STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CRS 71728

STATE OF NORTH CAROLINA)
)
)
v.) MOTION
)
)
GREGORY F. TAYLOR)

Now comes the State, and moves the Court for an Order summarily striking the pleading of the defendant, "Plea for Declaration of Innocence", and further order the defendant to file a bill of particulars setting forth what facts the defendant contends proves his factual innocence by clear and convincing evidence. In addition the State moves the Court to order the defendant to provide discovery, including, but not limited to, witnesses' statements, results of any testing, documents and other tangible items that the defendant may offer to prove his factual innocence. In the alternative, the State request that the Court convene as soon as possible and hold a hearing to determine whether the pleading should be stricken, a bill of particulars filed and discovery provided to the State. In support of the motion, the State shows:

1. The statutory purpose of this extraordinary procedure is to determine whether the defendant proves his factual innocence of the crime of which he is convicted, or any other reduced level of criminal responsibility related to the crime, by credible, verifiable evidence that has not previously been presented at trial or considered at a hearing granted through post conviction relief. [N.C.G.S. 15A-1460(1)]

2. That the defendant has filed a "Plea For Declaration of Innocence" that is replete with references to inadmissible evidence, evidence irrelevant to this proceeding and opinions and conclusions of counsel, many of which do, and are clearly intended to, prejudice the State by placing them before the triers of fact with no opportunity for the State to object. The pleading fails to allege any new evidence of factual innocence save an alleged "confession" by the North Carolina Department of Correction inmate Craig Taylor.

3. The statutory duty of the Panel is to review new evidence that would prove the defendant's innocence, not re-litigate issues that have been reviewed by the trial jury, the Supreme Court, motion(s) for appropriate relief and habeas corpus proceedings.

4. Innocence may be proven by three methods: (1) a crime was not committed (2) the crime was committed exclusively by others or (3) the defendant could not or did not participate in the crime in any way.

5. Jacquettal Thomas suffered a sudden, violent death on September 26, 1991 that the Office of the Chief Medical Examiner declared and common sense shows was a homicide. Thus there is no issue as to method number one.

6. As to the second method, in its presentation to the North Carolina Innocence Inquiry Commission (IIC), the staff of the IIC presented an edited version of a confession by Craig Taylor. That evidence was deemed **"critical"** by the IIC staff. Subsequent fillings, while not addressing the staff's methodology of the interrogations, have demonstrated significant and serious concerns as to whether the statement is reliable, or has circumstances that clearly indicate its trustworthiness. The pleading fails to address whether the defendant vouches for and propounds this confession as truthful, or whether he acknowledges the confession's unreliability and abandons it. The State must know whether the defendant intends to offer the confession as reliable evidence, so that the State can subpoena and house numerous witnesses from other jurisdictions and states to show the lack of reliability and absence of trustworthiness of the statements.

7. In addressing the third method of proving innocence, the defendant merely advances some inconsistencies in witnesses statements allegedly produced eighteen years after their police interviews or testimony.

8. The defendant makes repeated references to the testimony of crime scene analysts, seeking to criticize their trial testimony of the description of the chemical tests performed to look for the presence of blood on the underside of the defendant's automobile. Much effort is spent attacking the existence or non-existence of blood on the defendant's automobile wheel wells, while the defendant acknowledges in his three (3) hour video taped statement (that portion not shown to the IIC) that he may have driven through the blood at the crime scene. If the defendant seeks to attack the previous testimony of crime scene analysts, the State must subpoena numerous lab personnel and agents, both active and retired, to explain the evidence that the defendant has admitted may exist.

9. In order for the State to be prepared to cross-examine witnesses and present evidence addressing the issues, the State must be able to ascertain what the issues are, and which ones are contested.

10. The defendant asks the Panel to ignore its statutory duty to determine whether the defendant has proven his factual innocence, and instead convert, without statutory authority, this proceeding to a hearing on a motion for appropriate relief and re-litigate issues previously addressed by the trial jury, North Carolina Supreme Court, Wake County Superior Courts, and the United States District Court in a habeas corpus proceeding and two motions for appropriate relief. Issues such as (1) sufficiency of the evidence (2) ineffective assistance of counsel and (3) consistency of trial witnesses, all fail to address the issue of factual innocence.

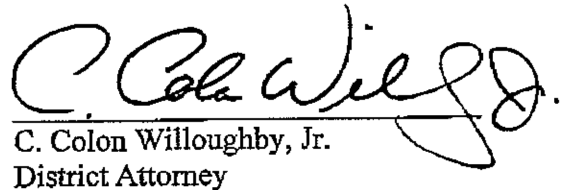
11. There is no statutory authority for the three-judge panel, or its senior member alone, to convert this proceeding into a hearing on a motion for appropriate relief; in fact, the contrary is true. Statutory provisions clearly state that a claim of factual innocence does not constitute a motion for appropriate relief. [N.C.G.S. 15A-1441(d)]

12. The clearly intended effect of defendant's request that the Court convert the "Plea for Declaration of Innocence" into a motion for appropriate relief is the **circumvention** of rulings in two (2) previous motions for appropriate relief (attached as Exhibits 1 and 2) made by Wake County Superior Court judges, at least one following a lengthy evidentiary hearing, as well as a habeas corpus proceeding previously decided in the United States District Court for the Eastern District of North Carolina (attached as Exhibit 3). The intended result would, likewise, **prevent** the State from asserting statutory rights set forth in Article 89 of Chapter 15A, specifically N.C.G.S. 15A-1419, among others.

13. In order for the State to be properly prepared and avoid unnecessarily lengthening the hearing by subpoenaing dozens of witnesses whose testimony the State should not be required to offer, it is necessary that the Court require the defendant to file a bill of particulars stating what, if any, admissible evidence the defendant contends proves his factual innocence and provide the State with discovery of said evidence. The bill of particulars is made necessary for the State to proceed judiciously due to the failure of the IIC to provide, along with its opinion, to the District Attorney, the Resident Superior Court Judge and thus the three-judge panel, the "supporting findings of fact" as required by N.C.G.S. 15A-1468(c).

WHEREFORE, the State moves that the pleading that is unresponsive to the Court's directive and inappropriate, in its inclusion patently inadmissible and irreverent evidentiary allegations, be stricken, and that the defendant be ordered to file a bill of particulars stating what admissible evidence that the defendant intends to offer at the hearing to prove his factual innocence. Further, the State prays that it be provided with discovery that includes, but is not limited to witnesses statements, testing results, documents and any other evidence that the defendant intends to offer at hearing, and that said discovery be provided sufficiently in advance of the hearing to allow the State to prepare for the hearing, have evidence examined by its own experts, and subpoena the necessary witnesses to testify.

