

## WHY MARCUS CARTER SHOULD NOT BE EXECUTED

- There are substantial doubts about his guilt.** When represented by counsel, a jury could not unanimously agree that Marcus Carter was guilty. Only when the State's circumstantial case went unchallenged by counsel was Mr. Carter convicted.
- Marcus Carter did not have meaningful access to the courts at trial.** Indigent, and having not seen his attorneys for the five months between the mistrial and retrial, Mr. Carter, at the suggestion of the trial judge, represented himself at his capital trial. He was untrained in the law and failed to challenge the State's evidence as counsel would have known to do.
- The jury was not fair and impartial concerning punishment.** Mr. Carter's jury was "death-qualified" but not "life-qualified." Jurors always opposed to the death penalty were excused by the trial court. However, jurors who believed that the only appropriate punishment for first degree murder is death were not questioned about whether those beliefs prevented them from considering life imprisonment as an alternative punishment.
- Marcus Carter was not tried by a jury of his peers.** Instead, he was convicted and sentenced to death by an all white jury.
- The prosecution was not convinced this was a death penalty case.** The prosecution offered a plea offer of life imprisonment after making a determination that life imprisonment was an acceptable punishment for Mr. Carter's crime. Mr. Carter discussed the plea offer with attorneys while the jury was deliberating at the first trial and, at that time, rejected the offer. His attorneys never discussed the possibility of a plea agreement with him again.
- Mr. Carter had inadequate representation at the sentencing phase of his capital trial.** Court documents show that his attorneys had not prepared for the penalty phase and that the mental health expert was unprepared to testify and, as a result gave damaging testimony. In addition, available and persuasive mitigating evidence was not presented.
- The State took advantage of the fact that Marcus Carter was unrepresented.** During jury selection, the prosecutor unfairly characterized his decision as a maneuver to gain the jury's sympathy.
- Marcus Carter did not have meaningful access to the courts during the appeal process.** The state trial judge denied Mr. Carter's appeal after purporting to review more than 300 pages of court documents in approximately an hour. The judge never read the trial transcript and refused to hold an evidentiary hearing on Mr. Carter's claims. The federal courts were "troubled" but declined to take action.

## **THE VERDICT IS UNRELIABLE BECAUSE THE POLICE INVESTIGATION WAS SLOPPY**

In the case of *Kyles v. Whitley*, 514 U.S. 419 (1995), the U.S. Supreme Court recognized the significance of the reliability – or sloppiness – of the police investigation of a crime. The Court found that criminal defendants have a constitutional right to evidence concerning “the police methods employed in assembling the case” that might “discredit the caliber of the investigation” in the eyes of the jury. In this case, numerous facts undermine the reliability of the police investigation. These include the following:

- A citizen reported to police dispatcher hearing a woman scream, “Please don’t kill me, I’ll do anything if you don’t kill me.” The citizen was inside an office building and heard the screams over the sound of her Kirby vacuum cleaner. She heard the victim scream eight to ten times and traced the sound to a nearby alley. The police dispatcher identified the call as a possible “public disturbance” rather than a possible “assault.” [705-08, 729-31]
- The police officer sent by the dispatcher failed to shine a light in the alley and failed to search or even to look in the alley where the body of the victim was later found. [709-12]
- The police officer sent by the dispatcher failed to question persons present in the vicinity of the crime scene about the screams. These persons were Caucasian and were gathered outside a bar no more than 200 feet from where the victim’s body was discovered. Police investigators later found two Caucasian hairs on the victim’s body and one in the area immediately around the body. One of the Caucasian hairs was found in combings of the victim’s pubic hair. [810-13, 1223-25, 1230]
- The body of victim was not found until three days after she died. [state court opinion]
- The sanitation worker who discovered the body inadvertently disturbed the crime scene: he touched the body – kicking the victim’s leg – and when he parked his vehicle it obscured a blood stain on the ground. [568-70, 587, 870-71]
- Even after the body was discovered and the police arrived, the crime scene continued to be violated. The dumpster was moved, the victim’s sweater was pulled down from her face, a coat was removed from her left foot. [917, crime scene photographs]
- In this suspected rape case, a pair of red and black panties found under the victim’s body were not sent to the S.B.I. lab or tested in any way. Nor were the victim’s pants sent to the lab for any analysis. [1074-75]

