STATE OF NORTH CAROLINA

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ALAMANCE COUNTY, C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE

COUNTY OF ALAMANCE

SUPERIOR COURT DIVISION

Nos. 84-CRS-10257
84-CRS-10258
84-CRS-10259
87-CRS-12792
87-CRS-12793
87-CRS-12794

STATE OF NORTH CAROLINA)
)
vs.) MOTION FOR APPROPRIATE RELIEF
)
RONALD JUNIOR COTTON)

The defendant Ronald Junior Cotton, through undersigned counsel, respectfully requests, pursuant to the provisions of the North Carolina General Statutes §15A-1411 et seq., that the Court grant this Motion for Appropriate Relief from the judgment and sentence entered against him in the above-captioned cases by the Honorable D. Marsh McLelland, Judge Presiding, in the Superior Court of Alamance County, on November 25, 1987. As grounds therefore, defendant respectfully shows the Court the following:

STATEMENT OF THE CASE

1. On November 25, 1987, Ronald Junior Cotton was convicted of one count of first degree rape, one count of second degree rape, one count of first degree sex offense, one count of second degree sex offense, and two counts of first degree burglary. He was sentenced to terms of imprisonment totalling life plus fifty-

four years.

2. All of the charges, and ensuing convictions and sentences, arose out of assaults on Jennifer Thompson and [redacted] in Burlington, North Carolina on July 29, 1984. Briefly stated, the evidence at defendant's trial was that before sunrise on July 29, 1984, two very similar burglaries, rapes, and sex offenses were committed against Thompson and [redacted] at their homes in Burlington, North Carolina. The offenses were proximate in time and location. In both cases, the assailant broke into the home, went through the victim's personal belongings, waited until the victim awoke, performed oral sex on the victim, sucked on the victim's breasts, then raped the victim. 4 Tr. T. 113-44, 5 Tr. T. 163 - 6 Tr. T. 26.[2] Both victims gave a similar description of their assailant's clothing, hair, and skin tone. 4 Tr. T. 119-25, 145, 6 Tr. T. 114-16.

3. On July 31, 1984, Thompson and [redacted] viewed a photo array which included a photograph of the defendant. Thompson narrowed it down to two subjects and, after between two and ten minutes, identified the defendant. 5 Tr. T. 33-35, 45, 93. [redacted] could not identify anyone because she did not see the assailant's face well enough. 6 Tr. T. 42.

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[1] At the time of the offense, [redacted] name was [redacted] By the time of defendant's trial, however, she had married and was using the name [redacted] She will be referred to as [redacted] throughout this Motion.

[2] Citation indicates reference to volume and page number of the defendant's second trial, which took place in Alamance County Superior Court in November, 1987.

4. The defendant was then arrested and charged with burglary, rape, and first-degree sex offense in the Thompson case.

5. On August 8, 1984, both Thompson and [redacted] viewed the same physical lineup. The defendant was the only subject present in both the photo and physical lineups. Again, Thompson narrowed it down to two subjects, and after ten minutes, identified the defendant. 5 Tr. T. 39-40, 79-80. [redacted] identified another participant in the lineup as her assailant. 4 Tr. T. 17, 26, 6 Tr. T. 130.

6. In January of 1985, before Judge Anthony Brannon, the defendant was tried and convicted of first degree burglary, first degree rape, and first degree sex offense arising out of the assault on Thompson. On January 17, 1985 he was sentenced to life plus 50 years imprisonment for these offenses. Defendant was represented at this trial, and in his ensuing second trial, by Daniel H. Monroe and W. Phillip Moseley of the Alamance County Bar.

7. Defendant, represented by Mr. Moseley, appealed his rape conviction and life sentence directly to the Supreme Court of North Carolina under then-existing Gen. Stat. §7A-27(a). The Supreme Court permitted defendant to bypass the Court of Appeals on the appeal of his other convictions and subsequently ruled that the trial court's exclusion of evidence of [redacted] identification of another suspect, given the similarity between the Thompson and [redacted] offenses, was prejudicial error requiring

a new trial. State v. Cotton (Cotton I), 318 N.C. 663, 351 S.E.2d 277 (1987). Significantly for the purposes of this Motion, the Supreme Court held that:

> [T]his court has been markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b), such as establishing the defendant's identity as the perpetrator of the crime charged. . . . Certainly Rule 404(b) must be applied in like manner to allow a defendant to introduce evidence of very similar crimes of another, when such evidence tends to show that the other person committed the crime for which the defendant is on trial.

State v. Cotton, 318 N.C. at 666, 351 S.E.2d at 279 (citations omitted).

8. After the first trial [redacted] announced that, after seeing the defendant being sentenced for the Thompson charges, she could identify the defendant as the man who raped her. At defendant's second trial she claimed that she had been able to make this identification at the physical lineup, but had been afraid to do so. 4 Tr. T. 42-43, 6 Tr. T. 44.

9. Subsequently, on August 3, 1987, defendant was indicted on charges of burglary, rape, and sex offense arising out of the assault on [redacted] The charges arising out of the assaults on Thompson and [redacted] were consolidated for trial and defendant's second trial began in November, 1987, before Judge D. Marsh McLelland. Aside from the identification by the two victims, the evidence implicating defendant in these offenses was sparse. Semen found at each of the crime scenes did not match defendant's blood type, although each sample was consistent with the blood type of that victim's boyfriend, and there was evidence that each

victim had engaged in intercourse with her boyfriend in the days before the attack. 4 Tr. T. 153, 7 Tr. T. 12506, 8 Tr. T. 17, 23-30. The police found, in the search of the defendant's person and home, a pocket knife, and Thompson had testified that her assailant threatened her with a knife. 7 Tr. T. 48-49. The police also found a red and white flashlight at defendant's home, and [redacted] testified that her assailant used a flashlight and that an orange flashlight was missing from her car after the assault. 7 Tr. T. 64-65, 5 Tr. T. 169-170, 6 Tr. T. 35-36.[3] A woman who knew defendant testified that she saw him riding a bike near the locale of the assaults in the early morning hours of July 29, although she described the bike rider as wearing different clothes than those worn by the assailant. 5 Tr. T. 136-38, 147-52. Finally, an SBI expert testified that a piece of foam found in Jennifer Thompson's apartment could have come from a pair of athletic shoes which were found at defendant's home. 7 Tr. T 170.

10. At this second trial, defense counsel's primary defense was to show that another individual, Bobby Leon Poole, had committed both the Thompson and [redacted] crimes. To that end, counsel proffered to the court the following evidence:

(a) Bobby Poole, on two different occasions to two different witnesses, confessed to having committed the offenses

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[3] [redacted] father testified that he gave his daughter a red, not an orange, flashlight, and that the one found in Cotton's home looked like the one he gave his daughter. 7 Tr. T. 120-22.

for which defendant was convicted.[4]

(b) Between October 31, 1983 and April 21, 1985 Bobby Poole committed a series of offenses against single women living alone in Burlington which were strikingly similar to each other and to the attacks on Thompson and [redacted] 8 Tr. T. 61-69. Bobby Poole confessed, to the police, to a series of 16 incidents involving burglaries, breakings & enterings, rapes, attempted rapes, sex offenses, and petty larcenies, committed in the same time frame and in the same vicinity as the offenses for which defendant was convicted. Like the Thompson and [redacted] incidents, Poole's crimes involved late night break-ins, going through personal belongings, waiting until the victims awoke, crouching by the victims' beds, oral sex, sucking on the victims' breasts, removal of only one leg of the victims' panties, limited intercourse, rummaging through the victims' belongings, petty thefts, cutting phone wires, drinking beverages from the victims' refrigerator, and multiple offenses on the same night, committed sequentially and leading back to Poole's residence. Poole entered guilty pleas to, and was sentenced on, numerous charges

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[4] The trial court refused to admit the evidence of Poole's confession to [redacted] Hammonds after a lengthy voir dire. 8 Tr. T. 54-106, 9 Tr. T. 7-60. Defense counsel did not find out about Poole's confession to Dennis Bass until the very end of the trial. They immediately moved to put up the evidence, or, alternatively for a mistrial or a new trial. The trial court found that the motion was aptly made before the case was submitted to the jury, but reserved ruling on the motion until after the jury's verdict. 12 Tr. T. 32-35, 41-50. After the verdict the court, after hearing further argument, denied the motion. Defense counsel later took sworn testimony from Dennis Bass, which testimony was provided to appellate counsel and is attached as Appendix B.

arising out of these assaults. 8 Tr. T. 61-69; See also defendant's comparison chart attached as Appendix A.[5]

(c) The blood type from a spot of fresh blood found by an officer at one of the two crime scenes, which was inconsistent with defendant's blood type, was consistent with Bobby Poole's blood type. 8 Tr. T. 12, 67.[6]

12. The defendant's voir dire proffer of evidence concerning the guilt of Bobby Poole for both the Thompson and [redacted] charges was the most hotly contested issue at the second trial. All of this evidence was excluded by Judge McLelland. 8 Tr. T. 64, 102-03, 9 Tr. T. 60, 12 Tr. T. 50. None of it was heard by the jury.

