

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)	
)	<u>From Court of Appeals</u>
)	No. COA19-1055
v.)	
)	<u>From Gaston</u>
)	08 CRS 68290
MARK BRADLEY CARVER)	

**DEFENDANT'S RESPONSE TO STATE'S
PETITION FOR DISCRETIONARY REVIEW**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PROCEDURAL AND FACTUAL BACKGROUND 2

 A. Trial and Appeal 2

 B. Motion for Appropriate Relief..... 4

 C. Court of Appeals..... 8

REASONS WHY THE STATE'S PETITION FOR
DISCRETIONARY REVIEW SHOULD BE DENIED 14

 A. The State's appeal is procedurally barred..... 15

 B. Alternatively, the State's appeal lacks merit. 20

 1. The Court of Appeals made no error of law. 21

 2. The Court of Appeals' decision does not conflict
 with this Court's precedent, and thus, this cause
 implicates no legal principles of major significance
 to the state's jurisprudence. 27

 C. This Court may sanction the State..... 34

CONCLUSION 36

CERTIFICATE OF FILING AND SERVICE..... 38

APPENDIX

TABLE OF AUTHORITIES

CASES

North Carolina Supreme Court

State v. Brooks, 337 N.C. 132,
446 S.E.2d 579 (1994) 20

State v. Carver, 366 N.C. 372,
736 S.E.2d 172 (2013) 4

State v. Ellis, 361 N.C. 200,
639 S.E.2d 425 (2007) 17

State v. Monroe, 330 N.C. 433,
410 S.E.2d 913 (1991) 9

State v. Moore, 210 N.C. 686,
188 S.E. 421 (1936) 20

State v. Roberts, 351 N.C. 325,
523 S.E.2d 417 (2000) 19

Trustees of Rowan Tech. v. Hammond Assoc.,
313 N.C. 230, 328 S.E.2d 274 (1985) 24

Weil v. Herring, 207 N.C. 6,
175 S.E. 836 (1934) 34

North Carolina Court of Appeals

State v. Carl, 192 N.C. App. 544,
665 S.E.2d 787 (2008) 12

State v. Carver, ___ N.C. App. ___,
2021-NCCOA-141 1

<i>State v. Carver</i> , 221 N.C. App. 120, 725 S.E.2d 902 (2012)	4
<i>State v. Collins</i> , 221 N.C. App. 604, 727 S.E.2d 922 (2012)	32
<i>State v. Gonzalez</i> , 263 N.C. App. 527, 823 S.E.2d 886 (2019)	25
<i>State v. Hanton</i> , 175 N.C. App. 250, 623 S.E.2d 600 (2006)	24
<i>State v. Hester</i> , 254 N.C. App. 506, 803 S.E.2d 8 (2017)	18
<i>State v. Howard</i> , 247 N.C. App. 193, 783 S.E.2d 786 (2016)	9
<i>State v. King</i> , 218 N.C. App. 384, 721 S.E.2d 327 (2012)	25
<i>State v. McCoy</i> , 171 N.C. App. 636, 615 S.E.2d 319 (2005)	36
<i>State v. Murrell</i> , 54 N.C. App. 342, 283 S.E.2d 173 (1981)	31
<i>State v. Peterson</i> , 228 N.C. App. 339, 744 S.E.2d 153 (2013)	9
<i>State v. Pimental</i> , 153 N.C. App. 69, 568 S.E.2d 867 (2002)	32
<i>State v. Rouse</i> , 234 N.C. App. 92, 757 S.E.2d 690 (2014)	32
<i>State v. Tutt</i> , 171 N.C. App. 518, 615 S.E.2d 688 (2005)	15

STATUTES

N.C. Gen. Stat. § 7A-28 16

N.C. Gen. Stat. § 7A-28(a) 19

N.C. Gen. Stat. § 7A-31 15

N.C. Gen. Stat. § 7A-31(a) 16

N.C. Gen. Stat. § 7A-31(c)(2) 21

N.C. Gen. Stat. § 7A-31(c)(3) 21

N.C. Gen. Stat. § 14-87(d)..... 18

N.C. Gen. Stat. § 15A-1414 3

N.C. Gen. Stat. § 15A-1415 4

N.C. Gen. Stat. § 1415(b)..... 16

N.C. Gen. Stat. § 1415(b)(6)..... 16

N.C. Gen. Stat. § 1415(c) 16

N.C. Gen. Stat. § 15A-1422(c)(3) 13

N.C. Gen. Stat. § 15A-1422(f) 19

N.C. Gen. Stat. § 15A-1444(e) 32

N.C. Gen. Stat. § 15A-1445(a)(2)..... 9

CONSTITUTIONAL AUTHORITIES

North Carolina Constitution

N.C. Const. art. IV, § 12 17
N.C. Const. art. IV, § 13 (2) 16

OTHER AUTHORITIES

North Carolina Rules of Appellate Procedure

N.C. R. App. P. 2 18
N.C. R. App. P. 15(a) 14
N.C. R. App. P. 15(d) 1
N.C. R. App. P. 16(a) 20
N.C. R. App. P. 21(a)(1) 26
N.C. R. App. P. 21(a)(2) 19
N.C. R. App. P. 21(c) 20
N.C. R. App. P. 25(b) 2
N.C. R. App. P. 34(b) 2

No. 301P12-2

JUDICIAL DISTRICT 27A

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)	
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)	No. COA19-1055
v.)	
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)	08 CRS 68290
MARK BRADLEY CARVER)	

**DEFENDANT'S RESPONSE TO STATE'S
PETITION FOR DISCRETIONARY REVIEW**

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA:

NOW COMES the Defendant-Respondent, Mr. Mark Bradley Carver, by and through undersigned counsel, pursuant to N.C. R. App. P. 15(d), in response to the State's Petition for Discretionary Review.

Mr. Carver respectfully asks this Court to dismiss the Petition on the ground that the State's appeal from the Court of Appeals' unanimous 20 April 2021 published decision in *State v. Carver*, ___ N.C. App. ___, 2021-NCCOA-141, is procedurally barred or, in the alternative, to deny

it as being without merit. Mr. Carver further asks this Court to dissolve its 11 May 2021 temporary stay of the Court of Appeals' decision, and to grant any other relief which this Court deems just and proper, including sanctions pursuant to Rules 25(b) and 34(b) based on the State's violations of the N.C. Rules of Appellate Procedure ("Rules"). In support of this Response, Mr. Carver shows the following:

PROCEDURAL AND FACTUAL BACKGROUND

A. Trial and Appeal

On 15 December 2008, a grand jury in Gaston County Superior Court indicted Mr. Carver and his cousin, Mr. Neal Cassada, with first-degree murder and conspiracy to commit first-degree murder in connection with the 5 May 2008 death of Ms. Irina Yarmolenko. (R p 4; Trial T p 2).¹ Mr. Cassada died of a heart attack the day before his October 2010 trial. (R p 391; T pp 1083, 1214).

