STATE OF NORTH CAROLINA
COUNTY OF CABARRUS

FILED
2009 FEB 25 P 2:54
CABARRUS COUNTY, C.S.C.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 76 CRS 5708, 5709

STATE OF NORTH CAROLINA)
)
vs.)
) **ORDER**
RONNIE WALLACE LONG)
Defendant.)

THIS MATTER coming on to be heard and being heard before the undersigned Superior Court Judge beginning November 21, 2008, in a special session of Criminal Superior Court, upon a Motion For Appropriate Relief, requesting that this court vacate the defendant's convictions and grant a new trial. The defendant was present in court throughout these proceedings, and represented by attorneys Donna Bennick and Janine Zanin. The State was represented by District Attorney Roxann Vaneekhoven and Chief Assistant District Attorney Ashlie Shanley. In ruling upon this Motion, the Court has had an opportunity to view the manner and appearance of each witness and to make appropriate determinations as to the credibility of each witness. The Findings of Fact set forth below take into account these determinations of credibility of the evidence presented.

THE COURT, after hearing the evidence and considering the arguments of counsel, makes the following

FINDINGS OF FACT

1. On October 1, 1976, the defendant, Ronnie Wallace Long, was convicted in Cabarrus County Superior Court of one count of first degree rape and one count of first degree burglary.

2. Defendant was sentenced to two concurrent life sentences.

3. At trial defendant was represented by Attorneys James Fuller and Karl Adkins of the "Chambers Firm" in Charlotte, North Carolina.

4. Defendant appealed to the North Carolina Supreme Court and in that appeal the original judgments of the trial court were affirmed. (State v. Long, 293 N.C. 286, 237 S.E. 2d 728 (1978)).

5. Defendant filed a Motion for Appropriate Relief in 1987 alleging ineffective assistance of counsel as one factor to be considered, and that Motion was denied.

6. That defendant's trial attorneys did not file a motion for discovery in this case. It is important, however, to consider the context in which this decision was made with respect to discovery. As noted in more detail below, this case was tried more than 30 years ago, at a time when discovery was handled much differently from present practice. Further, the District Attorney at that time followed a policy of "open file" discovery, making information available to defense counsel without the necessity of filing a motion for discovery.

7. It is also noted that, because more than 30 years have passed since the trial of this case, the passage of time has taken a toll on the memories of everyone involved in the case, as further referenced hereinafter.

8. That defendant's trial attorneys testified at this hearing that they were experienced attorneys who had handled several rape and murder cases prior to their representation of this defendant. Furthermore, that these attorneys had the reputation of being "excellent trial lawyers" as evidenced by Judge Erwin W. Spainhour's testimony at defendant's first motion for appropriate relief hearing. (p. 37 Transcript from first motion for appropriate relief).

9. Ron Bowers, who was the senior Assistant District Attorney in the District Attorney's office in 1976, prosecuted this case on behalf of the State, together with Bob Roberts, the elected District Attorney. Mr. Roberts is now deceased. Mr. Bowers testified at this hearing that the District Attorney's office had an "open file policy" which meant that whatever evidence the District Attorney's Office had in its file was made available to defense counsel. Mr. Bowers testified that the District Attorney's office relied upon the police department to provide it with all of the evidence the police collected in a case. Mr. Bowers stated unequivocally under oath that he had no idea that physical evidence in this case was sent for testing to the SBI or that the SBI generated reports. Mr. Bowers testified the first time he saw the Isenhour Reports and the SBI Reports was when he received them a few weeks before this hearing from either Ms. Bennick or the District Attorney. He further testified that if he or Mr. Roberts had known of the Isenhour Reports and the SBI Reports, they would have been "automatically" turned over to the defense, and that under no circumstances would he or Mr. Roberts have kept this evidence from the defense. Mr. Bowers also testified that he would have wanted to know of this critical evidence since he would not have wanted any surprises at trial. He testified that the District Attorney's office not only had a legal duty to turn over all evidence, including potentially exculpatory evidence, but that the District Attorney's office had an ethical duty to do so. Mr. Bowers further testified that if he had known that a full "rape kit" had been taken, he would have asked the SBI lab to conduct serological testing to include or exclude

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Defendant as the perpetrator. Mr. Bowers testified that if an innocent man is convicted, "two wrongs are done. The innocent man is in prison and the guilty man who needs to be in prison is forever free. That's a double wrong and shouldn't happen".

