STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE**
COUNTY OF MONTGOMERY	**SUPERIOR COURT DIVISION**
	FILE NOS: 99 CRS 2818, 3820
STATE OF NORTH CAROLINA)	
)	**ORDER SUMMARILY DISMISSING**
)	**CERTAIN CLAIMS OF DEFENDANT'S**
v.)	**MOTION FOR APPROPRIATE RELIEF**
)	**AND SUPPLEMENTAL MOTION FOR**
)	**APPROPRIATE RELIEF**
SCOTT DAVID ALLEN)	

THIS CAUSE came on to be heard before the undersigned Superior Court Judge on the Motion for Appropriate Relief ("MAR") filed by Scott David Allen ("Defendant") on or about 2 July 2007 and the Supplemental Motion for Appropriate Relief ("SMAR") filed by Defendant on or about 17 September 2013, and the Court, having considered the MAR, SMAR, the State's Answer and Motion for Summary Denial, Defendant's Response to the State's Motion for Summary Denial, the State's Reply, the arguments of counsel at the non-evidentiary hearing held on 4 April 2014, Defendant's Memorandum in Response to State's Oral Argument, and after reviewing the documents attached thereto or presented therein and reviewing the record proper, the Court hereby makes the following Findings of Fact and Conclusions of Law:

PROCEDURAL HISTORY

1. On 24 January 2000, Defendant was indicted for the first-degree murder of Christopher Gailey ("Gailey"), felonious larceny, and felonious possession of stolen goods. Defendant was capitally tried before a jury at the 27 October 2003 Criminal Session of Superior Court, Montgomery County. On 13 November 2003, the jury found Defendant guilty of first-degree murder on the basis of premeditation and deliberation, felonious larceny, and felonious possession of stolen goods. On 18 November 2003, after a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction, and the trial court entered judgment in accordance with that recommendation. The trial court consolidated the remaining offenses for judgment and sentenced Defendant to a prison term of ten to twelve months.

2. Defendant gave notice of appeal to the Supreme Court of North Carolina, and by unanimous decision entered 2 March 2006, the Court held no error and affirmed the judgment below. State v. Allen, 360 N.C. 297, 626 S.E.2d 271, cert. denied, 549 U.S. 867, 127 S. Ct. 164, 166 L. Ed. 2d. 116 (2006). On 2 October 2006, the United States Supreme Court denied Defendant's petition for writ of certiorari.

3. On or about 2 July 2007, Defendant filed his MAR in this Court, presenting ten claims for relief. On or about 17 September 2013, Defendant filed his SMAR in this court, supplementing claims 1, 2, 3, 8, and 9 of his MAR and presenting two additional claims, for a total of twelve claims for relief.

FACTUAL SUMMARY

4. The facts of Defendant's murder of Gailey were summarized by the Supreme Court of North Carolina in Allen, 360 N.C. at 301-04, 626 S.E.2d 276-79.

CLAIMS RAISED

5. The sum of the claims raised in Defendant's MAR and SMAR are as follows:

I. THE STATE PRESENTED FALSE AND MISLEADING EVIDENCE VIOLATING DEFENDANT'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE RULE IN NAPUE V. ILLINOIS.

II. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE AND CALL KEY DEFENSE WITNESSES TO PRESENT EXCULPATORY EVIDENCE TO THE JURY OR CHALLENGE FALSE EVIDENCE.

III. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THE GUILT-INNOCENCE PHASE BY FAILING TO CROSS-EXAMINE THE STATE'S WITNESSES EFFECTIVELY.

IV. THE STATE FAILED TO PRODUCE MATERIAL AND EXCULPATORY EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND ITS PROGENY.

V. THE INDICTMENT FOR FIRST DEGREE MURDER WAS IMPROPER AND DID NOT CONVEY JURISDICTION TO TRY DEFENDANT FOR FIRST DEGREE MURDER OR TO SENTENCE HIM TO DEATH.

VI. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE GUILT-INNOCENCE AND SENTENCING PHASES BY FAILING TO OBJECT TO INAPPROPRIATE CLOSING ARGUMENTS.

VII. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE DURING THE SENTENCING PHASE FOR FAILURE TO CALL A MENTAL HEALTH EXPERT TO EXPLAIN THE SIGNIFICANCE OF LAY

TESTIMONY AND OTHER MATTERS PLACED BEFORE THE JURY.

VIII. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THE SENTENCING PHASE BY FAILING TO INVESTIGATE AND PRESENT AVAILABE MITIGATING EVIDENCE.

IX. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THE SENTENCING PHASE BY FAILING TO ADEQUATELY PREPARE WITNESSES.

X. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE THROUGHOUT THE TRIAL DUE TO CUMULATIVE EFFECTS.

XI. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE EVIDENCE POINTING TO A THIRD PARTY'S GUILT.

XII. DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN HE WAS PRESENTED TO THE JURY SHACKLED WITHOUT A HEARING AS TO THE NEED FOR THOSE RESTRAINTS.

CLAIM I of MAR and SMAR

6. Defendant claims that the State violated his right to a fair trial by the knowing use of false testimony. Specifically, Defendant contends that the testimony of Vanessa Smith ("Smith") was false, that the State knew Smith's testimony was false, and that the State used this false testimony to convict Defendant. (MAR pp. 27-34; SMAR pp. 2-11) Additionally, Defendant contends that the testimony of Robert Johnson ("Johnson") was false, that the State knew it was false, and that the State used Johnson's false testimony to convict Defendant. (MAR pp. 29, 34) Therefore, the only witnesses who Defendant claims gave false testimony at Defendant's trial are Smith and Johnson.

7. For the reasons enumerated below, the Court finds that Claim I of Defendant's MAR and SMAR is (1) procedurally barred with regard to those portions of Smith's testimony which were raised on direct appeal and ruled upon by the Supreme Court of North Carolina pursuant to N.C.G.S. § 15A-1419(a)(2), (2) procedurally barred with regard to those portions of Smith's testimony not raised on direct appeal pursuant to N.C.G.S. § 15A-1419(a)(3), (3) procedurally barred with regard to the entirety of Johnson's testimony pursuant to N.C.G.S. § 15A-1419(a)(3), and (4) without merit in the alternative.

Portion of Claim I is Procedurally Barred Under N.C.G.S. § 15A-1419(a)(2)

8. Defendant's contention that the State knew that Smith's testimony was false, but used it anyway, is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(2) because "the ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment . . . ." N.C.G.S. § 15A-1419(a)(2) (2016). On direct appeal of this case, the Supreme Court of North Carolina rejected the contention that the State knew that Smith's testimony was demonstrably false when it presented her as a witness at trial. Allen, 360 N.C. at 304-06, 626 S.E.2d at 279-80. The Supreme Court summarized Defendant's contention on direct appeal and ruled as follows:

> We note today there is a difference between the knowing presentation of false testimony and knowing that testimony conflicts in some manner. It is for the jury to decide issues of fact when conflicting information is elicited by either party. See, e.g., State v. Boykin, 298 N.C. 687, 694, 259 S.E.2d 883, 888 (1979), cert. denied, 446 U.S. 911, 100 S. Ct. 1841, 64 L. Ed. 2d 264 (1980). In fact, if inconsistent information is elicited from a witness, the party who called that witness may impeach him or her. See N.C.G.S. § 8C-1 Rule 607 (2005).
>
> Here, Defendant argues the prosecution violated Defendant's constitutional rights by offering two portions of Smith's testimony. First, Defendant contends Smith's testimony she and Defendant waited seven to eight hours in the Uwharrie Forest for the victim to die and they left the scene while he was still alive was demonstrably false testimony and known to be so by the prosecution. Second, Defendant contends Smith's testimony that she "heard, I'm assuming it was Chris empty his gun out" was also demonstrably false and known to be so by the prosecution.
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> As to Defendant's first contention, we note the length of time it took the victim to die in this case is not easily proved. While the State Medical Examiner, Dr. John Butts, testified Gailey would not have survived as long as seven to eight hours, that testimony was his medical opinion. It cannot be said either Smith's statement or the opinion of Dr. Butts is verifiably false, much less that Smith's statement was knowingly false when elicited. In fact, during closing arguments, the prosecution admitted that Smith's perception of time "may not have been correct." Merely because inconsistent testimony is presented, it does not follow that such testimony is knowingly and demonstrably false.
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> Similarly, the testimony about the "emptying" of the victim's handgun, while unlikely to be accurate, cannot be said to have been known as false by the prosecution. Smith was a confessed drug addict and under the influence of drugs at the time of the murder. This, along with her prior convictions and other circumstances of her lifestyle revealed at Defendant's trial, made her a witness with less-than-perfect credibility.

> However, the prosecution did not violate Defendant's constitutional rights by submitting conflicting testimony when nothing in the record tends to show the prosecution knew the testimony was false. The prosecution could have truly believed Smith was simply mistaken and did not hear as many shots as she thought due to her drug abuse or just plain fear. Because we are unpersuaded the prosecution knew Smith intended to make false statements, we overrule Defendant's assignment of error.

Allen 360 N.C. at 304-06, 626 S.E.2d at 279-80.

9. In his MAR, Defendant again contends that Smith's testimony that she heard what she assumed was Gailey "'empty his gun out'" was demonstrably false and known to be so by the prosecution. (MAR p. 29) Also, in his MAR and SMAR, Defendant again contends that Smith's testimony she and Defendant waited seven to eight hours in the Uwharrie Forest for the victim to die and left the scene while he was still alive was demonstrably false testimony and known to be so by the prosecution. (MAR pp. 30-31; SMAR p. 3) Thus, Defendant's Claim I of his MAR and SMAR was previously adjudicated and rejected on direct appeal. Defendant's attempt to reassert these contentions on collateral attack of his conviction is expressly prohibited by the procedural bar contained in N.C.G.S. § 15A-1419(a)(2). Therefore, Defendant's assertions regarding the contentions previously ruled upon by the Supreme Court of North Carolina are procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(2).

10. Additionally, the Court concludes that Defendant has failed to show good cause and actual prejudice to justify this Court's lifting of the procedural bar for the evaluation of Defendant's claim on the merits. N.C.G.S. § 15A-1419(b)(1) (2016). Nor has Defendant shown that a miscarriage of justice will result if this Court does not review his procedurally defaulted claims. N.C.G.S. § 15A-1419(b)(2) (2016). Therefore, Claim I of Defendant's MAR and SMAR is procedurally barred from this Court's review under N.C.G.S. § 15A-1419(a)(2) with regard to those portions of Smith's testimony which were raised on direct appeal and ruled upon by the Supreme Court of North Carolina.

Remainder of Claim I is Procedurally Barred Under N.C.G.S. § 15A-1419(a)(3)

11. As to the portions of the claim relying upon the testimony of Smith and Johnson which were not advanced as error on direct appeal, these are procedurally barred for failing to raise them on direct appeal when in an adequate position to do so. The record on appeal shows that the entire testimony of Smith and the entire testimony of Johnson were before the Supreme Court of North Carolina. Therefore, Defendant was in a position to adequately raise the contention that the State knowingly presented false testimony by either Smith or Johnson when he filed his original brief on appeal. Since Defendant was in an adequate position to raise the remainder of Claim I of his MAR and SMAR on appeal but did not do so, the Court concludes that the remainder of Claim I is procedurally barred. N.C.G.S. § 15A-1419(a)(3) (2016).

12. Additionally, the Court concludes that Defendant has failed to show good cause and actual prejudice to justify this Court's lifting of the procedural bar for the evaluation of

Defendant's claim on the merits. N.C.G.S. § 15A-1419(b)(1) (2016). Nor has Defendant shown that a miscarriage of justice will result if this Court does not review his procedurally defaulted claims. N.C.G.S. § 15A-1419(b)(2) (2016). Therefore, Claim I of Defendant's MAR and SMAR is procedurally barred from this Court's review under N.C.G.S. § 15A-1419(a)(3) with regard to those portions of Smith's testimony not raised on direct appeal and the entirety of Johnson's testimony.

Claim I is Without Merit

13. In the alternative, Claim I is without merit because Defendant fails to show "that the testimony was in fact false, material, and knowingly and intentionally used by the state to obtain his conviction." State v. Robbins, 319 N.C. 456, 514, 356 S.E.2d 279, 308, cert. denied, 484 U.S. 918, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987); see also, State v. Williams, 341 N.C. 1, 16, 459 S.E.2d 208, 217 (1995), cert. denied, 516 U.S. 1128, 116 S. Ct. 945, 133 L. Ed. 2d 870 (1996).

14. In support of Claim I of his MAR and SMAR, Defendant attaches or cites the following materials in an attempt to show that the testimony Smith was false: (1) Affidavit of Tanzy Lanier (MAR Ex. 5); (2) Affidavit and Report of Greg O. McCrary (SMAR Ex. 41); (3) Testimony of Dr. John Butts, Chief Medical Examiner (T pp. 2001-16); (4) ATM Surveillance Videos (T pp. 1182-1215, 1250-78, 2143-59); (5) Affidavit of Dolly Ponds (MAR Ex. 6); (6) Affidavit of Troy Spencer (SMAR Ex. 42); (7) Testimony and Statement of Lilly Efird (T pp. 1854-57, 1864-69; MAR Ex. 7); (8) Statement of Robert Johnson (SMAR Ex. 43, 53); (9) Affidavit of Christina Fowler Chamberlain (SMAR Ex. 44); (10) Affidavit of Joe Loflin (SMAR Ex. 45); (11) Affidavit of Larry Smith (SMAR Ex. 46); and (12) Affidavit of Joyce Allen (SMAR Ex. 47). Additionally, Defendant contends that the Affidavit of Tanzy Lanier (MAR Ex. 5) shows that the testimony of Johnson was false because it contradicts the 3-4 hour time period between the 8:00 p.m. or later departure of Defendant, Smith, and Gailey from the lake house prior to Gailey's murder and Smith's return to the lake house by herself after Gailey's murder. (MAR p. 29; T pp. 1468-69) However, "there is a difference between the knowing presentation of false testimony and knowing that testimony conflicts in some manner. It is for the jury to decide issues of fact when conflicting information is elicited by either party." State v. Allen, 360 N.C. 297, 305, 626 S.E.2d 271, 279, cert. denied, 549 U.S. 867, 127 S. Ct. 164, 166 L. Ed. 2d 116 (2006); accord United States v. Griley, 814 F.2d 967, 971 (4th Cir. 1987) ("[M]ere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony."). While the State has a duty to correct any false evidence which could affect the jury's decision, "if the evidence is inconsistent or contradictory, rather than a knowing falsehood, such contradictions in the State's evidence are for the jury to consider and resolve." State v. Clark, 138 N.C. App. 392, 397, 531 S.E.2d 482, 486 (2000) (internal citations omitted); accord State v. Galloway, 145 N.C. App. 555, 560, 551 S.E.2d 525, 529-30 (2001); accord State v. Phillips, 365 N.C. 103, 125-27, 711 S.E.2d 122, 139-40 (2011). For the reasons enumerated below, the Court concludes that Defendant has failed to show that any inconsistencies between the attached or cited materials and the testimony of either Smith or Johnson rises to the level of a knowing falsehood intentionally used by the State to Defendant's prejudice. Therefore, Claim I of Defendant's MAR and SMAR is without merit.

A. **Post-Conviction Affidavit of Tanzy Lanier**

15. Defendant contends that the post-conviction Affidavit of Tanzy Lanier shows that she was the only sober person at the lake house when Defendant, Gailey, and Smith left the lake house prior to Gailey's murder, that she was the only person who was sober and awake when Smith returned to the lake house alone after Gailey's murder, and that Lanier's estimation of the time period between those two events makes it physically impossible for the murder to have occurred as Smith testified it did. (MAR pp. 27-28) However, Lanier's affidavit directly contradicts the statement she gave to law enforcement on 18 July 1999. (MAR Ex. 2) According to Lanier's statement to law enforcement, she was not at the lake house at all when Defendant, Gailey, and Smith left. (See MAR Ex. 2 p. 3) Instead, Lanier's husband, Danny Lanier ("Danny"), informed her "when she came home from work" that Gailey "had taken" Danny's truck to take Defendant and Smith to Defendant's mother's residence. (MAR Ex. 2 p. 3) Additionally, Lanier's statement to law enforcement contradicts her affidavit which indicates that "Danny had already gone to bed" and that she was the only one who was not "asleep or passed out from partying" when Smith returned to the lake house. (MAR Ex. 5 p. 2) According to her statement to law enforcement, Lanier and Danny were both present when Smith returned and "gave them the keys to Danny's truck" sometime before "she and her husband went to bed a short time later." (MAR Ex. 2 p. 3) Most importantly, Lanier's 18 July 1999 statement to law enforcement shows that she did not recall with any specificity when Smith returned alone that evening. (Id.) In contrast, Lanier's affidavit of 27 May 2007, made nearly eight years after her statement to law enforcement and long after Defendant's trial, indicates that Smith returned to the lake house "in about 1 to 2 hours." (MAR Ex. 5 p. 2) Thus, information that was known to the State from Lanier's 18 July 1999 statement to law enforcement contradicts the contentions made in Lanier's 27 May 2007 affidavit. Therefore, Lanier's 27 May 2007 affidavit cannot be used to prove that Smith's testimony at trial was in fact false, much less that the State knew that this testimony was false and intentionally used it to prejudice Defendant.

16. Additionally, Lanier's 27 May 2007 affidavit contradicts the pretrial statement that Danny made to law enforcement on 18 July 1999 (MAR Ex. 1). First, Danny's statement shows that Gailey borrowed Danny's truck at 9:00 p.m. rather than 9:30 p.m. as Lanier's affidavit of 27 May 2007 implies. (MAR Ex. 1 p. 4; MAR p. 28) Second, Danny's statement indicates that Smith returned to the lake house "between 12 midnight and 1 a.m. on Saturday, July 10, 1999" rather than 10:30 p.m. to 11:30 p.m., as suggested by Lanier's affidavit of 27 May 2007. (MAR Ex. 1 p. 4; MAR p. 28) Thus, Danny's statement indicates that Smith was absent from the lake house for three to four hours rather than the two hours suggested in Lanier's affidavit of 27 May 2007. Consequently, by Defendant's own Exhibit 1 attached to his MAR, Lanier's affidavit of 27 May 2007 cannot be used to prove that Smith's testimony at trial was in fact false, much less that the State knew it was false and intentionally used this false testimony to prejudice Defendant.

17. Furthermore, the court finds the testimony of Johnson at trial contradicts Lanier's affidavit of 27 May 2007. (See MAR p. 29) At trial, Johnson testified that he believed Defendant, Gailey, and Smith left the lake house at 8:00 p.m. or later because it was dark outside

when they left. (T pp. 1468-69) Johnson believed that Defendant, Gailey, and Smith were gone for three to four hours until Smith returned alone. (T p. 1469) Thus, Johnson's testimony directly contradicts Lanier's 27 May 2007 affidavit which Defendant uses to argue that Smith was only absent from the lake house for, at most, two hours. (MAR p. 28) Since Lanier's affidavit of 27 May 2007 is directly contradicted by Johnson's testimony at trial, it cannot be used to prove that Smith's testimony at trial was in fact false, much less that the State knew that it was false and intentionally used it to prejudice Defendant.

18. This discrepancy between Johnson's testimony at trial and Lanier's 27 May 2007 affidavit appears to be the only basis for Defendant's contention that Johnson gave false, misleading, or perjured testimony. (See MAR p. 29) In Claim I of his SMAR, Defendant actually cites Johnson as a credible source in support of his contention that Smith's testimony was in fact false. (SMAR pp. 6-7) Since, Lanier's affidavit of 27 May 2007 is directly contradicted by her prior statement to law enforcement (MAR Ex. 2 p. 3) as well as Danny's prior statement to law enforcement (MAR Ex. 1 p. 4), it cannot be used to prove that Johnson's testimony at trial was false or that the State knew that Johnson's testimony was false and intentionally used it to prejudice Defendant. Therefore, Claim I of Defendant's MAR and SMAR as it applies to the testimony of Johnson is without merit.

19. Although Johnson's testimony that Smith returned to the lake house three to four hours after leaving is inconsistent with Smith's testimony regarding the amount of time she spent in the Uwharrie Forest, such an inconsistency does not establish the State's knowing use of false testimony. See Allen, 360 N.C. at 305, 626 S.E.2d at 279 ("Merely because inconsistent testimony is presented, it does not follow that such testimony is knowingly and demonstrably false."); see also, Griley, 814 F.2d at 971 ("[M]ere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony."). Such contradictions in the State's evidence are for the jury to consider and resolve. Clark, 138 N.C. App. at 397, 531 S.E.2d at 486; Galloway, 145 N.C. App. at 560, 551 S.E.2d at 529-30. Therefore, Claim I of Defendant's MAR and SMAR as it applies to the testimony of Johnson and Smith is without merit.

