

STATE OF NORTH CAROLINA  
DURHAM COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

FILE NOS.: 98 CRS 5208  
98 CRS 7979-7980

STATE OF NORTH CAROLINA )  
PLAINTIFF )

V. )

DERRICK ALLEN )

DEFENDANT )

KT  
ORDER OF DISMISSAL PUSUANT TO  
N.C. Gen.Stat. §§ 15A-910 and 15A-954(a)(4)  
and THE UNITED STATES and  
NORTH CAROLINA CONSTITUTIONS

THIS MATTER came on for consideration before the undersigned Senior Resident Superior Court Judge upon a Motion to Dismiss filed by the defendant, Derrick Allen. The cases are being prosecuted by District Attorney Tracey Cline and Assistant District Attorney T. Mitchell Garell on behalf of the State of North Carolina. The Defendant, Mr. Allen, was present and represented by Attorney Lisa Anderson Williams. The Court after consideration of the record, hearing evidence, reviewing all exhibits introduced into evidence at the hearing, reviewing the file, and hearing the arguments of counsel, makes the following findings of facts and conclusions of law:

### **FINDINGS OF FACT**

#### **A. General Findings Related to the Procedural History of the Case and to the Evidentiary Hearing Conducted on December 9-10, 2010.**

1. Adesha Artis died on February 9, 1998. At the time of her death she lived with her mother Diane Jones and her mother's boyfriend, Derrick Allen. Mr. Allen is the Defendant in the above-referenced file numbers.
2. On February 9, 1998, within hours of Adesha Artis death, Mr. Allen was arrested and charged with the crime of Statutory Sex Offense. It is alleged that Adesha Artis was the victim. He was arrested on this charge and an outstanding arrest for failure to appear on the charge of driving while license revoked, also pending in Durham County.
3. On February 11, 1998 J. Andrew Curliss, a reporter from the News and Observer, and other media outlets interviewed Mr. Allen while he was in the Durham County Jail. Subsequently, Assistant District Attorney Freda Black filed a motion to compel the News and Observer and one other media source to disclose their complete notes, including information not disclosed in printed news article or aired on live television.
4. On February 16, 1998. Mr. Allen was indicted by the Durham County Grand Jury on the charge of Statutory Sex Offense. The indictment was signed by ADA Black.

5. On March 2, 1998 ADA Black presented two additional indictments to the Durham County Grand Jury. Mr. Allen was indicted for First-Degree Murder and Felony Child Abuse arising from the death and injuries of Adesha Artis on February 9, 1998.
6. On March 6, 1998 a hearing was held on the State's request to compel the production of information from the News and Observer and other media sources. The Court, the Honorable Orlando F. Hudson, Jr., presiding, granted the State's request and the News and Observer gave notice of appeal from the order of the Court.
7. On March 11, 1998 the North Carolina Supreme Court granted a Petition for Discretionary Review based on the News and Observer's appeal. The file number assigned to the case was 88P98.
8. On April 2, 1998, James E. Hardin, the District Attorney for Durham County, files a Notice of Intention and Application for a Rule 24 hearing.
9. On May 29, 1998 the North Carolina Supreme Court heard oral arguments in 88P98.
10. On July 6, 1998 a Rule 24 conference was conducted in Superior Court, the Honorable Henry Hight, presiding. Judge Hight determined that the State forecasted sufficient evidence of the presence of at least one capital aggravating factor and the State was granted permission to seek the execution of Mr. Allen. Judge Hight ordered that a second attorney be appointed to assist Robert Brown, who up until that time had been the sole attorney of record for Mr. Allen.
11. On July 16, 1998 Attorney Fred Battaglia was appointed as Associate Counsel to defend Mr. Allen.
12. On August 21, 1998, James E. Hardin, on behalf of the State filed a notice declaring all of Mr. Allen's cases exceptional based on Case Management Rules for Durham County Criminal Superior Court.
13. On December 10, 1998 Mr. Battaglia was removed as associate counsel and Stephen Freedman was appointed as substitute counsel. At the time, Mr. Freedman was a Staff Attorney for the Center for Death Penalty Litigation.
14. Attorneys working on behalf of Mr. Allen filed and properly served the following motions prior to March 4, 1999:
  - a) Motion to Suppress Statements, including a supporting affidavit filed by Stephen C. Freedman, filed on February 22, 1999.

- b) Motion to Suppress the Search, including a supporting affidavit of Stephen C. Freedman, filed on February 22, 1999.
- c) Motion to Preserve Evidence, filed on April 24, 1998.
- d) Motion to Inspect, Examine and Test Physical Evidence, filed April 24, 1998.
- e) Motion for Discovery, file-stamped April 31, 1998 and served on the State on May 1, 1998.
- f) Motion for Complete Recordation, filed on February 22, 1999.
- g) Motion for Production of Prior Written Statements of the State's Witnesses, filed on February 22, 1999.
- h) Motion to Produce Medical Records of Adesha Artis, file-stamped on February 22, 1999.
- i) Motion for the Production of Statements from the Defendant, filed on February 22, 1999.
- j) Motion to Produce Written Reports of Experts, filed on February 22, 1999.
- k) Motion for Production of Interview Statements of Witnesses that the State does not intend to produce at trial and for Production of Other Exculpatory Material, with an incorporated Memorandum of Law, filed on February 22, 1999.
- l) Motion to Produce Data, Test, Procedures and Diagrams, filed on February 22, 1999.
- m) Motion for Production of Exculpatory Evidence, filed on February 22, 1999.
- n) Motion for Disclosure of 404(b) Evidence, filed on February 22, 1999.
- o) Motion for Production of Crime Scene Report, filed on February 22, 1999.
- p) Motion for Disclosure of Aggravating and Mitigation Circumstances, filed on February 22, 1999.

q) Motion for Dismissal of the Indictments and in the Alternative for a Bill of Particulars. filed on February 22, 1999.

15. Mr. Allen was being prosecuted as of March 4, 1999 by two Assistant District Attorneys, Ms. Black and Ms. Cline. Both were very experienced in the prosecution of murder cases and child sex offenses.

16. Mr. Allen was represented by two attorneys on March 4, 1999 and through August 26, 1999, who were qualified and deemed capable of representing persons charged with capital murder: Robert B. Brown who was the Chief Public Defender for Durham County at all times between February 9, 1998 and August 26, 1999 and Stephen C. Freedman who was a Staff Attorney for the Center for Death Penalty Litigation.

17. A pretrial motions hearing in this case was conducted on March 4, 1999 in Durham County Superior Court, the Honorable David Q. LaBarre, presiding.

18. Some of the aforementioned pretrial motions were heard by Judge LaBarre on March 4, 1999. As discussed more fully below, Judge LaBarre entered orders for the issues he addressed on that date. Assistant District Attorneys Cline and Black were both present and represented the State of North Carolina and Attorneys Brown and Freedman were both present and represented Mr. Allen.

19. Following the entry of oral orders in open court on March 4, 1999, Judge LaBarre caused a written order to be entered, placed in the court file and served on all parties to the litigation.

20. With respect to any orders entered by Judge LaBarre requiring the State to disclose information to Mr. Allen that was then in the State's possession, it was Judge LaBarre's intent that the State immediately release any information in the possession of the State and/or its agents that was necessary to comply with his order. There are instances in his order in which he allowed the State to comply at a specified future time. For any directive he issued and did not authorize a period of time to comply, the Court finds that it was his specific intent that the parties use all due diligence and comply immediately.

21. Based on the information from the State's file contained in Defendant's Exhibit 33 and other information in the court file the Court has determined which Assistant District Attorney's made arguments on behalf of the State in response or opposition to various motions filed on the Defendant's behalf.

22. In determining which Attorneys were representing the State of North Carolina on March 4, 1999, it is not the Court's intention to suggest that either Assistant District Attorney had a lesser degree of responsibility than the other to the Court, opposing counsel, Mr. Allen or the citizens of the State of North Carolina. Rather, the Court finds the assignment of a particular

motion to a particular prosecutor to be most probative as to which lawyers were in fact prosecuting this case and their awareness that the case was of priority to the Office of the District Attorney for Durham County and the people of the State of North Carolina as there were in fact two Attorneys representing both sides and the State was seeking to execute Mr. Allen for the crimes he was accused of.

23. The court specifically finds that the following took place at the March 4, 1999 hearing before Judge LaBarre:

a) The Motion for Production of Exculpatory Evidence was argued on behalf of the State by ADA Black; Judge LaBarre ordered the disclosure of all exculpatory information to the Defense. In response, the State, through Ms. Black, made the following representations:

- There were no other persons who were considered suspects at any time in this case.

- There was no evidence that had been destroyed by law enforcement authorities and no policy that permitted the destruction of evidence.

- There were no statements of any witness or from any source that exculpated the defendant or otherwise indicated a lesser role in the case.

- There were no reports or evidence of threats made or deals, arrangements, promises or inducements made to any prosecution witness in this case.

- There were no witnesses with prior criminal records or pending charges.

- There was no evidence of any mental or emotional illness or drug or alcohol use by any prosecution witness at the time of this offense or any time thereafter.

b) The Motion for Production of Interview Statements of Witnesses the State does not intend to produce at Trial and for Exculpatory Material was argued by ADA Black on behalf of the State. This motion was denied.

c) Motion for Disclosure of 404(b) Evidence was argued by Assistant District Attorney Cline on behalf of the State. This motion was allowed.

d) Motion for Production of Prior Written Statements of the States Witness was argued by ADA Cline on behalf of the State. This motion was denied.

e) Motion for the Production of Statements from the Defendant was argued on behalf of the State of North Carolina by ADA Black. This motion was allowed.

- f) Motion to Produce Data, Test, Procedures and Diagrams was argued on behalf of the State of North Carolina by ADA Cline. This motion was allowed.
- g) Motion for Production of Crime Scene Report was argued by ADA Black on behalf of the State. This motion was allowed.
- h) Motion for Disclosure of Aggravating and Mitigation Circumstances was argued by ADA Black on behalf of the State. This motion was denied with respect to the disclosure of aggravating circumstances and allowed with respect to mitigating circumstances.
- i) Motion for Dismissal of the Indictments and in the Alternative for a Bill of Particulars was argued on behalf of the State by ADA Black. This motion was denied.
- j) The Motion for Complete Recordation was allowed.

24. Judge LaBarre entered oral orders on March 4, 1999. A *nunc pro tunc* order based on hearings from March 4, 1999 is signed on March 18, 1999 and file stamped March 22, 1999. A signed copy was placed in the court file and disseminated to the parties to the litigation.

25. On March 4, 1999, following the motions hearing conducted before Judge LaBarre, the State, through then-ADA Cline, released information to Mr. Allen's counsel that purported to be the complete rough notes of the State Bureau of Investigation. The disclosure certificate indicates that the information was being released per an order of the court as opposed to a voluntary disclosure by the State.

26. On July 23, 1999 the North Carolina Supreme Court entered an order deciding that the Petition for Discretionary Review based on the order compelling the media to make disclosures was improvidently granted.

27. On August 18, 1999, ADA Black wrote to Robert Brown indicating that she has met and discussed Mr. Allen's case with District Attorney Jim Hardin and that the State's current plea offer was its "bottom line" offer. She further stated in the letter that in an effort to help Attorneys Brown and Freedman persuade Allen that it is in his best interest to plead guilty and accept their bottom line offer she was voluntarily releasing two additional statements of Kia Ward.

28. On August 26, 1999, eight days after the voluntary release of some of Kia Ward's statements, Derrick Allen entered a negotiated Alford plea before the Honorable A. Leon Stanback. Pursuant to the agreement, Mr. Allen pled guilty to first degree sexual offense and to a reduced charge of second-degree murder. Mr. Allen received two consecutive aggravated

range sentences of 237-294 and 288-355 months active imprisonment. Mr. Allen was sentenced as a level II offender.

