

No. _____

FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

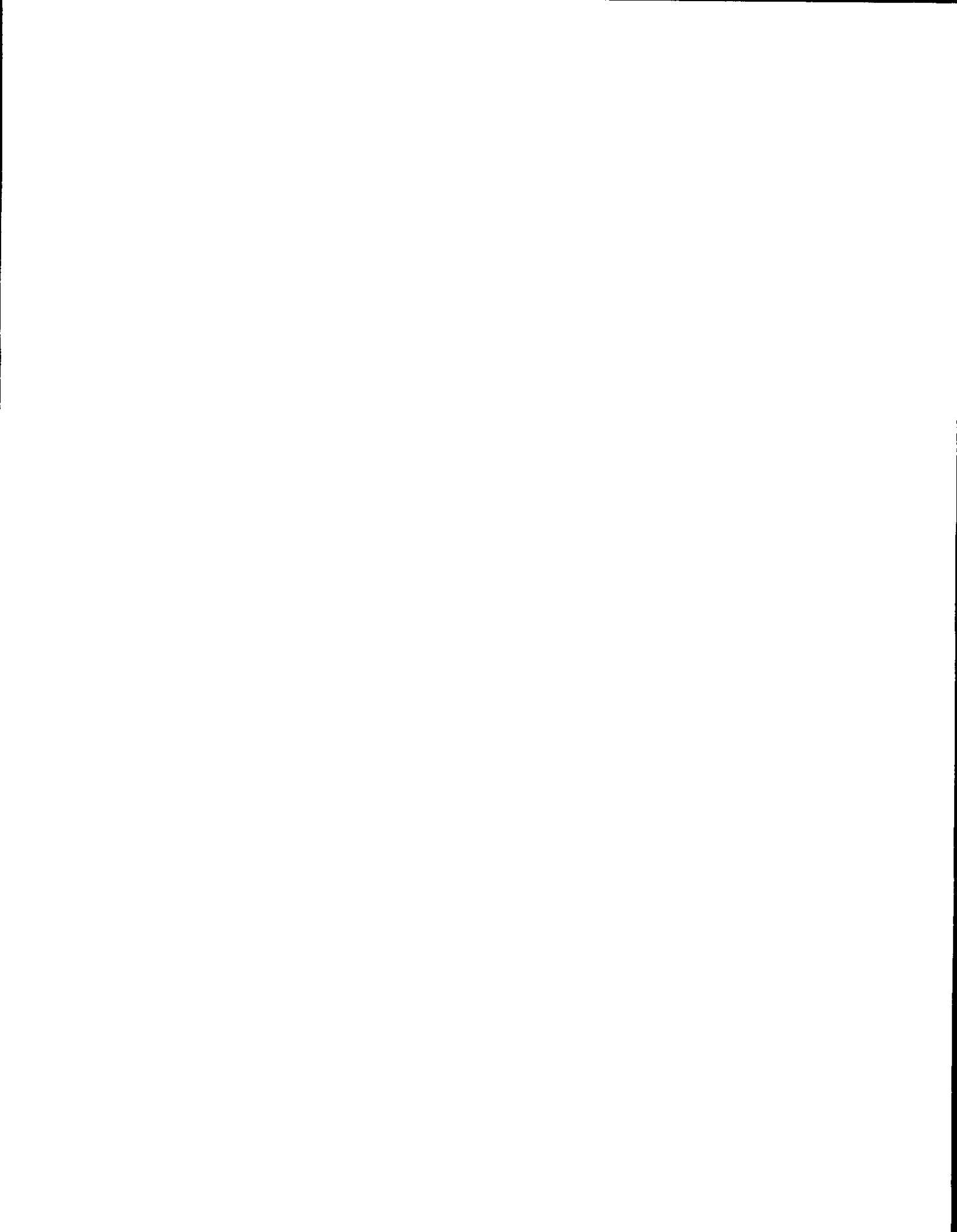
STATE OF NORTH CAROLINA)

v.)

MICHAEL DORMAN, II)

From Durham

NOTICE OF APPEAL
AND
PETITION FOR DISCRETIONARY REVIEW



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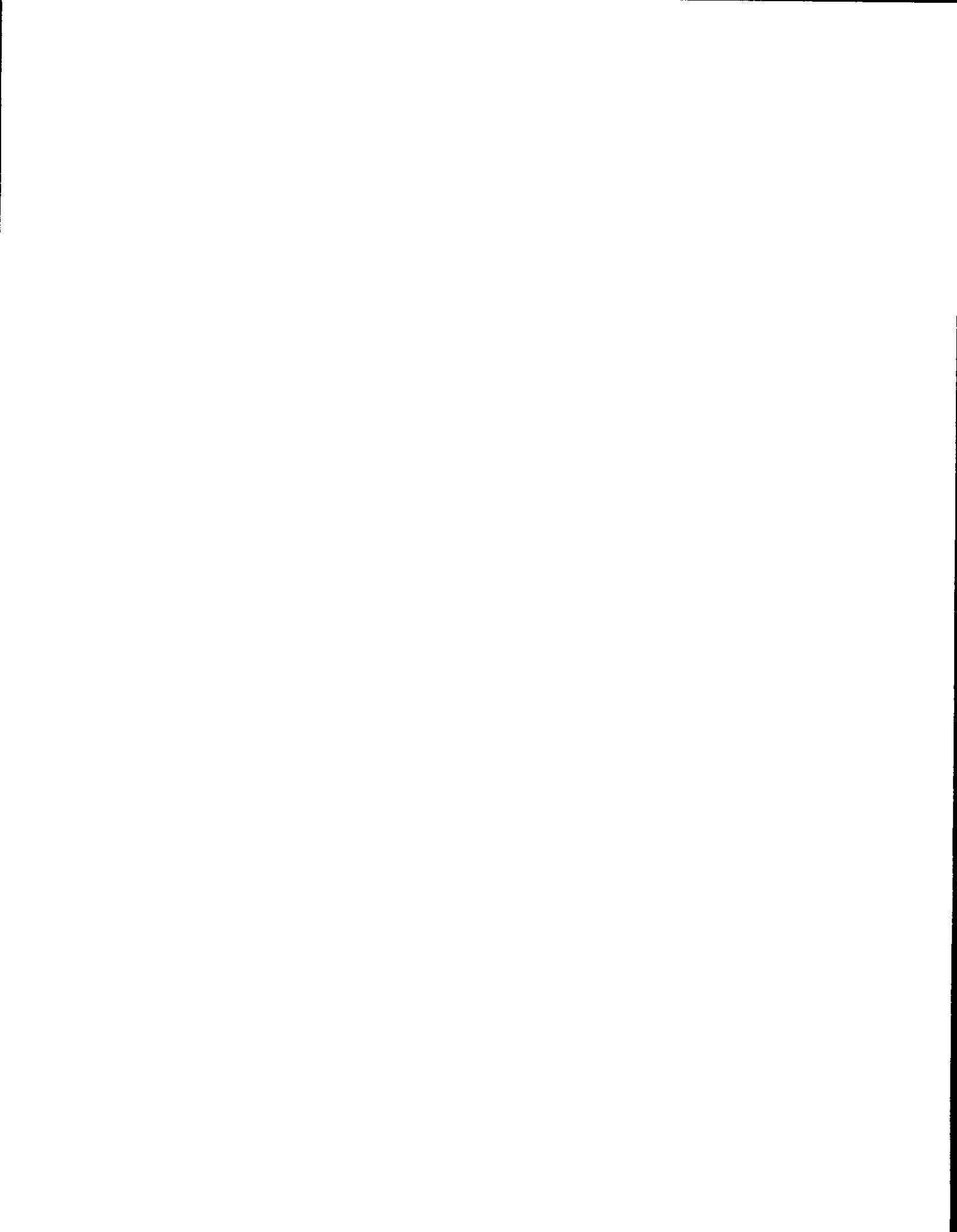


