

STATE OF NORTH CAROLINA  
COUNTY OF GASTON

FILED

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
08 CRS 068290

STATE OF NORTH CAROLINA

v.

MARK BRADLEY CARVER,  
Defendant.

2019 JUN 12 P 4 13

GASTON CO., N.C.

**ORDER GRANTING DEFENDANT'S  
MOTION FOR APPROPRIATE RELIEF**

THIS MATTER coming before the Honorable C.W. Bragg, Senior Resident Superior Court Judge, upon the Defendant's Motion for Appropriate Relief filed pursuant to N.C. Gen. Stat. § 15A-1411 *et seq.* Having heard the evidence and testimony presented during the April 2, 2019 Special Session of Superior Court, considered the arguments of counsel, and reviewed the entire record and the materials provided by the parties, the Court enters the following:

**PROCEDURAL BACKGROUND**

1. On May 5, 2008, Ms. Irina Yarmolenko was found murdered on an embankment of the Catawba River. Three ligatures were around her neck.
2. The autopsy report concluded she died from asphyxiation secondary to ligature strangulation.
3. On December 12, 2008, Mark Carver and his cousin, Neal Cassada, were arrested for first degree murder and felony conspiracy to commit murder.
4. Mr. Brent Ratchford was appointed to represent Mr. Carver and served as lead counsel.
5. Mr. David Phillips<sup>1</sup> was hired by the Cassada family to represent Mr. Cassada and joined Mr. Carver's defense after Mr. Cassada's death.
6. Mr. Cassada died on October 10, 2010, the day before his trial was scheduled to begin.
7. On March 14, 2011, Mr. Carver's trial began in Gaston County, the Honorable Timothy S. Kincaid presiding.
8. On March 17, 2011, at the close of the State's evidence, the Court granted the defense motion to dismiss the charge of felony conspiracy.

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<sup>1</sup> Judge David Phillips was appointed to the Gaston County Superior Court bench in April 2018.

9. On March 18, 2011, the trial concluded with the defense presenting no evidence.
10. On March 21, 2011, Mr. Carver was convicted of first degree murder and sentenced to life in prison without the possibility of parole.
11. On June 5, 2012, a split Court of Appeals of North Carolina upheld Mr. Carver's conviction. *State v. Carver*, 221 N.C. App. 120, 725 S.E.2d 902 (2012).
12. On January 25, 2013, Carver's conviction was upheld, *per curiam*, by the Supreme Court of North Carolina. *State v. Carver*, 366 N.C. 372, 736 S.E.2d 172 (2013).
13. Mr. Carver filed a Motion for Appropriate Relief on December 8, 2016, an Amendment to Defendant's Motion for Appropriate Relief on July 26, 2018, and a Second Amendment to Defendant's Motion for Appropriate Relief on April 8, 2019.
14. The State filed a Response to Defendant's Motion for Appropriate Relief on March 9, 2017 and a Response to Defendant's Amended Motion for Appropriate Relief on September 13, 2018.
15. The Court held a nine day evidentiary hearing on all claims and has carefully considered the evidence, including the testimony of twenty-five witnesses and the arguments presented by both the Defendant and the State, as well as the parties' pleadings and exhibits.

## FINDINGS OF FACT

### A. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

16. Pursuant to the United States Supreme Court opinion in *Wiggins v. Smith*, 539 U.S. 510 (2003), trial counsel must fully and thoroughly investigate their case before deciding whether or not to offer evidence at trial.
17. As noted in *Wiggins*,

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *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.*

*Wiggins*, 539 U.S. at 521–22 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984))(emphasis added).

18. The United States Supreme Court in *Rompilla v. Beard*, 545 U.S. 374, 387 (2005), looks to the American Bar Association Standards for Criminal Justice, specifically Standard 4–4.1 Duty to Investigate which states,

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should 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 defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

19. This Court finds there are a number of instances in this case where trial counsel failed to conduct any investigation relevant to his defense of Mr. Carver.

