tr. pp. 92-95). According to Williamson, Ms. Conley and Hull were dating in 1992, they argued frequently, and Hull physically assaulted Ms. Conley. (*Id.* at 85-86, 88-89).

172. Defendant's Exhibit 35, Bates-stamped 1462, has been in the possession of the Hickory Police Department since its creation in 1992 because it was located in the Hickory Police Department's file and provided to the defendant's current counsel, pursuant to their request for discovery from the State in this proceeding. (Defendant's Exhibit 35; 05/06 MAR Tr. pp. 150-52).

173. Defendant's Exhibit 35 was not in the possession of the District Attorney's office in 1992, 1993, and 1994 because it was not provided by the Hickory Police Department. (08/04 MAR Tr. pp. 986-89). The State concedes this fact.

174. The State did not produce Defendant's Exhibit 35 to defense counsel prior to trial or during trial nor permit defense counsel to review it through the District Attorney's "open file" policy. (12/04 MAR Tr. pp. 352-53).

175. In pretrial discovery, the State did disclose a typed report of Rhoney's interview with Chris Walker on September 2, 1992, which did not include the three names of individuals listed in Exhibit 35, the notes that were the basis of the report. (Defendant's Exhibit 34; 08/04 MAR Tr. p. 989). Rhoney was unable to account for the inconsistencies between his handwritten notes and the typed report at the evidentiary hearing. (12/04 MAR Tr. p. 163-164).

176. Neither Defendant's Exhibit 35 nor substantially equivalent evidence was

available to the defendant or his counsel, with reasonable diligence, at trial, other than through disclosure by the State.

177. Defendant's Exhibit 35 could have led defense counsel to interview Carolyn Williamson and use her as a witness to show Ms. Conley was alive on Friday, August 14, 1992, and implicate Hull in Ms. Conley's death. Williamson's recollection was somewhat vague. She did not recall on what day Conley's body was found and she did not know what Conley was wearing when she saw the alleged victim. (MAR Tr. 8/04, p. 93). Williamson indicated that she "thought so" when asked if she saw Conley the day before her body was found. (Id.). Williamson indicated that she did not see Conley with Billy Hull the day that she saw Conley. (Id.). Williamson also did not know that Conley was involved in prostitution or addicted to crack cocaine. (Id. p. 94). Williamson's testimony is also subject to impeachment based on her prior convictions for drug possession and possession of drug paraphernalia. If Williamson's testimony is considered independently, her testimony would not be material in that there is no reasonable probability that, had Williamson's identity been disclosed to the defense, the result of the proceeding would have been different. However, since materiality is determined collectively, and not item by item, the testimony that Williamson could have provided, when considered with the other evidence that was withheld in violation of the rule set forth in Brady v. Maryland, was such that there is more than a reasonable probability that the result of the proceeding would have been different. See Kyles v. Whitley, 514 U. S. 419 (1995).

Exhibit 36: Rhoney's March 30, 1992, Interview with Chris Walker

178. Defendant's Exhibit 36 is Rhoney's handwritten notes of his interview with Chris

Walker on March 30, 1993, in which Walker told Rhoney about a conversation he had with Michelle Dula on March 23, 1993, and this report included detailed directions to Dula's residence, which was a "bluish grey house." According to Walker, Dula saw some drug dealers trying to hide Ms. Ramseur's car behind Jamar Danner's house. Walker also said Danny Blackburn told him that defendant knocked on the door of Howard Cowans' house and asked for Ms. Conley, and then they left together in the direction of the house where Ms. Conley's body was found. (Defendant's Exhibit 36; 08/04 MAR Tr. pp. 978-81).

179. Defendant's Exhibit 36 is a source of leads for persons who might have murdered Ms. Ramseur. Indeed, defendant's counsel was searching for Michelle Dula prior to trial, but they were unable to locate her. (Trial Tr. Vol. II p. 389).

180. Defendant's Exhibit 36, Bates-stamped 1349-50, has been in the possession of the Hickory Police Department continuously since its creation in 1993 because it was located in the Hickory Police Department's file and provided to the defendant's current counsel, pursuant to their request for discovery from the State in this proceeding. (Defendant's Exhibit 36; 05/06 MAR Tr. pp. 150-52).

181. Exhibit 36 was not in the possession of the District Attorney's office in 1993 and 1994 because it was not provided by the Hickory Police Department. (08/04 MAR Tr. pp. 297-98, 982). The State concedes this fact.

182. The State did not produce Defendant's Exhibit 36 to defense counsel prior to trial or during trial nor permit defense counsel review it through the District Attorney's "open file" policy.

183. Neither Defendant's Exhibit 36 nor substantially equivalent evidence was

available to defendant's counsel, with reasonable diligence, at trial, other than through disclosure by the State.

184. Defense counsel was aware that Michelle Dula was a potential witness. However, they were unable to locate her. Curtis Fuller told the defense investigators on March 1, 1993, that Michelle Dula told Willie Armstrong that the defendant did not kill Ms. Conley because Conley was with Ms. Ramseur when she was killed and that two drug dealers killed her. Defense investigators immediately began searching for Dula, but were unable to locate her or her residence. (Defendant's Exhibit 74 entries for September 20 and 21, 1994; 12/04 MAR Tr. p. 653-655). Defense counsel made a motion to continue the defendant's trial on November 3, 1994, on the basis that they had been looking for Dula for a year and a half and were unable to locate her. (Trial Tr. Vol. II p. 389).

185. The defendant contends that defense counsel also could have used Exhibit 36 in the cross-examination of Danny Blackburn, who gave inconsistent testimony at trial. (Trial Tr. Vol. III pp. 141-43). Chris Walker's statement to Detective Rhoney was largely consistent with the core of Danny Blackburn's trial testimony. As indicated in Exhibit 36, Blackburn told Walker that the defendant said to Tenene Conley, "come on girl, you know what your (sic) supposed to do." (Exhibit 36). At trial, Blackburn testified that Chapman said, "she is getting out of the car, she knows what the hell she got to do, she knows what she has got to do." (Trial Tr. Vol. III p. 142.) As indicated in Exhibit 36, Blackburn told Walker that Conley left with the defendant "walking toward the house where she was found some time later." (Exhibit 36). Blackburn testified at trial that Conley left with the defendant walking up the street. (Trial Tr. Vol. III, pp. 142-143). Chris Walker's account as set out in Exhibit 36 differs from Blackburn's

testimony at trial in that Walker reported that Blackburn told him that he and Conley got separated from Chapman and that Blackburn and Conley went to Howard Cowans' house. (Exhibit 36). Walker informed Rhoney that Chapman came to Cowans' house and knocked on the door. (Id.). At trial, Blackburn testified that he, Conley and Chapman went to Cowans' house together. (Trial Tr. Vol. III, pp141-142). Defense counsel could have used Exhibit 36 to impeach Blackburn's testimony. The defense could have asked Walker about Blackburn's statements and presumably relied on Walker to reiterate Blackburn's comments to him. The value of that testimony would have been lessened by the fact that Chris Walker's testimony would have been subject to impeachment based on Walker's criminal record and allegations of bias based on his relationship with Ramseur. Furthermore, Blackburn's testimony was impeached at trial by Blackburn's own substantial criminal record, inconsistencies between his testimony and Howard Cowans' testimony and Blackburn's drug use. (Trial Tr. Vol. III, pp. 144-149). There is no reasonable probability that the outcome of the defendant's trial would have been different if Exhibit 36 had been provided to defendant's counsel for use at trial.

186. Exhibit 36 provided directions to Michelle Dula's residence as of March 30, 1993, which the defendant contends could have assisted defense counsel in their search for her at that time. (Exhibit 36). Michelle Dula did not testify during these proceedings. The Court has no basis for evaluating the significance of her testimony in the absence of some ability to ascertain the substance of her testimony or to evaluate her credibility. The defendant has failed to carry his burden of proof to establish that there is a reasonable probability that had Dula's address been disclosed that the result of the trial would have been different. For these reasons, this claim is denied.

Evidence against the Defendant in the Conley Case

187. The State's evidence against the defendant in the Conley case was not overwhelming, and the State's case was based upon circumstantial evidence. (08/04 MAR Tr. pp. 185, 196). The State did not produce any physical evidence linking the defendant to the crime scene, other than the presence of his sperm in Ms. Conley's body.

188. The evidence at trial implicating the defendant in the killing of Ms. Conley primarily consisted of Howard Cowans, Jamar Danner, and Danny Blackburn, who testified that they saw the defendant with Ms. Conley during the early morning hours of Friday, August 14, 1992; sperm found in Ms. Conley's vaginal area that was consistent with the DNA of the defendant; and testimony that the defendant performed some repairs on the house where Ms. Conley's body was found. The defendant himself testified he had sexual intercourse with Ms. Conley during the evening of Thursday, August 13, 1992, but he denied killing Ms. Conley.

189. Ms. Conley's body was found in the basement closet of a vacant house located at 649 First Avenue SE in Hickory on Saturday, August 15, 1992. (Trial Tr. Vol. III pp. 4-6, 81-82).

190. Jamar Danner testified that he saw the defendant and Ms. Conley together in the early morning hours of Friday, August 14, before daylight. Danner testified that the defendant and Ms. Conley had come to his house in search of crack cocaine, and they left walking toward the house where Ms. Conley's body was found. (Trial Tr. Vol. III pp. 150-52).

191. Howard Cowans testified that the defendant, Ms. Conley, and Danny Blackburn came to his apartment around 2:00 a.m. or 3:00 a.m. on Friday, August 14. They smoked crack cocaine in Cowans' apartment for about ten minutes. A few minutes after the defendant, Ms.

Conley, and Blackburn went outside, Cowans observed a man and a woman exit Blackburn's car and walk toward the house in which Ms. Conley's body was found. (Trial Tr. Vol. III pp. 120-24, 132-34, 136-17).

192. Danny Blackburn testified that he went with the defendant and Ms. Conley to Cowans' apartment around 2:00 a.m. or 3:00 a.m. on Friday, August 14. According to Blackburn, Cowans came out of his apartment and the group smoked crack cocaine in the car. After the group finished smoking crack, Blackburn offered the defendant the use of his car for ten dollars. The defendant refused, saying, "she is getting out of the car, she knows what the hell she got to do, she knows what she has got to do." According to Blackburn, Ms. Conley got out of the car and began walking up the street, followed by the defendant. (Trial Tr. Vol. III pp. 141-43).

193. Jacqueline Collins testified that she was Ms. Conley's roommate before her death, and that she last saw Ms. Conley on Wednesday, August 12, 1992. Collins looked for her on Thursday, August 13, 1992, but was unable to locate her. According to Collins, Ms. Conley came by the house every day to take a bath and eat. (Trial Tr. Vol. III pp. 105-06).

194. Dr. Thomas Clark, a forensic pathologist who performed the autopsy on August 17, 1992, testified that Ms. Conley died as a result of manual strangulation. Dr. Clark opined that abrasions found about Ms. Conley's head and forehead could have been made by contact with any type of blunt object, including the floor. He determined Ms. Conley had sexual intercourse within 24 hours of her death, and that the intercourse probably occurred within 12 hours of her death. (Trial Tr. Vol. III pp. 288, 298-99, 308, 310, 313).

195. Mark Boodee, a forensic DNA analyst, testified that DNA analysis of the sperm

sample taken from Conley's body matched a DNA sample given by the defendant. (Trial Tr. Vol. IV pp. 92-93).

196. Fannie Pinkston, the owner of the house in which Ms. Conley's body was found, testified that she hired the defendant in July of 1992 to paint the trim on the outside of the house, and that he had been inside and knew how to get into the house. (Trial Tr. Vol. III pp. 68-71).

197. Chapman testified he knew Ms. Conley and had done drugs with her. Chapman also testified he saw Ms. Conley in Sunny Valley on Thursday, August 13, and they went to an apartment around the corner and had sexual intercourse around 9:30 p.m. The defendant stated that after having sexual intercourse, Ms. Conley left and he went back to Sunny Valley, went to Marshall Tipps' and Jamar Danner's houses with Teddy Hartsoe and Johnny Williams, and then returned to Sunny Valley around 11:00 p.m. that evening. The defendant stated that when he returned to Sunny Valley, he saw Ms. Conley with Blackburn, rode in a car with them to a parking lot where they smoked crack, and then he got out of the car and left Ms. Conley with Blackburn. The defendant testified that was the last time he saw Ms. Conley alive. Chapman testified that he painted the trim on the outside of Pinkston's house for her, along with two other men. Chapman denied killing Ms. Conley. (Trial Tr. Vol. IV pp. 142-46, 149-51, 162).

198. The prosecution argued to the jury that the defendant was the last person seen with Ms. Conley, walking in the direction of the house where her body was found, and that the defendant murdered Ms. Conley during the evening that went from Thursday, August 13, 1992, to Friday, August 14, 1992 ("Thursday night"), immediately following sexual intercourse. (08/04 MAR Tr. pp. 214-15; 12/04 MAR Tr. pp. 313-14).

Withheld Evidence Indicating Ms. Conley was Alive on Friday and not with the Defendant

Exhibits 16 and 17: Mike Cosby's Interviews

199. Defendant's Exhibit 16 is a report of Lieutenant M.C. Hamilton's interview with Mike "Collins" (actually Mike Cosby) on August 15, 1992. (Defendant's Exhibit 16). Cosby said Ms. Conley was living with him prior to her death, and he had information that Ms. Conley "was last seen getting into a vehicle on South Center Street Friday evening (08/14/92)." The vehicle was occupied by Billy Hull and "Ice," a man known by Hamilton to be George Reinhardt. According to the information received by Hamilton, Ms. Conley had stolen a ring from Hull and had sold it for crack cocaine. A couple of hours later, someone asked Hull where Ms. Conley was, and he replied he had not seen her. Cosby also told Hamilton that Hull had been involved in a similar murder in Newton four or five years earlier. He said he had not seen either Hull or Reinhardt in the area since the discovery of Ms. Conley's body. (Defendant's Exhibit 16).

200. Defendant's Exhibit 16 tends to establish that Ms. Conley was still alive on the evening of Friday, August 14, 1992 and that she was last seen with Hull and Reinhardt, as opposed to the defendant. Moreover, it tends to implicate another person in the murder of Ms. Conley.

201. The testimony of Mike Cosby at the evidentiary hearing established he saw Ms. Conley on the morning of Thursday, August 13, when she came home to take a bath, and he saw Ms. Conley get into a car with Billy Hull and George Reinhardt on Thursday evening before dark. (08/04 MAR Tr. pp. 147, 170, 174). According to Cosby, he also saw Ms. Conley at approximately 10:30 a.m. on Friday, August 14, in a beige car being driven by someone else.

(*Id.* at 148-49). Billy Hull came by his house later on Friday, mad and upset, "ranting and raving," and looking for Ms. Conley because he said she stole a ring from him. (*Id.* at 149). On Saturday, Gene Robinson told Cosby that he saw Ms. Conley get into a vehicle with Hull and Reinhardt on Friday evening. (*Id.* at 162, 172, 174). A couple of hours later, someone asked Hull where Ms. Conley was, and he replied that he did not "know nothing about it." (Id. at 150). Ms. Conley never came home Friday night. (*Id.* at 147, 162).

202. Cosby confirmed that he told Hamilton the information contained in Defendant's Exhibit 16, and that he also told Hamilton that he saw Ms. Conley on Friday morning. (Defendant's Exhibit 16; 08/04 MAR Tr. pp. 151-152, 156). The Court finds that Cosby's testimony at the evidentiary hearing was credible.

203. Merl Hamilton's testimony at the evidentiary hearing confirmed that he typed the report of his interview with Cosby based upon the information that Cosby gave him. Moreover, Hamilton testified that he accurately reported his conversation with Cosby, including the statement that Ms. Conley was last seen getting into a vehicle with Hull and Reinhardt on Friday evening. (08/04 MAR Tr. pp. 358-363). According to Lt. Hamilton, his report was given to Detective Sams. (*Id.* at 364).

204. Defendant's Exhibit 17 is Detective Mark Sams' handwritten notes from his interview with Cosby on August 27, 1992. Cosby provided Sams with additional details about Ms. Conley's theft of a ring from Billy Hull; reported that Gene Robinson was the person who had asked Hull if he had seen Ms. Conley and had heard Hull say he had not; identified the murder victim (Nellie Long) in Newton allegedly killed by Hull, when he had disappeared for awhile thereafter; and indicated that Hull would not usually speak to Cosby, but had been trying

to speak to him after Ms. Conley's death. Sams' notes reflect that Cosby claimed that Gene Robinson saw Ms. Conley getting in the car with Hull and "Iceman" on Thursday night. (Defendant's Exhibit 17; 08/04 MAR Tr. p. 443-444).

205. Defendant's Exhibit 17 tends to implicate another person in the murder of Ms. Conley.

206. Cosby testified at the evidentiary hearing that contrary to the information contained in Defendant's Exhibit 17, he told Sams that he saw Ms. Conley with Hull and Reinhardt on Thursday night and that Robinson saw Ms. Conley with them on Friday night. (08/04 MAR Tr. pp. 174-75).

207. Defendant's Exhibit 16, Bates-stamped 1865, and Exhibit 17, Bates-stamped 2037, have been in the possession of the Hickory Police Department continuously since their creation in 1992 because they were located in the Hickory Police Department's file and provided to defendant's current counsel, pursuant to their request for discovery from the State in this proceeding. (Defendant's Exhibits 16 and 17; 08/04 MAR Tr. p. 439-442; 05/06 MAR Tr. pp. 150-152).

208. Defendant's Exhibit 16 and Defendant's Exhibit 17 were not in the possession of the District Attorney's Office in 1993 and 1994 because they were not provided by the Hickory Police Department. (08/04 MAR Tr. pp. 441, 455; 05/06 MAR Tr. pp. 150-152).

209. The State did not provide Defendant's Exhibit 16 and Defendant's Exhibit 17 to defense counsel prior to trial or during trial or permit defense counsel to review them through the District Attorney's "open file" policy. (08/04 MAR Tr. pp. 227-228; 12/04 MAR Tr. pp. 317-318, 324).

210. In pretrial discovery, the State did provide defense counsel with a copy of a typewritten report of Sams' interview with Cosby on August 27, 1992 that is Defendant's Exhibit 5. The disclosed report completely omits the following information contained in Defendant's Exhibit 17, Sams' handwritten notes that formed the basis of the report: that Ms. Conley had stolen Hull's ring and pawned it; that she had been seen getting into the car with Hull and "Iceman" on Thursday night; that Hull later denied knowing where Ms. Conley was; that Hull may have been involved in the "similar" murder of Nellie Long; and that Hull had been trying to speak to Cosby. (Defendant's Exhibits 5 and 17; 08/04 MAR Tr. pp. 229, 333). No explanation for the redaction of this information from the report disclosed to the defense has been offered. (08/04 MAR Tr. p. 452-453).

211. Adams testified that he remembered seeing a report referencing Hull and Reinhardt, but he was not aware that Ms. Conley had been seen getting into a vehicle with them on Thursday or Friday evening. (12/04 MAR Tr. pp. 317-18, 324).

212. The disclosure of only Defendant's Exhibit 5, Sams' abbreviated report of his interview with Cosby on August 27, 1992, would reasonably have led defense counsel to believe that Cosby did not have any information about Ms. Conley whereabouts on June 13th and 14th that would be useful to the defense.

213. Because Brady v. Maryland is concerned only with cases in which the Government possesses information that the defendant does not have, the Government's failure to disclose potentially exculpatory evidence does not violate Brady where a defendant knew or should have known of the essential facts permitting him to take advantage of any exculpatory information or where the evidence is available to the defendant from another source. United

States v. Cottage, 307 F. 3d 494 (6th Cir. 2002): See also United States v. Clark, 928 F. 2d 733 (6th Cir. 1991). The information from Cosby set out in Exhibits 16 and 17 was not known to defense counsel prior to the conclusion of the defendant's trial. Detective Sams' report omitted the pertinent information in those exhibits and the defendant's trial counsel reasonably would have interpreted Exhibit 5 to indicate that Cosby did not have any useful information. It is unreasonable and unfair to conclude that the defendant's trial counsel should have known of the information that Cosby possessed or should have discovered that information after a diligent inquiry when the discovery provided by the State would have lead reasonable defense counsel to conclude that there was no benefit to be gained from interviewing Cosby. The State should not be permitted to disseminate inaccurate information and then preclude the defendant from asserting a Brady claim for failing to ascertain that the State had provided misleading information.

214. Adams testified that Defendant's Exhibit 16 would have been very significant to the defense and that he was not furnished with this information. (*Id.* at 317-18). If Adams had learned Ms. Conley was in the company of Hull and Reinhardt on Friday, this would have been investigated by the defense. (*Id.* at 324).

215. Defendant's Exhibit 16 and Defendant's Exhibit 17 would have led the defendant to call Mike Cosby, Gene Robinson, and Lt. Hamilton as witnesses to show that Ms. Conley was alive on Friday, to establish that the defendant was not the last person seen with her, and to implicate Hull in Ms. Conley's death. This evidence undermines the State's theory at trial that the defendant was the last person seen with Ms. Conley before her body was found and that he murdered her on Thursday night.

216. Exhibit 16 and Exhibit 17 were withheld by the Hickory Police Department. The information contained in those exhibits was exculpatory in that it tended to rebut a critical component of the State's case against the defendant in the alleged murder of Tenene Conley and there is more than a reasonable probability that if this information had been presented to the jury that the outcome of the defendant's trial would have been different. This claim is granted.

Exhibit 18: Carl Geter's Interview

217. Defendant's Exhibit 18 is a report of Sergeant Dan Carlsen's interview with Carl Dennis Geter at the Hickory Police Department on September 2, 1992. Geter told Carlsen that he had heard that Billy Hull and "Ice Man" had Tenene Conley killed. Significantly, Geter also stated that Hull and "Ice Man" were with Ms. Conley "the day before she was found," and that a third unknown black male, who Geter described as dark skinned, 170 lbs, 5'9", and having a mustache and a little beard or goatee on his chin, was the person who actually killed her. Geter stated that he had received this information from his cousin, Angela Geter. (Defendant's Exhibit 18).

218. Defendant's Exhibit 18 tends to establish that Ms. Conley was still alive on the day before her body was found, which would have been Friday, August 14; that she was no longer with the defendant; and that she was with Hull, Reinhardt, and an unknown black male. This evidence tends to implicate another person as the murderer of Ms. Conley.

219. The testimony of Carl Geter at the evidentiary hearing confirmed what he told Carlsen in 1992 and established that he, as opposed to Angela Geter, was the actual source of some of the information contained in Defendant's Exhibit 18. (08/04 MAR Tr. p. 116). Geter

testified that he saw Ms. Conley between 9:30 a.m. and 10:00 a.m. on Friday morning. (*Id.* at 104, 122). He also saw Ms. Conley Friday evening on "the Hill," outside Tipp Hull's club, with Billy Hull, "Iceman," and a third black male, whose name was unknown to Geter. (*Id.* at 105-08, 114, 124). Geter first saw them between 1:45 a.m. and 2:00 a.m., when he left the club to get something to eat, and then he saw them again when he was returning to the club. (*Id.* at 125). According to Geter, Ms. Conley and Hull were arguing at that time, and Hull, "Iceman," and Ms. Conley left together. (*Id.* at 109, 142). Geter also clarified that the unknown black male was not the defendant, and he did not see the defendant with Ms. Conley on Friday. (*Id.* at 109, 114, 128). Geter also testified that he heard, from Danny Blackburn among others, that the unknown black male killed Ms. Conley; specifically, he beat Ms. Conley because he gave her some crack and she would not have sex with him. (*Id.* at 115-16, 130-31). The Court finds that Geter's testimony at the evidentiary hearing was credible.

220. Captain Carlsen testified at the evidentiary hearing that Defendant's Exhibit 18 contains the information that Geter provided to him. (02/06 MAR Tr. pp. 204-06). The Court finds that Carlsen's testimony at the evidentiary hearing was credible. Carlsen's report was submitted on September 5, 1992, three days after his conversation with Geter. Carlsen, who responded to the scene the day Ms. Conley's body was found, would have realized that "the day before she was found," would have been Friday, August 14, 1992.

221. Defendant's Exhibit 18, Bates-stamped 1996-97, has been in the possession of the Hickory Police Department continuously since its creation in 1992 because it was located in the Hickory Police Department's file and provided to the defendant's current counsel, pursuant to their request for discovery from the State in this proceeding. (Defendant's Exhibit 18; 08/04

MAR Tr. pp. 455-456; 05/06 MAR Tr. pp. 150-52).

222. Defendant's Exhibit 18 was not in the possession of the District Attorney's office in 1993 and 1994 because it was not provided by the Hickory Police Department. (08/04 MAR Tr. p. 245; 05/06 MAR Tr. pp. 150-52).

223. The State did not provide Defendant's Exhibit 18 to defense counsel prior to trial or during trial or permit defense counsel to review it through the District Attorney's "open file" policy. (12/04 MAR Tr. pp. 325-26).

224. In pretrial discovery, the State did provide defense counsel with a copy of a short typewritten report from Sams, submitted on February 3, 1993 (nearly six months after the discovery of Ms. Conley's body), describing a conversation between Sams and Carlsen on September 2, 1992, that relayed Carlsen's interview with Geter on that date. The disclosed report notably stated "that Tenene was seen with [Hull and "Ice Man"] on Wednesday night." (Defendant's Exhibit 11; 08/04 MAR Tr. pp. 243, 245, 333, 461, 463-464). Sams' report erroneously stated that Ms. Conley was seen with Hull and "Ice Man" on Wednesday night as opposed to Friday night. (08/04 MAR Tr. pp. 462-64). Sams did not explain why the Hickory Police Department only provided Sams' abbreviated report of Carlsen's conversation with Geter to the District Attorney's office instead of Carlsen's own report of his conversation with Geter. (08/04 MAR Tr. pp. 459-60).

225. The disclosure of only Sams' report would reasonably have led defense counsel to believe that Geter did not have any pertinent information about Ms. Conley's whereabouts on June 13th or 14th that would be useful to the defense because the date of Ms. Conley's encounter with Hull and Reinhardt was reported to be Wednesday night, prior to defendant's admitted

contact with Ms. Conley on Thursday night. The fact that others were seen with Conley on Wednesday was not of any significance in this case. The fact that others were seen with Conley on Friday was highly significant because that fact was directly contradicted the State's theory of the case in the Conley homicide. Geter's testimony would have directly contradicted an essential premise of the State's theory.

226. Because Brady v. Maryland is concerned only with cases in which the Government possesses information that the defendant does not have, the Government's failure to disclose potentially exculpatory evidence does not violate Brady where a defendant knew or should have known of the essential facts permitting him to take advantage of any exculpatory information or where the evidence is available to the defendant from another source. United States v. Cottage, 307 F. 3d 494 (6th Cir. 2002): See also United States v. Clark, 928 F. 2d 733 (6th Cir. 1991). The information from Geter set out in Exhibit 18 was not known to defense counsel prior to the conclusion of the defendant's trial. Detective Sams' report omitted the pertinent information in that exhibit and the defendant's trial counsel reasonably would have interpreted Exhibit 11 to indicate that Geter did not have any useful information. It is unreasonable and unfair to conclude that the defendant's trial counsel should have known of the information that Geter possessed or should have discovered that information after a diligent inquiry when the discovery provided by the State would have lead reasonable defense counsel to conclude that there was no benefit to be gained from interviewing Geter. The State should not be permitted to disseminate inaccurate information and then preclude the defendant from asserting a Brady claim for failing to ascertain that the State had provided misleading information.

227. If Adams had learned Ms. Conley was in the company of Hull and Reinhardt on

Friday, this would have been investigated by the defense. (12/04 MAR Tr. p. 324).

