STATE OF NORTH CAROLINA COUNTY OF ROBESON	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 93 CRS 15291–15293
STATE OF NORTH CAROLINA v. DANIEL ANDRE GREEN, Defendant.	FILED 2018 OCT -4 P 3:11 ROBESON CO., C.S.C. BY dck	FIFTH SUPPLEMENT TO FIRST AMENDED MOTION FOR APPROPRIATE RELIEF

NOW COMES the Defendant, Daniel Andre Green, by and through undersigned counsel, who files this Fifth Supplement to his First Amended Motion for Appropriate Relief. All the facts, legal claims, and arguments pled in Green's prior postconviction filings are incorporated hereto as if fully pled.

INTRODUCTION

1. Daniel Andre Green (Mr. Green) has been incarcerated for twenty-two years for crimes he did not commit. He was not present when James Jordan was murdered and had no knowledge of the murder until after it happened.

2. Mr. Green has maintained his innocence since his arrest in August 1993. Mr. Green's *pro se* Motion for Appropriate Relief (MAR) has been pending with this Court since 2000, after his unsuccessful direct appeal.

3. Due to the numerous failures of his trial counsel, his appellate counsel, and his postconviction counsel, Mr. Green has been forced to spearhead his eighteen year fight to prove his innocence and overturn his wrongful conviction.

4. The numerous instances of ineffective assistance of counsel of both his trial and appellate counsel are detailed below, but it is important to note that ineffectiveness continued through to Mr. Green's postconviction counsel as well.

    a. On May 16, 2000, Carlton Mansfield was appointed to represent Mr. Green on his previously filed *pro se* MAR..

    b. Mr. Mansfield represented Mr. Green for years, yet did no substantive work on the case despite compelling claims raised by Mr. Green. He also failed to communicate with his client despite repeated instructions from the Court for him to do so. (Ex. 40.)

    c. Mr. Mansfield stated the following to the Court at a 2005 hearing on his motion to withdraw: "If I was to go forward, Judge, there would be no evidence presented if I was the attorney prosecuting the motion. I believe that I would be ethically

prohibited from presenting evidence." (2017 State's Answer to Defendant's AMAR Supplements, Exhibit 16 at 11.)

d. Mr. Mansfield told the Court that Mr. Green's claims were frivolous and without merit. Considering the numerous claims filed by subsequent postconviction counsel, either Mr. Mansfield never actually reviewed the motions and investigated Mr. Green's claims or he was actively working against Mr. Green's interests during his representation.

5. Additionally, undersigned has recently learned that Mr. Mansfield may also have had a conflict during his representation of Mr. Green. A witness in Mr. Green's case, Mr. Michael Oxendine, aka Hollywood, has stated to undersigned counsel he is represented by Mr. Mansfield.

a. One of the first calls from James Jordan's cell phone after his death was to a number that belonged to Hubert Larry Deese, the son of Sheriff Hubert Stone and a drug trafficker.

b. According to a law enforcement report, Mr. Green's co-defendant, Larry Demery, identified the phone number as belonging to his friend, "Michael". (Ex. 1.)

i. The note was written in Officer Barry Lea's handwriting. Officer Lea was in the interrogation of Larry Demery and, presumably, received this information at that time.

c. Michael Oxendine was not only friends with Larry Demery, but he also worked closely with Hubert Larry Deese in his drug trafficking business. (Ex. 45.)

6. News articles also show that Mr. Mansfield had a connection to the Operation Tarnished Badge during his representation of Mr. Green. One article referred to Mr. Mansfield as "an original whistle-blower in the case." (2014 Motion for Discovery, Exhibit H.)

a. Mr. Mansfield should have realized this was a conflict and requested new counsel be appointed to Mr. Green.

7. Mr. Green's initial motion has been pending for many years in large part due to the inexplicable, and frankly unforgiveable, inaction of Mr. Mansfield.

JUDGE FLOYD'S 2008 ORDER

8. On October 2, 2008, in an Order of Summary Dismissal on Motion for Appropriate Relief, the Honorable Robert F. Floyd, Jr. denied Mr. Green's motion "except as to ineffective assistance of counsel and the States (sic) failure to disclose the tape recordings of telephone conversations of Melinda Moore and Deloris Sullivan" and stated that future claims and petitions would be procedurally barred. (Ex. 3.)

9. There has been an ongoing dispute between the State and the defense as to how Judge Floyd's 2008 Order relates to any issues raised in subsequent filings that amended the 2000 *pro se* Motion for Appropriate Relief.

10. The February 7, 2014 hearing before Judge Floyd, which he scheduled in order to "to determine issues," sheds some light on the question. (Ex. 4 (emphasis omitted.))

11. Although District Attorney Johnson Britt requested a transcript of the hearing, no transcript has been located by the defense, and the State has stated that it does not have a copy.

12. Amanda Lamb, a reporter with WRAL news, was present at the 2014 hearing and, as reporters do, took notes, including specific quotes, and emailed them to other WRAL colleagues that morning. (Ex. 5.)

13. Her notes show that Mr. Green's attorney, Scott Holmes, told the court that after he was appointed in 2008, he found there were "factual grounds for the things that were alleged" in the prior MARs. He added that "[w]e have discovered additional issues that we would like to explore with the discovery." (Ex. 5.)

14. In response, Judge Floyd said he needed counsel to prepare an MAR to lay out all of the issues. (Ex. 5.)

15. Judge Floyd stated, "I would like to a (sic) full final hearing, all of the evidence the best that we can . . . I would like to give you an opportunity to make a full investigation." He further stated, "[s]o we can maybe get some resolution and give Mr (sic) Green ample opportunity to present whatever he has." (Ex. 5.)

16. Judge Floyd set out a schedule for the defense motion and State's response and stated a hearing would be set for February 2, 2015 after the filings were complete.

17. Ms. Lamb's notes are consistent with the recollection of Scott Holmes as set forth in his affidavit filed with this Court on October 6, 2017. (Ex. 4.)

18. Scott Holmes's affidavit, Ms. Lamb's notes from the hearing, and N.C. Gen. Stat. § 15A–1415(g) make it clear that Judge Floyd intended for all potential issues to be fully investigated by counsel and that subsequent amendments with additional claims would be considered by the Court.

SUPPLEMENTAL INFORMATION FOR CLAIMS PREVIOUSLY RAISED

i. Promises of Sentencing and Leniency to Demery

19. The court record makes clear that there was a specific sentencing agreement in Mr. Demery's plea despite the State's declaration otherwise.

20. On October 3, 1997, the Court filed Mr. Demery's Judgment and Commitment. Box 1(b) under the section titled "For Use With Fair Sentencing Act Felonies Only" is checked indicating the Court "makes no written findings because the prison term imposed is *pursuant to a plea arrangement as to sentence . . .*" (Ex. 6 (emphasis added).) This clearly indicates the Court did not determine the sentence, but a specific sentence had been previously arranged pursuant to the plea agreement between the State and Mr. Demery.

21. Although Judge Weeks ran Demery's 40-year robbery sentence concurrent with his life sentence for the murder, pursuant to the plea agreement, the statutory law, under N.C.G.S. 14-87(d), required that the robbery sentence run consecutive to the life sentence.

22. After the Department of Corrections changed the sentence to conform with the law, the evidence shows that the District Attorney Johnson Britt worked with Demery's defense counsel and "life-long friend",[1] Hugh Rogers, to obtain resentencing so Demery could receive the benefit of his undisclosed, but expected, bargain.

23. On July 12, 2007, the Honorable Robert F. Floyd, Jr., signed an Order appointing attorney Hugh Rogers to "represent [Mr. Demery] to review sentencing in said cases above in light of recent case law" and to "assist [Mr. Demery] in preparing Motion for Appropriate Relief." (Ex. 7.)

    a. There is no motion in the court file between Mr. Demery's Judgment and Commitment in 1997 and the 2007 Order appointing Mr. Rogers to explain how the appointment came to be.

24. On October 4, 2007, Mr. Demery filed a Motion to Withdraw Pleas of Guilty. His motion explains that at the time of the original sentencing, "the State did not oppose a concurrent sentence in these matters, and joined in the request by [Mr. Demery's] attorney for a concurrent sentence; however, [Mr. Demery] has not received the benefit of the concurrent sentence entered and ordered by the court." (Ex. 8.)

25. On February 26, 2008, prior to Mr. Demery's sentencing adjustment, District Attorney Britt sent a letter by fax to Mr. James Jordan's son, Mr. Michael Jordan, providing further evidence of the details of the sentencing deal promised to Mr. Demery. (Ex. 9.)

26. The letter states, in pertinent part,

> Demery entered into a plea agreement with the State and testified against his codefendant, Daniel Green. Demery, who had additional charges, was sentenced to life in prison in your father's case and was sentenced to 40 years in his other cases. The court ordered that the 40 year sentence was to run concurrently with the life sentence. However, the North Carolina Department of Corrections applied an existing statute that mandated a sentence for robbery with a dangerous weapon must run consecutively to any sentence that the

[1] As described by Hugh Rogers during a meeting with undersigned.

> defendant was serving. In essence the Department of Corrections took the judge's order and changed it to a longer sentence of life plus 40 years.
>
> Demery's motion asks the court and me to correct the action taken by the Department of Corrections and to give him *the benefit of his plea agreement*. The action taken by the Department of Corrections requires Demery to serve more time than Green who was your father's actual killer. Demery played a significant role in helping the State obtain the conviction against Green. Demery's motion and the relief sought will not result in Demery getting a new trial, being released from custody nor will it set aside the life sentence. In all likelihood what will happen is that the judge will consolidate the 40 year sentence into the life sentence. *If that is what occurs then Demery will receive the benefit of his plea agreement* and will bring the matter to an end.

(Ex. 9 (emphasis added.))

27. On March 6, 2008, the State responded and joined Mr. Demery's motion to withdraw his plea in order to be re-sentenced. In its response, the State asserted that whether the sentences would run concurrent or consecutive was left up to the Court. (Ex. 10 ¶ 4.) However, that is contradicted by the October 3, 1997 Judgment and Commitment which indicated that the plea agreement included the sentence Mr. Demery would receive. (Ex. 10.)

    a. The State's response also quotes *State v. Wall* and *State v. Ellis* indicating the Supreme Court has held "*where the State's promise cannot be kept*, the defendant is entitled to his choice of two remedies . . ." (Ex. 10 ¶ 14 (emphasis added.))

28. The same day as the State filed its response, a new Judgment and Commitment was entered for Mr. Demery. Again, box 1(b) is checked indicating the Court "makes no written findings because the prison term imposed is *pursuant to a plea arrangement as to sentence* . . ." (Ex. 11 (emphasis added.))

29. On March 18, 2008, the Court entered an Order stating that "on October 3, 1997, the State and Defendant agreed to a concurrent 40 year sentence, and the Court adopted the intent and the agreement of the parties and entered a concurrent 40 year sentence *as agreed upon by the parties*." It goes on to state that Mr. Demery "has not received the benefit of his plea agreement nor the benefit of the concurrent judgment entered and ordered by the Court." (Ex. 12 (emphasis added.))

30. It is clear from the record that the plea agreement the State entered into with Mr. Demery included a promise for the specific sentence and that the State's many assertions to the contrary are false.

ii. Blood Evidence

31. In 2009, the National Academy of Sciences released its seminal report, *Strengthening Forensic Science in the United States: A Path Forward.*[2]

32. The report included a discussion on the Houston Police Department Crime Laboratory "performing grossly incompetent work and was *presenting findings in a misleading manner* designed to unfairly help prosecutors obtain convictions." (2009 NAS Report at 45.)

33. The evidence is clear that during the time Mr. Green's case was being investigated and prosecuted, the State Bureau of Investigation Crime Laboratory was doing just that—presenting findings in a misleading manner designed to unfairly help prosecutors obtain convictions.

34. The report went on to state that a large concern is "the significant potential for bias that is present in some cases." (2009 NAS Report at 45.) Not only was the SBI Crime Lab intentionally and systematically presenting findings in a misleading manner, the potential for the impact of biased reporting can have in favor of conviction in a case as high profile as Mr. Green's cannot be overlooked.

iii. Ineffective Assistance of Trial Counsel for Failing to Have a Ballistics Expert Testify

35. In Mr. Green's 2015 First Amended Motion for Appropriate Relief, the issue of trial counsel's ineffectiveness for failing to retain a firearms expert was raised.

36. In support of that claim, Mr. Green has retained a ballistics expert, Mr. Joshua A. Wright, who has provided an affidavit (Ex. 13) which confirms that had a similar expert been hired by trial counsel, they would have been able to challenge the credibility of the State's theory of the case, resulting in a high probability the jury would have returned a different verdict.

37. Mr. Wright's affidavit challenges the veracity of the testimony of Special Agent Ronald Marrs at Mr. Green's trial regarding nitrites. He states,

> Special Agent, Ronald Marrs, testified that he observed a hole consistent with the passage of a projectile in the upper right chest area of the decedent's shirt. Chemical testing was positive for one nitrite reaction around that hole. He also testified that he observed a dark ring at the top and slightly at the bottom of that hole in the upper right chest area.
>
> . . .
>
> Nitrites from gunshot residues come from the partially burned and unburned gunpowder particles after discharging a firearm. Nitrites

[2] The 2009 NAS Report is available at http://www.nap.edu/catalog/12589.html.

