STATE OF NORTH CAROLINA
GASTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 08 CRS 068290

STATE OF NORTH CAROLINA	)	
	)	
	)	AMENDMENT TO DEFENDANT'S
v.	)	MOTION FOR APPROPRIATE RELIEF
	)	
	)	
MARK BRADLEY CARVER,	)	
Defendant.	)	

NOW COMES the Defendant, Mark Bradley Carver (Carver), by and through undersigned counsel, and respectfully moves this Court, pursuant to N.C. Gen. Stat. § 15A–1415(g), to amend his Motion for Appropriate Relief (MAR) filed on December 8, 2016 to include the following information and additional claims for relief. All the facts, legal claims, and arguments pled in Carver's MAR are incorporated herein as if fully pled.

STATE'S ANSWER TO CARVER'S MAR

1. In the State's Answer to Defendant's MAR (State's Answer), the State writes "[i]t is admitted that a plea offer was made. Except as expressly admitted the allegation is denied. By way of further answer, the prisons are full of people who rejected the plea and were convicted. It is more an indication of foolishness than innocence." (State's Answer ¶ 199.) This statement exemplifies the type of simple-mindedness and tunnel vision that has plagued this case since the beginning of the investigation. It is also belied by the fact that plea offers are often rejected by men and women who have since been proven innocent during post-conviction proceedings. Many North Carolina exonerees—including North Carolina Center on Actual Innocence clients Dwayne Dail,[1] Larry Lamb,[2] and Greg Taylor[3]—turned down plea offers with the belief that their innocence would be proven at trial.

2. Importantly, the State correctly concedes additional significant facts in its Answer that go to the heart of Mr. Carver's claims, including:

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[1] Dwayne Dail refused a plea of three years probation for a reduced charge. He was exonerated in 2007 after spending eighteen years in prison for a rape he did not commit.

[2] Larry Lamb refused a plea of six years incarceration. He was exonerated in 2013 after spending twenty years in prison for a murder he did not commit.

[3] Greg Taylor turned down a plea *after* his conviction, for which he received a life sentence, and an evidentiary hearing on his first MAR. The attorney who represented him for his MAR signed an affidavit stating, "Mr. Taylor informed me that Tom Ford, who prosecuted the case, offered him a plea to a lesser offense if he would become a State's witness against co-defendant Johnny Beck, but Mr. Taylor refused this offer. Mr. Taylor told me that the reasons he refused the offer was because he did not want to plead guilty to a lesser offense of a crime he did not commit and because he would not lie about Johnny Beck to make things easier on himself." Greg Taylor was exonerated by a three-judge panel in 2010 after spending seventeen years in prison for a murder he did not commit.

a. Carver was excluded from the DNA on the ligatures. (State's Answer ¶ 4);
b. Carver was excluded from the fingernail scrapings of the victim. (State's Answer ¶ 5);
c. The time of death was between 11:10 a.m. and 1:07 p.m. based upon the YMCA surveillance footage and the first 911 call. (State's Answer ¶ 32);
d. Det. Terry knew that the camera's frame counter could advance without film. (*See* State's Answer ¶ 37);
e. Tpr. Souther was not wearing gloves and had incorrectly been told by law enforcement that the car had already been processed for prints and DNA when he began his inspection. (State's Answer ¶ 48);
f. The swabbing of the victim's car for DNA was not conducted for two months after the murder. (*See* State's Answer ¶ 49);
g. Contrary to standard protocol, none of the law enforcement agencies present at the crime scene maintained a crime scene log. (State's Answer ¶ 51);
h. The photos of the crime scene show ungloved contact of the officers with the victim's vehicle. (State's Answer ¶ 53);
i. Unidentified DNA was found on two of the ligatures used to murder the victim (State's Answer ¶ 88 ii);[4]
j. The State tested and compared the DNA of multiple alternate suspects after Carver's trial date had been set (State's Answer ¶ 92);
k. The Richland County Sheriff's Department Forensic Sciences Laboratory (RCSD Lab) that conducted more sensitive Y-testing on the ligatures was never asked by the State to compare the DNA of any of the alternate suspects to those ligatures—the State was only interested in whether Carver and Cassada's DNA matched. (*See* State's Answer ¶ 96)

CORRECTION TO CARVER'S MAR

3. Footnote 10 in the MAR incorrectly states that Y-STR testing was not conducted at the RCSD Lab.

4. Y-STR testing was conducted and compared to Carver's and Cassada's Y profiles. Both were excluded as contributing to the Y profile found on one of the ligatures. (Ex. 27.)[5]

5. The RCSD Lab was never provided with the DNA profiles of the additional suspects, so their Y profiles were never compared to the evidence.

OUTSTANDING DISCOVERY REQUEST

6. On April 11, 2016, undersigned faxed a request to the Mount Holly Police Department (MHPD) requesting an inventory of evidence pursuant to N.C. Gen. Stat. § 15A–268(a7).

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[4] Importantly, the unidentified DNA is male DNA.

[5] To avoid any confusion, the exhibit numbering in the AMAR continues where the exhibit numbering ended in the MAR. Exhibit 27, referenced in paragraph 4 above, was included with the MAR.

7. After receiving no response, a staff member of the N.C. Center on Actual Innocence called the MHPD and spoke to Officer Addis who stated that our request had been forwarded to DA Locke Bell and we would need to speak with DA Bell about the matter.

8. On March 22, 2017, Carver filed a Motion to Preserve and Produce Evidence requesting complete postconviction discovery from the State.

9. On May 17, 2017, the Court entered an order directing the State to provide postconviction discovery to the defense within twenty days.

10. On June 13, 2017, after nearly a month had passed without the defense receiving any discovery from the State, Carver filed a Motion Re Contempt.

11. On June 16, 2017, the defense finally received discovery from the State, which included discovery from the MHPD.

12. After reviewing the documents provided, undersigned determined that the evidence retention records were not complete. On April 26, 2018, undersigned emailed the MHPD Chief of Police and copied DA Bell and again requested an evidence inventory from MHPD. (Ex. 66.)