10. Mr. Bowers also provided, through his testimony, some insight into the discovery process as it was conducted in 1976. The volume of caseload and limited prosecutorial staff made it necessary for Mr. Bowers to rely upon law enforcement officers to provide discovery to defense counsel. In the normal course of events, defense counsel would contact Mr. Bowers if they experienced any difficulty in getting information and he would correct the situation. This usually meant a stern lecture from Bowers to any officers involved, because he did not tolerate officers' withholding of information in criminal cases. No such request was received by him in this case. Finally, Mr. Bowers portrayed an image of criminal prosecution from that era, noting that, in most cases, the defense attorney knew far more about that State's evidence than the prosecutor, particularly under the discovery practice of that District.

11. Defendant filed this second Motion for Appropriate Relief in 2008, contending that he was entitled to a new trial based upon newly discovered evidence and that such evidence should have been provided to him and his attorneys pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963), alleging specifically that the State failed to disclose the following material: three State Bureau of Investigation lab reports (Lab Report 1: shoeprint analysis, Lab Report 2: hair analysis, Lab Report 3: paint, fiber and matches analysis), Detective Isenhour's Crime Scene Identification Report and the victim's medical records.

12. Lab Report 1 detailed Agent Mooney's findings regarding a shoe print left at the crime scene in comparison to shoes seized from the defendant fifteen days after the crime occurred. Agent Mooney concluded in the report that the tread design of the defendant's shoe matched the tread design of the print left at the scene. Agent Mooney also concluded that the defendant's shoe could have made the impression found at the scene. Agent Mooney testified at the initial trial and was cross examined by defense counsel. Agent Mooney's testimony was consistent with the findings contained in the lab report.

13. Although the defendant claimed in his motion for appropriate relief that his trial counsel did not receive Lab Report 1, at the hearing Mr. Adkins, one of defendant's former attorneys, testified under oath that they had received this report.

14. Lab Report 2 detailed Agent Glesne's analysis of a random hair found at the crime scene in comparison to the defendant's hair sample. This lab report also contained Agent Glesne's examination of the victim's clothing.

15. At the current MAR hearing, both the State and the defendant called expert witnesses qualified in the field of hair analysis. Both the State's expert and the defendant's expert agreed that Agent Glesne could not determine if the random hair was human or derived from an animal. Several characteristics of the hair prevented definitive analysis. Those characteristics included the following: the heavy pigmentation of the hair prevented an observation of the interior structure of the hair; the scale structure was so worn down that Agent Glesne described it as "unidentifiable"; the medulla of the hair was at least 1/3 to 1/2 inches in diameter, which is wide for human hair; and the hair did not contain a root ball which is key in determining the origin of the hair.

16. In addition, the potential sources of the random hair were innumerable. On the day of the rape, the victim had entertained a nephew and others who walked through the hallway where the hair was found, the victim had attended church and had walked through the post office before returning home the day of the rape, Hours before the rape, the victim testified at trial that she had made preparations for a beach trip, pulling clothes, suitcases and other items out of closets and was "all over the house packing and cooking dinner." (Trial Tr. 4, 61, 66) After the victim reported the rape, three law enforcement officers arrived at her home and searched the house, and tracking dogs were led throughout the home in order to obtain the rapist's scent.

17. Agent Remy testified at the hearing that all of these individuals could have tracked in the hair that was found in the hallway via a primary or secondary transfer. Furthermore, she testified that there was no way to know how the long the hair had been there or how old it was which means that it could have been transferred there days, weeks, or months earlier.

18. Agent Glesne in Lab Report 2 also examined the victim's clothing. Agent Glesne found only brown Caucasian hairs in the victim's underwear. There is no dispute that a black male committed the rape. (Trial Tr. 11, 41, 42, 75, 121, 122, 133) Agent Glesne did not compare those hairs to the victims and did not exclude the victim as a source of the hairs found in her underwear. The victim testified at trial that the rapist tore all of her clothes off before the actual rape occurred. In addition, the victim never put on those clothes again. Agent Remy testified that a transfer of hair occurs in less than 20% of sexual encounters.

