STATE OF NORTH CAROLINA COUNTY OF ROBESON	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION Court File Numbers: 93 CRS 15291-15293
STATE OF NORTH CAROLINA v. DANIEL ANDRE GREEN	THIRD SUPPLEMENT TO FIRST AMENDED MOTION FOR APPROPRIATE RELIEF

NOW COMES the Defendant, Daniel Green, by and through undersigned counsel, who files this Third Supplement to his First Amended Motion for Appropriate Relief. This filing supplements other claims previously filed which show that Mr. Green's trial was replete with due process violations and that Mr. Green was deprived of his Sixth Amendment right to counsel.

SUMMARY OF ARGUMENT

After the body of James Jordan was discovered, Dr. Joel Sexton conducted an autopsy during which he noted there was no hole in Mr. Jordan's shirt that corresponded with the bullet wound in his upper right chest area. Later, Agent R.N. Marrs of the State Bureau of Investigation noted a hole in the shirt contradicting the findings of Dr. Sexton. No one, including the prosecutor or defense attorneys, raised this significant and material conflict, which suggested tampering with evidence. Mr. Green deserves a new trial because this evidence of tampering violated his due process rights. Additionally, he was deprived of the effective assistance of counsel when his trial lawyers failed to investigate this issue prior to trial or raise this inconsistency before the jury at trial.

FACTUAL SUMMARY

A. When Dr. Joel Sexton performed the autopsy he looked for but did not find a hole in the right chest area of the shirt to correspond with the entry wound into the body.

On July 22, 1993, Carolyn Robinson took a Polaroid picture of James Jordan ("Mr. Jordan") standing in her driveway while wearing a white, patterned shirt. *See* Tr. 119–21, State's Exhibits 2, 8, 9. Mr. Jordan reportedly left her house shortly after midnight on July 23, 1993. Tr. 128. On August 3, 1993, fisherman Hal Locklear found an unidentified black male in the Gum Swamp along Pea Bridge Road in Marlboro County, South Carolina. Tr. 189–95. Upon receiving the report of the body, Marlboro County Coroner Tim Brown had Art Sprenger ("Mr. Sprenger") of Palmetto Professional Services transport it to forensic pathologist Dr. Joel Sexton ("Dr. Sexton") for an autopsy. Tr. 480–81, 631.

Dr. Sexton, who is based in Newberry, SC, conducted the autopsy on the unidentified black male who, in the days following his cremation, would be identified through dental records as James Jordan. *See* Exhibit 120, Autopsy Conducted by Dr. Joel Sexton (attached) and Tr. 912. Upon examining the body, Dr. Sexton determined the cause of death to be a "fatal, penetrating, .38 caliber gunshot wound [to the] right chest" of the victim. *See* Exhibit 120, p. 6. Dr. Sexton determined the victim was shot once and noted that the "only penetrating wound [was the] wound noted in the right chest." *See* Exhibit 120, p.3.

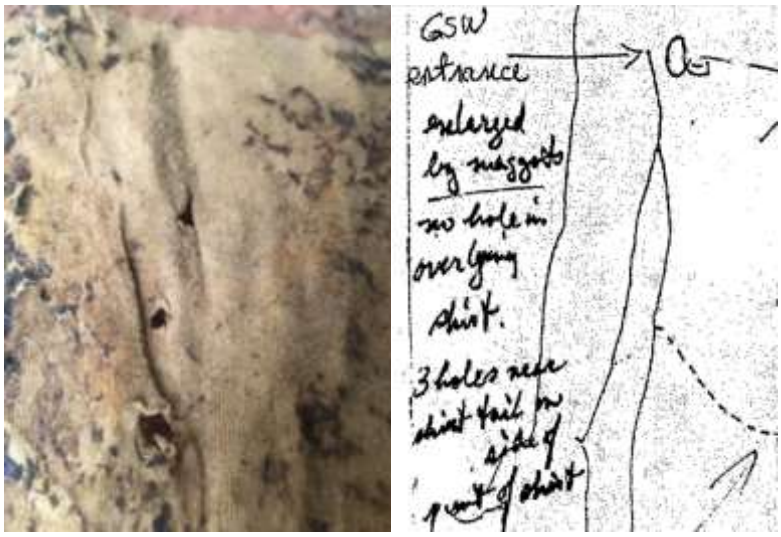
According to the autopsy report, Dr. Sexton looked for but **did not find** a corresponding hole in the right chest area of the shirt Mr. Jordan was wearing. After describing the location of the fatal chest wound, Dr. Sexton wrote, **"There is no hole in the shirt at that point."** *See* Exhibit 120, p. 3. Dr. Sexton also wrote, "Directly below that location in the lower abdominal region are three holes that would line up with the hole in the chest if the shirt were pulled up

approximately one foot"—as one might do if pulling a gun from their waist. *See* Exhibit 120, p. 3. The holes, pictured below, are consistent with a bullet traveling through a portion of the shirt that has been lifted vertically, creating a horizontal fold upon itself at the time of impact.

