No. JUDICIAL DISTRICT 16B

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Robeson
	)	93 CRS 15291-93
DANIEL ANDRE GREEN	)	

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PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Fourth Circuit U.S. Court of Appeals

North Carolina Supreme Court

North Carolina Court of Appeals

North Carolina General Statutes

United States Constitution

North Carolina Constitution

North Carolina Rules of Appellate Procedure

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TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

NOW COMES the Defendant-Petitioner, Mr. Daniel Andre Green, by and through undersigned counsel, and respectfully petitions this Court pursuant to N.C. R. App. P. 2 and 21(a)(1) and (e), N.C. Gen. Stat. § 15A-1422(c)(3), U.S. Const. amends. V, VI and XIV, and N.C. Const., art. I, §§ 19 and 23, to issue its Writ of Certiorari and review the Order Denying Motion for Appropriate Relief, Including Amendments and Supplements,[1] which the Honorable C. Winston Gilchrist filed on 7 January 2020 in Robeson County Superior Court in Case Nos. 93 CRS 15291 (first-degree murder), 15292 (robbery with a dangerous weapon), and 15293 (felonious conspiracy). Mr.

[1] Mr. Green's first amended MAR and five supplements shall be designated, collectively, as "MAR" unless a specific pleading is referenced.

Green respectfully asks this Court to: (1) Grant certiorari review; and, if granted, (2) reverse the trial court's erroneous denial of Mr. Green's right to an evidentiary hearing on his claims of newly discovered evidence, due process violations, and ineffective assistance of counsel, as set forth herein; and (3) give Mr. Green a full and fair opportunity to present his case for a new trial – relief which he has diligently pursued for the past 22 years. During those years, Mr. Green raised dozens of evidentiary and constitutional claims, supported by significant fact evidence, which, when proven true during an evidentiary hearing, would clearly establish the unjust nature of his conviction and his right to a new trial.

In support of this Petition, Mr. Green shows the following:[2]

I. PROCEDURAL HISTORY

A. Arrest, Indictments, and Appearance of Counsel

The Robeson County Sheriff's Office arrested Mr. Green, and his co-defendant, Larry Martin Demery, on the morning of 15 August 1993. (App.

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[2] Mr. Green has filed an Appendix and all cited transcripts with this Petition. The Appendix shall be designated as "App. p ___ ." The transcripts from Mr. Green's trial shall be designated as "T p ___ ." The transcripts from other proceedings shall be designated as "[Date of proceeding or first date of proceeding] T p ___ ."

Exhibits shall be designated as: State's trial exhibits ("State's Exhibit No. __"); Defendant's trial exhibits ("Defense Exhibit No. __ "); Defendant's MAR Exhibits ("MAR Exhibit No. __ "); and State's MAR Exhibits ("State's MAR Exhibit No. __ ").

pp 21-23, 39-41; T pp 3793-3795, 4759-4760).[3] Demery, a Native American male, turned 18 years old two weeks earlier. (App. p 41). Mr. Green, a Black male, was also 18 years old. (App. p 23).

On 7 September 1993, the Robeson County grand jury indicted both young men with three felony counts in connection with the 23 July 1993 death of James Jordan: first-degree murder, robbery with a dangerous weapon, and felonious conspiracy to commit robbery with a dangerous weapon. ("Jordan Case"). (App. pp 42-47). The robbery indictments alleged that Demery and Mr. Green took Jordan's 1992 Lexus 400 and "personal items therein" with a value of $40,000 by possessing and using a handgun. (App. pp 44, 47). L. Johnson Britt III, the then-recently elected Robeson County District Attorney, prosecuted the cases against Demery and Green for the State. (T p 2; 9 January 1995 T p 1). Public defender Angus B. Thompson and private counsel Woodberry A. Bowen were appointed to represent Mr. Green. (T p 2).[4] Hubert N. Rogers III and John W. Campbell were appointed to represent Demery. (9 January 1995 T p 1).

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[3] Demery was arrested at 4 a.m., one minute after the tape-recorded portion of his interrogation ended. (9 January 1995 T pp 301-302). Mr. Green was booked into the Robeson County jail at 7:10 a.m. (4 October 1995 T p 761).

[4] During his representation of Mr. Green in his criminal case, Bowen engaged in a contract for the sale of Mr. Green's prospective music lyrics to Willie French Lowery, a business associate who operated the Lumberton recording studio owned by Bowen. (App. pp 896-900). A worker in Bowen's office notarized the contract during jury selection in Mr. Green's case. (App. pp 898-899, 911).

Following the Jordan Case indictments, the grand jury indicted Mr. Green in two other cases on 2 October 1995:

- Robbery with a dangerous weapon, involving Ernest and Lorette Rezendez, and Joseph and Dorothy Tedeschi, on 4 July 1993 at the Family Inns of America Motel ("Family Inns Case"); and
- One count each of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and larceny of a firearm, involving Lowry's Short Stop convenience store clerk Clewis Demory on 15 July 1993 ("Short Stop Case"). (App. pp 389-392).

The Family Inns Case indictments alleged, in relevant part, that Demery and Mr. Green stole a VCR camcorder from one of the couples, while the Short Stop Case indictments claimed the two men shot Demory and stole his .38 caliber revolver. (App. pp 389-392).

B. Demery Pleads Guilty; Mr. Green Maintains His Innocence

On 21 March 1995, the Honorable Gregory A. Weeks denied Demery's motion to suppress statements he gave to law enforcement officers on the morning of 15 August 1993. (App. pp 313-331).[5] In the wake of that ruling,

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[5] In the order, Judge Weeks noted that Demery was not under arrest at the time he was taken to the Robeson County Sheriff's Office for an interrogation, where he was read and waived his *Miranda* rights. (App. pp 314-315). Judge Weeks found that Demery was subjected to a custodial interrogation, but his constitutional rights were not violated. (App. pp 325-330).

Demery pled guilty on 27 April 1995 before Judge Weeks in Robeson County Superior Court to all Jordan Case felonies, including first-degree murder under the felony murder rule.[6] (App. pp 332-335; T p 4173). According to a signed, written memorandum attached to his Transcript of Plea, Demery entered the plea knowing that he would plead guilty to:

- First-degree murder, with life in prison or death as punishment;[7] and
- 12 other felonies alleged in nine other indictments, which would be consolidated in a sentence of 40 years, to run concurrently or consecutively with the murder sentence at the court's discretion. The sentence included Demery's remaining Jordan, Family Inns, and Short Stop case charges as well as unrelated charges of assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and three counts of breaking and entering. (App. p 334; T pp 4173-4174).

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[6] Mr. Green's postconviction counsel was unable to obtain the transcripts from Demery's 27 April 1995 plea hearing and 3 October 1997 sentencing hearing. Counsel contacted Demery's trial attorney, Rogers. The attorney stated he would not have requested transcripts because there was not going to be an appeal.

[7] The plea agreement provided that a hearing pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982), would take place prior to Demery's first-degree murder sentencing. (App p 334). Under *Enmund*, the Eighth Amendment protects a person convicted of felony murder from the death penalty if the person did not "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund*, 458 U.S. at 797.

Additionally, the agreement required Demery to speak with State Bureau of Investigation (SBI) special agent Kim Heffney and Robeson County Sheriff's Office (RCSO) detective Anthony Thompson about the Jordan, Family Inns, and Short Stop cases. (App. p 334; T p 4174). He also agreed to testify at Mr. Green's trial. (App. p 334). The memorandum further stated there were "no explicit or implicit agreements between the parties other than these contained in this memorandum of agreement." (App. p 334). The court was to continue entry of judgment in Demery's case until after Mr. Green's trial. (App. p 334). The plea agreement required the State to stipulate to two mitigating factors at sentencing – Demery's admission of guilt at an early stage, and his aid in the apprehension of another capital felon. (App. p 334). At the time he entered the plea, Demery faced four other felony charges and one misdemeanor charge which his plea did not address. (App. pp 518-527).

Pursuant to his plea agreement, Demery talked with Heffney and Thompson between 2 and 8 May 1995. (App. pp 336-361). One month later, on 6 June 1995, the State dismissed three felony forgery charges against Demery that were not part of his plea arrangement. (App. pp 518-523). After entering his plea, Demery served six months in the N.C. Department of Corrections before being sent back to the Robeson County Detention Center while waiting to testify in Mr. Green's case. (T p 4183). During his stay there, Robeson County Sheriff Hubert Stone allowed Demery to be escorted home to

eat dinner and spend time with his fiancée (Angela McLean) and their baby, who was born 22 September 1993 while Demery was incarcerated. (T pp 4184-4185). Demery told a jailer, Richard Locklear, that Britt said Demery could expect to receive "40 years for armed robbery, life for the murder," with the sentences to run concurrently. (T p 6583-6584).

Mr. Green maintained his innocence and pled not guilty to all Jordan Case felonies. (App. pp 307-309). He went to trial with the charges from the Family Inns and Short Stop cases unresolved. (App. 558-561).

C. Trial, Sentencing, and Plea Agreements

After a series of pretrial hearings, Mr. Green's capital trial started before Judge Weeks at the 7 November 1995 Criminal Session of Robeson County Superior Court. (7 November 1995 T p 1). Demery gave more testimony than any other State's witness: He testified for six days between 29 January and 7 February 1996, with his testimony contributing more than 1,000 pages to the trial transcript. (App. pp 399-424; T pp. 3859-4998).[8] Demery testified, in general, that he saw Mr. Green shoot and kill Jordan, and that they conspired to dispose of Jordan's body and take his car and personal items. (T pp. 3859-4998).

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[8] For the Court's convenience, Mr. Green has provided the trial transcript index of witnesses and exhibits. Please note that the index is missing Volumes 7, 20-23, 26, and 43. (App. pp 399-424).

Mr. Green presented evidence but did not testify. (App. pp 412-415; T pp 6174-6792, 6952-6953). In closing argument, the prosecutor, Britt, commented twice on Green's decision not to testify – after having said earlier in the trial that he did not "care what the rules of professional conduct were" and noting the "elementary principal of constitutional criminal procedure" that he could not comment on Mr. Green's decision to not testify. (T pp 7289-7290, 7296, 7320). Mr. Green's counsel moved for a mistrial. (T p 7321-7334). The court asked Mr. Green if he agreed. (T p 7334).[9] Mr. Green stated that he believed the State was deliberately trying to get a mistrial, and he disagreed with his counsel's motion. (T pp 7335). The court appointed an attorney unrelated to the case from "the room next door," Kenneth Ransom, to advise Mr. Green on the motion since "he[] [was] available." (T pp 7338-7341). After meeting with Mr. Green, Ransom filed a document, signed and verified by Mr. Green, in which Mr. Green waived his right to move for a mistrial. (T pp 7347-7350). The trial court found that Mr. Green waived his right, instructed the jury to disregard the State's comments, and instructed the jury on the defendant's privilege to not testify. (T pp 7350-7351, 7353-7354, 7443-7444).

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[9] The trial court intervened between Mr. Green and his trial counsel three other times during the trial. (T pp 939-1013, 2651-2711, 3773-3787). During one of those interventions, the court appointed another independent attorney, Ertle Knox Chavis, to consult with Mr. Green about his attorneys' trial decision. (T pp 982-998).

On 29 February 1996, the jury returned verdicts finding Mr. Green guilty of all three Jordan Case felonies, including first-degree murder under the felony murder rule (as opposed to deliberate and premeditated murder). (App. pp 425-427; T pp 7546-7547). On 12 March 1996, following a sentencing hearing pursuant to *Enmund*, the jury recommended life imprisonment for Mr. Green's murder conviction. (App. pp 436-445; T pp 8391-8392).

On that same date, 12 March 1996, Judge Weeks sentenced Mr. Green in the Jordan Case to life imprisonment for first-degree murder and a consecutive term of 10 years for conspiracy to commit robbery with a dangerous weapon, and arrested judgment on the robbery with a dangerous weapon conviction.[10] (App. pp 428-435; T pp 8405-8406). On 22 June 1998, Mr. Green entered no-contest pleas to one count of robbery with a dangerous weapon in the Family Inns Case, and one count each of robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury in the Short Stop Case. (App. pp 558-561).[11] Judge Weeks ordered Mr. Green to serve a 28-year sentence consecutive to his sentence of life plus 10 years in the Jordan Case. (App. pp 558-561).

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[10] Mr. Green and Demery were sentenced under the Fair Sentencing Act, which applies to offenses committed between 1 July 1981 and 30 September 1994.

[11] Mr. Green has always admitted his involvement in the Family Inns Case and maintained that he did not participate in any way in the Lowry's Short Stop robbery.

Demery received a life sentence verdict from the jury on 20 May 1996 for his first-degree murder conviction. (App. pp 446-447).[12] On 3 October 1997, Judge Weeks entered judgment which allowed Demery's 40-year sentence for his other convictions to run concurrent with his life sentence. (App. pp 511-517).[13] On the judgment form, the court checked box 1(b) in the section labeled, "For Use with Fair Sentencing Act Felonies Only," which indicated that the court made no written findings of fact concerning Demery's sentence because it was imposed "pursuant to a plea arrangement as to sentence." (App. pp 514-517).[14] On 16 April 1998, the State dismissed a larceny of a firearm charge against Demery which stemmed from the Short Stop Case. (App. pp 526-527). A misdemeanor larceny charge pending at the time of his 27 April 1995 guilty plea was never served on him. (App. pp 524-

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[12] Judge Weeks noted on the judgment form that Demery was "not to be housed at any unit with [Mr. Green] unless active protective measures" were taken, and that "protection be given" to Demery "while housed within the Department of Correction." (App. p 446).

[13] In closing argument, the State told the jury, "Nobody guaranteed [Demery] that this 40 years is going to run together with any life sentence that he receives." (T pp 6426-7427).

[14] Demery's plea agreement left the decision of whether the sentences would run concurrently or consecutively to the discretion of the Court. (App. p 334). However, statutory law at the time required a consecutive sentence for the armed robbery. (App. p 1388). Judge Weeks applied the statutory consecutive sentence when he sentenced Mr. Green, yet he did not follow the statutory requirement for Demery's sentencing when he made the 40 years concurrent with the life sentence. (App. 514, 516, 558). Demery's sentence was corrected to consecutive when he was admitted to DPS, but he later received "the benefit of his plea agreement" when he was resentenced in 2008. (App. pp 1388, 1390-1392, 1395).

525). Demery currently is scheduled to be released from N.C. Division of Adult Correction custody in August 2024 via the Mutual Agreement Parole Program. (App. pp 1717-1721).

D. Appeal

Upon entry of the judgments in the Jordan Case on 12 March 1996, Mr. Green gave oral notice of appeal in open court. (T p 8407). On 2 June 1998, this Court upheld Mr. Green's convictions. *State v. Green*, 129 N.C. App. 539, 555, 500 S.E.2d 452, 462 (1998). Based on the dissent, which found that Mr. Green's statements were improperly admitted into evidence, Mr. Green appealed to the Supreme Court. *Id.*, 129 N.C. App. at 556-562, 500 S.E.2d at 462-466. The Court affirmed the majority opinion, *per curiam*, on 5 February 1999. *State v. Green*, 350 N.C. 59, 510 S.E.2d 375 (1999). The U.S. Supreme Court denied certiorari review. *Green v. North Carolina*, 528 U.S. 846 (1999).

E. Postconviction

1. Mr. Green's Appointed Counsel Fails to File an MAR

On 30 December 1999, Mr. Green filed a motion in Robeson County Superior Court in which he asked for appointment of counsel and law library access for the purpose of preparing an MAR. (App. pp 562-566) On 5 May 2000, he filed a *pro se* Motion Requesting Appointment of Counsel in Robeson County Superior Court in which he requested the appointment of counsel for the purpose of preparing a Motion for Appropriate Relief (MAR) and "[a]n

evidentiary hearing to decide substantial factual issues." (App. pp 567-572). On 16 May 2000, Judge Weeks appointed Carlton M. Mansfield to prepare a Motion for Appropriate Relief (MAR) on Mr. Green's behalf. (App. p 573).

On 21 July 2005, roughly five years into his appointment and without filing anything in the case, Mansfield moved to withdraw as Mr. Green's counsel. (App. pp 574-575). Based on his review of ethics rules and his consultation with a State Bar ethics advisor and the Appellate Defender, Mansfield claimed, he could no longer represent Mr. Green. (App. p 574). On 9 August 2005, the Honorable Robert F. Floyd, Jr., held a hearing on Mansfield's motion in Robeson County Superior Court. (9 August 2005 T p 2). During the hearing, Mr. Green expressed frustration with Mansfield's failure to communicate with him and investigate his claims. (9 August 2005 T pp 5-7). Mansfield reported that Mr. Green had filed a complaint against him with the State Bar, which the State Bar dismissed. (9 August 2005 T pp 15-16).

Before it ruled on Mansfield's motion to withdraw, the court ordered the attorney to submit an affidavit describing his "ascertainment of the merits" of Mr. Green's MAR and any "potential conflict" from the Bar complaint. (9 August 2005 T pp 16-17). Mansfield told the court that he would "see if I can get it done this week," and if not, he would submit the affidavit in October. (9 August 2005 T p 25). Six months later, on 1 February 2006, Mansfield submitted the affidavit. It was two pages. (App. pp 576-577).

In the affidavit, Mansfield stated that he reviewed "all materials" associated with Mr. Green's trial, researched and investigated Mr. Green's allegations, and determined that Mr. Green had "no meritorious claims" that would gain him relief in an MAR.[15] (App. p 577). He did not mention Mr. Green's Bar complaint. (App. pp 576-577).

More than two years later, Mansfield was still Mr. Green's attorney. On 25 August 2008, Mr. Green filed a *pro se* Amendment to Defendant's Motion for Appropriate Relief and/or Defendant's Motion for Appropriate Relief in Robeson County Superior Court. (App. pp 578-679). He also filed a Petition for Writ of Mandamus in this Court on 16 September 2008 seeking Mansfield's immediate removal as his counsel. (App. pp 680-690).[16] On 29 September 2008, Judge Floyd filed an order which allowed Mansfield to withdraw. (App. p 691). Despite representing Mr. Green for eight years, Mansfield never filed an MAR. (App. p 691). In the order, the court noted that Mr. Green had filed a *pro se* MAR and "undertaken to represent himself in this matter." (App. p 691).

On 2 October 2008, Judge Floyd entered an order summarily denying all claims which Mr. Green filed in his 25 August 2008 *pro se* MAR except the

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[15] Mansfield affirmed that he got the transcript, the clerk file, and the discovery provided to Mr. Green's trial counsel. However, he did not mention getting trial counsel's files. (App. pp 576-577).

[16] This Court dismissed the Petition without prejudice. (App. p 693).

claims of ineffective assistance of trial counsel and the State's failure to disclose tape recordings of telephone conversations of two witnesses. (App. p 692). The court appointed Carl Ivarsson to assist Mr. Green. (App. p 692). However, on 4 December 2008, Ivarsson moved to withdraw as counsel, citing his lack of any experience with postconviction cases. (App. p 694).

2. With New Counsel, Mr. Green Moves for Postconviction Relief

On 18 February 2009, the Office of Indigent Defense Services appointed C. Scott Holmes to represent Mr. Green in his MAR. (App. p 695). Ian A. Mance joined as co-counsel in September 2013. (App. p 714). Five years after Holmes' appointment, during a 7 February 2014 hearing, Judge Floyd stated that he would permit the attorneys to conduct discovery and "would like to have a full, final hearing after full investigation." (7 February 2014 T pp 17-18). Judge Floyd said he wanted to give counsel an opportunity to prepare an MAR that would "maybe get some resolution and give Mr. Green a full, ample opportunity to be presented whatever he has before the Court." (7 February 2014 T p 18). After going through extensive discovery and receiving extensions of time, Holmes and Mance filed the First Amended Motion for Appropriate Relief ("AMAR") on 6 April 2015, 15 years after Mr. Green first requested postconviction counsel to help him with preparing an MAR and presenting his claims at an evidentiary hearing. (App. pp 696-865). It was the first attorney-filed MAR in Mr. Green's case, and it raised seven claims, with

one of the claims noting several instances of ineffective assistance of counsel. (App. pp 696-865).