This the 4th day of January, 2010.



C. Colon Willoughby, Jr.
District Attorney

R. Thomas Ford
Assistant District Attorney

CERTIFICATE OF SERVICE

This shall certify that a copy of the foregoing Motion was this day served upon Maitri Klinkosum, Assistant Public Defender for Gregory F. Taylor, and Joseph B. Cheshire, V, Attorney for Gregory F. Taylor, by the following method; by depositing a copy in their box maintained by the Clerk of Superior Court; a copy to Christine Mumma, Attorney for Gregory F. Taylor, by the following method; by depositing a copy thereof in a United States Postal receptacle, postage prepaid, addressed to the following: Christine Mumma, P.O. Box 52446, Shannon Plaza Station, Durham, NC, 27707.

This the 4th day of January, 2010.

R. Thomas Ford
Assistant District Attorney
Wake Co. District Attorney's Office
P.O. Box 31
Raleigh, NC 27602
Telephone: (919) 835-3320
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STATE OF NORTH CAROLINA FILED IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY SUPERIOR COURT DIVISION
91 CRS 71728

STATE OF NORTH CAROLINA WAKE COUNTY, C.S.C.
BY_______________

v. ORDER DENYING MOTION FOR APPROPRIATE RELIEF

GREGORY F. TAYLOR

This cause coming on to be heard and being heard before the undersigned Superior Court Judge presiding upon the defendant's Motion for Appropriate Relief filed April 21, 1997 and defendant's Motion to Amend Motion for Appropriate Relief filed sometime on or after November 2, 1998. The hearing took place in part on April 3, 1998, May 15, 1998, and was finally completed on August 21, 1998. The Court having read and reviewed all documents filed of record in the official court file of the above captioned case including the trial transcript, having received the sworn testimony of witnesses offered by defendant, having received exhibits; and having read the written arguments of counsel for the State and defendant, makes the following:

FINDINGS OF FACTS

1. The defendant, Gregory F. Taylor, was personally present in open Court during the entirety of the hearing with his retained counsel, Thomas F. Loflin III; the State was represented by Assistant District Attorney, R. Thomas Ford.

2. The hearing was held in the absence of a jury.

3. The Court had the opportunity to see and observe each witness who testified at the hearing and to determine what weight and credibility to give the testimony of each witness.

4. The defendant's Motion for Appropriate Relief alleged the conviction at trial in the above captioned case was unconstitutionally obtained in that defendant's trial counsel, L. Michael Dodd and R.L. Adams rendered ineffective assistance of counsel.

5. The defendant's Motion for Appropriate Relief alleged ineffective assistance of counsel in the following respects:

   a) by failing to object to Detective Johnny Howard's testimony regarding his interview with co-defendant, Johnny Beck.

b) by failing to properly investigate the case prior to trial and with specific reference to jail inmates who could contradict the making of a "jailhouse confession" by the defendant testified to by a witness at trial, Ernest Andrews.
c) by failing to object to the testimony of Eva Marie Kelly identifying defendant as one of the men decedent was with the night of her death.
d) by failing to object to certain final arguments of the prosecutor.

6. The defendant's Motion to Amend Motion for Appropriate Relief further alleged ineffective assistance of counsel in the following respects:

   a) by failing "to advise defendant adequately regarding his right to testify."
   b) by failing "to call an expert witness to explain the actions of the police dog in a manner consistent with innocence."

7. Defendant was arrested and charged with the murder herein on September 26, 1991 and shortly after his arrest defendant employed James Blackburn (herein after referred to as Blackburn) and R.L. Adams (herein after referred to as Adams) to represent him to the conclusion of the trial of the matter.

8. Blackburn and Adams requested and received "full discovery" from the State.

9. Blackburn and Adams enlisted the services of an experienced private detective, Randy Montague, to supplement the discovery in investigation and preparation of their case; Mr. Montague, a former Wake County Sheriff's Department detective, spent from fifty to eighty hours searching for and interviewing potential witnesses and attempting to develop evidence advantageous to the defendant.

10. Defendant's family also employed a separate detective, Larry Morrisey to aid in developing exculpatory evidence and defendant's counsel were also privy to his findings.

11. Blackburn and Adams spent approximately four hundred and fifty hours in investigation and preparation of the case.

12. Prior to February 1993, Blackburn who had lost his privilege to practice law in North Carolina was forced to withdraw and his firm, Smith, Helms, Mulliss and Moore, agreed that they would allow defendant to replace Blackburn with the attorney of defendant's choice and the firm would pay the replacement. Adams would also remain on the case as attorney for defendant also because he was familiar with the case.

13. In February, 1993 defendant considered several attorneys to replace Backburn as a trial lawyer and chose L. Michael Dodd (herein after referred to as Dodd) an attorney defendant had earlier contacted immediately after his arrest for advice in this matter.

14. Dodd, a Wake County attorney, had practiced criminal law for seventeen years; one hundred percent of his practice had involved the defense of criminal charges for the preceding ten years.

15. Dodd had qualified for and been placed upon Wake County Bar's list "4A", those certain attorneys approved to serve as "first chair" for indigent defendants in capital cases.

16. Dodd has represented in excess of sixty defendants charged with murder, more than half of which were death penalty cases.

17. Dodd has been qualified by the North Carolina State Bar Board of Legal Specialization as a specialist in the field of State and Federal criminal law.

18. Upon his being retained to represent defendant at the trial of the case with Adams who continued with the defense team, Dodd, spent almost everyday for a period of time until he had reviewed every document in the file, including the original discovery information, additional investigation by private detectives and the original attorneys as well as any work product the attorneys had produced.

19. During the one hundred and twenty plus hours of trial preparation Dodd found the work done by Blackburn and Adams to have been very thorough and complete.

20. Dodd and Adams went to Chapel Hill, North Carolina and personally interviewed Dr. Deborah Radisch, the State's pathologist and medical examiner in preparation for trial.

21. Dodd and Adams employed former Chief Medical Examiner of North Carolina, Dr. Page Hudson and met with him for a day going through the medical examination discovery so they would be better prepared to cross examine Dr. Radisch and to develop certain arguments involving that evidence.

22. Early during the involvement of Mr. Dodd in the case, the attorneys determined and agreed that they considered the State's case was weak in areas and that the best trial strategy would be to not aid the State in producing evidence of any element of the crime and to attempt to focus first on those weaknesses and failings to procure nonsuit. Further Dodd and Adams felt it was best trial strategy to preserve final arguments, if possible, should the case get past nonsuit.