B. Post-Conviction Affidavit and Report of Gregg O. McCrary

20. In his SMAR, Defendant contends that the post-conviction Affidavit and Report of Gregg O. McCrary ("McCrary"), a purported crime scene expert retained post-conviction, supports the contention originally made in his MAR that the physical evidence collected at the scene of Gailey's murder by law enforcement shows that the shooting of Gailey could not possibly have occurred in the manner described by Smith. (SMAR p. 3; SMAR Ex. 41; MAR pp. 29-33) However, McCrary's conclusions about the physical evidence at the crime scene and whether or not this evidence contradicted Smith's testimony is based upon evidence introduced at trial by the State through witnesses subject to cross-examination by the defense. For example, McCrary's report depends upon the testimony of the following witnesses who testified at Defendant's trial: (1) Wesley Hopkins, Jr. (T pp. 1282-88); (2) Lieutenant Barry Bunting (T pp. 1289-1305, 1442-50); (3) Deputy Catha Wright (T pp. 1317-69, 1432-41); (4) Special Agent Timothy Luper (T pp. 1844-53); and (5) Dr. John Butts (T pp. 2001-16). (See SMAR Ex. 41,

McCrary Report pp. 1-9) Additionally, McCrary's report relies on several items of physical evidence that were introduced into evidence at trial. (SMAR Ex. 41, McCrary Report pp. 5-6) All of the items of physical evidence relied upon by McCrary to form the basis of his report, including photographs of these items and any expert testimony regarding them, were presented by the State at trial through the witnesses listed above and other witnesses who were subject to cross-examination by the defense at trial. (T pp. 1282-88, 1289-1305, 1442- 50, 1317-69, 1432-41, 1844-53, 2001-16, 2017-25, 2026-30, 2031-43, 2160-61)

21. Since the State introduced the items of physical evidence used to form the basis of McCrary's report, including photographs of the items and expert testimony regarding them, into evidence at trial, Defendant's contention that the inconsistencies raised by McCrary's report prove that Smith's testimony was false and that the State knowingly used this false testimony to prejudice Defendant is without merit. As noted above, "there is a difference between the knowing presentation of false testimony and knowing that testimony conflicts in some manner. It is for the jury to decide issues of fact when conflicting information is elicited by either party." Allen, 360 N.C. at 305, 626 S.E.2d at 279. The Court finds that it was for the jury to determine whether the evidence collected at the crime scene in this case conflicted with or corroborated Smith's testimony. In short, McCrary's opinion that the physical evidence collected at the crime scene contradicts Smith's testimony does not prove that Smith's testimony at trial was in fact false, much less that the State knew it was false and intentionally used it to prejudice Defendant. Therefore, Claim I of Defendant's MAR and SMAR is without merit.

C. Testimony of Dr. John Butts, Chief Medical Examiner

22. Defendant contends:

> The testimony of the State's Chief Medical Examiner, Dr. John Butts, also contradicted Smith's testimony. According to the CME, Gailey's wounds would have resulted in death within one or two hours, a far shorter period of time than depicted by Vanessa Smith, who insisted that Gailey suffered all night and was alive when she and Allen left the following morning. . . . The prosecution (sic) knew Smith's testimony was false when he presented it and argued it to the jury.

(MAR pp. 30-31) However, the Supreme Court of North Carolina ruled on this exact contention on direct appeal. In the direct appeal of this case, the Supreme Court ruled:

> As to defendant's first contention, we note the length of time it took the victim to die in this case is not easily proved. While the State Medical Examiner, Dr. John Butts, testified Gailey would not have survived as long as seven to eight hours, that testimony was his medical opinion. It cannot be said either Smith's statement or the opinion of Dr. Butts is verifiably false, much less that Smith's statement was knowingly false when elicited. In fact, during closing arguments, the prosecution admitted that Smith's perception of time "may not have been correct." Merely because inconsistent testimony is presented, it does not follow that such testimony is knowingly and demonstrably false.

Allen, 360 N.C. at 305, 626 S.E.2d at 279. Therefore, Defendant's contention on this matter is without merit based upon law of the case.

> Under the law of the case doctrine, an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal. However, the law of the case doctrine does not apply to dicta, but only to points actually presented and necessary for the determination of the case.

Creech v. Melnik, 147 N.C. App. 471, 473-74, 556 S.E.2d 587, 589 (2001) (internal citations omitted). Since Defendant presented the same facts and questions regarding the conflicting testimony of Smith and Dr. John Butts to the Supreme Court of North Carolina, and since the resolution of those facts and questions were necessary for the determination of the case on direct appeal, those facts and questions are also resolved for the purpose of post-conviction review. Therefore, Claim I of Defendant's MAR and SMAR as it applies to the testimony of Smith and whether Smith's testimony contradicts the testimony of Dr. John Butts is without merit.

D. ATM Surveillance Videos

23. Defendant contends that Smith's testimony that Defendant forced her to use Gailey's stolen automated teller machine ("ATM") card after Gailey's murder to obtain cash for drugs was demonstrably false, that the State knew it was false, and that the State knowingly used Smith's testimony on this matter to prejudice Defendant. (MAR p. 31) Defendant relies upon three ATM video tapes and a number of still photographs to support this contention. (See MAR p. 31; MAR Ex. 6 pp. 5-8; T pp. 1182-1215, 1250-78, 2143-59) However, the ATM video tapes and still photographs, which were never introduced into evidence at trial by either the State or Defendant, have never been properly authenticated. Therefore, they cannot prove that Smith's testimony was actually false or that the State knew that it was false and intentionally used this testimony to prejudice Defendant.

24. Defendant is correct in stating that law enforcement has acknowledged neither Smith nor Defendant appears in any of the three ATM video tapes or the still photographs that the State produced for Defendant during jury selection. (MAR p. 31; T pp. 2146-49) However, the Court finds that those tapes and photographs were never authenticated to show the location of the ATM machines or that the time and date stamps appearing on the videos and photographs were accurate. During a *voir dire* hearing on the tapes and photographs, Lieutenant Barry Bunting ("Lt. Bunting") testified that he contacted Wachovia Bank to obtain "bank videos" past a certain date that might be associated with the investigation of this case. (T pp. 1193-95) Lt. Bunting requested the bank videos before Montgomery County assumed jurisdiction of the investigation, and Lt. Bunting did not go to a physical bank to obtain the videos, but contacted the security director of Wachovia Bank to obtain them. (T pp. 1192-93) Instead of receiving the tapes from the security director of Wachovia Bank, Lt. Bunting testified that he received the videos from a Detective Branning of the Shallotte Police Department who "sent them directly to

me from the bank." (T p. 1198) The tapes that Lt. Bunting received from Detective Branning had no accompanying certificates of authenticity, nor was any information sent to Lt. Bunting regarding the location of the ATM machines or the accuracy of the time stamps. (See T pp. 1195-1202) Additionally, Lt. Bunting did not receive any information regarding the location of the still photographs or whether the time stamps in those photographs were accurate. (See T pp. 1250- 66) Finally, Lt. Bunting did not request any bank videos from Albemarle. (T p. 1212)

25. While Smith testified on direct examination that Defendant made her put Gailey's ATM card "in the machine and draw money out" in the vicinity of Shallotte and Albemarle, Smith did not give a specific location or time period for when she obtained money using Gailey's ATM card. (T pp. 1562-63) Additionally, Lt. Bunting testified at trial that he received records from Wachovia Bank showing transactions from Gailey's account between 11 July 1999 and 14 July 1999 at the following locations: (1) North Carolina State Employee's Credit Union in Shallotte; (2) Bank of America in Albemarle; (3) Citgo #140 Minuteman in Shallotte; and (4) Texaco Incorporated in Rowland, North Carolina. (T pp. 1254-57) These bank records were introduced into evidence as State's Exhibits 89-94. (Id.) Also, Lt. Bunting testified that, by 14 July 1999, the remaining balance in Gailey's account was $1.81. (T p. 2158) Thus, none of the transactions which drained Gailey's account between 11 July 1999 and 14 July 1999 occurred at any Wachovia Bank location. Therefore, the records from Wachovia Bank showing transactions from Gailey's account between 11 July 1999 and 14 July 1999 cannot, by themselves, authenticate the ATM video tapes or the still photographs.

26. From the evidence presented at the *voir dire* hearing and at trial, the unauthenticated ATM video tapes and still photographs were never linked to Gailey's bank records from Wachovia Bank, to any particular ATM locations, nor to any particular date or time that could be independently verified by a custodian of those materials. The trial court acknowledged that the lack of authenticating information regarding the video tapes and photographs would make them inadmissible at trial. (T pp. 2132-33) Since the tapes and photographs were never properly authenticated, they cannot prove that Smith's testimony was in fact false or that the State knew that her testimony was false and intentionally used this false testimony to prejudice Defendant.

27. Even if Defendant could somehow authenticate the three ATM video tapes and the still photographs, and even if the tapes and photographs showed that Smith gave false testimony about Defendant forcing her to use Gailey's ATM card, Defendant still could not prevail on Claim I of his MAR and SMAR because Smith's testimony about the ATM card was not material. First, the felonious larceny and felonious possession of stolen goods charges that accompanied Defendant's first-degree murder charge at trial were based upon the taking of Gailey's truck, not on the taking of Gailey's wallet which contained his ATM card. (T pp. 2309-12; State's Response Ex. 3) Second, at the charge conference, the trial court decided to instruct the jury on the felony murder rule regarding the taking of Gailey's truck but not regarding the taking of Gailey's wallet because, according to the evidence presented at trial, the wallet was not taken from Gailey's body but was stolen by Smith at the lake house sometime after Gailey's murder. (T pp. 2182-83) Third, the record shows that the three ATM video tapes and still photographs were unknown to the prosecution until Lt. Bunting discovered them in the evidence

room of the Randolph County Sheriff's Office during jury selection before the *voir dire* hearing regarding the tapes and photographs, at which time the prosecution made arrangements for the defense to view the tapes on special equipment. (See T pp. 1182- 95) Since the prosecution did not know about the tapes or photographs until the Tuesday before the *voir dire* hearing, the prosecution did not have time to properly authenticate the tapes or the photographs to determine whether or not they corroborated or contradicted Smith's testimony. Therefore, Claim I of Defendant's MAR and SMAR as it pertains to whether Smith's testimony contradicts the ATM video tapes and photographs is without merit.

E. Affidavits of Dolly Ponds and Troy Spencer

28. Defendant contends that the post-conviction affidavits of Dolly Ponds ("Ponds") and Troy Spencer ("Spencer") show that Smith's testimony regarding the murder of Gailey was false, that the State knew it was false and intentionally used it to prejudice Defendant. (MAR p. 32; SMAR p. 5) However, neither Ponds nor Spencer claim to have any first-hand knowledge of the events surrounding Gailey's murder or the events at the lake house on 9 July 1999 through 10 July 1999. (See MAR Ex. 6; SMAR Ex. 42) Instead, each affidavit purports to divulge inconsistent statements made by Smith and to divulge actions taken by Smith to show that she is not credible. (See Id.)

29. For instance, Ponds claims that Smith made statements inconsistent with her testimony at trial while Smith and Ponds were in the Montgomery County Jail together after Smith was arrested for her part in Gailey's murder. (See MAR & SMAR Ex. 6, p. 1) Additionally, Ponds recounts alleged sexual exploits of Smith in the Montgomery County Jail and Smith's use of the fruits of these exploits to obtain release from the Montgomery County Jail. (See MAR & SMAR Ex. 6, pp. 2-3) If believed as true, these statements do little more than allege inconsistencies with Smith's testimony at trial; Ponds does not claim to have any first-hand knowledge of Gailey's murder or the events that occurred at the lake house on 9-10 July 1999. Since Ponds has no first-hand knowledge of these events, her affidavit cannot be used to prove that Smith's testimony was in fact false or that the State knew that her testimony was false and intentionally used this false testimony to prejudice Defendant. Furthermore, the affidavit of Ponds actually states, "I have never been interviewed by anyone concerning Scott Allen's case and/or the death of Chris Gailey." (MAR Ex. 6, p. 3) Thus, Defendant cannot show that the State knew about Smith's alleged prior inconsistent statements to Ponds when it called Smith to testify at Defendant's trial.

30. Similarly, Spencer's affidavit claims that, while Smith was on house arrest and living with Spencer prior to Defendant's trial, Smith insinuated to Spencer that she pulled the trigger and killed Gailey. (SMAR Ex. 42 pp. 1-2) Also, Spencer claims that Smith can "manipulate a man, using sex to control him" and recounts tales of how Smith manipulated Spencer, a guard at the Montgomery County Jail, and Defendant. (Id.) However, Spencer does not claim to have any first-hand knowledge of Gailey's murder or the events that occurred at the lake house on 9-10 July 1999. (See SMAR Ex. 42) Since Spencer has no first-hand knowledge of these events, his affidavit cannot be used to prove that Smith's testimony at trial was false, much less that the State knew that her testimony was false and intentionally used it to prejudice

Defendant. At most, Spencer's affidavit alleges contradictory or inconsistent statements, not proof that false evidence was presented at trial. Therefore, Claim I of Defendant's MAR and SMAR as it applies to the affidavits of Ponds and Spencer is without merit.

F. Testimony and Statement of Lilly Efird and Affidavit and Statement of Robert Johnson

31. Defendant contends that the trial testimony of Lilly Efird ("Efird") and Efird's statement to law enforcement shows that Smith's testimony was false, that the State knew it was false, and that the State intentionally used this false testimony to prejudice Defendant. (MAR p. 33) However, like Ponds and Spencer, Efird did not claim to have any first-hand knowledge of the events surrounding Gailey's murder or the events that occurred at the lake house on 9-10 July 1999. (See T pp. 1854-75) Instead, all of Efird's information regarding Gailey's murder came from a conversation she allegedly had with Smith on or about 12 July 1999. (T pp. 1855-57) Since Efird had no first-hand knowledge of the relevant events, her testimony and statement to law enforcement cannot be used to prove that Smith's testimony at trial was false, much less that the State knew that Smith's testimony was false and intentionally used it to prejudice Defendant.

32. The State called Efird to testify at trial and Efird was subject to cross-examination by the defense. (T pp. 1854-75) Defense counsel extensively cross-examined Efird and impeached Efird with her prior statement to law enforcement regarding whether Smith told her that Defendant had shot Gailey in the chest rather than the back. (T pp. 1869-70) The resolution of any issues of fact raised by the inconsistencies between the testimony of Smith, the testimony of Efird, and Efird's prior statement to law enforcement was for the jury to decide. See Allen, 360 N.C. at 305, 626 S.E.2d at 279. Therefore, Defendant's Claim I as it applies to the testimony and statement of Efird is without merit.

33. Defendant contends that the post-conviction affidavit of Robert Johnson ("Johnson") shows that Smith's testimony was in fact false, that the State knew it was false, and that the State intentionally used this false testimony to prejudice Defendant. (See SMAR pp. 6-7; SMAR Ex. 43) Specifically, Defendant contends that Johnson's affidavit shows that Defendant was unarmed when he left the lake house with Gailey and Smith on the night of Gailey's murder and that "Johnson knew that Gailey's sawed-off shotgun, which the prosecution contended Allen used to kill Gailey, was left in the closet of his bedroom." (SMAR p. 6-7) However, Johnson's pretrial statement to law enforcement contradicts Johnson's post-conviction affidavit on this matter. (SMAR Ex. 53 p. 000914) Since Johnson's post-conviction affidavit contradicts his previous statement to law enforcement, Johnson's affidavit cannot be used to prove that Smith's testimony was false or that the State knew that this testimony was false and intentionally used it to prejudice Defendant.

34. Furthermore, Johnson testified at Defendant's trial and was subject to cross-examination by defense counsel. (T pp. 1451-1506) During cross-examination, defense counsel elicited the fact that Johnson saw Gailey's sawed-off shotgun at the lake house when the Randolph County Sheriff's Office came to his residence after 9 July 1999. (T p. 1503) Any inconsistencies between the testimony of Smith and this fact elicited by defense counsel were for

the jury to decide. See Allen, 360 N.C. at 305, 626 S.E.2d at 279. Therefore, Claim I of Defendant's MAR and SMAR as it applies to the post-conviction affidavit of Johnson is without merit.

G. Affidavits of Christina Fowler Chamberlain and Joe Loflin

35. Defendant contends that the post-conviction affidavits of Christina Fowler Chamberlain ("Chamberlain") and Joe Loflin ("Loflin") show that Smith's testimony was false, that the State knew that it was false, and that the State intentionally used this false testimony to prejudice Defendant. (SMAR pp. 7-9; SMAR Exs. 44 & 45) Specifically, Defendant offers these affidavits to argue that Defendant "spent most of the night of the shooting, Friday, July 9th, [1999] at Ms. Chamberlain's house, and not in the Uwharrie Forest with Ms. Smith." (SMAR p. 7) However, Chamberlain's post-trial affidavit of 14 June 2012 indicates that she "left for work between five and six p.m." on the evening of Friday, 9 July 1999, and did not return home until "around one or one thirty a.m. on Saturday morning." (SMAR Ex. 44 p. 2) Although Chamberlain claims to have left Defendant at her residence and returned to find him asleep on her couch, she does not claim to know the whereabouts of Defendant during the time that she was gone. (See SMAR Ex. 44) Additionally, while Chamberlain claims that she spoke to Defendant upon waking him up when she returned home and that "sometime later" Defendant crawled into bed with her, Chamberlain contends that Defendant was gone when she awoke (although she does not know what time she awoke, but that it was light outside). (SMAR Ex. 44 p. 2) The Court finds that Chamberlain's affidavit does not establish that Defendant spent most of the night of the shooting at Chamberlain's house.

36. Additionally, Chamberlain's affidavit of 14 June 2012 indicates that "Tonya Monk also came by that Friday after the Fourth of July holiday around five p.m. to pick up her car, which she had left there a few days before. Joe Loflin, a customer at the Badin Lake Boat and Tennis club, drove her to my house and they both saw Scott." (SMAR Ex. 44 pp. 2-3) However, Loflin's affidavit of 14 May 2012 contains no mention of the date that he went to Chamberlain's house and does not identify Defendant as the person he saw sitting in a car outside Chamberlain's house. (See SMAR Ex. 45) Instead, Loflin's affidavit of 14 May 2012 indicates that he remembers giving "Tonya a ride from the Badin Lake Boat and Tennis Club to [Chamberlain's] house a number of years ago." (SMAR Ex. 45 p. 1) According to Loflin, "[i]t was around nine or ten o'clock in the evening and was completely dark" when he and Tonya arrived at Chamberlain's house, rather than "around five p.m." as indicated in Chamberlain's affidavit of 14 June 2012. (SMAR Ex. 45 p. 1; SMAR Ex. 44 pp. 2-3) Also, Loflin does not state that he saw Defendant at Chamberlain's house. Instead, Loflin's affidavit of 14 June 2012 states that he was in his car when he saw Tonya talking to "a slim white male, who appeared to be fairly tall" sitting in another car and that the "driver's window was rolled down, and the man's arm, hanging on the door, had several tattoos." (SMAR Ex. 45 p. 1) In short, Loflin's affidavit fails to specifically identify Defendant as the person Loflin saw in the car outside of Chamberlain's house.

37. Since Chamberlain's affidavit does not establish that Defendant spent most of the night of the shooting at Chamberlain's house, it cannot be used to prove Smith's testimony was

false. Since Loflin's affidavit does not establish the date on which he took Tonya to Chamberlain's house or that Defendant was the person he saw in the car at Chamberlain's house, it cannot be used to prove that Smith's testimony was false. Additionally, neither affidavit indicates that Chamberlain or Loflin spoke to law enforcement officers or prosecutors at all. (See SMAR Ex. 44 & 45) Thus, even if the post-conviction affidavits of Chamberlain and Loflin could somehow prove that Smith's testimony was false, they cannot establish that the State knew that her testimony was false and intentionally used it to Defendant's prejudice. See State v. Sanders, 327 N.C. 319 337, 395 S.E.2d 412, 424 (1990), cert. denied, 498 U. S. 1051, 111 S. Ct. 763, 112 L. Ed. 782 (1991). Therefore, Claim I of Defendant's MAR and SMAR as it applies to the post-conviction affidavits of Chamberlain and Loflin is without merit.

H. Affidavits of Larry Smith and Joyce Allen

38. Defendant contends that the post-conviction affidavits of Larry Smith ("Larry") and Joyce Allen ("Joyce") show that Smith's testimony was false, that the State knew it was false and intentionally used it to prejudice Defendant. (SMAR pp. 9-10; SMAR Exs. 46 & 47) These two affidavits have two things in common: (1) neither of the affiants claim to have any first-hand knowledge of the events surrounding Gailey's murder or the events at the lake house on 9-10 July 1999; and (2) neither of the affidavits divulge inconsistent statements by Smith. (See SMAR Exs. 46 & 47) Instead, each affidavit purports to divulge a motive for Smith to provide false testimony against Defendant, i.e., to get revenge on Defendant for leaving her for another woman. (See id.) Since Larry and Joyce have no first-hand knowledge of the events surrounding Gailey's murder or the events at the lake house on 9-10 July 1999, their affidavits cannot be used to prove that Smith's testimony at trial was in fact false, much less that the State knew of its falsity and intentionally used this testimony to prejudice Defendant. Therefore, Claim I of Defendant's MAR and SMAR as it applies to the affidavits of Larry and Joyce is without merit.

Summary Disposition of Claim I

39. For the reasons listed above, the Court concludes that Claim I of Defendant's MAR and SMAR is procedurally barred with regard to those portions of Smith's testimony which were raised on direct appeal and ruled upon by the Supreme Court of North Carolina pursuant to N.C.G.S. § 15A-1419(a)(2). Additionally, the Court concludes that Defendant has failed to show good cause and actual prejudice to justify this Court's lifting of the procedural bar for the evaluation of Defendant's claim on the merits. N.C.G.S. § 15A-1419(b)(1) (2016). Nor has Defendant shown that a miscarriage of justice will result if this Court does not review his procedurally defaulted claims. N.C.G.S. § 15A-1419(b)(2) (2016). Therefore, Claim I of Defendant's MAR and SMAR is procedurally barred from this Court's review under N.C.G.S. § 15A-1419(a)(2) with regard to those portions of Smith's testimony which were raised on direct appeal and ruled upon by the Supreme Court of North Carolina.

