

STATE OF NORTH CAROLINA  
COUNTY OF **name**

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
**Case number**

STATE OF NORTH CAROLINA            )  
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**name**    )

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**MOTION FOR POST-CONVICTION DISCOVERY  
REGARDING THE STATE BUREAU OF INVESTIGATION**  
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COMES NOW THE DEFENDANT, **name**, by and through undersigned counsel,  
and respectfully moves this Court pursuant to N.C. Gen. Stat. § 15A-1415(f) for  
additional post-conviction discovery regarding the State Bureau of Investigation (SBI).

Defendant has already received post-conviction discovery, including files from  
the Office of the District Attorney and some discovery from the SBI. However,  
Defendant is requesting expanded discovery from the SBI in light of recent revelations  
that the SBI has engaged in a widespread and longstanding practice of misstating the  
results of forensic tests, concealing evidence favorable to the defense, and withholding  
material and potentially exculpatory evidence from numerous criminal defendants,  
including:

- Three defendants who have been executed;
- Four defendants currently on death row;
- One defendant sentenced to death whose sentence was commuted;
- 80 defendants currently incarcerated;
- 190 defendants convicted.

Ex. 1, Swecker-Report; *Scathing SBI Audit Says 230 Cases Tainted by Shoddy Investigations*, NEWS AND OBSERVER, August 19, 2010. <sup>1</sup>

In response, the Attorney General has initiated further review of the SBI Lab, including a legal review of every section to see if current procedures follow state law and a separate audit that will examine past cases. *SBI Lab get interim director; more audits coming, Cooper says*, WFAE.org, September 8, 2010. The call for a full audit was first raised by the North Carolina Conference of District Attorneys. *DA's demand full SBI audit*, NEWS AND OBSERVER, August 28, 2010. And Conference president Seth Edwards has expressed concern that the problems may extend beyond the SBI Lab: "At this point, everything at the SBI is open for discussion." *SBI bloodstain analysis team went leaderless for 21 years*, NEWS AND OBSERVER, September 9, 2010.

The shocking nature and scope of these developments is such that Defendant's post-conviction proceedings cannot continue until he has been given ample opportunity to determine exactly what evidence the SBI mishandled or concealed in his case and how that may have impacted the outcome of his capital trial. In support of this Motion, Defendant shows the following:

**PROCEDURAL HISTORY**

1. [Add procedural history]

**FACTUAL BACKGROUND**

*The Swecker Report*

2. On August 18, 2010, the Office of the Attorney General released the results of an independent review of the Forensic Biology Section of the SBI Crime Laboratory (SBI Lab) conducted by Chris Swecker and Michael Wolfe. Ex. 1, Swecker

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<sup>1</sup> Recent newspaper articles regarding the SBI are attached as Exhibit 2.

Report. The review was ordered by the Attorney General in the aftermath of the February, 2010, exoneration of Gregory Taylor by the North Carolina Innocence Inquiry Commission. Swecker is a North Carolina attorney and former Assistant Director of the FBI's Criminal Investigative Division, at the time of his retirement in charge of the FBI Laboratory. Wolf was the FBI Inspector in Charge of overseeing the overhaul of the FBI Laboratory in 1998-1999. Ex. 1, p. 2, n. 2.

3. Swecker and Wolf identified 230 cases in which SBI Crime Lab agents misreported the results of forensic tests for the presence of blood. In these cases, agents reported the results of presumptive tests which yielded "positive indications for the presence of blood" but omitted the results of subsequent confirmatory tests where the results were "negative" or "inconclusive." Ex. 1, p. 3. In other words, Swecker and Wolf found numerous cases in which SBI agents wrote reports suggesting that a substance was or could be blood when, in fact, subsequent and more sophisticated testing revealed that it was not.

4. In addition, Swecker and Wolf conducted a limited review of the SBI Lab's DNA program, which consisted of a review of five cases brought to their attention by defense attorneys. Ex. 1, pp. 22-25. They found "serious errors on the part of DNA Analysts."<sup>2</sup> Ex. 1, p. 4.

5. Although Swecker and Wolf's review was limited, it revealed systematic flaws in the review of physical evidence that could implicate all analysis performed by the SBI Lab.

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<sup>2</sup> Swecker conceded in his August 18, 2010 press conference that he is not a DNA expert. <http://www.wral.com/news/video/8153801/#/vid8153801> We do not yet know the full extent of the problems with DNA analysis at the SBI Lab.

This report raises serious issues about laboratory reporting practices from 1987-2003 and the potential that information that was material and even favorable to the defense of criminal charges was withheld or misrepresented. The factors that contributed to these issues range from poorly crafted policy; lack of objectivity, the absence of clear report writing guidance; inattention to reporting methods that left too much discretion to the individual Analyst; lack of transparency; and ineffective management and oversight of the Forensic Biology Section from 1987 through 2003.

Ex. 1, p. 4. Swecker commented to the Charlotte Observer that, “what surprised me was the sort of the looseness these, specifically with policy regarding reporting results. What was created was a very subjective environment with cases.” *SBI practices stun former high-ranking FBI official*, CHARLOTTE OBSERVER, August 20, 2010.

6. Reaction to the Swecker Report has been loud, swift and broad-based. The Governor lamented “real problems with the SBI crime lab procedures.” *Reaction to the SBI crime lab review*, WRAL.com, August 19, 2010. Former Chief Justice I. Beverly Lake was stunned: “I’m absolutely shocked and astounded at the depth of the problem... That’s horrendous. That’s a terrible indictment on the state of North Carolina.” *Id.*

7. The Attorney General called the report “troubling.” *Id.*; *SBI review finds flawed NC cases, including several local cases*, STAR NEWS, August 18, 2010. He promised changes and removed or suspended several SBI analysts and both SBI Director Robin Pendergraft and SBI Lab director Jerry Richardson. *Id.*; *New SBI chief removes lab director, suspends more analysts*, NEWS AND OBSERVER, August 21, 2010. More recently, the Attorney General announced the firing of SBI agent Duane Deaver, who gave misleading testimony in the Gregory Taylor case. *SBI fires much-criticized agent*, NEWS AND OBSERVER, January 11, 2011. New SBI Director Greg McLeod promised a

review of the firearm and toolmark unit of the SBI Lab in light of recent concerns. *SBI's bullet tests cold cases, indeed*, NEWS AND OBSERVER, August 27, 2010.