- **DNA analysis of blood found on Carter's sweatshirt did not reveal a match.**  
[1003-1005]
- **Black hairs found on Carter's sweatshirt were not suitable for forensic analysis.**  
[1223-25]

### **THE LACK OF COUNSEL UNDERMINES THE RELIABILITY OF THE VERDICT IN THIS CASE**

Marcus Carter was ill-equipped to defend himself. During his initial trial, when represented by counsel, the jury could not agree that he was guilty. Had a competent lawyer defended him at his retrial, it is highly likely that Marcus Carter would not have been convicted.

At numerous points in the trial, a competent lawyer would have raised objections, challenged evidence, and made arguments that Marcus Carter was not prepared to make. Among the points lost on the jury because Marcus Carter represented himself were the following:

- During jury selection, the prosecutor denigrated Carter's self-representation before the jury, noting that he had decided to represent himself as a ploy or "maneuver" to "gain sympathy" from jurors. The prosecutor was well-aware that Carter's dissatisfaction with his prior attorneys and the trial court's unwillingness to appoint new counsel were the reasons why Marcus Carter chose to represent himself. Competent counsel would have objected to these improper comments on Carter's exercise of his constitutional rights. [197-99]
- The jury selected to hear this case was all-white. The prosecutor in the case peremptorily excused five African-American jurors. Had Marcus Carter been represented by counsel, he likely would have obtained a more diverse jury, as he did in the first trial. [state court opinion]
- The jury selected to hear this case was not life-qualified. Consequently, jurors who could not consider a sentence of life imprisonment and would automatically impose the death penalty upon conviction of first degree murder were not questioned or removed from the jury. A competent lawyer would have questioned jurors so as to protect Marcus Carter's constitutional rights and to ensure enforcement of the Supreme Court's command that a state "not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death."<sup>1</sup>
- During the testimony of the State's second witness, the pathologist who examined the victim's body, one of the jurors interrupted the proceedings by announcing, "I am going to be sick." Counsel could have asked for an opportunity to question this juror about her ability to be fair in light of the disturbing testimony and her strong reaction to it. Were this juror to admit that she could not be fair, counsel could have asked the trial judge to excuse this juror. [610]

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<sup>1</sup> Counsel has reviewed the voir dire proceedings and has discovered no attempt to question jurors about whether they could consider a life sentence or would automatically impose a death sentence for first degree murder.

- The prosecution presented evidence that the rape victim identified Marcus Carter as her attacker and described his clothes. Police officers used her descriptions to arrest Carter and seize his clothing. Significantly, the rape victim did not mention seeing any scratches on Carter's face or injuries to his eye. In addition, the rape victim did not testify that she had seen blood on Carter's sweatshirt or jeans. Competent counsel would have argued that the jury should find reasonable doubt because if Marcus Carter were guilty of the murder and rape, surely the rape victim – who saw Carter an hour after the murder – would have noticed the facial injuries and blood stains. [751, 761, 844]
- The police officer who interviewed the rape victim testified that the rape victim gave him a detailed description of Marcus Carter and also described the clothing he was wearing the night of the offense. Carter asked no questions of this witness. A competent attorney would have asked the officer for his notes of the rape victim's account and would have brought out before the jury any inaccuracies, variances, or omissions in the description. [837, 844]
- The sanitation worker who found the victim and one of the first police officers at the scene both testified that the victim was wearing panties and that the panties were pulled down. In the crime scene photographs, the victim is not wearing panties. Nor does the autopsy report mention any panties. A pair of red and black panties found underneath the body of the victim were seized by the police. However, the panties were not sent to the S.B.I. lab in this suspected rape case. Asked to explain why the red and black panties were not sent to the lab for testing, a police witness stated, "I didn't have any reason." Competent counsel would have highlighted the police failure to maintain the integrity of the crime scene, the discrepancy between testimony and documentary evidence, and would have questioned the decision not to test potentially important evidence. [568, 869, 1074-75]
- The prosecutor emphasized to the jury evidence of nail polish fragments found on Carter's sweatshirt. An S.B.I. analyst testified about the preparation of the sample slides and testified that it was his opinion that the samples matched. This same analyst said of nail polish analysis, "that's not my area of experience." A competent attorney would have objected and stopped this analyst from expressing an opinion on an area beyond his expertise. [1283-84, 1369]
- Another S.B.I. analyst testified more extensively about the fingernail polish evidence. This analyst stated that there was a "high probability" that the samples taken from the victim's fingernails originated from the same source as those found on Carter's sweatshirt. The prosecutor emphasized this testimony to the jury. However, this testimony differed markedly from that given in the first trial. At the first trial, the analyst testified that that the red particles "could have originated from the same source" as the samples taken from Carter's sweatshirt. (The analyst's report stated the same thing.) When asked by the prosecutor at the first trial whether he could be any more specific, the analyst stated that he could

