

¶ 2 Of the twelve total claims raised in Allen’s MAR and SMAR, five of them directly relate to his allegation that his trial attorneys rendered unconstitutionally ineffective assistance of counsel (IAC) during the guilt-innocence phase of his trial by failing to investigate, develop, and utilize various sources of exculpatory evidence. The evidence Allen presented in support of these claims includes affidavits from acquaintances of Allen and the State’s primary witness, Vanessa Smith, implicating Smith in Gailey’s murder, as well as a report from a crime scene expert concluding that in light of the physical evidence discovered at the scene of Gailey’s death, Smith’s account of Gailey’s killing was “unfathomable.” Notwithstanding this evidence and the centrality of Smith’s testimony to Allen’s conviction, the MAR court dismissed Allen’s guilt-innocence phase IAC claims without conducting an evidentiary hearing to resolve disputed issues of fact.

¶ 3 Based on well-established precedent, we conclude that Allen is entitled to an evidentiary hearing on his guilt-innocence phase IAC claims. Allen has “present[ed] assertions of fact which will entitle [him] to . . . relief . . . if resolved in his favor.” governing post-conviction review of criminal convictions in North Carolina, the MAR court was obligated to conduct an evidentiary hearing prior to ruling on his MAR and SMAR claims, because “some of his asserted grounds for relief required the [MAR] court to resolve questions of fact.” *Id.* (interpreting N.C.G.S. § 15A-1420(c)(1)). Accordingly, we vacate the portions of the MAR court’s order summarily dismissing Allen’s guilt-innocence phase IAC claims and remand to the MAR court to conduct a full evidentiary hearing.

¶ 4 In addition, we hold that the trial court erred in summarily ruling that Allen’s claim alleging he was impermissibly shackled in view of the jury was procedurally barred. On this claim, we vacate the relevant portion of the MAR court’s order and remand for an evidentiary hearing to obtain the facts necessary to determine whether his claim is procedurally barred and, if not, whether it has merit. We affirm the MAR court’s disposition of all other claims raised in Allen’s MAR and SMAR.

## **Background**

¶ 6 Sometime during the afternoon of 9 July 1999, Allen, Smith, and Gailey entered the Uwharrie National Forest. At some point that evening, somebody shot and killed Gailey. His body was later found by a passerby driving an all-terrain vehicle. Smith eventually told law enforcement Allen killed Gailey to steal his money and drugs. Both Allen and Smith were charged with murder.

¶ 7 Approximately two weeks before Allen was brought to trial, Smith—who by that time had spent approximately twenty-three months in jail—entered into an agreement with the State. In exchange for her testimony against Allen, the State would drop the murder charges against her, and she would plead guilty to a lesser offense. At trial, Smith testified that Allen was the sole person responsible for Gailey’s death and that Allen acted in cold blood. According to Smith, Allen assassinated Gailey by shooting him from behind, unprovoked, as they walked along a path in the woods.

¶ 8 Because Allen did not testify, Smith provided the sole narrative of the events directly precipitating Gailey's death. As we explained in our decision resolving Allen's direct appeal, Smith was "a witness with less-than-perfect credibility." *Allen*, 360 N.C. at 306. She was a chronic heavy drug user who admitted to smoking marijuana shortly before Gailey's death. She was involved in a tumultuous romantic relationship with Allen which he had recently broken off. She accused Allen of Gailey's murder only after confronting him in Denver, Colorado, where Allen had reunited with a different ex-girlfriend. She testified at the trial pursuant to a deal with the State which significantly reduced her potential criminal liability.

¶ 14 Law enforcement officers who examined the crime scene discovered the following evidence:

- A .45-caliber semi-automatic handgun between Gailey's feet, loaded with a
- magazine containing five live rounds, and one spent .45-caliber shell casing
- jammed in the receiver;
- A number of live rounds of .45-caliber ammunition next to Gailey;
- A magazine containing live rounds several feet from Gailey's head;
- A black t-shirt draped over a rock with another smaller rock on top of it,
- approximately four feet from Gailey's body;
- A nylon handgun holster;
- Five expended shotgun shells;
- A hunting knife located on top of a duffel bag;
- A yellow container with \$1,944.00 in cash on Gailey's body.