8. Prosecutors have also taken the Swecker Report seriously:
  - Branny Vickory, District Attorney for Greene, Lenoir, and Wayne counties, stated, “This is mind-boggling. It is really a nightmare for everyone. I don’t know how we are going to make this right.” *Scathing SBI Audit Says 230 Cases Tainted by Shoddy Investigations*, NEWS AND OBSERVER, August 19, 2010.
  - Ann Kirby, a former Johnston County prosecutor who now works in the Craven County District Attorney's Office, stated “it’s an absolute betrayal to us as prosecutors... To find out that people we relied on so heavily in so many cases were slanting results—by their own accord or by the instruction of supervisors—is the ultimate betrayal. We are not playing a game here. These are people’s lives.” *Leaders calling for SBI cleanup*; NEWS AND OBSERVER, August 15, 2010.
  - Cumberland County District Attorney Ed Grannis said the SBI’s reputation had been “badly tarnished” and the problems may take years to fix. *Local prosecutors say there wasn’t tampering in SBI evidence*, FAYETTEVILLE OBSERVER, August 19, 2010.
  - Jim Woodall, District Attorney for Orange and Chatham counties, has called for a moratorium on executions in light of the scandal. *DA: Report puts death penalty in question*, WCHL1360.com, August 21, 2010.

9. The North Carolina Conference of District Attorneys has called for a full audit of all units of the SBI Lab. *DA's demand full SBI audit*, NEWS AND OBSERVER, August 28, 2010. In addition, prosecutors across the state are undertaking their own reviews of cases:

- Beaufort County District Attorney Seth Edwards, who is also the president of the North Carolina Conference of District Attorneys, promised, “we will endeavor to review all 190 cases to make sure justice has been served.” *SBI review revives death penalty concerns*, WRAL.com, August 19, 2010.
- Union County District Attorney John Snyder responded to the revelations with: “we’ve been out there asserting things as fact that just weren’t.” *Id.* Snyder has promised to review all homicide cases in which defendant did not confess for SBI mistakes. *Union County DA Will Review Cases*, NEWS AND OBSERVER, August 18, 2010. “The irony is, we have the best science being made here in North Carolina [at university and corporate labs], but down the road at the SBI lab, we have bad science being used to take away someone’s liberty.” *Id.* Of analysts who craft reports to fit a prosecution theory, he stated, “that’s not science; that’s creation.”
- District Attorneys in Onslow, Wake, Bertie, Halifax, and Henderson counties have also expressed concern and promised to review cases in their districts. *Five cases under review*, ROANOKE-CHOWAN NEWS-HERALD, August 28, 2010; *Reaction to the SBI crime lab review*, WRAL.com, August 19, 2010; *Onslow County case among those cited in crime lab*

*report*, JACKSONVILLE DAILY NEWS, August 28, 2010; *Three local cases in SBI review*, ROANOKE RAPIDS DAILY HERALD, August 24, 2010; *Doubt cast on '92 child abuse case*, TIMES NEWS, August 25, 2010.

10. The executive director of the North Carolina Police Benevolent Association stated, “undoubtedly, no further laboratory testing can be trusted under the current control of the SBI leadership.” *State police group urges criminal probe of SBI*, NEWS AND OBSERVER, August 19, 2010. Conservative columnist Rick Martinez called the SBI Lab “a professional embarrassment.” *Flights of evasion*, NEWS AND OBSERVER, August 26, 2010.

11. So far, one defendant whose case was listed in the Swecker Report has obtained relief. Derrick Allen was sentenced to almost 44 years in prison in 1998 after entering an Alford plea to second-degree murder and a first-degree sexual offense in the death of his girlfriend’s two-year-old daughter. Allen took the plea offer in order to avoid the death penalty. At his sentencing hearing, the prosecutor argued that the most damning piece of evidence was the blood reportedly found on the victim’s underwear. Swecker and Wolf uncovered that, in fact, confirmatory tests for the presence of blood on the underwear were negative and had not been reported by the SBI. Allen served over 12 years in prison before being released in September 2010. Charges against him were finally dismissed in December 2010. Durham County Superior Court Judge Orlando Hudson, who dismissed the charges, found the SBI’s work in the case “extremely disturbing.” *Allen’s charges all thrown out*, News and Observer, December 11, 2010.

***The SBI’s Involvement in Defendant’s Case***

12. [Add case-specific facts]

## GROUNDS FOR GRANTING DISCOVERY

13. In North Carolina, a capital defendant in post-conviction proceedings is entitled to discovery of “the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.” N. C. Gen. Stat. §15A-1415(f). In addition to the mandates of N. C. Gen. Stat. §15A-1415(f), the superior court may also order disclosure of the State’s files where that disclosure serves the interests of justice and the search for truth. *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 313 (2000); *State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990).

14. “The suppression of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83 (1963). The U.S. Supreme Court has also made clear that any information that may be used by the Defendant to impeach a testifying witness must be disclosed under *Brady*. *U.S. v. Bagley*, 473 U.S. 667, 676 (1985); *U.S. v. Giglio*, 405 U.S. 150 (1972).