Mr. Carver's case went to trial in March 2011 before the Honorable Timothy S. Kincaid. (R p 391; Trial T p 1). At trial, Karen Winningham of the SBI (now State) Crime Lab testified that the partial

¹ The Defendant's Response to State's Petition for Discretionary Review will use these designations: March 2011 trial transcript (Trial T p ___); April 2019 hearing transcript (T p ___); Record on Appeal and Supplement to Record on Appeal (R p ___).

DNA profile in a sample taken from the pillar above the driver's side rear door of Ms. Yarmolenko's car (Item 34-2) was a mixture, with the predominant profile matching Mr. Carver's DNA profile. (R pp 469, 478; Trial T pp 271-272). She also testified that Mr. Carver could not be excluded as a contributor to a DNA mixture found on the seatbelt button in the passenger side rear seat (Item 34-15). (R p 470; Trial T pp 280-281). Attorneys Brent Ratchford and David Phillips represented Mr. Carver at trial. (T pp 1083, 1187). The attorneys provided the State with no pretrial discovery and presented no evidence on Mr. Carver's behalf. (Trial T pp 3, 337-340).

Although the trial court dismissed the conspiracy charge, the jury found Mr. Carver guilty of first-degree murder. (R p 7; Trial T pp 336-337, 851). On 21 March 2011, the trial court entered judgment and sentenced Mr. Carver to a mandatory sentence of life without parole. (R pp 10-11; Trial T pp 854-855).

Mr. Carver gave oral notice of appeal in open court upon entry of judgment and filed a Motion for Appropriate Relief ("MAR") on 29 March 2011 in Gaston County Superior Court pursuant to N.C. Gen. Stat. § 15A-1414. (R pp 12-20; Trial T p 855). The trial court summarily

denied the MAR in a 14 April 2011 administrative order. (R p 21). On 5 June 2012, a divided Court of Appeals panel upheld Mr. Carver's conviction, which this Court affirmed in a *per curiam* opinion issued in January 2013. *State v. Carver*, 221 N.C. App. 120, 122, 725 S.E.2d 902, 904 (2012), *aff'd per curiam*, 366 N.C. 372, 736 S.E.2d 172 (2013).

B. Motion for Appropriate Relief

On 8 December 2016, Mr. Carver filed an MAR in Gaston County Superior Court pursuant to N.C. Gen. Stat. § 15A-1415. (R pp 22-51). He amended the MAR on 26 July 2018 and 8 April 2019. (R pp 100-122, 156-162). Mr. Carver asserted several claims, including ineffective assistance of counsel and newly discovered evidence. (R pp 39-46, 109-110). On 10 January 2017, the Honorable Jesse B. Caldwell III ordered an evidentiary hearing for Mr. Carver's MAR. (R pp 52-53). In April 2019, the hearing took place over nine days in Gaston County Superior Court, with the Honorable Christopher W. Bragg presiding. (R p 165).

On 12 June 2019, the trial court filed a written Order Granting Defendant's Motion for Appropriate Relief on three separate claims of ineffective assistance of counsel and one claim of newly discovered

evidence. (R p 165-179). The trial court denied Mr. Carver's remaining claims. (R p 174).

In granting Mr. Carver's ineffective assistance claims, the court concluded it was "not reasonable" that Mr. Carver's trial counsel failed to investigate his medical condition "particularly in light of the manner of death (strangulation) of a young, healthy and seemingly fit Ms. Yarmolenko," and it was not "not reasonable" that counsel failed to investigate his intellectual disabilities, which were "relevant regarding statements he made during his questioning by SBI Special Agent David Crow." (R pp 167-168, 172-173). The court further concluded that it was "not reasonable" that Mr. Carver's counsel – specifically lead counsel Ratchford – failed 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." (R pp 168-169, 173-174).

In its findings of fact, the trial court found that Ratchford relied on a DNA expert, Dr. Ron Ostrowski, even though he had "little information" in his case file about the expert, including no CV or report, and that Ratchford failed to meet with or discuss the testimony of the SBI Crime Lab analysts, Winningham and Kristin Hughes. (R p 168).

The court noted in its findings of fact that Ratchford was not aware of revised guidelines for DNA mixture interpretation that the Scientific Working Group on DNA Analysis Methods (SWGDM) published in April 2010. (R p 168; T pp 811-812). The court further found that, “lacking any independent research, education, knowledge or investigation of Touch DNA,” Ratchford “could not challenge the opinions of” his DNA expert, Ostrowski, who had told him that the State’s touch DNA evidence was “good,” and that calling him as a witness would only hurt the defense. (R pp 168-169).

Based on its findings of fact, the court concluded that Mr. Carver met his burden of proof and established his ineffective assistance of counsel claim by a preponderance of the evidence. (R p 174).

In granting Mr. Carver’s newly discovered evidence claim, the court recognized that Mr. Carver 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.” (R p 169). The court accepted, adopted, and incorporated Dr. Maher Nouredine’s 20 November 2016 report, opinions, and conclusions “as facts for the purposes of

supporting this Order.” (R p 171). The court noted that Dr. Noureddine’s expert opinion “was not contradicted by any evidence offered by the State.” (R p 170.)

Dr. Noureddine testified as a DNA expert for the defense at the evidentiary hearing. (T p 800). In his report and testimony, Dr. Noureddine stated that the SBI Crime Lab had neither adopted nor applied the revised SWGDAM guidelines for DNA mixture interpretation when it analyzed Items 34-2 and 34-15 in Mr. Carver’s case. (R p 177; T pp 879-880, 894). SWGDAM published the guidelines in April 2010, and an estimated 75-80 percent of the nation's forensic labs adopted those guidelines by the time of Mr. Carver's 2011 trial, according to Dr. Noureddine. (R p 177; T p 813). The State Crime Lab did not adopt the SWGDAM guidelines – and a stochastic threshold for DNA mixture interpretation – until 2013. (R p 177; T p 813).² When Dr. Noureddine applied the SWGDAM guidelines to his interpretation of the DNA mixtures in Items 34-2 and 34-15, he concluded the samples

² Mark Boodee, who worked at the SBI Crime Lab for 27 years, testified that “everybody in DNA” knew of the revised SWGDAM guidelines after their release in 2010. (App. pp 69-70; T pp 921, 923). Because of an investigation of the SBI Crime Lab, which led to the Forensic Sciences Act of 2011, the lab delayed adoption of a stochastic threshold. (T p 928). “There was not a focus on science at that time,” Boodee said. (T p 928).

had too much missing data and should have been deemed “inconclusive.” (R pp 177-178; T pp 832, 853-857). He described Winningham’s interpretation of Item 34-2 as “highly erroneous and scientifically baseless,” and he said Item 34-15 was of such low quality that one could not do “anything” with it. (R p 177; T pp 832, 853-857).