not. A competent attorney would have shown the jury that the analyst had grossly distorted the results of his analysis and would have impeached the analyst's testimony with his prior testimony and report. Marcus Carter was not equipped to do this. [544, <sup>2</sup>1144, 1364, 1369-70]

- The prosecutor emphasized to the jury that the victims of the murder and rape both had the left leg of their pants removed. The prosecutor noted that Marcus Carter was right handed and likely used right hand to do his "dirty work." According to the prosecutor, it would be easier to pull down the left pant leg because if the perpetrator was facing the victim, the left pants leg would be on the right side. The prosecutor then argued that the fact that the left pants leg was down in both crimes was "telltale" evidence that had "signature value" as evidence of guilt. Competent counsel would have brought out the fact that a number of witnesses testified that both of the murder victim's pants legs were pulled down around the ankles. Two witnesses testified that the right pants leg was hanging off the victim's right ankle. Competent counsel would have also brought out the fact that the victim's body was disturbed – in fact, a sanitation worker kicked the victim's leg, thus violating the integrity of the crime scene and undermining confidence in the evidence concerning the state of the victim's clothing. In addition, competent counsel would have brought out the fact that the murder victim's shirt was pushed up but the rape victim's shirt was not. [568-70, 598, 750, 781, 917-18, 1360]
- The pathologist testified that she found no foreign material or tissue under the murder victim's fingernails. Further, the pathologist testified that she specifically examined the fingernails for the presence of foreign tissue or hairs and found none. However, an S.B.I. fiber analyst testified that when he examined the fingernails he found "fibers suitable for comparison" which he then viewed microscopically and found consistent with fibers from Carter's sweatshirt. An S.B.I. serologist testified that she found blood on the fingernail clippings, although she could not tell if the blood was animal or human. The prosecutor devoted considerable time in his closing argument to the inculpatory "fibers from that sweatshirt in her nails," and blood on the clippings. Competent counsel would have made sure the jury understood the discrepancy between the testimony of the first member of the prosecution team to examine the victim's fingernails and subsequent analyses of those same fingernails. Competent counsel would have pointed out the general shoddiness of the police investigation and would have questioned the reliability of the testing done on the fingernails. Competent counsel would have urged the jury to find reasonable doubt based on the inconsistency between the testimony of the pathologist and other witnesses for the prosecution. Acting as his own lawyer, Marcus Carter did none of these things. [623-24, 1258-60, 1289-90, 1295, 1364, 1369-71]

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<sup>2</sup> This page citation refers to the transcript of the trial resulting in a mistrial.