15. The North Carolina Court of Appeals held in *State v. Dunn*, 154 N.C. App. 1, 571 S.E.2d 650 (2002) that criminal defendants are entitled to pre-trial discovery pertaining to SBI laboratory protocols, incidents of false positive results, quality control and quality assurance, and proficiency tests of the SBI Lab. Such discovery is necessary due to “the extraordinarily high probative value generally assigned by jurors to expert testimony,... the need for intensive trial preparation due to difficulty involved in cross-examination of expert witnesses, and... the inequality of investigation resources between prosecution and defense regarding evidence which must be analyzed in a

laboratory.” *Id.* at 6 (*quoting State v. Cunningham*, 108 N.C. App. 185, 194, 423 S.E.2d 802, 807 (1992)).

16. Defendant’s discovery request is also consistent with Swecker and Wolf’s recommendation that the SBI make policies and procedures “transparent and easily accessible to the public.” Ex. 1, p. 30. The Attorney General has made clear his intention to follow this recommendation by posting “policies, procedures, accreditations, and training materials” online and automating the sharing of laboratory files. Ex. 3, *SBI Changes: Checklist and Status*, September 8, 2010.

17. Due process and the interests of justice demand that Defendant be granted access to broad discovery from the SBI. The Swecker Report raises grave questions about the reliability of all convictions and death sentences based either on testimony of SBI agents or on evidence analyzed or collected by the SBI. However, Defendant cannot determine the full extent to which his case was affected by SBI misconduct without a significant amount of additional information. The Swecker Report was not a comprehensive audit of the SBI Lab.<sup>3</sup> Ex. 1, p. 30. The scope of the review was limited, encompassing only the question of “how SBI Serology Analysts reported the results of serology tests for the presence of blood” from 1987 to 2003, in addition to “a limited review of the SBI Laboratory DNA program.” Ex. 1, pp. 3,4.

18. There is good reason, however, to believe that problems at the SBI have not been confined to tests conducted for the presence of blood and that the Swecker Report may be just the tip of the iceberg. Five of the six contributing factors cited by Swecker and Wolf are broadly-applicable administrative problems: “poorly crafted

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<sup>3</sup> The SBI Lab consists of many sections, including Forensic Biology, Drug Chemistry, Documents and Digital Evidence, Evidence Control and Administrative Services, Firearm and Toolmark, Latent Evidence, Molecular Genetics, and Trace Evidence; plus a Quality Assurance Office. Ex. 1 p. 16, n.17.

policy; lack of objectivity; the absence of clear report writing guidance; inattention to reporting methods that left too much discretion to the individual Analyst; lack of transparency.” Ex. 1, p. 4. Indeed, the picture painted by the Swecker Report is one of an agency whose very culture has been characterized by a profound lack of objectivity, leadership, and scientific rigor.

### ***Withholding of Evidence***

19. The Attorney General ordered the Swecker review only after it became clear that SBI Agent Duane Deaver withheld exculpatory serology evidence in the case of Gregory Taylor. Gregory Taylor was convicted of first-degree murder in Wake County in 1993. An important piece of evidence used to convict Taylor was an SBI Lab report written by Agent Deaver reporting that tests performed on Taylor’s vehicle revealed “chemical indications for the presence of blood.” Proceedings initiated by the North Carolina Innocence Inquiry Commission revealed that, in fact, Deaver had also conducted more a sensitive confirmatory test for blood on the same items, and the results of that test were negative. Deaver did not report the negative results in his report, and the jury was led to believe that the substance on Taylor’s car was blood . Deaver testified that the way he reported the serology results was consistent with SBI “policy.” Taylor was exonerated at a hearing. Ex. 1, pp. 6-7.

20. Swecker and Wolf confirmed that Deaver’s withholding of evidence in the Gregory Taylor case was not an isolated incident and that, in fact, this practice was commonplace. Swecker and Wolf identified 932 cases in which at least one presumptive test for blood was conducted with positive results. Ex. 1, p. 9. In 230 of those cases, they found “at least one instance where the lab notes reflected that a positive presumptive

test for the presence of blood was followed by a confirmatory test that yielded results that were ‘negative,’ ‘inconclusive’ or ‘no result,’ but did not include this information in the final report.” *Id.* In other words, the rate of misreporting was nearly 25%.

21. The Gregory Taylor case and Swecker report are not the only instances of the SBI withholding exculpatory evidence.

- Alan Gell spent nine years on death row before being exonerated in 2004 based on exculpatory evidence withheld by SBI Special Agent Dwight Ransome. The Attorney General contracted with Swecker to review Ransome’s conduct in several homicide investigations. Swecker noted Ransome’s pattern of sloppiness, practice of omitting information from investigative files, and lack of supervision. He urged the Attorney General to investigate five cases in which Ransome’s files contained potentially exculpatory evidence to ensure that the evidence was turned over to prosecutors. Ex. 4.
- The Attorney General has ordered a special review of the case of Floyd Brown, who has filed a civil rights lawsuit against the SBI on grounds that Agent Mark Isley fabricated a confession against him. Doctors at Dorthea Dix say Brown is too mentally retarded to have made the statement Isley claims he did. A Superior Court judge dismissed charges against Brown in 2007. *SBI ignores years of warnings on confession called ‘fiction,’* NEWS AND OBSERVER, August 18, 2010.
- In a 2007 Davie County case, an SBI blood spatter analyst changed a report in order to support the prosecution’s theory. Agent Gerald Thomas,

supervised by Duane Deaver, had written an initial report stating that a particular bloodstain was likely made by “a bloody hand” but, after a meeting with the prosecutor, changed the language to “a pointed object, consistent with a knife.” Thomas failed to report the meeting, made no notation in the revised report that there had ever been another version, and dated the new report with the same date as the original. In this case, diligent defense counsel uncovered the deception before trial, and the defendant was acquitted of murder. Said one juror of the SBI’s evidence: “politically, socially, religiously, I’m conservative; I’m a law-and-order man. But I don’t know what other word to use but a fraud.” *Fantastic tales told in blood; a jury stunned by SBI’s acts*, NEWS AND OBSERVER, August 19, 2010. The Attorney General recently cited Duane Deaver’s conduct in this case as one of three reasons for his firing. *SBI fires much-criticized agent*, NEWS AND OBSERVER, January 11, 2011.