13. To date, undersigned has not received an evidence inventory or any form of response from either the MHPD or District Attorney's Office.

14. Although the defense needs a complete inventory to determine what evidence was collected and still exists, specifically the defense has been trying to ascertain the whereabouts of Ms. Yarmolenko's laptop. The defense has never been provided the complete contents of that laptop and believes its contents could provide clues as to the actual perpetrator of this crime.

FEDERAL BUREAU OF INVESTIGATION FILE

15. Post-conviction discovery provided to Carver included the Federal Bureau of Investigation (FBI) file from its assistance in the initial stages of the investigation.

16. Review of that file provides additional supporting evidence of local law enforcement's tunnel vision during the investigation of Ms. Yarmolenko's murder. Despite requesting the FBI's assistance, there is no indication that law enforcement or the DA's office pursued several of the important and objective investigative steps suggested by the FBI, including:

    a. "Consider analyzing the victim's shoes for DNA evidence, in the event that the offender(s) dragged her by her feet." (Ex. 36 at 3.)

    b. "Attempt to locate and recover dried blood, which was seen by NCAVC personnel in crime scene photographs, from the area where the victim's right ear was positioned. Given the nature of the crime scene, it is possible that the blood did not belong to the victim." (Ex. 36 at 3.)

c. "Consider conducting a thorough investigation regarding construction workers at a nearby new housing complex, and determine who has left the job site since the time of the captioned homicide." (Ex. 36 at 4.)

17. It is unclear whether local enforcement ever attempted to obtain the FBI file in this case prior to undersigned counsel requesting it. However, according to an FBI memorandum dated September 19, 2008, MHPD did participate in a conference call with the FBI on July 11, 2008. Therefore, at a minimum, MHPD was told verbally of the FBI's thoughts on potential investigative avenues. (Ex. 36 at 2.) The memorandum also states that a meeting between the FBI, MHPD, and SBI was to take place in the near future. (Ex. 36 at 4.)[6]

ADDITIONAL INFORMATION RELEVANT TO THE FIRST CLAIM FOR RELIEF

CARVER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT

a. Failure to Adequately Consider Mark Carver's Intellectual Disabilities

18. Despite Carver's obvious intellectual limitations, Carver's attorneys not only did not have him evaluated, but they inexplicably relied on him to make the important strategic decisions of whether they should put on evidence and witness testimony on his behalf.[7]

19. The US Supreme Court has held that,

> once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client.

Wainwright v. Sykes, 433 U.S. 72, 93 (1977).

20. Similarly, North Carolina Rule of Professional Conduct 1.2(a) states that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall *consult* with the client as to the means by which they are to be pursued" (emphasis added). The rule goes on to state that counsel "shall abide" by a client's decision in the following circumstances: 1) as to the plea entered, 2) whether to waive a jury trial, and 3) whether the

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[6] Law enforcement notes that are possibly in SBI Agent Crow's handwriting indicate a meeting took place between the MHPD, FBI and CMPD on September 3, 2008. The notes state that "[t]he purpose of the meeting was to coordinate FBI resources (Behavior scientist)." (Ex. 37.) Nothing in the FBI or other law enforcement files includes a behavioral analysis or names the behavioral scientist assigned to the case. It is unclear whether this is because the information was never documented, or if it was documented and was not provided to the defense.

[7] Not only were Carver's intellectual disabilities not investigated, there was little defense investigation at all. Trial counsel's file does not include the many witness interviews one would expect to see in a murder investigation. Eric Jones, who previously fished with Cassada and Carver at the same fishing spot where Carver was the day of the crime, was never interviewed despite his name being provided to trial counsel by Cassada. (*See* Ex. 38.)

client will testify. The rule does not leave it to the client to decide whether to put on any evidence.

21. The Supreme Court of North Carolina has held that "the type of defense to present and the number of witnesses to call is a matter of trial tactics, and the responsibility for these decisions rests ultimately with defense counsel." *State v. Covington*, 205 N.C. App. 254, 258, 696 S.E.2d 183, 186 (2010) (quoting *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 211 (1991)).

22. Carver's lead trial counsel acknowledged to undersigned counsel that Carver did not understand the gravity of the situation and was "naïve about the process." Despite that, he continued to ask Carver to make key decisions about his defense, including whether to put any evidence before the jury.

23. Defense counsel clearly recognized Carver's intellectual limitations, as there is a note in the defense file that trial counsel received approval for payment of a psychologist. (Ex. 39.) Nothing in the file suggests a psychologist was ever consulted—despite the funds being approved – and the psychiatrist referenced has confirmed that she was never consulted.

24. Had trial counsel pursued evaluation of their client, they would have learned that Carver's IQ test results make clear that he is not capable of making strategic decisions. (*See* Ex. 18.)

25. Carver put his faith in his counsel's ability to navigate the legal system. In abdicating their duties and leaving the important strategic decision of whether to put on *any* evidence up to Carver, Carver's trial counsel deprived him of his Sixth Amendment right to counsel.

26. As Carver's trial counsel never had his competency evaluated, and Carver did not testify, the Court had no reason to suspect he was unable to assist with strategic decisions. As a result, the Court inquired as to whether Carver wanted to put on evidence and explained the decision was his to make. (Trial Tr. 337–40.) Carver's trial counsel, who had enough conversations with him to understand his limitations, had the responsibility to raise the issue of Carver's competency with the Court.

c. Failure to Adequately Challenge the Touch DNA Evidence

i. DNA Mixture Analysis

27. Although many people believe DNA analysis is a completely objective science, in reality, the more sensitive DNA testing becomes, the more complicated and subjective the analysis can also become. This subjectivity can result in the same unintentional biases that affect other areas of the criminal justice system.