- Three police officers testified that at the time of his arrest, some three days after the victim was killed, Marcus Carter had a scratch on his face and a discolored eye. The prosecutor argued that the marks on Carter's face were evidence of a violent struggle between Carter and the murder victim. A competent attorney would have brought out the fact that although the rape victim gave a detailed description of Mr. Carter she did not mention these wounds, despite the fact that she was alleged to have seen the victim within an hour of the murder. Competent counsel would also have emphasized to the jury that the rape victim did not fight Carter and, consequently, was not the one who scratched and bruised Carter. [750, 781, 850, 927-28, 966-67, 1364-65]
- Nail marks were found on the victim's neck and police obtained a warrant for fingernail scrapings from Marcus Carter. Competent counsel would have pointed out to the jury that the police failed to conduct any testing on the scrapings. [607, 850-52]
- Police investigators obtained pubic and head hair samples from Marcus Carter. The testing performed by the State failed to turn up any of Carter's hairs on the body of the victim, or any of the victim's hairs on the clothing Carter was alleged to have worn on the night of the killing. At the retrial, the prosecution presented testimony from an S.B.I. hair analyst. The expert testified that pubic hairs are transferred from one individual to another through bodily contact, and the prosecutor argued that there was a violent struggle between the perpetrator and the victim. Competent counsel would have made sure to point out this significant hole in the State's case. Carter did not. [850-52, 971, 1224-25, 1231-32, 1364]

<b>WHAT HAPPENED AT TRIAL WHERE MARCUS CARTER REPRESENTED HIMSELF</b>	<b>WHAT COULD HAVE HAPPENED AT TRIAL WITH EFFECTIVE REPRESENTATION</b>
All white jury	Jury represents cross-section of the community
Jurors who could not consider a sentence of life imprisonment for first degree murder but would automatically impose the death penalty were not questioned or removed from the jury	Jurors who could not fairly consider both punishments X life imprisonment or the death penalty X would be questioned pursuant to <i>Morgan v. Illinois</i> , and excused from jury service
Jury included juror who had strong emotional reaction to autopsy testimony and might not have been able to be fair	Jury comprised of 12 fair and impartial jurors
No mention of fact that rape victim did not see scratches on Carter's face, an eye injury, or blood on his clothes	Jury aware of fact that rape victim did not see scratches on Carter's face, an eye injury, or blood on his clothes
S.B.I. agent with no experience in fingernail polish analysis gives opinion that polish samples from victim match fibers found on Carter's sweatshirt	Jury does not hear prejudicial testimony from unqualified expert
S.B.I. agent tells jury there is "high probability" that fibers from Carter's sweatshirt and victim's fingernails originated from same source	Jury learns that agent's report and prior testimony were that the particles "could have" come from the same source and that he substantially changed his testimony from the first and second trial, again <u>undermining reliability of prosecution's case</u>
Jury learns from prosecution that rape and murder were committed in remarkably similar, "telltale" and "signature" manner	Jury learns from defense that of important physical differences in the manner of these two attacks
Jury hears unchallenged prosecution argument concerning inculpatory fibers and blood found on the victim's fingernail scrapings	Jury learns from defense of significant inconsistencies in the testimony of prosecution witnesses concerning evidence found in the fingernail scrapings
Jury hears testimony concerning nail marks on the victim's neck and the fact that police investigators obtained a warrant to secure fingernail scrapings from Marcus Carter	Defense asks jury to consider why the fingernail scrapings were never tested and compared to tissue from the victim's body
S.B.I. hair analyst presents testimony to jury and acknowledges that three Caucasian hairs were found on the victim's; prosecutor argues that Caucasian hairs probably blew onto the body	<p>Defense points out that none of Carter's head hairs or pubic hairs were found on victim's body and none of the victim's head hairs or pubic hairs were found on Carter's clothing</p> <p>Defense argument connects the failure of police to question white individuals seen near the alley at the time of the crime and undermines reliability of investigation</p> <p>Defense challenges prosecution's assumption that fiber evidence remained fixed at the scene while evidence contrary to the state's theory "blew in" and thereby highlights wispy nature of the prosecution's circumstantial case</p>
Jury was presented with numerous photographs and pieces of documentary evidence from a variety of police witnesses	Jury would have considered fact that police witnesses testified to facts not supported crime scene photographs and documentary evidence and would have had substantial reason to question the integrity and reliability of the police investigation

