STATE OF NORTH CAROLINA
COUNTY OF ROBESON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 93 CRS 15291-93

State of North Carolina
vs.
Daniel Andre Green

AFFIDAVIT OF DANIEL ANDRE GREEN

DANIEL GREEN, being duly sworn, deposes and says:

1. I AM OVER THE AGE of 21, AM competent to make this AFFIDAVIT, AND the STATEMENTS CONTAINED HEREIN ARE true of my own PERSONAL KNOWLEDGE.

2. I the DEFENDANT AM filing the ATTACHED Amendment to Defendants Motion for Appropiate Relief ON my own behalf, pro se.

3. The facts averred herein are true of my own personal KNOWLEDGE except for those that are stated AS being true upon INFORMATION AND belief.

4. The ATTACHED Motion for Appropiate Relief is grounded IN SOUND LAW AND NO Argument is frivolous.

5. The copies of documents used for exhibits ARE true copies.

Further the affiant sayeth not.

This the 12th day of May, 2008.

/s/ Daniel Green

Daniel Andre Green

P.O. Box 280

Polkton, N.C.

28135

State of NC, County of Anson

Signed before me on this 12th day

of May by 2008

Notary Public Frances F. Greene

My Commission Expires:

7-10-2010

State of North Carolina
County of Robeson

In the General Court of Justice
Superior Court Division
File No. 93 CRS 15291-93

| | | |
|---|---|---|
| State of North Carolina | ) | |
| | ) | Amendment to Defendant's Motion for |
| v. | ) | Appropriate Relief and/or Defendant's |
| | ) | Motion for Appropriate Relief |
| Daniel Andre Green, a/k/a | ) | N.C.G.S. §15A-1415(g) *et. seq.*; |
| Lord D.A.A.S. U'Allah | ) | N.C.G.S. §15A-1411 *et. seq.* |

---

**TO: THE HONORABLE PRESIDING JUDGE OF THE SUPERIOR COURT OF ROBESON COUNTY**

Pursuant to the provisions of N.C. Gen. Stat. 15A-1415(g) et seq., the Defendant, Daniel A. Green, respectfully submits this Amendment to Defendant's Motion Requesting Appointment of Counsel filed May 5, 2000, which this Court accepted and construed liberally as being a Motion for Appropriate Relief (*see*, Exhibit 1) and/or pursuant to the provisions of N.C. Gen. Stat. 15A-1411, et seq., the Defendant respectfully requests from this Court an Order granting the Motion for Appropriate Relief from judgment and subsequent sentence of Life plus 10 years entered against Defendant by the Honorable Gregory Weeks presiding in the Superior Court in Robeson County during the 1995 to 1996 Criminal Session, on the grounds that his conviction and sentences were obtained in violation of Article I, Sections 19, 23, 24 and 27 of the North Carolina Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. As grounds therefore, Defendant respectfully shows the Court the following. Citations are provided, where appropriate, to the Motion Requesting Appointment of Counsel which the trial court liberally construed to be a Motion for Appropriate Relief (hereinafter referred to as "MAR") filed May 5, 2000, to the affidavit and other evidence submitted in support of this Amendment and to the Exhibits. When Defendant receives the case

file being held by Carlton Mansfield, which was requested on July 11, 2007, pursuant to Rule 1.16(d) of the Revised Rules of Professional Conduct of the North Carolina State Bar, Defendant will provide citations, where appropriate, to the transcript of prior proceedings in an Amendment to Defendant's MAR.

## GROUNDS OF ILLEGALITY OF THE DEFENDANT'S CONVICTION AND SENTENCE OF LIFE PLUS 10 YEARS UNDER THE FAIR SENTENCING ACT

The paragraphs that follow set forth additional evidence and argument regarding the grounds of illegality of the Defendant's conviction and sentence of life plus 10 years and the exhibits in support of Defendant's MAR filed therewith are specifically incorporated by reference herein. Likewise, the additional facts, arguments and exhibits contained in this Amendment are specifically incorporated into the original Motion for Appropriate Relief (Motion Requesting Appointment of Counsel) filed May 5, 2000. Each claim for relief amended herein begins with a statement of the claim and the constitutional and/or statutory provisions relied upon in support of the claim, which is followed by paragraphs setting out the additional factual basis for the claim.[1] The claims will be supported by additional facts or legal arguments developed during or before the hearing on this motion. In the statement of the legal basis for the claim, reliance on a specific provision of the United States Constitution is intended to comprehend the similar or identical provision of the Constitution of North Carolina. Accordingly, the North Carolina provisions are mentioned only once in each claim.

---

[1] Defendant sets out the factual basis of the claims as known to him at this point.

## NOTICE OF PRO SE REPRESENTATION

For the reasons set forth in the attached North Carolina State Bar Grievance Complaint against Carlton Mansfield, Esquire (hereinafter "Mr. Mansfield"), counsel appointed by the trial judge, the Honorable Gregory Weeks, pursuant to G.S. §15A-1421, to assist or represent Defendant in post-conviction proceedings, Defendant has been forced to file this motion on his own behalf and, therefore, asks that this Honorable Court construe this motion liberally and rule in the spirit of the law on the claims herein where Defendant's knowledge of the letter of the law falls short. The North Carolina State Bar grievance complaint against Mr. Mansfield is hereby incorporated by reference. The Complaint demonstrates Defendant's efforts to bring these claims before the Court since 1999 and also demonstrates that court-appointed counsel, Mr. Mansfield, has actively and passively obstructed Defendant's attempts to investigate these claims, research and present them to the Court to be ruled on in a timely manner and has made a mockery of this Court, the North Carolina State Bar Rules of Professional Conduct and his duty in regard to his appointment to Defendant. Thus, Defendant has been left no choice but to proceed on his own. See, Exhibit 2.

## I. DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL DURING THE INNOCENCE/GUILT PHASE AND THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND NORTH CAROLINA DUE TO TRIAL COUNSELS' CONFLICTS OF INTEREST

1. Defendant's finding of guilt and sentencing of life imprisonment are illegal because they were 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 Constitution. Defendant was deprived of effective assistance of counsel at both phases of his trial in violation of his Constitutional rights in that his

trial counsel created and labored under conflicts that adversely affected his performance in several specific instances.

A criminal defendant subject to imprisonment has a Sixth Amendment right to counsel. *Argersinger v. Hamlin*, 407 U.S. 25, 37, 32 L.Ed. 2d 530, 538 (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). Sections 19 and 23 of the North Carolina 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, 67 L.Ed. 2d 220, 230 (1981).

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, 64 L.Ed. 2d 333, 346-347 (1980); *see also*, *State v. Bruton*, 344 N.C. 381, 391, 474 S.E. 2d 336, 343 (1996). "[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, 64 L.Ed. 2d at 347. The United States Supreme Court clarified in *Mickens v. Taylor*, 535 U.S. 162 (2002), that to satisfy the Cuyler standard, a defendant need not show that "an actual" conflict existed that adversely affected counsel's performance; but that a conflict adversely affecting trial counsel's performance is the same as an actual conflict. Cuyler involved a conflict arising out of multiple representations, but North Carolina courts have applied the Cuyler standard to other conflicts. See, *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993) (attorney represented defendant

and key prosecution witness); and *State v. Loye*, 56 N.C. App. 501, 289 S.E.2d 860 (1982) (attorney was under investigation for own participation in criminal conduct involving defendant).

2. In the paragraphs below, Defendant sets forth individual acts and omissions by Defendant's trial counsel, Woodberry Bowen, Esquire (hereinafter "Mr. Bowen"), which deprived Defendant of his right to effective assistance of counsel when considered separately or cumulatively. These actions and omissions adversely affected Mr. Bowen's performance due to his burden that stemmed from the conflicts of interest that Mr. Bowen created and Mr. Bowen's personal interest in self-preservation that burdened him with the necessity of keeping these conflicts from the Court's, as well as, his peers' attention. These conflicts created a presumption of prejudice and resulted in Mr. Bowen performing below an objective standard of reasonableness which resulted in unreliable determinations by Defendant's jury that resulted in Defendant being found guilty.

3. Defendant's other attorney, Angus Thompson, Esquire (hereinafter "Mr. Thompson"), was aware of Mr. Bowen's actions that created the conflict of interest and failed to protect Defendant's interest and right to effective assistance of counsel and conflict-free counsel. In capital trials, North Carolina law gives an indigent defendant the right to a second attorney. See, G.S. 7A-450(b1). Not only does the denial of Defendant's statutory right to second counsel and limitations on second counsel participation (even if self-imposed by counsel) amount to a denial of the statutory right to counsel reversible error, but, moreover, since Mr. Bowen and Mr. Thompson shared responsibilities in the immediate case in all phases of the trial, from opening to closing arguments, the actions and inactions of one, and/or both, determine the effectiveness of the representation received by Defendant. Therefore, where, as in the immediate case, the conflict of interest of one attorney was known by the other, the overall representation received by

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); *State v. Matthews*, ___ N.C. ___, 591 S.E.2d 535 (2004).

4. Specifically, Mr. Bowen created concurrent conflicts of interest that actually affected the adequacy of his representation in that he:

(a) negotiated and entered into a publishing contract with Defendant and a third-party, Willie Lowery (hereinafter "Mr. Lowery"), a publisher, during his court appointed representation of Defendant in a capital punishment trial; (SEE Exhibit 13)

(b) obtained property by false pretenses, a violation of North Carolina General Statutes 14-100, by negotiating and entering into a publishing contract with Defendant and Mr. Lowery, and by engaging in business related to developing Defendant and Mr. Lowery's relationship during attorney/client visits at Robeson County Detention Center and at Robeson County Courthouse;

(c) procured Defendant to, and assisted Defendant in, obtaining a micro cassette recorder for the express purpose of recording the conversations of people that had provided perjurious statements to investigators and whom planned to commit perjury in Defendant's trial in order to receive valuable consideration of global immunity for their crimes and/or lesser sentences in North Carolina, other states and from the Federal Government. These acts of trial counsel were criminal acts that violated N.C.G.S. 15A-287.

## II. DEFENDANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL FREE FROM CONFLICTS OF INTEREST DUE TO TRIAL COUNSEL NEGOTIATING AND ENTERING INTO A BUSINESS TRANSACTION WITH DEFENDANT

Defendant repeats the allegations contained in paragraphs 1 thru 4 of the Amendment to Defendant's Motion for Appropriate Relief and/or Defendant's Motion for Appropriate Relief as if set forth herein at length.

5. Defendant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 1, 9, 19 and 23 of the North Carolina Constitution as a result of conflicts of interest created by trial counsel, Mr. Bowen, entering into a business transaction with Defendant by negotiating and entering into a publishing contract with Defendant and Mr. Lowery.

6. Since objectively reasonable performances are defined by what is reasonable under prevailing norms and Strickland indicated that prevailing norms of practice can be found in "American Bar Association standards and the like," and in North Carolina "the like" is North Carolina Rules of Professional Conduct, Defendant will utilize these guidelines to show how trial counsel created conflicts that are "actual conflicts" as defined above according to case law. Said conflicts prevented Defendant from receiving representation and advice free of competing loyalties between Defendant's and trial counsel's interests.