13. On November 25, 1987, defendant was convicted of two counts of first degree burglary, and one count each of first degree rape, first degree sex offense, second degree rape, and second degree sex offense. He was sentenced to two concurrent life sentences and a 54-year consecutive sentence.

14. Defendant appealed his conviction and sentence to the North Carolina Court of Appeals. Defendant being indigent, [redacted] from the Office of the Appellate Defender was appointed to represent defendant on appeal. Mr. [redacted] assigned error to the

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[5] The police reports detailing Poole's offenses were made part of the record at defendant's trial. For this court's convenience we will, before the hearing on this motion, submit them as a separate exhibit to be considered for purposes of this Motion for Appropriate Relief.

[6] Evidence was admitted that the assailant broke an outside light at [redacted] home, and that the fresh blood stain was found on the storm door. 6 Tr. T. 193-194,

exclusion of the evidence pointing to the guilt of Bobby Poole for the Jennifer Thompson and [redacted] offenses, but did not include it in his brief or argue it on appeal. Mr. [redacted] raised only two issues:

> 1) whether the court erred by admitting testimony of defendant's former employer that defendant touched two white female employees in a sexually offensive manner, and
>
> 2) whether the court abused its discretion in excluding expert testimony concerning eyewitness identification.

The Court of Appeals found no prejudicial error and upheld defendant's conviction and sentence. Following established North Carolina law, the Court summarily rejected the contention concerning the admission of the expert evidence, finding that this ruling was within the discretion of the trial judge. State v. Cotton, 99 N.C. App. 615, 621-22, 394 S.E.2d 456, 460 (1990). On the first contention, a majority of the court held that the evidence that the defendant behaved in a sexually improper manner on his job was admissible to rebut evidence presented by defendant that he was a good employee. While the majority agreed with the defendant that the age and race of the waitresses was irrelevant, it found the admission of this evidence to be harmless error. Id. at 619-20, 394 S.E.2d at 458-59. Judge Johnson dissented on the ground that there was a "serious and legitimate question as to identity" in this case and that therefore there was a reasonable possibility that the erroneous admission of the co-employees' race and ages contributed to the

defendant's conviction. Id. at 622-25, 394 S.E.2d at 460-62 (Johnson, J., dissenting).

15. Defendant then took his appeal as of right, N.C. Gen. Stat. §7A-30(2), to the North Carolina Supreme Court. Since [redacted] had left the Appellate Defender's office, defendant was represented in the Supreme Court by Malcolm Ray Hunter, the North Carolina Appellate Defender. Pursuant to North Carolina Rules of Appellate Procedure, Mr. Hunter was limited in his brief to the North Carolina Supreme Court to those issues briefed and argued in the Court of Appeals. See Affidavit of Malcolm Ray Hunter, attached as Appendix C. On September 5, 1991, a majority of the Supreme Court found no prejudicial error and upheld defendant's conviction and sentence. State v. Cotton, 329 N.C. 764, 407 S.E.2d 514 (1991). In finding that the admission of evidence of the race of the waitresses supposedly touched by defendant was harmless error, Justice Webb, writing for the majority, specifically eschewed any reliance at all on the supposed strength of the state's case, relying instead on the slight prejudicial effect of the contested evidence. 329 N.C. at 767-8, 407 S.E.2d. at 517. Justice Frye, joined by Chief Justice Exum, dissented on the ground that, since the evidence of defendant's identity was "less than overwhelming" and the physical evidence gathered at the scene was "inconsistent with defendant's blood type," there was a reasonable possibility "that, had the error not occurred, a different result would have been reached at trial." 329 N.C. at 769-71, 407 S.E.2d at 518-19

(Frye, J., dissenting).

16. Pursuant to his conviction and sentence defendant is currently incarcerated at the Southern Correctional Institution in Troy, North Carolina.

17. The defendant is indigent and unable to pay the costs of these proceedings. See defendant's Affidavit of Indigency attached hereto and made a part hereof as Appendix G.

18. The allegations presented herein at paragraphs 19-30 have not been previously presented, post-trial, to a court of competent jurisdiction, nor have they been passed on by any court of competent jurisdiction.

ALLEGATIONS

I. THE TRIAL COURT COMMITTED PREJUDICIAL, REVERSIBLE, AND CONSTITUTIONAL ERROR IN REFUSING TO ALLOW THE DEFENDANT TO PRESENT EVIDENCE THAT BOBBY POOLE COMMITTED THE CRIMES FOR WHICH DEFENDANT WAS SUBSEQUENTLY CONVICTED.

19. One may reasonably dispute whether the evidence available at trial more strongly implicated the defendant or Bobby Poole in the assaults on Thompson and [redacted] In any event, it is clear that the trial court's total proscription of the Poole evidence violated both established North Carolina law and settled constitutional principles.

20. The trial court's refusal to permit the introduction of the Poole evidence violated the defendant's rights to due process

of law, to confront the witnesses against him, and to present evidence on his own behalf, in violation of Article I, Sections 19 and 23 of the Constitution of North Carolina, and the Sixth and Fourteenth Amendments of the United States Constitution. In Chambers v. Mississippi, 410 U.S. 284 (1973), the United States Supreme Court made clear that state rules of evidence, including the hearsay rules, may not be used to keep a defendant from presenting his defense. In Chambers, as here, the evidence excluded involved confessions of another individual to the crime, and the Chambers Court found constitutional error even though the other suspect there, as Poole did here, denied having made the confession. See also Green v. Georgia, 442 U.S. 95 (1979) (constitutional error to exclude codefendant's confession to crime, even though exclusion consistent with state rule of evidence); Washington v. Texas, 388 U.S. 14 (1967)(constitutional error to apply state rule to exclude exculpatory testimony of codefendant). In State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976), the North Carolina Supreme Court applied Chambers and found a due process and confrontation violation because the trial court's failure to sever the defendant's trial from his codefendant's led to the exclusion of the exculpatory confession and testimony of the codefendant. The Alford court held that the test in a case like this one is whether the exclusion of the evidence rendered the defendant's defense "less persuasive" than it would have been had the evidence been admitted, 289 N.C. at 388-89, 222 S.E.2d at 232-33. In the instant case, the

defendant's primary defense was not only rendered "less persuasive" -- it was rendered non-existent. See also State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987)(finding Chambers violation and ordering new sentencing hearing because of exclusion of exculpatory statement by codefendant).

21. Even looking exclusively at North Carolina law, there is no question but that the trial judge committed error in keeping out the Poole evidence. The defendant's lawyers proffered Poole's confession to Kenneth Hammonds under the residual hearsay exception of N.C. R. Evid. 803(24).[7] In excluding this confession, the trial judge relied solely on the circumstances under which it was given to find that it was "manifestly untrustworthy": that Poole was already in prison and that Hammond was a friend of the defendant's. 9 Tr. T. 60. The trial court did not consider any of the other evidence proffered showing Poole's remarkably similar criminal behavior, the match between his blood type and the spot of blood found at the [redacted] home, and his similarity to the description given by the victims to the police. In ignoring this evidence, and in limiting its inquiry on trustworthiness to the circumstances surrounding the making of the confession, the court misapplied North Carolina law. In the courts of this state, in determining whether a statement is

[7] The confession by Poole to Dennis Bass was not discovered by the defendant's lawyers until the very end of the trial. The lawyers, upon being informed of the statement to Bass, immediately went to interview him and proffered his evidence after the jury was instructed but before the beginning of deliberations. The trial judge denied their motion to reopen the evidence or for a mistrial without making any findings. 12 Tr. T. 32-35.

admissible under 803(24) or other exceptions to the hearsay rule, the courts must consider whether the statement at issue is corroborated by evidence extrinsic to the circumstances under which the statement is given. That is, a North Carolina trial court must look at all of the evidence available, including circumstantial evidence corroborating the details of the statement, to see if the statement is trustworthy. See, e.g., State v. Sneed, 327 N.C. 266, 393 S.E.2d 531 (1990)(new trial ordered because of failure to admit statement implicating third party when statement corroborated by other evidence; citing, inter alia, Cotton I; State v. Deanes, 323 N.C. 508, 374 S.E.2d. 249 (1988), U.S. cert. denied 490 U.S. 1101 (1989)(under 803(24), child's hearsay statement trustworthy because supported by physical evidence of abuse and infection, identification of defendant by child, and evidence that defendant had opportunity to commit the crime); See also State v. Nichols, 321 N.C. 616, 625, 365 S.E.2d 561, 567 (1988)(courts must look at corroborating evidence to see if statement trustworthy under Rule 804(b)(5)); State v. Bullock, 95 N.C. App. 524, 383 S.E.2d 431 (1989)(statement admissible because corroborated by physical evidence and testimony of others); State v. Eggert, 110 N.C. App. 614, 430 S.E.2d 699 (1993)(statement made to prisoner reliable and admissible when corroborated by extrinsic evidence). Further, the underlying theory for the admissibility of Poole's confession was that the confession was a statement against penal interest, although Poole's presence at the trial raised a

question about the direct applicability of Rule 804(b)(3), and the North Carolina Supreme Court has held that trial courts must consider all available corroboration in determining whether the express corroboration requirement of 804(b)(3) has been met. See, e.g., State v. Tucker, 331 N.C. 12, 414 S.E.2d 548 (1992); State v. Levan, 326 N.C. 155, 388 S.E.2d 429 (1990). Since the confessions by Poole were in fact corroborated by extensive circumstantial evidence, it was error to keep them from the jury.