28. A DNA sample is analyzed to develop an identification profile by comparing repeating alleles at specific loci. If there is a partial profile, alleles may have failed to show up ("drop-out"). Imperfections in analysis can also create false peaks that are mistaken for alleles ("drop-in").

29. "With mixtures . . . [t]he number of alleles in a sample doubles in the case of two contributors, and triples in the case of three . . . The analyst must determine how many contributors are involved, and which alleles belong to whom. If the sample is very small or degraded—the two often go hand in hand—alleles might drop-out in some locations, or appear to exist where they do not." (Ex. 61 at 10–11.)

30. Mixed or partial sample allele interpretation requires more subjectivity and discretion of the analyst.

    a. In 2010, Itiel Dror (Dror), a neuroscientist at University College London and head of Cognitive Consultants International, and Greg Hampikian (Hampikian) of Boise State University in Idaho, began a case study on the analysis of DNA evidence in a 2002 rape conviction:

> Dror and Hampikian obtained paperwork from a 2002 Georgia rape trial that hinged on DNA typing: The main evidence implicating the defendant was the accusation of a co-defendant who was testifying in exchange for a reduced sentence. Two forensic scientists had concluded that the defendant could not be excluded as a contributor to the mixture of sperm from inside the victim, meaning his DNA was a possible match; the defendant was found guilty.
>
> Dror and Hampikian gave the DNA evidence to 17 lab technicians for examination, withholding context about the case to ensure unbiased results. All of the techs were experienced, with an average of nine years in the field. Dror and Hampikian asked them to determine whether the mixture included DNA from the defendant.
>
> In 2011, the results of the experiment were made public: Only one of the 17 lab technicians concurred that the defendant could not be excluded as a contributor. Twelve told Dror and Hampikian that the DNA was exclusionary, and four said that it was inconclusive. In other words, had any one of those 16 scientists been responsible for the original DNA analysis, the rape trial could have played out in a radically different way. Toward the end of the study, Dror and Hampikian quote the early DNA-testing pioneer Peter Gill, who once noted, "If you show 10 colleagues a mixture, you will probably end up with 10 different answers" as to the identity of the contributor.

(Ex. 61 at11–13.)[8]

[8] The study was published in 2011 in *Science & Justice*, a peer-reviewed journal published on behalf of the Forensic Science Society and the International Society for Forensic Genetics. It is included with this AMAR as Exhibit 63.

31. The issues with interpretation of mixtures and the updated SWGDAM guidelines are affecting cases nationwide.

    a. As recently noted in a California case where a petition for the writ of habeas corpus was granted in Superior Court, "[f]or several years leading up to . . . 2011, concern arose within the forensic scientific community regarding some of the techniques used by DNA laboratories in the interpretation of mixture samples. On January 14, 2010, the Scientific Working Group for DNA Analysis ('SWGDAM')[9] promulgated recommendations that the group concluded were necessary to the accuracy of mixture interpretation methods." (Ex. 62 at 11.)

    b. In January 2018, the San Diego District Attorney informed the attorneys representing 254 defendants in her office's jurisdiction that their convictions, between 2003 and 2016, relied in part on using an outdated DNA interpretation method as the 2010 SWGDAM DNA mixture interpretation guidelines were not taken into account in the cases. The DA acknowledged that the 2010 SWGDAM guidelines "call for a more conservative interpretive methodology of low level mixtures. Thus, there is the potential for change in the statistics and conclusions in testing that occurred prior to adoption of these guideline revisions by our local crime labs." (Ex. 41 at 1.) The letter went on to state that "[i]n appropriate circumstances, we will request one of the labs to conduct a recalculation using the 2010 guidelines revisions in addition to any subsequent revisions." (Ex. 41 at 2.)

32. Carver's trial took place in 2011, after the SWGDAM DNA mixture interpretation guidelines were issued. As the only physical evidence connecting Carver to the crime scene was a partial DNA profile from a mixture, competent counsel would have highlighted the issues with DNA mixture analysis and the lack of adherence to the SWGDAM guidelines through cross-examination and the use of a defense expert.[10]

33. A competent challenge of the DNA mixture evidence should also have included the fact that had the DNA testing been conducted by the FBI Lab, which state labs look to when considering proper standards, the results would have been reported as being inconclusive.

34. Trial counsel's failure to expose the inherent subjectivity and potential for flawed analysis of the DNA mixture resulted in the lost opportunity to discredit the only physical evidence the state used against Carver.

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[9] The SWGDAM guidelines released in 2010 are attached as Exhibit 40.

[10] Although not precedential to this Court, it should be noted that another first-degree murder case in Gaston County, *State v. Michael Patrick Ryan*, where analysis of a touch DNA mixture was critical in the case, was overturned by the Honorable W. Erwin Spainhour on February 3, 2017. Judge Spainhour's Order is attached as Exhibit 48. In Ryan's case, as in Carver's, trial counsel did not offer evidence from a DNA expert. Judge Spainhour concluded that at Ryan's May 2010 trial, the SBI analyst who testified "used scientifically incorrect guidelines and protocol in her interpretation of DNA samples as the basis for her testimony . . .The protocols of DNA analysis used by Harmon are no longer accepted by experts in the field of DNA analysis." (Ex. 48 at 3.) The analyst at Ryan's trial "made subjective interpretations of the data that fell below and were inconsistent with scientifically acceptable standards. She failed to acknowledge anomalies stemming from the poor qualities of the samples." (Ex. 48 at 4.) As argued in Carver's 2016 MAR, the same is true in Carver's case.

ii. Transfer of DNA Evidence

a. Video Evidence

35. Despite having footage from local news stations that showed law enforcement touching the victim's vehicle at the crime scene without gloves, Carver's trial counsel failed to introduce the footage.[11] (Def. Exs. 42, 43.) Had counsel done so, the jury would have seen with their own eyes that the crime scene was not properly processed, that critical locations of the vehicle were contaminated by law enforcement, and that there was a very real possibility that the contamination impacted the reliability of any DNA results obtained from the vehicle.