The AMAR initiated extensive litigation. Mr. Green filed five Supplements to the AMAR between 30 March 2016 and 4 October 2018, raising over 20 additional postconviction claims. (App. pp 1144-1155, 1239-1245, 1257-1287, 1338-1386).[17] The State filed four Answers to the AMAR and its supplements between 2 December 2015 and 26 November 2018. (App. 946-1143, 1228-1238, 1292-1325, 1523-1608). Mr. Green filed a Reply to the State's Answer to the AMAR on 30 March 2016. (App. pp 1156-1202).

The State also filed several Motions to Strike Inadmissible Evidence, including newspaper articles and any affidavits containing "inadmissible hearsay statements." (App. pp 933-945, 1217-1221, 1249-1251). Mr. Green responded to the motions. (App. pp 1203-1216, 1222-1227). The Honorable Michael E. Beale addressed the motions in two separate orders. (App. pp 1246-1248).

On 20 September 2017, the State filed a Motion to Deny Motions for Appropriate Relief on the Pleadings, asserting that all of Mr. Green's claims were "procedurally barred, completely without merit, or both," making an

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[17] Christine C. Mumma of the N.C. Center on Actual Innocence (NCCAI) entered Notice of Appearance as Mr. Green's counsel in open court on 16 December 2016 and joined Holmes and Mance in the filing of the Third Supplement on 14 June 2017. (App. pp 1257-1274). On 3 August 2018, Cheryl A. Sullivan of the NCCAI entered Notice of Appearance as Mr. Green's counsel. (3 August 2018 T pp 11-12).

evidentiary hearing unnecessary. (App. p 1288). On 15 March 2018, the State filed a Request for a Non-Evidentiary Hearing on the motion. (App. pp 1326-1333).

In August 2018, after Mr. Green informed the court that he would be filing a Fifth Supplement, Judge Gilchrist ordered that the pleadings would be "closed" after the State filed its Answer to the Fifth Supplement. (3 August 2018 T p 19). After Mr. Green filed the Fifth Supplement, the State filed a renewed motion to deny Mr. Green's MAR on the pleadings on 26 November 2018 and another motion to strike Mr. Green's evidence. (App. pp 1515-1522).

3. Court Denies Mr. Green's MAR Without an Evidentiary Hearing

The Honorable C. Winston Gilchrist presided over a non-evidentiary hearing on Mr. Green's MAR on 5 December 2018 in Lee County Superior Court for the purpose of determining which of Mr. Green's postconviction claims warranted an evidentiary hearing. (5 December 2018 T p 3). After hearing arguments, Judge Gilchrist stated he would take the matter under advisement and, with the parties' consent, rule out of county, term, and session. (5 December 2018 T p 112-113).[18]

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[18] Over the course of the three-hour hearing, Judge Gilchrist asked the parties three questions concerning their arguments. (5 December 2018 T pp 47, 99-100, 111).

On the morning of 6 March 2019, Judge Gilchrist, through the Superior Court Trial Court Coordinator, e-mailed counsel for Mr. Green and the State to inform them that he had summarily denied Mr. Green's MAR, "including all amendments and supplements," in its entirety without an evidentiary hearing. (App. p 1609).[19] Judge Gilchrist provided no reasoning for his decision in the e-mail. (App. p 1609). He asked the State to draft a proposed order. (App. p 1609). On the afternoon of 6 March 2019, Mr. Green filed a Motion for Reconsideration and submitted a claim of newly discovered evidence – Mr. Green's co-defendant, Demery, had recanted his testimony – and a claim alleging the State had presented false evidence. (App. pp 1612-1618). On 8 March 2019, the State filed its response to the motion and moved to strike the affidavit which Mr. Green's counsel filed with the Motion for Reconsideration. (App. pp 1620-1631). On 8 March 2019, Judge Gilchrist, again through the Superior Court Trial Court Coordinator, informed both parties by e-mail that he would deny the motion, and he asked the State to include the ruling in its proposed order. (App. p 1619). Again, Judge Gilchrist provided no reasoning for his decision in the e-mail. (App. p 1619).

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[19] Holmes voluntarily withdrew from the case at the 3 August 2018 hearing. (3 August 2018 T p 19). Mance voluntarily withdrew from the case in September 2018, but current counsel was not copied on Judge Gilchrist's e-mail allowing his withdrawal. (App. pp 1334-1337).

Ten months later, on 7 January 2020, Judge Gilchrist filed the 79-page Order Denying Motion for Appropriate Relief, Including Amendments and Supplements ("Order Denying MAR"). (App. pp 1632-1710). Based on his findings of fact and conclusions of law, Judge Gilchrist denied Mr. Green an evidentiary hearing, summarily denied all claims raised in his MAR "and all amendments and supplements," and ruled that "[a]ny and all claims by [Mr. Green] not specifically addressed herein are also without merit and are denied." (App. pp 1707-1708).[20] Judge Gilchrist adopted the State's proposed order with very few substantive changes.[21] The court's relevant findings and conclusions are discussed in more detail in "Reasons Why Writ Should Issue," *infra*.

4. Mr. Green Seeks Reversal of the Order Denying His MAR

On 12 February 2020, Mr. Green filed a Notice of Intent to Seek Review and Request for Appointment of Appellate Counsel. (App. pp 1711-1712). Based on Mr. Green's indigency status, Judge Gilchrist entered an Order for Appointment of Appellate Counsel on 25 February 2020. (App. p 1713). On 9

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[20] This Court recently disavowed this kind of gatekeeper order, holding that a trial court does not have the "authority to enter a gatekeeper order declaring in advance that a defendant may not, in the future, file an MAR; the determination regarding the merits of any future MAR must be decided based upon that motion." *State v. Blake*, __ N.C. App. __, __, 853 S.E.2d 838, 848 (2020) (citing N.C. Gen. Stat. § 15A-1420(c)).

[21] Six substantive changes appear in the Order prior to Page 12. Only one change appears in the remaining 67 pages.

April 2020, the Office of the Appellate Defender appointed Narendra K. Ghosh to serve as Mr. Green's appellate counsel. (App. p 1714). On 8 September 2020, attorneys Christine C. Mumma and Guy J. Loranger of the N.C. Center on Actual Innocence filed a Notice of Appearance in Mr. Green's appeal.[22] (App. p 1714). On 16 October 2020, Judge Gilchrist filed an order permitting Ghosh to withdraw as counsel. (App. p 1716).

II. STATEMENT OF FACTS

A. Mr. Green's Background

Mr. Green's case traces to his arrest at age 15 and his prosecution as an adult for assault with a deadly weapon with intent to kill inflicting serious injury. (App. pp 362-385). On 19 March 1991, Mr. Green entered an *Alford* plea to the charge in Robeson County Superior Court. (App. p 363). Later, in 1995, the conviction was vacated after an MAR hearing revealed that his attorney, assistant public defender Freda B. Black, failed to investigate his case and discover exculpatory evidence which supported a claim of self-defense. (App. pp 362-385). Because of the conviction, Mr. Green spent more than two years in prison before he was released on 4 June 1993. (T pp 7920-7921, 7951-7952).

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[22] Mr. Green is still indigent. Appellate counsel are representing him *pro bono*.

Growing up, Mr. Green's family moved between Philadelphia, Robeson County, and Florence, S.C., and he changed schools a "mind-boggling" 14 times in 10 years. (T pp 7764-7765, 7864, 7889). Through those moves and school transfers, he maintained a close friendship with Demery. (T p 3861-3862). They met in the third grade and saw each other through the years except when Mr. Green was incarcerated from March 1991 to June 1993. (T pp 3861-3862, 3867-3869). During that period, Demery went on a crime spree, committing 10 offenses for which he was later convicted, including three counts of felonious breaking and entering, three counts of felonious larceny, and one count each of robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. (App. pp 514-517). In one case, Demery threatened a woman with a .38-caliber pistol during a robbery and hit her with a "hard cinder block," which fractured her skull and caused hemorrhaging in her brain. (App. pp 2-3, 334).

After his release from prison in June 1993, Mr. Green returned to Robeson County and worked. (T pp 7951-7952). According to Demery, at some point in June, they reunited. (T pp 3861-3864). Demery had been working as a vehicle escort for Crestline Mobile Homes ("Crestline") before he chose to quit and "ma[k]e a career out of committing crimes." (T pp 3870-3871, 3934).

B. State's Case

1. Opening Statement

In its opening statement, the State promised to show the jury that, in the early morning of 23 July 1993, Demery and Mr. Green went to the Quality Inn at the crossroads of I-95 and U.S. 74 in Lumberton with a plan to rob someone. (T pp 19-20). They happened to see Jordan's car parked on the side of a service road near the motel. (T p 21). The State said the evidence would prove that Demery and Mr. Green went up to Jordan's car, saw the passenger side window was down, and looked inside. (T p 22). They saw Jordan in the reclined driver's seat, sleeping. (T p 22). After they hid, waited for cars to pass, and "pumped each other up," they went back to the car, with Mr. Green carrying a .38 caliber revolver. (T pp 22-23). As Demery stood beside him, Mr. Green pulled the gun from his pants, pointed it through the window, and shot Jordan once as he woke up. (T p 23). The two of them later drove Jordan's car to a creek located near Pea Bridge Road in Marlboro County, South Carolina, where they disposed of his body just across the state line. (T pp 26-27).

2. State's Evidence

In support of this theory, the State presented six weeks of evidence between 3 January and 15 February 1996. (T pp 76-6136). The evidence

consisted of 62 witnesses and more than 170 exhibits. (App. pp 399-424). Only one witness testified that he saw Mr. Green shoot and rob Jordan: Demery. (T pp 3381-3382, 3966-3968, 4162, 4261, 4480-4481, 4903-4904). According to the State's evidence:

a. Jordan Left the Wilmington Area After Midnight on 23 July 1993

Jordan was the father of former University of North Carolina and NBA basketball star Michael Jordan. (T p 108). The son gave his father gifts that included a 1986 NBA All-Star ring, a replica 1990-91 NBA Championship ring, a 1991-92 NBA Championship watch, and a red 1992 Lexus SC400 car. (T pp 108-109, 150-155). On 22 July 1993, Jordan arrived at James and Carolyn Robinson's home in Castle Hayne to go to a friend's funeral in nearby Wilmington. (T pp 113-116). Carolyn Robinson took photos of Jordan in her driveway, standing in front of his Lexus and wearing a white, patterned polo shirt. (T pp 117-121). After he drank at least one vodka drink and ate dinner at the Robinsons' home, Jordan left at around 12:30 a.m. to return to Charlotte. (T pp 127-128, 130, 139, 141-142).[23] He drove towards U.S. 74, which runs northwest from the Wilmington area through Robeson County. (T

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[23] In opening, the State claimed that Jordan drank an impairing amount of alcohol at dinner. (T pp 18-19). Jordan had a 0.154 ethanol level in his liver, according to a post-mortem toxicology report by the South Carolina State Law Enforcement Division (SLED) forensics lab. (T p 725-726). Because the body produces alcohol when it decomposes, the level may have been elevated, opined Dr. Joel Sexton, who performed the autopsy of Jordan's body. (T p 631, 683, 726).

p 134-136). Jordan never called the Robinsons after he got home as he had promised. (T p 128). He also did not show up for a flight he was scheduled to take to meet his son in Chicago. (App. p 1399).

b. Within Weeks, Jordan's Body and Car Were Discovered

On 3 August 1993, 12 days after Jordan was last seen, Hal Locklear found a body while fishing in Gum Swamp along Pea Bridge Road, an area in Marlboro County, South Carolina, which is near the North Carolina border. The area is also about one mile from Crestline, where Demery had worked. (T pp 188-189, 191-194, 3990, 6031). The body was floating in the water and hung up on a tree limb downstream from a bridge. (T pp 193, 213, 235-236). Locklear called law enforcement. (T p 195).

Several agencies responded, including the McColl (S.C.) Rescue Unit, which used a boat to remove the body to the bank. (T pp 407-409, 417-420). Due to discoloration and decay, the body's race was unknown. (T pp 407, 420). The responders took the body to a nearby McColl Rescue Squad facility. (T p 438). Marlboro County coroner Tim Brown checked the body for identification and found no wallet, money, car keys, or jewelry. (T pp 434, 478-479). Brown put the body in his truck and drove to Marlboro Park Hospital, where he met Palmetto Professional Services (PPS) driver Art Sprenger. (T pp 479-481, 751). Sprenger stored the body overnight at the PPS office in Darlington, S.C. (T pp 752-753).

On the morning of 4 August 1993, Sprenger took the body to Newberry (S.C.) County Memorial Hospital for an autopsy by Dr. Joel Sexton. (T pp 487, 631-633, 754-758). Sprenger stayed for the autopsy. (T pp 757-758). Sexton took photos of the body and identified it as a "Negroid or black" male and noted "moderate decomposition with odor, loss of epidermis, loss of head hair, bloating, discoloration, and maggot infestation." (App. p 4; T pp 637-638, 757). He estimated the man had been dead for one to five weeks. (App. p 9; T pp 680-681, 714-715).

Sexton removed a round-nosed, .38 caliber bullet from the body. (T pp 633, 642-643, 694). He saw no exit wound. (T p 641). He determined the cause of death to be a "penetrating, .38 caliber gunshot wound [to the upper] right chest," with the bullet having passed downward, at a trajectory of 10-to-15 degrees, through the aorta to the lower lobe of his left lung, causing internal bleeding. (App. p 9; T pp 642, 680). Sexton noted finding two pints of "bloody fluid" in the man's left chest cavity. (App. p 7; T pp 718). The human body typically contains 10 pints of blood, he said. (T p 717). Because the bullet struck the aorta, a "very short period" would have passed before death, he said. (T p 685).

Sexton identified State's Exhibit No. 22 as the shirt he removed from the body. (T pp 763-764). He described it as a polo type shirt with a white background, maroon and greenish-gray large stripes, and smaller black or

dark blue stripes around the sleeves. (T pp 635, 690). He testified that the shirt was in "substantially the same condition" as when he removed it from the body on 4 August 1993. (T pp 690-692). However, he stated, at the time of the autopsy, the shirt was "quite wet and covered with muddy material and decomposition fluid." (T p 688). When State's Exhibit No. 22 was shown to him in court, Sexton described seeing "multiple holes," or "defects" in the upper right chest and three "defects" on the lower right side, "about the area of the rib cage." (T pp 637, 690, 719). Mr. Green's counsel did not cross-examine Sexton about the discrepancy between his autopsy report and his testimony at trial concerning the hole he identified in the shirt's upper right chest area. (T pp 714-738).[24]

Brown authorized Sexton to remove the body's jaws and hands during the autopsy for the purpose of identification. (T pp 487-488, 554-555). Sexton gave the jaws to a Newberry dentist, Dr. Robert Brown, who prepared a dental chart and took X-rays of the jaws. (T pp 651, 817, 819, 821). Sexton gave the hands and several other items to SLED agent David Collins at the

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[24] In his autopsy report, Sexton described the shirt and its colored stripes. (App. p 6). He noted that the body's only penetrating wound was in the right chest area, but there was "no hole in the shirt at that point." (App. p 6). Directly below that location were "three holes that would line up with the hole in the chest if the shirt were pulled up approximately one foot," Sexton noted. (App. p 6). Sexton also made notes about the absence of a hole in the upper right chest of the shirt and the three smaller holes on a diagram. (App. p 11).

hospital, including a blood sample and the .38 caliber bullet removed from the body. (T pp 642-643, 649-650, 1028-1030).[25] Sprenger took the body to Caughman-Harman Funeral Home in Lexington, S.C. (T pp 489, 762).

Brown, the coroner, ordered the body to be cremated on 7 August 1993 before it was identified – the first time he had done that in his career. (App. p 12; T p 603). Five days later, on 12 August 1993, based on a comparison of dental X-rays and other records, Dr. Brown, the Newberry dentist, concluded that the body was that of James Jordan. (T p 393, 911-912). Also, one identifiable thumb print obtained from the hands matched Jordan's fingerprints on file with the FBI. (T pp 1089-1092, 1172-1173, 1196-1197). After the body was identified, the coroner ordered the jaw and hands to be cremated, and he flew to Wilmington to personally deliver the remains to the funeral home. (App. p 13; T pp 538-539).

After the autopsy, Sexton put the man's clothes (including the shirt) in a plastic bag and gave it to Collins, who gave the bag to Sprenger. (T pp 646, 687-688, 759, 761, 781-783, 785-791). Sprenger took the bag to the PPS office and left it with his boss, J. Todd Hardee. (T pp 761, 791, 795-796). Due to its "displeasing aroma," Hardee buried the bag that afternoon on the side of his warehouse. (T pp 798-800).

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[25] Collins, testifying as an expert in firearms identification, said the bullet (State's Exhibit No. 42-B) was most consistent with reloaded ammunition that could have been fired from a Smith & Wesson. (T pp 1032, 1040-1041, 1047-1048).

On 15 August 1993, SLED agent Michael Avery went to the PPS office to dig up the bag of clothing and take it to SLED headquarters. (T pp 800-801, 1106-1108). He did not see or examine the shirt for any holes or blood stains. (T pp 1121-1123). He placed the clothes under a "hood" to air dry them. (T p 1110). On 18 August 1993, after "these items were dried in the hood," Avery gave them to SBI agent Aprille Sweatt, who submitted them to the SBI Lab's Ron Marrs for testing. (T pp 1111, 1132-1133, 5252).

On the same day Jordan's body was found on 3 August 1993, Christopher Jones came upon Jordan's car. (T pp 1226). Jones said he saw the "Irish red" Lexus in the woods by his mother's home in the east Fayetteville area. (T pp 1226). Its windows were broken out, and its tires removed. (T p 1226). He did not see anything that looked like blood on or around the car seats. (T p 1250). Two days later, he tried to contact Jordan, the person whom he believed to be the car's owner based on paperwork he found in the car, but he was unsuccessful. (T pp 1227-1228). He then called the Cumberland County Sheriff's Office (CCSO). (T pp 1229-1230).

State Highway Patrol trooper Raymond Battle and a CCSO deputy, Scotten Williams, responded. (T pp 1231, 1267-1273, 1409-1410). At the scene, they saw the car and noticed its plate was removed. (T pp 1273, 1415). Battle observed an unspent .38 caliber bullet on the right back floorboard, which he left untouched. (T pp 1278, 1285). After a records check revealed

that the car had not been reported stolen, Williams left the car in the woods. (T p 1283).

Bothered by the CCSO's lack of action, and out of a sense of "duty and obligation," Battle began trying to reach the owner of the car. (T pp 1284-1294). On 6 August 1993, Battle's friend, Richard Crumpler, towed the car to Crumpler's Garage in Stedman at the request of Lawrence Hubbard, on whose property the Lexus was found. (T pp 1287-88, 1438-1441). Battle then made a series of phone calls to try to reach Jordan. (T pp 1288-1294). He spoke with two members of an investigative firm who were working for the Jordan family, and he learned that Jordan had been missing for "several days." (T pp 1294, 1329, 1331-1334). He relayed this information to his supervisor and ended his involvement with the case. (T pp 1294-96).

On 11 August 1993, the CCSO towed Jordan's car from Crumpler's Garage to a locked bay in the county garage in Fayetteville. (T pp 5561-5562). Lieutenant Durward Cannon processed the car for fingerprints and physical evidence. (T pp 5562-5563). He observed water in the floorboard and passenger seat areas and described the water as "puddled" about a quarter of an inch deep. (T pp 5561-5562). Although he got "several" latent fingerprint

lifts from the car's exterior, he made no positive identification from them. (T p 5565).[26]

He went through a two-step process to check the car's interior for blood stains. (T pp 5562-5564). First, he "luminoled" it and got a "minor" reaction for blood in the backrest area on the front passenger seat. (T pp 5563-5564, 5570-5571). But "[i]t was not enough for me to make a determination or be satisfied that there was a positive reaction for blood at that location at that time," Cannon said. (T p 5571). Second, he conducted a phenolphthalein test. (T pp 5563, 5572-5573). Even though he got a reaction, the reaction "was so faint that [he] was not sure that [he] could determine that the amount there was enough to substantiate the test." (T pp 5565, 5573). The amount of standing water in the car seats could have affected his test results, Cannon said. (T p 5565).

Although Cannon did not conduct a crystallin test, the SBI had the ability to do so. (T p 5573-5574). On 18 August 1993, the State Highway Patrol towed the car from Fayetteville to the SBI Crime Lab in Raleigh for further testing by SBI agent Jennifer Elwell. (T pp 5567-5568, 5593-5598).