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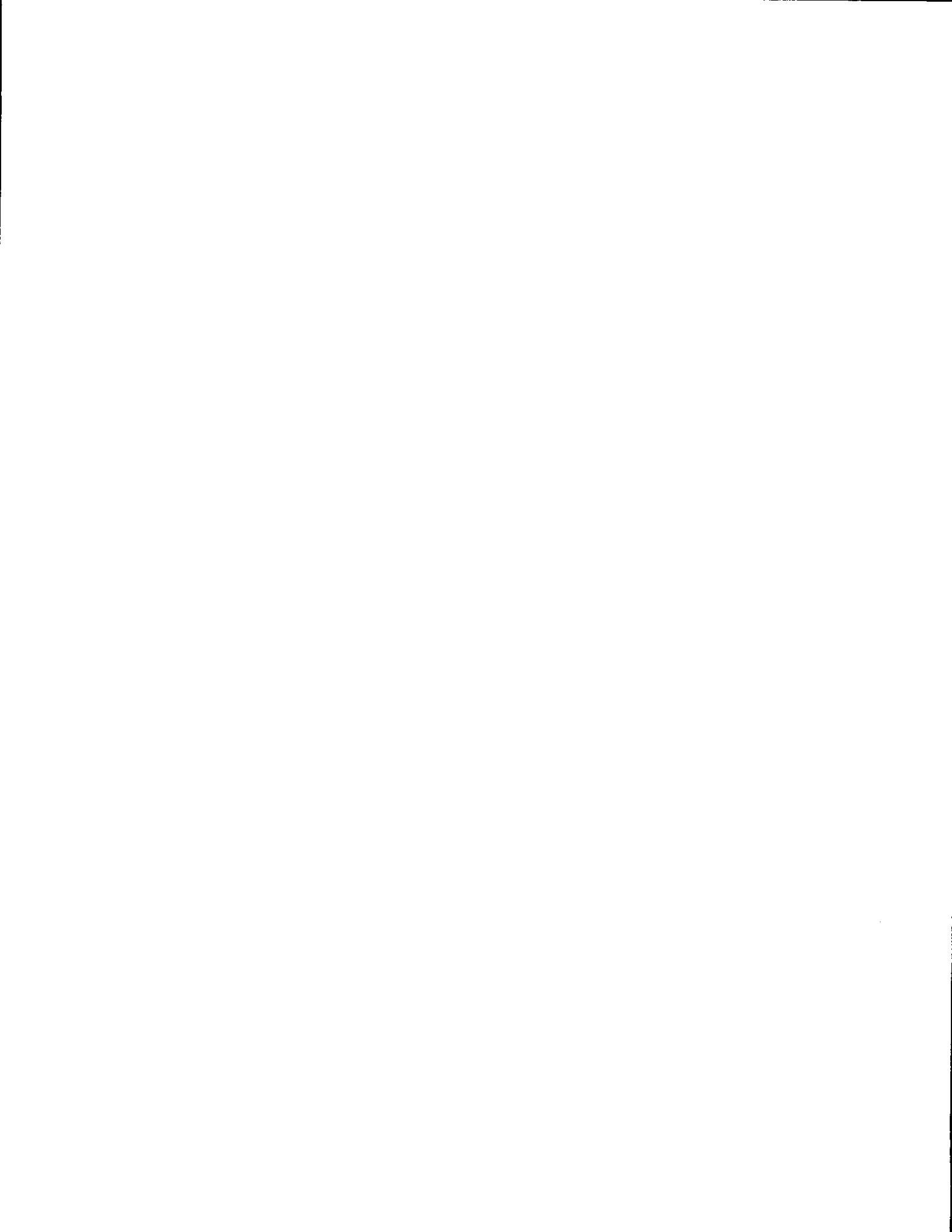
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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOTICE OF APPEAL

Defendant Michael Dorman, II, hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals entered upon its opinion issued 19 February 2013 reversing a trial court order dismissing a charge of first degree murder on both constitutional and statutory grounds and imposing lesser sanctions for discovery violations. The judgment of the Court of Appeals directly involves substantial questions arising under the Constitutions of the United States and of the State of North Carolina as follows:

Question 1: Said judgment directly involves a substantial question arising under the Due Process Clause of the Fourteenth Amendment to



the Constitution of the United States and Article 1, Sections 19 and 23 of the Constitution of the State of North Carolina in that it deprives rights secured thereunder to the Defendant by reversing the trial court order dismissing the charge of first degree murder for a flagrant violation of his right to due process through the bad faith destruction of bones and teeth before they could be examined by the defense which caused irreparable prejudice to the defendant's preparation of his case. This constitutional issue was timely raised in the trial tribunal by Defendant's motion to dismiss. This constitutional issue was determined erroneously by the Court of Appeals by ruling that the trial court was premature in concluding that the due process violation caused irreparable harm to the preparation of the defendant's case, that the record in its present state failed to show the kind of prejudice required for dismissal.

In the event this Court finds this constitutional question to be substantial, petitioner intends to present the following issues in his brief for review:

- I. WHETHER THE COURT OF APPEALS ERRED BY RULING THAT THE TRIAL COURT WAS PREMATURE IN RULING THAT A DUE PROCESS VIOLATION RESULTING FROM THE BAD FAITH DESTRUCTION OF THE BONES AND TEETH BEFORE THEY COULD BE EXAMINED BY THE DEFENSE CAUSED IRREPARABLE PREJUDICE TO THE PREPARATION OF THE DEFENDANT'S CASE, THAT THE RECORD FAILED TO SHOW THE KIND OF PREJUDICE REQUIRED FOR DISMISSAL?



PETITION FOR DISCRETIONARY REVIEW

Defendant Michael Dorman, II, by his undersigned counsel, hereby petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals entered upon its opinion issued 19 February 2013. The opinion of the Court of Appeals reversed a trial court order dismissing a charge of first degree murder on both constitutional and statutory grounds and imposing lesser sanctions for discovery violations.