29. Mr. Allen was represented at the sentencing hearing by Attorneys Brown and Freedman. ADA Black was the only prosecutor who signed the transcript of plea or who spoke at the sentencing hearing. ADA Black summarized the State's case. She highlighted the importance of Kia Ward's statement and the blood evidence on Adesha Artis' underwear and sleepwear. ADA Black referred to Ms. Kia Ward as Cecilia Ward. Cecelia Ward is the individual referred to throughout these proceedings as Kia Ward. Prior to determining that the State has made a sufficient factual basis to warrant the Court accepting the plea offer, Judge Stanback asked a question about the ownership of the underwear that Ms. Black highlighted in her factual basis and the presence of blood on the items. ADA Black stated that the underwear had blood on it and matched a description of panties that Kia Ward claimed to have seen Mr. Allen put on Adesha Artis that morning.

30. Prior to sentencing Mr. Allen Judge Stanback did not find any aggravating factor or that Mr. Allen had prior convictions to warrant being sentenced as a level II offender. There were no objections by any Attorneys participating and Mr. Allen was sentenced to a total of 54 years.

31. On October 29, 1999, Prisoner Legal Services wrote to the Clerk of Court, on behalf of Mr. Allen, requesting a copy of his court file.

32. On February 28, 2001, Mr. Allen requested and received a copy of his court file in reference to this matter from the Clerk of Superior Court for Durham County.

33. On January 27, 2004, Derrick Allen filed a *pro se* certiorari petition challenging aspects of his conviction in the above-referenced file numbers, at the Court of Appeals. The case is issued a file number by the Court of Appeals of COAP04-66.

34. On February 10, 2004, the North Carolina Court of Appeals issued an order allowing Mr. Allen's petition and remanding the case back to Durham County Superior Court for a determination of whether counsel should be appointed to represent Mr. Allen.

35. On May 25, 2004, Derrick Allen wrote to the Clerk of Court for Durham County inquiring as to why he has not been returned to Durham for a hearing as directed by the Court of Appeals.

36. Mr. Allen, acting *pro se*, filed and served a Motion to Locate and Preserve the Evidence in his case on May 30, 2004 and filed and served a Request for DNA testing on June 17, 2004. Mr. Allen's request of the Court was to order that forensic testing be conducted on many physical items of evidence in his case.

37. On September 2, 2004 Derrick Allen was returned to Superior Court. The State was represented by ADA Black: the record reflects that counsel was appointed for the purposes of "resentencing."

38. On September 22, 2004, Robert Brown acting as the Chief Public Defender for Durham County appointed Kevin Bradley to represent Mr. Allen for the purposes of "resentencing."

39. Mr. Bradley filed a Motion for Appropriate Relief on behalf of Mr. Allen challenging many aspects of the case and requesting (1) that the judgments be vacated and (2) that Mr. Allen be allowed to withdraw his plea.

40. On March 19, 2009, Judge Hudson vacated the judgments entered by Judge Stanback on August 26, 1999. Mr. Allen moved to withdraw his guilty plea as allowed by law. The Court allowed Mr. Allen's motion to withdraw his entry of an Alford guilty plea.

41. Kevin Bradley was allowed to withdraw on April 13, 2009 and Mark Edwards was appointed to represent Mr. Allen.

42. On April 14, 2009, Mr. Allen moved for a bond reduction to \$50,000.00. The State, through Assistant District Attorney T. Mitchell Garrell, objected to the bond being reduced to the requested amount. Bond was set at \$250,000.00.

43. On July 8, 2009 Mr. Edwards moved to withdraw, per the request of Mr. Allen. The motion was allowed.

44. On July 31, 2009 Michael Driver was appointed to represent Mr. Allen.

45. A trial date was set in these cases for May 10, 2010.

46. On February 4, 2010, at Mr. Allen's request, Mr. Driver was removed as counsel of record.

47. On February 18, 2010 Attorney Lisa Anderson Williams was appointed to represent Mr. Allen.

48. On April 13, 2010 and April 15, 2010, Ms. Williams inspected the property and forensic files, and what was presented as the complete files of the Durham District Attorney's Office. She was not provided with the files of the Durham Police Department.

49. As a result of those inspections, Ms. Williams wrote to ADA Garrell indicating that she had discerned that she has not been provided the complete files of the State and requesting specific information that she believed should be in the files but that was not provided.



50. On July 10, 2010, the State made an additional disclosure to Ms. Williams that contained information not previously disclosed to her.

51. Subsequent to July 10, 2010, Ms. Williams requested additional information from the State by filing and serving additional motions related to discovery. Ms. Williams, on behalf of Mr. Allen, filed and served the following motions on the Durham County District Attorney's Office:

- a) Motion to Reveal Deals and Concessions, filed and served on July 27, 2010.
- b) Motion for Discovery Pursuant to North Carolina General Statute § 15-A-903, filed and served on July 27, 2010.
- c) Motion to Compel Investigating Officers to Turn Over All Information Related to the Investigation of this Case to the Prosecutors, filed and served on July 27, 2010.
- d) Motion for Complete Recordation of All Proceedings, filed and served on July 27, 2010.
- e) Bond Motion filed and served on July 27, 2010.
- f) Defendant's Motion to Discover Tests Performed and Data Derived Therefrom, filed and served on July 28, 2010.
- g) Motion to Declare Exceptional, filed and served on July 28, 2010.
- h) Motion to Memorialize Discovery Provided by the Prosecutor Pursuant to an Open File Policy, filed and served on September 9, 2010.
- i) Motion for Specific Discovery, filed and served on or about September 9, 2010.
- j) Motion to Vacate Portions of Prior Discovery Order entered on March 4, 1999, filed and served on or about September 9, 2010.
- k) Motion to Require Compliance with North Carolina General Statutes § 15-A-501, filed and served on October 5, 2010.
- l) Motion to Compel Discovery, filed on November 2, 2010 and served on October 27, 2010.
- m) Motion to Dismiss with Prejudice, filed and served on October 12, 2010.

n) Ex Parte Motion for Review of Personnel Records and Brady Information. submitted to the Court for Review on October 23, 2010 and granted on November 9, 2010.

52. The State, through ADA Mitchell Garrell, consented to entry of orders for all discovery request filed by Ms. Williams that were granted by this Court prior to November 23, 2010.

53. The State, through District Attorney Cline, consented to the entry of all discovery orders that were filed by Ms. Williams that were granted on or after November 23, 2010 but prior to December 10, 2010.

54. The State objected to the Court reducing or modifying the terms of Mr. Allen's bond such that he would be released from incarceration on September 10, 2010 and at every hearing prior to that in which the issue was addressed.

55. In August, 2010 the Swecker-Wolf report was released by Attorney General Roy Cooper. This was a report of an audit requested by Attorney General Cooper conducted of the SBI laboratory's Molecular Biology Section which contained the serology unit. The auditors Swecker and Wolf flagged Mr. Allen's case as one of approximately 200 cases infected by improper and misleading reporting of test results or other forensic analysis.

56. On September 10, 2010 Mr. Allen's bond was reduced to an unsecured bond and Mr. Allen was released from custody. Ms. Williams continued to file discovery-related motions on his behalf. At this hearing, the parties reported to the Court that the State had offered Mr. Allen a plea agreement that would have enabled Mr. Allen to be sentenced to time served and be released from custody. Mr. Allen, prior to learning that the Court would order his release, refused to accept the State's offer which would have guaranteed his freedom and removed the possibility that he would ever return to prison on these charges.

57. On October 8, 2010, pretrial orders were entered by Judge Hudson.

58. On October 12, 2010, Ms. Williams filed a Motion to Dismiss. The motion to dismiss requested a dismissal with prejudice under multiple theories, all arising from the State's failure to release and provide information Mr. Allen was entitled to receive pursuant to statutes, case law, court orders, and the Constitutions of the United States of America and North Carolina.

59. On November 12, 2010 pretrial orders were entered by Judge Hudson. All parties were present for the hearing and served with a copy of the written order. At this hearing the Court indicated an intention to have Mr. Garrell file a response to the Motion to Dismiss by December 6, 2010. Mr. Garrell indicated that based on his heavy trial schedule he requested an additional period of time to file a response. Attorney Williams consented to his request for time to file a response and the Court amended its order and directed that the State's response would be due on December 15, 2010. A date was not set by the Court to preside over the motion.

60. On November 18, 2010 Ms. Williams filed an affidavit and attachments. The affidavit and the attachments indicate what discovery was provided to her in a digital format. The Affidavit relates the prior history of which prosecutors from the Durham District Attorney's Office have been assigned to the case at various times, including Freda Black, Tracey Cline and Mitchell Garrell. The affidavit alleges that the State released new information on October 21, 2010 that had never previously been disclosed to Ms. Williams and was not present in the State's files she had been provided access to on April 13 and 15, 2010. The affidavit also states that the exhibit tendered to the Court by the State pursuant to a court order to memorialize all discovery provided to Ms. Williams both contained new information not previously provided to her and omitted some information that she had been provided

61. The State has not filed any pleading disputing the accuracy of the aforementioned affidavit filed by Ms. Williams, and has not otherwise disputed the accuracy of that information. The Court expressly finds that all of the factual assertions contained in the Affidavit of Lisa Williams are truthful and accurate.

62. On November 23, 2010 District Attorney Cline, on behalf of the State, met ex parte with Judge Hudson and requested that the Court preside over the Motion to Dismiss prior to the end of 2010. District Attorney Cline stated that she had spoken to ADA Garrell and that the State was prepared to proceed. At the time she initiated the conversation with the Court, the State had been served with the Motion to Dismiss, the Affidavit of Ms. Williams with attachments, various motions to compel discovery, and copies of all of those documents had also been placed in the court file and were a matter of public record. After consulting with Ms. Williams, the matter was scheduled for hearing on December 9, 2010 after both parties consented to that date on November 23, 2010. Prior to consenting to the court date Ms. Williams did indicate that she would need to receive a response to the motion to dismiss and all of the discovery requested in the pending motions sufficiently in advance of the hearing in order to allow adequate preparation. Based on the representations by DA Cline, she was assured that the information would be provided by December 1, 2010 at 1:00 p.m. and the Court entered a written order consistent with those provisions, placed a copy in the court file and ensured that all parties were served with the same.

63. On November 23, 2010 ADA Garrell was employed by the Durham County District Attorney's Office and was working in criminal district court. ADA Garrell was not involved in a jury trial or any protracted hearings that prevented him from informing District Attorney Cline as to his preparedness or the status of the production of discovery requested by the Defendant on November 23, 2010.

64. Based on the representation of District Attorney Cline on November 23, 2010, the Court ordered the State to comply with all defense discovery requests which were then pending. A written order to this effect was entered on November 29, 2010 and served on ADA Garrell and District Attorney Cline separately.

65. The order dated November 29, 2010, that pertains to scheduling of the motion that is the subject of this order, mandates that in the event the State could not provide a requested item to the Defendant it was to file a written response explaining why the information could not be provided. The discovery, or a written explanation as to why it was not being provided, and the response to the Motion to Dismiss were to be provided to Ms. Williams by December 1, 2010 at 1:00 p.m.

66. On December 1, 2010 ADA Garrell provided information to the Court indicating he was not aware that the motion to dismiss had been scheduled at the request of District Attorney Cline, that he had a response due to the motion due by 1:00 on that date, or that the State was under an order to disclose discovery, until he received notice from Ms. Williams via the form of the written court order consented to by District Attorney Cline.

67. On December 1, 2010, prior to 1:00 p.m., ADA Garrell filed and served a responsive pleading on counsel for Mr. Allen, as ordered by the Court. The State did not move to continue the hearing on the Motion to Dismiss.

68. The State did not provide any additional discovery to Mr. Allen by December 1, 2010 at 1:00 p.m. as ordered by the Court on November 23, 2010.

69. The State made no written filing with the Court explaining any failure to provide discovery as ordered by the Court on November 23, 2010.

70. Mr. Allen specifically alleged in his pleadings that the outstanding discovery requests were necessary for proper preparation and litigation of the motion to dismiss and the Court has determined that the discovery items requested by Attorney Williams and ordered disclosed by the State would have been of material benefit to the defense in the preparation and litigation of the motion to dismiss.

71. The State was without just cause for failing to comply with the discovery order rendered on November 23, 2010 and reduced to writing on November 29, 2010.