According to the State's forensic pathologist, Gailey died from two gunshot wounds, one to the back of his right shoulder from close range and another to his right knee from a further distance. In the pathologist's opinion, Gailey probably lost consciousness "within a matter of minutes" of sustaining his injuries, and it was "extremely unlikely" Gailey survived for more than an hour or two after he was shot.

¶ 15 The State's case rested primarily on the testimony of Smith and Page. No fingerprint, DNA, or forensic evidence connecting Allen to the crime scene was ever produced, nor was the alleged murder weapon—Allen's sawed off-shogun—ever located. The jury was instructed on the offense of first-degree murder and the lesser included offenses of second-degree murder and voluntary manslaughter. During closing argument, the State emphasized Smith's testimony that Allen had thrown rocks at Gailey's body while they waited for hours for Gailey to die in seeking to persuade the jury to convict on a theory of malice, premeditation, and deliberation. Eschewing Smith's initial theory that Allen murdered Gailey for his money, the State argued in closing that Allen killed Gailey "to keep him from ratting [Allen] out . . . [and] to keep [Allen] from being arrested for his year-long rampage." The jury found Allen guilty of first-degree murder.

¶ 18 On 19 September 2013, Allen filed his SMAR. In his SMAR, Allen supplemented and amended various claims he initially raised in his MAR based upon new affidavits and statements elicited during additional post-conviction investigation. Allen again submitted affidavits from acquaintances of Smith's who

cast doubt on her version of events—including an affidavit from Smith’s former boyfriend stating that Smith told him she had been the one who developed and carried out the plan to jump Gailey and take his cocaine and cash. Of particular note, Allen submitted an affidavit and report prepared by Gregory McCrary (the McCrary Report), a former agent with the Federal Bureau of Investigation, who examined the evidence law enforcement found at the crime scene and determined it was inconsistent with Smith’s account of an unprovoked execution. Instead, McCrary concluded the evidence reflected a physical confrontation which had devolved into a shootout

## **Analysis**

¶ 26 Allen’s argument that his attorneys rendered IAC during the guilt-innocence phase of his trial encompasses multiple interrelated claims. Because these claims substantially overlap both factually and legally—and because the MAR court disposed of these claims in a single summary dismissal order—we consider them together. Specifically, in this section, we consider in their entirety Claim II (trial counsel’s failure to investigate and call certain witnesses), Claim VI (trial counsel’s failure to object to improper statements during closing arguments), Claim X (cumulative prejudice arising out of trial counsel’s multiple instances of deficient performance), and Claim XI (trial counsel’s failure to investigate evidence of a third party’s guilt). We also consider the subparts of Claim III (trial counsel’s failure to effectively cross-examine the State’s witnesses) which the MAR court resolved without conducting an evidentiary hearing. Although addressed in the same order, we separately address the claims which do not predominantly concern Allen’s IAC allegations, namely Claim I (the State knowingly presented false and misleading evidence), Claim IV (the State failed to disclose exculpatory evidence before trial), Claim V (the trial court lacked jurisdiction because Allen’s indictment was fatally deficient), and Claim XII (Allen was impermissibly shackled in view of the jury).

¶ 28 We begin by examining Allen’s assertion that his trial counsel unreasonably failed to investigate the crime scene evidence, which is contained within Claim III as supplemented and amended in his SMAR. This portion of Claim III is substantially based upon the evidence contained in the McCrary Report. McCrary was retained by Allen’s post-conviction counsel to independently assess the evidence discovered by law enforcement at the scene of Gailey’s death. Based upon his analysis of the crime scene evidence, McCrary concluded that portions of Smith’s testimony were incompatible with the physical evidence and, in his judgment, “unfathomable.” According to McCrary, the crime scene evidence “refute[s] Ms. Smith’s assertion that Mr. Gailey was assassinated in cold blood, never having got his gun out.” Instead, in McCrary’s opinion, “the totality of the evidence at the [crime] scene is more consistent with a dispute that deteriorated into a gunfight and significantly contradicts and discredits Ms. Smith’s story.”

¶ 29 Allen alleges his trial counsel were deficient for failing to obtain information regarding the inconsistencies between Smith’s testimony and the crime scene evidence prior to trial. In Allen’s view, counsel’s failure to adequately investigate the crime scene prejudiced his case in at least two ways. First, it deprived him of the

opportunity to choose to present testimony based upon the crime scene evidence which would have directly rebutted Smith's account of Gailey's death. Second, it deprived his counsel of the capacity to effectively cross-examine Smith on the discrepancies between her account and the physical evidence. The MAR court did not conduct an evidentiary hearing on this claim, and Allen seeks only a remand for an evidentiary hearing. Therefore, the question at this stage is not whether Allen has proven that he received IAC. Instead, the question is whether he has stated facts which, if proven true, would entitle him to relief. We conclude that he has.