7. "It is unethical, while representing the client in a particular case, to enter into an agreement for publication rights with respect to the case." See, American Bar Association Standards for Criminal Justice (Standard 4-3.4) and (Model Rule 3.6); "Defense counsel must refrain from conflicts of interest or inform the client of such conflicts and proceed only with the client's permission and the lawyer's belief that conflicts will not affect the lawyer's loyalty to the client." (Standard 4-3.5(a), Model Rule 1.7). See also, N.C. Rules of Professional Conduct,

Rule 1.7(a)(2005) (stating that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest"), Rule 1.8(a) (stating that a lawyer shall not enter into a business transaction with a client) and Rule 1.8(d) (stating that "prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation"). See also, *U.S. v. Hearst*, 638 F.2d 1190, 1193 (CA9 1980) (where "representation of the defendant somehow implicates counsel's personal or financial interests, including a book deal"). See, *Mickens v. Taylor*, 535 U.S. 174. "When a defendant shows that his counsel actively represented conflicting interests," he has "established the constitutional predicate for his claim of ineffective assistance." See, *Cuyler v. Sullivan*, 446 U.S., at 350.

8. The publishing contract negotiated by Mr. Bowen gave Mr. Lowery the valuable consideration of the publishing rights to Defendant's songs written during the summer of 1993 and while incarcerated in the Robeson County Detention Center. These sings are revealing portraits of Defendant's life and experiences during this period, including the events for which Defendant was awaiting trial. In particular, one of these songs dealt with the video that the State, in an intentional misstatement of fact, used in the media to condition the jury pool into thinking that Defendant was rapping about murdering James Jordan.

9. In return, Defendant received the valuable consideration of one dollar from Mr. Bowen, 1,000 hours of studio time in Mr. Bowen's studio and a portion of licensing and folio fees from the songs. The only way for Defendant to fully benefit from the contract would be if he was acquitted of the charges and was free to visit the studio. During negotiations, Mr. Bowen assured Defendant that this would happen.

The chain of events that led to this business transaction being completed are set forth below:

(a) Mr. Bowen heard Defendant singing on a portion of a tape that Defendant recorded on a recording devise given to Defendant by Mr. Bowen.

(b) Mr. Bowen informed Defendant he was into music and owned a studio in Lumberton, North Carolina, Soundstation Studios;

(c) Mr. Bowen recorded Defendant performing original songs in the attorney/client room at Robeson County Detention Center during an attorney/client visit;

(d) Mr. Bowen introduced Defendant to publisher, producer and artist, Mr. Lowery, in the attorney/client room at Robeson County Detention Center;

(e) Mr. Lowery visited Defendant on attorney visits arranged by, and accompanied with, Mr. Bowen on several occasions in the attorney/client room in Robeson County Detention Center. During these visits the above parties would have recording sessions on a Marantz recorder that, upon information and belief, belonged to Mr. Bowen;

(f) Mr. Lower could not have gained this access to Defendant during Mr. Bowen's attorney visits with Defendant without Mr. Bowen arranging such visits;

(g) Mr. Bowen negotiated the aforementioned contract involving the use of Soundstation Studios on Mr. Bowen's premises; and

(h) The contract signing was scheduled and arranged by Mr. Bowen, took place at the Robeson County Courthouse during jury selection and voir dire and, upon information and belief, was notarized by Mr. Bowen's secretary, Cindy INMAN. 1A.

10. Mr. Bowen acted as a representative of both Defendant and Mr. Lowery in this business transaction.



1A Defe not sure INMAN IS the NAME.

11. Mr. Bowen was a party to this business transaction.

12. Except for the one dollar Mr. Bowen gave Defendant, the contract Mr. Bowen negotiated and was a party to, provided no immediate benefit to Defendant.

13. The 1,000 hours of studio time provided to Defendant by Mr. Bowen and Mr. Lowery, was to be executed upon Defendant's acquittal.

14. The contract specifies that Defendant have access to the studio for his "personal use."

15. Defendant has repeatedly tried to use the studio time through third-parties since his conviction and has received no cooperation from Mr. Bowen or Mr. Lowery. Mr. Lowery always referred Defendant to Mr. Bowen and has always conveyed to Defendant that all decisions on the control, recording and use of the music under the contract were the exclusive control and domain of Mr. Bowen.

16. Defendant's conviction resulted in Mr. Bowen and Mr. Lowery not fulfilling the executory portion of the contract giving Defendant 1,000 hours of studio time worth $50,000.00, which benefited them financially.

17. Mr. Thompson, trial co-counsel, was personally aware of the facts set forth in paragraphs 8 through 13.

18. Defense attorneys are obligated to inform the court of conflicts of interest; see *Mickens v. Taylor*, 240 F.3d 357 (4th Cir. 2001). Both attorneys in the immediate action 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 and the interest of his business

partner/client/associate against Defendant's interest in receiving a defense required to insure confidence in the outcome of the trial.

## III. DEFENDANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL FREE FROM CONFLICTS OF INTEREST DUE TO TRIAL COUNSEL'S OBTAINMENT OF PROPERTY BY FALSE PRETENSE

Defendant repeats the allegations contained in paragraphs 6 thru 18 of the Amendment to Defendant's Motion for Appropriate Relief and/or Defendant's Motion for Appropriate Relief as if set forth herein at length.

19. The acts set forth in paragraph A, supra, demonstrate the following:

(a) Counsel's actions are a violation of N.C. Rules of Professional Conduct and N.C. General Statute 14-100. Obtaining property by false pretenses in that:

(1) Mr. Bowen was assigned to represent Defendant, an indigent, and was paid by State Funds pursuant to N.C. General Statute 7A-300(a)(2). This was the "obtaining property," from a "person" (body, politic, entity).

(2) During the time he was to provide this service of representation of Defendant, Mr. Bowen used his access to Defendant in Robeson County Detention Center and Robeson County Courthouse to record Defendant's music, bring Willie Lowery into the Robeson County Detention Center during attorney/client visits for recording sessions, negotiate a contract between Mr. Lowery and Defendant in which he gave Defendant 1,000 hours of studio time in the studio Mr. Bowen owns and arrange and close a contract signing at Robeson County Courthouse, all under the guise, and during the time he was being paid by the State, to prepare Defendant's defense in a Death Penalty trial – thus, wrongfully obtaining public funds by false pretenses.

(3) Trial Counsel, Angus Thompson, was personally aware of co-counsel's actions set forth above.

(4) Trial Counsel, Mr. Bowen's, actions created a concurrent conflict of interest in which his personal interest of avoiding criminal charges and professional censure was in opposition to Defendant's right to representation from client unencumbered by such a conflict.

## IV. DEFENDANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL FREE FROM CONFLICTS OF INTEREST DUE TO TRIAL COUNSEL WILLFULLY PROCURING AND ASSISTING DEFENDANT TO INTERCEPT ORAL COMMUNICATIONS OF OTHER PARTIES, CONSPIRING TO COMMIT THE SAME, AND BEING UNDER INVESTIGATION FOR SAME.

Defendant repeats the allegations contained in paragraph 19 of the Amendment to Defendant's Motion for Appropriate Relief and/or Defendant's Motion for Appropriate Relief as if set forth herein at length.

20. In 1994 – 1995, Mr. Bowen procured Defendant to record the oral communications between Melinda Moore and Deloris Sullivan during 3-way telephone conversations without their knowledge or consent.

21. In 1994 – 1995, Mr. Bowen procured Defendant to record the oral communications between a federal detainee, Danny Madison, and inmate, Darryl Locklear, without their knowledge or consent while incarcerated with Defendant in Robeson County Detention Center.

22. In order to carry out the actions described in paragraphs 20 and 21, Mr. Bowen smuggled a micro cassette tape recorder and three to four micro cassettes to Defendant during an attorney-client visit.

23. 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.

24. The acts of Mr. Bowen set forth in paragraphs 20 thru 23 are in violation of N.C. General Statute 15A-287(a)(1)(2) and Section 14-2.4, and are criminal actions carrying the punishment of prison time, fines and disbarment.

25. Mr. Bowen suggested this course of action after, upon information and belief, the State placed an informant in Defendant's cell for the specific purpose of validating a State concocted confession the State falsely attributed to Defendant through the informant, Russell Brown a.k.a. Lamont Harris. Defendant was informed by trial counsel and employees of Robeson County Detention Center that, with the exception of Darryl Locklear, the above individuals named in paragraphs 20 and 21, supra, had provided false statements to officials and planned to give perjurious testimony at Defendant's trial implicating Defendant in the murder of James Jordan and to bolster the State's case against Defendant. In return they were to receive the valuable consideration of global immunity for their crimes and/or lesser sentences in North Carolina, other states and from the Federal Government.

26. When Defendant filled up the cassettes with recorded material, Mr. Bowen picked the tapes up and gave Defendant more tapes. The recorded material proved the following:

(a) Melinda Moore lied to officials about being pregnant by Defendant. In order to get money from him for an abortion she did not need, she told Defendant she was pregnant with his child;

(b) When Defendant did not believe her and offered to go see the doctor with her and then limited their contact after he found out she was engaged to another man during the course of their relationship, Ms. Moore felt scorned;

(c) Ms. Moore had scammed other men out of "abortion money" in the past using the same ploy;

(d) When officials confronted Ms. Moore and convinced her Defendant was not concerned about her well being and convinced her she would be charged for conspiracy to commit armed robbery, larceny and various other charges if she did not cooperate, she decided to lie on Defendant about weapons, about pulling a weapon on a guy because of her at a club, about Defendant getting her pregnant and other accusations designed to portray Defendant in the worst possible light;

(e) Deloris Sullivan told investigators that Melinda Moore scammed guys out of money regularly for abortions and was lying on Defendant;

(f) Deloris Sullivan was also threatened with prosecution for armed robbery conspiracy, larceny and other charges if she did not cooperate and that she also lied on Defendant;

(g) Danny Madison ("Madison") was placed in the cell with Defendant for the specific purpose of lying on Defendant and attributing to him a confession he never made;

(h) Officers supplied Madison with the details he needed to make his story of Defendant's confession believable, including the State's version of the case;

(i) For his cooperation, Madison was to receive a plea bargain on bank robbery charges; this cooperation would require him to perjure himself in Court;

(j) In fact, Defendant never discussed his case with anyone in the cell Madison shared with Defendant, including Madison.

27. Darryl Locklear's voice was also recorded in conversations with Madison proving that Defendant never discussed his case except that he was innocent of the charges.

28. Darryl Locklear was also prepare to testify that Larry Demery ("Mr. Demery") informed him that "they" had put him up to lying on Defendant about James Jordan's murder in order to give Demery a plea bargain under the table and that he planned on accusing Defendant of wearing James Jordan's suit to court months in advance of the actual trial for "shock" value, a false accusation.

29. It is unethical "... to counsel a client in or knowingly assist a client to engage in conduct which the lawyer knows to be illegal or fraudulent." See, American Bar Association Standards for Criminal Justice, Standard 4.37(b). See also, N.C. Rules of Professional Conduct (2008) Rule 1.2(d) stating that a lawyer "shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent . . .". Comment 11 to Rule 1.2 states "a lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See, Rule 1.16(a). In some cases, withdrawal alone might be sufficient . . .".

Comment 11 is reinforced by Rule 1.16(a) which states, "except as stated in paragraph (c), a lawyer shall not represent a client, or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of law or the Rules of Professional Conduct . . .".

30. At no time was Defendant made aware by either Trial Counsel that the actions set forth above were potentially illegal and that the tapes could not be used as evidence without possibly violating the law. Moreover, Defendant was never advised that the actions set forth created a conflict that would affect Trial Counsel's options, trial strategy and testing of the State's case.