**i. Failure to Investigate Medical History**

20. Trial counsel failed to obtain any medical records or information regarding Mr. Carver's carpal and radial tunnel surgeries and other health related issues.
21. Trial counsel failed to interview any family members or friends of Mr. Carver who could describe and discuss his physical limitations.
22. Prior to Ms. Yarmolenko's death, Mr. Cassada had suffered two heart attacks and was limited in his physical activity and ability.
23. Trial counsel failed to investigate and obtain any medical records of his cousin and co-defendant, Neal Cassada.
24. Trial counsel failed to interview any family members or friends of Mr. Cassada who could describe and discuss his physical limitations

**ii. Failure to Investigate Defendant's Intellectual Abilities**

25. Evidence presented at the hearing indicated Mr. Carver's IQ ranged from a low of 61 to a high of 73.



26. Trial counsel failed to have Mr. Carver undergo psychological evaluation or testing, despite having secured funds in the amount of \$4,000 from North Carolina Indigent Defense Services for that very purpose.
27. Trial counsel failed to interview Dr. Vikram Shukla, a local psychiatrist who had been treating Mr. Carver, and in fact treated Mr. Carver on the morning of May 5, 2008, the date of Ms. Yarmolenko's murder.
28. It is clearly evident from Mr. Carver's testimony at the evidentiary hearing, as well as the audio and video recordings introduced, that Mr. Carver suffers from some level of intellectual disability.
29. Mr. Carver's intellectual disabilities were also supported by the testimony of family members at the evidentiary hearing and who were, again, not interviewed by trial counsel.
30. Evidence of Mr. Carver's intellectual disabilities would be relevant regarding statements he made during his questioning by SBI Special Agent David Crow.

**iii. Failure to Investigate Touch DNA**

31. Trial counsel failed to adequately investigate, educate themselves and become familiar with the key piece of evidence in this case, "Touch DNA".
32. While an expert witness, Dr. Ron Ostrowski, assisted the defense, there is little information in Mr. Ratchford's case file regarding Dr. Ostrowski or Touch DNA.
33. Trial counsel's file did not contain any reports from Dr. Ostrowski and even lacked a CV from the retired UNC Charlotte professor.
34. The Touch DNA in this case is the only evidence that directly linked Mr. Carver to the crime scene.
35. Trial counsel was not aware of the Scientific Working Group on DNA Analysis Methods' (SWGDM) 2010 report regarding the analysis of DNA mixtures.
36. Prior to trial, trial counsel failed to meet with or discuss the testimony of SBI Crime Lab analysts Karen Winningham and Kristen Hughes.
37. Mr. Ratchford testified at the evidentiary hearing that Dr. Ostrowski told him the DNA tests conducted by the SBI Crime Lab were "good" and that calling him as a witness would only hurt the defense.

38. Mr. Ratchford testified he had no reason not to believe Dr. Ostrowski and, lacking any independent research, education, knowledge or investigation of Touch DNA, could not challenge the opinions of Dr. Ostrowski.
39. Karen Winningham from the SBI Crime Lab testified that the DNA evidence #34-2, “was 126 million more times likely to be observed coming from Mark Carver than if it came from another unrelated individual in the N.C. Caucasian population.”
40. The United States Supreme Court held in *Wiggins* that

*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the “constitutionally protected independence of counsel” at the heart of *Strickland*. *Strickland*, 466 U.S. at 689. We base our conclusion on the much more limited principle that “strategic choices made after less than complete investigation are reasonable” only to the extent that “reasonable professional judgments support the limitations on investigation.” *A decision not to investigate thus “must be directly assessed for reasonableness in all the circumstances.”*

*Wiggins*, 539 U.S. at 533 (quoting *Strickland*, 466 U.S. at 690–91 (1984) (emphasis added)).