Based on its findings of fact, the court concluded that Mr. Carver met his burden of proof and established his newly discovered evidence claim by a preponderance of the evidence as well. (R p 174).

The court vacated Mr. Carver’s 21 March 2011 first-degree murder conviction and awarded him a new trial. (R p 175). On 13 June 2019, the State filed written notice of appeal. (R pp 180-181).

C. Court of Appeals

On 25 November 2019, the State filed the settled Record on Appeal in the Court of Appeals, which docketed the appeal on 3 December 2019. On 24 January 2020, after receiving one extension of time, the State filed the Brief for the State. The Brief presented two issues (framed as a single issue): Did the trial court err by granting Mr. Carver’s MAR on the grounds of ineffective assistance of counsel and newly discovered evidence? (Brief for the State pp 12-30).

In the Brief, the State relied on N.C. Gen. Stat. § 15A-1445(a)(2) as its ground for appellate review. (Brief for the State p 2). To support this position, the State cited solely *State v. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157, *disc. rev. denied*, 367 N.C. 284, 752 S.E.2d 479 (2013), and did not cite either *State v. Howard*, 247 N.C. App. 193, 783 S.E.2d 786 (2016), or *State v. Monroe*, 330 N.C. 433, 410 S.E.2d 913 (1991). Throughout its Brief, the State challenged the trial court's findings of fact and conclusions of law on both ineffective assistance of counsel and newly discovered evidence and sought a reversal of the trial court's order on both claims. (R pp 12-30). The State did not file a Petition for Writ of Certiorari in the Court of Appeals simultaneously with the Brief for the State and, to date, has declined to seek the lower appellate court's certiorari review of the trial court's granting of Mr. Carver's ineffective assistance of counsel claim. *See* Docket in Case No. COA19-1055.

On 27 July 2020, Mr. Carver filed three documents in the Court of Appeals: Motion to Dismiss / Motion to Strike Portions of State's Brief, Petition for Writ of Certiorari, and Defendant-Appellee's Brief. In the Motion, Mr. Carver recognized that N.C. Gen. Stat. § 15A-1445(a)(2)

gave the State the right to appeal from the trial court's order granting Mr. Carver a new trial on the ground of newly discovered evidence, "but only on questions of law." (Motion p 9). However, Mr. Carver maintained, the statute gave the State no right to appeal from the order granting a new trial on the ground of ineffective assistance of counsel. (Motion pp 8-14). Mr. Carver argued that because the State failed to seek certiorari review of the ineffective assistance issue – and could make no meritorious argument for certiorari review – the State's appeal should be dismissed as moot. (Motion pp 8-14).

In the Petition, Mr. Carver sought the Court of Appeals' review of the trial court's ruling on Mr. Carver's *Brady*, misrepresentation of evidence, and actual innocence claims pursuant to Rule 28(c) if the Court of Appeals denied his motion to dismiss and reviewed the State's appeal on its purported merits. (Petition pp 7-11). By reference, the Motion and Petition incorporated the arguments set forth in each pleading and the Defendant-Appellee's Brief. (Motion p 8; Petition p 6).

On 7 August 2020, the State filed responses to the Motion and Petition. In its Motion response, the State relied for the first time on *Monroe*, 330 N.C. at 436, 410 S.E.2d at 915, to support its position that

N.C. Gen. Stat. § 15A-1445(a)(2) gave the State the "absolute" right to appeal from every ruling in the trial court's order, including the court's ruling on Mr. Carver's ineffective assistance of counsel claim, because the court had granted him a new trial based, in part, on newly discovered evidence. (Motion Response pp 2-7). In a separate response, the State argued that Mr. Carver's Petition should be dismissed. (Petition Response pp 2-4). However, the State also wrote, "To the extent this Court agrees with [Mr. Carver] that the State's appeal should be dismissed, the State would join in [his] request for review of the trial court's 12 June 2019 order by certiorari." (Response p 4).

The Court of Appeals held oral arguments on 13 January 2021. During the argument, the State conceded that the newly discovered evidence and ineffective assistance of counsel issues in Mr. Carver's case were "mutually exclusive." *Carver*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 26. Four months later, on 20 April 2021, the Court issued its unanimous, published opinion dismissing the State's appeal. *Id.*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 29-30.

In the opinion, the Court of Appeals recognized the State's "limited" right to appeal under N.C. Gen. Stat. § 15A-1445(a)(2) from

the trial court's ruling on Mr. Carver's newly discovered evidence claim in the order granting him a new trial, "but only on questions of law."

Id., ___ N.C. App. at ___ , 2021-NCCOA-141, ¶ 21. However, the statute did not confer the right to appellate review of the trial court's ruling on Mr. Carver's ineffective assistance of counsel claim, the Court held. *Id.*, ___ N.C. App. at ___ , 2021-NCCOA-141, ¶ 22-27. The Court rejected the State's interpretation of N.C. Gen. Stat. § 15A-1445(a)(2), finding that the State would require the Court to ignore the statute's "specific limitations" on the State's right to appeal, which is the "opposite" of what the Court must do for a statute that must be "strictly construed" against the State's right to appeal. *Id.*, ___ N.C. App. at ___ , 2021-NCCOA-141, ¶ 27.

The Court examined its holdings in *State v. Carl*, 192 N.C. App. 544, 665 S.E.2d 787 (2008), *disc. rev. denied*, 363 N.C. 123, 672 S.E.2d 684 (2009), *Peterson*, and *Howard*, and determined that the State lacked the statutory right to appellate review of the ineffective assistance issue because it was based on "entirely separate facts and legal issues" and not "inextricably intertwined" with the newly discovered evidence issue for which the State did have appeal of right.

Carver, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 22-27. Noting that the State failed to seek certiorari review of the issue pursuant to N.C. Gen. Stat. § 15A-1422(c)(3), the Court dismissed the State's appeal from the portion of the trial court's order granting Mr. Carver a new trial based on the violation of his constitutional right to effective assistance of counsel. *Id.*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 28-29. Because the State's challenge to the trial court's ruling on Mr. Carver's newly discovered evidence claim would, in turn, have no practical effect on the case's outcome, the Court dismissed the State's appeal as moot. *Id.*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 29-30.³

On 7 May 2021, Gaston County Assistant District Attorney Stephanie A. Hamlin e-mailed a draft copy of the State's Motion to Release Evidence to Ms. Christine C. Mumma of the N.C. Center on Actual Innocence, Mr. Carver's counsel of record. (Appendix p 1). On 9 May 2021, Ms. Mumma responded with proposed changes to the Motion. (Appendix p 1).

