STATE OF NORTH CAROLINA COUNTY OF ROBESON	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION No. 93 CRS 15291-15293

STATE OF NORTH CAROLINA v. DANIEL ANDRE GREEN	FIRST AMENDED MOTION FOR APPROPRIATE RELIEF

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INDEX

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

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ISSUES PRESENTED

I. MR. GREEN'S DUE PROCESS RIGHTS HAVE BEEN DENIED BY THE ADMISSION OF FALSE AND MISLEADING EXPERT TESTIMONY ON BLOOD, THE FAILURE TO DISCLOSE LAB NOTES DOCUMENTING ADDITIONAL NEGATIVE/INCONCLUSIVE TESTS, AND THE DESTRUCTION OF MATERIAL EVIDENCE.

II. ACTS OF STATE LENIENCY PROVIDED TO A TESTIFYING CO-DEFENDANT CONSTITUTE EXCULPATORY IMPEACHMENT EVIDENCE AND MUST BE DISCLOSED AS A MATTER OF DUE PROCESS. THE PROSECUTOR SHOWED LENIENCY IN DEMERY'S SENTENCING TRIAL AND JOINED IN THE DEFENSE MOTION FOR CONCURRENT SENTENCES. THESE UNDISCLOSED ACTS OF LENIENCY VIOLATED MR. GREEN'S DUE PROCESS RIGHTS.

III. MR. GREEN'S DUE PROCESS RIGHTS WERE VIOLATED BY THE FAILURE TO DISCLOSE THAT THE CALL FROM THE JORDAN CAR PHONE WAS TO THE DRUG TRAFFICKING ILLEGITIMATE SON OF THE SHERIFF AND CO-WORKER WITH THE STATE'S MAIN WITNESS.

IV. MR. GREEN WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS PROMISED, BUT FAILED TO PROVE, THAT MR. JORDAN WAS STILL ALIVE AFTER THE STATE SHOWED HE WAS DEAD, THAT MR. JORDAN WAS KILLED IN A "DRUG DEAL GONE BAD," AND THAT GREEN WAS WITH BOBBIE JO MURILLO WHEN THE MURDER HAPPENED.

V. IGNORING TRIAL COUNSEL'S MOTION FOR MISTRIAL, ADDRESSING MR. GREEN DIRECTLY, AND APPOINTING A LAWYER STANDING IN THE HALL TO ADVISE MR. GREEN CONSTITUTED A COMPLETE DEPRIVATION OF MR. GREEN'S RIGHT TO COUNSEL.

VI. MR. GREEN WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS LAWYER, WOODBERRY BOWEN, FACILITATED A CONTRACT BETWEEN MR. GREEN AND BOWEN'S BUSINESS PARTNER, PROMISING 1000 HOURS OF STUDIO TIME IN EXCHANGE FOR RIGHTS TO LYRICS WRITTEN BY MR. GREEN.

VII. TRIAL COUNSEL MADE OTHER DECISIONS FALLING BELOW THE STANDARD OF EFFECTIVE ASSISTANCE OF COUNSEL.

PRELIMINARY STATEMENT

Daniel Green is wrongfully convicted. For 22 years, he has been in prison for the murder of James Jordan, a murder he did not commit and did not witness. Daniel Green has admitted his involvement in helping Larry Demery cover up the crime after the fact; however, he has always maintained his innocence on the murder charge under which he is currently serving a life sentence without possibility of parole.

The main evidence introduced against Green at his 1996 trial was the testimony of his co-defendant, Larry Demery. S.B.I. Agent Jennifer Elwell's expert testimony that there was "blood" in the front passenger seat of Jordan's Lexus was the only physical evidence confirming Larry Demery's story. Elwell's testimony critically supported the State's theory that the car was the scene of the murder. It also supported the theory that carjacking as the motive for the murder.

In 2010, following revelations of a widespread scandal within the State Bureau of Investigation's blood unit, newly discovered evidence showed that Agent Elwell's expert opinion was false and misleading. She said that if called to testify today she would not say the material was blood. Also, She revealed additional negative/inconclusive tests performed on the seat of the Lexus which were not provided at the time of trial.

Mr. Green's trial judge, the Honorable Gregory A. Weeks, has filed an affidavit with this motion stating that if lab notes of multiple tests were not disclosed to the Defense, then the State has violated the law as well as his Orders at trial. He has also said, if Agent Elwell's trial opinion on blood at trial was not accurate, then it was false and misleading on a material issue.

In addition to the issues involving the expert testimony about blood, there are significant issues surrounding the call made from James Jordan's car phone shortly

after he was killed. The phone number called was registered to a man named Hubert Larry Deese, the illegitimate son of Robeson County Sheriff Hubert Stone and a convicted cocaine trafficker. Sheriff Stone, who associated with other known drug traffickers, supervised the investigation of the Jordan murder. He testified as as an expert witness in the case. Deese was arrested by federal authorities for his large scale drug trafficking operation shortly after the Jordan murder and the arrest of Mr. Green.

Hubert Larry Deese was also a co-worker with Mr. Green's co-defendant, Larry Demery, at Crestline Mobile Homes. They worked within a mile of where Mr. Jordan's body was discovered, near a bridge in South Carolina.

Deese was also a long time close friend of the lead investigator of the Robeson County Sheriff's Office (RCSO) on the Jordan murder, Detective Mark Locklear. Detective Mark Locklear rode around with Deese in his patrol vehicle during the same time period Deese was trafficking drugs.

Deese was never interviewed by any law enforcement official, even though Jordan's cell phone records were among the most critical pieces of evidence.

Withheld evidence was not the only factor contributing to Mr. Green's wrongful conviction. Mr. Green's Trial Counsel for Mr. Green provided ineffective assistance of counsel in a number of ways. They promised to put on witnesses to

prove that Mr. Jordan was still alive at the time the State said he had been killed. However, they failed to interview these witnesses prior to trial. Similarly, they promised to show that the call to Hubert Larry Deese was evidence of a "drug deal gone bad." However, they failed to interview witnesses who supported this theory. One trial counsel, Mr. Bowen, entered into a business relationship with Mr. Green, creating a conflict of interest during trial. Meanwhile the Trial Counsel also failed to interview or call as a witness Mr. Green's principal alibi witness, Bobbie Jo Murillo. She has said she was with Mr. Green until the morning of July 23, 1993.

This mistakes and revelations undermine the confidence in Mr. Green's trial and require a new trial.

STATEMENT OF THE CASE

1. Daniel Andre Green, through undersigned counsel, C. Scott Holmes and Ian A. Mance, hereby moves the Court, pursuant to N.C. Gen. Stat. §15A-1411 et. seq., the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, Section 19 of the North Carolina Constitution, and the Assistance of Counsel Clause of the Sixth Amendment to the Constitution of the United States, and Article I, Section 23 of the North Carolina Constitution, for an order vacating his conviction and sentence. U.S. Const. Amend. V, VI, and XIV.; N.C. Const. Art. I Sec. 19.

2. Green was indicted September 7, 1993 for the murder of James Jordan, which allegedly took place July 23, 1993. Green was tried for first degree murder (93CRS15291), armed robbery of a 1992 Lexus and personal items, (93CRS15292), and conspiracy to commit robbery with Larry Martin Demery (93CRS15293) at the January 3, 1996, Session of Criminal Superior Court for Robeson County, the Honorable Gregory Weeks presiding.

3. Green was found guilty on all counts. Following a sentencing proceeding, the Court sentenced Green to consecutive sentences of life in prison for the murder and 10 years for the conspiracy to commit robbery.

4. The Court of Appeals affirmed Green's conviction with one dissent. *State v. Green*, 129 N.C. App. 539, 500 S.E.2d 452 (1998), aff'd, 350 N.C. 59, 510 S.E.2d 375 (1999), and the United States Supreme Court denied review. *Green v. North Carolina*, 528 U.S. 846 (1999).

5. Thereafter, Daniel Green filed a *pro se* Motion for Appropriate Relief on May 5, 2000 and Attorney Carlton Mansfield was appointed May 16, 2000.

6. an Amendment to the Motion for Appropriate relief on August 21, 2008 and Carlton Mansfield was allowed to withdraw September 16, 2008.

7. An Order was entered by the Honorable Robert F. Floyd, Jr. on October 2, 2008 summarily dismissing some claims. The Court appointed Carl

Ivarsson to represent Mr. Green, who was allowed to withdraw.

8. Replacement counsel, Scott Holmes was appointed on March 18, 2009. Attorney Holmes was allowed by the court to fully investigate the case and amend the Motion for Appropriate Relief.

9. Attorney Ian Mance, who has worked to investigate Mr. Green's case with Mr. Holmes since 2011, became pro bono counsel to Mr. Green in September 2013.

10. In 2015, the Southern Coalition for Social Justice, a Durham-based civil rights firm where Mance works as a Staff Attorney, assumed formal representation of Mr. Green.

11. This is the first attorney-drafted Amended Motion for Appropriate Relief filed on behalf of Mr. Green.[1]

STATEMENT OF THE FACTS

12. James Jordan was killed in Robeson County in the early morning hours of July 23, 1993. The State's said Jordan was sleeping in his Lexus automobile by a highway in Robeson County, North Carolina, when Mr. Green and his co-defendant, Larry Demery, approached the car on the side of the road and Daniel

1 Jay Z. Leff and a group of exceptional Duke Law Student volunteers were instrumental in the completion of this Amended Motion for Appropriate Relief, and their assistance is greatly appreciated by Mr. Green and his post-conviction counsel.

Green reached through the window and shot him while he was in the car. (Exhibit 1, Excerpt of Prosecutor Opening Statement, T pp 21–3).

13. The Defense put on evidence that Mr. Green was at a gathering at a friend's house at the time of the murder, and that Demery came to get Mr. Green's help as an accessory after the fact on the morning of July 23, 1993. Mr. Green does not contest that he was found in possession of stolen property after the murder. He continues to contest the charge that he was involved in the murder of James Jordan, and seeks to demonstrate his innocence on that charge.

A. <u>The Defense Promised, But Failed to Prove, that James Jordan Was Alive After the State Showed He Was Dead, and Failed to Introduce Important Alibi Evidence of Innocence.</u>

14. In the opening statement to the jury, Defense Counsel suggested that Mr. Jordan was seen alive after July 23, 1993. (Exhibit 2, Defense Opening, T pp 68–9). The Defense told the jury that "*someone by the name of Donald A. Chiofolo*" who worked with James Jordan, "*spoke with Delores Jordan, the wife of James Jordan, and the evidence will show that she informed Mr. Chiofolo that she had spoken with her husband on August 5th, this conversation having taken place on August 6 of 1993*." (Exhibit 2, T p 68).

15. The defense also told the jury that Bobby Millan, an official with the Federal Aviation Agency, and Ivan Johnson, Cumberland County Librarian, saw

James Jordan alive after July 23, 1993, and their testimony would be "*a disastrous blow to the State's theory*." (Exhibit 2, T pp 68–9).

16. Also, during the opening statement, Defense Counsel suggested that Mr. Green was at the home of Kaye Hernandez at a social gathering at the time of the murder. The defense planned to put on evidence of an alibi at the time of the shooting. (Exhibit 2, T pp 58–62). After promising to put on an alibi defense, the Defense failed to call Kaye Hernandez, Anne Green, Eboni Moore, and Bobbie Jo Murillo, the primary witnesses to Mr. Green's presence at the social gathering. Although the defense put on evidence that Mr. Green was at the party with Bobbie Jo Murillo, including a picture of her in his lap, the witnesses called by the defense were not with Mr. Green all night. (Exhibit 69, Defense Evidence, T p 6182, 6188–91, 6193, 6197–203, 6216, 6223, 6243–46, 6254–57, 6259–61,6268–69, 6271, 6300, 6302, 6305, 6308–09, 6312–13, 6320, 6323, 6339).

17. The Defense failed to interview, call, or introduce the testimony of Bobbie Jo Murillo who would have testified that she was with Mr. Green until the morning of July 23, 1993. (Exhibit 69, Defense Evidence; Exhibit 70, Affidavit of Bobbie Jo Murillo Lowery).

B. <u>The Defense Promised, But Failed to Prove, that the Call from the Jordan Car Phone After the Murder Was to the Drug Trafficking</u>

Illegitimate Son of the Sheriff Who Worked with the Co-Defendant Near Where the Body Was Disposed; and, the State Failed to Disclose Substantial Exculpatory Evidence Supporting this Defense Theory.

18. During the opening statement, Defense Counsel suggested that Demery left the gathering at the Hernandez home without Mr. Green to conduct a drug deal that resulted in the death of James Jordan: "*Now, [Green], a childhood friend, who knows Larry Demery, the evidence will show, thinks that this is perhaps some* ***drug deal gone bad***." (Exhibit 2, Defense Opening Statement, T p 63). To corroborate that this was a "*drug deal gone bad*," the defense promised to put on evidence that Larry Demery called Hubert Larry Deese, the reputed son of Sheriff Hubert Stone and a known drug dealer, from James Jordan's car phone. (Exhibit 2, T pp 63, 65):

19. Defense counsel forecasted the evidence, saying "*The second phone call, the evidence will show, that was made around 10:36 in the morning, July the 23rd, was made to one by the name of Hubert Dees[e], who is the reputed son of Hubert Stone, known drug dealer in Robeson county, who is now serving time for drug related charges in federal prison. That call was made, the evidence will show, by Larry Demery on the Lexus phone.*" (Exhibit 2, T p 65)

20. The Defense did not put on the central alibi witnesses, or any evidence that James Jordan was alive after July 23, 1993, and they did not put on evidence

of the call to Hubert Larry Deese or support their theory of a "drug deal gone bad."

21. The Prosecutor pointed out these failures in his closing argument. (Exhibit 7, Britt Closing Argument, 7316–20). With respect to the Defense promise to prove that Jordan was still alive Prosecutor Johnson Britt said, "*Then they turned around and said in the very next breath that James Jordan was alive and well after the date that we said he was killed. Did they present you any evidence of that? No. They told you they were going to bring witnesses in here who say that they saw him after July the 23rd, 1993. They were going to bring in Mr. Johnson from the library in Fayetteville. They were going to bring the store clerk in from a store down in Brunswick County. What happened to that? Then they turn around and they told you that this was a selective investigation. That it focused in on their client and their client only. Is that what the evidence in this case showed? Selective. They then even claim that they were going to show you evidence that the State, that I had withheld evidence from them during the course of this investigation, during the course of the history of this trial. Was there any evidence of that? No.*" (Exhibit 7, T pp 7317–18).

22. At the time Mr. Britt made these remarks, he was aware that the call from the James Jordan car phone after the murder was to the telephone number

of Hubert Larry Deese, the drug trafficking son of Sheriff Stone. (Exhibit 27, Mance Affidavit, Britt Interview, January 8, 2015). Mr. Britt failed to disclose this information even when the trial judge explicitly denied defense counsel's attempts to introduce the phone number because he said there was "no evidence" of a paternal relationship between the two men. (Exhibit 52, T p 5755). Detective Mark Locklear knew that Hubert Larry Deese and Demery both worked at Crestline Mobile Homes, a business within a mile of where the body of James Jordan was discovered. (Exhibit 27, Mance Affidavit, Locklear Interview, Exhibit 75, Report on Demery Statement p. 6).

23. The State failed to disclose that the Sheriff's detective in the Jordan murder, Mark Locklear, was good friends with Hubert Larry Deese. Deese rode around with Locklear in Locklear's Robeson County Sheriff's Office patrol vehicle until Deese became a target of federal investigation, before Mr. Jordan was killed. (Exhibit 27, Mance Affidavit, Locklear Interview).

24. After the Jordan murder, Deese continued to associate with with Robeson County Sheriff Deputies Steve Lovin and Thomas Strickland who debriefed him about his drug trafficking activities before Mr. Green's trial. (Exhibit 4, Mance Affidavit ¶¶ 23–4; Exhibit 44, Holmes Affidavit). By the time

of Mr. Green's trial, Deese was in federal custody, according to Demery and Deeses' federal docketing statement. (Exhibit 40, T p 4994, Exhibit 43)

25. Detective Mark Locklear, Sheriff Stone, and District Attorney Britt failed to disclose favorable information in the possession of the Robeson County Sheriff's department that (1) a call from James Jordan's car phone in the hours after his murder was to the son of the Sheriff; (2) the Sheriff's son was engaged in a large scale drug trafficking operation and had *worked as an informant for the Sheriff's department*; (3) the Sheriff's son was a co-worker with the State's chief witness Demery, who was also known to the department to be involved with cocaine; (4) the two men worked within a mile of where the body of James Jordan was found; and (5) lead investigator Mark Locklear regularly rode with the drug trafficking son of the sheriff in his patrol vehicle in the late 1980s and early 1990s.

26. Mark Locklear, a lead investigator in this case, *has conceded that this evidence is "Brady Material" that should have been disclosed.* (Exhibit 27, Mance Affidavit, Locklear Interview). Mark Locklear has said he "wouldn't close the door" on the possibility of Mr. Green's innocence." *Id.*

C. **Agent Jennifer Elwell Gave a False and Misleading Expert Opinion that There Was Blood in the Car and Failed to Disclose Negative Confirmatory Tests.**

27. During trial, Agent Jennifer Elwell of the State Bureau of Investigation testified that there was blood in the Lexus, stating, "it is my opinion that you do have blood." (Exhibit 5, Elwell Trial Testimony, T p 5611). Her expert testimony provided the only corroboration of Larry Demery's story James Jordan was shot inside his car.

28. Evidence discovered since Mr. Green's trial shows that Agent Elwell would now testify that she cannot give an opinion on what substance was in the car. (Exhibit 6, Hale Affidavit of November 5, 2014). Agent Elwell has conceded since the trial that the substance "could have been anything." (Exhibit 27, Mance Affidavit, Elwell Interview; Exhibit 95, Johnson Affidavit). It was also against S.B.I. policy at the time to testify that there was blood present with only presumptive tests. (Exhibit 72, Nelson Deposition, T p 94) ("Section policy and procedures would preclude any S.B.I. agent, forensic serologist, from testifying to opinion testimony as to whether it is blood or not, based on a phenolphthalein test.").

29. In addition, Agent Elwell failed to disclose additional negative/inconclusive confirmatory tests to the prosecution and defense, depriving the defense of the tools necessary to impeach her opinion testimony. (Exhibit 6, Hale Affidavit of November 5, 2014; Exhibit 27, Mance Affidavit;

Exhibit 95, Johnson Affidavit). These tests and lab notes were the subject of a subpoena issued by the trial judge before Mr. Green's trial. The State never complied. (Exhibit 15-G, Thompson Affidavit) The subpoena was still in the NC S.B.I.'s file on the Jordan murder when defense counsel met with Elwell in 2011. (Exhibit 15-G, Thompson Affidavit). This subpoena was also located within the Green file produced by the State Bureau of Investigation.

30. Trial Judge Gregory Weeks has filed an affidavit stating that if these multiple tests were not disclosed to the Defense, and if Agent Elwell's opinion at trial was not accurate, then the State has violated the law as well as his Orders at trial. Because the expert testimony was the only testimony corroborating the story of the testifying co-defendant, the failure to disclose multiple tests and the false and misleading testimony is material. (Exhibit 100, Judge Weeks Affidavit).

D. The Court and Defense Attorneys Failed to Accurately Advise Mr. Green on a Mistrial Motion After the Prosecutor Unlawfully Commented on His Decision Not to Testify.

31. In his closing argument, Prosecutor Britt twice commented on Mr. Green's right to remain silent. At the time he made the comments, Prosecutor Britt knew that commenting on the exercise of the privilege against self-incrimination was a clearly established violation of Mr. Green's right. In fact,

during the closing arguments Mr. Britt said, while discussing Mr. Demery, "*I can't tell the jury that the defendant was advised of his rights and then exercised those rights to remain silent. That is an elementary principle of constitutional criminal procedure. You know that, I know that, and they know that.*" (Exhibit 78, Defense Closing, T p 7289).

32. Nevertheless, Prosecutor Britt argued in closing to the jury "*They hung it out there on this thing called an alibi. And just like that water that's in that pot when you pour the noodles into that colander, their alibi goes out those holes and down the drain and is gone forever. And who better, who better than to assert this alibi than the defendant? **He didn't testify in this case**. And the Judge is going to give you an instruction on that. But even though **he didn't testify** ….*" (Exhibit 7, Prosecutor Closing argument, T p 7320).

33. Defense counsel moved for a mistrial, and argued that Prosecutor Britt irreparably violated Mr. Green's constitutional rights. (Exhibit 7, T pp 7322–23, 7330–31, 7334). The Court bypassed Mr. Green's attorney and asked him directly whether he agreed with his attorney's decision. (Exhibit 7, 7334).

34. Mr. Green stated that, "*I understand their position. I fully comprehend why they make their motion and their duty to make the motion, but I mean, I have -- to be honest with you, I have to disagree. **He set it up yesterday**, this*

man [Britt] is so scared you could smell it. And ***I honestly believe he is deliberately trying to get a mistrial.*** *And no, sir, I do not want a mistrial, I do not want one*." (Exhibit 7, T p 7334).

35. Mr. Green was referring to a moment the day before when Mr. Britt made a comment that he didn't "care what the rules of professional ethics were." (Exhibit 10, T p 7296). Mr. Green's belief that Mr. Britt was attempting to cause a mistrial was also informed by Mr. Britt's earlier comments that it was an "*elementary principle of constitutional criminal procedure*" that he could not comment on a defendant's decision not to testify. (Exhibit 78, T p 7289).

36. Following Mr. Britt's remarks, the Court appointed attorney Ken Ransom to confer with Mr. Green about his attorney's motion for mistrial. (Exhibit 7, T p 7339). At the time Mr. Ransom consulted with Mr. Green, Mr. Ransom only knew basic facts of the case from news reports. (Exhibit 8, Ransom Affidavit). He was not aware of the law that jeopardy can attach if the State intentionally creates a mistrial. *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988) ("Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on

his own motion."); *Oregon v. Kennedy*, 456 U.S. 667 (1982); (Exhibit 8, Ransom Affidavit).

37. Mr. Ransom did not advise Mr. Green that if he truly believed that the prosecutor was trying to "goad" him into a mistrial, then the prosecutor could be barred from trying the case again. (Exhibit 8, Ransom Affidavit). If Mr. Ransom had known that jeopardy could attach and the State could be precluded from retrying Green, he would have advised Mr. Green to join his defense motion for a mistrial. (Exhibit 8, Ransom Affidavit). It likely Mr. Green would have joined the motion under those circumstances. (Exhibit 8, Ransom Affidavit).

38. Trial counsel, Mr. Thompson and Mr. Bowen, also did not advise Mr. Green that the State could be barred from retrying him if he was deliberately throwing the case. (Exhibit 15, Thompson Affidavit). If Mr. Green had been properly and accurately advised of the law that prosecutorial misconduct in the context of a motion for a mistrial could bar future prosecution by double jeopardy, he would have followed his lawyers' advice. If the court were to agree with Mr. Green's assertion that Mr. Britt's conduct was deliberate, Mr. Green would have everything to gain and nothing to lose by joining his lawyers' motion for a mistrial. Mr. Green was first deprived of his counsel by the Court,

and then deprived of effective assistance by his replacement counsel, Mr. Ransom, who failed to give him accurate legal advice about the mistrial motion.

E. Trial Counsel Failed to Address a Conflict Between a Juror, the State's Witness, and Mr. Green's Alibi Witnesses

33. During the selection of Mr. James Cassidy, Juror number 10, Defense Counsel did not read the potential defense witness list. (Exhibit 11, Jury Selection December 8 and 11, 1995). Included on the witness list were Mr. Green's alibi witnesses, including Kaye Hernandez and Nellie Montes. (Exhibit 12).

34. Prior to Ms. Hernandez and Ms. Montes' planned testimony, they notified defense counsel that they had had prior dealings with Juror James Cassidy that could create a significant bias against them. (Exhibit 13, T pp 7664–65).

35. At a hearing after the jury had returned a guilty verdict, Defense Attorney Thompson admitted that, "quite frankly, we did not know, meaning Mr. Bowen and I found out that these individuals, that Nellie and Kaye knew Mr. Cassidy the Saturday before they took the stand, the Saturday before we introduced our evidence" (Exhibit 13, T pp 7664–65). Nellie Montes had told counsel that, years prior to Mr. Green's trial, she had accused Juror Cassidy of

sexually inappropriate behavior toward her and told him to stay away from her. (Exhibit 14).

36. Trial counsel did not disclose or take action with respect to this conflict before calling Nellie Montes to testify, and did not conduct a hearing and question James Cassidy about this conflict.

