



**BENJAMIN R. DAVID**  
**DISTRICT ATTORNEY**

*State of North Carolina*  
**General Court of Justice**  
**Sixth Prosecutorial District**  
Wilmington, NC 28402

**POST OFFICE BOX 352**  
**PHONE: (910) 772-6610**  
**FAX: (910) 772-6611**

July 31, 2020

To: Members of the Media

From: District Attorney Ben David

Re: New Trial Ordered for Keith Wiley

The District Attorney's Office has been notified that Judge Kent Harrell has granted a motion for appropriate relief filed on behalf of Keith Wiley. Wiley was convicted by a New Hanover County Jury on May 25, 1999 for the first degree murder, first degree kidnapping, and robbery with a dangerous weapon of Ritchie Futrelle. This jury sentenced Wiley to death two days later. This motion for appropriate relief was handled by the Attorney General's Office on behalf of the State. A copy of the order is attached.

Judge Harrell's order vacates the jury's conviction and sentence, granting Wiley a new trial. He will be returned from Central Prison to the New Hanover County Jail as he awaits this new trial. This converts the case to pending status, limiting the comments that my office can make about this case. We are actively reviewing the file and will determine how to proceed with the prosecution in the coming months. Wiley is scheduled to appear in New Hanover County Superior Court on Tuesday, August 4 in courtroom 401 at 9:30 a.m.

STATE OF NORTH CAROLINA  
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE #: 97-CRS-26510

FILED  
2020 JUL 28 P 4:30  
NEW HANOVER CO., N.C.  
BY SR

STATE OF NORTH CAROLINA

v.

KEITH WILEY,  
Defendant.

ORDER ON MOTION FOR  
APPROPRIATE RELIEF

This matter came before the undersigned Superior Court Judge in and for the County of New Hanover, having been assigned by the Senior Resident Superior Court Judge to act on Defendant's Motion for Appropriate Relief filed herein. The Court set this matter for hearing on the 16<sup>th</sup> of July, 2020. At the request of the State and the Defendant the hearing was limited to consideration of Claim XIII of Defendant's Amended Motion for Appropriate Relief and the State's Motion to Dismiss the Defendant's Motion for Appropriate Relief in its entirety. In that this hearing involved only issues of law, the Defendant was not present for the hearing. Consistent with existing orders of the Chief Justice of North Carolina in response to the COVID-19 pandemic, the hearing was conducted by video conference. The State was represented by Jonathan Babb, Deputy Attorney General for the State of North Carolina. The Defendant was represented by Don Beskind and Shelagh Kenney both of the Durham County Bar. The Court having reviewed the motions of the parties and having heard the arguments of counsel makes and finds the following facts to be undisputed from the record and by stipulation of the parties in their pleadings:

1. On November 3, 1997, defendant Keith Dedrick Wiley was indicted for murder, kidnapping, and robbery with a dangerous weapon. Defendant was tried capitally before a jury at the May 10, 1999 criminal session of New Hanover County Superior Court, Judge Russell J. Lanier presiding.
2. On May 25, 1999, the jury found Defendant guilty of first-degree murder, first-degree kidnapping and robbery with a dangerous weapon.
3. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first degree murder conviction and the trial court entered judgment accordingly. The trial court also sentenced the Defendant to consecutive sentences of 116 to 149 months for the first-degree kidnapping and 103 to 133 months for robbery with a dangerous weapon.
4. On June 28, 2002 the North Carolina Supreme Court affirmed the convictions and sentence of death. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22 (2002). Defendant filed a Petition for



Writ of Certiorari with the United States Supreme Court, which was denied on January 13, 2003.

5. On September 3, 2002, the Office of Indigent Defense Services appointed counsel for the Defendant for state post-conviction proceedings. Defendant's Motion for Appropriate Relief was timely filed September 10, 2003. An amended Motion for Appropriate Relief was filed July 2, 2009.
6. The State filed answers to both the Motion for Appropriate Relief and the Amended Motion for Appropriate Relief.
7. On January 8, 2014 the Defendant filed a motion captioned "Motion for Summary Judgment" requesting the Court conduct a hearing and grant the defendant relief based on Claim XIII of the Amended Motion for Appropriate Relief.
8. Claim XIII of the Amended Motion for Appropriate Relief sets forth the following basis for relief:

MR. WILEY WAS DENIED EFFECTIVE ASSISTANCE BY COUNSEL'S FAILURE TO ARGUE ON DIRECT APPEAL THAT THE TRIAL COURT ERRED IN DENYING MR. WILEY'S REQUEST TO REMOVE JUROR FREDERICK PHELPS WITH A REMAINING PEREMPTORY CHALLENGE AFTER THE TRIAL COURT REOPENED *VOIR DIRE*.