¶ 30 An attorney can render IAC by failing to conduct an adequate investigation of the physical evidence of a crime. *See, e.g., Elmore v. Ozmint*, 661 F.3d 783, 864 (4th Cir. 2011) ("Because [the defendant] lawyers' investigation into the State's forensic evidence never started, there could be no reasonable strategic decision either to stop the investigation or to forgo use of the evidence that the investigation would have uncovered."). Here, Allen has presented evidence which could support factual findings which could, in turn, establish a successful IAC claim. He has presented evidence supporting his contentions that (1) counsel were aware of the importance of the crime scene evidence before trial but unreasonably failed to follow up on these "red flags," *Rompilla v. Beard*, 545 U.S. 374, 392 (2005); (2) counsel did not perform an independent investigation of the crime scene evidence; (3) counsel's conduct was unreasonable when judged against prevailing professional norms in capital cases, including those outlined in the American Bar Association's guidelines; and (4) counsel's unreasonable failure to investigate was prejudicial. Given the centrality of Smith's testimony to the State's case, if each of these factual contentions were proven to be true, Allen would be entitled to a new trial. *See, e.g., Elmore*, 661 F.3d at 870 ("Though perhaps the jury would have yet believed the [State's witnesses], there is a reasonable probability that the jury would have doubted the [witnesses'] account" had defense counsel presented contradictory forensic evidence); *Rompilla*, 545 U.S. at 376 ("The undiscovered . . . evidence, taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability, and the likelihood of a different result had the evidence gone in is sufficient to undermine confidence in the outcome actually reached . . . ." (cleaned up) (first quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); then quoting *Strickland*, 466 U.S. at 694)). Thus, the MAR court erred in summarily dismissing Allen's guilt-innocence IAC claims.

¶ 31 The MAR court's reasoning in support of its decision to summarily dismiss these claims is critically flawed. According to the MAR court, Allen's counsel's failure to consult with or present testimony from a crime scene expert resulted from a "sound tactical decision." This "sound tactical decision" purportedly reflected the reasonable trial strategy of "focus[ing] on the doubt created by Smith's gaps in memory, addiction and use of controlled substances on the date of Gailey's death, and failure to maintain a cohesive timeline, rather than attempting to prove Defendant's innocence through the use of a crime scene analyst."

¶ 32 It is correct that in considering an IAC claim, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. However, this presumption is rebuttable. Once a defendant presents evidence rebutting the presumption of

reasonableness, the court is not at liberty to invent for counsel a strategic justification which counsel does not offer and which the record does not disclose. *See Wiggins*, 539 U.S. at 526–27 (rejecting “strategic” reasons that “the state courts and respondents all invoke to justify counsel’s limited pursuit of mitigating evidence [as] resembl[ing] more [of] a *post hoc* rationalization of counsel’s conduct than an accurate description of their deliberations prior to sentencing”).

¶ 33 In this case, Allen has presented direct evidence indicating his trial counsel’s decision not to adequately investigate the crime scene—and their resulting decision not to present evidence derived from an adequate investigation or use such evidence to impeach Smith’s testimony—was not a reasonable strategic choice. His SMAR included an affidavit from one of his two trial attorneys explicitly stating that he “do[es] not recall [either himself or Allen’s other attorney] making any strategic decisions to limit the cross-examination of the State’s witnesses, including Vanessa Smith.” This directly undercuts the MAR court’s presently unsupported theory that counsel’s failure to investigate resulted from a “tactical decision” to focus on Smith’s lack of credibility due to her drug use.<sup>6</sup> If it is true that trial counsel’s “failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment,” then counsel’s performance was deficient. *Wiggins*, 539 U.S. at 526.