31. When Robeson County Detention Center employee, Thomas Rowdy, found the tape recorder that Mr. Bowen smuggled in to Defendant, he confiscated it, pursuant to Robeson County Detention Center policy prohibiting tape recorders, and pursuant to N.C. General Statute 15A-289 stating that "Confiscation of wire, oral or electronic communication interception device. Any electronic, mechanical, or other devise used, sent, carried, manufactured, assembled, possessed, sold or advertised . . . may be seized and forfeited to this State." Defendant informed Officer Rowdy that the recorder and tapes he confiscated belonged to Mr. Bowen and to return the items to him. Officer Rowdy made a remark about Mr. Bowen ending up in the cell beside Defendant. Defendant immediately made Mr. Bowen aware of these events.

32. On July 6, 2007, Defendant submitted a N.C. General Statute 132 Public Records Law Request to Sheriff Kenneth Sealy ("Sheriff Sealy") of the Robeson County Sheriff Department requesting documents pertaining to a tape recorder confiscated from Defendant in 1995 during a cell search. (See Exhibit 3).

33. Sheriff Sealy responded on July 23, 2007 indicating his intent to forward any information in the public records that I requested. He also advised Defendant to contact the N.C. State Bureau of Investigation ("N.C.S.B.I."), the Robeson County District Attorney's office and the Robeson County Clerk of the Court after consulting with Robeson County Attorney Hal Kinlaw. (See Exhibit 3.1).

34. On August 21, 2007, Defendant submitted a N.C. General Statutes 132 Public Records Request to the Director of the N.C.S.B.I., Robin Pendercraft requesting indices of recordings of Defendant and other parties in the possession and custody of the N.C.S.B.I. and any documents, letters or emails that referenced, mentioned or documented the existence of the tape recorder that Officer Rowdy confiscated from Defendant as well as the cassette tapes in 1994, 1995 and 1996. (See Exhibit 3.2).

35. On August 27, 2007, N.C.S.B.I. Assistant Director William E. Weis responded to Defendant's request and stated, "due to the fact that law prohibits the release of our criminal investigative files without the order of a court of competent jurisdiction, we will be unable to release this information (see N.C.G.S. 132-1.4)". (See Exhibit 3.3).

36. North Carolina General Statute 132-1.4 "Criminal Investigations; Intelligence Information Records" excludes records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information compiled by public law enforcement agencies from being defined as Public Records under G.S. 132-1.

37. The facts set forth in paragraphs 15-30 demonstrate that Mr. Bowen, an experienced defense attorney and former District Attorney Assistant, knew or should have known that he was "under investigation for his own participation in criminal conduct involving Defendant." (See, *State v. Loye*, 56 N.C.App. 501, 289 S.E.2d 862 (1982) (Conviction reversed under the Sixth Amendment due to conflict of interest where attorney under investigation for own participation in criminal conduct involving defendant). Mr. Bowen's knowledge of these circumstances establishes a conflict between Mr. Bowen and Defendant. In these circumstances, N.C. Appellate Court has decided prejudice must be conclusively presumed and Defendant is entitled to a new trial.

38. Although it is "difficult to judge intelligently the impact of a conflict on the attorney's representation of a client, [a]nd to assess the impact of a conflict of interest on the attorney's options, tactics, and decisions . . ." (See, *State v. Loye*, 289 S.E.2d 862) the following will set forth adverse effects of the multiple conflicts of interest on Defendant's trial but by no means is it exhaustive due to Defendant's limited knowledge of the law, the denial of access to materials necessary to prepare a motion on an issue this complex by the State taking Defendant's personal law books, cases and documents, and by appointed post-conviction counsel's refusal to provide Defendant with his case file pursuant to the N.C. Rules of Professional Conduct 1.16(d).

## V. ADVERSE EFFECT ON TRIAL: COUNSEL'S CREATION OF CONFLICT OF INTEREST RESULTING FROM BUSINESS TRANSACTION, OBTAINING PROPERTY BY FALSE PRETENSES AND PROCURING AND ASSISTING DEFENDANT TO ENGAGE IN CRIMINAL ACTS CAUSED TRIAL COUNSEL TO RESTRICT DEFENSE STRATEGY.

Defendant repeats the allegations contained in paragraphs 20 thru 38 of the Amendment to Defendant's Motion for Appropriate Relief and/or Defendant's Motion for Appropriate Relief as if set forth herein at length.

39. Trial Counsels' responsibility to consider, recommend and carry out an appropriate course of action for Defendant's defense was materially limited as a result of Counsel's other responsibilities and interests. Mr. Bowen labored under conflicts of interest throughout the entire proceeding and the deprivation of the right to counsel suffered by Defendant affected and contaminated the entire proceeding – from pretrial motions to sentencing. This structural defect affected the framework within which trial proceeded and was not simply and error in the trial process itself. See, *Arizona v. Fulimante*, 499 U.S. 279, 310 (1991).

40. The fact that Mr. Bowen did not bring the conflicts of interest to the Court's attention, strongly indicates a decision made by Trial Counsel to keep the conflicts from coming to light. Mr. Bowen had an ethical obligation to the Court and to Defendant to put both on notice about the conflict and give Defendant an opportunity to seek new counsel or make a knowing and intelligent waiver of the right to conflict-free counsel. Even if Defendant would have chosen the latter course, the Court, having substantial latitude, could have and probably would have refused to accept a waiver and insisted on the Defendant being appointed new counsel since the Court, during the trial, placed such a high emphasis of ". . . avoiding even the appearance of impropriety."

41. In a situation like this where counsel would have been subjected to professional censure and possibly criminal charges if the conflicts would have come to light, and where Counsel chose to stay silent about the conflicts, to the Defendant's detriment, the evil is what Counsel may have found himself compelled to refrain from doing, kept any evidence from being presented in trial that would have revealed the hidden conflicts of interest. This includes Defendant's testimony, and the use of the tapes of Melinda Moore, Deloris Sullivan and Danny Madison to impeach them when they testified. In fact, the use of the tapes would have been a criminal violation of N.C. General Statute 15A-287(a)(4) (a person is guilty of a Class H felony if they "willfully uses or endeavors to use the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Article.")

42. When Mr. Bowen entered into the business transaction with Defendant, the relationship was no longer one strictly between attorney and client only, but also one between business partners with an obligation to each other. Mr. Bowen owned the studio and had control

over Defendant's access to the studio and quality of access so Defendant felt obligated to stay in Mr. Bowen's good graces, especially since Defendant would not have had the opportunity to have his music recorded and produced from inside the county jail without Mr. Bowen's assistance. Contractually and personally, Defendant owed Mr. Bowen. This debt allowed Mr. Bowen to exert undue influence on Defendant to make decisions that furthered the goal of the contract – to publish Defendant's music in a manner that offered the most exposure and the best opportunity for success and profit. See, N.C. Rules of Professional Conduct 1.8, comment [9] Literary Rights." Measures suitable in the representation of the client may detract from the publication value of an account of the representation."

43. During opening statements, both Trial Counsels promised the jury that Defendant would testify. Defendant's testimony in this case was critically necessary for the following reasons:

(a) this was a high profile case where the media acted as an agent of the State and had convinced the jury pool that Defendant had murdered James Jordan; And

(b) that Defendant admitted his involvement in the murder of James Jordan; And

(c) was a career criminal who had been to prison for armed robbery and assault with a deadly weapon with intent to kill; And

(d) had made a home video rapping about killing James Jordan; And

(e) that the State's only witness accusing Defendant of killing James Jordan, Larry Demery, was unwittingly pulled into a life of crime and murder and was testifying against Defendant only out of remorse and because it was the right thing to do; In Addition,

(f) Defendant's alibi witnesses could only testify that at the State's time of death for James Jordan, Defendant was with them. Only Defendant could testify about

what happened after Mr. Demery picked him up to contradict Mr. Demery's version which falsely portrayed Defendant as killing James Jordan in his sleep in order to rob him. Defendant's lack of testimony allowed Mr. Demery to write the history of this tragic event.

For the above reasons, a strategy of relying on the presupposition that every Defendant is innocent until proven guilty was not reasonable in this case because it simply never existed due to the local media's 2 ½ years of pre-trial propaganda and misstatements of facts that was coordinated by the Robeson County Sheriff's Department and other officials. (See Jury Issues in this M.A.R.). In this case, Defendant would have had to present evidence of his innocence of First Degree murder and evidence that would justify the Court giving jury instructions to consider convicting Defendant of lesser charges. This could only be done through Defendant testifying.

44. If Defendant would have testified, the conflicts of interest created by Mr. Bowen would have been exposed in at least three different ways:

(a) Defendant's testimony would have rebutted Ms. Moore's testimony that Defendant pulled a gun on a guy harassing her at a nightclub. Ms. Moore's testimony was damaging because it portrayed Defendant as having exclusive control of the gun the State claimed was the murder weapon and it portrayed Defendant as willing to resort to violence for no logical reason. This corroborated Mr. Demery's version of Defendant shooting James Jordan simply because he woke up. In fact, Ms. Moore was recorded by Defendant on tape admitting she lied about this incident and Defendant would have testified about her admission of perjury. In addition, the man Defendant was said to have pulled the gun on admitted Defendant never pulled a gun on him and described the gun as a semi-automatic model; not the revolver the State

claimed was the murder weapon. The tape recorder Defendant used to gather this evidence against Ms. Moore is the same tape recorder that Mr. Bowen gave to Defendant for said purposes.

(b) Defendant's testimony would have rebutted Deloris Sullivan's testimony that portrayed Defendant as having exclusive control of the weapon identified as the murder weapon, among other things. This also would have been done using the evidence of her admissions Defendant gathered on the tapes provided by Mr. Bowen.

(c) Defendant's testimony regarding the videotape (and still photographs lifted from the videotape) would have explained that Defendant, in contradiction of the State's witness, Mr. Demery, did not kill James Jordan for his jewelry and, in fact, did not even know of the jewelry's existence until days after his murder because Defendant did not find the All Star ring and watch until two days after James Jordan's death when Defendant found it in the console of the vehicle. This testimony would have laid the foundation for James Jordan's personal secretary to testify to James Jordan's personal habit of taking his jewelry off and placing it in the console of the vehicle when making road trips. Defendant's and James Jordan's personal secretaries' testimony would have removed the State's theoretical motive to kill James Jordan for his jewelry, thereby impeaching Mr. Demery's testimony by a neutral witness. In addition, Defendant's testimony would have proved that Defendant, in wearing James Jordan's jewelry, while rapping was not bragging about James Jordan's murder but, as an aspiring rapper, was emulating other rap artists that had obtained success. Defendant would have testified that the rap lyrics he was practicing were "freestyle" lyrics, which had nothing to do with bragging rights about James Jordan's murder, and that became a part of a song that Defendant gave Mr. Lowery the publishing rights to. This would have led to the revelation about the conflict Mr. Bowen

seemed intent on hiding from the Court, the Defendant and from the authorities; a conflict that involved unethical and illegal criminal acts by Mr. Bowen. By influencing Defendant not to testify, Mr. Bowen avoided scrutiny of his actions that created the conflict.