19. Agent Cone detailed his analysis of fibers, paint fragments and matches in Lab Report 3. Agent Cone examined the defendant's jacket, gloves and toboggan which were seized fifteen (15) days after the rape. The defendant was wearing the black leather jacket when he was arrested, the gloves were

discovered in the defendant's car and the toboggan was found under the driver's seat of the defendant's car. The microscopic examination of the leather jacket and leather gloves failed to reveal the presence of any hair, carpet fibers, or paint fragments from the victim's home. The microscopic examination of the leather jacket and leather gloves failed to reveal the presence of any hair, carpet fibers or paint fragments or anything including the defendant's own fibers, paint fragments or hair. Agent Cone testified at the hearing that items do not adhere well to leather, especially after fifteen days. The microscopic examination of the defendant's toboggan failed to reveal the presence of any carpet fibers from the victim's home. The examination did reveal, however, the presence of two white fragments embedded with other fibers. Agent Cone stated in his report and testified at the hearing that it was not possible to compare these white fragments with paint fragments collected from the victim's house.

20. At the trial, defense counsel argued to the jury that nothing was found on the defendant's clothing. During closing arguments, defense counsel said "White house. White paint. White columns. White drain spout. White siding. White windows. White frame. White boards, and black jacket without one trace of white paint anywhere on it. And black leather gloves without one trace of white paint on them, and I say to you, ladies and gentlemen, that taking everything the State has said, that one cannot shimmy up a pole, or drain pipe at the place where they found the footprint – and a black leather jacket, and not have white paint on it" (Closing Arguments 116).

21. At the hearing, both of defendant's original attorneys and the original defense investigator testified regarding their knowledge of the collection of the leather jacket, leather gloves, toboggan and shoes. They recalled a meeting with the District Attorney and law enforcement wherein they viewed these items and discussed the fact that they did not see any hair, paint or fibers. At the current MAR hearing, these attorneys testified that they chose not to have these clothing items tested at an independent lab.

22. At the current MAR hearing, both the expert for the State and the defense testified that the absence of evidence was not evidence of evidence and the lack of fibers or fragments did not exonerate the defendant.

23. Agent Cone also detailed his findings in Lab Report 3 regarding a comparison of matches found at the crime scene with several matchbooks collected fifteen days later from the defendant's car. The matches were discussed extensively at the original trial. (Trial Tr. 208-210, 233-234, 252-253) On cross examination, counsel for defense elicited testimony that the matches did not match. (Trial Tr. 209) This was inaccurate, but to the benefit of the defendant. Agent Cone's report indicated, and he testified at this hearing, that he could not do a comparative analysis because the matches found at the crime scene had been burned down too low. There was at least one matchbook that was

found in the defendant's car that could not be ruled out as the source of two matches found at the crime scene. Agent Cone testified at this hearing that matches are consumable especially by a smoker which he believed the defendant to be due to the marijuana he found in defendant's jacket and the rolling paper wrapper submitted with the jacket.

24. Both attorneys testified at the first Motion for Appropriate Relief which occurred in 1987, just eleven years after the original trial. At that hearing, defense attorney Fuller answered forty times within thirty pages that "I do not recall" to questions regarding his representation of the defendant. (State's Exhibit 1) Defense attorney Fuller testified that "A lot of things have happened in eleven years, and I just really don't remember a lot of things in this case." (State's Exhibit 1, page 24) Defense attorney Adkins testified twenty times within twelve pages that "I do not recall" to questions regarding his representation of the defendant. He did not recall arguing the defendant's appeal to the Supreme Court. (State's Exhibit 2) At the first MAR hearing, Attorney Fuller testified that District Attorney Bob Roberts had an open file policy for discovery and specifically set up a meeting with defense counsel and law enforcement to obtain whatever they needed. (State's Exhibit 1 page 24, 25)

25. At the hearing for the current Motion for Appropriate relief, thirty years after the trial, defendant's original trial counsel testified that they did not know exactly what discovery they had received, how many pages they received, who was there when they received the discovery, or where they received the discovery. During the current hearing, the original trial counsel and original defense investigator testified that the original defense file had been destroyed and the only remaining file belonged to the investigator who was not an employee of the firm and did not contain the complete file.

26. In the current Motion for Appropriate Relief, defendant claims that trial counsel did not receive a crime scene report completed by Concord Police Detective Isenhour detailing the collection of the items listed above and the submission of those items to the State Bureau of Investigation. At the original trial, when Detective Taylor indicated that other reports such as an Identification Report existed, defense counsel did not appear surprised or request a recess to review those reports. (Trial Tr. 249) In addition, defense counsel failed to ask Detective Taylor or Detective Isenhour any questions about the report at the trial. This Identification Report only outlines the information detailed in the three lab reports and has no independent value.

