STATE OF NORTH CAROLINA **IN THE GENERAL COURT OF JUSTICE**

COUNTY OF DURHAM **SUPERIOR COURT OF DIVISION**

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	**File No. 01 CRS24821**
	)	
MICHAEL IVER PETERSON	)	

****

STATE'S RESPONSE TO MOTION FOR APPROPRIATE RELIEF

****

The State of North Carolina, by and through Roy Cooper, Attorney General, Dean Bowman, Special Deputy Attorney General, William B. Crumpler, Assistant Attorney General, and John G. Barnwell, Assistant Attorney General, responds to defendant's motion for appropriate relief ("MAR") as follows and prays the Court to deny the motion in all respects.

PROCEDURAL HISTORY OF THE CASE

On 20 December 2001 the Durham County Grand Jury indicted Defendant Michael Iver Peterson ("defendant") for murdering his wife Kathleen Hunt Peterson on 9 December 2001. The case came on for trial at the 5 May 2003 session of Durham County Superior Court with the Honorable Orlando F. Hudson, Jr., (the "trial judge" or the "Court") presiding. The State was represented by District Attorney James Hardin ("Mr. Hardin" or "Hardin"), Assistant District Attorney Freda Black ("Ms. Black" or "Black"), and Assistant District Attorney David Saacks ("Mr. Saacks" or "Saacks"). The defendant was represented by lead trial counsel

David Rudolf ("Mr. Rudolf" or "Rudolf") and by Thomas Maher. On 10 October 2003 the jury found defendant guilty as charged, and the Court entered judgment, sentencing defendant to life imprisonment without parole as required by law.

He appealed to the Court of Appeals, and the case was argued before that Court on 18 April 2006. By an opinion filed 19 September 2006 the Court of Appeals affirmed defendant's conviction; one judge dissented on three of the five questions presented to that Court. State v. Peterson, 179 N.C. App. 437, 634 S.E.2d 594(2006).

Defendant gave notice of appeal and petitioned our Supreme Court for discretionary review as to additional issues. By Order of 25 January 2007 the Court denied defendant's petition for discretionary review as to additional issues. The case was argued before our Supreme Court on 10 September 2007. By unanimous opinion filed 9 November 2007, State v. Peterson, 361 N.C. 587, 652 S.E.2d 216 (2007), the Court affirmed the decision of the Court of Appeals. The United States Supreme Court denied defendant's petition for writ of certiorari on 17 March 2008.

Defendant now brings post-conviction claims.

FACTS

The facts of this case are extensive and cannot be reduced to a short summary without diminishing the powerful nature of the evidence produced by the State at trial. The facts demonstrate that defendant could not have suffered any prejudice even if any of

the claims in his motion for appropriate relief had some merit. They also help to demonstrate the lack of merit in the claims.

Consequently, the State believes that it would be useful to the State and to the Court to reproduce the statement of the facts contained in the State's brief on defendant's appeal to the North Carolina Supreme Court. The statement of the facts (State's Brief pp. 2-44)is therefore attached as an appendix.

The Record on Appeal in defendant Peterson's case was settled by stipulation of the parties on 21 July 2005 (Rp 302) and filed in the Court of Appeals 27 July 2005. The Record is extremely lengthy (303 pages), and the State has therefore not appended it to its Response. However, the State has referred to or quoted from this Court's Orders or other documents contained in the Record, and the State requests the Court to take judicial notice of the Record and other matters within the Court's memory as needed.

In the background information set forth in defendant's MAR (MAR pp. 3-5), he says the State was represented at trial by Mr. Hardin, Ms. Black, Mr. Saacks, and Michael Nifong (MAR p. 4 ¶ 5). Mr. Nifong did not represent the State at trial. He was not part of the prosecution team in this case. He made no court appearance on behalf of the State. He had no involvement in the case except occasionally to participate in a group discussion about some particular matter associated with the case. Defendant's remark suggesting that Mr. Nifong was one of the prosecutors appears calculated to take advantage of the notoriety surrounding Mr.

Nifong that resulted from his mishandling of the recent, well-publicized case concerning the Duke lacrosse players.

Indeed, defendant's current counsel, Jason Anthony, is quoted in the Raleigh News and Observer on 13 November 2008 as stating to the press on the courthouse steps in Durham that "Durham is going to have the same experience it had before with the Duke [lacrosse] case." According to the newspaper, Mr. Anthony further said, "This is the worst case of misconduct by the state that I have seen in my career." One may infer from his misleading allegation about Mr. Nifong in the MAR, and his bluster in playing to the press, that Mr. Anthony hopes to prevail in this cause through rhetoric rather than through facts.

REASONS WHY THE MOTION SHOULD BE DENIED

DEFENDANT HAS FAILED TO CARRY HIS BURDEN TO RECEIVE AN EVIDENTIARY HEARING ON HIS "GROUNDS FOUR, FIVE, SIX, AND SEVEN."

For the reasons noted in general here and in detail in the State's Response to the defendant's MAR "Grounds Four, Five, Six, and Seven," he is not entitled to an evidentiary hearing on those claims. They should be denied without further proceedings.

N.C.G.S. § 15A-1420(c)(1) provides that

> Any 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**. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.

[Emphasis added.]

Subsection (c)(7) of the statute "mandates that 'the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.'" State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 763 (1998), cert. denied, 528 U.S. 1095, 145 L. Ed. 2d 702 425 (2000). In construing subsection (c)(7), the Court in McHone emphasized that, read in pari materia, it does not expand a defendant's right to an evidentiary hearing if his MAR does not comply with statutory requirements or if the trial court can determine, on the basis of the materials submitted to it, that defendant's claims are without merit. The Court held that

> this subsection of the statute must be read in pari materia with the other provisions of the same statute. Therefore, when a motion for appropriate relief presents only questions of law, including questions of constitutional law, the trial court must determine the motion without an evidentiary hearing. N.C.G.S. § 15A-1420(c)(3); State v. Bush, 307 N.C. 152, 166-67, 297 S.E.2d 563, 574 (1982). Further, **if the trial court can determine from the motion and any supporting or opposing information presented that the motion is without merit, it may deny the motion without any hearing either on questions of fact or questions of law**, including constitutional questions. N.C.G.S. § 15A-1420(c)(1). Therefore, it does not automatically follow that, because defendant asserted violations of his rights under the Constitution of the United States, he was entitled to present evidence or to a hearing on questions of fact or law.

Id. (emphasis added)

With regard especially to defendant's "Grounds Six and Seven"

defendant has failed to comply with the requirements of N.C.G.S. § 15A-1420(b)(1) and (c)(6). Subsection (b)(1)provides that

> (1) A motion for appropriate relief made after the entry of judgment **must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion**.
>
> (2) The opposing party may file affidavits or other documentary evidence. [Emphasis added.]

Subsection (c)(6) provides that a "defendant who seeks relief by motion for appropriate relief **must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443**." (Emphasis added.)

In State v. Aiken, 73 N.C. App. 487, 500-501, 326 S.E.2d 919, 927, appeal dismissed and disc. rev. denied, 313 N.C. 604, 332 S.E.2d 180 (1985), the defendant filed an MAR alleging, among other claims, "ineffective assistance of counsel based on his failure to move to suppress defendant's statement to police, and to contact and call certain defense witnesses, and alleging unconstitutional makeup of the jury pool . . . ." The Court affirmed the trial court's denial of those claims without an evidentiary hearing, holding as follows:

> Defendant filed no supporting affidavit and offered no evidence beyond the bare allegations in the motion for appropriate relief. G.S. 15A-1420(c)(6) requires that '[a] defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears.' Since defendant did not comply with G.S. 15A-1420(c)(6), the trial court's summary denial of the motion for appropriate relief was not error.

Id. at 501, 326 S.E.2d at 927.

This practice is mirrored in federal collateral review. See, e.g., Nickerson v. Lee, 971 F.2d 1125, 1136 (4th Cir. 1992)("In order to obtain an evidentiary hearing on an ineffective assistance of counsel claim -- or, for that matter, on any claim -- a habeas petitioner must come forward with some evidence that the claim might have merit. Unsupported, conclusory allegations do not entitle a habeas petitioner to an evidentiary hearing."), cert. denied, 507 U.S. 923, 122 L. Ed. 2d 681 (1993); Zettlemoyer v. Fulcomer, 923 F.2d 284, 301 (3rd Cir.)("bald assertions and conclusory allegations do not provide sufficient ground...to require an evidentiary hearing"), cert. denied, 502 U.S. 902, 116 L. Ed. 2d 232 (1991); Ellis v. Lynaugh, 873 F.2d 830, 840 (5th Cir. 1989)(no evidentiary hearing necessary where record is complete or petitioner raised only legal claims resolvable without taking of additional evidence), cert. denied, 493 U.S. 970, 107 L. Ed. 2d 384 (1989).

General Response to MAR Grounds One Through Four

Defendant presents seven grounds for seeking relief. His presentation is largely argumentative and sensational. Grounds one through four concern a tire iron that was found in William Mitchell’s yard some distance from the Peterson house about the time of the murder. Defendant claims the tire iron had exculpatory value and was of critical importance to the defense. He accuses the State (both law enforcement and prosecution) of prejudicially

unethical conduct regarding the tire iron. Essentially he contends that the State deliberately withheld exculpatory evidence from the defense.

Grounds one through four are spurious. No one acting for the State deliberately withheld any exculpatory evidence about the tire iron from the defense. No one engaged in any misconduct whatsoever. The accusatory complaint made by defendant's counsel concerning improper conduct on the part of law enforcement and prosecutors is reckless and professionally irresponsible.

Moreover, the tire iron is irrelevant. No substantial evidence suggests that it could have been the murder weapon. In fact the evidence indicates to the contrary. Knowledge by the defense of the existence of the tire iron at a time before or during trial would not have enabled them to prepare a better defense. Defendant suffered no prejudice from not knowing about this tool at an earlier time.

The prosecution acted very responsibly before and during trial in regard to the disclosure of evidence. Prosecutor David Saacks has been extraordinarily liberal in allowing various persons to review the prosecution's files on behalf of defendant since his failure to obtain relief through the appellate court system. Mr. Saacks had no reason not to be liberal because the State had nothing to hide, and had he been so conniving and unethical as the MAR makes him out to be, he obviously could have refused access to the files or taken steps to dispose of them upon the exhaustion of

defendant's appellate recourse. At no time has the State sought to conceal any evidence. The State has maintained high professional standards in all phases of this case. Defendant through present counsel has distorted the facts in making his specious claims for relief.

Specific Responses to Allegations in Grounds One Through Four

As to those factual allegations for which specific responses in grounds one through four are appropriate, the State denies that it withheld exculpatory evidence from the defense; denies that the tire iron concerned was exculpatory or otherwise relevant; denies that the circumstances of the murder justified serious consideration of an object like the tire iron as a possible weapon; denies that the tire iron was so significant that earlier knowledge of it by the defense would have made any material difference in the manner by which the charge was defended; and denies any wrongdoing on the part of any agent of the State. The State accedes to none of defendant's factual allegations, and the burden is upon defendant to prove in court by competent evidence all material facts necessary to support grounds one through four. Especially considering the serious nature of the misconduct accusations against the State, this Court should demand strict proof from the defense of its factual allegations.

I.

In his first ground defendant contends that the State's

failure to disclose the tire iron evidence impaired his ability to defend himself. His factual allegations are misleading insofar as they indicate that the State concealed the evidence and insofar as they indicate that the evidence was exculpatory or otherwise relevant. The State responds more particularly to certain allegations by defendant as follows.

The State violated none of defendant's constitutional rights regarding the existence of exculpatory evidence (MAR pp. 5-6 ¶ 12). Under rational analysis the evidence of the tire iron would not have affected the conduct of the defense, would not have led to a strengthened defense strategy at trial, and would not have resulted in a different verdict. Without the tire iron defendant still could have presented an unknown intruder defense in addition to or in lieu of the accident defense, and such a defense would not have been enhanced by the evidence of the tire iron. The choice of accident as the means to try to avoid the jury's determination of the fact that defendant did murder his wife was rational, and in effect defendant wants another chance to go with another theory simply because his first theory did not succeed in avoiding the jury's determination.

SBI Agent Duane Deaver did not describe the murder weapon to Ms. Black in a way that fits the tire iron (MAR p. 7 ¶ 20). The State contended throughout the trial that the weapon probably was an instrument like the blow poke, not that the blow poke was in fact the weapon (MAR p. 7 ¶ 21).

The State did not violate its duty of disclosure (MAR p. 8 ¶ 25) and did not conceal the discovery of the tire iron (MAR p. 8 ¶ 26). More prompt testing of the tire iron would have revealed no other evidence favorable to the defense than later testing did.

As previously indicated, the tire iron was not material to the defense and was not a key nexus supporting the intruder theory (MAR p. 9 ¶¶ 28-29). Earlier disclosure would not have enhanced the defense strategy. Moreover, the State did not conceal the existence of the tire iron, did not prevent defendant from preparing the best, most complete and most informed defense, and did not deprive the court or the jury of relevant evidence. The jury had ample opportunity to decide the truth of the charge against defendant, and in fact did so, and the evidence of the tire iron would not have affected the verdict especially in view of the overwhelming evidence that defendant murdered his wife. (MAR pp. 9-10 ¶¶ 30-32)

Investigator Art Holland told the truth at the hearing on 18 October 2002. The allegation that he committed perjury is false and irresponsible as is the accusation of a violation of the State's legal and ethical obligations. There was no concealment of evidence and no violation of the State's duty to disclose exculpatory evidence. (MAR pp. 10-11 ¶¶ 36-39)

The tire iron was not exculpatory evidence of immense value for the defense, would not have affected the defense proffered at trial, and would not have provided a reasonable probability of a

different verdict (MAR p. 14 ¶ 53). The revelatory insight now touted by defendant's past and present counsel that the unknown intruder defense would have been a better way to avoid the jury's determination of the truth of the charge is no more than wishful thinking, wishful thinking influenced by the jury's seeing through the accident defense. The claim now that an unknown intruder was a better defense or a supplementary one to accident is self-serving and pretentious.

Mr. Saacks spoke candidly with Mr. Anthony on several occasions as Mr. Anthony was investigating the case and preparing the MAR. When he spoke to Mr. Anthony on 19 September 2008 (MAR p. 14 ¶ 54), he did not know about the tire iron. He did not tell Mr. Anthony, as alleged in the MAR (MAR p. 14 ¶ 54), that "the existence of the tire iron would be 'harmless,' due to its collection and testing so late in the trial." Rather, he said that the tire iron was harmless because it was not the murder weapon and was not exculpatory.