40. For the reasons listed above, the Court concludes that Claim I of Defendant's MAR and SMAR is procedurally barred with regard to those portions of Smith's testimony not raised on direct appeal and is procedurally barred with regard to the entirety of Johnson's

testimony pursuant to N.C.G.S. § 15A-1419(a)(3). Additionally, the Court concludes that Defendant has failed to show good cause and actual prejudice to justify this Court's lifting of the procedural bar for the evaluation of Defendant's claim on the merits. N.C.G.S. § 15A-1419(b)(1) (2016). Nor has Defendant shown that a miscarriage of justice will result if this Court does not review his procedurally defaulted claims. N.C.G.S. § 15A-1419(b)(2) (2016). Therefore, Claim I of Defendant's MAR and SMAR is procedurally barred from this Court's review under N.C.G.S. § 15A-1419(a)(3) with regard to those portions of Smith's testimony not raised on direct appeal and the entirety of Johnson's testimony.

41. In the alternative, the Court concludes, for the reasons listed above, that Claim I of Defendant's MAR and SMAR is without merit. Defendant has failed to show the testimony of Smith was false and that the State knew the testimony was false and intentionally used it to Defendant's prejudice. Additionally, Defendant has failed to show the testimony of Johnson was false and that the State knew the testimony was false and intentionally used it to Defendant's prejudice.

42. The Court concludes that Defendant is not entitled to an evidentiary hearing on Claim I of his MAR and SMAR. See N.C.G.S. §§ 15A-1419(b), 15A-1420(c)(1); State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 763 (1998). **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss Claim I of Defendant's MAR and SMAR is ALLOWED.

CLAIM II of MAR and SMAR

43. Defendant claims that he received ineffective assistance of counsel ("IAC") at the guilt phase of his trial because trial counsel failed to present evidence and failed to call the following witnesses to testify at the guilt phase: (1) Tanzy Lanier; (2) Dolly Ponds; (3) an expert crime scene analyst; (4) Robert Johnson; (5) Lois Lawson; (6) Troy Spencer; (7) Christina Fowler Chamberlain; (8) Joe Loflin; (9) Larry Smith; and (10) Joyce Allen. (MAR pp. 35-40; SMAR pp. 12-20) For the reasons enumerated below, the Court finds that Defendant's IAC claim regarding the presentation of evidence at the guilt phase of his trial is without merit in its entirety and as to each of its subparts.

Claim II is Without Merit

44. The Court finds that Defendant has failed to show both a deficiency of counsel and prejudice resulting therefrom. See Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693 (1984); see also, State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). Consequently, Defendant's contentions are without merit and are denied without an evidentiary hearing. See N.C.G.S. § 15A-1420(c)(1), (6); State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 763 (1998), cert. denied, 528 U.S. 1095, 120 S. Ct. 835, 145 L. Ed. 2d 702 (2000).

45. First and foremost, the record shows defense counsels' decision not to call any witnesses at the guilt phase of Defendant's trial was a tactical decision that was made after

consultation with Defendant. After the trial court denied Defendant's motions to dismiss at the close of the State's evidence, Defendant's counsel, Mr. Pierre Oldham ("Mr. Oldham") announced to the trial court that Defendant would not be offering any evidence during the guilt-innocence phase. (T p. 2163) The trial court then had Defendant sworn and inquired whether Defendant understood his rights and whether he wished to present evidence, to which Defendant responded, "Well, I don't know anything. I don't know what happened, so I have nothing to contribute to it." (T pp. 2164-65) Defendant also indicated that he did not wish to testify and that he understood the consequences of not doing so. (T p. 2165) The trial court then found that Defendant voluntarily, knowingly, and willingly understood his rights, chose not to testify, and conceded in the judgment of his counsel in not presenting any evidence. (T p. 2166) Therefore, the Court finds that defense counsels' decision not to call any witnesses at the guilt phase of Defendant's trial was a tactical decision that was made after consultation with Defendant. Consequently, the entirety of Claim II of Defendant's MAR and SMAR is without merit. See State v. Moore, 194 N.C. App. 754, 759, 671 S.E.2d 545, 549 (2009), rev'd on other grounds, 363 N.C. 793, 688 S.E.2d 447 (2010). Additionally, for the reasons enumerated below, the Court finds that the subparts of Claim II of Defendant's MAR and SMAR are without merit.

A. Tanzy Lanier

46. Defendant contends that trial counsel was ineffective in not calling Tanzy Lanier ("Lanier") to testify at the guilt phase for two reasons. First, Defendant contends that Lanier "knew that Vanessa Smith was at the [lake] house when Chris Gailey's murder occurred, and could not possibly have witnessed the series of events Smith described to the jury." (MAR p. 36) Second, Defendant contends that Lanier's testimony would "have established evidence to impeach prosecution witness Robert Johnson" which was relevant because, according to Defendant, "[i]t was Johnson's testimony regarding when Smith arrived home that misled the jury into believing Smith had sufficient time to accompany Gailey and Allen into the forest and witness the events she described." (MAR pp. 27-38) Thus, both of Defendant's contentions regarding trial counsel's alleged IAC for failing to call Lanier as a witness center around the one to two hour time period for which Lanier, in her affidavit of 27 May 2007, claims Smith was absent from the lake house on the night of Gailey's murder. (See MAR Ex. 5 p. 2)

47. Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable. As noted in the merits ruling on Claim I above, Lanier's affidavit of 27 May 2007 conflicts with the statement Lanier made to law enforcement on 18 July 1999, conflicts with the statement that Lanier's husband, Danny Lanier ("Danny"), made to law enforcement on 18 July 1999, and conflicts with Johnson's testimony on the length of Smith's absence from the lake house. More importantly, Danny's statement to law enforcement, which states that Defendant, Gailey, and Smith left together at approximately 9:00 p.m. and Smith returned to the lake house "between 12 midnight and 1 a.m. on Saturday, July 10, 1999," actually corroborates Johnson's testimony that Smith was absent for three to four hours. (MAR Ex. 1 p. 4; T p. 1469) Thus, even if Lanier had told trial counsel about the one to two hour time period in her affidavit of 27 May 2007, trial counsel's calling her as a witness would have resulted in Lanier's impeachment by her 18 July

1999 statement to law enforcement. Additionally, this would have allowed the State the opportunity to call Danny as a witness to both impeach Lanier's one to two hour time period and corroborate Johnson's three to four hour time period.

B. Dolly Ponds

48. Defendant contends that trial counsel was ineffective for failing to investigate the potential testimony of Dolly Ponds ("Ponds") and call Ponds as a witness. (MAR pp. 38-40) The court finds that Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable. First, Defendant fails to show that trial counsel were deficient in their representation of him. Defendant fails to show that trial counsel even knew of Ponds' existence. In her affidavit attached to Defendant's MAR, Ponds stated, "I have not been interviewed before by anyone concerning Scott Allen's case and/or the death of Chris Gailey." (MAR Ex. 6 p. 3) Additionally, Ponds does not claim to have talked to anyone about what Smith allegedly told her regarding Gailey's murder prior to or during Defendant's trial. (See MAR Ex. 6) The Court finds that trial counsels' inability to locate a potential witness who remained silent regarding information that she allegedly knew during the pendency of Defendant's trial is not objectively unreasonable.

49. Next, Defendant fails to show prejudice resulting from any alleged deficiency. Even if Ponds had contacted defense counsel, deciding not to call Ponds as a witness would not be objectively unreasonable and would not have so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable. In her affidavit, Ponds claims that Smith made statements inconsistent with her testimony at trial while they were in the Montgomery County Jail together. (See MAR Ex. 6) Specifically, Ponds claims that Smith told her that:

> She and her boyfriend still wanted more money. At some point, all three went out to the woods in a truck. As they got out of the truck, her boyfriend hit the guy in the head or shot him in the head. Her boyfriend then kicked the guy. The boyfriend took the guy's wallet. The boyfriend got back in the truck and told Vanessa that he "had killed the son-of-a-bitch." Vanessa said "let's go, let's go." Vanessa and her boyfriend then went to get some more crack. After that, they went to check on the guy. They threw rocks at the guy. The guy didn't move. They then left the woods.

(MAR Ex. 6 p. 1)

50. This testimony, if it had been admitted, would not have benefitted Defendant. Smith's alleged statement to Ponds not only implicates Defendant as Gailey's murderer, but it also corroborates Smith's testimony that Defendant threw rocks at Gailey to "check on" him and that the motive for killing Gailey was to acquire money to buy drugs. Even more damaging to Defendant's case, Smith's alleged statement to Ponds indicates that Defendant "took the guys wallet" and told Smith that he "'had killed the son-of-a-bitch.'" (Id.) At the charge conference in this case, the trial court instructed the jury on the felony murder rule regarding the taking of

Gailey's truck but not regarding the taking of Gailey's wallet. This was because, according to the evidence presented, the wallet was not taken from Gailey's body but was stolen by Smith at the lake house sometime after Gailey's murder. (T pp. 2182-83) Had trial counsel called Ponds to testify, they would not only have succeeded in corroborating the major points of Smith's testimony, but they would have also introduced the idea that Defendant stole Gailey's wallet shortly after murdering him.

C. A Crime Scene Analyst

51. Defendant also contends that trial counsel was ineffective for failing to call an expert crime scene analyst to testify regarding alleged discrepancies between Smith's testimony and the physical evidence found at the location of Gailey's murder. (SMAR pp. 12-15) In support of this contention, Defendant presents the affidavit and report of Gregg O. McCrary ("McCrary"), a post-conviction crime scene analyst who reviewed "selected trial testimony, descriptions of the crime scene reported by law enforcement, crime scene and autopsy photographs, police incident reports, witness affidavits and numerous other documents." (SMAR Ex. 41 p. 1) McCrary's report concludes that "the totality of the evidence at the scene is more consistent with a dispute that deteriorated into a gunfight and significantly contradicts and discredits Ms. Smith's story, which was the basis for charging and prosecuting Scott Allen." (SMAR Ex. B of Ex. 41 p. 11) However, McCrary's report is based upon the assumption that "[t]he only link between Scott Allen and the murder of Christopher Gailey are the allegations made by Ms. Smith." (SMAR Ex. B of Ex. 41 p. 12) This assumption is faulty as is belied by the record.

52. Several other witnesses corroborated Defendant's involvement in the murder. Absent from McCrary's analysis and report are the trial testimony of Harold Blackwelder ("Blackwelder"), Jeffrey Page ("Page"), and Coy Honeycutt ("Honeycutt"). (See SMAR Ex. 41) At Defendant's trial, Blackwelder testified that Defendant and Smith arrived at a cookout at the home of Jeff Brantley in Shallotte, North Carolina, on 10 July 1999. (T pp. 1748-49) As soon as Defendant and Smith arrived, Blackwelder went outside and saw a white pickup truck matching the description of Gailey's truck provided by Johnson earlier in the trial. (See T pp. 1749-50; T pp. 1464-65) Blackwelder then heard Defendant talking to Page about wanting to sell Page the truck, and Page even asked Blackwelder for his opinion on the truck. (T p. 1750)

53. Then, Page testified that Defendant offered to sell him the truck for $800.00, a price substantially lower than the fair market value of the truck. (See T pp. 1781, 2098 (noting the value of a GMC 1998 truck on 9 July 1999 was approximately $16,000.00)) Prior to making the offer, Defendant told Page that he "had shot a fellow" in the Uwharrie Forest with a shotgun, but Defendant did not tell Page the fellow's name. (T p. 1780) Defendant told Page that after Defendant shot the fellow, he "heard the boy groaning, and he also stated that he would throw a rock and when that rock would hit the ground the fellow thought that it was him and the fellow had a gun undoubtedly and went to shooting." (T p. 1781) Defendant told Page that he was afraid to go near the fellow because the fellow had a gun. (Id.) Also, Defendant told Page "that the reason he shot that boy [was] because he thought that boy was going to rat him off because he was an escapee from Troy prison." (T p. 1785) Page did not question the good deal that he

was getting on the truck until after he had bought it from Defendant and was riding back to Albemarle, North Carolina, with Smith, who confirmed Defendant's story. (T pp. 1782-87) At that point, Page decided to get rid of the truck. (T p. 1787)

54. Page then sold the truck to Honeycutt who owned a salvage yard in Conway, South Carolina, through the use of an intermediary named Eddie Sherron ("Sherron"). (T pp. 1788-90) The State called Honeycutt, who testified that Page and Sherron brought the truck to his salvage yard in Conway in July of 1999. (T p. 2045) Honeycutt testified that he bought the truck from Sherron and made a partial payment of $1,200.00, but Sherron never returned to collect the rest of the agreed upon price or to provide Honeycutt with title to the truck. (T pp. 2046-47) Defendant's statements to Page and Defendant's willingness to sell Gailey's truck to Page for $800.00 shortly after the murder thus link Defendant to the murder. Consequently, any alleged deficiency of trial counsel and prejudice resulting therefrom regarding counsel's failure to call a crime scene analyst must be viewed in light of Defendant's subsequent statements and actions that link him to Gailey's murder.

55. The decision of whether or not to call an expert witness is the very type of trial tactic that warrants deference and for which trial counsel is given wide latitude. Moore, 194 N.C. App. at 759, 671 S.E.2d at 549. Even the United States Supreme Court has recognized that a reasonable attorney could decide to forgo consultation with experts or the introduction of expert testimony based upon the circumstances of a particular case known to the attorney. See Harrington v. Richter, 562 U.S. 86, 106-07, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). The mere fact that an attorney does not seek to consult experts or introduce expert testimony does not render the attorney's performance deficient in the constitutional sense. See State v. Quick, 152 N.C. App. 220, 566 S.E.2d 735 (2002) (concluding that failure to call mental health expert to testify regarding Defendant's mental illness to negate the mental state required for the offenses charged did not render counsel's assistance constitutionally defective because, under the circumstances, there was no basis to conclude that counsel's decision was anything other than a sound tactical choice). After all, a recognized axiom of criminal trial advocacy states, "To support a defense argument that the prosecution has not proved its case it is sometimes better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." Harrington, 562 U.S. at 109.

56. Here, the record supports the conclusion that trial counsels' apparent decision to focus on the doubt created by Smith's gaps in memory, addiction and use of controlled substances on the date of Gailey's death, and failure to maintain a cohesive timeline, rather than attempting to prove Defendant's innocence through the use of a crime scene analyst was a sound tactical decision. In light of the inculpatory statements Defendant made to Page and the fact that Defendant sold Gailey's truck to Page for $800.00 shortly after Gailey was murdered, trial counsels' failure to call an expert crime scene analyst to testify was not an objectively unreasonable decision. Additionally, Defendant has failed to show that he suffered any prejudice from trial counsels' failure to call a crime scene analyst because Defendant's statements to Page, possession of Gailey's truck so soon after Gailey's demise, and willingness to sell the truck for a price far below the fair market value all tended to demonstrate evidence of Defendant's guilt. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by

committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

D. Robert Johnson

57. Defendant contends that trial counsel were ineffective for failing to call Robert Johnson ("Johnson") as a witness to testify that Defendant was not carrying a sawed-off shotgun when he left the lake house with Gailey and Smith on the night of Gailey's murder and that Gailey's shotgun remained in the closet at the lake house when they left the lake house that evening. (SMAR p. 15) The Court finds Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable. Defendant's argument which refers to Gailey's shotgun as "the supposed murder weapon" fails to recognize that the sawed-off shotgun that Smith testified she saw Defendant carrying in the Uwharrie Forest was not Gailey's shotgun. Smith testified that she saw Defendant carrying a "black sawed-off shotgun" in the Uwharrie Forest when the three of them parked and began walking down the trail. (T p. 1536) In contrast, Johnson's pretrial statement to law enforcement described Gailey's shotgun as having a brown wooden stock and brown wooden pump. (SMAR Ex. 53 p. 000912)

58. Additionally, neither Johnson nor Smith testified that they saw Defendant leave the lake house with Gailey's shotgun, or any gun at all for that matter. (T pp. 1467-68, 1533-35) In fact, defense counsel actually elicited the fact that Johnson had given a statement to law enforcement that he had never seen Defendant with a gun. (T p. 1493) Furthermore, both the State and the defense confirmed with Johnson that the last time he saw Gailey's shotgun was when the Randolph County Sheriff's Office seized it during a search of the lake house shortly after 9 July 1999. (T pp. 1482, 1503) In contrast, Smith testified that Defendant hid the sawed-off shotgun used in the shooting in the Uwharrie Forest just before the two left to drive back to the lake house. (T p. 1543) In short, there was no evidence presented at trial establishing that Defendant shot Gailey with Gailey's shotgun. Consequently, trial counsels' failure to call Johnson to testify that Defendant was not carrying a shotgun when he left the lake house and that Gailey's shotgun remained in the closet was not objectively unreasonable, nor is there a reasonable probability that, but for trial counsel failing to call Johnson to testify to these matters, the result of the proceeding would have been different. See Strickland, 466 I.S. at 694.

59. Furthermore, the Court finds that defense counsels' failure to call Johnson to testify about the location of Gailey's shotgun was not objectively unreasonable because Johnson gave a pretrial statement to law enforcement indicating that Gailey's shotgun was missing from his closet after Gailey's murder. (SMAR Ex. 53 p. 000914) If trial counsel had called Johnson to testify about the location of Gailey's shotgun when Defendant, Smith, and Gailey left the lake house, it would have opened the door for the State to cross-examine Johnson about his prior statement regarding the absence of the shotgun after Gailey's murder. Since neither Johnson or Smith testified that they saw Defendant leave the lake house with a gun, it would not have been favorable to Defendant to risk the State's drawing attention to the fact that Johnson gave a prior

statement implying that Gailey's shotgun was missing on the night of the murder. (See T pp. 1467-68, 1533-35)

60. Next, Defendant contends that trial counsel was ineffective for failing to call Johnson as a witness to testify (1) that Dustin Maness ("Maness") was camping in the Uwharrie Forest and conversed with Defendant in the woods on the night of Gailey's murder, (2) that Maness and Gailey had never reconciled after an altercation in May or June of 1999, during which Gailey threatened Maness with a knife, and (3) after Gailey's body was discovered, Maness said that he was glad Gailey was dead and that he deserved it. (See SMAR pp. 15-16; SMAR Ex. 43 p. 2; SMAR Ex. 53 p. 000914) Essentially, Defendant contends that trial counsel was ineffective for not calling Johnson as a witness in an attempt to prove that Maness was the actual murderer, or at least to raise the specter of Maness being present in order to contradict Smith's testimony that only Defendant, Smith, and Gailey were present during Gailey's murder. (See SMAR p. 16) However, examination of Johnson's potential testimony shows that failing to call Johnson as a witness was not objectively unreasonable and did not so prejudice the defense as to deprive Defendant of a fair trial whose result was reliable.

61. First, Johnson had no first-hand knowledge of any of the events that transpired in the Uwharrie Forest on the night of Gailey's murder. According to the evidence presented at trial, Johnson remained at the lake house when Defendant, Smith, and Gailey left for the Uwharrie Forest and was still present when Smith later returned. (T pp. 1466-69) Johnson's post-conviction affidavit indicates that his sole source of information as to what happened in the Uwharrie Forest on the night of Gailey's murder came from his after-the-fact conversation with a person named Mike Simpson who had talked to Dustin Maness. (SMAR Ex. 43 p. 2) Johnson's pretrial statement to law enforcement indicates the same. (SMAR Ex. 53 p. 000914) Thus, any potential testimony Johnson might have had about what happened in the Uwharrie Forest on the night of Gailey's murder would have been inadmissible hearsay if offered to prove that Maness was in the Uwharrie Forest on the night in question and had the stated interaction with Defendant. See N.C.G.S. § 8C-1, Rule 801(c) and Rule 802. Also, the logical implications of Johnson's potential testimony are that Defendant intended to murder Gailey and wished to keep Maness away by refusing Maness' help and telling him not to worry if he heard gunshots. (See SMAR Ex. 43 p. 2 and SMAR EX 53 p. 000914) Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

62. Second, Johnson's potential testimony that Gailey and Maness failed to reconcile after their altercation and Johnson's potential testimony that Maness said he was glad Gailey was dead and that he deserved it were not material facts in Defendant's prosecution. Defendant contends that Johnson's potential testimony for Defendant regarding these two matters would have been admissible at trial because they "would have directly rebutted Maness's testimony for the prosecution that he called Gailey about a week after the altercation at the trailer and that they 'were friends' at the time of the murder." (SMAR p. 16) However, the record shows that Maness's testimony regarding his altercation with Gailey and their subsequent reconciliation occurred in response to questions from defense counsel during cross-examination. (T pp. 1837-

38) The State did not elicit any information about the altercation or reconciliation on direct examination of Maness. (See T pp. 1820-24) Since defense counsel elicited Maness's testimony, Maness's answers on cross-examination were conclusive and Defendant would not have been permitted to contradict them with prior inconsistent statements or other extrinsic evidence. State v. Green, 296 N.C. 183, 192, 250 S.E.2d 197, 203 (1978) (where questions on cross-examination "concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony").

63. The Court finds that Maness' alleged statement that he was glad Gailey was dead and that Gailey deserved it is not material or relevant to the issue of whether Defendant murdered Gailey. Additionally, Maness testified during cross-examination at trial that he and Gailey did, in fact, reconcile after their altercation at the lake house in May or June 1999. (T pp. 1837-38) In light of trial counsels' thorough cross-examination of Maness (See T pp. 1825-38), trial counsels' failure to call Johnson in an attempt to introduce extrinsic evidence on collateral matters was not objectively unreasonable and did not so prejudice the defense as to deprive Defendant of a fair trial whose result was reliable.