Dr. Sexton discussed the absence of a bullet hole in the chest region of the shirt on the first page of his autopsy report. *See* Exhibit 120. The District Attorney's copy of the autopsy shows he highlighted Dr. Sexton's language making note of the absence of a hole in the chest region of the shirt. *See* Exhibit 121, Prosecutor's file copy of the Autopsy (attached).

The only penetrating wound is a wound noted in the right chest. There is no hole in the shirt at that point. Directly below that location in the lower abdominal region are three holes that would line up with the hole in the chest if the shirt were pulled up approximately one foot. The shirt has some decomposition material

An anatomical diagram of Mr. Jordan's body, annotated by Dr. Sexton at the time, also made reference to the conspicuous absence a hole in the chest region of the shirt. On the drawing, Dr. Sexton wrote, "GSW [gunshot wound] entrance" with an arrow pointing to the wound in the victim's chest. Below that, he wrote, **"No hole in overlying shirt"** and "3 holes near shirt tail on side of print of shirt." *See* Exhibit 120.



See Exhibit 120, p. 27, [Bate Stamped 3122], and State's Exhibit 22 at trial (Picture).

B. State agents who took custody of the shirt after the autopsy mishandled it and the next forensic examination contradicted the first.

After removing the shirt from the body, Dr. Sexton washed it and gave it to law enforcement, who gave it to Mr. Sprenger. Tr. 781. Mr. Sprenger was an employee of Palmetto Professional Services who transported and embalmed bodies for funeral homes. Tr. 746. Sprenger then gave the shirt to another civilian, Jay Todd Hardee ("Mr. Hardee"). Tr. 792. Mr. Hardee was Sprengner's boss at Palmetto. Tr. 761. Mr. Hardee, bothered by the odor from the shirt, *buried it in his yard.* Tr. 797.

Law enforcement later decided the shirt was evidence and the State Bureau of Investigation sent South Carolina SLED Agent Michael Avery to meet Mr. Hardee and exhume it. Tr. 1107. After being dug out of the ground, the shirt was sent to the SBI lab in Raleigh, where it was examined by Agent R.N. Marrs ("Agent Marrs"). Tr. 5252–53. Contrary to the results of prior examinations, during his examination Agent Marrs **reported the presence of a bullet hole in the upper right chest region of the shirt**. *See* Tr. 5258. His report identifying the hole in the right chest portion of the shirt was introduced at trial as State's Exhibit 19. The hole, pictured below, is visually consistent with a bullet hole. The shirt itself was introduced into evidence as State's Exhibit 22.

Picture of State Exhibit 22.

Agent Marrs reported finding the hole at precisely the location where Dr. Sexton twice wrote he had looked for ***and not found one***. *See* State's Exhibit 19. And although Sexton had washed Jordan's shirt in the course of his autopsy, and the shirt had been submerged in water for weeks before that, Agent Marrs reported seeing dark stippling around the hole. Tr. 5325–27. He testified at trial to the presence of a "dark ring" consistent with gunshot residue around the hole (Tr. 5325)—another finding that conflicted with Dr. Sexton's initial examination, which found "[n]o obvious powder grains or soot" on the shirt. *See* Exhibit 120.

Agent Marrs told the jury that the hole in the shirt—which corresponded with the wound in Mr. Jordan's chest—marked the location where the single, fatal bullet transversed the victim's clothing and entered his body. Tr. 5261–62, 5325. But Agent Marrs offered no explanation for the three holes in the lower section of Mr. Jordan's shirt that Dr. Sexton's autopsy suggested were caused by the bullet. The district attorney, who had once highlighted Dr. Sexton's notes about the absence of a bullet hole in the chest area of the shirt, did not ask about the three holes in the lower section of the shirt, and—critically for Mr. Green—neither did his defense attorneys.

C. Mr. Green's defense attorneys failed to notice or investigate the discrepancy between Dr. Sexton's finding that there was no hole in the shirt and Agent Marrs' discovery of a hole in the same alleged shirt.