36. In footage obtained from Fox Charlotte, a Gaston County Police Department (GCPD) officer believed to be Crime Scene Investigator Jim Workman (CSI Workman), is seen rubbing the victim's car above the driver side back door with his bare hands—the same spot where the State alleged there was DNA which was tied to Carver. As he is *rubbing the car with his bare hands*, CSI Workman has the following exchange with a voice off-camera (presumably Sgt. Jeff Skidmore of MHPD):

> Workman: Skidmore – Come down here. I need to fingerprint you to see if it matches you.
> Skidmore: I didn't touch it. I promise you I didn't touch it.
>
> (laughter off-screen)
>
> (Def. Ex. 42.)

37. Not only is this banter disrespectful to the victim, but CSI Workman's conduct contaminated the critical area of the vehicle where the lab later claimed Carver's DNA was located. As CSI Workman was the very individual who was tasked with collecting the DNA evidence from the scene, not only should he have understood the need to exercise caution and follow proper crime scene protocols, he should have ensured others did as well.

38. Interestingly, an October 8, 2010 letter from the State to Carver's and Cassada's trial counsel documents that the State inquired among the MHPD and GCPD as to whether anyone had touched or been seen touching the evidence at the crime scene with their bare hands. (Def. Ex. 32.) The letter specifically stated that CSI Workman had not touched the car without gloves on and did not see anyone else touch the car without gloves on. (Def. Ex. 32 at 2.) The footage from Defense Exhibit 36 clearly shows this statement was false and should have been proven false at trial through the introduction of the footage by counsel.

39. In other footage obtained from News 14 Carolina, an unidentified officer wearing a black vest is seen resting his bare arm on the open driver door. (Def. Ex. 43.) This is further evidence

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[11] Defense Exhibits 42 and 43, the aforementioned local news footage, are on the DVD included with this filing. They have been reformatted to be more user-friendly for the convenience of the Court, but the footage has not been changed. The originals are available upon request.

that law enforcement irreparably contaminated the crime scene and, had the footage been shown at trial, it undoubtedly would have impacted the jury's confidence in the reliability of the investigation.

40. The Ninth Circuit of the United States Court of Appeals has stated that "[a] lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises *sufficient* doubts as to that question to undermine confidence in the verdict, renders deficient performance." *Reynoso v. Giurbino*, 462 F.3d 1099, 1112, 06 Cal. Daily Op. Serv. 8367 (9th Cir. 2006) (quoting *Lord v. Wood*, 184 F.3d 1083, 1093, 99 Cal. Daily Op. Serv. 5603 (9th Cir. 1999) (citations omitted)).

41. In *Hinton v. Alabama*, the United States Supreme Court noted that the merit of an ineffectiveness claim hinges on the reasonableness of the counsel's efforts in light of the totality of the circumstances. *Hinton v. Alabama*, 571 U.S. 263, 273 (2014).

42. Notes in trial counsel's file make clear they were aware of the video and the exchange between Workman and Skidmore, as well as other instances where law enforcement touched the car without gloves on. (Exs. 44–46.)

43. Trial counsel's failure to present the compelling video evidence of crime scene contamination by law enforcement and failure to follow standard law enforcement procedure cannot be considered reasonable in light of the fact that the DNA evidence from the crime scene was the *only* evidence alleged to connect Carver to the crime scene.[12] There cannot be a strategic basis for failing to adequately challenge the evidence and the decision not to provide the jury with the visual evidence of the contamination of the crime scene was prejudicial to Carver.

b. Failure to Follow Expert Advice

44. Carver's trial counsel hired Dr. Ron Ostrowski (Dr. Ostrowski) as its DNA expert. Although counsel may claim that it was a strategic decision not to put on evidence and to rely on the expert in preparing for the cross-examination of the State's forensic witness, there cannot be a reasonable strategic reason for failing to use critical sections of the scientific expert's recommended questions during the cross examination.[13]

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[12] Brandon Garrett, a professor at the University of Virginia School of Law who has studied and written about numerous wrongful convictions, found that "in cases of DNA exonerees in which invalid, overstated, or erroneous forensics were presented at trial, '[d]efense counsel rarely made any objections to the invalid forensic science testimony in these trials and rarely effectively cross-examined forensic analysts who provided invalid science testimony.'" Brandon L. Garrett, *Constitutional Regulation of Forensic Evidence*, 73 Wash. & Lee L. Rev. 1147, 1152 (2016) (quoting Brandon L. Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA L. Rev. 1, 89 (2009)). Attached as Exhibit 47. Garrett also notes that "[f]ar more often in recent years, one sees courts granting postconviction relief in cases in which the defense failed to adequately litigate forensics." Ex. 47 at 1166–67.

[13] Trial counsel further disadvantaged their client by providing the expert with a biased summary which stated that trial counsel did not believe their client's or his co-defendant's denials of touching the car. Instead of asking the expert to determine whether Carver's statements could be true, trial counsel assumed they were not and communicated those assumptions to their expert. (*See* Ex. 50.) When counsel inexcusably fails to investigate certain evidence without any strategic basis, that conduct is "deficient" under *Strickland*. *See Rompilla v. Beard*, 545 U.S. 374 (2005). Carver's

a. On February 20, 2011, Dr. Ostrowski provided two memorandums with questions he suggested the defense ask during cross examination of the State's lab analyst. (Exs. 51, 52.) One of the memorandums was edited during the trial on March 17, 2011. (Ex. 53.)

b. Two critical sections of the first memorandum from the defense DNA expert were ignored by trial counsel and included questions relating to the real concerns regarding transfer of DNA. They also referenced the video of law enforcement touching the car without protective gloves and the fact that Carver handed law enforcement his identification at the scene. (Ex. 51 at 3, 5.)