After the conversation with Mr. Anthony on 19 September, Mr. Saacks first learned about the tire iron. When he spoke with Tamara Gibbs on 22 September (MAR p. 14 ¶ 55), sometime after Mr. Anthony gave his own interview to Ms. Gibbs, he did not refer to his personal knowledge about the tire iron; he referred to "we" in the sense of the State as an entity because someone with the State apparently had some knowledge about the tool despite Mr. Saacks's not having such knowledge earlier when he spoke with Mr. Anthony on

19 September. The implication in paragraphs 54 and 55 of the MAR that Mr. Saacks misrepresented the facts is specious.

In his conversation with Mr. Anthony on 25 September 2008 (MAR pp. 15-16 ¶ 60), Mr. Saacks conveyed information that he had found out, as he had told Mr. Anthony he would do.

As previously indicated, defendant was not deprived of the ability to develop his best defense (MAR p. 16 ¶ 64). Furthermore, there was no concealment of exculpatory evidence (MAR p. 17 ¶¶ 65 and 68), and counsel's rhetorical flourish about historical precedents (MAR p. 17 ¶¶ 65-68) is not only illusory but also superfluous. Once more, and consistently with his press conference bluster on the steps of the courthouse as mentioned previously, counsel tries to bolster his contentions by inserting Mr. Nifong's name (MAR p. 17 ¶ 65). Mr. Nifong's connection with the Peterson trial was de minimis. Counsel's shallow effort to take advantage of that situation hardly lends credence to his overstated claims.

None of defendant's rights were violated as claimed in the first ground. There was no improper or prejudicial conduct on the part of the State. The ground has no merit and should be rejected by the Court.

II.

In his second ground defendant contends that the State's failure to disclose the tire iron to the defense impaired his ability to dispute the State's theory of the case and to impeach its witnesses. This ground is similar to the first ground, and the

State incorporates its preceding responses as part of its response to the second ground.

In particular the State did not conceal the tire iron evidence from the defense. Its theory of the case was that defendant beat Kathleen Peterson to death by some means, and an instrument like the blow poke could have been the means. It was not necessarily the exclusive means. It demonstrated the characteristics of a weapon that could have caused Kathleen's injuries. Knowledge of the tire iron would not have enabled the defense to dispute the State's theory of the case more effectively, nor would it have facilitated impeachment of the State's witnesses.

None of defendant's rights were violated as claimed in the second ground. There was no improper or prejudicial conduct on the part of the State. The ground has no merit and should be rejected by the Court.

III.

In his third ground defendant contends that the State wilfully and knowingly disregarded court orders dealing with discovery. The State denies the contention. The preceding responses are incorporated as part of this third response. At all times the State conscientiously responded to discovery requirements. It did not conceal exculpatory evidence. To any extent that some matters of discovery may have been inadvertently omitted from the material turned over to the defense, the omission was harmless.

In particular as to some of defendant's allegations, the State

believes that Mr. Mitchell incorrectly recalls that Investigator Holland took notes when he collected the tire iron and asked Mr. Mitchell to write a statement. The overblown accusation that the State engaged in flagrant and egregious violation of a court order and conducted itself by its own rules is false. (MAR p. 25 ¶¶ 85-86)

Additionally, the State did not engage in a systematic pattern of violating court orders and the rules of professional conduct (MAR p. 27 ¶ 93). The slanderous accusation that the State engaged in a knowing and intentional perpetration of fraud on the court is reckless and professionally irresponsible (MAR p. 29 ¶ 102). This Court should demand strict proof from counsel and discipline counsel when he fails to substantiate the accusation. Again Mr. Anthony is engaging in rhetorical flourish consistently with his bluster at the press conference on the courthouse steps.

As to the specific allegations regarding Mr. Saacks and the court orders (MAR p. 29 ¶ 103), the discussion with Mr. Anthony occurred during a meeting requested by him. The conversation led to a question from Mr. Anthony that **IF** Mr. Saacks thought the allegations by the defense were true, would Mr. Saacks view this as a Brady violation. He responded that he did not see the tire iron as material to the case or exculpatory and that to the extent it was a discovery violation, it was harmless since it would have no bearing on the outcome of the trial. Mr. Saacks never conceded any violations and discussed the matter with respect to his opinions

and outlook as he had done in many other cases with many other attorneys. He had no expectation that what he said as one lawyer to another, in the way that lawyers frequently do, would be so taken out of context and misused in the MAR.

None of defendant's rights were violated as claimed in the third ground. There was no improper or prejudicial conduct on the part of the State. The ground has no merit and should be rejected by the Court.

IV.

In his fourth ground defendant essentially contends that the State botched the investigation of this case. He says the State failed to conduct an unbiased investigation, failed to diligently gather and test physical evidence in a timely fashion and properly investigate leads, and failed to keep and turn over notes properly. He even provides an attachment summarizing various investigative errors. He contends that his right to a fair trial was violated by these failures.

The State regrets that its investigation did not meet defendant's expectations,[1] but elevating any shortcomings in the

[1]It should be noted that defendant sharply contested the competency of the investigation during trial, to no avail. Among other things, he called two expert witnesses in this respect, Dr. Henry Lee and Major Timothy Palmbach. Their testimony is summarized in the attached statement of the facts, pages 33-35. While bringing some levity to the trial, Dr. Lee commented that the Durham Police Department did a pretty good job at the crime scene. His testimony actually reinforced that of SBI Agent Duane Deaver rather than undercutting it. (See pages 34-35 of the attached statement of the facts.)

investigation to the level of a constitutional fair trial violation is stretching the fair trial right to the point of absurdity. One cannot read the transcript of defendant's trial and the material associated with the appellate proceedings without appreciating that Peterson received all the fairness, and more, that he was entitled to at trial. The trial court was scrupulous in assuring that the trial was fair. His novel view that a faulty pretrial investigation begets an unfair trial deserves quick and summary disposition by this Court.

More particularly, it should be noted that defendant could have raised this ground upon his previous appeal but did not do so. Hence this Court should deny this specific claim for relief without a hearing. N.C.G.S. § 15A-1419(a)(3) (2007).

Furthermore, the ground is not included within N.C.G.S. § 15A-1415(b) as a ground that may be asserted by his MAR and thus should be dismissed by the Court. The ground is also subject to summary disposition without hearing under N.C.G.S. § 15A-1420(c)(1) and (3) because its factual basis clearly does not give rise to a claim of error **at trial** that bears upon the fair trial right. Pursuant to subsection (c) the Court is entitled to rule on the ground as a matter of law inasmuch as the claim has no merit. No findings of fact are necessary in this regard.

In light of the foregoing, the State prays this Court to reject summarily, without hearing, defendant's fourth ground. In all events, as with his other grounds, defendant has the burden to

prove every fact essential to support his motion with respect to this ground and to show prejudice, N.C.G.S. § 15A-1420(c)(5) and (6).

Even on the merits defendant is not entitled to any relief under the fourth ground. The preceding responses are incorporated as part of this fourth response.

As revealed by the trial and appellate proceedings, the State investigated the case and handled the evidence and reports appropriately. The police and the district attorney properly considered various scenarios and properly focused their time and attention on the right places during the investigation. They accumulated powerful evidence against defendant as they should have done, including strong evidence that Kathleen is not the first woman he has murdered. Defendant's criticisms amount to nitpicking. He would set an impossible standard for the police in investigating crimes. Most of his complaints do not warrant a specific response, but the State particularly responds to some of allegations as follows.

As to the allegation that the police did not search the Peterson house sufficiently (MAR p. 32 ¶¶ 113 and 114), the State asserts that the police searched the garage well enough to have found the blow poke that defendant introduced into evidence on 23 September 2003 had it been there at the time of the search. It therefore appears to the State that the blow poke introduced by defendant into evidence was placed in the garage sometime after the

police searched it. Along this line it is interesting to note that defendant knew where to acquire blow pokes in that he bought and had shipped to him two blow pokes on 29 September 2003 from a company in Maine.

The accusation of fraud (MAR p. 32 ¶ 115) is reckless and professionally irresponsible. The tire iron was tested promptly by informal arrangement between Art Holland and Susan Barker, and not by the normal request from a district attorney, given the status of the trial at that time. Ordinarily a request for forensic testing would require additional time, but there was no need to test the blow poke since it showed no damage as it would have had it been the particular weapon used by defendant. This is not to say that another blow poke was not the murder weapon bearing in mind that the State's position at trial was that an instrument like the blow poke could have caused Kathleen's injuries.

The allegations about possible witness intimidation (MAR pp. 39-41 ¶¶ 146-153) are particularly cynical in that it appears that Mr. Mitchell decided not to talk to the press because of a call he received from Mr. Anthony. Mr. Anthony interviewed Mr. Mitchell by phone and subsequently called him to tell him that the media would be contacting him. Mr. Mitchell did not want to talk to the press. Neither Art Holland nor anyone else acting on behalf of the State did anything to discourage Mr. Mitchell from talking with the press or to other persons about the case.

Mr. Anthony called Mr. Saacks concerning the possibility of

Mr. Mitchell's having been intimidated as a witness, and Mr. Saacks responded appropriately and explained his response to Mr. Anthony. Mr. Anthony's pretense that Mr. Saacks acted with ulterior motives or acted incorrectly is unprofessional. His attempt to make an intimidation issue out of something he precipitated should not be well received by this Court.

None of defendant's rights were violated as claimed in the fourth ground. There was no improper or prejudicial conduct on the part of the State. There was no improper or prejudicial failure to act on the part of the State. The ground has no merit and should be rejected by the Court.

DEFENDANT'S GROUND FIVE: ALLEGATION OF NEWLY DISCOVERED EVIDENCE REGARDING TESTIMONY OF SAAMI SHAIBANI
[MAR paragraphs 155-183]

Summary Response

Saami Shaibani committed perjury in testifying about his background, specifically his academic affiliation with Temple University. He perjured himself in this case and certainly one other, from the transcript of which Rudolf quoted as he cross-examined Shaibani. Despite the Court's instructions to the jury that all of Shaibani's evidence was stricken and to disregard it entirely, defendant complains that he was prejudiced by Shaibani's testimony on direct examination.

Defendant fails to acknowledge that the officer of the court who could most readily have prevented the jury from ever hearing Shaibani or anything about him was David Rudolf, the defendant's

lead counsel. Mr. Rudolf refused repeated opportunities to examine Shaibani on voir dire in the absence of the jury. A voir dire in the presence of a jury is nonsensical, but that is precisely what Rudolf wanted to do for tactical reasons. When the Court rejected the notion of a so-called voir dire in the presence of the jury, Rudolf withdrew his request for voir dire and stated he would bring out the information he had on Shaibani in cross-examination.

The evidence about Shaibani (Wisconsin v. Plude, 310 Wis. 2d 28, 750 N.W.2d 42 (2008)) which defendant says is newly discovered evidence entitling him to a new trial fails to meet the North Carolina test for such evidence in at least three crucial respects: it is cumulative, it merely impeaches a former witness, and it is not evidence of such significance that a different result would probably be reached at a new trial. See, State v. Beaver, 291 N.C. 137, 143, 229 S.E.2d 179, 183 (1976).

Detailed Response

A. Colloquies Between the Court and the Parties About Examination of Shaibani's Credentials and Cross-Examination of Shaibani

1.

Voir dire "denotes the **preliminary examination** which the court

may make **of one presented as a witness or juror, where his competency, interest, etc., is objected to.**" Black's Law Dictionary 1412 (5th ed. 1979). The whole purpose of inquiry into the nature and substance of evidence by voir dire is to determine whether the witness is competent and his or her testimony is admissible before the jurors are exposed to it. Obviously that requires that voir dire examinations of witnesses be conducted in the absence of the jury. See, e.g., State v. Fletcher, 322 N.C. 415, 420-21, 368 S.E.2d 633, 636 (1988)(Before permitting testimony to jury by child witness, trial court held voir dire hearing for "the court to be able to determine" whether she met the test for being a competent witness); State v. Grooms, 353 N.C. 50, 76, 540 S.E.2d 713, 729 (2000)(before permitting witnesses to testify before the jury the trial court conducted voir dire to determine whether "the prior acts [to which they would testify] were . . . admissible under . . . Rule 404(b)"), cert. denied, 534 U.S. 838, 151 L. Ed. 2d 54 (2001); State v. Gunter, 2007 N.C. App. LEXIS 1302 at * 7 (19 June 2007)(unpublished)(State examined Deputy Sheriff as to his qualifications and tendered him as an expert in the manufacture of methamphetamine; "the trial court conducted a voir dire hearing outside the presence of the jury" and indicated at the close of voir dire how it would rule).

In MAR paragraphs 155-168 the defendant gives his account of the reception of Shaibani's testimony. What defendant's fails to acknowledge is that, before Shaibani was accepted by the Court as

an expert, Mr. Rudolf, despite repeated requests, persistently refused to bring out the information he had about Shaibani's falsification of his credentials. In paragraph 160 defendant says that following "voir dire outside the presence of the jury" Mr. Hardin moved Shaibani's report into evidence. But defendant neglects to mention that the voir dire he referred to was a Daubert hearing. It dealt only with whether Shaibani's methodology met the requirement of having an accepted scientific basis. It did not deal with Shaibani's credentials as an expert. In paragraph 167 defendant says that the Court "did not explicitly instruct the jury to ignore the exhibits" connected to Shaibain's testimony. But defendant neglects to mention that at Rudolf's request the Court, after it ordered Shaibani's testimony stricken, also ordered the Exhibits stricken:

> [The COURT:] Now anything else as to Court's proceedings?
>
> Mr. Rudolf: No, sir, we just ask that the exhibits also be withdrawn from the court files. But I'd like them kept with the transcript, so that if there is, in fact, an investigation, that will all be available to the investigators.
>
> THE COURT: All right. **It is allowed. The exhibits are stricken.** How are you going to keep them, Ms. Clerk? Are you going to seal them?
>
> THE CLERK: I'm going to seal them. [71: 12777]

2.