This petition for discretionary review is filed pursuant to the provisions of G.S. § 7A-31(c) as a case in which the subject matter of the appeal has significant public interest, as a case which raises legal principles of major significance to the jurisprudence of the State and as a case in which the decision of the Court of Appeals appears to be in conflict with decisions of this Court.

In support of this petition for discretionary review, Defendant Dorman shows the following:

STATEMENT OF THE FACTS

I. Procedural History.

On 14 July 2010, Defendant-Appellee Michael Dorman was charged by a warrant obtained by Durham Police Detective Christopher Robinson with concealing a death of "AN UNKNOWN FEMALE," in violation of N.C.G.S § 14-401.22(a). (Rp. 9-10) The charge related to his alleged possession of a bag

containing human bones in a backpack. Dorman was found to be indigent and Durham County Public Defender Lawrence Campbell was appointed to represent him at his initial appearance. (FF 1-5, Rpp. 137-138)

On 7 September 2010, the Durham County Grand Jury returned an indictment charging Dorman with the murder of Lakeia Boxley sometime between 1 March and 30 April 2008. (Rp. 13). Durham Public Defender Campbell was appointed to represent him on this charge. (Rp. 14) On 16 September 2010, defense counsel filed a motion to retain and preserve all evidence in the case and a request for voluntary discovery under the provisions of N.C.G.S § 15A-902. (Rpp. 15-26) On 17 September, defense counsel filed a motion for discovery under the provisions of N.C.G.S §§ 15A-902 and -903. (Rpp. 17-19)

On 7 October 2010, the parties appeared before the Honorable Kenneth C. Titus, Superior Court Judge. Defense counsel wanted to be heard on the motion to preserve evidence, reporting that he had been told that day that bones of the alleged victim which formed the basis for the charge had been released to someone not in law enforcement. Judge Titus ordered orally that the evidence had to be preserved. The District Attorney informed the court that she knew that the remains, consisting of bones making up a partial skeleton, had been turned over to the alleged victim's family and buried save for a portion of the skull that the State contended was consistent with the victim suffering a gunshot wound. On 15

October, the District Attorney filed a voluntary dismissal of the charge of concealing a death. (FF 28, 111; Rpp. 141-144, 181)

The parties appeared before Judge Titus on 4 November 2010 on bond and discovery matters. Judge Titus ordered that whatever discovery was currently in the possession of the State be turned over to the defense. (FF 29; Rpp. 144)

The parties appeared before Judge Titus on 7 December 2010. At that hearing, Judge Titus signed a written order requiring the State and police agencies to preserve all evidence, including the human bones examined at the Medical Examiner's Office. (FF 31-33; Rpp. 145-146)

On 5 January 2011, the State provided to the defense some supplemental discovery which included a copy of the autopsy report from the Office of the Chief Medical Examiner [ME]. (Rpp. 49-51)

The parties appeared before Honorable Orlando Hudson, Jr., Superior Court Judge, on 7 June 2011. Defense counsel asked that the State inquire and report as to whether the bones and teeth that were used at the ME's office to formulate opinions as to the identity of the decedent and the cause and manner of death were still in the possession of the ME's office. The prosecutor agreed to make the inquiry. Judge Hudson took exclusive jurisdiction over the case and directed that the prosecutor report back. The prosecutor reported on 9 June that the only portion of the remains still in the possession of the ME's office was the frontal portion of

the skull and that the rest of the bones and the teeth that had been used to form an opinion as to the identity of the deceased had been released to the family and destroyed by cremation. Defense counsel made a motion to dismiss with prejudice. Judge Hudson directed that defense counsel serve and file a formal, written motion, and set the matter for hearing. (FF 44-51; Rpp. 147-148)

On 27 June 2011, defense counsel served and filed a written motion to dismiss with prejudice based on the destruction of the skeletal remains previously in the possession of the ME in violation of discovery statutes and Defendant Dorman's right to due process of law under the state and federal constitutions. (Rpp. 73-75) The hearing was held before Judge Hudson on 28 June. One witness, Dr. Jonathan Privette, who examined the remains at the ME's office and wrote the autopsy report, testified. After hearing arguments by the attorneys, Judge Hudson took the matter under advisement. (FF 52-54; Rpp. 148-152)

After learning from a document in the court file that the State of North Carolina had paid for the cremation of the remains, Judge Hudson issued an order on 5 July 2011 directing that the Division of Victim Compensation Services of the Department of Crime Control and Public Safety produce its complete file for inspection by the Court. After review in camera of that file, Judge Hudson issued an order on 13 July 2011 directing that a copy of that file, with some limited redactions, be provided to the parties. (FF 58-64; Rpp. 152-153)

On 14 July 2011 the State filed a motion to reopen the hearing on the motion to dismiss. On 22 July 2011, Judge Hudson issued an order reopening the hearing for the limited purposed of taking evidence on what role, if any, the State and its agents had in facilitating the destruction of the bones and teeth in this matter. The hearing was during the week of 15 August 2011. (Rpp. 84-95)

Evidence was heard by Judge Hudson on 15 and 16 August 2011 from a number of witnesses called by the State. (FF 66-87; Rpp. 153-176) At the conclusion of the testimony and the arguments from the attorneys, Judge Hudson orally granted the defense motion to dismiss. The State gave oral notice of appeal. (8/15-16/11Tpp. 330-332) On 24 August 2011, the State filed a written notice of appeal from the order. (Rpp. 131)

On 14 November 2011, Judge Hudson filed a written order containing findings of fact, conclusions of law and outlining the reasons for granting the motion to dismiss with prejudice. (Rpp. 137-228) On 22 November 2011, the State filed a written notice of appeal from the written order of dismissal. (Rp. 229)

II. Evidence Related to Motion to Dismiss.

In March 2008, while living in Durham, the mother of Lakeia Boxley [Boxley] reported her missing to the Durham Police Department. Boxley's sister, Latifah White [White] lived in Charleston, South Carolina. Her mother moved



there to live with her. In January 2010, White filed another report that Boxley was missing with the Durham Police Department. (8/15-16/11Tpp. 218-221)

On 14 July 2010, Orange Sheriff's Investigator Tony White was assigned by the Sheriff to look into the report of a citizen about a person having human remains. After interviewing the citizen, Inv. White observed Defendant Dorman give the citizen a book bag. The citizen gave the bag to White. At the Sheriff's office, Inv. White and Inv. Chris Upchurch opened the bookbag and found a plastic bag of bones. Photographs were sent to Dr. Oliver, an archeologist at N.C. State. He confirmed they were human bones. The investigators realized that the bones were evidence of a possible homicide. They turned them over to their evidence technician who delivered them to the ME's office that day. (8/15-16/11Tpp. 8-9, 11-14, 20-27, 31)

The contents of the bag of bones made up an incomplete human skeleton. Among other missing bones, many of the bones from the head were not present. The mandible, the lower jaw bone and teeth, were present. The maxilla, upper jaw bone and teeth, were missing. At the ME's office, the case was assigned to Dr. Jonathan Privette, a pathologist who had started a one year fellowship in forensic pathologist at the ME's office two weeks earlier. He was supervised on this case by Dr. Deborah Radisch, the Chief ME. (6/28/11Tpp. 4-6, 19-20, 45; 8/15-16/11Tpp. 262-265, 276)