    i. Similar questions regarding transfer and law enforcement touching the vehicle were also included in the second memorandum. (Ex. 52 at 5–6.)

c. The expert suggested having the lab analyst discuss the need for population genetics and following up with scholarly articles. None of which was done by trial counsel. (Exs. 51 at 2–3, 52 at 2–3.)

d. Importantly, discussion of the Y-STR analysis conducted at the Richland Lab was not broached with the State's expert. Had trial counsel followed its expert's advice, it would have used the suggested cross examination questions pointing out that an unknown male profile—from which Carver was excluded—was on the ligatures. (Ex. 52 at 4–5.)

e. The last memorandum, edited during the trial, points out the unidentified DNA on the bungee cord and the fact that no DNA evidence connected Carver to the murder weapon. (Ex. 53 at 3.) Again, trial counsel did not confront the lab analyst with these critical points.

f. In June 2017, the expert hired by the defense at trial still maintained that "given the tangential evidence of the crime scene I still believe that secondary transfer was the proper way to defend Mr. Carver." (Ex. 60.)

45. As trial counsel did not question the State's expert using the strategy endorsed by their own expert, they cannot claim to have sufficiently relied upon cross-examination alone to adequately challenge the DNA evidence.

iii. SWGDAM Guidelines as New Evidence

46. There is no indication in the defense file that either of Carver's trial attorneys were aware of the SWGDAM guidelines released in 2010, despite the fact that the guidelines were available for over a year prior to Carver's trial.

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trial counsel did not conduct any meaningful investigation to assess whether Carver's account could be supported by the evidence.

47. Although the evidence more strongly supports Carver's ineffective assistance of counsel claim in this regard, if the Court determines concludes counsel was not ineffective because an objectively reasonable attorney would not have been able to discover the scientific shift prior to Carver's trial—then the SWGDAM guidelines must be considered new evidence and Carver should be granted a new trial on that basis.

iv. Conclusion

48. This Court should find, as the Supreme Judicial Court of Massachusetts did in Commonwealth v. Epps,[14] that its

> touchstone must be to do justice, and that requires.... a new trial where there is a substantial risk of a miscarriage of justice because a defendant was deprived of a substantial defense, regardless whether the source of the deprivation is counsel's performance alone, or the inability to make use of relevant new research findings alone, or the confluence of the two.

Commonwealth v. Epps, 474, Mass. 743, 767, 53 N.E.3d 1247, 1266 (Mass. 2016).

49. As in *Epps*, without expert *testimony* from the defense to refute the State's theory, trial counsel "deprived the defendant of an available, substantial ground of defense, and thereby created a substantial risk of a miscarriage of justice."[15] *Id.* at 744, 53 N.E.3d at 1250.

50. Trial counsel did not attempt to illustrate the flaws and necessary subjectivity in the science behind analyzing touch DNA, despite the importance of the DNA evidence to the State's case. This signals failure by counsel to access the readily available SWGDAM report and published peer-reviewed articles showing the increased complexity and difficulty involved in analysis of small sample mixtures of touch DNA evidence—including the potential for contamination of samples.

51. Either Carver's trial counsel was ineffective for inadequately challenging the State's DNA analysis with the new SDWGDAM guidelines, or the shift in interpretation standards is new evidence, pursuant to *U.S. v. Cronic*, 466 U.S. 648 (1984), available postconviction that no attorney could have adequately challenged at the time of trial. Either way, the State's evidence at trial was not subjected to the necessary examination required of a fair trial, and therefore, Carver is entitled to a new one.

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[14] Although *Epps* was a shaken baby syndrome case, there are many similarities between the issues in *Epps* and those in the instant case. Both cases revolve around questionable scientific evidence and both Epps and Carver denied committing the crimes of which they were accused from the moment they were questioned. Importantly, after consulting experts, in neither case did trial counsel call an expert to the stand to contradict the State's questionable findings.

[15] The Michigan Supreme Court, in *People v. Ackley*, and the Sixth Circuit, in *Richey v. Bradshaw*, have also concluded that consulting an expert is not the end of trial counsel's duty to his client. *See People v. Ackley*, 497 Mich. 381, 870 N.W.2d 858 (2015); *See Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007).

d. Failure to Adequately Question Carver's Alleged Knowledge of Ms. Yarmolenko's Height

52. Not only did trial counsel fail to adequately counter the State's argument that Carver knew Ms. Yarmolenko's height with the available video evidence,[16] which shows that he was merely mimicking law enforcement, trial counsel actually argued *against* the footage being admitted into evidence unless Agent Crow was called by the State to testify. (Trial Tr. 185–87.)

    a. Despite the fact that Agent Crow was not called to testify, if the video was admitted into evidence and played for the jury, the necessary cross examination questions could have just as easily been asked of Det. Terry, who was present during Carver's interview and was called to testify by the State.

53. Trial counsel went even further and did not correct the State when it said that admissions against interest were included in the video.[17] (Trial Tr. 188–90.)

54. The State used Carver's alleged knowledge of Ms. Yarmolenko's height as an indication of guilt. Along with the Carver's proximity to the body and unchallenged DNA evidence was the third leg of the stool the State used to convict Carver. Had trial counsel allowed the video to be shown, or introduced it into evidence themselves, the State's assertions would have been discredited with visual evidence. That evidence would have shown how Carver was being manipulated, knocked the third leg off the stool, and the jury likely would have reached a different result.

f. Failure to Obtain and Use at Trial Carver's Medical Records Which Prove He was Physically Incapable of Committing this Crime

55. Defense notes that appear to have been taken while watching video of law enforcement interviews of Carver, indicate they were aware he suffers from carpal tunnel syndrome. "Carpal tunnel" is referenced in their notes, but never "radial tunnel". (Ex. 59 at 1.)

    a. Although Carver does have carpal tunnel syndrome, it is more significant that he has been diagnosed and treated for radial tunnel syndrome which is more severe and is what truly limits him physically.

    b. Trial counsel was unaware of this precisely because they failed to obtain Carver's medical records to prove his innocence at trial.[18]

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[16] The video was included with Carver's MAR as Defense Exhibit 29.