37. Furthermore, Defense Counsel knew that the State's witness, Ronald Fletcher, was good friends with the juror James Cassidy, and that Ronald Fletcher was planning to impeach Kaye Hernandez. (Exhibit 13, T p 7666–67).

38. Defense counsel failed to raise the information about Kaye Hernandez and Nellie Montes to James Cassidy during jury selection, failed to raise the potential conflict prior to the testimony of Mr. Green's alibi witnesses, and did not disclose the conflict between the juror, the state's witness, and his alibi until after the verdict.

F. **Trial Counsel Contracted with Mr. Green for Music Lyrics while Defending his Criminal Case.**

39. During jury selection, Defense Attorney Bowen facilitated the execution of a contract between Mr. Green and his business partner Willie French Lowery. Mr. Bowen owned a recording studio that employed Willie French Lowery. (Exhibit 71, Holmes Affidavit). Lowery and Attorney Bowen had a business relationship with one another, by which Lowery would write,

record, and produce music. (Exhibit 71). Mr. Bowen introduced Lowery to Mr. Green when Mr. Green was in the county jail awaiting trial for the murder of James Jordan. Mr. Bowen put together a legal contract for lyrics Mr. Green had written. The contract was not for music, just for lyrics. (Exhibit 71).

40. The music contract was notarized by Cindy Pitman Inman who worked with the defense attorney's office, on December 14, 1995, shortly before Mr. Green's trial began. (Exhibit 71, Holmes Affidavit). The contract provided to Mr. Green 1,000 hours of recording time at SoundStation Studio, 313 East 4th Street, Lumberton, NC, which he would be able to take advantage of only in the event of his acquittal.

41. Shortly before trial, Lowery said that Mr. Bowen took him to the Robeson County Jail to visit Daniel Green and discuss the music contract. Mr. Bowen told Lowery it was his intention to have him produce music based on lyrics Daniel Green had written while in the county jail. (Exhibit 27, Mance Affidavit, Lowery Interview; Exhibit 95, Johnson Affidavit).

42. According to Mr. Bowen's billing records, he was in Jury selection in the Daniel Green case on December 14, 1995, the day the contract was executed. (Exhibit 71, Holmes Affidavit, Time Sheet).

43. Mr. Green never benefited from the terms of the contract with his attorney, because he was convicted. To benefit from the terms of the contract negotiated with his trial attorney, Mr. Bowen, Mr. Green needed an acquittal. This created a direct financial interest for his trial attorney, Mr. Bowen, to lose the trial, which conflicted with his duty of loyalty and zealous representation.

CLAIMS FOR RELIEF

I. MR. GREEN'S DUE PROCESS RIGHTS HAVE BEEN DENIED BY THE ADMISSION OF FALSE AND MISLEADING EXPERT TESTIMONY ON BLOOD, THE FAILURE TO DISCLOSE LAB NOTES DOCUMENTING ADDITIONAL NEGATIVE/INCONCLUSIVE TESTS, AND THE DESTRUCTION OF MATERIAL EVIDENCE.

44. The Due Process Clause of the Fourteenth Amendment prohibits convictions based upon material false and misleading testimony. This Constitutional provision also requires the disclosure of exculpatory impeachment evidence in the form of negative/inconclusive tests. In the present case, Agent Elwell testified that in her expert opinion there was blood in the car. She will now say that was an error, and that she cannot give an opinion as to the composition of the material in the car. Her testimony was material because it was the only expert opinion corroborating the story of the testifying co-defendant. She also failed to disclose three negative confirmatory tests which would have assisted the Defense impeaching her misleading opinion.

A. Due Process Prohibits Convictions Based Upon False and Misleading Testimony

45. It is well established that the state's use of false, misleading or fabricated testimony at a trial violates the defendant's right to due process of law. The Supreme Court has long held that it violates due process to convict a defendant through the use of fabricated evidence:

> [D]ue process . . . cannot be deemed to be satisfied . . . if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Mooney v. Holohan, 294 U.S. 103, 112 (1935) (citation omitted); *see also Miller v. Pate*, 386 U.S. 1, 7 (1967) ("More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from that established principle. There can be no retreat from that principle here." (citations omitted)); *Giglio v. United States*, 405 U.S. 150, 153 (1972) (government's knowing use of false testimony violates due process); *Zahrey v. Coffey*, 221 F.3d 342, 355 (2d Cir. 2000) ("It is firmly established that a constitutional right exists not to be deprived of liberty on the basis of false

evidence fabricated by a government officer."); *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 129, 130 (2d Cir. 1997) ("When a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial"); *Washington v. Wilmore*, 407 F.3d 274, 282 (4th Cir. 2005).

46. The Supreme Court "has consistently held that a conviction . . . must be set aside if there is any reasonable likelihood that [] false testimony [presented by the state] could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). "[M]isleading testimony by a law enforcement officer is imputed to the prosecution." *Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998). "[Where] police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception . . . on the court and the defendant." *Id*. at 329-30.

47. "[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959); accord *State v. McDowell*, 310 N.C. 61, 310 S.E.2d 301 (1984). "The same result obtains when the State, although not soliciting false evidence, allows it to go

uncorrected when it appears." *Napue*, 360 U.S. at 269.

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

B. <u>Due Process Requires Disclosure of Exculpatory Impeachment Information in the Form of Lab Notes Documenting Negative Tests. Failure to Disclose Material Exculpatory Impeachment Information Requires a New Trial.</u>

49. It is well established that evidence that would impeach the credibility of a witness or, for that matter, the entire investigation must be disclosed to the Defendant. *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). When defense counsel makes a "specific and relevant request for discovery material, the failure to make any response is seldom, if

ever, excusable," *United States v. Agurs*, 427 U.S. 97, 106 (1976). "[T]he suppression . . . of evidence favorable to an accused upon request violates due process . . . irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "A conviction must be reversed[] only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985). The Supreme Court has explicitly "disavowed any difference between exculpatory and impeachment evidence for Brady purposes[.]" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). "The suppression of material evidence justifies a new trial." *Giglio v. United States*, 405 U.S. 150, 153 (1972). "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting [the witness's] credibility falls within this general rule." *Id*. at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). The "Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence," *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988).

50. In North Carolina, S.B.I. forensic experts are required to hand over their notes. *State v. Cunningham*, 108 N.C. App. 185, 194, 423 S.E.2d 802, 807

(1992). In *Cunningham*, the defendant received through discovery only an S.B.I. laboratory report, which was "limited to a statement that the material analyzed contained cocaine, reveals only the ultimate result of the numerous tests performed...." 108 N.C. App. at 196, 423 S.E.2d at 809. Explaining that this did not "enable defendant's counsel to determine what tests were performed and whether the testing was appropriate, or to become familiar with the test procedures," the Court held that this additional information was discoverable under N.C. Gen.Stat. § 15A-903(e), and that the trial court erred. *See id*. There the Court of Appeals explained that

> Because of the extraordinarily high probative value generally assigned by jurors to expert testimony, of the need for intensive trial preparation due to the difficulty involved in the cross-examination of expert witnesses, and in the inequality of investigative resources between prosecution and defense regarding evidence which must be analyzed in a laboratory, federal Rule 16 has been construed to provide criminal defendants with broad pretrial access to a wide array of medical, scientific, and other materials obtained by or prepared for the prosecution which are material to the preparation of the defense or are intended for use by the government in its case in chief.

Id at 194, 423 S.E.2d at 807-08; *see also*, *State v. Dunn*, 154 N.C. App. 1, 6, 571 S.E.2d 650, 653-54 (2002) writ denied, review denied, 356 N.C. 685, 578 S.E.2d 314 (2003).

51. It makes no difference whether the information was withheld by the

prosecutor or the police officer. *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976).

52. "Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure." *Id*.

C. **Agent Elwell Knowingly Gave False Testimony in Violation of S.B.I. Policy When She Gave an Expert Opinion on the Presence of Blood Based Solely Upon Presumptive Tests. She Also Failed to Disclose Lab Notes Documenting Additional Negative Tests.**

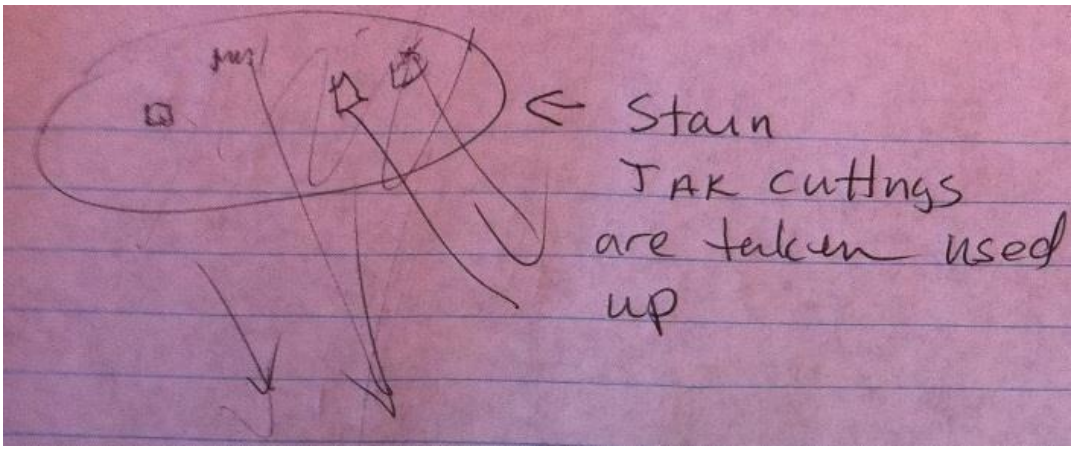
53. Agent Elwell conducted two presumptive tests and four confirmatory tests. The two presumptive tests showed some chemical indication of blood, but the four confirmatory tests were negative. Nevertheless, she testified in her opinion the material in the Jordan car was blood, and she failed to disclose the multiple negative confirmatory tests.

54. The first presumptive test Agent Elwell conducted was a Luminol test, which she characterized as a presumptive test for blood, but it was not specific for blood. (Exhibit 5, Elwell Testimony T p 5595). Luminol will react to things like metals, oxidants, detergents, and bleaches. (Exhibit 5, T p 5595). Agent

Elwell conducted another presumptive test, a phenolphthalein test, which is not conclusive for blood. (Exhibit 5, T p 5596).

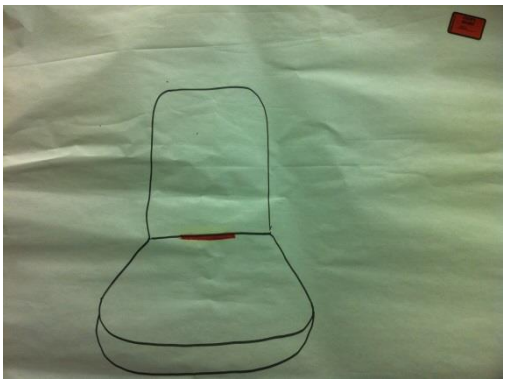
55. She testified at trial that she conducted one confirmatory chemical crystalline test, a Takayama test, and this test was "diluted." (Exhibit 5, T p 5599). Although her undisclosed lab notes indicate she found negative/inconclusive results, she never testified that this one test was negative or inconclusive. (Exhibit 5, Elwell Testimony; Exhibit 6-D, Hale Affidavit, Undisclosed lab notes). She did not disclose to the jury in her testimony that she conducted tests on the other cuttings from different parts of Jordan's front seat, which three additional negative or inconclusive results. (Exhibit 27, Mance Affidavit, Elwell Interview).

56. When asked about confirmatory crystalline tests at trial, Agent Elwell testified about only one confirmatory test, and did not call that test inconclusive or negative. (Exhibit 5, Elwell Testimony, T pp 5596-99). She did not disclose that she took four separate cuttings from the seat and tested each one of them individually. (Exhibit 27, Mance Affidavit, Elwell Interview; Exhibit 27-A, Cuttings Diagram).



57. Agent Elwell failed to disclose these additional confirmatory tests with negative or inconclusive results to the prosecution and defense, or in her testimony to the jury. (Exhibit 6, Hale Affidavit of November 5, 2014).

58. When asked to diagram the location of the positive reaction, she introduced State's Exhibit 100 and marked the area with a red line where she received a positive reaction. (Exhibit 25, T pp 5600-5601, Exhibit 26 – State's Exhibit 100). Exhibit 100, with a red line at the base of the seat, was introduced as fairly and accurately depicting "the passenger seat of the red Lexus" that Agent Elwell examined. (Exhibit 25, T p 5601). A comparison of State's Exhibit 51, a picture of the front of the Lexus when the Jordan car was discovered, and State's Exhibit 100, Agent Elwell's diagram, illustrates the misleading nature of her testimony.



59. Despite only receiving presumptive indications for blood, Agent Elwell testified that the material in the car was blood, stating, "*it is my opinion that you do have blood*." (Exhibit 25, T p 5611). That testimony was false and misleading.

60. Moreover, Agent Elwell suppressed evidence that would have exposed the falsity of her testimony. The only report Agent Elwell disclosed was the report introduced at trial which said, "Examination and analysis of the front passenger seat Item 159-A from the Lexus, Item #59-A, gave chemical indications for the presence of blood. Further analysis failed to give conclusive results." (Exhibit 6-A, Elwell Report, State Exhibit 101; Exhibit 5, Elwell testimony, T pp 5601-03). Her report did not detail that there were in fact four confirmatory tests on separate parts of the car seat, none of which gave a positive result for blood. (Exhibit 6-A, Elwell Report).

61. In fact, other agents at the S.B.I. would have characterized the four Takayama tests as negative. Another agent has stated under oath that the only two possible results for the Takayama test are negative or positive; there is either a result or there is not; either a crystal forms or it does not, and there is no such thing as an "inconclusive" Takayama test. (Exhibit 74, Deaver Deposition, T p 165).

62. Agent Elwell took cuttings from the seat and tested each one separately. (Exhibit 27, Mance Affidavit, Diagram of cuttings Exhibit 27-A). In each of these tests, no crystal formed and the tests were negative. Agent Elwell failed to disclose these multiple negative tests, failed to provide her bench notes documenting these tests, and failed to testify about multiplicity of these tests. Instead, she testified that there was one diluted test.

63. Defense Counsel made multiple specific *Brady* requests for lab tests and notes, (Exhibit 15A, B, D, F), and they served a specific subpoena for the lab notes on the State Bureau of Investigation. (Exhibit 15G), and Court orders compelling production of notes and reports, (Exhibit 15C, E), Agent Elwell did not disclose to the prosecutor or defense that there were multiple negative Takayama tests. (Exhibit 6, Hale Affidavit). The multiple tests on these cuttings

and Agent Elwell's bench notes, (Exhibit 15-H), were not disclosed to the prosecutor or defense. (Exhibit 15, Thompson Affidavit).

64. Agent Elwell's bench notes mention that J. Richardson was present when she cut the clippings from the car seat and conducted the tests. (Exhibit 15-H). Jerry Richardson was the S.B.I. Employee served with the subpoena to produce these notes. (Exhibit 15-G). Thus, one of them should have presented and disclosed the notes.

65. If called to testify now, Agent Elwell would say that she does not know if blood was present in James Jordan's vehicle. (Exhibit 6, Hale Affidavit; Exhibit 27, Mance Affidavit, Elwell Interview; Exhibit 95, Johnson Affidavit).

66. Agent Elwell's testimony was false in multiple significant ways. First, it hid the fact that the Takayama test she had conducted should be interpreted as a negative result. Second, it hid the fact that the S.B.I. conducted three additional Takayama tests on the seat of James Jordan's Lexus, none of which provided a positive indication for blood. Third, it hid the fact that the three additional tests were conducted on three different parts of the seat. Fourth, it mislead the jury in the conclusiveness of the two presumptive tests. Finally, it was contrary to S.B.I. policy not to give opinion testimony without conclusive results.

67. In 2011, Agent Elwell said that two presumptive tests do not make a conclusive test, and "I didn't know . . . whether it was blood or not blood. . . . It could have been anything." (Exhibit 27, Mance Affidavit; Exhibit 6, Hale Affidavit; Exhibit 95, Johnson Affidavit). Ralph Keaton, the director of ASCLD-LAB, which audits and accredits the S.B.I. serology lab, has stated that the two presumptive tests upon which Agent Elwell relied in her testimony "together do not confirm the presence of blood scientifically." (Exhibit 27, Mance Affidavit, Keaton Interview; Exhibit 95, Johnson Affidavit).

68. Her testimony was not only misleading; it was directly contrary to the policy and procedures of the S.B.I. at the time. According to Mark Nelson, her supervisor, "Section policy and procede—procedures would preclude any S.B.I. agent, forensic serologist, from testifying to opinion testimony as to whether it is blood or not, based on a phenolphthalein test. (Exhibit 72, Nelson Deposition, T p 94).

69. Thus, Elwell's testimony at trial, "it is my opinion that you do have blood," was a direct violation of S.B.I. policy.

70. Her testimony was prejudicial and material to the outcome of this case because she provided the only scientific expert opinion corroborating the testimony of the co-defendant Larry Demery. Demery had given multiple

accounts of the events.

71. Larry Demery was the only witness who said Daniel Green shot James Jordan. (Exhibit 40, T pp 3965–66). He said that Daniel Green shot James Jordan while Mr. Jordan was sitting inside of his car. (Exhibit 40, T p 3966). However, no blood was found in the car.

72. Demery said they physically moved the body from the driver's seat to the passenger seat. (Exhibit 40, T p 3969). Demery said he got Mr. Jordan's blood on his arm while moving him. (Exhibit 40, T p 3994-3995). During Demery's custodial interrogation by the police, he did not mention any blood in the vehicle. During his initial interview, Demery denied being a part of the killing. Investigators told him that Mr. Green had implicated him. They told him it would be best if he said Daniel did it. (Exhibit 42, Demery Custodial Interrogation).

73. Investigator Art Binder said, "I think you and him did exactly what he said-- you did by yourself. The only difference is, I think he's the one that shot him, and not you. I think he had the gun in his hand, I think he masterminded this little deal. You went along, because you felt safe with him there, he felt safe with you there. And I think the car got flagged down and I think the man got shot exactly the way it -- way -- uh -- it was said, but I think he might've pulled

the trigger. I don't know." (Exhibit 42).

74. Demery responded, "That just-- that doesn't-- that doesn't make no sense at all"

75. Demery later swore an affidavit that his custodial interrogation was coerced. (Exhibit 56, Demery Affidavit). In that affidavit Demery said many officers, who took turns coercing his statement, interrogated him. He said they turned off the recorder after a couple of hours. (Exhibit 56).

76. Demery eventually cut a deal with the prosecutors, negotiating a plea bargain that required the prosecutor to submit mitigating factors at his murder trial, leaving the discretion to run charges concurrently to the judge. (Exhibit 57, Demery Plea offer). As a result of this deal with prosecutors, Larry Demery is now eligible for parole. (Exhibit 77).

77. After giving multiple accounts of events to officers when he was arrested, eventually, Demery testified that Daniel Green was the shooter. (Exhibit 40, T pp 3965-67, Exhibit 42). It was not until Demery received the discovery in the case and was testifying at trial that Demery first mentioned blood in the car. He testified at trial, "come to find out later, later, there was some that was on the back part of the seat a little bit down in the bottom." He said that he cleaned blood off the passenger seat, after they got back to Daniel's

trailer. (Exhibit 40, T p 3995).

78. No other witnesses saw or detected blood in the vehicle. Lieutenant Cannon of the Cumberland County Sheriff's department conducted initial presumptive tests, including phenothalien and luminol, without conclusive results. (Exhibit 54, Transcript of Cannon testimony on blood).

79. Only Agent Jennifer Elwell of the State Bureau of Investigation testified that there was blood in the Lexus, stating, "it is my opinion that you do have blood." (Exhibit 5, Elwell Trial Testimony, T p 5611). Elwell's testimony was the only testimony providing testing of physical evidence that corroborated Larry Demery's version of events that Mr. Jordan was killed inside of his car.

80. Prosecutor Johnson Britt understood the importance of Elwell's expert opinion when he said in closing:

> "*Where was the blood found? The blood was found in the crack between the passenger seat. Blood. Blood from that wound. Blood that came off of that shirt, smeared on the back of that seat. Blood that puddled there in that seat while the body lay there. Blood that Larry Demery attempted to clean off . And what did Ms. Elwell say? Yes, you can clean off blood. Where did she find that blood? She told you she had to separate that fold, that blood had seeped back down in there*." (Exhibit 7, T p 7403).

81. The only exhibit introduced into evidence documenting the presence of blood in the car was State's exhibit 100. This exhibit was a red line drawn by Elwell demonstrating where the area tested positive. (Exhibit 26, State's Exhibit

100).

82. Moreover, establishing that the victim was killed in his vehicle was central to the state's attempt to prove its asserted motive for the murder. (Exhibit 7, Britt Closing, T pp 7368–69) ("A desire to have that car was the motive for this murder."). The stains that Elwell testified were blood constituted the only physical evidence introduced by the prosecution to establish the Lexus as the murder scene and to corroborate the story told by Demery. Had the jury been aware of that the material may not be blood at all, and understood the results of Elwell's additional negative Takayama tests, they might have reasonably chosen to disbelieve, in light of the paucity of other physical evidence, the prosecution's claims that the there was blood in the car and that James Jordan was shot and killed while sitting in his Lexus.

83. It is hard to believe that Jordan was shot through his aorta at close range inside his vehicle, that Jordan was moved from the driver's seat to the passenger seat without being removed from the vehicle, and that Demery used a rag to completely rid the vehicle of any forensic traces of blood. The prosecution had to show that there was blood in the car to make Demery a believable witness.

84. Demery's and Elwell's reliability was determinative of guilt or

innocence, and "when the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting [the witness's] credibility falls within this general rule" requiring disclosure of evidence. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

85. Defendant has demonstrated that this material evidence—evidence that would have been employed for both exculpatory and impeachment purposes, had it been disclosed—was withheld from Defense Counsel at trial despite the issuance of a specifically worded subpoena asking for all lab notes and experiment results. These undisclosed, favorable serology tests were performed by an agent who has since been suspended from the S.B.I. serology lab in relation to her failure to provide exculpatory evidence in other murder cases. The State's withholding of the existence of three negative blood tests, one each, for three separate stains the state insisted was blood at trial, is a violation of the defendant's due process rights so grievous it completely undermines public confidence in his trial.

86. Trial Judge Gregory Weeks has filed an affidavit stating that if these multiple tests were not disclosed to the Defense, and if Agent Elwell's opinion at trial was not accurate, then the State has violated the law as well as his Orders

at trial. Because the expert testimony was the only testimony corroborating the story of the testifying co-defendant, the failure to disclose multiple tests and the false and misleading testimony is material and would have affected the outcome at trial. (Exhibit 100, Judge Weeks Affidavit).

a. In his affidavit, Judge Weeks noted multiple specific requests filed by the Defense for exculpatory officer reports. (Exhibit 100, Judge Weeks Affidavit).

b. He noted multiple orders he entered compelling the officers to deliver material to the prosecutor, and compelling the prosecutor to deliver material to the Defense. (Exhibit 100, Judge Weeks Affidavit).

c. Judge Weeks noted that "The State's theory at trial was based, in large part, upon the testimony of co-defendant Larry Demery that Daniel Green shot James Jordan at close range while Jordan was seated in his Lexus automobile which was parked on the side of Highway 74 and that, after being shot, Jordan's upper torso slumped over onto the passenger side of the car." (Exhibit 100, Judge Weeks Affidavit).

d. Judge Weeks stated that "If Agent Elwell has subsequently admitted that she took and maintained notes regarding that analysis and that she did not disclose those notes regarding her negative or inconclusive findings to defense

counsel that would be in direct violation of applicable law and orders I entered regarding disclosure of exculpatory or impeaching evidence." (Exhibit 100, Judge Weeks Affidavit).

e. Judge Weeks concluded, "Further, if Agent Elwell has subsequently admitted that her analysis of the tested substances would not permit her to give an expert opinion at trial that the tested material was blood that would constitute false and misleading testimony on a material fact." (Exhibit 100, Judge Weeks Affidavit).

Judge Weeks has determined that Agent Elwell's the false and misleading testimony are "material." (Exhibit 100, Judge Weeks Affidavit).

D. <u>Due Process Prohibits The Destruction of Material Evidence.</u>

87. Police do not have "an undifferentiated and absolute duty to retain and preserve all material that might be of conceivably evidentiary significance," but they do have an "obligation to preserve evidence to reasonable bounds . . . [in] cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). "[I]t is well settled . . . that the failure of the police or prosecutor to preserve evidence may . . . constitute grounds for reversal of a conviction."