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[26] SBI agent Jerry Richardson testified that a fingerprint lifted from the car's rearview mirror matched Demery, while prints from the CDs that were thrown out of the car matched both Demery and Mr. Green. (T pp 5824-5829, 5833-5836).

c. Phone Records Connected Jordan's Car to Demery and Mr. Green

Jordan's car had a mobile phone. (T p 126). The phone's records played a key role in the investigation of his death, according to the State. (T pp 36-38). "Each phone call that appeared on the record from July the 22nd through July the 24th was investigated in terms of who received the call, where that person was, and who that person may have talked to," Britt, the prosecutor, said in his opening statement. (T p 36).

The phone records, admitted as State's Exhibit No. 56, showed a change in the car's location. (App. pp 884-889). The last call placed from the Wilmington area was at 7:47 p.m. on 22 July 1993. (T pp 1606-1609). The next call placed on the phone was in the Lumberton area at 7:05 a.m. on 23 July 1993. (T pp 1607, 1611-1612). The phone calls from 22 July 1993 included calls to numbers in Charlotte, Castle Hayne, New York and Rock Hill, S.C. (T pp 1609-1610). The calls from 23 July 1993 through 1:37 a.m. on 26 July 1993 included numbers in Lumberton, Pembroke, Rowland, Wilmington, Fayetteville, Marion, S.C., and Philadelphia, P.A. (T pp 1610-1612).[27] The State asserted that Mr. Green made all but two of those calls. (T p 37).

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[27] In his opening statement, Britt noted that the first call on 23 July 1993 went to a "sex line," while the second call went to "a residence in the area between Pembroke

d. Investigators Interrogated the Two Young Men for Several Hours

Starting on 13 August 1993, the Cumberland County Sheriff's Office made a series of arrests and conducted several interviews in connection with Jordan's car. (T pp 1968, 6906-6907, 6910). The information from those interviews brought SBI agent Randy Myers, CCSO detective Art Binder, RCSO detective Mark Locklear, and RCSO deputy Junior Mitchell to Mr. Green's trailer in Lumberton shortly before 9 p.m. on 14 August 1993. (T pp 5623-5629, 6836-6840, 6887, 6893). When he met Mr. Green at the door, Myers asked if he would go with them to the sheriff's office to discuss "stolen car parts that came off a Lexus," and he asked for consent to search Mr. Green's room. (T p 5630). Mr. Green agreed to go after he got dressed. (T p 5631). As he walked away from the door, Mr. Green's mother asked him if the officers would find anything, and he replied, "[N]o, not what they are looking for." (T pp 5633-5634, 5636-5637). She gave the officers consent to search her trailer. (T pp 5632-5633).

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and Wilmington." (T p 37). According to a 19 November 1993 SBI report, the second call was placed at 10:36 a.m. to the phone number (919) 521-3365, or Hubert Larry Deese's number in Pembroke. (App. p 880; T pp 1619-1620). Hubert Larry Deese is the son of then Sheriff Hubert Stone. (App. p 928). "It is unknown who made the call, but there are no indications that the call went through because the land time is zero but the air time showed one minute. This number was called only once," the report states. (App. p 880).

Myers and Binder, as well as FBI agent John Strong and CCSO lieutenant Jimmy Henley, took Mr. Green to the sheriff's office. (T pp 6840). On the way, they stopped and met other officers, including CCSO detective Don Smith, who witnessed Mr. Green sign a form for consent to search his room. (T pp 5363-5366, 5638-5639, 5674-5675). Smith and other officers, including CCSO detective Durward Cannon, RCSO detective Anthony Thompson, and SBI agents Barry Lea and Kim Heffney, went to Mr. Green's trailer, got written consent from his mother, and searched his room. (T pp 4999-5002, 5370-5374, 5388, 5554, 5956-5960, 5963, 5965-5966). The officers seized only a briefcase with a missing button. (T pp 5002, 5010-5011, 5372-5374, 5967).

After he signed the consent form, Binder and Myers took Mr. Green to the Robeson County Sheriff's Office. (T p 6839). They put him in a front room. (T p 6839-6840). Without advising him of his *Miranda* rights, Binder, Myers, Henley, and Strong interviewed Mr. Green for the next seven hours, from 9:36 p.m. until 4:45 a.m., about Jordan and his car. (App. pp 19-20, 50-142, 192; T pp 6841-6842). The officers recorded two hours and 11 minutes of the interview, which was transcribed. (App. pp 50-191). After conferring with officers who were interviewing Demery, Myers and Binder advised Mr. Green of his *Miranda* rights at 4:45 a.m., which he invoked, ending the interview. (4 October 1995 T pp 57-58; App. pp 19-20).

In the interview, Mr. Green admitted that he made calls from Jordan's car phone. (App. pp 52-53, 74-78, 88-89; T pp 6872-6877, 6919-6920). He gave different accounts to questions asked about how he came into possession of the car. First, he said that a "dark" man drove him to Fayetteville in the car and offered him $50 to give it to a Black man named "Rick" who had a colostomy bag. (App. pp 54-57; T pp 6897-6898). Later, he said a man outside a motel in Rowland lent them the car for the weekend in exchange for two rocks of cocaine. (App. pp 116-117). He made no mention of going to a cookout at Kay Hernandez' home on the night of 22 July 1993, nor did law enforcement ask him about that date or any other specific date. (App. pp 50-191; T pp 6842, 6877-6878, 6938). Throughout the interview, Mr. Green consistently denied that he killed, robbed, or conspired to rob anyone. (App. pp 128-129, 134, 140, 145, 156, 160, 168, 179-180; T pp 6915-6916, 6918-6919). When Binder told him that he faced a "three-year presumptive" prison term if he admitted to being an accessory after the fact, Mr. Green continued to deny any knowledge of how Jordan died. (App. pp 168-172; T pp 6916-6918).

According to Demery, Mr. Green called him in the early evening of 14 August 1993 to say police officers were at his home. (T p 4080). Demery stayed in his parents' trailer and listened to the police scanner until around

11 p.m., when he determined officers were coming for him. (T pp 4080-4082). He fled and hid in a nearby field for two hours. (T pp 4082-4084).

The officers went to Demery's parents' trailer after they left Mr. Green's trailer. (T pp 5012, 5374-5375, 5392, 5556, 5970-5971). Demery's mother gave them written consent to search the property. (T pp 5375, 5393-5394). The officers seized a gold button from the inside of Demery's beige Ford Tempo which looked like the one missing from the briefcase they found earlier at Mr. Green's home. (T pp 5375-76, 5558-60).

After hiding, Demery went back to his parents' trailer and took a bath while his mother called the police. (T pp 4084-4086). At about 1 a.m., SBI agent Barry Lea went to Demery's home with Detective Mark Locklear and Deputy Junior Mitchell of the RCSO and took him into custody. (T pp 4086, 5014-5015). Even though Locklear believed arrest orders were "on file" for Demery in another case when the officers picked him up, no officer served him with an arrest order or warrant. (9 January 1995 T pp 33-34, 294, 298).

As with Mr. Green, the officers put Demery in a room in the Robeson County Sheriff's Office. (App. p 197; T pp 5015). In contrast to their treatment of Mr. Green, the officers read Demery his *Miranda* rights at the outset of his interrogation, which he waived. (App. pp 197-198; T pp 5015-5016). Seven officers then interrogated Demery for the next seven hours, or from 1:45 to 8:45 a.m. (T pp 5018, 5131). The officers recorded two hours and

four minutes of the interview, which was transcribed. (App. pp 197-302; T pp 5016-5017, 5115-5117).

Initially, Demery denied any participation in the robbery and murder of Jordan. (T pp 5018-5019). He told the officers that, roughly three weeks earlier, a man named "Rick" showed up at Mr. Green's trailer in a red Lexus, and they drove the car to Mr. Green's brother's home in the Fayetteville area. (App. pp 199-200; T pp 4899, 5018-5019). Rick left that night, and Demery left the next day, while Mr. Green stayed a week. (App. 199-200). Demery said he told that story because it was the one "Daniel had told me to tell, and it was supposed to have covered us both, you know, covered us both up, you know." (T pp 4899).

Because it appeared the recorder was "bothering" Demery and making him "nervous," the officers stopped the recording at 3:59 a.m. (App. pp 301-302; T pp 5379-5380, 5414).[28] After he turned off the recorder, Smith told Demery that the police had evidence of calls made from Jordan's car phone and statements from witnesses who placed Demery and Mr. Green in the Fayetteville area "doing away with the car." (T pp 5429, 5441). He told

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[28] At Demery's January 1995 suppression hearing, CCSO detective Jimmy Henley testified that Demery was arrested at 4 a.m. on 15 August 1993, one minute after the officers stopped taping his interrogation. (9 January 1995 T pp 301-302).

Demery he would not "give up" on him. (T p 5442).[29] According to Smith, the CCSO detective, Demery "had a little moistness around the eyes," went to the bathroom, then said he would tell the officers what happened. (T p 5442). Demery revised his story, and the officers asked SBI agent Lea to put his statement in writing. (App. pp 24-38: T pp 5022-5023, 5131, 5380-5381). Lea wrote the statement, and Demery signed it. (App. pp 24-38; T pp 5022-5023).

In his statement, Demery made no mention of going to the Hernandez home on 22 July 1993. (App. 24-38). He stated that he and Mr. Green went to the Quality Inn on the early morning of 23 July 1993 with a plan to rob "someone" when they saw the Lexus parked on the shoulder of a service road, with its parking lights on, passenger window down, and someone sleeping inside. (App. pp 24-27; T pp 5026-28, 5382-5383). Mr. Green told Demery to get his car and meet him at the bridge by his home. (App. p 27; T pp 5028, 5383). Demery said that at the time, Mr. Green had a .38 revolver, while Demery had no gun. (App. p 25; T p 5026). According to Demery, Mr. Green told Demery his plan was to pull out his gun and make the person drive him to the bridge, where they would tape him up and eventually leave him on the

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[29] In support of his motion to suppress the statements he gave to officers on 15 August 1993, Demery filed an affidavit in which he stated that the officers "made statements to me that indicated to me that I would face lighter charges and punishment if I made a statement and would face harsher charges and punishment, including the death penalty, if I did not make a statement." (App. p 195).

road. (App. p 27; T pp 5028). Demery went to the bridge, and Mr. Green showed up minutes later in the Lexus, with the man "hurt bad or dead" in the passenger seat, Demery said. (App. p 28; T p 5028-5029, 5383). Mr. Green told Demery the man had woken up and seen his face. (App. p 28; T p 5029). They later dropped the body off the bridge located near Crestline, where Demery had worked. (App. p 31; T pp 5031-5032, 5042-5043).

Immediately after his interview, Demery rode with Lea and RCSO detective Locklear to the different sites he had mentioned in his statement, including the site where he said he and Mr. Green purportedly first saw Jordan's car. (T pp 5018, 5039-5043). Lea testified that the officers never got out of their car or looked for blood at the scene. (T p 5154). On that same day, SBI agents Myers and Underwood and RCSO detective Sandy McMillan went to an area off Dunn Road in Robeson County and found items which Demery said he and Mr. Green tossed from Jordan's car on 13 August 1993, including clothes, shoes, and compact discs. (App. p 37; T pp 5640, 5679-5681). Later that day, Mr. Green asked to speak with Robeson County Sheriff Hubert Stone. (4 October 1995 T pp 652-654). He then rode with Stone and SBI agent Tony Underwood to his grandmother's house, where he showed them where to dig up Jordan's 1986 NBA All-Star ring. (4 October 1995 T pp 657-667; T pp 5694-5695, 5700-5702, 5705-5706, 5731).

On the night of 16 August 1993, Underwood, Lea, and fellow SBI agent Kim Heffney joined RCSO detectives Erich Von Hackney and Thompson in conducting a second search of Mr. Green's mother's trailer pursuant to a search warrant. (T pp 3701-3707, 5058-5059, 5976-5986). This search was conducted the day after Demery's 15 August 1993 interview. (T pp 5058-5059). In Mr. Green's bedroom, where Demery admitted he slept "many nights," including around the time of murder, (T pp 3282, 3284-3285, 3352-3353, 3861, 4004, 4013, 4045-4046, 4278-4279, 4306-4307, 4637), Lea found a blue-steeled .38-caliber Smith & Wesson revolver with brown-colored handles and "paper writings" inside a Genie 12-gallon shop vac. (T pp 3711-3713, 3723, 3795-3796, 5978-5983). The gun was fully loaded. (T pp 3723, 3797, 5979). Lea and Underwood identified the gun as State's Exhibit No. 59-A. (T pp 3722-3723, 5071, 5987-5989). The officers also seized a videotape from a bookshelf in the trailer's front room. (T pp 3725, 3792, 5080). They took the tape because it was "separate and apart from those that were neatly lined along the bookshelf," Underwood said. (T p 3791).

e. As Part of His Plea Deal, Demery Testified Against Mr. Green

After his arrest, Demery gave multiple media interviews. On 16 November 1993, he spoke by phone from the Robeson County jail with a reporter from *The High Point Enterprise*. (App. pp 48-49; T pp 4605-4606, 4656-4657, 4901). Demery told the reporter that at around 2:30 a.m. on 23

July 1993, he dropped off Mr. Green at the Quality Inn after they had left "a friend's house." (App. p 48). Mr. Green told Demery he had "some things to take care of" at the motel, and he would meet Demery back at his trailer, Demery said. (App. p 48). Demery went to the trailer, and about 20 minutes later, Mr. Green drove up in the Lexus, with Jordan slumped over in the passenger seat. (App. p 48). Mr. Green told Demery to get in the car and said, "We got to get rid of this." (App. p 48). Demery never asked Mr. Green how the man died because he was afraid that his friend would tell him "something I didn't want to hear," he told the reporter. (App. p 49).

On 11 January 1994, Demery gave a second phone interview from the jail – this time with a reporter from *The Robesonian*. (App. pp 1446-1465; T pp 4605-4606, 4653-4656, 4685-4691, 4703-4708, 4711, 4901). Demery said that he and Mr. Green had gone to a party at the home of a friend of Mr. Green's mother before he dropped Mr. Green off at the Quality Inn to take care of "business." (App. p 1448). The first time he saw the Lexus and Jordan's body was when Mr. Green drove up to his trailer, Demery said. (App. p 1447). Mr. Green did not say what happened, and Demery did not ask. (App. p 1447).

On 2 May 1995, within a week after he entered his guilty plea on 27 April 1995, Demery went to the SBI district office in Fayetteville and spoke with SBI agent Kim Heffney and RCSO detective Thompson. (App. pp 1466-

1515; T p 6015-6016). With Demery's counsel present, they met for approximately 28 hours over a four-day span between 2 and 8 May 1995. (T pp 6015-6017). Demery discussed his interview with the officers over the course of his extensive testimony at Mr. Green's trial. (T pp 3859-4998).

Demery told the officers that, on 3 July 1993, he and Mr. Green talked about committing a robbery. (App. p 1494; T p 4824). Mr. Green took his mother's .380 caliber gun. (App. p 1494; T pp 3878, 4822-4823). Later that night, they made their way by foot to the Family Inns motel, wearing hooded sweatshirts, or "hoodies." (App. p 1495; T pp 4817-4819, 4826-4827). At about 4:00-4:30 a.m., they saw two couples in the motel's parking lot, robbed them, and fled into a cornfield. (App. pp 1496-1498; T pp 4831-4837, 4970-4971). Demery admitted that during the robbery he told one of the female victims to shut up or he would shoot her and that he threatened the victims with a gun. (App. p 1497; T p 4833-4836). Mr. Green kept a video camera from the robbery. (App. pp 1498-1500; T pp 4838-4842, 6053-6054).

According to Demery, on 15 July 1993, he stole two of his father's fully loaded .32 caliber guns – one with black handles for himself (State's Exhibit No. 74), and one with bone handles for Mr. Green (State's Exhibit No. 73). (App. pp 1508-1509; T pp 3878-3887, 3907, 3913-3914, 4276, 4858). Demery and Mr. Green rode around in Demery's Tempo, scouted places to rob, and picked Lowry's Short Stop. (App. p 1509; T pp 3889-3895). Mr. Green entered

first and gave a cue. (App. p 1509-1510; T pp 3896-3897). Demery went in with a bandana over his face and saw Mr. Green at the end of the counter with his gun drawn on the clerk. (App. p 1510; T pp 3896-3898). Mr. Green went around the counter to get the clerk's wallet and "mess" with the cash register while Demery yelled at him to hurry. (App. p 1510; T pp 3899-3900). Demery testified that from the front of the store, and out of the corner of his eye, he saw Mr. Green struggle with the clerk and shoot him three times. (App. pp 1510-1511; T pp 3899-3900, 4287, 4858, 4904). As they sped away in the car, Mr. Green showed Demery a .38 revolver that he took from the clerk, which Demery identified at trial as State's Exhibit No. 59-A. (App. p 1511; T pp 3903, 3915-3916, 4163-4164, 4178-4179, 4859).[30] Demery returned both of his father's guns to his family's trailer, putting three bullets into the one gun. (App. p 1511; T pp 3908-3909).

One week later, on 22 July 1993, Demery and Mr. Green discussed robbing a tourist at the Quality Inn, Demery said. (App. p 1466; T pp 3939-

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[30] Demory, the Short Stop store clerk, was age 82 at the time of trial. (T p 3587). He identified State's Exhibit No. 59-A as the gun he bought while working as a security guard in Maryland in 1961. (T pp 3588, 3615-3616). He testified that, before trial, he identified Mr. Green in a photo lineup as the man who shot him. (T pp 3618-3619). In court, he gave a qualified identification of Mr. Green, saying he looked "just like the one that was there, that I say was there, but I could not stand up and swear to it." (T pp 3621). Demory said he could not swear to the identification because "there's so many black people that look just alike." (T pp 3627-3628, 3633-3634,3639-3640, 3644). Demory could not identify the other perpetrator because the man wore a "towel" over his face. (T pp 3600, 3638).

3941, 3945, 4861-4862). On cross examination, Demery denied calling relatives in Huntington, N.Y., from his home that evening.[31] (T p 4614). He said that he spent the early part of the night buying gifts for and spending time with his pregnant girlfriend, McLean, before he met Mr. Green at his home. (App. pp 1467-1468; T pp 3941-3945, 6022-6023).

The two then went to the home of Kay Hernandez, a friend of Mr. Green's mother, getting there at around 10:30-11:00 p.m. (App. p 1468; T pp 4308, 6023). While Ms. Green and Hernandez watched movies in one room, Demery and Mr. Green watched videos in another room with Hernandez's daughter, Monica, and her friend, Bobbie Jo Murillo, until they left for the Quality Inn at around 1:30 a.m., Demery said. (App. p 1468; T pp 3946-3947, 4310-4311, 4324, 4617, 4619, 4863, 6023).

They parked Demery's Tempo on a dirt road off the service road near the Quality Inn at around 2:00 a.m., according to Demery. (App. p 1468; T pp 3948-3949, 4324-4325, 6023). After scoping out the motel parking lot for about one hour, they saw the Lexus parked on the side of U.S. 74, facing west, with a special "UNC" tag on the license plate and its parking lights on. (App. pp 1468-1469; T pp 3949-3695, 4337, 6024-6025). Though he never mentioned it in his August 1993 statement, Demery also said that they saw

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[31] Phone records contradicted Demery's testimony. (App. p 1436).

an 18-wheeler truck parked nearby across the road, facing the opposite direction, with its engine running and parking lights on. (App. pp 24-38, 1469; T pp 4326-4330, 4339-4340, 4374-4375, 4870-4871, 4959-4960).

Demery said they crossed U.S. 74 four times to inspect the Lexus, with Mr. Green carrying the .38 revolver. (T pp 4872, 4878-4883). They came up with a plan to kidnap the driver, force him to drive the car to Mr. Green's trailer, and then take the car, "tape up" the driver, and leave him by the side of the road. (App. p 1470; T pp 3959-3960, 4341-4345, 6025). As they returned to the car, they saw a man asleep in the reclined driver's seat, with the passenger side window of the car down about 1-2 inches below the halfway mark. (App. p 1470; T pp 3961-3962, 4417, 4478). The man wore a "real flashy looking" watch on his right arm, and a ring with a "big stone" on his right hand, Demery said. (T pp 3962-3963, 4420). They hid from passing cars in bushes near a flea market sign and encouraged each other, Demery said. (App. pp 1470-1471; T pp 3963-3965, 6026).