> can also be found in decaying bodies and other areas of the environment.
>
> . . .
>
> Being trained and familiar with gunshot residues, it is my opinion that nitrites derived from the firing of a projectile would not withstand the presence of water for an extended period of time and would not have been present after 12 days.

(Ex. 13.)

38. Mr. Wright also challenges the veracity of SA Marrs's testimony regarding the cannelure, stating,

> Special Agent, Ronald Marrs, testified that the dark ring around the hole in the upper right chest area of the decedent's shirt "could be consistent with soot and the lubricant (from the cannelure) which would be grease, which wouldn't dissolve in the water.
>
> . . .
>
> A cannelure on a projectile has three uses, a crimping area during seating of the projectile, lubricant to assist in projectile to barrel transference, and finally, identification. During the firing of a projectile the grease is heated to a point that it melts completely. It is extremely unlikely that a hole in an article of clothing produced by the passage of a projectile and then submerged in water for 12 days would have a grease ring around the hole from said cannelure.

(Ex. 13.)

39. Mr. Wright conducted a reconstruction of the shooting using a 1992 Lexus 400 SC and Mr. Demery's trial testimony that described his position and Mr. Green's position at the time of the shooting. He concluded, "with the passenger window positioned as Mr. Demery stated in his testimony, and the decedent sitting up, also as described in Mr. Demery's testimony, I found that it would be impossible to replicate the trajectory 10 to 15 degrees downward from an individual standing on flat ground outside the car." (Ex. 13 ¶ 21.)

40. Crucially, he concludes that "if a ballistics expert had been hired by trial counsel to view the actual car at the actual location to perform an accurate reconstruction, a more definitive conclusion with regard to the evidence in this case and the veracity of Mr. Demery's testimony could have been reached." (Ex. 13 ¶ 22.)

iv. Newly Discovered Evidence of Larry Demery Telling Numerous Individuals That Daniel Green Was Not Involved in the Murder

41. Prior filings have detailed statements and affidavits from Marcus Carrington, William Cruise, Jason Sams, and Connee Brayboy, who have all stated that they were told by Larry Demery that Daniel Green was not present when James Jordan was murdered.

42. In July 2018, postconviction counsel was contacted by John Burton who was previously incarcerated with Mr. Demery. Mr. Burton's account parallels the statements Mr. Demery made to others.

43. Mr. Demery told Mr. Burton that Mr. Green got "a raw deal," "didn't deserve what he got," and "wasn't even there." (Ex. 41.)

44. The sworn affidavits of Marcus Carrington, William Cruise, Jason Sams, Connee Brayboy, and John Burton are also consistent with an interview of James Haggins conducted by the defense during Mr. Green's trial.

45. On February 8, 1996, Garth Locklear, a private investigator for the defense, interviewed James Thomas Haggins at the Robeson County Detention Center. (Ex. 14.)

    a. This interview took place after Mr. Haggins told his own attorney, Mr. Ronald Foxworthy, that Mr. Demery told Mr. Haggins details about Demery's crimes and Mr. Haggins gave Mr. Foxworthy permission to contact Mr. Green's counsel. (Ex. 14 at 6.)

46. Mr. Haggins told the defense that while he was in solitary confinement for an infraction, Mr. Demery was in another cell nine to ten feet away. Mr. Haggins detailed how they were able to have conversations given the layout of the cells. (Ex. 14 at 2.)

47. After they had been there for a week or two, Mr. Haggins asked Mr. Demery about his case. At first, Mr. Demery wouldn't discuss the James Jordan murder, but he did discuss other robberies he had committed. (Ex. 14 at 4.)

48. Mr. Demery was eventually willing to talk about the murder of James Jordan. According to Mr. Haggins, Mr. Demery said he was with another person, but that it was not Daniel Green. He said the man's last name was Oxendine, but Mr. Haggins could not recall the first name. (Ex. 14 at 4–5.)

49. Mr. Haggins does not know Mr. Green. He only saw him once in the jail and they never spoke. He told the defense that as far he knew, Mr. Green did not even know who he was. (Ex. 14 at 6.)

50. When asked why he came forward, Mr. Haggins told the defense,

> Well sir I have been listening to the news you know like everyone else is. When Daniel Green. I'm gone tell you when Larry Demery told me what he done that night about the James Jordan case and then what I heard on the news is not the same and plus you know like I say I don't know Daniel Green personaly (sic). I don't know the man but I've been in the situation before that someone's lied on me and you know I don't think it's right for noone (sic) to take another man's word over another man's word and say he's guilty and he's wrong. When it could be the other man's that you know is telling the lies. I've been lied on before and I don't think it's right. I don't think noone (sic) should have to go to a courtroom especially when their life is on the line. And for a person to sit and lie on them is dead wrong. I've bene (sic) lied on before you know and I don't think it's right. How can you eve (sic) let such a thing like this go on.

(Ex. 14 at 6–7.)

51. Mr. Haggins told Mr. Locklear that he was willing to speak with defense attorneys and testify in Court (Ex. 14 at 7), but he was never asked to do so.

ADDITIONAL CLAIMS FOR RELIEF

DUE PROCESS VIOLATIONS

i. It is a Violation of Due Process for the Prosecutor to Put Forth a Factual Stipulation Which He Knows is Inaccurate.

52. "[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *accord State v. McDowell*, 310 N.C. 61, 310 S.E.2d 301 (1984).

53. Additionally, the Supreme Court has established a "'standard of materiality' under which the knowing use of perjured testimony requires a conviction to be set aside 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *State v. Sanders*, 327 N.C. 319, 336, 395 S.E.2d 412, 424 (1990) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)), cert. denied, 498 U.S. 1051 (1991). "When a defendant shows that 'testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction,' he is entitled to a new trial." *Id.* at 336, 395 S.E.2d at 423 (quoting *State v. Robbins*, 319 N.C. 465, 514, 356 S.E.2d 279, 308 (1987), cert. denied, 484 U.S. 918 (1987)).

54. In the instant case, the false evidence came not in the form of witness testimony, but instead in the form of a stipulation, crafted by the prosecution and trusted and agreed to by the defense, to be considered by the jury as a substitute for the testimony of Michael Jordan.

55. The stipulation, which was entered into evidence at trial as State's Exhibit 10, details three pieces of jewelry given to Mr. James Jordan by his son, Mr. Michael Jordan: a 1986 NBA All-Star ring, a replica 1990-91 NBA Championship ring, and a 1991-92 NBA Championship watch. The stipulation further explains that "on December 27, 1995, Michael Jordan met with District Attorney Johnson Britt, Special Agent Kim Heffney and Detective Anthony Thompson in Chicago, Illinois." (Exhibit 15.)

56. According to the stipulation, "Michael Jordan viewed a photograph of Daniel Green, marked as State's Exhibit 1, and identified the following items in the photograph as items belonging to his father or as gifts from him to his father:

    1. Eyeglasses worn by the defendant are identical to those belonging to James Jordan.
    2. The wristwatch worn by the defendant was identified as the 1991-92 NBA Championship watch that was given to James Jordan.
    3. The ring worn by the defendant on his right hand was identified as the 1986 NBA All-Star ring that was given to James Jordan.
    4. The ring worn by the defendant on his left hand was identified as the 1990-91 replica NBA Championship ring that was given to James Jordan.

    (Exhibit 15.)

57. Special Agent Heffney's report concerning the interview with Mr. Michael Jordan on December 27, 1995, contradicts the information contained in the stipulation. In his report, Special Agent Heffney states that "Jordan advised the NBA All-Star ring shown to him by Mr. L. J. Britt, III was in fact the 1986 All-Star ring he had received after playing in the All-Star basketball game in Dallas, Texas." (Exhibit 16 at 1.)

58. Contrary to the stipulation, Special Agent Heffney's report indicates that Mr. Michael Jordan did not identify three pieces of jewelry and a pair of glasses from a photograph of Mr. Green. Rather, Mr. Michael Jordan identified one piece of jewelry which was presented to him in person. Special Agent Heffney's report makes no reference to any other identification. (Exhibit 16.)

59. The stipulation written by the prosecution was a false report.

60. The State's identification of Exhibit 1 as the photograph shown to Michael Jordan was a false statement.[3]

61. The entry of both Exhibit 1 and 10 into evidence by the State was in essence perjury.

62. The stipulation was used by the prosecution to inflame the jury and support the State's theory that Mr. James Jordan was robbed and murdered for the expensive and "flashy" jewelry that

[3] It is clear from the photograph that the glasses Mr. Green is wearing are not Mr. Jordan's and that it is impossible to identify the rings.

he was wearing.[4] (Trial Tr. 3962.) This contention, predicated on the false information underlying the stipulation, undoubtedly "affected the judgment of the jury." *Sanders*, 327 N.C. at 336, 395 S.E.2d at 424 (citation omitted).

63. Since the information supporting the stipulation "was in fact false, material, and knowingly and intentionally used by the State," Mr. Green is entitled to a new trial. *Id.* at 336, 395 S.E.2d at 423 (citation omitted).[5]

ii. It is a Violation of Due Process for the State to Allow False Testimony.

a. Larry Demery

64. According to his plea, Mr. Demery was required to testify truthfully at Mr. Green's trial. However, there are several instances where Mr. Demery unquestionably gave false testimony.

65. The version of his statement given prior to the plea offer differed from the one he gave after his plea, and was also different than the story he eventually gave during his testimony at Mr. Green's trial.

a. Mr. Demery's first statements to law enforcement occurred on August 15, 1993. There was both an audio recording and an unrecorded statement made on that date. In both statements he denies being present for the murder. (2015 First AMAR Ex. 42 at 56, Ex. 42 at 6–7.)

b. Mr. Hugh Rogers, was appointed to represent Mr. Demery on August 16, 1993.

c. On January 11, 1994, Mr. Demery was interviewed by Mr. Brant Clifton of *The Robesonian* newspaper and he again denies being present during the murder. (Ex. 43 at 1–2.)

d. On April 27, 1995, Mr. Demery signed his plea agreement. (2015 First AMAR Ex. 57.)

e. On May 2, 1995, Mr. Demery gave another statement, now saying he was sixty feet away from the car and running towards his own car when James Jordan was shot. (Ex. 44 at 6.)

f. On May 8, 1995, he "corrects" his May 2, 1995 statement and now says he was next to the car when Mr. Jordan was shot and about two feet from Mr. Green. (Ex. 44 at 48.) This statement is consistent with his trial testimony, but is a far cry from his statement at the time of his plea.

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[4] Mr. Green admits to finding the NBA All Star ring and the Championship watch in the center console two days later. The NBA Championship ring was never seen by the defendants or found by law enforcement.

[5] Interestingly, Demery testified that Mr. Jordan wore his watch on his right hand. That, of course, would make it easier for him to see from the right side of the car, but pictures of Mr. Jordan reflect that wore his watch on his left hand. (TT 4420, line 1)

g. Despite Mr. Demery's plea agreement on April 27, 1995 requiring him to testify truthfully at Mr. Green's trial, his version of the truth changed between the time of the plea and his trial testimony. Apparently "the truth" just had to be good enough to ensure Daniel Green's conviction.

66. As detailed in the ineffective assistance of counsel section below, Mr. Demery testified that he did not call Janine Baculik on July 22, but instead only called her on July 25. The evidence clearly shows not only that a call was made from Mr. Demery's home to his cousin's home on July 22, 1993 at 10:03 p.m. but that Mr. Demery specifically made that call.

a. Law enforcement conducted interviews with Demery's aunt, Alice Baculik, and Janine Baculik corroborating that Demery did, in fact, call their home the night of July 22 to state he was coming to NY to get rid of something. Demery's phone records show a call to the Baculik home at 10:03 p.m. on July 22.

b. This call is material because it directly disputes Mr. Demery's entire version of events.

67. Mr. Demery testified that when Mr. Green drove up with James Jordan's car that Mr. Green "opened up the driver's door and [Mr. Demery] got in behind him in the back seat." (Trial Tr. 3974.)

68. Mr. Demery said he had difficulty getting into the car "because the seated (sic), it was still laid back and Daniel hasn't, for some reason it wasn't up yet. An (sic) later on he told me it was because he just hadn't figured out how to get the seat to come back up." (Trial Tr. 3975.)

69. Based on Demery's own testimony, the position of the driver's seat was reclined back. With the seat of a two door car reclined back in that fashion, it was impossible for Mr. Demery to get in the car behind the driver or sit behind the driver's seat as he falsely testified.

70. This assertion is not only supported by common sense, it is supported by the the photo of the Lexus showing the position of the seat when reclined as described in Mr. Demery's testimony. (Ex. 17.) There was no space for Mr. Demery to fit behind the driver's side with the seat reclined.

71. Throughout his testimony, Mr. Demery made false statements that should have been known as false and corrected by the State.

b. Agent Ronald Marrs

72. SBI Agent Ronald Marrs testified that the SBI Crime Lab received Mr. James Jordan's clothing from SBI Agent Aprille Sweatt on August 18, 1993, including a Grand Slam brand's man's golf shirt. (Trial Tr. 5252.)

73. Later in his testimony, Agent Marrs stated that "when [he] received the clothing they were soaking wet, so [he] had to dry them for two weeks before [he] could work on it." (Trial Tr. 5257.)