The Orange County investigators were informed that the bones were from a person who was murdered in Durham. They contacted the Durham Police Department. The matter was assigned to Detective Chris Robinson as lead investigator. His direct supervisor was Sgt. Perkins. Based on things not disclosed in the record, Robinson formed the belief that the bones were those of Lakeia Boxley. With a court order for Boxley's medical records, Robinson obtained a CD which included a copy of a CT scan image of her head from Duke University Hospital, which he took to the ME's office. He also took a synopsis of what happened, reporting that Boxley was the victim and that she had died as the result of a shotgun blast to the head. (8/15-16/11Tpp. 16, 32-37)

An autopsy on the bones was performed at the ME's office on 15 September 2010. Based on a comparison of the lower jaw and teeth to the CT head scan from Duke Hospital, Dr. Privette reported a positive identification of the bones as those of Lakeia Boxley. The autopsy report notes that the internal surface of the frontal bone of the skull showed multiple, small round discolorations, consistent with wipe off from or extended contact with small metal projectiles or objects. Photographs were taken of the bones and teeth. X-rays were taken of the mandible, spine and one knee. (6/28/11 20-22, 57;Rpp. 117-119)

The ME's office came to a conclusion about the manner of death, that it was a homicide. The ME's office could not come to a decision about the cause of death



scientifically. Clyde Gibbs, an investigator/anthropologist in the ME's office, completed his report on 5 August 2010. Dr. Privette signed the death certificate 8 August. In it, Dr. Privette reported 14 July 2010, the date the bones were recovered, as the date of death. He checked the box for manner of death as homicide. In the section headed "method of disposition," he checked the box "cremation." The autopsy report was completed on 23 November 2010. It states the conclusion that the cause of death is "undermined homicidal violence, with findings suggestive of blunt head trauma consistent with a shotgun wound." (6/28/11Tpp. 14, 20, 52; 8/15-16/11Tpp. 298-299)

A week before his testimony in June 2011, Dr. Privette contacted Dr. Allen Samuelson, a dentist at the UNC dental school, for a second opinion, because there was question about the identification of the bones and teeth as being those of Boxley. On 22 June, Samuelson sent Privette an e-mail reporting he was having a difficult time. He asked Privette to have Gibbs photograph the right and left sides of the teeth and make a standard dental radiograph of both sides of the mandible. Privette sent Samuelson photographs of the teeth and a radiograph of the mandible that had been made at the ME's office earlier. On 24 June 2011, Samuelson sent a letter to the ME's office stating that he "found many areas of congruity and no manifest exclusionary information" and stating that the "data supports evidence that these are the remains of Lakeia Boxley. (6/28/11Tpp. 17-21, 61-62; Rp. 127)

When informed by Clyde Gibbs after the 15 July 2010 autopsy that the ME's office identified the bones as those of Lakeia Boxley, Det. Robinson contacted her sister, Latifah White. He called the ME's office to give them the name of the next of kin. He also contacted Lucas Strout, who was employed by the Durham Police Department as a victim's advocate. Robinson got the warrant charging Defendant Dorman with concealing a death. He later took out the charge of murder against Defendant Dorman. (8/15-16/11Tpp. 37-40, 45-46)

Strout sent White information about services available to victim's families, including information about applying for funds from the North Carolina Victim's Compensation Services [VCS]. In addition to Strout, White had frequent telephone contacts with Zandra Ford, the District Attorney's administrative assistant, and Det. Robinson's supervisor, Sgt. Perkins, about services, assistance and about recovering the remains of her sister. Despite her concern about arranging for the return of her sister's remains, White did not contact anyone in the ME's office directly. (8/15-16/11Tpp. 56-60, 69-74, 222-223, 228-238)

In early August 2010, White met with Martha Archibald, the director of the J Stuhr funeral home in Charleston. In their first meeting, White told Archibald that she wanted to have his sister's remains cremated and the cremator remains delivered to her in South Carolina, in part because of the lower cost, but also for other reasons. They also talked about applying for compensation from VCS.

Archibald was familiar with a similar agency in South Carolina and agreed to make the arrangements for White. Archibald contracted with Quality Mortuary in Durham to get the remains from the ME, cremate them and transport the cremated remains to the funeral home in Charleston. (8/15-16/11Tpp. 208-211, 223-225)

On 25 and 26 August 2010, Durham Police Department victim's advocate Strout mailed White information about the VCS application for compensation to cover the expense for cremation and delivery of the cremated remains to White in Charleston. White filled out the form and sent it back to Strout. On 10 September, Strout sent the application for compensation to Melanie Plazatto at VCS who started a file on the claim. VCS did eventually grant compensation. Because of technical problems requiring a second application, and the need to get information from the Durham Police Department about the circumstances of the alleged crime, the check was not sent to the Charleston funeral home until 5 January 2011. (8/15-16/11Tpp. 56-57, 69-71, 80-81, 92-120)

Some of the bones and the teeth alleged to be those of Lakeia Boxley were released by the ME's office on 21 September 2010. Not all of them were released. The frontal bone of the skull, 7-10 cm long and the width of a skull bone, was retained by the ME's office. Dr. Privette testified that it was sealed in a plastic bag like other items of evidence recovered during autopsies, and stored as potential evidence because the ME's office felt it was "most contributory" on the question

of cause of death in case anyone wanted to view that portion of the remains at a later time. Dr. Radisch testified that it had suspicious marking that were not enough to permit a conclusion they came from shotgun pellets. There is no mention of the frontal bone in the autopsy report as an item of evidence retained. Dr. Privette testified that this made the report “incomplete” but not erroneous. No one told White that a portion of the bones had been retained. She learned of that fact through news accounts about the controversy of the release of the bones. (6/28/11 38-41, 45, 48; 8/15-16/11Tpp. 226-227, 278)

The rest of the bones, including the mandible and teeth which were the basis for the conclusion that the bones were those of Boxley, were released. Dr. Privette testified that they did not feel like any other part of the bones had any evidentiary value. On 21 September, the bones and teeth were collected from the ME’s office by Harry Roper, an employee of the mortuary contracted to cremate them and deliver the cremated remains to the funeral home in Charleston. White took possession of the cremated remains on 24 September 2010. Cremation destroys all of the organic material in bones, by heating them to the point of combustion, leaving only the inorganic part, calcium phosphate. (6/28/11Tpp. 14-17, 41; 8/15-16/11Tpp. 211-213)