#### **B. NEWLY DISCOVERED EVIDENCE CLAIM**

41. The defense asked the Court to find that newly discovered evidence exists in the form of scientific advances in DNA testing specifically as it relates to the testing, analysis and interpretation of DNA mixtures.
42. To prevail on a Motion for Appropriate Relief based on newly discovered evidence, a defendant must establish the following:
- (1) that the witness or witnesses will give newly discovered evidence,
  - (2) that such newly discovered evidence is probably true,
  - (3) that it is competent, material and relevant,
  - (4) that due diligence was used and proper means were employed to procure the

testimony at the trial,

- (5) that the newly discovered evidence is not merely cumulative,
- (6) that it does not tend only to contradict a former witness or to impeach or discredit him,
- (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

State v. Hall, 194 N.C. App. 42, 48-49, 669 S.E.2d 30, 35 (2008).

- 43. Supporting the contention of newly discovered evidence is the 2010 SWGDAM Report (DE 53) regarding the testing, analysis and interpretation of DNA mixtures.
- 44. The 2010 SWGDAM Report was published in April 2010.
- 45. Mr. Ratchford was not aware of the SWGDAM 2010 report regarding the analysis of DNA mixtures.
- 46. Dr. Ostrowski never discussed the SWGDAM 2010 report regarding the analysis of DNA mixtures with Mr. Ratchford.
- 47. The crux of the SWGDAM 2010 report regarding the analysis of DNA mixtures is that in testing, analyzing and interpreting DNA mixtures, a lab should establish a stochastic threshold.
- 48. A stochastic threshold “is defined as the value above which it is reasonable to assume that allelic dropout has not occurred within a single-source sample.” (DE 53, 3.2).
- 49. At the time of the Touch DNA analysis in this case, August 12, 2008 to July 27, 2010, the SBI Crime Lab did not have or use an established stochastic threshold for the analysis of DNA mixtures.
- 50. In 2013, the now North Carolina State Crime Lab did establish and now uses a stochastic threshold in the analyzation and interpretation of DNA mixtures.
- 51. In his review of the SBI Crime Lab’s Touch DNA testing, analysis and interpretation (DE 54), Dr. Maher Nouredine, specifically addresses issues regarding sample #34-2.
- 52. Dr. Nouredine, in his expert opinion, which was not contradicted by any evidence offered by the State, writes, “The data reflect a low quality sample: allelic peaks were not detectable at four markers, and allelic dropout must be assumed at all 15 autosomal



markers due to stochastic effect. This leads to the conclusion that a considerable amount of data is missing from this DNA mixture to allow for any reliable matching.”

53. Dr. Nouredine further opines, “Under current and more accurate and objective interpretation standards, the partial DNA mixture profile from item #34-2 would have been deemed inconclusive (as opposed to a “match” with a statistic of 126 million).” (emphasis added)
54. This Court specifically accepts, adopts and incorporates Dr. Nouredine’s report (DE 54), opinions and conclusions as facts for the purposes of supporting this Order.
55. The State offered Ms. Mackenzie DeHaan, a forensic science supervisor at the State Crime Lab, who testified the testing, analysis and interpretation of the DNA in this case by the State Crime Lab “was current at the time of the analysis.”
56. In 2010 dissemination of information over the Internet was not as recognized and relied upon as it is today.
57. Ms. DeHaan opined, without objection, in response to a question by the Court, that Dr. Ostrowski may not have known of the SWGDAM 2010 report regarding the analysis of DNA mixtures was published in April 2010.
58. In upholding Mr. Carver’s first degree murder conviction, the North Carolina Court of Appeals specifically addressed the DNA evidence in this case:

On appeal, Carver first argues that the trial court erred by denying his motion to dismiss because there was insufficient evidence that Carver committed the murder. We disagree.

In this case, there is only circumstantial evidence to show that Carver committed the murder: at the time the victim's body was discovered, Carver was fishing at a spot a short distance from the crime scene and had been there for several hours; and Carver repeatedly denied ever touching the victim's vehicle, but DNA found on the victim's vehicle was, with an extremely high probability, matched to Carver. 1 (A DNA sample found on the victim's car was "126 million times more likely to be observed from [] Carver [, a Caucasian,] than if it came from another unrelated individual in the North Carolina Caucasian population.”)