9. A review of the trial transcript reveals the following:
  - a. At the trial of this matter during voir dire, the jury was asked by the court if any prospective juror had any contact with Mr. Wiley or his family, or the victim or his family. No one in the group of prospective jurors that included Frederick Phelps indicated any contact with the victim or the victim's family. Tp. 401.
  - b. The state then introduced Willa White, mother of the victim, and other members of the victim's family who were seated in the courtroom and inquired whether any prospective jurors knew any members of the victim's family. None indicated they knew the victim's family. Tp. 427.
  - c. Frederick Phelps was then questioned by the State and passed. Tp. 434, 476. Phelps was also questioned by the defense and passed. Tp. 577. The jury was subsequently impaneled. Tp. 1055.
  - d. At the end of jury selection, counsel for the defendant had one peremptory challenge remaining.



- e. On the first day of trial evidence was presented from a number of witnesses including Willa White, mother of the victim.
  - f. At the start of the second day of trial, Frederick Phelps called to the court's attention that he knew the victim. All other jurors were excused from the courtroom and the court questioned Juror Phelps. Tp. 1134.
  - g. Juror Phelps indicated to the court that his mother and sister knew the victim's mother some 12 to 14 years ago through their family business in Carolina Beach. He denied any contact with the victim or victim's family since that time and denied that the prior relationship with the victim's family would affect his ability to hear the evidence and make a judgment based on the evidence presented at trial. Tp. 1134.
  - h. The court then afforded counsel for the defendant an opportunity to question Juror Phelps. Counsel for the defendant asked Juror Phelps several questions about the prior relationship between the families and when he first realized he knew the victim's family. Tpp 1135-1136.
  - i. The State also questioned Juror Phelps. Tpp. 1136-1137.
  - j. Counsel for the defendant then moved to have Juror Phelps excused for cause and, in the alternative, requested to use the remaining peremptory strike to remove Juror Phelps. Tpp. 1168. The court denied the challenge for cause and denied defense counsel's request to use a peremptory strike to remove Juror Phelps. *Id.*
10. Upon defendant's conviction, Margaret Ciardella was appointed as appellate counsel for the defendant. In the course of that appeal counsel assigned as error the trial court's denial of the defendant's attempted use of his remaining peremptory challenge but failed to brief the issue or argue it to the court. Ciardella Aff. ¶ 9-10.
  11. The failure of counsel to brief and argue that particular issue to the North Carolina Supreme Court was not a strategic decision made after a thorough investigation of law and facts relevant to plausible options. Counsel admits in her affidavit that she failed to adequately research the issue and did not investigate the merits of the claim as she should have done.

Based on those undisputed facts, the Court makes and enters the following:

#### CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to N.C. Gen. Stat. § 15A-1420.
2. It is within the discretion of a trial judge to reopen the examination of a juror, previously passed by both the State and the defendant, and to excuse such juror upon challenge, either



peremptory or for cause. N.C. Gen. Stat. § 15A-1214; State v. Kirkman, 313 N.C. 572, 238 S.E.2d 456 (1977).