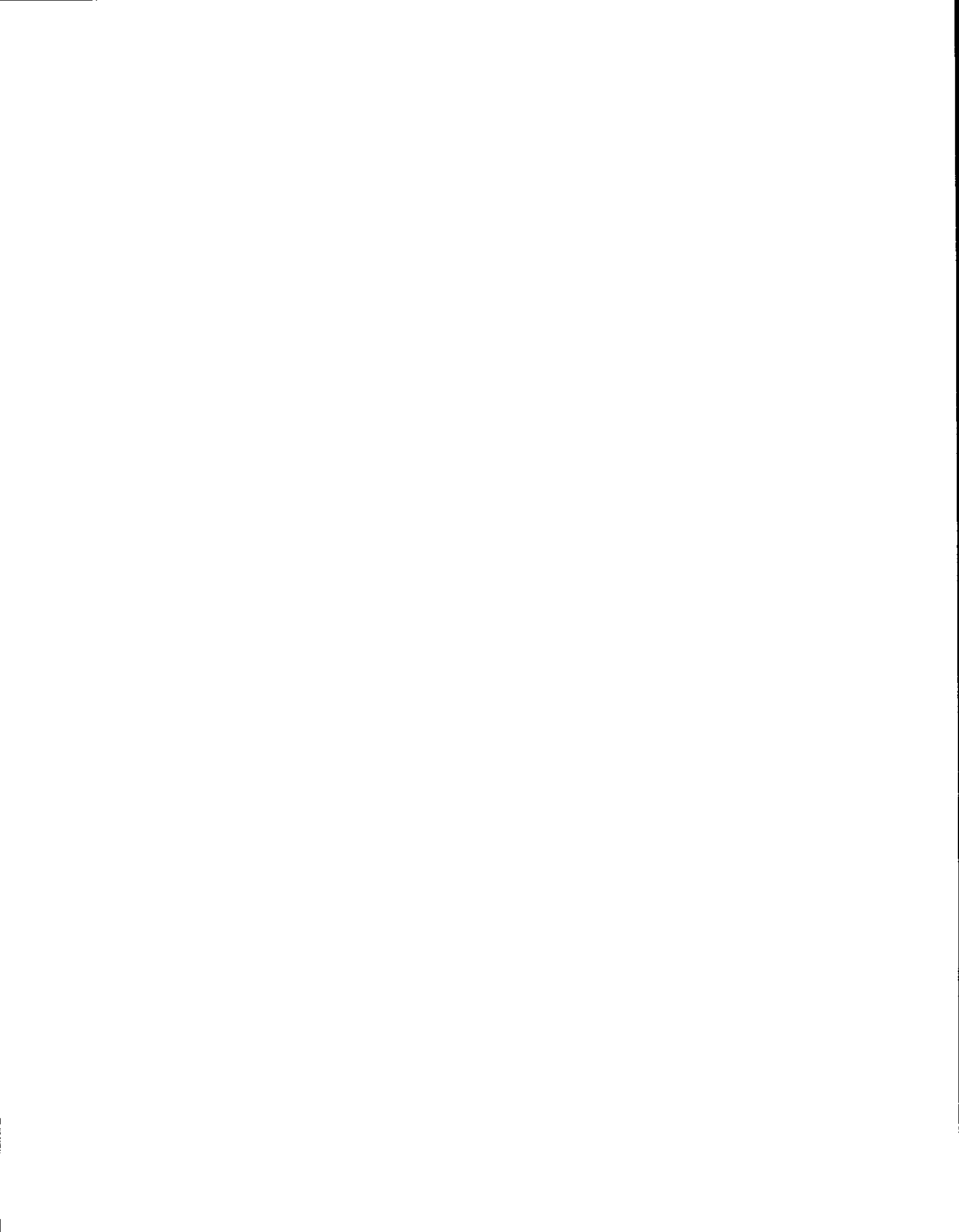
The ME’s file showed that nothing was done in the investigation in the ME’s office between the 5 August 2010 report of Clyde Gibbs and date of the

release. (8/15-16/11Tpp 290-292) The sequence of events leading up to the release of the bones and teeth for cremation was shown through a series e-mails between Clyde Gibbs at the ME's office and Lucas Strout at the Durham Police Department, revealed for the first time to the court and defense during the defense cross-examination of two of the witnesses called by the State at the reopened hearing in August 2011¹. In chronological order, the e-mails were the following:

On 8 August, Strout sent an e-mail to Gibbs. Strout asked for assistance in having the remains released and asking what needed to be done for Boxley's family to receive them. (8/15-16/11Tpp. 293)

On 10 September, more than a month later, Gibbs sent an e-mail to Strout. Gibbs said that he would contact Det. Robinson to see if there was any reason to continue to hold on to the remains. He provided some general information about how the family could make arrangements for a funeral home or crematory to pick up the remains from the ME's office. That same day, Strout sent a reply saying he would notify the family once the ME's office heard from Det. Robinson. (8/15-16/11Tpp. 294)

¹ None of these e-mails were produced by Dr. Privette in response to the subpoena for them when he testified in June. At least one, the 19 September e-mail from Gibbs to Strout, was in Strout's file which he gave to the district attorney prior to the beginning of the August hearings. The fact that these e-mails were not disclosed to the court or defense prior to being discovered during the cross-examination of Strout and Dr. Radisch is set out in the trial court order at some length as part of the explanation for the trial court's conclusion that testimony from law enforcement officers and the ME's office and the arguments by the District Attorney were not credible.



On 19 September, Gibbs sent an e-mail to Strout stating, "Per Det. Robinson, we are free to let Ms. Boxley be released. He went on to say that the family would need to make arrangements with a "funeral home/crematory" to pick up the remains. The following day, Strout sent Gibbs an e-mail thanking him. (8/15-16/11Tpp. 79 294-295; Rp. 115)

III. Critical Findings of Fact By Trial Court Based on Credibility.

The trial court ruled that dismissal of the charge of first degree murder was required as a remedy under the provisions of N.C.G.S. § 15A-954(a)(4) for the flagrant violation of Defendant constitutional right to due process resulting from the bad faith destruction of the bones and teeth causing irreparable prejudice to the defendant's preparation of his case.

The cremation of the bones and teeth alleged to be those of Lakeia Boxley upon release from the ME's office on 21 September permanently destroyed whatever evidence they might contain relating to the identity of the deceased and the manner and cause of death. The trial court found that this destruction of evidence was at the collective hands of the Durham Police and the ME with full knowledge that it would deprive Defendant Dorman of the ability to investigate and obtain evidence favorable to his defense and damaging to the State's case against him, causing Dorman irreparable prejudice. (FF 126, Rp. 197)

The basic facts found by the trial court underlying its due process ruling, set out in much detail in the order, are these: (1) the bones and teeth destroyed by cremation had obvious evidentiary value that required their preservation until they could be examined and tested by the defense; (2) the bones and teeth were not immediately released when the ME's investigation was done; (3) the determination to release the bones and teeth were made by law enforcement, the ME delegated its statutory obligation about release to Det. Robinson; (4) the police and ME knew that the bones and teeth would be destroyed by cremation as soon as they were released; (5) the release for destruction was made with the knowledge that it would deprive the defendant of the ability to investigate and obtain evidence favorable to him, (6) the destruction of the bones and teeth caused irreparable prejudice to the defendant. (FF 89(d), 89(e), 89(h), 89(i), 93, 95, 99, 101, 116, 123, 125.B.2, 125.C.1-5, 125.C.7, 125.C.8, 125.D.2, 125.D.10-12, 125.E.4-7, 125.G., 126 ; Rpp. 176-181, 183-193, 195-197)