23. Dodd and Adams discussed this strategy with defendant as it was being devised and the defendant concurred with that strategy.

24. Dodd, based on all his contact with defendant, found defendant to be an intelligent young man who appeared to understand the legal arguments and factual representations being made to him.

25. Trial of the matter commenced on April 13, 1993 and was concluded on April 19, 1993 and the defendant, who was free on bond, was represented at the trial by Dodd and Adams.

26. The defendant was convicted of first degree murder and sentenced to life in prison from which judgment he appealed directly to the North Carolina Supreme Court.

27. The Supreme Court of North Carolina reviewed the case and on September 9, 1994 filed an opinion in which the Court found that the defendant had received a fair trial free from prejudicial error.

28. Thereafter defendant through his attorney, Thomas Loflin, III filed this Motion for Appropriate Relief alleging the six separate manifestations of ineffective assistance of counsel heretofore set forth.

29. The closing arguments of the prosecutor which defendant contends in this motion amounted to an unconstitutional comment on defendant's election not to testify were reviewed directly by the North Carolina Supreme Court which found that these same arguments, when taken in context, "did not amount to an impermissible comment on defendant's failure to testify."

30. The arguments were not objectionable as impermissible comments by prosecutor on defendant's failure to testify and counsel failure to object thereto was not erroneous.

31. The third argument defendant complained of, when taken in context, is a paraphrase of the jury's duty as set forth in North Carolina Pattern Instructions - Criminal Section 101.35 and is not improper or objectionable and counsels failure to object thereto was not erroneous.

32. Defendant contends that trial counsel were ineffective in that they failed to object to hearsay testimony by Detective Howard regarding a statement given to him by the codefendant Johnny Beck.

33. Trial counsel were aware that such a statement would be objectionable hearsay. Trial counsel were desirous as part of a trial strategy, to question the detective about the unconscionable manner in which he questioned each defendant in an effort to obtain a confession, (i.e. telling each that the other had claimed that his codefendant had committed the murder.) Further trial counsel wanted the jury to know that inspite of these tactics that both defendant and codefendant Beck had continued to deny involvement by themselves or their codefendant.

34. Trial counsel had discussed the case with Randolph Riley, attorney for codefendant Beck, and had been told that he would not allow Beck to testify for the defendant.

35. Trial counsel purposefully did not object to the hearsay statement of Beck when prosecutor attempted to illicit same because they realized it "open the door" for them to obtain evidence of codefendant's continued denial of the guilt of either defendant even in the face of the unconscionable tactics used by the police in their attempts to obtain a confession.

36. Trial counsel did illicit testimony in length about the questionable methods used by the detective as well as the defendant's and codefendant's steadfast assertion of innocence despite the use of said tactics.

37. Defendant contended that trial counsel were ineffective for failure to fully investigate the validity of the testimony of former jail inmate Ernest Andrews.

38. Mr. Andrews who had been an inmate in the jail with defendant immediately after defendant's arrest testified that defendant made a somewhat inculpatory statement to him in jail.

39. Defendant's counsel became aware of this statement through discovery and thereafter sent Detective Montague to a prison unit in eastern North Carolina to determine if Andrews would testify and if he did, what he would say.

40. Andrews statements to Montague made trial counsel doubt that he would testify.

41. In Dodd's discussions with defendant while preparing for trial, defendant told Dodd he did not make the statement and that Andrews was lying. Defendant gave Dodd no indication that there were inmates who could refute the statement. Dodd instead prepared to cross examine Andrews about his ulterior motives and his extensive criminal record for crimes involving moral turpitude.

42. Defendant called two former inmates to testify at the hearing on the Motion for Appropriate Relief that they, too, were in jail with defendant immediately after his arrest. They, Shane Todd and Paul Eastridge, both with extensive an serious criminal backgrounds, testified that although they heard defendant discuss the circumstances of his arrest, they never heard him make an inculpatory statement. These witnesses had given information about the version of the incident (murder) that defendant had given, each of them from which a detective had drawn affidavit. The affidavits are somewhat in conflict with each other as to the events defendant reported.

43. Todd and Eastridge testified that they were in "E" block of the Wake County Jail during the relevant time; which cell block was composed of six four-man cells and that there were many others sleeping on the floor of the crowded cell block. Each testified that they had no idea to whom defendant spoke during periods of time.

44. Little evidence of value, if any, tending to refute the statements of Ernest Andrews was elicited from these inmate witnesses who defendant described as the people who knew him best while he was in jail at that time.

45. Defendant would have had to relinquish last argument to gain the testimony of these questionable witnesses and would have gained very little, if anything, toward damaging the State's case.

46. Defendant suffered no prejudice by trial counsel's adherence to the trial strategy of securing last argument by not calling these two career criminals in order to obtain the testimony they provided.

47. Defendant contended that trial counsel were ineffective for failing to object to the testimony of Eva Marie Kelly, a prostitute identifying the defendant as being one of the men that was with the decedent the night she was killed.

48. Ms. Kelly's trial testimony revealed that on the night of the murder, the defendant and codefendant approached her in defendant's vehicle and offered her money and cocaine to go "party" with them. She saw them and spoke to them from within arms reach. Later she had a conversation and confrontation in her lighted kitchen with the defendant, codefendant and "the girl Jackie" (the decedent) over the fact that they were using cocaine in a manner which frightened the "john" whom Ms. Kelly had with her. Later she saw these three leave in defendant's truck.

49. The day after the murder police canvassed the area of Ms. Kelly's home showing pictures of defendant, codefendant, and defendant's automobile and asking if anyone had recognized the vehicle and/or the defendant and codefendant. Ms. Kelly viewed the photographs before being given information regarding the crime and she told the officer that she had seen them and under what circumstances. Ms. Kelly did not originally tell the police of the confrontation inside her home.

50. This form of neighborhood canvassing and searching for possible witnesses by police officers did not amount to an impermissibly suggestive identification procedure so as to taint the witnesses' in-court identification of defendant. Further, based on the circumstances of the witnesses' viewings, twice outside at close range and once face to face in lighted kitchen and the certainty of her identification only a short time after seeing the defendant would have allowed her identification even if the original photo viewing was suggestive. This is so especially in light of the fact that defendant's own statement to police placed him in this neighborhood with the codefendant, in the automobile in question at the time the witness named.

51. The in court identification of the defendant by the witness Kelly was not objectionable and should have been allowed even if and objection had been lodged.

52. Defendant was not prejudiced by trial counsels' failure to so object.

53. Defendant alleged that trial counsel were ineffective because they failed to adequately advise the defendant regarding hid right to testify.