228. Exhibit 18 would have led the defendant to call Geter and Carlsen as witnesses in order to prove that Ms. Conley was alive on Friday. That evidence would have established that the defendant was not the last person seen with Tenene Conley. This evidence undermines the State's theory at trial that the defendant was the last person known to be with Ms. Conley before her body was found and that he murdered her on Thursday night. This evidence was certainly exculpatory and material. There is more than a reasonable probability that the outcome of this prosecution would have been different if this evidence had been presented at the trial of the defendant's case. There is certainly a sufficient probability that the outcome of this trial would have been different to undermine confidence in the outcome of this trial. The claim is granted.

Exhibit 24: Joanne Robinson's Interview

229. Defendant's Exhibit 24 is Detective Sams' handwritten notes of an interview with Joanne Robinson on August 31, 1992. The notes indicate that Tenene Conley was seen on Friday afternoon "with some tall dude." The notes also mention Calvin Coffey and Shannon-brook, and provide contact information for Sabrina Whitason, who spoke to Coffey. (Defendant's Exhibit 24; 08/04 MAR Tr. p. 479).

230. Defendant's Exhibit 24 tends to establish that Ms. Conley was still alive on Friday, August 14, 1992, and with a tall man, as opposed to the defendant. (Defendant's Exhibit 20).

231. Both Sams and Rhoney described the defendant as approximately 5'9" tall in the applications for a search warrant in the Ramseur and Conley cases. (Defendant's Exhibits 20

and 48).

232. Jason Parker testified at the evidentiary hearing that Shannon-brook is probably an address where Coffey might have lived. (08/04 MAR Tr. p. 255).

233. Defendant's Exhibit 24, Bates-stamped 2045, has been in the possession of the Hickory Police Department continuously since its creation in 1992 because it was located in the Hickory Police Department's files and provided to defendant's current counsel, pursuant to their request for discovery from the State in this proceeding. (Defendant's Exhibit 24; 05/06 MAR Tr. pp. 150-52).

234. Defendant's Exhibit 24 was not in the possession of the District Attorney's office in 1993 and 1994 because it was not provided by the Hickory Police Department. (08/04 MAR Tr. pp. 250, 481; 05/06 MAR Tr. pp. 150-52).

235. The State did not provide Defendant's Exhibit 24 to defense counsel prior to trial or during trial or permit defense counsel to review it through the District Attorney's "open file" policy. (08/04 MAR Tr. p. 254; 12/04 MAR Tr. p. 326).

236. Neither Defendant's Exhibit 24 nor substantially equivalent evidence was available to defendant's counsel, with reasonable diligence, at trial, other than through disclosure by the State.

237. Adams testified that if he had seen Defendant's Exhibit 24, this would have been investigated by the defense. (12/04 MAR Tr. p. 3268).

238. The defendant contends that Defendant's Exhibit 24 could have been used by the defendant to cross-examine Detective Sams. The Court cannot determine and the defendant does not specify how that exhibit would have been useful in the cross-examination of Detective Sams.

The defendant further contends that Exhibit 24 could have permitted the defendant's counsel to investigate Joanne Robinson and Calvin Coffey to ascertain whether they had information that Ms. Conley was still alive on Friday and that the defendant was not the last person seen with her. The defendant contends that evidence could have undermined the State's theory at trial that the defendant was the last person seen with Ms. Conley before her body was found and that he murdered her on Thursday night. However, there is no evidence in the record concerning what information Joanne Robinson or Calvin Coffey would have actually provided. Neither of these witnesses testified during any of the numerous hearings held in this matter. In the absence of such evidence, the Court cannot determine whether this evidence was exculpatory or whether it was material as those terms are defined by Brady and its progeny.

Exhibit 21: Mabel Jenkins Interview

239. Defendant's Exhibit 21 is Sergeant Dan Carlsen's report of his arrival at the Conley crime scene and subsequent interviews with several neighbors on August 15, 1992. One neighbor, Mabel Jenkins, told Carlsen that she had seen a vehicle at the residence where Ms. Conley's body was found between 11:00 p.m. and 12:00 a.m. on August 14, 1992. Jenkins told Carlsen that the vehicle had its headlights on. (Defendant's Exhibit 21).

240. Defendant's Exhibit 21 tends to establish that there was someone in a vehicle that was in the driveway at 649 First Avenue SE the night of Friday, August 14, before Ms. Conley's body was found at that residence.

241. The testimony of Mabel Jenkins at the evidentiary hearing confirmed that she saw a vehicle in the driveway of 649 First Avenue SE at night on Friday, August 14, as she told

Carlsen in 1992. (08/04 MAR Tr. pp. 62, 68). Jenkins also testified that the vehicle's headlights were off, but its brake light or tail lights were turned on, which differs somewhat from the information contained in Defendant's Exhibit 21. (08/04 MAR Tr. pp. 62, 66, 70). Jenkins further testified that she did not know how many people were in the car and that she did not know what color it was. (8/04 MAR Tr. p. 67). There is no indication that Jenkins saw anyone get out of the car or get into the car. Jenkins commented that she did not know what the car was doing and she noted that it seemed like a car made a wrong turn. (8/04 MAR Tr. p. 63, 64, 70).

242. Captain Carlsen testified at the evidentiary hearing that Defendant's Exhibit 21 contained the information that Jenkins provided him. (02/06 MAR Tr. p. 210). The Court finds that Carlsen's testimony at the evidentiary hearing was credible.

243. Defendant's Exhibit 21, Bates-stamped 1888-90, has been in the possession of the Hickory Police Department continuously since its creation in 1992 because it was located in the Hickory Police Department's files and provided to defendant's current counsel, pursuant to their request for discovery from the State in this proceeding. (Defendant's Exhibit 21; 08/04 MAR Tr. p. 464; 05/06 MAR Tr. pp. 150-52).

244. Defendant's Exhibit 21 was not in the possession of the District Attorney's Office in 1993 and 1994 because it was not provided by the Hickory Police Department. (08/04 MAR Tr. p. 250; 05/06 MAR Tr. pp. 150-52).

245. The State did not provide Defendant's Exhibit 21 to defense counsel prior to trial or during trial nor permit defense counsel to review it through the District Attorney's "open file" policy. (12/04 MAR Tr. pp. 327-28).

246. Neither Defendant's Exhibit 21 nor substantially equivalent evidence was

available to defendant or his counsel, with reasonable diligence, at trial, other than through disclosure by the State. (08/04 MAR Tr. p. 250).

247. The defendant contends that Defendant's Exhibit 21 could have led defendant to use Jenkins and Carlsen as witnesses. Defense counsel further contends that this evidence could have been used in an effort to challenge the State's theory that Ms. Conley was murdered on Thursday night. There is no indication that the car that Jenkins saw in the driveway at 649 First Avenue S. E. that evening had any connection to Conley's death. Jenkins provided no detail to permit anyone to identify either the car or its occupants. There is no reasonable probability that had Exhibit 21 been disclosed to the defense that the result of these proceedings would have been different. This claim is denied.

Withheld Evidence Implicating Other Individuals in Conley's Murder

Exhibit 15: Hickory Police Department's investigative materials regarding Billy Hull

248. Defendant's Exhibit 15 includes various investigative notes and materials regarding Billy Hull, including a phone memo to Detective Sams concerning a telephone call from Hull on September 10, 1992, at 3:37 p.m.; Sams' handwritten notes of an interview with Tim Brewer regarding Hull and the Nellie Long homicide, which indicate that Hull "wasn't really a suspect but he was involved in it" and that Long was a prostitute; Hull's mug shot; Hull's arrest report for Driving While License Revoked; a Hickory Police Department computer printout of data on Hull; and Sams' handwritten notes regarding attempting to locate Hull at his residence on September 9, 1992, and setting up an interview with Hull that day. (Defendant's Exhibit 15).

249. Defendant's Exhibit 15 tends to indicate that Hull was a person of interest in the Conley case; that he was contacted by Sams by telephone on September 9, 1992; and that his name came to the attention of investigators in connection with homicide of Nellie Long.

250. Defendant's Exhibit 15, Bates-stamped 1974, 2007, 2038, and 2125 through 2128, has been in the possession of the Hickory Police Department continuously since its creation in 1992 because it was located in the Hickory Police Department's files and provided to defendant's current counsel, pursuant to their request for discovery from the State in this proceeding. (Defendant's Exhibit 15; 05/06 MAR Tr. pp. 150-52).

252. Defendant's Exhibit 15 was not in the possession of the District Attorney's office in 1993 and 1994 because it was not provided by the Hickory Police Department. (Defendant's Exhibit 15).

253. The State did not provide Defendant's Exhibit 15 to defense counsel prior to trial or during trial or permit defense counsel to review it through the District Attorney's "open file" policy. (12/04 MAR Tr. pp. 321-23).

254. In pretrial discovery, the State provided defense counsel with a list of suspects and witnesses that Sams had in the Conley case that named the defendant, Bobby Smith, Rufus McGill, and Darryl Brown as suspects. (Defendant's Exhibit 23; 08/04 MAR Tr. pp. 252-53). This disclosed suspect list does not indicate that Hull was also a suspect in the Conley case.

255. The defendant contends that Exhibit 15 could have been used by the defendant to cross-examine Detective Sams to establish that Hull was a suspect in the Conley case. Moreover, the defendant contends that this exhibit could have led the defendant's counsel to present evidence implicating Hull in the murder of Tenene Conley. This investigative lead was

more promising as shown by evidence developed by defense counsel in the hearings on this MAR.

256. George Reinhardt testified at the evidentiary hearing that Ms. Conley was Hull's "girlfriend" during the summer of 1992, and they lived in an apartment together. (05/04 T p. 14-15, 18). Although they were no longer living together at the time of her death, Hull and Ms. Conley were in a "relationship" at that time. (*Id.* at 17, 18). According to Reinhardt, Ms. Conley had sex with men in order to get money for crack. (*Id.* at 15). Hull would get jealous of a woman and become violent toward her, especially if she had sex with another man for money and did not bring him the money. (*Id.* 19). On several occasions, Reinhardt witnessed Hull choke and beat Ms. Conley. (*Id.* at 19). Reinhardt testified that he was with Hull when they learned about Ms. Conley's death, and that Hull did not react in "a loving way" and did not go to the police to find out the details about her death. (*Id.* at 16, 23, 25). Hull did not attend Ms. Conley's funeral, and he left Hickory after her death. (*Id.* at 31-33). George Reinhardt, who was known as "Ice" or "Iceman," also testified at the evidentiary hearing that Hull told Reinhardt that he had spoken to the police twice about Ms. Conley's death. (05/04 T p 25, 31, 39). Reinhardt also testified that Hull and Nellie Long were in a "relationship" before she was murdered. (05/04 T p. 33-34). According to Reinhardt, Hull was violent toward most of the women that he had a "relationship" with. (05/04 T p. 18, 76-77).

257. Pankie Armstrong testified at the evidentiary hearing that on the Friday evening or late afternoon before Ms. Conley's body was found on Saturday, she saw Ms. Conley involved in an argument with Hull in front of the pool room. (08/04 MAR Tr. pp. 37-38, 45-46, 50, 53). Armstrong overheard Ms. Conley tell Hull "it was over," and then Ms. Conley left in a

burgundy car. (*Id.* at 38-39). Armstrong then heard Hull yell, "If I couldn't have you, couldn't nobody else have you. I would kill you, I swear to God." (*Id at 39.*). Armstrong also saw Ms. Conley earlier on Friday at Tipp's club and then at Snowball's, another bar. (*Id.* at 48-49).

258. Armstrong testified that Hull approached her when she was 11 years old about becoming her pimp and when she refused, he hit her. (*Id.* at 39-41). Armstrong also witnessed Hull assault several other women, including Teresa Hall. (*Id.* at 40-41).

259. Carolyn Williamson testified at the evidentiary hearing that she saw Ms. Conley at the pool room, alone, the day before her body was found. (*Id.* at 92, 95). According to Williamson, Ms. Conley and Hull were dating in 1992 until she died, and they would stay at the Inn Towner Motel together every other weekend. (*Id.* at 85-86, 89). William testified that Ms. Conley and Hull argued frequently, and that she witnessed Hull push Ms. Conley. (*Id.* at 86). Moreover, Hull became jealous of Ms. Conley when she was with someone else. (*Id.* at 89).

260. Williamson also testified that Hull was violent toward Teresa Hall and that she witnessed Hull choke and hit Hall constantly. (*Id.* at 87). Williamson recalled that on one occasion, after Hall attempted to run away from Hull, he caught her and started beating her. (*Id.* at 88).

261. Teresa Hall testified at the evidentiary hearing that she dated Billy Hull for six to seven months and that he used to beat her, choke her, and punch her in the stomach. (05/04 MAR Tr. pp. 126, 128). On one occasion, Hull threatened Hall with a broken liquor bottle and said, "I'm going to have to do like I did on the other." When Hall asked if that meant he was going to kill her, Hull did not respond. (*Id.* at 127).

262. Carl Geter testified at the evidentiary hearing that he saw Ms. Conley and Hull

arguing outside Tipp's club on the Friday evening before her body was found. According to Geter, Hull left town after Ms. Conley's death and that Hull did not go to her funeral or send flowers and, therefore, did not show any emotion or feeling about her death. Geter also testified that Hull became violent when he used crack or alcohol. (08/04 MAR Tr. pp. 105-09, 114, 118-19, 124, 141-43).

263. Mike Cosby testified at the evidentiary hearing that on the Friday evening before Ms. Conley's body was found, Hull was looking for her because she had stolen his ring and that Ms. Conley was seen getting into a vehicle with Hull on Friday evening. (*Id.* at 148-49, 172, 174). Cosby testified that when he discussed Ms. Conley's death with Hull, he did not seem surprised or show any emotion (*Id.* at 150). Cosby testified at the evidentiary hearing that Hull was violent towards women. (*Id.* at 160).

264. Danny Blackburn testified at the evidentiary hearing that Hull was a pimp and that he had assaulted various women, including Ms. Conley. Blackburn also said that Ms. Conley and Hull were living together and dating during the summer of 1992, and that he witnessed Hull assault Ms. Conley several times. (12/04 MAR Tr. p. 731).

265. Quwina Roddey testified at the evidentiary hearing that Hull beat women. Roddey testified that Hull and Ms. Conley were in a relationship and that he would not hesitate to knock her to the ground in public. According to Roddey, Hull also bragged about killing Nellie Long. (02/13/06 MAR Tr. pp. 74-75).

266. Lt. Merle Hamilton of the Hickory Police Department testified at the evidentiary hearing that Hull was a dangerous man, who was prone to violence. (08/04 MAR Tr. p. 366).

267. In this case, the State failed to disclose Exhibit 15 that contained information

indicating that Billy Hull was a potential suspect in this case. However, the requirements of Brady are not violated "if the information allegedly withheld by the prosecution was reasonably available to the defendant." *Hoke v. Netherland*, 92 F.3d 1350, 1355 (4th Cir. 1996); *see also United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990). The Court has reviewed the discovery materials that were made available to the defendant in the Conley case. In those materials, there were documents including an interview of Carl Geter on September 2, 1992. In that interview, Geter informed Sgt Carlsen of the Hickory Police Department that his cousin Angela Geter told him that Billy Hull and Ice Man had Tenene Conley killed. (See Exhibit 11). On October 14, 1994, Bob Adams acknowledged receipt of this interview of Carl Geter. On that same date, Adams received a copy of the notes of the interview of Joanne Morrison. Morrison was interviewed by Detective Sams on August 26, 1992. In that interview Morrison informed Sams that "we've heard talk about Billy Hull that he might have something to do with it…" (Exhibit 7). Morrison further indicated that Conley went with Hull in the past. Id. Furthermore, in the interview of Jacqueline Collins that was also provided to defendant's trial counsel there was an indication that she had heard allegations against Billy Hull in connection with Conley's death. (Exhibit 8). Adams asked Collins during her testimony in court about Billy Hull and whether Conley knew him and if Hull had come to the house to see Tenene Conley. (Trial Tr. Vol. III, p. 112). Adams admitted in his testimony during the MAR proceedings that he knew of Hull at the time. (12/04 Tr. p. 323). There were several references in the available discovery material that indicated that Billy Hull was a potential suspect in the death of Tenene Conley. In this instance, the discovery that was provided indicated to defense counsel that Billy Hull was a suspect in Conley's death and as such, there is no Brady violation in this instance. The materials

that were included in Exhibit 15 would not have provided additional information to defense counsel that was not already contained in the discovery material that was provided to them in these cases. For this reason, this particular Brady claim is denied.

Exhibit 87: Investigator Wiles' Interview with Deborah Lattimore

268. Defendant's Exhibit 87 is a report of Officer L.K. Wiles' interview with "Debra" Lattimore on October 13, 1992. Lattimore told Wiles that she lived with "Darrell" Brown until he beat her and kicked her out of the house and that in October 1992, Brown threatened to "kill her like he did the other one." Lattimore informed Wiles that Brown told her "he would cut her throat like he did the other one." Lattimore also commented that Brown used to live with the "black girl who was found dead in the basement of an empty house." According to Lattimore, Brown said that he murdered two women in New York by stabbing one woman ten times and drowning the other woman in a tub of water. (Defendant's Exhibit 87).

269. There is no indication that Tenene Conley's throat was cut. The autopsy report mentions only superficial abrasions on her neck. (Defendant's Exhibit 121). The manner of Conley's death was not consistent with the statement allegedly made by Darrell Brown to Debra Lattimore.

270. Defendant's Exhibit 87 tends to imply that Brown and Ms. Conley used to live together, that Brown threatened to kill Lattimore and that he claimed to have killed other women. The defendant claims that this exhibit was a source of leads in the Conley case.

271. The testimony of Deborah Lattimore at the evidentiary hearing confirmed some of

the information that she told Officer Wiles, but she was unable to recall if the "black girl who was found dead in the basement of an empty house" referred to Ms. Conley. (12/04 MAR Tr. pp. 1028-31). Lattimore testified that she did not know the identity of the other women that Brown had talked about. (12/04 MAR Tr. 1023). Lattimore further testified that she did not remember who she was referring to when she told Wiles about the black girl who was found dead in the basement of an empty house. (12/04 MAR Tr. p. 1030). She was not sure if that black girl was Tenene Conley or not. (12/04 MAR Tr. p. 1030). Lattimore also explained that Brown never said he killed Ms. Conley, and he did not identify "the other one" he allegedly killed. (*Id.* at 1033-34).

272. Defendant's Exhibit 87, Bates-stamped 3052-53, has been in the possession of the Hickory Police Department continuously since its creation in 1992 because it was located in the Conley investigative files maintained by the Records Division of the Hickory Police Department and provided to defendant's current counsel, pursuant to their request for discovery from the State in this proceeding. (Defendant's Exhibit 87; 05/06 MAR Tr. pp. 150-52).

273. Defendant's Exhibit 87 was not in the possession of the District Attorney's office in 1993 and 1994 because it was not provided by the Hickory Police Department. (05/06 MAR Tr. pp. 150-52).

274. The State did not provide Defendant's Exhibit 87 to defense counsel prior to trial or during trial or permit defense counsel to review it through the District Attorney's "open file" policy. (12/04 MAR Tr. pp. 330-31).

275. Neither Defendant's Exhibit 87 nor substantially equivalent evidence was available to defendant's counsel, with reasonable diligence, at trial, other than through disclosure

by the State.

276. In pretrial discovery, the State provided defense counsel with a list of suspects and witnesses that Sams had in the Conley case that named Darryl Brown as a suspect and identified Deborah Lattimore as a witness. According to this list, Lattimore said that Brown dated Ms. Conley in the past and "beats women." (Defendant's Exhibit 23; 08/04 MAR Tr. pp. 252-53). This disclosed information did not to refer to Brown threatening to kill Lattimore like "the other one" or telling Lattimore that he murdered women.

277. Adams testified that if he had the information contained in Exhibit 87, he might have investigated the connection between Brown and Ms. Conley. (12/04 MAR Tr. pp. 331-332).

278. The defendant contends that Defendant's Exhibit 87 could have been significant to the defense. (12/04 MAR Tr. p. 65). The defendant contends that defense counsel could have used Defendant's Exhibit 87 to cross-examine Sams at trial. There is no detail provided to explain the nature of this cross-examination and its benefit does not appear to be significant. The defendant further contends that Defendant's Exhibit 87 could have led defendant to use Lattimore as a witness. There was sufficient evidence in Exhibit 23 to identify Lattimore as a potential witness against Darryl Brown who was identified as a suspect in the Conley investigation.

279. The Court determines that the information concerning Darrell Brown's alleged statements that he killed other women is not material to this case. The statements do not identify Tenene Conley as one of the other women that Brown supposedly killed. The statement that he cut the victim's throat is inconsistent with the evidence in this case and shows that Conley was

not the woman to whom Brown allegedly referred. The references to killings of women in New York also do not appear to have any connection to Tenene Conley's death. Consequently, this claim is denied.

II. Claims that the State Knowingly Used False Evidence in Violation of *Napue v. Illinois*
(Amendment to MAR)

280. Subsequent to the evidentiary hearing, defendant amended his MAR to include claims that the State knowingly used false testimony and made false arguments at defendant's trial, in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and under Article I, Sections 19 and 23, of the North Carolina Constitution. The Court will in this section address the allegations that the State knowingly used false evidence and made false arguments at defendant's trial.

Legal Principles Applicable to Claim

281. The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the North Carolina Constitution prohibit the State from knowingly presenting false testimony. *See Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *State v. Boykin*, 298 N.C. 687, 694, 259 S.E.2d 883, 888 (1979). In *Napue v. Illinois*, the United States Supreme Court held that a conviction obtained through the knowing use of false testimony by the prosecution violates Due Process. 360 U.S. at 269. This is true regardless of whether the prosecution solicited testimony it knew to be false or

simply allowed such testimony to pass uncorrected. *Giglio*, 405 U.S. at 153; *Napue*, 360 U.S. at 269.

282. Subsequently, in *Giglio v. United States*, the Supreme Court made it clear that such errors do not require immediate reversal and articulated a materiality standard to guide the determination of whether a new trial is warranted. 405 U.S. at 154. Since its decisions in *Napue* and *Giglio*, the Supreme Court has consistently held that the knowing use of false testimony is material and constitutes a Due Process violation when "'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *Kyles v. Whitley*, 514 U.S. 419, 433 n.7 (1995) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)); *see also Longworth v. Ozmint*, 377 F.3d 437, 445 (4th Cir. 2004); *Boyd v. French*, 147 F.3d 319, 330 (4th Cir. 1998).

283. A defendant need not show that the prosecuting attorney knew the testimony was false. The Fourth Circuit Court of Appeals has held that knowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution. *Longworth*, 377 F.3d at 445; *Boyd*, 147 F.3d at 329.

284. Moreover, a prosecutor's knowingly false statements during arguments before the jury are improper. *Giglio*, 405 U.S. at 153; *State v. Bass*, 121 N.C. App. 306, 465 S.E.2d 334 (1996). In this instance, the Assistant District Attorneys do not appear to have been aware of the evidence that proved that their arguments were actually false.

285. Therefore, to prove that the State has denied him Due Process of Law by the State's presentation of false evidence, the defendant must prove (1) the presentation of false testimony by the State, (2) that the State, whether the prosecutor or a law enforcement officer,

knew the testimony was false, and (3) such testimony was material.

*Findings of Fact Applicable to Claim***s**

Facts Relating to the Investigation of the June 12, 1992 Fire and the Ramseur Case

286. Rhoney and Mueller went to the scene of the June 12, 1992, fire at 407 Highland Avenue together. (08/04 MAR Tr. p. 829). When Mueller arrived at the scene, he interviewed Creasman and took handwritten notes of the interview that are contained in Defendant's Exhibit 27. (12/04 MAR Tr. pp. 168, 170-72).

287. David Gill Kanupp, a fire investigator with the Hickory Fire Department, responded to the scene of the June 12, 1992 fire. (*Id.* at 207-08). According to Kanupp, it was fire department policy to check the cellar or basement area of a vacant house, and he and another person from the fire department inspected the crawl space. (*Id.* at 207-08, 212-213). During the inspection, the visibility in the crawl space was fairly clear because it was daylight and they had flashlights, and they were able to walk to a certain point in the crawl space and then had to crawl. (*Id.* at 213, 215, 231-32).

288. Rhoney went to the Ramseur crime scene after Ms. Ramseur's body was located on August 22, 1992 in the crawl space of the house at 407 Highland Avenue. (08/04 MAR Tr. p. 777; 12/04 MAR Tr. p. 67).

289. Kanupp was called back to 407 Highland Avenue on August 22, 1992, and asked to verify that there was not a body in the crawl space at the time of the June 12, 1992 fire. (12/04 MAR Tr. pp. 215-17). Kanupp viewed Ms. Ramseur's body in the crawl space. (*Id.* at 218). Based upon the previous inspection that Kanupp performed with his colleague, Kanupp

determined he "was absolutely sure there was no body there at the first fire." (*Id.* at 217, 220, 242).

290. Rhoney was the lead investigator in the Ramseur case. (08/04 MAR Tr. p. 771).

291. Ernie Bueker, who was Assistant Special Agent in Charge with the North Carolina State Bureau of Investigation when he investigated the scene of the June 12, 1992 fire, testified that after Ms. Ramseur's body was found, Rhoney and some other officers joked with him about doing a fire investigation at 407 Highland Avenue with a body in the crawl space. (12/04 MAR Tr. pp. 244-45, 255, 259, 261). Rhoney asked Bueker if he was sure there was not a body in the crawl space at the time of the first fire, and Bueker told Rhoney that there was no body in the crawl space to his knowledge. (*Id.* at 255, 259).

292. Officer Mueller testified that after Ms. Ramseur's body was discovered, Rhoney was looking for information on a black male with a white female, and Mueller showed Rhoney the handwritten notes of his interview with Creasman on June 12, 1992. (*Id.* at 185-86, 188). Mueller specifically recalled showing Rhoney Creasman's description of the black male and the white female. (*Id.* at 186).

293. Defendant's Exhibit 85 is the first page of the Ramseur prosecution summary located in the Hickory Police Department records division file, with an attached post-it note of "things to do" dated December 23, 1992, that was created by Rhoney's supervisor, Sergeant Dan Carlsen. Carlsen's testimony at the evidentiary hearing established that the note directed Rhoney to "locate wino and show photo of Ms. Ramseur and Chapman." (Defendant's Exhibit 85; 12/04 MAR Tr. pp. 27-30, 66-67; 02/06 T p. 212).

294. Rhoney found Creasman quickly in response to Carlsen's directive and brought

Creasman into the police department on December 23, 1992, the same date as the post-it note, to show him a photographic lineup. (Defendant's Exhibit 85; 08/04 MAR Tr. pp. 1021-22; 12/04 MAR Tr. p. 34-35; 02/06 MAR Tr. p. 214).

295. Rhoney showed a photographic lineup to Creasman that day, and Creasman identified someone other than defendant as the black male that he saw prior to the June 12, 1992 fire. (Defendant's Exhibit 25; 08/04 MAR Tr. pp. 857-58, 866-67).

296. Rhoney attended the defendant's entire trial. Rhoney sat beside Parker and assisted him with the presentation of evidence. (08/04 T p. 817, 867). Rhoney reviewed the Hickory Police Department files in the Ramseur case when he prepared for trial, and he had those files with him during the trial. (08/04 MAR Tr. p. 868; 12/04 MAR Tr. pp. 109-10).

Rhoney's False Testimony at Defendant's Trial

297. Before Raymond Mitchell read Creasman's hearsay statement to the jury, the trial court conducted a hearing on the admissibility of the statement. During that hearing, Rhoney testified that Officer Mueller, under his supervision, spent two full days attempting to locate Creasman; that Creasman's former wife informed authorities that Shelby was Creasman's last known location and that he spent some time in Broughton Hospital; and that they were unable to locate Creasman. (Trial Tr. Vol. IV p. 26). During cross-examination by Portwood, Rhoney testified as follows:

> Q: Did you meet Mr. Creasman or do you know him[?]
>
> A: I have spoken to him. I am saw him briefly in my office on the morning that the fire was under investigation but I personally did not speak to him other than to give him a cup of coffee. (*Id.* at 27).