Conveniently, the new hole fit the carjacking narrative that Larry Demery ("Demery") ultimately settled on more neatly than the three holes Dr. Sexton's autopsy suggested had been caused by the bullet. The absence of a hole in the right chest area, coupled with the three holes in the lower part of the shirt, contradicted the State's theory that Mr. Jordan was lying in his car when he was shot. It also gave strength to the defense theory that there was an altercation between Demery and Mr. Jordan, evidence which was kept from the jury.

Defense counsel failed to notice or investigate this significant discrepancy in a central piece of physical evidence supporting the State's case. *See* Affidavit of Angus Thompson, Exhibit 122, ¶ 5 (attached). The defense counsel, Angus Thompson, now aware of this discrepancy has agreed that evidence of tampering would constitute "a serious due process violation that should have been raised at trial." *See* Affidavit of Angus Thompson, Exhibit 122, ¶ 12.

D. At trial, Dr. Sexton failed to notice the discrepancy, and Mr. Green's defense counsel failed to point out the discrepancy before the jury.

Dr. Sexton testified at trial, more than two and a half years after his examination of Mr. Jordan's body. Prosecutor Britt asked Dr. Sexton:

> Q. When you examined the clothing of this body on August the 4th, 1993, prior to removing it, what if anything did you find?
>
> A. There were holes in the shirt that were on the right side of the chest.
>
> Q. And where were those holes located on that shirt?
>
> A. The ones that I saw were here on the right side down a little about the area of the edge of the rib cage. Tr. 637.

When first asked to describe the holes in the shirt, Dr. Sexton only testified to the three holes in the lower area of the shirt near the ribs. He did not mention any hole in the right chest area.

When asked by the district attorney at trial to identify the shirt in evidence he replied, "all I see presently . . . [is] the gunshot wound in the right chest, and this is the same Grand Slam type large with the design that I just described to you." And when then asked if the shirt was "in substantially the same condition as it was when [he] removed it from the body," Dr. Sexton answered in the affirmative, see Tr. 690, contradicting his own written autopsy findings, likely because of the length of time between his initial examination and his trial testimony. On cross,

defense counsel failed to point out the discrepancy between the condition of the shirt at the time of the autopsy and the shirt presented at trial. *See* Exhibit 122, ¶ 11.

These misstatements and omissions deprived Mr. Green of due process, and they deprived the jury of important information bearing on the integrity of the evidence and the trajectories and circumstances of the shooting itself. Further, the failure of Mr. Green's trial counsel to point out these significant contradictions deprived him of the effective assistance of counsel in violation of the Sixth Amendment.

ARGUMENT

I. WHEN STATE OFFICIALS TAMPER WITH PHYSICAL EVIDENCE THAT IS INTRODUCED AT TRIAL, OR PERMIT THE INTRODUCTION OF SUCH EVIDENCE, THEY VIOLATE DUE PROCESS, NECESSITATING A NEW TRIAL. HERE, THE STATE PERMITTED INTRODUCTION OF A SHIRT IN A SUBSTANTIALLY DIFFERENT CONDITION THAN WHEN IT WAS COLLECTED.

Mr. Green has a due process "right not to be deprived of [his] liberty as a result of the fabrication of evidence by a government officer." Washington v. Wilmore, 407 F.3d 274, 282 (4th Cir. 2005) (quoting Zahrey v. Coffey, 221 F.3d 342, 349 (2d Cir. 2000)); *see also* Miller v. Pate, 386 U.S. 1, 7 (1967) ("The Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."); Halsey v. Pfeiffer, 750 F.3d 273, 289–90 (3d Cir. 2014) ("[A] criminal defendant has been denied due process of law if he is convicted on the basis of fabricated evidence."); Whitlock v. Brueggemann, 682 F.3d 567, 580 (7th Cir. 2012) (observing that courts have "consistently held that a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of [his] liberty in some way"). The remedy for a due process violation owed to the use of such evidence is a new trial. Napue v. Illinois, 360 U.S. 264, 269 (1959).