³ On that same date, 20 April 2021, the Court of Appeals issued orders allowing Mr. Carver's Motion to Dismiss / Motion to Strike Portions of State's Brief "per opinion" and denying his Petition for Writ of Certiorari (without explanation). *See* Docket in Case No. COA19-1055.

On 10 May 2021, the State filed the State's Petition for Discretionary Review and State's Petition for Writ of Supersedeas and Application for Temporary Stay in this Court. On 11 May 2021, this Court entered an order allowing the temporary stay. *See* Docket in Case No. 301P12-2. On the same date, in an e-mail, Ms. Mumma asked Ms. Hamlin whether the State's Supreme Court pleadings would affect the filing of the State's Motion to Release Evidence. (Appendix p 3). Ms. Hamlin responded that she would "wait" and added that she was "glad to know that if and when the time comes we will likely be able to agree on the Motion/Order." (Appendix p 3).

On this date, 24 May 2021, Mr. Carver has filed the Defendant's Response to the State's Petition for Writ of Supersedeas and Application for Temporary Stay, which this Response incorporates by reference as if fully set forth herein. *See* Docket in Case No. 301P12-2.

**REASONS WHY THE STATE'S PETITION FOR
DISCRETIONARY REVIEW SHOULD BE DENIED**

Rule 15(a) precludes the State from seeking this Court's discretionary review of the unanimous, published opinion which the Court of Appeals issued on 20 April 2021. Alternatively, the State's appeal lacks merit. The Court of Appeals made no error of law in

dismissing the State's appeal. Instead, the Court of Appeals applied settled precedent in defining and applying the limited scope of appellate review which N.C. Gen. Stat. § 15A-1445(a)(2) permits the State, and its decision does not conflict with *Monroe* or other decisions of this Court, as the State contends. (State's Petition pp 4-11). Accordingly, this Court should dismiss, or in the alternative deny, the State's Petition for Discretionary Review, dissolve the temporary stay of the Court of Appeals' decision, and grant any other relief which this Court deems just and proper, including sanctioning the State for its appellate rule violations.

A. The State's appeal is procedurally barred.

The State seeks this Court's review of the Court of Appeals' decision pursuant to Rule 15 and N.C. Gen. Stat. § 7A-31. (State's Petition p 1). However, the State fails to acknowledge that both the appellate rule and statute expressly preclude the State's Petition.

First, Rule 15(a) states that "no petition for discretionary review may be filed in any post-conviction proceeding under Article 89 of Chapter 15A of the General Statutes," which governs motions for appropriate relief. *See State v. Tutt*, 171 N.C. App. 518, 521, 615 S.E.2d

688, 690-691 (2005) (noting that N.C. Const. art. IV, § 13 (2), gives the Supreme Court the "exclusive authority to make rules of procedure and practice for the Appellate Division"). In other words, this Court – not the legislature – has barred the State from seeking this Court's review of the Court of Appeals' decision on Mr. Carver's MAR pursuant to its state constitutional rule-making authority.

Second, N.C. Gen. Stat. § 7A-31(a) permits the State to move for certification for review of any criminal cause "[e]xcept in courts-martial and motions within the purview of" N.C. Gen. Stat. § 7A-28. "Decisions of the Court of Appeals upon review of [MARs listed in N.C. Gen. Stat. § 15A-1415(b)] are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise," N.C. Gen. Stat. § 7A-28 states. *See also* N.C. Gen. Stat. § 15A-1422(f) (Court of Appeals' decisions on MARs filed pursuant to N.C. Gen. Stat. § 1415(b) are "final and not subject to further review by appeal, certification, writ, motion, or otherwise.").⁴

The State does acknowledge that N.C. Gen. Stat. § 7A-28 and N.C. Gen. Stat. § 15A-1422(f) "[o]rdinarily" preclude this Court's review of

⁴ The statute was amended in 1995, replacing former N.C. Gen. Stat. § 15A-1415(b)(6) with N.C. Gen. Stat. § 15A-1415(c).

the Court of Appeals' decisions on MARs in non-capital cases such as the present one. (State's Petition p 10). Yet, relying on *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007), the State asserts that neither statute can restrict this Court's authority under N.C. Const. art. IV, § 12, to review on appeal any lower-court decision. (State's Petition p 10).

The State's reliance on *Ellis* is misplaced. First, the appellant in *Ellis* initially sought certiorari review in the Court of Appeals – a step which the State, to date, has not taken in the present case – before filing a petition for discretionary review in this Court. *Ellis*, 361 N.C. at 203, 639 S.E.2d at 427. Second, this Court stated in *Ellis* that it would "not hesitate to exercise its rarely used general supervisory authority when necessary, to promote the expeditious administration of justice," and it could do so to consider issues which were not properly before it according to the appellate rules. *Id.*, 361 N.C. at 205, 639 S.E.2d at 428. The Court found that the exercise of that authority was "particularly appropriate when ... prompt and definitive resolution of an issue is necessary to ensure the uniform administration of North Carolina's criminal statutes." *Id.*, 361 N.C. at 205, 639 S.E.2d at 428-429. In *Ellis*,

361 N.C. at 206-207, 639 S.E.2d at 429, the statute at issue was N.C. Gen. Stat. § 14-87(d).

Here, the State has not asked this Court to invoke its Rule 2 authority to suspend the appellate rules and "expedite a decision in the public interest" or "promote the expeditious administration of justice." *See State v. Hester*, 254 N.C. App. 506, 529, 803 S.E.2d 8, 24 (2017) (litigants "waive the arguments they fail to make"). Given the State's apparent readiness to move ahead with Mr. Carver's case upon remand, it appears that granting the State's Petition would delay – not expedite – a decision in the public interest. *See Appendix pp 1-4.*

Moreover, as discussed, *infra*, the Court of Appeals applied precedent in rejecting the State's assertion that N.C. Gen. Stat. § 15A-1445(a)(2) gave the State the right to appeal from "every ruling" in the trial court's order granting Mr. Carver a new trial simply because the order was based, in part, on newly discovered evidence. *Carver*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 22-27. Thus, in contrast to *Ellis*, there is no issue concerning the "uniform" administration of a statute, N.C. Gen. Stat. § 15A-1445(a)(2), which requires this Court to use its supervisory authority to resolve. The State has just misinterpreted the

scope of appellate review which N.C. Gen. Stat. § 15A-1445(a)(2) permits. Accordingly, the State can rely on neither Rule 15 nor N.C. Gen. Stat. § 7A-31 to seek this Court's discretionary review of the Court of Appeals' decision.