74. However, Agent Marrs's testimony was directly, and unequivocally, contradicted by the testimony by Michael Avery. Mr. Avery was employed by the South Carolina Law Enforcement Division's (SLED) trace evidence section in 1993 when SLED received Mr. James Jordan's shirt. (*See* Trial Tr. 1104.)

75. Mr. Avery testified the he went to Palmetto Professional Services on August 15, 1993, dug up the buried clothing himself, and took custody of it. (Trial Tr. 1107.)

76. Mr. Avery took the clothing back to SLED headquarters, "opened the plastic backing, inventoried the contents, [and] placed the contents *out for drying*." (Trial Tr. 1108 (emphasis added.))

77. Therefore, for the three days before Agent Marrs had possession of the shirt, it was being dried out. It is not possible that the shirt was still "soaking wet" as he testified.

    a. This false testimony is in addition to the issues with Agent Marrs's testimony raised above in the sworn affidavit of Mr. Joshua Wright.

78. Not only were Mr. Green's due process rights violated, pursuant to *Napue*, by the admission of false testimony by the State, but Mr. Green also received ineffective assistance of counsel when his trial counsel's failed to cross examine Agent Marrs on his false testimony.

79. A conviction based upon the false and misleading testimony of forensic analysts and the State's primary witness cannot be allowed to stand.

80. When falsehoods are identified, confidence in all of the evidence is shaken and justice demands Mr. Green's conviction be vacated as a result.

iii. Mr. Green's Due Process Rights, Pursuant to *Brady v. Maryland*, Were Violated When the State Did Not Turn Over Information Favorable to the Defense.

a. Phone Calls Between Mr. Green, Melinda Moore, and Deloris Sullivan.

81. Prior to trial, trial counsel for Mr. Green filed a request for voluntary discovery to be treated by the Court as a motion for discovery should the State not respond accordingly. Additional motions were filed requesting specific information from the State, including but not limited to a Motion to Compel Immediate Disclosure of Existence of Promises of Immunity, Leniency or Preferential Treatment, a Motion to Reveal the Deal, a Motion for Preservation of Notes and Tapes, and a Motion to Order Sheriff's Department to Disclose Records for Inspection and Copying.

82. The State has a duty to disclose evidence favorable to an accused person whether or not a defendant specifically requests the favorable evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Agurs*, 427 U.S. 97, 107–11 (1976). Even if a prosecutor does not himself possess *Brady* material, he has a duty to learn of any favorable evidence known to other government agents, including law enforcement. *Kyles v. Whitley*, 514 U.S. 432, 419 (1995).

83. The State's duty to disclose favorable evidence under *Brady* covers not only exculpatory evidence but also information that could be used to impeach State witnesses. *Giglio v. United States*, 405 U.S. 150, 154 (1972). The court in *Giglio* held that the State cannot knowingly create a materially false impression regarding the facts or the credibility of witnesses. *Giglio*, 405 U.S. at 153. A materially false impression can be created by an act of omission as well as an act of commission. A jury is entitled to hear evidence relevant to the credibility of witnesses. *Id.* at 155. In *Kyles*, the Supreme Court emphasized that there is no distinction between impeachment and exculpatory evidence for *Brady* purposes.

84. The State's obligation to disclose favorable evidence is limited to evidence that is material to the defendant's guilt or punishment. *Brady*, 373 U.S. at 87. In *United States v. Bagley*, 473 U.S. 667, 682 (1985), the Supreme Court held that evidence is material if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. This standard does not require a showing that, more likely than not, disclosure of the suppressed evidence would have resulted in an acquittal. *Kyles*, 514 U.S. at 434. Rather, when evaluating the materiality of suppressed evidence, the standard is a "reasonable probability" of a different result. *Id.* at 433. A reasonable probability of a different result exists where "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. Evidence withheld from the defense is to be evaluated collectively, not item-by-item. *Id.* at 436.

85. In the instant case, the State failed to disclose evidence which contradicted its theory of the case at trial. Specifically, that Mr. Green had exclusive control of what the State claims was the murder weapon, that Mr. Green was dedicated to finding opportunities to rob people, that Mr. Green was quick to brandish weapons at the slightest perceived provocation, and that Mr. Green conspired to rob, shoot and kill Mr. James Jordan. Moreover, the State failed to disclose critical impeachment evidence which included inconsistent statements from the State's witnesses and evidence of their bias and motives to testify.

86. The jury's verdict and findings of fact prove that they did not find Mr. Demery credible as, contrary to Mr. Demery's testimony, the jury did not find that Mr. Green was the person who shot Mr. Jordan. (Ex. 27.)

87. Mr. Demery was the only witness that linked Mr. Green to the murder. The fact that the jury found Mr. Green guilty despite their apparent disbelief of the most important parts of Mr. Demery's testimony, increased the potential impact of the circumstantial evidence

introduced through other witnesses. The State's failure to disclose impeaching evidence that could have been used in cross-examination denied Mr. Green due process.

88. The State failed to disclose evidence in its possession that directly contradicted and impeached the testimony of Deloris Sullivan and Melinda Moore.

    a. In his 2008 Order, Judge Floyd's allowed this claim to proceed. (Ex. 3.)

89. Ms. Sullivan testified that Mr. Green had a roll of money and told Ms. Sullivan and Ms. Moore that the money came from selling drugs and robbing people. She also testified that Mr. Green had her take him and Mr. Demery to a basketball court in Marion, South Carolina called the "Honey Hole" to rob someone. (Trial Tr. 2611, 2623, 2625–26.)

90. In the taped conversations she admitted she lied about these incidents because the police told her she would be charged with criminal acts if she did not cooperate. (2008 *Pro Se* MAR at 31–32.)

91. During a phone call, Ms. Sullivan also told Mr. Green that contrary to what Ms. Moore told him, Ms. Moore was never pregnant with his child but was attempting to scam Mr. Green out of money under the pretense of needing the funds for an abortion. (2008 *Pro Se* MAR at 32.)

92. The State's withholding of the above-described information denied Mr. Green the opportunity to present exculpatory, impeachment and mitigating evidence to the jury. Ms. Moore's and Ms. Sullivan's respective testimony bolstered Mr. Demery's version of the events surrounding James Jordan's murder as well as his negative portrayal of Mr. Green.

93. Mr. Green, who recalls the content of the conversations and will testify to them, has indicated the tapes of the calls include evidence of the following:

    a. In order to get money from him for an abortion she did not need, Ms. Moore told Mr. Green she was pregnant with his child. He did not believe her so he limited their contact and later found out she was engaged to another man during the course of their relationship. After he distanced himself, Ms. Moore became angry.

    b. Ms. Moore had previously used the same lies to obtain money from other men.

    c. Officials confronted Ms. Moore, convinced her Mr. Green was not concerned about her well-being, and told her she would be charged for conspiracy to commit armed robbery, larceny, and various other charges if she did not cooperate. As a result, she lied about Mr. Green pulling a weapon on someone at a club, about him getting her pregnant, and other accusations designed to portray Mr. Green in the worst possible light.

    d. Ms. Sullivan told investigators that Ms. Moore had regularly lied to other men about fake pregnancies and was lying about Mr. Green.

e. Ms. Sullivan said she was also threatened with prosecution for armed robbery conspiracy, larceny, and other charges if she did not cooperate and lie about Mr. Green.

(2008 *Pro Se* MAR.)

94. During a jail call recorded by the State, Ms. Moore told Mr. Green she lied when she told law enforcement that Mr. Green had planned to rob people.

95. During an interview on February 21, 1995 with a defense private investigator, Ms. Moore said she lied to law enforcement, corroborating what Mr. Green said about the phone calls. (Ex. 18 at 86–87.)

96. When asked to explain why she had given false information, Ms. Moore stated:

> First of all because, first out of anger and fear. But mainly because of the way that I was told that [Mr. Green] was talking about me and the things that he was doing to destroy my character and out of revenge, I said some things that I felt like I thought they wanted from the way that they asked the questions, I answered and then after re-thinking it and you know getting into it and finding out more, I found out that they tricked me, they used me and stuff like that, but I did lie when they first started coming to see me because I was mad and they kept boosting me up because they were telling me certain things that he was saying about me and I didn't feel like he had a reason to.

(Ex. 18 at 87.)

97. Ms. Moore also said that the statement that had been provided by law enforcement to Mr. Green's counsel included "a lot of things" she never said. (Ex. 18 at 87–88.)

98. The State's theory in this case hinged on convincing the jury that Mr. Green was a cold-blooded killer who spent his days looking for victims to rob and portraying him as a thug ready to shoot anyone who was in his way. This characterization of Mr. Green was offered through Mr. Demery, a man who testified to get a favorable plea bargain and save his own life. In order to bolster Mr. Demery's credibility, which the jury clearly doubted to some extent, the State offered evidence through Melinda Moore and Deloris Sullivan.

99. If the State had disclosed this evidence, it would have not only impeached the testimony of Ms. Moore and Ms. Sullivan, but would have called into question the tactics law enforcement used throughout its investigation.

100. The State's conduct in withholding the recordings and other information denied Mr. Green due process and interfered with his right to effective assistance of counsel, undermining confidence in the verdict. Had this information been disclosed, there is a reasonable probability that the result of the proceeding would have been different. *Kyles*, 514 U.S. at 433.

b. Interview of Hubert Larry Deese

101. On June 8, 2016, Mr. Green filed a Supplement to Motion for Discovery and Request for Expedited Hearing.

102. That filing pointed out specific information gained from a Freedom of Information Act request that indicated Hubert Larry Deese was interviewed by the North Carolina State Bureau of Investigation. In part, the filing stated:

> a. The FBI contacted the North Carolina SBI and informed them it had determined that James Jordan's cellular phone had called Hubert Deese, the son of Sheriff Hubert Stone, "shortly following [Jordan's] murder." *See* Exhibit 108.
>
> b. The SBI gave the FBI the impression in November 1993 that this fact was previously unknown to them. *See id.* at 2 (noting that "the SBI . . . was made aware of the fact by the FBI that a telephone call was placed from the cellular phone of the shortly following his murder to [Hubert Deese]" (emphasis added)).
>
> c. In response, the NC SBI told the FBI it would look into the issue. *Id.* at 2. ("SBI Investigators advised that [Deese] is to be interviewed regarding this point on the evening of November 23, 1993.").
>
> d. The NC SBI emphasized to the FBI that the Deese phone call was "strictly a local matter" and that it should "not be mentioned outside the FBI." *Id.* at 1.
>
> e. The NC SBI told the FBI that Deese, who at the time had not yet been arrested by the DEA for drug trafficking, was a "named target[] in a 10 month ongoing [Organized Crime and Drug Enforcement Task Force] investigation into cocaine distribution." *Id.* at 2-3.
>
> f. As the document is dated November 19, 1993, this would indicate that the SBI knew Deese was a drug suspect prior to and during the time of the Jordan homicide.

(2016 Supplement to Motion for Discovery at 3–4.)

103. A document subsequently produced in postconviction discovery adds additional credibility to the assertion that Mr. Deese was interviewed as part of the investigation into James Jordan's murder. (Ex. 19.)

104. The document is an outline of investigative steps taken in the case. It includes a list of individuals whose numbers were called from Mr. Jordan's car after the State alleges he was killed. (Ex. 19.)

105. "(Dictated)" is written next to the names of individuals whose numbers were called from Mr. Jordan's vehicle and who were interviewed by law enforcement as a result. (Ex. 19 at 6–8.)

106. One of those numbers belonged to Mr. Deese. Next to his name and number is typed "(Dictated)". (Ex. 19 at 8.)

107. The defense has not been provided a copy any interview of Hubert Larry Deese in connection with Mr. Jordan's death, despite this document indicating that one was "dictated".

108. Combined with the FBI teletype previously detailed in the 2016 discovery motion, it is clear that an interview of Mr. Deese did occur and that it has never been disclosed to the defense.

iv. Mr. Green's Due Process Rights, Pursuant to *Brady v. Maryland*, Were Violated When Law Enforcement Did Not Sufficiently Document an Interview It Conducted with a Key Alibi Witness.

109. As detailed in previous filings, Mr. Green has always maintained that he was not present for the murder of James Jordan and that he was attending a cookout at the home of a family friend, Kaye Hernandez, when the murder occurred. Several individuals were present for the cookout, including Melissa Grooms.[6]

110. A note in the law enforcement file confirms that Ms. Grooms was interviewed by law enforcement in 1993. However, beyond her contact information, the note only indicates "Grooms told Andrews she talked to Daniel Green that night at Monica Hernandez (sic) house" and a note indicating Kaye Hernandez should be re-interviewed. (Ex. 20.)

111. If provided, the note's brevity and lack of details would have hidden the true nature of the conversation and its importance to Mr. Green's defense. The note fails to include the information, favorable to the defense, that Ms. Grooms provided to law enforcement when they interviewed her.

112. On September 5, 2018, Ms. Grooms signed an affidavit detailing her knowledge of Mr. Green's whereabouts the night of the murder and her conversation with law enforcement in 1994. (Ex. 21.)

113. The affidavit states that in July 1993, she was living in Lumberton and was on summer break from Lumberton High School. She was good friends with Kaye Hernandez's daughter, Monica. (Ex. 21 ¶ 3–4.)

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[6] Melissa Grooms is now Melissa Bullard, as reflected in her affidavit.