54. Trial counsel had developed a dual trial strategy to both avoid providing any witness or evidence from which the prosecution might garner evidence of any element of the crime and also to preserve last argument if possible. Defendant was fully informed of this strategy and had approved this strategy. Trial counsel was of the opinion that defendant should not testify after the State's evidence in furtherance of both strategies.

55. At the close of the State's evidence trial counsel met with defendant to let him decide if he would testify in the trial. Defendant had been personally present through the entirety of the State's case, including his lengthy statement to police in which he explained his vehicle being at the scene, explained his presence there, and vehemently denied any involvement in the death by himself or codefendant. Defendant knew his trial testimony would only repeat that evidence.

56. Trial counsel believed that ultimately the decision as to whether defendant testified in any criminal case was solely that of the defendant. Trial counsel advised defendant that in their opinion he should not testify. After fully discussing the situation with trial counsel and trial counsel going over everything that had happened in the case to that point with defendant, defendant informed them that he agreed and still felt that he should not testify.

57. There is no credible evidence that defendant was not adequately and fully advised of his right to testify at trial nor that he was coerced in any way into his decision not to testify.

58. The defendant alleges that trial counsel were ineffective in that they failed to call an expert witness to explain the actions of the police dog in a manner consistent with innocence.

59. At trial the State called former police officer, Andy Currin who had been a canine handler for the Raleigh Police Department at the time of the murder who had taken a pedigreed bloodhound named "Sadie" to the murder scene. "Sadie" was "keyed" on the scent of the victim and given the command to "find". "Sadie" eventually "trailed" to the defendant's vehicle which was some distance away and out of sight. There "Sadie" gave indication that the scent was present in or on the vehicle.

60. Trial counsel objected to this testimony at trial and an extensive voir dire hearing was had. Trial counsel at that time demonstrated that they had recognized the evidentiary legal issues brought about by the unusual way the bloodhound was used and were prepared to challenge its validity and probative value.

61. The State prevailed in the hearing and the canine evidence was admitted over defendant's counsel's objection. The North Carolina Supreme Court reviewed the canine evidence extensively and found it to have met the tests of admissibility pertaining to such evidence and therefore properly admitted.

62. However trial counsel were successful in challenging the weight this evidence should have with the jury in cross examination of Currin by getting him to admit that he was skeptical of the validity of the process he was asking "Sadie" to perform. He was concerned to the point that he had expressed his feelings to his superiors that the dog was not trained for what she was being asked to do.

63. Prior to the time the defendant could have called an expert in rebuttal of the canine evidence, Eva Kelly, the prostitute had already testified that defendant and codefendant had attempted to get her in the vehicle and that later she had seen the decedent in the vehicle, which was all the canine evidence could possibly indicate, (i.e. that decedent had been in or around the vehicle.)

64. Defendant was not prejudiced by trial counsels' failure to call a rebuttal "canine witness" and counsels' preservation of last argument.

65. The Court has assessed trial counsel's performance with effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsels' challenged conduct, and to evaluate the conduct from counsels' perspective at the time. The Court has evaluated counsels' performance on the whole.

Based upon the foregoing facts, the Court makes the following:

CONCLUSIONS OF LAW

1. The trial preparation and performance of defendant's counsel, L. Michael Dodd and R.L. Adams was not deficient and was well above an objective standard of reasonableness and counsel made no error so serious that said counsel was not functioning as "counsel" guaranteed under the Sixth Amendment.

2. That in regards to said trial, defendant was not prejudiced by the performance of counsel and defendant was not deprived of a fundamentally fair trial, the result of which was reliable.

3. Defendant's conviction was not obtained in violation of the Constitution of the United States or the Constitution of North Carolina in any manner asserted in his original Motion for Appropriate Relief or as amended.

4. Defendant was tried upon a valid Bill of Indictment and had a fair and impartial trial; none of his constitutional or other legal rights were denied or violated in any respect before, during or after his trial.

5. Defendant is imprisoned by virtue of a legal and final Judgment of a Court of competent Juristriction and he is not unlawfully restrained of his liberty; that the time that defendant may be legally detained is not expired, and that the Defendant should be remanded to the custody of the North Carolina Department of Corrections.

6. Defendant's failure to assert any other grounds for relief at the hearing herein should be subject to being treated in the future, and pursuant to G.S. 15A-1419, as a bar to any and all other claims, assertions, Petitions, or Motions that defendant might hereafter file in this matter.

7. The Motion for Appropriate Relief (as amended) that his conviction be set aside and that he be granted a new trial and other relief should be denied.

Based on the foregoing findings of fact and conclusions of law, it is now, therefore,

ORDERED that:

1. The Motion for Appropriate Relief (as amended) filed herein and dated April 21, 1997 and the prayer for relief therein is hereby in all respects denied.

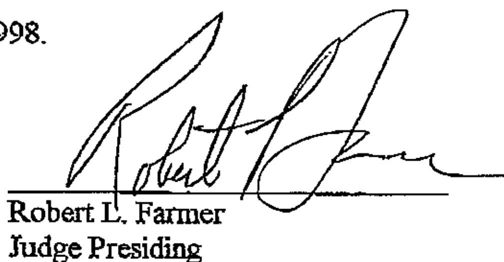
2. Defendant is remanded to the custody of the North Carolina Department of Corrections immediately to complete service of his sentence as provided by law.

3. Defendant's failure to assert any other grounds for relief at the hearing herein shall be subject to being treated in the future, and pursuant to General Statue 15A-1419, as a bar to any and all other claims, assertions, Petitions, or Motions that he might hereafter file this matter.

4. Copies of this Judgment shall be forwarded by the Clerk of Superior Court of Wake County to the Defendant, counsel for the Defendant, Thomas R. Loflin III, the Secretary of the North Carolina Department of Corrections; and the District Attorney, Tenth Judicial District.

Entered out of term and out of session with the consent of the Defendant, his counsel, Thomas F. Loflin III, and the Assistant District Attorney.

This the 10 day of December, 1998.



Robert L. Farmer
Judge Presiding

STATE OF NORTH CAROLINA FILED IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE 2003 APR 10 PM 2:12 SUPERIOR COURT DIVISION

92-CRS-71728

WAKE COUNTY, C.S.C.

BY____

STATE OF NORTH CAROLINA)
)
vs.)
)
GREGORY FLINT TAYLOR,)
)
Defendant.)

ORDER DENYING MOTION FOR DNA TESTING

THIS MATTER is before the Court upon a paper writing dated March 4, 2003 styled "Motion/Request for Post-Conviction DNA Testing."

The defendant contends that crime scene evidence included dried semen stains from the victim's panties and that exculpatory DNA test results of such evidence would raise a reasonable doubt as to his guilt.