The State also relies on *Monroe*, 330 N.C. at 435, 410 S.E.2d at 915 (N.C. Gen. Stat. § 7A-28(a)), and *State v. Roberts*, 351 N.C. 325, 328, 523 S.E.2d 417, 419 (2000) (N.C. Gen. Stat. § 15A-1422(f)), to assert that the Court of Appeals' dismissal of the State's appeal was not a "decision ... upon review" that would trigger statutes impeding this Court's review. (State's Petition p 10). Assuming, *arguendo*, this is true, the State's argument nonetheless fails to address Rule 15(a)'s clear mandate that "no petition for discretionary review may be filed in any post-conviction proceeding" involving an MAR. The rule is the product of this Court's "exclusive" rule-making authority for the appellate courts. *See Tutt*, 171 N.C. App. at 521, 615 S.E.2d at 690-691; N.C. Const. art. IV, § 13 (2). The State makes no request for this Court to invoke its Rule 2 authority and suspend the application of Rule 15(a).

Finally, in a footnote, the State asks this Court, "[t]o the extent necessary," to issue its writ of certiorari pursuant to Rule 21(a)(2) to

review the Court of Appeals' order dismissing the State's appeal. (State's Petition p 3). This Court should deny the State's request for two reasons. First, the State's pleading – labeled "State's Petition for Discretionary Review" – violates the Rule 21(c) requirement that a petition for certiorari review be "verified by counsel or the petitioner." Second, as discussed, *infra*, the State has failed to demonstrate "merit, or that probable error was committed" below. *State v. Moore*, 210 N.C. 686, 691, 188 S.E. 421, 424 (1936).⁵ Accordingly, the State's appeal to this Court is procedurally barred, and its Petition for Discretionary Review must be dismissed.

B. Alternatively, the State's appeal lacks merit.

Upon reviewing a decision by the Court of Appeals, this Court must determine whether there was "any error of law." *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994); *see also* N.C. R. App. P. 16(a) (whether review is by appeal of right or discretionary review, the Court's review is "to determine whether there is error of law in the

⁵ The State's attempt to join in Mr. Carver's 27 July 2020 Petition for Writ of Certiorari should be denied, if even considered, by this Court due to the State's failure to comply with Rule 21(c), and the fact that Mr. Carver did not seek certiorari review of the trial court's ruling on his ineffective assistance of counsel claims in the Petition.

decision of the Court of Appeals."). Here, assuming, *arguendo*, that the State's appeal is not procedurally barred, the State has nonetheless failed to demonstrate that the Court of Appeals committed any error of law in dismissing the State's appeal. Thus, the State cannot argue that its appeal merits review pursuant to N.C. Gen. Stat. § 7A-31(c)(2) because it involves "legal principles of major significance" to the State's jurisprudence, or that the Court of Appeals' decision appears likely to be in conflict with any decision of this Court to warrant review pursuant to N.C. Gen. Stat. § 7A-31(c)(3). Thus, the State's Petition must be denied.

1. The Court of Appeals made no error of law.

In its 12 June 2019 order granting Mr. Carver's MAR, the trial court awarded Mr. Carver a new trial based on four separate claims: three claims of ineffective assistance of counsel and one claim of newly discovered evidence. (R p 165-179). In dismissing the State's appeal from this order, the Court of Appeals recognized that N.C. Gen. Stat. § 15A-1445(a)(2) gave the State the right to appeal from the portion of the order granting Mr. Carver a new trial on the ground of newly discovered evidence. *Carver*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 21. However, the Court properly rejected the State's bid to enlarge the

statute's scope to include "every ruling" in the order, including the trial court's ruling on ineffective assistance of counsel claims that were based on "entirely separate facts and legal issues" and not "inextricably intertwined" with the newly discovered evidence issue. *Carver*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 22-27. The Court's decision was in harmony with *Carl*, *Peterson*, and *Howard*, and it presents this Court with no legal error to correct.

In *Carl*, 192 N.C. App. at 545-546, 665 S.E.2d at 790-791, the trial court entered an order which denied the State's motion to dismiss all claims against it based on a sovereign immunity defense and its motion to dismiss the plaintiffs' constitutional claim. The Court of Appeals noted that a party generally cannot appeal a motion to dismiss, which is an interlocutory order, unless it "affects a substantial right." *Id.*, 192 N.C. App. at 550, 665 S.E.2d at 793. Because the denial of the State's motion to dismiss based on the sovereign immunity defense affected a substantial right, it was appealable, while the denial of the State's motion to dismiss the constitutional claim was not appealable because it did not affect a substantial right, the Court held. *Id.* However, because

the constitutional claim issue was "inextricably intertwined" with the sovereign immunity issue, the Court granted certiorari review of it. *Id.*

In *Peterson*, 228 N.C. App. at 342, 744 S.E.2d at 156-157, the Court of Appeals found that two grounds, newly discovered evidence and *Brady* violations, served as the basis for the trial court's decision to grant the defendant's MAR and award him a new trial. The Court held:

"B]ecause the trial court granted defendant's MAR based, in part, on newly discovered evidence [a ruling appealable of right pursuant to N.C. Gen. Stat. § 15A-1445(a)(2)], the State had the right to appeal the MAR order. We note that the State, in case we found that the MAR order was based solely on *Brady* violations, filed a petition for writ of certiorari. Since certiorari is not necessary to confer jurisdiction on this Court, we dismiss the State's petition." *Id.*

The newly discovered evidence in *Peterson*, and the basis for the defendant's *Brady* violation claims, concerned an expert witness' background, his bias in favor of the prosecution, and the scientific basis for and acceptability of his opinions, methods, and experiments. *Id.*, 228 N.C. App. at 342, 744 S.E.2d at 156. However, because the Court of Appeals upheld the order for a new trial based on newly discovered evidence grounds, it did not address the *Brady* violations which the trial court found. *Id.* Accordingly, the Court of Appeals' statement regarding

the scope of the State's appeal was not necessary to its decision to affirm the trial court's order granting the defendant a new trial, and thus, it was "non-binding dicta." *See State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 603 (2006); *see also Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.").