114. On July 22, 1993, she lied to her parents about her plans for the evening so that she could go to a party with her friends. Her friend, Christy Locklear, allowed Ms. Grooms to say she was staying at Ms. Locklear's house as long as she arrived at Ms. Locklear's house before 5:00 a.m. when Ms. Locklear's father would be awake and getting ready for work. (Ex. 21 ¶ 6.)

115. Mr. Grooms arrived at Kaye Hernandez's home after midnight. There had been a cookout earlier and everyone was hanging out around the house afterwards. "The teenagers listened to music and visited on the porch late into the night. Some people, including Monica's brother-in-law, Hector, went to bed. Kaye Hernandez and Ann Green spent time together in a separate room from the teenagers." (Ex. 21 ¶ 7–8.)

116. Although she had heard of Mr. Green, Ms. Grooms had never met him before the early morning hours of July 23, 1993. (Ex. 21 ¶ 10.)

117. According to Ms. Grooms, "[s]ometime after 1:00 a.m. on July 23, 1993, Larry Demery attempted to get Daniel Green to leave the home, but Daniel wouldn't go with him." Mr. Green wanted to stay and talk with Bobbie Jo Murillo. (Ex. 21 ¶ 11.)

118. Mr. Demery then left the home, *alone*, and Mr. Green remained at the house. (*See* Ex. 21 ¶ 12.)

119. Ms. Grooms left the house around 4:00 or 4:30 a.m. so she could make it to Ms. Locklear's before her father woke up. When she left, Mr. Green was still at the house with Ms. Murillo and Mr. Demery had not returned. (Ex. 21 ¶ 13.)

120. The next month, after hearing about Mr. Green's arrest, Ms. Grooms went to her school's assistant principal to tell her what she knew. A few days later, law enforcement agents came to her school and interviewed her in the principal's office. (Ex. 21 ¶ 14–17.)

121. She met with the law enforcement officers for thirty to forty-five minutes and told them details of that night, including that Mr. Demery had left alone and Mr. Green stayed at Kaye Hernandez's house. (Ex. 21 ¶ 18–19.)

122. Ms. Grooms said "[t]he agents seemed irritated by my story and tried to convince me that I didn't remember things correctly. I told the agents that there was a videotape made at the Hernandez home that would support what I was saying, and they responded that times and dates can be changed on video cameras." (Ex. 21 ¶ 19.)

123. Ms. Grooms told her mother about the conversation with law enforcement and her mother told her "to stay out of it and not to get involved." (Ex. 21 ¶ 21.)

a. Ms. Grooms's mother, Julia Grooms, has also signed an affidavit corroborating her daughter's account. (Ex. 22.)

b. Julia Grooms remembers that her daughter came home one afternoon in August 1993 and was upset because law enforcement had pulled her out of class and questioned her. (Ex. 22 ¶ 5.)

c. She stated, "Melissa was upset and told me that the SBI agents were rude to her and made her feel like what she had to say was not important. Melissa was also upset because I had always stressed how important it was to tell the truth, but it seemed they didn't believe her." (Ex. 22 ¶ 7–8.)

d. For her part, Julia Grooms "was upset that law enforcement had spoken with [her] daughter without [her] permission or knowledge." (Ex. 22 ¶ 9.)

e. Despite Ms. Grooms wanting to tell someone else, Julia Grooms "told her they were not going to listen to her so she should try not to let it bother her." (Ex. 22 ¶ 10.)

f. Her daughter had mentioned over the years that "she knew Daniel Green was innocent because he stayed at the house that night." (Ex. 22 ¶ 12.)

g. In 2016, Ms. Grooms told her mother about the newspaper article and a conversation with her pastor. "Melissa felt responsible that Daniel Green's incarceration was prolonged because no one believed her in 1993, and she had not known what to do about it since then." (Ex. 22 ¶ 13–14.)

124. Ms. Grooms was never interviewed by the defense and "[p]rior to Daniels' trial, [she] became pregnant, withdrew from Lumberton High School, got married, and had [her] first child." By the time Mr. Green went to trial, she was no longer enrolled in school and did not interact as much with Monica Hernandez. (Ex. 21 ¶ 22.)

125. Importantly, she states, "I have always believed that Daniel Green was wrongly convicted, because he was in the same house as me at the time he is said to have killed Mr. Jordan." (Ex. 21 ¶ 23.)

126. In April 2016, Ms. Grooms saw an article in the newspaper that Mr. Green's counsel had filed a motion for a new trial. She consulted with her pastor, who encouraged her to come forward. As a result, she contacted Mr. Green's postconviction counsel. (Ex. 21 ¶ 24–25.)

127. The State cannot skirt its *Brady* obligations by failing to properly document a witness interview that divulged information favorable to the defense.

v. Mr. Green's Due Process Rights Were Violated When Law Enforcement Intimidated Mr. Green's Alibi Witness and Falsely Told Her She Was Too Young to Testify.

128. In Ms. Grooms's affidavit, she also states that when she told law enforcement she "was telling the truth" and "would swear to it in court," one of the agents responded by saying, "You're too young to testify in court." (Ex. 21 ¶ 20.)

129. As a result, Ms. Grooms "believed, as the agent told [her], that because [she] was under 18 at the time, that [she] could not have testified for Daniel even if someone had wanted [her] to." (Ex. 21 ¶ 23.)

130. Intimidating a witness by falsely telling them they cannot testify in court was misconduct designed to discourage an alibi witness from coming forward.

131. Had Ms. Grooms not been discouraged from coming forward, her testimony, as an independent disinterested witness, would have been compelling and created more than a reasonable doubt as to whether Mr. Green could have been present when James Jordan was murdered.

132. A conviction obtained through egregious misconduct is a violation of due process and cannot stand.

vi. Mr. Green's Waiver of His Right to Testify Was Not Made Knowingly, Violating his Due Process Rights.

133. Mr. Green has signed an affidavit swearing to his innocence, detailing his desire to testify at trial, and explaining the reasons he ultimately did not. (Ex. 23.)

134. Mr. Green states, "I wanted to testify at my trial because I was the only person who could tell the jury the truth about what happened on July 23, 1993." (Ex. 23 ¶ 5.)

135. Mr. Green's trial counsel told him that his "trial was going well and they did not want [him] to testify." (Ex. 23 ¶ 7.)

136. Going a step further to prevent Mr. Green from testifying, one of his attorneys told him that if he "testified, he would question [Mr. Green] about who the driver was during the July 4th robbery of the Family Inn. Mr. Bowen knew that [Mr. Green] did not want to implicate the driver because the driver didn't know anything about the robbery." (Ex. 23 ¶ 9.)

a. His trial counsel "had already allowed evidence of that robbery to come in through cross-examination despite Judge Weeks' admonitions." (Ex. 23 ¶ 10.)

137. Mr. Green was told by his counsel that if he "wouldn't answer the question about the driver on the stand, he would not ask [Mr. Green] any questions if [Mr. Green] took the stand," thereby making it so Mr. Green "would be alone." (Ex. 23 ¶ 11.) That is a terrifying position for a young man facing the death penalty to be put in by his own counsel.

138. Mr. Green "felt Mr. Bowen was using [his] refusal to name the driver to try and manipulate [his] decision about testifying." Crucially, Mr. Green "felt threatened by Mr. Bowen." (Ex. 23 ¶ 12.)

a. Importantly, the same counsel had taken advantage of Mr. Green's vulnerability previously and had him sign a contract regarding the rights to his music as detailed in prior filings.

139. Based on his prior experience with the Robeson County Public Defender's Office, where he was wrongfully convicted with that conviction subsequently vacated based on ineffective assistance of counsel, Mr. Green "did not trust Mr. Thompson" because he worked in that same office. (Ex. 23 ¶ 13.)

a. The Court Order vacating Mr. Green's prior assault conviction and detailing the ineffective assistance of counsel he received is attached as Exhibit 24.

140. His counsel "asked attorney Henderson Hill to come see [Mr. Green] to convince [him] not to testify." (Ex. 23 ¶ 14.)

a. Mr. Hill had represented Mr. Green in his Motion for Appropriate Relief for the prior case. Mr. Green's counsel knew that he "trusted Mr. Hill." (Ex. 23 ¶ 15.)

b. Mr. Hill told Mr. Green that he "should not testify and promised [Mr. Green] that if [he] was convicted [of Mr. Jordan's murder, Mr. Hill] would represent [Mr. Green] in a Motion for Appropriate Relief challenging the conviction." (Ex. 23 ¶ 16.)

141. Mr. Green has always maintained that this promise by Mr. Hill was the deciding factor for his decision not to testify, despite his desire to do so. (Ex. 23 ¶ 17.)

142. Although Mr. Green contacted Mr. Hill after his was convicted, "Mr. Hill has not assisted [him] in challenging [his] conviction." (Ex. 23 ¶ 18.)

143. Critically, Mr. Green asserts,

> If Mr. Hill had not promised to represent me post-conviction, I would not have waived my right to testify at my trial. My reliance on Mr. Hill's false promise of future representation was the deciding factor that caused me to waive my right to testify.

(Ex. 23 ¶ 19.)

144. The evidence supports Mr. Green's assertion that his waiver of his right to testify was not made knowingly or voluntarily. Rather, his waiver was made only after being threatened by his own counsel and relying on a false promise of future representation.

vii. Mr. Green's Due Process Rights Were Violated When Judge Weeks Did Not Properly Question Juror Cassidy After His Conflict Was Brought to the Attention of the Court.

145. "It is the duty and responsibility of the trial judge to insure that the jurors remain impartial and uninfluenced by outside forces." *State v. Rutherford*, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919 (1984).

146. "[W]hether the alleged misconduct has affected the impartiality of a particular juror is a discretionary determination for the trial judge." *Id.*

147. "The reason for the rule of discretion is apparent . . . . The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings." *Id.* (quoting *State v. Drake*, 31 N.C. App. 187, 190, 229 S.E.2d 51, 54 (1976)).

148. Thus, "the determination of the trial court on the question of juror misconduct will be reversed only where an abuse of discretion has occurred." *State v. Drake*, 31 N.C. App. 187, 190, 229 S.E.2d 51, 54 (1976).

149. However, when reviewing courts have refused to find that the trial court abused its discretion, "in each case the record shows that the trial court conducted a careful, thorough investigation, including an examination of the juror involved when warranted and concluded that the conduct had not prejudiced the jury on any key issue." *Id.* at 191, 229 S.E.2d at 54.

150. "Reversible error may include not only error prejudicial to a party but also error harmful to the judicial system. Basic principles of proper juror conduct should not be ignored by the trial court." *Id.* at 192–93, 229 S.E.2d at 55.

151. In the present case, Judge Weeks read letters *in camera* from key alibi witnesses who alleged an antagonistic relationship with one of the jurors, but did not conduct "a careful, thorough investigation," and in fact made no investigation whatsoever.

152. In her letter, Nellie Montes alleged that James Cassidy behaved inappropriately towards her while she was still a minor, and that he was aware of the fact that she did not like him and was uncomfortable around him. (Ex. 25.)

153. In her own letter, Kaye Hernandez alleged that James Cassidy had visited her home over the holidays of 1995. (Ex. 26.)

154. James Cassidy was accepted as a juror on December 11, 1995. (Jury Selection Tr. 1479.) Upon being accepted as a juror, James Cassidy was properly instructed "not to have any contact or communication of any kind with any of the attorneys, parties, witnesses, prospective witnesses or directly with the Court. (Jury Selection Tr. 1480.)

155. Kaye Hernandez's allegation that James Cassidy knew she was an alibi witness and visited her home over the holidays of 1995, if true, would clearly constitute improper contact with prospective witnesses. As such, it was incumbent upon Judge Weeks to conduct further investigation to ensure that "the conduct had not prejudiced the jury on any key issue." *Drake*, 31 N.C. App. at 191, 229 S.E.2d at 54.

156. Judge Weeks' failure to conduct any investigation into the alleged misconduct of juror James Cassidy was an abuse of his discretion. As indicated by the court in *Rutherford*, the reason for leaving such issues to the discretion of the trial judge is because the trial judge is better situated "to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings." *Rutherford*, 70 N.C. App. at 677 (citation omitted).

157. Judge Weeks did not investigate the allegations of misconduct, did not question witnesses, and did not make any findings. Instead, he summarily concluded, "there's nothing before me which would indicate any juror misconduct." (Trial Tr. 7669.)

158. Judge Weeks' abuse of discretion in this instance is further evidenced by the manner in which he previously addressed the alleged misconduct of two other jurors, both of whom were excused as a result of their conduct.

159. Early in the trial, juror Patricia Locklear notified the court that another juror, Cecelia Ellerbe, made some potentially improper comments. (Trial Tr. 1833–35.) Judge Weeks held a hearing in chambers during which he questioned Patricia Locklear, and then allowed the prosecution and defense the opportunity to question her. (Trial Tr. 1836–49.) During that examination, Patricia Locklear indicted that prior to raising her concern with the court, she had spoken with a friend, Jack Inman, about the issue. (Trial Tr. 1837–38.)

160. Judge Weeks subsequently conducted *in camera* questioning of Jack Inman; Cecelia Ellerbe; a bailiff, Jimmy Ray Horne; and yet another juror, Angela Coverdale, who had also heard the improper comments made by Cecelia Ellerbe. (Trial Tr. 1858–88.) In each instance, Judge Weeks questioned the witness and then allowed both the prosecution and the defense the opportunity to do so. (Trial Tr. 1858–88). Ultimately, both Patricia Locklear and Cecelia Ellerbe were excused from the jury. (Trial Tr. 1894.)