- A 2008 SBI memo advises that original versions of lab reports that have been changed are not to be disclosed to defense attorneys unless they are specifically requested. *Witness for the prosecution: Lab loyal to law enforcement*, NEWS AND OBSERVER, August 16, 2010.

22. Defendant is entitled to discovery regarding SBI policies and practices regarding the withholding of evidence. Defendant has a right to know whether SBI employees were instructed to keep certain information out of lab reports, withhold evidence from prosecutors or defense counsel, or decline to perform tests which might hurt the State’s case.

### *Lack of Objectivity*

23. The Swecker Report repeatedly criticizes the SBI Lab for a lack of objectivity. Ex. 1. pp. 4, 19, 29. Swecker and Wolf recount with concern that Mark Nelson, the Forensic Biology Section Chief from December 1, 1986 to April 1, 2002, and at the time of Defendant's trial, "articulated to reviewers that he considered the primary consumer of the lab reports to be law enforcement." Ex. 1. p. 19. One of the Swecker recommendations is to implement training of SBI employees in order to "specifically dispel any belief that the SBI laboratory and its personnel serve to support investigating officer and prosecutors only." Ex. 1, p. 29.

24. Recent reporting in the News and Observer has shown that SBI practices, training manuals, and directives have perpetuated a mindset that SBI agents and analysts are not neutral scientists but members of the prosecutorial team.

- SBI Lab analysts are encouraged to collaborate and communicate with local law enforcement and prosecutors but are told that they must let prosecutors know before speaking with defense counsel. *Witness for the prosecution: Lab loyal to law enforcement*, NEWS AND OBSERVER, August 16, 2010.
- A 2007 manual teaching analysts how to testify in court states, "Tell the D.A. in advance of any weaknesses in the case so that the trial of the case can be planned to minimize the weaknesses' impact." The SBI has recently suspended use of this manual. *Id.*; *New SBI director suspends use of training manual*, NEWS AND RECORD, August 12, 2010.

- SBI Lab analysts “depend on prosecutors to provide favorable feedback on their courtroom testimony as part of a certification requirement for the lab... In hundreds of feedback forms reviewed by the N&O, prosecutors offered glowing responses.” *Witness for the prosecution: Lab loyal to law enforcement*, NEWS AND OBSERVER, August 16, 2010.

25. Recent courtroom testimony by a suspended SBI serology analyst strongly suggests that this lack of objectivity still persists, even months after the Swecker report was issued. Agent Jennifer Elwell was removed from case work after her serology work was called into question in the Swecker report, including her work on the case of Derrick Allen. However, it is clear from Elwell’s testimony in a December 2010 hearing in the Allen case that she does not take the concerns seriously. Elwell testified that she had not even read the Swecker report. When asked why, she replied that she considered it to be just the opinion of one person and not the scientific community. *Lab analyst shrugs off audit that rocked SBI*, NEWS AND OBSERVER December 10, 2010. She also criticized Swecker and Wolf, saying that they didn’t understand forensic science. *SBI culture resists change*, NEWS AND OBSERVER December 12, 2010. After the hearing, the court dismissed all charges against Derrick Allen. *Allen’s charges all thrown out*, NEWS AND OBSERVER, December 11, 2010.

26. Defendant must be provided with discovery to determine the extent to which the SBI evidence in his case was tainted by an institutional culture biased towards the prosecution. For example, it is critical that Defendant know whether the SBI agents, analysts, and technicians involved in his case were encouraged to help the State at the expense of the defense or were instructed to highlight strengths in the state’s case and

downplay the State's weaknesses. Even more importantly, Defendant must be provided with the evidence necessary to determine whether the SBI employees working on his case believed that their certification or employment status were dependent on their ability to satisfy prosecutors.

### *Lack of Scientific Validity*

27. When SBI Lab analysts testify, they are qualified as experts and held out to juries as scientists. The Swecker Report, however, casts serious doubt on the scientific validity of the work performed by the SBI and the scientific approach of the SBI Lab analysts.

- Swecker and Wolf found that serology analysts were inconsistent in their understanding of whether the Takayama confirmatory test for the presence of blood could produce an inconclusive result. The SBI training manual made no reference to the possibility of an inconclusive result, yet a 1997 Molecular Genetics Section Administrative Order specifically instructed analysts to omit inconclusive results from reports. Some analysts judged a result to be inconclusive, as opposed to negative, when they subjectively concluded that the requisite salmon colored crystals were “trying to form” or must not have formed because the sample size was insufficient. Ex. 1, pp. 17-22.
- SBI analysts justified their failure to report the results of negative serology tests with the argument that a negative results did not mean that blood was **not** present. Ex. 1, p. 19. In an interview with the News and Observer, retired serology analyst Jed Taub stated: “we didn’t report the negative

result of a confirmatory test because, really, it's misleading. We couldn't be sure it wasn't blood, so those tests really didn't matter... People are so spacey about blood. If there was a misunderstanding, that's the fault of the [defense] attorney. We can't forestall every idiot." *Ex-SBI analyst defends withholding test results*, NEWS AND OBSERVER, August 20, 2010.

28. Furthermore, in their limited review of the SBI's handling of DNA evidence, Swecker and Wolf found "disturbing" mistakes made in five North Carolina cases. Ex. 1, pp. 22-25.