The trial court determined that Creasman was unavailable based upon Rhoney's testimony about Creasman and the efforts made to find him and ruled that the statement was admissible. (*Id.* at 28-30).

298. The record leaves no doubt that Rhoney's testimony about his contact with Creasman during the hearing on the admissibility of Creasman's hearsay statement was misleading.

299. Rhoney's testimony at trial that he had never talked with Creasman except for one time to give him a cup of coffee on the day of the fire investigation was false. (Exhibit 25; 08/04 MAR Tr. pp. 825-27; 12/04 MAR Tr. p. 43).

300. On December 23, 1992, Rhoney showed Creasman a photographic lineup and interviewed him about whether he could identify the black male he saw at 407 Highland Avenue on June 12, 1992. (Defendant's Exhibit 25).

301. The Court finds that a fair and accurate answer to Portwood's question would have revealed that Rhoney showed Creasman the photographic lineup on December 23, 1992. (08/04 MAR Tr. pp. 826-27).

302. Rhoney testified at various times during the evidentiary hearing that his response to Portwood was true because he did not recall showing Creasman the photographic lineup when he testified at trial. Moreover, at the evidentiary hearing, Rhoney claimed that he still did not recall the lineup when he testified at trial or during the MAR hearings. (*Id.* at 824-27, 832-834; 12/04 MAR Tr. pp. 26, 34-35 37, 40-41, 165-66). The Court finds that Rhoney's testimony to this effect is not credible. It is unlikely that Rhoney could recall giving Creasman a cup of

coffee, but forget about the lineup. There was no credible justification or excuse offered by Detective Rhoney for his failure to mention the photographic lineup to the District Attorney's office or the trial court. (08/04 MAR Tr. pp. 825-27, 833).

303. Creasman testified at the evidentiary hearing that Rhoney gave him a cup of coffee on the date of the photographic lineup. (*Id.* at 1022). Creasman recalled that he waited fifteen to twenty minutes after finishing the lineup to finish his coffee before leaving. (*Id.* at 1025-1026). The day of the lineup was the first and only time that Rhoney gave Creasman a cup of coffee. (*Id.* at 1022-23). The Court finds that Creasman's testimony is credible.

304. Rhoney's testimony at the evidentiary hearing that he gave Creasman a cup of coffee on the day of the June 12, 1992, fire is not credible. (*Id.* at 828, 831-33). Rhoney did testify that he was unable to refute Creasman's testimony that he gave Creasman a cup of coffee on the day of the photographic lineup. (12/04 MAR Tr. pp. 32-33).

305. The Court finds that Rhoney did not give Creasman a cup of coffee on the morning of the June 12, 1992, fire. Instead, he gave Creasman a cup of coffee at the time of the photographic lineup on December 23, 1992.

306. At the time Rhoney gave this inaccurate testimony at trial about his contact with Creasman, he knew it was false.

307. Rhoney also gave inaccurate testimony at trial about Officer Mueller's unsuccessful efforts to locate Creasman.

308. Officer Mueller testified at the evidentiary hearing that he did not make any efforts to locate Creasman for the defendant's trial. (12/04 MAR Tr. pp. 190-192, 201). Mueller recalled that Rhoney asked him to locate Creasman during the defendant's trial, but that Mueller

was the custodian of the evidence and someone else was assigned to locate Creasman. (*Id.* at 190-92). The Court finds that Mueller's testimony is credible.

309. Rhoney's testimony at the evidentiary hearing that he assigned Officer Mueller to the task of finding Creasman and that Officer Mueller attempted to locate Creasman is not credible. (08/04 MAR Tr. p. 837-839; 12/04 MAR Tr. pp. 41-42, 147-51).

310. The Court finds that Officer Mueller was not assigned the task of locating Creasman, and Officer Mueller did not spend two days attempting to locate Creasman. Instead, some other officer or perhaps an investigator in the District Attorney's office was assigned the task of locating Creasman.

311. At the time Rhoney gave this inaccurate testimony about efforts to locate Creasman, he only inaccurately identified the officer who attempted to find Creasman.

312. The trial court based the admissibility of Creasman's hearsay statement on Rhoney's inaccurate testimony. However, the name of the officer who attempted to locate Creasman was not significant. The significant matter was that the effort was undertaken and there is no evidence to indicate that the effort was not made.

False Testimony in the Ramseur Case

313. As presented at trial, the State's theory in the Ramseur case was that the defendant murdered Ms. Ramseur on June 12, 1992, and deliberately set two fires to the house in a bungled attempt to burn her body, which he had left in the crawl space underneath the house. (Trial Tr. Vol. IV pp. 217-18; 08/04 MAR Tr. pp. 197, 203, 817).

314. During the prosecution's opening statement, Parker told the jury: "[Y]ou will hear

her boyfriend was in jail on June 10th and she was last seen alive by a probation officer on June 11th. On June 12th, you will hear somebody tried to burn the house down they were in." (Trial Tr. Vol. II p. 407).

315. Weyburn Smith, Ramseur's probation officer, testified at trial that he last saw Ms. Ramseur in court on June 11, 1992 and that she left with a black man. (Trial Tr. Vol. III pp. 345-47). The prosecution implied from Smith's trial testimony that Ms. Ramseur was with defendant on June 11, 1992. There is no indication that Weyburn Smith's testimony was false.

316. Raymond Mitchell testified at trial about Creasman's hearsay statement, which indicated that Creasman saw a black male and white female at 407 Highland Avenue around daybreak the morning of the June 12, 1992, fire. (Trial Tr. Vol. IV p. 30). The prosecution implied from this statement that Ms. Ramseur was with defendant on June 12, 1992 at 407 Highland Avenue. This testimony supported the prosecution's theory that the defendant murdered Ms. Ramseur on June 12, 1992, placed her body in the crawl space, and set fire to the house in an attempt to burn the body.

317. Chris Walker and Hazel Williamson testified at trial that Walker was in jail in June 1992. (Trial Tr. Vol. IV pp. 3, 5-6, 10). The trial testimony from Walker and Williamson indicated that Chris Walker was not the black man with Ms. Ramseur on June 11 and June 12, 1992. There is no indication that Chris Walker or Hazel Williamson gave false testimony.

318. Lavar Gilliam testified at trial that during the summer of 1992, he overheard the defendant say that he had killed a woman, that her body was in the house on Highland Avenue, and that he was going to burn her body so that it could not be found. (Trial Tr. Vol. III pp. 248, 250-54). Gilliam's trial testimony, coupled with other evidence, permitted the inference that the

defendant set fire to the house in an attempt to burn Ms. Ramseur's body. The defendant has not carried his burden to establish that Gilliam's testimony to this effect was false.

319. SBI Agent Rasmussen testified that he did not and to his knowledge no one else went into the crawl space at 407 Highland Avenue on June 12, 1992, and that there would have been no occasion for anyone to go into the crawl space. During re-direct examination, Rasmussen testified that he was called back to a second fire at 407 Highland Avenue a couple of months later. (Trial Tr. Vol. IV pp. 13, 19). Rasmussen's trial testimony permitted the State to infer that Ms. Ramseur's body was in the crawl space at the time of the fire on June 12, 1992, and that the defendant set a second fire to the house in an attempt to burn Ms. Ramseur's body.

320. Rebecca Haddock made the prosecution's initial closing argument at the defendant's trial and she argued that Ms. Ramseur was "seen on June 11th in court with a black man" and "a white woman and black man was [sic] seen together in the abandon[ed] house which later that day a fire was put out by the fire department." Haddock noted that "[a] month later that same house is the house where the remains of Ms. Ramseur was (sic.) found underneath the crawl space." Haddock subsequently stated that "the black man was seen with a white female there and that it was not Chris Walker for the testimony was that Mr. Walker was in prison or jail." (Trial Tr. Vol. IV p. 183).

321. Parker made the prosecution's final argument to the jury and he contended: "Now June 11th, 1992, . . Ms. Ramseur is last seen alive . . . She is seen leaving the courthouse with a black male. Well we know that black male is not Chris Walker." (Trial Tr. Vol. IV p. 217). When referring to the fire at 407 Highland Avenue the next morning, Parker stated: "The next morning when the firemen arrived at 8:05 at the 407 Highland Avenue address, at that point

there is no smell from the body. Betty Ramseur has not started to decay but they talked with a vagrant by the name of Alvin Creasman, a white man, who said . . . I slept here all night and there was a white woman and a black man here around day break." (Trial Tr. Vol. IV p. 218). Parker also made reference to Gilliam's testimony that defendant said, "I killed a girl underneath that house and I think I will set it on fire and burn it." (Trial Tr. Vol. IV. 217). In response to defense counsel's argument that Gilliam's testimony was not believable, Parker noted: "Well Mr. Adams said if it happened between that time frame, how could he know about it but you remember something Mr. Rasmussen said, there was another fire at that place later on. What Gilliam actually said was later I heard about a fire in the house and a body being found. He might have heard about the fire later and the body being found." (Trial Tr. Vol. IV p. 217-18). Parker then argued that the fire "was done by man's hands and what man would have reason to have set the house on fire? The person who had just shoved a naked body underneath the house that is who." (Trial Tr. Vol. IV p. 219).

322. The above-referenced testimony and arguments were critical to the State's theory in the Ramseur case. The testimony of Raymond Mitchell concerning Creasman's statement and the testimony of Tom Rasmussen concerning the crawl space was misleading, and the State's arguments and theory were based on this testimony.

323. Rhoney was present at trial during the testimony of these witnesses, and he was aware of the State's theory in the Ramseur case and the State's arguments that the defendant and Ms. Ramseur were the two individuals seen by Alvin Creasman; that the defendant murdered Ms. Ramseur on June 12, 1992, put her body in the crawl space of 407 Highland Avenue, and set fire to the house; and that the defendant subsequently set a second fire to the house. (08/04

MAR Tr. pp. 817, 867, 872). Moreover, Rhoney knew that these witnesses' testimony was misleading and the State's arguments and theory were false.

324. At the time of Raymond Mitchell's testimony regarding Creasman's hearsay statement, Rhoney was aware that Mueller had interviewed Creasman and obtained a better description of the black male and white female from Creasman. (12/04 MAR Tr. pp. 185-186, 188).

325. Rhoney had looked for information on the black male who was observed with a white female at 407 Highland Avenue on June 12, 1992 after Ms. Ramseur's body was discovered, and Mueller showed Rhoney the notes of his June 12, 1992 interview of Creasman, which included Creasman's description of the black male and white female. (12/04 MAR Tr. pp. 185-86, 188). Rhoney's testimony to the contrary at the evidentiary hearing is not credible. (08/04 MAR Tr. pp. 854-57).

326. After Ms. Ramseur's body was found, Ernie Bueker of the SBI told Rhoney that there was no body in the crawl space on June 12, 1992. (12/04 MAR Tr. pp. 255, 259, 261).

327. At the time of trial, Rhoney was aware that the second fire at Highland Avenue had occurred after Ms. Ramseur's body was found. (08/04 MAR Tr. pp. 853-54; 12/04 MAR Tr. p. 72).

328. As part of his investigation of the Ramseur case, Rhoney showed a photographic lineup to Creasman on December 23, 1992, and Creasman identified someone other than the defendant as the black male that he saw at 407 Highland Avenue prior to the fire on June 12, 1992. (Defendant's Exhibit 25; 08/04 MAR Tr. pp. 857-58, 866-67). A witness instruction form from the lineup, Defendant's Exhibit 25, Bates-stamped 1434, has been in the possession of the

Hickory Police Department continuously since its creation in 1992. (Defendant's Exhibit 25; 05/06 MAR Tr. pp. 150-52). Rhoney never told Parker about the photographic lineup. (08/04 MAR Tr. p. 872).

329. Rhoney testified at the evidentiary hearing that he did not correct the trial testimony or the prosecution's arguments because he did not recall showing Creasman the lineup. Moreover, at the evidentiary hearing, Rhoney claimed that he still did not recall the lineup. (08/04 MAR Tr. p. 873; 12/04 MAR Tr. pp. 165-66). The Court finds that Rhoney's testimony on this point is not credible.

330. Rhoney is responsible for failing to disclose Defendant's Exhibit 25 to the District Attorney's office and defense counsel, for the misleading testimony of Raymond Mitchell and Tom Rasmussen, and for allowing the prosecution's false arguments to be made to the jury without correction.

331. Parker testified at the evidentiary hearing that he was not aware of the photographic lineup and there was no indication that defense counsel was aware of the lineup. (05/04 MAR Tr. pp. 263-66). Adams testified that he was not aware of the photographic lineup and that without the inference that the black male Creasman saw was the defendant, the State would not have been able to pursue it's theory that the defendant attempted to burn down the house to hide the body. (12/04 MAR Tr. pp. 335-36, 341-42).

332. There is no credible justification or excuse for Rhoney's failure to inform the prosecutors of the information in his possession and his failure to inform them prevented the prosecutors from correcting the misleading testimony presented by the State referenced above. This testimony offered by the prosecution, when Rhoney knew of contrary evidence of which

Parker and defense counsel were unaware, was false and misleading. The prosecution, if advised by Rhoney, would have been obligated to correct this misleading evidence and failed to do so because Rhoney withheld this information. The failure to correct this false evidence was material since there is more than a reasonable likelihood that the false testimony affected the judgment of the jury in this case. The fact that the defendant was not the black male observed by Alvin Creasman at the house on Highland Avenue on June 12, 1992 prior to the fire and the fact that there was no body in the crawl space after that fire directly contradicted the State's theory of the case in the Ramseur murder. The false and misleading evidence in this matter was critical to the State's case against the defendant in the Ramseur murder. The defendant is entitled to a new trial based on this claim.

Facts Relating to the Investigation of the Conley Case

333. Sams was assigned as the investigator responsible for the Conley case. (08/04 MAR Tr. pp. 406, 506).

334. On August 15, 1992, Lieutenant Merl Hamilton of the Hickory Police Department interviewed Mike "Collins" (actually Mike Cosby). Cosby told Hamilton that Ms. Conley was living with him prior to her death, and he had information indicating that Ms. Conley "was last seen getting into a vehicle on South Center Street Friday evening (08/14/92)." The vehicle was occupied by Billy Hull and "Ice," a man known by Hamilton to be George Reinhardt. According to the information received by Hamilton, Ms. Conley had stolen a ring from Hull and had sold it for crack cocaine. A couple of hours later, someone asked Hull where Ms. Conley was, and he replied he had not seen her. Cosby also told Lt. Hamilton that Hull had been involved in a

similar murder in Newton four or five years earlier. He said he had not seen either Hull or Reinhardt in the area since the discovery of Ms. Conley's body. (Defendant's Exhibit 16; 08/04 MAR Tr. pp. 147-49, 151-154, 156, 162, 172, 174, 360, 363).

335. On August 31, 1992, Sams interviewed Joanne Robinson. The handwritten notes of the interview indicate that Tenene Conley was seen on Friday afternoon "with some tall dude." The notes also mention Calvin Coffey and Shannon-brook, and provide contact information for Sabrina Whitason, who spoke to Coffey. (Defendant's Exhibit 24; 08/04 MAR Tr. p. 479-483).

336. On September 2, 1992, Sergeant Dan Carlsen of the Hickory Police Department interviewed Carl Geter. Geter told Carlsen that he had heard that Billy Hull and "Iceman" had Tenene Conley killed. Significantly, Geter also stated that Hull and "Iceman" were with Ms. Conley "the day before she was found," and that a third unknown black male, who Geter described as dark skinned, 170 lbs, 5'9", and having a mustache and a little beard or goatee on his chin, was the person who actually killed her. (Defendant's Exhibit 18; 08/04 MAR Tr. p. 112-117; 02/06 MAR Tr. pp. 204-06).

337. On September 9, 1992, Sams interviewed Mark Smith. Smith told Sams that he had seen Ms. Conley on Friday, August 14, 1992, around 10:00 a.m., out back of the pool hall. Smith stated that Ms. Conley approached him and said that he forgot to walk her home the night before and told him not to forget about walking her home that night. Smith saw her later the same day around 5:00 p.m., still out back of the pool hall, and she again reminded him not to forget to walk her home that night. Ms. Conley was not with anyone else when Smith saw her. (Defendant's Exhibit 14; 05/04 MAR Tr. pp. 98-99, 101-02, 104, 120).

338. Rhoney became the lead investigator in the Conley case after Sams left the Hickory Police Department. (08/04 MAR Tr. pp. 777, 868).

339. Rhoney attended the defendant's entire trial. Rhoney sat beside Parker and assisted him with the presentation of the evidence. (08/04 T p. 817, 867-868). Rhoney reviewed the Hickory Police Department files in the Conley case when he prepared for trial, and he had those files with him during the trial. (08/04 MAR Tr. pp. 801-03; 12/04 MAR Tr. pp. 60).

The Prosecution's Alleged False Statements in the Conley Case

340. As presented at trial, the State's theory in the Conley case was that the defendant was the last person seen with Ms. Conley, walking in the direction of the house where her body was found in a closet, and that the defendant murdered Ms. Conley during the evening that went from Thursday, August 13, 1992, to Friday, August 14, 1992 ("Thursday night"), immediately following sexual intercourse. (08/04 MAR Tr. pp. 214-15; 12/04 MAR Tr. pp. 313-14).

341. During the prosecution's opening statement, Parker told the jury: "Once a body is found you start going back and talking to people who last saw that person alive, and [t]here will be evidence to show that Glenn Chapman was seen there in that section of Hickory with Tenene Conley approximately 3:30 Friday morning, Thursday night or Friday morning, walking up the street, the two of them in the direction of First Avenue Southeast, near 649 First Southeast." (Trial Tr. Vol. II p. 406).

342. Ms. Conley's body was found in the basement closet of a vacant house located at 649 First Avenue SE in Hickory on Saturday, August 15, 1992. (Trial Tr. Vol. III pp. 4-6, 81-82).

343. Jamar Danner testified at trial that he saw the defendant and Ms. Conley together in the early morning hours of Friday, August 14, 1992, well before daylight, and they left walking toward the house where Ms. Conley's body was found. (Trial Tr. Vol. III pp. 150-52). There is no indication that this testimony was false.

344. Howard Cowans testified at trial that the defendant, Ms. Conley, and Danny Blackburn came to his apartment around 2:00 a.m. or 3:00 a.m. on Friday, August 14, 1992; they smoked crack in the apartment for about ten minutes; and then a few minutes after the defendant, Ms. Conley, and Blackburn went outside, Cowans saw a man and a woman get out of Blackburn's car and walk toward the house in which Ms. Conley's body was found. (Trial Tr. Vol. III pp. 120-23, 132-34, 136-17). There is no indication that this testimony was false.

345. Danny Blackburn testified at trial that he went with the defendant and Ms. Conley to Cowans' apartment around 2:00 a.m. or 3:00 a.m. on Friday, August 14, 1992. After the defendant, Ms. Conley, Blackburn, and Cowans smoked crack in the car, Ms. Conley got out of the car and began walking up the street, followed by the defendant. (Trial Tr. Vol. III pp. 141-43). There is no indication that this evidence was false.

346. The prosecution's closing argument at the defendant's trial began with Haddock, who said that "Conley was last seen with the defendant, Glenn Chapman, the early morning hours of Friday, August 14th and her body was found the next day, Saturday, August 15th." (Trial Tr. Vol. IV p. 183). That argument was consistent with the evidence that had been presented to the jury at the trial.

347. During the prosecution's final argument to the jury, Parker reviewed the testimony of Blackburn, Cowans, and Danner and said: "All right, what does that do? That gets

you three witnesses that put him as the last person to be seen when Tenene was alive." (Trial Tr. Vol. IV p. 219-20, 223-26). That argument was consistent with the evidence that had been presented to the jury at the trial.

348. The above-referenced testimony and arguments were critical to the State's theory in the Conley case. The testimony of Danner, Blackburn, and Cowans appears to be accurate, and the State's arguments and theory did not reflect the existence of witnesses who reported seeing Tenene Conley alive on Friday.

349. There is no evidence indicating that the substance of the testimony of Danner, Blackburn or Cowans was false. However, there was evidence in the files of the Hickory Police Department and the District Attorney's office showing Ms. Conley was alive on Friday, August 14, 1992, and no longer with the defendant.

350. In the Conley case, the State did not fail to correct evidence that was false. The failure to disclose information that Conley may have been seen by other individuals on Friday after she left the presence of the defendant does not give rise to a Napue claim since the evidence that the State offered that these three witnesses observed Conley in the defendant's presence early Friday morning appears to be true. The information that other individuals observed Conley on Friday gives rise to potential Brady and ineffective assistance of counsel claims that are addressed in other parts of this order.

III. Claims of Ineffective Assistance of Counsel
(MAR Claims II and Amended MAR)

351. Defendant's MAR alleges that he was deprived of his right to the effective assistance of counsel prior to his capital trial, during the guilt-innocence and the sentencing

phases of his trial, and on direct appeal, in violation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 19, 23, and 27, of the North Carolina Constitution. The Court will now address the allegations of ineffective assistance of counsel during the guilt-innocence phase of the trial.

Legal Principles Applicable to Claims

352. The Sixth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 19, 23, and 27 of the North Carolina Constitution, guarantee a criminal defendant the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Braswell*, 312 N.C. 553, 324, 241 (1985). In *Strickland* the Court held:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. *First, the defendant must show that counsel's performance was deficient.* This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. *Second, the defendant must show that the deficient performance prejudiced the defense*. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. (emphasis added). In *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985), the Supreme Court of North Carolina adopted the *Strickland* test as the standard for evaluating ineffective assistance of counsel claims under the North Carolina Constitution.

353. Further, "[t]he object of an ineffectiveness claim is not to grade counsel's performance." *Id.* at 696. A reviewing court indulges "a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance," I*d. at 694*, and the Court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

354. *Strickland* also admonishes reviewing courts to avoid the temptation "to second-guess counsel's assistance" in hindsight and that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.*

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689 (internal citations omitted).

355. Specifically with respect to the duty to investigate the State's case against the defendant, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "In any ineffectiveness case, a 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.*

356. In assessing counsel's performance, the United States Supreme Court, in *Rompilla v. Beard*, 545 U.S. 374, 162 L.Ed.2d 360 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), referred courts to the American Bar Association's Standards for Criminal Justice for guidance in determining the prevailing professional norms.

> We long have referred [to these ABA standards] as 'guides to determining what is reasonable.' *Wiggins* v. *Smith*, 539 U.S., at 524, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (quoting *Strickland* v. *Washington*, 466 U.S., at 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052).

Rompilla, 162 L.Ed.2d at 375. Specifically, as to the duty of trial counsel to investigate, the Court referred to the ABA standards:

> The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. As the District Court points out, the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one: It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. *The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.* The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty. 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

Id. (emphasis added).

357. As the Court noted in *Rompilla*, 162 L.Ed.2d at 376 n.7, in 1989 the ABA promulgated a set of guidelines specifically devoted to setting forth the obligations of defense counsel in death penalty cases known as the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989). These guidelines, which were in place

at the time of counsel's appointment in these cases, applied the clear requirements for investigation set forth in the earlier standards for death penalty cases and imposed a similarly forceful directive: "Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports." Guideline 11.4.1.D.4.

358. In *Rompilla*, the Court found that trial counsel's failure to investigate the court file containing his prior conviction was unreasonable in light of professional norms contained in the ABA standards. "[L]ooking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce." Id. at 377. The easy availability of the file at the courthouse heightens the unreasonableness of attempting no more than counsel did in Rompilla. *Id*. at 377.

359. In addition to looking at, and making use of, material made available to defense counsel by the State, counsel have a duty to perform their own reasonable investigation of the facts. "Counsel has a duty . . . to investigate all witnesses who allegedly possessed knowledge concerning [the defendant's] guilt or innocence." *Soffar v. Dretke*, 368 F.3d 441, 472 (5th Cir. 2004).

360. If a defendant carries his burden of showing his trial counsel's deficient performance, in order to obtain relief, he still must prove prejudice. Under *Strickland*, this means that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. In performing this analysis, a reviewing court must evaluate the acts and omissions of counsel both individually and for their cumulative effect. *See Williams v. Taylor*, 529 U.S.

362, 397-99 (2000).

361. Finally, the court must assess whether counsel's deficient performance, if found, prejudiced the defendant. In assessing the issue of prejudice, a court must examine the totality of the evidence. *Strickland*, 466 U.S. at 695. The court must first assess the State's evidence that defendant committed the first-degree murders of Ms. Ramseur and Ms. Conley. The court must then weigh against this evidence the strength of defendant's defense. *See Williams*, 529 U.S. at 398. Finally, the court must consider whether the additional evidence, had it been used effectively, creates a reasonable probability that the results of the proceeding would have been different. A reasonable probability need not be proof by a preponderance of the evidence that the result would have been different, but it must be a showing sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

Trial Counsel's Investigation of the Tenene Conley and Betty Ramseur Cases
(MAR Claims II(E), (J))

362. Shortly after defendant's arrest in the Ramseur case on December 31, 1992, attorney Robert W. Adams was appointed to represent him. (12/04 MAR Tr. p. 299; arrest warrant, court file). It was Adams' first assignment as lead counsel in a capital case, although he had served as assistant or second chair counsel in three other capital cases. (Id., p. 372). After the defendant was indicted in August 1993 for the Conley murder, Adams was appointed to represent him in that case as well. (12/04 MAR Tr. p. 299; Defendant's Exhibit 77). At the Rule 24 hearing on August 15, 1994, W. Thomas Portwood, Jr., was appointed by the Court as counsel to represent the defendant along with Adams. (Trial Tr. Vol. I p. 5; 12/04 MAR Tr. p. 300). Adams served as lead defense counsel in both cases. Adams and Portwood jointly

represented the defendant at his trial, which began on October 31, 1994.

363. On March 22, 1993, defense counsel obtained an order for the appointment of a private investigator in the Ramseur case. (Defendant's Exhibit 71). Defense counsel retained the services of private investigators Steve Ehlers and Coy Reid of Confidential Associates in the Ramseur Case. (Defendant's Exhibit 74; 12/04 MAR Tr. pp. 594-95). One of the tasks given to Ehlers was to administer a form of lie detector test known as a PSE (Psychological Stress Evaluator) to the defendant in the Ramseur case, a test that the defendant passed. (12/04 MAR Tr. pp. 373-76, 627, 635). Ehlers was never asked to administer such a test to the defendant in the Conley case. (*Id*. at 637). The test in the Ramseur case was administered because Detective Rhoney had told Adams some three months earlier that if the defendant passed a lie detector test, Rhoney would recommend his release. (*Id*. at 373, 624; 8/04 MAR Tr. pp. 185-86). The PSE test was given to the defendant to satisfy Ehlers and defense counsel that the defendant would likely pass a polygraph, the form of lie detector test used by law enforcement. No such additional test was ever administered to the defendant. (12/04 MAR Tr. pp. 373, 376-78, 636).

364. In the view of the Assistant District Attorney assigned to the cases, Jason Parker, the evidence in these cases was "not overwhelming," and he had made a plea offer to the defense because "it wasn't the world's greatest case, you know." (8/04 MAR Tr. pp. 188). As Detective Mark Sams, the lead investigator in the Conley case, admitted, there was no eyewitness to the murder, no co-defendant to testify against defendant, and no trace evidence linking the defendant to the scene of the murder, although there was DNA evidence that his semen was present in Conley's body at the time it was found. (8/04 MAR Tr. pp. 423-24). Despite these problems, it was Parker's view that the Conley case was the stronger case. (8/04 MAR Tr. p. 185).

365. The State's theory in the Conley case was that the defendant murdered Ms. Conley on Thursday night, August 13, 1992 (perhaps after midnight), after he was seen walking with her in the direction where her body was found late on Saturday afternoon in the basement of a vacant house with which the defendant was familiar, having performed some repair work on it for the owner, his semen having been identified as being in Ms. Conley's body. Under the State's theory, the defendant was the last person seen with Ms. Conley while she was alive. (8/04 MAR Tr. pp. 193-96, 214-15).