The evidence of the role played by Detective Robinson and other agents of the State in the release of the bones and teeth to the family of the alleged victim was contained in a series of e-mails that were in existence at the time that Judge Titus ordered on 4 November 2010 that the State provide the defense with whatever discovery the State then possessed. Although they were in the ME's files, they were not produced in response to a defense subpoena when Dr. Privette testified at the

first hearing on 28 June 2011. They were not produced prior to or at the beginning of the second hearing on 15 August 2011 or during the testimony of Detective Robinson. One of them came to light during cross-examination of Lucas Strout of the Durham Police Department when the trial court granted a defense motion for production of the file that had been reviewed by the District Attorney personally prior to the hearing. The rest were produced from the files of the ME's office during the cross-examination of Dr. Deborah Radish, the Chief ME, who was the last witness called by the State at the second hearing.

The failure to provide timely discovery of this evidence was a violation of Judge Titus' discovery order. The trial court found as fact that there was a deliberate effort to keep this evidence hidden. (FF 97-99, 125.B, 125D.2.g., 125.D.3.-8., 129, 139, 142, 148-150; Rpp. 179, 185-187, 190-193, 197, 199-201) For this discovery violation, the trial court imposed dismissal of the charges as a sanction. (Conclusions of Law 10-12, Rpp. 203-204)

IV. Rulings by the Court of Appeals.

The opinion of the Court of Appeals reversed the order of dismissal of the charge of first degree murder as a remedy for the flagrant violation of Defendant constitutional right to due process under the provisions of N.C.G.S. § 15A-954(a)(4). In particular, the Court of Appeals ruled that the trial court was premature in ruling irreparable prejudice to the preparation of the defense case was

caused by any due process violation resulting from the bad faith destruction of the bones and teeth by agents of the State before they could be examined by the defense. The Court of Appeals ruled that the record, in its present form, failed to show irreparable prejudice to the preparation of the defense case.

The opinion of the Court of Appeals reversed the order of dismissal of the charge of first degree murder as a remedy for discovery violations under N.C.G.S. § 15A-910 as an abuse of discretion. The Court of Appeals ruled that any harm to the defendant was either speculative or moot because the case had not yet proceeded to trial or plea and the defendant is now in possession of the evidence that the State initially failed to disclose.

The opinion of the Court of Appeals vacated that portion of the trial court order suppressing testimony from Detective Robinson and Dr. Privette as a remedy for discovery violations under N.C.G.S. § 15A-910 as an abuse of discretion. The Court of Appeals ruled the trial court based suppression on actions that were not discovery violations and, with respect to the evidence the State initially failed to disclose, suppression was based on a flawed prejudice analysis because the defendant is now in possession of that evidence.

REASONS WHY THIS COURT SHOULD GRANT REVIEW

This case, which has produced much public interest, has some unique aspects that underlie the trial court order imposing dismissal of the charge of first degree murder and other suppression of testimony from Detective Robinson and Dr. Privette as sanctions.

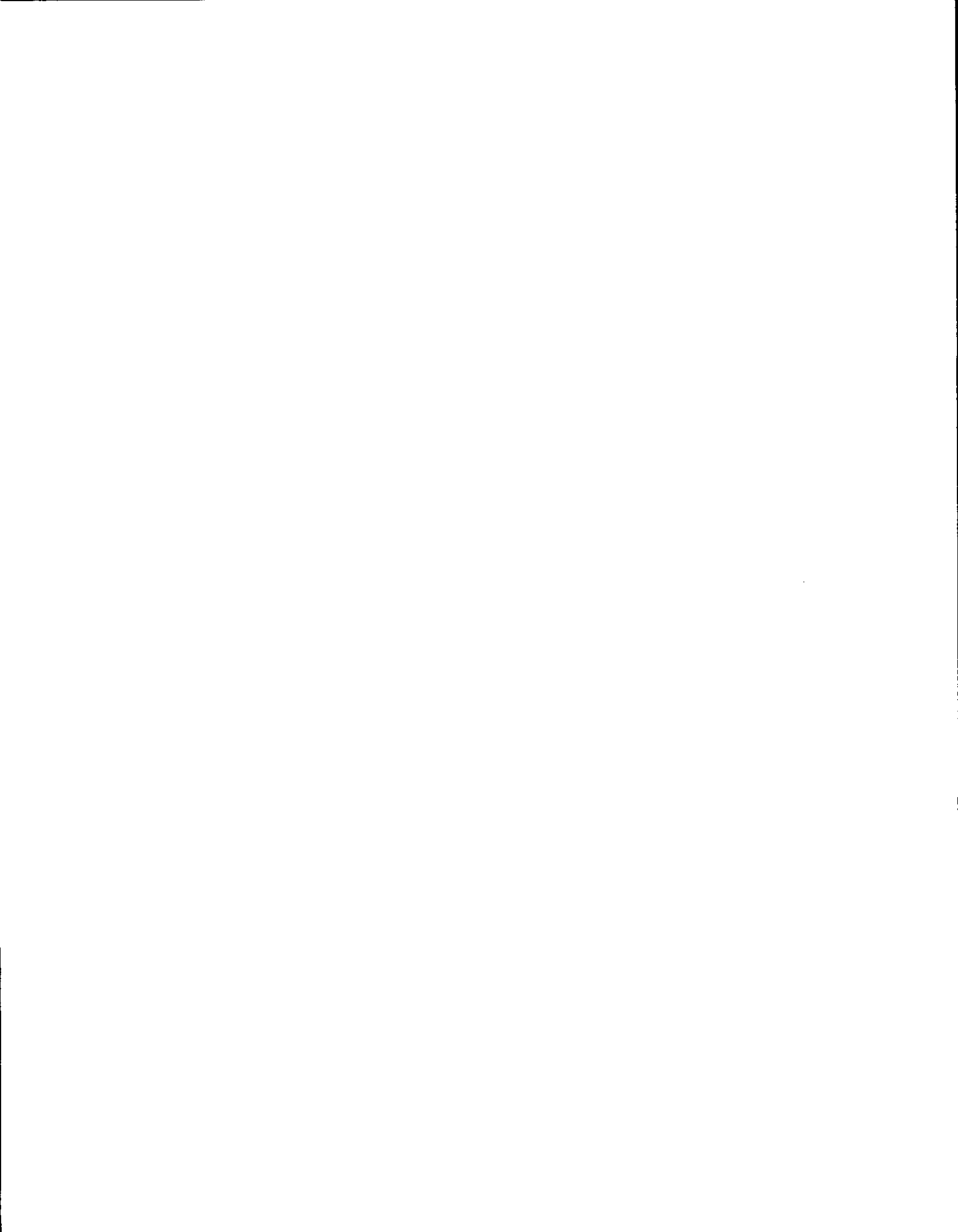
The only physical evidence that exists to show the identity of the alleged victim and the cause and manner of the death was the bones and teeth taken to the ME's office for examination. Save for a small piece of the skull, the bones and teeth were destroyed when they were cremated upon being released to the alleged victim's family before the defense had any opportunity to examine them. The trial court found, based on the evidence, that the destruction of the bones and teeth were the result of actions by agents of the State acting in bad faith, a due process violation which caused irreparable prejudice to the preparation of the defendant's case.