At a bench conference on the morning of 25 September 2003, before Shaibani was called, Mr. Hardin noted: "I have the

impression based on a comment you [Mr. Rudolf] made earlier that you intend to ask for a voir dire with respect to Dr. Shaibani. I'd like to get some understanding of what you anticipate." Mr. Rudolf replied: "Well I'd like to get to a point where you're going to offer opinions and then maybe I guess what we should do is, once we've got him qualified, assuming he qualifies, then we can break for voir dire." (68: 12527) As the bench conference continued Hardin observed that "I saw that you've got transcripts that you're going to be asking him about," and suggested that defense questioning of Shaibani should avoid reference to his religious beliefs. Rudolf responded that he was "not going to ask him whether because he taught at Liberty University he's a wacko. I'm not going to ask him any of that. But I am going to ask him about his scientific underpinnings and the extent to which he accepts science." (68: 12528-30)

The jury was then summoned and Mr. Hardin began the process of qualifying Shaibani by asking him about his educational and professional qualifications. Shaibani testified that he had a "research affiliation with Temple University" and that the "scholarly work . . . I undertake as clinical professor has Temple University's name as an affiliation in the papers that I publish and present." Asked to elaborate, Shaibani testified that he "began [his] relationship with Temple University in 1992 . . . and that was as part of the Temple University School of Medicine, more specifically through one of their teaching hospitals." He

testified further that his "specialty as a clinical professor is injury mechanisms analysis." He also testified that he had been qualified in North Carolina courts nine times as an expert in the "field of injury mechanism analysis" and "physics." (68: 12531-33, 12549)

When Mr. Hardin tendered Shaibani as an expert, Mr. Rudolf said he had "a number of questions on his qualifications, Your Honor." To proceed with a voir dire on those qualifications, the Court excused the jury, but Mr. Rudolf insisted on a so-called voir dire in front of the jury:

> MR. RUDOLF: I have a number of questions on his qualifications, your Honor.
>
> THE COURT: All right. Mr. Deputy, if you will take the jury to the deliberation room.
>
> **MR. RUDOLF: I request permission to do it in front of the jury.**
>
> **THE COURT: We need to talk about that.**
>
> MR. RUDOLF: Yes, sir.
>
> (The jury left the courtroom.)
>
> THE COURT: Yes, sir, Mr. Rudolf. You said you had a number of questions, but you didn't really say what they pertained to.
>
> MR. RUDOLF: Yes, sir. **They pertain to his qualifications, his academic appointments**, his publications, his undergraduate and master of education. They pertain to virtually every area that he has claimed to have expertise or experience in.
>
> And it's our position that **Dr. Shaibani has testified falsely about his credentials in a number of cases under oath, and we have gathered transcripts and we've gathered other materials, and I think it goes to his ability to testify at all.**

But certainly, the jury is entitled to hear about what he actually has done versus what he claims to have done before they hear his testimony, even if the Court overrules the objection.

THE COURT: As to the Court's determination as to whether he's an expert or not, that's a separate – - separate issue from what you get in front of the jury.

MR. RUDOLF: Yes, sir. And what I'm representing to the Court is that I think **there are serious issues with regard to this man's truthfulness and with regard to his qualifications.**

THE COURT: And that may be. I'm just trying to figure out commingling the issues that we're dealing with. His credibility as an expert, if the Court finds him to be so, is certainly something you can attack.

MR. RUDOLF: Yes, sir.

THE COURT: I'm trying to determine whether the Court needs enough information to make its determination with you doing whatever you have to do as far as your client is concerned.

MR. RUDOLF: Yes, sir.

THE COURT: With what you believe his credentials are. Are those really two separate issues?

MR. RUDOLF: Well, I don't know. I'll be happy, in camera, with the district attorney present, to explain to the Court some of the bases of what I'm talking about, but I think **it goes very directly to whether the Court ought to qualify him as an expert** in the field he claims expertise in.

But it seems to me that **I ought not to be required to make a choice and have to cross-examine him once outside the presence of the jury,** educate him about what I intend to get into, have the Court then rule, and then have to cross-examine him again on the very same topics in front of the jury after he's already been educated about what I'm going to ask him. So –-

THE COURT: The only problem with that, though, is that you do one examination, but when does Mr. Hardin know when his witness has been qualified as an expert or if he hasn't?

MR. Rudolf: Well --

THE COURT: It would be after your examination in front of the jury.

MR. Rudolf: Well, my position would be that before he gets into any opinions at all, this Court needs to determine whether or not his true qualifications are sufficient. And from the opinions or **from the transcripts I've read, I don't know that anyone's really gotten into the true qualifications.**

So the fact that other Courts may not have been aware of information, I don't think binds this Court in coming to an opinion, and I think that what I'm asking for might -- - what **I'm seeking permission to do is to conduct a voir dire limited to his qualifications**. I'm not going to get into his opinions about this case at all. **But a voir dire in front of the jury**, limited to his qualifications, in much the same way what we did with Duane Deaver, I believe.

MR. HARDIN: Your Honor, we would object to that process. **If Mr. Rudolf has information along the lines of what he has described, that's obviously very serious. It would be something that needs to be dealt with before the jury hears additional testimony from the witness.**

I'm aware of absolutely no entitlement that he has to have a voir dire as to his qualifications, and the Court's consideration of those qualifications, before the jury.

So we would ask that the Court conduct a voir dire, he suggested, in camera. **If it's this serious, we can do it in camera. It should be done outside the presence of the jury before the Court makes a decision about whether Dr. Shaibani can testify** as an expert in his field.

MR. RUDOLF: **I object to that, and have no intention of going forward with voir dire if it's outside the presence of the jury. I think its** - -

THE COURT: It's not a jury determination.

Mr. RUDOLF: I'm just not going to –- I'm not going to – - I'm going to do this cross-examination once on his qualifications, and **if the Court is satisfied based on what it's heard, and doesn't wish to allow me to do a voir dire in front of the jury, then I'm not going to ask**

any questions about qualification at this point.

THE COURT: Well –- yes, sir?

MR. HARDIN: **Well, what is being raised is extremely serious. And no one wants there to be a perpetration of any fraud on the Court.**

So if Mr. Rudolf: –- he offered to tell the Court and the State in camera about these issues. If he wants to do that, we need to do that.

MR. RUDOLF: I'll withdraw my request.

Mr. Hardin can put on his witness. I'm sure Mr. Hardin can find out from his witness what the truth is. It's his witness, not mine.

I'll withdraw my request, your Honor.

THE COURT: Although I'm not sure you said it, Mr. Rudolf, I take it that you do object to the Court finding him as an expert witness.

MR. RUDOLF: Yes, I do.

THE COURT: All right. You certainly have an option of presenting evidence or having a voir dire, if you so desire, on that issue.

I think the proper procedure in North Carolina is that preliminary determination would be an issue for the Court, and not the jury. And certainly, based on the Court's decision, you could still raise issues as to his credibility and as to his expertise, and that's still something you can always --

MR. RUDOLF: Yes, sir.

THE COURT –- always argue. **You do not wish to be heard at this time any further?**

MR. RUDOLF: No, sir.

(The jury entered the courtroom.)

MR. RUDOLF: Judge, at this time **I'm going to withdraw my request to do the voir dire at this point. I'll save my cross-examination on qualifications for cross-**

examination. [68: 12551-59[2]; emphasis added]

3.

Had the defendant's counsel brought out the information he had about Shaibani in voir dire as the Court and the District Attorney repeatedly suggested, the jury would never have heard the direct testimony about which defendant now complains. Instead, in the absence of a voir dire on his qualifications, Shaibani was allowed to testify as an expert, and he testified on direct to the effect that, in his opinion, Kathleen did not fall down the stairs and that her "body could not have come to rest on step 17 as a result

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[2] When Shaibani began to testify about the nature of his experiments, Rudolf called for a Rule "705, and a Daubert," explaining that "[t]o the extent that he wants to use these experiments, I need to find out what the scientific bases of them are." (68: 12572; 69: 12579)

At the time of defendant's trial the North Carolina Supreme Court had not yet handed down Howerton v. Arai Helmet , 358 N.C. 440, 597 S.E.2d 674 (2004), which defines the trial court's gatekeeper function for admitting or excluding expert opinion testimony. A Daubert hearing, based on the Supreme Court's opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469 (1993),"entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93, 125 L. Ed. 2d at ___. During the afternoon session of 25 September 2003 a true voir dire hearing, that is, in the jury's absence, was held on the scientific basis of Shaibani's experiments. Mr. Rudolf noted that the hearing's purpose was to gain an understanding of "the experiments you [Shaibani] did, the scientific basis of those experiments, and the opinions you drew from them. So I'll try to limit myself to those topics." (69: 12580) With the jury absent, Rudolf did not ask Shaibani any questions about Shaibani's claimed affiliation with Temple. At the conclusion of that hearing the Court asked whether either party desired to be heard. **Mr. Rudolf replied: "No, I'd sort of like the jury to hear this**." (69: 12628 [emphasis added])

of a fall within the stairway without external help." (70: 12703)

Mr. Rudolf made the tactical decision to expose Shaibani's previous as well as his current perjury in cross-examination before the jury. That cross-examination was devastating to Shaibani's false claims of a faculty or scholarly affiliation with Temple University in particular and to his pretensions as an expert in general.

Rudolf's cross-examination began on 26 September 2003, appearing at page 12705 of transcript volume 70. He did not immediately use the letter from Temple which had been sent by facsimile to his office on 25 September 2003. Instead, Mr. Rudolf questioned Shaibani using quoted questions and answers from the transcript of a case in Washington, D.C. in 2001[3], during which Shaibani testified, among other things that "over 80 percent of my time relates to my responsibilities as a clinical professor," that the "clinical professor at Temple is an unusual position in that I've been there for eight years now, I think and they support my research," and that, while his position at Temple was not tenured, it was permanent. Shaibani conceded that his quoted answers were given under oath. (70: 12727-29) Later in the fall of 2001 he testified in another proceeding that

Q. "Question: And is that work as a clinical professor affiliated with any educational institution?

[3] Rudolf identified the case as United States v. Angela O'Brien. (70: 12715)

Were you asked that in June –- I'm sorry, in October of 2001?

A. I believe I was, sir, yes, sir.

Q. And did you reply: "Yes. In 1992 I received an appointment from Temple University Medical School by one of their teaching hospitals, and for a period of time, I think of four years, the job title they gave me was principal research fellow. Overlapping with that I was also appointed a clinical professor. So the two are virtually synonymous. Instead of being affiliated at the moment with the Temple University Medical School, I'm affiliated with the main Temple University organization."

Is that what you testified to?

A. Yes, I did, sir. [70: 12731]

Then, after a short exchange, Rudolf sprang his trap:

Q. Now, the truth of the matter is that **at this trial in October of 2001, you were flat out told through a letter that was submitted to the Court by the dean of the department of physics at Temple that you were not affiliated with Temple, and that you were not to tell anybody anymore you were affiliated with Temple; isn't that true?**

A. Not true, sir. That was an allegation made by the public defender without any supporting documentation whatsoever.

(Defendant's Exhibit 292 was marked for identification.)

Q. **Let me show you what I've marked as Defendant's Exhibit 292** (handing). Just read that to yourself for the time being.

(Pause in the proceedings.)

A. All right, sir, yes.

Q. You were shown that letter --

A. **I don't remember seeing this letter, sir, no.** I remember it being --

Q. You don’t remember being shown that letter --

A. **I remember it being mentioned.**

Q. In the transcript, it was mentioned, wasn’t it?

A. I believe so, yes. [70: 12737-38; emphasis added]

Shaibani’s denial was followed by introduction of the text of a letter that the Chairman of the Physics Department had written to Joanne Slaight, defense counsel in the Washington, D.C., trial. The letter was dated 27 September 2001, shortly before Shaibani testified in that case. The transcript of that case shows that the letter was discussed with Shaibani at the time:

Rudolf then read the letter into the record before the jury:

Q. And what is says –- dated September 27, 2001, which was just a few weeks before you testified, right?

A. Yes, sir.

Q. “Dear Ms. Slaight: To my best recollection, Mr. Saami Shaibani was an adjunct professor of physics” –- doesn’t say “clinical,” does it?

A. No, it doesn’t, sir.

Q. –- “ for a period of one to two years sometime during the early 1990's. However, neither the physics department nor the dean’s office has on record any documentation confirming this appointment. An adjunct professorship is usually conferred as a matter of courtesy to a colleague who wishes to collaborate with a faculty member on a short-term basis. It provides no compensation or benefits, and does not require the fulfillment of any teaching or research duties. The recipient is typically offered parking privileges, perhaps some office space, but little else. I can assure you there is no such position in our department as a “–- quote –- “clinical associate professor of physics, nor was there during the early 1990's, when Sabiani” –- I’m sorry, “Shaibani,” parens, “perhaps, had a loose affiliation with us.”

And now the last paragraph:

"Any claim by Mr. Shaibani that he is now a member of or even affiliated with the Temple University Department of Physics is fraudulent."

See that word?

A. I do, sir.

Q. You understand what "fraudulent" means, right?

A. Yes, I do.

Q. "Furthermore, at least once a year I have to write this sort of letter when Mr. Sabiani –- Shaibani again tries to establish his bona fides as an expert witness by claiming he is a member of the physics department."

Right?

A. That's what this letter says, yes, sir.

Q. "Sincerely, Edward T. Gawlinski, Chair, Department of Physics." Right?

A. Yes, sir. [70: 12740-41]

Shaibani's efforts to explain away his testimony at that trial and his knowledge of that letter served only to brand him more deeply as a liar. (70: 12741ff)

Finally, Mr. Rudolf introduced the letter which had been faxed to his office the day before, and questioned Shaibani about it as follows:

MR. RUDOLF: Can we put that up.

(Referring to overhead screen.)

Q. See that the date on that letter?

A. Yes, sir.

Q. "Dear Ms. Henry," see that?

A. Yes, sir.

Q. "Enclosed are the documents in our file regarding Saami J Sabiani –- Shaibani." I apologize. I don't mean to mispronounce your name.

"As you can see, he was awarded an" –- should be "a" –- "courtesy appointment as a clinical associate professor without compensation or permanent faculty status for the period September 1, '95 through August 31, '98.

"According to our payroll records, he has never been an employee of the Temple University, of [sic] the Commonlaw System of Education.

"**By letter dated September 27, 2001, Edward T. Gawlinski, then chair of the Department of Physics, confirmed that Mr. Shaibani was not a member of, or even affiliated with, the Temple University Department of Physics**, and any such claim was fraudulent.

I have confirmed with Ralph Jenkins, senior associate dean, College of Science and Technology, that Mr. Shaibani has not become employed by or affiliated with the physics department since that time.

"In his September 27th letter, the chair expresses his frustration over having to write yearly letters to refute Mr. Shaibani's claim that he is a member of the physics department. However, we have no record of legal action being taken in regard to this misrepresentation."

You know what a misrepresentation is, right?

A. Yes, sir.

Q. "**Thank you for agreeing to forward to us the materials Mr. Shaibani is circulating which state he is currently employed in and/or affiliated with our physics department**.

"Any current representation" –- and that's what you made here today, right, a current –- I'm sorry, yesterday, you made a representation that you were affiliated with Temple, didn't you?

A. Yes, sir.

Q. "Any current representation that Mr. Shaibani is employed by or affiliated with Temple University is simply untrue."

Do you see that?

A. I do.

Q. Do you understand, sir, that when you get on a witness stand and swear to tell the truth, that it is perjury to lie, even about something like what your position is at a university?