### **THE WEAKNESSES IN THE STATE'S CASE**

According to the Supreme Court of North Carolina, the following evidence supported Marcus Carter's first degree murder conviction:

- The victim, Amelia Lewis, was last heard from at 11 p.m. on December 15, 1989
- When the victim's body was discovered by police at about 8:00 a.m. on December 18, 1989, her left pant leg was off completely. This reminded police investigators of the description of a rape reported by Kesha Davis on December 15, 1989, which occurred just four blocks away. Carter was identified by Davis as the rapist.
- At Carter's house, police found a green sweatshirt, a pair of jeans and a pair of black Carolina Turkey boots which matched the description Davis gave of her rapist's clothing.
- Carter was arrested for the rape of Kesha Davis on December 18, 1989. At the time of his arrest, investigators observed scratches on his face and a discoloration of his left eye.
- Fingernail scrapings from the victim were compared with samples from Carter's sweatshirt. Some of the particles, specifically nail polish, originated from the same source.
- Carter's green sweatshirt and blue jeans contained human blood splatter. These blood splatters matched the victim's blood and were inconsistent with Carter's blood.
- Fibers from the wheel of the dumpster next to where the victim was found were consistent with known samples of fibers from Carter's green sweatshirt.
- Fingernail clippings from the victim's hand contained fibers consistent with known samples from Carter's sweatshirt.

Close analysis of the evidence in this case demonstrates substantial weaknesses in the State's evidence that undermine any confidence we might have in Marcus Carter's guilt. The accompanying table illustrates this fact.

<b>Evidence Introduced at Trial</b>	<b>Flaws in the Evidence</b>
No confession or eyewitness testimony	Police failed to interview white individuals observed near alley at time of crime. Subsequent investigation revealed the presence of three, unidentified Caucasian hairs on or near the body of the victim; one of these hairs was found in combings of the victim's pubic hairs
Carter pled guilty to rape committed in a manner similar to attack on murder victim, namely, the left pant leg was removed from both victims	<p>Jury cannot trust this evidence because body was disturbed, first kicked by city worker who found body, then article of clothing covering right foot was removed; in addition, witnesses who found body said victim had panties on but panties do not appear in photographs of body and were not sent to pathologist</p> <p>At best, there is a photograph showing both pants legs were nearly removed from victim's body</p> <p>Murder victim's shirt was pushed up; no evidence that Carter pushed up shirt of rape victim</p>
Rape victim described Carter's clothing, which police then seized	Rape victim did not notice blood on sweatshirt and jeans belonging to Carter
When Carter was arrested, three days after the victim was killed, he had scratches on his face and discoloration in his left eye; prosecution argued he got these injuries while struggling with murder victim	Rape victim did not notice scratches on Carter's face or eye injury prosecution argued he allegedly sustained in the struggle with the murder victim only an hour before
Samples of fingernail scrapings from the victim were compared to samples taken from Carter's sweatshirt and an S.B.I. agent said the nail polish fragments found in both samples originated from the same source	<p>Pathologist testified that fingernails were clean when she examined them: no indication of foreign material or tissue</p> <p>S.B.I. agent who testified had no experience in examining nail polish fragments</p> <p>Other S.B.I. agent who testified embellished his testimony between first and second trial and testimony is contradicted by agent's report</p>
Blood found on Carter's sweatshirt and jeans matched the victim's blood and was inconsistent with Carter's blood	<p>ABO blood typing is obsolete and unreliable as forensic tool</p> <p>DNA testing did not show a match but was inconclusive</p>
Fibers from the wheel of the dumpster were consistent with fibers from Carter's sweatshirt	<p>Evidence is untrustworthy because integrity of crime scene was violated</p> <p>Fiber analysis is "junk science"</p>
Fibers from victim's fingernail scrapings were consistent with fibers from Carter's sweatshirt	<p>Pathologist testified that fingernails were clean when she examined them: no indication of foreign material or tissue</p> <p>Fiber analysis is "junk science"</p>