The State's response, filed April 9, 2003, contends that since the victim was a prostitute, semen deposited by one or more other persons prior to the victim's death would not exculpate this defendant because of the unique facts of this case.

The North Carolina Supreme Court opinion affirming this conviction reported in 337 N.C. 597 (1994) describes this unique evidence, at page 605, as follows:

"Applying the foregoing rules to the present case, we conclude that there was sufficient evidence from which a rational trier of fact could find that the defendant killed Jacquetta Thomas. The evidence tended to show that the defendant was present at the cul-de-sac on Blount Street near the time of the death of Jacquetta Thomas. This could reasonably be inferred from the location of the defendant's Pathfinder near the body, the testimony of Eva Kelly that the

defendant had been seen with the victim on the night of the killing only a few blocks from the cul-de-sac, and statements made by the defendant to the police and to Ernest Andrews. Evidence of the actions of the bloodhound was sufficient to allow the jury to reasonably infer that the victim had been in or around the defendant's Pathfinder which was found near the victim's body. Additionally, the defendant appeared and attempted to retrieve his Pathfinder from the area of the cul-de-sac at about 8:30 a.m. on 26 September 1991, shortly after the victim's body had been discovered.

From the evidence concerning the location of the body and the location of the patches and pools of blood, the jury could reasonably infer that the victim was slain in the cul-de-sac and left to die by her attacker. Evidence concerning the tire tracks at the scene of the murder tended to show that the defendant's vehicle passed so close to Jacquetta Thomas as to run through a pool of blood next to her body while she lay dying in the cul-de-sac. Such evidence would support a reasonable finding that, contrary to the defendant's statements to the police, Thomas had been attacked and left to die in the cul-de-sac at the time the defendant drove his Pathfinder past her and onto the gravel drive. Furthermore, the traces of blood found on the right front fender, right side A-frame and on the right front wheel-well liner of the defendant's Pathfinder, lent support to the inference that it had made the tire tracks at the murder scene. From the tire track location, the traces of blood on the outer fender and in the wheel-well of the defendant's Pathfinder, and the fact that the Pathfinder was stuck in the gully near the body, the jury could reasonably infer that defendant drove away from the victim's body and became stuck while attempting to flee.

Other evidence tended to show that the victim's wounds were caused by two different implements, one being a heavy blunt force instrument and the other an instrument with a sharp

cutting edge. The evidence tended to show that the wounds consistent with a blunt force instrument were inflicted to a different area of the body than those which were consistent with an instrument with a sharp cutting edge. This evidence would support a reasonable inference that the two implements were wielded by two different assailants, one of whom was the defendant.

The evidence also tended to show that defendant knew before the autopsy had been performed that the victim's throat had been cut. During the original questioning of the defendant by Detective Howard, the defendant looked at a small Polaroid photograph of the body and asked, "Was her throat cut?" Testimony of Detective Howard tended to show that the photograph did not reveal any laceration to the throat. There was additional testimony that by looking at the body, one "could not tell there was a hole [in the neck] because the blood had dried on it, was coagulated over it. These wounds were very hard to see."

The evidence tended to show that the defendant also told Ernest Andrews that "she died with a smile on her face" and had been "cut from ear to ear." Given the evidence tending to show the attack took place in a dark cul-de-sac, the jury reasonably could have inferred that the defendant must have inflicted the wound himself or watched as it was inflicted in order to have known how the victim's throat had been cut.

The foregoing evidence would permit the jury to find that the defendant took Johnny Beck and the victim in his Pathfinder to the cul-de-sac at the south end of Blount Street, about ten blocks from the home of Eva Kelly, after 2:30 a.m. on 26 September 1991. From the defendant's statement and the dry matches and plastic bags found in the cul-de-sac, the jury could reasonably infer that these three individuals smoked cocaine there. Evidence tended to show that the defendant became upset when the victim refused to have sex and that he hit her. The jury could reasonably infer from the evidence that the defendant was out of the Pathfinder

and participating when the blows, stabs, and cuts were inflicted on Jacquetta Thomas. From evidence tending to show that two weapons were involved and that wounds were inflicted by different weapons on opposite sides of the victim's body, the jury could reasonably infer that two assailants attacked the victim at the same time and that the defendant was one of the assailants.

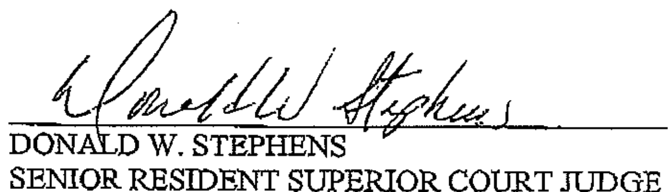
We conclude that the evidence in this case, taken as a whole and in the light most favorable to the State, was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that the defendant killed Jacquetta Thomas. Thus, the defendant's argument to the contrary is without merit. This assignment of error is overruled."

The absence of defendant's DNA in the dried semen stains found on the victim, a prostitute, would not be exculpatory. To the contrary, such absence would further support the State's contention that the defendant became upset with the victim while smoking cocaine together after the victim refused to have sex with him, causing the defendant to beat and stab her.

Under the unique facts of this case, the identity of the DNA in the dried semen stains found on the victim's panties would not be probative of the identity of the assailants.

WHEREFORE, the Defendant's motion for DNA testing is denied.

So ordered this the 10 day of April, 2003.



DONALD W. STEPHENS
SENIOR RESIDENT SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on the parties listed below by mailing and/or hand-delivering a copy thereof to each of said parties, addressed, postage prepaid, as follows:

Walter Jones
Clifford, Clendenin, O'Hale & Jones, LLP
415 W. Friendly Ave.
Greensboro, NC 27401

Donald R. Vaughan
Donald R. Vaughan & Associates
612 W. Friendly Ave.
Greensboro, NC 27401

R. Thomas Ford
Assistant District Attorney
Wake County Courthouse
PO Box 31
Raleigh, NC 27602

Colon Willoughby
District Attorney
Wake County Courthouse
PO Box 31
Raleigh, NC 27602

This the 10th day of April, 2003.

Terri Stewart
Judicial Assistant
Wake County Superior Court Judges' Office

7335

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

FILED

SEP 12 2000

DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

No. 5:99-HC-149-H

GREGORY FLINT TAYLOR,)
)
Petitioner,)
)
v.) ORDER
)
JOE HAMILTON, *et al.*,)
)
Respondents.)

Gregory Flint Taylor, a state inmate, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C.§ 2254. Respondents have moved for summary judgment, Petitioner has responded, and the matter is ripe for disposition.