Gov't of Virgin Islands v. Testamark, 570 F.2d 1162, 1165 (3d Cir. 1978).

88. The Supreme Court of North Carolina has observed that "bad faith on the part of the police . . . [may] constitute a denial of due process of law," *see State v. Hunt*, 345 N.C. 720, 725, 483 S.E.2d 417, 420 (1997) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)).

89. Generally speaking, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, 488 U.S. at 58. Likewise, in most cases, "the destruction of evidence in accord with some established procedure or regulation [will] foreclose[] a finding of bad faith . . . ." *Elliott v. Levitt*, 83 F. Supp. 2d 637, 647 (E.D. Va. 1999).

90. However, "if a criminal defendant can show that the police failed to 'preserve potentially useful evidence' with bad faith, he or she has been denied due process," *Basden v. Lee*, 290 F.3d 602, 615 (4th Cir. 2002) (citations omitted), and "the failure to follow established procedures is probative evidence of bad faith." *Elliot*, 83 F. Supp. 2d at 647. (emphasis added). The Supreme Court has held that the "presence or absence of bad faith . . . turn[s] on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, 488 U.S. at 56 n* (1988) (citing *Napue v.*

Illinois, 360 U.S. 264, 269 (1959)).

E. The State Violated Mr. Green's Due Process Rights When the Blood Was Destroyed As a Result of an Ex Parte Oral Motion While on Direct Appeal.

91. Very shortly after defendant's conviction, while the case was still on direct appeal, the State Bureau of Investigation obtained an order for the destruction of the only known sample of the victim's blood. On August 14, 1996, Agent Elwell received a note from her supervisor, Mark Nelson, to destroy this only known sample of James Jordan's blood "ASAP." (Exhibit 32).

92. This note was sent as a result of an order signed July 1, 1996 ordering destruction of the blood. This was an order signed pursuant to an *ex parte* oral motion by Prosecutor Britt who provided no evidentiary reason for requesting the destruction of this evidence. (Exhibit 6-B; Exhibit 27, Mance Affidavit, Britt Interview, March 25, 2015).

93. Because the state of South Carolina had taken the unusual step of cremating Mr. Jordan's body before it made a proper identification or even notified his family, the blood sample taken at autopsy was the only known sample of biological material from the victim in existence, which might have been employed for D.N.A. comparison purposes. (Exhibit 5, Elwell Testimony, T pp 5613; 5615–23).

94. The order to destroy the victim's tissue and blood was issued just months after defendant's conviction at trial and before his first appeal was ever completed. The order gave no indication whatsoever as to the reason(s) for the blood's destruction, other than to say it was in response to an ex parte motion made by District Attorney Johnson Britt. (Exhibit 6-B, Evidence Destruction Order).

95. Here, the S.B.I. was well aware that the blood evidence in its possession—the now missing seat cuttings, and the blood sample taken at autopsy—were the only physical evidence offered at trial in support of the state's theory that James Jordan was shot in the course of a carjacking. The S.B.I. was aware of the possible exculpatory value of the evidence to the defendant. In fact, the S.B.I., through Agent Elwell, falsely represented to the jury and to defendant that, because of its critical importance, the blood sample would be preserved at S.B.I. headquarters "for years and years and years." (Exhibit 5, Elwell Testimony, T p 5615).

96. Specifically when she testified at trial on February 13, 1996, Agent Elwell made clear that she was aware of the importance of the blood sample and said that the sample would be preserved "in the event that maybe further evidence would later [] come in." (Exhibit 5, T p 5613). The blood sample was

utilized for forensic purposes in the S.B.I. report introduced by the prosecution and Agent Elwell testified at trial that "since the individual was deceased, [the S.B.I.] would need a blood sample for purposes of [future] comparison." (Exhibit 5, Elwell Testimony, T p 5613:4-6).

97. Agent Elwell expressly acknowledged that "[t]here may be a time when . . . the item may be needed [again] for court purposes," (Exhibit 5, Elwell Testimony, T p 5613:4–6). Agent Elwell further explained, "As far as the blood sample goes . . . [i]f any other evidence was ever to come up in the case, we would be able to pull that blood stain out and it would be preserved and we could do any further analysis we needed to from that blood stain." (Exhibit 5, Elwell Testimony, T p 5615).

98. Both the prosecution and S.B.I. were also aware of the emerging potency of D.N.A. evidence in 1996 and the possibility that defendant might be able to employ testing to his advantage in the future. (Exhibit 5, Elwell Testimony, T p 5615-5616) (noting Agent Elwell's express acknowledgment that D.N.A. testing was possible at time of defendant's conviction but not yet on blood samples of that size).

99. However, despite of Agent Elwell's testimony on February 13, 1996 that she recognized the importance of the blood sample, her statements that the

S.B.I. would preserve it, and her acknowledgment of D.N.A. techniques, the State almost immediately obtained an order "allow[ing]" it to destroy the evidence. (Exhibit 6-C, Letter from "Mark" to S.B.I. Special Agent Jennifer Elwell (Aug. 14, 1996)). On September 4, 1996, the agency removed the blood vial from its deep freeze and willfully destroyed it. (Exhibit 6-C, Handwritten notes of Agent Elwell, on "Mark" Memorandum).

100. This evidence "which was destroyed [] had exculpatory value and [] that exculpatory value was apparent to [] reasonable law enforcement agent[s] before [it] was destroyed," thus entitling defendant to judicial relief. *United States v. Elliot*, 83 F. Supp. 2d 637, 642-43 (E.D. Va. 1999).

101. The memorandum, from an unidentified S.B.I. supervisor named "Mark," likely Mark Nelson, which is not printed on S.B.I. letterhead, orders Elwell to "destroy th[e] material ASAP" and instructs her to notify S.B.I. Agent Kim Heffney when it has been destroyed. (Exhibit 6-C, Letter from "Mark" to S.B.I. Special Agent Jennifer Elwell (Aug. 14, 1996)). The memo suggests that the desire to destroy the samples taken from the victim's autopsy originated from within the S.B.I. (Exhibit 6-C) ("We have a court order . . . allowing us to destroy the tissue samples from James Jordan," and "ASAP.").

102. Jim Coman, who was Director of S.B.I. during the relevant time

period, and who spoke publicly on behalf of the S.B.I. about the Jordan case, stated recently that the blood was destroyed without his knowledge or permission. (Exhibit 27, Mance Affidavit, Coman Interview).

103. Regarding the S.B.I.'s destruction of the blood evidence immediately following defendant's trial, Agent Elwell said "It's very unusual—very, very, very. I don't think it's happened before outside of this case." (Exhibit 27, Elwell Interview, Mance Affidavit).

104. The internal S.B.I. memorandum provided to the defense by Agent Elwell is evidence that the destruction of the blood was clearly not the sort of "mere negligence on the government's part [of] failing to preserve [] evidence [that] is inadequate for a showing of bad faith." *United States v. Bohl*, 25 F.3d 904, 912 (10th Cir. 1994).

105. Agent Elwell asserted that she "was just told to destroy it" and claimed not to have specific knowledge as to the reason the state sought the blood's destruction. (Exhibit 27, Mance Affidavit, Elwell Interview). By taking the "very, very, very" unusual step of destroying the blood evidence in this case, the state violated the "clear constitutional duty on the part of the government to preserve evidence . . . of potential exculpatory value." *Lovitt v. True*, 330 F. Supp. 2d 603, 633 (E.D. Va. 2004) aff'd, 403 F.3d 171 (4th Cir. 2005).

106. The State's actions support a reasonable inference that the S.B.I. has acted in bad faith. *See United States v. Elliott*, 83 F. Supp. 2d 637, 647 (E.D. Va. 1999) ("[T]he failure to follow established procedures is probative evidence of bad faith."); *Bohl*, 25 F.3d at 912-13 ("This evidence, in the absence of any innocent explanation offered by the government, gives rise to a logical conclusion of bad faith"); cf. *State v. Hunt*, 345 N.C. 720, 725, 483 S.E.2d 417, 420 (1997) (finding no evidence of bad faith where "[n]othing in the record suggest[ed] that any law enforcement officer willfully destroyed the missing evidence") (emphasis added).

107. By depriving defendant access to the purported blood evidence used to convict him, and destroying evidence whose "exculpatory value was apparent ... before [it] was destroyed," *see Elliott*, 83 F. Supp. 2d at 642–43, the government acted in bad faith and denied defendant due process of law. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). By destroying the evidence, the S.B.I. violated its "obligation to preserve evidence . . . [in] those cases in which the police themselves . . . indicate[d] that the evidence could form a basis for exonerating the defendant." *Id*. The evidence of bad faith in defendant's case is strong, particularly when considered in combination with the additional evidence of S.B.I. misconduct as described in the earlier causes of action, *see supra*, as

well as strong evidence of an intentional effort by law enforcement to cover-up of Larry Demery's ties to the Sheriff's drug-trafficking son. *See infra*. The bad faith destruction of the serological evidence in defendant's case warrants a reversal of defendant's conviction and the order of a new trial.

F. <u>The State Mishandling of Blood Evidence In This Case Was A Result of a Pattern and Practice of Misconduct at the S.B.I. Spanning Years and Tainting Other Cases.</u>

108. Further undergirding defendant's contention that the S.B.I. acted in bad faith are revelations that the agency, during the period surrounding defendant's trial in 1996, routinely "favored the prosecution and encouraged bias," *see* Kavita Pillai, *Another "Competitive Enterprise": A Balanced Private-Public Solution to North Carolina's Forensic Science Problem*, 90 N.C. L. REV. 253, 263 (2011), and a sixteen year practice of withholding critical evidence in their lab reports." (Exhibit 31 Mandy Locke & Joseph Neff, "S.B.I. Searches for New Crime Lab Director," RALEIGH NEWS AND OBSERVER, Aug. 27, 2010).

109. North Carolina Attorney General Roy Cooper called for an independent review into the State Bureau of Investigation Laboratory after the exoneration of Greg Taylor in 2010. Taylor spent sixteen years in prison as a result of false and misleading testimony about blood evidence by one of Agent

Elwell's trainers at the North Carolina State Bureau of Investigation. (Exhibit 16, "2 Ex-FBI Officials to Probe NC Crime Lab Practices," Martha Waggoner, Associated Press, Mar. 5, 2010).

110. "During Taylor's innocence hearing, an S.B.I. agent testified that agents were told to write in lab reports that evidence gave chemical indications for the presence of blood when the first test for blood came back positive. Agent Duane Deaver said agents were told to use that language even when a follow-up test was negative. The information about a negative follow-up test would be part of an agent's notes, but it wasn't included in the lab reports routinely provided to courts." *Id*. Lab analysts and technicians at the State Bureau of Investigation worked for the police and prosecutors leading to a bias for the prosecution and practices like refusing to run tests which might exonerate the defendant and refusing to disclose evidence that might assist the defense. (Exhibit 17, "Witness for the Prosecution: Lab Loyal to Law Enforcement," RALEIGH NEWS AND OBSERVER, Aug. 18, 2010).

111. S.B.I. Agents, including Jennifer Elwell, were trained as sworn law enforcement officers and received training in investigating and prosecuting crimes. In training, agents learned how to testify. As part of this training, agents were told, "Tell the D.A. in advance of any weaknesses in the case so that the

trial of the case can be planned to minimize the weaknesses' impact." (Exhibit 18, Basic Law Enforcement Training Manual). S.B.I. agents in the blood section participated in moot court trainings to practice testifying. Supervisors evaluated their performance. (Exhibit 20, Nelson deposition). S.B.I. Agent Elwell attended the S.B.I. Academy and S.B.I. Agent in service trainings where she learned law enforcement investigation techniques. She took firearms training and "ethics in law enforcement," like other investigative agents with the S.B.I.. As a lab technician she also received training on "use of force" and "law enforcement civil liability." Even though she was a lab technician, she took the training equivalent of a sworn law enforcement officer. (Exhibit 19, Elwell Training Transcript).

112. Investigations into the State Bureau of Investigation during the relevant period surrounding defendant's trial in 1996 showed that S.B.I. Agents routinely "favored the prosecution and encouraged bias." Kavita Pillai, Another "Competitive Enterprise": A Balanced Private-Public Solution to North Carolina's Forensic Science Problem, 90 N.C. L. REV. 253, 263 (2011). As a result, the Attorney General noted that he was "concerned about the potential of influence of prosecutors on the opinions of some S.B.I. agents regarding this science." (Exhibit 24, "Bloodstain Analysis Team Had No Guidelines for 21

Years,'' Raleigh News & Observer, September 10, 2010.).

Swecker-Wolf Report

113. Former FBI Agents Chris Swecker and Mike Wolf found 230 problem cases after examining more than 15,000 cases at the invitation of Attorney General Cooper. The Attorney General characterized the report as having revealed "a practice that should have been unacceptable then and is not acceptable now." (Exhibit 21, "Scathing S.B.I. audit says 230 cases tainted by shoddy investigations," RALEIGH NEWS AND OBSERVER, Aug. 27, 2010; Exhibit 22, Swecker-Wolf Report).

114. The Raleigh News & Observer reported, "In serology, police use rudimentary presumptive tests at crime scenes to determine where blood might be. Those tests are fallible, prone to giving false positives. So analysts depend on more sophisticated, confirmatory tests to determine whether a substance is, in fact, blood. Before 1997, the serology unit operated without report-writing guidelines. Analysts set their own criteria until 1997; that policy sanctioned the practice of not reporting negative or inconclusive results of confirmatory tests." (Exhibit 21, "Scathing S.B.I. audit says 230 cases tainted by shoddy investigations," RALEIGH NEWS AND OBSERVER, Aug. 27, 2010; Exhibit 22 Swecker-Wolf Report, p. 17–18).

115. "Tests used to confirm the presence of blood never yield "inconclusive results," Swecker noted. ("Scathing S.B.I. audit says 230 cases tainted by shoddy investigations," RALEIGH NEWS AND OBSERVER, Aug. 27, 2010; Exhibit 22, Swecker-Wolf Report, p. 11).

116. The Swecker-Wolf Report revealed that it was the sanctioned practice of some NC S.B.I. Laboratory Analysts at the time of Mr. Green's case to omit the results of certain negative or inconclusive confirmatory tests in final lab reports. This practice became the written S.B.I. policy in 1997. (Exhibit 22, Swecker-Wolf Report, p. 12). The Swecker-Wolf Report also revealed that as late as 1996, it was the bureau's policy not to provide lab files/notes without a court order. Many times the lab files or notes were not provided to the prosecution or to the accused. (Exhibit 22, Swecker-Wolf Report, p. 13).

117. Interviews with supervisors in the serology division showed that negative confirmatory results were withheld and that the proffered explanations did not "justify withholding a test result that is not positive." (Exhibit 22, Swecker-Wolf Report, p. 19).

118. In particular, the Takayama confirmatory test was often omitted, reported in contradictory ways, or misreported as inclusive when it was in fact negative. (Exhibit 22, Swecker-Wolf Report, p. 18–20).

119. Thirty-three of the cases identified by Swecker and Wolf as highly misleading were Agent Elwell's cases. (Exhibit 22, Swecker-Wolf Report). Agent Elwell has said that the S.B.I.'s training program "was not a real training program." (Exhibit 23, Elwell I/A Statement, p. 4). One trainer told her there was no such thing as an inconclusive result for a Takayama test and that "you either got crystals that formed or you did not." *Id.* Another trainer told the results of the Takayama could be inconclusive if it was determined it was a weak sample. She said, "both opinions were acceptable in the lab and it could have been written either way." She wrote reports to supervisors based on the preference of that particular supervisor. (Exhibit 23, Elwell I/A Statement, p. 4–5).

120. The Takayama test was discontinued in 2003. (Exhibit 22, Swecker-Wolf Report p. 4).

121. The Swecker-Wolf Report limited its review to laboratory files and did not review court transcripts. Without these additional pieces of information, Swecker and Wolf could not make a full determination of the nature and extent of potential violations of due process:

> Without court transcripts or investigative files reviewers could not determine whether the tested item was introduced into evidence or influenced the outcome of the cases in any way. The question of whether

> a decision was made to plead guilty, not testify or some other strategic defense action was taken based on a questionable lab report can only be answered by the accused or his/her Attorney. These decisions must be made on a case by case basis after reviewing the investigative files, lab files, court proceedings, and any other relevant material. (Exhibit 22, Swecker-Wolf Report, p. 12).

The Swecker-Wolf Report Identified Green's Case as Problematic

122. Mr. Green's case was identified in the Swecker-Wolf Report as problematic and as a case where multiple blood tests favorable to the defendant had been withheld. (Exhibit 22, Swecker-Wolf Report, p. 55). Swecker determined that Agent Elwell's lab report did not reflect multiple inconclusive confirmatory tests. (Exhibit 22, Swecker-Wolf Report, p. 55).

123. Mr. Swecker did not know, based upon the materials he reviewed, that it was actually four confirmatory tests on different parts of the car seat that tested negative. Mr. Swecker also did not know that Agent Elwell testified at trial that her opinion was that the material was "blood," based only upon a presumptive test capable of producing false positives.

124. Swecker reviewed the training manuals during the period of Mr. Green's case. He found that there was no reference to reporting Takayama as "inconclusive" or "no result." He also found that analysts were trained not to give an opinion based solely upon presumptive tests without the presence of a confirmatory test.

125. The S.B.I. Training Manual, in effect from 1986 to 1997 provided some guidance and relevant information on test limitations and the interpretation of test results. (Exhibit 22, p. 21). For example, the Training Manual in effect from 1985 through 1999 stated, "The phenolphthalein test is a presumptive catalyst test for the detection of blood. . . . False positive reactions can occur. The literature reports that certain plants including horseradish, tomato, turnip and Jerusalem artichoke possess elevated levels of peroxidase, which may give a positive reaction with phenolphthalein. . . . The literature also reports that bacteria which possess a high level of catalase activity may also give a false positive reaction." The Training Manual also stated, "the Presumptive tests, or catalytic tests for blood center on the erythrocyte portion of the formed elements. . . This technique allows for a quick visual screening of blood but should not be judged as a confirmation of the presence of blood. Presumptive tests are designed to be used in conjunction with confirmatory tests for blood if enough of a sample is available." (Exhibit 22, p. 21).

126. Regarding the confirmatory test for blood, the Training Manual stated, "The Takayama test will confirm the presence of blood and is designed to be used in conjunction with presumptive testing for blood. . . . A positive result is visualized microscopically by the formation of salmon colored rhomboidal or

stellate crystals. The only materials that will give a positive reaction other than blood are commercially produced preparations of catalase and peroxidase, items not occurring in nature." (Exhibit 22, p. 21). Thus only the formation of the salmon crystal could be interpreted as a positive result. No reference was found as to the possibility of an "inconclusive" result or a "no result". (Exhibit 22, p. 21).

127. Swecker and Wolf identified four categories of problems within the blood section of the State Bureau of Investigation.

128. The first category included reports that did not mention the negative or inconclusive confirmatory test, but ultimately stated the presence of blood was not conclusive. (Exhibit 22, p. 10).

129. The second category included reports omitting negative or inconclusive results and simply stating there were chemical indications for blood. This report fails to properly qualify the test results as unconfirmed and does not inform the reader of further tests that were negative or inconclusive. Id.

130. The third category involved cases in which the report states indications or chemical indications for blood were detected but no further testing took place, despite one or more confirmatory tests that were inconclusive or negative. Id.

131. The fourth and most serious category involved cases in which the

reported actual results of the confirmatory tests were over reported or not reflective of the results contained in the lab notes. For example, one case occurred where the reports said "revealed the presence of blood" when the confirmatory notes were negative. In some instances the report said there were chemical indications of blood and further tests were inconclusive or failed to give any result – when the lab notes indicated negative results. For some analysts, an inconclusive was the same as a negative result. Id.

132. If called to testify again, Agent Elwell would now testify that she does not know if blood was present in James Jordan's vehicle or not. (Exhibit 6, Hale Affidavit; Exhibit 27, Mance Affidavit, Elwell Interview; Exhibit 95 Johnson Affidavit). Because of the S.B.I.'s failure to disclose one or more inconclusive or negative Takayama test, as well as their Agent's exaggeration or falsification of the actual opinion that the material was "blood," this series of actions falls squarely within the most serious category of the Swecker-Wolf report.

Agent Elwell Gave False Blood Testimony Testing in Another Murder Case.

133. In a hearing in Durham County murder case involving blood testing, a Durham Superior Court Judge found that Agent Elwell acted unethically by declining to administer tests that she thought might aid the defense. (Exhibit 28, *State v. Allen*, 2011 WL 7062946, at ¶ 87(b) (N.C. Super. Ct. March 9, 2011).

The Judge found "Contrary to Agent Elwell's testimony . . . . Agent Elwell decided to stop further testing of items for DNA testing because [she] believed further testing of physical evidence of the case would not prove inculpatory to the Defendant . . . and could possibly inculpate others." rev'd on other grounds, 2012 N.C. App. LEXIS 1071, 731 S.E.2d 510 (2012).

134. Agent Elwell was suspended from working in the S.B.I. serology lab following revelations about her unethical conduct and false testimony in murder cases. (Exhibit 27, Mance Affidavit, Elwell Interview).

Agent Jerry Richardson, the Lab Director, Worked on Mr. Green's Case and was Later Removed from the Lab For Mishandling Evidence.

135. Jerry Richardson was an agent at the S.B.I. at the time of the investigation into the murder of James Jordan. He tested materials for fingerprints. (Exhibit 29, Richardson S.B.I. Report). Agent Richardson also testified at trial regarding the fingerprints of Mr. Jordan. (T pp 1179-1201). Agent Richardson was present with Agent Elwell when she conducted the multiple Takayama tests for the seat cuttings from James Jordan's car. (Exhibit 15-H). The S.B.I. received a subpoena for Agent Richardson from Defense Counsel for all notes from the S.B.I.. (Exhibit 15-G). Nevertheless, he did not disclose the bench notes to the defense or prosecution.

136. Agent Richardson was lab director at the time of Daniel Green's trial. He was removed from that position in August 20, 2010 when disclosures about the mishandling of blood testing evidence arose. (Exhibit 30, Mandy Locke and Joseph Neff, "S.B.I. Searches for a New Crime Lab Director," RALEIGH NEWS AND OBSERVER, Aug 20. 2010). Agent Richardson called firearms an "exact science," a contention that is flatly contradicted by the National Academy of Science. He disagreed with a judge's disqualification of a firearm analyst who had not passed a core element of his training. Also, he could not explain documents; some were disclosed to prosecutors and some were not. (Exhibit 31, "New S.B.I. Chief Removes Lab Director, Suspends More Analysts," RALEIGH NEWS AND OBSERVER, Aug. 27, 2010).

G. Elwell's New Opinion That There May Not Have Been Blood In Jordan's Car and the Pervasive Misconduct at the S.B.I. Laboratory Constitute Newly Discovered Evidence Requiring a New Trial.

137. Agent Elwell's revised opinion that she cannot say that the material in the car is blood constitutes material newly discovered evidence and requires a new trial.

138. In addition, the State Bureau of Investigation's pattern of fabrication and obstruction of justice at the time of Mr. Green's investigation and trial constitutes newly discovered evidence. Under North Carolina law:

> a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence. A motion based upon such newly discovered evidence must be filed within a reasonable time of its discovery. N.C. Gen. Stat. 15A–1415 (2011).

139. According to N.C. Gen.Stat. § 15A–1415(c), to prevail on a motion for appropriate relief based on newly discovered evidence, including recanted testimony, a defendant must establish the following:

(1) the witness or witnesses will give newly discovered evidence,

(2) such newly discovered evidence is probably true,

(3) it is competent, material and relevant,

(4) due diligence was used and proper means were employed to procure the testimony at the trial,

(5) the newly discovered evidence is not merely cumulative,

(6) it does not tend only to contradict a former witness or to impeach or discredit him,

(7) it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

State v. Peterson, 2013 N.C. App. LEXIS 756, 744 S.E.2d 153, 157–58 (2013) (citing *State v. Hall*, 194 N.C. App. 42, 48-49, 669 S.E.2d 30, 35

(2008)).

140. In *State v. Peterson*, the prosecution relied upon the expert testimony of S.B.I. Agent Duane Deaver regarding bloodstain patterns found at the crime scene. *Id*. at 156. Agent Deaver's testimony helped the prosecution show premeditation because he provided the only evidence supporting the prosecution's theory of how the defendant killed his wife. *Id*.

