STATE OF NORTH CAROLINA | IN THE GENERAL COURT OF JUSTICE

COUNTY OF DURHAM | SUPERIOR COURT DIVISION

CASE NOS. 92 CRS 28349, 25350, 28352

FILED
14 MAY 27 PM 12: 31
DURHAM COUNTY, C.S.C.

STATE OF NORTH CAROLINA)
)
Respondent,)
)
vs.)
)
DARRYL ANTHONY HOWARD)
)
Defendant-Petitioner.)

ORDER GRANTING MOTION FOR APPROPRIATE RELIEF, VACATING CONVICTION AND GRANTING NEW TRIAL

THIS CAUSE came before the Honorable Orlando Hudson, Senior Resident Superior Court Judge, presiding on Motion of the Defendant for Appropriate Relief filed on March 19, 2014, based upon newly discovered evidence and federal constitutional claims. The State of North Carolina has filed a Response to Defendant's Motion for Appropriate Relief and a Motion to Deny Defendant's Motion for Appropriate Relief and the Defendant has submitted a Response to the State's Answer and Motion to Dismiss and a Memorandum in Support of the Motion for Appropriate Relief. Consequently, this Court finds that this matter is appropriate for review and disposition under G.S. §§ 15A-270, 15A-1412, 15A-1417 and 15A-1420.

Based on a review of the pleadings and materials submitted by the Defendant and the State, this Court finds that the following facts are undisputed and enters the following Conclusions of Law based upon these undisputed facts:

FINDINGS OF UNDISPUTED FACT

Undisputed Facts Concerning the Underlying Crimes and Howard's 1995 Trial

1. The Defendant, Darryl Anthony Howard ("Mr. Howard"), was charged with two counts of First-Degree Murder and one count of First-Degree Arson arising out of the deaths of two women, Doris W. and her daughter Nishonda W. At trial, both First-Degree Murder charges were reduced to Second-Degree Murder. Mr. Howard was convicted by a Jury of two counts of Second-Degree Murder and one count of First-Degree Arson on March 27, 1995 and sentenced to 80 years' imprisonment. On June 18, 1996, his convictions were affirmed by the North Carolina Court of Appeals.

The Deaths of Doris and Nishonda W.

2. Just before 1:00 A.M. on November 27, 1991, the Durham Fire Department responded to a neighbor's call about a "structure fire" in Few Gardens, a public housing project in Durham. The first responder found two female bodies, both nude and face down, on one bed in the front bedroom on the second floor. The rescue team attempted CPR on the victims but both were already dead. The victims were later identified as 13-year-old Nishonda and her 29-year-old mother Doris W.

3. A fire investigator determined that the fire was started intentionally in a closet in the rear bedroom on the second floor. No cigarettes or matches were found at the crime scene. No rope, cord or other ligature was found at the crime scene.

4. Autopsies were performed on November 27 around 10:30 A.M. The Office of the Chief Medical Examiner ("OCME") collected sexual assault kits from the victims.

The OCME collects sexual assault kits when a victim "has obviously [been sexually assaulted] or [there was] a possibility of having been sexually assaulted." (T p 108.)

5. A "moderate number" of "well preserved" sperm heads were found in Nishonda's anus. (T pp 80, 135.) The pathologist determined that the sperm was deposited recently, within 24 hours of the young girl's death. (T pp 80, 135.) Nishonda also had redness at her vaginal opening, (T pp 75, 136-137), and cream-colored fluid in her vagina. (T pp 132-133.) The State Bureau of Investigation ("SBI") later examined Nishonda's rape kit and identified sperm in both Nishonda's anus and vagina.

6. Blood-tinged fluid was found in Doris' vagina. (T pp 119, 133; Exhibit D to MAR at 6.) Doris also had a ½-inch horizontal laceration midway up her vagina, located about one and a half inches from her cervix. (T pp 88, 119; Exhibit D to MAR at 6.) The pathologist testified that the tear, which occurred around the time of her death, was caused by the insertion of a foreign object into her vagina. (T pp 89-90.) At the time, no sperm was detected in Doris' vagina, anus or mouth. (T p 90.)

7. Nishonda's cause of death was strangulation by ligature, such as a cord or rope. (T pp 76-77.) Nishonda had scratches and tears on her mouth and abrasions on her back that were inflicted at about the time of her death. (T pp 73-76, 106-07; Exhibit C to MAR at 5, 9.) Based on her injuries, the pathologist testified that Nishonda struggled with her assailant. (T p 113.)

8. Doris was also strangled with a ligature, but it was not fatal. (T p 92.) Her death was caused by the force of a blunt, wide object against her abdomen, which produced a four-inch tear of her liver and extensive internal bleeding. (T pp 88-89, 92.)