[17] Trial counsel has stated to the undersigned that he would change his approach now and put the video in so that the jury could see how simple Carver is and that he never gets upset or loses his temper in the video.

[18] There is also no indication trial counsel attempted to obtain Cassada's medical records to show his physical limitations, despite being aware of his heart condition. (*See* Ex. 59 at 2.) As the State's theory was that the two men committed the crime together, both records should have at least been obtained and reviewed for Carver's defense.

56. As stated in Carver's MAR, there is no reasonable strategy that would justify not even *obtaining* the confidential medical records for review prior to trial. Had information regarding Carver's severe physical limitations been submitted to the jury, the verdict would have been different.

g. Admission of a Crucial Fact by Trial Counsel Adamantly Disputed by Carver

57. In their opening and closing arguments, Carver's trial counsel made statements admitting Carver touched Ms. Yarmolenko's car, despite Carver continually maintaining to law enforcement and his own counsel that he never touched or was near her car.

    a. Although the opening arguments were not recorded or transcribed, the State's notes from the Defense opening include that Carver's trial counsel stated, "[t]he fact that a person touched the car—doesn't mean he is guilty of murder." (Ex. 54a., Ex. 54b at 4.)

    b. This indicates Carver's counsel conceded to the jury at the very beginning of the trial that Carver had, in fact, touched the victim's vehicle despite his continuous denials and the expert's opinion.

58. Trial counsel picked up on the State's theme from its opening argument that "forensics don't lie" and weaved it through the defense's first closing argument. (Ex. 55.)[19]

59. After adopting the flawed, but common notion, that forensics don't lie, trial counsel pointed out avenues law enforcement never investigated. Inexplicably, it was phrased in ways that actually made it appear likely evidence of Carver's *guilt* could have been missed during the investigation.

    a. Trial counsel told the jury,

    > Why . . . didn't the police go search his vehicle? What if her DNA were found in his car? Would that not be important in this case? Her DNA in his vehicle. Was it ever searched? Was a bungee cord found in his vehicle? No. Is that not important in this case? Yes it is. It is critical to this case. His car's still there when the police are there. They didn't search his vehicle. If there's DNA in his vehicle, case is over. They never did that. Forensics don't lie. (Ex. 55 at 2–3.)

    b. Counsel later states, "[h]ow about the clothing that Mark Carver was wearing May the 5th, 2008? The police saw him that day. What was he wearing? You don't

[19] The closing arguments were not transcribed, however, trial counsel provided the State and Carver with a video recording of the defense's first closing argument at trial. Attorney Ashley Riggleman transcribed that video recording. The transcript is attached as Exhibit 55 and the video of the closing argument is on the enclosed disk as Exhibit 55a.

know. They didn't present any evidence about that. Did they test his clothing for DNA?" (Ex. 55 at 4.)

c. Incredibly, counsel again tells the jury that Carver touched the victim's vehicle, despite his client's consistent and adamant statements to the contrary:

> The evidence that the State presented was that Mr. Carver touched the Saturn. When was it touched? DNA cannot prove at what time that took place. When was that done? At the time she was—when she was dead? Before she was dead? Was she taking pictures out in the woods—as they want you to believe? She's down there taking pictures of the kayakers. Or is she even in the car when it was touched? You don't know. They haven't proven that. (Ex. 55 at 5.)

d. Trial counsel drives this point home by later stating, "the State must prove that the defendant's act was a proximate cause of Mr. Yarmolenko's death. His act. What was his act? Touched the car—that's all they can prove. His act proximately caused her death. By touching her car, that killed her. How did that happen? No." (Ex. 55 at 7.)

60. Although, admittedly, there is no case law directly on point, the recent United States Supreme Court decision relating to ineffective assistance of counsel in *Buck v. Davis* should be considered by this Court. *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759 (2017). In *Buck*, the defendant's trial counsel elicited testimony from its own witness during the sentencing phase of a capital trial that black individuals were more likely to act violently based solely upon their race. The jury returned a sentence of death.

61. The US Supreme Court determined that "the principal point of dispute during the trial's penalty phase was whether Buck was likely to act violently in the future." *Id.* at 16, 137 S. Ct. at 765. The Court found that the question before the Court regarding the prejudice prong of the *Strickland* analysis, was "whether Buck had demonstrated a reasonable probability that, without [the testimony from the psychologist] at least one juror would have harbored reasonable doubt about whether Buck was likely to be violent in the future." *Id.*

62. The Court noted that "[w]hen a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value."[20] *Id.*

63. Similarly, the substantive dispute in Carver's case was whether the DNA evidence—the only physical evidence presented as connecting him to the crime scene—was valid. In telling the jury that Carver did in fact touch the car, Carver's counsel in effect conceded the most substantive dispute in the case and deprived Carver of his right to a reasonable defense.

64. Although Carver did not testify at trial, Det. Terry's testimony was that Carver denied touching the car to law enforcement. Carver's counsel's statements during closing were more than enough to cause the jury to believe, incorrectly, that Carver not only lied to law enforcement—

[20] The Court reversed and remanded Buck's sentence of death.

but admitted to his attorneys that he had in fact touched the victim's car. That alleged, but false, physical evidence was the only thing connecting Carver to the victim.

65. When counsel admits an element of a charged offense, the IAC inquiry turns on a *Strickland* analysis of whether there was a strategic reason for the concession. Although it was not an element of the offense, the touch DNA evidence was critical evidence as it was the only evidence purporting to connect Carver to the crime scene. As it was inconsistent with all the other physical evidence, Carver's defense team could not have had a reasonable strategic basis for not only failing to adequately challenge it, but conceding it.

h. Conclusion

66. In order to prove ineffective assistance of counsel, the proof necessary is less than a preponderance of the evidence: "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). Where counsel made several errors in violation of *Strickland's* first prong, their prejudicial effect should be assessed cumulatively. *Williams v. Taylor*, 529 U.S. 362 (2000).