366. The State's theory in the Ramseur case was that the defendant murdered Ms. Ramseur on June 12, 1992, placed her body in the crawl space of a vacant house at 407 Highland Avenue, and then attempted to conceal the murder by setting fire to the house that day. (8/04 MAR Tr. pp. 203-04).

367. Portwood had passed away by the time of the hearings on the defendant's MAR and was not available to testify. Adams testified that he was lead counsel in the case and that Portwood was responsible for preparing the scientific and technical aspects of the case and for developing evidence in mitigation to use at sentencing. (12/04 MAR Tr. p. 533).

368. Adams' investigation of the cases was, by his own admission, rather limited, to say the least. Adams admitted that he did not use his court-appointed investigators "to conduct a complete re-investigation of the murder." (*Id.* at 540). Confidential Associates had been appointed only in the Ramseur case, however, and the defendant's counsel never applied for appointment of an investigator in the Conley case. (*Id*. at 325, 385; Defendant's Exhibit 71). Although he believed that the investigators were available to investigate both the Ramseur and Conley cases, he did not ask them to perform any investigation in the Conley case. (*Id*. at 540-

42). Adams testified that he did not know what to tell them to do. (*Id*. at 386).

369. The activity reports of the investigators reflect that no investigative activity in either case occurred during the five-month period from April 20, 1993, to September 20, 1993, when Adams called Ehlers, and September 21, when Ehlers met Lola Chapman and drove with her in an unsuccessful attempt to locate Michelle Dula. From that point, no activity at all occurred for over a year, until Ehlers drove Adams to the two crime scenes on October 18, 1994. The only remaining activity before trial was one conference with the defendant on October 24, and a meeting on October 28 with defense counsel to discuss serving subpoenas. Ehlers and his firm were not asked to do anything else beyond what was reflected in the activity reports and were not asked to do anything in the period of over a year from September 1993 to October 1994. (*Id*. at 614-16; Defendant's Exhibit 74).

370. Asked to describe his personal investigation into the facts, Adams could recall talking to only one witness in the Conley case, Fannie Pinkston, the owner of the house where Ms. Conley's body was found, who told him that the defendant had worked on repairs at the house and was a good worker. (*Id*. at 380-82). In the Ramseur case, Adams just relied on his investigators and talked to them, but could not recall positively that he talked to any potential State's witness. (*Id*. at 381-82). In fact, it was Adams' belief that he was not permitted personally to talk to any potential witness for the State in a criminal case, and it was not his practice to talk to detectives, either, so he never attempted to learn what Detective Sams knew about Ms. Conley's whereabouts or time of death. (*Id*. at 318-319, 520). Adams also testified that he went to the crime scenes, but from the testimony of Steve Ehlers of Confidential Associates, that visit occurred less than two weeks before trial, when Ehlers took Adams to both

locations because Adams did not know where they were. (*Id.* at 615). Adams testified that he did not look in the court files in the cases "[because [he wasn't] sure there would be anything that would be in the court's file that would not be in the DA's file." (*Id*. at pp. 400-401). Although Parker informed Adams that the State was going to file a petition for a material witness order to have certain witnesses placed under bond to ensure their appearance, Parker did not disclose to Adams the specific witnesses in question, and Adams did not look in the court file to see who was covered by the order. Therefore, he admitted, he did not know which witnesses were covered, and did not make any effort to learn what they might have to say that would be so important to the State that it would seek such an order. (*Id*. at 407). Even after the order was served on him by mail on October 20, less than two weeks before trial, he never talked to any of the listed witnesses, including Mark Smith. (*Id*. at 409-10; Defendant's Exhibit 19). Adams' candid recollection that he did not talk to many witnesses is reinforced by his time records submitted in support of his fee application, which do not mention any time spent talking to witnesses. (*Id*. at 468).

371. Adams' recollection of his limited use of his investigators was corroborated by the testimony of Steve Ehlers. Ehlers was never asked to perform any investigation in the Conley case. (*Id*. at 597-98). In the Ramseur case, he and his associate, Reid, received "very little" guidance from the defendant's counsel. (*Id.* at 597). The only discovery material Adams gave to Ehlers in the Ramseur case was a report of an interview of Lavar Gilliam (whose name was blacked out) by Investigator Wiles, and some SBI lab reports. (*Id*. at 599-604, 716-717). Ehlers also received a copy of the reports in the Conley case attached to the *Acknowledgment of Receipt of Evidence* that was furnished to Adams on October 14, 1994, but he was not asked to

perform any investigation related to that material. (*Id*.; Defendant's Exhibit 2). All of this material, whether in the Ramsey case or the Conley case, was received by Ehlers on October 17, 1994, two weeks before trial began and after any investigation of the case for the defense had, as a practical matter, ceased. (*Id*. at pp. 716-717).

372. In preparing to defend the Conley case, Adams stated that he relied upon the defendant's recollection of his conversations with Cowans and Blackburn, two of the witnesses who claimed to have seen the defendant walk away with Ms. Conley on Thursday night. (*Id*. at pp. 381, 577-578). The defendant's IQ is 79. (*Id*. at 582). The defendant told his attorneys that he had left Ms. Conley with Blackburn and was not the last person to be seen with her. (*Id*. at 578). Nonetheless, Adams did not ask the investigators to investigate Ms. Conley's whereabouts after last being seen with Blackburn. (*Id*. at 578-79). Adams' reliance on his client as his source of information for investigating the case was hampered by the fact that the defendant was sent to Central Prison in Raleigh for "safekeeping" following an outburst at the jail when he was served with the indictment in the Conley case in August 1993. He did not return to Catawba County until October 13, 1994, when he was brought back for his trial. (*Id*. at 580-81). Adams made a single visit to Raleigh to talk to his client in May 1994. (*Id*. at 591).

373. Adams testified that he availed himself of the State's "open file" policy and reviewed the material in the District Attorney's file. He initially testified that because of his reliance on this policy, he did not file a request for voluntary discovery; however, confronted with file stamped copies of such requests in each case, he admitted the filing was nothing more than a formality." (*Id*. at 301-03, 306-07; Defendant's Exhibits 90; Defendant's Exhibit 91). He filed the request in the Conley case on October 13, 1994; the next day, October 14, 1994, the

District Attorney's office presented Adams with two documents, both entitled *Acknowledgment of Receipt of Evidence*, which Adams signed that day. The first, Defendant's Exhibit 1, listed eight SBI lab reports that were attached. The second, Defendant's Exhibit 2, listed eleven reports of witness interviews, all from the Hickory Police Department's Conley investigation file.

374. Both Adams and Parker testified that they believed the purpose of the acknowledgements was to provide proof for the State's benefit that the defense had been furnished with a summary of evidence that the State intended to use. (*Id*. at 395; 8/04 MAR Tr. pp. 220-21). This may be true as to the SBI reports listed in Defendant's Exhibit 1, but very little of the evidence listed in Defendant's Exhibit 2 was used by the State at trial. (12/04 MAR Tr. pp. 395-97). The acknowledgement could have been used to establish that the defense had received certain information that was arguably Brady material and the evidence of the receipt of such material could have been relied on to foreclose such a subsequent claim. (Id. at p. 399).

<u>The Failure to Investigate in the Tenene Conley case</u>

Evidence That Ms. Conley Was Seen Alive Later on Friday August 14, 1992

375. The defendant contends that certain documents that were available to defendant's trial attorneys prior to the trial, including Defendant's Exhibits 4, 5, 8, 10 and 11 that were attached to a receipt of evidence that defendant's trial counsel acknowledged in writing that they received, a report of an interview of Mark Smith, which is Defendant's Exhibit 14, the search warrant application, which is Defendant's Exhibit 20, and the autopsy report, which is Defendant's Exhibit 39, provided the defendant's counsel with valuable leads that, if they had

been investigated, would have lead to information establishing that Tenene Conley was still alive on Friday August, 14, 1992.

376. For example, Defendant's Exhibit 4, a report of Detective Sams' interview with defendant's father, Henry Chapman, informed defense counsel that Mark Smith had begun walking Tenene Conley home two weeks earlier because of her fear of a man who had "jumped" her. The defendant contends that Adams could have spoken to Mark Smith to learn more about the man Ms. Conley was afraid of, and to learn the last time Mark Smith had walked her home or seen her. Defendant's Exhibit 4 did not indicate that Mark Smith had seen Conley on Friday and it served to focus attention on Bobby Smith, another would be suspect in the Conley case. Adams already had information in the form of a DNA analysis that excluded Bobby Smith as the source of the DNA found in Conley's vagina. Furthermore, as indicated below, there was other material in the open file discovery that identified Mark Smith. This interview note would, in all likelihood, not have led counsel to discover that Mark Smith had seen Ms. Conley alive throughout the day on Friday August 14, 1992. Adams indicated that he did not talk to Smith or ask his investigators to do so because Bobby Smith had already been excluded as a suspect. (12/04 MAR Tr. p. 388).

377. The defendant contends that if defense counsel had talked to Mike Cosby, the man interviewed by Detective Sams in Defendant's Exhibit 5 who had knowledge of Ms. Conley's relationship with another "Mike" who came up almost every Thursday to see her, they allegedly could have learned that Cosby, too, had seen Ms. Conley alive on Friday with Billy Hull. The information contained in Exhibit 5 did not indicate that Cosby saw Conley alive on Friday and the remaining information in Exhibit 5 did not provide any promising leads in the

Conley case.

378. The defendant contends that if defense counsel had interviewed Jacqueline Collins, the woman interviewed by Detective Sams in Defendant's Exhibit 8 who testified for the State at the defendant's trial, they could have come into contact with her husband, Mike Cosby, who might have revealed the information set forth above about Ms. Conley's being alive on Friday August 14, 1992. The report of the interview of Jacqueline Collins indicated that she last saw Conley on Wednesday and the report did not even refer to Mike Cosby. As such, Exhibit 8, the report of the interview of Jacqueline Collins, would not have indicated a need to contact Mike Cosby.

379. The defendant contends that if defense counsel had interviewed Barbara Diane Flowers, the person interviewed by Detective Sams in Defendant's Exhibit 10, they might have asked their investigators to locate and interview Billy Joe Henry, who had assaulted Ms. Flowers, who failed to deny killing Ms. Conley, and who commented that both she and Flowers "had a smart ass mouth." (Defendant's Exhibit 10). There is no evidence in the record of the MAR proceedings to indicate what pertinent information would have been developed from this alleged "lead."

380. The defendant contends that if defense counsel had interviewed Carl Geter, whose interview with Sergeant Carlsen is described by Sams in Defendant's Exhibit 11, they could have learned that Geter, too, had seen Ms. Conley alive on Friday night, as well as during the day, and that she was last seen by him in an angry argument with Billy Hull and "Iceman." (Defendant's Exhibit 11; 08/04 MAR Tr. pp. 109, 142). Exhibit 11 indicated that Conley was seen on Wednesday. Since Chapman was in Conley's presence on Thursday, this information did not

indicate to a reasonable attorney that Geter observed Conley alive on Friday August 14, 1992. This information contained in Exhibit 11 would not have appeared to be worth pursuing to reasonable defense counsel.

381. The failure to pursue these leads was not deficient performance. The information contained in Exhibits 4, 5, 8, 10 and 11 would not have appeared to be worth pursuing to reasonable defense counsel.

382. The defendant further contends that there was information in the District Attorney's "open file" that a reasonable attorney could have investigated to determine whether it might have offered a basis for their defense.

383. Defendant's Exhibit 14 is a report of an interview by Detective Sams of Mark Smith. The report gave Smith's address and telephone number. In the report, Smith told Detective Sams that about two weeks before she was killed, Ms. Conley asked Smith to begin walking her home because of her fear of an assailant, and he did so. However, he did not walk her home on the Thursday night or the Friday night before her body was found. The report states that Smith saw Ms. Conley on Friday morning about 10:00 a.m. out back of the pool room, and she chided him about not walking her home the previous evening, and he promised he would do so that night. He saw her again at 5:00 p.m., alone, and she again reminded him.

384. Defendant's Exhibit 14 tends to establish that Ms. Conley was still alive on Friday, August 14, 1992, and that she was no longer with the defendant at either of the times that Smith saw her. Defense counsel knew that the State's theory was that Ms. Conley had been murdered on Thursday night. (12/04 MAR Tr. pp. 313-14). Defense counsel had access to this report of the interview of Mark Smith, and it was incumbent upon counsel to investigate this

critical fact.

385. Smith gave credible testimony at the evidentiary hearing, confirming the things he told Detective Sams and adding that he had seen Ms. Conley throughout the day on Friday August 14, 1992. Smith indicated that Conley was not in the company of the defendant that day. Had he been asked, he would have told defense counsel or their investigator the same thing, and he could have testified at trial. (5/04 MAR Tr. pp. 98-102, 105-06). Such evidence would have directly contradicted a key element of the State's case against the defendant, namely that he had been the last person seen with Ms. Conley prior to the discovery of her body on Saturday afternoon.

386. Parker, the prosecutor, testified at the evidentiary hearing that neither Adams nor Portwood seemed aware of the evidence that Ms. Conley had been seen alive on Friday August 14, 1992. (8/04 MAR Tr. pp. 233-34). According to Parker, from the way Adams was asking questions at trial, "he didn't seem to be interested in whether [Ms. Conley] was alive on Friday or not." (8/04 MAR Tr. p. 234).

387. Defendant's Exhibit 14, Bates-stamped 730, was provided to the District Attorney by Detective Sams and was available as a part of the District Attorney's file for defense counsel to review under its "open file" policy. (08/04 MAR Tr. pp. 219, 248-249).

388. Adams testified that he did not recall seeing this document or any other evidence that Ms. Conley was seen alive on Friday, August 14, 1992. (12/04 MAR Tr. pp. 314-15). However, Adams recognized that he may have overlooked the document or "the sentence" (actually two sentences) referencing Friday. (12/04 MAR Tr. pp. 316, 320, 387, 522). In any event, he did not interview Mark Smith or have his investigators talk to him. (*Id.* at 317).

389. The defendant contends that there were other pieces of information in the record available to defense counsel that would have caused a reasonable attorney to investigate further the issue of whether Ms. Conley was killed Thursday night, as the State contended. Defendant's Exhibit 20, the search warrant obtained by Sams for physical evidence from the defendant in the Conley case, contained a probable cause statement sworn to by Detective Sams, in which Sams stated the following: "According to witnesses, Conley was last known to have been seen on 08-14-92 at approximately 2:00 p.m." (Defendant's Exhibit 20; 08/02/04 MAR Tr. p. 519). Detective Sams swore to the facts contained in the probable cause statement on May 7, 1993, after the investigation into Ms. Conley's death was well underway. (Defendant's Exhibit 20; 08/02/04 MAR Tr. pp. 431-434). At the evidentiary hearing, Sams suggested that perhaps he had just made a typographical error. (Id. at 519). However, his handwritten draft of the probable cause statement was introduced as Defendant's Exhibit 78, and it, too, states, "Conley last seen 1400 Fri afternoon." (Defendant's Exhibit 78; 08/02/04 MAR Tr. p. 432). Adams did not recall ever looking at the court files in these cases, and although he thought he had seen a copy of the search warrant, he failed to note the allegation of the time that Ms. Conley was last known to be alive, nor did he ever talk to Detective Sams to find out why he had sworn that she was alive at 2:00 p.m. on August 14, 1992. (12/04 MAR Tr. pp. 400-01).

390. Also in support of this contention, the defendant points to Defendant's Exhibit 39, the Report of Investigation by Medical Examiner completed by the Catawba County Medical Examiner, Dr. Jones on August 15, 1992. The report states that Ms. Conley was last known to be alive on August 14, 1992, at 10:00 a.m. (Defendant's Exhibit 39). The defendant contends that this exhibit should have induced his trial counsel to conduct further investigations based on

the reference in that exhibit that Conley was last seen alive at 10:00 a. m. on Friday, August 14, 1992. Presumably, such an investigation would have lead defendant's trial counsel to contact Dr. Jones and Mark Sams. There is no evidence in the MAR proceedings to indicate what Dr. Jones would have told defense counsel or their investigators about this reference in Exhibit 39. Sams testified at the evidentiary hearing that he advised the local medical examiner that Ms. Conley was last seen alive on August 14, 1992, at 10:00 a.m. (08/02/04 MAR Tr. p. 429, p. 442). According to Detective Sams, he received this information on August 15, 1992, from a witness, whom he was unable to recall at the time of the evidentiary hearing. (08/02/04 MAR Tr. pp. 429-30, 490-91, 497-498). It is unlikely that Sams had obtained this information from Mark Smith since Sams did not interview Smith until September 9, 1992 some 25 days after Dr. Jones made that notation on Defendant's Exhibit 39. There is nothing in the record in these proceedings to establish who provided the information to Sams that he passed on to Dr. Jones on August 15, 1992. As such, this Court cannot conclude that an investigation of this reference in defendant's Exhibit 39 would have been productive.

391. Moreover, the defendant contends that the indictment itself should have given counsel some hint that there was an issue as to the date on which Ms. Conley died. It lists the date of the offense as August 15, 1992, which was inconsistent with what counsel knew to be the State's theory as to the date of the murder. (Defendant's Exhibit 77). It is unlikely that counsel would have assumed that the date on the indictment was anything more that a reference to the date on which Conley's body was discovered.

392. Adams admitted that evidence that Ms. Conley was alive on Friday, following her encounter with the defendant, and not in his company, would have made a significant difference

in his representation of the defendant because there would be evidence that the defendant was not the last person seen with her. (12/04 MAR Tr. pp. 315-16). This evidence would have provided the defense with the ammunition necessary to challenge the State's theory of the case. (*Id.* at p. 315). Adams testified if he had been aware of this information then he would have called Smith as a witness, and he would have investigated further the whereabouts of Tenene Conley on Friday, August 14, 1992. (*Id.* at 314, 316). Thus, there was no strategic decision on the part of the defense to ignore testimony establishing Ms. Conley's condition and whereabouts on Friday, even if such a decision would have been a reasonable one. (*Id.* at 320). Adams admitted, too, that there is a distinct area that Ms. Conley frequented around South Center Street on both sides, including the areas known as "The Hill" and Sunny Valley, where such an investigation could reasonably have taken place. (*Id*. at 578).

393. Among the numerous witnesses reasonably diligent defense counsel would likely have found was Pankie Armstrong, who testified that she had been friends with Tenene Conley for five or six years and had seen her outside the pool room on the evening of Friday, August 14, 1992, the day before her body was found. Armstrong testified that Ms. Conley was not alone when Armstrong saw her; she was arguing with Billy Hull. Armstrong heard Tenene Conley tell Hull that "it was over, she didn't want to be bothered with him any more." According to Armstrong, Hull responded that "if he couldn't have her, wasn't nobody have her, he would kill her, he would swear to God." Hull yelled for a burgundy car, which stopped, and Ms. Conley got in and left. (8/04 MAR Tr. pp. 36-40).

394. Defendant's Exhibit 14, and the evidence available from a reasonable investigation of its contents, could also have been used by counsel in cross-examination of Mark

Sams and Dr. Clark to show that Ms. Conley was alive on Friday and that the defendant was not the last person seen with Ms. Conley. In addition to investigating the leads provided by this exhibit, reasonable counsel would have called Mark Smith to testify as a witness in light of the contents of Smith's statement, Defendant's Exhibit 14, as well as what would have been learned by interviewing him. Defense counsel offered no strategic reason for failing to call Smith as a defense witness. Rather, Adams stated that he must simply have overlooked either the statement itself, or the portions of it pertaining to Ms. Conley's whereabouts on Friday. (12/04 MAR Tr. pp. 316, 320, 387, 522).

395. Defense counsel's failure to investigate these matters was clearly prejudicial to the defendant. Parker, the prosecutor, admitted that evidence that Ms. Conley was alive during the day on Friday was relevant and should have been put before the jury for its consideration. (8/04 MAR Tr. p. 216). The defendant is granted a new trial on the basis of this claim.

Evidence That Billy Hull and "Iceman" Were Last Seen With Ms. Conley

396. In addition to investigating the whereabouts of Ms. Conley after her last contact with the defendant, counsel owed their client a duty to perform reasonable investigations of other critical aspects of the State's case. One such avenue of investigation was the possibility, suggested by the evidence available to defense counsel, that Billy Hull had murdered Ms. Conley or had knowledge of the murder. The Court has reviewed the discovery materials that were made available to the defendant in the Conley case. In those materials, there was an interview of Carl Geter on September 2, 1992. In that interview, Geter informed Sgt Carlsen of the Hickory Police Department that his cousin Angela Geter told him that Billy Hull and Ice Man had Tenene

Conley killed. (See Exhibit 11). On October 14, 1994, Bob Adams acknowledged receipt of this interview of Carl Geter. On that same date, Adams received a copy of the notes of the interview of Joanne Morrison. Morrison was interviewed by Detective Sams on August 26, 1992. In that interview Morrison informed Sams that "we've heard talk about Billy Hull that he might have something to do with it…" (Exhibit 7). Morrison further indicated that Conley went with Hull in the past. Id. Furthermore, in the interview of Jacqueline Collins that was also provided to defendant's trial counsel there was an indication that she had heard allegations against Billy Hull in connection with Conley's death. (Exhibit 8). Adams asked Collins during her testimony in court about Billy Hull and whether Conley knew him and if Hull had come to the house to see Tenene Conley. (Trial Tr. Vol. III, p. 112). Adams admitted in his testimony during the MAR proceedings that he knew of Hull at the time. (12/04 Tr. p. 323). There were several references in the available discovery material that Billy Hull was a potential suspect in the death of Tenene Conley.

397. If defense counsel had interviewed Carl Geter, they would have learned the information provided by Geter in his testimony at the evidentiary hearing. Geter testified credibly that he had known Ms. Conley for years; that he had seen her Friday morning when she asked him for a cigarette and stated she had been out all night doing drugs and selling her body; that he had seen Ms. Conley that evening on "The Hill" with Hull and Iceman; that Ms. Conley was arguing with Hull; that Ms. Conley had left with Hull and Iceman late that night; that Hull became violent when he used crack or alcohol; and that after Ms. Conley's death, Hull had vanished and did not come to her funeral or send flowers. (8/04 MAR Tr. p. 104-05, 107-10, 142-43)

398. Pankie Armstrong also had information that Billy Hull was with Conley late on Friday, and she testified that she had heard Hull confess to Conley's murder. Pankie Armstrong testified at the evidentiary hearing that on the Friday evening or late afternoon before Ms. Conley's body was found on Saturday, she saw Ms. Conley involved in an argument with Hull in front of the pool room. (08/04 MAR Tr. pp. 37-38, 45-46, 50, 53). Armstrong overheard Ms. Conley tell Hull "it was over," and then Ms. Conley left in a burgundy car. (*Id.* at 38-39). Armstrong then heard Hull yell, "If I couldn't have you, couldn't nobody else have you. I would kill you, I swear to God." (*Id at 39.*). Armstrong also saw Ms. Conley earlier on Friday at Tipp's club and then at Snowball's, another bar. (*Id.* at 48-49). On one occasion, Hull, after drinking and getting high, muttered to himself mentioning the name "Tenene." This occasion was after Conley's death, and it got Armstrong's attention. She asked Hull what he had just said, and he replied, "Tenene, I killed you once, I'll kill you again." When Armstrong then asked Hull if he had killed Nellie Long, too, he merely smirked. (08/02/04 MAR Tr. p. 44).

399. Armstrong also had personal knowledge of Hull's violent nature towards women, which she had witnessed on several occasions and had been a victim of herself. (8/04 MAR Tr. pp. 40-41). She identified her cousin, Teresa Hall, as one of the women Hull had assaulted. (*Id.* at 41). Hall was another witness that could have been identified had counsel conducted a reasonable factual investigation.

400. Teresa Hall testified at the evidentiary hearing that she dated Billy Hull for six to seven months and that he used to beat her, choke her, and punch her in the stomach. (05/17/04 MAR Tr. pp. 126, 128). On one occasion, Hull threatened her with a broken liquor bottle and said, "I'm going to have to do like I did on the other." (05/17/04 MAR Tr. p. 127). When Hall

asked if that meant he was going to kill her, Hull did not respond. (Id.). Hull told Hall that he was able to avoid being prosecuted and stay out of trouble because he knew important people. (05/17/04 MAR Tr. p. 129-130). According to Hall, the police would hassle her for prostitution unless she was with Hull. Hull would speak to the police officers and they would leave Hall alone. (05/17/04 MAR Tr. p. 140).

401. Carolyn Williamson was another person that a reasonable factual investigation may have identified as a witness in the Conley case. Carolyn Williamson had been mentioned as a possible witness in the Ramseur case in Detective Rhoney's handwritten notes of his interview with Chris Walker, but those notes were not made available to defense counsel. Ms. Williamson was a friend of Tenene Conley, and could easily have been identified as a source of potential information had counsel conducted an investigation of her associates and her neighborhood. Williamson testified at the evidentiary hearing that Ms. Conley and Billy Hull were dating in 1992 and that they continued dating until Ms. Conley died. (08/02/04 MAR Tr. pp. 85, 89). Ms. Conley and Hull would stay at the Inn Towner Motel together every other weekend. (08/02/04 MAR Tr. pp. 85-86). According to Williamson, Ms. Conley and Hull argued a lot. (08/02/04 MAR Tr. p. 86). Williamson witnessed Hull push Ms. Conley. (Id.). Moreover, Hull became jealous of Ms. Conley when she was with someone else. (08/02/04 MAR Tr. p. 89). Williamson also testified that Hull was violent toward Teresa Hall and that she witnessed Hull choke and hit Hall constantly. (08/02/04 MAR Tr. p. 87). On one occasion, after Hall attempted to run away from Hull, he caught her and started beating her. (08/02/04 MAR Tr. p. 88). Williamson saw Ms. Conley at the pool room, alone, the day before her body was found. (08/02/04 MAR Tr. pp. 92, 95).

402. Mike Cosby testified at the evidentiary hearing that on the Friday evening before Ms. Conley's body was found, Hull was looking for her because she had stolen his ring and that Ms. Conley was seen getting into a vehicle with Hull on Friday evening. (*Id.* at 148-49, 172, 174). Cosby testified that when he discussed Ms. Conley's death with Hull, he did not seem surprised or show any emotion (*Id.* at 150). Cosby testified at the evidentiary hearing that Hull was violent towards women. (*Id.* at 160).

403. Danny Blackburn testified at the evidentiary hearing that Hull was a pimp and that he had assaulted various women, including Ms. Conley. Blackburn also said that Ms. Conley and Hull were living together and dating during the summer of 1992, and that he witnessed Hull assault Ms. Conley several times. (12/04 MAR Tr. p. 731).

404. Quwina Roddey testified at the evidentiary hearing that Hull beat women. Roddey testified that Hull and Ms. Conley were in a relationship and that he would not hesitate to knock her to the ground in public. According to Roddey, Hull also bragged about killing Nellie Long. (02/13/06 MAR Tr. pp. 74-75).

405. Lt Merle Hamilton of the Hickory Police Department testified at the evidentiary hearing that Hull was a dangerous man, who was prone to violence. (08/04 MAR Tr. p. 366).

406. Each of these witnesses gave credible testimony at the hearing on the defendant's MAR concerning Conley's whereabouts on Friday August 14, 1992, the people she was with, her relationship with Billy Hull, and Hull's propensity for violence towards women.

407. Adams did not claim that he made a strategic decision to ignore evidence of the guilt of another person. In fact, he admitted that if he had been aware of evidence that Conley had been seen getting into a car with Billy Hull and Iceman on Friday August 14, 1992, he would

have considered this "very significant" to his defense. (12/04 MAR Tr. p. 317). At the trial, Adams specially mentioned Hull's name in his cross-examination of Jacqueline Collins. (*Id*. at 112-13). His recollection at the evidentiary hearing was that he knew of Hull but for some reason did not believe that he was available or in the area at the time of trial, and that he never spoke to him. (12/04 MAR Tr. p. 323). The Court finds that defense counsel made no investigation into the possibility that Billy Hull, "Iceman" (George Rhinehart, Jr.), or someone else was guilty of the murder of Conley, and that the failure to investigate this defense, given the evidence that was available to them in the discovery material, constitutes deficient performance.

408. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401, such evidence must tend both to implicate another and be inconsistent with the guilt of the defendant. State v. Cotton, 318 N. C. 663, 667, 351 S. E. 2d 277, 279-280 (1987).

409. In this case, the State contended at trial that the defendant was the last person who was seen with Tenene Conley while she was alive and that the defendant was seen with her late Thursday evening or Early Friday morning. The State contended at trial that the defendant was seen with the Tenene Conley at that time in the vicinity of the place where her body was found.

410. The evidence concerning Billy Hull indicated that Tenene Conley was seen with Hull on Friday. This evidence indicates that Conley was seen with Hull the day after she was observed in the presence of the defendant. Furthermore, this evidence concerning Billy Hull tended to establish a motive for Hull to assault or kill Conley.

411. In State v. McElrath, 322 N. C. 1, 366 S. E. 2d 442 (1988), the Supreme Court

held that the trial judge erred by excluding evidence of a map of the defendant's summer home containing notations indicating a possible larceny scheme that was found among the personal effects of the victim. The defendant contended that the map tended to indicate that other individuals had a motive to kill the victim. The defendant in McElrath offered evidence that the victim argued with and then departed with the occupants of another vehicle on the day of his disappearance and contended that this cast doubt on the State's theory that the defendant was responsible for the victim's demise. As the Supreme Court observed, the defendant in McElrath "no doubt hoped to persuade the jury that the victim, along with the other persons at the Denny's Restaurant parking lot, was engaged in a scheme to rob the defendant's summer home, that the victim had a falling out with those persons, and that the victim was in fact done in by his co-conspirators-all of this in the hope that one or more jurors would develop a reasonable doubt as to the defendant's role as the perpetrator of the crime." The Supreme Court concluded that the excluded evidence in McElrath was relevant to the issue of whether the defendant was the perpetrator of the crime. The evidence of the map together with the evidence of the victim's departure with the occupants of another vehicle on the day of his disappearance constituted a possible alternative explanation for the victim's unexplained disappearance and demise. The evidence in McElrath is similar to that presented by the defendant that Tenene Conley was observed in the presence of Billy Hull the day before her body was found and that Hull had an motive to assault or kill her.

412. In State v. Israel, 353 N. C. 211, 539 S. E. 2d 633 (2000), the Supreme Court considered another case involving a trial court's exclusion of evidence tending to exonerate the defendant and implicate another as the perpetrator of the murder. In Israel, the defendant offered

evidence of the identity of an alleged perpetrator and his violent dealings with the deceased. The defendant also produced evidence that this individual had the opportunity to kill the victim as well as a possible motive. The State's evidence in Israel, as in this case, was circumstantial. In Israel, the Supreme Court concluded that the excluded evidence cast doubt upon the State's evidence that the defendant was the perpetrator of the crime and that the evidence also implicated another person as the perpetrator beyond conjecture and mere implication. 353 N. C. at 219. The excluded evidence in Israel was deemed to be both relevant and admissible.

413. Based on the available evidence developed during the course of these MAR proceedings, there is more than a reasonable probability that the outcome of the defendant's trial would have been different if the evidence concerning Billy Hull's potential involvement in Tenene Conley's death had been presented. This evidence certainly creates a probability of a different result that is sufficient to undermine confidence in the outcome of the defendant's trial. The defendant is entitled to a new trial based on this ineffective assistance of counsel claim.

Evidence That Ms. Conley Did Not Die Early Friday Morning

414. The State's theory at trial was that Tenene Conley was murdered by the defendant during the nighttime hours of Thursday, August 13, 1992 or the predawn hours of Friday, August 14, 1992. Howard Cowans testified that a man and a woman (the defendant and Ms. Conley, the State argued) had been seen walking in the direction of the house where Ms. Conley's body was found (649 First Avenue SE) some ten minutes after having arrived at his house at 2:00 or 3:00 a.m. on Friday, August 14, 1992. (Trial Tr. Vol. III pp. 120-23). Jamar Danner testified that the defendant and Ms. Conley came to his house on F Street at some unspecified time in the predawn

hours of Friday August 14, 1992 to buy crack, but that he did not sell them any. They left heading in the general direction of the house on First Avenue where Ms. Conley's body was found. (*Id*. at 151-52). This meant that in order for the State's theory to be plausible, Ms. Conley died approximately 36 hours before her body was discovered by Lasonya Reid at 4:35 p.m. on Saturday, August 15, 1992.

415. The reports of the observations of Conley's body by the local medical examiner and by Dr. Thomas Clark at the Office of the Chief Medical Examiner were available to the defense prior to trial, either in the discovery or independently as public records. (Defendant's Exhibits 39; 12/04 MAR Tr. pp. 401-02).

416. The local medical examiner's report, Defendant's Exhibit 39, Bates-stamped 661, stated that the victim was last known to have been alive at approximately 10:00 a.m. on August 14, 1992. The search warrant application for hair samples from the defendant included Detective Sams' sworn statement that Ms. Conley had last been seen alive at 2:00 p.m. on August 14, 1992, a document Adams recalled seeing. (Defendant's Exhibit 20; 12/04 MAR Tr. p. 401). This information could have prompted defense counsel to investigate whether examinations of her body might indicate an interval between death and the discovery of her remains inconsistent with the State's theory of approximately 36 hours.

417. The autopsy documents noted that the body, by the time it was examined by Dr. Jones, the local medical examiner, at 8:00 p.m., some three and a half hours after its discovery at 4:35 p.m., was still noted to be "intact" as opposed to being in a stage of early decomposition, and in full rigor mortis graded at "3+." (Defendant's Exhibit 20, Bates-stamped 661-662). Even after the body was transported to Chapel Hill for an autopsy that occurred at 9:45 a.m. on

Monday, August 17, 1992 it was noted to be only in a stage of "early decomposition," with fly eggs present, indicating they had not hatched into larval stages. (*Id*. at Bates-stamped 663-664).

418. Defense counsel also had access to law enforcement reports that were in the District Attorney's file pursuant to the "open file" policy, including Officer Mueller's typewritten report containing his notes from the Conley crime scene that described apparent drag marks leading to Ms. Conley's body. (Defendant's Exhibit 113, Bates-stamped 760). These drag marks were described as "blood stain drag marks" in Officer Mueller's accompanying sketch of the crime scene. (Defendant's Exhibit 114, Bates-stamped 557). The report, Defendant's Exhibit 113, further noted that "some portions of the drag marks were moist," which could have been an indication that her body had been drug recently enough for the moisture not to have evaporated. Counsel also had access, through the "open file" policy, to the Hickory Police Department's crime scene photographs that were potential trial exhibits, including Defendant's Exhibits 122 A through W. Several of these photographs show what appears to be blood in a liquid state around Ms. Conley's body.

419. Armed with this information, reasonable defense counsel could have investigated the medical and scientific basis for the State's theory that Ms. Conley's death occurred during the pre-dawn hours on Friday, August 14, 1992. Defendant's evidence at the evidentiary hearing on his MAR demonstrates what such an investigation would have revealed. The evidence presented by the defense during the MAR proceedings indicates that Dr. Jason was practicing forensic pathology in 1994 and the fact that the State offered such evidence indicates that expert testimony from a forensic pathologist was available in 1994 when this case was tried. There is no indication in the record to establish when the scientific basis for the opinions expressed by Dr.

Murray Marks' was developed. A review of his resume or CV does not indicate whether such forensic anthropological evidence was available in advance of the trial of this case.

420. Had defense counsel engaged in the investigation suggested by the defense in his MAR, it presumably would have revealed the information offered by Dr. Donald Jason. At the evidentiary hearing on the defendant's MAR, an independent forensic pathologist, Dr. Donald Jason, testified that based on his review of the crime scene evidence and the description of the body by Dr. Jones, the local medical examiner, his opinion is that Ms. Conley died no more than 36 hours prior to being examined by Dr. Jones at 8:04 p.m. on Saturday, August 15, 1992 or in other words sometime after 8:00 a.m. on Friday, August 14, 1992. (5/06 MAR Tr. p. 73). The factors leading to Dr. Jason's opinion include not only Dr. Jones' assessment of rigor mortis, but also the degree of rigor evident in several of the crime scene photographs, the relatively warm temperature of the basement as established by the temperature analysis offered by defendant's experts, Dr. Jones' assessment of the body as "intact" as opposed to being in a state of early decomposition, the apparent freshness of the blood around the body at the crime scene, in that it appeared to be liquid, with no drying visible around the edges, and the witnesses' description of bloody drag marks leading to the body as being "moist," and the lack of any evidence of skin slippage in the crime scene photographs. (*Id*. at 74-80, 89-90). Dr. Jason's estimate of 36 hours is, in his opinion, the outermost limit, and Ms. Conley could have been deceased for a shorter period of time (which would mean her death occurred later on Friday). (*Id*. at 74). In fact, Dr. Jason testified, he would have expected the body to be in full rigor within 6 to 8 hours after death in the temperature range present in this case and to have remained in full rigor for 30 hours thereafter. (*Id*. at 82-83).

421. Dr. Jason has been teaching pathology and practicing as a licensed forensic pathologist in North Carolina since 1992 and presumably would have been available to the defense as a potential expert witness at the defendant's trial in 1994. (Defendant's Exhibit 126).

422. Dr. Jason's testimony during the MAR proceedings was credible. This evidence did not exclude the likelihood that Tenene Conley died within a few hours after the time that she was last seen in the presence of the defendant by Cowans and Danner. Danner, in particular, described the time at issue as the early morning or pre-dawn hours of Friday August 14, 1992. The testimony offered by Dr. Donald Jason is not such that it rebuts or refutes the State's theory of the case. Relying solely on Dr. Jason's testimony, the defendant has failed to carry his burden to show that there is a reasonable probability that had Dr. Jason's testimony been presented to the trial jury in the defendant's case, the result of the proceeding would have been different.

423. In addition, the defendant presented at the evidentiary hearing expert testimony from a forensic anthropologist, Dr. Murray K. Marks, of the University of Tennessee-Knoxville. Since 1994, Dr. Marks has conducted research into the decomposition of human remains at the Anthropological Research Facility of the University of Tennessee. Dr. Marks has also served as a consultant to the Regional Forensic Center at the University of Tennessee Medical Center, where he assists during autopsies, and as a consultant to the Tennessee Bureau of Investigation, where he examines human remains at scenes. (5/06 MAR Tr. pp. 8-14; Defendant's Exhibit 124).

424. Dr. Marks testified that in his opinion, it was "highly improbable" that Ms. Conley's remains had been at the scene for longer than 24 hours before they were photographed by law enforcement at 6:06 p.m. on August 15, 1992. He said that there was a "very outside,

very remote" possibility that they had been there up to thirty hours, but that 24 hours, or "really less than 24" was the more likely period. (5/06 MAR Tr. pp. 19-20). Dr. Marks based his opinion on the absence of any evidence of fly eggs or larvae on the corpse in the crime scene photographs, especially given the environment, which included raw sewage in the basement, doors and windows that were open to insect entry, and the blood visible in the photographs. He also found it significant that there was no evidence of skin slippage or decompositional bloating visible in the photographs. (*Id*. at 20-22). In particular, the lack of fly eggs in the wound and head orifices such as the eyes, ears, and mouth stood out to signal to Dr. Marks that the body seen in the photographs was "incredibly fresh." (*Id*. at 25).

425. If one accepts Dr. Marks' 24-hour estimate that places the time of death at approximately 6:00 p.m. on Friday, August 14, 1992 or later. This evidence is consistent with the pathological evidence from Dr. Jason and with the evidence from other witnesses who testified that they saw Ms. Conley alive, and not in the company of the defendant, at various times on Friday morning, afternoon, and evening. Dr. Marks' testimony was credible.

426. There is no indication in this case, that forensic anthropological evidence of the type offered by the defendant in his MAR was available to defendant's counsel in 1994. Dr. Marks obtained his Ph.D. in 1994. There is no indication in the record that the scientific basis for Dr. Marks' opinions was developed by 1994. Interestingly, the defense presented scientific articles in connection with the testimony of Dr. Ostrowski to establish that the scientific basis for his opinions on the survival of sperm existed prior to 1994. The Court is reluctant to conclude that defendant's trial counsel's performance was deficient for failing to present the testimony of a forensic anthropologist in 1994 when the record does not establish that such evidence was

available at that time. The defendant has failed to carry his burden to prove that defendant's counsel's performance did not fall within the wide range of reasonable professional assistance in 1994.

Evidence That Ms. Conley's Death Was Not a Homicide

427. In addition to his testimony concerning the time of death, Dr. Jason offered his opinion as to whether the cause of death of Ms. Conley had been adequately established and concluded that it had not, so that her cause of death is "undetermined." (5/06 MAR Tr. p. 68). Dr. Jason based his opinion on the absence of any indication at autopsy of life-threatening injuries to Ms. Conley's body. In particular, he testified that there were no hemorrhages or fractures noted in the larynx, which he would have expected if there had been strangulation, no hemorrhages in the muscles of the neck, even under the superficial scratches that Dr. Clark noted on the left side of the neck, and no injury to the hyoid bone was noted. (*Id*. at 68-69). The abrasions to Ms. Conley's head noted by Dr. Clark were described by Dr. Jason as "minor" and not likely to have accounted for the amount of blood visible in the crime scene photographs. (*Id*. at 72).

428. Dr. Jason testified that one possible explanation for Ms. Conley's death was a cocaine overdose. No toxicology tests for cocaine were requested or performed on Ms. Conley's body, despite the fact that she was known to use cocaine, nor did counsel or the pathologist later ask that such toxicology screens be run. Apparently, only alcohol was tested for, and that test was positive. (Defendant's Exhibit 39, Bates-stamped 670). No injury was described in the

autopsy that could have accounted for the quantity of relatively fresh, liquid blood visible in the photographs, but the autopsy report does not mention whether Dr. Clark examined the tongue and discovered any injury to it. The tongue is a very vascular structure that could have produced such a quantity of blood had it been bitten in a seizure. (Id. p. 72). The blood was not "purge fluid," in Dr. Jason's opinion, because Ms. Conley was not in a sufficiently advanced state of decomposition, and the blood was red and did not have the brownish, watery appearance of purge fluid. (*Id*. at 69-72). Because the evidence is that Ms. Conley was "found dead without any obvious lethal trauma," in Dr. Jason's professional opinion, the death of Ms. Conley was not necessarily a homicide at all; as he put it, "[s]he could have died of a drug overdose and the body put in the closet to hide it. It happens all the time." (*Id*. at 73, 86).

429. There is a reasonable probability that such testimony, if offered to the jury, would have resulted in a different outcome in this case. Dr. Clark's testimony at trial offered relatively little in the way of objective findings to support his diagnosis of manual strangulation. He described the abrasions to Ms. Conley's head as merely that, abrasions, "like a knee scrape on the pavement" that could have resulted from contact with the floor, and did not characterize them as lethal. (Trial Tr. Vol. III at 298-99). He described the sole injuries to the neck as "two scratch marks or abrasions," consistent with being inflicted by a fingernail. (*Id*. at 299). He found no injuries to the anterior (front) part of the neck or indeed to any other part of the neck. (*Id*. at 295, 300). He invited the possibility that another expert might disagree with his diagnosis. (*Id*. at 295). He could not form an opinion as to whether Ms. Conley had struggled with an assailant. (*Id*. at 308). The hyoid bone, which he said is a rather thin bone that can be fractured in cases of strangulation, was intact and had not been fractured. (Id. p. 309). He found no significant

injury inside the neck, such as bleeding of the neck muscle, which can occur in strangulation. (*Id*. at 309). Nonetheless, despite the absence of any objective findings other than the superficial scratches on the left side of Ms. Conley's neck, Dr. Clark opined at trial that the cause of death was manual strangulation. (*Id*. at 310).

430. In order to prevail on this claim, the defendant must show that defense counsel's performance was deficient in failing to obtain the services of an expert in the field of forensic pathology to present testimony of the type presented in the MAR proceedings. The defendant did not offer any standards such as the American Bar Association's Standards for Criminal Justice to support a contention that counsel's failure to offer such testimony did not conform to prevailing professional norms in 1994. There was also no evidence offered in the form of testimony from attorneys handling capital cases in North Carolina in 1994 to establish that defendant's counsel's performance was deficient in this respect. The Court, having reviewed the autopsy report prepared by Dr. Clark, cannot conclude that defense counsel should have ascertained what Dr. Jason concluded. Interestingly, it appears that the defendant's MAR counsel discovered this evidence fortuitously. Dr. Jason was evidently consulted about his opinions concerning the post-mortem interval in the Conley case and the cause of death issue was something that Dr. Jason uncovered in his review of the case. (MAR 5/06, Tr. p. 67). The Court's assessment of defense counsel's performance must be based on counsel's conduct at the time based on the information that counsel had available to them. Counsel's performance in this respect is subject to the "strong presumption" that their conduct falls within the wide range of reasonable professional assistance described in Strickland. The evidence before the Court does not indicate that counsel's performance was deficient in this respect.

431. That conclusion does not end the Court's evaluation of the significance of Dr. Jason's testimony. His testimony strongly indicates that Tenene Conley's death was not a murder. The notion that a defendant can be put to death when no crime in fact occurred is troubling at best. The law should afford some remedy in such a circumstance.

432. In State v. Britt, 320 N. C. 705, 360 S. E. 2d 660 (1987), the Supreme Court of North Carolina reiterated the applicable test for newly discovered evidence. The Court observed:

> Our usual standard for evaluating motions for new trial on the grounds of newly discovered evidence requires a defendant to establish seven prerequisites:
>
> 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 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.

320 N. C. at 712-713. In this instance, Dr. Jason will offer evidence that was newly discovered by counsel for the defendant during their investigations of the defendant's claims in the MAR proceedings. Based on his testimony at the MAR hearing, the Court concludes that Dr. Jason's testimony is probably true. His testimony that tends to show that Tenene Conley's cause of death is undetermined is competent and relevant to a determination whether she was murdered. That evidence does not only contradict, discredit or impeach another witness. This evidence directly questions whether a crime was committed in the Conley case. The evidence is of such a nature that a different result at a new trial would probably be reached in the event the jury was persuaded by the testimony of Dr. Jason. The Court has concluded that counsel for the defendant were not ineffective for failing to develop testimony of the type presented by Dr. Jason in the

MAR proceedings and cannot conclude that due diligence was not used by trial counsel to procure such evidence. Otherwise, defendant is ensnared in a Catch 22 situation not of his own making. For these reasons, the Court, grants the defendant a new trial based on this newly discovered evidence.

Evidence Challenging the Significance of Defendant's Sperm

433. The State offered evidence at trial that the defendant's sperm, identified through DNA testing, had been found inside the body of Ms. Conley. The defendant knew that such evidence would be offered, because the test results had been disclosed to defense counsel shortly before defendant's indictment on that charge in August 1993. (8/04 MAR Tr. p. 188; 12/04 MAR Tr. at 378-79). Both Parker and Detective Sams indicated that the DNA evidence was significant evidence in the Conley case, an impression confirmed by the fact that each of the jurors examined in the evidentiary hearing recalled the significance of the scientific evidence linking the defendant to the victim. (12/03 MAR Tr. pp. 62, 74-75, 92-93, 152; 8/04 MAR Tr. pp. 195, 424).

434. At trial, Dr. Clark testified on direct examination that he made sets of slides from swabs of Ms. Conley's vagina and observed sperm on the set of slides that he examined. (Trial Tr. Vol. III p. 301). In an answer to the prosecutor's question as to how many sperm, living and deceased, he had observed, Dr. Clark testified, without providing any foundation for his knowledge, that sperm "clear up quickly, most of them within twelve hours but they can be found up to about twenty four hours," and that sometimes "sperm can be found even longer than that but not very likely." (*Id.* at 308). In a deceased woman, the sperm decompose "just like the

body decomposes" and "die within a matter of a day or two." (*Id*. at 308). Dr. Clark did not provide any information as to the number or condition of the sperm (*i.e.*, whether the sperm were intact, or heads only).

435. Upon cross-examination by Portwood, Dr. Clark confirmed that in his opinion, Ms. Conley had sexual intercourse some 12 to 24 hours prior to her death, or even less than 12 hours. (*Id*. at 313-14). In closing argument, the State exploited this testimony, arguing that Ms. Conley had last had sex in the basement of the house where she was found, towards which she had been seen walking with the defendant, within zero to twelve hours of her death, and that "the sperm was put there a lot later than 9:00 p.m." (referring to the defendant's testimony as to when he had last had sex with Ms. Conley). (Trial Tr. Vol. IV pp. 228-29).

436. The discovery materials included Dr. Clark's report of the autopsy of Tenene Conley. That report refers to the presence of sperm in a vaginal smear taken during the autopsy. (Exhibit 39, Bates Number 666). There was no indication in the report prepared by Dr. Clark of any opinions concerning the length of time that sperm would have remained in Conley's body either prior to or after her death. Consequently, there is no indication that Adams or Portwood had any reason to expect that Dr. Clark would render opinions on that subject. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The adequacy of counsel's investigation is gauged from counsel's perspective at the time the investigative decisions were made. Rompilla, 545 U. S. 374, 381. In this instance, defense counsel had little or no warning prior to the time that Dr.

Clark testified that such opinions would be offered. If is difficult to suggest that counsel should have retained expert assistance to counter such opinion evidence when there was no advance warning that these opinions would be offered.

437. At the evidentiary hearing on the defendant's MAR, Dr. Ronald Ostrowski, an expert in genetics and human development testified (contrary to Dr. Clark's statements) that sperm will persist in the vaginal tract of a live female for 10 to 14 days and beyond, and that sperm will persist in the vaginal tract of a deceased woman for up to 4 or 5 days and beyond. (2/06 MAR Tr. p. 17). In this case, he testified that it was entirely possible that Ms. Conley "could have had intercourse at some time well prior to Thursday morning and still have had sperm detectable in her upon autopsy on Monday morning." (*Id*. at 28).

438. Dr. Ostrowski illustrated his testimony with excerpts from learned journals, including one entitled "Persistence of Spermatozoa in the Lower Genital Tracts of Women," published in 1978 in the Journal of the American Medical Association, another entitled "Persistence of Vaginal Spermatozoa as Assessed by Routine Cervicovaginal (Pap) Smears," published in 1986 in the Journal of Forensic Sciences, and a third entitled "Persistence of Spermatozoa and Prostatic Acid Phosphatase in Specimens From Deceased Individuals During Varied Postmortem Intervals," published in 2000 in The American Journal of Forensic Medicine and Pathology. (Defendant's Exhibits 105, 106, and 107). (Although Defendant's Exhibit 107 was published in 2000 and thus would not have been available to defendant's counsel or any expert hired by them in 1994, it cites a number of references that well predate defendant's trial, such as an article entitled "Sperm's Morphologic Survival after Sixteen Days in the Vagina of a Dead Body," published in 1974 in the Journal of Forensic Sciences). Dr. Ostrowski examined

other articles as well, and the "common thread" in all of the papers he reviewed was that sperm are found after intercourse over periods of multiple days in live women. (2/06 MAR Tr. p. 41). No learned article that he could find stated a period as short as 24 hours as the maximum period in which sperm could be found in a woman's body, as Dr. Clark had testified. (*Id*. at 43).

439. The testimony that Dr. Ostrowski gave, had it been offered to the jury at defendant's trial, does not create a reasonable probability that a different outcome would have resulted. The evidence presented at trial indicated that the sperm found in Tenene Conley's vaginal area could have remained there for up to 24 hours prior to her death and for 1 to 2 days after her death. This evidence did not create a time window that was so narrow that it indicated that the defendant was the only person who could have killed Conley. This evidence was consistent with the State's theory and also consistent with a defense that someone else killed Tenene Conley. As a result, the presentation of Dr. Ostrowski's testimony would not create a reasonable probability that the outcome of this trial of this case would have been different.

The Failure to Investigate the Ramseur Case

440. As stated previously, counsel's investigation of the facts of the Ramseur case consisted of reliance upon the interviews performed by Confidential Associates. Adams could not recall positively that he talked to any potential State's witness. (12/04 MAR Tr. pp. 318, 381-82, 520). The defendant contends that a number of exhibits introduced at the evidentiary hearing on the defendant's MAR suggest several avenues of reasonable factual inquiry that effective counsel would have been expected to pursue, either personally or through an investigator. These leads apparently were not furnished to Confidential Associates, for there is

no activity noted in the investigators' contemporaneously made activity reports relating to it; and as investigator Steve Ehlers testified, "I didn't get any guidance." (*Id*. at 672).

The Hickory Fire Department Report Reference To Creasman

441. Adams testified that although he did not receive the State's notice of its intent to offer the hearsay testimony of Alvin Creasman until during the trial, he was aware of the existence of Creasman's statement before trial and had seen the written report of that statement. (12/04 MAR Tr. p. 337-40, 420). The Notice of Intention To Offer Hearsay Statements at Trial, introduced in the MAR proceeding as Defendant's Exhibit 92, reflects on its face that the statement was made to Raymond Mitchell, "a fire marshal with the Hickory, North Carolina Fire Department." The statement attached to the notice indicated that Creasman had seen "a black male and a white female" about daybreak on June 12, 1992.

442. The defendant contends that reasonably effective counsel who were aware of Creasman's statement to Raymond Mitchell prior to trial and who had a copy of the Hickory Fire Department report of the June 12, 1992 fire would have investigated the circumstances surrounding the making of the statement, including other fire investigators who were present at the fire and might have had contact with Creasman or with the people he reported seeing. The defendant contends that his counsel should have examined the report for any evidence that might provide a basis for challenging any connection between Creasman's sighting of a black male and a white female on June 12, 1992 and the death of Ms. Ramseur, so that counsel would have been prepared to counter the contention by the prosecution that the fire was intentionally set by the defendant in order to cover up his murder of Ms. Ramseur, after he killed her on that day and

placed her body in the crawl space under the house. The prosecutors in fact argued this theory at trial, and Parker confirmed in the evidentiary hearing that he made such contentions at trial on the basis of the Creasman statement. (Trial Tr. Vol. IV pp. 183, 217-19; 8/04 MAR Tr. pp. 203-04).

443. While Adams testified that he did not appreciate the significance of the June 12, 1992 fire until during the trial, he and Portwood did at least intend to object to Creasman's hearsay statement and hoped that it would not be admitted, and they hoped that Creasman would not be present at trial. (12/04 MAR Tr. p. 339, 343, 420). Moreover, counsel had obtained a copy of the fire report and had it with them to use in cross-examination. Therefore, counsel recognized during the trial that Creasman's statement had some significance for the State's theory of the case.

444. Adams testified that he made no investigation of Creasman's whereabouts or what he might have seen, nor did he obtain any other reports of the fire investigation. He did not know what investigation Portwood made. Adams had never seen the fire report before the MAR evidentiary hearing. (12/04 MAR Tr. p. 421-23).

445. The defendant's counsel had the report of the Hickory Fire Department, Defendant's Exhibit 26 in the MAR proceedings, before the trial. Based on a review of the contents of the Hickory Fire Department's report, a decision not to investigate further to locate Creasman was reasonable under the circumstances applying a heavy measure of deference to counsel's actions.

446. The defendant's contention in this claim is essentially that the information contained in the Notice of Intention To Offer Hearsay Statement at Trial should have induced

defendant's trial counsel to locate and interview Alvin Creasman. It is unlikely that the defendant's counsel efforts would have achieved greater success than the State had in locating Creasman. As evidenced by the factual findings set out in paragraphs 307 to 312 of this order, the State was unable to locate Creasman to testify at the defendant's trial. In this instance, the defendant cannot establish that there is a reasonable probability that, but for counsel's failure to interview Creasman, the result of the proceeding would have been different. Since the defense was not aware that Creasman had identified someone other than the defendant as the black male he observed at 407 Highland Avenue on June 12, 1992, there is no basis for an assumption that the defendant's trial counsel would have devoted significant efforts to locate a witness who appeared to be less significant to the defense's case than he actually was.