A. I understand that, sir, yes. [70: 12748-50; emphasis added]

Rudolf then turned to certain of Shaibani's supposedly peer-reviewed articles and to his experiments in the Peterson case. (70: 12751-61). Rudolf concluded by asking Shaibani about his experiments for and testimony in a case from Eagle River, Wisconsin (the Plude case). Shaibani had been asked about his methodology, so-called, in conducting experiments to determine whether the victim could have drowned herself in a toilet bowl, as her husband claimed. Mr. Rudolf used the transcript of that case in questioning Shaibani:

Q. "Question: And you went there and you put heads in, put actual heads in toilets; is that right?

"Answer: As part of my scientific research, I found three volunteers. That word may be used loosely here. For four hours I put their heads in the actual toilet bowl where the husband claims to have found his wife, because science dictates that you compare apples with apples. The women volunteers were the same height and the same weight as the dead woman, and I wanted to see if it was physically possible for a woman of that height and that weight, with that actual toilet, to commit suicide by drowning or to drown accidentally. And

> the science says no, you can't.
>
> "Question: And the science was putting the heads in the toilet; is that right?
>
> "Answer: No, that was part of it. I asked these women, put you head in the toilet and see if you can drown yourself, and I'll try and fish you out before you succeed. But they never got close. They just simply couldn't do it. The laws of physics didn't allow them to drown themselves."
>
> Was that your testimony?
>
> A. Yes, sir.
>
> Q. Is that what you consider to be even a part of science?
>
> A. Of course. A lot of calculations involved seeing where the forces on different parts of the body were.
>
> MR. RUDOLF: Your Honor, may I have a brief recess so that I can organize my notes? I'm getting close to the end.
>
> THE COURT: Let me talk to you all up here.
>
> (A bench conference was held off the record.) [70: 12763-64]

Following that exchange the trial judge excused the jury and cautioned defense counsel: "All right, Mr. Rudolf, over lunch, control your righteous indignation somewhat." (70: 12765)

4.

The jury heard testimony from Shaibani as a direct result of Mr. Rudolf's desire and his calculated, tactical decision to expose Shabani as a fraud before the jury instead of laying out the considerable evidence of Shaibani's misrepresentation and past perjury before the trial judge alone. Rudolf insistently refused repeated opportunities to examine Shaibani by the usual and proper

procedure of voir dire in the jury's absence. It is a reasonable inference from Rudolf's decisions and action, that he hoped thereby to gain a tactical advantage, namely, to have the jury infer bad faith on the part of the prosecution in calling Shaibani as a rebuttal witness. While the series of requests and decisions made and taken by Mr. Rudolf during the Shaibani episode may not fit the technical definition of invited error, see N.C.G.S. § 15A-1443(c), the course he chose to follow in not bringing forward the information he had about Shaibani in voir dire smacks of invited error. It is certainly analogous to that concept in our law.

B. The Court's Ruling that It Was Striking Shaibaini's Testimony, and the Court's Curative Instruction to the Jury.

When the Court reconvened, Rudolf moved to strike Shaibani's testimony because of his perjury regarding Temple University and to instruct the jury accordingly. The District Attorney noted that

> Your Honor, the issues that Mr. Rudolf raised yesterday that were actually brought forward today related to information that we asked for yesterday and Mr. Rudolf chose not to provide that to us. We've obviously seen in great detail some of the information that he had with respect to several of these complaints or allegations. If we had had that information yesterday, I do not believe we'd be in the position that we are in today. [71: 12771]

Having made that point, Mr. Hardin did not oppose the motion to strike. (Id.) The Court announced it would strike Shaibani's testimony.

In MAR paragraph 170 the defendant alleges that the "Court's curative instruction went to Dr. Shaibani's perjury regarding his credentials but did not address his qualifications to testify as an

expert." That assertion completely ignores the text of the curative instruction. The Court did not tell the jury to disregard only defendant's testimony about his credentials because of his perjury. The Court did not tell the jury to treat Shaibani's opinion testimony with caution because of his perjury. The Court instructed the jury to disregard every bit of Shaibani's testimony and called for a show of hands to insure that the jury understood:

> THE COURT: All right, members of the jury, as to the last witness that appeared before you before lunch, the Court finds the following facts and will instruct the jury that the Court finds as a fact that this witness has committed perjury in relating to the jury his credentials to testify as an expert witness. **The Court orders the jury to totally disregard all of the testimony of this witness**, and it is further ordered that the court reporter should **strike it from the record of this trial.**
>
> Is there anything, members of the jury, you don't understand about the Court's order? **You are to totally disregard it in all respects.**
>
> MR. RUDOLF: I assume that also applies –- I'm sorry.
>
> THE COURT: All right. Mr. Deputy, if you'll take the jury back, I'll hear from counsel.
>
> MR. RUDOLF: All I was going to ask is whether that also applies to the exhibits, photographs, and all of the other stuff that he –-
>
> THE COURT: **The jury is ordered to totally disregard all of the testimony** of this **witness**. Does any juror not understand that? **If you do not understand that, raise your hand. I do not see any hands.**
>
> Mr. Deputy, take the jury back to the deliberation room [71: 12776-77; emphasis added]

The Court's curative instruction to the jury could not have been more absolute or complete, and, as noted above the Court also struck the exhibits associated with Shaibani's testimony. (71:

12777)

In State v. Thomas, 350 N.C. 315, 341, 514 S.E.2d 486, 503 (1999), cert. denied, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999), the Court held that when "the trial court sustained defendant's objection, allowed his motion to strike, and instructed the jury to disregard the statement . . . [it] **cured any error by its action in sustaining the objection and giving the curative instruction, [hence] we find no prejudice to defendant warranting a mistrial**" (emphasis added). The same applies in this case.

C. The Opinion in State v. Plude, 310 Wis.2d 28, 750 N.W.2d 42 (2008), Does Not Constitute Newly Discovered Evidence

1.

In MAR paragraphs 169-183 the defendant claims that the opinion of the Wisconsin Supreme Court in State v. Plude, 310 Wis. 2d 28, 750 N.W.2d 42 (2008), constitutes newly discovered evidence, entitling him to a new trial.

When a defendant seeks a new trial based on what he contends is newly discovered evidence, that evidence must meet all of the following requirements:

> (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the **newly discovered evidence is not merely cumulative or corroborative**; (6) **the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness**; and (7) **the evidence is of such a nature that a different result will probably be reached at a new**

trial.

Beaver, 291 N.C. at 143, 229 S.E.2d at 183 (emphasis added); accord, State v. Britt, 320 N.C. 705, 712-13, 316 S.E.2d 660, 664 (1987), State v. Eason, 328 N.C. 409, 434-435, 402 S.E.2d 809, 823 (1991).

Shaibani's testimony in the Plude case does not constitute newly discovered evidence. In Plude Shaibani testified as an expert and lied about his credentials. In Plude, unlike this case, the jury never knew Shabani had perjured himself, nor was his testimony stricken by the trial judge. In this case the trial judge's instruction to the jury to disregard all of Shaibani's testimony could not have been more encompassing regardless of Shaibani's testimony in Plude or any other case. Finally, considering the thorough impeachment of Shaibani on cross-examination by Mr. Rudolf, including the fact that he had lied about his credentials in 2001 in a Washington, D.C. case, the fact that he lied in still another case, namely Plude, is merely cumulative impeachment; it does not meet North Carolina's test for newly discovered evidence.

2.

In the case on which defendant relies, Douglas Plude was charged with murdering his wife Genell in October 1999; the case came on for trial in November 2002 and Plude was convicted. State v. Plude, 2007 Wisc. App. LEXIS 194 at *2, *12 (6 March 2007). The State's theory was that "Plude murdered Genell by poisoning her

with Fioricet-codeine and then drowning her in toilet bowl water . . . . Plude contend[ed] that Genell committed suicide by taking an overdose of drugs, which served as a catalyst for a fatal occurrence of pulmonary edema," i.e., she drowned in fluid created by her body. Plude, 310 Wis.2d at 32-33, 750 N.W.2d at 44. Shaibani testified as an expert that drowning in the toilet bowl "would have required 60 pounds of pressure to the back of her [the victim's] head to get her face in the toilet bowl water and keep it there." Id. at 40, 750 N.W.2d at 48.

Defendant Peterson's case came on for trial in May 2003. When Shaibani was called as a witness, defense counsel Rudolf knew about Shaibani's testimony in the Plude case, and, as discussed above, he cross-examined Shaibani about his testimony in that case and posed questions to Shaibani using the trial transcript of the Plude case. At the time of that cross-examination Rudolf knew that Shaibani had lied about his connection with Temple University in the Washington, D.C., case that was tried in October 2001. He also knew that Shaibani had perjured himself in the same way in defendant Peterson's case. As discussed above, Rudolf's cross-examination established the perjury Shaibani committed in both cases.

Unlike the situation in Plude's case, Shaibani's perjury was revealed to the Peterson jury and his entire testimony was ordered stricken. Shabani's perjury was, and is, not newly discovered evidence in defendant's Peterson case because it was revealed at trial.

Shabani's perjury was ultimately found to be grounds for a new trial in Plude's case because it was only discovered after Plude's conviction and appeals were final. In fact, Plude stated in his post-conviction proceedings "that he discovered Shaibani misrepresented himself when **Shaibani attempted** to testify untruthfully before a North Carolina court." Id. at 47n.10, 750 N.W.2d at 750 N.W.2d at 52n.10 (emphasis added).

In deciding Plude's motion for post-conviction relief the Wisconsin Supreme Court repeatedly made the point that the jury which convicted Plude did not know of Shaibani's perjury. The Court noted that Shaibani "had represented himself as a clinical associate professor at Temple University and as a specialist in 'injury mechanism analysis" . . . [and] said that as part of his duties at Temple University he taught physicians and surgeons about injury." Id. at 38, 750 N.W.2d at 47. The Court noted pointedly that in post-conviction proceedings the "State admit[ed] that if Shaibani's false testimony about his fictitious professorship at Temple University had been revealed during Plude's trial, the revelation would have unquestionably diminished Shaibani's credibility in the eyes of the jury." Id. at 48, 750 N.W.2d at 53. The Court "conclude[d]," finally, "that the discovery that Shaibani testified falsely about his credentials is newly-discovered evidence[4] that gives rise to a reasonable probability that, had the

[4] Wisconsin, like North Carolina has a multi-part test for newly discovered evidence. In Wisconsin the test is as follows:

jury heard Shaibani's misrepresentation about his credentials, it would have had a reasonable doubt as to Plude's guilt." Id. at 56, 750 N.W.2d at 56.[5]

In sum, Shaibani's perjury in the Wisconsin case of Plude is a red herring dragged across the path of defendant Peterson's case. The evidentiary elephants in the Plude case which defendant wants

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"(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." Id. at 48, 750 N.W.2d at 52 (citation omitted).

[5] In addition to Plude, defendant, in passing, cites Giglio v. United States, 405 U.S. 150, 31 L. Ed. 2d 104 (1992), to support his claim for relief. Petitioner Giglio was convicted of passing forged money orders. The relief granted to him by the Court was not based on a witness' expert credentials or any testimony claiming expert status because of those credentials. Instead, the error in Giglio involved evidence of a government witness' bias as a result of leniency in return for his testimony and the failure of the government to disclose that agreement.

The controversy centered "on petitioner's alleged coconspirator [Taliento], [who was] the only witness linking petitioner with the crime." Id. at 151, 31 L. Ed. 2d at 107. At trial the co-conspirator denied on cross-examination that anyone had ever told him he would not be prosecuted if he testified for the government. In closing argument the prosecutor referred to the lack of any agreement between Taliento and the Government. After trial it was discovered that an Assistant United States Attorney, DiPaola, had promised Taliento that he would not be prosecuted if he testified before the Grand Jury and at trial. "DiPaola presented the Government's case to the grand jury but did not try the case in the District Court, and Golden, the assistant who took over the case for trial, filed an affidavit stating that DiPaola assured him before the trial that no promises of immunity had been made to Taliento. Id. at 152-53, 31 L. Ed. 2d at 107-08. The Court held that, on the facts of Giglio, Due Process required the disclosure of DiPaola's promise to the jury regardless of the prosecuting attorney's knowledge or ignorance of that promise.

this Court to overlook are: first, unlike the Peterson jury, the Plude jury never knew that Shaibani had committed perjury in front of them; and second, unlike the Peterson jury, the Plude jury was never instructed to disregard all of Shaibani's testimony. State v. Plude does not constitute newly discovered evidence in the Peterson case. Defendant's request for relief from his conviction of first degree murder on the basis of his "ground five" should be denied without further proceedings.

DEFENDANT'S GROUND SIX: ALLEGATION OF JUROR MISCONDUCT BY DAVID HEGGINS AND TONIA ROGERS

[MAR paragraphs 184-96]

Summary Response

1.

The State notes initially that defendant's allegation in MAR paragraph 190 is simply wrong and is contradicted by the trial transcript. Defendant alleges that "Shaibani's testimony was struck before the Defense conducted any cross-examination [;] Defendant was denied his constitutional right to confront the witness against him." In fact, Shaibani's testimony was struck **after** and precisely **because of** Mr. Rudolf's cross-examination of Shaibani. That cross-examination covers 59 pages of transcript and was devastating to Shaibani's pretensions. (See the discussion of that cross-examination in the State's response to defendant's MAR "Ground Five" as well as State's Exhibit 1 [transcript, 70: 12705-12764].) The defendant was obviously not denied his Sixth

Amendment right to confront Shaibani as a witness.

In MAR paragraph 192 defendant claims that Heggins told Guerette that he (Heggins) had once fallen down stairs. Defendant alleges that, "despite being asked a direct question, this same juror [Heggins] did not reveal during *voir dire* that he once fallen down 14 metal steps and landed on his head, with very little injury." (MAR paragraph 192) That claim, like the one in MAR paragraph 190 is factually inaccurate; it, too, is contradicted by the transcript. Defendant through his current counsel gives no citation to where in the transcript Heggins was asked about falling down stairs. David Heggins was the first alternate juror selected. Mr. Hardin's examination of him begins on page 3893 of Volume 19 of the transcript. Mr. Rudolf's examination of Heggins on voir dire appears in Volume 19, pages 3924 through 3959. Although Rudolf posed numerous questions to Heggins about the State's burden of proof, circumstantial evidence, expert opinion testimony, the presence or absence of motive, willingness to keep an open mind, et cetera, **Heggins was never asked** whether he had fallen down steps, metal or otherwise. (See State's Exhibit 2 [transcript of Mr. Rudolf's voir dire examination of Heggins in jury selection, 19: 3924-3959])

2.