Doris suffered numerous other injuries, including scratches and bruises to her face, back, and arm. (T pp 87-88, 116, 120-21.)

9. A toxicology exam tested positive for cocaine in Doris' blood. (T p 91; Exhibit D to MAR at 14.) The pathologist testified that Doris ingested cocaine within several hours of her death. (T p 118.) A "white powdery flakey material" was found on her front chest and left arm. (Exhibit D to MAR at 5.)

10. Based on newspaper accounts, it is undisputed that several days before the murders, Nishonda had reached out to the Department of Social Services. Public documents reveal that Nishonda expressed concern for her safety because her mother was dealing drugs and owed money to drug dealers. Nishonda had begged – unsuccessfully – to be removed from her home because she feared her life was in danger.

11. For nearly one year, police did not arrest anyone for the crimes. In November, 1992, almost one year after the crimes, police arrested Darryl Howard. It is undisputed that Howard was an acquaintance of Doris who frequented Few Gardens and who was near the scene on the night of the crimes. Mr. Howard was charged with the murders of both victims and the arson. (T pp 15-16.) His brother, Harvey Howard, was also arrested, but only on the arson charge.[1]

12. It is undisputed that there was and is no physical evidence connecting Howard to this crime scene or to these victims. It is further undisputed that none of the

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[1] The arson charge against Harvey was dropped just days after Darryl Howard's convictions. John Stevenson, *Arson, Other Charges Dismissed for Brother of Convicted Murderer*, THE HERALD-SUN (May 3, 1995), at C1.

physical evidence found on or in the victims was connected to Howard. Rather, the State conceded that the physical evidence found on the victims that was known at trial excluded Howard.

13. In June, 1993, the SBI conducted pre-trial DNA testing on Nishonda's rape kit based on the testing methods available at the time. Howard was excluded as the source of the sperm in Nishonda's anus and vagina. (Exhibit G to MAR.)

14. Despite this DNA exclusion, the State continued to prosecute Howard for the crimes, claiming that the homicides did not involve sexual assaults.

The Trial of Darryl Howard

15. Mr. Howard pleaded not guilty to all charges. A trial was held in the Superior Court Division of the General Court of Justice of Durham County in March, 1995. The State's case was tried by Assistant District Attorney Michael Nifong.[2] The lead detective in charge of investigating the crimes was D. L. Dowdy.

16. A review of the trial transcript and the pleadings reveal that the State's theory of the case was that Doris sold drugs, that Mr. Howard's role was to collect the money she received from selling and that Doris botched the deal and could not pay Mr. Howard what she owed. The State argued that Mr. Howard did not plan to murder Doris, but, when he did, he also had to kill Nishonda, who happened to walk in. The State's theory was that Mr. Howard alone murdered Doris and Nishonda and that no sexual

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[2] This Court takes judicial notice of the juridical fact that Mr. Nifong would later be disbarred and held in contempt of court in 2007 for suppressing exculpatory evidence and willfully making false statements to the Hon. Osmond Smith in connection with another criminal prosecution.

assaults were committed in connection with these murders. (T pp 19-20, 43-44, 413-14, 737-41.)

17. Prior to trial, Det. Dowdy prepared an affidavit to collect Mr. Howard's DNA sample to compare it to the victims' rape kits. After DNA testing excluded Mr. Howard as the source of the sperm in Nishonda, Det. Dowdy testified under oath that he *never investigated the crimes as, or suspected that the crimes involved, sexual assaults*. (T p 425.)

18. Det. Dowdy testified at trial that based on his investigation he determined that Nishonda was away from home with her boyfriend for almost a week prior to her murder. No explanation was provided as to how Dowdy obtained this information. (T pp 422-23.)

19. In his closing argument, Nifong argued that "[t]his [case] was never about sex" and that "*this case was never investigated as a sexual assault and it was never suspected to be a sexual assault*." Nifong argued that the sperm found in Nishonda's anus at the time of her death was unrelated to the crimes. He told the Jury, "I would submit to you that a 13-year-old who can be gone for five days with her boyfriend is not somebody with whom sex is going to be an unknown subject." (T p 737.) Nifong suggested to the Jury that a 13-year-old girl who was brutally killed and had sperm in her anus at the time of her death had engaged in consensual anal sex prior to her murder.

20. The State's case against Mr. Howard rested primarily on eyewitness testimony that Mr. Howard was seen near the scene of the crimes. The State's witnesses presented inconsistent and/or conflicting accounts of Howard's actions on the afternoon

before and the night of the crimes. The State conceded at trial that not a single one of its witnesses saw Mr. Howard commit the crimes. (T pp 15-16, 45, 738.)