The trial court found that there was deliberate effort to not disclose discoverable emails which were the evidence that showed the involvement of the agents of the State in the deliberate and bad faith destruction of the bones and teeth in violation of the discovery statutes. As a result, the trial court imposed as sanctions dismissal of the charge of first-degree murder and, because of their particular role in not disclosing this information, suppression of any testimony from Detective Robinson and Dr. Privette.

The Court of Appeals found the trial court erred in each of the remedies imposed by the trial court. In doing so, the Court of Appeals ruled that the record in its current form did not establish that the sanctions were warranted, leaving open for further consideration the imposition of any or all of these sanctions after further developments in the case. The Defendant seeks review by this Court of these rulings by the Court of Appeals.

I. DISMISSAL AS A SANCTION FOR A CONSTITUTIONAL VIOLATION.

The Court of Appeals noted that the trial court found bad faith by agents of the State in the destruction of the bones and teeth, a violation, a flagrant violation of the constitutional right to due process. The Court of Appeals ruled that the imposition of dismissal was premature, that on the current state of the record the defendant failed to prove the destruction of the bones and teeth cause irreparable prejudice to the preparation of the defense case. In particular, the Court of Appeals first held that, because the bones and teeth were destroyed, it is impossible to determine the extent to which examination of them would be helpful to the defense case and the defendant could not meet his burden of showing his defense was actually prejudiced. The Court of Appeals also ruled that trial court ruling of dismissal was premature. The defense had not yet retained experts to examine the radiographs of the teeth and attempt to extract DNA from the small piece of bone



remaining, and it is possible that such defense experts would agree that the remains are indeed those of Ms. Boxley. The Court of Appeals held that the defense could not show irreparable prejudice until it was established that the partial remains are untestable or that the identification of the alleged victim was flawed or incapable of replication.

Insofar as the Court of Appeals held that a showing of actual, and not just potential prejudice, is required, the ruling is in conflict with the opinions of this Court in *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) and *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971). In those cases, this Court held that when evidence is deliberately destroyed by the State which deprives the defendant of an opportunity to obtain evidence that might establish innocence, “the State will not be heard to say that such evidence did not exist.” *Hill*, 277 N.C. at 555-556, 178 S.E.2d at 468. Prejudice requiring dismissal is established when the destruction of evidence deprives the defendant of the opportunity to find evidence that might establish innocence. Dismissal does not require a showing of actual prejudice. It only requires a showing of irreparable harm to the ability to produce evidence that would potentially support innocence.

The Court of Appeals also erred by limiting its consideration to the issue of identity of the alleged victim and ignoring other aspects of the trial court order relating to the issue of prejudice.

With respect to the issue of identity, the trial court found as fact, based on the evidence, that DNA testing of the remaining piece of bone is not likely to be of any value. The failure of the State to do DNA testing showed that the State and its agents did not believe that extracting DNA from the remaining bone is a real possibility. In addition, there is no known sample of Ms. Boxley's DNA to use for comparison purposes. (FF 125.E., Rpp 194-195) With respect to examination of the retained radiograph of Ms. Boxley's teeth, the trial court held that the State's experts from the ME's office would have a clear advantage before a jury over any defense expert testimony by pointing out that the ME's observations came from the actual teeth and bones themselves. (FF 116(i); Rpp. 182)

More significantly, the problem is not limited to the issue of the identity of the victim. The trial court also found that the destruction of the bones and teeth also prejudiced the defendant's ability to produce evidence favorable to the defense related to the issues of manner of death, whether or not it was a homicide, and cause of death, whether it was consistent with a shotgun blast to the head. The trial court held there were other forms of evidence that might have been discovered from a defense examination of the destroyed bones and teeth that would further contradict the State's theory of the crime. (FF 116, 126; Rpp. 181-183, 197) The destruction of the bones and teeth left no remaining evidence for any defense expert to examine on the issues of manner and cause of death. The irreparable prejudice to the defendant's

ability to prepare his case in these issues is enough by itself to require dismissal for the flagrant violation of his constitutional rights. The Court of Appeals decision to the contrary is in conflict with the decisions of this Court.

II. DISMISSAL AS A SANCTION FOR DISCOVERY VIOLATIONS

The Court of Appeals held that the discovery violation in the failure to timely produce in discovery the evidence of the role that the police played in the destruction of the bones and teeth would not serve as a basis for a sanction of dismissal because, now that the defendant had the e-mail evidence, there was no ongoing prejudice. The ruling again fails to consider the totality of the findings of the trial court.

As the trial court held, the attempt by the prosecutor and police and ME's office to keep secret the discoverable e-mails raises issues about discoverable evidence that has yet to be produced. The 19 September e-mail is evidence showing that some form of communication between Gibbs at the ME's office and Det. Robinson at the police department took place. As the trial court expressly noted, the manner, means and content of that communication, which went to the very question being litigated, has never been documented or disclosed in discovery. (FF 98, 99, 125.B.; Rp. 179, 185-186)

No explanation for the obvious discovery violation was ever offered by the State. Det. Robinson was not recalled as a witness to explain. Strout was not

recalled to explain why his file had a copy of only one of the series of e-mails. The manner in which the discovery violations began to surface led the trial court to a finding that it was likely that there was a destruction of relevant records and memory loss by critical witness and to a finding that the discovery violations were deliberate. (FF 131, 139; Rpp. 198-199)

Issues of fairness arise when courts cannot rely on the statutory obligation to provide discovery being fulfilled. Ultimately, the burden falls on the shoulders of the District Attorney to take steps to ensure that law enforcement files are produced completely. Violations can be punished only when the violator is caught. The real concern, expressed by the trial court in its order, is that the deliberate attempt not to disclose discoverable evidence raised the likelihood that additional discovery violations that had been uncovered.