The State notes next that defendant's claim regarding alleged misconduct by juror Heggins should be denied because he was aware of the claim in December 2003 and has unreasonably delayed in

putting it forward. At this late date the State is prejudiced in its ability to refute the hearsay claim about juror's Heggins alleged misconduct because he now suffers from dementia. As discussed below, defendant could have easily incorporated this claim in his direct appeal by motion for appropriate relief in the appellate division, but he did not do so. His record on appeal was not filed in the Court of Appeals until July 2005; the case was not decided there until September 2006. The case was then appealed to our Supreme Court, where it was heard in oral argument in September 2007, and not decided there until November 2007. As the Court of Appeals observed in State v. Riley, 137 N.C. App. 403, 528 S.E.2d 590, appeal dismissed, disc. rev. and cert. denied, 352 N.C. 596, 545 S.E.2d 217 (2000), cert. denied, 531 U.S. 1082, 148 L. Ed. 2d 681 (2001), regarding defendant's delay in raising a constitutional claim: "his case has been tried, appealed, remanded, and retried. At no point in any of these proceedings" did defendant bring forward his claim. Id. at 407, 528 S.E.2d at 593.

The State notes next that the material defendant submits in support of his claim of juror misconduct fails to comply with the requirements for "affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records" that are mandated by N.C.G.S. § 15A-1420(b)(1). While certain affidavits, e.g., one from a juror impeaching the jury's verdict, are inadmissible, an affidavit can in some circumstance provide a forecast of evidence that would be

admissible.

The State notes next that the material defendant submits is hearsay (technically, in fact, double hearsay) which fails to meet the standard of a showing of admissible evidence required for relief pursuant to a motion for appropriate relief. The hearsay statements of third parties, asserted by a post-conviction counsel, or any other person, are not legally sufficient under current N.C.G.S. § 15A-1420(c)(6) and our case law. See, State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1984). Furthermore, the letter of Cornelius Tucker on which defendant relies is not only double hearsay but also inherently unreliable. Apart from his very lengthy criminal record, including crimes involving fraud and deceit, Mr. Tucker was adjudicated legally insane when found not guilty by reason of insanity in 2005 and was confined for some months in a federal psychiatric hospital following his release from the North Carolina Department of Correction. In addition, he has been sanctioned repeatedly by our Court of Appeals for filing frivolous pleadings.

Finally, and most crucially, even if defendant proferred in support of this claim a proper affidavit from former juror Heggins himself, stating under oath that he considered Shaibani's testimony despite the trial judge's instructions to disregard, such an affidavit would not present a forecast of admissible evidence because testimony by a juror or jurors regarding his or their thought processes in reaching a verdict is prohibited in both state

and federal case law. Moreover, the Rules of Evidence prohibit the reception into evidence of such an affidavit.

The North Carolina Rules of Evidence provide that

> upon an inquiry into the validity of a verdict or indictment, **a juror may not testify as to** any matter or statement occurring during the course of the jury's deliberations or to **the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict** or indictment **or concerning his mental processes in connection therewith**, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. **Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.**

N.C.G.S. § 8C-1, Rule 606(b)(2007)[6]. This prohibition and the

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[6] N.C.G.S. § 15A-1240 also prohibits a juror from testifying to impeach the verdict he returned. The statute provides that

> (a) Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.
>
> (b) The limitations in subsection (a) do not bar evidence concerning whether the verdict was reached by lot.
>
> (c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:
>
> (1) Matters not in evidence which came to the attention of one or more jurors **under circumstances which would violate the defendant's constitutional right to confront** the witnesses against him; or
>
> (2) Bribery, intimidation, or attempted bribery or intimidation of a juror. [Emphasis added.]

public policy reasons for it are long established and eloquently expressed in our case law. The effect of disregarding trial court instructions in the course of deliberations falls within this prohibition. "'Resolving the question of whether jurors improperly disregarded the Court's instructions inevitably entails an anatomization of the thought behind the verdict,' and is therefore an impermissible avenue of inquiry because such evidence cannot be used to impeach the verdict" United States v. Sokoloff, 696 F. Supp. 1451, 1457 (S.D. Fla. 1988)(quoting United States v. Pavon, 618 F. Supp. 1245, 1247 (S.D. Fla. 1985), aff'd, 802 F.2d 1397 (11th Cir.1986)). Among many cases, State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989), points out that "both Rule 606(b) and Section 15A-1240 **unambiguously prohibit** inquiry into the effect of **anything** occurring during deliberations upon jurors' minds." Id. at 245, 380 S.E.2d at 394 (first emphasis added, second emphasis in original). Jurors "may testify regarding the objective events listed as exceptions in the statutes, but are prohibited from testifying to the subjective effect those matters had on their verdict." Id. at 246, 380 S.E.2d at 394. (Citing and quoting Smith v. Price, 315 N.C. 523, 535-36, 340 S.E. 2d 408, 416 (1986)).

In a criminal case the exception as to extraneous information exists to protect a defendant's right to confrontation, namely the exception for "[m]atters not in evidence which came to the attention of one or more jurors **under circumstances which would violate the defendant's constitutional right to confront** the

witnesses against him."[7] N.C.G.S. § 15A-1240(c)(1)(2007)(emphasis added); see also, Price, supra. The exception could not apply in this case because Shaibani was most definitely confronted and cross-examined by Mr. Rudolf.

The public policy underlying our law against allowing jurors to impeach their verdict after the fact has been enunciated many times. As the court noted in Government of the Virgin Islands v. Nicholas, 759 F.2d 1073 (3rd Cir. 1985),

> Some of the most thoughtful statements about the potential dire consequences of such impeachment efforts have been written by federal trial judges. . . .
>
> In exploring the implications of such post-verdict inquires, Judge Knox wrote:
>
> > If jurors were permitted to impeach their own verdict by statements such as these no criminal case would ever be ended, and the inducement would be great for defendants to engage in private interviews of jurors in an endeavor to get them to say that they did not understand the court's instructions which were clear and thus upset every verdict which was rendered. As a matter of fact, in the instant case the record indicates that the defendant personally went to interview two jurors and thereafter his counsel and a court reporter put these jurors, Zacur and Wolf, under oath and asked them questions which were later filed in court as exhibits. Such harassment of the jurors after their verdict should not be tolerated. Such procedures can very easily degenerate into a situation with all kinds of subtle pressures being exerted.

Id. at 1077-78 (quoting United States v. Homer, 411 F. Supp. 972

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[7] The other exception is for "bribery, intimidation, or attempted bribery or intimidation of a juror," and there is certainly no allegation of bribery or intimidation here.

(W.D. Pa. 1976), aff'd 545 F.2d 864 (3d Cir. 1976), cert. denied, 431 U.S. 954, 53 L. Ed. 2d 270(1977); accord, McDonald v. Pless, 238 U.S. 264, 267-68, 59 L. Ed. 1300, 1302 (1915) (stating same public policy and rationale).

Detailed Response

A. Defendant Has Unreasonably Delayed in Bringing His Claim of Alleged Juror Misconduct and the State Has Been Prejudiced by That Delay.

1.

The defendant was convicted and judgment was entered against him on 10 October 2003. According to defendant's exhibit 38, his investigator Ronald Guerette, by telephone, questioned juror Heggins just over two months later on 16 December 2003; on that date Heggins allegedly told Guerette, regarding the trial court's instruction to disregard Shaibani's testimony, "Yeah they you that, but show me a man that might say that, you don't erase everything, you take it into consideration. I did." (Defendant's MAR Exhibit 38)

Now, some five years after he first learned of what he alleges to be misconduct by juror Heggins and after appellate proceedings in the Court of Appeals, our Supreme Court, and the United States Supreme Court have concluded, he chooses to bring this claim.[8]

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[8] This Court may consider by analogy N.C.G.S. § 15A-1419(a)(3), which provides that

> (a) The following are grounds for the denial of a motion for appropriate relief, including motions filed in capital cases . . . (3) Upon a previous appeal the

The record on appeal in defendant's case was filed in the Court of Appeals on 27 July 2005 and docketed there on 3 August 2005. (See State's Exhibit 3 [Court of Appeals docket sheet for State v. Peterson].) From the time the trial court was divested of jurisdiction by defendant's appeal through its pendency in the Court of Appeals and the North Carolina Supreme Court defendant was in position to include his claim about juror Heggins in his direct appeal by motion for appropriate relief in the appellate division but he did not do so. Motions for appropriate relief in the appellate division made be decided there or remanded to the trial court for further proceedings after which the appellate court will decide the correctness of the trial court's ruling. N.C.G.S. § 15A-1418 provides as follows:

> (a) When a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division. For the purpose of this section a case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448, or when a petition for a writ of certiorari has been granted. When a petition for a writ of certiorari has been filed but not granted, a copy or written statement of any motion made in the trial court, and of any disposition of the motion, must be filed in the appellate division.
>
> (b) **When a motion for appropriate relief is made in the appellate division, the appellate court must decide**

> defendant was in a position to adequately raise the ground underlying the present motion but did not do so.

Furthermore, subsection (c) of the statute provides that "A trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim may not constitute good cause . . . .

> **whether the motion may be determined on the basis of the materials before it, whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings**, or, for claims of factual innocence, whether to refer the case for further investigation to the North Carolina Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.
>
> (c) The order of remand must provide that the time periods for perfecting or proceeding with the appeal are tolled, and direct that the order of the trial division with regard to the motion be transmitted to the appellate division so that it may proceed with the appeal or enter an appropriate order terminating it. [Emphasis added.]

Our appellate reports are replete with cases dealing with issues raised by defendants after trial by means of an MAR in the appellate division and decided in the course of direct appeal. In State v. Elliot, 360 N.C. 400, 628 S.E.2d 735 (2006), the defendant after trial and by MAR raised in his direct appeal precisely the kind of claim defendant now makes, namely juror misconduct. The Supreme Court resolved that claim on the basis of the materials before it without a remand. Id. at 417-21, 628 S.E.2d at 747-49 In State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985), the Court noted that "both the State and the defendant have filed motions for appropriate relief, the State pursuant to N.C.G.S. § 15A-1416 (motion by the State for appropriate relief) and Rule 37 of the North Carolina Rules of Appellate Procedure and the defendant pursuant to N.C.G.S. § 15A-1418 (motion for appropriate relief in the appellate division)." In Payne, too, the Court resolved the

issue on the basis of the materials before it. Id. at 667-69, 325 S.E.2d at 218-19; see also, State v. Bodden, ___ N.C. App. ___, ___, 661 S. E.2d 23, 30-32 (2008)(Court of Appeals reviewed both contentions in defendant's MAR filed before oral argument in the case, rejected both, and denied defendant's MAR without an evidentiary hearing).

In other cases our appellate courts have remanded issues raised by MAR made during the appeal to the trial division for further development of the record. In State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (1999), cert. denied, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000), the defendant was charged with two counts of first degree murder based on both premeditation and deliberation and felony murder (with the underlying felonies being sex offenses). The defendant raised by MAR in the Supreme Court the claim that he did not understand and therefore voluntarily consent to a statement which abandoned the insanity defense of which his counsel had previously given notice. The change of strategy substituted a plea of guilty to the sex offenses but not to the murders. "After reviewing defendant's motion for appropriate relief raising this issue," the Court "determined that the record on appeal contained insufficient evidence to enable this Court to determine the issue. Therefore, on 6 November 1997, this Court entered an order remanding defendant's motion to Superior Court, Wake County, for an evidentiary hearing." Id. at 713, 517 S.E.2d at 629. The order of remand instructed the trial court to address

> (1) the withdrawal of defendant's plea of not guilty to the murder charges by reason of insanity, (2) the submission of a stipulation by defendant admitting commission of the physical acts alleged in the bills of indictment and basing defense on absence of mental elements of the crime, (3) the tender of guilty pleas to the sex offenses, (4) the circumstances surrounding these submissions to the trial court, and (5) the defendant's understanding and voluntary tender thereof.

Id. at 713, 517 S.E.2d at 629-30. Following the evidentiary hearing, the Court reviewed the trial court's findings on the MAR claim and decided it and all other claims raised in defendant's appeal. Id. at 718-19, 517 S.E.2d at 632-33; see also, State v. Bishop, 346 N.C. 365, 402-04, 488 S.E.2d 769, 789-90 (1997)(during pendency of appeal, defendant filed an MAR alleging newly discovered evidence; the Court remanded the claim to the trial court for an evidentiary hearing and then reviewed the trial court's ruling and decided defendant's MAR claim along with all other issues raised in the appeal).

2.

Because of the passage of time and the illness that now afflicts former juror David Heggins the State's ability to respond to defendant's hearsay allegation has been severely prejudiced. As discussed below in section C, Mr. Heggins, who is now more than seventy-six years old, suffers from dementia.

Federal law on jurors' impeachment of their verdicts notes the dubious character of such claims, especially when they are not timely raised. As the Supreme Court has held, "allegations of juror misconduct, incompetency, or inattentiveness, raised for the

first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." Tanner v. United States, 483 U.S. 107, 120, 97 L. Ed. 2d 90, 106 (1987), superseded by statute on other grounds as stated in, United States v. Little, 889 F.2d 1367(5th Cir. 1989). Tanner cited, inter alia, the case of Government of the Virgin Islands v. Nicholas, 759 F.2d 1073 (3rd Cir. 1985). In Nicholas the defendant raised his post-conviction claim regarding a juror one year and eight months after verdict was rendered. In this case, the defendant is bringing forward his allegation more than five years after verdict was rendered.

B. The Material Offered by Defendant in Support of This Claim Fails to Comply with the Requirements of § 15A-1420.

The statement purportedly made by former juror Heggins to Ron Guerette (MAR Exhibit 38) fails to comply with the requirements of N.C.G.S. § 15A-1420 for obtaining an evidentiary hearing on a post-conviction claim. In addition, as discussed below, that purported statement is inadmissible as evidence under N.C.G.S. § 15A-1240, § 8C-1, Rule 606(b), § 8C-1, Rule 802, and case law. The same is true of the statement purportedly made and purportedly "overheard" by inmate Cornelius Tucker, a.k.a., Cornelius Tucker, Jr. (MAR Exhibit 39).

Section 15A-1420(b)(1) requires that

> [a] motion for appropriate relief made after the entry of judgment **must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case** or which are not within the knowledge of the judge who hears the motion.

[Emphasis added.]

Unsworn, hearsay statements of third parties are not legally sufficient under § 15A-1420(b)(1) as "affidavits" supporting relief requested by an MAR. "An affidavit is [a] written or printed declaration or statement of facts, made voluntarily, and **confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath**." Ogburn v. Sterchi Bros. Stores, Inc., 218 N.C. 507, 508, 11 S.E.2d 460, 461 (1940)(internal quotation marks and citation omitted). For a document to qualify as an affidavit based on an oath before a notary, the notary must fulfill the requirements "of the notarial act, including verifying the affiant's identity and ensuring that the affiant swears to or affirms the truthfulness of the statements in the affidavit. As with all notarial acts, the notary must properly complete the certificate." Charles Szypszak, Notary Public Guidebook for North Carolina, 90 (10th ed. 2006).