27. In the current Motion for Appropriate Relief, defendant claims that trial counsel did not receive the victim's medical records. Defendant's trial counsel was aware that the victim went to the hospital yet defense counsel testified at this hearing that they chose not to obtain the victim's medical records from the hospital. The victim's physician testified at the original trial regarding the

collection of semen evidence. Defense counsel did not appear surprised and did not request a recess in order to question the physician. In fact, the defense attorneys did not ask the physician any questions at trial. There is no evidence that the materials collected from the victim's person were ever examined by the State Bureau of Investigation. In fact, hospital staff placed the semen evidence in glass test tubes. Witnesses for the defense at this hearing testified to the effect that method of collection could have on the evidence. Law enforcement did not arrest the defendant until fifteen days after that material had been collected. If defense counsel had subpoenaed the medical records they would have learned of the existence of the evidence but the condition of the evidence would have been suspect. In addition, at this hearing Mr. Adkins testified that he would not have tested the semen evidence.

28. The medical records, introduced at the MAR hearing as Defendant's Exhibit 7, contain a document entitled "Authorization for Release of Rape Information, Specimens & Photographs", which indicate the "combed pubic hair [of the victim] in plastic bag" and "1 test tube with vaginal swabs and secretions" were released to Marshall J. Lee of the Concord Police Department on April 26, 1976. Despite an extensive search conducted by order of Judge Spainhour in connection with the instant MAR, the samples contained in the Rape Kit cannot presently be located. At trial, Dr. Lance Monroe testified about preparing one slide with fluid found in the victim's vagina and that under the microscope he observed the presence of human sperm. (Trial Tr. 170. There is no indication in the record that the biological evidence was submitted to the SBI for testing, even though Mr. Burns and Mr. Bowers testified at this hearing that in 1976 serological testing was available and could be used to include or exclude a suspect as the perpetrator of a crime. To date, the biological evidence that was collected at the hospital and turned over to the Concord Police Department, and the victim's clothing which was tested by the SBI, have not been found and thus, cannot be DNA tested.

29. The Defendant and his attorneys were aware that head and pubic hair samples had been collected from the Defendant.

30. Mr. Adkins and Mr. Fuller were experienced trial attorneys from a well known Charlotte firm referred to as "The Chambers Firm". Both attorneys had the reputation of being excellent trial lawyers. During the current hearing each attorney testified about different strategies they employed at the trial in 1976. Based on these lawyers' testimony in this hearing, in addition to their training, experience and trial practice, it is evident, that they recognized that at the time of trial it was to their client's advantage not to have certain items of evidence tested because they ran the risk of the results inculpating their client. Furthermore this gave the attorneys the opportunity to argue, as they did at trial, whatever they believed could be beneficial to their client's case without concrete testing results. This was a matter of strategy employed by the

defense that should not be allowed to be used to their benefit after a conviction has occurred.

31. This Court finds that it is as likely as not that strategic decisions were made by trial counsel concerning forensic evidence, particularly as to requesting the specifics of medical or other forensic evidence that might point toward their client, choosing to rely upon perceived gaps in the proof known to the prosecutors and available for use at trial.

32. The strength of the State's case at trial was compelling and included but was not limited to the following factors: The victim gave officers a detailed description of the rapist as soon as they responded to the scene; the victim gave officers a detailed description of the rapist's clothing as soon as they responded to the scene; the victim was shown thirteen (13) photos of African American males while she was in the hospital and she did not choose any of these thirteen (13) as being the man that raped her; the defendant, Ronnie Wallace Long, was not in any of these thirteen (13) photographs; fifteen days after the crime occurred the victim came to Cabarrus County District Court at the request of investigating officers to see if she recognized anyone in the courtroom as the man that raped her; the victim was told that the man that raped her may or may not be in the courtroom; Detective Taylor noted that there were numerous black males in the court room on that date and at least twelve (12) of those black males were in the same age range as the defendant; after more than an hour into the morning, when the defendant's case was called he walked to the front of the courtroom, spoke to the judge, resolved his case and walked back out of the courtroom the victim motioned to officers to indicate this was the man that raped her; officers escorted the victim from the courtroom and she told them that was the man that raped her and she recognized him by the way he walked, the way he talked, his voice, his face, his profile, the color of his skin and his mannerisms; the victim told officers "there is no doubt in my mind that is the man that raped me"; later that day the victim picked Ronnie Wallace Long out of a seven (7) person photo lineup, and when she picked the defendant out she stated "there is no doubt in my mind that is the man that raped me." (8) At trial, the victim identified the defendant's leather jacket, leather gloves and toboggan as "identical" to the items worn by the rapist. (9) At trial, Agent Mooney testified that in his expert opinion the tread pattern of the defendant's shoe was consistent with the shoe print left at the scene.