141. Agent Deaver and other S.B.I. agents were later found to have suppressed exculpatory evidence and laboratory reports and fabricated inculpatory evidence. The Independent Review of the S.B.I. Forensic Laboratory by Swecker & Wolf (the "Swecke-Wolf r Report") found serious problems and inconsistencies in the S.B.I. agents' methods of recording the results of blood testing in laboratory reports. (Exhibit 22, Swecker-Wolf Report). A court found that Agent Deaver gave results in lab reports that were entirely inconsistent with the results recorded in the internal lab notes. Deaver, who trained Agent Elwell, was suspended and then fired by the S.B.I. after this information was published. (Exhibit 22, Swecker-Wolf Report, pp 5–11, Exhibit 23, Elwell I/A Interview).

142. At the MAR hearing in the *Peterson* case, the trial court found that Agent Deaver had misrepresented his qualifications and held that *Peterson* was entitled to a new trial. *Peterson*, 744 S.E.2d at 158. The Court of Appeals

affirmed and stated that the defendant met all seven requirements necessary to secure a new trial based upon newly discovered evidence. *Id*.

143. In the present case, Agent Deaver trained Agent Elwell and supervised her casework training. (Exhibit 23, S.B.I. Internal Investigation Interview of Jennifer Elwell September 15, 2010). In addition, Agent Elwell confirmed that there was never a manual or procedure setting reporting guidelines for the tests she ran. (Exhibit 23).

144. The Swecker-Wolf Report found that, like Agent Deaver's lab reports, Elwell's lab reports contained many significant inconsistencies. (Exhibit 22, Swecker-Wolf Report).

145. Here, in addition to the newly discovered evidence of similar inconsistent S.B.I. practices and the impermissible withholding of the four exculpatory Takayama tests, the newly discovered evidence of Elwell's recanted testimony entitles defendant Green to a new trial.

146. As in *Peterson*, all seven of the necessary requirements to prevail on a Motion For Appropriate relief based on newly discovered evidence are present. The first and second requirements are that the witness will give newly discovered evidence and the evidence is probably true. To establish these two requirements, it is sufficient to have a witness testify regarding the evidence and

for this evidence to be uncontested. *Peterson*, 744 S.E.2d at 158. Here, Elwell personally stated that if called as a witness now, she could not confirm the presence of blood. (Exhibit 6, Hale Affidavit; Exhibit 27, Mance Affidavit, Elwell Interview; Exhibit 95, Johnson Affidavit). Because Elwell was the sole serology expert at trial and she now recants her testimony, this new evidence is uncontested.

147. The third requirement is that the newly discovered evidence is competent, material, and relevant. In *Peterson*, because the prosecution's case relied so heavily upon S.B.I. Agent Deaver's testimony, the new evidence that seriously undercut Deaver's credibility was sufficiently competent, material, and relevant. *Id.* Here, the prosecution's case crucially depended upon Elwell's testimony. The stains that Elwell testified were blood constituted the only physical evidence introduced by the prosecution to establish the murder scene and to corroborate Demery's story that Green was guilty. Like *Peterson*, many similarly grave deficiencies found in Elwell's testing and reporting procedures completely undermine her credibility as a witness.

148. Elwell's recanted statement regarding the presence of blood undermines her crucial testimony's credibility in an even stronger fashion than the facts in *Peterson*. Because Elwell was presented as the sole serology expert

in Mr. Green's case, the jury was inclined to adopt her misleading testimony as true. Her testimony was indispensable to the prosecution's establishment of the only physical evidence supporting Demery's story.

149. The fourth requirement is that due diligence was used and proper means were employed to procure the testimony at the trial. It is sufficient that defendant specifically sought to procure the evidence during trial. *See Peterson*, 744 S.E.2d at 158. In *Peterson*, Defense Counsel was found to have exercised due diligence and proper means to show that Agent Deaver was not qualified by questioning his laboratory practices at trial. *Id*.

150. Here, there is an even stronger case for granting a new trial because defense counsel also directly questioned Agent Elwell at trial regarding the substance testing and any indications of blood in the vehicle. It was during the cross-examination that Elwell explicitly stated "it is my opinion that you do have blood." (Exhibit 5, Elwell Testimony, T p 5611). Trial Counsel also filed multiple requests, received a Court order, and filed a subpoena to get the lab notes that were never disclosed. (Exhibit 15, Thompson Affidavit). As such, Mr. Green employed due diligence and proper means to procure the newly discovered evidence of Elwell's recanted statement at his trial.

151. The fifth requirement is that the newly discovered evidence is not

merely cumulative. Evidence is not cumulative if defendant was unable to demonstrate this evidence at trial. *Peterson*, 744 S.E.2d at 159. Though defense counsel questioned Elwell about the identity of the substance found in the car, she testified that it was blood. Though defense counsel subpoenaed and repeatedly requested the lab notes, Elwell and the S.B.I. did not produce them. Because Elwell was the sole serology expert and because she testified upon cross-examination that the substance was blood, defendant Green was unable to demonstrate that laboratory testing could not confirm that the substance was blood. The new evidence of her recanted testimony stating that she can no longer confirm the presence of blood in the vehicle is not cumulative, but rather, a complete reversal of the only physical evidence presented to establish Green's guilt.

152. The sixth requirement is that the evidence not merely impeach a witness. In *Peterson*, the court held that while impeachment evidence may be insufficient generally, impeachment evidence that also undermines a central aspect of the case does more than merely impeach. *Id*. The court found in *Peterson* that the evidence undermining Agent Deaver's credibility also undermined a central aspect to the case, because Deaver was the only witness to describe the theory of how the defendant killed his wife. *Id*.

153. Here, Elwell's recanted testimony also does far more than merely impeach her as a witness, because it also undermines a central aspect of the case. By recanting that testimony, Elwell no longer corroborates Larry Demery's story that the vehicle was the scene of the murder, and that Mr. Green was present at the time. The undermining of her testimony to the presence of blood, and thus the only physical evidence linking Green to the crime, completely guts the prosecution's case against Green. It not only undermines the key witness and sole serology expert's testimony, but it also eliminates the prosecution's only physical evidence that the murder occurred inside the Lexus, which was a material fact necessary to establishing Green's guilt under a theory of carjacking.

154. The seventh, and final, requirement is that the new evidence is of such a nature as to show that on another trial, a different result will probably be reached and that the right outcome will prevail. In *Peterson*, the court concluded that it was probable that the newly discovered evidence regarding Agent Deaver's testimony would cause a jury to reach a different result, as his testimony was central to the prosecution's case. *Id*.

155. In the present case, not only did Elwell train under Agent Deaver and thus exhibit similarly inconsistent laboratory testing and reporting practices, she

has also personally recanted her testimony concerning the presence of blood in the vehicle. Elwell's testimony represented the only physical evidence corroborating Demery's story that Green was present at the time of the murder, and that the murder occurred in the vehicle. Without Elwell's testimonial support, the prosecution has no physical evidence placing Green at the scene of the murder. Demery's story implicating Green's guilt significantly, if not completely, loses its bearing against the testimony of Green's alibi witnesses, and as such, the prosecution cannot come close to proving Green's guilt beyond a reasonable doubt. As such, this newly discovered evidence could cause the jury to reach a different result.

156. Because all seven requirements of the newly discovered evidence are met, defendant Green is entitled to a new trial.

II. ACTS OF STATE LENIENCY PROVIDED TO A TESTIFYING CO-DEFENDANT CONSTITUTE EXCULPATORY IMPEACHMENT EVIDENCE AND MUST BE DISCLOSED AS A MATTER OF DUE PROCESS. THE PROSECUTOR SHOWED LENIENCY IN DEMERY'S SENTENCING TRIAL AND JOINED IN THE DEFENSE MOTION FOR CONCURRENT SENTENCES. THESE UNDISCLOSED ACTS OF LENIENCY VIOLATED MR. GREEN'S DUE PROCESS RIGHTS.

160. The Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady v. Maryland,* and its progeny, requires disclosure of all deals, formal

and informal with testifying co-defendants. This includes all benefits provided by the State and acts of leniency which assist the co-defendant. In the present case, the Prosecutor had a tacit understanding with Demery's Trial Counsel that the Prosecutor would not zealously seek the death penalty and would not oppose requests for concurrent sentences for multiple charges. This undisclosed benefit violates the Due Process Clause and is material because Demery provided the only direct testimony implicated Mr. Green.

A. **Due Process Requires Disclosure of Acts of Leniency Provided to a Testifying Co-defendant.**

161. The Due Process prohibition on false testimony is set forth in section I.A., and the requirements on Prosecutors to disclose exculpatory impeachment information are set forth above in Section I.B. These general requirements apply specifically to promises of leniency, made by prosecutors or police that are not disclosed to the defense. In *Giglio v. United States*, 405 U.S. 150, 153 (1972), according to the affidavit of one member of the prosecutor's office, the cooperating witness was told "that if he did testify he would be obliged to rely on the 'good judgment and conscience of the Government' as to whether he would be prosecuted." The Supreme Court focused upon the fact that a no-prosecution promise had in fact been made, and that both the witness, in his testimony, and the prosecutor, in summation, had stated otherwise. *Id*. The Court

held that, since the government's case depended almost entirely on this witness' testimony, his "credibility as a witness was . . . an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id*. at 155.

162. In *Boone v. Paderick*, the Court held that failure to disclose a promise by the police for leniency led to false testimony of the main witness who appeared to the jury to be testifying from their own conscience, and not as a result of any benefit from the State. 541 F.2d 447, 451 (4th Cir. 1976). The fact that there was an unwritten promise that was tentative strengthened the significance of the promise because it required more effort on the part of the testifying witness to receive the benefit. "[R]ather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy. This is because a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor." *Id*. Therefore, any act of leniency or tacit understanding of benefit with the State's main witness must be disclosed pursuant to the Due

Process Clause of the United States Constitution. *Boone v. Paderick,* 541 F.2d 447, 451 (4th Cir. 1976).

B. The Prosecutor Showed Leniency at Demery's Sentencing Trial and Joined the Defense Motion For Concurrent Sentences.

163. On August 21, 1993, Hugh Roberts, attorney for Larry Demery announced he had evidence that neither teenager, Daniel Green nor Larry Demery, committed this murder. (Exhibit 84, "Lawyer Says Neither Teen Killed Jordan," Fayetteville Observer, Aug 21, 1993). About three months later, November 30, 1994, Demery swore out an affidavit saying that he was interrogated by eight or nine officers for nine hours. (Exhibit 56, Demery Affidavit). He said officers made promises to him for leniency if he made a statement, and he could face the death penalty if he didn't make a statement. (Exhibit 56). He said he felt intimated by the group of officers who were using profanity, stating he could not get a fair trial because of the identity of the victim. (Exhibit 56).

164. Also in November of 1994, Demery's attorney filed a motion with the Court to compel the State to produce " 'trust me' agreements wherein the prosecution avoids offering a specific plea agreement or immunity to a State's witness but expressly or implicitly offers to help the witness after the witness

has testified for the State. Any ‘trust me’ agreements wherein the prosecution or anyone connected with the prosecution expressly or implicitly offers not to prosecute a State’s witness for uncharged crimes or misconduct of which the State is aware in return for the testimony of the witness.” (Exhibit 86).

165. Six months later, Demery entered into a plea agreement April 27, 1995 in which he pled guilty to first degree murder, and agreed to testify against Daniel Green. He agreed to be interviewed by Special Agent Kim Heffney of the S.B.I.. (Exhibit 57). The State stipulated that there were two mitigating circumstances: Demery (1) admitted guilt at early stage of the proceedings, and (2) aided in apprehension of another capital felon. (Exhibit 57). Demery plead guilty to capital murder, with a potential sentence of “life imprisonment and the maximum penalty is death.” (Exhibit 57). In the plea agreement, Demery pled to other unrelated robberies and felony assaults. “The defendant shall receive a sentence of 40 years, such sentence may at the discretion of the Court run concurrently or consecutively to the sentence imposed in 93 CRS 15288.” (Exhibit 57). The plea agreement stated, “there are no other explicit or implicit agreements between the parties other than these contained in this memorandum of agreement.” (Exhibit 57).

166. After entering the plea agreement, Demery spent time in the Robeson County Jail, where he was escorted by a Robeson County Detention officer in shackles but no handcuffs to his home where he visited with his family and girlfriend, Angela McClain, as well as his newborn child. (Exhibit 40, T pp 4184–86). At Green's trial, Richard Locklear testified that as an employee of the Robeson County Detention center he asked Demery about how much time he was going to get, and Demery said, "40 years for armed robbery, life for the murder, they were going to run concurrent, with good year "With good time I'll do eight, nine years. I've been here for two and a half years, which means I'll serve another six, seven years." (Exhibit 69, T pp 6576, T pp 6584–85). Mr. Locklear said "you sound really sure about that," and Demery replied "It's what Johnson Britt told us." (Exhibit 69, T p 6584). Demery told Locklear, "I trust Johnson Britt." (Exhibit 69, T pp 6587, 6593).

167. Demery's sentencing trial began in May of 1996, and Britt explained to the press 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 evidence of an aggravating circumstance, the prosecutor in this state is bound by law to seek the death penalty." (Exhibit 85, Gary Wright, "Demery Sentencing Hearing to Begin," CHARLOTTE OBSERVER, Apr. 29, 1996). Britt told the press that "It's going to be

up to 12 citizens from this county to decide what's appropriate." (Exhibit 85). Britt explained the deal to the press and agreed that isn't much of a deal, if Demery gets the death penalty. He noted, "That's the roll of the dice – the chance he took by entering this plea." (Exhibit 85).

168. Hugh Rogers, attorney for Demery, was asked by members of the media how he felt about his client's chances in the death penalty trial, and he said "I feel very optimistic." (Exhibit 85). At the sentencing trial, Britt showed leniency to Demery and did not actively and zealously seek the death penalty as he indicated he was bound to do. When asked about the sentencing trial, Demery's attorney Hugh Roberts said, "*between the lines, Britt might as well be sitting at our table*." He didn't "object" or actively oppose the defense. "*He didn't bust his ass*" to get a capital conviction." (Exhibit 87, Holmes Affidavit, Roberts Interview). When asked whether that was something he just noticed at trial or whether that was the understanding about how the sentencing trial would be handled, Mr. Roberts said "*it was the understanding all along.*" (Exhibit 87).

169. The jury returned a verdict for life, and a judgment for life was entered May 20, 1996. (Exhibit 88). Nothing in the written judgment indicated that it would run concurrently with any other sentence. The Court entered judgment for

forty years on the remaining unrelated robbery and assault convictions on October 3, 1997. (Exhibit 89).

170. N.C. Gen. Stat. §14-87 required that the two sentences run consecutively as a matter of law.

171. Demery's lawyer filed a motion to with draw the guilty plea on October 4, 2007 on the grounds that the prison ran the robbery convictions consecutively with the murder charge instead of concurrently. (Exhibit 90). In the motion, Demery's attorney Hugh Rogers said that the "State did not oppose a concurrent sentence in these matters, and joined in the request by the Defendant's attorney for a concurrent sentence." (Exhibit 90). Attorney Rogers told the press, "I think that the court and 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." (Exhibit 91, "Jordan's Father's Killer up for Parole in 2016," WRAL Mar. 6, 2008). Prosecutor Britt offered no opposition during the hearing and said, "*Mr. Demery fulfilled his end of the bargain, which was to testify truthfully on behalf of the State. He spent the better part of a week testifying against Mr. Green. Mr. Demery, in essence, was the key that linked everything together. This is the appropriate remedy.*" (Exhibit 92, Mark Locklear, "Demery 'Now Eligible for Parole,' Mar 7 2008). Hugh

Roberts noted that Britt joined the motion to consolidate all the charges for one life sentence. (Exhibit 87).

172. At Green's trial, no mention was made of an "understanding" that Britt would not actively and zealously seek the death penalty. There was also no mention that Britt would join in the defense motion to have Demery's unrelated robberies and assaults run concurrently. (Exhibit 40 T pp 4173–4). Britt denied and opposed any suggestion that Demery would not be prosecuted for the death penalty, and then serve forty years for the unrelated robberies. In his closing argument, Prosecutor Britt told the jury,

> *They argue to you that he's made a sweet deal. And I told you in jury selection that there was an agreement. I told you in opening statements that there was an agreement. The record shows that there's an agreement. He's now 20 years old. He's going to prison for 40 years on everything that he's pled guilty to with the exception of the murder. The murder there is no agreement. There is no agreement as to what will happen to Larry Demery when it comes time for a jury to decide his fate. He faces life or he faces death. The maximum and minimum punishments in North Carolina. Nobody has guaranteed him a life sentence. Nobody guaranteed him that this 40 years is going to run together with any life sentence that he receives.*
> (Exhibit 7, T pp 7426–7).

173. In fact, Demery is now eligible parole as of December 2015, about twenty years after Demery was sentenced to life. (Exhibit 77, DOC printout of Demery's custody status; Exhibit 92,).

174. It was not true, as Britt suggested that "He's going to prison for 40 years on everything that he's pled guilty to with the exception of the murder." He actually finished that sentence in 2008. (Exhibit 77). Although Britt said that "no one guaranteed him a life sentence," he failed to mention that he planned to show leniency in the handling of the death penalty phase, or join in the Defense motion for concurrent sentences – maneuvers which led to the present possibility of release for Demery.

C. <u>The Undisclosed Leniency Was Material Because Demery Provided the Only Direct Evidence of Mr. Green's Guilt.</u>

175. As discussed above, Demery offered the only direct testimony implicating Mr. Green in the murder of James Jordan. His credibility and willingness to lie in order to help himself was the central issue before the jury. Demery gave multiple accounts of the incident before arriving at his story that Mr. Green killed Jordan. He swore out an affidavit saying his statement was coerced by police. He was facing the death penalty. All of these facts suggest that his testimony should be considered with great caution and skepticism. Prosecutor Britt's false statements to the jury about how long Demery would serve, coupled with his behavior during Demery's sentencing, show that the jury was not given an accurate picture of Demery's motivations.

176. The Fourth Circuit reached a similar conclusion in the case of *Boone v.*

Paderick, 541 F.2d 447, 453 (4th Cir. 1976). In *Boone*, the Defendant was found in possession of stolen goods related to the robbery and witnesses saw him with stolen money after the crime. *Id*. The testifying witness provided the only direct evidence of the actual robbery and Boone's direct involvement in the crime. *Id*. There were no fingerprints or physical evidence directly linking Boone to the robbery. *Id*. A box of ammunition matching the caliber of the gun used in the crime was found in Boone's car. *Id*. The Defense offered alibi witnesses that Boone was at an all-night party during the incident. *Id*. On these facts, the Fourth Circuit concluded that the jury could have reached a different verdict if they had been made aware of promises of leniency made to the witness by the police. *Id.* "The prosecutor made statements which were clearly intended to give the impression that Hargrove knew nothing about possible lenient treatment, that he testified against, rather than in aid of, his penal interest, and that his testimony in general was the product of an active conscience." *Id*. The Court concluded that:

> We believe, however, that with the evidence of Coffield's promise and without the prosecutor's misrepresentation that there was no promise of favorable treatment and his misinterpretation that Hargrove testified against his penal interest and out of a sense of conscience, which buttressed his credibility, there is reasonable likelihood that the jury would have reached a different result. Only Hargrove testified concerning the details of the robbery from direct

> observation; his testimony was critical to the conviction. Without him the jury would have known only of vague admissions and weak circumstantial evidence linking him to the robbery.

Boone v. Paderick, 541 F.2d 447, 453 (4th Cir. 1976)

177. Similarly in the present case, Demery was the only witness directly accusing Mr. Green of the killing. That Green was found in possession of stolen goods and incriminating material after the murder is a product of his admittedly criminal acts as an accessory after the fact. However, there was no physical evidence, fingerprints, blood, gunshot residue, or any other witness testimony establishing his role in the murder. Demery's testimony was therefore crucial to Green's conviction, and the failure to disclose the full range of promises, understandings, and acts of leniency misled the jury about his motives and requires a new trial.

III. MR. GREEN'S DUE PROCESS RIGHTS WERE VIOLATED BY THE FAILURE TO DISCLOSE THAT THE CALL FROM THE JORDAN CAR PHONE WAS TO THE DRUG TRAFFICKING ILLEGITIMATE SON OF THE SHERIFF AND CO-WORKER WITH THE STATE'S MAIN WITNESS.

178. The State is obligated to disclose information that supports the Defense theory of innocence as well as information that impeaches witnesses and the entire investigation. There was some evidence that Demery planned to conduct a drug transaction at the time of the Jordan murder. The phone number

called by the Jordan car phone after murder was listed to Hubert Larry Deese, who was the drug trafficking illegitimate son of Sheriff Stone. Deese worked at Crestline Mobile Homes with Demery, within a mile of where Demery admitted to dumping the body of James Jordan. Deese was also close friends with the top drug detective for the Robeson County Sheriff's department, Mark Locklear. Detective Locklear, and other deputies, regularly drove with Deese in their RCSO patrol vehicles. No one from the RCSO interviewed Deese about the call from the Jordan car phone. Shortly after the Jordan murder, Deese was arrested for a large scale drug conspiracy. Deese then worked as an informant for the Robeson County Sheriff's department, before the Green trial. By the time of trial, Deese was in federal prison. The relationships between Demery and Deese, and Deese and Sheriff Stone, and Deese and drug trafficking were not disclosed to the Defense, even though the information was in the possession of the Sheriff, Mark Locklear, and Prosecutor Britt.

A. Due Process Requires Disclosure of Exculpatory Evidence That Supports the Defense Theory of Innocence and that Impeaches the Entire Investigation.

179. The Due Process prohibition on false testimony is set forth in section I.A., and the requirements on Prosecutors to disclose exculpatory impeachment information is are set forth above in Section I.B. The prosecution's failure to

disclose evidence favorable to an accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) Moreover, the prosecutor's duty encompasses both impeachment material and exculpatory evidence, and it includes material that is "known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Along these lines, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf." *Id*. at 437. Significantly, a *Brady* violation has three essential elements: (1) the evidence must be favorable to the accused; (2) it must have been suppressed by the government, either willfully or inadvertently; and (3) the suppression must have been material, i.e., it must have prejudiced the defense at trial. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *Monroe v. Angelone*, 323 F.3d 286, 299–300 (4th Cir. 2003).

180. These general requirements apply specifically to information that supports the defense theory of innocence and is favorable to the defense. *Id.* (holding the Brady material included "statements given to Deputy Neal—including Samuels's personal problems statement could have been used to impeach other prosecution witnesses"). Furthermore, evidence which draws the

entire investigation into question and suggests sloppy police work, selective investigation, or a motive to cover up the crime also constitute *Brady* material. *Kyles v. Whitley*, 514 U.S. 419, 451 (1995) (finding evidence showing "the unreliability of the investigation" to be exculpatory *Brady* material).

B. **Information That the Person Called From the Jordan Car Phone After the Murder Was the Drug Trafficking Illegitimate Son of the Sheriff Who Worked With Demery at Crestline Mobile Homes, Within a Mile Where the Body Was Discovered, Constituted Exculpatory Evidence**.

181. The Defense attempted, but failed, to offer evidence that the co-defendant, Larry Demery, who was the chief witness against Mr. Green at trial, had in fact encountered and killed James Jordan while engaging in a drug trafficking conspiracy involving Hubert Larry Deese, who the defense alleged was the biological son of the Robeson County Sheriff, Hubert Stone. The Defense attempted and failed to put on evidence that the reason for the killing involved Demery's drug dealing and that Jordan's murder was a result of a "drug deal gone bad."

182. At trial, defense counsel suggested that Larry Demery left a gathering at the Hernandez home in order to conduct a previously arranged drug transaction near the Quality Inn, where he encountered and killed James Jordan outside of his vehicle. (Exhibit 2, T pp 59, 62, 63, 65). Hours later, Larry

Demery returned to the gathering at the Hernandez home and caused a disturbance. Demery solicited Mr. Green to come with him. Green accompanied Demery to a canal bank in an area adjacent to the Quality Inn where Green first saw the body of James Jordan. (Exhibit 2, T pp 61–3). The defense intended to show that the murder occurred during the course of a failed drug deal when Larry Demery encountered Mr. Jordan in the early morning hours of July 23, 1993 outside the Quality Inn. To corroborate that this was a "drug deal gone bad", the defense promised to put on evidence that shortly after the murder Larry Demery called Hubert Larry Deese, the reputed son of Sheriff Hubert Stone and a convicted drug trafficker, from James Jordan's car phone. (Exhibit 2, T pp 63, 65).