Initially, in his 2 May 1995 interview, Demery said that he went to his car while Mr. Green took the gun and went to the Lexus. (App. p 1471; T pp 4698-4699, 6026). They were separated for only seconds when Demery heard a gunshot, he said. (App. p 1471; T pp 4699, 6026). Demery estimated he was 60 feet away from Mr. Green when the shooting occurred. (App. p 1471; T pp 4699, 6026).

After the weekend, Demery spoke with Heffney and Thompson at the office of his attorney, Campbell, on Monday, 8 May 1995, and he changed his story again. (App. pp 1497, 1512; T pp 6050-51). He told the officers that he and Mr. Green actually both approached the car and squatted down beside the passenger door. (App. p 1513; T pp 3965-3966, 4478-4479, 6051). They stood up, and as they did, the man inside the car "came up" and asked, "What's going on?" or "What is this?" (App. p 1513; T pp 3966, 4480, 6051). At that point, Mr. Green reached through the window and into the car "enough to get in there and pull the trigger," according to Demery. (App. p 1513; T pp 3966, 4480, 4698, 6051-6052). Mr. Green shot the man once, Demery said. (App. p 1513; T pp 3966, 6051-6052). He said Mr. Green used the .38 revolver from the Short Stop robbery, which he identified as State's Exhibit No. 59-A. (T pp 4178-4179, 4817, 6053).

Demery said he was only two feet away from Mr. Green when the shooting occurred. (App. p 1513; T pp 3966, 6051-6052). He said they heard the man groan and watched him die. (App. p 1513; T pp 3966-3968, 4481, 6052). When he asked Mr. Green why he did it, Mr. Green did not respond but, instead, asked Demery to help him move the body to the passenger seat, Demery said. (App. p 1513; T pp 3968-3970, 6052). Demery then drove his car to Mr. Green's trailer, while Mr. Green drove the Lexus. (App. p 1514; T pp 3970, 4966-4969, 4884-4885, 6052).

Demery got into the backseat of the Lexus, and they drove towards Rowland, stopping in a cornfield on the way to examine the car and its contents. (App. p 1472; T pp 3974-3975, 3982, 6027-6028). In the cornfield, Demery opened the trunk and saw two golf bags, CDs, golf shoes, two suits, a toiletry bag, and a briefcase. (App. p 1473; T pp 4491, 6028). He testified that he saw Mr. Green go through the man's pockets and take off his jewelry, including a 1991-92 NBA Championship watch from the man's right arm, with an inscription on the back saying, "To Dad from Michael and Juanita." (App. pp 1473-1474; T pp 3982, 3986, 4157, 4179, 4491, 4692, 4795-4796, 6029).[32] Demery said he also saw Mr. Green remove a 1986 NBA All-Star ring from the man's right hand and a thin gold wedding band from his left hand. (App. pp 1473-1474; T pp 3982-3983, 4155-4156, 4692).[33] Based on the man's watch and driver's license, they determined he was Michael Jordan's father, Demery said. (App. p 1474; T pp 3985-3986, 4492, 4691, 4885, 6029-6030). At that time, Demery said, he noticed a "spot of blood" under the man's right arm about 1-2 inches in diameter. (App. p 1474; T pp 3994, 4486, 4501-4503, 4510-4511, 6030).

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[32] Demery admitted at trial that a photo of Jordan (State's Exhibit No. 9) showed him wearing the watch on his left rather than his right arm. (T pp 4795-4796).

[33] Annie Hutchison, Jordan's plant supervisor, told law enforcement that Jordan typically wore a watch, a wedding band, and a "big NBA ring." (T pp 77, 79). Demery subsequently had possession of the wedding band. (App. p 38; T pp 4072, 4907, 5037).

They drove to Rowland to dispose of Jordan's body in a waste treatment plant, Demery said. (App. pp 1474-1475; T pp 3987-3988, 6030). It was shortly before 4 a.m. (App. p 1475; T pp 3989, 4892, 6030). However, there was a gate up blocking the entrance, and they were nervous about the police. (App. p 1475; T pp 3989, 6030-6031). Demery came up with the idea to dispose of the body at a bridge near Laurinburg and his former employer, Crestline. (App. pp 1475-1476; T pp 3990, 4494-4495, 4701-4702, 4885, 6031). They drove to the bridge and dropped the body in the water. (App. p 1476; T pp 3991-3994, 6032). At the bridge, Demery said, he got a "smear" of Jordan's blood on his right arm. (T pp 3994, 4506-4508, 4540-4541).

After stopping for gas in Laurinburg and trying to use one of Jordan's credit cards at a bank machine, Demery and Mr. Green drove towards Lumberton. (App. pp 1477-1478; T pp 3995-3997, 4514-4515, 4554, 4703, 6033). They stopped at a canal bank near Demery's home, where they threw out more papers from the car. (App. p 1479; T pp 3998-4000, 4893-4894, 4709, 6034-6035). Demery claimed, he saw a small amount of blood, or "not much," in the "crack" area of the passenger seat, where the top and bottom parts connected when the car was at Green's house. (App. pp 1479-1480; T pp 3994-3995, 4003, 6035). Once they got items out of the car, Demery said, he wiped out the blood. (App. pp 1479-1480; T pp 4003, 6035). It was about 7 a.m. on 23 July 1993, and it was daylight outside. (T pp 4492-4493, 4555, 4708-4709).

They eventually went to the home of Mr. Green's brother, David Moore, in the Fayetteville area, arriving at around 1 a.m. (App. p 1486; T pp 4046-4049, 4895-4896, 6043). The .38 revolver and video camera were in the car, and Mr. Green wore Jordan's watch and rings, Demery said. (T pp 4050-4051).

Mr. Green told his brother that he got the car from a "crackhead" for two rocks of crack cocaine, Demery testified. (T p 4051). David told them that he would contact his friend, Thompson, to help them to get rid of the car, according to Demery. (App. p 1486; T pp 4055, 6044). They went to sleep, and the next morning, Thompson showed up to the home. (App. p 1486; T pp 4055-4057, 6044). They went to the home of a "mechanic" who would not buy the car because of its price. (App. p 1487; T p 6045). They put the golf clubs in Thompson's truck and left the Lexus in a wooded area. (App. pp 1487-1488; T pp 4063-4065, 6045). They were unable to get in touch with Thompson again about the car and spent the night at David's home. (App. p 1488; T pp 4066-4067, 6046). They left the golf clubs in woods near David's home. (App. p 1490; T p 6048).

David, his girlfriend, and Mr. Green drove Demery back to Mr. Green's trailer. (App. p 1488; T pp 4608, 6046-6047). Mr. Green went back to Fayetteville. (App. p 1489; T pp 4896-4897, 6046-6047). Demery waited at Mr. Green's trailer until his mother picked him up. (App. p 1489; T pp 4070).

Demery left Jordan's wedding band and a pair of golf shoes in Mr. Green's trailer and kept the .38 revolver. (App. p 1489; T pp 4069, 4072-4073, 6047, 6049). He denied that he put the gun in the shop vac in the trailer, or that he had a key to the trailer. (T p 4070).

Demery described swapping the .38 revolver with Mr. Green over the ensuing weeks, starting with giving the gun to Mr. Green when he returned from Fayetteville on either 30 or 31 July 1993. (T pp 4070-4071). On 13 August 1993, in the wake of media coverage about the discovery of Jordan's car and body, Mr. Green gave the gun back to him, Demery said. (T pp 4073-4076, 4996-4997). Because "the heat was coming down," they came up with a story to tell police: A man named "Rick" from Fayetteville had come to Mr. Green's trailer in the Lexus, and they got in the car with him to go to Mr. Green's brother's home. (T pp 4076-4077). On that same day, they also threw out CDs, golf shoes, and a shirt on the side of the road near a Food Lion. (App. p 1491; T pp 4077, 6048-6049). The next day, Mr. Green went to Demery's home to get the gun and a pair of shorts. (App. p 1491; T pp 4897, 6049). It was the last time Demery saw the gun. (T p 4897). Later that night, Mr. Green called Demery to tell him that police had surrounded his home, and Demery should get away. (App. p 1492; T pp 4079-4080, 6049-6050).

f. The State's Experts Found a Hole in the Shirt, Blood in the Car

Jennifer Elwell of the SBI Crime Lab testified as an expert in forensic serology. (T pp 5592-5593). She stated that she did a very brief visual exam of Jordan's Lexus on 18 August 1993 and forensic testing of the car a day later. (T pp 5594). She knew the interior had previously been wet. (T pp 5610, 5599). At the time she examined it, the interior was dry and dirty. (T pp 5594, 5609).

Like the CCSO's Cannon, she conducted a luminol test for blood. (T pp 5563, 5594-5595). While Cannon said he got a "minor" reaction for blood on the right-hand side of the front passenger seat, Elwell said she got a "fair to strong" reaction. (T pp 5563-5564, 5570-5573, 5600-5601, 5606). Cannon said he conducted a phenolphthalein test and did not get a "good enough reaction," while Elwell said she conducted a phenolphthalein test and got a reaction. (T pp 5563, 5572-5573, 5596-5597). Similar to a luminol test, a phenolphthalein test is a presumptive – not conclusive – test for blood, but it is "a lot more sensitive to blood" than luminol, Elwell testified. (T pp 5596).

Elwell stated that when she spread the top and bottom portions of the seat cushion, she saw a small stain where the cushions came together. (T pp 5597). The stain appeared to be weak and "washed out." (T p 5598). So, she removed upholstery from the area and took the sample "back to the laboratory to try to determine with a chemical crystallin test [Takayama test]

that it was indeed blood." (T pp 5597-5598). At the lab, she was unable "to obtain any type of result" that would allow her to do further blood group testing. (T pp 5597, 5612). She opined that the crystallin test failed to give a result because the stain was "very, very dilute" and "very, very weak." (T pp 5598). However, according to Elwell:

> "There is nothing that will give you a positive reaction period with luminol and phenolphthalein that is not blood, at least not known to the literature . . . if you have a reaction with both luminol and a reaction with both phenolphthalein, one can be comfortable in saying that you've got a pretty good indication of blood. And it is my opinion that you do have blood." (T pp 5611).

Elwell used a red marker to draw on State's Exhibit No. 100 where she purportedly found blood in the passenger seat. (App. p 396; T pp 5600-5601). She testified that she put "all findings" in her lab report, State's Exhibit No. 101. (App. pp 397-398; T p 5603). When she finished testing, she left the Lexus in the custody of SBI agent Jerry Richardson. (T pp 5604, 5614).

SBI agent Marrs testified as an expert in forensic firearms identification. (T p 5202). He conducted ballistics tests to determine if State's Exhibit No. 42-B, or the bullet removed from Jordan's body during the autopsy, had been fired from State's Exhibit No. 59-A, the .38 caliber revolver allegedly taken from Demory in the Short Stop robbery. (T pp 707-708, 712, 5220). Even though he found "some strong similarities" in the striations of

the bullet when he compared it to test bullets fired from the gun, Marrs said he could not make a conclusive determination that State's Exhibit No. 59-A fired the bullet. (T pp 5223-5224, 5345-5346). He noted his findings in a lab report admitted as State's Exhibit No. 95. (App. pp 393-395; T pp 5240-5241).

In that same lab report, Marrs discussed his examination of State's Exhibit No. 22, or the "Grand Slam" brand polo shirt removed from Jordan's body, which SBI agent Sweatt submitted to the SBI lab on 28 August 1993. (App. pp 393-394; T p 5252). Marrs said the shirt had been "soaking wet" when he received it, and he needed to dry it for two weeks before he could examine it. (T pp 5257, 5324). He stated that "environmental damage" to the shirt "may have destroyed any evidence that was on there before." (T pp 5257-5258, 5324).

Marrs examined the shirt for bullet holes and gunshot residue. (T p 5253). He found "approximately" eight holes in the shirt, including one 5/16-inch in diameter hole in the "upper right chest area" with a "dark elliptical ring around it." (T p 5253). He also saw three holes in the lower right abdomen area and four holes in the shirt's back shoulder sleeve area, which were irregular or jagged compared to the hole in the chest area. (T pp 5253-5254, 5257). He examined the holes under a microscope and was unable to observe any gunshot residue or burned particles of gunpowder or lead around any of them. (T pp 5254-5255).

He then conducted two chemical tests – the Greiss test for the residue of burned gunpowder, and a sodium rhodizonate test for lead or lead vapor. (T pp 5255). He got a nitrite reaction around the hole in the upper right chest area. (T p 5255-5256). Based on that reaction, he concluded that the hole had "physical characteristics consistent with the passage" of a bullet through it. (T p 5256). He noted that State's Exhibit No. 42-B, the bullet retrieved from Jordan's body in the autopsy, had a "lubrication ring around it" and the dark elliptical ring around the hole may have been from soot on the bullet or the bullet lubricant. (T p 5257). On cross examination, Marrs said he could not confirm whether the dark ring was from gunpowder. (T pp 5325, 5333). He stated that any gunpowder residue on the shirt may have been dissolved due to the body being in a swamp for nearly two weeks. (T p 5324). Lubricant, on the other hand, would not dissolve in water and could still be on the shirt, he said. (T p 5325).

Marrs also testified that he found no gunshot residue in the car's interior. (T p 5319, 5322-5324). He said it was possible that the gun was close enough to Jordan that all the gunpowder residue would have been deposited on him and not in the car. (T p 5324). He also said that if the car's interior had been exposed to the elements, it could "wipe away any evidence of gunshot residue," and people getting in and out of the car could also destroy evidence. (T pp 5322, 5347). On cross-examination, Marrs said could not

estimate the distance between the gun's muzzle and Jordan at the time of the shooting. (T pp 5334, 5340). He also said he could not conclusively determine whether the gun had been fired from inside or outside of the car. (T pp 5330-5331).

C. Defendant's Case

1. Opening Statements

In opening statements, Mr. Green's counsel said the evidence would show that he had merely "helped a childhood friend perhaps dump a body" and was innocent of the robbery and murder of Jordan. (T p 53-54). The evidence would show that Jordan was not killed where or in the manner alleged by the State, counsel promised. (T p 62).

According to counsel, the evidence would show that Demery went to Kay Hernandez's home on 22 July 1993, where Mr. Green and others were gathering, and he asked Mr. Green to go with him to his home. (T p 58-59). They went to Demery's home, where Demery called his cousin in Huntington, N.Y. (T p 59). Even though Demery could not get in touch with the cousin he called for, Joey Baculik, he spoke with another cousin, Janine Baculik, and said he would "bring [Joey] something" to New York. (T p 59).[34] They then went back to the Hernandez home, with Demery taking a bag and "some

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[34] The State admitted that phone records showed that a call was made from Demery's home to Baculik's home at 10:03 p.m. on 22 July 1993. (T p 5456).

guns" with him. (T pp 59-60). They watched TV until Demery left sometime after midnight. (T p 60). Mr. Green remained at the Hernandez home watching television with the others. (T p 60).

"[S]everal hours later," Demery came back to the home "all shook up" and "rattling around the house." (T pp 60-61). At the door, he begged Mr. Green to leave with him. (T p 61). Mr. Green went with Demery to an abandoned store near the Quality Inn, where Mr. Green saw Jordan's Lexus for the first time. (T pp 61-62). Demery asked Mr. Green to drive the Lexus to a canal bank located "just beyond" the store. (T p 62). Mr. Green got into the car and drove it to the bank, where he saw "there on the canal bank . . . the body of a black male lying on the ground with blood on the front of his clothes." (T p 62).

Mr. Green asked Demery what happened. (T p 63). Demery said the man reached for a gun, and he shot him. (T p 63). Mr. Green thought "this [was] perhaps some drug deal gone bad," counsel stated.[35] (T p 63). Still, Mr. Green helped his friend to dispose of the body. (T p 63). He then followed Demery back to Demery's house, where Demery changed clothes and told Mr. Green that he knew of a place to dispose of the body. (T p 64). From there,

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[35] Trial counsel Thompson conceded that "nothing could be more damaging than if we forecast to the jury a certain body of evidence, then change our minds." (App. p 877).

they drove to a bridge near Crestline to dump the body, Mr. Green's counsel promised to show. (T p 64).

Mr. Green's counsel also promised the evidence would show that the first call from Jordan's car phone after Demery and Mr. Green took possession of it was to "some 800 number," while the second call at 10:36 a.m. on 23 July 1993 was to Hubert Larry Deese, "the reputed son of [Sheriff] Hubert Stone, known drug dealer in Robeson County, who is now serving time for drug related charges in federal prison." (T p 65).[36] The evidence would show that Demery made the call, defense counsel said. (T p 65).[37]

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[36] In SBI agent Barry Lea's case outline, "(Dictated)" appears next to the name of each person called from Jordan's car phone on or after 23 July 1993. (App. pp 1404-1417). The list includes Deese's registered number at (919) 521-3365 in Pembroke. (App. p 1411). A 19 November 1993 Federal Bureau of Investigation (FBI) teletype indicated that the SBI was investigating the Jordan Case, and the SBI had been "made aware of the fact by the FBI" that a call was placed from Jordan's car phone "shortly following his murder" to an unnamed individual with ties to Stone. (App. p 920). The teletype stated that SBI investigators advised that the individual was to be interviewed "regarding this point" on the night of 23 November 1993. (App. p 920). An SBI special agent advised the FBI that the individual was "one of five named targets in a 10-month ongoing investigation into cocaine distribution," the teletype stated. (App. p 920). "No FBI agents will assist in this interview as it is strictly a local matter," according to the teletype. (App. p 920). On 28 February 1994, while Mr. Green's case was being investigated, Deese was arrested on a federal charge of possession with intent to distribute cocaine. (App. p 892). After his arrest, a U.S. Drug Enforcement Administration agent, Michael Grimes, and two RCSO deputies, Thomas Strickland and Steve Lovin, debriefed Deese. (App. p 929). On 23 January 1995, in the U.S. District Court for the Eastern District of North Carolina, Deese received a reduced sentence of 120 months based on "substantial assistance" he provided to law enforcement. (App. pp 894-895). Deese's sentence was then further reduced to 54 months in March 1997. (App. pp 894-895).

[37] In a December 2014 interview, Deese told Mr. Green's former postconviction counsel, Mance, that he knew and worked with Demery at Crestline. (App. p 928).

Counsel also promised the evidence would show that Jordan's wife said she had talked with him on 5 August 1993, or nearly two weeks after the alleged date of his death, and that "numerous citizens" had seen Jordan alive after 23 July 1993. (T pp 68-70).[38]

2. Defense Evidence

a. Mr. Green's Alibi

Mr. Green's counsel went on to call five witnesses – Nellie Montes, Monica Hernandez, Hector Leones, Sebette Leones, and Catina Jacobs – who testified that Demery and Mr. Green were at the home of Mr. Green's mother's friend, Kay Hernandez, on 22 July 1993. (T pp 6182, 6243-6244, 6267-6268, 6299-6300, 6337). Demery drove his Tempo, which sounded "raggedy" and made a loud muffler noise. (T pp 6206-6207, 6242-6243, 6301, 6339). Demery and Mr. Green left the Hernandez home at around 6 p.m. and returned to eat with everyone else at around 9:30 p.m. (T pp 6183, 6337).

The two young men then hung out in the den, watching TV, with a group that included Hernandez's daughter, Monica, as well as Catina Jacobs,

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Deese said he was involved in trafficking cocaine at the time he worked at Crestline, where, like Demery, his job duties included serving as a vehicle escort. (App. p 928). In the same interview, Deese admitted that he was the son of Sheriff Stone. (App. p 928).

[38] After the trial court sustained an objection to James Jordan's son Larry's testimony about his mother's statements about speaking with Jordan after the alleged date of his death, defense counsel made no other attempt to offer the evidence. (T pp 172-185).

Ebony Green, and Bobbie Jo Murillo. (T pp 6188-6189, 6201-6202, 6222-6223, 6245-6246, 6269-6270, 6304-6305, 6339-6340). Hector and Sebette Leones went to sleep at around 12:30 a.m. (T pp 6271-6273, 6306). Montes left between 1-1:30 a.m., with Demery and Mr. Green still in the home. (T p 6188, 6222, 6340). Several witnesses testified that Mr. Green and Murillo became intimate, which the defense illustrated through Defense Exhibit No. 35-C, a photo showing Murillo sitting on Mr. Green's lap in the Hernandez den. (T pp 6190-6191, 6197-6203, 6223-6224, 6245, 6311-6313).