*State v. Carver*, 221 N.C. App. 120, 122, 725 S.E.2d 902, 904 (2012).

59. The DNA evidence in this case is the lynchpin and basis of Mr. Carver’s conviction for first degree murder.

60. The State has argued strenuously and pointed out repeatedly that the SWGDAM 2010 report itself states “the revised guidelines are not intended to be applied retroactively.”
61. Mr. Carver is serving life in prison without parole based on the DNA match of item #34-2, and the testing, analysis and interpretation of that item is doubtful at best based on advances in the testing, analysis and interpretation of DNA mixtures.

**C. ACTUAL INNOCENCE, THE STATE’S MISREPRESENTATION OF CRITICAL FACTS AND BRADY VIOLATION CLAIMS**

62. This Court finds that in a Motion for Appropriate Relief it does not have the legal authority to declare any defendant actually innocent and that our legislature enacted N.C. Gen. Stat. § 15A-1460 *et seq.* as a means in which a defendant can seek a finding of factual innocence.
63. This Court finds that the defense failed to meet its burden of proof in regard to the claim that the State misrepresented critical evidence to the jury.
64. This Court finds that the defense failed to meet its burden of proof in regard to the claim that the State committed any *Brady* violations.

Based upon the foregoing Findings of Fact, the Court makes the following

**CONCLUSIONS OF LAW**

1. This Court has personal as well as subject matter jurisdiction to determine the issues presented.
2. The defense has failed to establish by a preponderance of the evidence that the State committed any “Brady” violations.
3. The defense has failed to establish by a preponderance of the evidence the State’s misrepresentation of critical evidence to the jury.
4. In seeking factual innocence a defendant must comply with N.C. Gen Stat 15A-1460 *et seq.* and a Motion for Appropriate relief is not the proper legal vehicle to seek factual innocence.
5. Trial counsel’s failure to obtain any medical records in light of Mr. Carver telling his attorneys of his surgeries and medical and physical issues, particularly in light of the manner of death (strangulation) of a young, healthy and seemingly fit Ms. Yarmolenko, was not reasonable.



6. Trial counsel's failure to interview any family members regarding Mr. Carver's medical and physical issues, in light of the manner of death (strangulation) of a young, healthy and seemingly fit Ms. Yarmolenko, was not reasonable.
7. With Mr. Carver's physical and medical limitations, and considering the amount of force and strength necessary to overcome resistance by a victim of strangulation, Mr. Cassada's medical condition, physical health and limitations are relevant.
8. Trial counsel's failure to investigate and obtain any medical records of his cousin and co-defendant, Neal Cassada, was not reasonable.
9. In view of the obvious and apparent intellectual limitations of Mr. Carver and having secured funds in the amount of \$4,000 from North Carolina Indigent Defense Services, trial counsel's failure to have him undergo any psychological evaluation or testing was not reasonable.
10. Trial counsel's failure to interview any family members regarding the intellectual limitations of Mr. Carver was not reasonable.
11. Trial counsel's failure to interview and obtain any information from Dr. Vikram Shukla, a local psychiatrist who had been treating Mr. Carver, and in fact treated Mr. Carver on the morning of May 5, 2008, the date of Ms. Yarmolenko's murder was not reasonable.
12. Trial counsel's failure to independently and adequately research, investigate and educate himself on the science related to the one, key piece of evidence in this case, "Touch DNA," was not reasonable.
13. Trial counsel's failure prior to trial to meet with or discuss the testimony of SBI Crime Lab analysts Karen Winningham and Kristen Hughes, the State's DNA expert witnesses, was not reasonable.
14. In light of the fact that the Touch DNA evidence was going to be admitted, that it was the only evidence that directly linked Mr. Carver to the crime scene (which he continues to strenuously insist he was never at) and that the Touch DNA was "good" in the eyes of Dr. Ostrowski, the "strategic choice" not to present evidence after a less than full, complete and thorough investigation was not a reasonably supported professional judgment under any circumstance.
15. In light of the fact that the Touch DNA evidence was going to be admitted, that it was the only evidence that directly linked Mr. Carver to the crime scene (which he continues to strenuously insist he was ever at) and that the Touch DNA was "good" in the eyes of Dr. Ostrowski, the "strategic choice" not to present evidence after a less than full, complete and

thorough investigation violates the American Bar Association Standards for Criminal Justice, Standard 4–4.1 Duty to Investigate.