- Francisco Laboy – The lab produced genetic profiles which identified both the defendant and the victim as being of the wrong gender. Ex. 1, p. 23.
- George Goode – SBI Agent Deaver falsified his report and testified falsely about his results. This case also involved the failure to properly preserve evidence and document chain of custody. Ex. 1, pp. 23-24.
- Leslie Lincoln – The lab analyst "inadvertently switched" the known DNA samples of the victim and the defendant, resulting in a report that erroneously identified bodily fluid on a piece of evidence as having come from the defendant when it came from the victim.. Ex. 1, p. 23
- Terrance Elliot – During testing, the SBI allowed cross-contamination to occur between different items of evidence. The defendant is currently on death row. Ex. 1, p. 24.
- Dwayne Dail – The original lab report omitted the fact that two hairs found at the crime scene were not consistent with the defendant's hair.

Mr. Dail was later exonerated by DNA evidence after serving 18 years in prison. *Id.*

29. The following additional examples further reveal the SBI lab's lack of true scientific purpose:

- Jerry Richardson, who was until recently from the director of the SBI Lab, does not have a science degree. He graduated from N.C. State with a BA in communications. *New SBI chief removes lab director, suspends more analysts*, NEWS AND OBSERVER, August 27, 2010.
- In 2007, a Davie County man was acquitted of murder after the jury watched a video showing SBI blood spatter analysts Gerald Thomas and Duane Deaver conducting unscientific tests designed to produce a result supporting the prosecution's theory. Since the acquittal, the bloodstain pattern expert hired by the defense has shown the video to colleagues, all of whom have been 'aghast' and have deemed the work unscientific. The Attorney General has suspended the work of the bloodstain pattern analysts and fired Duane Deaver. *Fantastic tales told in blood; a jury stunned by SBI's acts*, NEWS AND OBSERVER, August 19, 2010; *SBI fires much-criticized agent*, NEWS AND OBSERVER, January 11, 2011.
- In a 2006 murder trial, SBI firearm and toolmark analyst Beth Desmond testified with "absolute certainty" that two bullets were shot from the same gun. Independent analysts hired by the defense said that such bullet comparison is subjective and were unable to replicate Desmond's conclusions upon examination of the same bullets. *SBI relies on bullet*

*analysis that critics deride as unreliable*, NEWS AND OBSERVER, August 18, 2010. The SBI only agreed to reanalyze the bullets after the Swecker report began casting doubt on the lab's reliability. *Id.*; *SBI's bullet tests cold cases, indeed*, NEWS AND OBSERVER, August 27, 2010. The results of the reanalysis, conducted by a former chief of the FBI's ballistics section, seriously undermine the reliability of Desmond's testimony: while she testified that she was absolutely certain the bullets were fired from the same gun, the reanalysis was "inconclusive, with a 'tilting' towards the proposition that they *could have* been fired from the same barrel." *Report backs SBI ballistics in Pitt case*, NEWS AND OBSERVER, December 31, 2010. (emphasis added)

- In June 2010, the North Carolina Supreme Court chastised the SBI Lab for failing to conduct laboratory tests on pills suspected of being controlled substances. *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010). Instead, SBI analysts were identifying drugs simply by looking at them. At issue, specifically, was the visual inspection of pills by Special Agent Irvin Lee Allcox, a chemist in the SBI Lab for over 24 years. *Id.* at 740. Wrote Justice Brady: "It is difficult to view [Agent Allcox's] testimony as reflecting anything other than a technique for 'cutting corners.' Thus, even Agent Allcox's own testimony casts an unsettling shadow of doubt on the reliability of mere visual inspection as a method of proof." *Id.* at 745-46.

30. Defendant must be provided with the information necessary to assess the scientific validity of the work performed by the SBI agents, analysts, and technicians involved in his case.

### ***Lack of Quality Control***

31. It is clear that SBI leadership have failed to exercise adequate oversight. The Swecker Report repeatedly notes the SBI's failure to provide guidance to analysts. Ex. 1, pp. 17, 26-27. For example, the bloodstain pattern analysis team, which included Duane Deaver and has now been suspended, operated for 21 years without leadership or written policies. *SBI bloodstain analysis team went leaderless for 21 years*, NEWS AND OBSERVER, September 9, 2010. The Swecker report shows that when guidance was issued to analysts, it was often inconsistent and confusing. Ex. 1, pp. 21-22, 26-27.

32. In addition, Swecker and Wolf uncovered no evidence that the SBI policies, practices, and training materials they examined in their investigation of the serology section had ever been subjected to legal review. Ex. 1, p. 27. At this revelation, the Attorney General replied, "That concerns me greatly." *New SBI chief removes lab director; suspends more analysts*, NEWS AND OBSERVER, August 27, 2010. The Attorney General has now initiated a legal review of all sections of the SBI Lab. *SBI Lab get interim director; more audits coming, Cooper says*, WFAE.org, September 8, 2010.

33. The SBI Lab is accredited by ASCLD-LAB. The News and Observer has reported that ASCLD-Lab audits the SBI Lab every five years. *Inspectors missed all SBI faults*, NEWS AND OBSERVER, August 26, 2010. Inspectors examine five cases from each analyst, and those cases are selected by SBI supervisors. *Id.* ASCLD-LAB is headed by two former SBI agents. *Id.* Almost every year the SBI Lab has sought accreditation, it

has had to fix policies or remediate cases in order to pass. *SBI lab analysts taught in-house, away from peers*, NEWS AND OBSERVER, August 9, 2010. In addition, the Swecker Report references a Quality Assurance Program within the SBI. Ex. 1., p. 30.

34. The State may cite the SBI Lab's own quality control procedures and ASCLD-LAB certification as evidence that analysts were acting in good faith and that test results are accurate. Thus, Defendant must be provided with information about the SBI's Quality Assurance Program and ASCLD-LAB so that he may test the strength of any such arguments.

35. Moreover, if the SBI's Quality Assurance Program and ASCLD-LAB have conducted any audits or reviews finding problems like those uncovered by Swecker and Wolf, Defendant is entitled to know of those. If the SBI knew of these serious problems and covered them up, this just serves to deepen the doubled shadow of doubt already cast across the SBI evidence used against Defendant.