45. Due to Mr. Bowen's conscious decision to withhold information about the conflicts he created from the Court, it must be noted that Mr. Bowen also made a decision not to impeach Ms. Moore and Ms. Sullivan with the tape recordings of their conversations proving they perjured themselves under oath in Court and to investigators, and also that is Mr. Bowen would have used the tape recordings or information derived therefrom to impeach them the very conflict he concealed would have been exposed. In addition, by disclosing or endeavoring to disclose the contents of the tapes that impeached these witnesses he would have been committing a Class H felony in violation of N.C. General Statute 15A 287(a)(3) and (4), and he would have been exposing Defendant to prosecution for his involvement in this crime, thus violating his duty of confidentiality. See, *Holloway v. Arkansas*, 435 U.S. 485 (1977).

46. According to the ABA standards, strategic or tactical decisions, such as what witnesses to call and whether and how to conduct cross-examination, what trial motions to make and what evidence to introduce, are the province of counsel. See, Standard 4-5.2(a); see also, *State v. Luker*, 65 N.C.App. 644, 310 S.E.2d 63 (1983) (*citing* standards on this issue.) The standards further provide that where feasible and appropriate, the attorney should consult with the client about such decisions. See, Standard 4-5.2(b). See also, Rules 1.2, 1.4 of North Carolina Revised Rules of Professional Conduct (attorney should reasonably consult with client about means by which client's objectives are to be accomplished, keep client reasonably informed about status of matter, and promptly comply with reasonable requests for information); *Gov't. of Virgin Islands v. Weatherwax*, 77 F.3d 1425 (3rd Cir. 1996)(relying on *Strickland v.*

*Washington*, court states that important strategic and tactical decisions should be made only after lawyer consults with client).

47. Defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem. As officers of the court, he would have been advising the court virtually under oath. See, *Holloway v. Arkansas*, 435 U.S. 485-486 (1977).

48. For the reasons set forth above in paragraphs 46-47, the proper course of action Mr. Bowen should have embarked on to avoid this blatantly obvious impropriety and to protect Defendant's Constitutional Right to conflict-free effective assistance of counsel is threefold.

## VI. DEFENDANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO PROTECT DEFENDANT'S RIGHT TO CONSTITUTIONALLY-GUARANTEED CONFLICT-FREE COUNSEL.

Defendant repeats the allegations contained in paragraphs 39 thru 48 of the Amendment to Defendant's Motion for Appropriate Relief and/or Defendant's Motion for Appropriate Relief as if set forth herein at length.

49. In order to protect Defendant's Constitutional Right to conflict-free trial counsel, Mr. Bowen was obligated to take the following action or actions similar enough to afford Defendant the same protection:

(a) First, resolution of the conflict of interest is spelled out in Comment [2] to N.C. Rules of Professional Conduct 1.7 [2] which requires the lawyer to:

(1) clearly identify the client or clients;

(2) determine whether a conflict of interest exists;

(3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and

(4) if so, consult with the client(s) affected under paragraph (a) and obtain their informed consent, confirmed in writing.

The client(s) affected under paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2), "are included."

In fact, 1.7 Comment [4] states that "if a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). In this case, under these circumstances, the conflict would have been non-consentable due to the representation having resulted in violation of law and the Rules of Professional Conduct. See, Rule 1.16(a)(1); Comments [1][2], and in violation of N.C.G.S. 14-100 since Mr. Bowen negotiated, facilitated and participated in the publishing contract during the time he was paid strictly to represent Defendant in the capital punishment murder trial.

(b) Secondly, Mr. Bowen should have '[sought] an advisory opinion on any potential conflict from the N.C. State Bar." See, Performance Guidelines for Indigent Defense Representation In Non-Capital Criminal Cases at the Trial Level, Guideline 1.4(b)(2008).

(c) Lastly, Mr. Bowen should have filed a Motion to Determine Counsel's Duty To Withdraw. See, N.C. Defenders Manual, Feb. 2004, page 65. Counsel filing this motion, or in some other way making the trial court aware of the conflict of interest, would have required the trial court to "take control of the situation." See, *State v. James*, 111 N.C.App. at 791, 433 S.E.2d at 758, and, to "conduct a hearing" . . . "to determine whether there exist[ed] such a conflict of interest that the Defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth

Amendment." Id. (Citation omitted. See, *State v. Mims*, No. COA 06-10, filed 5 December 2006).

50 Mr. Bowen could not seek any of the conflict resolutions set forth above for the same reasons it was in Mr. Bowen's personal interest to induce Defendant not to testify and for Mr. Bowen not to impeach Melinda Moore, Deloris Sullivan and Danny Madison with the tapes and information gained from them: it would have exposed his actions that created the conflicts and would have subjected him to punitive actions from the N.C. State Bar, the trial court, Robeson County Sheriff's Department, Robeson County Detention Center and, quite possibly, criminal prosecution.

51. When a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical state in, at least, the prosecution of a capital offense, reversal is automatic. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963); *Holloway v. Arkansas*, 435 U.S. 489 (1977); *Cuyler v. Sullivan*, 446 U.S. 343 (1979); *Mickens v. Taylor*, 535 U.S. 166 (2001). Mr. Bowen's self-protecting strategy and tactical decisions amount to an actual denial of counsel at the critical stages described above and throughout the trial and pre-trial motions (such as the hearing where Danny Madison testified). "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. 490 (1977).

This was a close case where the State's evidence against Defendant was weak with guilt a close question. Although there was plenty of evidence of guilt of lesser offenses, on the issue of first degree murder, the State had only one witness saying that Defendant killed James Jordan in an attempt to rob him, Larry Martin Demery.

The jurors' findings of facts and recommendations in the sentencing phase prove that they did not believe Mr. Demery or the State's version of events surrounding the murder of James Jordan, as did their post-trial statements to the media. It is impossible to determine what evidence and how trial counsels' conflict-rooted errors adversely affected the trial but there is a real chance that it might have provided the slight impetus which swung the scales towards guilt. To determine the precise degree of prejudice sustained by Defendant is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. *State v. Loye*, 289 S.E.2d 862; *Glasser v. U.S.*, 315 U.S. at 75, 76, 62 S.Ct. at 467. Prejudice in these circumstances must be conclusively presumed and Defendant is therefore entitled to a new trial or other appropriate relief.

## VII. THE STATE FAILED TO DISCLOSE EXCULPATORY, IMPEACHMENT AND MITIGATING INFORMATION TO THE DEFENSE IN VIOLATION OF DEFENDANT'S RIGHTS TO DUE PROCESS AND A RELIABLE SENTENCING HEARING PURSUANT TO THE STATE AND FEDERAL CONSTITUTIONS.

Defendant repeats the allegations contained in paragraphs 49 thru 51 of the Amendment to Defendant's Motion for Appropriate Relief and/or Defendant's Motion for Appropriate Relief as if set forth herein at length.

52. Prior to trial, Mr. Bowen filed a request for voluntary discovery in the above-captioned case. A Motion for Discovery was later filed and included but was not limited to a general request for discovery. The motion also included a multitude of specific requests including but not limited to the State disclosing its witnesses' criminal history, evidence which impeached their credibility; evidence relevant to other party guilt; inconsistent statements of its witnesses; evidence relevant to third-party guilt; descriptions of the perpetrator that do not match

Defendant; inconsistent identifications or descriptions of the suspect; statements which contradicted other witnesses; officers' notes or reports which refute or impeach witnesses; the names and addresses of favorable treatment of its witnesses by the state or federal government or other inducements; any description of a suspect which is substantially different than Defendant. In addition, upon information and belief, defense counsel also filed a Motion to Reveal Grant of Immunity or Other Concessions, a Motion for Preservation of Notes and Tapes and a Motion to Compel Officers to Turn Over Information to Prosecutors and a Motion to Compel Discovery.

53. The State has a duty to disclose evidence favorable to an accused person whether or not a defendant specifically requests the favorable evidence. Brady, 373 U.S. at 87; *United States v. Agurs*, 427 U.S. 97, 107-11, 96 S.Ct. 2392, 49 L.Ed.2d 342 (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 the police. *Kyles v. Whitley*, 514 U.S. 432, 131 L.Ed.2d 490 (1995).

54. 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 a State cannot knowingly create a materially false impression regarding the facts or the credibility of witnesses. 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. Kyles, 131 L.Ed.2d at 505.

55. 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, 105 S.Ct. 3375, 87 L.Ed.2d 481 (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 432. Rather, when evaluating the materiality of suppressed evidence, the standard is a "reasonable probability" of a different result. 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. Evidence withheld from the defense is to be evaluated collectively, not item-by-item. Id. at 433.

56. In the instant case, the State failed to disclose evidence which contradicted its theory of the case at trial, specifically that Defendant had exclusive control of what the State claims was the murder weapon, that Defendant was dedicated to finding opportunities to rob people, that Defendant was quick to brandish weapons at the slightest perceived provocation and that Defendant conspired to rob, shoot and kill James Jordan. Moreover, the State failed to disclose critical impeachment evidence which included inconsistent statements on the part of State's witnesses, evidence of their bias and motive to testify. This non-disclosed impeachment evidence was crucial because the State's case rested upon the credibility of its witnesses, due to the lack of physical evidence linking Defendant to the victim's murder. The jury's verdict, suggestions and findings of fact prove that the jury did not find Mr. Demery credible. Mr. Demery was the only witness that linked Defendant to the murder. The fact that they found Defendant guilty despite their apparent disbelief of Mr. Demery's testimony strongly indicates that they found Defendant guilty based on circumstantial evidence introduced through other witnesses. The failure of the State to disclose evidence which impeached their witnesses

prevented counsel for Defendant from investigating and pursuing a course that would have easily resulted in these witnesses being impeached, their biases being exposed and the undue pressure investigators exerted upon these witnesses to incriminate Defendant being exposed. Had defense counsel received the above-referenced information, they would have used it at trial and in their preparation for trial, if they had any commitment to representing Defendant in accordance with their ethical obligations. Nondisclosure of exculpatory, impeachment and/or mitigating information in Defendant's case requires that his conviction be vacated. The prejudice from the nondisclosure of this evidence must be viewed in light of the lack of any direct physical evidence linking Defendant to the murder of James Jordan, the jury's impeachment of the only State witnesses accusing Defendant of killing James Jordan by their findings of fact at the sentencing stage of the trial and the great extent to which the State relied on the testimony of cooperating witnesses in securing the conviction of Defendant.

In addition, "Defendant has a constitutional right to the disclosure of exculpatory or favorable evidence. 'Impeachment evidence, . . . as well as exculpatory evidence, falls within the Brady rule.'" *U.S. v. Bagley*, 473 U.S. 667, 676 (1985); see also, *Brady v. Maryland*, 373 U.S. 83 (1963). "This rule applies regardless of whether there has been a specific request for the evidence." *State v. Wise*, 326 N.C. 421, 429, 390 S.E.2d 142, 147 (citing *U.S. v. Agurs*, 427 U.S. 97 (1976), *cert. denied*, 498 U.S. 853 (1990)). Quoting, directly *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992). During the *Miranda* suppression hearing, the State withheld information favorable to Defendant regarding accusations made against the victim by a family member and several others. There is a reasonable probability that if the State had made this information available to Defendant, the outcome of the suppression hearing would have been different and Defendant's un-*Miranda*ized statements would have been suppressed which would have changed

the outcome of the trial proceeding. Therefore, Defendant also requests a new suppression hearing.