Three witnesses testified that, due to the distinct sound of his car, they heard Demery leave the Hernandez home at around 2-2:30 a.m. (T pp 6249-6250, 6253-6254, 6307-6308, 6340-6341). After Demery left, Mr. Green stayed with Murillo in the den. (T pp 6254-6256, 6307-6313, 6342). Monica Hernandez testified that she was in the den as well. (T p 6256-6258). At around 4:30 a.m., Demery returned, "[h]e was nervous, he was shaking, kind of like he was anxious and ready to go," she said. (T pp 6258-6260). Mr. Green's mother yelled at them for making noise. (T pp 6315-6317, 6343-6344). About fifteen minutes later, Demery and Mr. Green left. (T pp 6259-6260, 6345). Monica Hernandez said she went to sleep just after 5 a.m. (T p 6260-6261).

Mr. Green's counsel listed Murillo, along with Kay Hernandez and Elizabeth Green, as a witness. (App. pp 867-868). None of the three were

called to testify as alibi witnesses. In closing argument, the State compared Mr. Green's alibi defense to a "colander" and asserted that none of Mr. Green's alibi witnesses testified that they saw him in the mobile home after Demery left[39], and the State noted that Mr. Green did not call Murillo to testify. (T pp 7312-7316).

b. No Evidence Presented that Jordan was Alive After July 23

Mr. Green put on no witness who testified about seeing Jordan after 23 July 1993 as defense counsel had promised in opening statements. (T pp 68-70). In closing argument, the State noted Mr. Green's failure to put on this evidence. (T pp 7317-7318).

c. Car Phone Records and Hubert Larry Deese

During the State's case-in-chief, Mr. Green's counsel asked Demery on recross examination if he knew a Hubert Larry Deese in the Pembroke area. (T p 4992). The State objected. (T p 4992). On *voir dire*, Demery said he knew a "Larry Deese" who was "living in a federal penitentiary in South Carolina right now" and prior to that lived "somewhere in Pembroke." (T p 4994). He

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[39] Mr. Green's counsel referred to Hernandez's testimony during closing arguments. (T p 7190-7191). The State did as well. "Monica, 'I heard, but I didn't see.' Who saw him? Who is it that supposedly saw him after Larry Demery left?" the prosecutor, Britt, argued to the jury. (T p 7313). Britt's statement to the jury did not accurately represent Hernandez's testimony that she was with Mr. Green after Demery left, and she saw Demery when he came back. (T pp 6256-6258).

denied he called Deese from Jordan's car phone. (T p 4995). The trial court sustained the objection on the ground that defense counsel's questions about Deese were outside the scope of redirect examination. (T pp 4992, 4996). The court also found the matter was "not relevant" because Demery denied making the call. (T p 4995).

Later, Mr. Green's counsel tried to cross-examine SBI agent Tony Underwood about Deese pursuant to N.C. Gen. Stat. 8C-1, Rule 803(19). (T pp 5746-5747). On *voir dire*, Underwood testified he:

- Was familiar with drug enforcement activities in the county;
- Knew of defendants, informants, and others who were familiar with some of the drug trafficking within the county;
- Knew who Deese was; and
- Knew whether Deese was known, by reputation in the community, to be the illegitimate son of Sheriff Stone. (T pp 5747-5748).

Underwood said he had heard that Deese was Sheriff Stone's son, but he did not "know that to be factual." (T pp 5747-5748).

The trial court asked Mr. Green's counsel about the relevance of the testimony. (T p 5748-5749). Counsel responded by explaining that Demery made a phone call "the night before to Huntington, New York, telling Joey that he's going to bring him a package up in New York. One of the first calls he makes the next morning is to Hubert Larry Deese . . . ." (T p 5749). The

court said it would not allow Underwood's testimony about Deese pursuant to N.C. Gen. Stat. 8C-1, Rules 401 and 403, finding that the evidence was not relevant. (T pp 5749-5765). The court noted that the defense could not prove that Demery made the phone call to Deese's number on the morning of 23 July 1993, that Deese took the call, that the call involved drug trafficking, or that Deese was the son of Stone. (T p 5755). The court said that counsel was asking the court to make a "logical leap" to connect Demery to the phone call. (T pp 5751-5752). "Have you ever dialed the phone and got a wrong number?" the court asked defense counsel. (T p 5751).[40] The State told the court that "in the presence of the jury, any question would have been objected to." (T p 5750).

During the defense's case, Mr. Green's counsel attempted to introduce subpoenaed phone records which would have identified the number called from Jordan's car phone as being registered to Deese. (T pp 6726-6727). The State objected, noting that the defense "could have caused a writ to be issued for Larry Deese to appear here . . . ." (T p 6728). The court would not admit the phone records into evidence. (T pp 6728-29).

d. Ballistics Testing and Expert Larry Fletcher

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[40] The court also found that the transcript of Demery's 15 August 1993 interrogation, in which the CCSO detective, Binder referred to Demery calling his "friend" in Pembroke, failed to establish relevancy because it did not support Mr. Green's position that (1) Demery made the call, and (2) the call was made to Deese. (T p 5762-5763).

Mr. Green's counsel retained a Dallas, Texas-based ballistics expert, Larry Fletcher. (T p 217). Heffney, the SBI agent, testified that he personally delivered to Fletcher at his Dallas office the .38 caliber revolver (State's Exhibit No. 59-A) that Mr. Green allegedly used to shoot Jordan, the two .32 caliber guns purportedly used in the Short Stop robbery[41] (State's Exhibits Nos. 73 and 74), the .38 caliber bullet removed from Jordan's body (State's Exhibit No. 42-B), and the .32 caliber bullet removed from the store in the Short Stop robbery (State's Exhibit No. 41-A). (T pp 217-220, 711-712, 2024, 3284-3287, 5214-5218, 5232-5233, 5991-6015, 6102-6103). Heffney saw Fletcher test the guns by firing them first without a round in the chamber and then firing them into a tank. (T pp 6106-6107). Fletcher then conducted a bullet comparison and examined Jordan's clothes, which were shipped to him in November 1995. (T pp 217-218, 6107-6111). He wrote a letter setting out "his points as to the various subjects," which Mr. Green's counsel provided to the State. (T pp 2024-2025).

During trial, counsel discovered that Fletcher mistakenly switched the two bullets in the sealed packages he received for evidence. (T pp 694-710). The trial court warned counsel that Fletcher would be subject to cross-examination about his mishandling of the bullets. (T pp 703-704). The

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[41] Demery stole these guns from his father's collection. (T p 3287).

defense rested without his testimony or the testimony of any other expert witness. In closing argument, Mr. Green's counsel argued that it was impossible for the bullet to have pierced Jordan's body the way it did and to have been fired from where Demery said Mr. Green was standing when he fired the gun. (T pp 7106-7109). The court sustained the State's objection to counsel's comments on the ground that Mr. Green had offered no evidence that the State "fabricated" the supposed trajectory of the bullet. (T p 7108).

D. Verdict and Appeal

The jury found Mr. Green guilty of all three charges, including first-degree murder under the felony murder rule. (App. pp 425-427; T pp 7546-7547). After the verdict, Mr. Green moved to dismiss all three charges on the grounds of insufficiency of the evidence to sustain a conviction, to set aside each verdict as contrary to law, and for a new trial on the grounds of errors committed at trial. (T pp 7570-7572). The court denied the motion. (T p 7572).

At Mr. Green's sentencing hearing, the State relied on the evidence presented in the guilt-innocence phase and testimony from two people who were the subject of the Family Inns robbery, Joseph and Dorothy Tedeschi. (T pp 7563-7565, 7598, 7702). Mr. Green offered testimony from Dr. Glenn Rohrer (a social worker and East Carolina professor), Dr. James H. Johnson Jr. (a demographer and University of North Carolina at Chapel Hill professor), and Joel Garth Locklear (an investigator for the public defender's

office). (T pp 7727-7728, 7793, 7798, 7961). At the close of the hearing, on 12 March 1996, the jury recommended that Mr. Green received a life sentence rather than the death penalty. (App. pp 436-445; T pp 8391-8392). On the Issues and Recommendations as to Punishment sheet, the jury responded "No" when asked if it found that Mr. Green killed, attempted to kill, or intended to kill Jordan, or intended that deadly force would be used in the felony. (App. pp 436-445). The trial court proceeded to sentence Mr. Green to a term of life imprisonment plus 10 years for the murder and conspiracy charges. (App. pp 430-433; T pp 8405-8406).

On appeal, Mr. Green raised 118 assignments of error in the Record on Appeal but argued only five issues in the Defendant-Appellant's Brief. (App. pp 448-510, 528-557). Mr. Green's appointed appellate counsel asserted that the trial court committed constitutional error by: Preventing Mr. Green from cross-examining Demery about threats made to him by police officers during his interrogation; denying Mr. Green's motion to suppress and admitting into evidence the statements he made to officers during his interrogation without being advised of his *Miranda* rights; and permitting Demory to identify Mr. Green as a participant in the Short Stop robbery where the pretrial identification procedure used by police officers was impermissibly suggestive. (App. pp 473-480, 483-494, 505-509). Appellate counsel also argued that the court committed reversible error by expressing an opinion vouching for the

veracity of the State's evidence during defense counsel's closing argument, and the court denied Mr. Green his constitutional right to counsel by repeatedly intervening between Mr. Green and his attorneys and requiring him to make trial decisions independently of them, including his decision of whether to move for a mistrial based on the State's closing argument. (App. pp 480-483, 494-505).

As discussed, *supra*, Mr. Green was unable to obtain relief from this Court, the North Carolina Supreme Court, or the U.S. Supreme Court on direct appeal from the judgment entered against him. Mr. Green, in turn, pursued postconviction relief pursuant to Chapter 15, Article 89, starting with his request for appointment of counsel and law library access in December 1999. (App. pp 562-566). The relevant evidence which Mr. Green provided in support of his MAR, as amended and supplemented, are discussed in more detail below.

III. REASONS WHY WRIT SHOULD ISSUE

Under N.C. Gen. Stat. § 15A-1422(c)(3) and Rule 21(a)(1), this Court may issue its writ of certiorari to review a trial court's ruling on a Motion for Appropriate Relief (MAR) that was filed pursuant to N.C. Gen. Stat. § 15A-1415 if the time for appeal has expired, and no appeal is pending. "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown," *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), or when "a

failure to issue [the] writ . . . would be manifestly unjust." *State v. Hammonds*, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012). Under Rule 21(e), this Court must dismiss the petition if a party unreasonably delayed the filing or violated procedural rules, or if the Court finds it is without merit. *Id.* Thus, "[t]wo things . . . should . . . appear on application for certiorari: First, diligence in prosecuting the appeal . . . and, second, merit, or that probable error was committed" below. *State v. Moore*, 210 N.C. 686, 691, 188 S.E. 421, 424 (1936).

Mr. Green's time for appeal has expired, and no appeal is pending. More than 20 years have passed since this Court and our Supreme Court denied Mr. Green relief on direct appeal, *see State v. Green*, 129 N.C. App. 539, 555, 500 S.E.2d 452, 462 (1998), *aff'd, per curiam*, 350 N.C. 59, 510 S.E.2d 375 (1999), and the U.S. Supreme Court denied review in 1999. *Green v. North Carolina*, 528 U.S. 846 (1999). Mr. Green has since sought relief through Article 89 of Chapter 15A of the General Statutes, which led to the lower court's 7 January 2020 order summarily denying his MAR. Under unique circumstances, Mr. Green and undersigned counsel have diligently sought review of that order. Mr. Green can also demonstrate error below where the court denied his MAR without holding the evidentiary hearing required by N.C. Gen. Stat. § 15A-1420(c)(4).

In each of his newly discovered evidence, due process violation, and ineffective assistance of counsel claims, Mr. Green raised questions of fact – not merely questions of law – which would entitle him to a new trial under N.C. Gen. Stat. § 15A-1417(a)(1) if they were resolved in his favor. He supported each claim with affidavits and/or other documentary evidence in compliance with N.C. Gen. Stat. § 15A-1420(b)(1), and he committed no procedural default requiring dismissal under N.C. Gen. Stat. § 15A-1419(a)(1)-(4).[42] By summarily denying Mr. Green's MAR under these facts, the lower court contravened *State v. McHone*, 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998), and this Court's line of decisions applying *McHone*'s interpretation of the N.C. Gen. Stat. § 15A-1420(c)(4) evidentiary hearing requirement.

Thus, for good and sufficient cause, and to prevent "manifest injustice" for a man who has spent 22 years seeking a new trial, this Court should grant certiorari review of the issues raised in this Petition. Upon consideration of the merits of those issues, the Court should ultimately reverse the lower court's order summarily denying Mr. Green's MAR and remand his case for an evidentiary hearing. *See McHone*, 348 N.C. at 258,

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[42] As discussed *infra*, Mr. Green concedes that three of the numerous claims raised in his MAR are procedurally barred.

499 S.E.2d at 763 (allowing certiorari review and reversing order denying defendant's supplemental MAR without an evidentiary hearing).

A. Mr. Green Has Timely Filed this Petition.

The "Rules of Appellate Procedure do not set forth a specific time period in which a defendant must file a petition for writ of certiorari." *State v. Rush*, 158 N.C. App. 738, 741, 582 S.E.2d 37, 38-39 (2003). What constitutes an "unreasonable delay" depends on the case's circumstances. *Id.* "[A]ny such delay after the earliest moment in the party's power to make the application must be satisfactorily accounted for." *Todd v. Mackie*, 160 N.C. 352, 359, 76 S.E. 245, 248 (1912).

Mr. Green seeks this Court's certiorari review 18 months after the lower court filed the order denying his MAR on 7 January 2020 and 10 months after his present postconviction counsel entered Notice of Appearance on 8 September 2020. (App. pp 1632-1710). If the Court finds this period to be a "delay," Mr. Green submits it has not been an unreasonable one.

Mr. Green promptly sought review of the trial court's 7 January 2020 order. He filed a Notice of Intent to Seek Review and Request for Appointment of Appellate Counsel on 12 February 2020, roughly one month after the order was entered. (App. pp 1711-1712). Three months passed before the Office of the Appellate Defender appointed counsel, Ghosh, to represent Mr. Green as an indigent defendant in this appeal. (App. p 1714).

Ghosh had not filed a petition by 8 September 2020, when the undersigned *pro bono* counsel from the N.C. Center on Actual Innocence entered Notice of Appearance to represent Mr. Green at the appellate level. (App. p 1715). The trial court allowed Ghosh to withdraw as Mr. Green's appellate counsel on 16 October 2020. (App. p 1716). Thus, current counsel has represented Mr. Green in his appeal for approximately 10 months, or since September 2020, which is also the same amount of time it took the trial court to file the order for which Mr. Green seeks this Court's review. (App. 1609, 1632-1710).

Over the course of these 10 months, undersigned counsel has undertaken a careful review of the voluminous record in this case, which spans more than two decades of postconviction litigation and includes:

- A trial transcript of 8,411 pages (not including jury selection);
- The Amended MAR and five supplements totaling 272 pages (with an additional 2,205 pages in exhibits);
- The State's responses to the amended MAR and supplements, totaling 346 pages (with 830 pages in attached exhibits); and
- The order denying Mr. Green's MAR, which spans 79 pages and includes findings of fact and conclusions of law on 36 separate claims raised between his first attorney-filed MAR in April 2015 and his Motion for Reconsideration filed in March 2019. (App. pp 1632-1710).

In this Petition, Mr. Green seeks review of a significant number of the findings and conclusions which the lower court reached in summarily denying every one of those claims. Preparation of the Petition has required significant time, effort, and research during a time of unprecedented upheaval in work conditions and client access resulting from the COVID-19 pandemic. Mr. Green's counsel have worked diligently to file this Petition at the "earliest moment" possible. *Todd*, 160 N.C. at 359, 76 S.E. at 248. Thus, should this Court find that a delay occurred in the filing of this Petition – and Mr. Green asserts it has not – the Court would not be required to dismiss this Petition under Rule 21(e), as Mr. Green has provided a reasonable explanation for any such delay.

Should this Court find Mr. Green's Petition should be dismissed pursuant to Rule 21(e), he urges this Court to invoke its discretionary authority to suspend the Rules of Appellate Procedure under Rule 2 and review his Petition to "expedite a decision in the public interest" and "prevent manifest injustice." The circumstances of his case present one of the "rare instances" where Rule 2 review would be appropriate as his "substantial rights" have been affected by the lower court's erroneous ruling. *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007).

Here, as Mr. Green demonstrates, the trial court contravened *McHone* and its progeny when it erroneously deprived him of an evidentiary hearing

on the claims raised in his MAR. Those claims included allegations of serious violations of Mr. Green's constitutional rights – violations which led to his sentence of life imprisonment. Since entering Notice of Appearance in this case, counsel have worked diligently with Mr. Green to review the lower court's decision and prepare a Petition upon which his quest for a new trial – and, ultimately, his freedom – may depend. Under such circumstances, the application of Rule 2 would certainly be proper. *See, e.g.*, *State v. Spencer*, 187 N.C. App. 605, 612, 654 S.E.2d 69, 73 (2007) (Rule 2 invoked to reach the merits of defendant's argument where defendant was erroneously convicted of larceny and possession of stolen property).

B. Mr. Green's Petition Demonstrates Merit.

By summarily denying the newly discovered evidence, due process violation, and ineffective assistance of counsel claims raised in Mr. Green's MAR, the lower court failed to follow well-established precedent which has found an evidentiary hearing under N.C. Gen. Stat. § 15A-1420(c)(4) to be mandatory where, as here, the court faces "a broad range of postconviction claims based on a large and unusual constellation of conflicting evidence." *State v. Howard*, 247 N.C. App. 193, 211, 783 S.E.2d 786, 798 (2016).

Mr. Green sufficiently supported his claims, and they were subject to no procedural bar. Thus, the court committed reversible error. This Court should grant certiorari review and, ultimately, remand his case to the lower

court for the taking of evidence on his claims. *See State v. Jackson*, 220 N.C. App. 1, 727 S.E.2d 322 (2012) (certiorari review granted, and lower court reversed, where defendant's MAR raised questions of fact which required an evidentiary hearing).

1. Standard of Review

Upon review of an MAR ruling, this Court must determine whether the lower court's "findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order" which the court entered. *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). If competent evidence supports the lower court's findings of fact – even if there is conflicting evidence – the court's findings are binding on appeal and cannot be disturbed unless the court abused its discretion. *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006). A court abuses its discretion when it makes a discretionary ruling under a misapprehension of the law. *Hines v. Wal-Mart Stores East, L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008).

"This Court reviews the trial court's conclusions of law in an order denying an MAR *de novo*." *State v. Martin*, 244 N.C. App. 727, 734-735, 781 S.E.2d 339, 344 (2016) (citing *Jackson*, 220 N.C. App. at 8, 727 S.E.2d at 329). "Whether the trial court was required to afford defendant an evidentiary hearing is primarily a question of law subject to *de novo* review."

Id. (citing *State v. Marino*, 229 N.C. App. 130, 140, 747 S.E.2d 633, 640 (2013).Under *de novo* review, Court may consider the lower court's legal conclusions anew and freely substitute its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-633, 669 S.E.2d 290, 294 (2008).

2. Issues for Certiorari Review

In this Petition, Mr. Green seeks certiorari review of three broad legal errors which the court committed below. Based on those errors, the court made numerous conclusions of law in which it denied Mr. Green an evidentiary hearing on the basis his claims were supposedly without merit and/or were procedurally barred. Those erroneous conclusions of law, and their underlying findings of fact, do not support the court's 7 January 2020 order summarily denying Mr. Green's MAR.

a. The trial court erred by summarily denying Mr. Green's MAR where the court resolved his claims by deciding questions of fact contrary to Mr. Green's allegations and making credibility determinations without first holding an evidentiary hearing.

i. Controlling Authority

a) Motion for Appropriate Relief

An MAR serves as a "procedural vehicle" for challenging convictions and sentences. *Howard*, 247 N.C. App. at 206, 783 S.E.2d at 795. It is not meant to be "determinative of the question of whether the moving party is entitled to" relief. N.C. Gen. Stat. § 15A-1412. Where, as here, a defendant

files an MAR more than 10 days after entry of judgment, the defendant may seek relief on grounds that include newly discovered evidence under N.C. Gen. Stat. § 15A-1415(c) and an assertion that the defendant's conviction was obtained in violation of the North Carolina and/or United States Constitution under N.C. Gen. Stat. § 15A-1415(b)(3). "When a defendant asserts multiple claims in an MAR, the trial court is . . . charged with evaluating each individual claim on the merits and under the applicable substantive law," and sits as "trier of fact." *Howard*, 247 N.C. App. at 206, 783 S.E.2d at 795.