STATEMENT OF THE CASE

On April 19, 1993, Petitioner was convicted following a trial by jury in the Superior Court of Wake County of first-degree murder and sentenced to life imprisonment. His appeal to the North Carolina Supreme Court was denied on September 9, 1994. He subsequently filed a motion for appropriate relief(MAR) in the Superior Court of Wake County and this was denied on December 10, 1998, following an evidentiary hearing. A petition for writ of certiorari was filed in the North Carolina Supreme Court. The petition was denied on March 4, 1999.

During his criminal proceedings, Petitioner was initially represented James Blackburn and R. L. Adams of Smith, Helms, Mulliss, and Moore of Raleigh. When Blackburn had to withdraw from the case, Petitioner hired Michael Dodd to represent him and Adams continued to work with Dodd.

STATEMENT OF THE FACTS

The facts, as determined by the Supreme Court of North Carolina, show that Officer Brad Kenan saw a woman's body lying in the street on a cul-de-sac at the end of Blount Street in Raleigh, North Carolina at 7:30 a.m. on the morning of September 26, 1991. The dead woman's clothes were torn and pants were down around her ankles. The officer observed two holes in the victim's head and several cuts between her breasts. The victim was later identified by her finger prints as Jacquetta Thomas. Paraphernalia associated with the use of cocaine and crack cocaine were also found in the cul-de-sac. Petitioner's truck was found stuck at the end of a dirt road which led off the cul-de-sac. When Petitioner returned early that morning to retrieve his truck, the police were there investigating the murder.

When Petitioner arrived at the scene, Detective Johnny Howard asked him to go to the police station for questioning. This interview was recorded. Petitioner told the police that he left home in his Pathfinder around 6:00 p.m. on September 25, 1991 and went to a friend's house where he stayed until about 9:30 p.m. He then went to another friend's house where he drank beer and became intoxicated. He then went to Johnny Beck's house around 11:30 p.m. where he smoked cocaine and drank more beer. He and Beck went to Beck's brother's house and stayed from around 1:00 a.m. until about 2:30 a.m., on September 26. Petitioner and Beck bought cocaine and drove into the cul-de-sac where the victim's body was found. He told police he did not see the body when they arrived. He stated that he and Beck saw the service road and decided to go "four-wheeling" in his Pathfinder. They drove down the service road and became stuck in the

ravine where they smoked more cocaine. He and Beck then got out of the truck and started walking north on South Blount Street when Beck saw the body in the cul-de-sac. After they walked further, Beck turned around and said he saw a person standing in the cul-de-sac. Petitioner then turned and saw the person. Beck and Petitioner walked to a busier street where they were picked up by a woman who drove them to a "rock" house. They stayed there using drugs until about 6:00 a.m. The woman drove Beck home and left Petitioner at a gas station where his wife picked him up. Petitioner repeatedly stated that he did know the victim, had not seen her before, and that she had never been in his vehicle.

Eva Marie Kelly testified that she was prostitute living at 419 East Street in southeast Raleigh o September 25, 1991. She stated that she saw a white man, whom she identified as Petitioner, and his black male passenger in her neighborhood that night and during the early morning hours of September 26. According to Kelly, the Pathfinder stopped in front of her house in the evening and she went up to the passenger door and spoke with the black man in the passenger seat. The black man asked if she wanted to get high and party with them. He displayed money and cocaine rocks and there was more cocaine in little plastic bags. Kelly did not get in the vehicle and the two men left.

When Kelly came home later in the evening, a black female named Jackie and one named Whoopie were in the kitchen with the two men she had seen earlier in the Pathfinder. Syringes were on the table and the group was smoking crack. Kelly left with her date, but when she returned she saw Jackie leaving by the kitchen door with the two men. She saw the Pathfinder traveling on Cabarrus Street and recognized it as the one

she had seen earlier. She identified Petitioner as the man she saw with Jackie in the kitchen and leaving with that night. She also identified him as the one driving the Pathfinder.

Ernest Andrews testified that he was in the Wake County Jail when Petitioner was placed in a cell with him. According to Andrews, he and Petitioner had several conversations while they were together. Petitioner told Andrews he was charged with murder. When another inmate asked Petitioner how the victim died, he responded that she died "with a smile on her face." Petitioner later added that she was "cut from ear to ear, throat cut."

William E. Hensley of the City-County Bureau of identification testified that technicians determined that the Pathfinder had been driven through the pool of blood found by the body. He further testified that the vehicle traveled in a northerly direction and circled around to the southwest before going over the curb and south up the gravel service road. Traces of blood were found on the passenger side front fender, passenger side A-frame and on the passenger side front wheel-well liner of Petitioner's Pathfinder. After a *voir dire* hearing, the trial court concluded the evidence that a purebread bloodhound had indicated the scent of the murder victim was in, on, or about the Pathfinder. The jury heard evidence that Officer Andy Currin took the bloodhound, Sadie, to the cul-de-sac and prepared a scent directly from the victim's body. After Sadie was presented with the scent and was commanded to "find," the dog headed southeast in a "zig-zag" manner to the gravel service road leading form the cul-de-sac and toward the Pathfinder. Sadie turned to Officer Currin indicating that the scent had stopped prior to or at the bottom of the

embankment. Sadie was taken to the top of the ridge, about thirty feet from the Pathfinder and again given the command to "find." She circled searching for the victim's scent. When she was fifteen or twenty feet from the Pathfinder, she went directly to the driver's door and around to the passenger side door. She jumped both doors. Officer Currin testified that Sadie's actions indicated the victim's scent was in, on, or around the vehicle.

Dr. Deborah L. Radisch, Associate Chief Medical Examiner, testified that the autopsy she performed on the victims's body showed cuts and stab wounds. She concluded, however, that the cause of death was blunt force injuries to the head and neck. There was no evidence that the victim was struck by a vehicle. Drug testing revealed a very high concentration of cocaine in the body. The wounds indicated the victim had been alive in the cul-de-sac and had been killed there.

At the close of the State's evidence and again at the close of all the evidence, Petitioner moved to dismiss the murder charge against him on the ground that there was insufficient evidence that he committed the crime. Petitioner's motions were denied. Petitioner presented no evidence at his trial.