33. The crimes for which the Defendant stands convicted occurred on April 25, 1976 and the Defendant was sentenced for these offenses on October 1, 1976.

BASED ON THE FOREGOING FINDINGS OF FACT, THE COURT CONLUDES AS A MATTER OF LAW THAT:

1. The defendant alleges that the State failed to disclose three State Bureau of Investigation lab reports (Lab Report 1: shoeprint analysis, Lab Report 2: hair analysis, Lab Report 3: paint, fiber and matches analysis), Detective Isenhour's Crime Scene Identification Report and the victim's medical records.

2. That the defendant has alleged that the defendant is entitled to appropriate relief on the grounds that the State failed to disclose evidence that was material to the defendant's guilt or innocence and thus violated the defendant's right to due process according to Brady v. Maryland, 373 U.S. 83 (1996). In order to demonstrate a Brady violation, the defendant must prove by a preponderance of the evidence that the evidence was exculpatory and was of such a nature that the result of the proceeding would have been different if the evidence had been disclosed to the defense. United States v. Bagley, 473 U.S. 667 (1985).

3. The defendant has also claimed that the defendant is entitled to appropriate relief pursuant to N.C. Gen. Stat. 15A-1415 that the evidence listed in paragraph 1 was unknown or unavailable to the defendant at the time of trial which could not with due diligence have been discovered at that time and which as a direct and material bearing upon defendant's guilt or innocence. In order to prevail upon a motion for appropriate relief on the ground of newly discovered evidence, a defendant must establish: (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the newly discovered evidence is competent, material and relevant; (4) that due diligence was used, and proper means were employed to procure the testimony at trial; (5) the new evidence is not cumulative; (6) the new evidence does not tend to only contradict a former witness or to impeach or discredit him; and (7) that this evidence is of such a nature as to show that on another trial a different result will probably be reached, and that the right will prevail. State v. Britt, 320 N.C. 705, 712-713 (1987).

4. The defendant has failed to prove by a preponderance of the evidence that the State failed to disclose the three State Bureau of Investigation lab reports (Lab Report 1: shoeprint analysis, Lab Report 2: hair analysis, Lab Report 3: paint, fiber and matches analysis), Detective Isenhour's Crime Scene Identification Report and the victim's medical records.

5. Defense counsel did not retain the original file and do not recall exactly what discovery they received from the State. Defense counsel never filed a motion for discovery in this case. Defense counsel testified that the District Attorney exercised an open file discovery policy and directed them to law enforcement

to obtain what they needed. Pursuant to State v. Anderson, 303 N.C. 185 (1981), defendant's failure to request what they needed from law enforcement cannot be used against the State.

6. That prior to trial defendant's attorneys recognized that it was to their client's advantage to not have certain items of evidence tested because they ran the risk of the results inculpating their client. For instance, the defendant certainly knew that his pubic hair and head hair were collected when law enforcement collected these items from him. Defendant's trial attorneys, based on their experience, would have known that there was a crime scene report produced in this case like all other rape cases. The fact that these attorneys chose not to ask for any of these items to be tested was a matter of strategy that should not be allowed to be used to their benefit after a conviction has occurred.

7. That the defendant has failed to prove by a preponderance of the evidence that the three State Bureau of Investigation lab reports (Lab Report 1: shoeprint analysis, Lab Report 2: hair analysis, Lab Report 3: paint, fiber and matches analysis), Detective Isenhour's Crime Scene Identification Report and the victim's medical records were material to the defense and would have changed the result at trial pursuant to Brady and Britt.

8. As to Lab Report 1, defense counsel had the opportunity to cross examine the agent who produced the report, the agent's testimony at trial was consistent with his report and the jury learned everything that was contained in the report yet found the defendant guilty of all charges. The defendant has failed to prove by a preponderance of the evidence that the contents of Lab Report 1 were material to the case and would have changed the result at trial.