Agent Marrs' reported on a hole that apparently did not exist at the time of autopsy, a fact strongly suggestive of evidence tampering. This glaring inconsistency between Agent Marrs' and Dr. Sexton's reports imposed certain responsibilities on Prosecutor Britt that he failed to meet. When reasonable cause exists to suspect the reliability or truthfulness of information put into evidence, "the prosecutor must at least investigate. The duty to act is not discharged by attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts." Morris v. Ylst, 447 F.3d 735, 737 (9th Cir. 2006); *e.g.*, Livers v. Schenck, 700 F.3d 340, 351–52 (8th Cir. 2012) ("Intentionally or recklessly failing to investigate . . . can violate the Fourteenth Amendment's due process clause."). Here, the evidence indicates the prosecutor was aware of Dr. Sexton's finding that there was no hole in the chest region of the victim's shirt. His personal copy of the autopsy shows that he highlighted the language about the lack of a hole. *See* Exhibit 121. Despite this, he called on Agent Marrs to testify to the presence of a hole in that same location and had him circle the hole for the jury with a red marker. Tr. 5262.

In cases where the evidence of tampering is circumstantial, courts have said that an "important factor to be considered is the likelihood of intermeddlers tampering with the evidence." United States v. Dickerson, 873 F.2d 1181 (9th Cir. 1988) (citing Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960)). Courts are to take note of "the circumstances surrounding its custody" and look to whether there are "indication[s] of foul play," including whether "anyone had the opportunity or the inclination to tamper" and whether "the article [of evidence] *had . . . changed in important respects*." West v. United States, 359 F.2d 50, 55 (8th Cir. 1966) (citing United States v. S. B. Penick & Co., 136 F.2d 413 (2d Cir. 1943) (emphasis

added)). "If"—as here—"there is some evidence of tampering, then the government must show that acceptable precautions were taken to maintain the evidence in its original state." United States v. Anderson, 654 F.2d 1264, 1267 (8th Cir. 1981), *cert. denied*, 454 U.S. 1127 (1981); United States v. Lane, 591 F.2d 961, 962 (D.C. Cir. 1979).

Here, the State plainly cannot do that. Officials took the shirt from Dr. Sexton and gave it to a civilian, who gave it to another civilian, who then buried it in the ground, from which it was later exhumed and discovered to be in a different state than when it was first examined. In doing this, these officials were clearly not acting "in accord with their normal practice." Arizona v. Youngblood, 488 U.S. 51, 56 (1988) (quoting California v. Trombetta, 467 U.S. 479, 488 (1984) (quoting Killian v. United States, 368 U.S. 231, 242 (1961))); *see also* House v. Bell, 547 U.S. 518, 547–48 (2006) (holding that "evidentiary disarray" surrounding the storage of key physical evidence introduced at trial "raise[d] substantial questions about [its] origin").

As such, "[t]he government [can] not establish that 'acceptable precautions,' or any precautions at all, were taken to maintain the [evidence] . . . in [its] original state." *Dickerson*, 873 F.2d at 1181 (9th Cir. 1988); *see also* United States v. Jackson, 482 F.2d 1264, 1266 (8th Cir. 1973) (discussing importance of "reasonable and necessary precautions to avoid any tampering" because the "prevention of tampering with . . . evidence is vital to the admissibility of evidence"); United States v. Anderson, 654 F.2d 1264, 1267 (8th Cir. 1981), *cert. denied*, 454 U.S. 1127 (1981).

These circumstances give rise to a reasonable inference that the shirt was tampered with. *Cf. Dickerson*, 873 F.2d at 1181 (finding "evidence of tampering" where key piece of physical evidence "had been moved from its original place" and had not "been secured during the six-day period the government had [it] in custody"). However, because of ineffective trial counsel, see

infra § II, and the prosecution's willingness to introduce evidence contradicted by one of its own experts, the changed condition of the shirt was not discovered in time to inform the jury.

This is not a case like *Youngblood* where "the State did not attempt to make any use of the [disputed] materials in its own case in chief." Arizona v. Youngblood, 488 U.S. 51, 56 (1988). Here, the hole in the shirt was used by the State to help establish a carjacking theory in which Mr. Jordan was said to be shot while sitting inside his Lexus. The absence of a hole in the right chest region would have significantly undercut the State's theory that Mr. Jordan was seated in his vehicle when shot. Dr. Sexton's autopsy concluded that the bullet entered Mr. Jordan's body through the lower—not upper—portion of shirt, a full foot below the location Agent Marrs' testified to, and a spot difficult to reconcile with someone seated in a vehicle. But when he took the stand, no one asked Dr. Sexton to offer an opinion as to where the bullet passed through the shirt, even though he was a licensed forensic pathologist, the only person to examine the body, and he had testified to "look[ing] carefully on the outside surface of the clothing" at the autopsy. *See* Tr. 637 (Dr. Joel Sexton).