COURT'S DISCUSSION

I. Taylor's Ground's for Relief

As grounds for relief, Petitioner states: (1) trial counsel were ineffective for failing to object to testimony including out-of-court statements which were inadmissible hearsay; (2) trial counsel failed to adequately prepare for trial, in that they did not interview witnesses who were essential to Petitioner's defense; (3) trial counsel were ineffective for failing to adequately prepare to confront or cross-examine the testimony of the State's

canine expert; (4) trial counsel were ineffective for failure to object to the testimony of Eva Marie Kelly, a prostitute, who testified in exchange for sentence concessions by the State in her own case; (5) trial counsel were ineffective for failure to object prosecutor's improper statements in his closing argument; and (6) trial counsel were ineffective for failing to adequately advise Plaintiff about whether he should testify in his own defense.

II. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986). The party seeking summary judgment must come forward and demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Once the moving party has met its burden, the non-moving party must then affirmatively demonstrate that there is a genuine issue of material fact requiring trial. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). When making a summary judgment determination, the facts and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

The Antiterrorism and Effective Death Penalty Act(AEDPA) imposes limitations on federal review of state court decisions. When reviewing habeas petitions involving claims adjudicated on the merits in state court, federal habeas may be granted only if the state court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or "resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d)(2).

In reviewing this case, we first determine that Petitioner's claims were adjudicated on the merits in the State court MAR hearing. Therefore, habeas may be granted only if the standard set forth above is met. Petitioner contends the State court decision on the merits of his claims as presented in his motion for appropriate relief was unreasonable and contrary to federal law.

A state court's decision is contrary to clearly established federal law as determined by the Supreme Court if the state court arrives at a conclusion opposite to that reached by the Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 120 S.Ct. 1495, 1523 (2000). A state court decision involves an unreasonable application of clearly established federal law if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* The Fourth Circuit in *Fisher v. Lee*, 215 F.3d 438, 447 (4th Cir. 2000), in construing *Williams*, pointed out that "'an unreasonable application of federal law is different from an incorrect application of federal law.'" A federal court considering a habeas petition may not therefore issue a writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly, but may do so only if the application is also unreasonable. *Williams*, 120 S.Ct. at 1523.

III. Ineffective Assistance of Counsel

The standard upon which claims of ineffective assistance of counsel are reviewed is that set forth in *Strickland v. Washington*, 466 U.S, 668 (1984). Under *Strickland* the petitioner must first show that counsel's performance was deficient by showing that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* at 687. Second, a petitioner must show that the deficient performance prejudiced his defense. *Id.* The second component requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.*

In reviewing Petitioner's claims of ineffective assistance of counsel, it is important to look at the backgrounds and experience of the attorneys representing him. As noted above, Petitioner was initially represented by James Blackburn and R.L. Adams, from the law firm of Smith, Helms, Mulliss and Moore. The superior court found that Blackburn and Adams requested discovery from the state and enlisted to services of an experienced private detective, Randy Montague to supplement to discovery. (Order denying MAR p. 2). The court also determined that Blackburn and Adams spent approximately four hundred and fifty hours in investigation and preparation of the case. *Id.* When Blackburn was forced to withdraw, Adams continued to work on the case with L. Michael Dodd who was selected by Petitioner to replace Blackburn. Dodd had practiced criminal law for seventeen years, with his total practice involving the defense of criminal charges for the preceding ten years. *Id.* Dodd had represented more that sixty defendants charged with murder and has been qualified by the North Carolina State Bar Board of Legal Specialization as a specialist in the field of state and federal criminal law.

For the most, part Petitioner's contentions center around trial counsel's defense strategy. His claims that trial counsel were ineffective for failing to object to testimony including inadmissible out-of-court statements, failing to interview witnesses who were essential to his defense, failing to adequately prepare to confront or cross-examine the testimony of the State's canine expert, failing to object to Eva Marie Kelly's testimony, failing to object to prosecutor's improper statements in his closing argument, and failing to advise Petitioner as to whether he should testify in his own defense, all relate to trial tactics as gleaned from the record. Both Attorney Dodd, in his testimony in the post-conviction proceedings, and Attorney Adams, in his affidavit, contend that their defense strategy was to call no witnesses and to leave it to the government to prove its case. Dodd further avers that his failure to object to the hearsay statements was part of his strategy to point out the improper tactics used by the police to elicit statements from Petitioner and Johnny Beck, his co-defendant. Moreover, he states that he, after consulting with Petitioner and Adams, determined that it would be more to their advantage not to call witnesses in Petitioner's defense in order to preserve the right to have final closing arguments.

Unsuccessful trial tactics, standing alone, neither constitute prejudice nor definitively prove ineffective assistance of counsel. *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995), *cert. denied,* 518 U.S. 1009 ((1996). To succeed on an ineffective assistance of counsel claim, Petitioner must overcome the presumption that the challenged action may be considered an appropriate and necessary trial strategy under the circumstances. *Strickland*, 466 U.S. at 689. Whether or not Petitioner consented to trial strategy is

probative of the reasonableness of trial counsels' performance. *See Bell*, 72 F.3d at 429.

There is no question concerning the credentials of the attorney's who represented Petitioner. Therefore, the court will first address Petitioner's contention that he was not properly advised as to the pros and cons of his testifying on his own behalf. Trial counsel state that they consulted with Petitioner regarding his right to testify, pointing out the pros and cons of Petitioner's taking the stand. However, Petitioner, in his affidavit states that he was not adequately advised by counsel as to whether he should take the witness stand. The state court, after throughly reviewing the evidence presented at the MAR hearing, concluded that there was no credible evidence that defendant was not adequately advised of his right to testify. Petitioner states in his affidavit that counsel's reasons for not allowing him to testify are inaccurate. However, even if the court were to determine that Petitioner was not adequately advised of his right to testify, there is no evidence to show that he was prejudiced as a result. Petitioner has not demonstrated that he could have offered any evidence in addition to that already before the jury by way of the statements to the police following the incident. Therefore , the state court finding that Petitioner was fully and adequately advised of his right to testify at trial was not unreasonable under the circumstances, nor contrary to federal law as established by Supreme Court in *Strickland*.