22. Similarly, the trial court committed error under the law of North Carolina when it refused to admit the abundant evidence that Bobby Poole had committed a series of crimes remarkably similar to the one for which the defendant was convicted. The clearest authority for this is the first appeal in this very case -- Cotton I. In that case, our Supreme Court made three points which are dispositive on this issue. First, Rule 404(b), which governs the admission of other crimes or wrongful acts, is a rule of inclusion, not preclusion, especially when the question is the admissibility of prior sexual activity. State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Thus, if evidence of another crime is relevant for any purpose other than to show the general criminal propensity of the actor, it is admissible. See also State v. Moore, 335 N.C. 567, 595, 440 S.E.2d 797, 813 (1994)(evidence of other crime admissible if it tends to support a jury finding that defendant committed the crime). Second, this rule of inclusion is broader in sex crime cases than in other cases, with the Supreme Court construing 404(b) expansively to

allow juries to hear evidence about a wide range of additional sexual misbehavior by the defendant. And finally, that this rule should be construed in a like manner when the evidence is proffered by a defendant to show the guilt of another. In other words, if the evidence of Poole's bizarre sexual crimes would have been admissible in a trial in which Poole was the defendant, then Cotton must be able to present it at his trial. State v. Cotton I, 318 N.C. at 665-6, 351 S.E.2d at 279.

23. There is no question but that the evidence against Poole would have been admissible against Poole should he have been charged with the rapes in these cases. The similarities in time, place, and nature of the sexual attacks are more abundant here than in a host of cases in which our appellate courts have allowed in evidence of other sexual activity. See, e.g., State v. Coffey, 326 N.C. 268, 389 S.E.2d 48 (1990)(evidence that defendant masturbated in front of one child admissible on charge of murdering another child); State v. Boyd, 321 N.C. 574, 364 S.E.2d 118 (1988)(evidence that defendant was found naked in bed with 8 year old cousin sufficiently similar to charge of rape of 13 year old step-daughter); State v. McKinney, 110 N.C. App. 365, 430 S.E.2d 300 (1993)(evidence that defendant brought little girls to his home to watch adult movies and spend the night admissible in trial for rape of minor); State v. Sneeden, 108 N.C. App. 506, 424 S.E.2d 449 (1993)(evidence that defendant had raped a woman to whom he had offered a job sufficiently similar to rape of victim offered a ride by defendant, even though first

rape occurred twenty three years earlier).

23. In Cotton I the Supreme Court reversed the conviction because the trial court did not allow into evidence a single identification of another possible culprit for a similar crime, even though there was not a shred of additional evidence supporting this identification. The evidence kept out of the defendant's second trial was far stronger in pointing to the guilt of another person. The trial court erred by isolating each type of evidence offered and thereby holding it inadmissible. If Poole had been on trial, there was certainly sufficient evidence to go to the jury. Jailhouse confessions are, after all, a time-honored form of evidence in our state, See, e.g., State v. Mash, 328 N.C. 61, 399 S.E.2d 307 (1991); State v. Brown, 306 N.C. 151, 293 S.E.2d 569 (1982), and here it was corroborated by physical evidence (the matching blood stain) and evidence of strikingly similar behavior. The Poole evidence should therefore have been admitted in the defendant's case because it pointed directly to the guilt of another perpetrator. See, e.g., State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988)(error to exclude evidence of map suggesting possible guilt of other persons in crime; court describes relevancy standard to be applied in this situation as "relatively lax").

II. DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL, AS GUARANTEED BY ARTICLE I, SECTIONS 19 AND 23 OF THE CONSTITUTION OF NORTH CAROLINA AND THE SIXTH AND FOURTEENTH

AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY HIS APPELLATE COUNSEL'S FAILURE TO BRIEF AND ARGUE IN THE NORTH CAROLINA COURT OF APPEALS THE EXCLUSION OF THE POOLE EVIDENCE.

24. The failure of the defendant's appointed attorney to bring the exclusion of the Poole evidence before the North Carolina Court of Appeals violated his right to the effective assistance of counsel guaranteed under both the North Carolina and federal constitutions. See Strickland v. Washington, 466 U.S. 668 (1984)(setting out standards for determining effective assistance of counsel); State v. Moorman, 320 N.C. 387, 358 S.E.2d 502 (1987)(same); Evitts v. Lucey, 469 U.S. 387 (1985)(right to effective assistance of counsel extends to the first appeal as of right). A defendant meets his burden of proving constitutionally ineffective assistance when he shows that counsel's performance "fell below an objective standard of reasonableness" and when he demonstrates that "a reasonable probability exists that, absent counsel's deficient performance, the result of the proceeding would have been different." State v. Moorman, 320 N.C. at 399, 358 S.E.2d at 510.

25. While appellate counsel does not have to raise every conceivable claim on appeal, Jones v. Barnes, 463 U.S. 745 (1983), courts have uniformly held that the failure of counsel to raise a meritorious issue on appeal satisfies both prongs of the test for ineffective assistance of counsel on appeal: it constitutes constitutionally defective performance and it prejudices the defendant. See, e.g., Orazio v. Dugger, 876 F.2d

1508 (11th Cir. 1989)(failure of appellate counsel to raise meritorious issue clearly in the record constitutes ineffective assistance of counsel on appeal); Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987); Tyler v. State, 507 So.2d 660 (Fla. 1987); Johnson v. Wainwright, 498 So.2d 938 (Fla. 1986); People v. Logan, 586 N.E.2d 679 (Ill. App. 1991); Cannellas v. McKenzie, 236 S.E.2d 327 (W.Va. 1977).

26. Under the circumstances presented in this case, it was objectively unreasonable for appellate counsel not to brief and argue the exclusion of the Poole evidence. See Affidavits of Adam Stein and Malcolm Hunter, attached in Appendix C. As demonstrated above, the exclusion of the evidence violated then-existing state law as well as federal constitutional law. The Poole evidence was obviously central to the defense at trial, see Affidavits of W. Phillip Moseley and Daniel H. Monroe, Jr., attached as Appendix E, and there is no reasonable tactical or strategic purpose which could have been served by failing to pursue the correctness of its exclusion on appeal, and this is especially evident when the merits of this claim are compared to the merits of the two claims that counsel did pursue. One, concerning the exclusion of the expert evidence on identification, raised an issue on which the North Carolina appellate courts have always found that a decision denying an expert is a decision totally within the trial court's discretion. The other, regarding the unnecessary introduction of evidence that the defendant had acted in a provocative manner towards

white waitresses, was based on an isolated incident at the trial which troubled the appellate courts primarily because of the weakness of the other evidence against the defendant. And, also as demonstrated above, counsel's failure to pursue this meritorious issue was not just prejudicial to defendant's chances to win a new trial -- it was fatal to those chances.

III. THE JURY INSTRUCTION ON REASONABLE DOUBT GIVEN AT THE DEFENDANT'S TRIAL VIOLATED THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AND TO A VERDICT BY A JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTIONS 19 AND 24 OF THE CONSTITUTION OF NORTH CAROLINA.

27. The entire jury instruction on reasonable doubt given at the defendant's trial is attached in Appendix D . At two points during this instruction the jurors were told that to find the defendant guilty beyond a reasonable doubt they had to be convinced "to a moral certainty." They were also instructed that a reasonable doubt is "an honest, substantial misgiving." This instruction is therefore indistinguishable from the reasonable doubt instructions found to be constitutionally infirm in State v. Bryant, 334 N.C. 333, 432 S.E.2d 291 (1993), certiorari granted, case vacated and remanded, 114 S. Ct. 1365 (1994), and State v. Williams, 334 N.C. 440, 434 S.E.2d 588 (1993).