21. The State's main witness at trial testified that she knew nothing about the murders and that she was coerced by Det. Dowdy into falsely testifying against Howard. (T pp 288-89, 308-09.) The court declared her a hostile witness and admitted into evidence her out-of-court tape recorded statement implicating Howard which she provided to Det. Dowdy eleven months after the crimes after she was arrested for solicitation. (T pp 290, 295-96, 307, 318, 382-83.)

22. Another witness at trial, Roneka Jackson, testified that on November 26, 1991, she saw Howard arguing with Doris about Howard's girlfriend and that Howard threatened to kill Doris and Nishonda. (T pp 168, 170-74, 189.) At the time of her testimony, Jackson was in prison for violating her probation; she received $10,000 from a state compensation fund in exchange for her testimony against Howard. (T pp 403-04, 616-17.)

23. Another of the State's witnesses, Dwight Moody Moss, testified that on the afternoon of November 26, 1991, he saw Howard standing in front of Doris' building yelling that "you messed up the money" and "you messed up the drugs" and then said "I'll kill you." (T pp 242-43.)

24. Mr. Howard maintained his innocence at trial. The defense's theory was that the medical and crime scene evidence showed that the victims were obviously sexually assaulted, that the sexual assaults went "hand in hand" with the murders, that Mr. Howard was excluded through pre-trial DNA testing as the source of the sperm in

Nishonda, and that Mr. Howard, who did not rape the victims, did not commit the murders. (T pp 20-21.) The defense argued that the State believed that the victims were sexually assaulted until Mr. Howard was excluded through pre-trial DNA testing. (T p 21.)

25. As set forth in the affidavit of Howard's trial attorney, the defense believed that a drug gang that was operating in the complex where Doris and Nishonda lived – the New York Boys – were responsible for these murders. (Exhibit W to MAR at ¶ 10.)

26. Mr. Howard also presented an alibi defense. He did not deny that he was near the scene on the night of the crimes, but he presented evidence establishing his whereabouts on the night of November 26 into the morning of November 27. (T pp 465-68.)

27. The defense argued that the State's witnesses were unreliable, were threatened, coerced or provided incentives by Det. Dowdy to falsely testify against Mr. Howard, and presented testimony that was inconsistent with other witness testimony and was contradicted by prior statements they gave to police shortly after the crimes. (T pp 675-97.)

28. The defense argued that there was no evidence that Doris sold drugs for Mr. Howard. (T p 713.) No physical evidence connected Mr. Howard to the crimes.

29. The Jury found Mr. Howard guilty of the murders of Doris and Nishonda and the associated arson. Mr. Howard was sentenced to 80 years in prison. (T pp 765-66, 776-78.)

The Motion for Appropriate Relief

30. On March 19, 2014, Mr. Howard filed a Motion for Appropriate Relief. The State subsequently filed an Answer and Motion to Deny the Motion for Appropriate Relief. On May 16, 2014, Howard filed a Response to the State's Answer.

Newly Discovered Evidence

Post-Conviction DNA Evidence

31. In 2009, Mr. Howard, through his counsel, moved under the State's post-conviction DNA statute, N.C.G.S. § 15A-269, for DNA testing on Doris and Nishonda's rape kits. One year later, the State consented to testing. In September, 2010, this Court granted DNA testing.

32. Based upon a review of the pleadings and exhibits, this Court finds that it is undisputed that the post-conviction DNA evidence presented by Howard, including the documentary exhibits submitted to the Court, establish as fact that:

a. Male DNA was found in the sperm fraction of Doris' vaginal swab.

b. Howard was excluded as the source.

c. The male DNA found in Doris was not detected at the time of trial and could not have been detected with the technology available at the time of trial.

d. The FBI's national CODIS database identified the source of the DNA in Doris's vagina as a convicted felon, Jermeck Jones.

e. Jones has a criminal history that includes over 35 convictions including several assaults against women.

f. The genetic profile of the sperm found in Nishonda's anus did not match Jones, but came from a second, unknown male.[3]

g. When presented with the DNA evidence, Jones claimed that he never had never met Doris, did not know her and had never been to the apartment where the murders occurred. (Exhibit U to MAR at ¶ 13). This is false as the DNA evidence establishes as a scientific fact that Jones' DNA was found in Doris' vagina.

h. When presented with the DNA evidence, Jones claimed that he had consensual sex with 13-year-old Nishonda the night before her murder. (Exhibit U to MAR at ¶ 8). This conflicts with the DNA test results which establish that Jones' DNA was not found in Nishonda.

i. When presented with the DNA evidence, Jones' opined that his semen may have traveled from Nishonda's anus to Doris' vagina. (Exhibit U to MAR at ¶ 13). This claim also conflicts with the DNA results. DNA testing does not reveal any evidence of Nishonda's DNA in the mixture of DNA recovered from Doris that contained Doris' DNA and DNA from Jones.