When a defendant files an MAR, the pleading must show the existence of all asserted grounds for relief and the requisite degree of prejudice, in accordance with N.C. Gen. Stat. § 15A-1443. N.C. Gen. Stat. § 15A-1420(c)(6). Under N.C. Gen. Stat. § 15A-1420(c)(1), either the State or the defendant is entitled to a hearing on questions of "law or fact" which arise from the MAR and any information the sides offered to support or oppose it unless the court determines the MAR is without merit.

Under N.C. Gen. Stat. § 15A-1420(c)(1), "[a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact." If the MAR and

supporting and opposing information present only questions of law, the court must rule on the MAR without an evidentiary hearing. N.C. Gen. Stat. § 15A-1420(c)(3). However, if the court cannot rule on the MAR without hearing evidence to resolve questions of fact, the court must hold an evidentiary hearing and make findings of fact. N.C. Gen. Stat. § 15A-1420(c)(4).[43] Thus, while an evidentiary hearing is not "automatically required" before a court rules on the MAR, "such a hearing is the general procedure rather than the exception." *Howard*, 247 N.C. App. at 207, 783 S.E.2d at 796.

In *McHone*, our Supreme Court held that N.C. Gen. Stat. § 15A-1420(c)(4), read *in pari materia* with subsections (c)(1) and (c)(3), requires a trial court to hold an evidentiary hearing unless a defendant's MAR asserts facts that would entitle the defendant to no relief even if found in his favor, or it presents only questions of law. *McHone*, 348 N.C. at 258, 499 S.E.2d at 763. "The ultimate question which must be addressed in determining whether [an MAR] should be summarily denied," this Court held in *Jackson*, 220 N.C. App. at 6, 727 S.E.2d at 328, applying *McHone*, "is whether the information contained in the record and presented in the [MAR] would suffice, if believed, to support an award of relief." In other words, a defendant need only "forecast

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[43] If a defendant alleges violations of federal constitutional rights, the court must make conclusions of law and provide a statement of the reasons for its determination, "to the extent required," to indicate whether the defendant had a "full and fair hearing" on the merits of the claim. N.C. Gen. Stat. § 15A-1420(c)(7).

adequate evidence of prejudice" to be entitled to an evidentiary hearing. *Jackson*, 220 N.C. App. at 11, 727 S.E.2d at 331.

Since *McHone*, this Court has consistently interpreted N.C. Gen. Stat. § 15A-1420(c)(4) as requiring reversal where a lower court decided issues of fact contrary to the defendant's allegations, *Martin*, 244 N.C. App. at 734, 781 S.E.2d at 343, or made credibility determinations, *Howard*, 247 N.C. App. at 211, 783 S.E.2d at 798, without first holding an evidentiary hearing. In Mr. Green's case, the lower court did both.

b) Ineffective Assistance of Counsel

The Sixth Amendment guarantees defendants the right to effective assistance of competent counsel. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). This right plays a crucial role in ensuring a fair trial, "since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution [. . .]" *Strickland v. Washington*, 466 U.S. 668, 685 (1984). An individual may be deprived of his right to counsel when counsel has "simply [. . .] fail[ed] to render 'adequate legal assistance.'" *Id.,* 466 U.S. at 686. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

A petitioner claiming ineffective assistance of counsel must ordinarily make two showings. First, he must show that counsel's performance was deficient. *Id.*, 466 U.S.at 687. Counsel's performance is deficient when it falls below an "objective standard of reasonableness" under the circumstances. *Id.*, 466 U.S. at 688–90. Second, a petitioner must also show that counsel's deficient performance prejudiced him. *Id.,* 466 U.S. at 687. Counsel's performance is prejudicial when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.,* 466 U.S. at 694. Where counsel made several errors in violation of *Strickland's* first prong, their prejudicial effect should be assessed cumulatively. *Williams v. Taylor*, 529 U.S. 362, 398-399 (2000).

To show ineffective assistance of counsel, the proof necessary is less than a preponderance of the evidence; in other words, a defendant need not show that counsel's deficient conduct "more likely than not altered the outcome in the case." *Strickland,* 466 U.S. at 693. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, 466 U.S. at 686.

c) Newly Discovered Evidence

When a defendant raises a newly discovered evidence claim in an MAR pursuant to N.C. Gen. Stat. § 15A-1415(c), the defendant must establish seven factors:

> (1) that the witness or witnesses will give newly discovered evidence, (2) that such newly discovered evidence is probably true, (3) that it is competent, material and relevant, (4) that due diligence was used and proper means were employed to procure the testimony at the trial, (5) that the newly discovered evidence is not merely cumulative, (6) that it does not tend only to contradict a former witness or to impeach or discredit him, (7) that 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. Hall, 194 N.C. App. 42, 48-49, 669 S.E.2d 30, 35 (2008).

A newly discovered evidence claim based upon a witness recantation has a different standard for a defendant to meet than traditional newly discovered evidence claims. Recanted testimony is considered "a special type of newly discovered evidence." *State v. Britt*, 320 N.C. 705, 713, 360 S.E.2d 660, 664 (1987). "In recantation cases, what is sought is a new trial *without* untruthful testimony rather than one that merely adds different material." *Id.* (emphasis in original). Under North Carolina law, the following must be established for a defendant to be granted relief based on recanted testimony: (1) the court is reasonably well satisfied that the testimony given by a material witness is false, and (2) there is a reasonable possibility that, had

the false testimony not been admitted, a different result would have been reached at the trial. *Id.*, 320 N.C. at 715, 360 S.E.2d at 665.

d) Due Process

"[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, 67, 310 S.E.2d 301, 306 (1984). Additionally, the Supreme Court has established a "'standard of materiality' under which the knowing use of perjured testimony requires a conviction to be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *State v. Sanders*, 327 N.C. 319, 336, 395 S.E.2d 412, 424 (1990). "When a defendant shows that testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction, he is entitled to a new trial." *Id.,* 327 N.C. at 336, 395 S.E.2d at 423.

The State also has a duty to disclose evidence favorable to a defendant regardless of whether the defendant specifically requests the favorable evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Agurs,* 427 U.S. 97, 107–111 (1976). Even if a prosecutor does not himself possess *Brady* material, he has a duty to learn of any favorable evidence

known to other government agents, including law enforcement. *Kyles v. Whitley,* 514 U.S. 432, 437-438 (1995).

The State's duty to disclose favorable evidence under *Brady* covers not only exculpatory evidence but also information that could be used to impeach the State's witnesses. *Giglio v. United States,* 405 U.S. 150, 154 (1972). The State cannot knowingly create a materially false impression regarding the facts or the credibility of witnesses. *Id.*, 405 U.S. at 153. A materially false impression can be created by an act of omission as well as an act of commission. A jury is entitled to hear evidence relevant to the credibility of witnesses. *Id.,* 405 U.S. at 155.

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

a different light as to undermine confidence in the verdict." *Id.,* 514 U.S. at 435. Evidence withheld from the defense is to be evaluated collectively, not item-by-item. *Id.,* 514 U.S. at 436.

e) Unauthorized and Unsupervised Juror Site Visit

The Sixth Amendment, which is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, guarantees that a defendant shall enjoy the right to a trial by an impartial jury and to be confronted by the witnesses against him. *Parker v. Gladden*, 385 U.S. 363, 364–365 (1966). As the U.S. Supreme Court noted in *Turner v. State of Louisiana*, 379 U.S. 466, 472-473 (1965), the evidence developed against a defendant must come "from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Where a defendant alleges that a juror's unsupervised and unauthorized visit to a crime scene violated his constitutional rights to confront and cross-examine witnesses against him and to be judged by an impartial jury, the issue is subject to harmless error analysis. *See Sherman v. Smith*, 89 F.3d 1134, 1137 (4th Cir. 1996).

ii. Deciding Issues of Fact Contrary to Mr. Green's Allegations

As discussed, *supra*, Mr. Green raised over two dozen meritorious claims in his MAR. The core issue in this Petition is whether an evidentiary hearing should have been granted so his claims could be fully evaluated. This

Court need not "decide whether the evidence put forth in [Mr. Green's] MAR was sufficient to entitle him to relief," only whether "it was enough to raise a factual dispute and, therefore, entitle[] [Mr. Green] to an evidentiary hearing." *Martin*, 244 N.C. App. at 737, 781 S.E.2d at 345. Although the issues discussed in detail below do not cover all of the issues pled in the MAR, they provide examples of the types of factual disputes raised in all of the claims. Those disputes clearly establish that an evidentiary hearing is required for a proper resolution in this case.

a) Credibility of Co-Defendant Larry Demery

Demery's testimony constituted the only direct evidence that Mr. Green was guilty of murder. No other witness testified that they saw Mr. Green shoot Jordan, were present when Mr. Green shot Jordan, or even were aware of a plan to commit an armed robbery. Thus, the State's case turned on whether the jury believed Demery. Indeed, as Judge Weeks noted, Demery's credibility was "the focal point of the case." (T p 6553).

The record shows that the jury struggled with Demery's credibility. Although Demery testified that he watched Mr. Green shoot Jordan in cold blood, the jury did not find Mr. Green guilty of murder on the basis of malice, premeditation, and deliberation, but instead found him guilty under the felony murder rule. (App. p 426). Even more revealingly, the jury explicitly indicated during sentencing that they did not unanimously find that Mr.

Green "[k]illed or attempted to kill the victim," "[i]ntended to kill the victim," or "[i]ntended that deadly force would be used in the course of the underlying felony." (App. p 436). Clearly, not every juror believed Demery's version of events – possibily because there were several versions before he settled on the one he testified to at trial. Thus, any evidence that further reduced Demery's credibility would have had a reasonable probability of changing the outcome of the trial.

Despite the State's oft-repeated mantra in its pleadings that Mr. Green must have been the triggerman because he "enjoy[ed] the spoils of the kill," (App. pp 1033, 1060, 1078, 1314, 1531, 1536, 1538-1539),[44] the State's ability to convict Mr. Green of murder actually depended on Demery's testimony about what happened during the early morning hours of 23 July 1993, not the fact that Mr. Green later possessed some stolen jewelry and shared possession of the car with Demery and several others. In fact, Jovan Carter testified that he was currently serving a sentence for possessing a stolen vehicle relating to the red Lexus. (T pp 1645-1646). Terrellis Teasley testified that he was currently serving a sentence for breaking and entering and larceny in connection to the Lexus. (T pp 2068-2069). Demery also admitted that he possessed the .38 caliber revolver at times, (App. p 1489; T pp 4069, 4073-4076, 4996-4997, 6047, 6049), and that he possessed Jordan's wedding band. (App. pp 38, 1489; T pp 4072, 4907, 5037, 6047, 6049). Demery also admitted

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[44] The lower court also adopted the State's mantra throughout its Order. (App. pp 1659, 1677, 1698).

to driving the Lexus. (T pp 3995, 4002, 4006-4007, 4019, 4042-4043). And, although Mr. Green wore Jordan's watch, James Moore, a State's witness, testified that when he asked to buy the watch, Mr. Green acted like he could not make a decision until he first consulted with Demery. (T pp 2137, 2162-2163).

Since both Demery and Mr. Green possessed "the spoils," and Demery admitted to being there at the time of the murder, but Mr. Green did not, the State needed something more than evidence of non-exclusive possession of stolen goods to convince the jury that Mr. Green was even present at the time of Jordan's death, much less that he was the shooter. Demery's testimony was the linchpin of the State's case and the *only* direct evidence of Mr. Green actually committing the crimes of robbery and murder. As a result, any evidence that further undermined Demery's credibility would have a significant impact on the outcome of Mr. Green's trial. Discussed below are several illustrative examples of matters raised in Mr. Green's MAR that (1) involve disputed factual issues, and (2) if proven, would substantially impact Demery's credibility, thereby entitling Mr. Green to relief.

1) Ballistics and Bullet Hole

The only eyewitness testimony of Jordan's shooting came from Demery. In order to bolster and corroborate Demery's version of events, the State presented testimony from several expert witnesses regarding physical evidence. Thus, defense expert testimony that contradicted the State's

experts, and undermined Demery's testimony, would have been an essential component of a competent legal defense.

At trial, Demery said Mr. Green stood outside the passenger side window of Jordan's car, which was about halfway down, reached inside "enough to get in there and pull the trigger," and shot Jordan once from point-blank range. (App. p 1513; T pp 3966, 4480, 4698, 6051-6052).

Sexton testified that he removed a .38 caliber bullet from Jordan's body during the August 1993 autopsy and concluded that Jordan died from the bullet passing downward at a 10-to-15-degree trajectory through the aorta to his lower left lung, causing internal bleeding. (T pp 642, 678, 680). In his autopsy report and an accompanying diagram, Sexton noted there was no hole in the upper right chest of Jordan's shirt, where the bullet entered Jordan's body, and he observed "three holes that would line up with the hole in the chest if the shirt were pulled up approximately one foot." (App. pp 6, 11).

Marrs, testifying as a firearms expert for the State, described his findings in his lab report (State's Exhibit No. 95) and noted finding a hole in the front upper chest of Jordan's shirt, precisely where Sexton had noted the absence of a bullet hole that corresponded with Jordan's wound. (App. p 394). Marrs also testified that he got a nitrite reaction around the hole, indicating gunpowder residue, and he believed the dark ring came from bullet lubricant.

(T pp 5255-5257). The shirt was "soaking wet" and needed to air dry for two weeks when he first examined it, Marrs said. (T pp 5257, 5324). He opined that any gunpowder on it may have dissolved, but the lubricant would remain. (T pp 5324-5325).

Though Mr. Green's trial counsel retained a ballistics expert, that expert was retained for the narrow purpose of determining whether he concurred with the State's expert's determination that the bullet from Jordan's body could not conclusively be tied to a specific gun. (T pp 217-220, 857, 1065, 2024, 5873, 5214, 5218, 5232-5233, 5991-6015, 6101-6103, 6107-6111). Trial counsel's expert was not asked to perform any analysis concerning the bullet trajectory, so even if he had testified at Mr. Green's trial, he would have been unable to offer any opinion about bullet trajectory. Recognizing that the trajectory was important, in closing, trial counsel attempted to challenge the State's evidence about the trajectory of the shot that killed Jordan. (T pp 7106-7109). The court sustained the State's objection to those comments, noting Mr. Green had presented no evidence to assert the State "fabricated" evidence about the bullet's trajectory. (T p 7108).

Included with Mr. Green's MAR was an affidavit from his trial counsel, Thompson, conceding he "probably should have gotten an expert on guns and bullet trajectory to effectively" challenge the State's evidence. (App. pp 876-877). He noted how a lack of blood, tissue, or gunshot residue in the car belied

the State's theory of how the shooting may have occurred. (App. p 876). Mr. Green asserted in his MAR that his trial counsel's failure to investigate was deficient and prejudicial because counsel recognized the significance of the ballistics evidence in its closing argument, and the evidence would have "directly supported the defense theory and contradicted the State's theory." (App. pp 860-862).

Mr. Green's MAR also included an affidavit from Joshua Wright, who described his education, training, and experience in the field of forensic ballistics as well as the method he used to attempt a reconstruction of the shooting. (App. pp 1396-1397). Wright stated that he used a 1992 Lexus 400 SC – the same model as Jordan's car – as well as Sexton's autopsy report (with the projected 10-to-15-degree downward bullet trajectory), and Demery's description of where Mr. Green purportedly stood at the time of the shooting. (App. p 1397). Wright concluded: "[W]ith the passenger window positioned as Mr. Demery stated in his testimony, and [Jordan] sitting up, also as described in Mr. Demery's testimony, I found that it would be impossible to replicate the trajectory 10 to 15 degrees downward from an individual standing on flat ground outside the car." (App. p 1397). Wright also challenged Marrs' testimony that he found nitrites around the purported bullet hole in Jordan's shirt, opining that the nitrites "would not withstand

the presence of water for an extended period of time and would not have been present after 12 days" in water. (App. p 1397).

If Mr. Green's trial counsel had hired a similar expert to challenge the State's theory of the case, as Thompson concedes they should have, there is a reasonable probability that the result of the proceedings would have been different, or at least sufficient to "undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

It is hard to imagine what strategic reason trial counsel could have for declining to cross-examine the State's experts about why Sexton specifically noted the absence of a bullet hole in the front upper chest portion of Jordan's shirt, but Marrs subsequently discovered a bullet hole in that very same location. Still, if that was a strategic decision, the appropriate place for trial counsel to discuss that decision would be from the witness stand at an evidentiary hearing.

In summarily denying Mr. Green's claim, the lower court held that he failed to show his counsel's "strategic choices" were unreasonable in failing to offer expert testimony to challenge the State's theory of the shooting, or that he was prejudiced by their failure to do so.[45] (App. p 1652). The court also held that Mr. Green failed to provide "any evidence of an expert" who would

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[45] By incorporating its findings and conclusions, the court treated the claims, collectively, as a single ineffective assistance of counsel claim pursuant to N.C. Gen. Stat. § 15A-1415(b)(3). (App. pp 1656, 1675-1676).

have testified inconsistently with his guilt, of which there was "overwhelming" evidence. (App. p 1652). Because it determined the issue lacked merit from the record, the court held that no evidentiary hearing was required. (App. 1652, 1658-1659, 1676). However, to reach this conclusion, the court necessarily resolved issues of fact counter to Mr. Green's allegations – without first hearing witnesses or taking evidence – in contravention of N.C. Gen. Stat. § 15A-1420(c)(4) and controlling precedent.

Mr. Green specifically asserted that his counsel was deficient for failing to investigate bullet trajectory forensics, retain or hire an expert in that field, or to offer an expert's testimony to counter the State's version of how Jordan's death occurred and, in turn, to undermine the credibility of the only witness who testified to seeing Mr. Green shoot Jordan or to having any participation at all in the man's robbery and death. (App. 832, 859, 862, 1343). He provided an affidavit from his trial counsel, Thompson, and an affidavit from an expert witness, Wright, to show no "strategic choice" existed for counsel's failure to do so. (App. 874-879, 1396-1397). Thus, he established the factual nature of his claim and the significance of potential expert testimony. *Martin*, 244 N.C. App. at 737, 781 S.E.2d at 345.

The court found that Mr. Green's counsel had, in fact, consulted a "ballistics expert," Fletcher, and Mr. Green had simply failed in his MAR to show it was "unreasonable strategy" for counsel to not call him to testify.

(App. pp 1651, 1658). First, Fletcher's analysis and lack of testimony was not the issue in question. Second, the court reviewed the information Mr. Green provided in support of his MAR and the State's opposing information, and he resolved a disputed fact – whether his counsel made a "strategic choice" to not call an expert – against Mr. Green. This was error under *McHone* and its progeny, as well as the plain language of N.C. Gen. Stat. § 15A-1420(c)(4).

Moreover, the record fails to support the court's findings. In summarily denying Mr. Green's claim, the court found he had "offered no evidence from any ballistics expert" that was inconsistent with Mr. Green's guilt. (App. p 1651).[46] The court found that Wright's evidence was inconsistent with the evidence at trial as to how Jordan was shot. (App. pp 1675-1676). The court noted that Wright referred to the bullet trajectory coming from an individual "standing on flat ground outside the car," while Demery said Mr. Green had reached inside of the car, the court found. (App. pp 1675-1676). On one hand, the finding appears illogical – regardless of whether Mr. Green reached into the car, as Demery described, he still would have needed to stand on ground outside of the car. But more importantly, the court was simply in no position to make a "credibility determination," *Howard*, 247 N.C. App. at 211, 783 S.E.2d at 798, and assess Wright's opinion without first holding an

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[46] While Mr. Green may not have provided that information in the April 2015 pleading, he supplemented his allegations in the Fifth Supplement with the affidavit by Wright.

evidentiary hearing at which Wright could testify as to the role expert testimony would have played at Mr. Green's trial. Wright's affidavit sufficed to merit an evidentiary hearing on the issue of whether the failure of Mr. Green's counsel to call a trajectory expert was "strategic" or deficient performance.

Contrary to the court's holding, Mr. Green's MAR was sufficient to show the existence of prejudice, or a "reasonable probability" that, but for his counsel's failure to offer expert testimony challenging the State's theory of the case at trial, and the weakness of its physical evidence, the result of the proceedings would have been different," or at least sufficient enough to "undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, Mr. Green's case raised disputed issues of fact – not merely questions of law – which would entitle him to a new trial if resolved in his favor. By summarily denying Mr. Green's MAR on the ground that he failed to show deficient performance or prejudice in his factual assertions and supporting information, the court committed reversible error.