28. In Bryant the North Carolina Supreme Court, relying on

Sullivan v. Louisiana, 508 U.S. ___, 124 L.Ed. 2d 182, 113 S. Ct. 2078 (1993), and Cage v. Louisiana, 498 U.S. 39 (1990), held that such a defective reasonable doubt instruction is "fundamental error," and therefore review of that error cannot be foreclosed by a failure to object at trial. 334 N.C. at 339-40, 432 S.E. 2d at 295. In Sullivan the United States Supreme Court unanimously held that a constitutionally infirm reasonable doubt instruction cannot be harmless error, both because it is "structural error" and because it means that there has not been any constitutionally recognizable jury verdict at all. 113 S. Ct. at 2081-83. But see Victor v. Nebraska, 114 S. Ct. 1239 (1994)(interpreting reasonable doubt instructions as not violative of due process). Under these principles, defendant's conviction must be reversed.

III. DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF NEWLY DISCOVERED EVIDENCE THAT DEMONSTRATES THAT THE PICTURE PAINTED AT TRIAL THAT HE WAS A SEXUALLY AGGRESSIVE EMPLOYEE WAS FALSE.

29. The prosecution presented testimony at the defendant's trial from Lloyd Byrum, the manager of Summers Seafood Restaurant, where the defendant had worked prior to his arrest, to the effect that the defendant was sexually aggressive in the workplace towards waitresses, and especially white waitresses. 7 Tr. T. 152-159. The appropriateness of this evidence, and the prejudice caused by its admission, were hotly contested issues on direct appeal. See parag. 14-15, supra.

30. Mr. Byrum, the manager of Summers Seafood Restaurant, had testified at the defendant's first trial and had made no mention of any sexually aggressive behavior by the defendant. He had made no mention of any such alleged behavior in his out-of-court discussions with defense counsel. This evidence therefore came as a complete surprise to the defendant's attorneys, and they had no opportunity to counter it. See Affidavits of W. Phillip Moseley and Daniel H. Monroe, Jr., attached as Appendix E.

31. Further investigation now reveals that the image presented by the prosecution of the defendant as a sexual predator in the workplace was false. Mr. Byrum testified that the defendant's sexual aggressiveness was pervasive -- "he was always messing with them . . . touching them . . . telling dirty jokes . . . about every Friday and Saturday night . . .[talking to them] usually about sex . . . ." 7 Tr. T. 153-157. Attached in Appendix F are Affidavits from three of the women who worked with the defendant at Summers Seafood: [redacted], [redacted], and [redacted] Not only did they not suffer any of this alleged sexual harassment themselves -- they never saw the defendant demonstrate any such behavior towards any other female. If the State knowingly created this false impression, then the defendant's due process rights, as guaranteed by both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina, were violated. See, e.g., Miller v. Pate, 386 U.S. 1 (1967); Alcorta

v. Texas, 355 U.S. 28 (1957); Hamric v. Bailey, 386 F.2d 390 (4th Cir. 1967). Even if there is no constitutional violation, this newly discovered evidence requires a new trial under the established law of North Carolina. Given the surprise nature of Byrum's testimony, trial counsel could not reasonably have been expected to discover the new evidence; the evidence is not cumulative; it is probably true and relevant; it does more than just impeach a witness; and there is a probability that it could have effected the result of the trial.

WHEREFORE, the defendant prays that the Court grant the following relief:

1. That the Court find the defendant indigent and allow defendant to proceed without payment of filing fees or costs;

2. That the Court grant the defendant a hearing on this motion;

3. And for the reasons shown in this Motion that the Court reverse the defendant's conviction and sentence and grant the defendant a new trial.

Respectfully submitted,

This the 23rd day of June, 1994.

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ATTORNEYS FOR DEFENDANT RONALD JUNIOR COTTON

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of this Motion for Appropriate Relief on the 15A District Attorney by depositing this copy in the United States Mail, addressed to:

Mr. Steve A. Balog
District Attorney, 15A Judicial District
Suite D, 114 S. Maple St.
Burlington, N.C. 27253

This the 23rd day of June, 1994.

Richard A. Rosen

INDEX TO APPENDICES

APPENDIX A

SUMMARY OF SIMILARITIES BETWEEN THOMPSON/[redacted] ASSAULT AND ASSAULTS ADMITTEDLY COMMITTED BY BOBBY LEON POOLE

I. INTRODUCTION

At Mr. Cotton's trial his attorneys subpoenaed and obtained police and court records relating to a series of assaults, burglaries, and rapes committed by Bobby Leon Poole in Burlington, North Carolina. This summary has been prepared in order to facilitate an understanding of the striking similarities between the crimes admitted to by Bobby Poole (the Poole crimes) and the Thompson/[redacted] assaults which led to Mr. Cotton's conviction. The facts of the Poole crimes are taken from the police reports which were introduced as voir dire exhibits at trial, 8 Tr. T. 90, and salient parts of which were read into the record during the voir dire hearing, 8 Tr. T. 62-67. The facts of the Thompson and [redacted] crimes are taken from the transcript of the Mr. Cotton's second trial.

II. TIMING OF THE POOLE CRIMES

Thompson and [redacted] were attacked in the early morning hours of July 29, 1984. Poole's admitted crimes started on January 26,

1984 and ended on April 21, 1985. They thus began before, and ended after, the Thompson/[redacted] assaults. Below are the dates of the Poole crimes and the names of the victims.

DATE	VICTIM
1-26-84	[redacted]
9-04-84	
10-04-84	
10-12-84	
1-13-85	
4-05-85	
4-05-85	
4-05-85	
4-21-85	
4-21-85	

III. COMPARISON CHART

Below are set out, for comparison purposes, salient aspects of the Thompson/[redacted] assaults and six of the Poole crimes.

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[1] Poole confessed to crimes involving three other victims, [redacted], [redacted], and [redacted]. These offenses were not discussed at the Cotton trial and there is no information in the record concerning these individuals.

SIMILARITIES IN THE CRIMES TO WHICH POOLE CONFESSED AND THOSE FOR WHICH COTTON WAS CONVICTED

EVENTS LEADING TO CRIME	Poole	Thompson/[redacted]
time-between 1 & 5am	6/6	2/2
entry-picked/opened door/window	6/6	2/2
did not wake victim	6/6	2/2
appeared at end of bed/sofa where victim slept	5/6 [2]	2/2
2 assaults in one night	4/6	2/2

ATTACKER'S BEHAVIOR TO VICTIM	Poole	Thompson/[redacted]
sucked breasts	3/6	2/2
oral sex	3/6	2/2
intercourse	2/6	2/2
removed 1 leg of panties	2/6	1/2
covered victim's mouth	5/6	1/2
talked to victim	3/6	1/2
went through v's personal things	2/6	1/2

VICTIM'S DESCRIPTION OF ATTACKER	Poole	Thompson/[redacted]
light to medium skin tone	3/6	2/2
5'9 to 6'2	5/5	2/2
short hair	5/6	2/2

[2] In the sixth crime, a dog woke up and started barking when the intruder entered.

victim noted or Poole admitted smoking & drinking before attack	[redacted] 6/6	[redacted] 1/2
attacker left suddenly	[redacted] 5/6	[redacted] 1/2

IV. EXPLANATION

As the above chart indicates, there are numerous similarities between the bizarre attacks on Thompson and [redacted] and Poole's equally bizarre modus operandi. There are, further, some additional similarities not captured in the chart.

For example, when [redacted] awoke to discover Poole at the foot of her bed, Poole covered her mouth and said he wanted to be with her. Thompson's assailant did the same thing. 4 Tr. T. 114-5. Poole tried to kiss [redacted], just as Thompson's assailant tried to kiss her. 4 Tr. T. 122. Poole then sucked her breasts and performed oral sex on her before having intercourse -- as did the Thompson/[redacted] assailant did in both rapes. 4 Tr. T. 117-150. Poole then gave a fake name to [redacted] and tried to socialize with her after the attack. So did Thompson's assailant. 4 Tr. T. 124-135.

In the attack on [redacted], Poole cut the phone wires outside the house just as the assailant did before he re-entered [redacted] apartment. 5 Tr. T. 180, 6 Tr. T. 171-72. When [redacted] woke to find Poole standing over her bed, Poole tried to put a pillow over her face. [redacted] assailant did the same thing. 6 Tr.

T. Again, Poole sucked her breasts and performed oral sex on her before he raped her as the assailant did in both of the Thompson/[redacted] rapes. Poole even stole $10 from [redacted] billfold -- Thompson's assailant stole $10 from her purse. 4 Tr. T. 144.