72. No one from the Durham District Attorney's Office interviewed Special Agent Jennifer Elwell in preparation for the hearing on the Motion to Dismiss or asked her to make a determination prior to her testimony on December 9-10, 2010 of the location of evidence or whether certain items had been destroyed.

73. Police Investigator Grant Gilliam was not interviewed or consulted prior to his testimony on December 10, 2010 as to the location of any missing items of evidence, location of witnesses, any actions or inactions he took and information in the police files that was or was not disclosed to the Office of the Durham County District Attorney regarding his work in the case of State v. Derrick Allen.

74. On December 8, 2010 District Attorney Cline directed ADA Garell to make a discovery disclosure regarding the practices of the State Bureau of Investigations at approximately 4:00 p.m. Ms. Williams was not available to be served on December 8, 2010, but did accept service prior to court on December 9, 2010.

75. On December 9, 2010 prior to the call of the matter the Court conducted a prehearing conference with Ms. Williams and Mr. Garrell. The Attorneys advised the Court of which claims were disputed and which stipulations they had agreed to.

76. The Court conducted an evidentiary hearing on Mr. Allen's motion to dismiss on December 9-10, 2010. On December 10, 2010 the Court orally rendered an order from the bench granting the Motion to Dismiss. The State and the Defendant consented to entry of a written order outside of the current session of Court.

77. On December 17, 2010 the State filed a written notice of appeal from the dismissal order rendered on December 10, 2010.

78. At the beginning of the hearing, Mr. Allen moved for sequestration of all witnesses. ADA Garrell had no objection to the sequestration of all witness. District Attorney Cline asked that she be excepted from the sequestration order, as she was the prosecutor bringing the action and representing the State. Mr. Allen objected to the exception of District Attorney Cline as she was a witness in the matter. The Court overruled Mr. Allen's objection and allowed District Attorney Cline to remain in the Courtroom for any and all proceedings.

79. The first witness called by Mr. Allen was District Attorney Cline who was sworn and testified to the following:

- a) She is a licensed Attorney in the State of North Carolina and has been since the year 1989. At the time of her testimony she had been an Attorney for at least 21 years.
- b) Her first employment utilizing her legal degree was as an Assistant Public Defender in Fayetteville, North Carolina.
- c) While employed as an Assistant Public Defender she represented persons charged with violent offenses and that her employment in that capacity lasted for between two and three years.
- d) After leaving the Public Defender's Office in Fayetteville, she was next employed as an Assistant District Attorney in the First Judicial District in the State of North Carolina.
- e) Beginning in February or March of 1994. Ms. Cline became employed as an Assistant District Attorney in the Durham County District Attorney's Office.

- f) From the beginning of her tenure in the Durham County District Attorney's Office, she prosecuted violent felonies including rapes, robberies, murders, habitual felons and violent habitual felons.
- g) For some period of time, then-ADA Cline prosecuted all of the child sex offenses in Durham County. During that time she was also prosecuting murder cases.
- h) District Attorney Cline has been aware of her obligations pursuant to North Carolina General Statutes §15A-903 in its various forms throughout her career as a prosecutor.
- i) District Attorney Cline specifically acknowledged that absent a protective order from the Court, the State is required to fully comply with the discovery obligations imposed upon the State based on statutory provisions, orders of the Court, and the Constitutions of the United States and North Carolina.
- j) District Attorney Cline has been aware since 1989 of the State's obligation to disclose exculpatory information to the Defendant, and that disclosure of exculpatory information is a right of the Defendant that stems from the United States Constitution.
- k) She has been aware that exculpatory information is defined to include impeachment information, mitigation evidence, evidence of third party guilt and evidence of other suspects investigated by the State and its agents and has been aware of the same since 1989 when she became a licensed attorney.
- l) The *Kyles* case from 1995, a decision issued by the United States Supreme Court, imposed a duty upon the individual prosecutor(s) to determine if exculpatory information exists in the files of the State and its agents, including law enforcement officers, and to disclose any exculpatory information to the Defendant. She has been aware of that obligation since the case became the law of the land.
- m) To the best of her recollection she has requested permission from the Court to seek execution in a minimum of three cases: Angel Richardson, Keith Kidwell, and Richard Terry.
- n) She has never prosecuted or defended a capital murder case that went to trial. However, she did begin to select a capital jury before a mistrial was declared. In all of the capital murder cases she has been assigned to she has offered the Defendant an opportunity to plead guilty and avoid a capital murder trial, i.e. avoid the possibility of being executed by the State of North Carolina.

- o) District Attorney Cline indicated that she believed if there was sufficient evidence of a capital aggravating factor that it was both proper and consistent with the United States Constitution to use the application of the death penalty as leverage to resolve the cases by plea and circumvent a trial.
- p) She first reviewed the case file after reading coverage of the Derrick Allen's case in the News and Observer generated by the Swecker-Wolf report in the summer of 2010.
- q) After reading the newspaper she went to Mr. Garrell's office over the weekend, removed the file from his office and reviewed it. In so doing her intention was to ensure the State had sufficient evidence to warrant the prosecution of Mr. Allen and his continued confinement.
- r) Her review of the State's files led her to believe that the State's prosecution of Mr. Allen would continue and that he should remain incarcerated. She testified in her opinion the presence or absence of blood on the panties of Adesha Artis was irrelevant and of no importance.
- s) District Attorney Cline testified that in 1998 and 1999 Freda Black alone prosecuted Mr. Allen and nothing in her review of the files prompted her memory of any prior involvement she had in the case.
- t) She was generally aware of the case and remembered it because of the allegations involving the use of an ink pen to sexually assault a child and because it involved the death of a child. With some prompting and after seeking permission to review the State's files during a recess, she further remembered being assigned a limited task of investigating whether or not Mr. Allen had committed other sexual offenses against other victims.
- u) She was not aware of the Order to Memorialize Discovery provided to the Defendant pursuant to Court order dated October 8, 2010.
- v) Daniel J. Wright is Mitchell Garrell's legal assistant. She is Mr. Wright's hiring authority and he works at her pleasure.
- w) She issued no directives to any person on her staff not to comply with the Order of the Court to memorialize a complete copy of the discovery provided to Mr. Allen.
- x) She had no explanation as to why the complete files of the State disclosed to the Defendant on April 13 and April 15, 2010 were not scanned and provided to the Court and the Defendant as ordered by the Court on October 8, 2010.

y) She did acknowledge having one conversation with the paralegal that scanned the discovery provided to Mr. Allen and was informed that the information had been scanned and provided to Mr. Allen's attorney.

80. The second witness called by Mr. Allen at the hearing was Attorney Freda Black who was sworn and offered the following testimony:

a) She has been a licensed attorney in the State of North Carolina since 1985.

b) Prior to working in the Durham County District Attorney's Office she was employed in private practice for some years and then employed as the Chief Assistant Public Defender in Robeson County. In that capacity she received training at the Annual Public Defender Conferences and managed her case load and advised junior Assistant Public Defenders employed by the office.

c) When she was employed in the Durham County District Attorney's office, she was frequently assigned the most serious murder cases, and has prosecuted Capital Murder cases and tried them to verdict on behalf of the State of North Carolina.

d) Prior to District Attorney Cline joining the office in Durham, she prosecuted all of the sex offenses and rapes in Durham, North Carolina.

e) She was assigned the case of State v. Derrick Allen by District Attorney James E. Hardin and was instructed to prosecute it as a Capital Murder case, i.e. seeking the execution of Mr. Allen.

f) She was aware of her obligation to comply with the statutory discovery, orders of the Court, the requirements of the Constitutions of the United States and North Carolina and the Rules of Professional Responsibility at all times that she prosecuted the case of the State of North Carolina v. Derrick Allen.

g) At all times relevant to the prosecution of Mr. Allen in 1998 and 1999, she was aware that the disclosure of exculpatory information in the files of the District Attorney Office and its agents must be disclosed and that mandate stems from the United States Constitution.

h) The case law in 1998 and 1999 had clearly defined exculpatory evidence to include third party guilt, alternate suspects, impeachment evidence and mitigation evidence and she was aware of those definitions in 1988 and 1999. She was not aware of any specific case law in North Carolina to require when exculpatory evidence should be disclosed but she believed it would be best to disclose it before the case was finally disposed of and prior to trial.



- i) She believed that in a death penalty case the State should be at the highest level of diligence in complying with discovery obligations due to the unique nature of capital prosecutions and punishments.
- j) She had no specific recollection of what she did to ensure Mr. Allen received all of the information he was entitled to receive, but indicated her normal habit and routine would be to call in the law enforcement officer assigned to the case and ask them to bring their entire and complete file to the District Attorney's Office and that she would then review the complete set of information and copy it so that there was a complete and exact set of information in her possession. She recalls that Grant Gilliam, the lead detective in Mr. Allen's case, was very easy going and cooperative. She could recall no instance in which Detective Gilliam did not comply with her requests in this case.
- k) She attended a discovery hearing on March 4, 1999 which was presided over by the Judge LaBarre. At the hearing the State was ordered to disclose certain information and relieved of obligations to produce other information.
- l) It would have been her habit to take contemporaneous notes of the orders of the Court on the motions as the Court entered a ruling on each motion.
- m) When she was shown a set of documents from the State's files, which were marked as Defendant's Exhibit 33, they were in fact her hand written notes taken contemporaneous to the rulings of the Court on March 4, 1999.
- n) On March 4, 1999 ADA Cline signed a disclosure certificate that purported to release the rough notes of the SBI as a result of a court hearing on March 4, 1999. When shown copies of the rough notes of the SBI disclosed on March 4, 1999 she indicated she had no memory of seeing them and that District Attorney Cline likely was responsible for that aspect of the case.
- o) She had no knowledge or recollection of the following things:
  - 1) That Kia Ward aka Cecilia Ward was ever investigated as a suspect in this case as the person who killed and sexually assaulted Adesha Artis.
  - 2) That Kia Ward had a sexual relationship with Mr. Allen and considered him an enemy of hers, and that she had given a statement to this effect to law enforcement.
  - 3) That the SBI had conducted testing that was inconsistent with the presence of blood on the child's panties and sleepwear.

- 4) That Agent Jennifer Elwell from the State Bureau of Investigation ever discussed the confirmatory blood test results with her.
- 5) That she had any input into the decision of Agent Elwell to not test items for DNA.
- 6) The Attachment to the SBI- 5 form submitted by Grant Gilliam.
- 7) That DNA testing had ever been requested by Grant Gilliam on any item of evidence.
- 8) That Grant Gilliam wrote a memo to Special Agent Mike Wilson instructing him to keep the interview and polygraph of Kia Ward from being discovered by anyone.
- 9) That Kia Ward had been polygraphed in April of 1998, or of the results of the polygraph testing.
- p) On August 18, 1999 Ms. Black wrote to the attorneys representing Mr. Allen and disclosed statements that appeared to be inculcating to Mr. Allen with the specific intent of encouraging Mr. Allen to plead guilty and avoid the possibility of being executed or having the State's case tested at trial. These statements by Ward were conveyed to Mr. Allen contemporaneously with the "bottom line" plea offer from District Attorney Hardin, the offer which Mr. Allen ultimately accepted eight days later.
- q) Ms. Black tendered a factual basis to Judge Stanback on August 26, 1999. Her presentation of a factual basis for Mr. Allen's plea was an evidentiary hearing required before the Court could accept Mr. Allen's guilty plea.
- r) At the hearing on August 26, 1999 Judge Stanback did in fact request clarification and more information about the presence of blood purported to be on Adesha Artis's underwear and Ms. Black did provide him with greater detail.
- s) That on August 26, 1999 she summarized the strengths of the State's case as being the statement of Kia Ward which she read into the record and the blood on the child's panties.
- t) At the hearing on August 26, 1999 she described Ms. Ward as being "a third party defendant" and while a third party guilt defendant is a legal term, she misspoke on that date and was unaware that Kia Ward was ever investigated as an alternate suspect or "third party guilty defendant" in the death and alleged sexual offense of Adesha Artis.

81. The third witness called by Mr. Allen was former Special Agent Mike Wilson of the State Bureau of Investigation who was sworn and offered the following testimony:

- a) He was employed by the State Bureau of Investigations and conducted polygraph examinations in the SBI's Greensboro office for many years
- b) He is no longer employed in that capacity. He has no memory of conducting any polygraph test or writing any reports in Mr. Allen's case.
- c) When he was shown documents with his signature on it as a result of interviews conducted with Kia Ward aka Cecilia Ward, they did not refresh his recollection in any way.
- d) He does not remember the contents of any interviews with any witness that he conducted in the case of State of North Carolina v. Derrick Allen.
- e) He does not remember the names or identities of any additional witnesses that were present at any interviews that were conducted.
- f) He is unable to say if his reports or prior statements are accurate or complete now or then.

82. The fourth witness called by Mr. Allen was Special Agent Jennifer Elwell of the State Bureau of Investigation who was sworn and offered the following testimony:

- a) Agent Elwell has been employed as a forensic scientist by the State Bureau of Investigation since 1988.
- b) She has testified as an expert for the State of North Carolina on 150 different occasions in the courts of this State.
- c) She has worked as a training officer teaching other State Bureau of Investigation agents and scientist how to better perform their jobs.
- d) Prior to December 9, 2010 she did not meet with ADA Garrell or District Attorney Cline to discuss any aspect of her testimony or work in this case and did not attend any meetings regarding this hearing with the Durham District Attorney's Office.
- e) Prior to the publishing of the Swecker-Wolf report, she was a Team Leader in the Forensic Biology Section with seven agents reporting to her. She worked as a serologist and in the DNA section testing physical items for the presence

of evidence and comparing them to known samples and data bases to assist the State of North Carolina in an effort to solve crime.

- f) After the Swecker-Wolf Report was published she was placed under investigative suspension and removed from analyzing evidence on behalf of the State Bureau of Investigation.
- g) She has not read the complete Swecker-Wolf report, but did review "parts and pieces" of the report. She reviewed the cases imputed to her in the Swecker-Wolf report and the conclusions they reached after evaluating each. Her work was summarized accurately in each incident identified by the Swecker-Wolf report.
- h) Her assignments since being removed from case work include writing the new testing policy procedures as the SBI moves towards a new stricter "ISO" format designed to bring a better level of service to her client, the State of North Carolina.
- i) Her work in the Allen case underwent a technical review by Special Agent David Spittle. The purpose of the technical review was to measure compliance with the evaluation of the evidence conducted by the Analyst with the policies of the State Bureau of Investigation.
- j) She received a copy of the SBI 5- form and a multi-page attachment prepared by Grant Gilliam prior to initiating any testing in Derrick Allen's case.
- k) On August 12, 1998 she had a telephone call from Grant Gilliam that she memorialized in the phone log maintained by the Bureau. In that phone call Investigator Gilliam asked her to take actions that were contrary to his written request submitted on the SBI 5 form.
- l) Investigator Gilliam specifically requested that certain items not be examined for certain fluids and other items not examined at all.
- m) On August 17 and August 18, 1998 Agent Elwell conducted the forensic examination by the SBI of the evidence in this case.
- n) On August 18, 1998 Agent Elwell's phone log indicated that she called ADA Black and gave her the results of testing and that she and ADA Black decided that certain items would not be tested and that DNA testing would not be conducted on any item of evidence.
- o) She denied that Investigator Gilliam ever requested DNA testing on any item of evidence submitted in the case at issue.

- p) She tested several items with a presumptive test for blood and those items include but are not limited to the panties and sleepwear of Adesha Artis. She prepared a written report that indicated that the panties of the child gave chemical indications for the presence of blood.
- q) At the time that she prepared the written report she did not include any indications that the child's panties and sleepwear had been tested with a confirmatory blood test on multiple occasions and the results were not consistent with the presence of blood on those items.
- r) There is a section in the written report that indicated the following items failed to indicate the presence of blood and neither the panties or the sleepwear of the child is included in that section.
- s) Her method of reporting is scientifically accurate and while 32 of her cases were flagged by the independent auditors, Swecker and Wolf, there is no issue or problem with her work.
- t) In her opinion neither Swecker nor Wolf are scientists trained in serology or DNA and did not understand the analysis she undertook. Agent Elwell further opined that Swecker's and Wolf's evaluations and perspectives are reflective of their individual opinions and not the scientific community as a whole.
- u) The State Bureau of Investigation did not have a policy in 1998 and 1999 that indicated in the absence of a negative confirmation test for blood and negative test for sperm or spermatozoa the item would not be tested for DNA.
- v) She and ADA Black did not submit the items for DNA testing because they agreed DNA testing would not prove anything in this case.
- w) She was not asked by anyone to determine whether physical items retained by the SBI in 1998 have been destroyed and she did not inquire at any point prior to her testimony and she does not know where the physical items retained by the SBI are located or if they were destroyed. Her written report does indicate that the samples they retained could be destroyed after five years time had elapsed.
- x) She was unaware of Mr. Allen's Motion to locate and preserve items for DNA testing and Request for DNA testing filed in 2004.
- y) She was not aware of the Affidavit for a Search Warrant filed by Investigator Gilliam indicating he needed samples of blood, saliva, hair and pubic hair from Mr. Allen, because it would be of material value in the investigation of

the death and sexual assault of Adesha Artis. She did receive all of the items from the Medical Examiner and the Durham Police Department necessary to conduct the DNA testing referred to in the Affidavit of Grant Gilliam. attached to the search warrant.

- z) She has never provided any document, policy or procedure connected to her work in the case of Sate v. Derrick Allen to any Attorney or investigator working on behalf of Mr. Allen. All information was provided to the Durham District Attorney's Office working on behalf of the State of North Carolina.

83. The fifth witness called by Mr. Allen was David J. Spittle, a former Agent employed by the State Bureau of Investigation, who was sworn and offered the following testimony:

- a) He began his employment with the State Bureau of Investigation in 1979. He retired from the SBI in 2001 and worked in the serology section. The serology section later came to be known as the Molecular Genetics Section.
- b) Prior to his employment at the SBI he was employed by the Federal Bureau of Investigations in the crime lab in Washington, D.C.
- c) He performed a technical review of Agent Elwell's work in the case of State v. Derrick Allen. He signed a document that indicated he reviewed her work and concurred with her results. The form he signed when he reviewed her work indicated he did not review any DNA results and that they were not performed in the case at issue.
- d) He indicated that he had trained Agent Elwell and was conducting evaluations and forensic testing on items for the State Bureau of Investigations contemporaneous with Agent Elwell's work in this case.
- e) Without a positive confirmatory test he could not conclusively state that an item was blood.
- f) The wording on Agent Elwell's report met the bureau's policy at the time it was written but he would not have written the reports that way Agent Elwell did. The policy of the SBI gave the Agent that choice.
- g) David Spittle indicated if he were writing the reports on the same date and time that she did with the same results she obtained he would have added language that said "an insufficient amount of evidence was observed for the conclusive identification of blood on this item". He stated he would have added that language to a description of the testing conducted on item

number four, the girls panties, and any other item with a positive presumptive test that were not confirmed by the confirmatory Takyama testing.

- h) During the time he was conducting testing, he added the language discussed above in his reports and even with the addition of that language Swecker and Wolf determined that his reports were still problematic and should have contained more detail as to the confirmatory testing conducted by the State Bureau of Investigation.
- i) Eighty-nine of his cases were flagged by Swecker and Wolf. Seventy-two were instances where he included language indicative of the fact that further testing did not confirm the presence of blood. The phrase he most commonly used was "an insufficient amount of evidence was observed for the conclusive identification of blood on this item." Such wording also fell within the policy of the State Bureau of Investigations and was reviewed by his supervisor prior to being disseminated to prosecutors and defendants all over the State.

84. The sixth witness called by Mr. Allen was Investigator Grant Gilliam, who was sworn and offered the following testimony:

- a) He was the lead investigator assigned by the Durham Police Department to investigate the case of State of North Carolina v. Derrick Allen. He retired in July, 2009 from the Durham Police Department.
- b) During his tenure in the police department he worked in uniform patrol, and as a detective investigating property crimes, violent offenses and murder cases.
- c) During his investigation in Derrick Allen's case he worked very closely with the Durham District Attorney's office and he completed every task they requested to the best of his ability.
- d) He transported Kia Ward to Greensboro to meet with Special Agent Mike Wilson for the purpose of polygraphing her.
- e) Prior to the interview occurring he sent a memo to Mike Wilson and a summary of his investigation. The memo indicates which questions he and Assistant District Attorney thought were appropriate for the interview and polygraph testing of Ms. Ward to cover.

- f) The Durham District Attorney's Office knew he was going to be transporting Kia Ward to Greensboro for the purpose of polygraphing her about her possible involvement in the death and alleged sexual assault of Adesha Artis.
- g) After the polygraph test was completed he informed the Durham District Attorney's Office of the results.
- h) He was in an adjacent room with a two way mirror so that he could observe the questioning but he could not hear the questions or the responses given in the interview of Kia Ward.
- i) He provided all of his reports and all information required to the Durham District Attorney office.
- j) The last time he saw Kia Ward was on April 7, 1998 at the conclusion of her interview and polygraph test.
- k) No one from the Durham District Attorney's Office requested his assistance in locating Kia Ward or Diane Jones at any point since April 7, 1998.
- l) No one from the Durham Police Department requested his assistance in trying to locate Kia Ward or Diane Jones since April 7, 1998 to the present.
- m) His reports from this case indicate it was his pattern to contact the District Attorney's Office and let them know he would be meeting with a witness, discuss which questions to ask of the witness and then inform them of the results.
- n) He recognized from his initial appointment that this was a very important case and he met with ADA Black on many occasions and more then he normally would because he knew it was a capital murder case and a child sex offense.
- o) On one occasion ADA Black and Investigator Gilliam returned to the home of Adesha Artis and located an item of evidence that the police and the crime scene unit had failed to secure.
- p) His reports indicate that ADA Black independently of him had spoken to several witnesses that she played a major role in the investigation, and they kept each other closely informed throughout.
- q) He was contacted in the fall of 2010 by Art Holland, a homicide detective assigned as a liaison to the Durham District Attorney's Office to inquire if he had the Durham Police Departments copy of the murder investigation. He indicated he did not.



- r) He did check out a copy of the 911 tape related to the death of Adesha Artis and deliver it to the District Attorney's Office. Gilliam asked the District Attorney's Office to review the tape because he thought it had evidentiary value. After doing so he attended meetings with the Chief of Police, Teresa Chambers, and attorneys for the Durham Police Department regarding a release of the tape. When he received the tape back from the Durham District Attorney's Office he returned it to the property room. He was unaware that the 911 tape had been picked up by anyone subsequent to that and has no explanation about where it currently is, or why it is now missing.
- s) After reviewing the tape, the Durham District Attorney's office opted to release a transcript of the tape to the media rather than an audible copy of the tape.
- t) Prior to receiving a subpoena from Mr. Allen, he had not been interviewed or contacted by the Durham District Attorney's Office related to this case since 1999. The State did furnish him with a partial copy of his reports on December 9, 2010; some pages were omitted from the information he was provided.
- u) Within the Durham Police Department file and the District Attorney's file is a permission to search form purportedly signed by Diane Jones dated February 9, 1998. This document has been in the possession of the Durham Police Department since that date. He was unaware of the motion to suppress for lack of consent to search and accompanying affidavit by Attorney by Steve Freedman that was filed and served on the Durham District Attorney's Office in February of 1999.
- v) He was unaware of the motion to preserve evidence filed in this case, the Durham District Attorney's Office never informed him of it and he never informed the medical examiner or anyone else of a need to retain all evidence in this case.
- w) Ernesto Allen was murdered on November 2, 2008 in Durham County, Durham, North Carolina.
- x) Investigator Gilliam's complete initial report is 86 pages long. The information provided to the defendant on April 15, 2010 is an incomplete copy of his report in that it stops on page 62. Pages 63-86 were not included and released to the Defendant on that date.

85. The seventh witness called by Mr. Allen was Kathy Shuart, who was sworn and gave the following testimony:

- a) She is employed as the Trial Court Administrator for Durham County.
- b) Part of her duties include the assignment of the court reporters and helping to determine which court reporters were assigned to certain court rooms on certain dates.
- c) She was provided with a copy of the Court order signed by Judge Hudson regarding the production of certain transcripts in the case of State v. Derrick Allen.
- d) She was informed that the case was a priority, and she did her best to locate information that would have allowed the tapes to be located and the transcripts produced.
- e) Her investigation determined that the Clerk had requested and received permission from the AOC to destroy certain tapes constituting the raw data taken by Court Reporters in Superior Court.
- f) The tapes from the following dates were destroyed pursuant to the request of the Clerk of Court for Durham County and the authorization of the Administrative Office of the Courts: March 4, 1999, July 6, 1998, February 16, 1998 and April 7, 1998. As a result, it is now impossible to produce transcripts of hearings conducted in this case on those dates.

86. The eighth witness called by Mr. Allen was Daniel J. Wright, who was sworn and gave the following testimony:

- a) He is employed as a legal assistant to T. Mitchell Garrell in the Durham District Attorney's Office.
- b) He was asked by Mr. Garrell to scan the entire discovery that was provided to Ms. Williams on or about October 20, 2010.
- c) He understood that the directive to scan all of the information provided to Ms. Williams was in fact based on a Court order entered by Judge Hudson.
- d) Mr. Garrell gave him a box to scan and he scanned everything in the box.
- e) He had no explanation or specific memory of why certain items marked as Defendant's Exhibit 33 were not scanned.
- f) He has no recollection as to whether defendant's Exhibit 33 was work product or copied and scanned pursuant to the Court order he was aware of.

87. The Court after considering the testimony of each witness makes the following findings of facts:

- a) Agent Elwell informed ADA Black on August 18, 1998 that items on the child Adesha Artis' panties and sleepwear gave positive indications for the presence of blood based on a presumptive test and that subsequent confirmatory testing had failed to indicate blood was present on the same items.
- b) Contrary to Agent Elwell's testimony, investigator Gilliam did specifically request that the S.B.I. conduct DNA testing on various items submitted for analysis, as documented in the attachment to the SBI-5 form submitted by Investigator Gilliam. ADA Black and Agent Elwell decided to stop further testing of items for DNA testing because they believed further testing of physical evidence of the case would not prove inculpatory to the Defendant Derrick Allen and could possibly inculcate others.
- c) At the time ADA Black and Agent Elwell decided to stop the physical testing, ADA Black and Investigator Gilliam, at least, knew that Mr. Allen had asserted that the testing would exonerate him, and they were aware that there was a viable third party guilt suspect who should be included or excluded in a fair and competent investigation.
- d) The State Bureau of Investigation laboratory report in this case was intentionally written in a manner to obscure the testing conducted by Agent Elwell that was inconsistent with the presumptive test she conducted.
- e) ADA Black was aware on August 26, 1999 when she proffered the factual basis for Mr. Allen's plea to Judge Stanback, that summarized the strengths of the State's case as being the blood on the child's panties and the statements of Kia Ward which incriminated Mr. Allen, that the State Bureau of Investigation had determined that it could not conclude that there was blood on the panties.
- f) The assertions made by ADA Black to Judge Stanback were an intentionally false representation to a trier of fact in violation of Mr. Allen's due process rights of the Fourteenth Amendment to the United State's Constitution and under Article I, section 19 of the North Carolina Constitution.
- g) The lab reports concerning the testing for blood on the panties and sleepwear were intentionally prepared in an inaccurate, incomplete and intentionally misleading manner. The Court notes that Agent Elwell remains unbothered by her conduct and insists there was no wrongdoing on her part in this or any other case noted in the Swecker-Wolf report.

- h) On August 26, 1999, ADA Black knew that Kia Ward was a viable third party guilt suspect who had not been completely investigated, that Ward had been unavailable for the last 14 months, and that the State had not disclosed interviews, reports and statements regarding Ms. Ward as ordered by Judge LaBarre.
- i) ADA Black knew that she was obligated to comply with Judge LaBarre's orders from March 4, 1999. She intentionally decided to not disclose information from the State's file that was inconsistent with Mr. Allen's guilt, inculcating to others, and material to Mr. Allen's defense.
- j) At the time she failed to disclose the exculpatory evidence to Mr. Allen she also failed to take any steps to inform any agent working on behalf of the State to preserve any of the evidence including those item never tested, failed to disclose or preserve the handwritten notes from the police officers, failed to ensure that specimens from Adesha Artis' body were preserved by any of its agents, failed to determine the location and identification of critical witnesses, failed to preserve statements taken from Derrick Allen taken at the jail in which he denied his involvement to the media, failed to preserve the underlying data from the polygraph testing of Adesha Artis, failed to preserve the 911 tape, and failed to preserve the medical records of the child Adesha Artis.
- k) The District Attorney's Office in Durham and the Assistant District Attorneys assigned to this case were aware of the obligation pursuant to *Kyle's* and *Agurs* to seek out exculpatory information in its files and in the possession of its agents and disclose it as ordered by the Court, and they intentionally failed to do so.
- l) ADA's Black and Cline were aware that the North Carolina General Statute §15A-903 required disclosure of the reports of experts and the underlying data and intentionally failed to comply with this requirement and the orders of the Court entered on March 4, 1999 by Judge LaBarre
- m) ADA's Black and Cline were aware that the case of *State v. Cunningham* required the release of all underlying data from testing of all experts and they intentionally failed to comply with the law and the orders of Judge LaBarre on March 4, 1999.
- n) The Court has examined Defendant's Exhibit 33. There is no information included on that item that can be appropriately described as work product pursuant to North Carolina General Statutes § 15 A-904 and the State was without just cause in failing to scan it and include the documents in the exhibit of information provided to Mr. Allen on April 13 and April 15, 2010 as ordered by the Court on October 8, 2010.
- o) ADA's Black and Cline knew that some information they intentionally failed to disclose was exculpatory information and that their suppression of favorable material information was a violation of Mr. Allen's Constitutional Rights stemming from the

Constitutions of the United States of America and North Carolina and that they were not complying with the orders of Judge LaBarre which the court finds imposed upon them an obligation to release either immediately or based on the timetable he specifically directed in his written order, which they were aware of.

- p) Agent Elwell intentionally chose to write her report in such a way as to omit any reference to the testing that she conducted that failed to confirm the presence of blood. In the absence of a positive confirmatory test, there is no scientifically sound basis to conclude that an item is blood and describe it as the same.
- q) As a result of the wording chosen by Agent Elwell, Mr. Allen reasonably believed the plain wording of her report and the direct representations of ADA Black that the child's panties had blood on them. Those representations and the Defendant's reliance on their accuracy played a critical part in Mr. Allen's decision to waive his right to a trial, enter an Alford plea of guilty and receive a sentence of 54 years in the Department Corrections. The sole benefit Mr. Allen received as a result of entering a guilty plea was avoiding the possibility of an execution.
- r) The physical specimens from Adesha Artis's body left in the custody of the SBI were destroyed by the State Bureau of Investigation and are no longer available.
- s) The physical specimens of Adesha Artis retained by the Medical Examiner's Office to include her eyes and sections of her brain were destroyed and are not available to be tested. Neither the Medical Examiner nor either of the two consulting pathologist working on behalf of the State examined the child's eyes or specimens from her brain prior to their destruction rendered an opinion as to the time of injury.
- t) Information in the files of the SBI that indicates Agents Elwell and Spittle were engaged in a pattern of misconduct by failing to disclose material information regarding testing conducted and then preparing misleading written reports as a result of their work is *Brady* information that was not disclosed on March 4, 1999 as ordered by Judge LaBarre. The Court finds such conduct to be a material failure pursuant to North Carolina General Statute § 15A-910.
- u) The State Bureau of Investigation had an obligation to disclose in its reports the result of every test conducted by its agents, including the subsequent confirmatory testing that failed to confirm the initial presumptive blood test and that was not consistent with the conclusions stated or implied in their written reports.
- v) The results of the confirmatory testing that were inconsistent with the presumptive testing is information that was required to be disclosed by the United States Constitutions and the Orders entered on March 4, 1999 by Judge LaBarre.

- w) The pattern of misconduct identified by Swecker and Wolf as to Agents Spittle and Elwell which occurred prior to August 26, 1999 and any misconduct occurring after that date and until November 29, 2010 should have been disclosed pursuant to the Constitutions of the United States and North Carolina, the court orders entered by Judge LaBarre on March 4, 1999, and by the undersigned Judge on October 8, 2010, November 12, 2010, and November 23, 2010.
- x) The District Attorney's Office in Durham intentionally failed to comply with discovery orders entered by this Court on October 8, 2010, November 12, 2010, and November 23, 2010 and with the orders entered by Judge LaBarre on March 4, 1999.
- y) These failures cumulatively deprived Derrick Allen of information that would be material to his defense and to the litigation of the motion to dismiss heard on December 9-10, 2010.

88. In addition to the testimony presented at the hearing, numerous exhibits were introduced into evidence. Among other items, the exhibits, considered cumulatively, document the entire discovery provided to Attorney Lisa Anderson Williams in this case. From these exhibits, the Court finds the following facts:

- a) The Autopsy Report in this case contains no opinions regarding the timing of any injury inflicted on Adesha Artis, other than describing some of the injuries as acute.
- b) Diane Jones, the mother of Adesha Artis, provided to the Durham Police Department letters she received from Derrick Allen while he was incarcerated in the Durham County Jail for offenses related to the death of Adesha Artis. In those letters Mr. Allen stated that he had not committed any offense against Adesha Artis. Mr. Allen also stated in the letters that the police were lying about his involvement in these offenses, that he had voluntarily provided a DNA sample and that the forensic testing being performed by the SBI laboratory would exonerate him.
- c) Investigator Gilliam attached a five page addendum to the SBI-5 form requesting forensic testing in this case. The written materials show that Investigator Gilliam specifically requested that DNA testing be conducted on various items and that he obtained known DNA samples from Mr. Allen for comparison purposes.
- d) The Court concludes that Mr. Allen would not have accepted the plea offer and would have insisted on going to trial if he had not been facing the death penalty and he did not believe he would be at great risk of execution if he had proceeded to trial. The Court notes that when the State removed the threat of

execution in April of 2009. Mr. Allen while remaining incarcerated and facing the possibility of his natural life in prison without the possibility of parole refused any and all offers to plead guilty to greatly reduced charges and sentences. This includes offers that would have released him from prison immediately, had he chose to accept them.

e) The discovery provided to Mr. Allen, which purports to be complete open file discovery under the current statute, shows no communication between the State and its agents at any date before or after the conviction of Derrick Allen in which the State informs any of its agents of any *Brady* or discovery order of the Court or in which the State attempts to ensure that those agents provided the State with all of the information the State was required to provide to Mr. Allen as required under *Kyles v. Whitley* and *U.S. v. Agurs*.

89. The discovery materials admitted into evidence at the hearing include statements from both Diane Jones and Kia Ward. Some of these statements by Jones and Ward purport to describe the events of February 9, 1998, leading up to Mr. Allen calling 911. These statements are therefore relevant to the Court's materiality determination with respect to information improperly withheld from Mr. Allen, as set out more fully below. Cumulatively, these statements indicate the following:

- a) Kia Ward was home with Adesha Artis on the morning of her death, and the two of them were alone together for a substantial period of time that morning. While the statements indicate Mr. Allen was in the home as well, they indicate that he was in a back bed room asleep at least until about 11:00. The statements suggest that Adesha Artis and Kia Ward were both awake and interacting for approximately one and half hours before Mr. Allen awoke and emerged from the bedroom.
- b) Kia Ward and her mother had a significant argument on the evening prior to Adesha Artis's death and the argument was such that her mother ejected her from her residence in Chapel Hill, escorted her to a homeless shelter, and left Ms. Ward there.
- c) Ms. Ward arranged transportation from the homeless shelter in Chapel Hill to the home of her cousin, Diane Jones, in Durham.
- d) When Kia Ward arrived, Ms. Jones indicated she looked "rough" and the two had a tense discussion regarding the lifestyle and poor decisions Kia Ward was making.
- e) Kia Ward's initial response to the Police Officers from Durham and her final statements differ substantially and become increasingly inculpatory towards Mr.

Allen with each interview by the Durham Police Department and the State's agents.

- f) One of Kia Ward's statement's given close to the end of her interactions with the Durham Police Department indicates that she left the child, her biological relative, in the home alone with Mr. Allen, a person who was not a biological relative of the child and a man she described as an enemy, after purportedly observing Mr. Allen yelling at her, and changing her clothes and undergarments repeatedly, hearing the sounds of what she thought was physical contact between the two, seeing the child limping around in the apartment, and emerging from some state of semi consciousness that seemed like a seizure to her.
- g) If Kia Ward's statements are to be believed, then it would appear that she left the child in Mr. Allen's care in great distress, and took no adequate steps to protect the child while in the home, did not alert the child's mother to the peril the child was in while she was present in the home or after leaving the home, and did not alert her grandmother of the child's distress when her grandmother arrived to transport Ms. Ward away from the apartment,. The police reports reflect that Ms. Ward's grandmother was accompanied by an adult male relative who had access to a cell phone that he used to call Ward to get directions to the apartment.

90. The Court notes that no prosecutor working on behalf of the Durham County District Attorney's Office ever disputed any material allegation made in the Defendant's motion to dismiss. The State does not deny that *Brady* information described fully herein related to Kia Ward was not disclosed by the State prior to July 10, 2010, the State does not deny that the reports and underlying data of SBI Agent Wilson regarding his interview of Kia Ward on April 7, 1998 were not disclosed until July 10, 2010, the State does not dispute the Brady information in the SBI files related to a pattern of misconduct by Agents Elwell and Spittle were not disclosed until November 29, 2010, the State does not deny that Derrick Allen received a single benefit from his entry of a guilty plea on August 26, 1999 : a guarantee that he would not be executed by the State of North Carolina. The State does not deny that witnesses cannot be located, physical evidence has been destroyed and physical specimens from Adesha Artis that were once in the State's and it's agent's possession are no longer available. Neither did any prosecutor acting on behalf of the Durham District Attorney's Office indicate that their failures to disclose information was due to ignorance of the relevant case law, statutes, court orders or mandates from the Constitutions of the United States of America and North Carolina.

91. The Court finds that given the uncontroverted testimony of Grant Gilliam that Art Holland, a homicide detective assigned to the Durham District Attorney's Office, contacted him in the Fall of 2010 attempting to locate the copy of the Durham Police Department files for this case, that the disclosure of the information on July 10, 2010 made by the Durham District Attorney's had been in their files prior to August 26, 1999 as indicated by the cumulative weight of the evidence.



92. After all of the evidence was presented at the hearing on December 10, 2010; the parties presented closing arguments in support of their respective positions on the motion to dismiss. In closing argument the State, through ADA Garrell, conceded both that Mr. Allen had not received all of the information he was entitled to at the time of his plea and that Mr. Allen would be prejudiced in terms of his ability to proceed to trial at this point. Having conceded both a violation and prejudice, the State only contested the question of the appropriate remedy.

93. Specifically, ADA Garrell conceded in his argument that "I do not agree that they were not entitled to [the complete test results]. I would agree that they were entitle[d] to it. The question is what is the remedy Your Honor is going to grant." With respect to the additional violations, ADA Garrell acknowledged, "I am not unaware, nor am I unconcerned, with the evidence presented by Ms. Williams here in this courtroom. Totally exclusive of the SBI." Finally, ADA Garrell expressly conceded that "the passage of time has prejudiced both sides in terms of going to trial."

94. The following items were and should still be in the possession and control of the State of North Carolina or its agents. These items should have been provided to the defense as ordered by the court as they would have been of material benefit to his preparation of the issues addressed in the motion heard on December 9-10, 2010, but were not provided as ordered by the Court on November 23, 2010:

- a) Access to the master copy or original form of the 911 call and all police communications related to the investigation of Adesha Artis death and sexual assault on February 9, 1998.
- b) The handwritten notes from all officers involved in the investigation. Per Judge LaBarre's ruling on March 4, 1999 the State objected to the release of the notes and they were to be tendered to the Court for an in camera examination. The present form of discovery disclosed by the State is devoid of the handwritten notes from the officers working the case on behalf of the Durham Police Department or any communications with Judge LaBarre that they were tendering the same to him for review.
- c) A response from the State as to whether the rape kit and any samples removed from Adesha Artis and held by the State Bureau of Investigation have been lost or destroyed in the intervening years.
- d) The complete medical records of the child to include those in any names other than her given legal name. Per the Police Reports disclosed to Mr. Allen on or after July 10, 2010, the child had long been sick and under the care of a doctor prior to her death and the mother admitted that Adesha Artis had a medical history in a name other than her given legal name.

- e) A Current CV and complete report of any expert used on behalf of the State in the case at issue. Those reports are to include but not be limited to Spittle, Elwell, Mike Wilson two unnamed SBI Agents who reviewed the data from the polygraph machine and allegedly concurred with Mike Wilson's conclusions, the Medical Examiner and the two consulting pathologists used by the State to examine the child's eyes.
- f) The underlying data to include all control questions used in the interview and testing of Kia Ward which was reviewed by Agent Wilson and two of his peers on April 7, 1998 per the reports of the SBI.
- g) Policy Manuals from the State Bureau of Investigation and the Durham Police Department, to include the property and forensics units that were in place at any relevant time to this investigation and that provided instruction on appropriate retention, testing and preservation of evidence, and investigation of murder and sex offense cases as well as the pursuit and preservation of exculpatory or material evidence.
- h) The SBI Manuals and reports that would have governed the generating of reports and the conclusion of the polygraph testing used in this case.
- i) Information related to the Death of Ernesto Allen who the defense contends was an alternate suspect who should be investigated by his present counsel.
- j) In October of 2010 the State disclosed a copy of a CD of a child being interviewed disclosing the details of a molestation. According to the data on the disc Derrick Allen would have been incarcerated at the date indicated on the CD, the entire copy of the State's file related to that investigation of this particular child was to be provided.

95. The failure of the State to disclose the information to Mr. Allen as ordered by the Court on November 23, 2010 is a discovery violation of information that is material to his defense at trial and for the issues that were adjudicated on December 9 and 10, 2010.

96. The failure of the State to provide the information to Mr. Allen as ordered by the Court on November 23, 2010 is a discovery violation of information that is material to his prosecution of the motion to dismiss that were adjudicated on December 9 and 10, 2010 and that the State's failures to provide the information or even a reason for its failure to provide the information was intentional and willfully designed to give the State an advantage at the hearing and place the Defendant at a disadvantage in prevailing on the merits of his motion. Such conduct violated his due process rights of the Fourteenth Amendment of the United States Constitution and the parallel provision of the North Carolina Constitution.

97. The Durham District Attorney's Office failed to inform or provide a copy of the order to compel discovery issued by this Court on November 23, 2010 and signed on November 29, 2010 to the State Bureau of Investigation, the Medical Examiner, or Grant Gilliam formerly of the Durham Police Department. The State offered no explanations for this failure.

98. The State of North Carolina was on notice and had been informed that Counsel for Mr. Allen consented to a hearing date on December 9, 2010 with the specific understanding that the State would comply with the outstanding discovery request and that she would have the information by December 1, 2010 at 1:00 p.m.

99. The State of North Carolina through the Office of the District Attorney for Durham County was served and received notice of a motion to locate and test items for DNA comparison filed pro se by Derrick Allen on May 30, 2004 and June 17, 2004 respectively.

100. The Durham District Attorney's Office did not inform the Medical Examiner, the Durham Police Department or the State Bureau of Investigation of the Motion to Preserve Evidence filed by Mr. Allen or his request to locate and preserve items for DNA testing. The State's failure to inform any of its agents at any time of the request to preserve evidence significantly increased the likelihood that the items retrieved from Adesha Artis and other valuable pieces of physical evidence were destroyed in the intervening years.

## **B. Additional Findings of Fact Related to Specific Claims**

### ***1. Claims Related to The Failure to Report the Results of Confirmatory Blood Testing by the State Bureau of Investigation Laboratory.***

101. Throughout 1998 and 1999, N.C. Gen. Stat. §15A-903 (e), in pertinent part, required "the prosecutor to provide a copy of ... results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor." N.C. Gen. Stat. §15A-903 (e) (Cum. Supp 1999)(superseded). The plain language of this provision required the State to provide in discovery a report of the results of every test performed in connection with any given case, without exception and without regard to whether the State intended to use the test results as evidence at trial.

102. In *Brady v. Maryland*, 373 U.S. 83 (1963) the United States Supreme Court held that the Due Process clause of the Fourteenth Amendment to the United States Constitution requires the State to provide to defendants in criminal cases any material exculpatory evidence in its possession. *Brady* and its progeny define exculpatory evidence to include evidence that impeaches the State's witnesses as well as evidence that tends to negate the defendant's guilt or mitigate his degree of guilt. The State is required to provide *Brady* material to the defendant in a timely manner that allows the defendant to make effective use of the information. *State v. Canady*, 355 N.C. 242, 253 (2002). When a pretrial *Brady* violation has irreparably prejudiced

the defendant, a dismissal under N.C. Gen. Stat. §15A-954(a) (4) is required. *State v. Williams*, 362 N.C. 628 (2008).

103. With respect to the testing performed on Adesha Artis' panties and her sleepwear, the Laboratory Report produced by Agent Elwell and approved by Agent Spittle in this case simply states that the items, listed as items 3, 4 and 19 on the report, "gave chemical indications for the presence of blood." The report does not identify what test or tests were performed that led to this conclusion, and does not state that the test was only a preliminary test. The report wholly fails to mention that the State conducted confirmatory testing on these items that failed to confirm the presence of blood on the panties.

104. The lab report written by Agent Elwell and provided to the defense in discovery failed to satisfy the State's discovery obligations under §15A-903(e) and under the orders entered by Judge LaBarre on March 4, 1999.

105. The lab report written by Agent Elwell was written in a manner that obfuscated the test results rather than clearly and accurately reporting those results. The report was written in this manner pursuant to a designed policy of the SBI laboratory. This policy had the systemic effect of deliberately concealing negative test results. The report is deceptive and would lead a reasonable non-scientist to believe that the testing conducted by Agent Elwell provided scientific support for the proposition that blood was present on the items when her actual testing failed to provide support for this conclusion.

106. The rough notes from the SBI lab, provided in discovery on March 4, 1999 in response to Judge LaBarre's order entered that date have small dash marks next to the word "Takayama" on the pages for items 3, 4 and 19. The notes contain no English language narrative stating that a Takayama test was conducted, that such test yielded negative results, or even that a Takayama test is a confirmatory test for the presence of blood. Regardless of what these notes might have conveyed to a scientist, they completely failed to convey to a reasonable non-scientist, such as most lawyers, judges, and potential jurors the complete results of the tests performed by Agent Elwell. As a result, the rough notes failed to satisfy the State's discovery obligations under §15A-903(e).

107. A review of the transcript from August 26, 1999, indicates that that there were no objections or corrections to ADA Black's statement to Judge Stanback at the plea hearing that blood was present on Adesha Artis' panties. The Court concludes that Derrick Allen was in fact deceived by the report's misleading description of the test results and that he erroneously believed that the SBI could prove that blood was present on Adesha Artis' panties was not corrected by the disclosure of the rough notes released by the State.

108. The presence or absence of blood on Adesha Artis' panties and sleepwear was highly material to the prosecution and to the defense of this case.

109. The discovery, considered in total, establishes that the State had no witnesses who saw any alleged act of mistreatment of Adesha Artis by Mr. Allen. As a result, the State had to rely on a possible inference that Mr. Allen harmed Adesha because she was in his care and custody when her injuries were discovered. However, the fact that Adesha Artis was in Mr. Allen's care when her symptoms became apparent does not establish that she was in his care when the injuries were inflicted. See, generally, *State v. Roach*, COA08-720 (unpublished opinion 6 Oct. 2009). The omission from the autopsy report of any opinion regarding the timing of infliction of any of Adesha Artis' injuries undercuts the State's case. Against this background, any evidence that suggests or creates the impression of immediacy of Adesha Artis' injuries would be highly material.