¶ 34 Even if trial counsel chose to pursue a “strategy” of focusing on Smith’s lack of credibility, counsel’s failure to adequately investigate the crime scene could still be unreasonable. *Strickland*, 466 U.S. at 690–91 (“[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”). With the benefit of insights gleaned from the crime scene, counsel could have directly contradicted Smith’s account of Gailey’s death with tangible, extrinsic evidence, a tactic which would only serve a strategy centered around attacking Smith’s credibility. To answer the question of whether Allen’s counsel made a reasonable strategic judgment in foregoing a thorough investigation of the crime scene, the MAR court needed to resolve factual issues, a task our statutes do not permit it to undertake in these circumstances without first conducting an evidentiary hearing.

¶ 37 Regardless, the State’s argument that Allen cannot prove prejudice rests on two erroneous premises. First, the State contends the McCrary Report cannot support Allen’s IAC claim because it failed to account for the State’s evidence indicating Allen shot Gailey “in the back at close range with a shotgun.” This assertion is belied by the text of the McCrary Report, which explicitly acknowledges the State’s medical examiner’s conclusion that Gailey was shot from “quite close, within a matter of a foot or so” and also from “several yards away.” McCrary’s conclusion that “the totality of the evidence at the [crime] scene is more consistent with a dispute that deteriorated into a gunfight” reflects his interpretation of *all* of the crime scene evidence, including the evidence the State relied upon in support of Allen’s conviction.

¶ 38 Second, the State argues that because there was evidence indicating Allen shot Gailey “in the back at close range with a shotgun,” no rational juror could possibly conclude that Allen committed anything other than first-degree murder. As the State bluntly puts it, “[s]hooting someone in the back at close range with a shotgun is not

a gunfight, it is premeditated and deliberated murder.” This argument incorrectly suggests that Allen’s intent has been established as a matter of law by the manner of Gailey’s death. The State disregards more than a century of precedent explaining that “[w]hether an act is the result of premeditation and deliberation is a fact to be found by the jury, and not a conclusion of law to be drawn by the court.” *State v. Daniels*, 134 N.C. 671, 674 (1904).

¶ 39 While the jury could have inferred that Allen acted with premeditation and deliberation based upon “the distance from which the shot was fired and . . . the weapon and ammunition used,” *State v. Reece*, 54 N.C. App. 400, 406 (1981), these facts would not have precluded Allen from persuading the jury to draw a different inference, see *State v. Walker*, 332 N.C. 520, 533 (1992) (concluding that the “nature of the killing, a contact shot to the temple, *indicates* a premeditated and deliberate act of homicide . . . [which] *support[s] a reasonable inference*” of intent (emphases added)). The nature of Gailey’s wounds is not necessarily inconsistent with the alternative theory propounded by McCrary of a drug-fueled confrontation that turned fatal, a theory Allen alleges is supported by physical evidence from the crime scene, such as the evidence demonstrating Gailey fired his weapon and the unexplained presence of a hunting knife.

¶ 40 As described above, in addition to his argument based upon counsel’s purported failure to adequately investigate the crime scene evidence, Allen raises other related IAC claims challenging other aspects of his trial counsel’s performance during the guilt-innocence phase of his trial. Having already determined that the MAR court erred in summarily denying one of Allen’s IAC claims, we need not address his other claims here without the benefit of a more fully developed factual record. Applying the two-prong *Strickland* test, we conclude that Allen has presented evidence supporting his contention that his attorneys provided IAC during the guilt-innocence phase of his trial, creating factual disputes which, if resolved in his favor, would entitle him to relief. At a minimum, he is entitled to further develop these claims during an evidentiary hearing. *Todd*, 369 N.C. at 712 (remanding for an evidentiary hearing because “the record before th[e] Court [was] not thoroughly developed regarding defendant’s appellate counsel’s reasonableness, or lack thereof, in choosing not” to pursue an argument).

## **Conclusion**

¶ 75 We hold that the MAR court erred in summarily dismissing Allen’s guilt-innocence phase IAC claims without an evidentiary hearing. Because Allen has presented evidence which, if proven true would entitle him to relief, Allen is entitled to an evidentiary hearing in accordance with the mandate of N.C.G.S. § 15A-1420(c)(1) and *McHone*, 348 N.C. at 258. We also hold that the MAR court erred in dismissing Allen’s shackling claim as procedurally barred without conducting an evidentiary hearing to establish facts without which the claim could not fairly be resolved. Therefore, we vacate the portions of the MAR court’s orders summarily dismissing Claims II, VI, X, XI, XII and the portions of Claim III not addressed during the limited evidentiary hearing, and we remand to the MAR court to conduct an evidentiary hearing.