161. Judge Weeks conducted no such investigation with the allegations pertaining to James Cassidy. James Cassidy was not questioned by Judge Weeks, the prosecution, or the defense. Neither Kaye Hernandez nor Nellie Montes were questioned about the allegations.

162. Judge Weeks had a duty to ensure that no juror behaved improperly or had been improperly influenced. He neglected that duty by failing to conduct even a minimal investigation into allegations of serious juror misconduct by James Cassidy. His abuse of discretion constitutes both "error prejudicial to a party" and "error harmful to the judicial system." *Drake*, 31 N.C. App. at 192–93, 229 S.E.2d at 55.

ELEMENTS OF FIRST DEGREE FELONY MURDER NOT MET

163. There was no factual basis to support the conviction for first-degree felony murder because the jury did not unanimously find that Mr. Green killed James Jordan, and no evidence was presented that would allow the jury to determine that his co-defendant, Larry Demery, killed Mr. Jordan.

164. North Carolina adheres to the agency theory of felony murder. Accordingly, in North Carolina, the felony murder rule only applies where death in question was caused by an agent of the underlying crime, thereby limiting the reach of the felony murder doctrine in North Carolina to acts committed by the felon or a co-felon. *See State v. Bonner*, 330 N.C. 536, 542–44, 411 S.E.2d 598, 601–02 (1992). *See also State v. Williams*, 185 N.C. App. 318, 332, 648 S.E.2d 896, 906 (N.C. Ct. App. 2007).

165. It has been the common law in North Carolina since at least 1924 that "a person may not be held criminally responsible for a killing unless the homicide were either actually or constructively committed by him, and in order to be his act, it must be committed by his own hand, or by someone acting in concert with him, or in furtherance of a common design or purpose." *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568, 570 (1924).

166. To apply the felony-murder rule, the evidence must show "that the felon or his accomplice commit[ed] the killing, for if he does not, the killing is not committed to perpetrate the felony." *Weick v. State*, 420 A.2d 159, 162 (Del. 1980) "In adjudging a felony-murder, it is to be remembered at all times that the thing which is imputed to a felon for a killing incidental to his felony is malice and not the act of killing.... It is necessary . . . to show that the conduct causing death was done in furtherance of the design to commit the felony." *Id.* at 162.

167. The State contends in its Answer to the Motion for Appropriate Relief that the State's evidence tended to show that Mr. Green shot and killed James Jordan, that Larry Demery was not the shooter, and that Larry Demery was only an accomplice. (State's 2015 Answer to MAR at 1, 10, 61.; State's 2016 Answer to First MAR Supplement at 4–5.)

168. Larry Demery pled guilty to felony murder and his testimony was the only evidence offered to prove beyond a reasonable doubt that Mr. Green fired the shot that killed James Jordan. This scenario was the only scenario under which Mr. Green could be convicted of felony murder, given that there was no evidence presented that a co-defendant pulled the trigger.

169. Only Larry Demery and Daniel Green were indicted and charged with James Jordan's murder. The State asserted that Mr. Demery and Mr. Green were the only persons involved, and specifically named Mr. Green as the shooter. The jury instructions specify that the State contended that Larry Demery was an accomplice. The State maintained during arguments in the sentencing phase, after the jury reached its verdict, that Mr. Green pulled the trigger. (Trial Tr. 7451, 8192.)

170. Neither the State nor the defense put on any evidence that tended to show Larry Demery pulled the trigger and killed James Jordan.

171. Mr. Green could only be convicted on felony murder if the he was unanimously convicted of all three elements of felony murder:

a. Killing;

b. Of a human being;

c. During the commission of a felony (robbery).

(Trial. Tr. 7459.)

172. As no evidence was put forth that Larry Demery killed James Jordan, the State could only satisfy the "killing" element of felony murder by a unanimous jury verdict that Mr. Green was the shooter.

a. Although defense counsel raised the theory that Larry Demery killed James Jordan during opening and closing arguments, the United States Supreme Court has held that the "verdict must be based upon the evidence developed at the trial. This is true regardless of the heinousness of the crime charged, the apparent guilt of the offender, or the station in life which he occupies." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). "[T]he arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996).

173. Additionally, the Court specifically charged that the jury had to find that Mr. Green:

a. Committed or attempted to commit robbery with a firearm;

b. While committing or attempting to commit robbery with a firearm **the defendant killed the victim with a deadly weapon**;

c. The Defendant's act was a proximate cause of the victim's death.

(Trial Tr. 7463–7464 (emphasis added.))

174. The judge's instructions to the jury made clear that they could only find Mr. Green guilty of felony murder if they also concluded Mr. Green shot James Jordan. (Trial Tr. 7466.)

175. Although "[i]t is elementary that the jury may believe all, none, or only part of a witness's testimony," *State v. Miller*, 26 N.C. App. 440, 443, 216 S.E. 2d 160, 162 (N.C. Ct. App. 1973), when a jury fails to believe the only evidence supporting one element of the crime, the conviction must be vacated.

176. In Mr. Green's case, the verdict sheet shows that the jury did not believe Larry Demery's testimony proved the first element of the offense, the killing, was committed by Mr. Green beyond a reasonable doubt. (Ex. 27 at 1.)

177. The jury did not have the option to find that Mr. Green was a co-felon in the robbery, but that Demery pulled the trigger. No evidence was presented by either the State or the defense which supported that theory and the jury instructions precluded that option.

178. By accepting Mr. Demery's plea, the State conceded that he testified truthfully that he was not the shooter.

179. The jury did unanimously find that Mr. Green "was a major participant in the underlying felony (robbery and conspiracy to commit armed robbery) and showed reckless disregard for human life."[7] (Ex. 27 at 1.) However, without a unanimous finding of guilt beyond a reasonable doubt of every element of the felony-murder charge, that conviction is unlawful and cannot stand.

180. "Where a special finding of facts is inconsistent with the general verdict, the former controls, and the court shall give judgment accordingly." N.C. Gen. Stat. § 1–202; N.C. Gen. Stat. § 1A–1, Rule 49.

181. In addition to the conviction being unlawful for failing to prove the elements of the crime, Mr. Green's trial counsel *and* appellate counsel were ineffective, pursuant to the standard set forth below in *Strickland v. Washington*, for not previously bringing this issue to the Court's attention. Their failure to bring this to the trial court's attention and the appellate court's attention has resulted in Mr. Green being wrongly incarcerated for over two decades.

INEFFECTIVE ASSISTANCE OF COUNSEL

182. The Sixth Amendment guarantees defendants the right to effective assistance of competent counsel. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). This right plays a crucial role in ensuring a fair trial, "since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' [. . .]" *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 275–76 (1942)). An individual may be deprived of his right to counsel when counsel has "simply [. . .] fail[ed] to render 'adequate legal assistance.'" *Id.* at 686 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)).

[7] Based on the jury's findings, Mr. Green could only have been convicted of felony murder under the proximate cause theory of felony murder—which North Carolina does not recognize. *See State v. Bonner*, 330 N.C. at 542–44, 411 S.E.2d 601–02. However, as discussed above, even if North Carolina did recognize the proximate cause theory of felony murder, the instructions given to the jury would still make it impossible for them to have found Mr. Green guilty of felony murder while also finding that he was not the shooter.

183. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

184. A petitioner claiming ineffective assistance of counsel (IAC) must ordinarily make two showings. First, he must show that counsel's performance was deficient. *Id.* at 687. Counsel's performance is deficient when it falls below an "objective standard of reasonableness" under the circumstances. *Id.* at 688–90.

185. Second, a petitioner must also show that counsel's deficient performance prejudiced him. *Id.* at 687. Counsel's performance is prejudicial when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

186. The Supreme Court of the United States has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that 'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). Further, the Supreme Court has determined that "[t]he first prong-constitutional deficiency-is necessarily linked to the practice and expectations of the legal community." *Hinton v. Alabama*, 571 U.S. 263, 273 (2014). Further, "[c]ounsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688.

187. Throughout Mr. Green's trial, defense counsel failed to provide adequate representation, and their deficient performance prejudiced Mr. Green such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

188. While the State has argued that some of Mr. Green's claims should be procedurally barred for failure to raise them on direct appeal, the Court should look to the 2018 decision in *State v. Hyman*.

a. In *Hyman*, the Court stated that "[a]s we have previously indicated, N.C.G.S. § 15A–1419(a)(3) 'is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review' and requires the reviewing court, instead, 'to determine whether the particular claim at issue could have been brought on direct review." *State v. Hyman*, __ N.C. App. __, 817 S.E.2d 157, 169–70 (2018) (Quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 525 (2001)).

i. Ineffective Assistance of Trial Counsel for Failing to Consult a Serology Expert Concerning the Alleged Blood Evidence

189. The State presented evidence that a small amount of blood was found between the top and bottom cushions of the passenger seat of the Lexus. The validity of that evidence has been seriously undermined, as detailed in Mr. Green's 2015 First Amended MAR.

190. Nevertheless, defense counsel should have presented a serology expert to effectively rebut the State's contention that there was blood in the car.

191. The State introduced State's Exhibit 100, a drawing by the State's expert, Jennifer Elwell, where she conveniently used a red marker to indicate where she purportedly found blood on the seat. (Ex. 30.)

192. State's Exhibit 100 misleadingly illustrates that blood was visible on the car seat and significantly exaggerated the amount of alleged blood found there. Defense counsel should have objected to the introduction of such a misleading characterization of physical evidence and, if still allowed into evidence, should have used an expert to question its accuracy.

193. Defense counsel also needed a serology expert to counter the incorrect assertion from Agent Elwell that "[t]here is nothing that would give you a false positive for phenolphthalein and luminol." (Trial Tr. 5611.) A serology expert could have credibly challenged that false statement.

194. Additionally, had the defense hired a serology expert, they could have challenged how it was possible that the officer with the Cumberland County Sheriff's Office was not able to get a reportable phenolphthalein reaction but Agent Elwell, with biased tunnel vision, was able to get a "definite" reaction. (Trial Tr. 5563–65, 5596–97.)

195. Finally, had the SBI lab notes been provided to the defense before trial, as ordered by Judge Weeks, the defense would have known that Agent Elwell gave false testimony when she testified that she cut samples from the vehicle for additional testing right away, rather than four days later as reflected by the lab notes.

196. The blood evidence in this case was misleadingly presented, and Agent Elwell's conclusion that "it is my opinion that you do have blood" (Trial Tr. 5611) has been seriously undermined, most notably by Agent Elwell herself. If the defense had consulted a serology expert, they would have been able to credibly challenge the evidence and conclusions offered by Agent Elwell. The defense had no strategic reason for not consulting a serology expert.

ii. Failing to Interview Key Alibi Witness, Bobbie Jo Murillo, Prior to Trial and Failing to Subpoena Her Testimony

197. In Mr. Green's First Amended Motion for Appropriate Relief, filed in 2015, postconviction counsel mistakenly raised the claim that his trial attorneys were ineffective for failing to interview alibi witness Bobbie Jo Murillo. The correct issue is that Mr. Green's trial counsel were ineffective for failing to interview Ms. Murillo prior to trial and failing to have her testify.

a. Prior postconviction counsel never obtained trial counsel's files.[8] After obtaining those records, undersigned found a transcribed defense interview of Ms. Murillo from February 20, 1996.

[8] The undersigned obtained trial counsel's files—consisting of eleven banker's boxes—in August 2018 and have been diligently going through them to meet the Court's deadline for this supplemental motion.

198. In trial counsel's file is a subpoena for Ms. Murillo to testify at Mr. Green's trial, signed by trial counsel on February 17, 1996. The subpoena does not indicate it was ever served and there is no other documentation in the file to suggest that it was. (Ex. 31.)

199. A private investigator for the defense, Mr. Tobin Henry, interviewed Ms. Murillo at 11:15 p.m. on February 20, 1996. A transcript of the interview was included in trial counsel's file. (Ex. 32.)

200. There is no indication from the interview transcript that the subpoena was ever served or that Ms. Murillo was asked to come to court to testify.

201. The interview transcript shows that Ms. Murillo's recollection supported Mr. Green's alibi account of that night—that he was at Kaye Hernandez's house, with Ms. Murillo and others, when the murder happened.

202. Ms. Murillo is Kaye Hernandez's niece and was at her home that night spending time with her cousin, Monica Hernandez, and Monica's friends. (Ex. 32 at 2.)

203. Ms. Murillo knew Mr. Green because Mr. Green's mother, Elizabeth Ann Green, was best friends with Kaye Hernandez and Ms. Murillo had seen Mr. Green at Monica's house previously. (Ex. 32 at 1.)

204. Ms. Murillo told the defense that she remembered the cookout, that it occurred in July 1993. She remembered many people were there, including Mr. Green, Ebone Green, Elizabeth Ann Green, Kaye Hernandez, Monica, and Larry Demery. They watched videos, talked, and just hung out. She said that Mr. Green and his mother had been there all day. (Ex. 32 at 2.)

205. The teenagers spent most of their time in the den, took photos, and recorded on a video camera. (Ex. 32 at 2.)

206. Ms. Murillo said Larry Demery left around 1:00 a.m. or 2:00 a.m. and didn't return until 4:30 a.m. or 5:00 a.m. Mr. Demery left alone and Mr. Green remained at the house with Ms. Murillo and the others until Mr. Demery returned. (Ex. 32 at 3–4.)