2) Blood Analysis

To corroborate Demery's testimony that Jordan was shot inside the car, the State sought to present evidence of blood being found in the car. A juror understandably might have questioned how a man sitting in his car could be shot in the chest, (T p 680), bleed out in "no more than a minute or two," (T p

685), be pushed and pulled until his body was "twisted" partially into the passenger seat, (T pp 3969-3970), and yet not leave a trace of blood anywhere in the car. But after CCSO Lieutenant Cannon processed Jordan's car with both luminol and phenolphthalein, he was unable to say that there was a positive reaction for blood in the car. (T pp 5565, 5571, 5573).

Interestingly, eight days later, the car was subsequently processed by SBI analyst Elwell, who, unlike Cannon, was able to get positive reactions using both luminol and phenolphthalein. (T pp 5563-5564, 5570-5573, 5596-5597, 5600-5601, 5606). Since both tests are merely presumptive, not conclusive, for the presence of blood, Elwell then took a cutting from the passenger seat to conduct confirmatory testing at the lab, but was unable "to obtain any type of result." (T pp 5596-5598, 5612). Despite the lack of a confirmatory test showing that the substance was, in fact, blood, Elwell told the jury that the two presumptive tests together provided proof that the substance was blood. (T p 5611). Without any scientific evidence to support her conclusion, she testified, "it is my opinion that you do have blood." (T p 5611).

In support of his MAR, Mr. Green submitted an affidavit from his prior postconviction counsel, Mance. (App. pp 922-932).[47] In the affidavit, Mance

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[47] The competency of affidavits containing hearsay statements, including this one, is discussed *infra*.

memorialized an interview he conducted with Elwell, and he certified that Elwell had declined to provide an affidavit herself. (App. p 922).[48] According to Mance's affidavit, Elwell told him that if she testified today, she would testify differently than she had at Mr. Green's 1996 trial. (App. p 922). Most importantly, Elwell said that the substance in the passenger seat, which she identified at trial as blood, in fact "could have been anything." (App. p 922).

In the MAR, Mr. Green argued that this revelation from Elwell constituted newly discovered evidence, as well as evidence that Elwell testified falsely at trial in violation of Mr. Green's due process rights. In summarily denying those claims, the lower court found that the assertions contained in Mance's affidavit did not give rise to an issue of fact requiring an evidentiary hearing. (App. p 1637). The court summarized the facts "as they were heard and considered by the jury: Elwell conducted luminol and phenolphthalein tests that were positive for the presence of blood but could not confirm the presence of blood through Takayama testing." (App. p 1637). The court's summary of the facts heard by the jury conspicuously did not include Elwell's unambiguous testimony that "it is my opinion that you do have blood." (T p 5611). The court's omission is significant because Elwell's new opinion, which was forecast in Mance's affidavit, does not necessarily

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[48] Mance also submitted the audio recording and verbatim transcript of his interview with Elwell. (App. p 1285).

conflict with the court's incomplete summary of the evidence presented to the jury. However, Elwell's new opinion does conflict with her unambiguous testimony at trial that the substance was blood. The facts recited by the court as being those "heard and considered by the jury" were simply unsupported by the record.

In addition to being unsupported by the record, the court's findings also improperly resolved questions of fact without an evidentiary hearing. Whether Elwell would testify differently today than she had at trial is a factual question, and one that the State disputes. The court could not make a "credibility determination," *Howard*, 247 N.C. App. at 211, 783 S.E.2d at 798, about the forecasted evidence from Elwell without hearing from her at an evidentiary hearing. And without knowing whether Elwell's forecasted evidence was credible, the court could not resolve several factors of the newly discovered evidence test, including whether "the witness or witnesses will present newly discovered evidence," whether the evidence is "probably true," and whether it is "competent, material, and relevant." *Hall*, 194 N.C. App. at 48, 669 S.E.2d at 35. To resolve Mr. Green's allegation that the State knowingly presented false testimony, the court needed to assess the credibility of Elwell's new opinion to determine whether the testimony she gave at trial was false and material. *Sanders*, 327 N.C. at 336, 395 S.E.2d at

423. By resolving disputed factual issues without an evidentiary hearing, the court below committed reversable error.

3) Recantation

In support of his MAR, Mr. Green submitted affidavits from individuals to whom Demery confessed that his trial testimony was untrue. (App. pp 912-918, 1445, 1610-1611).[49] The statements from Demery documented in the affidavits included:

- That he "would be out sooner than people thought because of a deal," (App. p 915)[50];
- "That Daniel had nothing to do with the murder except for helping to get rid of the body," (App. p 916);
- That Demery "was the person who had shot and killed Mr. James Jordan," that Demery "killed Mr. Jordan because he had witnessed a drug transaction," and that "the murder had taken place outside and not inside of Mr. Jordan's Lexus," (App. p 918);
- That "Daniel Green got 'a raw deal,' 'didn't deserve what he got,' and 'wasn't even there,'" (App. p 1445); and

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[49] The law concerning competency of affidavits containing hearsay statements, included with MARs, is discussed *infra*.

[50] In his MAR, Mr. Green also presented additional evidence of the fact that Demery had an undisclosed deal with the State beyond that which was publicly disclosed at trial. (App. 775-786, 1340-1342).

- That "the State told [Demery] that they needed him to say he was close to the car and that he saw Mr. Green shoot the victim," that Demery "felt coached by law enforcement to lie at trial," and that "if he was called to testify at a hearing, he would testify to" those statements. (App. pp 1610-1611).

Mr. Green argued that the recantation of Demery, forecast in the hearsay affidavits and told directly to Mr. Green's postconviction counsel, was newly discovered evidence entitling him to a new trial. Mr. Green did not ask the court to grant his MAR and vacate his convictions based upon hearsay statements, but instead merely asked for an evidentiary hearing at which he could compel sworn testimony from Demery himself.[51]

In summarily rejecting Mr. Green's claim, the court found that the evidence provided in support of Demery's recantation, the inmate affidavits and the affidavit from Connee Brayboy, the former Editor-In-Chief of the *Carolina Indian Voice*, "lack indicia of trustworthiness." (App. p 1659). But as this Court made clear in *Howard*, "an evidentiary hearing was required in order to assess the truthfulness of [the witness'] affidavit." *Howard*, 247 N.C. App at 210, 783 S.E.2d at 798. "Since the trial court had no opportunity to evaluate [the witness'] specific reasons for his recantation and his demeanor

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[51] Mr. Green cannot compel Demery to sign an affidavit, but he can subpoena Demery's sworn testimony at an evidentiary hearing.

in giving that explanation, it could not properly determine whether the recantation was genuine and whether the statement and relevant trial testimony were false." *Id.* The court below was in no position to determine whether the affiants were credible. The court needed to hear from each affiant, as well as Demery, under oath at an evidentiary hearing, to make those credibility determinations.

The court also found that Mr. Green failed to show that "the hearsay statements attributable to Larry Demery are probably true," noting that other evidence "corroborated that [Mr. Green], not Demery, shot and killed Mr. Jordan. Most notable is the fact that [Mr. Green], not Demery, enjoyed the spoils of the robbery of Mr. Jordan and that the murder weapon was recovered not from Demery but from [Mr. Green's] home." (App. p 1659). However, as discussed *supra*, both Demery and Mr. Green "enjoyed the spoils," (App. p 1489; T pp 4069, 4072, 4076, 4907, 4996-4997, 5037, 6047, 6049), and Demery often spent the night at Mr. Green's home, including during the days after Jordan's murder. (T pp 3282, 3284-3285, 3352-3353, 3861, 4004, 4013, 4045-4046, 4278-4279, 4306-4307, 4637). Thus, the supposed corroborating evidence does not actually suggest that it was Mr. Green, rather than Demery, who shot and killed Jordan. At most, it suggests that Mr. Green possessed stolen goods.

The court further found that the statements attributable to Demery are "directly contradicted by other evidence admitted at trial, including Demery's sworn testimony." (App. p 1659). This, of course, is the very essence of a recantation: that a witness will now say something different from what they said before. It would appear from the court's logic that no recantation claim could ever have merit, since the new statement would be "directly contradicted" by prior statements of the same witness. However, it is the credibility of the recantation that must be assessed, and that can only be done through testimony during an evidentiary hearing.

The lower court then concluded as a matter of law that "[e]ven accepting the statements in Ms. Brayboy's affidavit as true and admissible, the information still does not constitute newly discovered evidence because the statements attributed to Larry Demery in Ms. Brayboy's affidavit do not establish [Mr. Green's] innocence." (App. p 1661). In so holding, the court applied an incorrect legal standard. Newly discovered evidence in the form of a recantation need not "establish [a] defendant's innocence," but rather need only raise "a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial." *Britt*, 320 N.C. at 715, 360 S.E.2d at 665. In the present case, if Demery now admitted that much of his trial testimony was untrue, there is more than a reasonable possibility of a different result at trial. As discussed throughout this Petition,

Demery's testimony was the linchpin of the State's case. As such, a recantation of the key points of Demery's testimony would probably result in a different outcome.

Ultimately, the court's erroneous legal conclusion in this instance is beside the point. The court could not assess the importance and credibility of a Demery recantation without first hearing from Demery. Mr. Green provided numerous affidavits which adequately forecast the recantation, such that the proper procedure was to hear from witnesses at an evidentiary hearing. By resolving disputed factual issues against Mr. Green without hearing from witnesses and taking evidence at an evidentiary hearing, the court below committed reversible error.

b) Mr. Green's Alibi

As detailed *supra*, Mr. Green has always maintained that he was not present at the time of the murder and that he was attending a gathering at the home of a family friend when it occurred. The court, however, erroneously determined that Mr. Green's trial counsel made a strategic decision not to offer certain alibi witnesses because of the supposed conflict between Mr. Green's initial statement and his alibi. (App. pp 1650, 1652, 1657, 1685-1687, 1693, 1695). Numerous times, the court found that Mr. Green's initial

statement to investigators, that he was at a Rowland motel, conflicted with his alibi offered at trial.[52] (App. pp 1650, 1652, 1657, 1685-1687, 1693, 1695).

The court's conclusion is flawed for several reasons. First, trial counsel did offer some alibi witnesses, but not the most essential alibi witnesses, so it is clear that they were not avoiding the presentation of the alibi because of this alleged conflict.

Second, the court's finding of a "conflict" is not supported by the record as, during the interrogation, law enforcement never asked, and Mr. Green did not say, where he was on the evening of 22 July 1993 or the early morning hours of 23 July 1993. (App. pp 50-191). The court's repeated finding that Mr. Green's alibi was "inconsistent" with the alibi he gave officers during his August 1993 interrogation mirrors the State's repeated misrepresentation of fact in its postconviction pleadings (Answer to the AMAR pp 133-134, 175-177; Answer to the Fifth Supplement pp 41-43, 63-64), and in oral arguments before Judge Gilchrist (5 December 2018 T pp 74, 85, 89, 96).[53] As law

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[52] Mr. Green knew of drug-related corruption in Robeson County, as later exposed in Operation Tarnished Badge. (App. p 929). Demery told Mr. Green that Demery went to meet a drug dealer, had a confrontation, and had to shoot the man, according to Mr. Green. Mr. Green feared the officers interrogating him might be involved in drug trafficking and, if he had information that might incriminate them in some way, he would be harmed. Mr. Green's distrust of the justice system began with his incarceration for an act that was committed in self-defense.

[53] When Mr. Green moved for a mistrial based on Britt's comment on his decision to not testify, Britt told the court that he had instead been commenting on Mr. Green's statements in his August 1993 interrogation. (T p 7325). Assuming *arguendo* this

enforcement never asked Mr. Green where he was on 22-23 July 1992, it is not possible that he gave an inconsistent answer to question that was never asked.[54]

At a minimum, whether Mr. Green gave an inconsistent alibi is a controverted fact. Finally, and more fundamentally, the court could not possibly know whether his trial attorneys' failure to call certain alibi witnesses was a strategic decision without first hearing from trial counsel at an evidentiary hearing.

1) Bobbi Jo Murillo

In his MAR, Mr. Green raised a claim that his trial counsel were ineffective under *Strickland* for failing to interview Bobbi Jo Murillo prior to trial and failing to have her testify.

A private investigator for the defense interviewed Murillo for the first time at 11:15 p.m. on 20 February 1996, during the second month of Mr. Green's trial and after other alibi witnesses had already begun to testify.

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was the case, Britt's suggestion that Mr. Green gave an inconsistent alibi was unsupported by the evidence. Interestingly, Britt now admits his comment about Mr. Green exercising his constitutional right not to testify was a "screw up", but he says it's "Mr. Green's fault" a mistrial wasn't declared. (see Moment of Truth, Episode 4, 00:25:56:22)

[54] The misrepresentation that Mr. Green gave an inconsistent alibi in his August 1993 interrogation was perpetuated by Britt in his closing argument. (T pp 7355-7358). The State continued to make this misrepresentation of fact in its pleadings and in the draft order summarily denying Mr. Green's MAR, which the trial court adopted with very few substantive changes.

(App. p 1425).[55] During that interview, Murillo's recollection supported Mr. Green's alibi account of that night—that he was at Kaye Hernandez's house, with Murillo and others, when the murder happened. (App. p 1425).

Ms. Murillo told the defense that she remembered the July 1993 gathering. (App. p 1426). She said that Mr. Green and his mother had been there all day. (App. p 1426). The teenagers spent most of their time hanging out in the den, took photos, and recorded on a video camera. (App. p 1426).

Murillo said Demery left around 1:00 a.m. or 2:00 a.m. (App. p 1427). Demery left alone and Mr. Green remained at the house with Murillo and the others until Demery returned around 4:30 a.m. or 5:00 a.m. (App. pp 1427-1428).

Murillo specifically remembered that Demery was acting differently when he returned: "Larry was in a hurry to get out of the house and he wasn't acting like he was before, before he was calm, and when he came back he was all nervous and ready to go and just looked like something was wrong with him." (App. pp 1427-1429). Murillo also noted that Demery's clothes "looked like he had been through a lot" when he returned. (App. p 1429). She said he looked "[l]ike he had been working, doing something, like when

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[55] Trial counsel signed a subpoena for Murillo to testify at Mr. Green's trial on 17 February 1996, but the subpoena does not indicate it was ever served and there is no other documentation in the file to suggest that it was. (App. pp 1423-1424).

people go to work all day how their clothes look when they come back. Just looked like he had been off doing something that required a lot of work." (App. p 1429). After Demery got back, he kept "bugging" Mr. Green to leave with him. (App. p 1428). According to Murillo, Mr. Green finally agreed to leave around 5:00 a.m. after being aggravated by Demery. (App. p 1428).

The court stated in its order that the "purported pre-trial defense interview" was "allegedly gleaned from trial counsels' files." (App. p 1693). The court's own wording establishes the need for an evidentiary hearing. If the court is unsure whether this document is what the defense purports it to be, an evidentiary hearing, with testimony from Murillo and trial counsel, is the way to establish when Murillo was interviewed and whether the statement given is in fact from a defense interview from Murillo during the trial.

Murillo not only was Mr. Green's best alibi witness, but she would also have impeached Demery's testimony about Mr. Green's actions and whereabouts that night. Although the defense put on other evidence that Mr. Green was at the gathering with Murillo, including showing the jury a picture of her in his lap, the alibi witnesses called by the defense were not with Mr. Green for the entire night. (T pp 6182, 6188-6191, 6193, 6197-6203, 6216, 6223, 6243-6246, 6254-6257, 6259-6261, 6271, 6300, 6302, 6305, 6308-6309, 6312-6313, 6320, 6323, 6339.) As Murillo could provide a consistent

alibi for the entire timeframe at issue, the court erred by finding that her testimony would have merely been cumulative to the testimony of other alibi witnesses. (App. p 1652).[56]

The court also erred by determining that trial counsel "*may* have had good strategic reasons" for not having Murillo testify without having an evidentiary hearing. (App. p 1650) (emphasis added). An evidentiary hearing was necessary, in part, so that trial counsel could testify to whether there was a strategic reason for their decision. This was not a determination the court could make on the pleadings alone and, in fact, the court specifically uses the term *may* which indicates it is not a conclusive finding. Moreover, there is no evidence in the record to support a finding that counsel made a strategic decision not to have Murillo testify at trial. In fact, counsel forecasted to the jury that they would present an alibi for Mr. Green, but then failed to call the critical alibi witness who could verify Mr. Green's whereabouts for the entire time at issue.[57] Should the court find her

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[56] The court also erred when it found that the evidence of Mr. Green's guilt was "overwhelming." The evidence presented by the State of his guilt, as it relates to the murder, is not only disputed but thoroughly discredited by the various claims filed in the MAR.

[57] The court noted that Murillo "would have been extensively cross-examined about her interactions with [Mr. Green] in the days immediately following the murder." (App. p 1650). While that might have happened if she had testified, it is further reason the court was required to grant an evidentiary hearing on the ineffective assistance of counsel claim as the court would need to hear from trial counsel as to whether there was a strategic decision for their failure to have her testify.

testimony credible, and thereby find that Mr. Green was in her presence all night and could not have been present when Jordan was murdered, Mr. Green would be entitled to a new trial based on ineffective assistance of counsel.[58]

Had Murillo's testimony been put before the jury, the jury would have weighed her testimony against Demery's. As it is clear the jury had doubts about Demery's credibility, Murillo's testimony would likely have been all it took to create reasonable doubt as to whether Mr. Green was present when Jordan was murdered.[59] Even the State pointed out in its closing argument at trial that calling Murillo "[c]ertainly would strengthen the alibi," which further shows this claim has merit, trial counsels' decision was unreasonable, and that the failure of counsel to have Murillo testify was deficient performance and prejudiced Mr. Green. (T p 7314).

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[58] The court also erred by finding this claim was procedurally barred. Appellate counsel could not have known about the February 1996 interview of Murillo and, therefore, could not have raised this claim on direct appeal.

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

2) Melissa Grooms

Several individuals stated they were present for the gathering at Kaye Hernandez's home on 22 July 1993, including Melissa Grooms.[60] A note in the law enforcement file confirms that Grooms was interviewed by law enforcement in 1993. (App. p 1418). Beyond her contact information, the note only indicates "Grooms told Andrews she talked to Daniel Green that night at Monica Hernandez (sic) house" with a comment indicating Kaye Hernandez should be re-interviewed. (App. p 1418).

Even if it was provided to the defense prior to trial, the note's brevity and lack of details would have hidden the true nature of the conversation and its importance to Mr. Green's defense. The note fails to include the pertinent information, favorable to the defense, that Grooms provided to law enforcement when they interviewed her. (*See* App. p 1418).

On 5 September 2018, Grooms signed an affidavit, which was filed with the MAR, detailing her knowledge of Mr. Green's whereabouts the night of the murder and her conversation with law enforcement in 1994. (App. p 1419). The affidavit states that in July 1993, she was living in Lumberton and was on summer break from Lumberton High School. (App. p 1419). She was good friends with Kaye Hernandez's daughter, Monica. (App. p 1419).

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

Grooms arrived at Kaye Hernandez's home after midnight on 23 July 1993. (App. p 1419). Everyone was hanging out around the house. (App. p 1419). "The teenagers listened to music and visited on the porch late into the night. Some people, including Monica's brother-in-law, Hector, went to bed. Kaye Hernandez and Ann Green spent time together in a separate room from the teenagers." (App. p 1419).

Although she had heard of Mr. Green, Grooms had never met him before that evening. (App. p 1419). According to Grooms, "[s]ometime after 1:00 a.m. on July 23, 1993, Larry Demery attempted to get Daniel Green to leave the home, but Daniel wouldn't go with him." (App. p 1419). Mr. Green wanted to stay and talk with Murillo. (App. p 1420). Demery then left the home, *alone*, and Mr. Green remained at the house. (*See* App. p 1420). When she left around 4:00 a.m. or 4:30 a.m., Mr. Green was still at the house with Murillo, and Demery had not returned. (App. p 1420).