The Hickory Fire Department Report Reference To The Crawlspace

447. SBI Agent Thomas Rasmussen, a fire investigator who investigated the June 12 fire, testified at trial on direct examination that, to his knowledge, no one had gone under the house to look in the crawl space. (Trial Tr. Vol. IV p. 13). The obvious purpose of eliciting this evidence was to support the prosecutors' arguments that the body of Ms. Ramseur was under the house at that time and was not discovered by the fire investigators.

448. Defense counsel had a copy of a Hickory Fire Department Fire Investigation Report of the June 12, 1992 fire at trial, because Portwood used it in cross-examining Agent Rasmussen. (Trial Tr. Vol. IV p. 14). Portwood did not cross-examine Rasmussen on the issue of whether the crawl space had been examined by other fire investigators.

449. Adams testified that he did not obtain any reports of the fire investigation. He did

not know what investigation Portwood made. Adams had never seen the fire report before the MAR evidentiary hearing. (12/04 MAR Tr. p. 421-23).

448. The defendant contends that the Hickory Fire Department Fire Investigation Report, Defendant's Exhibit 26, Bates-stamped 1319-1329, provided counsel and their investigators with evidence that could have been used to challenge the State's theory in the Ramseur case. The defendant contends that the report inventoried the fire and smoke damage to each area of the house based on an area-by-area inspection of the premises. The report does state: "No damage to crawl space/basement area." The defendant contends that this reference indicated that someone had inspected that area, contrary to Agent Rasmussen's testimony, and had found no damage. The defendant further contends that Exhibit 26 tended to show that no body was observed during an inspection of the crawl space. The report also includes a summary in the "remarks" section that a "vagrant appeared to have dropped a cigarette in some clothing and started fire." (Defendant's Exhibit 26; Trial Tr. Vol. IV, pp. 13-17).

450. The defendant contends that the Hickory Fire Department Fire Investigation Report should have lead defendant's trial counsel and their investigators to investigate whether other witnesses had inspected the crawl space at 407 Highland Avenue on June 12, 1992 and whether they had observed a body underneath the premises on that date.

451. Defendant's Exhibit 26 lists the persons who were "directly involved in on scene investigation." Among these were Gill Kanupp and "Agent Beeker" [*sic*], whose duties were listed as "fire cause determination." (Defendant's Exhibit 26). These witnesses were available to be interviewed by defense counsel or their investigator. Each was located by the defendant's present counsel, and each gave credible testimony at the MAR evidentiary hearing.

452. David Gill Kanupp testified at the evidentiary hearing as an expert in the field of cause and origin of fires. (12/04 MAR Tr. p. 207). Kanupp was a fire investigator with the Hickory Fire Department on June 12, 1992, and he responded to the scene of the fire that day. (*Id*. at 207-08). According to Kanupp, it was fire department policy to check the cellar or basement area in a vacant house. (*Id*. at 213). The determination in the Hickory Fire Department report that there was "[n]o damage to crawl space/basement area" was made after Kanupp and another person from the fire department inspected the crawl space for fire extension and origin. (*Id*. at 212-213). Kanupp testified that during the inspection, visibility in the crawl space was fairly clear because it was daylight and they had flashlights, and they were able to walk to a certain point in the crawl space and then had to crawl. (*Id*. at 213, 215, 231-32).

453. Kanupp also testified that he was called back to the same residence on August 22, 1992, the date Ms. Ramseur's body was discovered, and was asked to verify that there was no body in the crawl space at the time of the first fire. (*Id*. at 215-17). Kanupp went back into the crawl space on August 22 and viewed Ms. Ramseur's body, and he was able to do so in a crouched or stooped position. (*Id*. at 218). Based upon the previous inspection that Kanupp had performed with his colleague, Kanupp determined that he "was absolutely sure there was no body there at the first fire." (*Id*. at 217).

454. Ernie Bueker testified at the evidentiary hearing as an expert in the field of fire investigation. (12/04 MAR Tr. p. 245). Bueker was Assistant Special Agent in Charge with the North Carolina State Bureau of Investigation on June 12, 1992, when he responded to the scene of the fire at 407 Highland Avenue. (*Id*. at 244-45). Agent Bueker also testified, contrary to Agent Rasmussen's trial testimony, that it was standard practice for someone who was part of the

investigative team to go into the crawl space. (*Id*. at 261-62). The determination in the Hickory Fire Department report that there was "[n]o damage to crawl space/basement area" was made because someone would have been assigned to examine the crawl space for fire extension and origin. (*Id*. at 250). Bueker himself looked into the crawl space for fire spread and extension with a flashlight, but he did step into the crawl space. (*Id*. at 250, 252-53, 257-58). Bueker testified that he did not see a body in the crawl space. (*Id*. at 253).

455. With respect to this claim of ineffective assistance of counsel, the issue before the Court is whether the contents of Exhibit 26 of the Hickory Fire Department Fire Investigation Report should have lead defense counsel to investigate whether the individuals who went to 407 Highland Avenue on June 12, 1992 had inspected the crawl space of the residence. In order to make such a determination, it is important to consider the contents of that exhibit. The report indicated that the "fire originated in room at center of house left side, progressed to center room on right and up stairs to upper floor and attic area." The attached drawing indicated a point of origin on the first floor of the vacant house. There were no drawings of the crawl space. The report noted "most of first floor damaged by fire-Extensive damage to second floor area due to path of fire spread." The report further indicated that "the fire appeared to have started just inside the window of room on ground floor-left side of house (from the road) center room scattered amount of old clothes and debris in this area." The essential conclusion of the report was that this fire began in some old clothes and debris on the first floor of the vacant house and that it spread from there to the second floor of the structure. The defendant's contention in this proceeding rests on a single reference of "no damage to crawl space/basement area." Given the description of the origin of the fire and its spread, this reference does not indicate that any

inspection of the crawl space occurred.

456. In evaluating a claim for ineffective assistance of counsel, the Court first determines whether trial counsel's performance was deficient. On this claim, the defendant contends that his trial counsel failed to conduct adequate investigations based on the material set forth in Exhibit 26. Counsel has a duty to make reasonable investigations and a particular decision to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment. Strickland v. Washington, 466 U. S. 668, 690-691 (1984). In assessing counsel's investigation, the Court must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms which include a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time. Wiggins v. Smith, 539 U. S. 510, 523 (2003). The standard of reasonableness is applied as if one stood in counsel's shoes. Rompilla v. Beard, 545 U. S. 374, 381 (2003). In this instance, based upon the contents of Exhibit 26 and applying a heavy measure of deference to counsel's judgment, the Court cannot conclude that the single reference to the absence of damage in the crawl space would have alerted defendant's trial attorney's to the potential evidence from Kanupp and Bueker. As such, the defendant has not overcome the strong presumption that counsel's performance in this respect fell within the wide range of reasonable professional assistance. This claim for ineffective assistance of counsel is hereby denied.

Other Potential Witnesses

457. In addition to the evidence summarized above, the defendant contends that

various other statements were available to the defendant's trial attorneys through the State's "open file" policy that could have led reasonable counsel to investigate potentially exculpatory evidence revealed therein by interviewing witnesses. Many such statements are contained in Defendant's Exhibit 47, the prosecution summary in the Ramseur case. In other instances, the defendant contends that his trial counsel failed to identify and interview reasonably available witnesses that should have been obvious sources of information. The defendant contends that the following are examples of these alleged instances of deficient performance on the part of his trial counsel.

Exhibit 22: Carter Interview with David Woody

458. Defendant's Exhibit 22 is Officer S.D. Carter's report of an interview with David Woody on August 16, 1992, in reference to the Conley case. Woody reported that he had overheard two women telling his landlord that they had seen Ms. Conley with Rufus McGill sometime before her body was found. Woody gave specific information about where the two women could be found. (Defendant's Exhibit 22). Rufus McGill was one of the suspects listed by Detective Sams, a list that Adams admitted having possibly seen. (Defendant's Exhibit 23, 12/04 MAR Tr. p. 333). McGill was a violent man who had even threatened to beat up Jason Parker. (08/04 MAR Tr. p. 252).

459. Adams testified at the evidentiary hearing that he did not recall seeing this information; that had he seen it, he would have remembered it because he had represented McGill's brother; and that had he seen it, he might have investigated, or asked his investigators to investigate, the connection between McGill and Ms. Conley. (12/04 MAR Tr. p. 329).

460. In fact, Defendant's Exhibit 22 was in the possession of the District Attorney's office and was, therefore, available to defendant's counsel.. (08/04 MAR Tr. p. 251).

461. There is no evidence in the record in this proceeding that indicates when or under what circumstances Rufus McGill was seen in Betty Ramseur's presence and the defendant has failed to offer any evidence in these proceedings to establish that this alleged deficiency was prejudicial or material to his defense.

Exhibit 30: Crisp Interview with George Reinhardt

462. Defendant's Exhibit 30 is a report by Officer Michael M. Crisp, who investigated the scene where the body of Ms. Ramseur was found on August 22, 1992, interviewed George Mitchell "Rhinehardt" (Reinhardt), the buyer of the land and house where Ms. Ramseur's body was found; obtained his address and telephone number; and learned that in the past "several weeks" Reinhardt had seen a white female and two white males on the property where Ms. Ramseur's body was found. The testimony of George Mitchell Reinhardt, Jr., and Jason Parker at the evidentiary hearing confirmed that Officer Crisp interviewed Reinhardt's father, George Mitchell Reinhardt, Sr. (5/04 MAR Tr. p. 42; 8/04 MAR Tr. p. 275). This exhibit, Bates-stamped 704-07, was in the possession of the District Attorney's office and was therefore available to defendant's counsel prior to trial under the District Attorney's "open file" policy. (8/04 MAR Tr. pp. 277, 909-910). Adams initially testified that the information in Reinhardt's statement was too vague to be useful, but ultimately he agreed that there were at least names of people who might be sources of information and that he might have suggested the investigator at least check them out. (12/04 MAR Tr. pp. 346-37). There was no evidence presented in these

proceedings to establish that the failure to pursue this lead was prejudicial to the defendant.

Exhibit 31: Chris Danner Statement

463. Defendant's Exhibit 31 is a typewritten statement from Chris Markquel Danner, a young man who, with Bobby Smith, discovered Ms. Ramseur's car parked "along the tree line behind the building" of Central Air Conditioning Supply, 29 First Avenue SE, the Thursday after June 18, 1992. According to Chris Danner, he and Smith took Ramseur's car and drove it around. That night, two other men, "E.R." and "Tank," took the keys and the car and returned the car the following morning. On June 26, 1992, Danner and Smith left the car, which had become disabled, in the parking lot of the J&W Cafeteria. Danner's statement was taken by Investigator D.A. Rhoney, the lead investigator assigned to the Ramseur investigation. (Defendant's Exhibit 31).

464. "E.R." is Robert Frazier. (Defendant's Exhibit 54; 08/04 MAR Tr. pp. 898, 901, 907-08; 12/04 MAR Tr. p. 56). "Tank" is Sheldon Bryce. (Defendant's Exhibits 31 and 54; 08/04 MAR Tr. pp. 281, 899, 902). Both men were known to Detective Rhoney as drug dealers and as violent men. (*Id*. at 899, 902).

465. Defendant's Exhibit 31, Bates-stamped 776-77, was in the possession of the District Attorney's office and was, therefore, available to defendant's counsel, with reasonable diligence, at trial. (08/04 MAR Tr. p. 279-280).

466. Chris Danner testified at the evidentiary hearing on the defendant's MAR and would have been available to provide information to defense counsel or their investigators had they interviewed him, as well as testify at trial, but he was never contacted by the defense prior

to the trial. (12/04 MAR Tr. pp. 590, 1056-57). Danner said that he and Bobby Smith found Ms. Ramseur's abandoned car at a warehouse next to 407 Highland Avenue, where Ms. Ramseur's body was later found. The car had not been there the previous day when Danner and Smith walked the same route to the soup kitchen. (*Id*. at 1039-1042). According to Danner, there were no signs of a struggle, and the car was unlocked with the car keys lying in the floorboard and a purse, containing Ms. Ramseur's driver license and other documents, was either in plain view inside the car or perhaps in the trunk area of the hatchback. (*Id*. at 1042-44, 1060). Danner and Smith took the car to the house of his uncle, Jamar Danner, and showed him the license with the picture of Ms. Ramseur. Tank and E.R., who were hanging around the area, then borrowed the car to drive, and returned it later. (*Id*. at 1044, 1047-48). Later Chris Danner was interviewed by Detective Rhoney, who showed him photographs of suspects in the Ramseur murder, which included the defendant as well as Tank, E.R., and Bobby Smith. (*Id*. at 1053-54).

467. Exhibit 31, and the information provided by Chris Danner, provided facts about the apparent abandonment of Ms. Ramseur's vehicle, keys, and purse, away from her residence, shortly after she disappeared and at about the time the State had alleged in the indictment that she was murdered, and near the location where her body was found. This evidence does not indicate how Ramseur's car came to be in the vicinity of 407 Highland Avenue and it does not implicate anyone in connection with her death. Even if defendant's counsel were deficient in their representation of the defendant for failing to investigate these leads and to offer such evidence at trial, there is no reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Consequently, this claim is denied.

Exhibit 32: Rhoney Interview with Zavea Stroud

468. Defendant's Exhibit 32 is a report of Investigator Rhoney's interview with Zavea Stroud on September 1, 1992. Stroud said that within a week after he had last seen Ms. Ramseur, and after she had become missing, he saw a black male from Newton, who he said used to be Ms. Ramseur's boyfriend, driving her car. The black male responded to an inquiry from Stroud about where Ms. Ramseur was by stating that she was at "Joan Fabrics." The statement also names other known associates of Ms. Ramseur. The driver of the car could not have been Chris Walker, Ms. Ramseur's boyfriend at the time of her disappearance, since he had been incarcerated since May 30, 1992. (Trial Tr. Vol. IV pp. 9-10).

469. Defendant's Exhibit 32, Bates-stamped 1682-83, was contained in the District Attorney's file and was therefore available to defense counsel under the "open file" policy. Adams testified that if he had been provided with the information from Stroud, he possibly would have asked investigators to look into the information. (12/04 MAR Tr. p. 351). They never did so. (*Id*. at 516-17). Exhibit 32 was, in fact, provided to counsel in discovery, and defense counsel could have investigated the identify of the former boyfriend of the missing Ms. Ramseur who was seen driving her car, or asked their investigators to do so. There is no evidence in the record to establish what this investigation would have revealed and consequently there is no showing that counsel's alleged deficient performance was prejudicial.

Acquaintances of the Defendant

470. Both of the victims in these cases were women. Both of these women were

cocaine users. Part of the State's trial strategy linking the deaths of Ms. Ramseur and Ms. Conley was to contend that the defendant was violent towards women, especially when he used cocaine. For example, Parker, playing the role of the defendant in his closing argument, said: "When I smoke rock I am around women just something about them I can't stand. Makes me want to pick up a brick and hit one in the head . . . ." (Trial Tr. Vol. IV p. 227).

471. The defendant contends it could have been helpful to the defense of the case to present evidence that the defendant was not violent towards women, whether using cocaine or not. Two potential witnesses on that subject were Anthony Roddy and Quwina Roddy. Adams never talked to either of them. (12/04 MAR Tr. p. 478). If he or Portwood done so, they could have learned from them that in their opinion the defendant was never violent towards women, even when smoking crack, and that when the defendant used cocaine, he became quiet, not aggressive. (2/06 MAR Tr. pp. 49-53, 70-72). Other potential witnesses who could have testified that the defendant was never violent towards women were his sisters, Frankie Chapman and Tini Chapman, as well as his uncle, Ben Chapman. (12/04 MAR Tr. pp. 1085, 1107; 2/06 MAR Tr. pp. 178-79). None of these individuals was interviewed by defense counsel or their investigators, despite their availability and willingness to testify if asked. (12/04 MAR Tr. pp. 1088, 1109-10; 2/06 MAR Tr. p. 183). The defendant contends that this failure to interview these witnesses and present their testimony constitutes deficient performance. The impact of this evidence at the trial of the defendant's cases, in light of the other available evidence, would have been minimal. There is no reasonable likelihood that the outcome of the trial would have been different if this evidence had been offered.

472. The defendant further contends that if the trial counsel had interviewed Quwina

Roddey, they would also have learned that Henry Wallace, a convicted serial killer from Charlotte, had been in the Hickory area in the summer of 1992, as she testified. (2/06 MAR Tr. pp. 75-76). This evidence would not have been admissible since it only created an inference or conjecture of the guilt of another. See State v. Cotton, 318 N. C. 663, 351 S. E. 2d 277 (1987). In addition, the defendant contends that Quwina Roddey could have provided information concerning Billy Hull's violence towards women in general and toward Tenene Conley in particular, and that he had bragged about killing Nellie Long. (*Id*. at 74-75). This claim is addressed in paragraphs 396 to 413 of this order. Both Anthony and Quwina Roddey would, if asked, have testified to Nicole and Brian Cline's poor reputations for truthfulness. (*Id*. at 54, 76-77). Given the other challenges at trial to these witnesses' credibility, it is unlikely that this reputation evidence would have affected the outcome of the defendant's trial. These claims of alleged ineffective assistance of counsel are denied.

The Victims' Detox Records

473. Adams admitted that counsel never tried to obtain the detox records for either Ms. Conley or Ms. Ramseur, despite their well-known cocaine habits. (12/04 MAR Tr. p. 590). If they had done so, they would have obtained the information about Ms. Ramseur contained in Defendant's Exhibit 42, and particularly the information that in June 1991, Ms. Ramseur had checked herself out of detox against staff advice with a man who had been discharged because of disruptive behavior. (Defendant's Exhibit 42, Bates-stamped 2221; 12/04 MAR Tr. p. 930). With appropriate court orders, counsel could also have interviewed Priscilla Donahue, the Director of Catawba County Detox at that time, have identified the person Ms. Ramseur left

with, William Edward Ruth, and have obtained his records from Catawba County Detox, which would have confirmed that he was a patient at the same time as Ms. Ramseur, had left with her against staff advice, and would have also shown that he had a criminal record and had been released from prison, that he had been "aggressive" towards Ms. Ramseur, and that he was in the area in the summer of 1992 and had returned to the facility as a patient in July 1992, after Ms. Ramseur had failed to keep her own return appointment for June 23, 1992. (Defendant's Exhibit 86; 12/04 MAR Tr. p. 936-39). Defense counsel learned none of this information, because they did not take any steps to seek it. This failure allegedly constitutes deficient performance. There was no evidence offered to indicate that William Edward Ruth was in any way involved in Ramseur's death or that he had seen her in almost one year. As such, this alleged deficient performance was not prejudicial since the evidence did not create more than a conjecture of Ruth's guilt. State v. Cotton, 318 N. C. 663, 351 S. E. 2d 277 (1987).

Counsel's Failure to Present an Effective Defense

474. Even the most thorough investigation is worthless to the defense if no use is made at trial of any relevant and material information that is uncovered. The defendant contends that in this case even the limited information admittedly possessed by defense counsel was never presented to the jury charged with determining the defendant's guilt.

475. The defendant contends that the most obvious example of counsel's failure to present importance evidence that might have exculpated their client with respect to the death of Tenene Conley was their failure to subpoena Mark Smith, whose statement confirming that Ms. Conley was alive on Friday August 14, 1992, long after anyone had placed her in the company of the defendant, had been furnished to counsel prior to trial. (Defendant's Exhibit 14, Bates-

stamped 730.) The Court has resolved this claim in the portion of this order that addresses the failure to investigate Tenene Conley's whereabouts on August 14, 1992. See paragraphs 375 to 395 of this order.

476. Reasonable doubt can be raised by skilled cross-examination as well as by the presentation of affirmative evidence. See *Berryman v. Morton*, 100 F.3d 1089, 1099 (3rd Cir. 1996) (holding that trial counsel's failure to utilize inconsistencies in prior descriptions of the defendant by the state's key witness constitutes ineffective assistance of counsel). In this case, the defendant contends that trial counsel missed several key opportunities to confront the State's witnesses with known facts inconsistent with the State's theory of guilt.

477. The defendant contends that his trial counsel failed to present an effective defense by not cross-examining Detective Sams about certain statements in the search warrant application that he prepared or information that he provided to the medical examiner. Detective Sams, the lead investigator in the Conley case swore in an application for a search warrant that "according to witnesses, Conley was last known to have been seen on 8-14-92 at approximately 2:00 p.m." (Defendant's Exhibit 20, 8/04 MAR Tr. p. 431). With respect to the quoted statement in the search warrant application, the prior drafts Sams prepared are inconsistent with the final version. Sams noted in an earlier draft that "Conley last seen 1400 Friday afternoon." In another draft, Sams wrote in handwriting that "according to witnesses found, Conley had last been seen on Friday 08-14-92 at approximately 2:00 p.m." At another stage in the drafting process, Sams typed that "affiant believes that based on the above stated facts, that Glenn Edward Chapman did murder Tenene Yvette Conley on or about the early morning hours of August, 14, 1992." This last statement was not included in the final application for the search

warrant that was submitted to Judge Forrest Ferrell. (8/04 MAR Tr. pp. 430-434, 520-519, 567-571). When asked about these conflicting references, Sams could not identify the source of the information that Conley was seen alive on Friday, August 14, 1992 at 2:00 p. m. (8/04 MAR Tr. pp. 432-433, 568). Sams indicated that he may have made a mistake in preparing the search warrant application. (Id. pp. 431, 433). This information in the search warrant application would not have been admissible for the truth of the contents of that document. Instead, that information could only have been utilized in cross-examination to impeach Sams' testimony. In addition, Sams had furnished information to the local medical examiner that caused Dr. Jones to write on his Report of Investigation that Ms. Conley was last known to be alive at approximately 10:00 on August 14, 1992. (Defendant's Exhibit 39, Bates-stamped 661; 8/04 MAR Tr. pp. 429-30). Sams did not recall who provided him that information. (8/04 MAR Tr. pp. 430, 497-498). Defendant's trial counsel did not cross-examine the lead investigator at all. The failure to cross-examine Sams about these prior statements did not deprive the defense of substantive evidence. It only cost the defense an opportunity to impeach Sams based on these prior inconsistent statements. Given the indication that Sams would have explained that these references were mistakes on his part, it is unlikely that the outcome of these proceedings would have been different if this cross-examination had been conducted.

478. The defendant further contends that his trial counsel was ineffective because they did not cross-examine Detective Sams regarding the other suspects he had listed and the reasons he had listed them, including Bobby Smith, Rufus McGill, and Darryl Brown, and they did not ask Sams why other suspects mentioned in the material available through the open file policy were not listed, such as Billy Hull, George Reinhardt ("Iceman"), or Billy Joe Henry.

(Defendant's Exhibit 23). Adams acknowledged having seen Sams' suspect list. (12/04 MAR Tr. pp. 332-33). Trial counsel knew that Ms. Conley had previously had Bobby Smith arrested for rape, that he had threatened her, that she was so afraid of him that she had asked Mark Smith to walk her home each night, and that there were similarities between the crime scene of the Conley death and another case in which Smith was a suspect. (Defendant's Exhibits 4, 8, 9, 13, and 14). The failure of trial counsel to investigate and present evidence that Billy Hull was a potential perpetrator of the murders alleged in these cases was determined to be ineffective assistance of counsel as set forth in paragraphs 396 to 413 of this order. The evidence concerning the remaining suspects set out in this paragraph did no more than create a conjecture of the guilt of these suspects and consequently, that evidence would have been excluded as irrelevant based on State v. Cotton, 318 N. C. 663, 351 S. E. 2d 277 (1988). This alleged claim of ineffective assistance of counsel is denied.

479. The defendant further contends that his trial counsel failed to present an effective defense by not cross-examining Detective Sams about the State's lack of incriminating evidence against the defendant from the crime scenes. The defendant contends that his trial counsel were aware, having acknowledged receipt of the report of SBI Agent Robert E. Neill, that the head hair taken from the door edge at the scene where Conley's body was discovered was examined and found to be inconsistent with hair samples taken from both Bobby Smith and Ms. Conley. (Exhibit 58). The hairs found on Conley's right foot were determined to be microscopically consistent with the head hair sample from Tenene Conley. (Id.) Neither sample was apparently ever compared to hair samples provided by defendant, nor were they compared to samples from any other suspect. (Defendant's Exhibit 58, Bates-stamped 512-13). The State called Agent

Neill to establish that the hair taken from the door edge was inconsistent with hair samples from both Ms. Conley and Bobby Smith, presumably in an effort to eliminate Smith as a suspect. (Trial Tr. Vol. IV pp. 70-71). The evidence that defendant contends could have been presented by cross-examining Sams was in fact admitted into evidence during the testimony of Agent McNeill. (Trial Tr. Vol IV, pp. 70-71). The evidence that the hairs found on Conley's right foot were consistent with Conley's head hair was also presented during McNeill's testimony. (Id. p. 71). The defendant contends that Portwood did not elicit from Agent Neill that the trace evidence had never been compared to the defendant's hair, despite the fact that the State had obtained hair samples from defendant for that purpose. Detective Sams testified that hair samples were taken from the defendant. (Trial Tr. Vol III. p. 188). Portwood argued in his closing argument that the hair samples taken from the defendant were not compared to the samples that Agent McNeill examined. (Trial Tr. Vol. IV, p. 195). Portwood was able to make that argument by connecting the availability of Chapman's hair samples and the lack of any such testing. The defendant further contends that his trial counsel failed to point out to the jury that an examination of fingerprint lifts from a door knob at the Conley scene failed to produce any identifiable latent prints. (Defendant's Exhibit 59). The defendant ignores Portwood's closing argument which contained such an argument. (Trial Tr. Vol. 4, pp. 191-192). The defendant further contends that defense counsel was ineffective because they failed to cross-examine Sams about the lack of any forensic evidence, except for the defendant's DNA in semen that was found in Conley's vaginal area, placing the defendant at the scene where Ms. Conley's body was discovered, and on the State's failure to have tested samples taken from the defendant to see if he could be eliminated as was Smith. The defendant fails to explain why it was not sufficient for

his trial counsel to observe that the State had offered its forensic evidence and then present their arguments based on the absence of any such forensic evidence. See Trial Tr. Vol. IV, p. p. 197). There is no reasonable possibility that the outcome of the defendant's trial would have been different if Sams had been asked questions to confirm what other evidence had already established.

480. The defendant further contends that his trial counsel were ineffective because they failed to cross-examine Detective Sams, who was vulnerable to cross-examination. Prior to the trial, Sams had stolen prescription drugs from a pharmacy and had been arrested and indicted for felony possession of Schedule II controlled substances and misdemeanor larceny. As a result of those charges, Sams lost his job as a police officer. Defendant's trial counsel knew these facts and had argued successfully against the State's motion in limine to exclude evidence of Sams' drug use and reason for leaving the police department, pointing out that Sams had admitted in voir dire examination that he was using the pain killer Fiorinal during his investigation of the Conley case, a fact confirmed by Sams in his testimony at the evidentiary hearing. (Trial Tr. Vol. III pp. 164-70; 8/04 MAR Tr. pp. 504-17). Having won the right to cross-examine the former detective on these matters, defendant's trial counsel failed to ask Sams any questions at all after he testified to the jury.

481. Sams testified about a statement that the defendant made to him in which the defendant denied his guilt. Sams indicated that Chapman admitted being with Tenene Conley, Danny Blackburn, and Teddy Hartsoe, and that Chapman told Detective Sams that Conley was still with Danny Blackburn when he left them, just as he later testified to the jury. (Trial Tr. Vol. III pp. 186-87, Vol. IV pp. 149-50). The defendant testified to the jury in a manner that was

largely consistent with the statement that Sams recounted to the jury. The defendant did contend that Sams had not accurately taken down some of what the defendant told him and the alleged errors in Sams' version concerned only some particular and relatively minor details in his statement. (Trial Tr. Vol. IV pp. 163-64, 166-167). The failure to impeach Sams by questioning him about his drug abuse and criminal charges would not have affected the outcome of the defendant's trial. The conflict between Sams' recounting of the defendant's statement and the defendant's trial testimony was not a significant aspect of this case. The core of Sams' testimony concerning the defendant's statement to him was more beneficial to the defense than the minor discrepancies. This aspect of the defendant's claim is denied.