Demery Called New York the Day Before the Killing to Arrange Transport of Drugs

183. The co-defendant, Larry Demery, called New York before the killing to make plans to "get rid of something." Police reports indicate that on July 22, 1993, a day before the murder, a phone call was made from the phone belonging to Larry Demery's mother, Virginia Strickland (919-521-8885), to Janine Baculik in Huntington, New York at 10:03 pm. The Huntington number was 516-271-7715. (Exhibit 36, Virginia Strickland Phone Records). Ms. Baculik

said that Larry Demery called on July 22, 1993 and spoke about getting "rid of something." She assumed he was talking about smuggling drugs. (Exhibit 37, Statement of Janine Baculik). Other calls were made to the same Huntington, New York number from the car phone of James Jordan on July 25, 1993. (Exhibit 38 Investigative report of calls from Jordan car phone, Exhibit 39, Jordan car phone records). Other calls were also made to the Huntington number from the home of Larry Demery's mother, Virginia Strickland, on July 25 and 28. (Exhibit 36).

184. Larry Demery admitted to calling his cousin at this number from both his mother's house and the car phone. (Exhibit 40, Demery Testimony T p 4040). These phone calls suggest that Larry Demery made phone calls arranging transportation of drugs before the murder and that he called again after the murder.

Call From Jordan Car Phone to the Number For Sheriff Stone's Drug Trafficking Illegitimate Son

185. One of the very first calls from James Jordan's car phone on July 23, 1993 was to 919-521-3365, a number registered to Hubert Larry Deese of Pembroke, North Carolina. The number was the first dialed to be associated with a specific individual, the only other prior call that morning having been to a 1-

900 number. The call to Hubert Larry Deese was the only call of many calls from the James Jordan car phone to a phone in Pembroke. (Exhibit 38, Investigative Report on phone calls from Jordan Car Phone, Exhibit 39 Jordan Car phone records).

186. As of July 23, 1993, Deese was participating in a drug-trafficking conspiracy that had been under investigation since January of 1993. (Exhibit 41, Fayetteville Observer, "Lawmen: Cocaine Pipeline Crimped," Mar. 1, 1994). Investigators believed that the Deese organization smuggled in 10–20 kilos of cocaine into Robeson County every six weeks. (Exhibit 41).

187. Seven months after the Jordan murder, on February 28, 1994, Hubert Larry Deese was arrested by the DEA for his role in a drug trafficking ring. (Exhibit 41 Fayetteville Observer Article, "Cocaine Pipeline Crimpled," Exhibit 43, Deese Federal Docket). After his arrest, Deese was debriefed by DEA Agent Michael E. Grimes and Robeson County Sheriff Deputies Thomas Strickland and Steve Lovin. (Exhibit 4, Mance Affidavit ¶¶ 23–4; Exhibit 44, Holmes Affidavit).

188. Deputies Thomas Strickland and Steve Lovin were later among the first deputies to be arrested in Operation Tarnished Badge, the largest police

corruption scandal in North Carolina history. (Exhibit 4, Mance Affidavit, ¶ 24; Exhibit 4-H).

189. Deese was prosecuted by Robert E. Skiver, the former Assistant U.S. Attorney for the Eastern District of North Carolina's Criminal Division. Mr. Skiver has recently stated that he was unaware that Deese had any connection to Sheriff Hubert Stone and did not know he was his son. (Exhibit 27, Mance Affidavit, Skiver Interview).

190. When asked whether Sheriff Hubert Stone was ever under investigation for possible connections to drug trafficking, Mr. Skiver stated, "towards the end of [Stone's] tenure, he was being looked at." Sheriff Stone retired from the Sheriff's department in 1994. (Exhibit 27, Mance Affidavit, Skiver Interview). Jim Coman, Director of the S.B.I. at the time, has also stated that it was his understanding that Sheriff Stone had been under investigation "sometime in the '90s." (Exhibit 27, Mance Affidavit, Coman Interview).

191. Hubert Larry Deese pled guilty on July 21, 1994, to federal drug conspiracy charges and was released on an unsecured bond. (Exhibit 4, Mance Affidavit, Exhibit 4-G).

192. On January 23, 1995, Deese was sentenced in federal court. (Exhibit 4, Mance Affidavit, Exhibit 4-G). The Government made a motion for downward

departure due to "substantial assistance." Deese earned a reduction in his federal charge by debriefing and working as an informant with deputies Strickland and Lovin of the Robeson County Sheriff's office. (Exhibit 4, Mance Affidavit, ¶¶ 22–3).

193. Even with the motion for downward departure, Deese was sentenced to 10 years in federal prison for his crimes. (Exhibit 4, Mance Affidavit, Exhibit 4-G).

194. Jury selection in Mr. Green's trial began November 13, 1995.

195. By the time of jury selection in Mr. Green's trial, Deese had provided statements and begun to work as an informant with regard to his drug trafficking activities at the time of the Jordan murder. Michael Grimes, the lead federal agent on the case, as well as Robeson County Sheriff Deputies, confirmed that Deese was the biological son of Sheriff Hubert Stone and that he debriefed Deese with deputies Lovin and Strickland. (Exhibit 44, Holmes Affidavit). Even during Mr. Green's trial, and after Deese was sentenced to prison, Deese continued to cooperate with state and federal officials, resulting in another motion for reduction in his sentence on March 3, 1997. This ultimately reduced his sentence to 54 months. (Exhibit 4, Mance Affidavit, Exhibit 4-G).

196. There were multiple law enforcement interviews of Deese during the time of the investigation and trial of Daniel Green. None of these statements were disclosed to the defense. Deese was working as an informant with the DEA and Robeson County Sheriff's Department during the period of the investigation and trial of Daniel Green. (*These interviews are the subject of a Motion for Discovery filed in this matter December 11, 2014*).

197. District Attorney Johnson Britt acknowledged to defense counsel in January 2015 that at the time of Daniel Green's trial in 1996 he was aware that Hubert Larry Deese was the biological son of Sheriff Hubert Stone. (Exhibit 27, Mance Affidavit, Britt Interview, January 8, 2015). Mr. Britt told defense counsel that he became aware Hubert Larry Deese was involved with drugs when he was arrested. (Exhibit 27, Mance Affidavit) Johnson Britt therefore knew, at the time of trial, that the call from the Jordan car phone was to the drug trafficking son of the Sheriff. He never disclosed this fact to the defense.

Hubert Larry Deese Worked with Larry Demery at Crestline Mobile Homes, Near Where the Jordan Body was Discovered

198. Larry Demery said he worked at Crestline Mobile Homes and transported mobile homes south down I-95 to South Carolina. (Exhibit 40, T pp 4991–4). During trial, on voir dire, Larry Demery admitted that he knew of

Hubert Larry Deese, and that he knew him by "Larry." (Exhibit 40, T p 4994). Demery also testified that he was aware that Hubert Larry Deese was in federal prison in South Carolina at the time of his testimony. (Exhibit 40, T p 4994). He also knew that, prior to federal prison, Deese lived somewhere in the Pembroke area. (Exhibit 40, T p 4994).

199. Hubert Larry Deese worked with Larry Demery at Crestline Mobile Homes. In an interview, Hubert Larry Deese said he worked at Crestline Mobile Homes in the early 1990s until 1993. (Exhibit 4, Mance Affidavit). Deese said the he worked with Larry Demery at Crestline, and that during his time at Crestline, Deese sometimes transported mobile homes south down I-95 to South Carolina. (Exhibit 4, ¶¶ 15–6). This information is corroborated by Deese's wedding announcement, which was printed May 10, 1992 in THE ROBESONIAN. (Exhibit 4-D).

200. Crestline Mobile Homes is located less than a mile from the bridge at Gum Swamp where Demery chose to dispose of the body of James Jordan. (Exhibit 40, T pp 3990–91).

201. Hubert Larry Deese has admitted to working together with Larry Demery at Crestline Mobile Homes. (Exhibit 27, Mance Affidavit, Deese

Interview). Both Deese and Demery worked sometimes transporting mobile homes along the highway. (Exhibit 27).

202. Detective Mark Locklear said he knew Hubert Larry Deese worked at Crestline Mobile Homes. He also knew Larry Demery worked at Crestline Mobile Homes. (Exhibit 27, Mance Affidavit, Locklear Interview).

Investigators Questioned Demery About the Call to Deese

When Demery Was Arrested

203. Cumberland County Captain Art Binder questioned Larry Demery about his "call in Pembroke" when Demery was arrested August 15, 1993, and indicated that it had significance. Detective Binder said to Demery:

> But the one thing that's gonna hurt you worse than anything, is, you made a telephone call to Pembroke. And you made it at the same time just after not long after, but just after Mr. Jordan went in the water. ***It's gonna be your friend's to Pembroke***. And you think about it, 'cause that's the call that's gonna get you, okay? ***Only, just a hour or two after he hit the water, you made that phone call***.

(Exhibit 42, Demery Interview, August 15, 1993, pp 76–7). At the time Demery was being interrogated in July 1993, Hubert Larry Deese was a target in a federal investigation which began in early 1993. (Exhibit 41, Fayetteville Observer Article, "Cocaine Pipeline Crimpled"; Exhibit 43, Deese Federal Docket).

Convicted Drug Trafficker Hubert Larry Deese Was the Biological Son of Sheriff Hubert Stone and A Good Friend of RCSO Detective Mark Locklear

204. According to Hubert Larry Deese, his ex-wife Diana Tubbs, James Deese, Detective Mark Locklear, and District Attorney Johnson Britt, Hubert Larry Deese is the biological son of the now deceased Robeson County Sheriff, Hubert Stone, who oversaw the arrest of Daniel Green. (Exhibit 27, Mance Affidavit, Deese Interview, Tubbs Interview, Locklear Interview).

205. In the late 1980s and early 1990s, Hubert Larry Deese was good friends with Robeson County Sheriff deputy Mark Locklear, the lead investigator of the James Jordan murder, as well as other sheriff's deputies. (Exhibit 27, Mance Affidavit, Locklear Interview). Prior to becoming a detective and working on the Jordan murder, Locklear worked as the head of the RCSO narcotics unit. During the same period of time he was actively trafficking cocaine into Robeson County, Hubert Larry Deese rode on patrol with Mark Locklear and his deputies. (Exhibit 27). Deese also regularly socialized with Robeson County Sheriff deputies including Locklear, all while engaging in a large scale drug trafficking enterprise. (Exhibit 27).

206. Mark Locklear has characterized Hubert Larry Deese's cocaine trafficking enterprise as "big time," stating, "He had some major connections.

Back then, we called it the 'Cuban connection.'" Detective Locklear added, "He wasn't no street dealer. We're talking pounds and kilos." (Exhibit 27).

207. In March 2015, Mark Locklear told defense counsel, "there was times when [Hubert] Larry [Deese] would ride around with me in the patrol car and with other deputies. He was close. We socialized after hours together. We did that for years. When I took over the [Robeson County Drug] Task Force, [Hubert] Larry [Deese] actually still hung around with us a little bit." (Exhibit 27). According to Mark Locklear, Deese rode along with him into the 1990s. (Exhibit 27).

208. James Jordan was murdered in July 1993.

Deese Continued to Associate with the RCSO After His Arrest on Federal Drug Trafficking Charges.

209. Detective Locklear has stated that he felt betrayed when he learned his good friend was a large scale drug trafficker. (Exhibit 27). However, he stated that even after he learned of Deese's criminal activities, he did not arrest him, despite being head of the county drug task force. (Exhibit 27). Locklear's explanation for this is that the "Robeson County Sheriff's Department wasn't capable of handling an investigation on that scale." Locklear said that his failure to arrest Deese had nothing to do with the fact that Deese's father was the

Sheriff of Robeson County and his boss. (Exhibit 27). Locklear has previously acknowledged that he was very close with Sheriff Stone, saying that he was in regular contact with him from 1985 until his death in 2008. (Exhibit 27). Locklear has also stated that he "lost [his] job because of [his] relationship with Hubert Stone," given the subsequent Sheriff's belief that Locklear was too closely associated with his political rival. (Exhibit 27).

210. Even after his criminal activities were detected by federal authorities and he was initially arrested, Hubert Larry Deese continued to spend time with Robeson County Sheriff drug investigators Steve Lovin and Thomas Strickland. (Exhibit 27). Until he was sentenced in January 1995, Deese worked as an informant for the joint-task force, setting up undercover operations for the DEA and RCSO Deputies Lovin and Strickland. (Exhibit 4, Mance Affidavit; Exhibit 44, Holmes Affidavit). Deputies Lovin and Strickland were later sent to federal prison in conjunction with Operation Tarnished Badge, the largest police corruption scandal in North Carolina history. (Exhibit 4-H).

After Deese was Released From Prison, Sheriff Stone Deeded Him Property

211. After Hubert Larry Deese was released from federal prison, Deese and his wife Diane were deeded property, located at 10702 Deep Branch Road in

Maxton, NC. (Exhibit 45, Deed signed by Hubert Stone to Hubert Larry Deese). The Grantor of the property was H & K Stone Enterprises, Inc. Sheriff Hubert Stone co-owned H&K Stone Enterprises at the time with his son, current Nash County Sheriff Keith Stone. (Exhibit 46, Annual Filing). Sheriff Hubert Stone personally signed the deed as President of H & K Stone Enterprises, Inc., transferring the property to Hubert Larry Deese. (Exhibit 45). Sheriff Keith Stone has stated that this transaction was made without his knowledge or authorization. (Exhibit 27, Mance Affidavit, Stone Interview). Sheriff Keith Stone has stated he does not know Hubert Larry Deese and that he did not know that a land transaction was made to him. (Exhibit 27).

In Addition to Associating With Deese, Sheriff Stone Associated With Drug Traffickers.

212. In July 1985, Sheriff Stone testified on behalf of Carson Maynor who was indicted on cocaine charges. Sheriff Stone testified at Maynor's trial that Maynor's reputation in the community was "good." (Exhibit 58, Prosecutor: Drug Case Not Changed by Letters, March 26, 1988).

213. Jonathan Lowry was arrested trying to buy 500 pounds of drugs from undercover agents in Brevard County, Florida in November 1985, and Sheriff Hubert Stone wrote a letter of support for Jonathan Lowery to Florida

prosecutors. (Exhibit 59, Letter of Support for Drug trafficker from Hubert Stone to prosecutors; Exhibit 58, Prosecutor: Drug Case not Changed by Letters, March 26, 1988). In that letter, Sheriff Hubert Stone wrote: "I have been acquainted with Mr. Lowry and his family for 20 years. Jonathan Lowry is involved in the business of satellite sales, car sales, and real estate rentals and investments. … His businesses are a valuable asset to our community." (Exhibit 59, Stone Letter).

214. In February 1988, Lowry's businesses, satellite sales, car sales, and real estate rentals and investments were seized by the U.S. Department of Justice as being part of "a major interstate narcotic distribution organization." (Exhibit 60, Robeson County Property Seized in Drug Probe, Feb 4, 1988). Also seized was the property of James Carlie Maynor and James Harold Maynor, who were co-conspirators with Jonathan Lowry. (Exhibit 60).

215. A Robeson County Sheriff's deputy testified under oath in 1987 that a Robeson County drug dealer cut Sheriff Hubert Stone $300 in protection money for every ounce of cocaine sold. (Exhibit 51, Scott Rabb Article). After Sheriff Stone supported Jonathan Lowry and Carson Maynor in their drug cases, they were indicted again in the Eastern District of North Carolina for a large scale trafficking conspiracy. (Exhibit 61, Court of Appeals 4th Cir. Unpublished

Opinion). Jonathan Lowry, Bonita Lowry and Carson Maynor were convicted following a jury trial in the Eastern District of North Carolina. Jonathan Lowry was convicted of conducting a continuing criminal enterprise, conspiracy to possess with intent to distribute cocaine and marijuana, interstate travel with the intent to promote the distribution of marijuana, and money laundering. (Exhibit 61; Exhibit 62, "Five Indicted for Drugs in Robeson," Jan 11, 1990). Carson Maynor was convicted of conspiracy to possess with intent to distribute and with distribution of marijuana and cocaine. (Exhibit 61, 4th Cir. Opinion).

216. On January 21, 2000, the United States Department of Justice filed a supplemental proceeding ancillary to the criminal proceedings to satisfy the criminal judgments entered against Jonathan Lowry, Carson Maynor, James C. Maynor, and James H. Maynor for their participation in a criminal enterprise. The suit sought to satisfy the judgment against them by seizing real estate and personal property registered in their name. (Exhibit 63, Federal Complaint). The complaint alleged that "the defendants [had] purported to place legal title in, or convey legal title and ownership of assets to others" and that the "placing of or transferring to others [of] the title to the property was a sham, and the recipients were straw men or nominees, or in the case of corporate entities Low-Man Investments, Inc., Jamestown Auto World, Inc., Jamestown Mobile Home Sales,

Inc., and West Eagle Job-Net, Inc., an alter ego of the defendants James H. Maynor and Jonathan Lowry." (Exhibit 63, p. 30).

There is a Reasonable Inference that Demery was Transporting Drugs for Deese

217. In March 2015, defense counsel confronted Mark Locklear about his relationship with Hubert Larry Deese and questioned him about the nature of Hubert Larry Deese's relationship with Larry Demery. (Exhibit 27, Mance Affidavit, Locklear Interview). When defense counsel asked Mark Locklear if Larry Demery sold drugs for Hubert Larry Deese, Locklear responded, "Larry Demery, I would categorize him as a mule." (Exhibit 27). Locklear claimed that he had no specific knowledge that Demery worked directly for Deese, but he acknowledged, "it wouldn't surprise me." (Exhibit 27).

Detective Locklear was the Lead Investigator in the Jordan case for RCSO, and He Could Not Explain the Call to Deese's Phone.

218. According to press accounts, Detective Mark Locklear "spent the early morning hours Sunday supervising the interrogation and arrest of two Robeson men accused of murdering James Jordan." (Exhibit 25, "Mark Locklear, 'the Total System Has Let us Down," THE ROBESONIAN, August 17, 1993). Mark Locklear commented on their prior criminal record saying, "The total system has

let us down. There is no deterrent anymore." *Id.* "Locklear is the supervisor of the Department's Drug Enforcement Division." *Id.*

219. In another article, Mark Locklear was quoted prior to trial saying, "I feel confident we have enough evidence to prove that [Demery and Green] committed the crime of murder." (Exhibit 32, "Defense Attorneys at Odds," THE ROBESONIAN, August 23, 1993). When there were sightings of James Jordan after the murder, Detective Mark Locklear dismissed those sightings as "conflicting rumors." (Exhibit 35, "Brunswick sighting report probed in Jordan Case," The Morning Star, Aug 25, 1993). "Robeson County Detective Mark Locklear, who is leading the investigation, said it would take something dramatic to convince him that Mr. Jordan was seen days after he was supposedly shot and killed." (Exhibit 55, "Lawmen check on Rumors in Jordan Case," Fayetteville Observer, Aug 26, 1993).

220. Mark Locklear has previously characterized James Jordan's cell phone records as "one of the leading factors" that led detectives to conclude Daniel Green and Larry Demery were involved in the murder of James Jordan. (Exhibit 27, Mance Affidavit, Locklear Interview). However, Mark Locklear provided no explanation for why, as the detective on the case, neither he nor any other law enforcement officer interviewed Hubert Larry Deese, the person called from

James Jordan's cell phone in the hours after his murder. (Exhibit 27). When asked about the matter, Mark Locklear has stated, "It's a valid question, and I don't have an answer," and "I can't tell you . . . why he wasn't interviewed, but that is strange that he was called." (Exhibit 27).

221. In March 2015, Mark Locklear said that he was entirely unaware that Hubert Larry Deese—his former "buddy," his boss's biological son, a convicted large scale cocaine trafficker, and a known co-worker of Larry Demery—was ever connected in any way to the James Jordan case. (Exhibit 27). Locklear stated, "It does not make sense from an investigative standpoint as to why anyone would not have tracked [Hubert] Larry Deese down and interviewed him as to why that call had been made to him, especially with the magnitude of that [James Jordan] case." (Exhibit 27).

222. Detective Locklear has stated that Deese's connection to the Jordan murder "would not have been anything I would have avoided, because I still had a hard on for [Hubert] Larry Deese, because he embarrassed me." (Exhibit 27). However, at a separate time, Detective Locklear said, "maybe . . . I just wrote it [the phone call] off, because I would have–it wouldn't have seemed, wouldn't have had any correlation to the case." (Exhibit 27).

Sheriff Stone Spoke Regularly to the Media About the Car Phone Calls and the Connection to Crestline Mobile Homes, But He Concealed the Call to Deese.

223. Sheriff Stone made many statements on his investigation to the media. He commented on Mr. Green's criminal history to The New York Times. (Exhibit 49).

224. In the days immediately following the arrest of Green and Demery, Sheriff Stone informed the press about the importance of the calls from the Jordan car phone stating, "They took a cellular phone which was in the car, and it was a big help." (Exhibit 50, "Car Phone was Clue for Police," THE ROBESONIAN, Aug 16, 1993).

225. Sheriff Stone talked to national GQ reporter Scott Rabb about the car phone stating, "According to Stone, the two boys dumped the corpse in Gum Swamp, back over the South Carolina state line, and kept the car for three days, cruising, calling friends and 1-900 sex lines from James Jordan's cellular phone." (Exhibit 51, Scott Rabb, "Reasonable Doubt," GQ Magazine, March 1994).

226. Sheriff Stone did not mention that his son, Hubert Larry Deese, was the call right after the call to the 1-900 sex line. In fact, Sheriff Stone did not

send anyone to interview or talk to Hubert Larry Deese about the call from the car. (Exhibit 4, Mance Affidavit, ¶ 33). A review of the prosecution file confirms that no one ever asked Hubert Larry Deese where he was the night of the Jordan murder, whether he knew or worked with the suspects, and why one of them would call him immediately after the murder. The prosecution file reveals that the other persons called from James Jordan's cellular phone after the call to Deese were interviewed by authorities. Hubert Larry Deese has personally confirmed that no law enforcement officer ever interviewed him about the phone call. (Exhibit 4, Mance Affidavit). Detective Mark Locklear also confirmed that police did not interview Hubert Larry Deese. (Exhibit 27, Mance Affidavit, Locklear Interview).

227. Sheriff Stone talked at length about this case to the local and national media. He told the reporter from GQ: "Anytime you look down the street and you see a black and an Indian guy, you've got crime. You know you're not supposed to look at things like that, but that's the way it is. . . . If they're running together, something's up. We always know when we spot a car and see 'em—an Indian and a black—there's gonna be some crime. We have to keep a firm hand on 'em. It's not like Philadelphia or New York: Down here, the sheriff is the

chief law-enforcement officer." (Exhibit 51, Scott Rabb, "Reasonable Doubt," GQ Magazine, March 1994).

Sheriff Stone's Testimony Was Central to the Case

228. At the pre-trial suppression hearing, Prosecutor Britt moved to have the court accept Sheriff Stone as an expert in criminal investigation. (Exhibit 47). On October 6, 1995, the Court granted a motion for the State declaring Sheriff Stone an expert and paying him $50 per hour for his testimony. (Exhibit 48). When he testified, October 10, 1995, Sheriff Stone never mentioned his relationship to Deese. He did not disclose that Hubert Deese had debriefed with Robeson deputies about his drug trafficking activities and was still assisting his office with other drug investigations. Mark Locklear said that Sheriff Stone actively concealed his biological relationship with Hubert Larry Deese. (Exhibit 27, Mance Affidavit, Locklear Interview). The suppression hearing was hotly contested and formed the basis of the appeal of the conviction to the Court of Appeals where Judge Horton dissented. *State v. Green*, 129 N.C. App. 539, 500 S.E.2d 452 (1998), *aff'd*, 350 N.C. 59, 510 S.E.2d 375 (1999), *cert. denied*, 528 U.S. 846 (1999). The Trial Court and the Court of Appeals relied solely on the credibility of Hubert Stone in ruling on the Constitutional issue regarding Mr. Green's statement.

Defense Efforts to Put the Evidence of a "Drug Deal Gone Bad" Before the Jury Failed

229. The Defense was prohibited from admitting evidence about the call to Hubert Larry Deese at trial. In denying the Defense's attempt to get the information before the jury, the trial judge found that there was "no evidence" of a connection between Sheriff Hubert Stone and Hubert Larry Deese. (Exhibit 52, T pp 5755). District Attorney Johnson Britt actively argued to keep jurors from hearing about Deese. At the time he did so, he had specific knowledge that Deese, a convicted federal drug trafficker, was the son of Sheriff Hubert Stone.