207. Ms. Murillo specifically remembered that Mr. Demery was acting differently when he returned than when he had left earlier in the evening: "Larry was in a hurry to get out of the house and he wasn't acting like he was before, before he was calm, and when he came back he was all nervous and ready to go and just looked like something was wrong with him." (Ex. 32 at 3–5.)

a. Ms. Murillo also noted that Mr. Demery "looked like he had been through a lot" when he returned. He looked "[l]ike he had been working, doing something, like when people go to work all day how their clothes look when they come back. Just looked like he had been off doing something that required a lot of work." (Ex. 32 at 5.)

208. After Mr. Demery got back, he kept "bugging" Mr. Green to leave with him. According to Ms. Murillo, Mr. Green finally agreed to leave around 5:00 a.m. after being aggravated by Mr. Demery. (Ex. 32 at 4.)

209. It is incredible that trial counsel did not interview Ms. Murillo prior to the trial and failed to call her to testify not only as Mr. Green's main alibi witness, but to impeach Mr. Demery's testimony about Mr. Green's actions and whereabouts that night.

a. This interview of Ms. Murillo corroborates Ms. Murillo's 2016 affidavit and bolsters her credibility as she has remained consistent, without access to her prior statement to refresh her memory, that Mr. Green was with her when the State claims James Jordan was killed.

210. Although the defense put on evidence that Mr. Green was at the party with Ms. Murillo, including a picture of her in his lap, the alibi witnesses called by the defense were not with Mr. Green for the entire night. Only Ms. Murillo could provide a consistent alibi for the entire timeframe at issue. (2015 AMAR Ex. 69, Trial Tr. 6182, 6188–91, 6193, 6197–203, 6216, 6223, 6243–46, 6254–57, 6259–61, 6271, 6300, 6302, 6305, 6308–09, 6312–13, 6320, 6323, 6339.)

211. Mr. Green's trial counsel's failure to have Ms. Murillo testify is ineffective assistance of counsel under *Strickland* because they promised to put on evidence of an alibi during opening arguments, yet they failed to interview the key alibi witness until after the trial had begun, and then failed to subpoena or have her testify.

212. Competent counsel would have interviewed every potential alibi witness well in advance of trial. There is no valid or strategic reason to wait until the second month of trial to interview a key witness and then fail to have her testify.

213. As Judge Weeks instructed the jury,

> The defendant's contention that he was not present and did not participate is simply a denial of facts essential to the State's case. Therefore, I instruct you that if upon considering all of the evidence in this case, *including the evidence with respect to an alibi*, you have a reasonable doubt as to the defendant's presence at or participation in the crime or crimes charged, then you *must* find him not guilty.

(Trial Tr. 7458 (emphasis added).)

214. Had Ms. Murillo's testimony been put before the jury, the jury would have weighed her testimony against Mr. Demery's. As it is clear the jury had doubts about Mr. Demery's credibility, Ms. Muriollo's testimony would likely have been all it took to create reasonable doubt as to whether Mr. Green was present when James Jordan was murdered.

a. Had law enforcement not intimidated her from coming forward, the defense would also have been able to put forth testimony from Melissa Grooms, as discussed above, which would have added additional credibility to Ms. Murillo's statement and further convinced the jury Mr. Green was not present when James Jordan was murdered.

215. No strategic reason exists for trial counsel to present a partial alibi for Mr. Green, but then fail to call the key alibi witness who could verify Mr. Green's whereabouts for the entire time at issue.

iii. Failing to Object to the State's Closing Argument Falsely Stating that the State Had Proved That State's Exhibit 59–A was the Weapon Used to Kill James Jordan.

216. During closing arguments, District Attorney Johnson Britt repeatedly made statements indicating that the weapon entered into evidence as State's Exhibit 59-A was the gun used to kill James Jordan.

217. Specifically, Mr. Britt made the following statements during closing:
   a. "And lo and behold, who's got the murder weapon? The defendant. (Trial Tr. 7376.)
   b. "That's the gun that was used to kill James Jordan." (Trial Tr. 7409.)
   c. "This is the tool of the killer (indicating). . . This gun was used in the trade of killing, in the trade of robbery, by that defendant, on July the 23rd." (Trial Tr. 7437–38.)

218. Contrary to Mr. Britt's assertions, the State's own ballistics expert, Ronald Marrs, had testified "I could not reach a positive – or a conclusive determination that the bullet in State's Exhibit 42–B had been fired from State's Exhibit 59-A." (Trial Tr. 5223.)

219. Despite Mr. Britt's comments being misleading and contrary to the State's own ballistics expert testimony, defense counsel did not object. Further, the defense cannot contend that they refrained from objecting for strategic reasons, as defense counsel objected fourteen times during the State's closing argument. (Trial Tr. 7307, 7314, 7316, 7318, 7320, 7362, 7367, 7383, 7394, 7428, 7430, 7431, 7435.)

220. Defense counsel's deficient performance at such a critical stage was prejudicial to Mr. Green. In any situation, a prosecutor's gross mischaracterization of a piece of evidence being established as the murder weapon would be highly prejudicial, but that mischaracterization is even more harmful in a case, like the one at issue, which relied heavily on co-defendant testimony. Further, Mr. Britt only uttered five more sentences after his final inaccurate statement regarding the alleged murder weapon. As such, one of the last comments heard by the jury before they were charged by the judge was an unchallenged, factually inaccurate statement from the prosecutor that the gun in question was the murder weapon. Defense counsel's failure to challenge the prosecutor's gross mischaracterization of physical evidence in the case at a critical stage of trial was sufficiently prejudicial such that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

iv. Failing to Disclose a Conflict that Existed Between a Juror and Defense Counsel.

221. It was unknown to Mr. Green at the time of his trial that his trial counsel and juror James Cassidy were friends, members of the same church, and members of the same masonic lodge.

a. Mr. Green spoke to Mr. Ronald Fletcher on June 11, 2008. They did not know each other and had never spoken previously.

b. Mr. Fletcher stated that Mr. Cassidy and Angus Thompson were friends, members of the same church, and members of the same masonic lodge at the time of Mr. Green's trial.[9]

c. Mr. Cassidy was in a senior position at the lodge, serving as its secretary. (Ex. 28.)

d. To become a member of a masonic lodge, one takes an oath and has obligations to fellow masons which may have caused Mr. Thompson to put Mr. Cassidy's interests above Mr. Green's.

222. This conflict should have been made known to Mr. Green and the Court during jury selection.

223. Unquestionably, it should also have been brought to Mr. Green and the Court's attention when two of Mr. Green's alibi witnesses came forward to trial counsel and stated that Mr. Cassidy had sexually harassed one of them and could not be an impartial juror.

224. There is no valid or strategic reason for counsel to keep this conflict to himself. The relationship clearly impacted his decision regarding how to address the allegations made by Kaye Hernandez and Nellie Montes.

v. Mr. Green was Deprived of Effective Assistance of Counsel When His Lawyers Agreed to an Unsupported Factual Stipulation.

225. On December 27, 1995, the District Attorney and law enforcement interviewed Mr. Michael Jordan in Chicago, IL. Mr. Michael Jordan was the son of Mr. James Jordan. Handwritten notes and a typed report memorialized the conversation. (Ex. 16.)

226. Subsequently, the District Attorney and the defense entered into a stipulation regarding Mr. Michael Jordan's identification of items during that meeting. (Ex. 15.)

227. During the trial, the State entered State's Exhibit 1 into evidence—a still photograph of Mr. Green taken from a video recording. (Trial Tr. 109; Ex. 29.)

[9] Mr. Green's other trial counsel, Mr. Woodberry Bowen, is also a member of a masonic lodge.

228. The stipulation states that the State showed State's Exhibit 1 to Michael Jordan during their December 1995 meeting and Michael Jordan identified the watch, the two rings, and the glasses as belonging to James Jordan. (Ex. 15.)

a. The glasses in the photo actually belonged to Mr. Green and he was still in possession of and wore them during his pre-trial hearings.

229. Although the jewelry was discussed, law enforcement memoranda and contemporaneous notes of the conversation do not indicate Michael Jordan was ever shown a picture of Mr. Green or a picture of the jewelry. (*See* Ex. 16.)

a. The notes only indicate that Michael Jordan was shown one NBA All Star ring by the District Attorney and he identified it as belonging to his father. (Ex. 16.)

b. If the other items or a photo of the items were shown to Michael Jordan, the notes would have reflected that as they reflected the identification of the NBA ring.

230. Michael Jordan did not sign any statement or affidavit and the only memoranda, both handwritten and typed, detailing the meeting do not support the stipulation put forth by the State.

231. Inexplicably, there is no indication that trial counsel questioned the proposed stipulation or the factual basis for it.

232. The flashy nature and value of the jewelry went to the alleged motive of robbery in the murder of James Jordan. Identification of the items in the photo as belonging to James Jordan was key to proving that motive.

233. Trial counsel was ineffective for agreeing to and signing a stipulation for which there was no factual basis, especially when the content of that stipulation went to the heart of the State's case.

vi. Failing to Adequately Cross-Examine Larry Demery Regarding His False Testimony

234. Throughout his testimony, Mr. Demery made statements that were plainly false that were not challenged through cross-examination.

a. Call to Demery's Relatives in New York

235. Mr. Green's trial counsel failed to adequately cross-examine Larry Demery regarding the call he made to the Baculik home in New York on July 22, 1993.

236. During his testimony, Mr. Demery was repeatedly asked whether he had called Huntington, New York at 10:03 p.m. on July 22, 1993.[10] Each time Mr. Demery responded that he had not. (Trial Tr. 4318, 4614, 4621–22, 4624–25.)

237. Mr. Demery did acknowledge knowing that the number counsel was asking about belonged to the Baculiks, his relatives who lived in Huntington, New York. He also acknowledged their daughter is Janine Baculik and their son is Joy Baculik.[11] (Trial Tr. 4318, 4614–15.)

238. Mr. Demery claimed that the first time he called the Baculik house was on July 25, 1993 and that he did not speak to anyone. (Trial Tr. 4319, 4625, 4629.) He was attempting to reach his cousin, Joy. (Trial Tr. 4629.)

a. He later acknowledges he may have "shot the breeze" with someone who picked up, but he did not get in touch with the person he was looking for. (Trial Tr. 4630–31.)

239. Defense counsel was aware that law enforcement had interviewed the Baculiks and both Alice Baculik and Janine Baculik had confirmed that Mr. Demery called their home on July 22, 1993 and they each spoke to him.

a. Trial counsel was clearly aware of Janine Baculik's interview with law enforcement, as they noted it to the Court out of the presence of the jury. (Trial Tr. 4635–36, 5453–66.)

240. On August 15, 1993, Alice Baculik was interviewed by federal law enforcement at her home in New York. Alice told them that Larry Demery was her nephew. Virginia Strickland is Mr. Demery's mother. Alice is Virginia's sister. She received a call from a man around 9:00 p.m. on July 22, 1993 who asked to speak to Janine. (Ex. 33.)

a. She also acknowledged calling Virginia Strickland after the incoming call mentioned above. She told Ms. Strickland that Mr. Demery had just called and spoken with Janine. (Ex. 33.)

241. On August 15, 1993, Janine Baculik was also interviewed by federal law enforcement. (Ex. 34.)

242. Janine also confirmed that Larry Demery called their home on July 22, 1993. According to the memorandum of the interview, "Janine stated that [Mr. Demery] was very nervous, his voice uneasy and she could sense, through conversation, he was troubled." (Ex. 34.)

243. Janine continued and said that Mr. Demery "Said he was coming up, on his way up to NY, he had to come up and get rid of something." She said he said that "several times during the course of the conversation, but did not reveal what the 'something' was." He also asked that she not tell her mother that it was Mr. Demery who had called. (Ex. 34.)

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[10] The importance of this call is detailed in Mr. Green's 2015 First Amended MAR at 83–84.

[11] Mr. Demery's cousin, Joy Baculik, is sometimes also referred to as Joey.

244. When Janine specifically asked him if "he was into anything illegal or if he was in trouble with the law," he didn't respond. (Ex. 34.)

245. On November 3, 1994, Alice Baculik confirmed with state law enforcement that her prior statement to federal authorities was accurate. (Ex. 35.)

246. The same day, Janine Baculik confirmed with state law enforcement that her prior statement to federal authorities was accurate. (Ex. 36.)

a. Although Janine also says that Mr. Demery made statements that diminished his role in the crime and incriminated Mr. Green, it further shows Mr. Demery has given inconsistent statements to everyone.

b. Most importantly, he lied under oath at Mr. Green's trial about making the call and the defense had evidence to prove that, but never put it before the jury.

247. Importantly, the July 22, 1993 call is corroborated by the telephone bill which shows a call to the Baculiks' number at 10:03 p.m. on July 22, 1993. The bill shows the call lasted seventeen minutes. (Trial Tr. 5455, Ex. 37 at 5.)

248. The July 22, 1993 phone call corroborated a key point of Mr. Green's defense and failing to properly challenge Larry Demery's false denial that it occurred was ineffective assistance of counsel.

b. Impossibility of Getting in the Back Seat of the Lexus

249. During his testimony, Mr. Demery indicated that he got into the back seat of the Lexus while Mr. Green was still seated in the driver's seat. (Trial Tr. 3974–75.)