The next month, after hearing about Mr. Green's arrest, Grooms went to her school's assistant principal to tell her what she knew. (App. p 1420). A few days later, law enforcement agents came to her school and interviewed her in the principal's office. (App. pp 1418, 1420). She met with the law enforcement officers for 30-45 minutes and told them details of that night, including that Demery had left alone and Mr. Green stayed at Kaye Hernandez's house. (App. p 1420). Grooms said "[t]he agents seemed irritated

by my story and tried to convince me that I didn't remember things correctly. I told the agents that there was a videotape made at the Hernandez home that would support what I was saying, and they responded that times and dates can be changed on video cameras." (App. p 1420).[61]

Grooms was never interviewed by Mr. Green's trial counsel and "[p]rior to Daniels' trial, [she] became pregnant, withdrew from Lumberton High School, got married, and had [her] first child." (App. p 1420). By the time Mr. Green went to trial, she was no longer enrolled in school and did not interact as much with Monica Hernandez. (App. p 1420).

Importantly, her affidavit states, "I have always believed that Daniel Green was wrongly convicted, because he was in the same house as me at the time he is said to have killed Mr. Jordan." (App. p 1420).

Grooms's affidavit also states that when she told law enforcement she "was telling the truth" and "would swear to it in court," one of the agents responded by saying, "You're too young to testify in court." (App. p 1420). As a

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[61] Grooms contemporaneously told her mother about the conversation with law enforcement and her mother told her "to stay out of it and not to get involved." (App. p 1420). Ms. Grooms's mother, Julia Grooms, signed an affidavit, which was included in the MAR, corroborating her daughter's account. (App. p 1422). Julia Grooms remembers that her daughter came home one afternoon in August 1993 and was upset because law enforcement had pulled her out of class and questioned her. (App. p 1422). She stated, "Melissa was upset and told me that the SBI agents were rude to her and made her feel like what she had to say was not important. Melissa was also upset because I had always stressed how important it was to tell the truth, but it seemed they didn't believe her." (App. p 1422).

result, Grooms "believed, as the agent told [her], that because [she] was under 18 at the time, that [she] could not have testified … even if someone had wanted [her] to." (App. p 1421).

The trial court entered orders instructing the State to turn over all *Brady* material to the defense before trial. (App. pp 386-388). The statement of an alibi witness is by definition favorable to the defense and should have been turned over.[62] The State cannot skirt its *Brady* obligations by failing to properly document a witness interview that divulged information favorable to the defense.

Moreover, law enforcement's intimidation of a witness by falsely telling them they cannot testify in court was designed to discourage an alibi witness from coming forward. Had Grooms not been discouraged from coming forward, her testimony, as an independent and disinterested witness, would have been compelling and created more than a reasonable doubt as to whether Mr. Green could have been present when Jordan was murdered.

The court erred by denying Mr. Green's MAR without an evidentiary hearing where Grooms could testify for the first time and the court could assess her credibility. Grooms did not have a prior relationship with Mr. Green, came forward to authorities early in the investigation on her own, and

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[62] Although Mr. Green and Grooms were both at the Hernandez home, Grooms was much younger and Mr. Green was focused on Murillo. There is no indication in trial counsel's file that they were aware Grooms could provide alibi testimony.

would have been a disinterested alibi witness had she testified. Therefore, the court erred when it concluded that her testimony would not have been material or changed the outcome of the trial. (App. p 1686). As with Murillo, and particularly in combination with Murillo, should Mr. Green be granted an evidentiary hearing and the court were to find Grooms's testimony credible, Mr. Green would be entitled to a new trial.

c) Unauthorized and Unsupervised Juror Site Visit

In his MAR, Mr. Green asserted that juror Paula Locklear made an unauthorized and unsupervised visit during the trial to the scene where Jordan's body was found in South Carolina. (App. pp 1150-1154). Her actions resulted in violation of his Sixth Amendment right to confront the witnesses against him and receive a fair trial, and prejudiced him because it caused Locklear to develop a theory of how Jordan died that was "inconsistent with the State's evidence at trial." (App. pp 1150-1154).

To support his claim, Mr. Green presented a 22 February 2016 affidavit from Paula Locklear. (App. pp 1719-1720). In the affidavit, Locklear stated in relevant part that, before trial, she worked with the sister of Hal Locklear, the man who discovered Jordan's body on 3 August 1993 in South Carolina, and she talked about her brother's discovery of the body. (App. p 1719). She also stated that during Mr. Green's trial, she conducted her own investigation into the case and visited the site in South Carolina where the body was

found. This was in violation of the court's order, which the court repeated throughout trial, to not "conduct any independent inquiry or research of any kind." (App. p 1719; T p 1562).

The lower court erred when it summarily denied Mr. Green's claim on the ground that, even accepting her claim that she made the unauthorized and unsupervised visit as true, the juror's actions would have been harmless beyond a reasonable doubt based on the evidence in this case. (App. p 1719). The court based this conclusion, in part, on its finding that "any information" gained from Locklear's visit would have been cumulative of other evidence presented at trial and not critical to the determination of Mr. Green's guilt under a theory of felony murder and robbery. (App. p 1719). "A necessary element of felony murder is the underlying felony of robbery which, in this case, occurred in North Carolina," and thus "North Carolina properly had jurisdiction and [Mr. Green] was properly convicted in North Carolina," the court held. (App. pp 1664-1665).

Again, the court's error lay in resolving a question of fact against Mr. Green without first hearing from the witness at an evidentiary hearing. The court could not have possibly determined that "any" information Locklear obtained from her visit was "cumulative" without first hearing Locklear testify and identifying the specific information she relied on to form her belief about how and where Jordan died.

In his 13 June 2017 order, Judge Beale specifically found Locklear's affidavit to be competent as to the factual allegations of any "improper actions by a juror or as to matters not in evidence that may have come to the attention of any juror." (App. p 1253). During an evidentiary hearing, Locklear could provide that information in her testimony, and the court could in turn assess her credibility and if her independent investigation may have prejudiced the verdict. Thus, Mr. Green's pleading, and the affidavit he offered in support of it, "forecast adequate evidence," *Jackson*, 220 N.C. App. at 11, 727 S.E.2d at 331, that Locklear's actions violated his constitutional rights, and he was entitled to an evidentiary hearing on this claim.

iii. Why Certiorari Review is Warranted

The record in Mr. Green's case is "replete with [many more] similar factual disputes, many of which the trial court purported to resolve in its findings of fact despite the lack of an evidentiary hearing." *Howard*, 247 N.C. App. at 210, 783 S.E.2d at 798. By deciding issues of fact based simply on Mr. Green's MAR and the supporting and opposing information provided by the parties, and determining the credibility of witnesses based on affidavits, the lower court ruled contrary to the clear statutory mandate of N.C. Gen. Stat. § 15A-1420(c)(4), and controlling authority interpreting that mandate. For this reason, Mr. Green's case warrants certiorari review.

b. The trial court erred by summarily denying Mr. Green's MAR where the court exceeded its authority by overruling prior rulings in the same case.

An MAR, whether made before or after entry of judgment, is "a motion in the original cause and not a new proceeding." N.C. Gen. Stat. § 15A-1411(b). "[O]rdinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *State v. Macon*, 227 N.C. App. 152, 156, 741 S.E.2d 688, 690 (2013) (citation omitted). Here, in two instances, the court summarily denied Mr. Green's MAR by exceeding its authority and overruling fellow Superior Court judges' rulings in this case.

First, on 2 October 2008, Judge Floyd entered an order summarily denying all claims which Mr. Green filed in his 25 August 2008 *pro se* MAR *except* the claims of ineffective assistance of trial counsel and the State's failure to disclose tape recordings of telephone conversations of two witnesses. (App. p 692). At the 7 February 2014 hearing, Judge Floyd noted how, subsequent to that order, other issues had arisen in Mr. Green's case "that have opened the case, looks like, maybe wide open . . . [a]t least for reconsideration . . . on some kind of order." (7 February 2014 T pp 4-5). Mr. Green's postconviction counsel at the time, Holmes, stated that counsel had discovered "additional issues" since being appointed to represent Mr. Green. (7 February 2014 T p 7).

Judge Floyd went on to state at the hearing that Mr. Green's counsel would receive the opportunity to make a "full investigation and [if] they're substantive to the claims in an attorney-filed MAR with the appropriate affidavits, then we'll go forward on the hearing." (7 February 2014 T p 17). The court consulted with counsel on setting a timeline for discovery, the filing of Mr. Green's attorney-prepared MAR, and getting the State's responses before the case would come back before the court "for some type of order setting the matter for hearing probably in February." (7 February 2014 T p 19). If the State's responses were filed by December 2014, Judge Floyd said he would "try to entertain some type of order setting the matter for hearing probably in February [2015]." (7 February 2014 T p 19). He tentatively set the hearing date for 2 February 2015. (7 February 2014 T p 19).

Thus, it was clear from Judge Floyd's 2 October 2008 order and his ruling at the 7 February 2014 hearing that he ordered, at a minimum, an evidentiary hearing to be held on Mr. Green's claim of ineffective assistance of counsel and the State's failure to disclose tape recordings of telephone conversations of two witnesses. If Judge Floyd had found those claims to be without merit, and thus no evidentiary hearing was required, he would have done so in the 2 October 2008 order by summarily denying them as he did other claims which Mr. Green had raised – and he did not. By denying Mr. Green an evidentiary hearing on those claims in his 7 January 2020 order,

Judge Gilchrist exceeded his authority and overruled Judge Floyd's prior order, which constitutes reversible error.

Second, Judge Beale entered two orders in response to the State's motions to strike several affidavits containing hearsay statements. First, on 4 January 2017, Judge Beale held that the court would strike an affidavit submitted by Mance containing third-party statements unless Mance attached a certification stating that the witness(es) he interviewed refused to sign an affidavit based on their personal knowledge. (App. pp 1246-1247). The court noted that ethics rules would require Mance to withdraw as Mr. Green's counsel if the court granted an evidentiary hearing based on any information within the affidavit. (App. p 1247).

Judge Beale also entered an order on 13 June 2017 after having presided over a hearing on the State's motions on 5 April 2017. (App. pp 1252-1256; 5 April 2017 T p 1). In the order, in relevant part, the court granted the State's motions to strike from consideration:

- Any newspaper articles Mr. Green offered as exhibits;
- Any legal opinions or conclusions in the affidavit of Judge Weeks; and
- All portions of a juror's affidavit relating to juror deliberations or the effect of outside information on jurors. (App. pp 1252-1253).

However, the court denied the State's motions to strike the affidavits of Mance and five others, deeming them "competent for determining whether or

not [Mr. Green] should be granted an evidentiary hearing" under N.C. Gen. Stat. § 15A-1420. (App. pp 1252-1256). The order specifically allowed consideration of Defense MAR Exhibits Nos. 4, 6, 27, 94, 95, 102, 104, 117, and 118. (App. pp 1252-1256).[63] The court further held that any affidavits containing third-party statements which Holmes submitted would be subject to the same certification and withdrawal requirements as the court noted for Mance in the 4 January 2017 order. (App. pp 1254-1255). The court ordered Mr. Green to provide to the State copies of "any and all" audio and/or video recordings of the interviews of the persons whose statements were represented in any of the affidavits and to provide the court and the State with verbatim transcripts of those interviews. (App. p 1256).[64]

Judge Beale correctly held that the hearsay affidavits were "competent for determining whether or not [Mr. Green] should be granted an evidentiary hearing" under N.C. Gen. Stat. § 15A-1420(c)(4). (App. pp. 1029-1032). Judge Gilchrist, as a fellow Superior Court judge presiding over matters in the same action, had no authority to modify, overrule, or change Judge Beale's prior

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[63] Those MAR exhibits were affidavits from Steve Hale, Terry Evans, Aaron Johnson, Connee Brayboy, Nathaniel Kite, and several from Ian Mance.

[64] Pursuant to the 4 January 2017 order, Mance filed an affidavit on 16 February 2017 in which he certified that the following witnesses refused to sign an affidavit based on their personal knowledge: Jennifer Elwell, Mark Locklear, Art Binder, Hubert Larry Deese, and Luther Johnson Britt III. (App. pp 922-932). Mr. Green filed audio recordings and transcripts of interviews with Elwell, Locklear, Binder, and Britt simultaneously with the Fourth Supplement. (App. p 1285).

order. *Macon*, 227 N.C. App. at 156, 741 S.E.2d at 690. However, Judge Gilchrist erroneously did so in several findings of fact and conclusions of law throughout the order denying Mr. Green's MAR without a hearing. (App. pp 1637, 1639, 1641-1643, 1659-1662, 1676-1679, 1706-1708). Thus, to the exent the court relied on those findings and conclusions to summarily deny Mr. Green's MAR without an evidentiary hearing, the court committed reversible error.

c. The trial court erred by summarily denying Mr. Green's MAR where the court based its ruling on the mistaken conclusion that, because they contained hearsay statements, Mr. Green's supporting affidavits failed to sufficiently support his allegations.

In several instances, as discussed *supra*, the lower court summarily denied Mr. Green's claims based on findings and conclusions that the affidavits he provided in support of his factual assertions contained hearsay statements. (App. pp 1637, 1639, 1641-1643, 1659-1662, 1676-1679, 1706-1708). Because those statements were inadmissible under the Rules of Evidence, the court erroneously held that they failed to sufficiently support Mr. Green's factual assertions under N.C. Gen. Stat. § 15A-1420(b)(1). (App. pp 1639, 1642-1643, 1660-1662, 1677-1679, 1707-1708).

i. Concluding Only Admissible Evidence May Be Considered When Ruling on an MAR Without Any Finding that Such a Rule Exists

Under N.C. Gen. Stat. § 15A-1420(b)(1), a defendant must support all claims in an MAR "by affidavit or other documentary evidence" if the claims are based on the existence or occurrence of facts which cannot be ascertained from the record or transcripts, or which are not within the trial court's knowledge. N.C. Gen. Stat. § 15A-1420(b)(1). If a defendant fails to properly support an MAR claim, the court may deny it without an evidentiary hearing. *See State v. Aiken*, 73 N.C. App. 487, 501, 326 S.E.2d 919, 927 (1985) (defendant filed no supporting affidavit and offered no evidence beyond "bare allegations" in MAR).

In an MAR, a defendant must "show the existence" of all asserted grounds for relief and satisfy the relevant standard of prejudice. N.C. Gen. Stat. § 15A-1420(c)(5). Under the plain language of the statute, the defendant's burden to prove every essential fact beyond a preponderance of the evidence applies only "[i]f an evidentiary hearing is held." N.C. Gen. Stat. § 15A-1420(c)(5). At that point, the Rules of Evidence would apply to the hearing, and the court would be required to "base its determinations upon only competent evidence." *Howard*, 247 N.C. App. at 211, 783 S.E.2d at 798. *See also* N.C. Gen. Stat. 8C-1, Rule 101. However, "whether inadmissible

evidence can be used *at an evidentiary hearing* is a different question from whether inadmissible evidence can support a claim for *entitlement to an evidentiary hearing*." *Robinson v. Polk*, 438 F.3d 350, 367 (4th Cir. 2006) (emphasis in original).

This is so because the MAR is a pleading, or "procedural vehicle" for a defendant, which serves the purpose of "forecast[ing] adequate evidence" to obtain a hearing on the facts asserted in the MAR. *Jackson*, 220 N.C. App. at 11, 727 S.E.2d at 331. A court reviews the defendant's MAR and supporting information for the purpose of determining whether the defendant should be allowed the "opportunity to produce evidence to substantiate his allegations" at a hearing, *State v. Hardison*, 126 N.C. App. 52, 57, 483 S.E.2d 459, 462 (1997), and not whether "to *allow* the MAR." *Martin*, 244 N.C. App. at 736, 781 S.E.2d at 345. An MAR is not meant to be "determinative of the question of whether the moving party is entitled to the relief sought or to other appropriate relief." *See Howard*, 247 N.C. App. at 208, 783 S.E.2d at 796-797.

d. The trial court erred by summarily denying Mr. Green's MAR where no procedural bar applied to his claims.

The court erred in finding that several claims raised for the first time in Mr. Green's MAR were procedurally barred. Pursuant to N.C. Gen. Stat. § 1419(a), a motion for appropriate relief can be denied if the defendant was in a position to adequately raise the ground or issue in a prior appeal or postconviction motion but either did not do so or raised the issue and it was

denied on the merits. *State v. Blake*, __ N.C. App. __, __, 853 S.E.2d 838, 848 (2020).

As detailed *supra*, this MAR and the supplements to it are the first postconviction motion filed in Mr. Green's case. Mr. Green is withdrawing the claim regarding deprivation of counsel during counsel's motion for mistrial that was raised on direct appeal. None of the remaining claims are procedurally barred.

III. CONCLUSION

Throughout its lengthy order, the lower court concluded that Mr. Green's MAR presented only questions of law, meaning they "present[ed] assertions of fact which [would] entitle him to no relief even if resolved in his favor." *McHone*, 348 N.C. at 258, 499 S.E.2d at 763. However, in numerous instances, the allegations in Mr. Green's claims and the opposing information from the State did, in fact, create disputed questions of fact. The trial court endeavored to resolve those issues by reaching facts contrary to Mr. Green's assertions and by assessing the credibility of potential witnesses without first holding an evidentiary hearing. Under N.C. Gen. Stat. § 15A-1420(c)(4), the court was not permitted to do so. The court's order must be reversed and Mr. Green should be granted an evidentiary hearing on his ineffective assistance of counsel, newly discovered evidence, and due process claims.

IV. PRAYER FOR RELIEF

WHEREFORE, the Defendant-Petitioner, Mr. Daniel Andre Green, respectfully prays that this Court issue its writ of certiorari to permit review of the 7 January 2020 order denying Mr. Green's MAR without an evidentiary hearing and grant such other relief as the Court may deem proper. In the event this Court allows this Petition, the issues to be briefed will be:

1. Whether the trial court erred by summarily denying Mr. Green's MAR where the court resolved his claims by deciding questions of fact contrary to Mr. Green's allegations and making credibility determinations without first holding an evidentiary hearing.

2. Whether trial court erred by summarily denying Mr. Green's MAR where the court exceeded its authority by overruling prior rulings in the same case.

3. Whether the trial court erred by summarily denying Mr. Green's MAR where the court based its ruling on the mistaken conclusion that, because they contained hearsay statements, Mr. Green's supporting affidavits failed to sufficiently support his allegations.

4. Whether the trial court erred by summarily denying Mr. Green's MAR where no procedural bar applied to his claims.

Respectfully submitted, this 30th day of July, 2021.

s/Electronically filed

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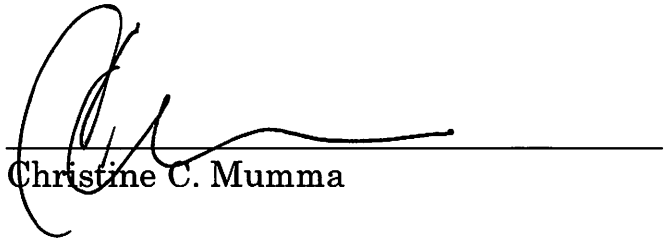
ATTORNEYS FOR DEFENDANT-PETITIONER

VERIFICATION

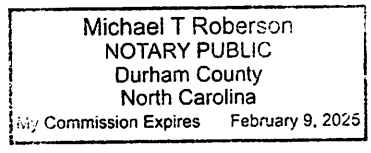
Ms. Christine Mumma, being first duly sworn, depose and say that she has read the foregoing Petition for Writ of Certiorari and that the same is true to her own knowledge except as to matters alleged upon information and belief, and as to these matters, she believes them to be true.

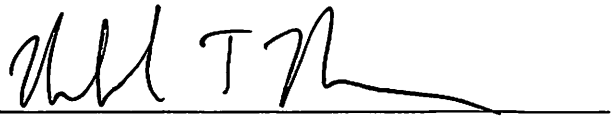


Christine C. Mumma

Sworn to and subscribed before me,

This 30th day of July, 2021.





NOTARY PUBLIC

My commission expires: 2/9/2025

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Petition for Writ of Certiorari has, on this date, been filed in the North Carolina Court of Appeals by electronic delivery as permitted by N.C. R. App. P. 26(a)(2).

I further hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has, on this date, been duly served upon the State, by electronic mail as permitted by N.C. R. App. P. Rule 26(c) addressed to:

Jonathan P. Babb
Special Deputy Attorney General
N.C. Department of Justice
jbabb@ncdoj.gov

On this 30th day of July, 2021.

s/Electronically filed

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ATTORNEYS FOR DEFENDANT-PETITIONER

No. JUDICIAL DISTRICT 16B

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Robeson
	)	93 CRS 15291-93
DANIEL ANDRE GREEN	)	

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APPENDIX

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