Instead, the district attorney put the questions about the hole in the chest area to Agent Marrs, who examined the shirt only after it had completed its bizarre path to the SBI laboratory in Raleigh. Agent Marrs gave the jury his "opinion that there were physical characteristics consistent with the passage of a bullet in the hole in the upper right chest." Tr. 5256. He did not address the issue of Dr. Sexton's multiple reports noting the conspicuous absence of a hole in the right chest or the holes Dr. Sexton had identified at the autopsy.

Because the circumstantial and documentary evidence gives rise to a reasonable inference that the shirt was tampered with in a significant way at some point after it left Dr. Sexton's custody, and because the shirt was entered into evidence and used at trial to help secure Mr.

Green's conviction, this Court should award him a new trial. It is well "established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," and that the "same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue v. Illinois, 360 U.S. 264, 269 (1959). Even when it is "presented in good faith," "to permit a conviction based on uncorrected false material evidence to stand is a violation of a defendant's due process rights under the Fourteenth Amendment." Maxwell v. Roe, 628 F.3d 486, 506–07 (9th Cir. 2010), *cert. denied*, Cash v. Maxwell, 565 U.S. 1138 (2012).

II. TRIAL COUNSEL'S FAILURE TO NOTICE, INVESTIGATE, AND EXPOSE THE DISCREPANCY BETWEEN THE AUTOPSY REPORT AND THE SBI GUNSHOT RESIDUE REPORT DEPRIVED MR. GREEN OF HIS SIXTH AMENDEMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Trial counsel's failure to notice, investigate, and point out at trial the discrepancy between the condition of the shirt at the time of the autopsy and at the time of trial constituted ineffective assistance of counsel. *See* Exhibit 122, ¶15. The discrepancy in this critical piece of evidence should have led to a defense investigation into the tampering of evidence and a focused cross-examination at trial as to the contradiction between the autopsy and the forensic examination of the shirt. *See* Exhibit 122, Affidavit of trial counsel Angus Thompson.

A. The Sixth Amendment right to effective assistance of counsel requires a reasonable investigation into contradictions in evidence and impeachment on significant discrepancies.

To satisfy the performance prong of *Strickland v. Washington*, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U.S. 668, 688 (1984). In so doing, the defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690. For its part, the court deciding the "ineffectiveness claim must judge the reasonableness of counsel's

challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. That is, the court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id. "In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Id. Nevertheless, the court also "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. Significantly, the *Strickland* Court recognized that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 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. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation," but "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id. at 690–91. "Failure to conduct a pretrial investigation into the State's forensic evidence" constitutes ineffective assistance of counsel. Elmore v. Ozmint, 661 F.3d 783, 866 (4th Cir. 2011), *as amended* (Dec. 12, 2012).

Defense 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. "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." Lord v. Wood, 184 F.3d

1083, 1093 (9th Cir. 1999) (quoting Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999)). In particular, if counsel's failure to investigate possible methods of impeachment is part of the explanation for counsel's impeachment strategy (or a lack thereof), the failure to investigate may in itself constitute ineffective assistance of counsel. *See* Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir. 2003) ("Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel."). Although trial counsel is typically afforded leeway in making tactical decisions regarding trial strategy, counsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision. *See* Riley v. Payne, 352 F.3d 1313, 1324 (9th Cir. 2003) (holding that, under clearly established Supreme Court law, when defense counsel failed to contact a potential witness, counsel could not "be presumed to have made an informed tactical decision" not to call that person as a witness); *see also* Williams v. Washington, 59 F.3d 673, 681 (7th Cir. 1995) ("Because investigation [of the witnesses] might have revealed evidence bearing upon credibility (which counsel believed was the sole issue in the case), the failure to investigate was not objectively reasonable."); United States v. Tucker, 716 F.2d 576, 583 (9th Cir. 1983) (holding that the failure to interview or to attempt to interview key prosecution witnesses constitutes deficient performance); Baumann v. United States, 692 F.2d 565, 580 (9th Cir. 1982) ("We have clearly held that defense counsel's failure to interview witnesses that the prosecution intends to call during trial may constitute ineffective assistance of counsel."). The duty to investigate is especially pressing where, as here, the witnesses and their credibility are crucial to the State's case. *See* Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir. 1998) (collecting cases). Moreover, although matters such as counsel's approach to impeachment are often viewed as tactical decisions, and such decisions do not constitute deficient conduct simply because there

are better options, a poor tactical decision may constitute deficient conduct if "the defendant [can] overcome the presumption that, under the circumstances, the challenged action [or lack of action] 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

B. Here, trial counsel provided ineffective assistance of counsel in violation of Mr. Green's Sixth Amendment rights when they failed to notice or investigate the discrepancy between the autopsy and gunshot residue reports and impeach witnesses on this significant contradiction at trial.