#### ***Materiality of the Evidence Sought***

36. It is clear that the problems at the SBI outlined in the Swecker report and News and Observer have impacted criminal cases, even leading to wrongful prosecutions and convictions. Problems with forensic evidence are not confined to North Carolina. A 2009 study looked at 137 cases from across the nation in which defendants had been exonerated by post-conviction DNA testing and found that 60% of these wrongful convictions were based, at least in part, on invalid forensic testimony regarding testing ranging from serological analysis to bite mark comparison. Ex. 5, Brandon L. Garrett and Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 V.A. L. REV. 1 (2009).

37. [Add case-specific argument: why SBI evidence important in Defendant's case, pre-existing evidence of SBI misconduct, etc.]

38. Defendant cannot yet know whether further examination of the other SBI evidence in his case would uncover misconduct similar to that found in the serology section. Moreover, Defendant must now wonder, in light of the recent revelations, whether the SBI Lab performed any other analyses, the results of which have never been revealed, or whether the SBI declined to perform analyses which may have rendered exculpatory or mitigating evidence.

39. Defendant must be provided with the information necessary to determine the accuracy of all of the SBI's evidence in this case. This means more than bench notes and lab results, although those are certainly essential. Defendant also has a right to discover evidence showing that the agents who worked on his case were biased, poorly supervised, inappropriately trained, or led to understand that their job security depended on helping the State win convictions.

40. In addition, Defendant requires discovery on all policies and procedures that shed light on the honesty, objectivity, scientific proficiency, and leadership of the SBI as a whole and, therefore, on the weight that should be give to evidence produced by the SBI. Seth Edwards, Beaufort County District Attorney and president of the North Carolina Conference of District Attorneys, has acknowledged that the recent revelations about the SBI could make a difference to jurors' consideration of SBI evidence: "The mindset has changed. We'll encounter jurors who won't believe in the SBI anymore." *Distrust of SBI appears in court*, NEWS AND OBSERVER, August 24, 2010; *see also SBI review revives death penalty concerns*, WRAL.com, August 19, 2010 and *Flagged SBI*

*tests include Pitt cases*, DAILY REFLECTOR, August 18, 2010 (containing similar statements from Clark Everett, Pitt County District Attorney, and Jim Woodall, District Attorney for Orange and Chatham counties and past president of the NC Conference of District Attorneys).

41. Moreover, Defendant must be provided discovery regarding the SBI agents involved in his case who did not work in the SBI Lab. Seth Edwards has expressed concern that the problems may extend beyond the SBI Lab: “At this point, everything at the SBI is open for discussion.” *SBI bloodstain analysis team went leaderless for 21 years*, NEWS AND OBSERVER, September 9, 2010. For example, Special Agent Dwight Ransome withheld evidence in the Alan Gell case. In his audit concerning Ransome, Swecker blamed Ransome’s actions, in part, on a lack of supervision. Ex. 4. Thus, in the context of these latest revelations about the SBI Lab, Ransome’s misconduct appears to be more than just the work of a rogue agent but rather the product of the broader cultural problems and failure of leadership at the SBI.

42. The discovery Defendant seeks could potentially reveal previously withheld exculpatory evidence, bases for additional post-conviction claims, grounds for challenging the admissibility of the forensic evidence, and evidence impeaching the credibility of the SBI witnesses who testified at Defendant’s trial and may testify at his evidentiary hearing. Accordingly, Defendant requests the following discovery.

**DISCOVERY MATERIALS SOUGHT BY DEFENDANT**

43. Much of the material Defendant seeks below would be subject to a public records request. *See* N.C. Gen. Stat. §132.1, *et. seq.* However, Defendant seeks an order from this Court due to the gravity of questions currently surrounding the SBI and the

potential importance of these materials to Defendant's capital case. It is apparent from recent reporting that the News and Observer was provided with large amounts of internal information from the SBI. Surely, the same types of materials accessible to the press should also be available to a defendant facing the death penalty.

44. For each item requested below, Defendant seeks all paper documents and electronic files in the possession of the SBI, Office of the Attorney General, or Office of the District Attorney.

***Materials pertaining to the Swecker Report***

**[if your case is on "the list"]**

45. Defendant's case was one of 230 found by Swecker and Wolf to contain misreported serology evidence. Defendant requests the following pertaining to Swecker and Wolf's review of his case:

- a. All documents, notes, test results, or evidence regarding Defendant's case reviewed by Swecker, Wolf, and/or those working on their behalf;
- b. All documents, notes, and work product containing observations, impressions, conclusions, or questions regarding Defendant's case raised by Swecker, Wolf, and/or those working on their behalf;
- c. Notes or transcripts of all interviews with agents, analysts, or technicians involved in Defendant's case conducted by Swecker, Wolf, and/or those working on their behalf;
- d. Any communications regarding Defendant's case between the SBI and/or the Office of the Attorney General and Swecker, Wolf, and/or those working on their behalf.

***Materials pertaining to any review undertaken by the District Attorney or North Carolina Conference of District Attorneys [if your case is on “the list”]***

46. President of the North Carolina Conference of District Attorneys Seth Edwards has declared his intention to review the cases listed in the Swecker Report. As Defendant’s case is one of those listed, he requests the following:

- a. All documents reviewed by the District Attorney as part of his review of Defendant’s case.
- b. All documents containing any observations, impressions, conclusions, or questions raised in any review of Defendant’s case.