E. Lois Lawson

64. Defendant contends that trial counsel were ineffective for failing to call Lois Lawson ("Lawson") as a defense witness. (SMAR pp. 16-17) In support of this contention, Defendant presents the affidavit of Lawson. (SMAR Ex. 48) However, Lawson's affidavit demonstrates that Lawson knew nothing about Gailey's murder or what happened in the Uwharrie Forest on that night, and knew nothing about the events that transpired at the lake house on 9-10 July 1999. (See SMAR Ex. 48) Instead, Lawson states in her affidavit that her husband at the time, Jamie Fender ("Fender"), went out looking for Defendant just after dark on the night of Gailey's murder because he was furious with Defendant. (SMAR Ex. 48 p.1) According to Lawson, Fender took an assault rifle with him and had learned from Gailey that Defendant had been frequenting Johnson's lake house. (Id.) Once Fender left, Lawson called Johnson's lake house and told Defendant to leave because Fender was on his way. (Id.) Then, Lawson makes the following statements:

> I do not know whether Jamie had enough time to find Scott that night. He was gone for about one and a half or two hours. There may have been people other than Chris, Scott and Vanessa Smith out in the woods that night, but I do not know whether Jamie was one of them.

(Id.) Thus, Lawson's affidavit contains nothing but mere speculation about what happened in the Uwharrie Forest on the night of Gailey's murder.

65. Additionally, since the only gunshot wounds on Gailey's body were shotgun wounds (T p. 2005), there is no link between Fender's assault rifle and Gailey's murder. Since Lawson knew nothing about Gailey's murder or the events at the lake house on 9-10 July 1999, Lawson could not testify to any relevant facts surrounding Gailey's murder. Further, if trial

counsel had called Lawson to testify that Gailey told Fender that he could find Defendant at Johnson's lake house, and that Lawson communicated that fact to Defendant immediately before Defendant, Smith, and Gailey left for the Uwharrie Forest, the jury may well have inferred that Defendant believed, based upon Gailey's betrayal of Defendant to Fender, that Gailey was also "going to rat him off because he was an escapee from Troy prison" as Defendant told Page. (See T p. 1785) Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

F. Troy Spencer

66. Defendant contends that trial counsel were ineffective for failing to call Troy Spencer ("Spencer") as a defense witness. However, in his post-conviction affidavit, Spencer does not claim to have any first-hand knowledge about Gailey's murder, about anything that happened in the Uwharrie Forest on 9-10 July 1999, or about any of the events that transpired at the lake house on that night. (See SMAR Exs. 42 & 49) Instead, Defendant offers Spencer's affidavit of 2 October 2012 and letter of 31 March 2003 to show that defense counsel was ineffective for not calling Spencer at trial because Spencer could have allegedly testified that (1) Smith repeatedly confessed to shooting Gailey and stated that the murder was her plan, (2) Smith admitted that her motive in testifying at Defendant's trial was personal revenge, and (3) that contrary to Smith's testimony at trial, Smith continued to abuse controlled substances and was not drug free at the time of Defendant's trial. (SMAR pp. 17-19) However, Spencer's letter of 31 March 2003, which defense counsel appears to have possessed since 2 April 2003, contradicts Spencer's affidavit of 2 October 2012 on the contentions listed above. (Compare SMAR Exs. 42 & 49)

67. For instance, on the contention that Smith repeatedly confessed to shooting Gailey, Spencer's letter of 31 March 2003 states, "She told me that 'she wanted the big bag of cocaine that Chris Gailey always displayed , and she wanted the big roll of cash.' She told me that it was her idea to jump Chris and to take it. It was all premeditated on both their parts." (SMAR Ex. 49 pp. 00512-13) Then, Spencer's letter goes on to state, "[S]he told me that she used witchcraft on Scott and went on and on at him 'until he agreed to plan out a meeting with Chris to make an exchange for some guns they stole for cocaine.' But they 'both planned' it out for days." (SMAR Ex. 49 p. 00514) Finally, Spencer's letter states, "She planned that murder. It's time she gets a taste of her own treatment of people. 'State's witness.' Hell, she probably pulled the trigger herself." (SMAR Ex. 49 p. 00517) The Court finds that, rather than establishing that Smith repeatedly confessed to shooting Gailey, Spencer's letter of 31 March 2003 offers only speculation that Smith "probably" pulled the trigger herself. (SMAR Ex. 49) Additionally, to Defendant's detriment, Spencer's letter of 31 March 2003 states that Smith and Defendant planned the murder for days and that "[i]t was all premeditated on both their parts." (SMAR Ex. 49 pp. 00513-14)

68. Next, on the contention that Smith admitted to Spencer that her motive for testifying against Defendant was revenge, Spencer's letter of 31 March 2003 states in pertinent part:

> She was the master-mind in this crime. And Scott was the fall guy from the start. That's her way. Use a man up, then throw him to the lions when she gets hot for somebody else. She manipulated me when I was down and out in that jail. She used me because I told her I would not stop at anything till I got her out. She used, once again, her sexuality to sucker me in. Once she got out, EVERYTHING changed. She put a spell on me and I've still got to pay for the damage she caused my life for years to come.

(SMAR Ex. 49 p. 00516) (emphasis in original) Thus, contrary to Defendant's contention that Smith's motive for testifying against Defendant was revenge, Spencer's letter of 31 March 2003 states that Defendant was the "fall guy from the start" and that Smith manipulated him into murdering Gailey so that she could testify against Defendant for her own freedom. (See SMAR Ex. 49) Additionally, Spencer's letter of 31 March 2003 indicates that his desire to be a witness for Defendant springs from a personal grudge that he holds against Smith. (See id.)

69. Next, on the contention that Smith continued to abuse controlled substances and was on drugs at the time of Defendant's trial, Spencer's letter of 31 March 2003 states in pertinent part, "She may be changed at this time. She is clean from dope and doing good. But it's still in her. She is still a heartless, devious, cold-blooded bitch!" (SMAR Ex. 49 p. 00514) Thus, contrary to Defendant's contention, Spencer's letter of 31 March 2003 actually states that Smith was clean from dope and doing well. In light of Spencer's potential testimony, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

G. Christina Fowler Chamberlain

70. Defendant contends that trial counsel was ineffective for failing to call Christina Fowler Chamberlain ("Chamberlain") as a witness to testify that Defendant spent the night of Gailey's murder at Chamberlain's house. (SMAR p. 19) In support of this contention, Defendant presents the affidavit of Chamberlain which was executed on 14 June 2012. (SMAR Ex. 44) However, Chamberlain's affidavit does not actually establish that Defendant spent the night of 9-10 July 1999 at her house. Instead, Chamberlain's affidavit states that she "left for work between five and six p.m." on the evening of Friday, 9 July 1999, and did not return home until "around one or one-thirty a.m. on Saturday morning." (SMAR Ex. 44 p. 2) Although Chamberlain claims to have left Defendant at her residence and returned to find him asleep on her couch, she does not claim to know the whereabouts of Defendant between the time she left for work and the time she arrived home again. (See SMAR Ex. 44) Additionally, while Chamberlain claims that she spoke to Defendant for "a little while" upon waking him up when she returned and that "sometime later" Defendant crawled into bed with her, Chamberlain contends that Defendant was gone when she awoke (although she does not know what time this was, but that it was light outside). (SMAR Ex. 44 p. 2)

71. More importantly, the times during which Chamberlain claims she saw Defendant at her residence do not materially conflict with the time frame of Gailey's murder. According to Chamberlain's affidavit, she did not see Defendant between 5:00 or 6:00 p.m. on 9 July 1999 and 1:00 or 1:30 a.m. on 10 July 1999, when she returned from work. (See SMAR Ex. 44 p. 2) This would have put Defendant out of Chamberlain's sight for a minimum of seven hours. At trial, Johnson testified that he believed Defendant, Gailey, and Smith left the lake house at 8:00 p.m. or later because it was dark outside when they left. (T pp. 1468-69) Johnson believed that Defendant, Gailey, and Smith were gone for three to four hours until Smith returned alone. (T p. 1469) Although Smith testified that they left the lake house in the daylight of late afternoon (T p. 1535), the fact that the murder occurred in July means that the daylight of late afternoon could have lasted until 8:00 or 8:30 p.m. Since the State had established that the three left the lake house after 8:00 p.m., and since Smith returned three to four hours later, the evidence at trial established that Defendant had sufficient opportunity to murder Gailey and send Smith back to the lake house before Chamberlain claims to have found Defendant asleep on her couch at around 1:00 to 1:30 a.m. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

H. Joe Loflin

72. Defendant contends that trial counsel was ineffective for failing to call Joe Loflin ("Loflin") as a witness to corroborate Chamberlain's testimony that Defendant spent the night of 9-10 July 1999 at Chamberlain's house. (SMAR p. 19) In support of this contention, Defendant presents the post-conviction affidavit of Loflin executed on 14 May 2012. (SMAR Ex. 45) However, Loflin's affidavit does not actually establish that Defendant spent the night of 9-10 July 1999 at Chamberlain's house. Instead, Loflin's affidavit contains no mention of the date when he purportedly went to Chamberlain's residence and does not positively identify Defendant as the person he saw sitting in a car outside her residence at 9:00 or 10:00 p.m. (See SMAR Ex. 45) Furthermore, Loflin's affidavit actually contradicts Chamberlain's affidavit regarding the time that Loflin supposedly went to her house. According to Chamberlain's affidavit, Loflin brought Tonya Monk ("Monk") to her house at approximately 5:00 p.m. on 9 July 1999 to pick up a car that Monk had left there a few days prior. (SMAR Ex. 44 pp. 2-3) In contrast, Loflin's affidavit claims that he and Monk arrived at Chamberlain's residence at 9:00 or 10:00 p.m. and that it was "completely dark." (SMAR Ex. 45 p. 1) Thus, Loflin's affidavit neither corroborates Chamberlain's affidavit nor establishes that Defendant was at Chamberlain's residence on the night of 9-10 July 1999. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

I. Joyce Allen and Larry Smith

73. Defendant contends that trial counsel was ineffective for not calling Joyce Allen ("Joyce") and Larry Smith ("Larry") to testify for the same reason, because they could "have

testified about how angry Vanessa got when she learned in mid-July, 1999 that Allen had gone back to Denver to see his new girlfriend, Kelly Racobs." (SMAR p. 19) According to Defendant, "[t]his testimony is critical because Vanessa Smith went to the police in Charlotte and accused Allen of murdering Gailey immediately upon learning that Allen intended to stay in Denver with his new girlfriend." (SMAR p. 20) In support of this contention, Defendant presents the affidavits of Joyce and Larry. (SMAR Exs. 46 & 47) However, trial counsel had no need to call either of them because trial counsel had already established these facts through effective cross-examination of Smith. (See T pp. 1695-1730)

74. For example, on cross-examination, trial counsel elicited from Smith that she suspected Defendant was having a romantic relationship with Kelly Racobs ("Racobs") when Smith returned to North Carolina from Denver and Defendant remained. (T pp. 1695-98) When trial counsel asked Smith what made her suspect that Defendant was seeing Racobs, Smith responded, "Things he would say. He would tell me some of the same lies that he used to tell his wife about seeing me, he would just remanufacture them and tell them to me." (T p. 1696) Smith also testified that Defendant admitted to her that he had been seeing Racobs before he returned to North Carolina from Denver. (T pp. 1696-98) Also in response to cross-examination, Smith testified that she told Officer Poole that she called Racobs at home and at work and "gave her hell" about Defendant because he was Smith's man. (T p. 1704)

75. Furthermore, Smith testified on cross-examination that, after Defendant fled following Gailey's death, Smith followed Defendant to Denver because she was jealous about his relationship with Racobs and because Smith was pregnant. (T p. 1714) Smith admitted that she was angry when she went to Denver to find Defendant and that, when Defendant left her in her condition, she did not know what to do. (T pp. 1714-15) Additionally, Smith admitted that her feelings of jealousy were so strong that she began looking through Defendant's things even before she followed Defendant to Denver. (T p. 1715) Finally, Smith testified that, although she was mad at Defendant and afraid of him in Denver, she did not go to the police in Denver; instead, Smith returned to North Carolina, turned herself in to law enforcement, and gave her statement that Defendant murdered Gailey. (See T pp. 1717-18, 1730)

76. Since trial counsel elicited the facts listed above from Smith on cross-examination, they did not need to call Joyce or Larry to prove that Smith was mad at Defendant when she followed him to Denver, or that Smith accused Defendant of the murder upon her return. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

Summary Disposition of Claim II

77. For the reasons listed above, the Court concludes that Claim II of Defendant's MAR and SMAR is without merit in its entirety and as to each of its subparts. Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

78. The Court concludes that Defendant is not entitled to an evidentiary hearing on Claim II of his MAR and SMAR. See N.C.G.S. § 15A-1420(c)(1); McHone, 348 N.C. at 257, 499 S.E.2d at 763. **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss Claim II of Defendant's MAR and SMAR is **ALLOWED.**

CLAIM III of MAR and SMAR

79. Defendant claims that he received ineffective assistance of counsel ("IAC") during the guilt phase of his trial because trial counsel failed to adequately cross-examine the following State's witnesses: (1) Vanessa Smith; (2) Wesley Hopkins, Jr.; (3) Lt. Barry Bunting; (4) Robert Johnson; (5) Jeffrey Page; (6) Dustin Maness; and (7) Lilly Efird. (MAR pp. 40-60; SMAR pp. 33-40) For the reasons enumerated below, the Court finds that Defendant's IAC claim regarding trial counsels' cross-examination of these witnesses is without merit.

80. Defendant also claims that trial counsel's cross-examination of Vanessa Smith ("Smith") was rendered ineffective due to the trial court's refusal to reveal Smith's mental health and substance abuse records to trial counsel after an *in camera* inspection of those records. (SMAR Claim III.H and the first paragraph of SMAR Claim III.I, which incorporates SMAR Claim III.H) Additionally, Defendant claims that the trial court's refusal to reveal those records to trial counsel resulted in trial counsel's inability to conduct a *voir dire* of Smith and John Warren, a psychologist for the defense, regarding Smith's mental health and substance abuse. (SMAR Claim III.J) Defendant further claims that the trial court's refusal to reveal Smith's mental health and substance abuse records prevented trial counsel from offering extrinsic evidence of Smith's unreliability. (SMAR Claim III.K) As to these subparts of Claim III of Defendant's SMAR, the Court finds that it is unable to determine from the materials and record before it whether the documents reviewed by the trial court *in camera* were made part of the record on appeal before the Supreme Court of North Carolina. The Court hereby reserves ruling on these subparts of Claim III of Defendant's SMAR as they relate to the trial court's *in camera* review of Smith's sealed records.

Claim III is Without Merit

81. Defendant fails to establish (1) that counsel deficiently represented Defendant by committing an objectively unreasonable error, and (2) that such deficiency prejudiced the defense so as to deprive Defendant of a fair trial whose result was reliable. See Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693 (1984); see also, State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). For the reasons listed below, Defendant's contentions, except for the subparts of Claim III of Defendant's SMAR for which the Court has reserved ruling, are without merit and are denied without an evidentiary hearing. See N.C.G.S. § 15A-1420(c)(1), (6); State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 763 (1998), cert . denied, 528 U.S. 1095, 120 S. Ct. 835, 145 L. Ed. 2d 702 (2000).

A. **Cross-examination of Vanessa Smith**

82. Defendant first contends that Smith's testimony contradicted the crime scene evidence and that trial counsel's failure to cross-examine Smith regarding the crime scene constitutes IAC. (MAR p. 40) However, the record shows that Smith had no firsthand knowledge of the scene where Defendant shot Gailey or any physical evidence found there. According to her testimony at trial, Smith was walking behind Defendant when Defendant pushed her backwards and began firing at Gailey's back. (T p. 1539). Smith then fell to the ground and covered her head in fear during the shooting. (T p. 1540). Smith heard the sound of Gailey in pain but never saw him again after Defendant began firing. (Id.) When Defendant stopped shooting, he grabbed Smith by the back of her shirt and led her back up to the cabin they had passed, which was some distance away. (T pp. 1540-41) From the cabin, Smith saw Defendant approach the area where he had shot Gailey several times, but Smith never approached the area herself. (See T pp. 1540-41)

83. Since Smith never approached the scene where law enforcement officials found Gailey's body and other physical evidence, her lack of firsthand knowledge about the crime scene necessarily foreclosed the possibility of her offering any meaningful testimony on the subject had she been cross-examined. In fact, had trial counsel attempted to cross-examine Smith about the location of physical items found at the crime scene, Smith would have had to state that she did not know how those items came to be there, or worse may have speculated as to what happened.

84. Further, trial counsel did not forgo cross-examining Smith all together. Rather, Smith was cross-examined regarding her extensive drug use, inconsistencies in statements made to law enforcement, and other character flaws. (T pp. 1668-1732) These facts, coupled with the fact that Smith never approached the crime scene, show that failing to cross-examine Smith about the crime scene evidence was not an objectively unreasonable error.

85. Also, assuming *arguendo* that failing to cross-examine Smith about the crime scene evidence was an objectively unreasonable error, Defendant cannot show prejudice under Strickland. The second prong of Strickland requires prejudice so great that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. Since Smith had no firsthand knowledge of the physical state of the crime scene, she could not testify as to what items were recovered from the crime scene, let alone how those items came to be there. Had trial counsel cross-examined Smith regarding the crime scene evidence, it is highly unlikely that Smith repeatedly stating "I don't know" with regard to the crime scene evidence and how it came to be where it was found would have had any bearing on the jury's verdict. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

86. Next, Defendant contends trial counsel was ineffective for failing to obtain a crime scene analyst to assist in cross-examining Smith about items of physical evidence that law enforcement found at the crime scene. (SMAR pp. 33-35) The Court finds that this contention is merely a slight permutation of the above contention that trial counsel was ineffective for failing to cross-examine Smith about the crime scene evidence. Therefore, for all of the reasons and authorities listed above in the Court's adjudication of Defendant's contention that trial counsel was ineffective for failing to cross-examine Smith about the crime scene evidence, which are incorporated herein by reference as is fully set forth, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

87. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Smith about certain portions of the post-conviction affidavit of Christina Fowler Chamberlain ("Chamberlain") and certain portions of the letter which Troy Spencer ("Spencer") delivered to trial counsel prior to trial. (SMAR p. 35; SMAR Exs. 44 & 49) The Court finds that this contention is merely a slight permutation of the contentions contained in Defendant's Claim II F and II G, above, regarding Defendant's IAC claim for trial counsels' failure to call Spencer and Chamberlain as defense witnesses at the guilt phase of Defendant's trial. After all, failing to cross-examine a State's witness regarding out-of-court statements of other people that trial counsel reasonably believed the defense would not call as witnesses at the guilt phase of Defendant's trial is not objectively unreasonable. Additionally, this Court has already found that defense counsels' decision not to call any witnesses at the guilt phase of Defendant's trial was a tactical decision that was made after consultation with Defendant. (See Adjudication of Claim II, above) Therefore, for all of the reasons and authorities listed above in the Court's adjudication of Defendant's contention that trial counsel was ineffective for failing to call Spencer and Chamberlain as defense witnesses at the guilt phase of Defendant's trial, which are incorporated herein by reference as is fully set forth, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable. Consequently, Defendant's contention that trial counsel was ineffective for failing to cross-examine Smith about certain portions of the post-conviction affidavit of Chamberlain and certain portions of the letter which Spencer delivered to trial counsel prior to trial is without merit.

88. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Smith regarding certain portions of the post-conviction affidavit of Dolly Ponds ("Ponds"). (SMAR p. 36) The Court finds that trial counsel was unaware of Ponds at the time of Defendant's trial. According to her affidavit, Ponds failed to tell anyone about her conversations with Smith regarding Gailey's murder at any time prior to or during Defendant's trial. (MAR Ex. 6) Furthermore, as noted in this Court's adjudication of Defendant's Claim II B, above, Ponds' affidavit implicates Defendant in Gailey's murder, verifies the motive for the killing was money to buy drugs, and verifies Smith's claim that Defendant threw rocks at Gailey to "check on him." (MAR Ex. 6) In light of the above facts, the Court finds that cross-examining Smith about Ponds' post-conviction affidavit would not have benefitted Defendant. Therefore, Defendant has

failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

89. Finally, Defendant contends trial counsel was ineffective for failing to cross-examine Smith "about her claim that Allen carried Gailey's sawed-off shotgun into the Uwharrie Forest and used it to kill Chris Gailey." (SMAR p. 37) However, the Court finds that Smith never made such a claim. As noted in this Court's adjudication of Defendant's Claim II D, above, the sawed-off shotgun that Smith testified she saw Defendant carrying in the Uwharrie Forrest was not Gailey's shotgun. Smith testified that she saw Defendant carrying a "black sawed-off shotgun" in the Uwharrie Forest when the three of them parked and began walking down the trail. (T p. 1536) In contrast, Johnson's pretrial statement to law enforcement described Gailey's shotgun as having a brown wooden stock and brown wooden pump. (SMAR Ex. 53 p. 000912) Additionally, neither Johnson nor Smith testified that they saw Defendant leave the lake house with Gailey's shotgun, or any gun at all for that matter. (T pp. 1467-68, 1533-35) Furthermore, both the State and the defense confirmed with Johnson that the last time he saw Gailey's shotgun was when the Randolph County Sheriff's Office seized it during a search of the lake house shortly after 9 July 1999. (T pp. 1482, 1503) In contrast, Smith testified that Defendant hid the sawed-off shotgun used in the shooting in the Uwharrie Forest just before the two left to drive back to the lake house. (T p. 1543) In short, there was no evidence presented at trial establishing that Defendant shot Gailey with Gailey's shotgun.