Turning to Petitioner's contention that his attorneys were ineffective due to their failure to object to certain hearsay statements made by a co-defendant to the investigating officer. Mr. Dodd testified during the MAR hearing before Judge Farmer, that testimony concerning statements the co-defendant made which were contradictory to Petitioner's statements were hearsay. During his tape recorded interview, Petitioner stated that he

and the co-defendant saw the body lying where the victim was later found, and that the co-defendant had called his attention to the fact that someone was standing in the circle over the victim's body. Mr. Dodd, without objecting, allowed the State to elicit testimony from Detective Howard that the co-defendant stated that he did not see any other person near or around the body. Dodd claims he did not object and allowed the co-defendant's testimony as a trial tactic, because he wanted to ask the detective about his "unconscionable" tactics used in questioning both the co-defendant and Petitioner. (MAR tr. pp. 18-19.). The superior court rejected Petitioner's claim that trial counsel were ineffective for failing to object to the hearsay testimony of Detective Howard regarding a statement given to him by the co-defendant, Johnny Beck. Rather, the superior court pointed out that trial counsel were aware that Howard's statement would be objectionable hearsay, but as a part of their trial strategy wanted to use this as way to question the detective about the manner used to question each defendant and to show the jury that in spite of the "unconscionable" tactics, both Petitioner and Beck continued to deny involvement in the murder. (Order denying MAR p. 4). The superior court concluded that trial counsel did illicit testimony in length about questionable methods used by the detective and testimony concerning both defendants' assertions of innocence. Therefore, the court's findings that trial counsel's actions were reasonable and that Petitioner was not prejudice as a result are not contrary to, nor do they involve an unreasonable application of the standard set forth in *Strickland*.

Petitioner next contends trial counsel was ineffective for failing to adequately prepare for trial because they did not interview witnesses who were essential to his defense. Petitioner specifically argues that counsel did not try to find witnesses who were

in the cell with Petitioner and Ernest Andrews, the inmate who testified that Petitioner made a jailhouse confession. In this case, counsel had a transcript of Andrews' tape recorded statement and thus they were aware of the nature of his testimony. Andrew's statement that there were other inmate's present when Petitioner allegedly made the first statement incriminating himself, indicated that there were other potential witnesses who could have possibly refuted Andrews' testimony. In his affidavit, R. L. Adams stated that Petitioner suggested that they have some of the inmates from his cellblock testify. Adams, however, states that this idea was not followed through on because none of the inmates were with Petitioner for twenty-four hours a day and therefore could not testify that it was impossible for Petitioner and Andrews to have had the conversation. Apparently, Petitioner's current counsel was able to find witnesses who also shared the jail cell with Petitioner when he was first arrested. After reviewing the testimony of the two inmates, Judge Farmer determined that they gave little evidence of value which would tend to refute Andrews' statements. A review of the testimony of the witnesses who supposedly would have aided Petitioner's defense shows that their testimony would have offered little or nothing to rebut Andrew's assertions concerning Petitioner's jailhouse confession. *(See* MAR tr. pp. 3-33). At most, their testimony merely demonstrated that Petitioner never confessed to them. Thus, the court concludes that Petitioner was not prejudiced by trial counsel's the tactical choice and their decision not to use these witnesses did not amount to profession dereliction.

Petitioner claims that trial counsel's deficiencies in failing to obtain an expert to deal with the bloodhound evidence and to object to tainted identification evidence were

prejudicial under the *Strickland* standard. The evidence in question has to do with the testimony concerning the trailing of the victim's scent to Petitioner's vehicle which was stuck near a service road off the circle and the identification of Petitioner by Eva Marie Kelly.

With regard to the bloodhound evidence, the record shows that counsel objected at trial to this evidence and that there was an extensive *voir dire* hearing. Through a suppression motion and cross-examination trial counsel demonstrated the recognition of the legal issues involved in this kind of testimony. Moreover, the evidence provided at the MAR hearing by Jonni Joyce, who at the time was a sergeant with the Zebulon Police Department and a professional canine trainer, shows that such rebuttal evidence would not have aided Petitioner's defense. Instead, this merely served as a look at the evidence in hindsight not as an indication of any deficient performance on the part of trial counsel in dealing with this evidence.

Respondent argues, however, that even if the failure of the attorneys to hire a separate bloodhound expert amounted to ineffective assistance, there was no prejudice because the bloodhound evidence was duplicative. Respondent concludes that the Kelly's testimony placed the victims in Petitioner's presence and in his car shortly before she was killed.

Even so, Petitioner asserts that trial counsel was ineffective for failure to object to the testimony of Kelly who testified in exchange for sentence concessions. He contends the identification was the result of an impermissibly suggestive photographic "showup." The state court found, following the MAR proceeding, that "based on the circumstances

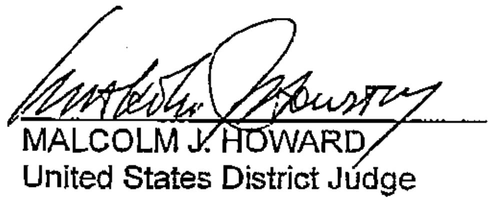
of the witnesses' viewing, twice outside at close range and once face to face in the lighted kitchen and the certainty of her identification only a short time after seeing the defendant would have allowed her identification even if the original photo viewing was suggestive." (Order denying MAR p. 6). This determination by the state court is reasonable in view of the fact that Kelly had at least one good opportunity to see Petitioner when he and his co-defendant called her to his truck, thus establishing that the in-court identification had an independent origin. *See Simmons v. United States*, 390 U.S. 377 (1968).

Finally, Petitioner claims counsel were ineffective for failing to object to prosecutor's improper statements in his closing argument. The allegedly improper arguments were as follows: (1) "[g]enerally, in a homicide, there's two kinds of parties there, the victim who can't say anything, and the perpetrator, who won't say anything;" (2) "[t]he defendant has got to explain something to you;" and (3) "[i]t's your duty to speak for the people of the State of North Carolina when there's another side to what Mr. Dodd says and I know y'all will do that even though I can't do it because obviously I'll be sitting there with my turn having come and gone but don't think that I'm not wishing that I had, that I'm not wishing that I had spoken about something that he mentioned when there's another side." Petitioner contends these comments as found in 1 and 2, violate his right not to be a witness. The court finds that these comments alone, although improper, did not prejudice Petitioner where they were not extensive. Similarly, the court finds that comment 3, which was an isolated comment did not prejudice Petitioner. The court therefore determines that trial counsel was not ineffective for failing to object to the comments at issue.

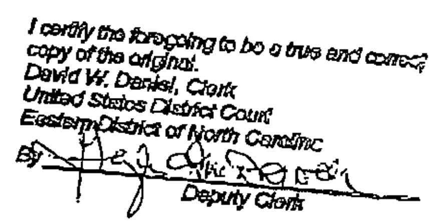
CONCLUSION

Accordingly, the court finds that the evidence viewed as a whole, does not raise a reasonable probability that the result of Petitioner's trial would have been different were it not for counsel's deficient performance and that Petitioner has failed to demonstrate the existence of genuine issues of material fact. Therefore, the court having found no violations of federal or constitutional laws, Respondent's motion for summary judgment is GRANTED as to all claims raised in Petitioner's habeas corpus petition.

SO ORDERED this 11th day of September 2000.



MALCOLM J. HOWARD
United States District Judge


I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By
Deputy Clerk