**A. The State Failed to Disclose Evidence which Contradicted Its Theory of the Case, Specifically Tape Recordings of Telephone Conversations of Melinda Moore and Deloris Sullivan that Impeached their Pre-Trial Affidavits and Trial Testimony that Portrayed Defendant in a Negative Manner to Bolster Larry Demery's Credibility.**

57. The State's theory in this case hinged on convincing the jury that Defendant was a cold-blooded killer whose day-to-day existence revolved around finding victims to rob and portraying Defendant as a thug ever ready to shoot anyone who was in the way. This characterization of Defendant was mainly offered through Mr. Demery, a man who was testifying to save his own life and to get a plea bargain that will put him back on the streets in less than 20 years. To bolster Mr. Demery's credibility, the State offered evidence through Melinda Moore and Deloris Sullivan to support said portrayal.

58. The State failed to disclose evidence in its possession that directly contradicted and impeached the testimony of these two women.

59. Specifically, the State failed to disclose conversations recorded by the Robeson County Detention Center penal telephone system that contradicted the following:

Melinda Moore

60. Trial Testimony: Ms. Moore testified that at a club Defendant pulled a gun on a guy who was harassing her. She testified that Defendant had exclusive possession of the gun the State identified as the murder weapon used in James Jordan's murder. Ms. Moore also testified Defendant told her he got his money from selling drugs and committing robberies. In addition to the above-referenced testimony, Ms. Moore testified that Defendant got her pregnant and she told him she was having an abortion. The taped conversations recorded her admitting she lied

about these things because the police told her Defendant downplayed their relationship and because the police threatened her with perjury and criminal charges.

Deloris Sullivan

61. Trial Testimony: Ms. Sullivan testified that Defendant had a roll of money and gave his mother $100.00 and told her and Ms. Moore that the money came from selling drugs and robbing people. She testified that Defendant had her take him and Mr. Demery to a basketball court in Marion, South Carolina called the "Honey Hole" to rob someone. The taped conversations recorded her admitting she lied about these incidents because the police told her she would be charged with criminal acts if she did not cooperate. Ms. Sullivan informed Defendant that Ms. Moore was never pregnant with his child but Ms. Moore was attempting to scam Defendant out of money under the pretense of needing the funds for an abortion. Ms. Sullivan also was recorded telling Ms. Moore that Defendant, according to police, was recording their conversations.

62. On July 6, 2007, Defendant submitted a N.C. General Statute 132 Public Records Law Request to Sheriff Kenneth Sealy of the Robeson County Sheriff's Department requesting electronic data processing recordings of these conversations. (See Exhibit 3.)

63. Sheriff Sealy responded on July 23, 2007 indicating his intent to forward any information in the public records that Defendant requested. He also advised Defendant to contact the N.C. State Bureau of Investigation, the Robeson County District Attorney Office and the Robeson County Clerk of Court after he consulted with Hal Kinlaw, the Robeson County attorney. (See Exhibit 3.1.)

64. On August 21, 2007, Defendant submitted a N.C.G.S. 132 Public Records Request to the Director of the N.C.S.B.I., Robin Pendercraft and requested the telephone recordings. (See Exhibit 3.2.)

65. On August 27, 2007, N.C.S.B.I. Assistant Director, William E. Weis, responded to Defendant's request stating that, "due to the fact that law prohibits the release of our criminal investigative files without the order of a court of competent jurisdiction, we will be unable to release this information. (See Exhibit ___.)

66. The State's withholding of the above-described information denied Defendant the opportunity to present exculpatory, impeachment and mitigating evidence to the jury. Ms. Moore and Ms. Sullivan's respective testimony bolstered Mr. Demery's version of the events surround James Jordan's murder as well as the negative portrayal of Defendant. The State's conduct in withholding the recordings and other information denied Defendant due process, interfered with his right to effective assistance of counsel, and subjected him to cruel and unusual punishment. The failure to disclose this evidence violated Defendant's rights pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and under Article I §§ 19, 23 and 27 of the North Carolina Constitution. The failure of the State to disclose this information undermines confidence in the verdicts returned. 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. Had defense counsel been aware of the substance of these recordings, a cross-examination exposing these witnesses' biases and motives for committing perjury could and should have been prepared. "Cross examination is the principal means by which the believability of a witness and the truth of testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 39 L.Ed.2d 347, 353 (1974).

**B. The State Failed to Disclose Evidence which was Favorable to Defendant Because it Supported His Credibility by Corroborating His Testimony at the *Miranda* Suppression Hearing and, Thus, Impeached the Testimony of the State's Witnesses.**

67. Prior to the trial, Defendant's attorneys filed a motion to suppress statements Defendant made to law enforcement officials during what Defendant contends was a custodial interrogation where no *Miranda* warnings were given.

68. From October 4, 1995 through October 12, 1995, the trial court held a pre-trial hearing on Defendant's motion to suppress the statements in question. Following the hearing, the trial court made extensive findings of fact and, based on those findings, concluded Defendant was not in custody during the time in question and that his statements were admissible. These findings of fact were based on the evidence presented and the Court's assessment of the witnesses' truthfulness, including Defendant.

69. The State withheld material evidence that was favorable to the determination of Defendant's reliability at the suppression hearing and the State knowingly used perjured testimony and/or failed to correct what was known to be false testimony by State witnesses who are agents of the State. Therefore, the Court's findings of fact were based on evidence that was not truthful and that evidence was not complete due to the State's witnesses and reinforced Defendant's version of the events that took place on the night of the seven (7) hour interrogation.

70. The exact nature of the evidence withheld will be detailed in a sealed document which will be unsealed only if deemed necessary by the Court and at the Court's discretion at, or prior to, the evidentiary hearing on this Motion for Appropriate Relief for the following reasons:

(a) The relevance of the evidence withheld from the Defendant is not the nature or truthfulness of the allegations against the victim, but rather the fact that the officers, Art Binder and Randy Meyers, made these

allegations to Defendant during the interrogation; Defendant's testimony about these allegations weakened Defendant's credibility due to the allegations being so unbelievable at the time and would have had the effect of making Defendant appear to be lying to the Court under oath; and the fact that the State had evidence which it withheld from the Defendant that these allegations did exist and since Defendant would have had no way of knowing about these allegations except for the officers revealing them to Defendant. Defendant's credibility would have been support instead of undermined by his testimony to the Court about these allegations.

(b) Exposing these allegations could cause undue embarrassment to the victim's family and reputation.

(c) There is a possibility that this motion will garner the attention of the media and these allegations if made public could be taken as being true although they were never substantiated.

71. For the reasons set forth in paragraph 70, Defendant is attaching the sealed document to this Motion as Exhibit ___ and requests the Court to review it in chambers and requests that this issue be referred to as "Giglio Issue B."

72. The State's withholding of the above-described information, Giglio Issue B denied the Defendant the opportunity to present evidence to the Court that impeached the State's witnesses and supported Defendant's credibility and testimony at the suppression hearing. The suppression of this material evidence denied the Defendant due process, interfered with his right to counsel, and subjected him to civil and unusual punishment. The failure to disclose this

evidence violated Defendant's rights pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and under Article I §§ 19, 23 and 27 of the North Carolina Constitution. The failure of the State to disclose this information undermines confidence in the Court's determination of Defendant's credibility, the competence of the evidence presented at the suppression hearing, the trial Court's findings of facts and the trial Court's conclusion of law. Had this evidence been disclosed, there is a reasonable probability that Defendant's interrogative statements would have been suppressed and the proceedings of the trial and appeal would have been different.

## VIII. DUE TO THE STATE'S CONSTANT AND UNRELENTING INTERFERENCE WITH DEFENDANT' RIGHTS TO GAIN ACCESS TO THE COURTS, DEFENDANT CANNOT ADEQUATELY ADDRESS THE FOLLOWING ISSUES IN THIS MOTION BUT DOES NOT WISH TO WAIVE THEM. THE STATE'S INTERFERENCE HAS INVOLVED TAKING DEFENDANT'S LAW BOOKS AND LEGAL DOCUMENTS USED TO RESEARCH THESE ISSUES, PLACING DEFENDANT IN SEGREGATION FOR REQUESTING DUE PROCESS IN THE STATE'S TAKING OF THESE MATERIALS AND THE APPOINTMENT OF ATTORNEY CARLTON MANSFIELD WHO HAS ACTIVELY AND PASSIVELY OBSTRUCTED DEFENDANT'S ACCESS TO THE COURTS AS SAT OUT IN THE ATTACHED N.C. STATE BAR COMPLAINT.

Defendant repeats the allegations contained in paragraphs 52 thru 72 of the Amendment to Defendant's Motion for Appropriate Relief and/or Defendant's Motion for Appropriate Relief as if set forth herein at length.

### A. Violations of Defendant's Sixth Amendment Right to an Impartial Jury and Thirteenth Amendment Right to Due Process and Equal Protection under the United States Constitution.

73. On January 18, 1996, two (2) weeks after the trial began, the Court was made aware of ex-juror, Patricia Locklear ("Ms. Locklear"), discussing the case with a local AM talk show host who is related to the District Attorney who prosecuted this case, Johnson Britt.

74. During a hearing in the Judge Week's chambers, Ms. Locklear admitted to discussing the case with the talk show host. District Attorney Britt admitted the man in question was his cousin. When Judge Weeks informed Ms. Locklear she was being dismissed from the jury, irrationally she broke out in hysterical tears.

75. After her dismissal, Ms. Locklear, in a knowing misstatement of fact, told the press, "we do not know. If we had done something wrong, we would tell you. We have done nothing wrong," denying any wrongdoing. Exhibit 4.

76. Mr. Britt's cousin, the talk show host had already made inflammatory and prejudicial comments about Defendant that portrayed Defendant as guilty.

77. At the time of Ms. Locklear's dismissal, no evidence had been introduced to the jury that would lead an impartial jury to find Defendant guilty of James Jordan's murder or robbery. No evidence linking Defendant to the murder or robbery had been introduced.

78. The next couple of days, Ms. Locklear assumed the role of trial consultant to the media based on her former position as a juror. She immediately began telling the media in interviews that Defendant was guilty, was a bad person and that she knew Defendant had gotten Mr. Demery in trouble by guiding him into a life of crime. Note that at this time, no evidence had been presented linking Defendant to James Jordan's murder.

79. Taker her role further, Ms. Locklear sat behind the District Attorney's team almost daily during the trial, consulted with the District Attorney's team and gave regular running commentary on the trial, always speaking on behalf of the State, to the local media in interviews that were televised. She also took notes every day.

80. At some point, it came to the Court's attention that Ms. Locklear and juror Angela Coverdale ("Ms. Coverdale") talked regularly after the days' proceedings. The Court questioned

both Ms. Locklear and Ms. Coverdale. Both denied discussing the case, but Ms. Locklear admitted she was working on a book about the trial. It should be noted that Ms. Coverdale was one of two jurors who originally voted for capital punishment in the sentencing phase and, echoing Ms. Locklear's comments to the jury she told the media. "I have a feeling that he was a really mean kid." Exhibit 5.

81. The Court again admonished Ms. Locklear and Ms. Coverdale not to discuss the case but also stated he could not prevent them from talking to each other. Ms. Locklear was present and took notes during portions of the trial that the jury were not present at. In addition, it has also come to light that Ms. Locklear is the cousin of a deputy that regularly escorted both Defendant and Mr. Demery to court and worked in the jail that housed both men. This deputy is Abigail Locklear ("Deputy Locklear"). During the voir dire portion of the trial, upon belief, Ms. Locklear denied knowing or being related to any officers. Ms. Locklear lied to the press about why she was dismissed from the jury, about knowing officers and also during the voir dire process when she claimed she was objective, impartial and had no opinion about Defendant being guilty as evidenced by her comments to the media immediately after her dismissal from the jury.