33. The State does not contest the accuracy or reliability of the post-conviction DNA test results or dispute that Jones made the above statements when faced with the DNA evidence.

34. It is undisputed that the semen of two different men – neither of whom was Howard – was found in the victims at the time of their deaths. The DNA of Jermeck Jones was found in Doris W.'s vagina. The DNA of a second, unknown male was found in Nishonda W.'s vagina and anus.

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[3] Because only a partial male DNA profile was detected from the sperm found in Nishonda, the DNA profile was not eligible to be searched in CODIS and thus it could not be determined whether a known offender in that database was the contributor of the DNA.

35. The State has not presented any new or additional evidence in light of this post-conviction DNA testing to explain how Jermeck Jones' DNA was found in Doris' vaginal swab.

36. The State has not offered any evidence or explanation as to why Jermeck Jones made patently false statements when confronted with this DNA evidence.

37. It is undisputed that the existence of foreign male DNA in Doris' vaginal swab was not known at the time of trial and could not have been known because of the limited technology available at the time.

38. It is undisputed that the identity of Jermeck Jones as the contributor of the foreign male DNA in Doris' vaginal swab was not known at the time of trial and could not have been known because of the limited technology available at the time.

39. The DNA test results obtained as a result of the post-conviction DNA testing ordered in 2010 could not have been discovered by Mr. Howard (or his counsel) in the exercise of reasonable diligence in 1995.

40. There is no dispute in the pleadings that this evidence is probably true as it is based upon scientific findings and facts that are not controverted.

41. This evidence is competent, material and relevant.

42. This evidence is not merely cumulative.

43. This evidence undermines the credibility of the State's theory of the case and is not merely impeaching.

Recantation by a State's Witness

44. The Court finds that the evidence presented by Mr. Howard, including the documentary exhibits submitted to the Court, establish as fact that Dwight Moody Moss has recanted his prior statement against Darryl Howard and attested in a sworn affidavit that he was coerced by Det. Dowdy into falsely implicating Howard. (Exhibit H to MAR.)

45. The State does not dispute that Moss recanted his prior statement against Howard and that he asserted in a sworn affidavit that Det. Dowdy coerced him into falsely implicating Mr. Howard in the murders of Doris and Nishonda.

46. The State does not dispute the veracity of Mr. Moss' sworn affidavit recanting his prior statement against Mr. Howard and asserting that Det. Dowdy coerced him into falsely implicating Mr. Howard in the murders of Doris and Nishonda.

47. A review of the transcript and the pleadings in this matter reveals that Moss was an important witness for the State at Mr. Howard's trial, and the State has submitted no evidence to the contrary.

48. This Court finds that this recantation is material and exculpatory.

49. This Court finds that this recantation by an important witness for the State could not have been discovered by Howard (or his counsel) in the exercise of reasonable diligence in 1995.

50. There is no dispute in the pleadings that this recantation has been made, and the State has presented no evidence from Moss to contradict that Moss' recantation is probably true.

51. This Court is further reasonably well satisfied that Moss' testimony at trial was false in light of his recantation of that testimony.

52. This evidence is competent, material and relevant.

53. This evidence is not merely cumulative.

54. This evidence undermines the credibility of the State's theory of the case and is not merely impeaching.

Police Memo

55. The Court finds that the evidence presented by Howard, including the documentary exhibits submitted to the Court, and the State's Answer, establish as fact that:

a. On December 1, 1991, just a few days after the crimes, Durham police received information from a confidential informant that the homicides involved sexual assault and that more than one perpetrator committed the crimes. The police documented the informant tip in a memo. The memo reads as follows:

> Reference Double Homicide\Arson Phew [sic] Gardens.
> Informant advised me that subjects were probably murdered because mother owed $8,000.00 to to [sic] drug dealers from either Philadelphia or New York.
> Informant stated that many residents in Phew [sic] Gardens were offered two thousand-dollars a week for use of their apartment but apparently not many accepted. Informant further stated that perpetrators were believed to have left 4 bags of drugs in the apt. and apparently found some contents missing when they came for them.
> The perps. then told the victim/tenant she owed them eight-thousand dollars. When perps. came for the money they first raped her before strangling her. The 13 yr. old daughter may have unknowingly walked in on the seen [sic] so then killed her.

(Durham Police Dep't Routing Slip from J.P. Pradka to J.T. Muse (Dec. 1, 1991), Exhibit A to MAR.)

b. A handwritten note in the margin of the memo reads: "Dowdy There may be something to this. I don't remember any public info on the rape. EES."

(*Id.* at 1.)