482. The defendant contends that trial counsel also could have cross-examined Dr. Clark vigorously as to the basis for his diagnosis of manual strangulation. Portwood did not cross-examine Dr. Clark to see whether he was aware that Ms. Conley was known to use crack cocaine nor bring out that despite the doctor's testimony concerning the ability to perform toxicology screens for drugs, no such screen had been performed on the body of Ms. Conley other than a test for alcohol. (Defendant's Exhibit 39, Bates-stamped 670; Trial Tr. Vol. III p. 289). The defendant contends that his trial counsel were ineffective because they failed to raise the possibility that Ms. Conley had died of an overdose of cocaine, given that there were no lethal injuries noted on her body, and no findings at all that were consistent with strangulation, other than what Dr. Clark had described as "scratch injuries, superficial abrasions" to one side of her neck. (Trial Tr. Vol III p. 294). The Court addressed this issue in paragraphs 427 to 432 of this order and concluded that the trial counsel's failure to realize that Conley may have died as a result of a cocaine overdose instead of by manual strangulation was not ineffective assistance of

counsel. Consequently, the alleged failure of defendant's trial counsel to raise that aspect of this potential defense by means of cross-examination is also not ineffective assistance of counsel for the reasons set forth earlier in this order.

483. The defendant contends that his trial counsel's cross-examination of the State's witnesses in the Ramseur case was similarly deficient. First, the defendant contends that his trial counsel seemed to ignore the total lack of any forensic evidence from the crime scene linking the defendant to the murder of Ms. Ramseur. The defendant contends that his trial counsel did not point out to the jury that none of the hairs from the clothing collected from the Ramseur crime scene were the defendant, because he had been excluded in the testing, and that the hairs were not compared to two other suspects, Danny Blackburn and Zavea Stroud. (Defendant's Exhibit 63). The evidence in the trial record indicates that hair samples were located at the scene where Ramseur's body was found and that Detective Rhoney requested that trace evidence testing be done. (Trial Tr. Vol III p. 279). Rhoney testified that he carried samples to the SBI lab and requested trace evidence testing. (Id.) Rhoney testified that the SBI lab confirmed that they found a negro hair on one of the articles that had been given to them. (Id.). There was no indication in the record that the hair matched the defendant's hair. Portwood noted in his closing argument that there was no hair match to Chapman in these cases. (Trial Tr. Vol IV. p. 197). Adams observed in his closing argument that there is nothing that the State had offered to connect Glenn Chapman to the murder of Betty Ramsuer. (Trial Tr. Vol. IV, pp. 200-201). Adams also noted the failure to test the hair samples in these cases in his closing arguments. (Id. pp. 204-205). As such, the substance of the evidence that forms the basis of this contention was presented and argued to the jury. The absence of any connection between the hairs found at the

scene where Ramseur's body was located and the defendant's hair samples was before the jury. Similarly, the defendant contends that his trial counsel were ineffective because they failed to point out that the brick pieces submitted for examination did not reveal the presence of human blood, and because Adams objected to Detective Rhoney's testimony that what had appeared to be blood on the brick had turned out to be paint. (Defendant's Exhibit 65; Trial Tr. Vol. III p. 270). Adams' objection was sustained, so presumably the jury disregarded the witness' answer that the brick had paint, not blood on it. At the evidentiary hearing, Adams denied any strategic reason for keeping this evidence from the jury and admitted that it might have been helpful. (12/04 MAR Tr. p. 432). Since Nicole Cline had testified that the defendant had said that he had killed Chris Walker's girlfriend by bashing her head in with a brick, and the defendant denied making any such statement, it could have been helpful to the defense to show that while there was a brick near Ms. Ramseur's body, it had no human blood on it and could not have been used to kill her. (Trial Tr. Vol. III pp. 228-30). There was no evidence presented at the trial of this case to establish that there was blood present on any brick located at the scene where Betty Ramseur's body was located. The absence of such evidence was before the jury and there is no requirement that defense counsel catalogue every item of evidence that has not been presented. There is no reasonable possibility that Adams' failure to object to this question or to point out that this evidence was lacking would have affected the outcome of the defendant's trial.

484. Counsel had available to them, through the District Attorney's open file policy, the typed interview notes of Detective Rhoney's interview with Robert Ramseur, brother of Betty Ramseur. (Defendant's Exhibit 53, Bates-stamped 1534-35). The notes reveal that shortly before her disappearance, Ms. Ramseur went on what she described as a "dinner date" with one

Dennis Dickerson, and that her insistence and anxiety over being on time for the date seemed to reflect a sense of urgency. Yet although Adams cross-examined Robert Ramseur at trial, he never brought up Ms. Ramseur's association with Dennis Dickerson and her urgent need to be with him the last time Ms. Ramseur had ever seen his sister. At the evidentiary hearing, Adams testified that he did not recall the statement mentioning the date with Dickerson. (12/04 MAR Tr. pp. 356-57). Exhibit 53 indicated that this event occurred on June 2, 1992. Ramseur was observed alive and in court in Catawba County on June 11, 1992. As such, the relevance of this information is minimal and there is no reasonable possibility that cross-examination of Robert Ramseur about this subject would have affected the outcome of the trial.

485. Part of the State's theory that the defendant was guilty of both murders was that the bodies of both women had been placed in the lowest levels of houses familiar to the defendant and to which he had access. (Trial Tr. Vol. IV pp. 182, 186-87, 230). The defendant contends in these proceedings that it would have been helpful to the defense to show the jury that the house at 407 Highland Avenue was accessible to anyone who cared to go in it or under it. In fact, according to the testimony of Detective Rhoney during these proceedings, the house was a "flophouse" frequented by a number of homeless people and drug users, and the "crawl space" where the body was found was actually a fairly open space, with several points of access where one could nearly walk in without stooping, and where, based on the numerous items of clothing that were present, "there was every opportunity for anyone to go into that crawl space" or at least to have noticed the odor from Ms. Ramseur's decaying body. (12/04 MAR Tr. pp. 83-84). The defendant contends that these points could have been illustrated for the jury by the crime scene photographs taken at the time of the discovery of Ms. Ramseur's body, which show the easy

access from multiple points and the various items of clothing and discarded food containers tending to show human habitation. According to Detective Rhoney, Defendant's Exhibit 47, the prosecution summary in the Ramseur case, would have contained the crime scene photographs, including a contact sheet of all photographs. (12/04 MAR Tr. pp. 47-49). There was ample evidence in the trial record, including photographs of the house, to establish that the house was vacant or abandoned, that there was no electricity, that clothing and other debris were spread throughout the house, that the house was not boarded up or secured and that Creasman slept inside it. This additional cross-examination would not have added any evidence of consequence and the outcome of the trial would not have been any different if this evidence had been presented.

486. The defendant further contends that his trial counsel were ineffective because the cross-examination that was undertaken was, on occasion, more harmful than helpful, and on at least two occasions it seemed based upon a theory that conflicted with what counsel knew their client would say on the stand. For example, Portwood embarked on an effort, in his cross-examination of SBI Agent Mark Boodee, to demonstrate why, based upon the method of statistical sampling, DNA testing was not "foolproof." (Trial Tr. Vol. IV pp. 97-100). However, as counsel well knew, defendant took the stand and testified that he had intercourse with Tenene Conley on Thursday night, and so he did not deny that his DNA was present in her body. Similarly, Adams questioned Nicole Cline at length about whether it wasn't true that the defendant had just been kidding when he had claimed to have killed Chris Walker's girlfriend, only to have the defendant deny ever having made such a statement at all. (Trial Tr. Vol. III p. 235; Vol. IV pp. 148-49). These alleged shortcomings would not have affected the outcome of

this trial and were not prejudicial.

Trial Counsel's Failure to Preserve Claims for Appellate Review
(MAR Claim II(S))

487. During the State's case, Parker elicited from Bobby Smith that he had voluntarily supplied samples of his hair and bodily fluids to the police. Smith also testified that he had submitted to the examination because he wanted to prove he was innocent. Parker then asked Bobby Smith the following question:

> Q. Now after you gave the samples to the police, did you talk to your . . . did you talk to come by and see did the police talk to you again? [*sic*].
>
> A. Well, I was asking to take a lie detector which I did.
>
> Q. And I will show you what is marked State Exhibit 20 and I ask if you recognize that.

(Trial Tr. Vol. III p. 64). At this point the trial judge interrupted the examination and asked to see the exhibit, then instructed the District Attorney not to ask about it. (*Id*.).

488. It appears that the State was seeking to elicit testimony from Bobby Smith, that he had asked to take a lie detector test and had been allowed to do so, implying, of course, that he had passed it, especially since he had not been charged, had been called by the State as a witness, and had just proclaimed his innocence. Defense counsel failed to object to the question before the trial court intervened and did not move to strike the answer that preceded the Court's intervention. In doing so, the defendant contends his trial counsel failed to object to the admission of Smith's testimony regarding a lie detector examination. The defendant contends that this failure to oppose the inadmissible evidence, to seek an appropriate remedial measure such as an instruction to strike the testimony, or otherwise to preserve the error for appellate

review was prejudicial to the defense. There is no reasonable likelihood that Bobby Smith's testimony that he asked to take a polygraph test, without more, affected the outcome of this trial. Counsel's alleged deficient performance did not prejudice the defendant in any meaningful way. Consequently, this claim is denied.

IV. Claims of Juror Misconduct
(MAR Claim III (A))

489. Defendant's Motion for Appropriate Relief alleges that he was deprived of his right to a fair and impartial jury, to Due Process, and to confront the evidence against him as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 19, 23, 24, and 27 of the North Carolina Constitution, based on jury's consideration of extrinsic information or materials during their deliberations. The Court will at this time address this claim only as it pertains to the guilt-innocence phase of the trial.

490. Defendants in criminal trials are entitled to a fair trial before an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145 (1968). "The Sixth Amendment guarantees a criminal defendant the right to trial by an impartial jury. No right touches more the heart of fairness in a trial." *Stockton v. Commonwealth of Va.*, 852 F.2d 740, 743 (4th Cir. 1988).

491. The Supreme Court has defined "an impartial trier of fact" as "a jury capable and willing to decide the case solely on the evidence before it." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (citing *Smith v. Phillips*, 455 U.S. 209, 217 (1982)).

> The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced by the constitutional concept of trial by jury. In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial

> protection of the defendant's right of confrontation, of cross-examination, and of counsel.

Turner v. Louisiana, 379 U.S. 466, 472-73 (1965); *see also* Gardner v. Florida, 430 U.S. 349, 362 (1977).

492. A jury's consideration of materials that are extrinsic to the evidence admitted at trial violates a defendant's right to a fair and impartial jury, to Due Process, and to confront evidence against him as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, 24, and 27 of the North Carolina Constitution.

493. Because a jury's consideration of extra-evidential material violates a defendant's Sixth Amendment right of confrontation, the error, if proved, is presumed to be prejudicial, and the burden is on the State to show that it was harmless beyond a reasonable doubt. *State v. Lyles*, 94 N.C. App. 240, 248, 280 S.E.2d 390 (1989).

494. An error of constitutional magnitude will be held to be harmless beyond a reasonable doubt only when "the court can declare a belief . . . that there is no reasonable possibility that the violation might have contributed to the conviction." *State v. Lane*, 301 N.C. 382, 387, 271 S.E.2d 273, 277 (1980), quoted in *Lyles*, 94 N.C. App. at 249. Because inquiry into jurors' mental processes is prohibited, "the court must apply an objective test, assessing for itself the likelihood that the influence would affect a typical juror." *Id.* (internal citations omitted). Among the factors that the court should apply in making this assessment of the likely impact of the extraneous material on the mind of the hypothetical juror are these: (1) the nature of the extrinsic information and the circumstances under which it was brought to the jury's attention; (2) the nature of the State's case; (3) the defense presented at trial; and (4) the

connection between the extraneous information and a material issue in the case. *Id.*

495. Under N.C. Gen. Stat. § 15A-1240, a juror may give evidence in cases where "matters not in evidence . . . came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him." Likewise, Rule 606(b) of the North Carolina Rules of Evidence provides that a juror may testify to "whether extraneous prejudicial information was improperly brought to the jury's attention" or "whether any outside influence was improperly brought to bear upon any juror." See *State v. Lyles*, 94 N.C. App. 240, 280 S.E.2d 390 (1989).

496. Michael Aguero served on the jury in this case.

497. Aguero recalled that there was some mention of a young girl. A female juror brought up the subject during a break at some point prior to the beginning of jury deliberations. Aguero overheard casual conversation between two other jurors. Aguero did not hear any other jurors discussing this subject and nor was it brought up at any other time.

498. Aguero overheard the other juror indicate that it was believed that Chapman was involved in a kidnapping of a young girl who had been sexually molested and possibly murdered. The alleged victim in the other matter was a little girl from Shelby. Aguero could not determine if the other juror was linking Chapman to this other incident or not. The other juror did not identify her source for this information.

499. Irene Freeman testified concerning allegations that the jury was exposed to extrinsic information concerning the death of a Dawkins girl.

500. Freeman's recollection was, by her own admission, confused. Freeman was not sure where or from whom she heard this information. Her description of a white male talking

about that subject was inconsistent with the testimony of Michael Aguero. Her description of what was actually said concerning this subject was also inconsistent. Freeman could not state with any specificity what was actually said. Freeman's testimony also appeared to be inconsistent with her prior affidavit. Based on Freeman's uncertainty and her lack of a reliable memory of the alleged incident, her testimony is not credible.

501. The Court is unaware of any competent evidence that tends to show that this defendant had anything to do with the kidnapping and possible murder of the young girl from Shelby, and so the admission of evidence concerning that kidnapping and possible murder, without more, would not have been relevant. Because certain jurors' exposure to this extrinsic information occurred during one of the breaks in the trial while the jury was assembled in the jury room, the defendant had no notice that some of the jurors in his case had heard of allegations concerning the kidnapping and possible murder of a young girl from Shelby. Defendant had no opportunity to contest the admissibility of this information accusing him of the kidnapping and possible murder of a young girl, or to challenge the information by cross-examination, or to minimize its impact through a curative instruction by the court.

502. The testimony of juror Agüero involves "extraneous prejudicial information" pursuant to Rule 606(b) and "matters not in evidence" implicating defendant's confrontation rights within the meaning of Section 15A-1240 of the North Carolina General Statutes and is thus admissible in these MAR proceedings.

503. The exposure of certain jurors' to this extraneous information concerning the defendant's alleged involvement in another alleged crime, without notice to the defendant, abridged his constitutional right to an impartial jury and his rights of confrontation, of cross-

examination, and of counsel. *See Lyles*, 94 N.C. App. at 247, 380 S.E.2d at 395 (holding that the defendant was denied his constitutional right of confrontation when jurors removed tape and paper on a photograph introduced into evidence to examine information regarding defendant's prior criminal record which directly contradicted defendant's alibi).

504. N.C. Gen. Stat. § 15A-1420(c)(6) provides that in the MAR context, prejudice is determined by reference to N.C. Gen. Stat. § 15A-1443. That statute provides that "[a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b); *see also Stockton v. Virginia*, 852 F.2d 740, 744 (4th Cir. 1988) ("Where . . . the danger is not one of juror impairment or predisposition, but rather the effect of an extraneous communication upon the deliberative process of the jury, the defendant's right to an impartial jury requires that the government bear the burden of establishing the non-prejudicial character of the contact."); *Lyles*, 94 N.C. App. at 247, 380 S.E.2d at 395.

505. In this instance, there was one reference to the alleged kidnapping and possible murder made by one juror in a conversation with another juror. There was no indication that this subject was discussed during the actual deliberations of the jury as a whole. There was no detailed information offered and there was no explanation of any similarity between the cases being tried by the jury and the other alleged offenses. Furthermore, there was no indication of the source of the information that was being discussed between these two jurors. In addition, only one juror was called to testify during these proceedings who was able to credibly recall this information. Unlike Lyles, the extrinsic information did not directly contradict the defense

offered by the defendant. All of these facts indicate that effect of this extraneous information was harmless and did not prejudice the jury in its consideration of these two cases. In this instance, there is no reasonable possibility that this extrinsic information contributed to the defendant's convictions for these offenses.

506. Since the extrinsic information was not prejudicial, this claim in the defendant's Motion for Appropriate Relief is denied.

V. Claims that Recanted Testimony Is Newly Discovered Evidence Requiring a New Trial
(MAR Claim IV(A))

507. Defendant's MAR alleges that he is entitled to a new trial based upon recanted testimony. The Court will now address the defendant's claims that recanted testimony requires a new trial.

Legal Principles Applicable to These Claims

508. North Carolina General Statute § 15A-1415(c) permits a motion for appropriate relief to be made at any time after verdict on the ground that "evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence." N.C. Gen. Stat. § 15A-1415(c). The North Carolina Supreme Court has described the difference between recanted testimony and newly discovered evidence as follows:

> Newly discovered evidence is evidence which was in existence but not known to a party at the time of trial. Recanted testimony is testimony which has been repudiated by a party who gave it. Recanted testimony is not evidence which

> existed at the time of trial because the recanting witness would not have testified to it at trial. A motion for a new trial on the basis of recanted testimony is for the purpose of removing testimony from a jury. A motion for new trial based on newly discovered evidence is for the purpose of putting new evidence before a jury.

State v. Nickerson, 320 N.C. 603, 609, 359 S.E.2d 760, 763 (1987).

509. In *State v. Britt*, the North Carolina Supreme Court adopted a two-part test for evaluating motions for new trial based on recanted testimony. 320 N.C. 705, 714-15, 360 S.E.2d 660, 665 (1987). A defendant may be allowed a new trial on the basis of recanted testimony if (1) the court is reasonably well satisfied that the testimony given by a material witness is false, and (2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial. *Id.*

Findings of Fact Applicable to These Claims

The Evidence Against The Defendant in the Ramseur Case

510. The State's evidence against the defendant in the Ramseur case was summarized in paragraphs 64 to 77 of this order. That summary is incorporated into this section of the order by reference.

511. Nicole Cline testified at trial that in June or July of 1992, the defendant came to her apartment and said, "I just killed somebody." The defendant then took her to the balcony and said he had just killed Chris Walker's girlfriend by "crack[ing] her in the head with a brick." Chapman then pointed to the house at 407 Highland Avenue and said he "put her in the bottom of the basement." (Trial Tr. Vol. III p. 228). Nicole Cline testified that Brian Cline was there when she had this conversation with the defendant. (Trial Tr. Vol. III p. 232, 238). On August

22, 1992, Nicole Cline was sitting on the balcony braiding a woman's hair and she smelled a funny smell, and then they looked over at 407 Highland Avenue and saw police and an ambulance there. After Nicole Cline learned that a body was found at 407 Highland Avenue, she told her father, Harold Chapman, about her earlier conversation with the defendant. (Trial Tr. Vol. III pp. 228, 231, 233, 236, 239).

512. Brian Cline testified at trial that he overheard a conversation between Nicole Cline and the defendant in the summer of 1992. Brian Cline testified that Nicole Cline and the defendant were on the balcony and that defendant told her "something about he killed the girlfriend of Chris Walker." Brian Cline testified that when he overheard this conversation, he had woken up and gone into the hallway and "was about half asleep." (Trial Tr. Vol. III pp. 241-42). Following this conversation, but before Ms. Ramseur's body was discovered, Brian Cline testified that he and the defendant were driving down "the street where the house was located on" when the defendant pointed to the house and said, "If people keep fucking with me they would end up like that bitch that was under the house." (Trial Tr. Vol. III pp. 241, 242, 244).

513. Lavar Gilliam testified at trial that during the summer of 1992, he overheard the defendant tell two or three people, including Gwendolyn Anderson, that he had killed a woman over some drugs, that her body was in the house on Highland Avenue, and that he was going to burn her body so that it could not be found. Gilliam testified that when he overheard the defendant's conversation, he was walking on the sidewalk, the defendant was standing in the parking lot talking to some people, there were some people on a porch and some in the driveway, and Anderson was near by. Gilliam also testified that later on, he heard about a fire at that house. (Trial Tr. Vol. III pp. 248, 250-54).

514. The defendant testified at trial that he did not kill Ms. Ramseur. Chapman further denied telling the Clines that he had killed somebody, and he denied ever having seen Gilliam before he testified. (Trial Tr. Vol. IV pp. 148-149, 151, 157).

Nicole Cline's Recantation of Her Trial Testimony

515. During Nicole Cline's testimony at trial, she referred to the brick on two separate occasions. She first testified that the defendant said, "I cracked her in the head with a brick." (Trial Tr. Vol. III p. 228). Nicole Cline then testified that the defendant said "he had killed her by crushing her head with a brick." (Trial Tr. Vol. III p. 230). Rhoney testified at trial that he gathered "a brick that appeared to have blood on it" from the Ramseur crime scene, and then testified, over a sustained objection, that testing of the brick revealed it was paint. (Trial Tr. Vol. III p. 270). Moreover, Dr. Hall testified that Ms. Ramseur had died as a result of a blunt-trauma injury to the head, and that the injury was consistent with use of a hard object like a brick or a hammer. (Trial Tr. Vol. III pp. 317, 320, 324, 326). Moreover, during the State's closing argument, Jason Parker, playing the role of the defendant, said: "When I smoke rock I am around women just something about them I can't stand. Makes me want to pick up a brick and hit one in the head . . . ." (Trial Tr. Vol. IV p. 227). Parker then said, "This guy might as well got him a brick with the name of GEC on it and stamp them up beside the head for he killed both of them." (Trial Tr. Vol. IV p. 230).

516. Nicole Cline executed an affidavit prior to testifying at the evidentiary hearing. In this affidavit, Cline averred that the defendant came to her apartment in August of 1992 sometime after midnight and told her that he had "just killed Chris Walker's girlfriend by

crushing her head with a brick and that he put her in the basement of the house where the Mayfield's used to live." Nicole Cline indicated in her affidavit that she did not believe that the defendant killed Betty Ramseur. The contents of Nicole Cline's affidavit were largely consistent with her trial testimony in 1994.

517. Nicole Cline testified at the evidentiary hearing that when the defendant came to her apartment, it was after midnight, and she was in bed. (08/04 MAR Tr. pp. 681, 718-19). Nicole Cline explained that she was half asleep during their conversation. (08/04 MAR Tr. p. 681). On direct examination, Nicole Cline testified that the defendant said he either killed Chris Walker's girlfriend and put her under the basement or saw Chris Walker's girlfriend under the basement. (08/04 MAR Tr. pp. 681-82, 685-86). Nicole Cline testified that she did not believe that the defendant had killed Chris Walker's girlfriend. (08/04 MAR Tr. p. 683). During cross-examination, Nicole Cline testified that the defendant said he either killed Chris Walker's girlfriend or found her body under the house (08/04 MAR Tr. pp. 700, 719); however, she later testified that she told the truth at trial. (08/04 MAR Tr. p. 745). On re-direct examination, she varied her testimony again and indicated the she could not remember whether the defendant said that he killed Chris Walker's girlfriend, which she did not believe, or that he found Chris Walker's girlfriend under the basement. (08/04 MAR Tr. p. 758). Nicole Cline also testified that the defendant never said anything about hitting Chris Walker's girlfriend in the head with a brick, and she only testified to that at trial because she saw the photographs and the police said Ms. Ramseur was hit in the head with a brick. (08/04 MAR Tr. pp. 701, 761-62). Cline did indicate that Chapman said he hit Chris Walker's girlfriend in the head. (08/04 MAR Tr. p. 762).

518. The Court has carefully scrutinized the prior trial testimony of Nicole Cline, and the Court has carefully watched and evaluated the demeanor of this witness at the evidentiary hearing. Nicole Cline's testimony at the evidentiary hearing was largely consistent with her testimony at trial. The Court is not satisfied that Nicole Cline testified falsely at trial about the defendant cracking Ms. Ramseur in the head with a brick. Nicole Cline's testimony at the evidentiary hearing is consistent with her statement to Detective Rhoney. In the handwritten notes and the typed report of Rhoney's interview with Nicole Cline, Rhoney noted that the defendant came to Cline's house in July 1992 and stated that he had killed Chris Walker's girlfriend and had put her in the basement of the house where the Mayfield's used to live. There is no reference to a brick in Rhoney's typed record of this interview. There is very little detail about the events in this relatively brief note of the interview. (Defendant's Exhibit 84; 08/04 MAR Tr. p. 950). The Court concludes that Nicole Cline's testimony has been generally consistent despite her evident desire not to testify against the interests of the defendant. Nicole Cline did not testify that her trial testimony was false. Therefore, Nicole Cline did not recant the essence of her trial testimony. The critical component of Cline's testimony is her largely consistent indication that the defendant told her that he had killed Betty Ramseur. As such, this claim is denied.

Brian Cline's Recantation of His Trial Testimony

519. In his testimony at the evidentiary hearing, Brian Cline recanted his trial testimony and stated that he did not tell the truth when he testified that he heard the defendant

make incriminating statements about murdering Ms. Ramseur.

520. Brian Cline testified at the evidentiary hearing that the testimony he gave at the defendant's trial was not true. (08/04 MAR Tr. p. 593). Brian Cline testified that he and the defendant were together in a car one night and pulled onto the side of the house at 407 Highland Avenue, and sat in the car or went to the porch and got high. (08/04 MAR Tr. pp. 584-86, 602, 606-07, 638-39, 642, 644). Brian Cline testified at the hearing that the defendant never made any remarks about killing anyone or about a body being under the house. (08/04 MAR Tr. pp. 584-86, 602, 606-07, 638-39, 642, 644-45). Brian Cline also testified at the hearing that the defendant did not make reference to Chris Walker's girlfriend, use the name Betty, or use the terms bitch, white bitch, woman, or white woman. (08/04 MAR Tr. p. 586).

521. Brian Cline also testified at the evidentiary hearing that one evening during the summer of 1992, he overheard a conversation between Nicole Cline and the defendant where she provided support for the defendant and told him that he needed to stop doing drugs. (08/04 MAR Tr. pp. 582-84). When Brian Cline overheard this conversation, he was leaving the apartment after coming there to get some clothes. (08/04 MAR Tr. p. 583). Brian Cline testified at the hearing that he never heard the defendant make any remarks to Nicole Cline about killing someone or seeing a body under a house. (08/04 MAR Tr. p. 584).

522. Rhoney interviewed Brian Cline on August 26, 1992, and he told Rhoney that approximately one month to six weeks before Ms. Ramseur's body was discovered, he and the defendant were driving down First Avenue SE near Fifth Street SE when the defendant said, "if people didn't quit 'fucking' with him that he was going to kill them and put them under that house like he did that white girl." (Defendant's Exhibit 47; Trial Tr. Vol. III p. 263). Brian

Cline testified at the evidentiary hearing that when he was interviewed by Rhoney in August 1992, he had been doing drugs the night before and he was still under the influence of drugs. (08/04 MAR Tr. pp. 587-88, 605). Brian Cline testified at the hearing that any information he told Rhoney about the defendant came from what he heard from other people as opposed to what he heard from the defendant. (08/04 MAR Tr. pp. 589, 603). Brian Cline testified at the hearing that he spoke to Rhoney because his father, Harold Chapman disliked the defendant and because Rhoney offered to help Brian Cline with charges and he wanted to stay out of prison. (08/04 MAR Tr. pp. 586, 615, 617).