82. North Carolina General Statutes Section 8-53.11(a)(1) defines a journalist as "[a]ny person . . . engaged in the business of gathering, compiling, writing, editing, photographing, recording or processing information for dissemination via any news medium."

83. North Carolina General Statutes Section 8-53.11(a)(2) defines a legal proceeding as "any criminal prosecution . . .."

84. Ms. Locklear was, in fact, a journalist due to her actions set forth in paragraphs 78 thru 80 and as such should not have been allowed to communicate with Ms. Coverdale, a juror,

at will. Due to her perjury as set forth in paragraph 81, her assertions of not discussing the trial with Ms. Coverdale should not have been taken on face value and the Court should have dismissed Ms. Coverdale, as well as the whole jury. At the very least, the Court should have conducted further voir dire to ascertain the impact of Ms. Locklear's actions and presence in support of the District Attorney on the jury since these acts had the obvious potential of tainting the whole jury. Ms. Locklear's failure to honestly answer and bring to the Court's attention her relation to Deputy Locklear prevented the Defendant from challenging, for cause, her admission as a juror. Ms. Locklear's deceitful actions and her close contact with the prosecutor's cousin, team and as a mouthpiece for the prosecutor to the media, suggests that her sole purpose was to sabotage Defendant's case from the inside under the cover of being an impartial juror. It should be noted that the Court dismissed Cecilia Ellerbe, a juror who was the only black female on the jury, for stating that "we will have to take our time with this case and not rush to judgment" or something to that effect. An ex-juror who was planning on profiting from the trial, who was an advocate of Defendant's guilt, who actively engaged in the business of gathering, compiling, writing, editing, processing information for dissemination for the local news station at the same press conferences held by the District Attorney, in the District Attorney's office and giving interviews proclaiming Defendant's guild before any evidence of alleged guilt was presented by the State should not have been allowed to communicate with the jury during the trial, especially since the Court directly ordered the jury to have no contact with the media. These two jurors did not know each other prior to the trial and any friendship forged was forged during the two weeks they were together on the jury so common sense dictates that they discussed the primary thing they had in common, the trial.

85. Moreover, the facts set forth in the paragraphs above is substantial evidence that the District Attorney, Johnson Britt violated North Carolina Rules of Professional Conduct, Rule 8.4(a)(d) and (c) in that he violated the Rules of Professional Conduct and knowingly assisted and/or did so through the acts of Ms. Locklear. Specifically, he violated Rule 3.6(a) in that he constantly made extrajudicial statements that he knew would be disseminated by means of public communication that had a substantial likelihood of, and did, materially prejudiced Defendant's trial and assisted Ms. Locklear in doing the same and did so through her. These acts also violated the Court's gag order on the attorneys involved in the trial. What Michael B. Nifong, former North Carolina District Attorney ("Mr. Nifong"), did to the 2006 Duke University Lacrosse team after their arrest, D.A. Britt did during the trial which was more damaging. Mr. Britt has also continued his use of the media to deceive the public about the evidence presented at Defendant's trial and in his efforts to justify giving Mr. Demery an illegal plea bargain in exchange for the testimony Defendant's jury impeached by their findings in the sentencing stage.

86. On the day Defendant was found guilty, Defendant was informed by two of the people on his witness list, Kaye Hernandez ("Ms. Hernandez) and Nellie Montes ("Ms. Montes"), that one of the jurors, whom they referred to as "Cap" used to be a family friend until he sexually harassed Ms. Montes whom he knew to be married and due to the harassment, the friendship was ruined and there was now animosity between them. The juror known as "Cap" denied he harassed Ms. Montes sexually to Ms. Hernandez.

87. Ms. Montes testified that at the time Mr. Demery testified James Jordan was murdered, Defendant was at Ms. Hernandez's home. The jury's determination of Ms. Montes' credibility would have had substantial effect on their findings of fact which led to their verdict.

The juror identified as "Cap" could not have been objective in assessing Ms. Montes' credibility and, furthermore, he should have informed the Court of their relationship and at the very least that he knew not only Ms. Montes but also Ms. Hernandez and the other witnesses at Ms. Hernandez's home that night, Monica Hernandez, Sebette Boulet, her husband and other witnesses.

88. Ms. Hernandez and Ms. Montes also informed Defendant that they told Defendant's trial counsel and investigator, Garth Locklear ("Mr. Locklear"), about the facts set forth in paragraph 86 and told them they should get "Cap" off of the jury. They informed Defendant that they did not tell him due to trial counsels telling them not to discuss the case with Defendant.

89. The facts set forth in paragraphs 86 and 88 were placed in affidavits by Ms. Hernandez and Ms. Montes and given to Defendant.

90. The next day in Court, Defendant immediately brought this issue to the Court's attention and gave Judge Weeks the affidavits in his chambers. At no point did trial counsel deny that they knew and failed to inform Defendant about this information.

91. When Defendant asked counsel why they did not tell him about this matter, they both said they "forgot." Mr. Locklear also stated that he "forgot."

92. In addition, Defendant was informed that "Cap" was close friends and hanging buddies with a man on the State's witness list who gave statements to investigators accusing Ms. Hernandez and Ms. Montes of lying. (Ronald Fletcher)*2

93. Ronald Fletcher was also the same person who made statements about his hopes that a movie would be made about the case and that Denzel Washington would play him. This offers revealing insight into his motivation for interjecting himself into this case. Although this man

2. On June 11th Defendant spoke to Ronald Fletcher for the first time, to his recollection, in his life. Mr. Fletcher informed Defendant that Angus Thompson and James Capston? (The Juror) 41 were, at the time of the trial, friends, members of the same church and members of the same Masonic Lodge.

did not testify, his presence on the State's witness list led to counsel, against Defendant's wishes, not calling Ms. Hernandez to give testimony.

Ronald [redacted] Fletcher PS

94. "[redacted] was employed by the Department of Social Services in Lumberton, North Carolina. The Department of Social Services by no coincidence took custody of Defendant's nieces on the day Mr. Britt made statements to the jury about Defendant not testifying. The day before, Mr. Britt made comments to the effect that he was no longer playing fair.

95. "Cap," according to Ms. Hernandez, and Ms. Montes, frequently made trips to Fayetteville to pay for the services of prostitutes.

96. The facts set forth in paragraphs 86 thru 95 should have been presented to Defendant by trial counsel and should have been presented to the Court. "Cap" should have been removed from the jury.

97. The failure of trial counsel and appellate counsel to present these issues to the Courts is ineffective assistance of counsel.

98. When Defendant receives the case file, this motion will be amended to reflect the names of the people referred to in paragraphs 86 thru 97.

99. In addition, during the trial, Defendant received the following information:

(a) That the youngest black male on the jury discussed the trial with his sister. His sister told Ms. Ann Freeman ("Ms. Freeman") that the juror had expressed the opinion that Defendant would have to testify in order to be found not guilty due to the backlash the O.J. Simpson jury ("Simpson Jury") had faced after acquitting him. This conversation took place during the trial and Defendant informed trial counsel. Furthermore, the State has evidence in its possession about this conversation.

#3 It has come to Defendants attention that Mr. James Fletcher may have occupied a supervisory position in Child Services which would support Defendants position that Mr. Fletcher was involved in taking Defendants sisters child.

(b) During the trial, Mr. Locklear, informed Defendant and trial counsel that the restaurant the jury frequented during the trial prominently displayed the front page of the *Robesonian* newspaper, which almost daily featured the trial; that the jury could not help but be exposed to these articles and Defendant was prejudiced thereby. Mr. Locklear was to have taken pictures of this and placed said photographs in Defendant's case file.

(c) During jury deliberations, the jury made reference to the backlash on the Simpson Jury for finding him not guilty and they were concerned about the same happening to them if they acquitted Defendant. This argument was used to persuade some of the jurors to find Defendant guilty. While this concern was justified, it should have played no part in their decision.

**B. Defendant's U.S. Constitutional Fifth Amendment Privilege Against Self-Incrimination, Sixth Amendment Right to the Assistance of Counsel and Fourteenth Amendment Right to Due Process Violated by the Prosecutor's Reference to Defendant not Testifying and by the Court Appointing Third-Party Attorney to Defendant Who was not Fully Informed Enough to Effectively Assist Defendant.**

100. Shortly after he began presenting his closing argument, Mr. Britt pointedly noted that Defendant did not testify on his own behalf at the trial.

101. The Court (not trial counsel) cut Mr. Britt off mid-sentence and asked trial counsel if they wanted to request a mistrial.

102. After conferring with Defendant in a side room, trial counsel made a formal motion for a mistrial.

103. The Court asked Defendant if he agreed with the decision. After hesitating, Defendant told the Court he wanted the trial to continue and specifically stated he believed that Mr. Britt was "deliberately trying to get a mistrial."

104. Due to spending 2 ½ years in the Robeson County Detention Center, during which Defendant was drugged with psychotropic drugs to impair his mental state, subjected to sensory deprivation, isolated from general population against his will, assaulted while handcuffed by staff with sticks and handcuffs, the Defendant was not in a mental condition to overrule tactical decisions of the lawyers, especially concerning which trial motions to make. In addition, Defendant had just been informed that his niece had been taken by the State for no justifiable reason and Defendant believed it was related to his trial.

105. In this situation, Defendant was questioned by the Court about his desires versus the expertise of his attorneys. By simply telling the truth, Defendant was forced to overrule the decision of trial counsel. Defendant should not have been forced to make this decision.

106. Most importantly, the Court did not fully inform he third-party attorney of the events surrounding Defendant's dilemma.

107. Specifically, the Court did not make available to the third-party attorney, Ken Ransom, the transcript from the day before in which Mr. Britt blatantly stated his intent to "stop playing fair."

108. That statement combined with Mr. Britt's remarks about Defendant not testifying clearly revealed Mr. Britt's intention to cause a mistrial.

109. Such action by Mr. Britt if proven would have provided grounds for a mistrial with no re-trial according to N.C. General Statute at the time.

110. If Mr. Ransom would have been aware of Mr. Britt's statements from the day before, Defendant would have been informed of this option and he would have requested a mistrial and would've requested that the charges be dismissed in accordance with the law.

111. Due to the Court's failure to fully inform third-party attorney about the situation that the Court pulled him into, Mr. Ransom could not adequately inform Defendant and, therefore, Defendant's decision to continue with the trial, against his attorneys' wishes, was not made intelligently and knowingly.

### C. Defendant's Right to a Fair Trial Violated by Larry Demery's Testifying about Inadmissible Evidence.

112. Prior to Defendant's trial, Defendant's conviction for assault with a deadly weapon was vacated by Judge Weeks.

113. As a result of this conviction being overturned, the State could not use it against Defendant during the trial or sentencing stage, nor could the State introduce evidence about this conviction and Defendant's previous incarceration.

114. On January 24, 1996, the State's star witness, Larry Demery, made a direct reference to Defendant's incarceration by stating that "he (Defendant) said that while he was away, he had learned of ways to commit crimes without getting caught."

115. Defendant never made such a statement to Mr. Demery and Mr. Demery's only purpose for attributing this statement to Defendant was to call the jury's attention to Defendant's incarceration in order to bolster his story of Defendant being an experienced criminal who led him into a crime spree.