Poole attacked [redacted] in her apartment in the exact same Brookwood Gardens cul-de-sac where Thompson lived when she was raped. When [redacted] awoke to see Poole crouched by the side of her bed, Poole covered her mouth and told her to "be quiet." Thompson's assailant acted in a similar manner. 4 Tr. T.114. Although Poole ran out before he could rape [redacted] because she "screamed like hell", Poole rummaged through her personal things before he attacked her, as did the Thompson [redacted] assailant. 4 Tr. T. 143-44 and 5 Tr. T. 176.

When [redacted] awoke to see Poole coming toward her, Poole covered her mouth and said "be quiet." Thompson's assailant covered her mouth and said "shut up". 4 Tr. T. 114. In the [redacted] crime, Poole used a cinder block to enter the trailer window, which is similar to the assailant's entry in the [redacted] case. Poole gave [redacted] a fake name, just as he had previously done in the [redacted] assault, and as Thompson's assailant did. 4 Tr. T. 117.

The assault on [redacted] began just as did the assault on Thompson: Poole got on top of her, covered her mouth, and repeatedly told her to "shut up". 4 Tr. T. 114. Before he ever assaulted [redacted] Poole helped himself to some orange juice from

[redacted] refigerator -- Thompson's assailant drank some beer before the assault. 4 Tr. T. 124-5. Poole told [redacted] to shut up or he would kill her -- exactly what Thompson's assailant said. 4 Tt. T. 114.

Three other crimes, not included in the chart in part III, to which Poole confessed had some similarities with the Thompson [redacted] attacks, but were interupted before the victims were sexually assaulted. For instance, on September 4, 1984, Poole broke the window at [redacted] residence but she screamed and he ran away. On October 4, 1984, Poole took off the screen of [redacted] window, put something under the window to boost himself up and then went in through a window and back out the door. Likewise, Poole went in the back way of [redacted] home where she was asleep on the couch. When [redacted] awoke, she began screaming and fighting, and ran out one door as Poole ran out the back door. 8 Tr. T. 64.

The above description of the Poole crimes and the Thompson/[redacted] assaults exemplify the numberous details of the two sets of crimes not even discussed in the general chart which bear uncanty similarity. Either there were two identically deranged, and unusual, sexual assaulters roaming Burlington, N.C., at the same time, or one person committed all of these crimes.

STATE OF NORTH CAROLINA

COUNTY OF ALAMANCE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
84 CRS 10257
84 CRS 10258
84 CRS 10259
87 CRS 12792
87 CRS 12793
87 CRS 12794

STATE OF NORTH CAROLINA)
)
vs.)
)
RONALD JUNIOR COTTON,)

DEPOSITION OF

DENNIS RAY BASS

The deposition of Dennis Ray Bass was taken on November 30, 1987, beginning at 4:45 o'clock p.m. in the Alamance County Jail, 105 S. Maple Street, Graham, N.C., by and before Barbara H. Dodson, Notary Public.

APPEARANCES:

W. Phillip Moseley, Esq.
9 Court Square, N.E.
Graham, N.C. 27253

DENNIS RAY BASS being first duly sworn in the above cause, was examined and testified on his oath as follows:

DIRECT EXAMINATION OF DENNIS RAY BASS BY MR. MOSELEY:

Q Would you state your name please.

A Dennis Ray Bass.

Q Mr. Bass, my name is Phillip Moseley and I am the court appointed attorney of record for Ronald Junior Cotton. Mr. Cotton has been charged with a first degree burglary of the residence of Jennifer Thompson in Brookwood Garden Condominiums occurring on the early morning hours of July 29, 1984, in a subsequent break in into the burglary of the home of [redacted] who is now married to Mr. [redacted] Her last name is [redacted] now, on Treva Street, which occurred later on that same morning. It is my understanding that you have some knowledge or information about those cases. Is that correct?

A Yes, sir.

Q Let me first get some biographical information about you, Mr. Bass. How old are you, sir?

A Thirty-two.

Q What is your date of birth?

A October 30, 1955.

Q What is your social security number?

A [redacted]

Q And this interview is being conducted in the Alamance County Jail. Is that right?
A Yes, sir.
Q Why are you here in the Alamance County Jail?
A Parole violation.
Q Who is your parole officer?
A Steve Neighbors.
Q What are you on parole for?
A Breaking, entering and larceny.
Q Mr. Bass, would you then tell me what information you have about this matter?
A I was incarcerated with Poole in 1985 of August. He stated to me that the crime Cotton had been charged for and given time for, he didn't do it.
Q Who didn't do it?
A Cotton did not do it.
Q Okay.
A That he woke up ...
Q He who?
A Poole.
Q Okay.
A Some time in the morning and found himself in the household and as far as like the addresses and houses, he didn't say. But he did say that Cotton was not guilty of the crime; but he had been given time. And at the time, Poole had

not been tried. He was there waiting on trial and I left him in the jail house like August 3rd I think of 1985 and we left shipped to Salisbury. And I did not hear any more from him since that time, nor have I seen him since then. Like that was the last discussion that we had. But he did state to me that Cotton was not guilty of the crime that he committed. And from the way he talked it was like the same crime that Cotton had been tried and convicted of, was the same crime that he had done, that he described to me.

Q What did Poole tell you about ... Did Poole tell you who had committed the crime Cotton was convicted of?

A Well, he in so many words, he said that he woke up...

Q He who? Poole?

A Poole woke up in like Brookwood Apartments, some lady's apartment. He didn't know how he got there or nothing like that. He said he wondered off and that is where he ended up at, at Brookwood Apartments. Like I said, as far as the address, he didn't give.

Q Who brought up this subject about Cotton?

A He did because I never knew Cotton nor did I know Poole until that day I was in jail.

Q Now, Bobby Leon Poole, that is who we are talking about?

A That is who we are talking about.

Q And Bobby Leon Poole told you that Cotton did not do those crimes?

A That is exactly right.
Q That he Poole had done those crimes?
A That he woke up in one of Brookwood Apartments and he said he didn't know how he got there when he woke, that is where he was at, some lady's house.
Q Did he describe leaving that house and going to another house that same night or not?
A No, he didn't say anything to that effect. Like I said, all he stipulated was that he woke up in Brookwood. I do remember that. In Brookwood Apartments in some lady's house. As far as names and addresses, no.
Q Okay. Now, are you aware that he did have a breaking and entering or burglary I should say, and an attempted sexual assault in Brookwood Garden Condominiums and he left there, went to another place and then was shot by the police?
A I think he mentioned something about getting shot because like I wasn't aware that you know he had like left one place and went to another and got shot.
Q Okay. Is the time that he said about Cotton's crimes different from the time when he went into Brookwood Gardens another time and got shot later on that day and was caught by the police?
A Well, I am really, ... It is dim to me now as far as like the times whether or not, like close to three years ago. But I do specifically remember him telling me that he did

wake up, he left some place or another where he had come from, wondered off or something and he ended up in Brookwood Apartments in some lady's house. Like the crime that Cotton was guilty of and had been convicted of, they had the wrong man. And I remember that.

Q This conversation was brought up by Bobby Leon Poole to y

A Right.

Q And at the time you were cell mates at the Alamance County Jail? Is that the old jail or the new jail?

A Old jail.

Q And why were you in jail at that time?

A With the same charge, breaking and entering. But I had got time on it, breaking, entering and larceny.

Q Okay. And Bobby Poole had not yet been tried as far as you know?

A Had not been tried.

Q And you left the jail. Why did you leave the jail?

A Going to Salisbury. I had already been sentenced. I got sentenced that Friday, and left that Saturday morning.

Q Okay. Now, last week, you came into the jail again. Is that right?

A Right, Tuesday.

Q What happened on Tuesday?

A It was like a probation violation.

Q You were arrested and brought into the jail on

probation violation and the date of that arrest?
A 24th.
Q Of what month?
A November.
Q Okay. And when you came into the jail on November 24, did you meet someone named Duncan Eric Turner?
A Yes.
Q How did you meet Mr. Turner?
A Well, actually we were in the same cell block. I didn't know him personally, but he knew me. You know, and that is how we got to meet, as well as Cotton; the first time. Well, I had seen him. When I first come to the jail you know he was checking me in and he was getting ready to go to court. And I still didn't know him, but I had the feeling that I did know him. Then when I got upstairs, the guy was telling me, described him to me. You know, I was thinking the guy was getting out, and it was him.
Q Turner?
A No, it was Cotton.
Q Cotton.
A And I had never seen him before.
Q I see. You had never seen Cotton before?
A I had never until Tuesday.
Q Okay. Mr. Cotton had his street clothes on because he was going to court.