90. Additionally, Smith's pretrial statements to the Charlotte Police Department and Montgomery County Sheriff's Office indicate that Smith believed that the black sawed-off shotgun she saw Defendant carrying in the Uwharrie Forest belonged to Johnson, not Gailey. (Def's Resp. Ex. 57 p. 000935 ¶1 and Ex. 58 p. 17 ¶5) Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

B. <u>Cross-Examination of Wesley Hopkins, Jr.</u>

91. Defendant contends that trial counsel was ineffective for failing to cross-examine Wesley Hopkins, Jr., ("Hopkins"). (MAR pp. 42-43) The record shows that trial counsel did not cross-examine Hopkins at all. (T p. 1288) However, the Court finds that failing to cross-examine Hopkins at all was not objectively unreasonable under the circumstances of this case and that failing to cross-examine Hopkins did not so prejudice the defense as to deprive Defendant of a fair trial whose result was reliable. Hopkins was the first witness called by the State and gave limited testimony about the fact that he found "a man laying there dead" approximately twenty five yards from his father's cabin while riding an all-terrain vehicle ("ATV"). (T pp. 1282-84) After discovering the body, Hopkins went to the home of Lieutenant Barry Bunting ("Lt. Bunting"), whom Hopkins knew as a law enforcement officer living nearby. (T pp. 1285-86) Hopkins testified that, upon reporting the existence of the dead body to Lt. Bunting, he may have shown Lt. Bunting where the body was, but did not recall whether he showed Lt. Bunting or just told Lt. Bunting where the body was. (T p. 1286) Hopkins testified that he found the dead body

during the daylight hours of Sunday, 11 July 1999, and that it had been raining. (T pp. 1282, 1287) Based upon this limited testimony, there was nothing for trial counsel to cross-examine Hopkins about. Hopkins did not know the identity of the dead body he had found and had no information about how the body came to be in the Uwharrie Forest near his father's cabin. Additionally, Hopkins had no information about whether or not Defendant murdered Gailey. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

92. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Hopkins about the fact that there was another witness to the discovery of Gailey's body, one Julie Culler ("Culler"). (MAR p. 42) However, Defendant has failed to allege, let alone show, how Culler's presence at the discovery of Gailey's body was relevant to his defense. Culler's affidavit does not state that Culler interfered with the discovery of Gailey's body or the crime scene where Gailey's body was discovered. (See MAR Ex. 9) Additionally, Hopkins' affidavit actually states, "Julie and I did not touch anything at the crime scene." (MAR Ex. 8 p. 1) Since Culler did not touch anything at the crime scene, her presence or absence at the discovery of Gailey's body was not relevant to Defendant's defense. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

93. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Hopkins about the lack of substantial blood at the crime scene. (MAR p. 43) However, according to the record, Hopkins discovered Gailey's body in the Uwharrie Forest nearly two days after Defendant shot Gailey. (T pp. 1282-83, 1287, 1290, 1466-67, 1533-40) Additionally, Hopkins testified that it had been raining on the day that he discovered Gailey's body. (T p. 1287) Since the entire crime scene, including Gailey's body, had been exposed to the elements for nearly two days and rained upon, trial counsels' failure to cross-examine Hopkins about the lack of substantial blood at the crime scene was not objectively unreasonable. Additionally, the State introduced photographs of the crime scene, including photographs of the cabin, the trail leading from the cabin to Gailey's body, and the area where Gailey's body was found, into evidence at trial. (T pp. 1320-29) Thus, the jury was able to see for itself the exact amount of blood that was present at the crime scene. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

94. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Hopkins regarding Defendant's post-conviction claim that Gailey's body was in a different position than appeared in the crime scene photographs presented at trial when Hopkins originally discovered it. (MAR Ex. 43) According to his 17 June 2007 post-conviction affidavit, Hopkins recalls telling Defendant's father, at some point during the trial, that some photographs he saw up on a screen in the courtroom during the trial showed Gailey's body in a different orientation and 20 to 25 feet from where Hopkins discovered it. (MAR Ex. 8 p. 2) While

Hopkins' affidavit does not state exactly what photographs he was looking at when he formed the opinion that Gailey's body was in a different position than at the time he discovered it, what is clear from the record is that Hopkins formed this opinion well after the time that he testified as the State's first witness at trial. The State did not present any photographs from the crime scene until much later in the trial. (See T pp. 1320-29) The Court finds that trial counsels' failure to cross-examine Hopkins about an opinion he had not yet formed was not objectively unreasonable.

95. Additionally, according to his post-conviction affidavit, Hopkins did not tell Defendant's trial counsel or counsel for the State that he had formed the opinion that the photographs depicted Gailey's body in a different position than at the time he discovered it. (See MAR Ex. 8) Without knowledge of Hopkins' newly formed opinion, trial counsels' failure to cross-examine Hopkins about it at trial cannot be objectively unreasonable, nor can it prejudice Defendant. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

96. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Hopkins to seek his admission that driving an ATV near the crime scene "could have" altered the rocks at the crime scene. (MAR p. 43) Defendant claims that cross-examining Hopkins on this subject would have raised a doubt about whether the State's closing arguments accurately described the events leading to Gailey's death. (Id.) However, as defense counsel's own closing argument pointed out, jury determinations of guilt or innocence should be based on proven facts, rather than mere conjecture. (T pp. 2264-65) In light of the overwhelming evidence of Defendant's guilt presented at trial, the Court finds that trial counsels' failure to cross-examine Hopkins about the mere conjecture that driving an ATV near the crime scene "could have" altered the rocks at the crime scene was not objectively unreasonable, nor is there a reasonable probability that, but for trial counsel failing to cross-examine Hopkins on this mere conjecture, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

97. Finally, Defendant contends that trial counsel was ineffective for failing to cross-examine Hopkins regarding the fact that Gailey's body was located on a path downhill from the cabin. (MAR p. 43) According to Defendant, this fact would make it possible for a person of Smith's height to cause the downward angle of the gunshot wound to Gailey's back, contradicting the State's closing argument that it would be impossible for Smith to inflict such a wound. (Id.) However, as noted above, the State introduced photographs of the crime scene, including photographs of the cabin, the trail leading from the cabin to Gailey's body, and the area where Gailey's body was found, into evidence at trial. (T pp. 1320-29) Additionally, Smith appeared before the jury and testified. (T pp. 1507-1573) Thus, the jury was able to see for itself the exact downhill angle of the area between the cabin and the place where Gailey's body was discovered as well as Smith's height. Since the jury was able to view this evidence for itself, trial counsels' failure to cross-examine Hopkins about the fact that Gailey's body was located on

a path downhill from the cabin was not objectively unreasonable, nor is there a reasonable probability that, but for trial counsel failing to cross-examine Hopkins on this fact, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

C. **Cross-examination of Lt. Barry Bunting**

98. Defendant first contends that trial counsel was ineffective for failing to cross-examine Lt. Bunting about the fact that Culler was present when Hopkins discovered Gailey's body. (MAR p. 44) However, as noted in this Court's adjudication of Claim III B, above, Defendant has failed to allege, let alone show, how Culler's presence at the discovery of Gailey's body was relevant to his defense. Culler's affidavit does not state that Culler interfered with the discovery of Gailey's body or the crime scene. (See MAR Ex. 9) Additionally, Hopkins' affidavit actually states, "Julie and I did not touch anything at the crime scene." (MAR Ex. 8 p. 1) Since Culler did not touch anything at the crime scene, her presence or absence at the discovery of Gailey's body was not relevant to Defendant's defense. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

99. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Lt. Bunting about the lack of substantial blood at the crime scene. (MAR p. 44) However, as noted in this Court's adjudication of Claim III B, above, the record shows that Hopkins discovered Gailey's body in the Uwharrie Forest nearly two days after Defendant shot Gailey and that it had been raining on the day that Hopkins discovered Gailey's body. Since the entire crime scene, including Gailey's body, had been exposed to the elements for nearly two days and rained upon, trial counsels' failure to cross-examine Lt. Bunting about the lack of substantial blood at the crime scene was not objectively unreasonable. Additionally, the State introduced photographs of the crime scene, including photographs of the cabin, the trail leading from the cabin to Gailey's body, and the area where Gailey's body was found, into evidence at trial. (T pp. 1320-29) Thus, the jury was able to see for itself the exact amount of blood that was present at the crime scene. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

100. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Lt. Bunting about "anomalies at the crime scene" because it would have forced Lt. Bunting "to explain a series of inconsistencies between the prosecution's theory and the crime scene [Lt. Bunting] observed." (MAR pp. 44-45) However, the record shows that trial counsel did cross-examine Lt. Bunting about his observations upon reaching the crime scene, his actions in securing the crime scene, his recollection of which officers responded to the crime scene, and his notes taken at the crime scene. (T pp. 1299-1305) Additionally, according to Lt. Bunting's

testimony, he was not the officer who processed the crime scene. (T pp. 1293-95) Failing to cross-examine a law enforcement officer in such a way that allows him to explain how the crime scene evidence fits the State's theory of the case is not objectively unreasonable, nor is there a reasonable probability that, but for trial counsels' failure to allow Lt. Bunting to explain away the alleged inconsistencies between the crime scene evidence and the State's theory of the case, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. In short, the record shows that trial counsel effectively cross-examined Lt. Bunting, and cross-examining Lt. Bunting in the manner suggested by Defendant's MAR would not benefit Defendant. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

101. Next, Defendant contends trial counsel was ineffective for failing to obtain a crime scene analyst to assist in cross-examining Lt. Bunting about items of physical evidence that law enforcement found at the crime scene. (SMAR pp. 37-38) The Court finds that this contention is merely a slight permutation of the above contentions that trial counsel was ineffective for failing to cross-examine Lt. Bunting about the fact that Culler was present when Hopkins discovered Gailey's body, about the lack of substantial blood at the crime scene, and about "anomalies at the crime scene" that would have allowed Lt. Bunting to explain the alleged inconsistencies between the crime scene evidence and the State's theory of the case. Therefore, for all of the reasons and authorities listed above in the Court's adjudication of Defendant's contentions that trial counsel was ineffective for failing to cross-examine Lt. Bunting about these matters, which are incorporated herein by reference as is fully set forth, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

D. Cross-examination of Robert Johnson

102. Defendant first contends that trial counsel was ineffective for failing to cross-examine Robert Johnson ("Johnson") about his heavy drinking on the night of Gailey's murder, his "passing out on the floor" of the lake house that evening, and his remaining in that state until sometime after Smith returned to the lake house. (MAR p. 45-46) According to Defendant, cross-examining Johnson about these matters would have contradicted Johnson's testimony that he believed Defendant, Gailey, and Smith left the lake house at 8:00 p.m. or later on the night of Gailey's murder and that they were gone for three to four hours, until Smith returned alone. (See MAR p. 46; T pp. 1468-69) However, Defendant's sole source of support for this contention is the 27 May 2007 post-conviction affidavit of Tanzy Lanier ("Lanier"). (MAR p. 46; MAR Ex. 5) As noted in this Court's merits adjudication of Claim I A, above, Lanier's post-conviction affidavit conflicts with the statement Lanier made to law enforcement on 18 July 1999, conflicts with the statement that Lanier's husband, Danny Lanier ("Danny"), made to law enforcement on 18 July 1999, and conflicts with Johnson's testimony at trial. Additionally, Danny's statement to law enforcement, which states that Defendant, Gailey, and Smith left together at approximately 9:00 p.m. and Smith returned to the lake house "between 12 midnight and 1 a.m. on Saturday, July 10, 1999," actually corroborates Johnson's testimony that Smith was absent for three to four

hours. (MAR Ex. 1 p. 4; T p. 1469) Furthermore, Johnson's 18 July 1999 pretrial statement indicates that he was awake and lucid when Defendant, Gailey, and Smith left the lake house and when Smith returned alone. (See SMAR Ex. 53 p. 000913) Consequently, trial counsel had no reason to ask Johnson whether or not he was passed out on the floor when Defendant, Gailey, and Smith departed from the lake house or when Smith later returned alone. The Court finds that trial counsels' failure to cross-examine Johnson about allegations Lanier did not make until several years after Defendant's trial was not objectively unreasonable, nor did it prejudice Defendant. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

103. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Johnson regarding the investigation of Johnson, Lanier, and Danny following Gailey's murder, the fact that Johnson was charged with misdemeanor possession of marijuana and misdemeanor possession of drug paraphernalia as a result of that investigation, and law enforcement's decision not to charge Johnson when they discovered Gailey's shotgun in a closet at Johnson's lake house. (MAR p. 46) According to Defendant, cross-examining Johnson regarding these matters would have exposed Johnson's self-interest in testifying and would have highlighted Johnson's "understanding with the State." (MAR p. 46) However, contrary to Defendant's contention, the record shows that there were no understandings, concessions, or deals between the State and Johnson. During a *voir dire* hearing, Johnson testified that he pled guilty to the possession of marijuana charge in 1999, that he did not recall law enforcement making any statements to him regarding any help he would receive on the marijuana and paraphernalia charges in exchange for his statement regarding Gailey's murder, and that the detective that interviewed Johnson did not offer to speak to anyone on Johnson's behalf regarding the charges. (T pp. 1417-19) Additionally, when Johnson told police that the shotgun they found in the lake house closet belonged to Gailey and that Gailey brought it to the house and left it in the closet, the police did not charge him with possession of a weapon of mass destruction. (T pp. 1420-21) In fact, when asked during the *voir dire* hearing whether law enforcement promised not to charge him with possession of a weapon of mass destruction if he would give a statement about Gailey's murder, Johnson responded, "They never made me any promises about anything." (T p. 1421) Furthermore, trial counsel thoroughly cross-examined Johnson regarding several weaknesses in the State's case. (See T pp. 1483-1506) Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

104. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Johnson about the fact that he did not see Defendant or Smith with any weapons when Defendant, Gailey, and Smith left the lake house. (SMAR pp. 38-39) In support of this contention, Defendant claims that trial counsel could have impeached material portions of Smith's testimony by showing that Gailey's shotgun, which Defendant again refers to as "the supposed murder weapon," was found in Johnson's lake house closet after Gailey's murder. (SMAR p. 39) However, Johnson had already testified on direct examination that the only thing he saw Defendant and Smith take with them was a large black bag with undisclosed contents. (T

pp. 1468-69) Additionally, as noted in this Court's merits adjudication of Claim II D, above, the sawed-off shotgun that Smith testified she saw Defendant carrying in the Uwharrie Forest was not Gailey's shotgun. Smith testified that she saw Defendant carrying a "black sawed-off shotgun" in the Uwharrie Forest when the three of them parked and began walking down the trail. (T p. 1536) In contrast, Johnson's pretrial statement to law enforcement described Gailey's shotgun as having a brown wooden stock and brown wooden pump. (SMAR Ex. 53 p. 000912) Neither Johnson nor Smith testified that they saw Defendant leave the lake house with Gailey's shotgun, or any gun at all for that matter. (T pp. 1467-68, 1533-35) In fact, defense counsel actually elicited the fact that Johnson had given a statement to law enforcement that he had never seen Defendant with a gun. (T p. 1493) Furthermore, both the State and the defense confirmed with Johnson that the last time he saw Gailey's shotgun was when the Randolph County Sheriff's Office seized it during a search of the lake house shortly after 9 July 1999. (T pp. 1482, 1503) In contrast, Smith testified that Defendant hid the sawed-off shotgun used in the shooting in the Uwharrie Forest just before the two left to drive back to the lake house. (T p. 1543) In short, there was no evidence presented at trial establishing that Defendant shot Gailey with Gailey's shotgun. And the State did not argue that Gailey's shotgun was the murder weapon during closing arguments. (See T pp. 2199-2240) Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

105. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Johnson regarding: (1) Johnson's pretrial statement that Dustin Maness ("Maness") was camping in the Uwharrie Forest on the night that Defendant murdered Gailey; (2) that Maness and Gailey never reconciled after an altercation they had in Johnson's lake house in May or June of 1999; and (3) after Gailey's body was discovered, Maness went around saying that he was glad Gailey was dead and that Gailey deserved it. (SMAR p. 39; SMAR Ex. 53) However, as noted in this Court's adjudication of Claim II D, above, Johnson had no first-hand knowledge of any of the events that transpired in the Uwharrie Forest on the night of Gailey's murder. According to the evidence presented at trial, Johnson remained at the lake house when Defendant, Smith, and Gailey left for the Uwharrie Forest and was still present when Smith later returned. (T pp. 1466-69) Johnson's post-conviction affidavit indicates that his sole source of information as to what happened in the Uwharrie Forest on the night of Gailey's murder came from his after-the-fact conversation with a person named Mike Simpson who had allegedly talked to Maness. (SMAR Ex. 43 p. 2) Johnson's pretrial statement to law enforcement indicates the same. (SMAR Ex. 53 p. 000914) Thus, any potential testimony Johnson might have had about what happened in the Uwharrie Forest on the night of Gailey's murder would have been inadmissible hearsay if offered to prove that Maness was in the Uwharrie Forest on the night in question and had the stated interaction with Defendant. See N.C.G.S. § 8C-1, Rule 801(c) and Rule 802.

106. Additionally, as this Court found in its adjudication of Claim II D, above, Maness' alleged statement that he was glad Gailey was dead and that Gailey deserved it is not material or relevant to the issue of whether Defendant murdered Gailey. Furthermore, as noted in the adjudication of Claim II D, above, the record reflects that Maness testified during cross-

examination at trial that he and Gailey did, in fact, reconcile after their altercation at the lake house in May or June 1999. (T pp. 1837-38) Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

E. Cross-examination of Jeffery Page

107. Defendant first contends that trial counsel was ineffective for failing to cross-examine Jeffrey Page ("Page") about the effect of his agreement with the State to testify truthfully in exchange for the dismissal of the accessory after the fact of murder charge which he incurred as a result of his involvement with Defendant's case. (MAR pp. 46-48) The Court finds Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable. The record shows that Page testified during direct examination that he was charged as an accessory after the fact of murder in connection with Defendant's case and that the charge was still pending at the time of Defendant's trial. (T p. 1776) Also, Page testified that, as long as he testified truthfully in Defendant's case, the charge of accessory after the fact would be dismissed. (T pp. 1776-77) During direct examination, Page even identified the written agreement he had signed with the State prior to trial before it was admitted as a State's exhibit by the trial court. (T p. 1777) In spite of Page's testimony admitting all these facts, Defendant contends that trial counsel was ineffective for failing to cross-examine Page regarding his facing punishment as a class C felon for the charge of accessory after the fact, his facing mandatory prison time, and his facing a minimum of forty-four months imprisonment if he were convicted as an accessory after the fact. (MAR p. 48)

108. However, Page only might have suffered this punishment if he failed to tell the truth. According to the agreement between Page and the State, the only result of Page's failing to testify completely and truthfully regarding the events that occurred after the murder of Gailey was that the agreement would be null and void and the State not bound by it. (MAR Ex. 10 p. 1) Page still had a constitutional right to trial by jury, and could have stated so in response to cross-examination questions asking what punishment he faced if he did not testify completely and truthfully. Additionally, cross-examining Page about the potential punishment he faced could have allowed the State in closing argument to contend that Page was telling the truth when he testified because he did not want to go to prison for forty-four months if he did not. The Court finds that, since the jury already knew that Page had an agreement with the State and what the terms of that agreement were, trial counsels' failure to cross-examine Page about the potential punishment he faced if he did not testify completely and truthfully was not objectively unreasonable nor is there a reasonable probability that, but for trial counsel failing to cross-examine Page on this subject, the result of the proceeding would have been different. See Strickland 466 U.S. at 694.

109. Next, Defendant contends that, although trial counsel cross-examined Page regarding his prior inconsistent statements to law enforcement, trial counsel was ineffective for

failing to cross-examine Page regarding "the important details behind" his prior inconsistent statements. (MAR p. 49) According to Defendant, cross-examining Page about these details would have suggested that "Page only implicated [Defendant] because he was under arrest, was facing prison time, and wanted to get out of trouble." (MAR p. 50) However, on direct examination, Page testified that he gave a statement to law enforcement on 27 October 1999 that was not truthful. (T p. 1789) Although Page testified that he gave a second statement to law enforcement that was truthful and implicated Defendant in Gailey's murder, the State neglected to inquire as to what date Page made this second statement to law enforcement. (T pp. 1789-90) On cross-examination, trial counsel extensively cross-examined Page about his false statement of 27 October 1999 and how it was inconsistent with his second statement, but did not reveal the date that Page made his second statement to law enforcement. (T pp. 1791-98) The State did not conduct a redirect examination of Page. (T pp. 1806) Since trial counsel did not reveal the date that Page made his second statement, the jury was free to conclude that Page changed his story after being arrested as an accessory after the fact to Gailey's murder. Thus, trial counsels' failure to cross-examine Page about the details behind his prior inconsistent statements was not objectively unreasonable nor is there a reasonable probability that, but for trial counsel failing to cross-examine Page on this subject, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

110. Finally, Defendant contends that trial counsel was ineffective for failing to cross-examine Page about two prior convictions for injury to personal property over $200.00 that Page incurred in 1997. (MAR p. 49) The record reflects that trial counsel did not cross-examine Page about these two prior convictions. (T pp. 1791-1805) However, the record shows that trial counsel did cross-examine Page about a prior driving while impaired conviction. (T p. 1802) Trial counsel asked Page about this conviction after impeaching Page with his second prior statement to law enforcement which indicated that Page was under the influence of alcohol when he left the cookout in Shallotte at which Defendant made inculpatory statements to him about Gailey's murder. (T pp. 1801)

111. Assuming *arguendo* that trial counsels' failure to cross-examine Page about his two injury to personal property convictions from 1997 was objectively unreasonable, the Court finds that Defendant has failed to show that there is a reasonable probability that, but for trial counsels' failure to cross-examine Page about his two prior injury to personal property convictions, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. At the time trial counsel failed to cross-examine Page about his two injury to personal property convictions, the jury knew that Page was charged as an accessory after the fact to Gailey's murder, that the charge was still pending at the time of Defendant's trial, and that Page had entered into an agreement with the State that, as long as he testified completely and truthfully, the charge against him would be dismissed. (T pp. 1776-77) Additionally, the jury knew that Page bought Gailey's truck from Defendant at far below fair market value, hid the truck at another person's house in Albemarle, and sold the truck to a junk dealer in South Carolina for partial payment through an intermediary who never returned to provide the junk

dealer with title to the vehicle or collect the remainder of the agreed upon price. (T pp. 1779-82, 1783-84, 1788, 1817-18, 2045-46) Furthermore, the jury knew that Page initially made a false statement to law enforcement on 27 October 1999 before giving a statement implicating Defendant in the murder of Gailey sometime later. (T pp. 1789-90)

112. Through cross-examination by trial counsel, the jury learned that Page had been convicted of driving while impaired, that Page told investigators that he was under the influence of alcohol when he left the cookout in Shallotte at which Defendant made inculpatory statements to him about Gailey's murder, and that Page's minor child was "unfortunately" in the back seat of the car with Smith when Page drove under the influence from Shallotte to Albemarle. (T pp. 1801-05) Additionally, the jury got to hear the inconsistencies, one by one, between the false statement that Page gave to law enforcement on 27 October 1999 and the statement he gave sometime later implicating Defendant in Gailey's murder. (T pp. 1791-94) In light of the above-listed evidence impeaching Page's credibility that was before the jury, Defendant has failed to show that there is a reasonable probability that, but for trial counsels' failure to cross-examine Page about his two prior injury to personal property convictions, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. Therefore, Defendant has failed to show that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable, and his contention is without merit.