When quite obviously willful discovery violations appear, the trial court is in the unique position to assess the overall danger when assessing penalty. When a trial court loses complete faith in the State's production of discoverable evidence because evidence appears of a deliberate attempt to fail to disclose discoverable evidence, sanctions, including the most severe sanction of dismissal, is within a trial court's discretion. The Court of Appeals should not be allowed to replace it's judgment of what is the appropriate sanction for that of the trial court who heard

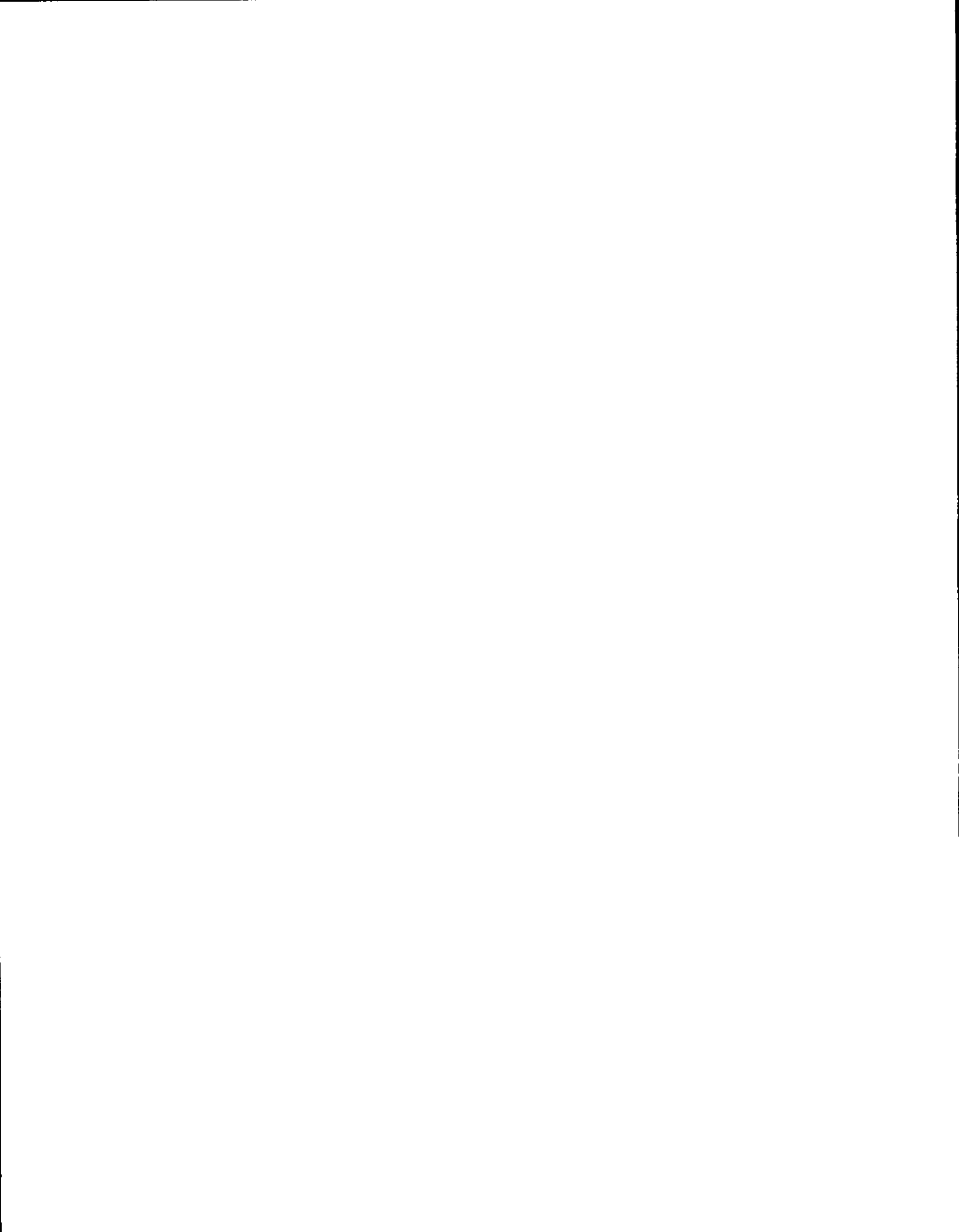


the evidence and saw the witness. This is an issue which warrants consideration by this Court because of its importance to the jurisprudence of this State.

III. SUPPRESSION OF TESTIMONY AS A SANCTION FOR DISCOVERY VIOLATION.

The trial court noted that Detective Robinson and Dr. Privette played a significant part in the failure to timely disclose the discoverable e-mail evidence showing the role played by the police in the decision to release the bones and teeth for destruction by cremation. The trial court found as fact that the failure of Dr. Privette to produce them at the first hearing despite a defense subpoena was deliberate. The trial court found as fact that the failure of Detective Robinson to disclose evidence showing his controlling role in the release of the bones and teeth for destruction was deliberate, leaving only misleading testimony. As a result, the trial court imposed sanctions for their roles in the failure to produce discoverable material in a timely fashion, suppression of testimony from either of them. (FF 97-98, 125A.-B & D., 149-150; Cconclusions of Law 10-11; Rpp. , 179, 184-187, 190-193, 201, 203)

The Court of Appeals ruled that these sanctions were imposed in error because there was no ongoing prejudice to the defendant in the future since he obtained the evidence through other means. The ruling of the Court of Appeals that only continuing prejudice to the defendant in the future will justify sanction of



suppression for a deliberate discovery violation is without supporting precedent. Surely, when willful discovery violations are discovered prior to trial, the trial court is in a unique position to determine what sanctions might be imposed on those most responsible, even when there is no continuing prejudice because the defense discovered the material by happenstance. This too is an issue which warrants consideration by this Court because of its importance to the jurisprudence of this State.

ISSUES TO BE BRIEFED

- I. WHETHER THE COURT OF APPEALS ERRED BY RULING THAT THE TRIAL COURT WAS PREMATURE IN RULING THAT A DUE PROCESS VIOLATION RESULTING FROM THE BAD FAITH DESTRUCTION OF THE BONES AND TEETH BEFORE THEY COULD BE EXAMINED BY THE DEFENSE CAUSED IRREPARABLE PREJUDICE TO THE PREPARATION OF THE DEFENDANT'S CASE, THAT THE RECORD FAILED TO SHOW THE KIND OF PREJUDICE REQUIRED FOR DISMISSAL?
- II. WHETHER THE COURT OF APPEALS ERRED IN RULING THAT THE RECORD FAILED TO SHOW THE KIND OF PREJUDICE REQUIRED FOR DISMISSAL BASED ON THE DISCOVERY VIOLATIONS?
- III. WHETHER THE COURT OF APPEALS ERRED IN RULING THAT THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING A SANCTION OF SUPPRESSION OF TESTIMONY AS A SANCTION FOR THE DISCOVERY VIOLATIONS?

CONCLUSION

For the above and foregoing reasons, Defendant Michael Dorman respectfully requests that this Court find the constitutional question raised by his notice of appeal to be substantial and requests that this court grant discretionary review of the issues set out above.

This the 26th day of March, 2013.

Respectfully submitted,

/s/ electronically filed
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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I hereby certify that the original of the above and foregoing Notice of Appeal and Petition has filed with the Clerk of this Court by electronic filing.

I hereby certify that a copy of the above and foregoing Notice of Appeal and Petition has been served on counsel for for the State, Special Deputy Attorney General Robert C. Montgomery, Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629, by depositing same in the United States Mail, first class postage prepaid.

This the 26th day of March, 2013.

/s/ electronically filed
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