9. As to Lab Report 2, because the original analyst could not determine whether the hair was human, could not determine the race of the person from whom the hair originated, and the potential sources of the hair were too numerous, the defendant has failed to prove by a preponderance of the evidence that the contents of this lab report were material to the case and would have changed the result at trial. The Court of Appeals addressed a similar fact pattern in State v. Campbell, 133 N.C. App. 531 (1999). The Court held that "the existence of an undisclosed hair and crime scene photos merely provided some support for a theoretical possibility that another individual was in the victim's room and the perpetrator of the crime does not rise to the materiality standard the defendant must meet." The fact that the defendant's hair was not in the victim's clothing is not material and would not have changed the result at trial. The rapist had torn the clothing off the victim and the victim never put the clothing on again. The only hair recovered was Caucasian, like the victim's. In fact, it was most likely the victim's own hair. The victim consistently testified that a black man raped her, yet no negroid hair was found in her clothing. Thus, the rapist did not transfer hair to the victim's

clothing which is consistent with Agent Remy's testimony that hair transfers do not occur in 80% of sexual encounters.

10. As to Lab Report 3, because of the fabric of the items, the weather conditions, the fact that fifteen days (15) had elapsed since the time of the crime, and an innumerable amount of other factors that could have occurred with these clothing items during that fifteen (15) day time period, the defendant has failed to prove by a preponderance of the evidence that the contents of Lab Report 3 were material to the case and would have changed the result at trial. In addition, the jury observed these items for themselves and the defense argued that nothing on these items contained materials from the victim's home. "Lab reports containing no meaningful analysis are not exculpatory and thus failure to disclose is not a Brady violation. State v. Hodge, 118 N.C. App. 655 (1995). Furthermore, because Agent Cone could not definitively say that the matches found at the crime scene did not match the matchbooks found in the defendant's car, the defendant has failed to meet his burden. Defense counsel extensively discussed the matches at trial and the jury was misled to believe that the matches did not match which was to the defendant's benefit.

11. As to Detective Isenhour's Identification report, the report merely outlines the evidence collected and examined in Lab Reports 1-3 discussed above. The defendant has failed to prove beyond a preponderance of the evidence that the contents of this report were material to the case and would have changed the result at trial.

12. As to the victim's medical records, there is no evidence that the Concord Police Department or the District Attorney's Office ever obtained the records themselves. The defendant has failed to prove by a preponderance of the evidence that they did not receive information that the semen evidence was seized. They did not subpoena records from the hospital and did not appear surprised at trial when the physician testified about the semen evidence. In fact the defense attorneys chose not to ask the physician one single question.

13. In State v. Alston, 307 N.C. 321 (1983) *quoting* United States v. Agurs, 427 U.S. 97 (1976), the court stated, "The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." In the current hearing, defendant's trial attorneys contradicted one another on several occasions regarding how they may have used some of the information they claim they did not receive, if they would have used it at all. Therefore the claims the defense alleged at this hearing as to how they may have used this information at trial if they had known about it carries no weight or merit, is not material and would not have changed the result at trial.

14. As to the cumulative affect of the items of evidence the defense alleges they did not receive, this court finds, based on the findings of fact and conclusions

of law stated herein, that the contents of several of the items the defense alleges they did not receive were fully addressed in front of the jury; that other materials contained in the reports were more favorable to the State's case than the defendant's; and that any remaining matters that were not presented to the jury were of little or no value to the case as a whole; and that the cumulative affect of any items with any value is so minimal that it would have had no impact on the outcome of the trial.

15. Based on the foregoing findings of fact, the State's case at trial was compelling. When balancing the strength of the State's case with the cumulative affect of the items of evidence the defense alleges they did not receive, the defendant has failed to prove by a preponderance of the evidence that the cumulative affect of these items are material or would have changed the result at trial. In addition, as to the new evidence claim, the defendant failed to proof several factors required by Britt. The defendant failed to prove that the newly discovered evidence was competent, material and relevant. The defendant failed to prove that due diligence was used to procure the testimony at trial. The defendant failed to prove that the new evidence was not cumulative. The defendant failed to prove that the new evidence would not solely contradict a former witness or impeach or discredit her. Finally, the defendant did not proof that the newly discovered evidence would have changed the result at trial.

16. In summary, the Defendant has failed to prove by a preponderance of the evidence that there exists newly discovered evidence that is competent, material and relevant, that due diligence was used and proper means employed to procure such evidence at trial, and that such evidence is of a nature as to show that upon another trial a different result would probably be reached and that thereby right would prevail.