Defendant describes his exhibit 38 as a "notarized statement the juror stated [sic] about Dr. Shaibani." (MAR at 50) The paperwriting he has attached does not support that characterization. It is captioned "Investigative Report 3," with subheadings "Synopsis" and "Investigative Findings." It is not signed by juror David Heggins, but by "Ronald T. Guerrette." N.C.G.S. § 10B-20(b) mandates that

> A notarial act shall be attested by all of the following:
>
> (1) **The signature of the notary, exactly as shown on the notary's commission**.

> (2) The legible appearance of the notary's name exactly as shown on the notary's commission. The legible appearance of the name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible.
> (3) **The clear and legible appearance of the notary's stamp or seal.**
> (4) A statement of the date the notary's commission expires. The statement of the date that the notary's commission expires may appear in the notary's stamp or seal or elsewhere in the notarial certificate.

At the bottom of page 3 of defendant's exhibit 38 the following appears: "Marquise J. Ballentine, Notary [,] commission expires 02/04/2012." There is no statement by "Ballentine" that Guerrette personally appeared before her or when, no statement that Guerrette's "Report" was made under oath before Ballentine, and no notary's seal. In addition the "Report" is dated "December 16, 2003, Tuesday," and, according to the heading of the report, it was prepared for attorneys David Rudolf and Tom Maher. Rudolf and Maher represented defendant Peterson at trial; only Mr. Maher represented him on direct appeal in the Court of Appeals and Supreme Court. Neither of them represents defendant in this MAR. Ballentine gives the expiration date of her notary commission as 2 February 2012. Notary commissions are not renewed; new commissions are granted after completion of inter alia a written examination. See, N.C.G.S. § 10B-11 (2007). Moreover, North Carolina law provides that "[a] person commissioned under this Chapter [10B] may perform notarial acts in any part of this State **for a term of five years**, unless the commission is earlier revoked or resigned." N.C.G.S. § 10B-9 (2007)(emphasis added). Accordingly, Ms.

Ballentine's commission could have been granted no earlier than 3 February 2007. Guerette could not have appeared before this notary in 2003.

As for the letter of Cornelius Tucker, a.k.a., Cornelius Tucker, Jr., (MAR Exhibit 39)[9] defendant does not even purport that it is an affidavit. Instead, he characterizes it as "allegations of misconduct against another juror . . . made by Mr. Cornelius Tucker in a letter dated November 1, 2003, which was sent to Defendant's son Todd Peterson . . . ." (MAR at 51) This paperwriting is entirely in one handwriting. At the top of the page, just below the address the following appears: "Sworn verified Affidavit." It proceeds to allege that Tucker "overheard juror Tonia Perry Rogers" make statements about her assessment of the parties at trial and her thought process in deciding defendant Peterson's guilt or innocence. In addition to the author's long history of falsehoods and false and frivolous court filings detailed below, this item has none of the elements of an affidavit.

The Court of Appeals and our Supreme Court have held that an MAR claim is properly denied without an evidentiary hearing when it is supported by no more than the sort of material defendant provides here. For example, in the first degree murder case of State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985) the Court held that

N.C.G.S. § 15A-1420, which governs the procedure for

[9] In his MAR defendant misnumbers this exhibit as number 40.

> filing a motion for appropriate relief clearly requires supporting affidavits to accompany the motion in a case such as this. Subsection (c)(6) provides that a 'defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.' Subsection (b)(1), entitled 'Supporting Affidavits' provides as follows:
>
> > A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records . . . .

Id. at 668-69, 325 S.E.2d at 42-43. In Payne the defendant's MAR filed in the Supreme Court alleged that a witness in the defendant's trial, Zachary Beard was hypnotized prior to testifying. The Court summarily denied the MAR "because defendant submitted no supporting affidavits or other documentary evidence tending to show that Zachary Beard did in fact undergo hypnosis prior to defendant's trial and this alleged fact is not ascertainable from the record or transcripts . . . ." Id. at 669, 325 S.E.2d at 43.

In the capital case of State v. Elliot, 360 N.C. 400, 628 S.E.2d 735 (2006), the trial court denied without an evidentiary hearing the defendant's MAR which alleged juror misconduct. The defendant contended that two jurors met and prayed outside the jury room and that this constituted impermissible deliberation in the absence of the other jurors. Our Supreme Court "conclude[d] evidentiary support submitted by defendant was insufficient to 'show the existence of the asserted ground for relief' or to show

the required prejudice to defendant, we hold the trial court did not err in denying defendant's motion." Id. at 417, 628 S.E.2d at 747 (citing N.C.G.S. § 15A-1420(c)(6)). The Court was dubious about the merit of defendant's argument, but noted as a matter of procedure that defendant had not supported his claim, such as it was, with affidavits, and the Court held that the trial court did not err in denying defendant's claim without an evidentiary hearing because "defendant failed to make an adequate threshold showing of juror misconduct." Id. at 419-20, 628 S.E.2d at 748.

Likewise in the second degree murder case of State v. Rhue, 150 N.C. 280, 563 S.E.2d 72 (2002), appeal dismissed and disc. rev. denied, 356 N.C. 689, 578 S.E.2d 589 (2003), the Court of Appeals, affirmed the trial court's denial without an evidentiary hearing of defendant's MAR claim. The Court noted that the rules

> for filing a motion for appropriate relief clearly require supporting affidavits to accompany the motion. The [North Carolina Supreme] Court [has] observed that aside from subsection [15A-1420] (c)(6), N.C. G. S. § 15A-1420(b)(1) provides that motions for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records . . . .

Id. at 290, 563 S.E.2d at 79; accord, State v. Aiken, 73 N.C. App. 487, 501, 326 S.E.2d 919, 927 (trial court properly denied, without a hearing, the defendant's MAR based on ineffective assistance of counsel where the defendant failed to produce any supporting affidavits or other evidence beyond bare assertions), appeal dismissed and disc. rev. denied, 313 N.C. 604, 332 S.E.2d

180 (1985).

The material defendant offers regarding alleged juror misconduct does not comply with the requirements of N.C.G.S § 15A-1420 and case law; those claims do not warrant an evidentiary hearing and should be denied.

C. The Material Attached by Defendant in Support of This Claim Presents No Forecast of Admissible Evidence; It Consists of Hearsay. In Addition, Cornelius Tucker's History of Criminal Deceit, of Being Sanctioned for Frivolous Court Filings, and of Adjudicated Insanity Deprives His Allegations of Any Credibility.

1.

"Whenever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay." State v. Smith, 312 N.C. 361, 366, 323 S.E.2d 316, 318 (1984) Accordingly, "evidence presented in the form of an affidavit is hearsay." Id. The primary reason for excluding hearsay is that it presents the party against whom it is offered with no opportunity to test the matter asserted by cross-examination. If defendant had offered the affidavit of former juror Heggins himself, that submission would be hearsay. But defendant has not even done that. What he presents is a paper-writing containing what Guerette says that Mr. Heggins said; in short, defendant is proposing to carry his burden on this claim by submitting double hearsay. See, e.g., State v. Cunningham, 344 N.C. 341, 358, 474 S.E.2d 772, 780 (1996)(defendant's proffer of testimony from an investigator as to

what another person said to the investigator "was at least double hearsay and was properly excluded").

The hearsay statements of third parties, asserted by a post-conviction counsel, or any other person including a person who is investigating the case, are not legally sufficient to meet the legal standard for submissions which will support a motion for appropriate relief. As our Supreme Court held in State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1984),

> In an evidentiary hearing for appropriate relief where the judge sits without a jury the moving party has the burden of proving by the preponderance of the evidence every fact to support his motion. G.S. 15A-1420(c)(5). The court must make findings of fact in support of its ruling. G.S. 15A-1420(c)(4). In hearings before a judge sitting without a jury adherence to the rudimentary rules of evidence is desirable even in preliminary voir dire hearings. Such adherence invites confidence in the trial judge's findings.
>
> The affidavit of Carolyn Neely offered by defendant was clearly hearsay and inadmissible.

Id. at 37, 310 S.E.2d at 608.

The defendant has failed to show that he has evidence admissible at an evidentiary hearing on his motion for appropriate relief to prove the allegation in his MAR that Mr. Heggins disregarded the trial judge's instruction about Shaibani's testimony. His claim should, therefore, be denied pursuant to N.C.G.S. § 15A-1420(c)(6) and State v. Rhue, which, among numerous other cases, cites that section and holds that "a defendant is not entitled to a hearing on a motion for appropriate relief if it can be determined from the motion itself that the defendant is not

entitled to relief." Rhue, 150 N.C. at 288, 563 S.E.2d at 78.

2.

Even if juror Heggins himself were not barred by statute and case law from impeaching his verdict by testifying in court about how his alleged consideration of Shaibani's testimony affected his thought process in reaching a verdict, the defendant's failure to present this claim in a timely fashion has prejudiced the State's ability to refute it after the passage of more than five years and the onset of the dementia from which Mr. Heggins now suffers.

Mr. Heggins, born 20 October 1932, is now almost seventy-six and one-half years old. On 13 January of this year SBI Agent Perry visited Mr. Heggins and his wife, Emma Jean Heggins, and was informed that Mr. Heggins began having problems with his memory sometime back, but was not officially diagnosed as having dementia until late 2007 or early 2008. Heggins stated that his health and memory have progressively deteriorated since the time of defendant Peterson's trial. (Agent's Perry's Affidavit concerning his interview with Mr. and Mrs. Heggins is attached as State's Exhibit 4.)

3.

a. Cornelius Tucker and North Carolina Judicial Proceedings

For the purpose of impeaching the credibility of any witness the North Carolina Rules of Evidence provide that the witness' conviction of a felony or of certain misdemeanors is admissible. More precisely, N.C.G.S. § 8C-1, Rule 609 provides as follows:

> (a) General rule. -- For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted . . . .
> (b) Time limit. -- Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

N.C.G.S. § 8C-1, Rule 609(a) and (b).

Most recently, as discussed below, Cornelius Tucker, alias Goothamer Tucker, alias Neil Tucker, was located at the Forsyth County Detention Center, where he was interviewed by S.B.I. Agents K. Perry and D. W. Mayes on 12 January 2009. Before his current incarceration, he was in the custody of the North Carolina Department of Correction until his release on 7 July 2008.

The public records of the North Carolina Department of Correction on Mr. Tucker run for eleven pages. The crimes for which he was serving sentences for state offenses, include at least the following: possession of a schedule II controlled substance and habitual felon; shoplifting and possession of drug paraphernalia; assault with a deadly weapon inflicting serious injury; uttering forged paper; worthless check (numerous counts); assault on a female; fraud in connection with a rental vehicle; larceny; and prison escape. (See Exhibit 5.)

Tucker has been repeatedly sanctioned for filing frivolous pleadings. The Court of Appeals has entered at least four Orders finding Tucker's pleadings there to be frivolous under North Carolina law and ordering that he not submit "any additional frivolous documents to this Court for review." These orders dated 18 April 2008, 14 September 2005, 28 October 2004, and 18 November 2002 are attached as State's Exhibit 6.

b. Tucker and Federal Judicial Proceedings

Tucker's involvement with the federal judicial system is likewise extensive. [10]

By an indictment entered 9 July 2003, Tucker was charged with twelve counts of mailing threatening communications in violation of 18 U.S.C. § 876. "Dr. Kendall Carnes Warden, a psychiatrist in Durham, was appointed to evaluate the defendant's competency, both

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[10] In addition to the numerous Fourth Circuit Court of Appeals cases involving Tucker, he has also in federal district court in the District of Columbia sued "Captain Branker (a correctional officer at the prison in which Tucker was incarcerated) and the President and Vice President of the United States, alleging that the defendants had violated his constitutional rights by, among other things, (1) giving him the drug Thorazine four times a day; (2) refusing to mail "10 suits" to various courts; and (3) housing him with tuberculosis patients who refused to take their medicine. . . . The district court granted Tucker's application to proceed IFP but . . . sua sponte dismissed Tucker's complaint because it was '**without basis in law or in fact.**'" Tucker v. Branker, et al., 142 F.3d 1294 (D.C. Cir. 1998); see also, Tucker v. Beck, 2001 U.S. App. LEXIS 6745 (5 March 2001)("This action is frivolous and fails to state any claim which would warrant the extraordinary remedy of mandamus"); Tucker v. Clinton, U.S. President, et. al., 1996 U.S. App. LEXIS 34438 (D.C. Cir. 1996)(summarily affirming the district court's order and noting that Tucker "has not stated a claim against the President of the United States").

to stand trial and at the time of the offenses charged." United States v. Tucker, 2005 U.S. Dist. 42270 at *1 (E.D.N.C. 2005). The Court found that Dr. Warden

> expressed her professional opinion . . . that the defendant is not now competent to stand trial, nor was he competent at the time of the offenses charged. The defendant's counsel, James B. Craven III of Durham, and Government counsel, Felice McConnell Corpening, Assistant United States Attorney of Raleigh, are in agreement with Dr. Warden, as is the Court. Accordingly, the defendant having on September 7, 2004 filed notice of his intent to assert an insanity defense, the Court now, pursuant to 18 U.S.C. 4242(b), **finds the defendant Cornelius Tucker, Jr. not guilty only by reason of insanity**.

Id. at *1-2 (emphasis added) The Court noted that Tucker's projected release date from the North Carolina Department of Correction was 5 July 2008 and ordered that "[r]egardless of when Tucker is released from state custody, however, he shall be committed to a suitable Bureau of Prisons medical facility pursuant to 18 U.S.C. 4243(a) until such time as he is eligible for release pursuant to 18 U.S.C. 4243(e)."[11]

The United States Court of Appeals for the Fourth Circuit affirmed the federal district court's order. United States v. Tucker, 153 Fed. Appx. 173 (4th Cir. 2005), cert. denied, 546 U.S. 1202, 164 L. Ed. 2d 104(2006). The Court also denied

> all of Tucker's pending [pro se] motions, including his motion to relieve and substitute counsel, motion for

[11] The United States Code provides for the psychiatric hospitalization of defendants found not guilty by reason of insanity and mandates that such a defendant "shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e)." 18 U.S.C. 4243(a)(2008).

> counsel's dismissal on the merits, motion for oral argument, motion to show cause, motion to strike statements, motion to request mediation out of time, motion for a competency hearing, motion for transcript, motion for psychiatric exam, and motion to expedite appeal. In accordance with the requirements of Anders, we have reviewed the entire record in this case and have found no meritorious issues for appeal.