523. Brian Cline testified at the evidentiary hearing that he was doing drugs during the summer of 1992 and at the time of the defendant's trial. (08/04 MAR Tr. pp. 584-85, 587). He used crack cocaine often, and his drug use caused him to have blackouts. (08/04 MAR Tr. p. 594). According to Brian Cline's testimony at the hearing, he was coming down off of being high on cocaine when he testified at the defendant's trial. (08/04 MAR Tr. p. 593). Brian Cline testified that he was young and felt pressured to come to court and testify against the defendant. (08/04 T pp. 584-85, 593). Brian Cline also testified that Jason Parker and Rhoney said they would help him with pending charges in exchange for his testimony. (08/04 T pp. 588, 591-92, 615, 621). Although he did not recall the specifics, Brian Cline testified that there was some concession made by the State for his testimony in this case. (08/04 T pp. 624, 637, 640).

524. Before trial, defendant's attorneys filed a *Motion to Reveal the Deal*. At the hearing on the motion, Assistant District Attorney Jason Parker, stated: "I have not entered into any plea arrangements with any of the witnesses for their testimony or any other consideration given to them by me or anyone else to my knowledge . . . . No one from my office has come to

me and said this is a witness in this case and ask [*sic*] for any consideration for them." (Tr. Vol. II pp. 4, 16). Parker did state, however, that Brian Cline "indicated that he was on his brother's bond and asked for consideration but no promise has been made to him." (Trial Tr. Vol. II p. 15).

525. In April of 1993, Brian Cline spoke to Investigator Coy Reid, who was an investigator for the defendant. Brian Cline told Reid that the defendant had not talked to him about killing a woman, and Nicole Cline had not told him anything about the defendant. He also told Reid that he did not know anything about Ms. Ramseur's death. (Defendant's Exhibit 74; Trial Tr. Vol. IV p. 135). Brian Cline testified at the evidentiary hearing that he spoke to Reid, and he indicated that he did not recall telling Reid that the defendant made a statement about putting a body under a house. (08/04 MAR Tr. pp. 589-90). Brian Cline testified that if he told Reid that he did not hear anything that would have been true. (08/04 MAR Tr. p. 590).

526. Numerous witnesses at the evidentiary hearing testified that Brian Cline has a reputation for being untruthful. (05/04 MAR Tr. p. 728; 02/06 pp. 54, 76-77).

527. During the evidentiary hearing, Brian Cline repeatedly indicated that he could not recall certain matters. (8/04 MAR Tr. p. 584, p. 587, p. 590). Cline commented that it had been years since the events occurred. (8/04 MAR Tr. p. 585, p. 605, p. 644). Cline indicated in his testimony at the hearing that he could not remember half of the stuff that went on. (8/04 MAR Tr. 618). At the hearing, Brian Cline could not even accurately recall the address of the place where he lived in 1992. (8/04 MAR Tr. p. 581, p. 597). Due to the passage of time and Cline's admittedly faulty memory, his testimony at the hearing is not credible.

528. Cline testified at the hearing that he had continued to use drugs after the trial of the defendant's case. (8/04 MAR Tr. p. 596). Cline also admitted that he was in jail for stealing

to support his drug habit. Id. Cline even indicated that he was probably high when he signed an affidavit for the defense in these MAR proceedings. (8/04 MAR Tr. p. 619).

529. Cline signed an affidavit in these proceedings on November 9, 2003. (MAR Attachment 67). Some of the averments in this affidavit are, by Brian Cline's own admission, false. (8/04 MAR Tr. pp. 638-639). In paragraph 18 of the affidavit, Brian Cline swore that Detective Rhoney drove him to court to testify. At the hearing, Brian Cline testified that he went to court with his father and his sister. (8/04 MAR Tr. p. 618). In the affidavit, Brian Cline swore that his father and the defendant's father had problems over a debt. (MAR Attachment, paragraph 6). At the hearing, Brian Cline testified that there was no ill will between his parents and the defendant's. (8/04 MAR Tr. p. 578). In the affidavit, Brian Cline swore that the defendant "gestured toward the house and said something about a body being under the house." (MAR Attachment 67, paragraph 11). At the hearing, Brian Cline repudiated that statement in his affidavit that the defendant told him that there was a body under the house. (8/04 MAR Tr. pp. 607-608, p. 639). The conflicts between Brian Cline's affidavit and his testimony at the hearing in August 2004 further discredit his testimony recanting his trial testimony.

530. Brian Cline also testified at the MAR hearing that he was HIV positive. (8/04 MAR Tr. p. 613, p. 615, pp. 632-633). Brian Cline testified that he was dying. (8/04 MAR Tr. p. 613 p. 615, p. 626). Brian Cline further testified that he loved the defendant, who is his first cousin. (8/04 MAR Tr. p. 577, p. 630). The Court infers that Brian Cline has a motive to help the defendant avoid execution and that Cline's perception of his own impending death from AIDS creates a sense of security that there will not be any consequences for testifying falsely. His likely motivation further discredits Brian Cline's testimony at the August 2004 hearing.

531. The Court has carefully scrutinized the prior trial testimony of Brian Cline, and the Court has carefully watched and evaluated the demeanor of this witness at the evidentiary hearing. The Court finds Brian Cline's present testimony at the August 2004 hearing is not worthy of belief. This claim is denied.

Lavar Gilliam's Recantation of His Trial Testimony

532. In his testimony at the evidentiary hearing, Lavar Gilliam recanted his trial testimony, indicating that he did not tell the truth when he testified that he heard the defendant make incriminating statements about murdering Ms. Ramseur.

533. Gilliam testified at the evidentiary hearing that he had reviewed his testimony at trial and that most of the testimony he gave was not true. (12/04 MAR Tr. pp. 274-73, p. 293). Gilliam testified that he never heard the defendant make any statements to anyone about killing someone, placing a body under a house, or planning to burn the body. (08/04 MAR Tr. pp. 268-69, p. 274, p. 276, p. 288, pp. 290-91). One day in the summer of 1992, Gilliam was at Nicole Cline's house when police cars and an ambulance arrived at a house nearby, and he learned that they found a body under the house and the house was partially burned. (12/04 MAR Tr. pp. 266-67). After learning the body had been found, Gilliam overheard Nicole Cline say that the defendant "could" or "may" have done it. (12/04 MAR Tr. pp. 268, p. 280). Gilliam testified that he had a "crush" on Nicole Cline. (12/04 MAR Tr. p. 266). Gilliam also testified that he did not know Gwen Anderson. (12/04 MAR Tr. p. 267, p. 274, p. 277).

534. Gilliam testified at the evidentiary hearing that he lied to Investigator Wiles of the Hickory Police Department when he was interviewed on November 19, 1992, while incarcerated

at the Juvenile Evaluation Center in Swannanoa. (12/04 MAR Tr. pp. 269-70, p. 253, p. 280, p. 290). Gilliam told Wiles that he was walking by an apartment building and overheard the defendant having a conversation with his girlfriend, Gwen, and other people on a porch; that the defendant said he killed a woman, "he had better go back and burn the body so there wouldn't be any evidence," and "he might burn the whole house down"; and that Gilliam later heard about a fire at the house and the police finding a body there. (MAR Attachment 71; Defendant's Exhibit 72; 12/04 MAR Tr. p. 280, pp. 290-91). Gilliam testified that the information he told Officer Wiles about the defendant was a combination of what he heard on the street, Nicole Cline's comment about the defendant, and what Officer Wiles told him. (12/04 MAR Tr. pp. 270-71, pp. 277-78, p. 280, pp. 291-92). Gilliam testified that he was only fourteen years old, he did not understand the consequences that his false statements would have on the defendant, and that he was trying to cast blame away from himself and help the investigator so that he would leave. (12/04 MAR Tr. p. 270).

535. Gilliam was sixteen years old when he testified at the defendant's trial. (12/04 MAR Tr. p. 271). According to Gilliam, he gave false testimony at trial because he was concerned about what would happen to him if he did not come to court and testify. (12/04 MAR Tr. p. 275). Gilliam testified that Jason Parker had called him and told him that if he did not come to court and testify, Parker would have him "locked up." (12/04 Tr. pp. 273, pp. 281-82, pp. 284-86). According to Gilliam, Parker's comments scared him, and he interpreted the comments to mean that he would be charged with the murders. (12/04 Tr. pp. 273-74, p. 285). Gilliam claimed that he came to court and testified because of Parker's comments. (12/04 Tr. p. 273, p. 282, p. 286).

536. Gilliam claimed that his testimony at the evidentiary hearing was truthful. (12/04 MAR Tr. pp. 275-76). Gilliam explained, "I'm just trying to do what's right now. I've been carrying this burden around for so many years, and I had a chance to really come forward and tell the truth. That's why I'm here today, to tell the truth here today, tell the truth." (12/04 MAR Tr. p. 275).

537. In November of 2003, Gilliam signed an affidavit stating that he never heard the defendant say anything about a murder. This affidavit was signed more than a year before Gilliam's testimony at the evidentiary hearing. (12/04 MAR Tr. p. 288).

538. The Court has carefully scrutinized Gilliam's trial testimony and the Court has carefully watched and evaluated the demeanor of this witness at the evidentiary hearing. The Court finds Gilliam's present testimony is not worthy of belief.

539. Since the defendant's trial, Lavar Gilliam was convicted of second degree murder. Jason Parker was the assistant District Attorney who prosecuted the case against Gilliam. Gilliam's claim that he thought that Parker was going to charge him with the murders for which the defendant was on trial is not credible. (12/04 MAR Tr. p. 273). The Court does not find that Gilliam's testimony in this proceeding is credible or worthy of belief. This claim is denied.

VI. Claims that Results of Recent DNA Testing Require a New Trial
(MAR Claim IV(B))

540. The defendant's MAR alleges that favorable results of forensic testing entitle the defendant to a new trial. Subsequent to the evidentiary hearing, the defendant amended his MAR to include claims that he was entitled to a new trial, pursuant to North Carolina General Statute § 15A-270, based upon the results of allegedly favorable DNA testing.

541. Pursuant to North Carolina General Statute § 15A-270:

> (a) Notwithstanding any other provision of law, upon receiving the results of the DNA testing conducted under G.S. 15A-269, the Court shall conduct a hearing to evaluate the results and to determine if the results are unfavorable or favorable to the defendant.
>
> (b) If the results of DNA testing conducted under this section are *unfavorable* to the defendant, the Court shall dismiss the motion and, in the case of a defendant who is not indigent, shall assess the defendant for the cost of the testing.
>
> (c) If the results of DNA testing conducted under this section are favorable to the defendant, the Court shall enter any order that serves the interests of justice, including an order that does any of the following:
>
> (1) Vacates and sets aside the judgment.
> (2) Discharges the defendant, if the defendant is in custody.
> (3) Resentences the defendant.
> (4) Grants a new trial.

542. The State's evidence against defendant in the Conley case was not overwhelming, and the State's case was based upon circumstantial evidence. (08/04 MAR Tr. pp. 185, 196) The State did not present any trace evidence linking defendant to the crime scene, other than the presence of his semen in Tenene Conley's body at the time it was found. (08/04 MAR Tr. pp. 423-24).

543. As presented at trial, the State's theory in the Conley case was that the defendant was the last person seen with Ms. Conley, walking in the direction of the house where her body was found in a closet, and that the defendant murdered Ms. Conley during the evening that went from Thursday, August 13, 1992, to Friday, August 14, 1992, following sexual intercourse. (08/04 MAR Tr. pp. 214-15; 12/04 MAR Tr. pp. 313-14).

544. The State's case against the defendant rested on the testimony of Howard Cowans, Jamar Danner, and Danny Blackburn, who testified that they saw the defendant with Ms. Conley the evening of Thursday, August 13, 1992, and the early morning hours of Friday, August 14, 1992; DNA testing from a vaginal swab establishing that the sperm found in Ms.

Conley was consistent with the DNA of the defendant; and testimony that the defendant performed some repairs on the house where Ms. Conley's body was found.

545. When Ms. Conley's body was found on Saturday, August 15, 1992, she was nude from the waist down. (Trial Tr. Vol. III pp. 4-6, 81-82).

546. Mark Boodee, a forensic DNA analyst, testified at trial that DNA analysis of the male fraction obtained from the vaginal swabs taken from Ms. Conley's body matched DNA obtained from a bloodstain given by the defendant. (Trial Tr. Vol. IV pp. 92-93).

547. Fannie Pinkston, the owner of the house in which Ms. Conley's body was found, testified that she hired the defendant in July 1992 to paint the trim on the outside of the house, and that he had been inside and knew how to get into the house. (Trial Tr. Vol. III pp. 68-71).

548. The defendant testified he had sexual intercourse with Ms. Conley at Roger Craft's apartment the evening of Thursday, August 13, 1992. After having sexual intercourse, Ms. Conley left the apartment and went to Sunny Valley. The defendant denied killing Tenene Conley. (Trial Tr. Vol. IV pp. 142-46, 149-51, 162).

549. In November 2003, the defendant filed a *Motion for Testing of Trace Evidence*, requesting the testing of certain items of trace evidence specified in the motion. The Court heard the defendant's motion via telephone conference on November 13, 2003. On December 9, 2003, the Court entered an order allowing DNA testing of physical evidence related to the defendant's convictions. On March 7, 2005, the Court entered a subsequent order for DNA testing of State's Exhibit 3b, which included the panties and blue jeans obtained from the Conley crime scene. The testing was completed by the North Carolina State Bureau of Investigation (SBI), and the files of this testing were produced to counsel for State and the defendant, Bates-stamped 3163-3318.

The defendant offered the results of the SBI's testing into evidence at the evidentiary hearing. (Defendant's Exhibit 130; 05/06 MAR Tr. pp. 130-32).

550. The SBI tested a cutting from the panties identified as collected from Ms. Conley. The results of the testing of the panties showed that the DNA profile obtained from the male fraction of the cutting matched the DNA profile obtained from the bloodstain of the defendant. (Defendant's Exhibit 130, Bates-stamped 3186-87, 3316).

551. The SBI tested a cutting from the inside back pocket of the blue jeans collected from Ms. Conley. The results of the testing of the blue jeans showed that the DNA profile obtained from the male fraction of the cutting was consistent with a mixture from multiple contributors. The SBI determined that the results were inconclusive as to whether the victim, the defendant, or Bobby Smith were contributors to the mixture. (Defendant's Exhibit 130, Bates-stamped 3186-87, 3316).

552. The SBI tested two cigarette butts obtained from the Conley crime scene. An unknown female DNA profile was obtained from one cigarette butt and did not match the DNA profile obtained from the victim, the defendant, or Bobby Smith. An unknown male profile was obtained from the other cigarette butt and did not match the DNA profile obtained from the victim, the defendant, or Bobby Smith. (Defendant's Exhibit 130, Bates-stamped 3186-87).

553. In January 2006, the Court entered a subsequent order permitting transfer of certain items of trace evidence for further testing by defense experts.

554. Further DNA testing was completed by LabCorp, and the defendant submitted the certificates of analysis into evidence at the evidentiary hearing. (Defendant's Exhibit 131; 05/06 MAR Tr. pp. 112-14, 130-32).

555. Meghan Clement, the technical director of LabCorp, testified at the evidentiary hearing as an expert in forensic DNA analysis. (05/06 MAR Tr. p. 92, 96). The original DNA analysis performed by the SBI for the defendant's trial was restriction fragment length polymorphism (RFLP) testing, which requires large quantities of DNA that was very high quality. (05/06 MAR Tr. p. 102-03). The post-conviction DNA analysis performed by the SBI and LabCorp was polymerase chain reaction (PCR) testing, which can be performed with smaller quantities of DNA. (05/06 MAR Tr. p. 96, 102-03).

556. Clement reviewed the reports and raw data on the post-conviction DNA analysis performed by the SBI on the panties, pants, and cigarette butts. (05/06 MAR Tr. p. 103). Clement testified that following her review of these materials, she had altering or additional conclusions for some of the samples. (Defendant's Exhibit 129; 05/06 MAR Tr. p. 103).

557. Clement testified concerning her interpretations of the testing performed by the SBI on the stain from the blue jeans. Clement determined that in the male fraction, there had to be a minimum of three contributors included in the mixture, at least one of which was male. There were nine genetic areas where characteristics possessed by the defendant were not seen within the mixture at reportable levels and at least six genetic areas where characteristics possessed by the defendant and Bobby Smith were not seen within the mixture, and based on this, Clement testified that she would exclude both of them as a contributor to this mixture. Clement determined that in the female fraction, there was a minimum of two contributors included in the mixture, at least one of which was male. Clement testified that she would exclude both of them as a contributor to this mixture. (Defendant's Exhibits 129 and 130; 05/06 MAR Tr. p. 105-10, 121-23). The Court finds that Clement’s testimony at the evidentiary hearing was

credible.

558. Clement also testified regarding her interpretations of the testing performed by the SBI on the cigarette butt that generated a male profile. There were many common characteristics between the male profile obtained from the cigarette butt and the male fraction obtained from the pants sample, and based on this, Clement testified that she could not exclude the source of the DNA on that cigarette butt from being a possible minor contributor to the mixture on the pants. (Defendant's Exhibits 129 and 130; 05/06 MAR Tr. p. 110-11, 120-21, 125-27). The Court finds that Clement's testimony at the evidentiary hearing was credible.

559. The results of DNA testing on Ms. Conley's panties are not favorable to the defendant. This evidence tends to corroborate the State's theory that the defendant was in Ms. Conley's presence before her death and it is further supported by the evidence that the defendant's DNA was discovered on vaginal swabs taken from Conley's body. The presence of the defendant's DNA in Conley's panties corroborates the State's claim that sexual intercourse occurred between the defendant and Conley prior to her death. The presence of DNA on Conley's panties is consistent with Chapman and Conley having sexual intercourse and then Conley wearing her panties for some period of time before the two again had or attempted sexual intercourse. This evidence does not tend to establish the defendant's innocence or to rebut any fact of significance to the State's case.

560. The results of the DNA testing on Ms. Conley's blue jeans are not favorable to the defendant. Although this evidence tends to exclude the defendant as a contributor of the male fraction found on the jeans, the mere fact that the defendant was not the contributor of that DNA does not indicate that the defendant did not kill Tenene Conley. The presence of this DNA on the

pocket of the victim's jeans is consistent with the State's evidence that tended to show that Conley was a young female who used crack cocaine daily and paid for her habit through prostitution. That reality explains the presence of male DNA on her clothing. There is no indication when or under what circumstances this DNA was deposited on Conley's jeans. There is no evidence that links the presence of that DNA to the location where Conley's body was found. As such, the evidence is not of significance in this case and is not favorable to the defense.

561. The results of the DNA testing of the cigarette butts are not favorable to the defendant. The presence of DNA contributed by people other than the defendant, Conley or Bobby Smith on the cigarette butts tends to establish that other people were present in the basement of the vacant house located at 649 First Avenue, S. E. in Hickory at some point in time. This evidence does not indicate that the individuals' who smoked those cigarettes were present at the time that Conley died. The house had been vacant for several months and the power had been turned off. Anyone in the vicinity could have noticed that the house was dark. The house was accessible without the use of a key. There was a broken window on a side door that allowed access to the house. Prospective tenants who visited the house prior to the discovery of Conley's body also observed that a basement door was open. This DNA evidence tends to indicate that other individuals may have been in the basement of this vacant house. This evidence does not indicate that those two individuals had anything to do with Conley's death. As such, this evidence is not of significance in this case and is not favorable to the defense.

562. The Court, having carefully reviewed the evidence presented at trial and the evidence presented at the evidentiary hearing, finds that the new DNA results, conducted

pursuant to North Carolina General Statute § 15A-269, both separately and cumulatively, are not favorable to the defendant. Consequently, pursuant to N. C. General Statute 15A-270(b), the defendant's claim based on the additional DNA testing is denied.

PREJUDICE ARISING FROM THE INTERRELATED NATURE OF THE TWO CHARGES

563. The defendant was tried for both of these murders in the same trial. The State moved for joinder of the cases and the defendant objected to The trial court, in the exercise of its discretion, allowed the joinder of the two murder charges for trial. The Supreme Court of North Carolina affirmed the trial court's ruling allowing the joinder of the two cases. As the Supreme Court observed, N. C. Gen. Stat. 15A-926(a) provides, in pertinent part, that two or more offenses may be joined…for trial when the offenses…are based… on a series of acts or transactions connected together or constituting parts of a single scheme or plan." State v. Chapman, 342 N. C. 330, 342, 464 S. E. 2d 661 (1995). The Supreme Court further observed that "(t)he facts incident to the two murders here reveal a common modus operandi and a temporal proximity sufficient to establish a transactional connection." Id. at 343. The Supreme Court continued by observing that "(b)oth victims were young women with drug habits; defendant knew both and had smoked crack with each. One victim was nude when found and the other was nude from the waist down. Both victims suffered blunt-force injuries to their heads; Conley died as a result of strangulation, and the pathologist could not rule out the possibility that Ramseur had also been strangled. The women were killed within two months of each other, and their bodies were found in the lowest part of vacant houses within two blocks of

each other." Id. Under Rule 404(b), evidence of another crime may be offered on the issue of the defendant's identity as the perpetrator when the modus operandi of that crime and the crime for which the defendant is being tried are similar enough to make it likely that the same person committed both crimes. State v. Moses, 350 N. C. 741, 759, 517 S. E. 2d 853 (1999). Effectively, each of these murders was Rule 404(b) evidence tending to show a common plan or scheme to support the State's contention that the defendant committed the other murder. To the extent that the defendant is entitled to a new trial for errors in the Ramseur case, the defendant is also entitled to a new trial in the Conley case because the evidence in the Ramseur case was used as Rule 404(b) evidence to establish the defendant's guilt in the Conley case. To the extent that the defendant is entitled to a new trial for errors in the Conley case, the defendant is also entitled to a new trial in the Ramseur case because the evidence in the Conley case was used as Rule 404(b) evidence to establish the defendant's guilt in the Ramseur case.

MOTION FOR APPROPRIATE RELIEF ON SENTENCING PHASE ISSUES

564. Because the Court, by virtue of this order, has ordered a new trial in these cases, there is currently no need to make findings of fact and conclusions of law on the sentencing phase issues in these cases. The Court, therefore, defers making such findings of fact or conclusions of law, until such time, if ever, as this order is vacated, reversed or otherwise modified by either the Supreme Court of North Carolina or the North Carolina Court of Appeals. In the event that such a ruling is entered at a later date, the Court will then address the sentencing phase issues in these cases.

BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Court determines that the defendant's Motion for Appropriate Relief should be and hereby is granted. The judgments entered against the defendant in these cases on November 15 and 16, 1994 are hereby vacated and the defendant shall receive a new trial on all of these charges.

This the ____ day of _____, 2007.

_____
ROBERT C. ERVIN
Superior Court Judge Presiding

http://deathwatch.wordpress.com/2007/11/

New Trial for Glen Chapman

November 8, 2007

In 1994, Glen Edward Chapman was convicted of killing Tenene Yvette Conley and Betty Jean Ramseur. He has spent every day of the last 14 years on death row, protesting his innocence. Yesterday, a judge ordered that Chapman should receive a new trial because police withheld evidence, lost or destroyed documents, and the lead investigator perjured himself on the stand. The judge also noted that the evidence against Chapman was circumstantial, that he received ineffective assistance of counsel, and that one of the women he is accused of killing was likely not murdered at all.

Tenene Yvette Conley

Ms. Conley was found dead in the closet of an abandoned house. Mr. Chapman's sperm was found in her body. The State theorized that Chapman killed Ms. Conley shortly after they were seen together on August 13, 1992. Detectives did not reveal statements from numerous witnesses who saw Ms. Conley alive and with other people – including a man with a history of violence against her – the day after the State claimed she was murdered. A review of records by forensic pathologists hired by post-conviction counsel showed that Ms. Conley had no life-threatening injuries, that her time of death was consistent with that suggested by the hidden statements, and that she may well have died of a cocaine overdose.

Betty Jean Ramseur

Ms. Ramseur's body was found in the crawl space of a home that had been set on fire twice. At trial, the State claimed that Chapman killed Ms. Ramseur and set the house on fire to hide the evidence. An investigation done by post-conviction counsel revealed that Hickory Police Department Detective Dennis Rhoney concealed evidence that a witness picked another suspect out of a lineup, that another person claimed responsibility for the killing, that the first fire was accidentally set by a vagrant, and that the second fire occurred after the body was removed from the home. Rhoney also failed to turn over information that pointed to other suspects. There was no physical evidence linking Chapman to Ramseur's murder.

Robert Adams and Thomas Portwood

Despite the efforts of police and prosecutors to conceal the truth, Chapman might have been spared 14 years on death row had he been represented by competent counsel. Chapman was represented by Robert Adams and Thomas Portwood, both of whom

struggled with alcohol abuse. The attorneys failed to hire an investigator to look into the Conley killing, and the investigator they hired for the Ramseur killing appears to have done nothing more than administer a lie detector test (which Chapman passed), visit the crime scene, and make one unsuccessful attempt to speak with a witness. There were multiple hints in the prosecutor and court files that Ms. Conley had been seen alive after Mr. Chapman was supposed to have killed her, but counsel either failed to look at the files or did not examine them closely.

Adams has been sanctioned by the bar multiple times and Portwood died of alcohol-related illness. Portwood represented several other men whose trials resulted in death sentences, including Ronald Frye, who was executed in 2001.

(News reports here and here. You can read the judge's full order here.)

Edited 04.02.08 to add – All charges have been dropped and Glen Chapman has been released from death row. See here.

http://deathwatch.wordpress.com/2008/04/02/breaking-innocent-man-released-from-death-row/

Innocent Man Released from Death Row

From press release:

INNOCENT MAN PUT ON DEATH ROW BY LYING POLICE OFFICER FINALLY SET FREE

NEWTON, NC – Today Glen Edward Chapman, who spent 15 years on North Carolina's death row for crimes he did not commit, is walking out of prison a free man.

Chapman was sentenced to death for the 1992 murders of Betty Jean Ramseur and Tenene Yvette Conley in Hickory. Last November Superior Court Judge Robert C. Ervin ordered a new trial for Chapman, citing withheld evidence, "lost, misplaced or destroyed" documents, the use of weak, circumstantial evidence, false testimony by the lead investigator, and ineffective assistance of defense counsel. Ervin also cited evidence that Ms. Conley may not have been murdered, but instead died of a drug overdose.

Catawba County District Attorney James Gaither, Jr. dismissed the charges against Chapman today.

Chapman's lawyers, Frank Goldsmith and Jessica Leaven, are very pleased with their client's release for which they fought long and hard. "Edward has always maintained, and we have always believed in, his innocence," said Goldsmith. "Justice has not been served for the families of Ms. Ramseur and Ms. Conley, and we hope their deaths will be reinvestigated." Goldsmith added, "We are extremely grateful to Judge Ervin and to Mr. Gaither for doing the right thing."

Judge Ervin found that each of the lead detectives assigned to the cases by the Hickory Police Department had covered up exculpatory evidence that pointed to Chapman's innocence and that was inconsistent with the State's theory of his guilt. In addition, Judge Ervin found that Hickory Police Department Detective Dennis Rhoney had perjured himself at Chapman's original trial, and that his testimony at the hearings conducted by Judge Ervin was "not credible."

In his order, Judge Ervin also cited evidence presented by a forensic pathologist, Donald Jason, who found the cause of Conley's death "undetermined." Dr. Jason found no life-threatening injuries and suggested a possible cocaine overdose. Judge Ervin wrote that Dr. Jason's report "strongly indicates that Terene Conley's death was not a murder. The notion that a defendant can be put to death when no crime in fact occurred is troubling at best."

Additionally, Judge Ervin found ineffective assistance of counsel by Chapman's trial attorneys, Robert Adams and Thomas Portwood, for failing to adequately investigate the facts. Adams has been disciplined by the North Carolina State Bar and Portwood died of an alcohol-related illness. Portwood represented Ronnie Frye in his death penalty trial less than a year before Chapman's trial started. Portwood admitted that he was drinking 12 shots of rum nightly during Frye's trial. Frye was executed in 2001. Portwood was later removed from another death penalty case and entered alcohol detoxification treatment.

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Congratulations to Mr. Chapman and his attorneys. A victory hard-fought and long deserved.

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