230. During trial, Mr. Green's Trial Counsel repeatedly attempted to put into evidence the call from the car phone to Hubert Larry Deese, a known drug dealer and the reputed son of the Sheriff, but the court repeatedly sustained the prosecution's objections to references to Hubert Larry Deese. (Exhibit 52; Exhibit 53). Defense Counsel explained to the Court that Hubert Larry Deese was the first person called from the car phone of James Jordan and that Larry Demery knew him. (Exhibit 52, T pp 5748–49). The trial court sustained the objection to this line of questioning on the ground it was not relevant, stating "*Have you ever dialed the phone and got a wrong numbe*r?" (Exhibit 52, T p

5751). The Court also noted that the Defense could not prove that it was Larry Demery who called Hubert Larry Deese. (Exhibit52, T pp 5752–53).

231. In explaining why it was sustaining the objection, the trial court stated that there was "*no evidence*" linking Sheriff Stone to Hubert Larry Deese. (Exhibit 52, T p 5755).

232. During the defense case, defense counsel attempted to introduce the phone records which showed that the 10:36am call from James Jordan's car phone was to the phone listed to Hubert Larry Deese. (Exhibit 53, T pp 6726–30). The trial court refused to allow admission of this evidence on sur-rebuttal.

C. <u>This Information Was Material Because It Supported the Defense Theory of a "Drug Deal Gone Bad," Impeached the Credibility of Demery, and Impeached the Entire Investigation of Sheriff Stone.</u>

233. The Robeson County Sheriff Deputies and/or the Robeson County District Attorneys' Office failed to disclose:

a. the debriefing interviews with Hubert Larry Deese which would have shown his drug dealing activity during the time of the James Jordan killing;

b. that Hubert Larry Deese was working as an drug informant with the DEA and Robeson County Sheriff's Office at the time of the investigation and trial of this case;

c. that Hubert Larry Deese worked at Crestline Mobile Homes at the same time as Larry Demery;

d. that Hubert Larry Deese is the son of Sheriff Hubert Stone;

e. that the lead investigator from the Robeson County Sheriff's Office, Mark Locklear, was good friends with Hubert Larry Deese at the time of the Jordan murder, until Deese was charged with drug trafficking.

234. This information and the debriefings with Deese could shed more light on his connection to the co-defendant Larry Demery. The Deese debriefings in his federal case would show whether the wooded trails where he transported cocaine on ATVs intersected the canal bank near the Quality Inn where James Jordan was killed. (*These debriefings are the subject of a pending motion for discovery*). Mark Locklear, the lead Sheriff Investigator in this case, has agreed that this evidence is "Brady material," that should have been disclosed. (Exhibit 27, Mance Affidavit, Locklear Interview).

235. The connections between Demery and Deese, between Deese and Sheriff Stone, between Deese and Detective Mark Locklear constituted exculpatory impeachment information which cast the entire case in a different light, and undermine confidence in the trial.

236. This information could have impeached Demery, whose testimony was central to this case. See *supra,* III.A. This information would have impeached the entire investigation, led by Mark Locklear, a friend of a drug trafficker named in discovery who received phone call from Jordan's car after the murder. The relationship between Deese and Demery as coworkers provides circumstantial evidence that Demery called Deese. Locklear has admitted that it is plausible that Demery transported drugs for Deese. The connection between Deese and Locklear provides motive for Locklear and Stone to cover up the connection of Deese to the Jordan killing. The Defense would have had ample material to draw material and substantial questions about the objectivity of the investigation and the credibility of the leaders of the investigation. Furthermore, the information was favorable to the defense because it supported the defense theory of a "drug deal gone bad". Armed with this information, the defense would have been able to adequately challenge the investigation and a reasonable jury could have reached a different result. Without question the "suppression undermines confidence in the outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985). A new trial is therefore required.

D. <u>This Information Connecting Deese to Sheriff Stone, Mark Locklear, Demery, and Drug Trafficking is Newly Discovered Evidence Requiring a New Trial.</u>

237. As described above, (Section I.G.) newly discovered evidence forms the basis of a meritorious motion for appropriate relief when the evidence is material and calls into question the validity of the verdict.

(1) The Witness or Witnesses Will Give Newly Discovered Evidence.

238. The new evidence connecting Sheriff Hubert Stone to Hubert Deese partly comes from the deed from Stone to Deese in 2003. (Exhibit 45). This led to interviews with Deese and his ex-wife which confirmed the connection. (Exhibit 27, Mance Affidavit, Deese Interview). The new evidence connecting Sheriff Stone to Mark Locklear comes from an interview with Mr. Locklear in which he now admits being close friends with Deese and allowing him to ride in his patrol vehicle in the period leading up to the Jordan death and at a time Deese was engaging in drug trafficking. (Exhibit 27, Mance Affidavit, Locklear Interview).

239. The new evidence that Deese was a drug trafficker comes from interviews with the DEA investigator in that case, Michael Grimes, who said Deese set up drug deals with Robeson County Sheriff Deputies Steve Lovin and Thomas Strickland. (Exhibit 44, Holmes interview with Grimes). This was confirmed by Deese himself in an interview. (Exhibit 4, Mance Affidavit).

(2) The Newly Discovered Evidence is Probably True.

240. Each piece of evidence described above is likely true because it is supported by filed documents before the Court and interviews with the people directly involved.

(3) The Evidence is Competent, Material and Relevant.

241. This evidence is material, competent, and relevant because it shows a motive within the investigation to avoid investigating why Hubert Deese was called from James Jordan's car phone shortly after the murder. Detective Mark Locklear could not explain why everyone was interviewed who was listed in the phone records except for Hubert Larry Deese, the first person called after the murder. (Exhibit 27, Mance Affidavit, Locklear Interview). This evidence is material, competent, and relevant because it supported the Defense theory that Demery went to the Quality Inn for a drug deal that went bad when he encountered James Jordan there late at night.

(4) Due Diligence Was Used and Proper Means Were Employed to Procure the Testimony at the Trial.

242. The Defense made all the necessary *Brady* requests and report requests to get the information described above, and it did not receive the information. Furthermore, the investigation into Deese and his cooperation with investigators appears to have been ongoing before, during, and after the Green trial. This

could have restricted the Defense access to these debriefing reports and undercover transaction reports that are the subject of a motion for discovery still pending before this Court. Because law enforcement officers were involved with the drug trafficker, and had motive to conceal the association, defense counsel could not get access to this information until these law enforcement officials were no longer working.

(5) The Newly Discovered Evidence is Not Merely Cumulative.

243. No evidence of this "drug deal gone bad" was allowed at trial because these connections were not made. The trial court sustained the objection to this line of questioning on the ground it was not relevant, stating "*Have you ever dialed the phone and got a wrong number?*" (Exhibit 52 , T p 5751). The Court also noted that the Defense could not prove that it was Larry Demery who called Hubert Larry Deese. (Exhibit 52, T pp 5752–53). In explaining why it was sustaining the objection, the trial court stated that there was "*no evidence*" linking Sheriff Stone to Hubert Larry Deese. (Exhibit 52, T p 5755).

244. Now we know that there was evidence linking Stone to Deese, and that the prosecutor, Johnson Britt, was fully aware of the connection at the time the Court made this statement. (Exhibit 27, Mance Affidavit, Britt Interview, January 8, 2015). We also know there was a connection from Deese to the

testifying co-defendant Demery, because they worked together at Crestline Mobile Homes, within a mile where the body of James Jordan was discovered. This evidence is not cumulative.

(6) The New Evidence Does Not Tend Only to Contradict a Former Witness or to Impeach or Discredit him,

245. This evidence does far more than simply impeach the investigation into this matter. It supports the defense theory that Demery committed the murder in connection with drug trafficking arranged by Hubert Larry Deese, and this connection was concealed by Sheriff Stone and deputies close to Deese.

(7) The Evidence Is of Such a Nature as to Show that on Another Trial a Different Result Will Probably Be Reached and that the Right Result Will Prevail.

246. If put before the jury, there is a strong likelihood the jury would have reached a different result. This evidence shows a connection from the co-defendant to drug trafficking and to the Sheriff which would contradict the State's theory, support the defense theory, and impeach the entire investigation of the murder.

247. For these reasons, this information constitutes newly discovered evidence requiring a new trial.

IV. MR. GREEN WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS PROMISED, BUT FAILED TO PROVE, THAT MR. JORDAN WAS STILL ALIVE AFTER THE STATE SHOWED HE WAS DEAD, THAT MR. JORDAN WAS KILLED IN A "DRUG DEAL GONE BAD," AND THAT GREEN WAS WITH BOBBIE JO MURILLO WHEN THE MURDER HAPPENED.

248. It constitutes ineffective assistance of counsel, and violates the Sixth Amendment Right to Counsel, for trial counsel to promise to prove important facts and then fail to do so. Here, Trial Counsel promised to call multiple witnesses who purportedly saw Jordan alive after the State said he was killed. They also promised to put on evidence that Demery killed Jordan during an encounter in the parking lot of the Quality Inn while Demery was trying to meet someone for a drug deal. Trial Counsel also promised to prove an alibi, but failed to call the central alibi witnesses. The Trial Counsel's failure to put on this evidence irreparably harmed their credibility.

A. Promising Evidence in Opening Statements and Failing to Deliver On Those Promises Because of A Failure to Investigate Constitutes Ineffective Assistance of Counsel.

249. The North Carolina and United States Constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (incorporating right to counsel to the states); N.C. Const. Art. I, § 23; *State v. Braswell*, 312 N.C. 553,

561–62, 324 S.E.2d 241, 247–48 (N.C. 1985). Ineffective assistance of counsel is shown when: (1) the counsel's performance fell below an objective reasonableness standard; and (2) counsel's errors were "so serious as to deprive the defendant of a fair trial . . . ." *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987) (citing *Strickland v. Washington*, 446 U.S. 668, 687 (1984)); *Braswell*, 312 N.C. at 562 (adopting the two-part *Strickland* test for right to counsel guaranteed by the North Carolina Constitution).

250. Unreasonable errors depriving a defendant of his Sixth Amendment right to counsel fulfill the first prong of the test. *Strickland*, 466 U.S. at 687. However, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 690.

251. The second prong is fulfilled if there is "reasonable probability that, but for counsel's errors, there would have been a different result . . . ." *Braswell*, 312 N.C. at 563. Reasonable probability means that it creates just enough doubt as to be sufficient in undermining confidence in the outcome. *Strickland*, 466 U.S. at 694.

252. Failure to investigate a claim before presenting it to the jury is an

unreasonable error. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Hinton v. Alabama,* 131 S. Ct. 1081, 1088 (2014) (quoting *Strickland*, 466 U.S. at 690–91).

253. Frustration of jury expectations, where counsel promises the jury that he will present evidence to prove a theory and then fails to do so, is widely understood to amount to the deficient performance necessary for finding ineffective assistance of counsel. *E.g.*, *State v. Mason*, 337 N.C. 165, 177, 446 S.E.2d 58, 65 (1994); *State v. Moorman*, 320 N.C. 387, 399-400, 358 S.E.2d 502, 511 (1987); *State v. Burton*, 735 S.E.2d 400, 407 (2012). "An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. When a verdict is "only weakly supported by the record" it is much more likely that the error prejudices the defendant. *Id.* at 696.

254. "A cardinal tenet of successful advocacy is that the advocate be

unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause." *Moorman*, 320 N.C. at 400. The loss of credibility by defense counsel's failure to produce evidence after making a promise to the jury can be "sufficient to undermine confidence in the trial's reliability." *Id*. at 399.

255. In *Moorman* the court found the attorney's promise to present evidence that his client was "mentally and physically incapable" of committing rape, and the subsequent failure to produce any such evidence, prejudicial to his client. *Moorman*, 320 N.C. at 400. The court justified its finding because the case was a 'he said, she said' type of case. "The question for the jury, then, was which witness to believe. This translates into a relatively close case on the facts." *Id*. As evidence of prejudice, the court pointed to the State's closing arguments, which focused on the unfulfilled promise and the credibility of the defense. *Id*. at 401. Though not necessary to its ruling, but as compelling support, the court pointed out a number of other mistakes that hurt the credibility of the defense, including that the defense never brought up the defense in pretrial preparation, *id.* at 401, and that the defense made other assertions in opening and throughout the trial that were never backed up by evidence. *Id.*

B. Mr. Green's Lawyers Promised, But Failed to Prove, A "Drug Deal Gone Bad," that Mr. Jordan Was Still Alive After the State Showed He Was Dead,

and that He was with Bobbie Jo Murillo When the Murder Happened.

256. The Defense committed ineffective assistance of counsel when they made a promise of defense theories they did not keep to the Jury. This failure to produce evidence promised in opening statement not only damaged the credibility of counsel, but also demonstrated a complete failure to investigate claims before presenting them to the jury.

257. First, in the opening statement to the jury, Defense Counsel suggested that Mr. Jordan was seen alive after July 23, 1993. (Exhibit 2, Defense Opening, T pp 68–9). The Defense told the jury that "*someone by the name of Donald A. Chiofolo*" who worked with James Jordan, "*spoke with Delores Jordan, the wife of James Jordan, and the evidence will show that she informed Mr. Chiofolo that she had spoken with her husband on August 5th, this conversation having taken place on August 6 of 1993*." (Exhibit 2, T p 68).

258. The defense also told the jury that James Jordan was seen alive after July 23, 1993 by Bobby Millan, an official with the Federal Aviation Agency, and Cumberland County Librarian Ivan Johnson, and this would be "*a disastrous blow to the State's theory*." (Exhibit 2, T pp 68–9).

259. Second, during the opening statement, Defense Counsel suggested that Demery left the gathering at the Hernandez home without Mr. Green to conduct

a drug deal that resulted in the death of James Jordan: "Now, [Green], a childhood friend, who knows Larry Demery, the evidence will show, thinks that this is perhaps some drug deal gone bad." (Exhibit 2, T p 63). To corroborate that this was a "drug deal gone bad" the defense promised to put on evidence that Larry Demery called Hubert Larry Deese, the reputed son of Sheriff Hubert Stone and known drug dealer, from the car phone of James Jordan. (Exhibit 2, Defense Opening Statement, T pp 63, 65). "*The second phone call, the evidence will show, that was made around 10:36 in the morning, July the 23rd, was made to one by the name of Hubert Dees, who is the reputed son of Hubert Stone, known drug dealer in Robeson county, who is now serving time for drug related charges in federal prison. That call was made, the evidence will show, by Larry Demery on the Lexus phone*." (Exhibit 2, T p 65).

260. Third, during the opening statement, Defense Counsel suggested that Mr. Green was with Bobbie Jo Murrilo at the home of Kaye Hernandez at a social gathering at the time of the murder. The defense planned to put on evidence of an alibi at the time of the shooting. (Exhibit 2, T pp 58–62). After promising to put on an alibi defense, however, the Defense failed to call Kaye Hernandez, Anne Green, and Bobbie Jo Murillo, the primary witnesses to Mr. Green's presence at the social gathering. Although the defense put on evidence

that Mr. Green was at the party with Bobbie Jo Murillo, including a picture of her in his lap, the witnesses called by the defense were not with Mr. Green all night. (Exhibit 69, Defense Evidence, T pp 6182, 6188–91, 6193, 6197–203, 6216, 6223, 6243–46, 6254–57, 6259–61, 6268–69, 6271, 6300, 6302, 6305, 6308–09, 6312–13, 6320, 6323, 6339). The Defense failed to interview, call, or introduce the testimony of Bobbie Jo Murillo who would have testified that she was with Mr. Green until the morning of July 23, 1993. (Exhibit 69, Defense Evidence; Exhibit 70, Affidavit of Bobbie Jo Murillo Lowery).

261. The Defense put on no evidence that James Jordan was alive after July 23, 1993. They also did not put on evidence of the call to Hubert Larry Deese or otherwise support their theory of a "drug deal gone bad." And, they failed to call the central alibi witnesses promised in opening statement.

C. Trial Counsel's Failure to Keep Their Promises Destroyed Their Credibility and Likely Altered the Outcome of the Trial

262. The Prosecutor argued in closing argument that the Defense failed to keep all of its promises. (Exhibit 7, Britt Closing Argument, 7316-7320).

> *"With respect to the Defense promise to prove that Jordan was still alive when the State said he was dead, the prosecutor said, "Then they turned around and said in the very next breath that James Jordan was alive and well after the date that we said he was killed. Did they present you any evidence of that? No.*
>
> *They told you they were going to bring witnesses in here who say that*

they saw him after July the 23rd, 1993. They were going to bring in Mr. Johnson from the library in Fayetteville. They were going to bring the store clerk in from a store down in Brunswick County. What happened to that?

Then they turn around and they told you that this was a selective investigation. That it focused in on their client and their client only. Is that what the evidence in this case showed? Selective.

They then even claim that they were going to show you evidence that the State, that I had withheld evidence from them during the course of this investigation, during the course of the history of this trial. Was there any evidence of that? No.

They didn't fulfill their promises.

And they said, oh, you can't hold us to that.

Credibility of anybody that stands in front of you is always an issue, whether ***it's a lawyer****, whether it's a witness*"

(Exhibit 7, T pp 7317–18).

263. The news reports noted the failure of the defense to deliver on these promises to the jury. (Exhibit 76, "[Green] Jury Nears Deliberations, Fayetteville Observer, Feb 26, 1996).

- "In his opening statement, Public Defender Angus Thompson II told jurors that Jordan's body was lying on a canal bank off U.S. 74 when [Green] first saw it. There was no testimony about the body being anywhere other than in the red Lexus before it was dumped into a South Carolina creek."

- "Thompson told jurors that people reported seeing Jordan alive after July 23, the day prosecutors say he was killed. None of those people testified."
- "Thompson told jurors that one of the first calls made on Jordan's car phone was to Hubert Larry Deese, a known drug dealer in Robeson County. The defense was unable to get that testimony before the jury."

264. "Woodberry Bowen, who also represents [Green], isn't bothered that the defense did not follow its forecast of the evidence. He said opening statements are made, in part, on what lawyers anticipate a witness will say. If the defense falls short, Bowen said, that should not be held against it." Id. "But Robeson County District Attorney Johnson Britt disagrees. He plans to remind the jury of what Thompson promised the "credible evidence'' would show. "They hung themselves out there on an alibi knowing what he said to the officers,'' Britt said." Id.

265. In a pre-trial meeting with Mr. Green, his defense counsel instructed him, "*Nothing could be more damaging than if we forecast to the jury a certain body of evidence, then change our minds*." (Exhibit 15, Thompson Affidavit).

The Failure to Investigate Sightings of Jordan

266. Trial Counsel failed to adequately investigate the issue of the timing of Jordan's death. They did not personally interview any of the witnesses they said

they were going to call. (Exhibit 15, Thompson Affidavit). They did not determine this information lacked credibility until after they had already forecast it to the jury. (Exhibit 15).

267. Even after making the promise the jury to produce this evidence, and after failing to offer any evidence, the Defense still attempted to argue this issue in closing argument.

268. Bowen argued that the body was never proved to be James Jordan in his closing. He also tried to make the bizarre argument that somehow the perpetrators shot a person who was already dead.

269. In particular, he continuously made statements such as, "He says this bullet came into this dead person above the right nipple." (Exhibit 78, Defense Closing, T pp 7056). And even, more explicitly, "Dr. Sexton told you that the average body, Mr. Jordan, ***if this was he,*** holds ten pints of blood. . . ." (Exhibit 78, T pp 7056). Bowen argued, "Has the State proved to you beyond a reasonable doubt that this individual was living at the time that the bullet entered his body?" (Exhibit 78, T p 7058). Mr. Bowen was trying to explain the lack of blood by suggesting that Mr. Jordan was already dead when he was shot, and the heart was not moving blood through the body. *Id.*

270. Then even more explicitly, "What caused the death of the deceased.

State's got to prove beyond a reasonable doubt that the bullet that they claim came out of State's 59-A, the revolver, ***killed not just a man, but James Jordan***. And they've got to show that Mr. Jordan, ***or whoever it was,*** was alive before that bullet entered him." (Exhibit 78, Defense Closing, T pp 7061). The Trial Counsel continued, at closing argument, to damage their credibility by advancing theories they never investigated or offered any supporting evidence.

Failure to Investigate the "Drug Deal Gone Bad"

271. They also failed to investigate the underlying evidence of their promise to show a "drug deal gone bad." (Exhibit 15, Thompson Affidavit). Defense attorneys did not locate Ms. Baculik in New York to testify about the call from Demery to New York. They could have found the federal docketing statement which showed the arrest, charge, conviction, and sentencing of Hubert Larry Deese. They could have found his wedding announcement which showed that he worked at Crestline Mobile Homes. They could have interviewed members of Deese's family to determine the connection to Sheriff Stone. They could have put on evidence of the phone records provided in discovery, or issued a subpoena at an earlier time for these records. Instead, they promised this important evidence to the jury and failed to produce it due to a lack of investigation.

272. If the trial lawyers had investigated their theory of a drug deal gone bad they could have found the following information:

273. They could have connected Hubert Larry Deese to the Sheriff because Deese and his ex-wife admit that Hubert Deese is Sheriff Hubert Stone's son, (Exhibit 4, Mance Affidavit, Deese Interview). The detective on the Jordan murder, Mark Locklear, was good friends with Deese and knows he is the Sheriff's son. (Exhibit 27, Mance Affidavit, Locklear Interview).

274. They could have connected Hubert Larry Deese to the co-defendant Demery by learning that the pair worked together at Crestline Mobile Homes. The discovery information showed that Demery worked at Crestline, and the Jordan body was found within a mile of where Deese and Demery worked at Crestline. (Exhibit 75, Written Report on the Demery Statement). If defense attorneys had searched news articles related to Hubert Larry Deese, they would have discovered from his marriage announcement he also worked at Crestline. (Exhibit 4-D, Mance Affidavit).

275. A review of the news articles detailing Deese's arrest for drug trafficking would have connected Deese to drug trafficking activities at the time of and in the area of the Jordan murder. (Exhibit 4-F). A review of the federal docketing statement in Deese's drug trafficking case would have shown that he

received two reductions in his sentence, below the mandatory minimum as a result of "substantial assistance." (Exhibit 4-G).

276. Reviewing this information would have revealed that Deese was cooperating with federal authorities in active drug investigations in order to reduce his federal sentence. At the time of trial, defense counsel may have been able to confirm the fact that Deese cooperated with a multi-agency task force in setting up undercover transactions by talking to the lead federal investigator, Michael Grimes, who knew that Deese provided this substantial assistance, and worked with Deputies Steve Lovin and Thomas Strickland in the Robeson County Sheriff Drug Unit. (Exhibit 44, Holmes Affidavit, Grimes Interview).

277. Defense counsel would not have known that Deputies Steve Lovin and Thomas Strickland were themselves corrupt, because they were not arrested until 2002 pursuant to operation "Tarnished Badge." (Exhibit 4-H).

278. Each of these investigative steps would have helped tighten the connections between Larry Demery, Hubert Deese, and the Sheriff. This would not only have advanced the theory of a "drug deal gone bad," it would have also supported the defense theory that this was a "selective investigation" in which certain avenues of investigation were not pursued. Trial Counsel committed ineffective assistance of counsel when they promised to put on evidence of a

"drug deal gone bad" and failed to put on the evidence at their disposal. This failure was made more egregious by their failure to investigate the connections between Demery, Deese, and drug trafficking in the area where Jordan was killed and at the time Jordan was killed.

279. The Defense theory that Demery killed Jordan outside Jordan's car while Demery was in the area to engage in a drug deal at the direction of Hubert Larry Deese fits the physical evidence and makes more sense than a random shooting inside the Lexus that left no blood inside. As the father of a multi-millionaire NBA player, and owner of a business that marketed his son's apparel, James Jordan was a man of financial means. If Mr. Jordan had wanted to sleep, it makes more sense that he would have stopped at the Quality Inn just yards from where the State contends he was killed, rather than pulling over on the side of the road to sleep in his vehicle. It is more likely that Demery, Deese or someone else involved in a drug transaction encountered Jordan in the parking lot and mistook him for someone connected with the drug deal, leading to the killing of Mr. Jordan by Demery, Deese, or someone meeting them there. Properly investigated and presented, this defense had a reasonable likelihood of success with the jury.

Failure to Investigate Bullet Trajectory Forensics

280. Angus Thompson, Trial Counsel for Mr. Green, has conceded that with the State's theory of a close range shot into the chest, the trajectory of the bullet and the proximity of the gun suggested a longer range shot. There would have been an exit wound, and there would have been a lot of blood in the car. (Exhibit 15, Thompson Affidavit). He concedes they should have retained an expert on guns and bullet trajectory to effectively explore that with the jury. (Exhibit 15).