250. As detailed above, the design of the Lexus, as with nearly every two-door car, is such that you cannot get into the back seat without the front seat being pulled forward. (Ex. 17.)

251. As explained above, the jury's verdict sheet shows that they did not believe Mr. Demery's testimony that Mr. Green was the one who shot James Jordan. (Ex. 27.) As Mr. Demery's testimony was the primary evidence against Mr. Green at trial, and the jury already did not entirely believe him, trial counsel was ineffective for failing to adequately point out each and every instance where Mr. Demery gave false testimony. Had they done so, the outcome of the trial would likely have been different.

vii. Opening the Door to Previously Inadmissible Evidence Being Presented to the Jury Regarding the July 4th Robbery

252. Judge Weeks initially ruled that "the risk of prejudice is substantial, and that it substantially outweighs the probative value of the evidence related to the July 4th, 1993 incident." (Trial Tr. 3575.)

253. Subsequently, while cross examining Larry Demery, Mr. Thompson asked Mr. Demery about his plea agreement with the State. (Trial Tr. 4791.) In the plea agreement, Mr. Demery pled guilty to committing the robbery on July 4, 1993, among other crimes. (Ex. 49.)

254. Judge Weeks then ruled that by asking open-ended questions of Mr. Demery about the plea agreement, the defense had opened the door to anything else contained in the plea agreement, including the July 4, 1993 robbery. (Trial Tr. 4807.)

255. Mr. Thompson's failure to ask sufficiently narrow questions of Mr. Demery resulted in otherwise inadmissible evidence being introduced before the jury, constituting ineffective assistance of counsel.[12]

viii. Counsel Was Unable to Effectively Represent Mr. Green Due to Numerous Conflicts of Interest.

256. Mr. Green's conviction was obtained in violation of his right to effective assistance of counsel guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I §§19, 23 and 27 of the North Carolina State Constitution. He was deprived of effective assistance of counsel at both phases of his trial in violation of his Constitutional rights as his trial counsel created and labored under conflicts that adversely affected their performance.

257. A criminal defendant subject to imprisonment has a Sixth Amendment right to counsel. *Argersinger v. Hamlin,* 407 U.S. 25, 37 (1972). The Sixth Amendment right to counsel applies to the State of North Carolina through the Fourteenth Amendment of the United States Constitution. *State v. James,* 111 N.C. App. 785, 789, 433 S.E.2d 755, 757 (1993) (citation omitted). Sections 19 and 23 of the North Carolina State Constitution also provides criminal defendants in North Carolina with a right to counsel. *Id.* The right to counsel includes a right to "representation that is free from conflicts of interest." *Wood v. Georgia,* 450 U.S. 261, 271(1981).

258. When a defendant fails to object to a conflict of interest at trial, a defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980); *see also, State v. Bruton,* 344 N.C. 381, 391, 474 S.E. 2d 336, 343 (1996)(citation omitted). "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler*, 446 U.S. at 349–50 (citation omitted).

259. Individual acts and omissions by Mr. Green's trial counsel, Woodberry Bowen, deprived Mr. Green of his right to effective assistance of counsel when considered separately and cumulatively. These actions and omissions stemmed from conflicts of interest that Mr. Bowen created and, in his personal interest in self-preservation, kept from the Court's attention. These

[12] It also allowed Mr. Green to be put in the position of Mr. Bowen stating he would ask Mr. Green about the July 4, 1993 robbery if Mr. Green insisted on testifying as previously discussed..

conflicts resulted in Mr. Bowen performing below an objective standard of reasonableness which prejudiced Mr. Green.

260. Mr. Green's other trial counsel, Angus Thompson, was aware of Mr. Bowen's conflicts and failed to protect Mr. Green's right to conflict-free counsel. Since Mr. Bowen and Mr. Thompson shared responsibilities in all phases of the trial, the actions and inactions of one, and/or both, determine the effectiveness of the representation received by Defendant.

261. Where the conflict of interest of one attorney was known by the other, the overall representation received by a defendant is constitutionally deficient regardless of which attorney was constitutionally required and which one was only statutorily required. *See State v. Hucks,* 323 N.C. 574, 374 S.E.2d 240 (1988).

262. Specifically, Mr. Bowen created concurrent conflicts of interest that actually affected the adequacy of his representation in that he negotiated and entered into a publishing and recording contract with Mr. Green and a third-party, Willie Lowery, during his court appointed representation of Mr. Green in his capital trial. This conflict is detailed in Mr. Green's 2015 First Amended Motion for Appropriate Relief. (2015 First Amended MAR at 20–21.)

263. Mr. Bowen also provided a micro cassette recorder to Mr. Green, in the Robeson County Detention Center, for the express purpose of recording the conversations of people that had provided false statements to investigators and planned to testify falsely at Mr. Green's trial in order to receive immunity for their crimes and/or lesser sentences in North Carolina, other states, and from the Federal Government. (2008 *Pro Se* MAR at 6.) These acts of trial counsel were criminal acts that violated N.C. Gen. Stat. § 15A–287.

a. On June 7, 1995, Mr. Bowen acknowledged he provided the micro cassette recorder to Mr. Green in a letter to the Robeson County Jail Administrator. (Ex. 39.)

264. Prior to Mr. Green's trial, Mr. Bowen told him to record the oral communications between Melinda Moore and Deloris Sullivan during three-way telephone conversations. (2008 *Pro Se* MAR at 12.)

265. Mr. Bowen also told Mr. Green to record the oral communications between a federal detainee, Danny Madison, and inmate, Darryl Locklear, while the three were incarcerated with Defendant in Robeson County Detention Center. (2008 *Pro Se* MAR at 12.)

266. In order to allow Mr. Green to record these conversations, Mr. Bowen smuggled a micro cassette tape recorder and three to four micro cassettes to Defendant during an attorney-client visit. (2008 *Pro Se* MAR at 6.)

267. When Mr. Green filled up the cassettes with the recorded material, Mr. Bowen would get the tapes from him and provide Mr. Green with additional tapes to continue recording. (2008 *Pro Se* MAR at 13.)

268. Mr. Bowen showed Defendant how to use the recorder and suggested that he place it in a brown accordion-designed folder with a cut in it in order to record the inmate's conversation. (2008 *Pro Se* MAR at 13.)

269. Mr. Bowen's actions violated N.C. Gen. Stat. § 15A–287(a)(1)(2) and §14–2.4, and are criminal actions carrying the punishment of prison time, fines and possible disbarment.[13]

270. Although the State and law enforcement were aware of the recorder and how it came into Mr. Green's possession, the public and the State Bar were not. In order to avoid the information becoming public knowledge, and likely detrimentally affecting his legal career, Mr. Bowen influenced Green not to testify.

a. "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Holloway v. Arkansas,* 435 U.S. 475, 490 (1978).

271. "Because the burden of ensuring that a criminal defendant is informed of the nature and existence of the right to testify rests upon trial counsel, the burden shouldered by trial counsel is a component of effective assistance of counsel . . . Consequently, a criminal defendant's claim that his trial counsel was constitutionally ineffective because trial counsel failed to inform him of his right to testify . . . must satisfy the two-prong test established in *Strickland v. Washington.*" *Sexton v. French,* 163 F.3d 874, 882 (4th Cir. 1998) (citation omitted).

272. Defendants have a constitutional right to "the assistance of an attorney unhindered by a conflict of interests." *Holloway*, 435 at 483, n. 5.

273. Defense attorneys are obligated to inform the court of conflicts of interest. *See Mickens v. Taylor*, 240 F.3d 348, 357 (4th Cir. 2001). Mr. Green's trial attorneys either neglected or willfully refused to do so with full knowledge that Mr. Bowen was operating under a conflict of interest that pitted his personal interest in avoiding professional censure, criminal charges, his financial interest derived from the contract against Mr. Green's interest in receiving a competent defense required to ensure confidence in the outcome of the trial.

274. Mr. Green was never advised that Mr. Bowen's actions created a conflict that would affect his trial strategy and testing of the State's case.

275. Mr. Bowen had an ethical and professional responsibility to inform the Court of his numerous conflicts and withdraw from the case. Instead, he chose to provide Mr. Green with ineffective assistance of counsel. As a result, Mr. Green is entitled to a new trial.

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[13] Mr. Bowen suggested this course of action after it was believed that the State placed an informant in Mr. Green's cell for the specific purpose of obtaining a confession for the State to falsely attribute to Mr. Green. The informant was inmate Russell Lamont Brown (a.k.a. Lamont Harris). Mr. Green was informed by trial counsel and employees of Robeson County Detention Center that, with the exception of Darryl Locklear, the individuals Mr. Green recorded had provided false statements to officials and planned to give false testimony at his trial implicating him in the murder of James Jordan in order to bolster the State's case. (2008 *Pro Se* MAR at 13.)

ix. The Numerous Ineffective Assistance of Counsel Claims, Taken Individually and Cumulatively, Require Mr. Green Be Granted a New Trial.

276. In order to prove ineffective assistance of counsel, the proof necessary is less than a preponderance of the evidence: "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). Where counsel made several errors in violation of *Strickland's* first prong, their prejudicial effect should be assessed cumulatively. *Williams v. Taylor*, 529 U.S. 362 (2000).

277. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. As a result of trial counsel's inaction on the key issues in the case, there was no true adversarial testing of the State's case. It was not a process that can be relied on as having produced a just result. Justice demands Mr. Green be granted a new trial, with effective counsel and free of the numerous violations of his Constitutional rights that prevented him from receiving a fair trial in 1996.

x. Mr. Green's Appellate Counsel Did Not Adequately Raise All Compelling Issues Thereby Denying Him Effective Assistance of Appellate Counsel.

278. "To show ineffective assistance of appellate counsel, Defendant must meet the same standard for proving ineffective assistance of trial counsel." *State v. Simpson*, 176 N.C. App. 719, 722, 627 S.E.2d 271, 275 (2006) (citation omitted).

279. "To show prejudice in the context of appellate representation, a petitioner must establish a 'reasonable probability . . . he would have prevailed on his appeal' but for his counsel's unreasonable failure to raise an issue." *United States v. Rangel*, 781 F.3d 736, 745 (4th Cir. 2015) (quoting *Smith v. Robbins*, 528 U.S. 259, 285–86 (2000)).

280. There were 118 assignments of error identified in the Record on Appeal for Mr. Green.[14] Out of those, his appellate counsel, Janine Fodor, only raised twelve.

281. The following are assignments of error which should have been raised by appellate counsel, but were not.

a. Assignment of error #29, which contends that the trial court erred by admitting into evidence pieces of the victim's clothing, on the ground that the chain of custody of the clothing had been broken and there was insufficient foundation for its admission. The factual circumstances surrounding the mishandling of James Jordan's shirt are detailed extensively in Mr. Green's 2017 Third Supplement.

b. Assignment of error #58, which contends that the trial court erred by sustaining the State's objections to questions posed to state witness Larry Demery regarding Demery's relationship with Hubert Deese. The facts concerning Hubert Larry

[14] All of the Assignments of Error are included as Exhibit 1 in the State's 2015 Appendix In Support of State's Answer to MAR.

Deese's relevance to the case are detailed in Mr. Green's 2015 First Amended MAR, 2016 Second Supplement, and 2017 Fourth Supplement.

c. Assignment of error #63, which contends that the trial court erred by sustaining the State's objections to and excluding evidence regarding the identity and reputation of Hubert Deese. The facts concerning Hubert Larry Deese's relevance to the case are detailed in Mr. Green's 2015 First Amended MAR, 2016 Second Supplement, and 2017 Fourth Supplement.

d. Assignment of error #64, which contends that the trial court erred by overruling defendant's objections to testimony by SBI Agent Tony Underwood regarding statements allegedly made by defendant. Specifically, on redirect Mr. Britt elicited testimony from Agent Underwood that while Agent Underwood, Sheriff Stone, and Mr. Green were driving to Mr. Green's grandmother's house, they passed the US-74/I-95 interchange and saw a media vehicle parked on the shoulder. According to Agent Underwood's testimony, Mr. Green then asked "could they get footprints?" (Trial Tr. 5770–71.) This line of questioning was entirely outside the scope of redirect.

e. Assignment of error #69, which contends that the trial court erred by sustaining the state's objection to questions posed to state witness Kim Heffney regarding the identity of the person registered as the owner of a particular phone number. That phone number was (919) 521-3365, registered to Hubert Larry Deese. The facts concerning Hubert Larry Deese's relevance to the case are detailed in Mr. Green's 2015 First Amended MAR, 2016 Second Supplement, and 2017 Fourth Supplement.

f. Assignment of error #80, which contends that the trial court erred by directing Mr. Green to make tactical trial decisions independently of his attorneys.

g. Assignment of error #105, which contends that the trial court erred by overruling defendant's objections to the prosecutor's closing arguments. Specifically, Mr. Britt misstated the nature of the stipulation identified as State's Exhibit 10. Mr. Britt claimed that the defense had stipulated that the jewelry depicted in State's Exhibit 1 was jewelry given to James Jordan by Michael Jordan, when in fact the defense had merely stipulated to the state's assertion that Michael Jordan had identified the jewelry as such. (Trial Tr. 7362–65.)

h. Assignment of error #106, which contends that the trial court erred by failing to declare a mistrial following the prosecutor's unconstitutional argument regarding the defendant's failure to testify.

i. Assignment of error #109, which contends that the trial court erred by accepting defendant's waiver of his right to a mistrial against the advice of his originally appointed attorneys.

j. Assignment of error #113, which contends that the trial court erred by failing to make adequate inquiry into allegations of juror misconduct concerning James Cassidy. This issue is discussed in detail above.

k. Assignment of error #114, which contends that the trial court erred by failing to excuse Juror #10, James Cassidy. This issue is discussed in detail above.