67. As stated in Carver's MAR, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686 (1984). As a result of trial counsel's inaction on the key issues in the case, there was no true adversarial testing of the State's case. It was not a process that can be relied on as having produced a just result.

THIRD CLAIM FOR RELIEF

NEW EVIDENCE HAS BEEN DISCOVERED THAT INDICATES AN INDIVIDUAL OTHER THAN CARVER COMMITTED THE CRIME

68. Newly discovered evidence indicates a man other than Carver murdered Ms. Yarmolenko.

69. A defendant can file a motion for appropriate relief based upon newly discovered evidence if he meets the requirements set out in N.C. Gen. Stat. § 15A-1415(c), which states:

> [A] defendant at any time after verdict may by a motion for appropriate relief, raise 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 . . . and which has a direct and material bearing upon the defendant's [. . .] guilt or innocence.

70. After Carver's conviction, his trial counsel learned that Carol Ingle (Ms. Ingle) had information about the case. A private investigator working for the defense spoke to Ms. Ingle who stated she had been driving down Highway 273 close to 11:00 a.m. on her way to lunch. She saw a blue car, like Ms. Yarmolenko's car she later saw on television, driving very fast down Highway 273. She saw the car turn into the road that goes to the YMCA in Mount Holly. Ms.

Ingle indicated that the car was driven by a young white male, approximately 5'10'', with a stocky build and short medium brown hair. (Ex. 56.)

71. Approximately thirty minutes later, Ms. Ingle headed back home on Highway 273. She saw the same young man walking along the road. (Ex. 56.)

72. Ms. Ingle stated that the young man was neither of the men she had seen in the paper (referring to Carver and Cassada). (Ex. 56.)

73. Ms. Ingle relayed this information to Officer Kevin Murphy with GCPD in 2011. (Ex. 56.) No one from the State followed up with Ms. Ingle about the information she provided.

74. Undersigned counsel spoke with Ms. Ingle and her memory remains consistent with what she previously told the defense investigator and Officer Murphy. Ms. Ingle is certain that the young man she saw walking down the road was the same individual she saw driving the car. She believes the man was in his 20s.

75. Had the jury heard testimony from Ms. Ingle, the verdict likely would have been different. When combined with the information included in Carver's MAR and this amendment, there is more than a reasonable probability that the verdict would have been different.

FOURTH CLAIM FOR RELIEF

THE STATE'S MISREPRESENTATION OF CRITICAL EVIDENCE VIOLATED CARVER'S DUE PROCESS RIGHTS

76. At the time of Carver's trial, the American Bar Association's Criminal Justice Prosecution Function Standard 3-5.8(a) stated: "In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw."[21]

77. The ABA's standard is in line with United States Supreme Court precedent that a prosecutor's improper comments during closing argument may "so infect [] the trial with unfairness as to make the resulting conviction a denial of due process."[22] *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

78. In *Berger v. United States*, the Court asserted that "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States*, 295 U.S. 78, 88 (1935).

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[21] The Third Edition of the ABA's Criminal Justice Prosecution Function Standards was current in 2011 when Carver's trial occurred. The relevant section is available at https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html#5.8.

[22] Although the Court determined the prosecutor's comments in Donnelly's trial were not "so fundamentally unfair as to deny him due process," especially considering the "specific disapproving instructions" given by the Court, *Donnelly*, 416 U.S. at 645, the comments in Carver's case had no such instruction by the Court and went to the central issue at the heart of the case.

79. In its closing argument, the State's notes indicate it told the jury:

> Transfer—NO. BOTH analysts said no! Kristen says the research says it doesn't happen. Both said as far as they know They have NEVER seen it happen. (Ex. 58 at 8.)

80. This statement completely misrepresented the facts to the jury. Not only is transference possible, the State's expert, Karen Winningham, acknowledged during her testimony that transference was possible, although she qualified that it was unlikely.

81. The State further misrepresented the scientific evidence by stating during closing,

> The ligatures still had her DNA because they still were still attached to her. But no other profile could be found. NOBODY's DNA other than IRA was found on the cord – but we know it was wrapped around her neck and tied into a knot. (Ex. 58 at 9.)

82. The lab reports document the exact opposite. According to the lab reports produced by the State Crime Lab, swabs from the bungee cord contained a partial profile that included a DNA mixture. Carver and Cassada were excluded as contributors. Additionally, there was no confirmed match of Ms. Yarmolenko, but she could not be excluded.

    a. Although we cannot say for certain that one of the profiles came from Ms. Yarmolenko, even if it did, there is also a partial profile of at least one unidentified individual that we know for certain was not Carver or Cassada.

    b. Importantly, all of the alternate suspects whose DNA was collected and compared to the evidence could not be excluded from the mixture, meaning any of them could be a second contributor to the mixture.[23]

83. By definition, a mixture includes the DNA of at least two individuals.

    a. Importantly, Carver and Cassada were excluded from that mixture.

    b. Ms. Yarmolenko could not be excluded as the major contributor.

    c. None of the State's alternate suspects whose DNA had been collected were excluded.

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[23] A clear indication of the State's tunnel vision in this case, a note in the State's file states, "Y testing gave us nothing." (Ex. 57.) Y testing could only give the State "nothing" if the only thing the State cared about was Carver and Cassada being implicated by the results. The reality is that the Y testing indicated there was an unidentified Y profile on the bungee cord and at least three Y profiles on the drawstring—none of which belonged to Carver or Cassada. An unbiased investigation and prosecution would have seen the results of the Y testing as providing them with a possible Y profile of the person or persons who actually committed this crime.

d. The minor contributor profile was entered in CODIS.