Nonetheless, in *Howard*, 247 N.C. App. at 205, 783 S.E.2d at 794, the Court of Appeals examined *Peterson* and cited it in holding that the State could rely on N.C. Gen. Stat. § 15A-1445(a)(2) to gain appellate review of issues beyond the defendant's newly discovered evidence claims only because "*all of the relief*" which the trial court had granted was "inextricably linked to, and based on, what the court found to be newly discovered evidence." (Court of Appeals' emphasis). In *Howard*, as in *Peterson*, the newly discovered evidence served as the sole basis for the defendant's constitutional violations claims. *Id.* In particular, a police memo implicating out-of-state gang members in the victims' murder, which the State had not turned over until post-conviction discovery, served as the basis for the defendant's newly discovered

evidence, *Brady*, and *Napue* violation claims. *Id.*, 247 N.C. App. at 200-201, 783 S.E.2d at 791-792.⁶

Here, the Court of Appeals noted how the panel in *Howard* had merely applied *Carl's* "inextricably intertwined" rule in the MAR context. *Carver*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 24. The Court of Appeals also noted how *Howard* supported its ruling by citing *Peterson's* holding that appellate jurisdiction existed where the trial court's ruling was based, in part, on newly discovered evidence. *Id.*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 25. Because the decisions in *Peterson* and *Howard* were clearly harmonized, the Court properly applied the most recent of those decisions – *Howard* – to the facts in Mr. Carver's case. *Id.*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 25 (citing *State v. Gonzalez*, 263 N.C. App. 527, 531, 823 S.E.2d 886, 888 (2019)).

Based on its review of the facts, the Court correctly concluded that the trial court's rulings on Mr. Carver's newly discovered evidence and

⁶ This Court may take judicial notice of the Record on Appeal in *Howard*, which contains the trial court's order granting the defendant's MAR on pages 431-458. *See* Docket in Case No. COA14-1021; *see, e.g., State v. King*, 218 N.C. App. 384, 387-388, 721 S.E.2d 327, 330 (2012) ("This Court may take judicial notice of the public records of other courts within the state judicial system. If a party requests that the court take judicial notice and provides the necessary information, it is mandatory that a court take judicial notice. Judicial notice may be taken at any stage of the proceeding, including on appeal.")

ineffective assistance of counsel claims were not "inextricably linked," and thus the State could not rely on N.C. Gen. Stat. § 15A-1445(a)(2) to claim the right to appellate review of both issues. *Id.*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 26. As the Court noted, the State even conceded that Mr. Carver's newly discovered evidence and ineffective assistance claims were "mutually exclusive," with one based on evidence that was unavailable at the time of trial, and the other claim based on "separate evidence" which the trial court found was available to Mr. Carver's counsel if they had exercised "due diligence." *Id.* The evidence in support of Mr. Carver's ineffective assistance claims went beyond his trial counsel's handling of the DNA issue and included extensive evidence about their failure to investigate and present evidence of his physical and mental limitations. (R pp 166-168). Thus, in contrast to *Carl*, *Peterson*, and *Howard*, the issues which the State has sought to appeal in the present case are not "inextricably intertwined."

Accordingly, the State had no right to appeal the trial court's ruling on Mr. Carver's ineffective assistance of counsel claims pursuant to N.C. Gen. Stat. § 15A-1445(a)(2). Instead, the State needed to seek certiorari review of that issue pursuant to Rule 21(a)(1) and N.C. Gen.

Stat. § 15A-1422(c)(3) – a step which the State refused to take and which, at this point, would be an unreasonably delayed pleading. *See* N.C. R. App. P. 21(c). In summary, the Court of Appeals made no error in dismissing the State's appeal as moot, and the State can present no reason why this Court should grant discretionary review of the lower court's decision. The State's Petition must be denied.

2. The Court of Appeals' decision does not conflict with this Court's precedent, and thus, this cause implicates no legal principles of major significance to the state's jurisprudence.

The State's argument that this case falls within the purview of N.C. Gen. Stat. § 7A-31(c)(3) because it "conflicts with *Monroe* to say nothing of the plain language" of N.C. Gen. Stat. § 15A-1445(a)(2) is meritless. (State's Petition p 11). It is based on the flawed idea that this Court, in *Monroe*, established a rule that, if a trial court enters an order which grants a defendant a new trial based, in part, on the ground of newly discovered evidence, then N.C. Gen. Stat. § 15A-1445(a)(2) gives the State the right to appeal the *entire* order – even issues entirely unrelated to newly discovered evidence. (State's Petition p 6). That is not the holding in *Monroe*. And that is not the law in North Carolina. The Court of Appeals properly rejected this attempt by the State to

"broaden [its] ability to appeal MAR rulings unfavorable to the State as a matter of right." *Id.*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 28.

In *Monroe*, 330 N.C. at 434, 410 S.E.2d at 914, the trial court granted the defendant a new trial based solely on newly discovered evidence, and the State appealed from the interlocutory order pursuant to N.C. Gen. Stat. § 15A-1445(a)(2). The issue was that the Court of Appeals had dismissed the State's appeal because it was interlocutory. *Id.* This Court found that the Court of Appeals erred because, even though the State's appeal was interlocutory in nature, N.C. Gen. Stat. § 15A-1445(a)(2) gave the State the "absolute" right to appellate review of the order. *Id.*, 330 N.C. at 436, 410 S.E.2d at 915. However, in *Monroe*, this Court reached no holding on whether the State's "absolute" right under N.C. Gen. Stat. § 15A-1445(a)(2) would have extended to issues in the trial court's order beyond newly discovered evidence, which is the issue in the present case.

Here, in fact, the Court of Appeals recognized exactly what this Court held – and *only* held – in *Monroe*: N.C. Gen. Stat. § 15A-1445(a)(2) gives the State the right to appeal the trial court's order granting a new trial on the ground of newly discovered evidence even

though it is an interlocutory order. See *Carver*, ___ N.C. App. at ___ , 2021-NCCOA-141, ¶ 21, and *Monroe*, 330 N.C. at 436, 410 S.E.2d at 916. No conflict exists between this Court's holding in *Monroe* and the Court of Appeals' decision in the present case. That is because *Monroe* simply did not address what is at issue in this case: Whether N.C. Gen. Stat. § 15A-1445(a)(2) gives the State the right to appeal *every* issue in a trial court's order granting a new trial so long as the order is based, in part, on newly discovered evidence.

The State's argument is rooted in further misinterpretation of two cases which have addressed this issue: *Peterson* and *Howard*, neither of which examined or even cited *Monroe*. According to the State, "*Peterson* held unequivocally that the State has a right to appeal 'because the trial court granted [the] defendant's MAR based, in part, on newly discovered evidence.'" (State's Petition p 8, citing *Peterson*, 228 N.C. App. at 343, 744 S.E.2d at 157). The State ignores that this holding was non-binding dicta, *Hanton*, 175 N.C. App. at 254, 623 at 603. Furthermore, the State's argument fails to note that the newly discovered evidence in *Peterson* concerning the State's expert witness

also served as the entire basis for the defendant's *Brady* violation claims. *Peterson*, 228 N.C. App. at 342, 744 S.E.2d at 156.