56. This memo was obtained by Howard's post-conviction counsel through open-file discovery in 2010.

57. Mr. Howard submitted the affidavit of his trial counsel, H. Woody Vann, who is a member in good-standing of the State Bar of North Carolina. (Exhibit W to MAR .) Mr. Vann averred that he has no recollection of receiving or seeing this document before or during trial. Mr. Vann further stated under oath that he is certain that, if the memo had been produced, he would have seen it and he would have used it at trial. (Exhibit W to MAR at ¶ 7.)

58. Mr. Vann further averred that this document "is highly exculpatory and would have been extremely relevant to Mr. Howard's defense." (Exhibit W to MAR at ¶ 7.) Mr. Vann further stated under oath that "the document eviscerates the State's theory at trial. The State argued at trial that the sexual assault evidence was immaterial and unrelated to the murders. The tip from the informant completely undermines the State's case." (Exhibit W to MAR at ¶ 9.)

59. The State conceded that this document was in its file and specifically in the screening section of the District Attorney's file. The State further does not dispute and has conceded that "EES" (whose initials are on the document in the margin) are the initials of former Durham Police Department Captain E. E. Sarvis.

60. The State failed to tender any evidence by affidavit or otherwise that this document was produced to Mr. Howard or his counsel. Specifically, the State did not tender documentary evidence recording the production, or an affidavit of Det. Dowdy indicating that he provided this document to the District Attorney's Office, or an affidavit from ADA Nifong (or any other member of the Office of the District Attorney) that this document was produced to Howard's trial counsel. The December 1, 1991 memo documents information from a confidential informant that police received early on in the investigation that the murders involved rape. The memo includes a note from Capt. Sarvis to Det. Dowdy advising Det. Dowdy that the information about the rape was non-public and asking him to investigate.

61. This memo is directly contrary to Det. Dowdy's testimony and ADA Nifong's closing argument at Mr. Howard's trial that the homicides were "never" suspected to involve sexual assaults. The State has not submitted any explanation from Det. Dowdy or ADA Nifong as to why this memo is not directly inconsistent with Det. Dowdy's trial testimony and ADA Nifong's argument to the jury that the sexual assaults were never suspected as being connected to the homicides.

62. The December 1, 1991 memo documents information from a confidential informant that police received early on in the investigation that more than one perpetrator committed the crimes. This memo is directly contrary to the State's theory at trial that the crimes were committed by a single perpetrator.

63. Evidence that the victims were sexually assaulted and murdered by more than one perpetrator, as indicated in this memo, is consistent with the post-conviction

DNA test results identifying the sperm of two different men in the victims at the time of their deaths.

64. In addition, as set forth in Vann's affidavit, the information in this memo "eviscerates the State's theory at trial." (Exhibit W to MAR at ¶ 9.) The Court finds that this memo significantly undermines the State's theory at trial of this murder.

65. Moreover, this memo, as set forth in Vann's affidavit, could have also been used to attack the credibility of Det. Dowdy's testimony that these murders were never investigated or suspected to be connected to sexual assaults of the victims. (Exhibit W to MAR at ¶ 11.) Vann's affidavit further establishes that this memo would have been used to attack, by extension, the credibility of the witnesses from whom Dowdy obtained statements and to attack the quality and caliber of the investigation into these murders. (Exhibit W to MAR at ¶¶ 11-12.)

66. The State submitted no sworn affidavit or other evidence that contradicts Vann's statements as to the use of this memo (had it been known) at trial.

67. The State relies on a presumption that since the memo was subsequently found in the screening section of the District Attorney's file it must have been disclosed by ADA Nifong to defense counsel in the regular course of business. This Court cannot make a finding that the memo was disclosed based on that presumption.

68. This Court finds that the matters set forth in the memo are material and exculpatory.

69. This Court finds that this memo could not have been discovered by Mr. Howard (or his counsel) in the exercise of reasonable diligence in 1995.

70. There is no dispute in the pleadings concerning the existence of this memo in the State's file and the truthfulness of the fact that the Durham Police Department, and specifically Det. Dowdy, was in possession of information that sexual assaults had taken place and had suspected that sexual assaults had taken place at that point in the investigation.

71. This evidence is competent, material and relevant.

72. This evidence is not merely cumulative.

73. This evidence undermines the credibility of the State's theory of the case and is not merely impeaching.

A State's Witness was Murdered Shortly After Howard's Trial

74. The Court finds that the evidence presented by Mr. Howard, including the documentary exhibits submitted to the Court, establish as fact that Roneka Jackson was killed by the New York Boys – the drug gang operating in Nishonda and Doris' apartment complex and who Mr. Howard believed committed these murders – five months after Mr. Howard's trial.

75. The State does not dispute that Jackson, who testified on behalf of the State at Mr. Howard's trial, was choked and her body set on fire by the New York Boys shortly after Mr. Howard's trial. This killing is similar to the murders of Doris and Nishonda.