Id. at 175.

c. S.B.I. Agent Perry's Interview with Tucker

In the course of their interview on 9 January 2009, Tucker told Agent Perry that he was released from "Butner after he had been treated for about four months." Tucker indicated that he was being held in Forsyth because when he was released from Butner he did not know he was on probation, and he did not contact his probation officer. Regarding the letter he wrote to Todd Peterson (MAR Exhibit 39), Tucker said that he did not remember what he had written "because it was a long time ago and he had emphysema and had been diagnosed as Bi-polar." Tucker knew Tonia Rogers because she was a correctional officer at Polk Correctional where he was housed at the time he wrote the letter. Upon reviewing the letter, Tucker admitted that he wrote it because the officers at Polk "were giving him cruel and unusual punishment, and he was trying to get back at any correctional officer he could," including Rogers, who, he said, was a member of a team of officers giving him a hard time by strapping him down for several hours a day.

Tucker said that "nothing in the letter he said about hearing Rogers make those comments was true;" he added that he "once heard Rogers say something about being a juror, but what he heard was

nothing like what he wrote." Finally, Tucker admitted that he was "trying to find a way to get out of Polk," that he had written threatening letters to the President at about the same time he wrote the letter to Todd Peterson, and that he "would be sent off for several months at a time to have tests and be treated to see if he could stand trial, but he was found not guilty by reason of insanity." (See State's Exhibit 7 for Agent Perry's Affidavit regarding his interview with Tucker.)

D. Defendant Has Provided No Forecast of Evidence Admissible to Impeach the Verdict in This Case.

In State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 64 L. Ed. 2d 796, 1980 (1980), the jury convicted the defendant of first degree murder, and in the sentencing phase of trial recommended the death penalty. After the trial, the defendant alleged that in the sentencing phase the jurors had considered matters outside the record and moved to take testimony from the jurors and to set aside the death penalty verdict. Specifically, defendant alleged that a juror had told a reporter that she and the other juror recommended the death penalty mainly because they were aware that otherwise defendant Cherry "would be eligible for parole in 20 years." Id. at 100, 257 S.E.2d at 560.

Our Supreme Court affirmed the trial court's denial of defendant's motion. The Court noted first North Carolina's long standing rule that "after a verdict has been rendered and received

by the court, and jurors have been discharged, jurors will not be allowed to attack or overthrow their verdict, nor will evidence from them be received for such purpose." Id. at 100, 257 S.E.2d at 560. The Court "recognize[d] that a defendant's eligibility for parole is not a proper matter for consideration by the jury." Id. at 101, 257 S.E.2d at 561. Nevertheless, the Court rejected defendant's contention that N.C.G.S. § 15A-1240(c)(1) brought defendant's allegation within the exception to the rule that testimony of jurors cannot be received to impeach their verdict. That subsection of the statute deals with "[m]atters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him;" a "juror's knowledge that there is a possibility of parole for a defendant," the Court held, "would not 'violate the defendant's constitutional right to confront the witnesses against him.'" Id. That holding is applicable here. The witness about whose testimony defendant Peterson complains was cross-examined.

In McCain v. Otis Elevator Co., 106 N.C. App. 415 S.E.2d 78 (1992), after the jury had returned a verdict and been discharged, the plaintiff moved for a new trial based on affidavits from two jurors to the effect that the jury "'disregarded the evidence and the Court's instructions . . . .'" Id. at 50, 415 S.E.2d at 81 (ellipsis in original). Citing Rule 606(b), the Court of Appeals affirmed the trial court's denial of the plaintiff's motion.

"After a jury has rendered a verdict and has been discharged by the court, 'jurors will not be allowed to attack or overthrow [the verdict], nor will evidence from them be received for such purpose.'" Id. (citing Craig v. Calloway, 68 N.C. App. 143, 150, 314 S.E.2d 823, 827 (1984)).

The policy, statutory, and case law against allowing jurors to impeach their verdicts are not unique to North Carolina. They are deeply entrenched in other state jurisdictions and in federal law. In the murder case of Echols v. State, 360 Ark. 332, 201 S.W.3d 890 (2005), for example, the defendant sought post-conviction relief thorough the mechanism of Arkansas' corum nobis proceeding. The Court noted that the defendant had hardly shown due diligence in waiting ten years to bring forward a claim that was known to him at or shortly after the time of trial. The Court, however, reached Echols' claim that "the jury received and considered extraneous information - specifically, the confession of [one] Jessie Misskelley - during deliberations at his trial . . . ." Id. at 335-36, 201 S.W.3d at 892. The Arkansas Supreme Court resoundingly rejected that claim, holding that

> We have unequivocally stated that any effort by a lawyer to gather information in violation of Rule 606(b) to impeach a jury's verdict is improper. Although Echols argues that he interviewed the jurors in order to determine whether any external influence or information played a role in the jury's deliberations, **what he is essentially asking this court to do is to delve into the jury's deliberations in order to determine whether any of them disregarded the trial court's instructions - specifically, the court's instruction to not consider that a witness had mentioned Misskelley's statement**.

Id. at 339, 201 S.W.3d at 895 (citation omitted)(emphasis added).

In State v. Walker, 783 S.W.2d 145 (Mo. App. 1990), co-counsel for defendant moved for a new trial and filed an affidavit stating that he had spoken to a juror who said that, contrary to the court's instructions, she had found the defendant guilty because he did not take the witness stand and deny his guilt. Id. at 149. The Court affirmed the trial court's denial of defendant's motion, adhering to the "general rule long recognized in this jurisdiction that a jury will not be heard to impeach its own verdict" and its specific precedent that a juror will not be heard to impeach his verdict by testimony that he drew adverse inferences from defendant's failure to testify. Id., accord, Sims v. State, 444 So.2d 922, 925 (Fla. 1983); United States v. Voigt, 877 F.2d 1465 (10th Cir. 1989)(holding that federal rule of evidence 606(b) precludes examination of jury as to whether, in disregard of the court's instructions, "the 'decisive basis' of the verdict against the defendant was her failure of defendant to take the witness stand and testify"); see also, State v. McDaniel, 392 S.W.2d 310, 318 (Mo. 1965)(juror visited the scene of the crime during deliberations contrary to the court's instructions; "affidavits or testimony of third persons as to statements of jurors tending to impeach their verdict are inadmissible, not only as hearsay but also for the same reason which excludes the affidavits or testimony of the jurors themselves").

Almost one-hundred years ago the United States Supreme Court

set out the public policy on this question in McDonald v. Pless, 238 U.S. 264, 59 L. Ed. 1300 (1915), in its opinion affirming a North Carolina federal trial court's ruling[12] that the jurors were incompetent witnesses to impeach their own verdict. The Court noted that the policy it adhered to "has been declared by that Court [the North Carolina Supreme Court,] by those in England and most of the American States." Id. at 267, 59 L. Ed. at 784. Let "it once be established," the Court said,

> that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. **Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct** sufficient to set aside a verdict.[13] If evidence thus secured could be

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[12] The case was originally brought in state court, but was removed to federal court.

[13] Jurors have, of course, a First Amendment right, if they so choose, to discuss a case they have decided once they have been discharged after returning a verdict. Some jurisdictions, however, have local rules regulating the time, place, and manner of juror interviews to avoid the harassment and subtle pressures upon them which many opinions decry. For example,

> Local Rule 16 E of the Southern District of Florida provides in pertinent part that before, during, and after the trial, a lawyer should avoid conversing or otherwise communicating with a juror on any subject, whether pertaining to the case or not. Provided, however, after the jury has been discharged, upon application in writing and for good cause shown, the Court may allow counsel to interview jurors to determine whether their verdict is subject to legal challenge. In this event, the Court shall enter an order limiting the time, place, and circumstances under which the interviews shall be conducted. The scope of the interviews should be

> thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation -- to the destruction of all frankness and freedom of discussion and conference.

Id. at 267-68, 58 L. Ed. at 784 (emphasis added).

By the time the Court handed down its decision in Tanner, the federal rules of evidence had been adopted and the Court, reiterating the public policy against allowing jurors to impeach their own verdicts, held that Rule 606(b)[14] did not permit jurors to impeach their verdicts by post-verdict testimony that one or more of them were intoxicated during the trial and jury deliberation in the case. Tanner, 483 U.S. at 109, 97 L. Ed. 2d at 99.

In Government of the Virgin Islands v. Nicholas, following jury trial the defendant was convicted of first degree murder. On appeal defendant's case was remanded for re-sentencing on the lesser included offense of second degree murder. Next, defendant moved to vacate his sentence on the grounds that he was denied his constitutional right to a unanimous verdict because one of the

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> restricted and caution should be used to avoid embarrassment to any juror and to avoid influencing his action in any subsequent jury service.

United States v. Sokoloff, 696 F. Supp. at 1457.

[14] North Carolina's Rules of Evidence are based for the most part on the federal rules. "The commentary to each rule indicates whether the rule is identical to or different from its counterpart in the federal rules." N.C.G.S. § 8C-1, Rule 102 ("Purpose and Construction")(Commentary). The Official Commentary to our Rule 606 ("Competency of juror as witness") states that "[t]his rule is identical to Fed. R. Evid. 606." N.C.G.S. § 8C-1, Rule 606, Commentary (2007).

jurors who returned the verdict was partially deaf and unable to hear certain evidence at his trial. Nicholas, 759 F.2d at 1074-75. The Court of Appeals for the Third Circuit "affirm[ed] the district court's ruling that the appellant failed to prove that he had a right to an evidentiary hearing on the issue" and held that "even if the juror was unable to hear portions of the evidence, Nicholas would not be entitled to post-conviction relief as a matter of law because under Fed. R. Evid. 606(b), the juror would be incompetent to so testify." Id.

Following the verdict in United States v. Sokoloff (cited above), defendants moved the trial court to interview jurors alleging that misconduct by a juror or jurors had tainted the verdict. Specifically, defendant alleged that an alternate juror had indicated among other things that the jurors, disregarding the court's instructions, had "considered the case before they were instructed to begin their deliberations." 696 F. Supp. at 1455. The court denied the motion, holding, as discussed above, that "[r]esolving the question of whether jurors improperly disregarded the Court's instructions inevitably entails an anatomization of the thought behind the verdict, and is therefore an impermissible avenue of inquiry because such evidence cannot be used to impeach the verdict." Id. at 1457 (citations omitted).

As the Court in Government of Virgin Islands v. Gereau said regarding the guidelines of the Third Circuit on attempts to impeach a jury's verdict

> [a]ny attempt to impeach a jury verdict initially encounters two evidentiary obstacles: (1) producing evidence competent to attack the verdict, and (2) establishing the existence of grounds recognized as adequate to overturn the verdict. And even where both obstacles are cleared, there must be a finding that the party seeking to impeach the verdict has suffered prejudice from misconduct of the jury.

523 F.2d 140, 148 (3d Cir. 1975), cert. denied, 424 U.S. 917, 47 L. Ed. 2d 323 (1976).

In sum, in addition to the defendant's unreasonable delay and the prejudice to the State caused by the intervening mental condition of Mr. Heggins in the lapse of time before defendant brought this claim; the lack of proper support for it, and the hearsay character of the support, such as it is, that defendant does offer; defendant Peterson has provided no forecast of evidence admissible under our statutory and case law to impeach the verdict in his case. His request for relief from his conviction of first degree murder on the basis of his "ground six" should be denied without further proceedings.

DEFENDANT'S GROUND SEVEN: ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

[MAR paragraphs 197-199]

Summary Response

Defendant through his current counsel alleges that his lead trial counsel Mr. Rudolf rendered ineffective assistance of counsel ("IAC"). Defendant contends that Rudolf was ineffective because (1) his opening statement "led to the admission of evidence of Defendant's sexual activities;" (2) he should have moved for a

mistrial when Shaibani's testimony regarding his credentials was demonstrated to be perjurious; and (3) Rudolf should also have moved for a mistrial when a juror informed the court that she had received a letter "from a report[15] [sic] at Channel 11" television. (MAR at 53)

The defendant's solicitation of sex from and attempts to arrange a rendezvous for that purpose with homosexual prostitute Brent Wolgamott was relevant to the defendant's motive for murder. That evidence would have been admitted to show motive regardless of what Rudolf said in his opening statement about the loving relationship between the defendant and his wife. The extreme remedy of mistrial was not warranted for Shaibani's perjury about his credentials, especially in view of the trial court's strong curative instruction to the jury to disregard Shaibani's testimony in its entirety. Mistrial was not warranted by the premature invitation from a television reporter to the jurors to come to a dinner to discuss the trial after they had rendered a verdict.

Regarding the decisions Rudolf made on each of these matters, the defendant has failed to satisfy either prong of the test for ineffective assistance of counsel.

Defendant has also failed to meet the requirements of N.C.G.S. § 15A-1420 and our case law. Why and how a lawyer makes tactical decisions, for example, how to structure an opening statement or

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[15] Presumably defendant is referring to one Sonya Pfeiffer, who was at the time of trial a television reporter.

how to cure an inappropriate contact with a juror, are matters outside the record. The defendant's unsupported, conclusory allegations that Mr. Rudolf was ineffective should be summarily denied.

Where a defendant fails "to file **anything but bare assertions that his counsel was ineffective, 'the trial court's summary denial of the motion for appropriate relief was not error.**'" State v. Rhue, 150 N.C. App. 280, 290, 563 S.E.2d 72, 79 (2002)(emphasis added)(quoting State v. Aiken, 73 N.C. App. 487, 326 S.E.2d 919, appeal dismissed and disc. review denied, 313 N.C. 604, 332 S.E.2d 180 (1985)), appeal dismissed and disc. rev. denied, 356 N.C. 689, 578 S.E.2d 589 (2003); see also, State v. Payne, 312 N.C. 647, 668, 325 S.E.2d 205, 219 (1985)(declining to address defendant's MAR claim because of his failure to comply with N.C.G.S. § 15A-1420(b)(1), which provides that motions for appropriate relief made after the entry of judgment "must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion").

Detailed Response

A. Defendant's Ineffective Assistance of Counsel Claims and His Burden for Showing Ineffective Assistance

The standard for evaluating an IAC claim is well known.

> First, defendant must show that counsel's performance was deficient. This requires a showing that counsel made

> errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). The federal and state constitutional standards are the same. State v. Braswell, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Both federal and North Carolina case law emphasize that judicial review of IAC claims must be highly deferential and that defendant has a heavy burden to bear in overcoming the legal presumption that counsel's professional decisions were reasonable.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . There are countless ways to provide effective assistance in any given case.