3. The discretion of the trial court to reopen voir dire does not terminate at impanelment of the jury. Id.;
4. If a judge at any point after a juror has been passed, allows the attorneys to question a juror directly, *voir dire* has necessarily been reopened. Once the examination of a juror by counsel has been reopened the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror. State v. Boggess, 358 N.C. 676, 600 S.E.2d 453 (2004).
5. This was the law at the time of the defendant's trial in 1999 as set forth in State v. Holden, 346 N.C. 404, 488 S.E.2d 514 (1997) (the trial court may reopen the examination of a juror after the jury is impaneled and once examination is reopened, each party has an absolute right to exercise any remaining peremptory challenges).
6. The absolute right of counsel to exercise remaining peremptory challenges after the trial court reopens *voir dire* was recently affirmed in State v. Thomas, 230 N.C. App. 127, 748 S.E.2d 620 (2013), and appears to be such a well settled issue in the eyes of our appellate courts that the most recent decision addressing this issue was unpublished. See State v. Gill, 2018 N.C. App. LEXIS 1062, 2018 WL 5796336 (2018).
7. At the point the court allowed counsel for the defense and the state to question Juror Phelps, the court reopened *voir dire* even though the jury had already been impaneled.
8. Once *voir dire* was reopened, counsel for the defendant had an absolute right to exercise any remaining peremptory challenges.
9. The court's refusal to allow counsel for the defendant to exercise a remaining peremptory challenge constituted error.
10. In the appellate context, a claim of ineffective assistance of counsel requires a showing that the appellate representation did not fall within the range of competence demanded of attorneys in appellate cases and that prejudice resulted to the defendant. State v. Baskins, 260 N.C. App. 589, 600, 818 S.E.2d 381, 391 (2018) (citing Strickland v. Washington, 466 U.S. at 687, 80 L. Ed. 2d at 693).
11. Generally, the decision not to press a claim on appeal is not an error of such magnitude that it renders counsel's performance constitutionally deficient under the test of *Strickland* and there is a presumption that the challenged action might be considered sound trial strategy. Id.

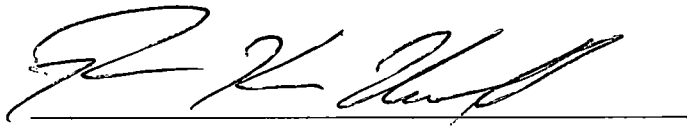




12. Appellate counsel's failure to brief and argue the trial court's denial of the defense counsel request to exercise a remaining peremptory challenge after *voir dire* was reopened was not a strategic decision and was not done in the exercise of reasonable professional judgment.
13. The defendant has established a reasonable probability he would have prevailed on his appeal but for his counsel's unreasonable failure to raise the issue. For purposes of establishing prejudice, a "reasonable probability" simply means "a probability sufficient to undermine confidence in the outcome of the appeal". *Id.* (citing *Spruill*, 252 N.C. App. at 491, 798 S.E.2d at 805.
14. The defendant having established ineffective assistance of appellate counsel, this court therefore considered the underlying issue on its merits.
15. This court is aware of no appellate case since *State v. Holden* wherein a defendant was denied the right to the exercise of a remaining peremptory challenge after *voir dire* was reopened and a new trial not ordered on appeal.
16. The awarding of a new trial is the only adequate remedy to address the error in jury selection.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this Court grants Claim XIII of Defendant's Amended Motion for Appropriate Relief and accordingly the conviction previously entered in this case is set aside as to all charges. The Defendant is hereby awarded a new trial on all charges. Having found the defendant is entitled to the relief requested, the State's motion to dismiss is denied as to Claim XIII and the State's motion to dismiss as to the remaining issues are rendered moot.

This the 28<sup>th</sup> day of July, 2020.



R. Kent Harrell  
Superior Court Judge Presiding



CERTIFICATE OF SERVICE

I hereby certify that the forgoing Order was this day served on the following by depositing the same in a postage paid envelope in a depository under the exclusive care, custody and control of the United States Postal Service.

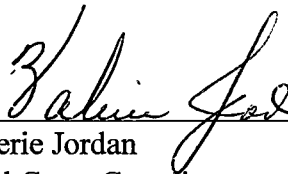
Donald Beskind  
*Counsel for Defendant*  
Duke University School of Law  
P.O. Box 90360  
Durham, NC 27708-0360

Shelagh Rebecca Kenney  
Center for Death Penalty Litigation, Inc.  
*Counsel for Defendant*  
201 West Main Street, Suite 300  
Durham, N.C. 27701

Jonathan Babb  
Special Deputy Attorney General  
N.C. Department of Justice  
Capital Litigation Section  
PO Box 629  
Raleigh, NC 27602

Benjamin R. David  
District Attorney  
PO Box 352  
Wilmington, NC 28402

This the 28 day of July, 2020.

  
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Valerie Jordan  
Trial Court Coordinator