A Right.
Q Not getting out?
A Not getting out.
Q Right. And so you saw Cotton for the first time then?
A That's right.
Q How did you meet Duncan Eric Turner?
A In the cell block.
Q In the cell block. Did you tell Mr. Turner this information that you just told me?
A I might have mentioned it to him after I got to know that this was Cotton going to court and whatnot, I may have mentioned it to him that this is what Poole said to me in 1985.
Q Okay. If I understand this right, you didn't know Ronald Junior Cotton at all until you happened to see him on November 24, 1987?
A Right.
Q So he is not a friend of yours?
A Right. Personal friend, no. I didn't know him prior.
Q Do you have any hard feelings or ill will at all against Bobby Leon Poole?
A No, I don't. Actually the way we really got the conversation started was that by marriage he knows my wife and

he was talking about the community that I stay in now and that he had stayed in beforehand, and no, I don't, you know. But just like Cotton that said to me since we got to know one another while they were in Central Prison together. Cotton would say you know how you could feel somebody was watching you, you know, you could sense that. You would look around and see this guy looking at you. The guy was standing there, shake his head and walk off.

Q Who would walk off?

A Bobby Poole. But I have no hard feelings toward him. I am just telling you what he had said to me. And it just dawned on me when I got here, you know, because I had no idea that Cotton had come back for retrial at all. And it just dawned on me what Bobby had told me about him going and finding himself in one of these Brookwood Apartments and after finding out about Cotton's case and reading it and whatnot.

Q Did Bobby Leon Poole tell you anything else about any of these other cases or crimes or what he was charged with?

A No, he didn't that I think would amount to anything other than it just stayed in my head that he said Brookwood. What he said, it seemed like he said he woke up in this apartment is where he was at. And it just dawned on me, how could this man leave from one place conscious and end up in this apartment. That was what was so puzzling to me.

Q Mr. Bass, when you get out of jail here, do you plan to go back to work.
A Go back to work, yes, sir.
Q Where is that?
A J. R. Majors Construction Company.
Q J. R. Majors Construction Company. Where is that located?
A Highway 54.
Q In Graham?
A Yes, in Graham.
Q What type of work do you do in construction?
A Drywall and sheetrock.
Q Well, I suppose, Mr. Bass, somebody might ask you if you heard this before; why didn't you come forward and tell somebody Mr. Poole made this jailhouse confession to you?
A Well, like it was on a Friday night. I had no idea ... If anybody had come up to me and said anything pertaining to this, I would have gone on then and said what it was, but you know I just never thought that this man had life and 54 years already or whatever he had you know. It just never did dawn on me because I was going this way. He had already been in Central Prison. I didn't think it really mattered then.
A Okay. Is there anything else you would like to tell us before the court reporter terminates us?

A That is about all that was said that would be any use I guess.

Q Thank you.

NORTH CAROLINA)
)
ALAMANCE COUNTY)

VERIFICATION

DENNIS RAY BASS, being duly sworn, says that he has read the foregoing 11 pages in his November 30, 1987 deposition and that the same is true of his own knowledge except as to those matters and things therein stated upon information and belief, and as to those he verily believes it to be true.

Dennis Ray Bass
DENNIS RAY BASS

Sworn to and subscribed
before me this the 3rd
day of December, 1987.

Lynn A. Dodd
Notary Public

My commission expires:

12-4-88

APPENDIX C

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

AFFIDAVIT

Malcolm Ray Hunter, Jr., being first duly sworn, deposes and says:

1. I have served as the Appellate Defender for North Carolina since January, 1986. I served as an Assistant Appellate Defender from December, 1980 until my appointment as Appellate Defender.

2. I have been an attorney licensed to practice law in North Carolina since 1976.

3. [redacted] was an Assistant Appellate Defender in the office from June, 1983 until February, 1991.

4. Mr. [redacted] was assigned to represent Ronald Junior Cotton on his appeal. Mr. [redacted] prepared the record and wrote the brief in this case in 1988.

5. The case was decided by the North Carolina Court of Appeals on August 6, 1990. The Court of Appeals found no error but one Judge dissented. Therefore, Mr. Cotton was entitled to appeal the issue on which the Judge dissented to the Supreme Court of North Carolina.

6. Shortly after the Court of Appeals issued its opinion in *State v. Cotton*, Mr. [redacted] informed me that he intended to resign his position due to medical problems. I reassigned several of his cases to the lawyers within the Office of the Appellate Defender. I reassigned *Cotton* to myself.

7. Upon reviewing the file, I immediately noticed that Mr. [redacted] had assigned as error, but failed to brief, the question of whether it was error to exclude evidence showing that another person committed the crimes. I was shocked because this appeared to me to be an extremely strong appellate issue. I could not think of a good reason for Mr. [redacted] not to have briefed it.

8. I discussed the situation with at least one of my assistants, [redacted] We considered what steps would be appropriate to take. I decided to continue to represent Mr. Cotton on the one issue still alive in the direct appeal of his case and, if Mr. Cotton did not receive a new trial on appeal, find an attorney outside the Office of the Appellate Defender to file a motion for appropriate relief alleging, among other things, that Mr. Cotton received ineffective assistance of counsel by virtue of Mr. [redacted] failure to raise this issue.

9. I wrote the new brief and argued Mr. Cotton's appeal in the Supreme Court of North Carolina.

10. After the Supreme Court found no error in Mr. Cotton's direct appeal, I contacted Professor Richard Rosen of the University of North Carolina Law School and asked him if he would agree to represent Mr. Cotton in a motion for appropriate relief. Professor Rosen agreed to do so.

11. I have cooperated with Professor Rosen but have not taken a direct part in the preparation or investigation of the motion for appropriate relief.

12. Based upon my knowledge of this case and of appellate practice in North Carolina, I do not believe that the decision to omit the above-discussed argument was or could have been a reasonable decision. I believe that if the issue had been raised on appeal the defendant would have won a new trial.

This the 31 day of January, 1994.

Malcolm Ray Hunter, Jr.
Appellate Defender
Office of the Appellate Defender
1905 Meredith Drive, Suite 200
Durham, North Carolina 27713
(919) 560-3282

Sworn to and Subscribed before
me this 31 day of January, 1994.

Notary Public

My Commission Expires: 10-28-95

APPENDIX D

EXCEPTION NO. 75

MEMBERS OF THE JURY, THE ACCUSATION AGAINST THE DEFENDANT, THE CHARGE THAT HE COMMITTED THESE OFFENSES, IS NOT EVIDENCE OF GUILT.

NOR DOES THE FACT OF ACCUSATION RAISE ANY INFERENCE THAT THE DEFENDANT IS GUILTY OF ANY OF THE CRIMES CHARGED AGAINST HIM, OR OF ANY LESSER CRIMES INCLUDED IN THE CHARGES.

UNDER OUR SYSTEM OF JUSTICE, WHEN AN ACCUSED PLEADS "NOT GUILTY," AS THIS DEFENDANT HAS DONE, THE LAW RAISES A PRESUMPTION OF INNOCENCE WHICH MAY BE REBUTTED ONLY BY EVIDENCE SUFFICIENT TO CONVINCE A JURY BEYOND A REASONABLE DOUBT THAT THE ACCUSED IS GUILTY.

THE BURDEN OF PROVING GUILT IS ON THE STATE--NOT THE DEFENDANT. THE DEFENDANT IS NOT OBLIGED TO PROVE INNOCENCE IN ORDER TO BE FOUND NOT GUILTY.

THE LAW REQUIRES ACQUITTAL OF THE DEFENDANT UNLESS YOU DETERMINE, UPON A FULL AND FAIR CONSIDERATION OF ALL THE EVIDENCE THAT YOU'VE HEARD--THE STATE'S AND THE DEFENDANT'S--THAT GUILT HAS BEEN PROVED, BEYOND A REASONABLE DOUBT.

A REASONABLE DOUBT IS NOT A VAIN, IMAGINARY OR FANCIFUL DOUBT, BUT IS A SANE, RATIONAL DOUBT. WHEN IT IS SAID THAT A JURY MUST BE SATISFIED OF THE DEFENDANT'S GUILT, BEYOND A REASONABLE DOUBT, IT'S MEANT THAT THE JURY MUST BE FULLY SATISFIED, ENTIRELY CONVINCED, OR SATISFIED TO A MORAL CERTAINTY OF GUILT.

A REASONABLE DOUBT, AS THAT TERM IS EMPLOYED IN THE ADMINISTRATION OF THE CRIMINAL LAW, IS AN HONEST, SUBSTANTIAL MISGIVING, GENERATED BY THE INSUFFICIENCY OF THE PROOF AND INSUFFICIENCY WHICH FAILS TO CONVINCE YOUR JUDGMENT AND PONDERANCE, AND SATISFY YOUR REASON AS TO THE GUILT OF THE ACCUSED.