Failure to Interview and Call the Alibi, Bobbie Jo Murillo

281. In the opening and in the middle of the trial, the defense promised the jury that they would show that Ann Green and Bobbie Jo Murillo were with Daniel while the murder occurred. (Exhibit 2, T pp 61). But, though the defense offered other witnesses that "heard" Ms. Murillo and Ms. Green with Daniel, they never called either of them to the stand, even though they were the most solid of the alibi witnesses. (Exhibit 69, Defense Evidence, T pp 6182, 6188–91, 6193, 6197–03, 6216, 6223, 6243–46, 6254–57, 6259–61,6268–69, 6271, 6300, 6302, 6305, 6308–09, 6312–13, 6320, 6323, 6339). The Defense failed to call Ms. Murillo even though she would have testified she was with Mr. Green all night, until the morning when Larry Demery returned. (Exhibit 70, Murillo Lowery Affidavit).

282. Located by the Defense in 2015, Ms. Murillo, now Bobbie Jo Murillo Lowery, stated that she had been with Daniel Green and members of the Hernandez family the entire night. She stated that she only remembered one person ever coming to talk to her about the night of the Jordan murder, and she could not remember whether they represented Daniel Green's Trial Counsel or the State. (Exhibit 27, Mance Affidavit, Murillo Interview). Discovery records indicate that Ms. Murillo was interviewed once by Art Binder of the Cumberland County Sheriff's Office, but that Mr. Binder did not ask Ms. Murillo about her or Daniel Green's whereabouts on the night of July 22–23, 1993. (Exhibit 93, Binder Interview with Murillo, Sept 22, 1993).

283. Despite not calling Murillo to the stand, defense counsel argued in closing, "[Daniel] had a choice to leave at 1:30 with Larry Demery, or stay at Kay's with Bobbie Jo Murillo, and that's what he did." (Exhibit 78, Defense Closing T p 7265).

284. The State again pointed out the mistake not to call the best witnesses in the closing, saying, "*Ask yourself the opposite of what they asked you, why didn't they call the people who supposedly saw him? His momma?*" and "*Bobbie Jo M[u]rillo. This is the young lady they said he had a choice, leave with Larry Demery or stay with Bobbie Jo. According to their evidence Bobbie Jo was with*

him the entire time. Why didn't they call her? Certainly would strengthen the alibi." (Exhibit 7, Britt Closing T pp 7313–14).

285. That the jury could not trust defense counsel, when the only viable and real defense completely relied on credibility, "rendered [the proceeding] unreliable, and hence the proceeding itself unfair." *Strickland*, 466 U.S. at 694. In defense counsel's words, "[n]othing could be more damaging than if we forecast to the jury a certain body of evidence, then change our minds." (Exhibit 15, Thompson Affidavit).

286. Counsel's promise to provide evidence to the jury that the murder victim was still alive without an investigation of that claim and then failure to produce any evidence to substantiate that promise was unreasonable error. This gross error, which severely damaged the defense's credibility, in a case that came down to witness credibility, and was thus close on the facts, is so "damaging" it is sufficient to undermine confidence in the outcome of the trial under *Strickland* and *Moorman*.

287. Under similar circumstances, the North Carolina Supreme Court has concluded that the promise to a jury of material evidence and the failure to keep that promise as a result of a failure to investigate constitutes reversible ineffective assistance of counsel in violation of the Defendant's Sixth

Amendment Right to Counsel. *State v. Moorman*, 320 N.C. 387, 402, 358 S.E.2d 502, 511 (1987) ("Under this circumstance we conclude that Paul's wide-ranging opening assertions, which had no foundation in his pretrial investigation and were never remotely supported by any evidence proffered at trial, undercut the only defense supported by the evidence and defendant's own testimony.").

V. IGNORING TRIAL COUNSEL'S MOTION FOR MISTRIAL, ADDRESSING MR. GREEN DIRECTLY, AND APPOINTING A LAWYER STANDING IN THE HALL TO ADVISE MR. GREEN CONSTITUTED A COMPLETE DEPRIVATION OF MR. GREEN'S RIGHT TO COUNSEL AT A CRITICAL STAGE.

288. During closing arguments, Prosecutor Johnson Britt commented directly on Mr. Green's right to remain silent and said Mr. Green was the best person to establish his own alibi. Defense counsel immediately moved for a mistrial. Mr. Green, however, believed the Prosecutor was intentionally trying to get a mistrial. After the Court asked Mr. Green directly what he thought, the Court allowed Mr. Green to overrule his defense attorney's motion. The Court then appointed outside counsel to make sure Mr. Green was knowingly overriding his trial lawyer's motion. The trial lawyers and the outside lawyer then gave Mr. Green inaccurate advice about the law, which deprived him of counsel at that critical stage of the trial.

A. **A Complete Deprivation of Counsel is Structural Error and Does Not Require a Showing of Prejudice.**

289. The standards for a showing of ineffective assistance of counsel are discussed above in section IV.A. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *Wheat v. United States*, 486 U.S. 153, 158 (1988) (internal quotation marks omitted). When a Defendant is completely deprived of counsel, the reviewing Court does not engage in "harmless-error" review; rather, this kind of structural error is reversible without a showing of prejudice. *Gonzalez-Lopez*, 548 U.S. at 148–49. This class of constitutional error is called "structural defects." *Id.* These "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." *Id.* (internal citations omitted). Such errors include the denial of counsel, *see Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963), the denial of the right of self-representation, *see McKaskle v. Wiggins*, 465 U.S. 168, 177–78 (1984), the denial of the right to public trial, *see Waller v. Georgia*, 467 U.S. 39, 46 (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, *see Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

290. When such structural error occurs with respect to the right to counsel,

"it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation." *Hyatt v. Branker*, 569 F.3d 162, 172 (4th Cir. 2009) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006)).

291. The decision whether to move for a mistrial is a decision only an attorney can make. The U.S. Court of Appeals for the Fourth Circuit has explicitly held that the decision to move for a mistrial is in the exclusive province of the attorney and that allowing the defendant to override this decision amounts to a violation of the right to counsel. *See United States v. Chapman*, 593 F.3d 365, 368 (4th Cir. 2010) ("decisions regarding a mistrial are tactical decisions entrusted to the sound judgment of counsel, not the client"); *Galowski v. Murphy*, 891 F.2d 629, 639 (7th Cir. 1989) ("The decision whether to move for a mistrial or instead to proceed to judgment with the expectation that the client will be acquitted is one of trial strategy.").

292. Courts have enumerated a number of specific decisions that are the province of the attorney alone. These select decisions are vested in the attorney because of the Supreme Court's recognition of "the superior ability of trained counsel in the 'examination into the record, research of the law, and marshaling of arguments." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). "[D]ecisions regarding . . . what trial

motions to make are ultimately the province of the lawyer." *State v. Luker*, 65 N.C.App. 644, 649, 310 S.E.2d 63, 66 (1983), *aff'd as to error, rev'd as to harmlessness of error,* 311 N.C. 301, 316 S.E.2d 309 (1984).

293. The U.S. Supreme Court has held that a trial is "presumptively unfair . . . where the accused is denied the presence of counsel at 'a critical stage' . . . ." *Bell v. Cone*, 535 U.S. 685, 695 (2002). The Court has also signaled that such a deprivation of counsel is so significant that it amounts to structural error.

294. In *State v. Miller*, 214 Or. App. 494, 505–06, 166 P.3d 591, 598 (2007), the Oregon Court of Appeals recently explained:

> In *United States v. Gonzalez–Lopez,* —— U.S. ——, 126 S.Ct. 2557, 2565, 165 L.Ed.2d 409 (2006), the Supreme Court . . . reiterated its adherence to the structural error principle in the context of the Sixth Amendment right to counsel. The inquiry involves two questions: (1) Was the proceeding for which counsel was denied a "critical stage" during which the defendant was entitled to counsel under the Sixth Amendment? (2) If so, was there a *complete* denial of counsel during that critical stage? *United States v. Cronic,* 466 U.S. at 659, 104 S.Ct. 2039. The first determination whether a stage of the proceeding is "critical" depends upon "whether potential substantial prejudice to defendant's rights inheres in the * * * confrontation and the ability of counsel to help avoid that prejudice." *United States v. Wade,* 388 U.S. 218, 227, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). . . . The second inquiry is whether the denial of counsel was "complete."

295. The North Carolina Supreme Court has further explained that structural errors are of a type that they "infect the entire trial process . . . and

necessarily render a trial fundamentally unfair. . . . [S]uch errors are reversible *per se* . . . . [and include the] complete deprivation of [the] right to counsel." *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (internal citations omitted). The Court has said that "[w]hen a defendant demonstrates an at-trial violation of his rights under the North Carolina Constitution, we may sustain the defendant's conviction only if the State proves beyond a reasonable doubt that the error in the defendant's case was harmless." *State v. Wilson*, 192 N.C. App. 359, 369, 665 S.E.2d 751, 756 *writ allowed*, 668 S.E.2d 782 (N.C. 2008) and *aff'd*, 363 N.C. 478, 681 S.E.2d 325 (2009) (citing *State v. Huff*, 325 N.C. 1, 34–35, 381 S.E.2d 635, 654 (1989), *vacated on unrelated grounds*, 497 U.S. 1021 (1990)).

296. In the instant case, Defendant was denied competent counsel at a critical juncture of his trial—at a point when he was faced with the prospect of deciding whether to move for a mistrial after the prosecutor had twice remarked on his failure to testify. This deprivation of an essential right significantly prejudiced Defendant, who would have been well served to follow his original attorneys' advice to make the motion.

B. **The Trial Court Ignored Trial Counsel's Motion for Mistrial, Addressed Mr. Green Directly, and then Appointed Him Counsel Unfamiliar With the Case.**

297. In his closing argument, Prosecutor Britt twice commented on Mr. Green's right to remain silent. At the time he made the comments, Prosecutor Britt knew that commenting on the exercise of the privilege against self-incrimination was a clearly established violation of Mr. Green's right. In fact, during the closing arguments Mr. Britt said, while discussing Mr. Demery, "*I can't tell the jury that the defendant was advised of his rights and then exercised those rights to remain silent. That is an elementary principle of constitutional criminal procedure. You know that, I know that, and they know that*." (Exhibit 78, Defense Closing, T p 7289).

298. Mr. Britt was referring to clearly established Constitutional law prohibiting prosecutors from commenting on a Defendant's exercise of his right to remain silent during trial. *Griffin v. California*, 380 U.S. 609, 614 (1965); *see also State v. Randolph*, 312 N.C. 198, 205–06, 321 S.E.2d 864, 869 (1984) ("A criminal defendant cannot be compelled to testify, and any reference by the State regarding his failure to do so violates an accused's constitutional right to remain silent.").

299. Nevertheless, Prosecutor Britt argued in closing to the jury, "*They hung it out there on this thing called an alibi. And just like that water that's in that pot when you pour the noodles into that colander, their alibi goes out those*

holes and down the drain and is gone forever. And who better, who better than to assert this alibi than the defendant? ***He didn't testify in this case****. And the Judge is going to give you an instruction on that. But even though* ***he didn't testify.***." (Exhibit 7, Prosecutor Closing argument, T p 7320).

300. This comment was a particularly egregious attack on Mr. Green's right to remain silent because the alibi testimony was the heart of Mr. Green's defense, and commenting on his failure to establish his own alibi significantly weakened his case. Defense counsel appropriately moved for a mistrial, and argued that Prosecutor Britt irreparably violated Mr. Green's constitutional rights. (Exhibit 7, T pp 7322–23, 7330–31, 7334). Trial counsel said, "*I argue to you he's commented directly on the defendant's decision not to testify. That is a cardinal rule, I suggest to you, Your Honor, which is quite frankly it's so egregious, it would entitle the defendant to a mistrial.*" (Exhibit 7, T p 7321).

301. The Court bypassed Mr. Green's attorney and asked him directly whether he agreed with his attorney's decision. (Exhibit 7, 7334).

> *THE COURT: Your position is asserted under Griffin and Taylor and due process.*
>
> *MR. THOMPSON: As well as North Carolina Constitution:*
>
> *THE COURT: Yes, sir. You want to cite the specific provisions of the NC Constitution?*

MR. THOMPSON: Yes, sir,corresponding provisions of the North Carolina Constitution, Your Honor, Article 1, Section 19.

THE COURT: Yes, sir.

MR. THOMPSON: As well as Section 23.

THE COURT: All right. Mr. Green, for the purposes of the record, the response you can give to the questions I'm about to ask you: I agree, I disagree, or I don't wish to answer. Are you joining in your counsel's request for mistrial, pursuant to 15-A- 1061?

MR. GREEN: Your Honor, may I speak freely?

THE COURT: Yes, sir.

MR. THOMPSON: Stand up.

THE COURT: You can be seated.

MR. GREEN: I understand their position. I fully comprehend why they make their motion and their duty to make the motion, but I mean, I have -- to be honest with you, I have to disagree. He set it up yesterday, this man is so scared you could smell it. ***And I honestly believe he is deliberately trying to get a mistrial****. And no, sir, I do not want a mistrial, I do not want one.*

(Exhibit 7, T p 7334).

302. Mr. Green was referring to a moment the day before when Mr. Britt made a comment that he didn't "care what the rules of professional ethics were." (Exhibit 10, T p 7296). Mr. Green's belief that Mr. Britt was attempting to cause a mistrial was also informed by Mr. Britt's earlier comments that it was an

"*elementary principle of constitutional criminal procedure*" that he could not comment on a defendant's decision not to testify. (Exhibit 78, T p 7289).

303. There was no reason for the Court to speak directly to Mr. Green. The decision whether or not to move for a mistrial was the decision of his lawyers under the Sixth Amendment right to Counsel. Mr. Green had elected to be guided at trial by his right to counsel. He did not suddenly or spontaneously decide to waive his right to counsel. The training and experience of lawyers was necessary to understand the critical Constitutional harm that Prosecutor Britt inflicted upon the case with his unlawful comment. Mr. Green was obviously out of touch with how the trial was going if he thought Mr. Britt was trying to throw the case, and that he was winning, because he promptly lost.

304. Following Mr. Britt's remarks, the Court appointed attorney Ken Ransom to confer with Mr. Green about his attorney's motion for mistrial. (Exhibit 7, T p 7339). At the time Mr. Ransom consulted with Mr. Green, Mr. Ransom only knew basic facts of the case from news reports. (Exhibit 8, Ransom Affidavit). He was not aware of the law that jeopardy can attach if the State intentionally creates a mistrial. *See State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988) (quoting *Oregon v. Kennedy*, 456 U.S. 667, 675–76 (1982)) ("Only where the governmental conduct in question is intended to "goad" the

defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion"); (Exhibit 8, Ransom Affidavit).

305. Mr. Ransom did not advise Mr. Green that if he truly believed that the prosecutor was trying to "goad" him into a mistrial, then the prosecutor could be barred from trying the case again. (Exhibit 8, Ransom Affidavit). If Mr. Ransom had known that jeopardy could attach and the State could be precluded from retrying Green, he would have advised Mr. Green to join his defense motion for a mistrial. (Exhibit 8, Ransom Affidavit). It is likely Mr. Green would have joined the motion under those circumstances. (Exhibit 8, Ransom Affidavit).

306. Trial counsel, Mr. Thompson and Mr. Bowen, also did not advise Mr. Green that the State could be barred from retrying him if he was deliberately throwing the case. (Exhibit 15, Thompson Affidavit). If Mr. Green had been properly and accurately advised of the law that prosecutorial misconduct in the context of a motion for a mistrial could bar future prosecution by double jeopardy, he would have followed his lawyers' advice.

307. The Fourth Circuit has held that the Sixth Amendment requires nothing less than effective counsel "at every stage of the trial" and that the "right to the effective assistance of counsel contemplates the guiding hand of an able

and responsible lawyer . . . who has ample opportunity to acquaint himself with the law and facts of the case . . . .' " *United States v. Hill*, 310 F.2d 601, 605 (4th Cir. 1962) (quoting *Willis v. Hunter*, 166 F.2d 721, 723 (10th Cir. 1948), cert. denied 334 U.S. 848) (emphasis added); see also *State v. Cook*, 362 N.C. 285, 296, 661 S.E.2d 874, 880–81 (2008) (noting that "[w]hile . . . sympathetic to the trial court's dilemma . . . the trial court should have allowed a continuance" when defense was given inadequate time to prepare in light of new circumstances).

308. Kenneth Ransom do not have "ample opportunity to acquaint himself with the law and facts of th[is] case." He had no knowledge of the many contested facts, other than perhaps what he might have read in the newspaper, and, critically, no sense of the jury's disposition towards the Defendant. (Exhibit 8, Ransom Affidavit)

309. Mr. Green was first deprived of his counsel by the Court, and then deprived of effective assistance by his replacement counsel, Mr. Ransom, who failed to give him accurate legal advice and fully inform him about the mistrial motion. The closing argument at the end of a trial that lasted months constituted a "critical stage" in the proceedings. This complete deprivation of counsel at this critical stage constitutes structural error and requires a new trial. *Gonzalez-*

Lopez, 548 U.S. at 148–49 (2006) (citing *United States v. Cronic*, 466 U.S. 648, 659 (1984)). Therefore, Mr. Green was deprived of effective assistance of counsel at a critical stage of the proceedings in violation of his Sixth Amendment Rights.

VI. MR. GREEN WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS LAWYER, WOODBERRY BOWEN, FACILITATED A CONTRACT BETWEEN MR. GREEN AND BOWEN'S BUSINESS PARTNER, PROMISING 1000 HOURS OF STUDIO TIME IN EXCHANGE FOR RIGHTS TO LYRICS WRITTEN BY MR. GREEN.

310. The Sixth Amendment Right to effective assistance of counsel means the right to counsel free from actual conflicts of interest. During jury selection, one of Mr. Green's trial lawyers, Woodberry Bowen, had his business partner, Willie French Lowery, a famed Lumbee musician, enter into a business contract with Mr. Green, providing him 1000 hours of studio time in exchange for rights to lyrics written by Mr. Green. Because Bowen would not owe studio time to Mr. Green if Bowen lost the trial, an actual conflict of interest arose creating a *per se* claim for ineffective assistance of counsel.

A. **Actual Conflicts of Interest Between Attorney and Client Constitute Ineffective Assistance of Counsel**.

311. The right to effective assistance of counsel is described in the sections above, V.A., and IV.A. A criminal defendant subject to imprisonment has a

Sixth Amendment right to counsel. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). The Sixth Amendment right to counsel applies to the State of North Carolina through the Fourteenth Amendment of the United States Constitution. *State v. James*, 111 N.C.App. 785, 789, 433 S.E.2d 755, 757 (1993). Sections 19 and 23 of the North Carolina Constitution also provide criminal defendants in North Carolina with a right to counsel. *Id.*

312. The right to counsel includes a right to "representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). When a defendant fails to object to a conflict of interest at trial, a defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *see also, State v. Bruton*, 344 N.C. 381, 391,474 S.E. 2d 336, 343 (1996). "[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." 446 U.S. at 349–50. The United States Supreme Court clarified in *Mickens v. Taylor*, 535 U.S. 162, 170–71 (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). The United States Supreme Court has long held that an actual conflict of interest is a denial of effective assistance of counsel. *Glasser v. United States*, 315 U.S. 60, 70 (1942).

313. North Carolina Rule of Professional Conduct 1.8(a), concerning conflicts of interest with current clients, states: "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless:

> i. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; [and]
>
> ii. the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> iii. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the

transaction, including whether the lawyer is representing the client in the transaction. North Carolina Rule of Prof'l Conduct 1.8(a)

314. When the trial attorney creates a situation where he does not have to provide the benefits of a negotiated contract if he loses the trial, the attorney has created an actual conflict of interest with his client. This is an actual conflict because the attorney creates a financial burden upon himself, in the event that he wins.

B. **Defense Counsel Woodberry Bowen Facilitated a Contract with Green Promising 1000 Hours of Studio Time Which Bowen Would Not Have to Honor If He Lost**

315. In the course of representing Daniel Green, defense attorney Bowen facilitated the execution of a contract between his client, Green, and his business partner, Willie French Lowery. (Exhibit 71, Holmes Affidavit, Lyrics Contract). Bowen owned a recording studio, in which Lowery worked as an engineer and ran most of the day-to-day operations. (Exhibit 71, Holmes Affidavit; Exhibit 95, Affidavit of Aaron Johnson). Lowery and Attorney Bowen were in the recording business together. (Exhibit 71, Holmes Affidavit). Bowen received a percentage of all profits from their shared business. (Exhibit 27, Mance Affidavit, Lowery Interview).

316. After hearing Green rapping, Attorney Bowen decided to set him up with his business partner, Lowery. (Exhibit 27, Mance Affidavit, Lowery

Interview). Bowen took Lowery to the jail, where he introduced him to Green. (Exhibit 91, Affidavit of Aaron Johnson). Bowen then created a legal contract for the sale of Green's music lyrics to Lowery. (Exhibit 71). The music contract was notarized by Cindy Pitman Inman, who worked with the defense attorney's office, on December 14, 1995. (Exhibit 71). The contract provided to Green 1000 hours of recording time at SoundStation Studio, 313 East 4th Street, Lumberton, NC. This studio was owned by his attorney, Bowen. (Exhibit 71). In addition, Green would receive $1 under the contract and specified royalties, which were to be paid to his mother, Elizabeth Ann Green. (Exhibit 71). According to Bowen's billing records, he was in Jury selection in the Daniel Green case on December 14, 1995, the day the contract was signed. (Exhibit 71, Holmes Affidavit, Time Sheet).

317. Green never benefited from the terms of the contract with his attorney, because he was convicted. Under the business arrangement Bowen created, Green could receive the bulk of the consideration he was due under the contract, the 1000 hours of recording time in Mr. Bowen's studio, only if he was acquitted. As such, Bowen created a business arrangement in which he could avoid conferring 1000 hours of recording time by failing to prevail in Mr. Green's case. This constituted an impermissible conflict of interest, which

unduly interfered with Bowen's duties of loyalty and zealous representation.

318. The business contract Bowen made with Green for the sale of music rights directly violated North Carolina Rule of Professional Conduct 1.8(a). It constituted an impermissible business transaction with a current client because it failed to meet any of the three criteria which are all required to be exempt from the general ban on business transactions with current clients. Despite the fact that the contract officially named Green and Lowery, Bowen's business partner, as the parties, it still constituted a business transaction between Bowen and his client because Bowen owned the music studio, was business partners with Lowery, and received a percentage of Lowery's earnings. (Exhibit 27, Mance Affidavit, Lowery Interview; Exhibit 71, Holmes Affidavit). Green was introduced to Lowery through Bowen, and the notion to create this business arrangement in the first place belonged to Bowen.

319. The contract violated Rule 1.8(a)(1) because its terms were hardly "fair and reasonable." The bulk of Bowen's consideration was the promised 1000 hours of recording time in his studio—nearly half a year of studio time. However, due to the circumstances of Green's prosecution, Bowen would have to provide this consideration only if Daniel Green was acquitted in the case in which Bowen was representing him. Not only did this arrangement confer a

benefit upon Bowen and his business partner without requiring them to provide any consideration, it created a contractual incentive for Bowen to avoid providing 1000 hours of studio time by failing to prevail in Green's case.

320. In addition, the monetary consideration of a mere one dollar and promises of speculative royalties falls short of the "fair and reasonable" terms Rule 1.8(a)(1) mandates. Furthermore, Bowen did not satisfy Rule 1.8(a)(2), as he failed to advise Green in any manner, written or otherwise, to seek the advice of independent counsel. Moreover, because Green never provided any written consent to Bowen's role in the transaction, Bowen also failed to meet the requirements of Rule 1.8(a)(3).

321. Bowen's Rule 1.8 conflict of interest violation also constituted an "actual conflict" rendering Green's assistance of counsel ineffective. In forging this business contract, Bowen "actively represented conflicting interests," and completely flouted his "duty to avoid conflicts of interest." *See Strickland*, 466 U.S. at 688. This actual conflict of interest "adversely affected" Bowen's representation of Green. *See Cuyler*, 446 U.S. at 348. Seeing the opportunity to gain from the large amount of media attention and notoriety surrounding his client and his client's case, Bowen devised to obtain the rights to Green's musical works in exchange for little to no consideration. In doing so, Bowen

took advantage of Green's vulnerability and reliance upon Bowen as his attorney, his inferior business sophistication, and his desire to provide for his mother in uncertain times. Instead of dedicating himself to the criminal case at hand, Bowen redirected his thoughts, efforts, and incentives to profiting from this business contract.

322. On January 6, 2000, Bowen wrote to Green in custody, and told him he would let him use the studio time, knowing full well he was in custody and this was impossible. (Exhibit 79). "*It is true that I own the premises of the recording studio and I will be happy for it to be used for such purposes as you and Willie can work out.*" (Exhibit 79). Because Bowen violated his "most basic" duty of loyalty to his client, and created business incentives at odds with his duty to zealously defend Mr. Green in his capital murder case, he failed to provide Green with the effective assistance of counsel mandated by the Sixth Amendment. *See Strickland*, 466 U.S. at 692.