Howard recognized the nexus between the newly discovered evidence and constitutional violations in *Peterson* when it relied on *Peterson* to reach its holding that the State's right to appeal under N.C. Gen. Stat. § 15A-1445(a)(2) extended to those issues which were "inextricably linked to, and based on, what the court found to be newly discovered evidence." *Howard*, 247 N.C. App. at 205, 783 S.E.2d at 794. The Court stressed that the newly discovered evidence factored into "all of the relief" which the trial court had granted to the defendant in *Howard*. *Id.* *Howard* did not reject a defendant's assertion that the State could appeal from only "the portion" of the trial court's order granting newly discovered evidence and not the *entire* order, including unrelated issues, as the State contends. (State's Petition p 8). In fact, the Court in *Howard* voided a portion of the trial court's order which the State had appealed from. *Id.*, 247 N.C. App. at 202, 783 S.E.2d at 793. *Howard* also did not interpret *Peterson* as creating a blanket rule that all grounds for relief in an order granting a new trial are

appealable by the State as long as one of those grounds is newly discovered evidence.

The interpretation of the plain language of N.C. Gen. Stat. § 15A-1445(a)(2) which the State urges this Court to consider not only lacks support in *Monroe*, *Peterson*, and *Howard*, it also defies the well-established rule that the State's right to appeal in a criminal proceeding is entirely statutory and must be strictly construed. *State v. Murrell*, 54 N.C. App. 342, 343-344, 283 S.E.2d 173, 173 (1981). As the Court of Appeals noted, the State's interpretation would have required the Court to ignore the "specific limitations" which N.C. Gen. Stat. § 15A-1445(a)(2) places on the State's right to appeal, and that is the "opposite" of what our state's jurisprudence requires. *Carver*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 27. The State's argument, in fact, would have rendered the statute's express restriction to appeals based on questions of law "superfluous," allowing the State to appeal all issues in the trial court's order, "whether they involve questions of law or not." *Id.*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 27.

As the State admits, even when a party has the right to appeal from an order or judgment in a criminal proceeding, the legislature may

still "restrict the scope of issues addressed on appeal." (State's Petition p 9). *See, e.g.*, N.C. Gen. Stat. § 15A-1444(e); *see also State v. Rouse*, 234 N.C. App. 92, 95, 757 S.E.2d 690, 692 (2014) (recognizing the constitutional issue raised by the defendant did not fall within his limited right of appeal after a guilty plea under N.C. Gen. Stat. § 15A-1444), *and State v. Pimental*, 153 N.C. App. 69, 74, 568 S.E.2d 867, 870 (2002) (concluding there was no right to appeal six issues raised in defendant's guilty plea appeal even though two issues were properly before the Court).

Here, the Court of Appeals merely applied the plain language of N.C. Gen. Stat. § 15A-1445(a)(2) and controlling precedent which restricts the scope of the State's right to appeal from an order granting a new trial to questions of law which involve the trial court's ruling on newly discovered evidence, or issues "inextricably intertwined" with that evidence. If the State sought to appeal an issue beyond that limited scope – such as the trial court's granting of Mr. Carver's ineffective assistance claim – then the State could have sought certiorari review of that issue, the Court of Appeals noted. *Carver*, ___ N.C. App. at ___ , 2021-NCCOA-141, ¶ 28; *see, e.g., State v. Collins*, 221 N.C. App. 604,

606, 727 S.E.2d 922, 924 (2012) (granting the State's motion to dismiss the defendant's direct appeal from the judgement entered on his guilty plea, but still granting certiorari review). Here, the State has steadfastly refused to do so.

In this sense, the State's cause does not involve legal principles of major significance to the State's jurisprudence or merit this Court's review under N.C. Gen. Stat. § 7A-31(c)(2). It is noteworthy that in both *Peterson*, 228 N.C. App. at 343, 744 S.E.2d at 157, and *Howard*, 247 N.C. App. at 201, 783 S.E.2d at 792, the State had previously recognized the need to file a petition for writ of certiorari in the event the Court of Appeals found that the trial court had granted relief that was not based on newly discovered evidence. Here, the State could have relied on those precedents and determined that, in contrast to *Peterson* and *Howard*, the trial court granted relief to Mr. Carver based on "entirely separate facts and legal issues" which were not "inextricably intertwined" with the newly discovered evidence issue for which the State had appeal of right. *Carver*, ___ N.C. App. at ___, 2021-NCCOA-141, ¶ 22-27. The State's failure to do so does not warrant this Court's granting of discretionary review.

Moreover, the State provides no support for its claim that, in the present case, it eschewed seeking certiorari review because the Court of Appeals "had dismissed as unnecessary a petition for writ of certiorari in apparently every other case appealed under [N.C. Gen. Stat. § 15A-1445(a)(2)] since *Monroe* recognized the State's absolute right to appellate review." (State's Petition p 11). The State never even cited *Monroe* in its principal brief. (Brief for the State pp 12-30). After citing *Monroe* for the first time in a response to Mr. Carver's motion to dismiss the State's appeal, the State now relies heavily on *Monroe* in an attempt to get a "better mount" before this Court. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). This Court should reject the State's argument, dismiss (or in the alternative deny) the State's Petition, and dissolve the temporary stay of the Court of Appeals' mandate.

C. This Court may sanction the State.

The State's Petition for Discretionary Review contains two violations of the N.C. Rules of Appellate Procedure. First, the State represents as fact that Mr. Carver "murdered" Irina Yarmolenko on 5 May 2008. (State's Petition p 2). This statement is opinion, not fact, and thus, it violates the Rule 15(c) requirement that the petitioner "set forth

plainly and concisely the factual and legal basis" for seeking discretionary review under N.C. Gen. Stat. § 7A-31. Second, in a footnote, the State asks this Court to issue its writ of certiorari "[t]o the extent it is necessary" to review the Court of Appeals' order dismissing the State's appeal. (State's Petition p 3). As noted, *supra*, the State's pleading – labeled "State's Petition for Discretionary Review" – violates the Rule 21(c) requirement that a petition for writ of certiorari be "verified by counsel or the petitioner."

Under Rule 25(b), this Court may, on its own initiative or on a party's motion, impose sanctions against a party or attorney if the Court determines that such party or attorney or both "substantially failed to comply with these rules." The court may also impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals. N.C. R. App. P. 25(b). Under Rule 34(b), sanctions available to the Court include dismissal of an appeal, monetary costs, and "any other sanction deemed just and proper."