F. Cross-examination of Dustin Maness

113. Defendant first contends that trial counsel was ineffective for failing to cross-examine Dustin Maness ("Maness") in a manner that would rebut Smith's testimony and "suggest alternative scenarios that would explain what was found at the crime scene." (MAR p. 52) In support of this contention, Defendant presents the post-conviction affidavit of Maness. (MAR Ex. 16) However, a review of Maness' affidavit shows that Maness knew nothing about the murder of Gailey, had no idea what happened in the Uwharrie Forest on the night of Gailey's murder, and knew nothing about the events that transpired at Johnson's lake house on 9-10 July 1999. (See MAR Ex. 16) Additionally, Maness did not collect any evidence or inspect the crime scene where Gailey was shot. (See id.) Thus, according to his post-conviction affidavit, Maness could not have contradicted Smith's testimony on any material point. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

114. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Maness about the extent to which Gailey loved guns and the fact that Gailey would go into the woods to shoot guns with Maness. (MAR pp. 52-53) The Court finds that Defendant has failed to establish that this information would be relevant or material to his defense. (See MAR Ex. 16) Additionally, several witnesses testified at Defendant's trial that Gailey carried at least one firearm on him at all times. (See T pp. 1466, 1487-90, 1710, 1823, 1829-30, 1834) Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

115. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Maness about Gailey using a knife during the altercation that occurred between Maness and Gailey in May or June of 1999. (MAR pp. 54-55) However, the record indicates that trial counsel did cross-examine Maness about the altercation, during which Maness failed to mention anything about Gailey using a knife. (T pp. 1837-38) Additionally, a review of the record and the exhibits presented with Defendant's MAR and SMAR indicates that the first time Maness mentioned that Gailey had a knife during this altercation was in his post-conviction affidavit which was executed on 29 May 2007. (MAR Ex. 16 p. 2) Furthermore, as noted in the adjudication of Claim II D, above, the record reflects that Maness testified during cross-examination at trial that he and Gailey did, in fact, reconcile after their altercation at the lake house in May or June 1999. (T pp. 1837-38) Since Maness did not mention that Gailey used a knife at the altercation between the two of them until several years after Defendant's trial and, since Maness and Gailey reconciled after the altercation but before Gailey's murder, defense counsels' failure to cross-examine Maness about the knife was not objectively unreasonable nor is there a reasonable probability that, but for trial counsel failing to cross-examine Maness on this subject, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

116. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Maness about the criminal charges that Maness took out as a result of his above altercation with Gailey. (SMAR p. 40) However, according to Maness' post-conviction affidavit, the only information that Maness could provide on these charges was that his mother and girlfriend persuaded him to press the charges against Gailey, that Maness was going to drop the charges against Gailey because the two had reconciled, and that Gailey was found dead before the court date for the charges. (MAR Ex. 16 p. 2) In light of the overwhelming evidence of Defendant's guilt presented at trial, the Court finds that trial counsels' failure to cross-examine Maness regarding these criminal charges was not objectively unreasonable, nor is there a reasonable probability that, but for trial counsel failing to cross-examine Maness about these charges, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

117. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Maness about the fact that he "may have" spent the night of Gailey's murder "camping somewhere near the crime scene." (SMAR p. 40) Defendant's sole source of support for this contention appears to be the hearsay statements contained in the pretrial statement and post-conviction affidavit of Robert Johnson ("Johnson"). (SMAR Exs. 43 & 53) However, as noted in this Court's adjudication of Claim II D, above, Johnson had no first-hand knowledge of any of the events that transpired in the Uwharrie Forest on the night of Gailey's murder. According to the evidence presented at trial, Johnson remained at the lake house when Defendant, Smith, and Gailey left for the Uwharrie Forest and was still present when Smith later returned. (T pp. 1466-

69) Johnson's post-conviction affidavit indicates that his sole source of information as to what happened in the Uwharrie Forest on the night of Gailey's murder came from his after-the-fact conversation with a person named Mike Simpson who had allegedly talked to Maness. (SMAR Ex. 43 p. 2) Johnson's pretrial statement to law enforcement indicates the same. (SMAR Ex. 53 p. 000914) Thus, any potential testimony Johnson might have given about what happened in the Uwharrie Forest on the night of Gailey's murder would have been inadmissible hearsay if offered to prove that Maness was in the Uwharrie Forest on the night in question and had the stated interaction with Defendant. See N.C.G.S. § 8C-1, Rule 801(c) and Rule 802.

118. Additionally, Maness' post-conviction affidavit does not state that he was camping in the Uwharrie Forest on the night of Gailey's murder. (See SMAR Ex. 16) In fact, Maness' affidavit shows that Maness knew nothing about the murder of Gailey, had no idea what happened in the Uwharrie Forest on the night of Gailey's murder, and knew nothing about the events that transpired at Johnson's lake house on 9-10 July 1999. (See MAR Ex. 16) Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

119. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Maness about Johnson's claim that, after Gailey's body was discovered, Maness went around saying he was glad Gailey was dead and that Gailey deserved it. (SMAR p. 40) As this Court found in its adjudication of Claim II D, above, Maness' alleged statement that he was glad Gailey was dead and that Gailey deserved it is not material or relevant to the issue of whether Defendant murdered Gailey. Additionally, Maness' post-conviction affidavit does not state that he made any disparaging remarks about Gailey after Gailey's death. (See SMAR Ex. 16) To the contrary, Maness' affidavit states that he and Gailey had reconciled after their altercation at the lake house and that Maness was going to drop the charges he had taken out against Gailey. (SMAR Ex. 16 p. 2) Since, according to Maness, he and Gailey had reconciled before Gailey's murder, trial counsels' failure to cross-examine Maness about the disparaging remarks that Johnson claimed Maness made after Gailey's murder was not objectively unreasonable, nor is there a reasonable probability that, but for trial counsel failing to cross-examine Maness about these alleged statements, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. Consequently, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

120. Finally, Defendant contends that trial counsel was ineffective for failing to cross-examine Maness about the fact that Gailey frequently sold drugs at Maness' house and that some of Gailey's customers were upset because Gailey mixed the cocaine he sold with other substances, thus reducing its potency. (SMAR p. 40) In light of the overwhelming evidence of Defendant's guilt presented at trial, the Court finds that trial counsels' failure to cross-examine Maness regarding Gailey's selling cocaine at his house and the dissatisfaction of Gailey's customers was not objectively unreasonable, nor is there a reasonable probability that, but for trial counsel failing to cross-examine Maness about these charges, the result of the proceeding

would have been different. See Strickland 466 U.S. at 694. At Defendant's trial, several witnesses testified that Gailey was a drug dealer who had plenty of money and carried at least one firearm on him at all times. (See T pp. 1466, 1487-90, 1710, 1823, 1829-30, 1834) The logical inference that such a person had enemies was not so remote that trial counsel would have had to cross-examine Maness about it to argue it before the jury. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

G. Cross-examination of Lilly Efird

121. Defendant first contends that trial counsel was ineffective for failing to adequately cross-examine Lilly Efird ("Efird") regarding the theft of her vehicle by Vanessa Smith ("Smith"), Efird's report of that theft to law enforcement, and law enforcement's subsequent failure to charge Smith with the theft of Efird's vehicle. (MAR pp. 55-56) According to Defendant, this information was material to his defense because it would establish either (1) that the State allowed Smith to get away with stealing Efird's vehicle to preserve Smith's credibility for trial or (2) that the State did not believe Efird's theft report and found her to be lacking in credibility. (MAR p. 56) However, the record and Defendant's own post-conviction exhibit in support of this contention establish that Smith allegedly stole Efird's vehicle in a jurisdiction which was not under the control of the prosecutor in this case. The Court finds that trial counsels' failure to further cross-examine Efird on a crime allegedly committed by Smith in another jurisdiction to challenge the credibility of Smith or Efird on the basis of that jurisdiction failing to pursue charges against Smith was not objectively unreasonable, nor is there a reasonable probability that, but for trial counsel failing to cross-examine Efird about this matter, the result of the proceeding would have been different. See Strickland 466 U.S. at 694.

122. During cross-examination, Efird testified that she drove herself and Smith to the beach where she was awakened in the middle of the night by someone looking for a lighter who told Efird that Smith had gotten Efird's car keys to get a cigarette. (T p. 1872) When Efird checked her pockets, she discovered that her car keys were gone, her money was gone, and her car was gone. (Id.) Based on this information, Efird concluded that Smith had stolen her keys, money, and car. (Id.) Efird did not see Smith again until after Defendant and Smith were charged with Gailey's murder and Efird went to the courthouse in Montgomery County to visit Smith. (See T pp. 1872-73; MAR Ex. 23). Additionally, the incident/investigation report from the Brunswick County Sheriff's Department, attached as an exhibit to Defendant's MAR, confirms that the location from which Smith allegedly stole Efird's car and money was a residence in Shallotte, North Carolina. (MAR Ex. 18) The same incident/investigation report indicates that the Brunswick County Sheriff's Department marked the case for "further investigation" at the time it was reported. (MAR Ex. 18 p. 1) Defendant offers nothing to show that Efird pursued charges against Smith, that the person who provided Efird with the hearsay statement that Smith took her car provided the same information to Brunswick County authorities, or that Brunswick County authorities did not uncover evidence exonerating Smith during their investigation.

123. The Court takes judicial notice that North Carolina Prosecutorial District 19B does not include Brunswick County and that Brunswick County is, in fact, in another prosecutorial district. In light of the above-listed facts, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

124. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Efird about the fact that Smith ingested some of Efird's muscle relaxer pills prior to telling Efird about Gailey's murder. (MAR p. 56) According to Defendant, such cross-examination would have shown that the statements Smith made to Efird about Gailey's murder were not credible. (Id.) However, the record shows that, during cross-examination, trial counsel was able to elicit several inconsistencies between the rendition of Gailey's murder which Smith told Efird and Smith's testimony at trial. For instance, trial counsel elicited from Efird that Smith told her Gailey shot back at Defendant (T p. 1868), that, when Smith left Defendant to return to the lake house, she did not pick Defendant up until 5 or 6 hours later (T p. 1871), and that Defendant shot Gailey in the chest, rather than the back (T pp. 1869-70). These statements were inconsistent with Smith's testimony at trial. (See T pp. 1539-44) Since trial counsel elicited these inconsistencies, trial counsels' failure to cross-examine Efird about the fact that Smith ingested some of Efird's muscle relaxer pills prior to telling Efird about Defendant's murder of Gailey was not objectively unreasonable, nor is there a reasonable probability that, but for trial counsel failing to cross-examine Efird about this matter, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. Indeed, cross-examining Efird about Smith's ingestion of muscle relaxer pills prior to making these inconsistent statements to Efird could have explained why Smith made the inconsistent statements. Such a course of questioning would not have benefitted Defendant's case. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

125. Next, Defendant contends that trial counsel was ineffective for failing to cross-examine Efird about Efird's phone records from July of 1999. (MAR pp. 56-58) According to Defendant, cross-examining Efird about phone calls from Efird's residence to Denver, Colorado, and between Efird's residence and Shallotte, North Carolina, would establish that Smith made those phone calls. (Id.) The Court finds trial counsels' failure to cross-examine Efird about her phone records from July of 1999 was not objectively unreasonable, nor is there a reasonable probability that, but for trial counsel failing to cross-examine Efird about this matter, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. Although Defendant fails to clearly state why establishing that Smith made those phone calls would be material to his defense (See MAR pp. 56-59), Defendant has failed to show that Efird had any knowledge of who made those phone calls from her residence. Efird's pretrial statement to law enforcement does not state that she witnessed Smith make or receive any calls from her residence, and the phone records attached as an exhibit to Defendant's MAR do not indicate who made or received the phone calls. (See MAR Exs. 7 & 19) Additionally, the evidence presented at trial indicated that there were a number of people who could have made or received the calls from Efird's

residence. Efird had three children, ages 9, 11, and 13 years, who were capable of making or receiving calls at Efird's residence. (See T pp. 1856-57) Also, Efird had a brother who traveled back and forth from Albemarle, where Efird lived, to Shallotte who also could have made or received the calls. (See T pp. 1751-54, 1782) Based on the circumstances listed above, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

126. Finally, Defendant contends that trial counsel was ineffective for failing to cross-examine Efird about her prior criminal record. (MAR pp. 58-59) Specifically, Defendant claims that trial counsel was ineffective for failing to cross-examine Efird on a single driving while license revoked conviction from May of 2001. (See MAR p. 58; MAR Ex. 20 pp. 3-4) However, during direct examination, Efird admitted that she had been convicted of multiple driving while impaired offenses within the past ten years. (See MAR p. 58; T p. 1854) Additionally, as noted above, the prior inconsistent statements by Smith which trial counsel elicited through cross-examination of Efird made it necessary to preserve at least some of Efird's credibility at trial to assist Defendant in his defense. (See T pp. 1868-71) Since Efird had already admitted to several driving while impaired convictions on direct examination, and since it benefited Defendant to preserve at least some of Efird's credibility to establish the prior inconsistent statements of Smith, trial counsels' failure to cross-examine Efird about a single driving while license revoked conviction from 2001was not objectively unreasonable, nor is there a reasonable probability that, but for trial counsel failing to cross-examine Efird about this matter, the result of the proceeding would have been different. See Strickland 466 U.S. at 694. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

Summary Disposition of Claim III

127. For the reasons listed above, the Court concludes that Claim III of Defendant's MAR and SMAR, except for the subparts of Claim III of Defendant's SMAR for which the Court has reserved ruling, is without merit in its entirety and as to each of its subparts. Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

128. The Court concludes that Defendant is not entitled to an evidentiary hearing on Claim III of his MAR. See N.C.G.S. § 15A-1420(c)(1); McHone, 348 N.C. at 257, 499 S.E.2d at 763. **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss Claim III of Defendant's MAR is **ALLOWED.**

129. The Court concludes that it is unable to determine from the materials and record before it whether Vanessa Smith's mental health and substance abuse records reviewed by the trial court *in camera* were made part of the record on appeal before the Supreme Court of North Carolina. **IT IS THEREFORE ORDERED** that the Court reserves ruling on the subparts of

Claim III of Defendant's SMAR as they relate to the trial court's *in camera* review of Vanessa Smith's sealed records.

130. The Court concludes that Defendant is not entitled to an evidentiary hearing on the subparts of Claim III of his SMAR not related to the *in camera* examination of the sealed records of Vanessa Smith. See N.C.G.S. § 15A-1420(c)(1); McHone, 348 N.C. at 257, 499 S.E.2d at 763. **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss all subparts of Claim III of Defendant's SMAR not related to the *in camera* examination of the sealed records of Vanessa Smith is **ALLOWED.**

CLAIM IV of MAR

131. Defendant claims that the State violated his right to due process by failing to produce material and exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny. (MAR pp. 60-67) Specifically, Defendant contends that the State violated his right to due process by failing to disclose two prior convictions for injury to personal property over $200.00 that State's witness Jeffrey Page ("Page") incurred in 1997. (Id.) This claim shall be referred to hereafter as **Claim IV A.**

132. Additionally, Defendant claims that the State violated his right to a fair trial by the knowing use of false testimony in violation of Napue v. Illinois, 360 U.S. 264, 79 S. Ct 1173, 3 L. Ed. 2d 1217 (1959), and its progeny. (MAR pp. 66-67) Specifically, Defendant contends that the State violated his right to a fair trial by failing to correct Page's testimony on direct examination, when Page failed to include the two injury to personal property convictions listed above in response to the State's question of what Class 1 misdemeanor or above convictions Page had incurred in the past ten years. (Id.) This claim shall be referred to hereafter as **Claim IV B.**

133. For the reasons enumerated below, the Court finds that Claim IV A and Claim IV B of Defendant's MAR are without merit.

Claim IV A is Without Merit

134. The Court concludes that Defendant has failed to show that the State had a constitutional duty to provide him with Page's 1997 convictions for injury to personal property because Defendant could have obtained the records from other sources through the exercise of due diligence. In the instant case, Page's prior criminal history, including his two convictions for injury to personal property that form the basis of Defendant's Brady claim, was a public record available to trial counsel prior to and during trial. (See MAR Ex. 12) Defendant admits as much in his MAR. (See MAR p. 49 ("To the extent that trial counsel could have obtained Page's prior criminal record on their own . . .")) As such, Brady did not compel the disclosure of the two prior convictions for injury to personal property over $200.00 that Page incurred in 1997, and the State did not violate Defendant's right to due process by failing to produce those records. Therefore, Defendant's Claim VI A is without merit.

135. Furthermore, assuming *arguendo* that the State was under a constitutional duty to disclose Page's 1997 convictions for injury to personal property, Defendant's Claim IV A still fails. The Court finds Defendant has failed to show that there is a reasonable probability that the result of the proceeding would have been different if the suppressed documents had been disclosed to the defense. See Strickler v. Green, 527 U.S. 263, 289-90, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). As noted in this Court's adjudication of Claim III E, above, at the time trial counsel failed to cross-examine Page about his two injury to personal property convictions, the jury knew that Page was charged as an accessory after the fact to Gailey's murder, that the charge was still pending at the time of Defendant's trial, and that Page had entered into an agreement with the State that, as long as he testified completely and truthfully, the charge against him would be dismissed. (T pp. 1776-77) Additionally, the jury knew that Page bought Gailey's truck from Defendant at far below fair market value, hid the truck at another person's house in Albemarle, and sold the truck to a junk dealer in South Carolina for partial payment through an intermediary who never returned to provide the junk dealer with title to the vehicle or collect the remainder of the agreed upon price. (T pp. 1779-82, 1783-84, 1788, 1817-18, 2045-46) Furthermore, the jury knew that Page initially made a false statement to law enforcement on 27 October 1999 before giving a statement implicating Defendant in the murder of Gailey sometime later. (T pp. 1789-90)

136. Through cross-examination by trial counsel, the jury learned that Page had been convicted of driving while impaired, that Page told investigators that he was under the influence of alcohol when he left the cookout in Shallotte at which Defendant made inculpatory statements about Gailey's murder, and that Page's minor child was "unfortunately" in the back seat of the car with Smith when Page drove under the influence from Shallotte to Albemarle. (T pp. 1801-05) Additionally, the jury got to hear the inconsistencies, one by one, between the false statement that Page gave to law enforcement on 27 October 1999 and the statement that he gave sometime later implicating Defendant in Gailey's murder. (T pp. 1791-94) The Court concludes that Defendant is unable to show a reasonable probability that a different verdict would result if Page's two convictions for injury to personal property from 1997 were available to trial counsel. Therefore, Defendant's Claim IV A is without merit.

Claim IV B is Without Merit

137. As noted in this Court's adjudication of Claim I, above, to prevail on a claim of the use of false or misleading testimony, a "defendant must show that the testimony was in fact false, material, and knowingly and intentionally used by the state to obtain his conviction." State v. Robbins, 319 N.C. 456, 514, 356 S.E.2d 279, 308, cert. denied, 484 U.S. 918, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987) (citing Napue). Therefore, to prevail on Claim IV B, Defendant must show that the challenged testimony of Page was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction. The Court concludes that Defendant has failed to meet this standard.