282. Each of the foregoing assignments of error had merit and should have been raised on direct appeal. The strength of each claim is further detailed either in this filing or in one of Mr. Green's previous filings.

283. Appellate counsel's failure to raise these claims constitutes representation falling below the objective standard of reasonableness required by *Strickland.*

284. In each instance, if appellate counsel for Mr. Green had raised the claim on direct appeal, there is a "reasonable probability . . . he would have prevailed on his appeal." *Rangel*, 781 F.3d at 745 (citation omitted).

MR. GREEN'S DUE PROCESS RIGHTS WERE VIOLATED BY THE ACTIONS OF THE DISTRICT ATTORNEY

285. Throughout the trial, Mr. Green's due process rights were violated by the unethical actions of the District Attorney.

286. In addition to the standard set forth above in *Napue v. Illinois*, as stated by the New York Court of Appeals in a case very similar to Mr. Green's, *People v. Savvides,* 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854-855:

> It is of no consequence that the falsehood bore upon the witness' credibility, rather than directly upon defendant's guilt. **A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.** . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." (emphasis added)

287. The ethical standards set forth by the American Bar Association include Standard 3-1.4 entitled "The Prosecutor's Heightened Duty of Candor."[15] This standard recognizes that a prosecutor's candor to the Court is of the utmost importance to a defendant receiving a fair trial.

[15] The American Bar Association Criminal Justice Standards for the Prosecution are available at https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html.

288. The American Bar Association states in Standard 3-1.4(a) that "[i]n light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations."

289. It goes on in Standard 3-1.4(b) to explain that

> [t]he prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes. In addition, while seeking to accommodate legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder.

290. Despite the clear ethical and Constitutional obligations of his position, the District Attorney repeatedly put forth false arguments to the Court and did not correct false testimony throughout Mr. Green's trial.

291. Not only were Mr. Green's counsel ineffective for allowing Larry Demery to give false testimony regarding the phone call he made to his relatives in New York on July 22, 1993, the District Attorney allowed that false testimony to go uncorrected.

292. Despite knowing that Mr. Demery's relatives had confirmed he had made such a call, and the phone records supported their statements, the District Attorney allowed the Court to believe it was possible the law enforcement report included a typo and the relatives were not confirming that the 10:03 p.m. call on July 22, 1993 came from Mr. Demery. There was no plausible confusion over these facts, but the District Attorney refused to set the record straight for the Court. (Trial Tr. 5453–66.)

293. Similarly, he made no attempt to make clear to the Court that the (910) 521-3365 phone number belonged to Hubert Larry Deese and had been identified by Larry Demery as a call he had made from the Lexus, despite the attempts by the defense to introduce that evidence.

a. During a proffer, when Mr. Demery denied making the call to Mr. Deese, it was the District Attorney's obligation to correct that statement. (Trial Tr. 4995.)

294. He even allowed the Court to suspect the number could have been a misdial, despite the clear connections between Mr. Demery and Mr. Deese, which were known to the State. (Trial Tr. 5751–65.)

295. Multiple law enforcement reports make clear the State knew the phone number belonged to Mr. Deese and one confirms that Mr. Demery claims the call was one he made to a friend. (Ex. 1, Ex. 19 at 8, Ex. 38.) As described in several of Mr. Green's filings, the State knew the

connection the defense was trying to make between Mr. Demery and Mr. Deese was legitimate, yet the State made no attempts to inform the Court.

296. The District Attorney stated in his closing that the gun stolen from Mr. Clewis Demory was the gun used to murder James Jordan. (Trial Tr. 7397.) However, there was no evidence conclusively connecting the gun stolen from Mr. Clewis Demory to Mr. Jordan's murder.

297. The District Attorney also said that the man who shot Mr. Clewis Demory was wearing sunglasses. (Trial Tr. 7387.) His purpose was clearly to inflame the jury because of the photographs they had previously been shown of Daniel wearing glasses. Mr. Clewis Demory, however, never described his shooter as having worn glasses. (Trial Tr. 3649, 3690.)

298. Throughout Mr. Green's trial, the District Attorney not only allowed false testimony to be admitted by the State's witnesses, but misrepresented the evidence himself to the Court and the jury. A conviction obtained on the basis of prosecutorial dishonesty, identified in this brief and prior briefs filed in this case, cannot stand.

BURDEN OF PROOF

299. "If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. §15A-1420(c)(5). Mr. Green has the evidence necessary to support his claims and meet this standard.

300. Due Process Violations

a. "[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." "[A] 'reasonable probability' of a different result" is one in which the suppressed evidence "undermines confidence in the outcome of the trial." *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017) (citation omitted). The State failed to disclose the following material evidence that was favorable to the defense. Trial court judge Gregory Weeks has provided a sworn affidavit regarding the impact these violations had on his rulings during trial.

   i. Recorded jail phone calls;
   ii. Evidence that Larry Demery made the second call from Mr. Jordan's phone after his death and that the call was made to known drug trafficker Hubert Larry Deese, who was known by the State to be the son of Robeson County Sheriff Hubert Stone and had worked at Crestline Mobile Homes with Larry Demery;

iii. Evidence that multiple confirmatory serology tests on the evidence from the victim's Lexus had negative results and were not provided to the defense, in violation of the Court's order;
iv. Impeachment evidence regarding the true nature of the plea deal provided to Larry Demery and his true understanding of the benefit he would receive in return for his testimony;
v. The fact that Melissa Grooms was interviewed by law enforcement and the content of that interview; and
vi. The fact that Hubert Larry Deese was interviewed by law enforcement and the content of that interview.

b. "[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment . . . [and] the same result obtains when the State, although not soliciting false evidence, allows it go uncorrected when it appears." In such cases, judgment must be reversed where there is a "reasonable likelihood" that the false evidence may "have affected the judgment of the jury" and therefore had "an effect on the outcome of the trial." *Napue*, 360 U.S. at 269, 271–72 (citation omitted). The State allowed false testimony from:

i. Larry Demery
    1. Calling Hubert Larry Deese from James Jordan's phone;
    2. Calling his relatives in New York on July 22, 1993;
    3. Testifying he got in Mr. Jordan's car behind Mr. Green; and
    4. Testifying he did not have a sentencing agreement.
ii. Agent Ronald Marrs
    1. Testifying to a bullet hole in the victim's shirt that was not present at the time of autopsy;
    2. Testifying he had to air dry the clothing before he could work on it;
    3. Testifying chemical testing was positive for a nitrite reaction after the evidence had been in water for twelve days; and
    4. Testifying soot and grease from the cannelure wouldn't dissolve in water.
iii. Analyst Jennifer Elwell
    1. Testifying to an expert opinion on the presence of blood based solely upon presumptive tests.
iv. District Attorney Johnson Britt
    1. Presenting a false stipulation as evidence.

c. Misconduct by the State

i. DA Britt unlawfully and unethically commented on Mr. Green's decision to not testify;
ii. The destruction of Mr. Jordan's blood sample;
iii. Tampering with evidence by creating an additional bullet hole in Mr. Jordan's shirt that did not exist at the time of the autopsy;

iv. Intimidating a teenage alibi witness to keep her from coming forward; and
v. Falsely characterizing State's Exhibit 59-A definitively as the weapon used to kill Mr. Jordan.

d. "[T]he determination of the trial court on the question of juror misconduct will be reversed only where an abuse of discretion has occurred . . . Reversible error may include not only error prejudicial to a party but also error harmful to the judicial system. Basic principles of proper juror conduct should not be ignored by the trial court." *Drake*, 31 N.C. App. at 190, 192–93, 229 S.E.2d at 54–55. The Court did not investigate or properly address the conflict between a juror and two of Mr. Green's alibi witnesses.

e. Mr. Green's waiver of his right to testify is invalid as it was not made knowingly, intelligently or voluntarily. It was made after being manipulated by a conflicted attorney and in reliance on a false promise by another attorney.

301. "Where a special finding of facts is inconsistent with the general verdict, the former controls, and the court shall give judgment accordingly." N.C. Gen. Stat. § 1–202; N.C. Gen. Stat. § 1A–1, Rule 49. A conviction is unlawful if the jury did not find each element of the crime was proven beyond a reasonable doubt. As the jury specifically found that Mr. Green did not shoot Mr. Jordan, a key element of the crime was never proven to the jury.

302. Newly Discovered Evidence

a. Pursuant to N.C. Gen. Stat. § 1419(e), a defendant raising a claim of newly discovered evidence of factual innocence must prove "by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty." Mr. Green has presented the following newly discovered evidence:

i. Analyst Jennifer Elwell's new opinion that under current scientific standards and lab policy, she would not be able to give her opinion that the substance in the victim's car was blood, as she did at the time of trial;
ii. The pervasive misconduct in the serology section at the SBI Crime Laboratory in the 1990s;
iii. The connection between Hubert Larry Deese, Sheriff Hubert Stone, Mark Locklear, Larry Demery, and Drug Trafficking in Robeson County; and
iv. Sworn affidavits that Larry Demery has told numerous people Mr. Green was not involved in the murder of James Jordan.

303. Ineffective Assistance of Counsel

a. A defendant must show that, 1) counsel's performance was deficient, falling below "an objective standard of reasonableness," and 2) that the deficient performance prejudiced him, meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Strickland*, 466 U.S. at 687–94. Mr. Green's trial counsel and appellate counsel were ineffective for:

i. Failing to present evidence to the jury that had been promised in opening arguments;
ii. Failing to present important alibi witnesses, including, but not limited to, Bobbie Jo Murillo and Melissa Grooms;
iii. Failing to fully and adequately investigate Mr. Green's alibi prior to trial;
iv. Failing to accurately advise Mr. Green on a mistrial motion after DA Britt unlawfully and unethically commented on his decision to not testify;
v. Failing to disclose the numerous conflicts of both Mr. Green's trial attorneys;
vi. Unethically facilitating a recording contract, during the trial, between Mr. Green and another individual that personally benefitted trial counsel;
vii. Failing to read the witness list to each juror during jury selection to ensure no conflicts existed;
viii. Failure to present testimony of a ballistics expert;
ix. Failure to present testimony of a serology expert;
x. Failure to notice or investigate the discrepancy between the autopsy report and Agent Marrs's discovery of a new bullet hole in Mr. Jordan's shirt;
xi. Agreeing to a factual stipulation not supported by evidence;
xii. Failing to properly cross-examine witnesses about their testimony despite having evidence to prove it was false;
xiii. Opening the door to previously inadmissible evidence; and
xiv. Failing to properly raise all viable claims on appeal.

304. The facts are supported by the record and the State's own evidence and Mr. Green's conviction should be vacated without an evidentiary hearing based on the law as detailed in the briefs that have been filed. In the alternative, a full evidentiary hearing on all claims should be granted.

CONCLUSION

305. Upon reviewing the record in this case, the action of the prosecution, law enforcement, and Mr. Green's prior attorneys, in conjunction with the inexplicable rulings made by the trial judge, it is difficult to escape the conclusion that multiple parties conspired to convict an innocent man.

a. If the State was making a sincere attempt to determine the truth in this case, they would have followed every lead, including those provided by Mr. Green. Instead, the only objective was to make the evidence and Mr. Demery's story match as closely as possible in order to convict Mr. Green.

306. Wrongful convictions can inadvertently occur because of unintentional tunnel vision and confirmation bias, but when you have corruption that runs as deep as it does in this case it increases the chances of error by even by the most well-meaning state actors.

307. The claims listed above are the last claims Mr. Green will file prior to the December 5, 2018 oral arguments.

308. Mr. Green reserves his right to supplement his MAR prior to 30 days before any evidentiary hearing on the merits of Mr. Green's claims, as allowed by N.C. Gen. Stat. § 15A–1415(g).

309. Mr. Green has been incarcerated since his 1993 arrest for a crime he did not commit. Justice demands his conviction be vacated and he be immediately released.

Respectfully submitted the 2nd of October, 2018.

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Certificate of Service and Compliance with 15A-1420(a)(1)(c1)

I hereby certify that, via the United States Postal Service, I caused to be served a copy of the above **Fifth Supplement to First Amended Motion for Appropriate Relief** upon the Attorney General's Office:

Mr. Jonathan P. Babb
Ms. Danielle Marquis Elder
Special Deputy Attorney General
P.O. Box 629
Raleigh, NC 27602

I further certify, pursuant to N.C. Gen. Stat. § 15A-1420(a)(1)(c1), that, in my professional judgment as a postconviction attorney, there is a sound legal basis for this motion, that this motion is made in good faith, that I have reviewed the trial transcript in the case, and that I have given notice of this motion to the State, through service of the motion as indicated above. Notice of this motion has also been given to the attorneys who represented Mr. Green at trial, Mr. Angus Thompson and Mr. Woodberry Bowen, via email.

This the 2nd day of October, 2018.

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FIFTH SUPPLEMENT TO FIRST AMENDED MOTION FOR APPROPRIATE RELIEF EXHIBIT LIST