17. The Defendant has failed to prove by a preponderance of the evidence that his due process rights have been violated under Brady v. Maryland, 373 U.S. 83 (1996), in that he has not shown by a preponderance of the evidence that the claimed evidence was withheld by the State, that it was exculpatory, or that the result likely would have been different with the claimed evidence. Decisions made by trial counsel for strategic purposes have been weighed as part of this determination.

18. Defendant asserts that his Judgments and Commitments should be corrected and amended to specifically state that he shall "be imprisoned for a term of 80 years in the State's prison" in accordance with N.C. Gen. Stat. § 14-2 which was in effect on both the date of the offense (April 25, 1976) and at the time that Defendant was sentenced (October 1, 1976).

19. The statutory definition of a "life sentence" under N.C. Gen. Stat. §14-2 at the time Defendant was sentenced in October of 1976 specifically provided that a "life sentence" constituted a term of imprisonment of 80 years. At present, his Judgments and Commitments state that his sentence is "life imprisonment" and the Department of Correction (DOC) has not distinguished between his life sentence (of 80 years) and a life sentence under today's Structured Sentencing Law (natural life) for purposes of calculating a projected release date.

20. According to the Editor's Note in the 1977 Cumulative Supplement, prior to April 8, 1974, N.C. Gen. Stat. § 14-2 read as follows:

> Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding 10 years, or both, in the discretion of the court. (*Editor's Note*, N.C. Gen. Stat. § 14-2 (1977 Cum. Supp.)).

21. In 1973, the Legislature amended N.C. Gen. Stat. 14-2 by changing the "punishable" to "punished" and by adding this second relevant sentence:

> A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison.

Session Laws 1973, ch. 1201, § 6; see also N.C. Gen. Stat. § 14-2 (1977 Cum. Supp.). The amendment to § 14-2 became effective on April 8, 1974 and was applicable to all offenses thereafter committed. Session Laws 1973, ch. 1201, § 8.

22. The eighty year statutory term for a life sentence remained in effect until July 1, 1978 when the above provision was deleted by the legislature. Session Laws 1977, ch. 711, §§ 15 & 39. Although Session Laws 1977, ch. 711 § 39 indicates that it applies "without regard to when a defendant's guilt was established or when judgment was entered against him," to retroactively apply the removal of the eighty-year life term would be a clear violation of the constitutional prohibitions against enactment of *ex post facto laws*. See, State v. Robinson, 335 NC 146, 147 (1993), *quoting* U.S. Cons. Art. I, § 10; N.C. Const. art. I § 16; and Calder v. Bull, 3 U.S. 386, 1 L. Ed. 648 (1789). The goal of the statute was to set the length of a life sentence in a specific term of years, to wit, 80 years.

23. It is well established that the intent of the legislature controls the interpretation of a criminal statute. State v. Hearst, 356 N.C. 132, 567 S.E.2d 124 (2002); State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975). "The legislative intent of a statute may first be ascertained through examining the language of the statute, and then by examining the statute's legislative history, the spirit of the statute, and the goal that the statute seeks to accomplish." State v. Jones, 358 N.C. 473, 479, 598 S.E.2d 125, 129 (2004).

24. The language of N.C. Gen. Stat. § 14-2 is clear and unambiguous. There is no room for judicial construction and this Court is required to give the statute its plain and definite meaning.

25. In addition to the clear and unambiguous language of the applicable statute, the North Carolina Supreme Court has used the statutory eighty-year term to calculate an inmate's total sentence for purposes of applying jail credit. More recently, the North Carolina Court of Appeals has directed that a sentence of life imprisonment "shall be treated as a sentence of 80 years for all purposes," including his unconditional release date. State v. Bowden, ____ N.C. App. ___, 668 S.E.2d 107 (2008).

26. Defendant is entitled to have his sentence considered as a term of eighty years, and the Department of Corrections should be directed to calculate a projected release date for him after applying all jail credit to which Defendant is entitled.

IT IS THERFORE, ORDERED that defendant's motion requesting this court to vacate defendant's convictions and grant a new trial in this case is hereby denied.

IT IF FURTHER ORDERED, however, that the Defendant's motion requesting that his life sentences be considered as two concurrent terms of 80 years is allowed. The Department of Correction is hereby directed to calculate a projected release date for the Defendant treating each of the sentences as a term of 80 years, applying all jail credits, good time and gain time to which Defendant is entitled.

This the 20th day of February, 2009.

Judge Donald Bridges
Superior Court Judge