138. Assuming *arguendo* that Page's testimony about the prior convictions he had incurred in the past ten years was false, Defendant has failed to show that the State knew his testimony was false and intentionally used it to obtain Defendant's conviction. First, Defendant

did not attach Page's criminal history that the State provided to trial counsel to his MAR. Instead, Defendant attached to his MAR a criminal history that post-conviction counsel obtained in 2007 that shows his two 1997 convictions for injury to personal property over $200.00. (MAR Ex. 12) When Defendant did attach Page's criminal history that the State provided to trial counsel to his Response to the State's Motion for Summary Denial, that criminal history did not show Page's two 1997 convictions for injury to personal property over $200.00. (See Def's Resp. Ex. 64) Additionally, the criminal history attached to Defendant's Response to the State's Motion for Summary Denial clearly states, "**Caution*** Changes to this record may occur at any time and a new inquiry should be made for subsequent use." (Def's Resp. Ex. 64 p. 02704 (certain capitalizations omitted)) Finally, Page's two convictions for injury to personal property over $200.00 occurred in Wilkes County. (MAR Ex. 12 pp. 1-2) The Court takes judicial notice that North Carolina Prosecutorial District 19B does not include Wilkes County and that Wilkes County is, in fact, in another prosecutorial district. In light of the facts listed above, Defendant has failed to show that the State knew that Page's testimony about the prior convictions he had incurred in the past ten years was false and intentionally used it to obtain Defendant's conviction. Therefore, Claim VI B is without merit.

139. Next, assuming *arguendo* that Page's testimony about his prior convictions was false and that the State knowingly and intentionally used his false testimony of omitting the two prior convictions for injury to personal property to obtain Defendant's conviction, Defendant's Claim IV B still fails. The Court concludes that Defendant fails to meet the "standard of materiality" under which the knowing use of perjured testimony requires a conviction to be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). As noted in this Court's adjudication of Claim IV A, above, there was a plethora of other evidence impeaching Page's credibility that was before the jury at Defendant's trial. In light of all the evidence before the jury impeaching Page's credibility listed in this Court's adjudication of Claim IV A, above, and incorporated herein by reference as if fully set forth, Defendant has failed to show that there is any reasonable likelihood that informing the jury of Page's two prior convictions for injury to personal property could have affected the judgment of the jury. Therefore, Defendant's Claim IV B is without merit.

Summary Disposition of Claim IV

140. For the reasons listed above, the Court concludes that Claim IV A and IV B of Defendant's MAR are without merit. Defendant has failed to show that the State had a constitutional duty to provide him with Page's 1997 convictions for injury to personal property because Defendant could have obtained the records from other sources through the exercise of due diligence. Additionally, Defendant has failed to show that there is a reasonable probability that the result of the proceeding would have been different if the suppressed documents had been disclosed to the defense. Furthermore, Defendant has failed to show that the State knew that Page's testimony about the prior convictions he had incurred in the past ten years was false and intentionally used it to obtain Defendant's conviction. Finally, Defendant has failed to show that there is any reasonable likelihood that informing the jury of Page's two prior convictions for injury to personal property could have affected the judgment of the jury.

141. The Court concludes that Defendant is not entitled to an evidentiary hearing on Claim IV A and IV B of his MAR. See N.C.G.S. § 15A-1420(c)(1); McHone, 348 N.C. at 257, 499 S.E.2d at 763. **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss Claim IV of Defendant's MAR is **ALLOWED.**

CLAIM V of MAR

142. Defendant claims that the indictment charging him with murder was fatally defective for failing to specifically allege the elements of first degree murder and for failure to specify the aggravating circumstances to be submitted against him at the sentencing hearing. (MAR pp. 67-72). For the reasons enumerated below, the Court finds that Claim V of Defendant's MAR is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(2).

Claim V is Procedurally Barred Under N.C.G.S. § 15A-1419(a)(2)

143. Defendant's claim that the indictment charging him with murder was fatally defective for failing to specifically allege the elements of first degree murder and for failure to specify the aggravating circumstances to be submitted against him at the sentencing hearing is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(2) if "the ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment." N.C.G.S. § 15A-1419(a)(2)(2016). On direct appeal of this case, the Supreme Court of North Carolina addressed and rejected Defendant's contentions that (1) "his short form indictment was insufficient because it failed to allege all the elements of first-degree murder," and (2) "the trial court lacked jurisdiction to enter a death sentence because the indictment did not list the aggravating circumstances to be proven by the State during the penalty phase." Allen, 360 N.C. at 316-17, 626 S.E.2d at 286. In ruling on the merits of these contentions, the Supreme Court of North Carolina held as follows:

> Defendant contends his short-form indictment was insufficient because it failed to allege all the elements of first-degree murder. We disagree. We have consistently ruled short-form indictments for first-degree murder are permissible under N.C.G.S. § 15-144 (2005) and the North Carolina and United States Constitutions. See State v. Mitchell, 353 N.C. 309, 328-29, 543 S.E.2d 830, 842, cert. denied, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001); State v. Davis, 353 N.C. 1, 44-45, 539 S.E.2d 243, 271 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001); State v. Braxton, 352 N.C. 158, 173-75, 531 S.E.2d 428, 436-38 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001); State v. Wallace, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43, cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000). We see no compelling reason to depart from our prior precedent on this issue. Here the indictment read: "The jurors for the State upon their oath present that on or about the 8th day of July, 1999, and in the county named above the Defendant named above unlawfully, willfully and feloniously and of malice aforethought did kill and murder Christopher Conrad Gailey. Offense in violation of G.S. 14-17."

> As this indictment meets the requirements of N.C.G.S. § 15-144, we overrule Defendant's assignment of error.
>
> Additionally, Defendant argues the trial court lacked jurisdiction to enter a death sentence because the indictment did not list the aggravating circumstances to be proven by the State during the penalty phase. This Court has rejected this argument in the past. See State v. Hunt, 357 N.C. 257, 268-78, 582 S.E.2d 593, 600-07, cert. denied, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003). We see no reason to depart from our holding in Hunt and therefore overrule Defendant's assignment of error.

Allen, 360 N.C. at 316-17, 626 S.E.2d at 286. Since Defendant raised both of the contentions in Claim V of his MAR before the Supreme Court of North Carolina on direct appeal of his judgment of conviction, and since the Supreme Court previously determined both of the contentions in Claim V of Defendant's MAR on the merits, Claim V of Defendant's MAR is procedurally barred pursuant to NCGS §15A-1419 (a)(2).

Summary Disposition of Claim V

144. For the reasons listed above, the Court concludes that Claim V of Defendant's MAR is procedurally barred pursuant to N.C.G.S. §15A-1419 (a)(2). Additionally, the Court concludes that Defendant has failed to show good cause and actual prejudice to justify this Court's lifting of the procedural bar for the evaluation of Defendant's claim on the merits. N.C.G.S. § 15A-1419(b)(1) (2016). Nor has Defendant shown that a miscarriage of justice will result if this Court does not review his procedurally defaulted claims. N.C.G.S. § 15A-1419(b)(2) (2016). Therefore, Claim V of Defendant's MAR is procedurally barred from this Court's review under N.C.G.S. § 15A-1419(a)(2).

145. The Court concludes that Defendant is not entitled to an evidentiary hearing on Claim V of his MAR. See N.C.G.S. § 15A-1419(b); McHone, 348 N.C. at 257, 499 S.E.2d at 763. **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss Claim V of Defendant's MAR is **ALLOWED.**

CLAIM VI of MAR

146. Defendant claims that he received ineffective assistance of counsel ("IAC") at trial because trial counsel failed to object to certain portions of the State's closing argument at the guilt phase of his trial. (MAR pp. 72-77)[1] Specifically, Defendant contends that trial counsel was ineffective for failing to object to the following portions of the State's argument that Defendant contends were not supported by the evidence presented: (1) the State's argument that Defendant manufactured a pretext that there were guns in the Uwharrie Forest in order to lure

[1] Although Defendant mentions the State's closing argument at the penalty phase of his trial in Claim VI of his MAR, the only contentions that Defendant actually raises in Claim VI pertain to the State's closing argument at the guilt phase of his trial. (See MAR pp. 72-77)

Gailey into the woods to kill him; (2) the State's argument that there were no guns in the woods which was the foundation of Defendant's pretext to lure Gailey; (3) the State's argument that the weather was hot on 9 July 1999 in the Uwharrie Forest, which purportedly explained why Gailey's shirt was found lying on the ground; and (4) the State's argument that it would be impossible for Smith to inflict the deadly wounds upon Gailey due to the height differential between them. (Id.) For the reasons enumerated below, the Court finds that Claim VI of Defendant's MAR is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3) and is without merit as a matter of law in the alternative.

Claim VI is Procedurally Barred Under N.C.G.S. § 15A-1419(a)(3)

147. Defendant's claim that he received IAC at trial because trial counsel failed to object to the above-listed portions of the State's closing argument is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3) if "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C.G.S. § 15A-1419(a)(3)(2016). The record on appeal shows that the entirety of the State's closing arguments were before the Supreme Court of North Carolina. Additionally, Defendant raised the following claim on direct appeal that included the following contentions:

> Defendant claims the prosecution's closing arguments in both the guilt-innocence and penalty proceedings violated notions of fundamental fairness because the prosecution "plugged a crucial hole" by mentioning evidence outside the record. Defendant notes five instances in which he alleges the prosecution's argument contained facts outside the evidence presented: (1) Defendant devised a plan to lure Gailey into the woods in order to murder him; (2) a cache of firearms was never discovered in the woods; (3) the weather was hot on 9 July 1999 in the Uwharrie forest, which purportedly explained why Gailey's shirt was found lying on the ground; (4) that it would be impossible for Smith to inflict the deadly wounds upon Gailey due to the height differential between them; and (5) Gailey fired his .45 caliber handgun once, after which the handgun jammed.

Allen, 360 N.C. at 306, 626 S.E.2d at 280. Since the entirety of the State's closing arguments were contained in the record on appeal, and since Defendant raised each of the underlying contentions regarding the propriety of the State's closing arguments on appeal that he now seeks to raise in Claim VI of his MAR to argue IAC, Defendant was in a position to adequately raise Claim VI of his MAR on direct appeal. Since Defendant was in a position to adequately raise Claim VI of his MAR on direct appeal but did not do so, Claim VI of Defendant's MAR is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3). Therefore, the Court concludes that Claim VI of Defendant's MAR is procedurally barred because Defendant was in a position to adequately raise this IAC claim on direct appeal but did not do so.

148. Additionally, the Court concludes that Defendant has failed to show good cause and actual prejudice to justify this Court's lifting of the procedural bar for the evaluation of Defendant's claim on the merits. N.C.G.S. § 15A-1419(b)(1) (2016). Nor has Defendant shown that a miscarriage of justice will result if this Court does not review his procedurally defaulted

claims. N.C.G.S. § 15A-1419(b)(2) (2016). Therefore, Claim VI of Defendant's MAR is procedurally barred from this Court's review under N.C.G.S. § 15A-1419(a)(3).

Claim VI is Without Merit

149. Defendant has failed to establish (1) that counsel deficiently represented Defendant by committing an objectively unreasonable error, and (2) that such deficiency prejudiced the defense so as to deprive Defendant of a fair trial whose result was reliable. See Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693 (1984); see also, State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985).

150. The Supreme Court of North Carolina ruled that all four of the State's arguments listed above were proper under North Carolina law; therefore, trial counsel could not have been ineffective for failing to object to these arguments.

> Defendant's first contention that no evidence supported the statement made by the prosecution that defendant devised a plan to lure the victim into the forest is without merit. Defendant concedes in his brief that some evidence existed in the record to draw this inference-- namely Smith's testimony that the victim did not usually hike in the woods, the victim did not want to go into the woods, and defendant talked the victim into entering the woods. It is a reasonable inference both the prosecution and the jury could make that defendant previously contrived a plan to lure his long-time friend into the forest for the purpose of ending his friend's life. Therefore, the prosecution's argument was consistent with N.C.G.S. § 15A-1230(a), which allows argument of any conclusion based on counsel's analysis if the conclusion is consistent with the evidence.
>
> Similarly, a reasonable inference could be made that no firearms existed at the site where the body was found. As stated earlier, defendant allegedly told his victim he had stashed firearms in a cabin in the forest and they should retrieve the firearms to sell them. Smith testified that while they were walking in the forest, defendant changed his story about where the firearms were located. In addition, the only testimony concerning a weapon found at the scene of the crime was testimony about the victim's .45 caliber handgun. Because of the testimony establishing the only weapon at the scene of the crime was the handgun, it is reasonable to infer that in fact no firearms existed and thus the assertion made by defendant about the firearms constituted nothing more than a ploy to lure the victim into the forest for his execution.
>
> A reasonable inference could also be drawn that the victim removed his own shirt during the hike into the woods. This matter is relevant because a photograph of the crime scene showed a large rock atop Gailey's shirt. Smith testified "it was hot" on the day of the shooting, and a crime scene photograph of the victim's body clearly shows his shirt removed. It is reasonable to infer that the victim removed his shirt before he was shot and before the rocks were thrown at him.

> Defendant also takes issue with the prosecution's argument asserting it "would be hard to imagine" Smith shooting the victim because of her size. The jury had the opportunity to observe Smith's physical characteristics when she testified. See State v. Brown, 320 N.C. 179, 199, 358 S.E.2d 1, 15 (discussing how "evidence is not only what [jurors] hear on the stand but what they witness in the courtroom."), cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987). The jury also heard testimony from Dr. John Butts, the State Medical Examiner, which confirmed the wounds traveled in such a manner that one could reasonably infer the shotgun pellets traveled slightly downward. Because the jury could see Smith's height, and could infer the pellets from the shotgun blast to the back traveled in a downward motion, it is a reasonable inference that it is unlikely Smith inflicted the wound.
>
> . . . Therefore, the assignments of error are overruled.

Allen, 360 N.C. at 307-08, 626 S.E.2d at 280-81. In light of the Supreme Court of North Carolina's findings, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable. Consequently, Defendant's IAC claim regarding these arguments is without merit.

151. The rulings of the Supreme Court of North Carolina regarding each of the State's arguments listed above are binding on this Court pursuant to the doctrine of law of the case.

> Under the law of the case doctrine, an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal. However, the law of the case doctrine does not apply to dicta, but only to points actually presented and necessary for the determination of the case.

Creech v. Melnik, 147 N.C. App. 471, 473-74, 556 S.E.2d 587, 589 (2001) (internal citations omitted). Since Defendant presented the same facts and questions regarding the State's closing arguments to the Supreme Court of North Carolina, i.e., that they were improper because they were not supported by the record evidence, and since the resolution of those facts and questions were necessary for the determination of the case on direct appeal, those facts and questions are also resolved for the purpose of post-conviction review. Since the Supreme Court resolved the facts and questions above by ruling that the arguments were not improper, and thus not objectionable, Defendant cannot now use those same facts and questions as a basis for his IAC claim that trial counsel was ineffective for failing to object to the State's arguments listed above. Therefore, Claim VI of Defendant's MAR is without merit as a matter of law.

Summary Disposition of Claim VI

152. For the reasons listed above, the Court concludes that Claim VI of Defendant's MAR is procedurally barred pursuant to N.C.G.S. §15A-1419(a)(3). Additionally, the Court concludes that Defendant has failed to show good cause and actual prejudice to justify this Court's lifting of the procedural bar for the evaluation of Defendant's claim on the merits. N.C.G.S. § 15A-1419(b)(1) (2016). Nor has Defendant shown that a miscarriage of justice will result if this Court does not review his procedurally defaulted claims. N.C.G.S. § 15A-1419(b)(2) (2016). Therefore, Claim VI of Defendant's MAR is procedurally barred from this Court's review under N.C.G.S. § 15A-1419(a)(3).

153. In the alternative, the Court concludes, for the reasons listed above, that Claim VI of Defendant's MAR is without merit as a matter of law. Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

154. The Court concludes that Defendant is not entitled to an evidentiary hearing on Claim VI of his MAR. See N.C.G.S. §§ 15A-1419(b), 15A-1420(c)(1); McHone, 348 N.C. at 257, 499 S.E.2d at 763. **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss Claim VI of Defendant's MAR is **ALLOWED**.

CLAIM X of MAR

155. Defendant claims that the alleged ineffective assistance of counsel ("IAC") claims in his MAR and SMAR amount to cumulative error. (See MAR pp. 118-19) Specifically, Defendant contends that Claim II of his MAR and SMAR, Claim III of his MAR and SMAR, Claim VI of his MAR, Claim VII of his MAR, Claim VIII of his MAR and SMAR, and Claim IX of his MAR and SMAR amount to cumulative error. (See id.) However, if none of Defendant's individual IAC claims have merit, there is no cumulative error based upon IAC. See Nwakanma v. Gonzales, 126 F. App'x 699, 702 (6th Cir. 2005) ("Respondent's contention defies the laws of mathematics: the sum of many zeros nonetheless equals zero. To put it differently, a whole lot of nothing equals nothing.")

156. Additionally, it is settled law in the Fourth Circuit that there is no cumulative error analysis for IAC claims. See Fisher v. Angelone, 163 F. 3d 835, 852 (4th Cir. 1998) ("To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue."). Furthermore, the United States Supreme Court has never addressed the issue and expressly found such "cumulative error" to be cognizable. See Williams v. Anderson, 460 F. 3d 789, 816 (6th Cir. 2006) (noting the attractiveness of cumulative error analysis but nevertheless holding "that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue"); Williams v. Sec'y, Dep't of Corr., No. 8:07-cv-591-T-33TBM, 2009 U.S. Dist. LEXIS 32776, at *36-37 (M.D. Fla. Apr. 2, 2009) ("No Supreme Court authority

recognizes ineffective assistance of counsel 'cumulative error' as a separate violation of the Constitution, or as a separate ground for habeas relief."). Were this Court to conclude that cumulative IAC error is cognizable, it would constitute a "new rule" barred by Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) and State v. Zuniga, 336 N.C. 508, 444 S.E.2d 443 (1994). Accordingly, Claim X of Defendant's MAR is without merit.

Summary Disposition of Claim X

157. As noted in this Court's adjudication of Claims II, III, and VI, above, the Court has concluded that the State is entitled to summary dismissal of Claim II of Defendant's MAR and SMAR, Claim III of Defendant's MAR, all subparts of Claim III of Defendant's SMAR for which the Court has not reserved ruling, and Claim VI of Defendant's MAR. Therefore, the Court concludes that the State's Motion to Summarily Dismiss Defendant's cumulative IAC error claim regarding the claims listed above that focus on the guilt phase of Defendant's trial should be allowed. **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss Claim X of Defendant's MAR as it pertains to Claim II of Defendant's MAR and SMAR, Claim III of Defendant's MAR, all subparts of Claim III of Defendant's SMAR for which the Court has not reserved ruling, and Claim VI of Defendant's MAR is **ALLOWED.**

158. Further, the Court concludes that, following an evidentiary hearing, if Defendant establishes a meritorious claim for IAC as alleged in Claim VII of his MAR, Claim VIII of his MAR and SMAR, or Claim IX of his MAR and SMAR, the remedy must be a new sentencing hearing. Therefore, the Court concludes that Claim X (cumulative IAC error) is superfluous as it pertains to Claim VII of Defendant's MAR, Claim VIII of Defendant's MAR and SMAR, and Claim IX of Defendant's MAR and SMAR. The Court further concludes that, if Defendant fails to establish a meritorious claim for IAC as alleged in Claim VII of his MAR, Claim VIII of his MAR and SMAR, or Claim IX of his MAR and SMAR, the State is entitled to a summary dismissal of Claim X as well. **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss Claim X of Defendant's MAR as it pertains to Claim VII of Defendant's MAR, Claim VIII of Defendant's MAR and SMAR, and Claim XI of Defendant's MAR and SMAR is **ALLOWED.**

159. The Court concludes that Defendant is not entitled to an evidentiary hearing on Claim X of his MAR. See N.C.G.S. § 15A-1420(c)(1); McHone, 348 N.C. at 257, 499 S.E.2d at 763. **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss Claim X of Defendant's MAR is **ALLOWED.**

CLAIM XI of SMAR

160. Defendant claims that he received ineffective assistance of counsel ("IAC") at trial because trial counsel failed to adequately investigate evidence pointing to the guilt of a third party. (SMAR pp. 52-56) Specifically, Defendant contends that trial counsel was ineffective for failing to adequately investigate evidence pointing to the guilt of (1) Vanessa Smith ("Smith"), (2) Dustin Maness ("Maness"), and (3) Jamie Fender ("Fender") for the murder of Christopher

Gailey ("Gailey"). (SMAR p. 52 n.19) For the reasons enumerated below, the Court finds that Claim XI of Defendant's SMAR is without merit.

Claim XI is Without Merit

161. Defendant fails to establish (1) that counsel deficiently represented Defendant by committing an objectively unreasonable error, and (2) that such deficiency prejudiced the defense so as to deprive Defendant of a fair trial whose result was reliable. See Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693 (1984); see also, State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985).

162. The testimony Defendant alleges should have been elicited by trial counsel would not have been admissible pursuant to the constraints on admissibility of third party guilt. See Holmes v. South Carolina, 547 U.S. 319, 323-24, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (evidence of third party guilt admissible if it raises reasonable inference or presumption as to the defendant's own innocence but not admissible if it merely casts a bare suspicion upon another or raises a conjectural inference as to the commission of the crime by another); State v. Israel, 353 N.C. 211, 217, 539 S.E.2d 633, 637 (2000) (evidence that another committed the crime for which defendant is charged generally relevant and admissible as long as it does more than create an inference or conjecture; it must point directly to the guilt of the other party); State v. Cotton, 318 N.C. 663, 667, 351 S.E.2d 277, 279-80 (1987) (to be admissible, such evidence must tend both to implicate another and be inconsistent with the guilt of the defendant).