A REASONABLE DOUBT MAY ARISE OUT OF THE EVIDENCE OR THE LACK OF EVIDENCE. IF AFTER CONSIDERING, COMPARING AND WEIGHING ALL OF THE EVIDENCE, YOUR MINDS ARE LEFT IN SUCH CONDITION THAT YOU CANNOT SAY THAT YOU HAVE AN ABIDING FAITH TO A MORAL CERTAINTY THAT THE DEFENDANT IS GUILTY, THEN YOU HAVE A REASONABLE DOUBT AND YOU MUST ACQUIT.

THE STATE IS NOT OBLIGED TO PROVE GUILT BEYOND ALL DOUBT, ANY DOUBT, OR ANY SHADOW OF A DOUBT, BUT BEYOND A REASONABLE DOUBT.

AND THAT CRITERIA APPLIES, OF COURSE, TO ALL OF THE CHARGES AGAINST THE DEFENDANT. IN ORDER TO DETERMINE TRUTH FROM EVIDENCE, MEMBERS OF THE JURY, YOU MUST FIRST DETERMINE THE CREDIBILITY OF THE WITNESSES WHO GAVE THAT EVIDENCE.

YOU SHOULD APPLY TO THE TESTIMONY THAT YOU'VE HEARD TESTS OF TRUTHFULNESS THAT YOU BELIEVE TO BE RELIABLE--THAT YOU USE IN YOUR EVERYDAY AFFAIRS.

AMONG SUCH TESTS, I SUGGEST THAT YOU CONSIDER, AS THE EVIDENCE DISCLOSED IT, THE OPPORTUNITY EACH WITNESS HAS TO SEE, HEAR, KNOW, UNDERSTAND AND REMEMBER THE MATTERS ABOUT WHICH

APPENDIX E

NORTH CAROLINA

ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
84 CrS 1257-59;
87 CrS 12792-94

STATE OF NORTH CAROLINA

vs.

RONALD JUNIOR COTTON,
Defendant.

AFFIDAVIT

The undersigned, W. PHILLIP MOSELEY, being first duly sworn does hereby depose and say as follows:

1. Along with Daniel H. Monroe, I represented the defendant in the above referenced cases. I was court appointed to represent Mr. Cotton at his first trial in January of 1985 before Judge Anthony Brannon, and after his conviction at that trial I also was court appointed to handle the appeal to the North Carolina Supreme Court.

2. The first trial results were overturned by the North Carolina Supreme Court and the case was sent back to Alamance County because of the trial court's exclusion of evidence tha[redacted] had identified another suspect during a police lineup.

3. At some time after the conclusion of the first trial in 1985 [redacted] claimed that after seeing Mr. Cotton at his first trial she could now identify that he was the man who had raped her. She later claimed at Mr. Cotton's second trial that she could have made this identification from the beginning but she had been afraid to do so.

4. After Mr. Cotton's first trial, he was subsequently indicted on new charges involving burglary, rape and sex offense arising out of the assault on [redacted] Subsequently the charges from both the Thompson and [redacted] cases were consolidated for trial.

5. Mr. Monroe and I represented Mr. Cotton at his second jury trial in the Alamance County Superior Court beginning in November, 1987 before Judge D. Marsh McLelland.

6. As our investigation into this matter continued it became evident that, absent the identification by the two victims, the other physical evidence in this case was less than abundant. In fact, much of the evidence was inconsistent with the guilt of our client Mr. Cotton.

7. During our investigation of this matter we obtained evidence that another man, Bobby Leon Poole, was claiming to have been the perpetrator in these crimes. Poole had confessed to a fellow inmate named [redacted] Hammonds and we called Mr. Hammonds to the witness stand. Mr. Hammonds testified during a lengthy voir dire hearing outside of the presence of the jury that Mr. Poole had in fact confessed that Ronald Cotton was in jail for the crimes that Poole had committed.

8. At the very end of the trial we also learned that Poole had confessed to a person named Dennis Bass. We immediately made a motion for the court to re-open the evidence (the evidence had not yet been submitted to the jury for deliberations) or alternatively for a mistrial or for a new trial. The trial judge denied our motions and the jury began their deliberations. We later obtained sworn testimony from Mr. Bass and we provided this to Mr. Cotton's appellate counsel.

9. The trial jury was never allowed to hear the evidence regarding Bobby Poole. In addition to Mr. Poole's confessions we had evidence that Mr. Poole had committed a series of very similar offenses against single women living alone in Burlington during the time period the crimes occurred for which Mr. Cotton was convicted. The modus operandi involved in the Jennifer Thompson and [redacted] [redacted] crimes was strikingly similar to other crimes to which Mr. Poole had

confessed to the police. In addition, an important piece of physical evidence was a blood spot that was found on a storm door at Ms. [redacted] house and this blood was inconsistent with Mr. Cotton's blood type but was consistent with Mr. Poole's blood type. In addition, [redacted] Ms. [redacted] boyfriend, testified that during the night of the assault on Ms. [redacted] he had been at her house but that he had not been cut and did not bleed himself.

10. During the investigation of these two assaults both Ms. [redacted] and Ms. Thompson reviewed identical live line-ups. Ms. [redacted] picked out a member of the lineup who had strikingly similar facial features to Mr. Poole and very dissimilar facial features to Mr. Cotton. Ms. Thompson had some trouble selecting between the same person who Ms. [redacted] picked and Mr. Cotton himself, and only after some wavering did she pick Mr. Cotton. In addition the composite picture that had been developed by the police department was very close in appearance to Mr. Poole and again strikingly dissimilar to the facial features of Mr. Cotton.

11. During Ms. [redacted] testimony she testified that she had observed her assailant make an unusual "grin" facial expression. During Mr. Poole's voir dire testimony I saw him make a similar "stress grin" facial expression.

12. There is no question that at Mr. Cotton's second trial the crux of our defense was the evidence regarding the guilt of Bobby Poole for both the Thompson and [redacted] charges. This was a very hotly contested issue at the second trial.

13. Judge McLelland did not allow the Bobby Leon Poole evidence to be heard by the jury and we felt that this ruling may well have been error by the trial court and was certainly the central issue for our client's appeal.

14. I was completely shocked that my client's appellate counsel, Mr [redacted] decided not to brief the issue regarding the inadmissibility of the Bobby

Leon Poole evidence and therefore waived that issue as an issue on appeal. In light of Mr. Cotton's first appeal to the North Carolina Supreme Court and the court's opinion in that matter I certainly felt that the judge's decision regarding the inadmissibility of the Bobby Poole evidence was a winning issue on appeal and that Mr. Cotton would be granted a new trial.

15. On January 10, 1989 I wrote Mr. [redacted] a letter wherein I noted that he did not pursue the Bobby Leon Poole issue and asked him to telephone me regarding his research notes on that issue. A copy of that letter is attached hereto as Exhibit A and incorporated herein by reference as if fully set forth. Mr. [redacted] never did telephone to discuss this matter with me.

16. The second trial also contained some surprise testimony from Mr. Byrum the owner of Somers Seafood where our client worked. Mr. Byrum testified that our client had fondled waitresses and otherwise acted inappropriately on the job. This testimony came as a surprise to me as Mr. Cotton's trial attorney in that this evidence had not been elicited during the first trial nor had any discovery been provided regarding this testimony. Mr. Byrum had testified at Mr. Cotton's first trial and had made no mention whatsoever of any inappropriate sexual behavior by Mr. Cotton. I also had out of court discussions with Mr. Byrum and he had never mentioned any of this to me. I also had never seen any discovery provided by the prosecutor in this case nor had the prosecutor ever even informally mentioned this alleged evidence. Suffice it to say that this evidence from Mr. Byrum came as a complete surprise to me during the trial.

17. The Byrum evidence in my opinion was harmful to my client in the jury's eyes and I did not feel that I had enough notice of this evidence in order to adequately attempt to meet this evidence satisfactorily.

18. I have always been troubled that the State of North Carolina convicted the wrong man when they convicted Mr. Cotton of these crimes. I certainly feel that

had the jury been allowed to hear the evidence regarding Mr. Poole a different result would have been obtained. In the absence of the jury's knowledge of the Poole evidence, I felt that the surprise testimony from Mr. Byrum prejudiced my client to the point where the jury was unfairly swayed against him.

W. Phillip Moseley (SEAL)

Sworn to and subscribed before me
this the 16th day of June, 1994.