323. Severe conflicts of interest where the defendant's attorney "actively represented conflicting interests" require no showing of prejudice. *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *State v. Chivers*, 180 N.C. App. 275, 282, 636 S.E.2d 590, 596 (2006).

324. Here, Counsel created a situation where there was an active conflict of

competing interests when he promised 1000 hours of studio time and would not have to provide that benefit if he lost the trial. This adversely affected his performance, as demonstrated by the specific claims for ineffective assistance of counsel documented in this First Amended Motion for Appropriate Relief.

VII. TRIAL COUNSEL MADE OTHER DECISIONS FALLING BELOW THE STANDARD OF EFFECTIVE ASSISTANCE OF COUNSEL.

A. **Ineffective Assistance of Counsel Occurs When Counsel's Performance Falls Below an Objectively Reasonable Standard and Deprives Defendant of a Fair Trial**.

325. Ineffective assistance of counsel is shown when: (1) the counsel's performance fell below an objective reasonableness standard; and (2) counsel's errors were "so serious as to deprive the defendant of a fair trial . . . ." *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987) (citing *Strickland*, 446 U.S. at 687 (1984)); *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 247–48 (1985) (adopting the two-part *Strickland* test for right to counsel guaranteed by the North Carolina Constitution).

B. **Trial Counsel Committed Ineffective Assistance of Counsel When They Failed to Read the Witness List to Juror James Cassidy, Failed to Request a Full Hearing When They Discovered He Had a Conflict with Mr. Green's Alibi Witnesses, and Failed to Discover He was Watching the News and Talking about the Trial with a Potential State's Witness.**

326. During the selection of Mr. James Cassidy, Juror number 10, Defense Counsel did not read the potential defense witness list. (Exhibit 11, Jury

Selection December 8 and 11, 1995). Included on the witness list were Mr. Green's alibi witnesses, including Kaye Hernandez and Nellie Montes. (Exhibit 12). Prior to Ms. Hernandez and Ms. Montes' planned testimony, they notified defense counsel that they had had prior dealings with Juror James Cassidy that could create a significant bias against them. (Exhibit 13, T pp 7664–65).

327. Hernandez and Montes had accused Cassidy of inappropriate sexual behavior with Montes, who was between 16 and 18 years old during the relevant time period. (Exhibit 14, Written Statements of Hernandez; Exhibit 13, Hearing on Conflict). Mr. Cassidy has admitted since trial that on numerous occasions he had been inside the Hernandez trailer where Daniel Green stated he was at the time James Jordan was murdered. (Exhibit 27, Mance Affidavit, Cassidy Interview). Mr. Green's trial counsel, Angus Thompson, had known Cassidy since childhood and did not object to his inclusion on the jury. (Exhibit 13, In Camera Hearing on Relation Between Juror Cassidy and Alibi Witnesses). Mr. Cassidy originally met Ms. Hernandez and her daughter in the mid-1980s through his lifelong friend Ronald Fletcher, a 30-year employee at the Robeson County Department of Social Services. (Exhibit 27).

328. According to Mr. Cassidy, Mr. Fletcher also "probably" had a sexual relationship with Ms. Hernandez. (Exhibit 27). A statement from Mr. Fletcher

indicates the two had a falling out sometime before Daniel Green's trial. (Exhibit 13, In Camera Hearing). Mr. Cassidy has stated that he "assume[s]" Mr. Fletcher and Ms. Hernandez were sexual partners based on the nature of their interaction while in his presence. (Exhibit 27).

329. During trial, Mr. Fletcher walked into Prosecutor Britt's office and volunteered a statement impeaching Ms. Hernandez. Prosecutor Britt explained to the Court that Fletcher, "during one of the days when we were out of court, came to my office and requested to speak to me specifically about Kay[e] Hernandez. He knows her and has known her for a number of years, and he was concerned that she may perjure herself if called as a witness, and that resulted in the statement that was provided to them." (Exhibit 13, T p 7667). Mr. Fletcher's statement also impeached Mr. Green's mother, another potential alibi witness the defense promised to call to the stand.

330. In a recent interview, when he told Mr. Cassidy told Ronald Fletcher that Kaye Hernandez or Nellie Montes would be testifying as alibi witnesses for Daniel Green, Mr. Cassidy stated, "*maybe I did mention it*." (Exhibit 27, Mance Affidavit, Cassidy Interview). Mr. Cassidy also admitted that while serving on the jury he watched news coverage of the case on television and likely discussed the case with Mr. Fletcher, with whom he regularly socialized. (Exhibit 27). Mr.

Cassidy admitted he likely violated court rules by watching media coverage of the trial and discussing the case with Mr. Fletcher. (Exhibit 27).

331. The defense ultimately did not call Kaye Hernandez or Anne Green to the stand, calling Nellie Montes instead. (Exhibit 69, T pp 6173–265).

332. The conduct of the defense attorneys with respect to this issue fell below an objectively reasonable standard in that they (1) failed to read the jury list to James Cassidy to see if he knew the potential alibi witnesses; (2) took no action to put on the record the nature and extent of the conflict once they became aware of the conflict between the alibi witnesses and Juror Cassidy; (3) failed to explore whether Cassidy had tipped Fletcher off that Hernandez was testifying, which would have explained Fletcher's unsolicited appearance in Prosecutor Britt's office to offer a statement against Hernandez. If Counsel had conducted this hearing, they may have also discovered that Cassidy was watching T.V. and talking regularly with his friend who had a bias against Ms. Hernandez.

C. **Trial Counsel Committed Ineffective Assistance of Counsel When They Failed to Interview the Alibi Witness Bobbie Jo Murillo**.

333. In *Strickland*, the Court specifically addressed so-called "failure to investigate" claims, explaining that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually

unchallengeable." *Strickland*, 466 U.S. at 690–91. The Court further explained, however, that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*. In short, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

334. Guided by *Strickland*, the Fifth Circuit has held that counsel's failure to interview eyewitnesses to a charged crime constitutes "constitutionally deficient representation." *Anderson v. Johnson*, 338 F.3d 382, 391 (5th Cir. 2003) (citing *Strickland*); *Bryant v. Scott*, 28 F.3d 1411, 1418 (5th Cir.1994) (holding that "through better pretrial investigation of the eyewitnesses, and a reasonable lawyer would have made some effort to investigate the eyewitnesses' testimony").

335. In the present case, although the defense put on evidence that Mr. Green was at the party with Bobbie Jo Murillo, including a picture of her in his lap, the witnesses called by the defense were not with Mr. Green all night. (Exhibit 69, Defense Evidence, T pp 6182, 6188–91, 6193, 6197–203, 6216, 6223, 6243–46, 6254-57, 6259–61,6268-69, 6271, 6300, 6302, 6305, 6308-09, 6312–13, 6320, 6323, 6339). The defense failed to interview, call, or introduce

the testimony of Bobbie Jo Murillo, who would have testified that she was with Mr. Green until the morning of July 23, 1993. (Exhibit 69, Defense Evidence; Exhibit 70, Affidavit of Bobbie Jo Murillo Lowery).

336. Ms. Murillo was prepared to testify she was with Mr. Green all night, and he left in the morning. (Exhibit 70, Murrillo Affidavit).

337. This constituted ineffective assistance counsel because the defense (1) promised to put on evidence of an alibi, (2) failed to interview the alibi who was with Mr. Green the most that evening, (3) put on evidence of other witnesses who saw the alibi with Mr. Green, but not Ms. Murillo herself. The failure to conduct an interview with Ms. Murillo undermines confidence in the trial, because the alibi was Mr. Green's central defense.

D. Trial Counsel Committed Ineffective Assistance of Counsel When They Failed to Retain a Firearms Expert.

338. "Although it may not be necessary in every instance to consult with or present the testimony of an expert, when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance." *Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) (citation omitted); *Caro v. Woodford*, 280 F.3d 1247, 1254-56 (9th Cir. 2002) (holding that counsel was deficient for failing to consult an expert and present

expert testimony about the physiological effect of toxic chemical exposure on defendant's brain); *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001) (finding deficient performance when counsel failed to hire an expert to rebut the prosecution's expert testimony about physical evidence linking defendant to the crime scene when the defense theory was that defendant was not at the crime scene), *remand order modified by stipulation*, 268 F.3d 485 (7th Cir. 2001) (vacated at request of parties when settlement was reached); *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D. Fla.1986) (holding that counsel's failure to depose the State's expert, and more important, failure to consult with an expert in order to contradict key evidence of the "most crucial aspect of the trial" was deficient), *aff'd Troedel v. Dugger*, 828 F.2d 670 (11th Cir.1987).

339. In the present case, Trial Counsel Angus Thompson has said that "if the shooting had occurred at point blank range there probably would have been blood and tissue all over that car." (Exhibit 15, Thompson Affidavit). The trajectory of the bullet from that distance would have likely gone through the body and there would have been an exit wound. Mr. Thompson has admitted that the defense "probably should have gotten an expert on guns and bullet trajectory to effectively convey that to the jury." (Exhibit 15).

340. Without an expert, Trial Counsel was left to speculate to the jury about

the trajectory in closing argument. Though the defense never called a firearms expert in this case, in his closing Bowen argued the impossibility of the trajectory of the bullet piercing the body the way it did and being fired from where Demery said Mr. Green was standing when he fired the bullet. (Exhibit 78, Defense Closing, T pp 7106–09). In part, Bowen stated, "*Bullet comes in under the right nipple slightly down 10 degrees, slightly below the heart, severs the aorta, and severs the lower lobe of the lung. Wait a minute, he is back like this. What's going to happen? If it hits him in the upper right above the right nipple, in that position, that bullet has got to travel, may travel back some, but it's got to travel across this way. Not that way. The only way that you could get an angle that way would be if the bullet were fired from the back window.*" (Exhibit 78, Defense Closing, T pp 7107–08).

341. Moreover, as Bowen continued to belabor the trajectory point, the Prosecutor objected and the Judge granted the objection on the grounds that the defense had offered no evidence that the supposed trajectory of the bullet was fabricated by the state.

MR. BOWEN: "*They knew they had problems with the angle, so they tried to cure it that way. Raising up the individual. You roll him around any way you want to, you have can't make that bullet, you can't make the angle that Dr.*

Sexton describes because if you roll him around that way --

MR. BRITT: *Objection.*

THE COURT: *Members of the jury, you are to disregard any contention by counsel for defendant, Mr. Bowen, that there has been any fabrication of evidence in this case in any respect. There is absolutely no evidence to support that contention.*" (Exhibit 78, Defense Closing, T pp 7108).

342. The failure to offer such evidence constituted ineffective assistance of counsel because it was an area of investigation that directly supported the defense theory and contradicted the State's theory.

NOTICE OF RESERVATION OF RIGHT TO AMEND

343. Despite the best efforts of undersigned counsel, there remain information and evidence, which counsel in good faith believe to exist and which would be relevant to the claims raised here. Counsel, therefore, reserves the right to supplement and amend this Motion for Appropriate Relief as and to the extent that additional evidence and information are discovered that support new or amended claims.

PRAYER FOR RELIEF

WHEREFORE, Defendant Daniel A. Green respectfully prays the Court to:

344. On the evidence presented in this written Motion, grant an order

vacating the trial Court's judgment against Defendant and remand for a new trial;

345. Should the Court require additional evidence to grant relief, conduct an evidentiary hearing at which proof may be offered concerning the allegations of this Motion;

346. To the extend the State claims that any of the Mr. Green's claims are barred by procedural default, allow Defendant to obtain discovery from the State and other and order an evidentiary hearing to allow Defendant to develop his claim of actual innocence under Schlup v. Delo, 513 U.S. 298 (1995), which would allow the court to hear any such defaulted claims, Teleguz v. Pearson, 689 F.3d 322 (4th Cir. 2012);

347. Permit a reasonable period of time following an evidentiary hearing for the submission of memoranda of law on Defendant's constitutional and statutory claims; and

348. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this date March 31, 2015

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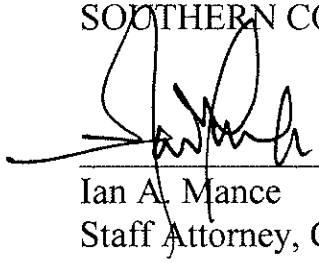

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that copies of the foregoing in the above entitled action were served by United States Mail, placing it in a depository for that purpose, postage prepaid and addressed as follows:

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STATE OF NORTH CAROLINA COUNTY OF ROBESON	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION Court File Numbers: 93 CRS 15291-15293
STATE OF NORTH CAROLINA v. DANIEL ANDRE GREEN	AMENDED MOTION FOR APPROPRIATE RELIEF (Index of Exhibits)

INDEX OF EXHIBITS

1. Excerpt of Prosecutor Opening – State's Theory of the Case, T pp 21-23 [3 pages]
2. Defense Opening Statement, T pp 51-75 [25 pages]
3. Order on Defense Motion to Compel Disclosure of Promises of Lenience, [1 Page]
4. Mance Affidavit on Hubert Larry Deese, son of Sheriff Stone, friend of Detective Locklear, Co-Worker with Testifying Co-Defendant Larry Demery, and convicted drug trafficker. [84 pages]
    a. Exhibit 4-A Jordan Car Phone records
    b. Exhibit 4-B SBI Report on Jordan Car Phone records
    c. Exhibit 4-C Deed from Sheriff Stone to Hubert Larry Deese, convicted drug trafficker
    d. Exhibit 4-D Deese Wedding announcement indicating place of employment, Crestline Mobile Homes, where Co-Defendant Demery worked
    e. Exhibit 4-E Transcript of Demery Trial testimony working at Crestline, T pp 3870-72
    f. Exhibit 4-F "Cocaine Ring Foiled in Robeson County" documenting arrest of Deese on federal drug trafficking charges
    g. Exhibit 4-G Deese Federal Docketing Statement for criminal conviction
    h. Exhibit 4-H Article on Operation "Tarnished Badge."
    i. Exhibit 4-I Transcript of Defense attempt to question about Car phone call to Deese, T pp 4992-4995 (Demery Testimony), 5744-5765 (Testimony of Officer Underwood), 6726-30 (Sur-rebuttal
    j. Exhibit 4-J GQ Article on Stone Investigation "Reasonable Doubt"
    k. Exhibit 4-K Sheriff Stone quoted in press discussing Crestline Mobile Homes connection to Demery
    l. Exhibit 4-L Sheriff Stone quoted in press discussing "Car Phone was Clue for Police."
    m. Exhibit 4-M News report linking Deese to the Green trial

5. Testimony of Agent Elwell about blood testing, T pp 5591-5620 [30 pages]
6. Affidavit of Steve Hale – interview with Agent Elwell [7 pages]
    a. Exhibit 6-A Elwell Report
    b. Exhibit 6-B Ex Parte Order destroying blood while on direct appeal
    c. Exhibit 6-C SBI Note to Elwell destroying blood
    d. Exhibit 6-D Elwell undisclosed notes regarding additional testing
7. Prosecutor Britt's Closing Argument, T pp 7300-7439 [140 pages]
8. Affidavit of Attorney Ransom [2 pages]
9. Britt comments during Trial on the prohibition on commenting on the silence of the Defendant, T pp 7289-90 [2 pages]
10. Britt apologizes for his comments that he does not care about the rules of ethics, T p 7296 [1 page]
11. Voir Dire of juror James Cassidy, [79]
12. Defense Trial Witness List [8 pages]
13. Post Verdict In Camera Hearing on Relation between Juror Cassidy and Alibi Witness Montez , T pp 7653-7670 [18 pages]
14. **[UNDER SEAL] Written Statements from alibi Witnesses regarding Juror Cassidy [11 pages]**
15. Defense Attorney Thompson Affidavit [21 pages]
    a. Brady Motion December 31, 1993
    b. Motion for Exculpatory information, December 31, 1993
    c. Order to Produce Exculpatory Information, September 29, 1995
    d. Motion to Compel officers to hand over material, December 31, 1993
    e. Order compelling officers to hand over material, September 29, 1995
    f. Motion to Compel Production of Brady Material, February 14, 1996
    g. Subpoena to SBI for lab notes, January 10, 1996
    h. Agent Elwell Notes that were not produced,
16. Martha Waggoner, AP, NC Taps 2 Ex-FBI officials to review crime lab cases after exoneration of wrongly accused man, Mar. 5, 2010. [2 pages]
17. "Witness for the prosecution: lab Loyal to law enforcement," News and Observer, Aug 18, 2010.
18. **[UNDER SEAL] "Preparing for Court and Testifying in Court," BLET Training Manual [1 page]**
19. **[UNDER SEAL] Elwell Training and Career Development Transcript Report [6 pages]**
20. **[UNDER SEAL] Excerpt of Nelson Deposition in Greg Taylor v. Deaver case [1 page]**
21. "Scathing SBI audit says 230 cases tainted by shoddy investigations," Raleigh News and Observer, Aug 27, 2010.

22. “An Independent review of the SBI Forensic Laboratory,” Chris Swecker and Michael Wolf [77 pages]
23. **[UNDER SEAL] Internal Affairs Report interview with Agent Elwell, Sept 15, 2010 [23 pages]**
24. “SBI Bloodstain Analysis team had no guidelines for 21 years,” Raleigh News and Observer, Sept 9, 2010.
25. “Detective Locklear ‘The Total System Has Let Us Down’” the Robesonian, Aug 17, 1993
26. State’s Exhibit 100, Diagram of Blood in seat by Elwell [1 page]
27. Ian Mance Affidavit with exhibits
28. Derrick Allen Order of Dismissal, March 9, 2011 [47 pages]
29. Jerry Richardson, firearm and car analysis, July 23, 1993, [4 pages]
30. “SBI Searches for new crime lab director,” Raleigh News and Observer, Aug. 20, 2010 [2 pages]
31. “New SBI chief removes lab director, suspends more analysis.” Raleigh News and Observer, Aug. 27, 2010 [3 pages]
32. “Defense Attorneys at Odds,” August 23, 1993, The Robesonian [1 Page]]
33. Ex Parte Order destroying blood evidence while on appeal July 3, 1996 [1 page]
34. Johnson Britt discusses elementary principle of criminal procedure not to comment on the right to remain silent, T p 7289 [1 page]
35. “Brunswick sighting report probed in Jordan Case,” The Morning Star, Aug 25, 1993. [1 Page]
36. Virginia Demery Phone Records [13 pages]
37. Statement of Janine Baculik regarding call from Demery July 22, 1993 [2 pages]
38. SBI Report on Car Phone Calls, November 19, 1993 [11 pages]
39. Jordan Car Phone Records
40. Larry Demery Trial Testimony, T pp 3959-3970, 3988-4000, 4039-4041, 4170-4188, 4985-4999 excerpts [62 pages]
41. “Lawmen: Cocaine Pipeline Crimped,” Fayetteville Observer, Mar 1, 1994. Arrest of Hubert Larry Deese on drug trafficking charges [2 pages]
42. Transcribed interrogation of Larry Demery, Aug 15, 1993 [106 pages]
43. Hubert Larry Deese federal docketing statement [5 pages]
44. Holmes affidavit interviewing Agent Michael Grimes [1 page]
45. Warranty Deed from Sheriff Stone to Hubert Larry Deese [4 pages]
46. H&K Stone Enterprises Corporate Filing, 2002 [1 page]
47. State Motion to Declare Hubert Stone an Expert [3 pages]
48. Order Declaring Sheriff Stone an Expert [1 page]
49. “Two Men are Charged with Murder of Jordan,” New York Times, Aug. 16, 1993 [3 Pages]
50. “Robeson pair charged in Jordan murder,” The Robesonian, Aug 16, 1993. [2 Pages]

51. "Reasonable Doubt," Scott Rabb, GQ Magazine, March 1994.
52. Trial Transcript concerning introduction of evidence about Hubert Larry Deese [22 pages]
53. Trial Transcripts, Deese phone records not admitted at trial, T pp 6726-6730 [5 Pages]
54. Testimony of Office Cannon regarding presumptive blood tests [40 pages]
55. "Lawmen check on Rumors in Jordan Case," Fayetteville Observer, Aug 26, 1993 [1 Page]
56. Larry Demery Affidavit that statement was coerced [2 Pages]
57. Larry Demery Plea Offer [7 Pages]
58. "Prosecutor: Drug Case not Changed by Letters," Observer-Times, Sam Rankin, March 26, 1988.
59. Letter of Support for Drug trafficker by Sheriff Hubert Stone, March 26, 1988, [1 Page]
60. "Robeson County Property Seized in Drug Probe," Fayetteville Observer, Feb 4, 1988 [2 Pages]
61. United States v. Jonathan Lowry, Carson Maynor, 947 F.2d 942 (4th Cir 1991) (unpublished) [13 pages]
62. "5 Indicted for Drugs in Robeson," Fayetteville Observer, Jan 11, 1990. [2 Pages]
63. United States v. Jonathan Lowery, James C. Maynor, (7:00CV10-F(1), Jan 1, 2000. [33 Pages]
64. H&K Stone Enterprises, Inc. Articles of Incorporation, March 23, 2000. [1 Page]
65. Deeds from Pate Supply Company, Inc. to H&K Stone Enterprises, Inc., Apr 4, 2000. [6 Pages, legal size paper]
66. Deeds from Pate Supply Company, Inc. to H&K Stone Enterprises, Inc., April 19, 2000. [6 Pages, legal size paper]
67. Property Record Showing Deese selling Stone property for more than $300,000
68. Property Record showing Stone selling property for more than a million dollars.
69. Defense Evidence T pp 6168-6271, 6300-6325, 6336-6342, 6571-6596 [162 Pages]
70. Affidavit of Bobbie Jo Murillo Lowery [1 Page]
71. Holmes Affidavit, conversation with Woodberry Bowen. [2 Pages]
    a. Exhibit 71-I – Music Contract with Green
    b. Exhibit 71-J – Bowen time sheet
72. [UNDER SEAL] Nelson Deposition, May 6, 2013 [35 Pages]
73. State v. Daniel Green, 129 N.C. App. 539 (1998) [14 pages]
74. [UNDER SEAL] Deaver Deposition, April 29, 2013 [55 pages]
75. SBI Report on Demery Statement, May 1995, [26 Pages]
76. "U'Allah Jury Nears Deliberations," Fayetteville Observer, Feb 26, 1996 [3 Pages]
77. Demery DOC Record [3 Pages]
78. Defense Closing Argument, T pp 7036-7300. [265 Pages]
79. Letter from Bowen to Green regarding music contract, Jan 6, 2000. [1 Page]
80. Demery's handwritten Statement, Aug 15, 1993 [15 Pages]

81. Christopher Jones testimony regarding picture of Lexus, T pp 1236-37, [2 Pages]
82. Exhibit 51, Picture of Lexus Front view [1 Page]
83. Goode v. Branker, 5:07-HC-2192-H, Oct 21, 2009, (E.D.N.C.) (Unpublished) [35 pages]
84. "Lawyer Says Neither Teen Killed Jordan," Fayetteville Observer, Aug 21, 1993 [2 Pages]
85. "Demery Sentencing Hearing to begin, Charlotte Observer, Apr 29, 1995 [3 Pages]
86. Demery Motion to Disclose Deals, "Trust Me" Agreements, April 29, 1996 [2 Pages]
87. Holmes Affidavit, Interview with Demery Attorney Hugh Roberts [2 Pages]
88. Demery Judgment for Life, May 20, 1996 [2 Pages]
89. Demery Judgment on unrelated robberies and assaults, October 3, 1997 [4 Pages]
90. Demery Motion to Withdraw Guilty Plea, Oct 4, 2007 [3 Pages]
91. "Jordan's Father's Killer up for Parole in 2016, WRAL, Mar 6, 2008 [2 Pages]
92. Demery "Now Eligible for Parole, Mark Locklear," The Robesonian,Mar 7 2008 [1 Page]
93. Statement of Bobbie Jo Murillo, Sept. 22, 1993, Art Binder [1 Page]
94. Affidavit of Terry Evans, [2 Pages]
95. Affidavit of Aaron Johnson, March 23, 2015, [4 Pages]
96. "Murder by the Road in Robeson County," Vibe Magazine, February 1994 [7 Pages]
97. H&K Enterprises Corporate Filing, 2003 [1 Page]
98. Carrington Affidavit, April 18, 2000, [2 Pages]
99. Affidavit of William Cruise, February 9, 2000 [2 Pages]
100. Gregory Weeks Affidavit, March 30, 2015 [10 pages]
101. Jason Sams Affidavit, January 20, 2000 [2 Pages]