84. The most plausible explanation for why an unidentified profile was found on one of the murder weapons is that the profile belonged to the actual perpetrator in this case. When the State misrepresented this critical evidence to the jury, Carver's due process rights were violated. Had the jury understood that an unidentified profile was found on the murder weapons, it is likely the outcome would have been different.

85. The introduction of the DNA evidence interpreted under outdated and inferior guidelines, combined with erroneous expert testimony regarding transference, and incorrect and misleading statements by the State during closing undermined the fundamental fairness of Carver's entire trial.

    a. As the closing arguments were not transcribed, the only evidence of the State's closing are its prepared notes of what prosecutors planned to say. (Ex. 58.)

FIFTH CLAIM FOR RELIEF

THE STATE WITHHELD MATERIAL EVIDENCE IN VIOLATION OF BRADY V. MARYLAND

86. Over half a century ago, the Supreme Court of the United States issued a landmark decision in *Brady v. Maryland*, 373 U.S. 83 (1963). The 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." *Id.* at 87.

87. In subsequent cases, the Court further held "that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Further, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434.

88. The Court has also asserted that prosecutors have a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation [. . .] the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles*, 514 U.S. at 437–38.

89. In the present case, a law enforcement officer interviewed Angel Beatty (Ms. Beatty) who lived near the crime scene. She told him that she "saw a black male running up the hill from the direction of the Water's Edge neighborhood He was wet with water or sweat and had a book bag underneath his right arm." (Ex. 64 at 1.)

90. She described him as having "a slender build with short hair and appeared to be in good shape." (Ex. 64 at 1.)

91. In 2016, Ms. Beatty was speaking with Bo Eller who told her that "Scott Wright, a Mount Holly police officer at that time, had come by the water plant and discussed what was going on with the Yarmolenko case. Wright told Bo Eller that the Mount Holly Police had stopped a black male that was running down Highway 273. The black male was carrying a laptop computer and was soaking wet; they were not sure if it was sweat or water." (Ex. 64 at 2.)

92. After that conversation, Ms. Beatty again contacted law enforcement. She left a message with the Mount Holly Police Department, but never heard back. (Ex. 64 at 2.)

93. There is no indication from the file that the Mount Holly Police Department gave this information to the defense or the prosecution.

94. There is a reasonable probability that had this evidence been properly disclosed to the defense, a different result would have been obtained at trial. Had the defense known about Ms. Beatty's statement, combined with the known statement from Officer Wright, a likely alternate suspect could have been identified by the defense at trial.

    a. Although the alternate suspect identified by law enforcement[24] was excluded from several pieces of evidence, as Carver and Cassada were, he could not be excluded from the front passenger seat belt button.

    b. With the evidence against Carver being as weak as it was, testimony from Ms. Beatty and Officer Wright would have impacted the jury's decision.

    c. It is also possible that this alternate suspect was the figure the FBI noted seeing in the YMCA surveillance video "walking directly from the [crime scene] . . . and may actually depict her killer." (Ex. 65 at 2.)

95. The failure of the State to provide the defense with information about this critical witness interview renders Carver's conviction unworthy of confidence.

CONCLUSION

96. Mark Carver's Constitutional rights were violated by his defense counsel's ineffective representation and the State's use of flawed and misleading scientific evidence. As a result, he has been wrongfully convicted and incarcerated for over seven years.

PRAYER FOR RELIEF

[24] It should be noted that we cannot be certain that the individual identified by law enforcement was the black male seen by Angel Beatty as they never asked her to look at a photographic or live lineup.

WHEREFORE, Defendant respectfully prays unto the Court the following:

1. Issue an order vacating the Trial Court's judgment against Defendant and dismiss all charges against him.

2. In the alternative, issue an order for a new trial.

3. Grant such other relief as this Court deems just and proper.

Defendant further requests that the Court issue an order directing the Mount Holly Police Department to provide the defense with a complete inventory of the evidence in their possession pursuant to N.C. Gen. Stat. § 15A–268(a7) and the Court's Order filed May 17, 2017.

Respectfully submitted, this the 20th day of July, 2018.

Attorneys for Mark Bradley Carver:

N.C. Center on Actual Innocence
P.O. Box 52446 Shannon Plaza Station
Durham, North Carolina 27717-2446
Phone: (919) 489-3268

Christine C. Mumma
Executive Director
cmumma@nccai.org
N.C. State Bar No. 26103

Cheryl A. Sullivan
Senior Staff Attorney
csullivan@nccai.org
N.C. State Bar No. 42489

Certificate of Service and Compliance with 15A-1420(a)(1)(c1)

I hereby certify that, via the United States Postal Service, I caused to be served a copy of the above **Amendment to Defendant's Motion for Appropriate Relief** upon District Attorney Locke Bell, in whose prosecutorial district this case was tried:

The Honorable Locke Bell
Judicial District 27A
Gaston County Courthouse
325 North Marietta St., Suite 2003
Gastonia, NC 28052

I further certify, pursuant to N.C. Gen. Stat. § 15A-1420(a)(1)(c1), that, in my professional judgment as a postconviction attorney, there is a sound legal basis for this motion, that this motion is made in good faith, that I have reviewed the trial transcript in the case, and that I have given notice of this motion to the District Attorney's Office, through service of the motion as indicated above. Notice of this motion has also been given to the attorneys who represented Mr. Carver at trial, Mr. Brent Ratchford and Mr. David Phillips, via email. A copy has also been provided to Mr. T. Richard Kane, attorney for Mr. Brent Ratchford.

This the 20th day of July, 2018.

Christine C. Mumma
Attorney for Mark Bradley Carver
Executive Director
N.C. Center on Actual Innocence
P.O. Box 52446 Shannon Plaza Station
Durham, North Carolina 27717-2446
(919) 489-3268
cmumma@nccai.org
N.C. State Bar No. 26103

AMAR EXHIBIT LIST

DOCUMENT	EXHIBIT NO.