76. The State does not dispute that the New York Boys is the same drug gang that sold drugs in the housing project where the victims, Doris and Nishonda, lived; the same drug gang for whom Doris sold drugs and who, according to the trial testimony, she

allowed to sell drugs out of her apartment; and the same drug gang that Det. Dowdy was told early on in the investigation was involved in the murders of Doris and Nishonda.

77. The State does not dispute that a confidential informant told police just days after the crimes that the perpetrators were drug dealers from New York or Philadelphia.

78. The State does not dispute that members of the New York Boys gang were convicted of Jackson's kidnapping that resulted in her death.

79. This Court finds that evidence that Jackson associated with the New York Boys and was eventually murdered by members of that gang, and that her murder took place using the same *modus operandi* as the murders of Nishonda and Doris, would have been material and exculpatory as to the defendant's theory that the New York Boys were responsible for the murders of Doris and Nishonda (as indicated by the informant memo in the possession of the police and District Attorney).

80. This Court finds that this information could not have been discovered by Mr. Howard (or his counsel) in the exercise of reasonable diligence in 1995.

81. There is no dispute in the pleadings that this evidence is true.

82. This evidence is competent, material and relevant.

83. This evidence is not merely cumulative.

84. This evidence undermines the credibility of the State's theory of the case and is not merely impeaching.

Constitutional Violations

85. This Court adopts by reference and incorporates its findings set forth in paragraphs 1 through 84 of this Order.

Due Process Violation: The Failure to Produce Material and Exculpatory Evidence

86. For 50 years it has been a principle of Due Process that the "suppression by the prosecution of evidence favorable to an accused" violates due process "where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *U.S. v. Bagley*, 473 U.S. 667 (1985) (rejecting the requirement that exculpatory evidence must first be requested by Defendant). The obligation established by *Brady* is required by the Due Process clause of the Fifth (and Fourteenth) Amendment, as it directly affects whether a defendant has had a fair chance to defend himself. *See Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985).

87. Evidence is "favorable" if it is either exculpatory or if it could be used to impeach the prosecution's witnesses. *U.S. v. Ellis*, 121 F.3d 908, 914 (4th Cir. 1997). *See U.S. v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Giglio v. U.S.*, 405 U.S. 150, 154 (1972)) ("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule."); Id. ("This Court has rejected any such distinction between impeachment evidence and exculpatory evidence."); *Bramblett v. True*, 59 Fed. Appx. 1, 12 (4th Cir. 2003) ("In addition to the disclosure of materially exculpatory evidence, due process requires the government to disclose material evidence affecting the credibility of prosecution witnesses."). Impeachment evidence is no different than exculpatory

evidence because, when "disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676 (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

88. The State has conceded that the informant memo was contained within both the file of the Durham Police Department and was in the screening section of the file of the Office of the District Attorney.

89. Based upon Vann's affidavit, and the failure of the State to present any counter evidence in the form of affidavits or documents indicating that this memo was produced to Mr. Howard, the Defendant has shown that the State failed to produce this memo at trial.

90. As further set forth in Vann's affidavit, and as revealed by the contents of the memo itself, this memo contains material exculpatory evidence and material impeachment evidence.

91. Based upon a review of the pleadings and the materials attached to them, this Court further finds that there is a reasonable probability that, had this evidence been disclosed to Mr. Howard, the results of Mr. Howard's trial would have been different.

Due Process Violation: The Presentation of False Testimony by the State

92. For more than 50 years, it has been a fundamental principle "implicit in any concept of ordered liberty" that "a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction." *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

93. The State does not dispute that the informant memo was in the police file and was sent to Det. Dowdy. Nor does the State dispute that Det. Dowdy received the memo. The State offers no evidence that Det. Dowdy performed any investigation in response to the informant memo.

94. The State does not dispute that Det. Dowdy testified at trial that he never "suspect[ed]" that "this was a sexual assault case" and that he never investigated "this as a sexual assault." (T p 425.)

95. The informant memo reveals this testimony to be false and materially misleading. The informant memo on its face not only indicates that police were told early in the investigation that "this was a sexual assault case" but that they believed it involved sexual assault because, according to the note in the margin by Captain Sarvis, "There may be something to this. I don't remember any public info on the rape." (Exhibit A to MAR at 1.) If these cases were never suspected to be sexual assaults, then Captain Sarvis would not have written that police had withheld information from the public "on the rape."

96. Det. Dowdy's testimony that these crimes were never suspected to involve sexual assault was critical to the State's theory that the DNA results that excluded Howard were irrelevant. Had the truth about the fact that the police did suspect these cases not only involved sexual assault, but also rape, this would have undermined the State's theory at trial of the case and revealed Det. Dowdy's testimony to be false and misleading.