116. "Away" is a clear reference to being in prison as Mr. Demery used it. Webster's Encyclopedic Unabridged Dictionary defines put away (put: 26 e.) as "to confine in a jail or a mental institution: He was put away for four years."

117. The prosecutor was well aware of the media attention given to Defendant having been recently released from prison, and knew the jury was aware of it, shortly before James Jordan was murdered. Mr. Britt was also made aware that the conviction being vacated was

given very little publicity. In fact, Defendant's release from prison and subsequently being charged for murder was used by the N.C. General Assembly to call for the enhancement of sentence served by convicted felons. (See Exhibit 11).

118. This clear reference to Defendant's prior incarceration deprived Defendant of a fair trial.

**D. Defendant Denied a Fair Trial by the State's Hiding the Existence of Witness Dominique "Slick Rick" Hales.**

119. The State introduced a witness, Dominique Hales ("Mr. Hales"), at the last moment and claimed that Mr. Hales, who had a sentence of over 100 years reduced to 16 days, received no deal for his testimony and the State could not find him, due to him being in the custody of the Feds in Florida, until shortly before he took the stand.

120. Upon information and belief, the State knew that Mr. Hales was, in fact, in the custody of the State in the Department of Corrections and had received a global immunity plea from the Feds and the State to testify against Defendant.

121. The fact that this was withheld from the Defendant, deprived him of a fair trial.

**E. Defendant's Waiver of Conflict with Public Defenders Office and Trial Counsel, Angus Thompson, was not Knowing and Intelligent Due to Court's Misrepresentation of Facts and Mr. Bowen's Misrepresentation Made to Defendant.**

122. Prior to trial, the Court held a conflict hearing due to Defendant's prior conviction being vacated after his court-appointed attorney, employed by the Public Defenders Office, Freda Black ("Ms. Black"), was found to be ineffective in representing Defendant. As a result of Ms. Black's ineffectiveness, due in part to the Public Defenders Office lack of funding, Defendant spent 2 ½ years in the Department of Corrections from the age of 16 to 18. This is the conviction authorities used to justify their characterization of Defendant as being a "career

criminal." In truth, Defendant defended himself after being assaulted by three other teenagers and after being held by force at one of the young men's home.

123. Due to the fact that Defendant could have pursued a civil lawsuit against the Public Defenders Office and the State for the wrongful conviction, the prosecutor saw a potential conflict in Defendant being represented by the Public Defenders Office that was found to be ineffective in the prior proceeding.

124. In considering whether to waive the potential conflict, Defendant had to consider whether such waiver would adversely affect future efforts to gain relief for the wrongful conviction and incarceration.

125. The Court informed Defendant that his prior conviction, which was vacated by the Court, could not be used against him in future proceedings, and that the prior conviction would be wiped from his records which Defendant understood to mean that no trace of the prior conviction existed on record.

126. The Court's information to Defendant has proven to be untrue. The prior conviction was used against Defendant in the trial by Mr. Demery making reference to it and has been used by the N.C. Dept. of Corrections. Furthermore, the prior conviction is still on record as if it had never been vacated.

127. At the same pre-trial hearing, Mr. Bowen told Defendant in open court that he would make sure he had an attorney to represent him in his efforts to gain relief for the time he spent in prison on the wrongful conviction. This has proven to be untrue.

128. The statements by the Court and Mr. Bowen played a part in Defendant's decision to waive the conflict issue between him and the Public Defenders Office and the fact that he made a decision based on the word of the Court and trial counsel, that turned out to be not true

renders his waiver null and void due to it not being knowingly and intelligently made due to misrepresentations of fact presented to him by the above-named parties.

129. Due to the fact that Defendant's consent to be represented by conflict-free counsel was induced by the Court's and trial counsel's misrepresentations of facts. Defendant's subsequent representation by trial counsel resulted in a structurally flawed trial. Defendant is entitled to a new trial.

### F. Defendant's Court-Appointed Trial Counsel Use of Larry Demery's Cousin as Private Investigator is a Conflict of Interest that Adversely Affected Defendant's Trial.

130. It has come to Defendant's attention that, upon information and belief, the private investigator employed by the Public Defenders Office and who worked on Defendant's case, Mr. Locklear, is the cousin of Mr. Demery.

131. The Public Defenders Office should be considered as a single law firm and staff may not represent co-defendants with conflicting interests unless the Defendant gives consent in writing.

132. The fact that Mr. Locklear and Mr. Demery are related, is an obvious conflict. Defendant should have been given the opportunity to waive this conflict or receive the services of another investigator without this conflict. At no time did Defendant waive this conflict.

133. This conflict adversely affected Defendant's trial because, just to give one example, Mr. Locklear had to choose between investigating and gathering evidence of other robberies and assaults committed by Mr. Demery that, if presented at trial, would not only have impeached Mr. Demery's testimony and proved he committed perjury, but would have also provided another aggravating circumstance that would have increased the likelihood of Mr. Demery receiving the death penalty.

134. One of these robberies was the robbery of the store known as "Scotts" and "Redbanks" that Mr. Demery and another individual committed at night after assaulting the cashier. Mr. Demery told Defendant about this robbery which happened when Defendant was incarcerated at Western Youth Institution. Defendant had no way of knowing the details of this crime unless the perpetrator told him. Although Defendant's trial counsel cross-examined Mr. Demery about this and other crimes (to which Mr. Demery responded "what kind of fool would I be to tell you if I did anything.") The person who aided Mr. Demery and the cashier was not interviewed by the investigator nor were they called to the stand to testify at trial.

135. The above facts demonstrate that Defendant's trial was structurally flawed and due to the conflict Defendant was denied a fair trial.

### G. Trial Counsel Ineffective for Failure to Produce Evidence Forecasted in Opening Argument.

136. During opening argument, trial counsel told the jury that they would present evidence that the victim was still alive and the body found by authorities was not James Jordan.

137. All scientific evidence proved that the body did belong to James Jordan and upon information and belief, trial counsel knew this at the time they made opening argument.

138. Trial counsel also had a statement in which Defendant admitted he helped dispose of a body. In light of this, trial counsel's opening argument was an insult to the jurors' intelligence and destroyed their credibility in this case, which resulted in the jury finding Defendant guilty.

139. Trial counsel's ineffectiveness resulted in Defendant being deprived of a fair trial.

### H. Trial Counsel's Misstatements Led Directly to Introduction of Evidence that Would Not have Been Otherwise Admissible.

140. To quote Craig Whitlock, formerly a writer for the *Raleigh News Observer*, "many of U'Allah's (Defendant) problems were his attorneys' fault." The Court had previously ruled that jurors could not hear testimony about the robbery of tourists and that jurors could not see a video of Defendant that the Court described as evoking racial stereotypes because this evidence was too prejudicial and had no direct bearing on the case.

141. The Court warned trial counsels repeatedly not to ask Mr. Demery about portions of his confession that dealt with these crimes or he would allow testimony and evidence in that he had previously ruled inadmissible.

142. Mr. Thompson, cross-examining Mr. Demery, disobeyed the Court's admonitions and this resulted in the inadmissible evidence being introduced. Trial counsel's ineffectiveness resulted in Defendant being deprived of a fair trial.

## I. Defendant was Deprived of Effective Assistance of Appellate Counsel in Violation of the Constitutions of the United States and North Carolina.

143. Defendant was interrogated by the police for close to seven hours after being taken into custody by officers investigating the murder of James Jordan.

144. Comments and statements made by the officer to Defendant were coercive and threatening, other statements amounted to an impermissible inducement of hope. For these reasons, Defendant's statements and the fruit derived therefore, should have been excluded on the grounds that they were not freely or voluntarily made.

145. Appellate counsel did not include the "voluntarily claim" in the original brief of the appeal and has admitted that she was ineffective for failing to do so and is willing to write an affidavit to that effect. (See Exhibit 6 ).

146. Due to the facts set forth in paragraphs 143 thru 145, Defendant was denied effective assistance of appellate counsel and should receive a new trial and/or to have his appeal reinstated on this issue.

**J. Defendant was Deprived of Life and Liberty without Due Process of Law, was Denied the Right to be Confronted with the Witnesses against Him, to Have Compulsory Process for Obtaining Witnesses in His Favor, was Denied Effective Assistance of Counsel for His Defense, and was Denied Equal Protection of the Laws Due to the Illegal Plea Bargain the State's Witness, Larry Demery, Received from the Prosecutor, Johnson Britt, and Due to this Illegal Plea Bargain Being Hid from the Jury, in Violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.**

147. During Defendant's trial, the State's star witness, Mr. Demery, testified that Defendant led him into a life of crime, planned the robbery of James Jordan and shot James Jordan in cold blood while Mr. Demery just stood by and watched in shock.

148. Mr. Demery was the only State witness that linked Defendant to the murder. In fact, the State's whole version of how James Jordan died, where he died and when he died came from Mr. Demery, alone, in totality.

149. Mr. Britt said that "Mr. Demery, in essence, was the key that linked everything together." (See Exhibit ___). Therefore, Mr. Demery credibility was a substantial issue in this trial and the jury and Defendant had a right to any information that impeached his credibility and case light on his motivation for testifying. Especially since, as Mr. Britt told the press, including the *Fayetteville Observer*, on February 26, 2008, 'Demery . . . made the case.'" (See Exhibit ___).

150. Nothing about Mr. Demery's version of events surrounding James Jordan's death was independently verified or conclusively proved. For this reason, the prosecutor's decision to believe and argue Mr. Demery's version in prosecuting Defendant was not based on the evidence

nor was it an objective choice; it was totally subjective. In fact, the evidence shows that Mr. Demery was, based on his history, more likely to plan and carry out a robbery, involve others and avoid responsibility for is actions. The only thing that Mr. Demery has that could give him more credibility than Defendant is that he is not a black male.

151. On February 29, 1996, Mr. Britt told the *Raleigh News Observer* that he did not cut a deal with Mr. Demery or promise him reduced punishment for his testimony. (See Exhibit [illegible]). Mr. Britt gave the jury the false impression that Mr. Demery was testifying for mainly altruistic reasons – to do the right thing – and that Mr. Demery was not even given a guarantee that he would avoid the death penalty. Mr. Britt's reluctance to seek the death penalty against Mr. Demery was revealed on April 29, 1996 when he told the media that "I've got to do it." "The law's pretty clear. If there's a plea to first-degree murder, and there's evidence to support the existence of an aggravating circumstance, the prosecutor in this State is bound to seek the death penalty." "I can't argue my personal opinion. I can argue what the evidence and the law supports. Those are the rules. My job is to seek justice in each case." (See Exhibit [illegible]12.)

152. This is what the law supports. The Fair Sentencing Act, which was in effect at the time of Mr. Demery's plea deal and Defendant's trial, requires the sentence for any conviction carrying a mandatory sentence to run consecutive to any other sentence given to a person convicted of a crime. This is the law the Court, the State and every person in North Carolina was bound by at the time.

153. The North Carolina Code of Judicial Conduct Canon 2A states that "a judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The

adjudicative responsibilities as stated by Canon 3A(1) of a judge is to ". . . be faithful to the law and maintain professional competence in it."

154. The prosecutor as a minister of justice has a duty to see justice, not merely to convict. (See Comment [1] to Rule 3.8 of the N.C. Rules of Professional Conduct.)

155. On or about February 22, 1996, an officer employed by Robeson County Detention Center, Richard Locklear, testified that Mr. Demery told him that his attorneys and Mr. Britt had arranged for Mr. Demery to get out of prison earlier than his plea bargain showed. In retaliation for his testimony, Richard Locklear was fired by Sheriff Glenn Maynor who, as proof of divine justice, has been himself convicted of charges relating to his abuse of power in his position as sheriff.