***Materials pertaining to work done in Defendant’s case***

47. SBI Lab Reports in Defendant’s case refer to SBI Lab Number [REDACTED] and SBI File Number [REDACTED]. Ex. 5, SBI lab Reports. Defendant requests discovery pertaining to all work performed by the SBI on his case, including, but not limited to:

- a. All exculpatory test results, including test results impeaching conclusions reported or testified to in Defendant’s case. *See Brady v. Maryland*, 373 U.S. 83 (1963); *U.S. v. Bagley*, 473 U.S. 667, 676 (1985); *U.S. v. Giglio*, 405 U.S. 150 (1972).
- b. All laboratory case files (including lab reports, draft lab reports, withdrawn or canceled lab reports, bench notes, charts, graphics, and raw data) of each agent, analyst or technician’s work on Defendant’s case.
- c. Any and all notes of each supervisor pertaining to Defendant’s case; all documents detailing or describing the role played by each supervisor in the SBI’s work on Defendant’s case; and all communications between

supervisors and agents, analysts and technicians pertaining to Defendant's case.

48. A list of every section of the SBI Lab involved in testing or handling evidence in Defendant's case, including all titles, past and present, by which that section has been called and what evidence each listed section tested or handled;

49. For every section of the SBI Lab which handled or tested evidence in Defendant's case, all editions of the following in effect during [relevant time period], with any revisions, including revisions history:

- a. Policy and Procedures Manual;
- b. Report Writing Manual;
- c. Technical Procedures Manual;
- d. Evidence Field Guide;
- e. Training Manual(s);
- f. Standard Operating Procedures;
- g. Operational Manual(s);
- h. Administrative Orders Manual(s);
- i. Safety Manual(s);
- j. Chemical Work Sheets related to any testing procedures performed in Defendant's case including required items; instructions for preparation; storage condition; expiration dates; vendor/lot; amount made; date prepared; and analyst.
- k. All Precision Weighing certificates from the National Bureau of Standards and/or National Institute of Standards and Technology related to the

instruments used in sampling, preparation and testing of samples referred to in Defendant's case.

- l. Complete copies of all equipment maintenance and repair logs for all equipment used in analyzing evidence in Defendant's case.
- m. Complete copies of all equipment user manuals, product inserts or other materials related to the testing conducted by the SBI in Defendant's case.
- n. Complete copies of all contamination logs and action reports maintained by the SBI.
- o. List or lists of abbreviations;
- p. List or lists kept by the SBI of revisions made to SBI manuals and protocols.
- q. Any and all internal SBI audit reports on the sections of the SBI Lab involved in testing or handling evidence in Defendant's case.

50. Defendant requests the following with regard to each SBI agent, analyst or technician who testified, processed evidence, or was otherwise involved in Defendant's case, and every supervisor who reviewed the work of each agent, analyst or technician, including [name all]:

- a. Dates of employment, job titles, and what section or sections each was assigned to within the SBI Lab or in the field throughout the time of employment at the SBI;
- b. Curriculum Vitae and/or course history;
- c. Job description, including any educational or experience requirements for the position;

- d. Law enforcement certification;
- e. Statement of qualifications;
- f. A list of the chain of command to whom each agent, analyst, technician and/or supervisor reported during his or her time at the SBI;
- g. A list of all cases in which each agent, analyst, technician and/or supervisor testified in court on behalf of either the State or defense;
- h. All records of training received by each agent, analyst, technician and/or supervisor;
- i. Copies of the scientific and technical literature each agent, analyst, technician and/or supervisor was expected to review;
- j. All records of any and all performance reviews;
- k. Copies of the SBI Lab's Quality Assurance/Control Manual relevant to each agent, analyst, technician and/or supervisor's work in effect during [relevant years], as well as the laboratory's most recent Quality Assurance/Control Manual (i.e. the document(s) that describe the laboratory's quality objectives and policies);
- l. Copies of the SBI Lab's technical procedures and/or SOPs relevant to each agent, analyst, technician and/or supervisor's work in effect during [relevant years], as well as the laboratory's most recent technical procedures and/or SOPs;
- m. All records of any and all internal affairs investigations, the results of any investigations, any disciplinary action taken against each agent, analyst, technician and/or supervisor; and/or any other corrective action taken;

- n. The current employment status of each agent, analyst, technician and/or supervisor still employed by the SBI; and, for each agent, analyst, technician and/or supervisor no longer so employed, all records explaining or related to why he or she left the employment of the SBI;
- o. Initial competency testing for each agent, analyst and technician including, but not limited to: raw data and reported results, target values and acceptance ranges, performance scores, and all related correspondence and feedback memos;
- p. Internal and external proficiency testing for each agent, analyst and technician including, but not limited to: raw data and reported results, target values and acceptance ranges, performance scores, and all related correspondence and feedback memos;
- q. All completed prosecutor feedback forms, from any case (not just Defendant's), for each agent, analyst, technician and/or supervisor; and any other communication between prosecutors and the SBI praising, commending, describing, or criticizing the testimony or work of each agent, analyst, technician and supervisor.
- r. Any and all reports concerning the ASCLD-LAB review of the work of each agent, analyst, technician and supervisor; and any and all reports concerning any review of the work of each agent, analyst, technician and/or supervisor by any other testing laboratory audit organization.

***Materials pertaining to withholding of evidence***

51. Defendant requests all SBI training materials, policies, procedures, and directives; past or present, written or unwritten, formal or informal; instructing analysts and agents on the following topics:

- a. How and whether to report information that might hurt the State's case;
- b. Whether to conduct tests which might hurt the State's case.

52. All SBI training materials, policies, procedures, and directives; past or present, written or unwritten, formal or informal; instructing analysts and agents to withhold any information from lab reports or to withhold any information from prosecutors, defense counsel, or defense experts;

53. All SBI training materials, policies, procedures, and directives; past or present, written or unwritten, formal or informal; indicating whether the SBI Lab has adopted any code of ethics or statement of ethical standards; the content of any ethical standards; whether agents, analysts, and/or technicians are trained in ethical standards and/or required to adhere to any ethical standards as a condition of employment; and the process followed when an agent, analyst, and/or technician is suspected of violating ethical standards.