In the present case, defense counsel did not investigate the discrepancy between Dr. Sexton's finding that no hole was present in the right chest area of Mr. Jordan's shirt and Agent Marrs' finding of a hole in that area. Trial counsel also did not impeach Dr. Sexton or Agent Marrs regarding this contradiction. Trial counsel has admitted under oath by way of affidavit that there was no strategic reason for this glaring omission. *See* Exhibit 122, ¶15.

The substantial contradiction—and trial counsel's failure to raise it—would have impacted the verdict in two ways. First, had the discrepancy been highlighted, it would have raised questions about the legitimacy of the investigation by raising the specter of known evidence tampering, and the offering of that evidence, by the State. *See* Exhibit 122, ¶12 and 13. The Prosecutor was clearly aware of the discrepancy and knowingly admitted the evidence anyway. *See* Exhibit 121. Second, the absence of a hole in the shirt to match the entry wound into the body significantly undercuts the State's theory that Mr. Jordan was asleep in the car when he was shot. The three bullet holes in the rib cage area of the shirt suggest that Mr. Jordan was pulling up his shirt when he was shot. This discrepancy would have "greatly strengthened the defense argument that Demery's version of events was false." *See* Exhibit 122, ¶ 13. It also would have supported "the version of events Mr. Green has always insisted Demery told him." *See* Exhibit 122, ¶ 14.

The duty to investigate is especially pressing where, as here, the witnesses and their credibility are crucial to the State's case. *See* Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir. 1998). In the present case, the State's case rested upon the credibility of the testifying co-defendant Larry Demery. The fact that the medical examiner twice memorialized finding no hole in the shirt at the location where Demery said Mr. Jordan was shot while lying down in his vehicle significantly undercut Demery's story. Tr. 3381.

C. Mr. Green's trial lawyers' failure to expose the discrepancy between the absence and the presence of the hole in Mr. Jordan's shirt is prejudicial, undermines the confidence in the proceeding, and requires a new trial.

Having shown that trial counsel's performance fell below a reasonableness standard, and that there was no strategic reason supporting the failure to challenge this evidence, this Court must also decide whether, but for such deficiencies, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. In making this determination, the court "must consider the totality of the evidence before the judge or jury." Id. at 695. However, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693.[1]

Mr. Green has always maintained that he was not present when Mr. Jordan was killed. He has reported that Demery enlisted his help in concealing the body afterwards. Mr. Green was at a party with friends when Mr. Jordan was killed. The only direct evidence of guilt comes from the testimony of Larry Demery who received a plea offer and assistance from the prosecutor at sentencing. Demery, who had a serious criminal history prior to trial, gave several contradictory

[1] This Court may find instructive the Eighth Circuit Court of Appeals opinion in *Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995), which considered a fact pattern not dissimilar from that raised in this Supplement and found ineffective assistance of counsel.

versions of events before settling upon the version of events at trial. He testified Mr. Jordan was killed while lying asleep in his Lexus, and that he appeared to be waking up when shot. Tr. 3381. This version of events was erroneously corroborated by physical evidence in two ways—both of which have been discredited. First, as has been raised earlier, false evidence was introduced indicating that there was blood in the vehicle. *See supra* Claim I, First Amended Motion for Appropriate Relief. Second, evidence was introduced that there was a hole in Mr. Jordan's shirt with a black ring around it at the place where the bullet entered Mr. Jordan's chest. The false evidence resulted in a conviction based on serious violations of Mr. Green's constitutional rights. Justice demands a new trial.

CONCLUSION

Mr. Green's conviction was based on the presentation of false evidence by the State. He was deprived of his right to effective counsel when counsel did not investigate or challenge the false evidence. As a result, Mr. Green's due process rights have been denied and a new trial must be granted.

INCORPORATION IN FIRST AMENDED MAR

This additional claim is hereby incorporated by reference to Defendant's First Amended MAR. For the above stated reasons, as well as those presented in Defendant's M.A.R., and his First and Second Supplements, this Court should grant Defendant a new trial. In the alternative, this Court should order an evidentiary hearing so that Defendant may present evidence of his innocence and deficiencies in his trial that rendered it unfair and unjust.

Respectfully submitted this date 19th day of June 2017

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that copies of the foregoing in the above entitled action were served by email and United States Mail, delivery as follows:

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