Mr. Carver respectfully moves this Court to enter appropriate sanctions against the State for its above appellate rule violations, including but not limited to dismissal of the State's purported petition

for writ of certiorari. *See, e.g., State v. McCoy*, 171 N.C. App. 636, 638-639, 615 S.E.2d 319, 321 (2005) (Court found that a footnote contained in the appellant's brief "clearly [did] not meet the requirements set forth in Rule 21(c)," and declined to invoke Rule 2).

CONCLUSION

For the foregoing reasons and authorities, the Defendant-Respondent, Mr. Mark Bradley Carver, respectfully asks this Court to dismiss or, in the alternative, deny the State's Petition for Discretionary Review, dissolve this Court's temporary stay of the Court of Appeals' decision, and grant any other relief which this Court deems to be just and proper, including imposing sanctions upon the State pursuant to Rules 25(b) and 34(b) for the State's violations of the N.C. Rules of Appellate Procedure.

Respectfully submitted, this 24th day of May 2021.

s/Electronically filed

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

s/Electronically filed

Guy J. Loranger
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(919) 489-3268

ATTORNEYS FOR DEFENDANT-RESPONDENT

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the Defendant's Response to the State's Petition for Discretionary Review has, on this date, been filed in the Supreme Court of North Carolina by electronic delivery. I further hereby certify that a copy of the above and foregoing Response has, on this date, been duly served upon the State-Petitioner by electronic mail as permitted by N.C. R. App. P. Rule 26(c) addressed to:

Mr. Joseph L. Hyde
Assistant Attorney General
N.C. Department of Justice
jhyde@ncdoj.gov

On this 24th day of May 2021.

s/Electronically filed

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

s/Electronically filed

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ATTORNEYS FOR DEFENDANT-RESPONDENT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)	
)	<u>From Court of Appeals</u>
)	No. COA19-1055
v.)	
)	<u>From Gaston</u>
)	08 CRS 68290
MARK BRADLEY CARVER)	

**DEFENDANT'S RESPONSE TO STATE'S
PETITION FOR DISCRETIONARY REVIEW**

APPENDIX

E-mails between Stephanie A. Hamlin
and Christine C. Mumma (7 and 9 May 2021) ... 1-2

E-mails between Stephanie A. Hamlin
and Christine C. Mumma (11 May 2021) 3-4

Subject: Re: Motion to Release Evidence
Date: Sunday, May 9, 2021 at 2:39:10 PM Eastern Daylight Time
From: Chris Mumma
To: Hamlin, Stephanie A.
CC: Cheryl Sullivan
Attachments: Carver Motion to release evidence - with CM suggested edits.doc, image001.png, image002.png, image003.png, image004.png, image005.png

Good afternoon,

Thank you for sending the draft motion. As we discussed, Cheryl Sullivan and I continue to be attorneys of record. Please copy both of us on all communications.

I've included some proposed edits in the attached. Please add service to the motion. We will want to be heard on the motion if the proposed changes are not adopted. Thank you.

Best,

Chris Mumma

Executive Director

N.C. Center on Actual Innocence

P.O. Box 52446 Shannon Plaza Station

Durham, North Carolina 27717-2446

Office: [\(919\) 489-3268](tel:9194893268)

Fax: [\(919\) 489-3285](tel:9194893285)

www.nccai.org

On Fri, May 7, 2021 at 4:33 PM Hamlin, Stephanie A. <Stephanie.A.Hamlin@nccourts.org> wrote:

Good Afternoon

Please review this Motion. The agreed upon order would mirror this Motion. Let me know if you have anything more you want me to add or change.

Thank you,



Stephanie Hamlin

Assistant District Attorney
District 38

North Carolina Judicial Branch

704-852-3113

Justice for all

www.NCcourts.gov



E-mail correspondence to and from this address may be subject to the North Carolina public records laws and if so, may be disclosed.

Subject: RE: Motion to Release Evidence
Date: Tuesday, May 11, 2021 at 2:36:24 PM Eastern Daylight Time
From: Hamlin, Stephanie A.
To: Chris Mumma
CC: Cheryl Sullivan
Attachments: image003.png, image004.png, image005.png, image006.png, image011.png, image012.png, image013.png, image014.png

At this point I guess I will wait but I am glad to know that if and when the time comes we will likely be able to agree on the Motion/Order.

Thanks, Stephanie



Stephanie Hamlin
Assistant District Attorney
District 38
North Carolina Judicial Branch
704-852-3113

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From: Chris Mumma <cmumma@nccai.org>
Sent: Tuesday, May 11, 2021 2:19 PM
To: Hamlin, Stephanie A. <Stephanie.A.Hamlin@nccourts.org>
Cc: Cheryl Sullivan <csullivan@nccai.org>
Subject: Re: Motion to Release Evidence

Stephanie,

I'm assuming you know that the State filed a petition with the Supreme Court and the COA's decision has been stayed. Didn't know if that impacts what you intend to file at this time.

Thanks,

Chris

On Tue, May 11, 2021 at 2:17 PM Chris Mumma <cmumma@nccai.org> wrote:

Having your investigator transfer the evidence sounds fine, Stephanie.

I am aware that MHPD has evidence in its custody. I also know that evidence was not used at trial.

Thanks,

Chris

On Tue, May 11, 2021 at 2:10 PM Hamlin, Stephanie A. <Stephanie.A.Hamlin@nccourts.org> wrote:

Good afternoon

Our investigator is Matt Helton. He has worked in our office at least 7 or 8 years at this point. We have only one investigator assigned to the DA's Office. You realize that Mount Holly still has multiple pieces of evidence in their custody in their property room that we may also send to the lab. They were the investigating agency in the case so they will be involved in any further investigation in the case.

Thanks,
Stephanie



Stephanie Hamlin
Assistant District Attorney
District 38
North Carolina Judicial Branch
704-852-3113

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From: Chris Mumma <cmumma@nccai.org>
Sent: Tuesday, May 11, 2021 12:09 PM
To: Hamlin, Stephanie A. <Stephanie.A.Hamlin@nccourts.org>
Cc: Cheryl Sullivan <csullivan@nccai.org>
Subject: Re: Motion to Release Evidence

Good afternoon, Stephanie.

We've had a lot of evidence sent from the clerk offices to labs, but I understand you are opposed to that.

You are correct that we are specifically opposed to MHPD transporting the evidence. Can you tell me who your investigator is?

Thank you,

Chris

On Tue, May 11, 2021 at 8:49 AM Hamlin, Stephanie A. <Stephanie.A.Hamlin@nccourts.org> wrote: