

STATE OF NORTH CAROLINA
COUNTY OF GASTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. 07 CRS 54397—98

STATE OF NORTH CAROLINA

v.

ORDER

MICHAEL PATRICK RYAN,
Defendant/ Petitioner.

THIS CAUSE, coming on to be heard and being heard before the undersigned judge presiding in the Superior Court for Gaston County, commencing on 11 January 2017 and extending through 18 January 2017 for an evidentiary hearing upon defendant's Motion for Appropriate Relief filed pursuant to the provisions of N.C. Gen. Stat. § 14-1411, *et. seq.*;

AND IT APPEARING TO THE COURT that these cases are before this court for consideration of defendant's Motion for Appropriate Relief filed in the Supreme Court of North Carolina; that on 21 May 2010 the defendant was convicted of first-degree murder and robbery with a dangerous weapon; that he was sentenced to death for first-degree murder and an active sentence for robbery with a dangerous weapon; that the defendant appealed to the North Carolina Supreme Court; that on 7 September 2010 further proceedings in defendant's appeal were stayed until after the Supreme Court ruled upon defendant's Racial Justice Act motion had been ruled upon; that defendant's Racial Justice Act motion is not for hearing before this court; and that on 21 December 2012 the defendant filed in the Supreme Court the Motion for Appropriate Relief now pending and alleged that his constitutional rights to due process and effective assistance of counsel were violated; that the Supreme Court remanded defendant's Motion for Appropriate Relief to the Superior Court of Gaston County to hold an evidentiary hearing on the motion; and that the Supreme Court entered a stay in appellate proceedings that continues in effect;

AND IT FURTHER APPEARING TO THE COURT that the defendant was present in open court at all times during the hearing of this matter and was represented on this Motion for Appropriate Relief by his attorneys, Lisa Dubbs of the Catawba County Bar, Marilyn G. Ozer of the Orange County Bar and William F.W. Massengale of the Orange County Bar, and the State was represented by Gaston County District Attorney Locke Bell and Assistant District Attorneys Zach Holeve and Howard Wellons;

AND IT FURTHER APPEARING TO THE COURT that the court had the opportunity to observe carefully the witnesses tendered and form an opinion as to their credibility. Based upon the credible evidence offered by the State and the defendant, and by at least a preponderance thereof, the court makes the following findings of fact:

1. At approximately 10:00 o'clock A.M. on Tuesday, 20 March 2007 a 66 year old man, David Farrar was robbed, shot several times and died while in the driveway of his own house in Gaston County. The homicide was not discovered until his wife returned home about 10:00 o'clock P.M. that evening and discovered his body.

2. Tonya Walker, Nichole Hobbs and Wes Adair were suspects at first. Adair was sleeping with Hobbs and living in a trailer belonging to Chuck Fernandez, the defendant's half-brother. Walker, Hobbs and Adair all "ran drugs" for a drug dealer named Frank Parker.

3. The defendant lived in New Jersey with his fiancée, Wendy Ash, and his daughter, Christina, whose date of birth was 8 September 1994. Christina was twelve (12) years old at the time of the homicide.

4. Wes Adair and the defendant were indicted for first-degree murder in the death of David Farrar, and Adair was allowed to plead guilty to second-degree murder in return for his testimony against the defendant. Adair testified that the defendant accompanied him to Farrar's house and participated in the shooting and robbery of Farrar. In order to support Adair's testimony the State needed forensic evidence tying the defendant to the crime. The forensic evidence came in the form of testimony offered by the SBI's forensic biologist, Agent Michelle Hannon, as discussed *infra*.

5. The defendant has been tried twice on these charges. The first trial ended in a mistrial when the jury split 4-4-4. Four votes were for not guilty, four for second-degree murder and four for first-degree murder. A year later the defendant was tried again, whereupon the jury found him

guilty and recommended that he be sentenced to death. The trial court was required to follow the jury's recommendation, and did so.

6. The defendant was represented the same attorneys at both trials. The attorneys that now represent the defendant on the Motion for Appropriate Relief did not represent him at either of his trials.

DNA AND FINGERPRINT EVIDENCE

7. The court at the hearing of this motion heard testimony from three witnesses whom the court allowed to testify as experts to assist the court in understanding and interpreting the DNA evidence offered at trial and in determining whether the DNA evidence at trial had been analyzed and interpreted according to scientifically accepted guidelines and protocol. SBI agent Michelle Hannon testified on behalf of the State at trial and before this court at the hearing of this motion. James Thomas McClintock, Ph. D, and Mayer ("Max") Nouredine, Ph.D. testified on behalf of the defendant at the hearing of this motion. The defendant did not offer evidence at trial from a DNA expert.

8. Agent Hannon used scientifically incorrect guidelines and protocol in her interpretation of DNA samples as the basis for her testimony in this case. The protocols of DNA analysis used by Hannon are no longer accepted by experts in the field of DNA analysis. Moreover, using the protocols and guidelines which then were acceptable at the time of her analysis, Hannon used scientifically incorrect interpretation of the samples in forming her opinions that were offered at trial.

9. Dr. McClintock was first contacted on 10 April 2010 by defense counsel and was retained to review the DNA testing results of Agent Hannon and to confer with defense counsel. The trial started on 13 April 2010 and ended on 21 May 2010. On 6 May and on 12 May 2010 Dr. McClintock requested that defense counsel send him laboratory reports and supporting data (DNA profiles) for several of the evidentiary samples. This missing data was never supplied by defense counsel. After reviewing the missing data in preparation for this motion hearing, Dr. McClintock concluded that the data in question was critical for Ryan's defense. He could not do a meaningful review without receiving the underlying data he had requested. He telephoned and sent email to defense counsel requesting the data. He never received the data from defense counsel, and he was therefore denied the information he needed to help the defendant. In preparation for this hearing

Dr. McClintock had the opportunity to review the data he had requested years ago from defense counsel. If called to testify, his testimony would have been, in summary, diametrically opposed to that of Agent Hannon which is described below. He was available to testify, or if counsel desired, he was available to sit with defense counsel at trial to help defense counsel cross-examine Hannon, but counsel did not ask him to do so. This was a serious error in judgment that was prejudicial to the defendant.

10. Certain items that were identified as having been stolen from Farrar's home were found in one place by investigators and were sent to the SBI for forensic analysis. These items included a gold charm bracelet, a knife, a pocketknife, a collector's box holding six coins, and a collector's box for holding three coins and a jewelry box. Additional other items sent to the SBI for analysis were cuttings from the victim's clothing that he was wearing, DNA swabs from all the suspects (Adair, Ryan and others), a blood sample and DNA sample from the victim, sheets of stamps found by a person named Graham who kept the stamps for three days (during which time he showed the stamps to various people), a wooden bat, a cigarette found at the homicide, work gloves, a carpet sample from Adair's blue or gray van, a coin box found with other items stolen from Farrar's house, cloth seat samples from a vehicle Adair and the defendant allegedly used, and clothing from Adair and the defendant.

11. Agent Michelle Hannon analyzed the samples, issued a report and testified at trial. Her report and her testimony at trial reflected scientifically unacceptable techniques. She testified that several of the DNA samples extracted from collected evidence were consistent with a "mixture" of DNA from more than one individual. In order to conclude that the items were mixtures, she made subjective interpretations of the data that fell below and were inconsistent with scientifically acceptable standards. She failed to acknowledge anomalies stemming from the poor qualities of the samples. She interpreted test results as an indication the DNA extractions from some items came from more than one contributor, but her interpretation did not follow accepted scientific protocol. The scientifically unacceptable interpretation allowed her to conclude that the defendant "could not be excluded" as a contributor of DNA to some of the items in evidence. However, if accepted guidelines for interpretation had been followed, the defendant Ryan would have been excluded as a contributor.

12. As a result of Hannon's testimony, the jury was allowed to speculate that Ryan could

have been a contributor when in fact he should have been excluded. Hannon based her opinion on the scientifically incorrect interpretation that the DNA extracted from the stamps, for example, came from more than one individual, and that Ryan could not be excluded as a contributor to the mixture of DNA she said was found on the stamps. Hannon then presented to the jury a color-coded chart which, when correctly interpreted, shows that Ryan was not a contributor—but she never told that to the jury.

13. Dr. Nouredine corroborated the testimony of Dr. McClintock, and he concluded that the DNA analysis of the subject material by Hannon was not done in accordance with acceptable scientific guidelines.

14. The court finds both Dr. McClintock and Dr. Nouredine have offered credible expert testimony to assist the court regarding the DNA evidence that was offered at the defendant's trial. The court further finds that if defense counsel had taken advantage of the expertise offered by Dr. McClintock, if he had submitted the requested DNA data, if he had brought him to court to assist in cross-examination of Agent Hannon, or if he had offered him as a witness at trial, the result of the trial would likely have been different. That counsel did not do some or all of these things exhibited a serious error in judgment that were prejudicial to the defendant.

15. Not one of the DNA samples tested conclusively matched the sample from the defendant.

16. No fingerprint evidence connected the defendant with the scene of the crime or the items taken from the scene. Even though swabs and cuttings were analyzed from possible weapons, the victim's clothes, and items stolen from Farrar's house, no positive match could be made.

THE AVAILABLE WITNESSES NOT CALLED

CHRISTINA RYAN AND WENDY ASH

17. Christina Ryan is now twenty-two years old and lives in California where she is employed at four different jobs. She has considered Wendy Ash her step-mother since she was seven years old. Her biological mother has done nothing since Christina was seven regarding Christina's up-bringing. The defendant and Christina came to Gastonia shortly before 20 March 2007 for the purpose of enrolling her in school, and he attempted to enroll her in the morning of 20 March 2007. When the defendant took Christina, then twelve years old, to Stanley Middle

School, Wendy Ash remained in New Jersey in the home where she and Christina had lived for some time. The defendant, Christina and Wendy intended to move to North Carolina, but Wendy did not want to move until she had obtained a job here. The defendant and Christina, meanwhile, intended to stay at the home of the defendant's half-brother, Chuck Fernandez, in Gaston County.

18. The defendant lacked the proper documentation for her to register, and the defendant and his daughter left the school later in the morning of 20 March 2007. The defendant was operating an old orange and white pickup truck when he took Christina to and from the school. The pickup truck broke down while the defendant and Christina were returning to Chuck Fernandez's house. The defendant worked on the truck on the side of a road, and Christina remained with him until the truck was repaired sufficiently to return to Fernandez's house. Up to this point, there is little in controversy about Christina's testimony at the first trial. She did not testify at the second trial, as discussed below. However, her testimony about events from this juncture is in serious dispute, and the testimony of Christina would have been of great importance to the defendant. If believed by the jury, Christina would have provided an alibi for her father, but defense counsel did not call her as a witness during the second trial—which ended in a death sentence.

19. Christina was called by defense counsel as a witness at the first trial, but was impeached by the State due to inconsistencies in her statement made to Eddie Howell, an investigator from the District Attorney's office who went to New Jersey to interview her. Howell interviewed Christina on 18 September 2008 at her school. She had turned thirteen years of age ten days prior to the interview. Christina was called out of her eight-grade science class by her principal and taken to see the investigator. Howell identified himself as one who job was to "talk to families, and people, who are in crisis." Howell never said that he was a policeman. The principal told Howell that Christina was "concerned if her mom (step-mom) had been notified." Christina told the investigator that the defendant worked on the truck and got it running in about twenty minutes, that they returned to Chuck Fernandez's home, and that she was outside with her father the rest of that day, 20 March 2007, while he worked on the truck. Toward the end of the interview Christina asked Detective Howell, "Does my mom even know that you guys are here?" and "Can I talk to her?" She was not given the opportunity during the interview to talk with Wendy. Eventually, she said, "I don't want to say anything I want to talk to my mom I need to talk to my mom." Detective Howell got out of his chair, sat on the table in front of Christina, looked down on her

and then told her, "Christina, I'm not done up in New Jersey. Okay? I will be back in New Jersey. And the fact (is) that you'll probably be seeing me again.... The truth will set you free." Christina was upset at the interview, and she admitted to this court that she "made up stuff to get him to go." If permitted to testify again she would say that it was true that the defendant took her to school to enroll her, that the orange and white truck broke down and her father was able to get it running again, that they returned to her uncle Chuck Fernandez's house, that Nichole and Wes were not at home when they returned to Chuck's house, and that her father worked on the truck all that day.

19. Wendy Ash was not notified that Christina was to be interviewed by law enforcement authorities. Wendy personally was interviewed by Vee Thornburg, an investigator in the District Attorney's office, at which time he accused Christina of committing perjury in providing an alibi for her father, the defendant. Thornburg also told Wendy that if Wendy were to testify, she also would be committing perjury. After Thornburg left, Wendy drove to Christina's school and picked her up and took her home. Christina was upset and frightened by the police.

20. Wendy and Christina had mobile phones and used them frequently to speak with each other while Christina lived with Wendy in New Jersey and on 20 March 2007—the day that David Farrar was killed. Telephone records of calls made between Christina's cell phone and Wendy's on 20 March 2007 show that beginning at 8:10 o'clock A.M. and extending throughout the day. She would testify that she was talking with Wendy while the defendant was trying to get the truck to run on the side of the road, that she and Wendy were laughing at him and that Wendy cautioned her not to laugh at her father so as to avoid upsetting him. The telephone records confirm that numerous calls were made that day between Christina and Wendy. Counsel did not obtain the telephone records, so they were not introduced at trial.

21. Defense counsel did not call Christina at the second trial when the defendant was sentenced to death. He thought that since she was impeached at the first trial that she would not be an effective witness. However, prior to the first trial counsel did not explain courtroom procedure to her, did not take her to a courtroom to orient her about where she would be sitting during her testimony, did not take her to the school where an attempt to register her was made, did not ask her about her telephone conversations with Wendy and did not go over her testimony before calling her as a witness. In summary, defense counsel did not prepare Christina, then a child, to testify at a capital trial. Christina was available as a witness, and she was willing to come to the second trial. Defense counsels' decision not to call Christina as a witness during the second trial was due to

lack of proper preparation during the first trial, and this was a serious mistake in judgment that was prejudicial to the defendant.

22. Defense counsel did not call Wendy Ash as a witness at either trial. Ms. Ash now lives in Lakewood, Florida, where she is employed as director of catering at a Hilton Hotel. She has an associate degree in criminal justice and makes a good impression while on the witness stand. She has no criminal record. She and the defendant have been engaged for several years and remain engaged to this day. She, Christina and the defendant lived together in New Jersey prior to the homicide. She confirmed that she and Christina talked several times by telephone on 20 March 2007 as shown on telephone records, and she corroborates Christina's testimony about the conversations that occurred. She also corroborates Christina's testimony that she was regarded by Christina as Christina's mother, and about not being notified that Christina was to be interviewed by a detective at school in New Jersey as well as about the intent to enroll her in school in Gaston County. Defense counsel did not ask her about her telephone bill which would have corroborated that numerous calls were made between her and Christina. She was offended by Investigator Vee Thompson's comments to her that he would have dressed in better clothes if he had known how attractive she was. Wendy Ash was notified by defense counsel about a day before Christina was needed to testify at the first trial, and she drove twelve hours to get her to Gastonia. She was with Christina during this entire trip, and she corroborated Christina's testimony that counsel did not sit down with her to tell her what was going to happen in court, and that she was never interviewed by counsel as to what her testimony might be. Counsels' decision not to call Christina at trial resulted in their not calling Wendy Ash to corroborate Christina. Thus, the defendant was deprived of an articulate, credible adult witness with no criminal record. This was a serious mistake in judgment that was prejudicial to the defendant.

DENISE ARNOLD

23. Denise Arnold lives near the home of the defendant's half-brother, Chuck Fernandez, in Gaston County. The houses are located on a cul-de-sac, and Ms. Arnold had the opportunity to see persons and vehicles coming and going on 20 March 2007. Ms. Arnold was interviewed by Investigator Vee Thornburg and Sonya Cayghey who worked as a victim witness legal assistant for the district attorney on 23 March 2007.

24. Ms. Cayghey testified at the hearing of this motion that “it was a very pleasant interview”, that Ms. Arnold came to the door of her home, and that she and Thornburg were invited into her home.

25. Ms. Arnold paints a different picture about the interview in her testimony before this court, and the court finds that her testimony is credible.

26. Ms. Arnold was subpoenaed by the defendant’s investigator on the day before Thornburg and Cayghey came to Arnold’s house. Ms. Arnold was alone in her home and was sitting on the toilet when she heard someone knocking on her door. She shouted, “Just a minute, I’m in the bathroom.” When she came out, she saw Thornburg standing in the middle of her living room. She had not given anyone permission to enter her house. Cayghey was in the doorway leading to the porch. Ms. Arnold told them that she watched her granddaughter board her school bus about 7:30 o’clock A.M. on 20 March 2007; that she saw the defendant working on the orange truck at the end of the cul-de-sac; that he waved to her; that he had a tool in his hand; that she saw the orange truck come back into the cul-de-sac sometime later in the morning on 20 March; that still later that morning she saw a blue van drive out with two people in it; that the person in the passenger seat was a dark headed person; that she could not see the driver; that the blue van came back later that morning, and returned again to the cul-de-sac driving really fast in the afternoon; that she could see the driver with long blond hair; that the defendant was completely bald then, and he still is; that neither person in the van was bald; and that she saw the defendant later that day still working again on the orange truck. The defendant was not in the blue van.

27. Ms. Arnold was frightened and intimidated by the investigators. Thornburg and Cayghey told her that she could be prosecuted for perjury or accessory after the fact if she did not help them, and they made her afraid to testify. The interview ended with her crying, and she finally insisted that they leave. She did not testify at either trial, but she would have testified if defense counsel had asked her to do so—but they did not.

28. To summarize regarding the available witnesses that counsel did not call to testify, the court is aware that each such witness could have been cross-examined extensively, and perhaps effectively, but each had something important to say on behalf of the defendant. There was ample opportunity to explain why a thirteen year old girl, interviewed under the circumstances described above, misstated some things, but that others should be believed. Once the decision not to call

Christina Ryan was made, there was no opportunity to call Wendy Ash as a corroborating witness. Denise Arnold's interview in her home by investigators Thornburg and Caughey was oppressive and egregious, and counsel could have explained that any inconsistencies must be viewed under the circumstances during which they were made. Counsels' failure to call these witnesses was prejudicial to the defendant.

ANALYSIS AND CONCLUSIONS OF LAW

1. The standard for determining whether the defendant was afforded ineffective assistance of counsel was enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. To prevail on a claim of ineffective assistance of counsel, a defendant must establish two elements; (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. Stated another way, (1) that the defendant was denied reasonably effective assistance considering all the circumstances; and (2) that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.* At 694.

2. Ineffective assistance of counsel occurs when counsel fails to provide experts with easily obtainable reports which would have resulted in measurably more effective testimony. *Rompilla v. Beard*, 593 U.S. 374 (2005). In her concurrence, Justice O'Connor noted while "a jury could have heard it all and still have decided on the death penalty, that is not the test." *Id.* At 393 (O'Connor concurring). Instead, "the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome." *Id.* At 393, quoting *Strickland*, 466 U.S. at 694. See also, *Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001) for a case remarkably similar to the case before this court.

3. The failure of defense counsel to obtain an expert in DNA analysis to assist him in the cross-examination of the State's DNA expert, and the failure of defense counsel to submit to the jury the testimony of one or more then available experts in DNA analysis was deficient performance on the part of defense counsel and denied the defendant reasonably effective assistance considering all the circumstances. The prosecution presented evidence to the jury from

an SBI DNA analyst who failed to follow scientific protocol and included scientifically invalid interpretations of DNA samples. The defendant was afforded ineffective assistance of counsel when defense counsel relied solely on cross-examination to discredit the State's DNA expert. *Miller v. Anderson, supra*. This deficient performance prejudiced the defense. There is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.

4. The failure of defense counsel to call witnesses Christina Ryan, Wendy Ash and Denise Arnold who would have supported the defendant's alibi and impeached other witnesses constituted ineffective assistance of counsel after application of the *Strickland* standard. Investigator Thornburg frightened and intimidated Christina Ryan, then a child of thirteen, to the extent that in her statement to him she made "up stuff just to get him to go." Investigator Thornburg threatened both Wendy Ash and Denise Arnold with criminal charges if they testified in court in accordance with their out of court statements. This should have been brought to the attention of the trial court and the jury. Prosecutorial interference violates a defendant's compulsory-process rights when defense witnesses are intimidated by the prosecution, including threatening a defense witness with perjury. *Webb v. Texas*, 409 U.S. 95 (1972); *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982); *United States v. Goodwin*, 625 F.2d 334 (6th Cir. 1973); *United States v. Schlei*, 122 F. 3d 944, 991(1997); *United States v. Smith*, 478 F.2d 976, 979 (D.C. Cir. 1973).

5. Based upon the foregoing findings of fact and conclusions of law, the court concludes that the defendant's Motion for Appropriate Relief should be granted, and the defendant should be allowed a new trial.

IT IS THEREFORE ORDERED that the defendant's Motion for Appropriate Relief shall be, and it is hereby, GRANTED, that the defendant's convictions in these matters are vacated and that the defendant is granted a NEW TRIAL on all issues.

THIS ORDER has been prepared by the undersigned, and it is signed on this the 3d day of February, 2017.


W. Erwin Spainhour