156. Since his convictions and incarceration, Mr. Demery has told other inmates that he had an under the table plea deal with Mr. Britt. (See Defendant's M.A.R. Exhibit 1.)

157. The facts are this. On May 21, 1996, Mr. Demery was convicted of First Degree Murder. On October 3, 1997, Mr. Demery was convicted of an assortment of crimes that originally carried 270 years of prison time but were consolidated into one 40 year sentence which carried a mandatory seven year sentence for the principle charge – robbery with a dangerous weapon. See Exhibit 69. By law, as referred to in paragraph 152, Mr. Demery should have had to serve the mandatory sentence of 40 years consecutive to the life sentence. In fact, as Judge Weeks pointed out to Defendant for his sentencing on all other charges besides the murder charge, by law he could not run the sentences concurrent with the life sentence because the second sentence carried a mandatory sentence. This is why the N.C. Department of Corrections ran Mr. Demery's sentences consecutively.

158. As the prosecutor, Mr. Britt had the authority to grant Mr. Demery immunity for the mandatory sentence or he could have had Mr. Demery sentenced to the mandatory sentence prior to being sentenced for the murder and then, by law, the Court could have ran the murder sentence concurrent to the mandatory sentence, arguably.

159. If Mr. Britt would have granted Mr. Demery immunity for 270 years of charges, 170 years more charges than Defendant had (Defendant had no charges besides those he shared with Mr. Demery who, in fact, had additional robbery, assault and other charges against him), it would have shattered the illusion he painted for the jury to bolster Mr. Demery's credibility: that Mr. Demery had nothing to gain by lying on Defendant and incriminating himself.

160. If Mr. Britt would have taken the other route and sentenced Mr. Demery for the assortment of armed robbery and assault charges prior to his sentencing for the murder, prior to Mr. Demery testifying against Defendant, he could not hold the plea of a 40 year sentence for 270 years of charges over Mr. Demery's head as an incentive for Mr. Demery to stick to the script. Mr. Britt knew that the star witness he used to convict, and attempt to kill Defendant, was motivated not by remorse, not by a desire to do the right thing but by the most valuable thing there is, freedom. Twenty years in prison compared to 27 years in prison is the difference between getting out in your 30's and getting out in your 40's. It's the difference perhaps between getting out in time to see your family alive or visiting their gravesite. Mr. Demery knew that if he helped convict his former best friend of a murder that Mr. Demery himself committed, he could be on the streets for work release within 16 to 20 years instead of on death row or in a Close Custody prison.

161. Instead of taking the two options available to him as prosecutor to insure that Demery would not have to serve a day of the 270 years he would have otherwise been exposed to

if he had not agreed to testify against Defendant, Mr. Britt and Mr. Demery's lawyers created a loophole, a rat hole, if you will, for Mr. Demery to receive the benefit of the bargain that, during Defendant's trial, Mr. Britt and Mr. Demery maintained to the jury, Court, Defendant and the public, did not exist in the manner shown below.

162. First of all, although Defendant's jury was told in open Court that Mr. Demery still faced the death penalty in order to lead them into thinking Mr. Demery testified truthfully with no incentive, this simply was not true. As an ex-football player, if Mr. Britt had ever been proven to shave points or throw a game, he would have been kicked off the team. As a prosecutor for the State, as Mr. Britt stated, "The law's pretty clear. If there's a plea to first-degree murder, and there's evidence to support the existence of aggravating circumstances, the prosecutor in this State is bound to seek the death penalty." A careful review of Mr. Demery's sentencing hearing will prove that Mr. Britt not only "shaved points," but, he "threw the game." He conceded mitigating circumstances that Mr. Demery did not in fact have, he did not argue all of the aggravating circumstances Mr. Demery had and overall he communicated to Mr. Demery's sentencing jury that Mr. Demery did not deserve the death penalty. Why? Because of the "under the table" deal Mr. Britt had with Mr. Demery. A comparison between sentencing hearings of the men Mr. Britt did win capital punishment sentences in and Mr. Demery's sentencing hearing will prove this point. By demonstrating the difference in effort when he truly is prosecuting a case to win and when, as in Mr. Demery's sentencing hearing, he is not. He allowed his adversary, the opposing team, keep the score, referee the game, and bring their own ball when he did not test Mr. Demery's version of events while, in name only, seeking the death penalty against Mr. Demery.

163. Secondly, Mr. Britt and Mr. Demery entered into an illegal plea bargain which the Court allegedly approved. Mr. Britt is a master of the law. Hugh Rogers ("Mr. Rogers"), Mr. Demery's attorney, is a master of the law with a reputation of getting his clients the sweetest pleas. Judges are masters of the law. They knew that under the Fair Sentencing Act, Mr. Demery's concurrent sentence was unlawful and illegal. Yet, as Mr. Rogers has admitted, "I think that the Court, Mr. Britt and myself were all on the same page when we left the building, thinking, in fact, it was going to be a concurrent sentence and it turned out it was not." (See Exhibit 8 ).

Why give Mr. Demery an illegal plea bargain when these lawyers knew the Department of Corrections would not respect it and, thus, would run Mr. Demery's sentences consecutive? It's simple. It was Mr. Demery's guarantee that his secret plea bargain would be fulfilled after things quieted down and after time had passed. By law, when there is a discrepancy between the Court's oral judgment and the written judgment, the oral judgment trumps the written judgment. Therefore, even if Mr. Britt ever tried to renege on the secret plea bargain, by law, all Mr. Demery had to do was file a Motion for Appropriate Relief and withdraw his plea bargain because the sentence he received did not coincide with the Court's oral judgment. Even if the Court remained silent on whether Mr. Demery's sentences should be ran concurrent or consecutive, by law, the assumption is that it be ran concurrent . . . except in an instance such as Mr. Demery's where, by law, the sentences had to be ran consecutive. The lawyers knew this and Mr. Demery apparently understood it since he had told numerous people that he would be out earlier than everyone thought. And that is how events unfolded, exactly as Defendant has maintained they would since his conviction.

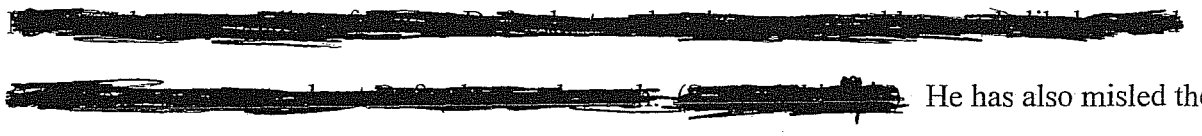
## LARRY DEMERY RECEIVING THE BENEFIT OF HIS BARGAIN

164. As set forth in the paragraphs above, Defendant, the Court and, most importantly, the jury was given the impression by Mr. Britt that there was no bargain. The jury, as the fact finders should have known about the illegal plea bargain Mr. Demery benefited from, although the benefit was delayed on paper. The Court should have known about it and Defendant should have been made aware of it in order to confront Mr. Demery and test the true motivation for his perjurious testimony against Defendant. Notwithstanding their denials of any bargains, Mr. Demery recently received the benefit of his bargain.

Mr. Rogers filed, on behalf of Mr. Demery, a Motion for Appropriate Relief in order to have Mr. Demery's sentence ran concurrent. Although the public and the media have been given the impression that Mr. Demery will not come up for parole until 2016, he will actually come up for parole in 2013 if he received credit for time served in the county jail since he was arrested in August, 1993. If he has not yet received credit, he will. As Mr. Rogers recently informed the media, "It's getting to his time for parole and he'll be able to get jobs outside the prison camp as opposed to working within the camp." What Mr. Rogers is referring to is Mr. Demery receiving work release from prison which an inmate must be within for five years of his parole date to receive.

165. Referring to the bargain, Mr. Britt has told the media the following: (1) "Mr. Demery fulfilled his end of the bargain;" and (2) "he's (Mr. Demery) basically asking for the benefit of his bargain."

166. In his attempt to justify to the public that Mr. Demery deserved the plea bargain,



He has also misled the

public into thinking that if Mr. Demery would not have received a concurrent sentence, he would do more time than Defendant for the same crimes when, in fact, Mr. Demery admitted and pled guilty to 170 years worth of crimes. More than Defendant was charged with and had been accused of. In short, Mr. Demery, who actually committed the murder of James Jordan, committed more crimes than Defendant and perjured himself, in a court of law, to receive an illegal plea bargain and stay off of death row has been rewarded, not for telling the truth, but for lying on Defendant and "making the case" against Defendant. These facts should be placed in front of a new jury and Defendant should receive a new trial. In addition, Defendant will prove that in comparison to Defendant, who has received illegal opposition to his post-conviction efforts to gain relief, Mr. Demery has received preferential treatment from the Department of Corrections.

## RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant prays that the Court grant the following relief:

1. Take judicial notice of all materials pertaining to the case that are contained in the Office of the Clerk of Robeson County, the possession and chambers of the Honorable Gregory Weeks, the Honorable Dexter Brooks, the Honorable Craig B. Ellis, Judge Carter and the Honorable Robert Floyd, the N.C. Court of Appeals and the N.C. Supreme Court.

2. Grant Defendant an evidentiary hearing on all claims.

3. Consider all facts alleged in this Motion as supporting each and every claim raised and consider the cumulative effect of all claims on both phases of Defendant's trial and appeals.

4. Pursuant to N.C.G.S. 15A-1420(c)(1), hold a pre-hearing conference on the scope and scheduling of the evidentiary hearing.

5. Appoint an independent private investigator to assist Defendant in investigating and gathering evidence in preparation for the evidentiary hearing.

6. Appoint a paralegal to assist Defendant in completing and filing Court documents.

7. Appoint standby counsel to assist Defendant.

8. Grant Defendant access to a law library and websites necessary to fully research and draft motions based on the foregoing claims.

9. Order the Department of Corrections to grant Defendant access to a copy machine in order for Defendant to make the necessary amount of copies to serve upon all parties.

10. Order the Department of Corrections to abstain from taking or reading Defendant's legal materials necessary to prepare for the evidentiary hearing and to abstain from packing or otherwise taking possession of Defendant's legal materials outside of Defendant's presence in the event Defendant is placed in segregation.

11. Grant Defendant judgment relieving him of his unlawful convictions and sentence.

12. Grant such other and further relief as may be just and proper.

This The 12th Day of May, 2008 Respectfully submitted,

State of NC, County of Anson
Signed before me on this 12th day
of May by 2008
Notary Public Hattie F. Greene

/s/ Daniel A. Green
a/k/a Lord D.A.A.S. U'Allah
P.O. Box 280
Polkton, North Carolina 28135

Date: May 12, 2008 My Commission Expires: 7-10-2010

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been duly served upon the following by depositing it in the exclusive custody and control of the United States Postal Service in a postage-paid wrapper properly addressed as follows:

Ms. Renae O. Hunt
Clerk of the Court of Robeson County
500 N. Elm; Room 101
P.O. Box 1084
Lumberton, North Carolina 28358

Luther Johnson Britt, III
District Attorney
Robeson County Courthouse, Box 19
Lumberton, North Carolina 28358

/s/ Daniel A. Green
a/k/a Lord D.A.A.S. U'Allah
P.O. Box 280
Polkton, North Carolina 28135