A. Evidence Regarding the Alleged Guilt of Vanessa Smith

163. Defendant contends that trial counsel was ineffective for failing to adequately investigate the potential testimony of Troy Spencer ("Spencer") because it points to the guilt of Smith. (SMAR p. 52 n.19 (citing SMAR pp. 5-6, 17-18) In support of this contention, Defendant presents Spencer's 31 March 2003 letter (SMAR Ex. 49) which trial counsel appears to have possessed since 2 April 2003 and Spencer's 2 October 2012 affidavit (SMAR Ex. 42) which Spencer executed several years after Defendant's trial. (See SMAR p. 52 n.19) However, the Court concludes these two documents only show that Spencer's potential testimony at the time of Defendant's trial regarding the alleged guilt of Smith for Gailey's murder would have been inadmissible because it merely raised a conjectural inference, did not point directly to the guilt of Smith, and was not inconsistent with Defendant's guilt.

164. First, regarding Smith's role in the murder of Gailey, Spencer's 31 March 2003 letter states in pertinent part, "She told me that 'she wanted the big bag of cocaine that Chris Gailey always displayed, and she wanted the big roll of cash.' She told me that it was her idea to jump Chris and to take it. It was all premeditated on both their parts." (SMAR Ex. 49 pp. 00512-13) (emphasis in original) Spencer's letter continues, "[S]he told me that she used witchcraft on [Defendant] and went on and on at him 'until he agreed to plan out a meeting with Chris to make an exchange for some guns they stole for cocaine.' But they 'both planned' it out for days." (SMAR Ex. 49 p. 00514) (emphasis in original) Further the letter states, "She planned that murder. It's time she gets a taste of her own treatment of people. 'State's witness.' Hell, she

probably pulled the trigger herself." (SMAR Ex. 49 p. 00517) While the above-quoted portions of Spencer's letter may implicate Smith in the planning of Gailey's murder, they merely raise a conjectural inference that Smith "probably pulled the trigger herself." Additionally, Spencer's statements that Smith and Defendant "'both planned' it out for days" and that "[i]t was all premeditated on both their parts" is not inconsistent with Defendant's guilt. In fact, it actually implicates Defendant in Gailey's murder. In short, Spencer's 31 March 2003 letter merely raised a conjectural inference that Smith shot Gailey, did not point directly to the guilt of Smith for shooting Gailey, and was not inconsistent with the State's theory that Defendant shot and murdered Gailey. Therefore, Spencer's potential testimony on this matter would have been inadmissible at Defendant's trial.

165. Second, regarding Smith's role in the murder of Gailey, Spencer's 2 October 2012 affidavit states in pertinent part:

> On several occasions, Vanessa insinuated that it was her, not [Defendant], who pulled the trigger and killed Chris Gailey. In fact, one time she said, "that pussy mother fucker couldn't even do it and I had to do it myself." Those are her exact words. She also told me that she wanted the "big bag of cocaine" and "big roll of cash" that Chris Gailey always carried. She said it was her idea to jump Gailey and take it, and that [Defendant] didn't want to hurt Chris. She planned it all, not [Defendant].

(SMAR Ex. 42 p. 2) The Court finds that the above-quoted portion of Spencer's post-conviction affidavit differs materially from his 31 March 2003 letter that was available to defense counsel prior to trial. In adjudicating IAC claims, this Court is required to review trial counsel's actions from his or her perspective at the time of trial, without the distorting effects of hindsight. See Strickland, 466 U.S. at 689. Since Spencer's 31 March 2003 letter implicated Defendant in Gailey's murder, did not point directly to Smith as the shooter, and was not inconsistent with Defendant's guilt, trial counsels' failure to further investigate Spencer's allegations was not objectively unreasonable. Additionally, in light of Spencer's apparent disdain for Smith who Spencer claims "used" and "manipulated" him to get out of jail prior to Defendant's trial (see SMAR Ex. 49 p. 00516), trial counsels' failure to further investigate Spencer's allegations was not objectively unreasonable.

166. Finally, in light of the overwhelming evidence of Defendant's guilt presented at trial, there is no reasonable probability that, but for trial counsels' failure to further investigate Spencer's potential testimony, the result of the proceeding would have been different. See Strickland, 466 U.S. at 694. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

B. Evidence Regarding the Alleged Guilt of Dustin Maness

167. Defendant contends that trial counsel was ineffective for failing to adequately investigate the potential testimony of Robert Johnson ("Johnson") because it points to the guilt of Maness. (SMAR p. 52 n.19 (citing SMAR pp. 6, 15) In support of this contention, Defendant presents Johnson's 18 July 1999 pretrial statement (SMAR Ex. 53) and Johnson's 4 March 2012 post-conviction affidavit (SMAR Ex. 43). (See SMAR p. 52 n.19) However, the Court concludes these two documents only show that Johnson's potential testimony regarding the alleged guilt of Maness for Gailey's murder would have been inadmissible at Defendant's trial because it merely raised a conjectural inference, did not point directly to the guilt of Maness, and was not inconsistent with Defendant's guilt.

168. The Court finds that neither Johnson's pretrial statement nor his post-conviction affidavit directly link Maness to the murder of Gailey. At best, they merely place Maness in the Uwharrie Forest on the night of Gailey's murder through hearsay. In fact, when fairly read, the hearsay communicated to Johnson by Mike Simpson tends to show that Defendant premeditated the murder of Gailey and even had the forethought to tell Maness "not to worry if he heard shooting, because they were test firing some guns" shortly before the murder. After all, according to Johnson's pretrial statement, Johnson "thinks [Defendant] killed [Gailey] but [Maness] knows something" about it. Therefore, Johnson's potential testimony on this matter would be inadmissible at Defendant's trial because it merely raises a conjectural inference that Maness could have murdered Gailey due to his alleged presence in the Uwharrie Forest on the night of Gailey's murder. Additionally, Johnson's potential testimony on this matter does not point directly to the guilt of Maness and is not inconsistent with Defendant's guilt.

169. Next, Maness' alleged statement that he was glad Gailey was dead and that Gailey deserved it does not implicate Maness in the murder of Gailey. At best, it merely raises a conjectural inference that Maness could have murdered Gailey because he bore a grudge against Gailey over the altercation the two of them had when Gailey found Maness in the bathtub of Johnson's lake house. However, as noted in the adjudication of Claim II D, above, the record reflects that Maness testified during cross-examination at trial that he and Gailey did, in fact, reconcile after their altercation at the lake house in May or June 1999. (T pp. 1837-38) Therefore, Johnson's potential testimony on this matter would be inadmissible at Defendant's trial because it merely raises a conjectural inference that Maness could have murdered Gailey due to the grudge he allegedly bore toward Gailey over the altercation the two of them had when Gailey found Maness in the bathtub of Johnson's lake house. Additionally, Johnson's potential testimony on this matter does not point directly to the guilt of Maness and is not inconsistent with Defendant's guilt.

170. In spite of these facts, Defendant contends that Johnson's potential hearsay testimony on these matters would have been admissible at trial because they showed that Maness had the motive and opportunity to murder Gailey. (See SMAR p. 52 n.19) However, evidence establishing a third party's motive to commit a crime is not admissible where there is no evidence linking the third party to the crime and the proffered evidence does no more than arouse suspicion as to the guilt of the third party. See State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789

(1995). Since Johnson's above-quoted statements do not link Maness to Gailey's murder and do no more than to arouse a suspicion that Maness murdered Gailey, Johnson's potential testimony on these matters would not have been admissible at Defendant's trial, even to show motive. Additionally, in light of the overwhelming evidence of Defendant's guilt presented at trial, there is no reasonable probability that, but for trial counsels' failure to further investigate Johnson's potential testimony, the result of the proceeding would have been different. See Strickland, 466 U.S. at 694. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

C. Evidence Regarding the Alleged Guilt of Jamie Fender

171. Defendant contends that trial counsel was ineffective for failing to adequately investigate the potential testimony of Johnson and Lois Lawson ("Lawson") because their testimony allegedly points to the guilt of Fender. (SMAR p. 52 n.19 (citing SMAR pp. 16-17 & n.8) In support of this contention, Defendant presents Johnson's 4 March 2012 post-conviction affidavit (SMAR Ex. 43) and Lawson's 14 May 2012 post-conviction affidavit (SMAR Ex. 48), both of which were executed several years after Defendant's trial. (See SMAR p. 52 n.19) However, the Court concludes these two documents only show that Johnson's and Lawson's potential testimony regarding the alleged guilt of Fender for Gailey's murder would have been inadmissible at Defendant's trial because they merely raise a conjectural inference, do not point directly to the guilt of Fender, and are not inconsistent with Defendant's guilt.

172. The Court finds that nothing in the post-conviction affidavits purporting potential testimony of Johnson or Lawson directly links Fender to the murder of Gailey. First, Johnson's affidavit merely states that Lawson and Gailey were secretly "sleeping together" at a time when Lawson was married to Fender. Neither Johnson's nor Lawson's potential testimony states that Fender ever found out that Gailey and Lawson were sleeping together. Additionally, even if Fender found out that Gailey and Lawson were sleeping together, that fact alone does not implicate Fender in the murder of Gailey. While such knowledge could potentially provide a motive for murder, evidence establishing a third party's motive to commit a crime is not admissible where there is no evidence linking the third party to the crime and the proffered evidence does no more than arouse suspicion as to the guilt of the third party. See State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995). Furthermore, Johnson's potential testimony about what Fender told him the Monday after Gailey's murder not only implicates Defendant in Gailey's murder, it actually provides Defendant's motive for murdering Gailey. Therefore, Johnson's potential testimony on this matter would be inadmissible at Defendant's trial because it merely raises a conjectural inference that Fender murdered Gailey, does not point directly to the guilt of Fender, and is not inconsistent with Defendant's guilt.

173. Second, Lawson's potential testimony shows that Fender was mad at Defendant, not Gailey, for taking his rare LP albums. While such potential testimony may show motive for Fender to kill Defendant, it shows absolutely no motive for Fender to murder Gailey. Additionally, Fender's arming himself with an assault rifle prior to leaving his house to search for Defendant does not link Fender to Gailey's murder because the record shows that Gailey was

killed with a shotgun, not an assault rifle. (T p. 2005) Furthermore, Lawson's statement does not place Fender in the Uwharrie Forest on the night of Gailey's murder. Instead, Lawson merely speculates that "[t]here may have been people other than [Gailey], [Defendant] and Vanessa Smith out in the woods that night, but I do not know whether [Fender] was one of them." Therefore, Lawson's potential testimony on this matter would be inadmissible at Defendant's trial because it merely raises a conjectural inference that Fender murdered Gailey, does not point directly to the guilt of Fender, and is not inconsistent with Defendant's guilt.

174. Since the potential testimony of Johnson and Lawson would merely raise a conjectural inference, does not point directly to the guilt of Fender, and is not inconsistent with Defendant's guilt, trial counsels' failure to further investigate Johnson's and Lawson's allegations was not objectively unreasonable. Additionally, in light of the overwhelming evidence of Defendant's guilt presented at trial, there is no reasonable probability that, but for trial counsels' failure to further investigate Johnson's and Lawson's potential testimony, the result of the proceeding would have been different. See Strickland, 466 U.S. at 694. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

Summary Disposition of Claim XI

175. For the reasons listed above, the Court concludes that Claim XI of Defendant's SMAR is without merit. Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable. Therefore, Defendant has failed to establish a meritorious claim.

176. The Court concludes that Defendant is not entitled to an evidentiary hearing on Claim XI of his SMAR. See N.C.G.S. § 15A-1420(c)(1); McHone, 348 N.C. at 257, 499 S.E.2d at 763. **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss Claim XI of Defendant's SMAR is **ALLOWED.**

CLAIM XII of SMAR

177. Defendant claims that he is entitled to a new trial and sentencing hearing on the grounds that he was placed in physical restraints in view of the jury during the trial. (SMAR pp. 57-60) For the reasons enumerated below, the Court finds that Claim XII of Defendant's SMAR is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3) and is without merit in the alternative.

Claim XII is Procedurally Barred Under N.C.G.S. § 15A-1419(a)(3)

178. Defendant's claim that he is entitled to a new trial and sentencing hearing on the grounds that he was placed in physical restraints in view of the jury during trial is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3) if "[u]pon a previous appeal the defendant was in

a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C.G.S. § 15A-1419(a)(3) (2016). At trial, Defendant and his counsel would have known whether or not Defendant was subjected to physical restraints. If Defendant was, in fact, subjected to physical restraints and his shackling was in error, it was incumbent upon him to timely raise the issue at trial in accordance with N.C.G.S. § 15A-1031. See State v. Thomas, 134 N.C. App. 560, 568, 518 S.E.2d 222, 228 ("[F]ailure to object to the shackling, . . . waives any error which may have been committed." (omission in original) (quoting State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976))), disc. rev. denied and appeal dismissed, 351 N.C. 119, 541 S.E.2d 468 (1999).

179. Additionally, on direct appeal, appellate counsel could have learned from Defendant or Defendant's trial counsel whether Defendant was subjected to physical restraints and could have determined, from a review of the transcript, whether the trial court fulfilled its corresponding obligations under N.C.G.S. § 15A- 1031. If Defendant's appellate counsel then believed that the issue had merit, there remained ample opportunity to ensure that the transcript and record reflected that Defendant was shackled and to include the issue as an assignment of error and brief the issue accordingly. By not raising the issue on direct appeal, Defendant is now procedurally barred from doing so. See N.C.G.S. § 15A-1419(a)(3).

180. Furthermore, the Court concludes that Defendant has failed to show good cause and actual prejudice to justify this Court's lifting of the procedural bar for the evaluation of Defendant's claim on the merits. N.C.G.S. § 15A-1419(b)(1) (2016). Nor has Defendant shown that a miscarriage of justice will result if this Court does not review his procedurally defaulted claims. N.C.G.S. § 15A-1419(b)(2) (2016). Therefore, Claim XII of Defendant's SMAR is procedurally barred from this Court's review under N.C.G.S. § 15A-1419(a)(3).

Claim XII is Without Merit

181. The Court finds that Defendant has failed to produce any competent evidence that the jury saw Defendant in shackles or restraints inside the courtroom during his trial. However, assuming *arguendo* that the jury saw Defendant in shackles or restraints inside the courtroom during his trial, Defendant has waived any error by failing to make a timely objection or motion at trial to allow the trial court to rule and instruct the jury pursuant to N.C.G.S. § 15A-1031.

182. In support of his contention that he was subjected to physical restraints inside the courtroom, Defendant presents the affidavit of Juror Shirlene Ewing ("Juror Ewing") (SMAR Ex. 55). (See SMAR pp. 58-59) Juror Ewing's affidavit states in pertinent part:

> During the trial, Scott Allen was in the courtroom every time the jury came into the room. He looked pale, as if he was not allowed to go outside very much. I could see that he had tattoos on his neck. He sat at the table in between his two lawyers. I know that Scott Allen had some type of shackles or restraints on during the trial, but I do not remember whether I saw them while he was sitting at the table in the courtroom.

(SMAR Ex. 55 p. 2) Additionally, in support of his contention that he was subjected to physical restraints outside of the courtroom, Defendant presents another part of Juror Ewing's affidavit:

> When the jury was allowed to have a break during the trial, I had to go outside if I wanted to smoke. A deputy would always go outside with me and the other jurors who wanted to smoke. One time, the deputy made us stop and wait in the hallway. He told us that other deputies were bringing Scott Allen into the courthouse and that we could not go outside until Scott Allen was gone. The deputy said that we were not supposed to see Scott Allen when he was being moved by the deputies.

(SMAR Ex. 55 pp. 1-2) The Court finds that neither of the above-quoted portions of Juror Ewing's affidavit show that she ever saw Defendant in shackles or restraints during his trial. Although the first quoted portion states that Juror Ewing "kn[e]w" Defendant had "some type of shackles or restraints on during the trial," Juror Ewing does not recall actually seeing shackles or restraints on Defendant while he was in the courtroom. Additionally, Juror Ewing's affidavit affirmatively states that Defendant was already "in the courtroom every time the jury came into the room." Furthermore, according to the second above-quoted portion of Juror Ewing's affidavit, she never saw Defendant outside of the courtroom at all because "the deputies" kept her from doing so. Therefore, Defendant has failed to show that the jury saw Defendant in shackles or restraints inside the courtroom during his trial.

183. Next, Defendant contends that another juror, Johnny Randall McDowell ("Juror McDowell"), allegedly "told post-conviction investigators that [Defendant] was shackled and 'there were deputies all around him.'" (SMAR p. 59) However, Defendant fails to state when Juror McDowell allegedly viewed Defendant. Instead, Defendant's SMAR merely states that Juror McDowell "declined to sign an affidavit." (Id.) A review of Defendant's exhibits show that Defendant failed to attach an affidavit from Juror McDowell and failed to attach an affidavit from a post-conviction investigator to support his assertion that Juror McDowell ever made this statement. Therefore, Defendant has failed to show that the jury saw Defendant in shackles or restraints inside the courtroom during his trial.

184. Additionally, assuming *arguendo* that the jury saw Defendant in shackles or restraints inside the courtroom during his trial, Defendant has failed to establish prejudice as a result. See State v. Stanley, 213 N.C. App. 545, 551, 713 S.E.2d 196, 201 (2011) ("The trial court did not give the required instruction under N.C. Gen. Stat. § 15A-1031(3). However, in order for Defendant to receive a new trial, he must prove that this omission was prejudicial."). First, Defendant has not shown that the alleged shackles or restraints in any way impaired his ability to assist in his defense. See State v. Holmes, 355 N.C. 719, 729, 565 S.E.2d 154, 163, cert. denied, 537 U.S. 1010, 123 S. Ct. 478, 154 L. Ed. 2d 412 (2002). Second, the evidence at the guilt phase of Defendant's trial established that Defendant had previously escaped from prison work release, fled the state of North Carolina, and assumed the identity of Byron Johnson, a resident of the State of Washington, in order to avoid detection by authorities. (T pp. 1459-63, 1513-20, 1662-63) Therefore, the jury knew that Defendant was a flight risk and an escaped

fugitive when he was arrested for the murder of Gailey. Under such circumstances, seeing Defendant in physical restraints during his trial would not have surprised or prejudiced the jury.

185. Furthermore, Defendant presented evidence at the sentencing phase of his trial showing that several of the witnesses who testified in his defense corresponded with and/or visited Defendant in prison and in the Randolph County jail prior to trial. (T pp. 2442-44, 2463-64, 2477, 2519-20) With all of these references to Defendant being in custody, Defendant has failed to show that he suffered prejudice at his sentencing hearing from the jury allegedly seeing him in shackles or restraints. Indeed, by that point, "Defendant's guilt had already been determined as Defendant had been previously convicted of first-degree murder. The jury was aware of this. Thus, being temporarily observed in restraints did not infringe on Defendant's presumption of innocence, since there was no such presumption." State v. Thomas, 344 N.C. 639, 652, 477 S.E.2d 450, 456 (1996), cert. denied, 522 U.S. 824, 118 S. Ct. 84, 139 L. Ed. 2d 41 (1997). Therefore, Defendant has failed to establish prejudice.

186. Finally, in light of the overwhelming evidence establishing Defendant's guilt presented at trial and the overwhelming evidence establishing the aggravating circumstances found by the jury in reaching its recommendation of death as a sentence, Defendant has failed to establish prejudice as a result of the alleged viewing by the jury of Defendant in shackles or restraints. See Stanley, 213 N.C. App. at 552, 713 S.E.2d at 201; see also, State v. Lee, 218 N.C. App. 42, 52, 720 S.E.2d 884, 891 ("[G]iven the overwhelming evidence against defendant, including his own Mirandized statements, we fail to see how defendant's shackling contributed to his convictions in the present case."), disc. rev. improvidently allowed, 366 N.C. 329, 734 S.E.2d 571 (2012); see also, Thomas, 134 N.C. App. at 570, 518 S.E.2d at 229. Therefore, Claim XII of Defendant's SMAR is without merit.

Summary Disposition of Claim XII

187. For the reasons listed above, the Court concludes that Claim XII of Defendant's SMAR is procedurally barred pursuant to N.C.G.S. §15A-1419(a)(3). Additionally, the Court concludes that Defendant has failed to show good cause and actual prejudice to justify this Court's lifting of the procedural bar for the evaluation of Defendant's claim on the merits. N.C.G.S. § 15A-1419(b)(1) (2016). Nor has Defendant shown that a miscarriage of justice will result if this Court does not review his procedurally defaulted claims. N.C.G.S. § 15A-1419(b)(2) (2016). Therefore, Claim XII of Defendant's SMAR is procedurally barred from this Court's review under N.C.G.S. § 15A-1419(a)(3).

188. In the alternative, the Court concludes, for the reasons listed above, that Claim XII of Defendant's SMAR is without merit.

189. The Court concludes that Defendant is not entitled to an evidentiary hearing on Claim XII of his SMAR. See N.C.G.S. §§ 15A-1419(b), 15A-1420(c)(1); McHone, 348 N.C. at 257, 499 S.E.2d at 763. **IT IS THEREFORE ORDERED** that the State's Motion to Summarily Dismiss Claim XII of Defendant's SMAR is **ALLOWED**.

ORDER

1. Claims I, II, IV, V, VI, X, XI, and XII are summarily dismissed.

2. Claim III of Defendant's MAR is summarily dismissed.

3. All subparts of Claim III of the SMAR are summarily dismissed, except for Claim III.H, Claim III.J, Claim III.K and that portion of Claim III.I that relates to the *in camera* examination of the sealed mental health and substance abuse records of Vanessa Smith.

4. The Court shall address Claim VII of Defendant's MAR, Claim VIII of Defendant's MAR and SMAR, and Claim IX of Defendant's MAR and SMAR in a separate order.

IT IS SO ORDERED, this the 18 day of August, 2016.

Honorable V. Bradford Long
Senior Resident Superior Court Judge