Strickland, 466 U.S. at 689, 80 L. Ed. 2d at 694-95; accord, State v. Gainey, 355 N.C. 73, 113, 558 S.E.2d 463, 488 ("judicial review of counsel's performance must be highly deferential"), cert. denied, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless

it is shown that no reasonable lawyer, in the circumstances, would have done so." Rogers v. Zant, 13 F.3d 384, 386 (11th Cir.), cert. denied, 513 U.S. 899, 130 L. Ed. 2d 175 (1994).

This defendant, like any defendant claiming ineffective assistance, "is entitled to a new trial only if the error was so fundamental that, absent the error, **the jury probably would have reached a different result**." State v. Augustine, 359 N.C. 709, 717, 616 S.E.2d 515, 523 (2005)(emphasis added), cert. denied, 548 U. S. 925, 165 L. Ed. 2d 988 (2006).

B. Defendant's First IAC Claim

Regarding the first IAC claim, defendant asserts that Rudolf's opening statement "was conduct which failed to meet expected standards of professional conduct . . . ." But defendant completely fails to show that the opening statement was unreasonable, and that it was deficient performance, and that the jury probably would have reached a different verdict but for Rudolf's opening statement.

"Evidence of motive is always admissible where the doing of the act is in dispute." 1 Kenneth S. Broun, Brandis and Broun on North Carolina Evidence § 110 at 338 (6th ed. 2004). There are very many cases showing the relevance of extramarital affairs to motive for murder. See, e.g., State v. Shank, 327 N.C. 405, 411, 394 S.E.2d 811, 815 (1990)(proper to argue that common sense and life experience support "the likelihood of, and motive for, violence and even killing" when extramarital affair is involved);

accord, State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

Rudolf was aware that the State had evidence that defendant had solicited and engaged in extramarital homosexual affairs, and on 14 February 2003 (four and one-half months before the presentation of evidence began) he moved in limine to prevent the State from introducing evidence that his client "had engaged in homosexual correspondence or relationships." (Rp 69) That motion was partially successful in that Judge Hudson found evidence of defendant's homosexual affairs before he married Kathleen irrelevant. However, defendant's solicitation by phone and e-mail of sex with male prostitute Brent Wolgamott in the fall of 2001 was another matter. (See 39: 7749 and Rpp 89-90 ["Order Partially Denying Defendant's Motion in Limine"]).

Aware of the looming evidence about motive, Rudolf took steps to defuse that evidence through the jury questionnaire, voir dire examination of prospective jurors, and his opening statement. The first two steps were designed to protect his client from jurors who would be unduly disturbed about homosexuality. The questionnaire asked: "Do you have any religious, moral or personal feelings, convictions or beliefs about . . . Adult use of sexually explicit materials (pornography). Adults who engage in homosexual activities? If yes . . . please describe." (Jury Questionnaire, no. 92; see State's Exhibit 8.) In jury voir dire Rudolf posed questions like this: Is "it fair to say that your view of

[homosexuality] is, it's just sort of a lifestyle choice people can make or do you have some other views about that?" (9:1776)

Rudolf's lengthy opening statement was designed to impress upon the jury that the defendant and Kathleen had a loving marriage and, therefore, he would not have been influenced to murder her even if he had been sexually unfaithful. Rudolf repeatedly told the jurors that, while motive suggested by the State militated in favor of guilt, the lack of motive militated in favor of innocence:

> In any event, the truth of the matter is that the absence of a convincing motive, especially in a circumstantial case, has to be considered on the side of innocence. I read you the instruction in voir dire.
>
> (Referring to overhead screen)
>
> There it is. The bottom line. '**The absence of motive is equally a circumstance to be considered on the side of innocence.**' [Emphasis added] [24: 4741-42]

These actions by counsel, including his opening statement, were reasonable and did not constitute deficient performance.

In the end, the evidence of defendant's involvement with Wolgamott was admitted because it was relevant to motive as the trial judge ruled: "**The evidence is relevant to this matter in two ways: First, it relates to a possible motive**, which is a circumstantial piece of evidence that the jury can consider. Second, it goes to rebut the assertions in Defendant's opening statement regarding the idylillic relationship between the Defendant and the deceased in this case." (Rp 90, emphasis added; see State's Exhibit 9)

The relevance and admissibility of the evidence of motive at issue would not have changed regardless of what Rudolf said or did

not say in his opening statement. The opening statement merely added a secondary basis for admitting the evidence. The Court of Appeals affirmed Judge Hudson's ruling on this evidence. In doing so it noted that

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The standard set by Rule 401,
>
> > gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has any logical tendency to prove any fact that is of consequence.

State v. Peterson, 179 N.C. App. 437, 461, 634 S.E.2d 594, 612-13 (2006), aff'd, 361 N.C. 587, 652 S.E.2d 216 (2007), cert. denied, ___ U.S. ___, 170 L. Ed. 2d 377(2008). The Court cited Judge Hudson's dual basis for admitting the evidence of motive:

> The trial court concluded that the evidence regarding defendant's bi-sexuality was relevant for two purposes: one, it related to a possible motive; and two, it could be used "to rebut the assertions in Defendant's opening statement regarding the idyllic relationship between the Defendant and the deceased in this case." We now consider whether the evidence of defendant's bi-sexual tendencies was relevant because it rebutted defendant's opening statements of a loving relationship.

Id. The Court concluded that it was, and noted that it did not need to reach the second: "We need not determine whether the evidence of defendant's bi-sexuality was relevant to motive, as we conclude that the evidence was admissible as a rebuttal to defense counsel's opening statement." Id. at 463, 634 S.E.2d 613.

In view of all our case law supporting Judge Hudson's ruling about the relevancy of motive, especially in a murder case,

defendant cannot show that but for the opening statement the evidence would not have been admitted. Much less can he show that he was prejudiced by Rudolf's strenuous efforts to defuse the impact of his client's interest in and solicitation of homosexual liaisons.

C. Defendant's Second IAC Claim

As discussed above in response to defendant's fifth ground for relief, defense counsel Rudolf was aware before Shaibani began his testimony that his pretended affiliation with Temple University was fraudulent. Rudolf's cross-examination of Shaibani established Shaibani's perjury. Rudolf then moved to strike Shaibani's entire testimony and the exhibits associated with it. (71: 12768, 12776-77) The District Attorney did not object to the motion to strike, and the Court allowed it. (71: 12776-77) The Court instructed the jury that it

> finds as a fact that this witness has committed perjury in relating to the jury his credentials to testify as an expert witness. **The Court orders the jury to totally disregard all of the testimony of this witness**, and it is further ordered that the court reporter should strike it from the record of this trial.
>
> Is there anything, members of the jury, you don't understand about the Court's order? **You are to totally disregard it in all respects**.
>
> . . . .
>
> The jury is ordered to totally disregard all of the testimony of this witness. Does any juror not understand that? **If you do not understand that, raise your hand. I do not see any hands**. [71: 12776-77; emphasis added.]

With the information Rudolf had about Shaibani he could have prevented his testimony by simply agreeing to Mr. Hardin's proposal

for a voir dire examination of Shaibani “outside the presence of the jury.” (68: 12555) Rudolf was determined to expose and embarrass Shaibani in front of the jury rather than simply having him disqualified as an expert and never allowed to testify. Instead, Rudolf did not disclose the information he had about Shaibani either to the District Attorney or the Court, but waited until Shaibani had testified and then disgraced him before the jury. For that purpose, as noted above, he withdrew his request for a voir dire because the trial judge correctly ruled that voir dire should be in the jury’s absence. Rudolf’s ploy was considered beforehand and was effective. Having exposed Shaibani, Rudolf then received exactly what he asked for, namely, an instruction to the jury to disregard Shaibani’s testimony in its entirety.

Rudolf’s decision not to move for mistrial was not deficient performance and did not prejudice his client. Mistrial is an extreme remedy, as our appellate courts have repeatedly held, and as our Supreme Court very recently reiterated. "'Mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict.'" State v. Taylor, 362 N.C. 514, 538, 669 S.E.2d 239, 260 (2008)(quoting State v. Smith, 320 N.C. 404, 418, 358 S.E.2d 329, 337 (1987) (quoting State v. Stocks, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987)). Moreover, our case law holds that mistrial is not warranted when an objection is allowed and a curative instruction given to remove any error. A trial court is required

to allow a defendant's motion for mistrial only "if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (2007). A motion for mistrial and the determination of whether defendant's case has been irreparably and substantially prejudiced is consigned to the trial court's sound discretion. State v. Williamson, 333 N.C. 128, 423 S.E.2d 766 (1992). The trial court's decision in that regard is afforded great deference because the trial court is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable. Id. at 138, 423 S.E.2d at 772. Moreover, "when the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." State v. Black, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991); accord, Thomas, 350 N.C. at 341, 514 S.E.2d at 503 (N.C. 1999)("Because the trial court cured any error by its action in sustaining the objection and giving the curative instruction, we find no prejudice to defendant warranting a mistrial").

In view (1) of defendant's tactics regarding Shaibani, (2) of our case law on mistrial in general, and (3) of our case law on mistrial and curative instructions in particular, defendant's second IAC claim is without merit. It should be denied or dismissed with prejudice.

D. Defendant's Third IAC Claim

Defendant's last claim is that Rudolf should have moved for a mistrial when, during deliberations, a juror received a letter from a television reporter inviting them to a dinner after the trial was over.

On Thursday, 9 October 2003 the clerk brought to the court's attention "an item mailed to a juror." With the jury absent the Court read pertinent excerpts of the letter to all counsel. The stated purpose of the letter was "to offer an opportunity for all of you to come together again **after you've decided your verdict**." (78: 13395-96; emphasis added) The reporter specified a "certain date in the future" for a "juror dinner" at which she "want[ed] you all to be able to talk with each other as well as talk to me about getting through what all us called Camp Peterson." A space for responding to the letter's RSVP was included. The clerk added that the juror "knows all but one other has received something." (78: 13395-97)

After a brief recess, the clerk told Judge Hudson that "Susan said that Sonya came to her and asked her to tell the jurors that those letters should not have been mailed out. You know, they were not to be mailed out until after." (78: 13399)

Following a colloquy with counsel the trial court agreed that the matter should be handled by submitting a letter from the Court instructing the jurors not to consider the reporter's letter of invitation. Judge Hudson instructed the foreperson to circulate among all jurors the curative instruction that had been drafted.

That instruction read as follows:

> Dear Juror:
>
> It has come to the attention of the Court that a reporter with a local television station has sent letters to jurors expressing interest in meeting jurors after the trial is over. The reporter informed the Court that the letters were to have been sent after the jury had been discharged from the trial, and were mistakenly sent while deliberations were still underway. Please disregard the letter, do not respond, and do not let the letter influence your deliberations in any way.

The letter was signed "Honorable Orlando F. Hudson[,] Senior Resident Superior Court Judge." (See Exhibit 10.)[16] The Court concluded its verbal instruction to the jury by noting that "what the Court expects you, how to respond, is very clear." (78: 13403) "The law presumes that jurors follow the court's instructions." State v. Tirado, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004), cert. denied, 544 U.S. 909, 161 L. Ed. 2d 285 (2005).

As previously noted, mistrial is an extreme remedy. Had Rudolf moved for mistrial based on the prematurely released invitation letter, the trial judge should have and -- as the trial transcript demonstrates –- probably would have denied the motion. (78:13399-13403)

The inappropriate contact between journalistic media and the jury in this case was far less serious than other cases where our appellate courts have affirmed trial courts' denials of mistrial

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[16] The District Attorney's staff have searched diligently for a copy of this letter in the case files but have been unable to find it. Therefore, the State has copied the text of the document from the online archives of Court T.V. where the document is still available.

motions. In State v. Degree, 114 N.C. App. 385, 442 S.E.2d 323 (1994), for example, the defendant was tried for kidnapping and rape. During an overnight recess one of the jurors "inadvertently read a portion of a newspaper article which reported that the defendant had Acquired Immune Deficiency Syndrome (AIDS)." Id. at 391, 442 S.E.2d at 326. Defendant Degree argued that "the juror could not possibly have known that the article was about him without first learning that the defendant had AIDS, because the reference to the disease was in the first paragraph while the defendant's name did not appear until the third paragraph. . . . [and] this knowledge 'is so inflammatory' that it inevitably tainted the juror's decision." Id.

The trial court inquired about the juror's knowledge of the article and was told: "I was reading and I saw the defendant's name and I quit." Id. at 392, 442 S.E.2d at 327. The Court of Appeals affirmed the trial court's denial of a mistrial, noting that the

> ever-widening coverage by the press, radio, and television is likely to bring the problem before the courts with increasing frequency. The problem is primarily one for the trial judge, who must weigh all the circumstances in determining in his sound judicial discretion whether the defendant's right to a fair trial has been violated when information or evidence reaches the jury which would not be admissible at trial.

Id. (citation omitted); accord, State v. Jones, 50 N.C. App. 263, 267, 273 S.E.2d 327, 330 (during defendant's trial on drug charges, three jurors read an article reporting that defendant was appealing a previous conviction on drug charges; in light of all circumstances known to the trial court, there was no abuse of

discretion in its denial of mistrial motion), cert. denied, 302 N.C. 400, 279 S.E.2d 354 (1981).

A ruling denying a mistrial "will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." State v. Steen, 352 N.C. 227, 279, 536 S.E.2d 1, 31 (2000)(citations omitted), cert. denied, 531 U.S. 1167, 148 L. Ed. 2d 997 . A "trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." State v. Brown, 350 N.C. 193, 209, 513 S.E.2d 57, 67 (1999).

Defendant Peterson has failed to show that his trial counsel was ineffective by failing to move for mistrial on the ground of the television reporter's prematurely released invitation to a "juror's dinner."

Defendant has failed to show that he received ineffective assistance of counsel. His request for relief from his conviction of first degree murder on the basis of his "ground seven" should be denied without further proceedings.

CONCLUSION

For the reasons discussed in detail above, the State requests this Court to deny summarily the claims for relief set forth in defendant's "Grounds Four, Five, Six, and Seven" without further proceedings in the trial division.

Respectfully submitted this the 27th day of February, 2009.

ROY COOPER
Attorney General

_____
John G. Barnwell
Assistant Attorney General

North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6500
jbarn@ncdoj.gov

_____
William B. Crumpler
Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6500
bcrump@ncdoj.gov

_____
H. Dean Bowman
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6500
DBowman@ncdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **STATE'S RESPONSE TO MOTION FOR APPROPRIATE RELIEF** upon the defendant by placing same in the United States Mail, first class postage prepaid, addressed to his attorney of record as follows:

Jason John Anthony
Boone Beale
27 North 17th Street
Richmond, VA 23219

This the 27th day of February, 2009.

John G. Barnwell
Assistant Attorney General