***Materials pertaining to prosecutorial bias***

54. Defendant requests all SBI training materials, policies, procedures, and directives; past or present, written or unwritten, formal or informal; instructing analysts and agents on the following subjects:

- a. How and whether to communicate with prosecutors;
- b. How and whether to communicate with law enforcement;
- c. How and whether to communicate with defense counsel;

- d. How and whether to communicate with defense experts;
- e. How to testify on behalf of the State;
- f. How and whether to testify if called by the defense.

55. All SBI training materials, policies, procedures, and directives; past or present, written or unwritten, formal or informal; showing that agents and analysts were commended for their role in securing convictions, criticized or penalized for their failure to secure convictions, or that the outcomes of the criminal cases in which analysts were involved impacted their certification, promotion, salary, or employment status

56. Blank copies of all forms distributed by the SBI for use by prosecutors to provide feedback regarding the testimony and/or work of SBI agents, lab analysts, and/or employees.

***Materials pertaining to training and proficiency***

57. Defendant requests all SBI policies, procedures, and directives; past or present, written or unwritten, formal or informal; as to training requirements for SBI agents, analysts, and technicians; including how often analysts, agents, and technicians receive training, the substance of the training required, and the source of the training.

58. Defendant requests all SBI policies, procedures, and directives; past or present, written or unwritten, formal or informal; as to proficiency requirements for SBI agents, analysts, and technicians; including how often analysts, agents, and technicians' proficiency is tested, the manner of testing, the individuals conducting the testing, and the use to which proficiency results are put.

***Materials pertaining to quality control, audits, and accreditation***

59. Defendant requests all documents, past or present, describing the function, authority, role, and management of the SBI's Quality Assurance Program and any previously-titled office serving a similar function. In addition, Defendant requests the following:

- a. All editions of the Quality Assurance Manuals for each and every section of the SBI Lab, past and present;
- b. Blank copies of all audit forms used by the Quality Assurance Program for each and every section of the SBI Lab, past and present;

60. All SBI policies, procedures, and directives; past or present, written or unwritten, formal or informal; regarding steps to be taken when an analysts' work is found to be in error by a court or when serious questions as to accuracy are raised by an expert not affiliated with the SBI; records of any and all corrective action taken in response to such situations; and logs of false positive results.

61. In response to the Swecker Report, the Attorney General has initiated further audits and reviews of the SBI. Defendant requests the following discovery pertaining to any ongoing and upcoming reviews and audits of the SBI:

- a. All documents, notes, test results, or evidence regarding Defendant's case reviewed as part of any future audit or review of the SBI Lab or any section of the SBI Lab;
- b. All documents, notes, and work product containing observations, impressions, conclusions, or questions regarding Defendant's case produced as part of any future audit or review of the SBI Lab or any section of the SBI Lab;

- c. Notes or transcripts of all interviews with SBI agents, analysts, or technicians involved in Defendant's case conducted as part of any future audit or review of the SBI Lab or any section of the SBI Lab;
- d. Any communications regarding Defendant's case between the SBI and/or the Office of the Attorney General and any individuals working on behalf of any future audit or review of the SBI Lab or any section of the SBI Lab.

62. The SBI Lab is accredited by ASCLD-LAB. Defendant requests the following with regard to ASCLD-LAB accreditation, and/or any similar audit, review, or accreditation by any other outside entity:

- a. A copy of the SBI Lab's ASCLD-LAB application for accreditation, Annual Accreditation Review Report covering [relevant years], most recent Annual Accreditation Review Report, and any applications or reports submitted by the SBI Lab to any other auditing or accrediting entity;
- b. A copy of the N.C. SBI lab's ASCLD-LAB on-site inspection report covering [relevant years], its most recent ASCLD-LAB on-site inspection report, and any reports of on-site inspection by any other auditing or accrediting entity;
- c. The names of all people involved in reviewing, evaluating, and generating reports, notes, work-product, or other information forming the basis of any accreditation or audit reports regarding the SBI Lab covering [relevant years] by ASCLD-LAB or any other auditing or accrediting entity;

- d. Any past or present employment or relationship between people involved in paragraph (iii.) above and the SBI;
- e. All SBI training materials, policies, procedures, and directives; written or unwritten, formal or informal, covering [relevant years]; regarding how supervisors are to select cases for review by ASCLD-LAB or any other auditing or accrediting entity.

***Additional materials pertaining to the SBI***

63. A list detailing the organization and chain of command within the SBI, past and present;

64. All SBI Lab directives, including the text of all rescinded directives;

65. Information regarding what steps the Office of the Attorney General and SBI are taking in response to the recent revelations, including whether the Swecker review is ongoing and any similar reviews planned or underway. This includes all internal emails, memoranda, or other correspondence between SBI officials, supervisors, agents, experts, and prosecutors regarding what steps will be taken to remedy the SBI Lab problems and deal with the lack of credibility the SBI Lab is facing. This also includes any revisions to protocols, procedures, training, or testing that have occurred as a result of the reporting of the problems with the SBI.

***Request for Depositions***

66. This Court is authorized to order depositions as part of post-conviction discovery. *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000). Defendant requests an Order allowing for the taking of depositions of the following:

***Request for Inspection of SBI Lab***

67. Defendant requests an Order allowing him and his chosen expert(s) to inspect the following sections of the SBI Lab:

***Request for Independent Testing of Evidence***

68. Defendant requests an Order releasing the following evidence for independent testing by an expert of his choice:

***Request for Preservation of Evidence***

69. Defendant requests an Order directing the SBI Lab, [ ] County clerk of court, [ ] police department, and [ ] Sheriff's Office to preserve all physical evidence collected in Defendant's case.

Respectfully submitted, this the \_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be served a copy of the above and foregoing Motion for Discovery upon

**AG**

North Carolina Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602

**District Attorney**

by United States Postal Service, first-class postage prepaid.

This the \_\_\_\_ day of \_\_\_\_\_, 2011.

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