97. False testimony that is known to be false by a police officer (or other government official) violates the Fourteenth Amendment. In *Goode v. Branker*, No. 5:07-HC-2192-H, 2009 WL 8545584 (E.D.N.C. Oct. 21, 2009), involving misleading testimony given by SBI Agent Deaver in a homicide case, the Federal District Court wrote that "[t]he State's use of false evidence against a defendant violates the Fourteenth Amendment. The violation occurs when the State intentionally relies upon such evidence and also when the State has not deliberately introduced the false evidence, but fails to correct it after it is introduced. False testimony or evidence introduced by a law enforcement officer is imputed to the State." *Id.* at *9 (imputing Agent Deaver's false testimony to the State) (internal citations omitted). In so ruling, the District Court was following Fourth Circuit precedent that had existed since 1975. In *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir. 1975), the Fourth Circuit held :

> When public officers connive at or knowingly acquiesce in the use of perjured evidence, their misconduct denies a defendant due process of law. *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935). . . . A habeas corpus petitioner must show that the prosecutor **or other government officers knew the testimony in question was false** in order to prevail. *Hysler v. Florida*, 315 U.S. 411, 418-21, 62 S. Ct. 688, 86 L. Ed. 932 (1942); *Harrison v. Boles*, 307 F.2d 928, 933 (4th Cir. 1962)

(emphasis added).

98. The Fourth Circuit's holding that a Due Process violation occurs when "other government officers" are aware of the false testimony was repeated in *Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998), *cert. denied*, 525 U.S. 1150 (1999)

("knowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution"), *Longworth v. Ozmint*, 377 F.3d 437, 445 (4th Cir. 2004) ("Knowingly false testimony of a law enforcement officer is imputable to the prosecution. . . ."), and *Bramblett v. True*, 59 Fed. Appx. 1, 17 n.1 (4th Cir. 2003) (Michael, J., dissenting) ("the officer's knowledge is imputed to the prosecution").

99. Thus, the State is responsible for Det. Dowdy's false and misleading testimony.

100. In addition, the State has conceded that the informant memo was found in the file maintained by the Office of the District Attorney, and specifically in the "screening" section of that file.

101. This admission means that this information was known to the Office of the District Attorney during Mr. Howard's prosecution. ADA Nifong, however, not only presented this testimony from Det. Dowdy, he argued to the Jury that:

> despite the fact that this case was never investigated as a sexual assault and it was never suspected to be a sexual assault [defense counsel] wants to make it a sexual assault and why, because he knows the defendant never had sex with Nishonda or Doris. So, if he makes you believe the killer was somebody who had sex with [them] then obviously it couldn't be the defendant.

(T p 737-38.)

102. Det. Dowdy's testimony, and ADA Nifong's argument, in the context of the State's possession of the informant memo, was false and misleading.

103. Det. Dowdy's testimony and account of the police investigation are matters that were material and critical in Mr. Howard's trial. They were material and critical to Det. Dowdy's credibility and the credibility of the State's evidence at Mr. Howard's trial.

104. ADA Nifong solicited testimony from Det. Dowdy that, in light of the informant memo, was false and misleading.

105. ADA Nifong's closing argument that there was no suspicion of any sexual assault in connection with the murders is a matter that was material and critical in Mr. Howard's trial.

106. The facts necessary to demonstrate Det. Dowdy's and ADA Nifong's misrepresentations were not in Mr. Howard's possession at the time of his criminal trial and could not have been discovered by him (or his counsel) in the exercise of reasonable diligence.

107. The facts necessary to demonstrate these misrepresentations were contained within the State's files.

108. This Court believes and finds as a fact that Det. Dowdy's testimony and ADA Nifong's reinforcement of that testimony in his closing argument had a material impact on the deliberations and verdict of the Jury. Specifically, in light of the importance of Det. Dowdy's testimony to the State's case against Mr. Howard, the importance of Det. Dowdy's credibility to the State's case against Mr. Howard, the significance of Det. Dowdy's and ADA Nifong's misrepresentations, the fact that Mr. Howard presented evidence that the crimes involved sexual assaults to support his defense that he did not commit the crimes, and the significance of the sexual assaults to

Mr. Howard's defense at trial, this Court finds as a fact that Det. Dowdy's and ADA Nifong's misrepresentations that police never investigated or suspected that the crimes involved sexual assaults had a substantial and injurious effect on the outcome of Mr. Howard's trial.

109. Based upon a review of the State's Answer and exhibits, the State has presented no evidence that either Det. Dowdy or ADA Nifong were unaware of the informant memo; rather, the State concedes that both were aware of its existence.