110. With respect to the sexual offense charge, the medical records and the autopsy report contain inconsistent descriptions of the injury to Adesha Artis' vagina. The medical descriptions of the injury to Adesha Artis vagina varied greatly. One doctor describes a tear; another describes an abrasion and laceration. One doctor describes an injury from 4:00 to 7:00 and another from 6:00 to 9:00. Neither the autopsy nor the medical records contain any opinion regarding the timing of the injury to her vagina. The records also contain no opinion that the injuries to the vagina occurred at the same time frame as the injuries that led to her death. The medical records do not conclusively establish that the injuries to Adesha Artis' vagina were inflicted as the result of a sexual offense and do not establish the timing of any such offense if one did occur. The presence or absence of blood on Adesha Artis' panties would be material to any resolution of these questions by a jury.

111. Separate and apart from any impact on a jury's determination of Mr. Allen's guilt or innocence, the presence of blood on Adesha Artis' panties would have been a highly graphic and disturbing piece of evidence that would have severely prejudiced Mr. Allen in the eyes of the jury at a capital sentencing hearing if the jury had convicted him of first-degree murder.

112. As a result, the negative Takayama tests, which failed to confirm the presence of blood on Adesha Artis' panties or sleepwear, constituted exculpatory material and impeachment material under *Brady* and its progeny, and Mr. Allen was entitled to be made aware of the negative results of the confirmatory blood testing. The lab report which failed to mention the negative Takayama tests and deliberately created an impression contrary to the negative Takayama test results violated Mr. Allen's Due Process and Law of the Land rights under *Brady* and its progeny and violated the order entered by Judge LaBarre on March 4, 1999. This violation was not cured by providing the rough notes which failed to adequately convey the negative results of confirmatory testing for blood.

113. In addition to the *Brady* violation arising from the lab report produced in this case, the systemic policy of the SBI laboratory's Forensic Biology section to produce misleading reports that intentionally failed to explicitly report test results favorable to defendants is information that shows a pro-prosecution bias on the part of the Agents in that section and that substantially impeaches the credibility of all of the Agents in that section in every criminal case in which they testify on behalf of the State.

114. Although there is no evidence that the prosecutors were personally aware of the systemic reporting problems at the SBI lab, the Agents in the lab were themselves fully aware of the information throughout the 1990s, and specifically including in 1998 and 1999. Pursuant to *Kyles v. Whitley*, the State is responsible for locating and providing exculpatory information in the possession of its agents, including law enforcement officers. As a result, the State's failure to inform Mr. Allen in a timely manner of the systemic reporting problems subsequently documented in the Swecker-Wolf report constituted a separate Brady violation.

115. In light of the Court's finding that Agent Elwell made ADA Black aware of all of the results of the blood testing she conducted on August 18, 1998, the State's failure to provide complete and accurate reporting of all of the testing, including the negative confirmatory testing results, constitutes an intentional, willful, and material violation of both the discovery statute, orders of the Court, and Mr. Allen's Due Process rights under *Brady* and its progeny.

**2. *Claims Arising From the Failure to Provide Discovery of Information Regarding Kia Ward and her Credibility.***

116. Kia Ward was a critically important witness for the State. If her statements are to be believed, she was the only other adult present in the home along with Adesha Artis and Mr. Allen on the day Adesha Artis died. According to her statements, once Diane Jones left the house in the morning, she was alone with Adesha until Mr. Allen woke up later in the morning, then the two of them were alone in the house with Adesha Artis and then she left the home, leaving Adesha alone with Mr. Allen. If Ms. Ward's statements are believed, a Trier of fact could conclude that Mr. Allen inflicted Adesha Artis' injuries. On the other hand, if her statements were disbelieved, then a Trier of fact could conclude that she is a prime alternate suspect for having inflicted Adesha Artis' injuries herself. Moreover, if her statements are inaccurate, this opens the door for the possibility that some other person, such as Mr. Allen's brother Ernesto, might have been present that morning and in a position to inflict the fatal injuries on Adesha Artis.

117. As a result of the foregoing, any information that impeached Kia Ward's credibility was highly material.

118. Kia Ward gave several statements to the police in connection with this investigation. In one of the last statements that she gave to Investigator Gilliam, in 1998, Ms. Ward admitted that she had previously had a sexual relationship with Mr. Allen, but that she did not sleep with him on the day in question and that the relationship between her and Mr. Allen had become one of being enemies. In this statement, Ms. Ward also admitted that she regularly smoked marijuana around the time of the offense. In each of these regards, this statement was inconsistent with previous statements given by Ms. Ward to law enforcement during the course of the investigation.

119. This statement was material that impeached Ms. Ward's credibility. As such Mr. Allen was entitled to the statement under *Brady* and its progeny and under the order entered by Judge LaBarre on March 4, 1999.

120. This state does not deny that the statement was never provided to Mr. Allen or his counsel prior to Mr. Allen entering his plea on August 26, 1999. This statement was also not provided to Mr. Allen in the initial batch of discovery provided to Ms. Williams on April 15, 2010 upon her appointment to represent Mr. Allen. Rather, it was provided only after its absence was discerned by Attorney Williams in April of 2010 and a specific discovery request was submitted to ADA Garrell. Then and only then was it disclosed on July 10, 2010.

121. The State's failure to provide this statement to Mr. Allen was especially aggravated by the fact that when Judge LaBarre ordered the disclosure of any *Brady* material and ADA Black responded by expressly asserting that the State had no information that any prosecution witness was using drugs at the time of the offense, an assertion that was inconsistent with the content of this statement.

122. Investigator Gilliam and the Durham District Attorney arranged for Ms. Ward to be subject to polygraph testing. As documented by Investigator Gilliam's memo to Agent Wilson, he and an assistant district attorney discussed what questions they wanted Ms. Ward to be asked during the interview and polygraph test, and settled on a number of specific questions, including questions that directly address the possibility that Kia Ward personally inflicted Adesha Artis' injuries as well as questions relating to Kia Ward's credibility.

123. On April 7, 1998, Investigator Gilliam transported Ms. Ward to the SBI field office in Greensboro, where SBI Agent Wilson conducted a polygraph test.

124. Agent Wilson informed Investigator Gilliam that Ms. Ward had passed the polygraph test and provided several written documents to him on April 7, 1998 which clearly are reports of an expert working as an agent of the State as defined by N.C. Gen. Stat. §15-A-903 (e). Investigator Gilliam then relayed the information and reports to the Durham District Attorneys Office as it was in their files and disclosed to Attorney Williams on July 10, 2010.

125. Investigator Gilliam requested that Agent Wilson take all necessary steps to avoid disclosing to anyone the fact that Ms. Ward had been interviewed and given a polygraph test.

126. At the time, §15A-903(e) required the State to provide discovery regarding all tests and examinations conducted in connection with a case, without exception and regardless of whether the State intended to use the test results at trial. Under *State v. Cunningham*, 108 N.C.App. 185 (1995), the State's discovery obligation included providing the raw data from any testing, in addition to any conclusory statement of the test results.

127. Under the plain language of the statute, the State was obligated to provide complete discovery to Mr. Allen of the polygraph testing conducted on Ms. Ward. None of the

ADA's who have prosecuted the case over the years ever asserted that they disclosed the reports of Agent Wilson prior to July 10, 2010. The Court has determined that the State failed to provide any discovery regarding this testing to Mr. Allen at any time prior to July 10, 2010. This discovery should have been provided to Mr. Allen as ordered on March 4, 1999 when Judge LaBarre entered an order compelling the production of the reports of the State's experts and the underlying Data and Testing for their opinions.

128. If the State had disclosed a complete report of the polygraph testing of Kia Ward conducted by Agent Wilson on March 4, 1999 or any date prior to August 26, 1999 Mr. Allen would have known that the State likely viewed Ms. Ward's credibility as suspect, and that she was a viable third party guilt suspect and would not have accepted the State's "bottom line" plea offer.

129. The State's failure to provide Mr. Allen with the reports of Agent Wilson's regarding Kia Ward is both a material discovery violation and a denial of Brady materials. These actions by the State constitute an intentional and willful violation of the discovery statute, court orders, and Mr. Allen's Due Process rights under *Brady* and its progeny.

**3. *Claim of Fraudulent Inducement to Waive Right to Jury Trial Arising From the Combination of Withholding Evidence and Threatening a Capital Prosecution***

130. Derrick Allen vigorously and consistently denied any wrongdoing in Adesha Artis's death. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 24 of the North Carolina Constitution guaranteed Mr. Allen's right to trial by jury.

131. Prior to accepting the State's final plea offer, Mr. Allen gave every indication that he intended to plead not guilty and exercise his right to trial. ADA Black's cover letter to Mr. Allen's trial counsel on August 18, 1999, which accompanied the State's final plea offer, indicates that ADA Black was voluntarily providing two statements from Kia Ward in an effort to help Mr. Allen's attorneys persuade Mr. Allen that it was in his best interest to plead guilty. This shows that even at this late stage, the State was aware that Mr. Allen wanted to go to trial, and did not intend to waive his constitutional right to a trial by jury.

132. In light of the State's awareness that Mr. Allen intended to exercise his right to trial by jury, the State's egregious conduct of willfully withholding numerous items of evidence to which Mr. Allen was constitutionally entitled, and providing Mr. Allen a deliberately deceptive lab report which grossly overstated the strength of the blood testing evidence, while simultaneously threatening to seek his execution was fundamentally unfair and constituted a particularly flagrant and egregious violation of Mr. Allen's constitutional rights.

133. In light of the deceptive nature of the SBI lab report and the State's failure to provide the negative confirmatory blood test results, in light of the other *Brady* and discovery violations found by the Court and in light of the State's deliberate misstatement of material fact



to Judge Stanback, the Court finds that the State fraudulently induced Mr. Allen to plead guilty and fraudulently induced Mr. Allen to waive his constitutional right to a trial by jury. As a result, Mr. Allen's waiver of his right to trial by jury was not a truly voluntary waiver of that right.

134. The State's action in providing Mr. Allen with two inculpatory statements made by Kia Ward, intended to help induce Mr. Allen to plead guilty, while simultaneously withholding the statement in which she admits a prior sexual relationship with Mr. Allen, characterizes her subsequent relationship with Mr. Allen as one of being enemies, and in which she admits to smoking marijuana, constitutes especially egregious and willful misconduct by the State.

135. Under these unique circumstances, the State's use of the threat of the death penalty as leverage to coerce Mr. Allen into entering a guilty plea and waiving his constitutional right to trial, while simultaneously withholding critical information to which Mr. Allen was statutorily and constitutionally entitled, was willful, unlawful and constituted a flagrant violation of Mr. Allen's rights under the Fifth, Sixth, Eighth and Fourteenth to the United States Constitution and Article I, Sections 19, 23, 24 and 27 of the North Carolina Constitution.

#### 4. *Napue Claims:*

136. In *Napue v. Illinois*, 360 U.S. 264 (1959) the United States Supreme Court held that a prosecutor commits a Due Process violation under the Fourteenth Amendment to the United States Constitution by intentionally presenting materially false information to a Trier of fact or by failing to correct a statement of fact made by a witness that the State knows to be false.

137. At the plea hearing on August 26, 1999, Mr. Allen entered an *Alford* plea of guilty to second-degree murder and to first-degree statutory sexual offense. Mr. Allen did not admit that he was guilty of those offenses. As a result, the State was required to present a factual basis for the plea before the plea could be accepted by the court. In stating the factual basis for the plea, ADA Black stated that one of the most important pieces of evidence for the State was the blood on Adesha Artis' panties.

138. Although ADA Black testified on December 9, 2010 at the hearing that she was unaware that confirmatory tests for blood on the panties were negative, the Court does not find that testimony to be credible. Rather, the Court finds that Agent Elwell's contemporaneous phone log entry stating that she spoke with ADA Black on August 18, 1998 and discussed the test results with her is credible evidence that ADA Black was aware of the results of the confirmatory blood testing.

139. The representation by ADA Black to Judge Stanback on August 26, 1999 that there was blood present on the panties of Adesha Artis was an intentional misstatement of a material fact to a Trier of fact and constituted a flagrant violation of Mr. Allen's rights under the

Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

140. At the March 4, 1999 motions hearing, Judge LaBarre allowed Mr. Allen's motion for production of exculpatory evidence. One of the items specifically requested in the motion was any evidence that prosecution witnesses were using illegal drugs or other impairing substances at the time of the events in question. After Judge LaBarre allowed the motion and directed the State to provide Mr. Allen with any exculpatory evidence in its possession, ADA Black responded by asserting that the State possessed no evidence of drug use in the relevant time frame by any prosecution witness.

141. In light of the fact that the State possessed a statement from Kia Ward admitting to marijuana use during the relevant time period, as found above, ADA Black's statement to Judge LaBarre and to Mr. Allen constituted an intentional false statement of material fact. As such, this statement also constituted a flagrant violation of Mr. Allen's rights under the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

**C. Findings of Fact Related to Prejudice, to Mr. Allen's Inability to Obtain a Fair Trial, and to The Appropriate Remedy for the Violations Found by the Court.**

142. Mr. Allen has maintained his innocence throughout the entire course of the proceedings in this case. He was initially insistent upon exercising his right to trial, and maintained this position until he was finally induced to accept the State's "bottom line" offer. If Mr. Allen had not been facing the risk of a death sentence, he would not have accepted the State's plea offer and would have gone to trial. The only reason Mr. Allen decided to accept the plea offer was to avoid the possibility of being executed. As a result, the threat of a death sentence greatly magnified the prejudicial effect of the *Brady* and discovery violations by inducing Mr. Allen to waive his constitutional right to trial by jury when he otherwise would not have done so.

143. Mr. Allen was incarcerated from February 9, 1998 to September 10, 2010. The total length of his incarceration was 4,595 days.

144. The *Brady* violations found by the Court are not limited in time to 1998 and 1999. Rather, the State's obligation to disclose exculpatory information under *Brady* is an ongoing obligation that continues even after a conviction.

145. The *Brady* violations found by the Court began in 1998 when the State first came into possession of Kia Ward's statement that substantially impeached her credibility and when the negative Takayama test results were reported by Agent Elwell to ADA Black but not memorialized in the written lab report and not conveyed to the defense.

146. These *Brady* violations became a direct violation of an express court order after the State continued to fail to disclose the information following the order entered by Judge LaBarre on March 4, 1999 requiring disclosure of all exculpatory information.

147. The State's ongoing *Brady* violation continued throughout the period from 1999 until 2009 when Mr. Allen was filing *pro se* pleadings and then litigating the MAR filed on his behalf by Mr. Bradley seeking to vacate his convictions and to be allowed to withdraw his plea.

148. The State's ongoing *Brady* violations were not cured until 2010 when the State provided Kia Ward's statement in July, 2010, when the Swecker-Wolf report was published in August 2010, when the State provided more specific information about the SBI lab's reporting practices on the eve of the hearing on the motion to dismiss, and disclosed the information from its files that Kia Ward was an alternate suspect.

149. Until the State cured its ongoing *Brady* violations it would not have been possible for Mr. Allen to receive a fair trial. As a result, the Court finds that any prejudice caused by the passage of time, as found more specifically below, is entirely the fault and responsibility of the State and not of Mr. Allen. In light of this finding and in light of the Court's findings with respect to the various constitutional violations committed by the State, the Court finds that the flagrant violation of Mr. Allen's constitutional rights has caused irreparable prejudice to Mr. Allen's case.

150. It is no longer possible for Mr. Allen to ever receive a fair trial.

151. All of the biological evidence retained by the Medical Examiner, including Adesha Artis' brain, spinal column, eyes, and other biological materials prepared during the autopsy are no longer available.

152. The State Bureau of Investigation has also destroyed the items it retained following the testing it conducted, including physical specimens from Adesha Artis and other material submitted for testing. The Court is unable to determine when such items were destroyed based on an intentional suppression of information by the State Bureau of Investigation and by the Office of the Durham County District Attorney. Any independent testing of these items is now impossible.

153. The original tape of the 911 call is missing and cannot be located. Evaluating the tone of Mr. Allen's voice during the 911 call might be critical to a potential jury's consideration of his guilt or innocence and the jurors will not be able to determine if indications of other adult persons present in the home can be discerned.

154. As found above, if Kia Ward's statements to the police are untrue, she is a prime alternate guilt suspect, as an adult who had exclusive care and custody of Adesha for at least a part of the morning of the day Adesha died. It is no longer possible for Mr. Allen's defense counsel to conduct a thorough investigation of Kia Ward as a possible alternate suspect. Agent

Wilson has lost all recollection of the interview and testing he conducted on Ms. Ward. It is highly unlikely that any person to whom she might have made any incriminating statements can now be located or would now be able to reliably and accurately recall the details of any such statement. Ms. Ward herself has not been located and it is mere speculation that she herself will ever be located so that Mr. Allen's defense team can confront her with the inconsistencies and other impeaching matters contained in her statements and asks her any questions about what really happened that morning and other relevant periods of time. It is also patently obvious that if she ever were located and received competent legal advice or simply through an exercise of her own discretion would decide to assert her Fifth Amendment Right to refuse to incriminate herself and decline to answer any further questions.

155. Ernesto Allen, another possible third party guilt suspect, especially with respect to any sexual offense if such took place but was not committed at the same time as Adesha Artis' fatal brain injuries, has died and can no longer be fully and properly investigated as a possible third party guilt suspect.

156. In light of these findings, the Court finds that the State's concession in closing argument that Mr. Allen has been prejudiced as a result of the passage of time was a well-taken concession that is amply supported by the facts and circumstances of this case, and is accepted by the Court.

157. With respect to the statutory discovery violations found above, the Court has considered all of the facts and circumstances of the case including, but not limited to, the willful nature of the violations, the materiality of the information withheld, the fact that it is now impossible for Mr. Allen to receive a fair trial, and the fact that Mr. Allen spent over 4500 days in the custody of the State. The Court has considered the suitability of lesser sanctions, as urged by the State at the hearing on the motion to dismiss. However, in the exercise of the Court's discretion, the Court has determined that a dismissal of all charges with prejudice is the appropriate remedy.

### **CONCLUSIONS OF LAW**

1. The State's willful failure to provide Mr. Allen in a timely manner with an accurate, honest lab report documenting the negative results of confirmatory blood testing on Adesha Artis' panties and sleepwear flagrantly violated Mr. Allen's constitutional rights under the Fourteenth Amendment to the United States Constitution and under Article I, Section 19 of the North Carolina Constitution to the production of exculpatory information in the possession of the State.

2. The State's act of providing Mr. Allen with a deceptively written report designed to obscure the fact that confirmatory blood testing was performed on Adesha Artis' panties and sleepwear and yielded negative results also flagrantly violated Mr. Allen's constitutional rights

under the Fourteenth Amendment to the United States Constitution and under Article I, Section 19 of the North Carolina Constitution.

3. The State's willful failure to provide Mr. Allen in a timely manner with the statement given by Kia Ward in which Ms. Ward acknowledges a prior sexual relationship with Mr. Allen, acknowledges that she subsequently considered him an enemy, and in which she admits to smoking marijuana around the time in question flagrantly violated Mr. Allen's constitutional rights under the Fourteenth Amendment to the United States Constitution and under Article I, Section 19 of the North Carolina Constitution to the production of exculpatory information in the possession of the State.

4. The State's willful failure to provide Mr. Allen in a timely manner with information regarding systemic problems within the SBI laboratory which demonstrated the prosecution bias of its Agents as witnesses for the State and which impeached the credibility of its Agents reports of testing results flagrantly violated Mr. Allen's constitutional rights under the Fourteenth Amendment to the United States Constitution and under Article I, Section 19 of the North Carolina Constitution to the production of exculpatory information in the possession of the State.

5. The State's willful and unlawful actions in fraudulently inducing Mr. Allen to waive his constitutional right to a jury trial flagrantly violated Mr. Allen's rights under the Sixth, Eighth and Fourteenth to the United States Constitution and Article I, Sections 19, 23, 24 and 27 of the North Carolina Constitution.

6. The State's intentional misrepresentation of material fact to the Court at Mr. Allen's plea hearing flagrantly violated Mr. Allen's constitutional rights under the Fourteenth Amendment to the United States Constitution and under Article I, Section 19 of the North Carolina Constitution.

7. The State's use of the threat of the death penalty as leverage to coerce Mr. Allen into entering a guilty plea and waiving his constitutional right to trial, while simultaneously withholding critical information to which Mr. Allen was statutorily and constitutionally entitled, was willful, unlawful and constituted a flagrant violation of Mr. Allen's rights under the Fifth, Sixth, Eighth and Fourteenth to the United States Constitution and Article I, Sections 19, 23, 24 and 27 of the North Carolina Constitution.

8. The flagrant violation of Mr. Allen's constitutional rights has caused such irreparable prejudice to his case that a dismissal with prejudice is the only appropriate remedy under N.C. Gen. Stat. §15A-954(a)(4). Each of the aforementioned violations has individually caused such irreparable harm to Mr. Allen's case as to require a dismissal and the violations have cumulatively caused such irreparable harm to Mr. Allen's case as to require a dismissal

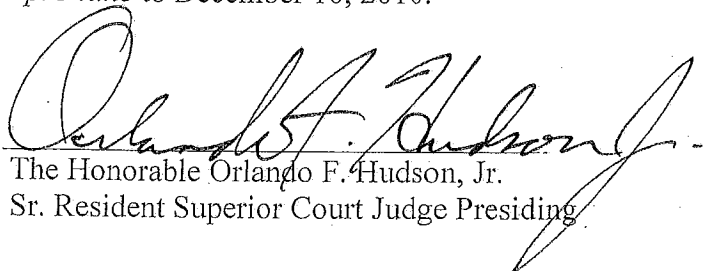
9. The State's willful failure to fully and completely report the results of the blood testing performed by Agent Elwell, including the failure to properly report the confirmatory blood testing that yielded negative test results violated Mr. Allen's statutory right to discovery under N.C. Gen. Stat. §15A-903(e) (Cum. Supp 1999)(superseded). The Court, in the exercise of its discretion, has determined pursuant to N.C. Gen. Stat. §15A-910 that the appropriate remedy for this violation is for all charges against Mr. Allen to be dismissed with prejudice.

10. The State's willful failure to fully and completely report the results of the polygraph testing performed by Agent Wilson on Kia violated Mr. Allen's statutory right to discovery under N.C. Gen. Stat. §15A-903(e) (Cum. Supp 1999)(superseded). The Court, in the exercise of its discretion, has determined pursuant to N.C. Gen. Stat. §15A-910 that the appropriate remedy for this violation is for all charges against Mr. Allen to be dismissed with prejudice.

**NOW THEREFORE based on the foregoing FINDINGS of FACTS AND CONCLUSIONS OF LAW, it is hereby ORDERED, ADJUDGED, and DECREED as follows:**

1. The charges of First Degree Murder, Felony Child Abuse and Statutory Sex Offense against Mr. Allen are Dismissed with Prejudice.

This the 9th day of March, 2011, *nunc pro tunc* to December 10, 2010.

  
The Honorable Orlando F. Hudson, Jr.  
Sr. Resident Superior Court Judge Presiding

### CERTIFICATE OF SERVICE

I hereby certify that I have served the Attached Order of Dismissal With Prejudice on the Office of the District Attorney for the Fourteenth Prosecutorial District and have filed the same with the Clerk of Court or his designee by delivering a copy of the same to the persons in charge of their offices on the sixth and fifth floor of the Durham County Judicial Building on the date indicated below.

This the 9<sup>th</sup> date of March, 2011.

A handwritten signature in black ink, appearing to read 'Lisa Anderson Williams', written over a horizontal line.

Lisa Anderson Williams, Esq.