16. The defense has met its burden of proof and has established its ineffective assistance of counsel claim by a preponderance of the evidence.
17. Dr. Maher Nouredine provided testimony and his report (DE 54) of newly discovered evidence regarding the testing, analysis and interpretation of item #34-2, a DNA mixture linking Mr. Carver to Ms. Yarmolenko's car.
18. Dr. Maher Nouredine's report (DE 54), testimony and opinions in regard to the testing, analysis and interpretation of item #34-2 a DNA mixture are probably true.
19. Dr. Maher Nouredine's report (DE 54), testimony and opinions in regard to the testing, analysis and interpretation of item #34-2 a DNA mixture are competent, material and relevant.
20. Trial counsel and Dr. Ostrowski were unaware of The Scientific Working Group on DNA Analysis Methods' (SWGDM) 2010 report regarding the analysis of DNA mixtures.
21. Dr. Maher Nouredine's report (DE 54), testimony and opinions in regard to the testing, analysis and interpretation of item #34-2, a DNA mixture, is not merely cumulative.
22. Dr. Maher Nouredine's report (DE 54), testimony and opinions in regard to the testing, analysis and interpretation of item #34-2, a DNA mixture, does not tend to only contradict a former witness or to impeach or discredit a former witness.
23. Dr. Maher Nouredine's report (DE 54), testimony and opinions in regard to the testing, analysis and interpretation of item #34-2, a DNA mixture, is of such a nature as to show that in another trial a different result will probably be reached and that the right result will prevail.
24. The defense has met its burden of proof and has established its newly discovered evidence claim by a preponderance of the evidence.

Based upon the foregoing Findings of Fact and Conclusions of Law the Court

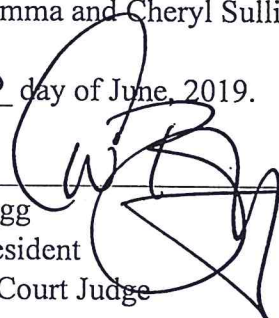
**ADJUDGES, DECREES and ORDERS**

1. Defendant's MAR on the grounds of actual innocence, the State's misrepresentation of critical evidence, and *Brady* violations is denied.



2. Defendant's MAR on the grounds of ineffective assistance of counsel and newly discovered evidence is granted.
3. Mark Carver's conviction on the charge of first degree murder is set aside, and he is granted a new trial in this case.
4. Upon the filing of this Order, the defendant Mark Carver is ordered released from the North Carolina Department of Adult Corrections and is to be immediately transferred back to the custody of the Gaston County Sheriff's Office.
5. Upon the filing of this Order, the Court sets pre-trial conditions of release for Mr. Carver as follows:
  - a. Mr. Carver shall be released upon posting a bond of \$100,000.
  - b. Mr. Carver shall report in person immediately to the pretrial services office upon posting bond.
  - c. Mr. Carver shall be placed on GPS monitoring supervised by pretrial services.
  - d. Mr. Carver shall abide by all conditions of pretrial services.
  - e. Mr. Carver's failure to abide by any condition shall result in the immediate revocation of his bond.
6. The conditions for release will remain in effect while the State either (1) appeals this Order granting Mr. Carver's Motion for Appropriate Relief, or (2) while this matter is awaiting retrial by the State.
7. A filed copy of this order shall be immediately forwarded by the Clerk of Superior Court of Gaston County to District Attorney Locke Bell, Assistant District Attorney Stephanie Hamlin, and counsel for the Defendant, Christine C. Mumma and Cheryl Sullivan.

Ordered in open court on June 5, 2019 and entered this the 10 day of June, 2019.

  
C.W. Bragg  
Senior Resident  
Superior Court Judge