110. The State has presented no evidence that the presentation of Det. Dowdy's false and misleading testimony and ADA Nifong's false and misleading argument to the Jury was not prejudicial error.

Based upon the foregoing **FINDINGS OF FACT**, this Court enters the following **CONCLUSIONS OF LAW.**

CONCLUSIONS OF LAW

111. The undisputed evidence discussed in this Order is newly discovered evidence within the meaning of N.C.G.S § 15A-1415(c) in that it was unknown and unavailable to Howard at the time of his trial, could not have been discovered in the reasonable exercise of due diligence, materially bears on his innocence, is probably true, and is not merely impeaching but undermines the credibility of the State's theory at trial of the case.

112. In addition, North Carolina's post-conviction DNA statute provides that, if the results of DNA testing performed under N.C.G.S. § 15A-269 are "favorable" to the defendant, the court "shall enter any order that serves the interests of justice," including

an order vacating the judgment, releasing the defendant from custody, or granting a new trial. N.C.G.S. § 15A-270(c) (2001).

113. The undisputed post-conviction DNA results are favorable to Mr. Howard.

114. This Court concludes that each piece of newly-discovered evidence, by itself, makes it reasonably probable that a jury would reach a different result at another trial.

115. This Court further concludes that the newly-discovered evidence, when considered cumulatively, makes it reasonably probable that a jury would reach a different result at another trial.

116. This Court thus concludes that each piece of newly-discovered evidence, individually and cumulatively, meets all the requirements of newly discovered evidence under § 15A-1415(c) sufficient to grant a new trial.

117. In addition, this Court concludes that Howard's Due Process and Fourteenth Amendment rights under *Brady v. Maryland* were violated by the State's failure to produce the informant memo. This information was materially exculpatory and would have been powerful impeachment evidence sufficient to undermine the State's theory of the case such that Mr. Howard has been prejudiced and this Court's confidence in the outcome of Mr. Howard's trial has been undermined.

118. Consequently, Mr. Howard is entitled to a new trial on the additional constitutional ground that the State, by failing to produce material, exculpatory and impeaching evidence, violated Howard's rights under the Fourteenth Amendment to the U.S. Constitution.

119. In addition, this Court concludes that the State presented materially misleading and false testimony from Det. Dowdy and that ADA Nifong made a materially misleading and false argument to the Jury. The presentation of this testimony and this argument prejudiced Howard and undermines confidence in the accuracy of the verdict; the State has presented no evidence that this constitutional violation of Mr. Howard's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments was not prejudicial.

120. Consequently, Mr. Howard is entitled to a new trial on the additional constitutional ground that the State, by presenting materially misleading and false testimony and argument to the Jury, violated Howard's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

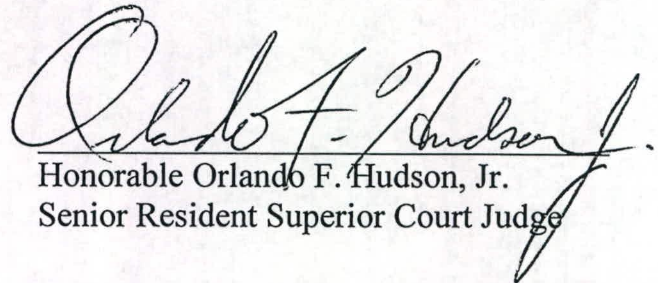
121. Finally, while this Court finds that the undisputed evidence demonstrates that the State did not produce the informant memo to Mr. Howard, the Court also finds as a matter of law, in the alternative, that if the informant memo was produced, then the uncontradicted affidavit of Mr. Vann establishes that his failure to use the informant memo was a departure from objective standards of reasonableness for counsel under the Sixth Amendment and is sufficiently prejudicial that this error undermines confidence in the outcome of Mr. Howard's trial.

122. Consequently, Mr. Howard is entitled to a new trial on the additional constitutional ground that, if the informant memo was produced to his trial counsel, then his counsel's failure to use that memo at trial or to investigate it prior to trial constitutes

ineffective assistance of counsel in violation of Mr. Howard's rights under the Sixth Amendment to the U.S. Constitution.

Based upon the foregoing findings of fact and conclusions of law, and pursuant to N.C.G.S. §§ 15A-270, 15A-1415(b)(3) and 15A-1415(c), this Court finds and concludes that newly discovered evidence of innocence entitles Mr. Howard to a new trial and that Mr. Howard's convictions were obtained in violation of the Constitution of the United States. Consequently IT IS HEREBY ORDERED, ADJUDGED and DECREED that Mr. Howard's convictions be and are hereby VACATED.

This the 27th day of May, 2014.



Honorable Orlando F. Hudson, Jr.
Senior Resident Superior Court Judge