Notary Public

My Commission Expires:

10-2-95

MOSELEY AND WHITED, P.A.
ATTORNEYS AND COUNSELORS AT LAW
9 COURT SQUARE N.E.
GRAHAM, NORTH CAROLINA 27253

W. PHILLIP MOSELEY
G. KEITH WHITED

TELEPHONE
(919) 227-1065

January 10, 1989

[redacted]
Assistant Appellate Defender
OFFICE OF THE APPELLATE DEFENDER
STATE OF NORTH CAROLINA
5 West Hargett Street
Post Office Box 1070
Raleigh, North Carolina 27602

Re: State v. Ronald Junior Cotton
Alamance County File Numbers 84 CrS 10257-10259
Alamance County File Numbers 87 CrS 12792-12794

Dear Mr. [redacted]

Thank you for the copy of your most excellent brief in the above captioned matter.

I noted that you did not pursue the exclusion of evidence that Leon Poole may have been the perpetrator. Since I have a similar issue in the office at the present time, I wonder if you would be kind enough to call me about your research notes on that issue.

Thanking you in advance for your consideration, I remain

Sincerely,

MOSELEY AND WHITED, P.A.

W. Phillip Moseley

W. Phillip Moseley

WPM/lr

NORTH CAROLINA

ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
84 CrS 1257-59;
87 CrS 12792-94

STATE OF NORTH CAROLINA

vs.

RONALD JUNIOR COTTON,
Defendant.

AFFIDAVIT

The undersigned, DANIEL H. MONROE, being first duly sworn does hereby depose and say as follows:

1. Along with W. Phillip Moseley, I represented the defendant in the above referenced cases. I assisted Mr. Moseley at his first trial in January of 1985 before Judge Anthony Brannon.

2. The first trial results were overturned by the North Carolina Supreme Court and the case was sent back to Alamance County because of the trial court's exclusion of evidence that [redacted] had identified another suspect during a police lineup.

3. At some time after the conclusion of the first trial in 1985 [redacted] claimed that after seeing Mr. Cotton at his first trial she could now identify that he was the man who had raped her. She later claimed at Mr. Cotton's second trial that she could have made this identification from the beginning but she had been afraid to do so.

4. After Mr. Cotton's first trial, he was subsequently indicted on new charges involving burglary, rape and sex offense arising out of the assault on [redacted] Subsequently the charges from both the Thompson and [redacted] cases were consolidated for trial.

5. Mr. Moseley and I represented Mr. Cotton at his second jury trial in the Alamance County Superior Court beginning in November, 1987 before Judge D.

Marsh McLelland.

6. It was evident that, absent the identification by the two victims, the other physical evidence in this case was less than abundant. In fact, much of the evidence was inconsistent with the guilt of our client Mr. Cotton.

7. During our investigation of this matter we obtained information that another man, Bobby Leon Poole, was claiming to have been the perpetrator in these crimes. Poole had confessed to a fellow inmate named [redacted] Hammonds and we called Mr. Hammonds to the witness stand. Mr. Hammonds testified during a lengthy voir dire hearing outside of the presence of the jury that Mr. Poole had in fact confessed to committing these crimes and that Cotton was in jail for crimes he, Poole, had committed.

8. The trial jury was never allowed to hear the evidence regarding Bobby Poole. In addition to Mr. Poole's confessions we had evidence that Mr. Poole had committed a series of very similar offenses against single women living alone in Burlington during the time period the crimes occurred for which Mr. Cotton was convicted. The modus operandi involved in the Jennifer Thompson and [redacted] crimes was strikingly similar to other crimes to which Mr. Poole had confessed to the police. In addition, an important piece of physical evidence was a blood spot that was found on a storm door at Ms. [redacted] house and this blood was inconsistent with Mr. Cotton's blood type but was consistent with Mr. Poole's blood type.

9. There is no question that at Mr. Cotton's second trial a main focus of our defense was the evidence regarding the guilt of Bobby Poole for both the Thompson and [redacted] charges. This was a very hotly contested issue at the second trial.

10. Judge McLelland did not allow the Bobby Leon Poole evidence to be heard by the jury and we felt that this ruling may well have been error by the trial court

and was certainly the central issue for our client's appeal.

11. I was completely shocked that my client's appellate counsel, Mr. [redacted], decided not to brief the issue regarding the inadmissibility of the Bobby Leon Poole evidence and therefore waived that issue as an issue on appeal. In light of Mr. Cotton's first appeal to the North Carolina Supreme Court and the court's opinion in that matter I certainly felt that the judge's decision regarding the inadmissibility of the Bobby Poole evidence was potentially a winning issue on appeal and that Mr. Cotton would be granted a new trial.

12. The second trial also contained some surprise testimony from Mr. Byrum the owner of Somers Seafood where our client worked. Mr. Byrum testified that our client had fondled waitresses and otherwise acted inappropriately on the job. This testimony came as a surprise to me as Mr. Cotton's trial attorney in that this evidence had not been elicited during the first trial nor had any discovery been provided regarding this testimony. I also had never seen any discovery provided by the prosecutor in this case nor had the prosecutor ever even informally mentioned this alleged evidence. Suffice it to say that this evidence from Mr. Byrum came as a complete surprise to me during the trial.

13. The Byrum evidence in my opinion was harmful to my client in the jury's eyes.

14. I feel that had the jury been allowed to hear the evidence regarding Mr. Poole a different result might well have been obtained.

Daniel H. Monroe (SEAL)
Daniel H. Monroe

Sworn to and subscribed before me
this the 12th day of May, 1994.

Notary Public

My Commission Expires: 3-24-96

APPENDIX F

STATE OF NORTH CAROLINA
ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NOs 84 Crs 10257-59,
87 Crs 12792-94

STATE OF NORTH CAROLINA)
)
v.) AFFIDAVIT
)
RONALD JUNIOR COTTON)

FAYE [redacted] being duly sworn, states:

1. I currently work in the Ladies Department of Wal-Mart in Burlington, North Carolina. In 1984, I was a waitress at Somers' Seafood Restaurant on West Webb Avenue in Burlington.

2. In 1984, Ronald Cotton was also employed at Somers'. Ronald washed dishes, helped in the kitchen, bussed tables, and mopped. Ronald was nice to me, and I like him. He never made any passes at me or at my daughter [redacted], who also was a waitress at Somers'. I do not remember any complaints about him from other waitresses either.

3. On one occasion, Ronald called me at home and asked for a ride somewhere. I did not give him one. On another occasion, my daughter [redacted] gave Ronald a ride home. He did not make a pass at her on this occasion.

4. I am a white female, currently 49 years-old. My daughter [redacted] is currently 28.

Faye [redacted]
FAYE [redacted]

Sworn to and subscribed before me
this the 23 day of November, 1993.
Notary Public Shelby A Mann
My Commission expires: 10-9-94

STATE OF NORTH CAROLINA
COUNTY OF ALAMANCE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Case Nos. 84 CR 10257-59
87 CR 12792-94

STATE OF NORTH CAROLINA)
)
vs.) **AFFIDAVIT**
)
RONALD JUNIOR COTTON)

ALMA [redacted] being duly sworn, states:

1. I am a cook at Somers' Seafood Restaurant on West Webb Avenue in Burlington, North Carolina. I have been at Somers' since 1975.

2. I was a cook at Somers' in 1984, when Ronald Cotton was also employed at Somers'. Ronald was a part-time employee. Typically, he would come to work between 4:00 and 5:00 p.m. His duties included making hush puppies and french fries and sweeping up and mopping. Ronald was a good worker and was well-mannered. He never bothered nor made passes at any female employees in the kitchen while I was present. I never heard him say an ugly word.

3. I was very surprised when Ronald was arrested for rape.

4. No police officers or attorneys interviewed me during the investigation or in preparation for Ronald's trial.

5. I am a black female, currently 50 years old.

Alma [redacted]
ALMA [redacted]

Sworn to before me this
23 day of Nov, 1993.

Shelby D. Morr
NOTARY PUBLIC

My Commission Expires 10-9-96

STATE OF NORTH CAROLINA
ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NOs 84 Crs 10257-59,
87 Crs 12792-94

STATE OF NORTH CAROLINA)
)
v.) AFFIDAVIT
)
RONALD JUNIOR COTTON)

SUNNY [redacted], being duly sworn, states:

1. I am a waitress at Somers' Seafood Restaurant on West Webb Avenue in Burlington, North Carolina. I have been employed off and on at Somers' since 1978.

2. I was a waitress at Somers' in 1984, when Ronald Cotton also worked there. Ronald was always a gentleman towards me. On some occasions he would help me carry things to my car. Ronald never harassed me, nor did I ever see him harass any of the other female employees. About 3-5 waitresses would be on duty when Ronald worked. I do not know what kind of employee Ronald was.

3. I am a white female, currently 42 years-old.

Sunny [redacted]
SUNNY [redacted]

Sworn to and subscribed before me
this the 23 day of November, 1993.
Notary Public Shelby L Mann
My Commission expires: 10-9-94